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Martial Lawlessness: The Legal Aftermath of Kwangju

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MARTIAL LAWLESSNESS: THE LEGAL AFTERMATH OF KWANGJU

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FOR DR. CHOI SUNG-IL (1941-1991)

Abstract: On August 26, 1996, two former presidents of the Republic of Korea, Chun Doo-Hwan and Roh Tae-Woo, were convicted of insurrection, treason, and corruption. The charges arose out of their December 1979 coup and the ruthlessly violent suppression of a democratic protest in the city of Kwangju in May 1980. This article recounts the origins and analyzes the progress of this dramatic criminal trial, which has attracted worldwide attention. The current South Korean head of state, President Kim Young-Sam, has depicted the conviction of his predecessors as a historic juncture opening a new era of constitutionalism for Korea. Despite the popularity of the prosecutions in Korea, however, critics see the cases as motivated by revenge or political opportunism and have questioned whether the trials actually will serve to establish a Rule of Law under which Korea's dynamic political economy can purge itself of chronic corruption and authoritarian abuses of power. Other issues examined include continuing impacts of the Kwangju tragedy upon U.S.-Korean relations as well as possible implications of the criminal prosecutions for Korean reunification and for future transitions to democracy in other nations.

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I. INTRODUCTION

In South Korea, the Kwangju massacre of May 1980 is widely regarded as the nation's most traumatic historical episode since the Korean War.[1] Over fifteen years later, the bloodshed at Kwangju has a complex

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[1] An opinion poll recently conducted at Seoul National University indicated that today's students "overwhelmingly" regard the Kwangju massacre as "the greatest tragedy in Korean history since 1945." This surprised the academics who designed the survey, for they naturally believed that the prevailing response would be the Korean War. Nicholas Kristof, *For Victims of Korea's Ugly Years, A Time to Savor*, N.Y. TIMES, Dec. 5, 1995, at A3. *See generally* THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA (Donald Clark ed., 1988). For broader context, *see* MARK L. CLIFFORD, TROUBLED TIGER: BUSINESSMEN, BUREAUCRATS AND GENERALS IN SOUTH KOREA (1994) (concerning Park's assassination);

significance that pervades yet transcends domestic politics. In what follows, the focus will be upon legal repercussions of the Kwangju incident, particularly upon the criminal prosecutions of former presidents Chun Doo-Hwan (in office 1980-88) and Roh Tae-Woo (in office 1988-93), who on August 26, 1996, were convicted of military insurrection, treason, and massive corruption.[2] One aim will be to consider whether this criminal case, labeled "the trial of the century" by the Korean mass media, actually marks the opening of a new phase in the transition from dictatorship to democracy that has been unfolding in Korea since 1987.[3]

Precisely what happened at Kwangju in May 1980 was hotly contested for years. The events have been variously characterized as an "uprising," a "massacre," an "anti-fascist rebellion," a "riot," a "people's democratization movement," a "communist-led insurrection," an "abortive revolution," a "national liberation struggle," an "exercise of state terror," a "North Korean provocation," a "holocaust," and even an "act of genocide." Recent Korean legislation and the legal proceedings to date have discredited the Chun regime's original depiction of the episode as a revolt organized by North Korean operatives. Instead, the Kwangju incident now is described officially in South Korea as a spontaneous and self-defensive reaction by citizens against grossly excessive force deployed by an illegitimate military junta.[4]

Since Kwangju, other violent attacks upon civilians by armed forces under the command of undemocratic regimes have been witnessed elsewhere in the Far East: massacres took place in Rangoon in August and

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HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES (William Shaw ed., 1991); ASIA WATCH, HUMAN RIGHTS IN KOREA (1986) (report by Dr. James Palais).

[2] As explained *infra* text Part I, the charges against the former presidents and 14 other former South Korean Army generals stem from a military coup on December 12, 1979, from the killing of more than 200 civilians in Kwangju in May 1980, and from other measures taken by Chun in the process of installing himself in the presidency in August 1980. The corruption charges relate to extortion and personal misappropriation by the former presidents of hundreds of millions of dollars in "donations" from businessmen over the 1980-1993 period. Appeals were pending at the time of writing.

[3] James M. West & Edward J. Baker, *The 1987 Constitutional Reforms in South Korea: Electoral Processes and Judicial Independence*, 1 HARV. HUM. RTS. Y.B. 135 (1988), *reprinted in* HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES, *supra* note 1, at 221-52.

[4] "The historical significance of the May 18 Kwangju democratization movement has been newly illuminated to allow the people to cast off the yoke of past history and participate in creating the New Korea. The historical meaning of the June 10, 1987 democratization movement has also been reevaluated to credit the main players of that movement with having worked for the accomplishment of democratic reforms." *Anti-Corruption Drive Without Sanctuary: Part 4 in a Series of Articles on President Kim Young-Sam's Three Years of Change and Reform*, KOREA PRESS SERV., Feb. 28, 1996. *See also The Underdogs Bite Back: South Korea*, ECONOMIST, Dec. 16, 1995, at 32.

September 1988, in Beijing in June 1989, in Bangkok in May 1992, and in East Timor on more than one occasion. Korea's disposition of criminal charges against the former military junta probably is being followed with interest by powerholders in Indonesia, Burma, China, and elsewhere who, in case of a future regime change, may also find themselves bereft of *de facto* immunities long taken for granted.[5]

If Kwangju belongs in the same legal category as the Tiananmen Square massacre or the State Law and Order Restoration Council ("SLORC") atrocities in Burma, then one begins to grasp why so many Koreans have felt betrayed by the United States. The United States organized sanctions against China and Burma, at least temporarily, but it refrained—for reasons of national security—from any comparably concrete response against the Chun junta in the wake of the Kwangju massacre.[6] On the contrary, Chun was the first foreign head of state invited to pay a call on Ronald Reagan in Washington, D.C., in early 1981.[7] As many predicted at the time, this move induced the Korean populace to surmise that Chun's usurpation of power had been condoned, if not covertly encouraged, by the American government.[8] The double standard of the Cold War era came to be enshrined in the scholastic distinction between "authoritarian" and "totalitarian" regimes, a failed attempt to rationalize support of "friendly anti-communist dictators" ranging from the Shah of Iran to Ferdinand Marcos to Park Chung-Hee and Chun Doo-Hwan in South Korea.[9]

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[5] A newspaper editorial of March 1996 declared: "Should Seoul stray off [the path to democracy] as Koreans calling for righteousness stumble into excesses instead, a bungled democratic transition could result. That would have a chilling effect on even more fragile processes in several other Asian countries. That is why the trial of two former presidents which opened this week is so worrying." *Review and Outlook: Korean Portents,* ASIAN WALL ST. J., Mar. 14, 1996, at 8. Despite such warnings and related predictions that dictators may become less willing to negotiate relinquishment of their autocratic powers, the punishment of Korea's former military junta conceivably could induce other dictators to exercise more restraint by showing that their future impunity is not to be taken for granted.

[6] In June 1989, President George Bush first suspended military exports to China, then suspended all high-level diplomatic exchanges and ordered sympathetic consideration to be given to Chinese nationals in the United States wishing to extend their stays. Jan-Michele Lemon, *China: United States Policy After Tiananmen Square,* 3 HARV. HUM. RTS. J. 195, 196-97 (1990). In the wake of indiscriminate killings in Rangoon on August 8-12, 1988, the U.S. government made an official protest and following the related coup, on Sept. 18, 1988, all U.S. aid to Burma was cut off. *See* 1989 ASIA Y.B. (Far E. Econ. Rev.) 95.

[7] MICHAEL KLARE & CYNTHIA ARONSON, SUPPLYING REPRESSION: U.S. SUPPORT FOR AUTHORITARIAN REGIMES ABROAD 86 (1981).

[8] *See* Jerome A. Cohen & Edward J. Baker, *U.S. Foreign Policy and Human Rights in South Korea, in* HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES, *supra* note 1, at 171, 216-17.

[9] *See, e.g.,* STANLEY HOFFMAN, JANUS AND MINERVA: ESSAYS IN THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS 387-88 (1987):

Preliminarily, a glance at salient features of the historical context may render more comprehensible the legal aftermath of Kwangju, particularly ongoing controversies over the dictates of "justice" in the criminal cases brought against the two ex-presidents and fourteen other former generals.

A. The Notion of "Righting the Wrongs of History"

For many Koreans, the Cold War partition of the nation constitutes *the* historic wrong of the present era, and one which, directly or indirectly, has engendered many subsequent tragedies and miscarriages of justice.[10] In 1945, after war's end brought the lifting of thirty-five years of Japanese colonial rule, the Korean people largely supported a systematic purge of those who had collaborated with the Japanese regime.[11] Even before partition, however, the anti-communist priorities of the U.S. military government precluded retribution against pro-Japanese Koreans accused of treason.[12] In fact, the Republic of Korea's ("ROK") military and state administrative apparatus, particularly the legal system and the police, were staffed in large part by former collaborators.[13] With American support, the tables quickly were turned against leftists who had led the anti-Japanese resistance and who were among those demanding a purge of collaborators.[14] The opportunity for a reckoning was lost.

Under President Syngman Rhee (in office 1948-60), a pattern of corrupt authoritarianism emerged in which the legal system lacked basic

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> As for the famous distinction between totalitarian and authoritarian governments, it rests . . . on a confusion between the world of ideal-types . . . and the world of political realities. As a result, it tends to ascribe to actual totalitarian governments attributes of the pure ideal-type, and to credit (or debit) them with a capacity of mass mobilization and an ability to control all sectors of society that far exceed their resources . . . . Also, the distinction unduly beautifies authoritarian regimes. Today, such regimes are often anything but "traditional"; they are either sophisticated modern versions of fascism, with emphasis on controlling the corporate groups it pretends to resuscitate or to create, or they are systems of uncontrolled bureaucratic and technocratic rule. They are not satisfied with banning political parties (or creating false ones) and limiting freedom of political expression, but insist on preventing society from organizing itself in a way that could challenge the arbitrary power of the state—hence the purging of unions and universities.

[10] *See generally* Bruce Cumings, *The Division of Korea*, *in* TWO KOREAS—ONE FUTURE? 5 (John A. Sullivan & Roberta Foss eds., 1987).

[11] CARTER J. ECKERT ET AL., KOREA OLD AND NEW: A HISTORY 327-37 (1990).

[12] *See, e.g.*, John P. Lovell, *The Military and Politics in Postwar Korea*, *in* KOREAN POLITICS IN TRANSITION 153, 155-56 (Edward R. Wright ed., 1975).

[13] GREGORY HENDERSON, KOREA: THE POLITICS OF THE VORTEX 141-44 (1968).

[14] *See generally* BRUCE CUMINGS, THE ORIGINS OF THE KOREAN WAR: LIBERATION AND THE EMERGENCE OF SEPARATE REGIMES 1945-1947, at 428-44 (1981).

prerequisites of legitimacy. The criminal justice system became a weapon used to silence Rhee's political opponents, many of whom were imprisoned or even judicially murdered.[15] Under his rule, the National Security Act, modeled on the 1925 Peace Preservation Act of the Japanese colonial period, abridged or annulled civil liberties, and the Constitution repeatedly was modified.[16] Popular outrage against Rhee culminated in the student-catalyzed revolution of April 19, 1960.[17] Rhee's ouster presented another potential occasion to purge anti-democratic figures, including former collaborators.

The *coup d'état* of May 16, 1961, soon brought a purge orchestrated by Park Chung-Hee, but the overriding goal of the new military strongman was to secure his own power.[18] Gradually it became clear that Park had no intention of tolerating democratic politics or a Rule of Law capable of constraining abuses of official authority.[19] Another chance for a historical reckoning thus also miscarried. Constitutional instability worsened under military authoritarianism, and the legal order was seriously deformed by a long concatenation of draconian martial law decrees.[20] Park coercively repressed all political challengers and by 1972 had ensconced himself as President for life.[21]

B. "Creeping Coup": October 1979 through May 1980

The assassination of President Park Chung Hee on October 26, 1979, created a severe power vacuum.[22] A true believer in his own indispensability, Park failed to fix coherent contingency plans for succession. Assassin Kim Jae-Kyu, director of the Korea Central Intelligence Agency ("KCIA"), immediately was arrested along with a group of his subordinates.[23] Choi Kyu-Ha, Park's pliant civilian prime

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[15] Gregory Henderson, *Human Rights in South Korea 1945-1953*, *in* HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES, *supra* note 1, at 125, 165-69.

[16] James B. Palais, *'Democracy' in South Korea 1948-1972*, *in* WITHOUT PARALLEL: THE AMERICAN-KOREAN RELATIONSHIP SINCE 1945, 322-27 (F. Baldwin ed., 1973).

[17] *See* RICHARD C. ALLEN, KOREA'S SYNGMAN RHEE: AN UNAUTHORIZED PORTRAIT 225-34 (1960).

[18] JOHN KIE-CHIANG OH, DEMOCRACY ON TRIAL 138-44 (1968).

[19] *See generally* SUNG-JOO HAN, THE FAILURE OF DEMOCRACY IN SOUTH KOREA (1974).

[20] Palais, *supra* note 16, at 338-50.

[21] Cohen & Baker, *supra* note 8, at 176-88.

[22] *See* CLIFFORD, *supra* note 1, at 138-42.

[23] The course of events between the assassination and the Kwangju massacre in May 1980 is described in a chronology appearing in THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA, *supra* note 1, at 10-14.

minister, assumed the role of acting chief of state and declared martial law.[24] Choi soon lifted a few of the *Yusin*-era martial law decrees that were highly unpopular, but he proved irresolute and incapable of controlling the military.[25]

Substantial segments of the Korean populace cautiously had welcomed Park's demise as an overdue opportunity for democratic reforms.[26] Park's death was generally believed to have been occasioned by growing challenges to his high-handed and brutal *Yusin* autocracy. The immediate events leading up to Park's assassination began when Park expelled Kim Young-Sam, then a leader of the opposition New Democratic Party, from the National Assembly on October 4, 1979.[27] Large-scale street protests erupted in the following week in Kim's home base area of Pusan, then spread to nearby Masan, leading Park to declare martial law and to ban public assemblies.[28]

Park ordered Kim Jae-Kyu to Pusan by on October 19 to evaluate the situation. Park's inclination was to dispatch military commandos to quell the protests by the use of overwhelming force, even if doing so entailed serious bloodshed.[29] The KCIA chief later claimed he had counselled against such a risky course, warning that massive resistance would follow.[30] Park apparently rejected Kim's advice, agreeing instead with his bodyguard, Ch'a Chi Ch'ol, an advocate of ruthless countermeasures who argued that even large-scale killing of protestors would bring no unmanageable repercussions, domestically or internationally.[31] Kim Jae-Kyu claimed that in the end the only way he could preempt the use of commandos in South Kyongsang province was by gunning down the President.[32]

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[24] THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA, *supra* note 1, at 10.

[25] Cohen & Baker, *supra* note 8, at 189-90.

[26] Choi Jang-Jip, *Political Cleavages in South Korea*, *in* STATE AND SOCIETY IN CONTEMPORARY KOREA 33 (Hagen Koo ed., 1993).

[27] Cohen & Baker, *supra* note 8, at 189.

[28] ECKERT ET AL, *supra* note 11, at 371.

[29] *See, e.g.*, SOHN HAK-KYU, AUTHORITARIANISM AND OPPOSITION IN SOUTH KOREA 155-73 (1989).

[30] CLIFFORD, *supra* note 1, at 139.

[31] CLIFFORD, *supra* note 1, at 139.

[32] Kim Jae-Kyu's testimony declaring a tyrannicidal motive for killing Park has been doubted by some, who emphasize Kim's personal enmity toward Ch'a, a key rival. "Disagreement over [Kim Jae-Kyu's] motives, variously alleged to have been personal ambition, principled opposition to Park's authoritarian regime, and a nervous breakdown resulting from mental exhaustion, was not resolved at his trial, which ended with sentences of death for him and six other defendants." FRANKLIN L. FORD, POLITICAL MURDER: FROM TYRANNICIDE TO TERRORISM 322 (1985).

Less than six weeks after Park's death, a violent putsch was executed. The *coup d'état* launched on December 12, 1979, by Chun Doo-Hwan, Roh Tae-Woo, and their supporters was facilitated by Chun's position as head of the Army internal security unit entrusted with investigation of the assassination.[33] Chun's clique, centered in the Eleventh and Twelfth Classes of the Korean Military Academy, seized power by forcibly arresting the martial law commander, Chung Seung-Hwa, and other senior generals on suspicion of conspiring in the assassination.[34] Chun abruptly moved frontline armored forces from the Demilitarized Zone to Seoul in support of the coup, reportedly causing consternation in the U.S.-led Combined Forces Command.[35] Firefights in central Seoul between ROK army contingents resulted in casualties, including the deaths of several men loyal to Chung's side. Choi Kyu-Ha and other civilian holdovers from the Park Chung Hee regime quickly acquiesced in the seizure of the military command structure by Chun, who publicly pretended to support Choi's succession to the presidency.[36] Over the next few months, however, Chun consolidated *de facto* rule by his clique, and in April he illegally installed himself as director of the KCIA, a key organ of state coercion alongside the military.[37]

After enduring increasingly repressive rule under Park Chung-Hee, the Korean people in spring 1980 were hoping for an early transition to democracy. As Chun's clique tightened its grip on the state, demonstrations erupted in Seoul and around the country in early May.[38] On May 17, Chun openly seized power by declaring nationwide martial law, dissolving the National Assembly, arresting a wide spectrum of opposition politicians and student dissidents, and banning assemblies and demonstrations.[39] The city of Kwangju in South Cholla province, a stronghold of veteran opposition leader Kim Dae-Jung, was the scene of protest demonstrations on May 18,

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[33] Cohen & Baker, *supra* note 8, at 190.

[34] Cohen & Baker, *supra* note 8, at 190.

[35] Cohen & Baker, *supra* note 8, at 190.

[36] CLIFFORD, *supra* note 1, at 143-52.

[37] THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA, *supra* note 1, at 11.

[38] Cohen & Baker, *supra* note 8, at 192:

> Beginning in May, campus demonstrations increased dramatically. Students were calling for an end to martial law; the dismissal of Chun, President Ch'oe [Choi Kyu Ha], and Prime Minister Sin Hyon-hwak; the prompt drafting of a new constitution; and early elections. . . . As many as 100,000 students demonstrated in downtown Seoul on the 15th. They were met with tear gas. Riot police equipped with gas masks, shields, and clubs attacked the students, beating many. Hundreds were injured. Many were arrested.

[39] Cohen & Baker, *supra* note 8, at 192.

when local students learned that Kim, as well as their own leaders, had been detained.[40]

C. *The Kwangju Massacre, May 1980*

Popular antipathy toward Chun's junta stems from their usurpation of power, gross abuses of human rights, and proclivity for corruption while in office, but most of all it stems from the terror unleashed against the citizens of Kwangju in May 1980. Precisely what transpired in Kwangju has been hard to ascertain, due in part to cover-ups and to disinformation spread by the Chun and Roh governments.[41] One reason the recent criminal prosecutions have been broadly supported in Korea is that they afford a belated opportunity to uncover the truth once and for all, and to put an end to conflicting accounts of the massacre. For example, immediately afterwards, estimates of casualties varied from the government's figure of 191 killed (including twenty-three soldiers), to claims by dissidents that 2000 or more perished.[42] These questions have not yet been definitively resolved.

Scale of casualties aside, certain key facts about the Kwangju massacre are now established beyond serious dispute. First, a deliberate decision was made on May 18 to send into Kwangju elite "black beret" troops of the Special Warfare Command.[43] These Special Forces were paratroopers tasked to be inserted behind North Korean lines in the event of war—they were experts in hand-to-hand combat, trained to dispatch enemy forces without revealing their presence.[44]

Second, the Special Forces were told by their commanders that participants in the Kwangju demonstrations were the spearhead of a communist revolution being orchestrated by North Korea.[45] The Chun Doo-Hwan regime persisted for years in characterizing the initial Kwangju

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[40] Tim Warnberg, *The Kwangju Uprising: An Inside View*, 12 KOREAN STUDIES 33-56 (1988).

[41] For example, the Korean Army forwarded false reports to the U.S. Embassy that "liberated" Kwangju was the scene of many summary executions by communist "People's Courts." It was also claimed, without any basis, that the disorder in Kwangju was being used as a pretext for widespread personal revenge killings by local people. *See* Yoon Sung-Min, *Document: Report on the Kwangju Incident to the National Assembly National Defense Comittee*, June 7, 1985, *reprinted in* THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA, *supra* note 1, at 83-93.

[42] ASIA WATCH, *supra* note 1, at 36-42.

[43] THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA, *supra* note 1, at 12.

[44] Gregory Henderson, *The Politics of Korea*, *in* TWO KOREAS—ONE FUTURE?, *supra* note 10, at 105.

[45] *See, e.g.*, ECKERT ET AL., *supra* note 11, at 374.

demonstrators, college students protesting arbitrary arrests of their leaders, as agents under North Korean control who were intent on fomenting a revolution to be coordinated with a North Korean incursion across the Demilitarized Zone.[46] No credible evidence has ever been produced to substantiate Chun's claim.

Third, ample testimony of eyewitnesses has confirmed that the Special Forces not only used egregiously excessive force against unarmed demonstrators; they also committed *random* attacks on obviously innocent civilians.[47] Paratroopers carried out door-to-door searches in the course of which they brutally beat any young men they found without attempting to check their identity.[48] Some of these innocent victims were killed or permanently incapacitated by head trauma and other wounds.[49] Passersby in the streets, including females, were assaulted, battered, and in some instances killed and mutilated with bayonets.[50] Not just the intensity of the violence, but especially its indiscriminate character, make it apt to speak of "state terror" at Kwangju. In hindsight, the escalation of street violence in Kwangju was precipitated by the excessive brutality of the ROK military, not by any covert action attributable to North Korea.

In recent years, a near-consensus has emerged in Korea that the "rebellion" in Kwangju was spontaneous and self-defensive in nature. Unwarranted brutality of the Special Forces, along with lies contemporaneously disseminated by the state-controlled media, provoked tens of thousands of Kwangju citizens to organize themselves to resist the Army invasion, including by "liberating" firearms from local armories. Due to Korea's system of universal military conscription, virtually all adult males in Kwangju were military veterans and many were members of the

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[46] The allegation of North Korean involvement remained a part of "the official story" for years afterwards. A Report to the National Assembly by Defense Minister Yoon Sung-Min, June 7, 1985, asserted that "our national security was threatened both from within and without"; that "intelligence said that North Korea would soon attack the South"; that "[g]roundless rumors [were] fabricated by impure elements"; that "the Supreme Court [in convicting Kim Dae-Jung] made it clear that some political forces pulled a string for the flare-up of the Kwangju incident"; and that "impure elements which were manipulated by well-organized outside forces stimulated the Kwangju citizens by rousing regional sentiments while circulating rumors." Yoon Sung-Min, *supra* note 41, at 84, 89.

[47] *See* Warnberg, *supra* note 40 (an eyewitness account).

[48] ASIA WATCH, *supra* note 1, at 36-42.

[49] ASIA WATCH, *supra* note 1, at 36-42.

[50] ASIA WATCH, *supra* note 1, at 37.

military reserves.[51] Once the local population mobilized in self-defense, the Special Forces retreated behind a siege cordon on the outskirts of the city.[52]

For several days, the citizens of "liberated" Kwangju tried without success to organize negotiations with the Chun regime in hopes of preempting further bloodshed. Kwangju citizens had difficulty reaching a consensus on whether and under what conditions to surrender, partly because they had no reliable information about what was happening elsewhere; the government had cut off Kwangju's communications with the rest of the country, and the news reaching the rest of the country was heavily censored. Efforts were made to have the United States Embassy intervene, but U.S. Ambassador Gleysteen declined to intermediate.[53] President Choi Kyu-Ha went to Kwangju on May 25 and claimed to favor a peaceful solution, but at one o'clock in the morning on May 27, 1980, Chun sent thousands of troops back into Kwangju.[54] Military control was reestablished. There were additional casualties, though fewer deaths than many had feared because most citizens dropped weapons in the face of overwhelming force.[55] In the wake of the uprising, thousands of Kwangju citizens were interrogated or detained, and hundreds were prosecuted.[56] Opposition leader Kim Dae-Jung was convicted by a martial law tribunal of treason for "masterminding" the rebellion and sentenced to death, a sentence later commuted.[57]

In hindsight, there can be little doubt that the military junta sought to "make an example" of the people of Kwangju in May 1980. The random violence unleashed by the Special Forces evidently was calculated to terrorize the populace into immediate submission, and moreover, to deter

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[51] Under the Military Service Act, Korean males are obliged to serve three years in one of the branches of the armed forces.

[52] THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA, *supra* note 1, at 13.

[53] Cohen & Baker, *supra* note 8, at 193.

[54] THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA, *supra* note 1, at 90.

[55] Norman Thorpe, in Kwangju at that time as a correspondent for the *Asian Wall Street Journal*, on September 27, 1996, at a Conference held at the Pacific Rim Center of the University of San Francisco, expressed the view that a peaceful resolution of the standoff was near and that the 17 or more deaths incurred during the retaking of the city were entirely unnecessary.

[56] According to the Republic of Korea ("ROK") government, 2522 people were arrested, of whom 404 eventually were convicted by martial law tribunals and sentenced to imprisonment. THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA, *supra* note 1, at 91.

[57] Kim Dae-Jung was convicted by a military tribunal and sentenced to death for allegedly founding and heading an "anti-state organization" based in Japan and for inciting revolution. Cohen & Baker, *supra* note 8, at 194-95. Under strong pressure from Japan and the United States, the death sentence was commuted and on December 23, 1982, Kim was allowed to go into exile in the United States. ASIA WATCH, *supra* note 1, at 47-49.

similar outbreaks of protest elsewhere in the future. Chun, Roh, and many of their cohorts were veterans of combat in Vietnam, where analogous tactics of terror had been used successfully by Korean armed forces to deter Viet Cong ambushes.[58] Chun had every reason to expect his junta's illegitimacy would be challenged through nationwide civil disobedience, a tried-and-true device by which Korean students had expelled Syngman Rhee from the presidency in April 1960.[59] By demonstrating his preparedness to kill protestors, Chun may have hoped to preempt popular opposition to his rule, in effect aggravating an atmosphere of crisis so that further draconian measures would appear inevitable when carried out in the name of smashing ostensible North Korean provocations.

Moreover, Chun unctuously adored Park during "His Excellency's" lifetime, and Chun's self-image as a true and faithful heir of Park may have contributed to the decision to dispatch Special Forces as he perhaps believed Park himself would have done.[60] Even if Chun did not pay perverse homage to Park's memory in this way, it appears unlikely that he actually believed the Kwangju demonstrations were under remote control from Pyongyang. No proof of this was adduced in the trial of Kim Dae-Jung or in other trials after suppression of the uprising. The assertion that Kim Il-Sung was behind the Kwangju uprising is accredited by almost nobody in South Korea today.[61]

D. Impunity as an Affront to History

When President Kim Young-Sam (inaugurated in February 1993 for a non-renewable five-year term) speaks of "righting the wrongs of history," he taps into decades of frustration over the impunity enjoyed by despots who often substituted naked coercion for a principled administration of

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[58] *See* Diane Jones & Michael Jones, *Allies Called Koreans—A Report from Vietnam, in* AMERICA'S RENTED TROOPS: SOUTH KOREANS IN VIETNAM 20 (Am. Friends Serv. Comm.).

[59] QUEE-YOUNG KIM, THE FALL OF SYNGMAN RHEE 100-35 (1983).

[60] On the eve of his assassination seven months earlier, Park Chung-Hee had had paratroopers standing by for a similar demonstration of state terror in Pusan. In 1959, Chun traveled to the United States for five months of special training in psychological warfare. Chun also actively supported Park Chung Hee's coup on May 16, 1961, organizing a pro-coup street march in Seoul by cadets of the Military Academy, for which action Park reportedly remained grateful in later years. For a biographical sketch of Chun, *see* KIHL YOUNG-WHAN, POLITICS AND POLICY IN DIVIDED KOREA: REGIMES IN CONTEST 122-27 (1984).

[61] Kim Il-Sung was the autocratic leader of the People's Democratic Republic of Korea from its founding in 1948 until his death on July 8, 1994. *See generally* SUH DAE-SOOK, KIM IL-SUNG: THE NORTH KOREAN LEADER (1988).

justice. Accumulated frustration over Korea's recent history of dictatorship has been in ever greater tension with growing national pride over Korea's rapid industrialization.[62] The chronic deformation of politics under military rule has impacted upon Korean society in countless ways. Many citizens believe it precluded any progress toward peaceful reunification of North and South Korea.[63] Many also feel that the military strongmen, by unduly favoring their home regions with largesse and by implacably suppressing labor unions, have prevented deepening inequities, across regions as well as social classes, from being rationally addressed.[64]

The popularity of the prosecution of the self-appointed guardians who obstructed democratization for more than ten years thus is scarcely surprising. Neither is it surprising that villification of Chun and Roh has been linked to resentment against the United States for having overtly supported and covertly counseled corrupt military dictatorships for decades.[65] The ideals of democracy and legality scorned by Chun and Roh are values long espoused on the international stage by the United States. By past acts and omissions, the United States has seemed to Koreans to show contempt for its own oft-proclaimed ideals. The American government's self-exculpatory attitude toward the Kwangju incident, for many, has been an especially telling example of such duplicity.[66]

II. THE MILLS OF JUSTICE BELATEDLY GRIND

A. Timing, Scope, and Momentum of Delegitimation

The criminal prosecutions of the former presidents are seen in Korea today as actions capable of investing the legal system with a new legitimacy after decades in which the criminal law was cynically manipulated as a political weapon of powerholders.[67] For this to be accomplished, the law must be seen as being applied in a principled manner, not as an instrument

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[62] *See generally* STEPHAN HAGGARD & ROBERT R. KAUFMAN, THE POLITICAL ECONOMY OF DEMOCRATIC TRANSITIONS (1995).

[63] For background, *see, e.g.*, Chong-Sik Lee, *North and South Korea: From Confrontation to Negotiation*, *in* KOREA BRIEFING 1990, at 39-53 (Chong-Sik Lee ed., 1991).

[64] Choi Jang-Jip, *supra* note 26, at 33.

[65] *See* Donald Clark, *Bitter Friendship: Understanding Anti-Americanism in South Korea*, *in* KOREA BRIEFING 1991, at 157-58 (Donald Clark ed., 1991).

[66] *See, e.g.*, Samsung Lee, *Kwangju and America in Perspective*, 12 ASIAN PERSP. 69 (1988).

[67] For background on Korea's unhappy constitutional history, *see* YOON DAE-KYU, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA (1991); Choi Jang-Jip, *supra* note 26, at 33.

of revenge or of political opportunism.[68] However, troublesome issues have arisen surrounding the prosecutions.

One set of questions concerns the timing of the prosecutions. As detailed below, it was not until late 1995 that Chun Doo-Hwan, Roh Tae-Woo, and others were indicted for treason and other crimes in connection with the December 1979 military mutiny and the May 1980 massacre at Kwangju. Until very recently under Korean law, even the gravest offenses could not be prosecuted if fifteen years had elapsed since completion of the crime.[69] The accused contend that their prosecution should have been legally barred by the statute of limitations. Further, they assert that they have been unconstitutionally singled out for punishment at this late date merely because President Kim Young-Sam, his popularity waning partly due to his failure to support prosecution of the former junta, found a *volte-face* to be politically expedient. Given that more than thirty-two months passed between Kim Young-Sam's inauguration in February 1993 and the initiation of the prosecutions, the delay does stand in need of explanation.[70]

The retroactivity issue has been before the Korean Constitutional Court four times in differing postures and also has been addressed in special legislation by the National Assembly. As a constitutional problem it merits analysis, even though the majority of the Korean public strongly supports the prosecutions and most appear to view the retroactivity issue as little more than a technicality. The inconsistent ways in which the Constitutional Court and the hierarchy of public prosecutors have dealt with the retroactivity issues in turn have elicited questions about whether these institutions are sufficiently insulated from political pressures.

Another controversial set of problems concerns the scope of the prosecutions. The investigation into the *coup d'état* and the Kwangju massacre led to the indictment of sixteen former military officers, including

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[68] Legitimacy is often said to depend on "impartiality" in the administration of justice, but such a value is utopian in the context of treason prosecutions by a successor regime unless it is understood merely as a call for nondiscrimination in application of the formal law. In the words of the German historian, Theodor Mommsen: "Impartiality in political trials is about on the level with Immaculate Conception: one may wish for it, but one cannot produce it." *Quoted in* OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS 304 (1961).

[69] As of December 21, 1995, this changed, and certain "crimes destructive of the constitutional order" may be prosecuted without any time limit. *See infra* note 170.

[70] "President Kim . . . is not getting credit for the trial because his action against the generals smacks of political expediency rather than principle. Critics say his promise to correct historical wrongs would be more believable were it not applied to everyone but himself; he has declined to give a full account of his own dealings with the old soldiers, and the twists and turns of his own political career leave many unanswered questions." *Uneasy Lies the Head*, ECONOMIST, Mar. 23, 1996, at 33.

the two former presidents, on military mutiny, treason, and derivative charges.[71] Twenty-two other lower-ranking officers initially indicted for participation in the December 1979 mutiny had their indictments dismissed without trial.[72] Thirty-three others investigated for criminal conduct in the course of the Kwangju massacre were spared indictment despite their involvement. Soon after the investigations were reopened in November 1995, Kim Young-Sam announced that criminal prosecutions would be limited to the "masterminds" or "ringleaders," even though the violence actually was carried out by lower-ranking men acting under orders now being denounced as illegal.[73]

Such a limitation of the scope of prosecutions, while perhaps unsurprising within the practical political context presented, appears to contravene the so-called "principle of legality" under which prosecutors have a duty to charge any individual found as a matter of fact to have been engaged in criminal conduct.[74] There also is a potential inconsistency with international criminal law doctrine—derived from the Nuremberg war crimes trials—pursuant to which a defense of "superior orders" or "duress" does not excuse subordinates from criminal responsibility if they ought to have known the orders were illegal.[75] Moreover, imposition of such limits

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[71] Five of the defendants (Chun Doo-Hwan, Chung Ho-Yong, Hwang Yung-Si, Lee Hui-Sung and Chu Yong-Bok) were additionally charged with having committed homicide in the course of the Kwangju massacre. Indictments concerning the military mutiny, cases 95 *Kohap* 1280 (95 *Hyongje* 129453, 1400469) and 96 *Kohap* 127 (95 *Hyongje* 144115) were filed with the court on December 21, 1995, and February 28, 1996, respectively. The 130-page indictment for insurrection (treason) and homicide centering on the Kwangju massacre, cases 96 *Kohap* 38 (95 *Hyongje* 144116) and 96 *Kohap* 76 (95 *Hyongje* 144116), was filed by the Seoul District Prosecutor's Office on January 23, 1996.

[72] On January 21, 1996, prosecutors announced that battalion and regimental commanders "who merely participated in the quelling of the civil uprising" would not be prosecuted. *Chun's Cronies to be Indicted for Kwangju Suppression*, KOREA HERALD (Jan. 21, 1996) <http://www.koreaherald.co.kr>.

[73] *President Kim Limits Prosecution to 1980 Kwangju Masterminds*, KOREA HERALD (Nov. 26, 1995) <http://www.koreaherald.co.kr>.

[74] Under Article 247 of the Korean Code of Criminal Procedure and Article 51 of the Korean Criminal Code, as interpreted by the Korean courts, the discretion of prosecutors in declining indictment is limited.

[75] In the words of the Nuremburg Tribunal:

> It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter [of the Tribunal] specifically provides in Article 8: "The fact that a Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment." The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international laws of war has never been recognized as a defense to such acts of brutality, though . . . the order may be urged in

by the President is vulnerable to criticism as an improper intervention into the criminal process that has overridden whatever discretion the prosecutors otherwise rightfully might have exercised in discharging their duties.

Apart from being charged with mutiny and insurrection, both former presidents also have been prosecuted and convicted for accepting massive bribes and retaining much of the money after leaving office. The corruption investigations yielded further indictments, and eventually convictions, of leading industrialists and of other former government officials.[76] The corruption cases cannot be analyzed in detail here, but they also present instances of seemingly politically-motivated intervention by President Kim Young-Sam into the criminal process. Most of the businessmen charged with bribery were spared pre-trial detention, purportedly to minimize disruption of economic affairs.[77] In addition, prior to the National Assembly elections of April 11, 1996, President Kim expended a great deal of effort in reassuring industrialists, including those already under indictment, that steps would be taken to keep the corruption prosecutions from having any serious negative impact on their enterprises. Following conviction in August 1996, as noted below, some prominent businessmen were given suspended sentences and several others, although sentenced to prison terms of two years or more, were permitted to remain at large pending appeals.[78]

Finally, the belated prosecutions of Chun and Roh have potentially far-reaching institutional implications for the legal system itself. This problem has to do with "momentum of delegitimation." That is, a finding that Chun and Roh are guilty of treason exposes many present and former officals to accusations of "collaboration" with past regimes that were not just illegitimate, as many contended at the time, but actually criminal.[79] President Kim Young-Sam clearly hopes to foreclose any wide-ranging

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mitigation of punishment. The true test, which is found in varying degrees in the criminal laws of most nations, is not the existence of the order, but whether moral choice in fact was possible.

Quoted in INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 105 (Henry J. Steiner & Philip Alston eds., 1996).

[76] *Convictions in Korea Highlight Anxieties Over Economy, Politics*, ASIAN WALL ST. J., Aug. 27, 1996, at A1, A9.

[77] *Scandalous Tycoons Not to Be Physically Detained*, KOREA HERALD (Nov. 25, 1995) <http://www.koreaherald.co.kr>.

[78] *The Mighty Fall in South Korea*, ECONOMIST, Aug. 31, 1996, at 31.

[79] Opposition politicians were quick to call for resignation of persons aligned with the former military regime. *See, e.g., Mutiny, Treason Collaborators Urged to Resign*, KOREA HERALD (Nov. 29, 1995) <http://www.koreaherald.co.kr>.

retribution against working-level officials who served the former regimes, for the destabilization potential of a major purge could be considerable. Furthermore, most of the men potentially affected have been aligned more or less closely with the conservative party headed by Kim. Nevertheless, the premise of the prosecutions of the ex-presidents is that the South Korean state of the 1980s was a criminal organization.[80]

The paradox of an illegal state apparatus that is nonetheless "legally sovereign and effective" for an extended duration raises many perplexing issues.[81] For example, today's Korean law incorporates many pieces of legislation enacted by irregular bodies formed by prior military regimes now characterized as having been unconstitutional.[82] The treason convictions of the former presidents might be held to imply that such past legislation adopted at their initiative through irregular procedures ought to be null and void *ab initio*. However, nullification would amplify uncertainty about the validity of many legal norms now in force which the current legislature has taken no steps to repeal. At the same time, what is to be done about persons victimized in the past by irregular laws? Some steps have been taken to rehabilitate individuals stigmatized by political prosecutions or other "legalized abuses" of the former military regimes, but no systematic processes have been instituted to compensate victims of past human rights violations.[83]

The ongoing delegitimation of Korea's past military dictatorships shares features with situations in Eastern European countries where successor regimes have conducted broad purges of functionaries who served oppressive Communist governments.[84] Latin American experience, in contrast to more recent transitions in Eastern Europe, amply illustrates the

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[80] For a useful theoretical discussion, *see* Charles Tilley, *War Making and State Making as Organized Crime*, *in* BRINGING THE STATE BACK IN 169 (Peter B. Evans et al. eds., 1985).

[81] *See generally* Otto Kirchheimer, *State Structure and Law in the Third Reich*, *in* THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER 142-71 (William Scheurman ed., 1996).

[82] The National Security Act and certain provisions of Korea's labor legislation fall in this category of statutes that were amended by prior military regimes to "normalize" repressive practices originally introduced during periods of martial law.

[83] According to a recent State Department report: "In August [1995] the Government issued amnesty and pardons to a number of political dissidents, including some prisoners who had been incarcerated since the Korean War. However, the government did not authorize independent investigations of the cases of prisoners who had received sentences on charges believed to have been fabricated by previous governments." *Republic of Korea Human Rights Practices, 1995*, U.S. DEPT. OF STATE DISPATCH, Mar. 1996 *available in* LEXIS, Exec. Library, DSTATE file.

[84] *See, e.g.*, Paulina Bren, *Lustration in the Czech and Slovak Republics*, 2 RFE-RL RES. REP. 16 (1993).

gravity of problems impeding principled imposition of criminal sanctions when extensive sectors of the political, military, and economic elites are exposed to accusations of collaboration with prior dictatorships.[85] Like other states in transition, Korea faces many dilemmas. Goals of retribution and reconciliation collide; pursuit of one may totally frustrate pursuit of the other. Difficult choices have been made, but demands for accountability continue to be evaded, as in the past. If legal institutions are to be accepted as legitimate, prosecutions limited to the topmost echelon of the former military junta may not be enough. Judges and prosecutors who, without apparent qualms, did the dirty work of prior military dictatorships may come under growing pressure to resign, assuming they are spared prosecution for complicity in the gross human rights violations of the 1980s. Some Korean jurists have a conflict of interest that induces them to show leniency toward "passive" collaborators. Depending on future political developments, functionaries now involved in cases against the former military leadership could face reckonings of their own.

B. From "Let History Judge" to "Judges! Let's Rectify History!"

Ironies abound in the ongoing drama surrounding the prosecutions of the former presidents. Chun Doo-Hwan, who from 1979 through 1988 trampled on human rights while mercilessly deploying the criminal justice system against democratic activists, now waxes indignant, claiming that his rights to due process of law are being infringed.[86] Roh Tae-Woo, who cultivated the image of a "common man" during his incumbency from 1988 to 1993, and was less roundly hated than the ever-arrogant Chun, now is reviled as a monumental hypocrite.[87]

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[85] On the serious problems encountered in Argentina, *see* Aryeh Neier, *What Should Be Done About the Guilty?*, N.Y. REV. OF BOOKS, Feb. 1, 1990, at 32. The negotiation of transitional "pacts" is analyzed in GUILLERMO O'DONNELL & PHILIPPE SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 37-47 (1986).

[86] *See* Shim Jae-Hoon, *Swift, Tough Justice: Due Process Questions Raised in Chun-Roh Trial*, FAR E. ECON. REV., Aug. 15, 1996, at 16-18.

[87] According to a poll conducted in November 1995, Roh Tae-Woo was regarded by 80% of respondents in Seoul as "the most loathsome politician." *Roh Named As Most Hated Politician: Poll*, KOREA HERALD (Nov. 19, 1995) <http://www.koreaherald.co.kr>.

1. *Prosecution for the Coup d'État? "Let History Judge"*

Chun's indignation seems to stem partly from a belief that he previously had been guaranteed immunity from prosecution for the *coup d'état* and the massacre at Kwangju. Ostensibly, such immunity would have flowed from a deal whereby Chun relinquished about US$20 million in assets, languished in internal exile at a remote Buddhist temple for nearly two years, and reluctantly appeared at a National Assembly hearing on December 31, 1989.[88] At the time this deal was negotiated between the junta and opposition leaders, Chun and Roh still enjoyed strong support from high-ranking military officers affiliated with Chun's "Society of One Mind" ("*Hanahoe*").[89] Many of these officers had actively participated in the coup themselves, and fourteen former *Hanahoe* generals ended up being prosecuted alongside Chun and Roh.

In January 1990, shortly after Chun's less than contrite testimony before the National Assembly, Kim Young-Sam abruptly merged his opposition political faction with the ruling party of Roh Tae-Woo and the right-wing faction led by Kim Jong-Pil, creating the Democratic Liberal Party ("DLP").[90] The merger was denounced by many democratic activists and alienated some of Kim Young-Sam's own longtime followers.[91] Agreements related to the unexpected merger remained secret, but it has been widely believed that an informal commitment to spare Chun and Roh from prosecution was a *quid pro quo* conceded by Kim Young-Sam in order to obtain the nomination and financial backing of the DLP coalition in the December 1992 presidential election, in which Kim Young-Sam managed to defeat his archrival, Kim Dae-Jung.

Following his inauguration in February 1993, President Kim Young-Sam moved cautiously but deliberately to ease supporters of Chun and Roh

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[88] 1990 ASIA Y.B. (Far E. Econ. Rev.) 155-56.

[89] Much information about *Hanahoe* has been publicized as a result of the investigative reporting of Kim Jae-Hong, an assistant political editor with the *Dong-A Ilbo* and a Nieman Fellow at Harvard University in 1995-96. On March 7, 1996, Mr. Kim gave a presentation in the Current Affairs Forum of the Korea Institute at Harvard University in which he discussed the rise and fall of *Hanahoe*, arguing convincingly for a fundamental continuity between the Park Chung-Hee regime and the subsequent Chun/Roh junta. Kim's findings about *Hanahoe* are recorded in a two-volume Korean language work entitled *Kun* (Army).

[90] *See* Jin Park, *Political Change in South Korea: The Challenge of the Conservative Alliance*, 30 ASIAN SURV. 1154 (1990).

[91] *See generally* Wonmo Dong, *Domestic Politics in 1990: A Year of Crisis*, *in* KOREA BRIEFING, 1991, *supra* note 65, at 5-25.

out of the Korean armed forces.[92] The last eight *Hanahoe* generals on active duty were relieved of their Army commands and eased into retirement in April 1994.[93] Meanwhile, in July 1993, a group of thirty-eight military officers, including Chung Seung-Hwa, Chang Tae-Wan, and other senior generals who had been arrested by Chun and his cohort in the course of the December 1979 coup, filed criminal complaints with the Seoul District Prosecutor's Office urging that Chun, Roh, and others be indicted for military mutiny and treason before the fifteen-year statute of limitations lapsed.[94]

On October 29, 1994, after sixteen months of investigation, the Seoul Prosecutor's Office announced that no criminal cases would be instituted against any of the accused, even though Chun, Roh, and their supporters were found to have engaged in illegal troop movements, insubordination, desertion of martial law posts, homicides, and other acts constituting mutiny under the Military Penal Code.[95] With respect to the charge of treason, the prosecution indicated that there was no evidence that Chun, Roh, and their group seized power in December 1979 with an intent to destroy the constitutional structure of government.[96]

The official explanation of the decision said:

> In light of the fact that the two former presidents and others turned our constitutional history backwards by staging a rebellion, they should be prosecuted and the wrong past be corrected. But, their indictment is feared to revive national divisiveness and confrontation in the course of legal disputes over the past, and what is to be taken into account is that they have already been judged by the people through parliamentary hearings on the Fifth Republic.[97]

This decision immediately was assailed by many civic groups and by opposition politicians, but President Kim Young-Sam, then and for a year

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[92] *See, e.g.*, Wonmo Dong, *Civilian Democracy and the Politics of Leadership Change in Korea*, *in* CONTINUITY AND CHANGE IN CONTEMPORARY KOREA 47-53 (Christopher Sigur ed., 1994).

[93] *Eight Hana-hoe Generals Forced to Retire*, KOREA TIMES, Apr. 18, 1994, at 3.

[94] *Dec. 12 Incident is Mutiny by Chun, Roh*, KOREA TIMES, Oct. 30, 1994, at 1.

[95] *Id.*

[96] *Id.*

[97] *Id.*

afterward, maintained the stance that the guilt of the former military dictators should be "left to the judgment of history."[98]

The October 1994 decision to forgo prosecution of the former presidents was appealed by the complainants to higher-level prosecutors, but such appeals quickly were dismissed.[99] A petition seeking judicial review also was submitted to the Constitutional Court, an institution established in 1988 by constitutional reforms adopted in response to the massive June 1987 street protests against the Chun dictatorship.[100]

On January 20, 1995, the Constitutional Court issued its ruling.[101] One part of the judgment held that the statute of limitations for certain offenses had been suspended from running during the incumbencies of the former presidents due to a constitutional provision that expressly immunizes sitting presidents from being prosecuted for any offense other than insurrection or treason.[102] This meant that although Chun and Roh no longer could be charged with treason for acts in December 1979 once the fifteen-year period of prescription had expired, they would remain subject to prosecution for other offenses with a fifteen-year limitation, such as mutiny or homicide; Chun could be prosecuted for such offenses until April 2002, as his term of office was eight years, and Roh could be prosecuted for such offenses until December 1999, as his term of office was five years. [103]

The Court declined, however, to overturn the prosecution's exercise of discretion to suspend indictments for mutiny, remarking: "Reasons for prosecution such as faithful liquidation of the past, a warning for the future, restoration of justice and meeting the popular sentiment of law carry great meaning . . . [but the reasons weighing against prosecution such as] a prolonged social confrontation, a waste of national energy, and damage to the people's sense of self-pride" also are meaningful and cannot be taken lightly.[104]

The Constitutional Court's ruling on partial suspension of statutes of limitations during incumbency of the former presidents was welcomed by many, but the political rationale offered in validation of forbearance from

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[98] *Id.*

[99] *Chung, Accusers to Appeal This Week,* KOREA TIMES, Oct. 30, 1994, at 3.

[100] *See generally* James West & Yoon Dae-Kyu, *The Constitutional Court of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73 (1992) (also reprinted in part in SANG-HYUN SONG, KOREAN LAW IN THE GLOBAL ECONOMY 208-44 (1996)).

[101] *Statute of Limitation for Chun, Roh Suspended,* KOREA TIMES, Jan. 21, 1995, at 1.

[102] *Id.*

[103] *Id.*

[104] *Id.*

prosecution was widely condemned. Critics suggested that the prosecutor's office as well as the Court had sacrificed the strictures of an authentic Rule of Law in deference to a "reconciliation" policy established by President Kim Young-Sam. They argued that even if President Kim possessed authority to grant pardons or to commute sentences after conviction in the interest of reconciliation, to permit Chun, Roh, and their cohort to enjoy total impunity debased the justice system.[105] Such criticism, casting in doubt the autonomy of the prosecution as well as the independence of the Constitutional Court, was politically potent at a juncture when Kim Young-Sam's administration avowedly was seeking to restore trust in the integrity of the legal system. The poor showing of DLP candidates in the local government elections staged in June 1995 was read by some as an indication that President Kim's acquiescence in impunity for the former dictators was unacceptable to many citizens.

2. *Prosecution for the Kwangju Massacre? "Let History Judge"*

The controversial January 1995 Constitutional Court case soon was overshadowed by another set of criminal complaints that had been filed by 322 citizens on May 13, 1994, against Chun, Roh, and fifty-six others.[106] These complaints urged punishment of the former military junta for treason, insurrection, and murder in relation to the May 17, 1980, declaration of martial law and the Kwangju massacre. The complainants, including relatives of the dead, urged that the victims were patriots rightfully opposing patently unconstitutional measures ordered by Chun on May 17-18, 1980, including his declaration of nationwide martial law, dissolution of the National Assembly, banning of assemblies and demonstrations, and preventive detention of opposition political figures and student leaders. Because the pertinent events were in May 1980, the accused could be indicted at least through late May 1995. The prosecutors investigating this case took the position, in fact, that the statute of limitations would not expire until August 15, 1995, the fifteenth anniversary of Choi Kyu-Ha's abdication of the presidency in favor of Chun Doo-Hwan.[107] In other words,

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[105] *Mixed Reaction Shown to Prosecution's Decision to Stay Indictment of Ex-Presidents*, KOREA TIMES, Oct. 30, 1994, at 3.

[106] The complaint and other related documents are reproduced and analyzed in POPJOK CH'AEKIM KWA YOKSAJOK CH'AEKIM 5.18 (Un-Jong Pak & In-Sop Han eds., 1995).

[107] *Prosecution Clears Ex-Presidents of Insurrection in May 18 Suppression*, KOREA TIMES, July 8, 1995, at 3.

the prosecutors viewed the putative offenses as having continued from May 17 through August 15, 1980.[108]

The Seoul District Prosecutor's Office leaked its decision on the Kwangju-related complaints to the press around July 8, 1995, although no formal announcement was made until July 18.[109] The Prosecutor's Office decided that no prosecution for insurrection or treason could be instituted because actions taken pursuant to a declaration of martial law by a military regime that has effectively seized state power have a *de facto* political validity that renders them non-justiciable. In the words of Senior Prosecutor Chang Yun-Sok: "We concluded that it's hard to subject the May 18 incident to either judicial judgment or [to a probe by] investigation authorities . . . to determine its legality because it was [a] high-powered political activity to deal with a serious national crisis."[110]

Chang went on to state that, although the investigation had confirmed that innocent citizens of Kwangju were killed and wounded in the military action suppressing the uprising, such casualties occurred in the course of "political activities to control the state, which was plunged in[to] a chaotic situation," and that such activities "were legal measures taken under the then [effective] Martial Law."[111] Incoherently, the prosecution also remarked that they had been unable to secure evidence and testimony by which to judge the legality of the measures alleged by the complainants to be treasonous.[112] The investigation, which extended over fourteen months and yielded oral or written testimony from some 280 persons, had not had the benefit of direct interrogation of Chun or Roh. In deference to their "dignity" as former presidents, Chun, Roh, and Choi Kyu-Ha had been questioned only through written questions.[113] Choi declined to cooperate with the investigation at all, while the responses made by Chun and Roh were evasive and tailored to avoid self-incrimination.

The prosecutorial decision of July 1995, again leaving the criminality of the former military dictators to "the judgment of history," infuriated

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[108] *Id.*

[109] *Id.*

[110] *Prosecutors Give Up Right to Indict Chun, Roh—Killing of Innocent Kwangju Citizens Confirmed*, KOREA TIMES, July 19, 1995, at 3.

[111] *Id.*

[112] *Id.*

[113] *Three Ex-Presidents to Face Written Query on Kwangju Uprising*, KOREA TIMES (Dec. 16, 1994) <http://www.korealink.co.kr/times.htm>.

many citizens, who saw it as an evasion of duty by the prosecutors.[114] The complainants petitioned the Constitutional Court for review of the prosecutorial finding that the charges were not justiciable. A nationwide protest campaign was launched by a federation of progressive groups, and demonstrations quickly commenced in Seoul.[115] Lawyers for a Democratic Society ("*Minbyun*") filed another criminal complaint with the Seoul District Prosecutor's Office, this one alleging that Chun and six other junta members committed perjury in the course of their sworn testimony on the Kwangju incident before the National Assembly in 1988 and 1989.[116]

Popular protests against the impunity of Chun and Roh steadily mounted in August and September 1995. On August 29, over 200 professors of Seoul National University, Korea's leading educational institution, issued a statement asserting that "the prosecution's logic runs counter to . . . the people's hope . . . to clear up the vestiges of past military regimes and to construct a true democracy," and that "the prosecution's decision is an act of arrogation and the case should be judged by the judicature, not the prosecution."[117] Within several weeks, more than 5000 faculty members of universities across the nation had joined in the call for punishment of the former dictators.[118]

In mid-September, some 120,000 Catholic clergy and church members signed a petition calling for the enactment of a special law and appointment of a special prosecutor to take legal action to punish Chun and others for their involvement in the Kwangju massacre.[119] The political party of Kim Dae-Jung introduced bills into the National Assembly in September for special legislation designed to facilitate prosecution of the former military regime by extending the statutes of limitations and setting up an

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[114] *Civic Groups Decry Non-Indictment of Former Presidents Chun, Roh*, KOREA TIMES, July 20, 1995, at 3.

[115] *Id.*

[116] *Prosecution Begins Probe into Perjury by Chun on 1980 Kwangju Uprising*, KOREA TIMES, July 23, 1995, at 3; *Prosecution Starts Probe into Chun*, KOREA HERALD, Oct. 3, 1995, at 3.

[117] *SNU Profs. Call for Bill to Probe Chun, 57 Others*, KOREA HERALD, Aug. 30, 1995, at 3; *SNU Professors Urge Gov't to Punish Those Responsible for May 18 Uprising*, KOREA TIMES, Aug. 30, 1995, at 3.

[118] *Calls for Special Legislation on May 18 Kwangju Incident Ever Spreading in Teaching Profession*, KOREA TIMES, Sept. 29, 1995, at 3.

[119] *Catholics Join Campaign Calling for Bill to Punish Chun, Others*, KOREA TIMES, Sept. 19, 1995, at 3.

independent prosecutor.[120] By late September, the petition campaign by university professors had spread to thousands of teachers at primary and secondary schools, and tens of thousands of university students in Seoul and Kwangju had boycotted classes or joined in large-scale campus protests.[121]

That faculty members and religious groups had joined forces with students conferred a growing moral authority upon the protests against impunity for the former military junta. This confluence threatened political disaster for Kim Young-Sam and the DLP if they persisted with the policy of "letting history judge." On the other hand, the DLP included among its leaders men intimately associated with the Chun and Roh regimes, including several incumbent legislators likely to face prosecution along with the former presidents if criminal proceedings went forward. Long portrayed by critics as having made a Faustian bargain with the hated former dictators, President Kim Young-Sam thus faced a deepening dilemma by early October 1995. Criticized as a protector of unrepentant criminals, his popularity was rapidly eroding. The DLP seemed almost on the verge of disintegration as longtime party supporters who had joined Kim in opposing the military regime now feared that their own political futures were being sacrificed to preserve the 1990 coalition with holdovers from the Chun and Roh regimes.

3. *The "Slush Fund" Scandal and the Downfall of Roh Tae-Woo*

On October 5, 1995, Roh Tae-Woo enraged many when, in the course of a speech at a social function organized by his high school alumni association, he said that the Kwangju massacre was "nothing" compared to the bloodshed witnessed in China during the Cultural Revolution.[122] When faulted for his incredible insensitivity, Roh at first denied having made the remark.[123] Confronted with a tape recording, he admitted he had said it and called a press conference on October 13 to offer a public apology. "I really

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[120] *NCNP to Present Bills for Indictment of Suppressors of May 18 Kwangju Uprising*, KOREA TIMES, Sept. 19, 1995, at 2; *Dealing with Kwangju Incident to be Hot Issue in Assembly*, KOREA HERALD, Sept. 22, 1995, at 2.

[121] *College Students Begin Nationwide Class Boycott*, KOREA HERALD, Sept. 30, 1995, at 3; *Students Stage Violent Rallies in Cities—Demand Kwangju Massacre Perpetrators be Punished*, KOREA TIMES (Oct. 1, 1995) <http://www.korealink.co.kr/times.htm>.

[122] *Ex-President Roh Apologizes for Kwangju Remarks*, KOREA PRESS SERV. (Oct. 13, 1995) <http://203.254.53.1/NEWS/KPS/9603/960318.4.html>.

[123] *Id.*

feel sorry for distressing the victims of the Kwangju incident and others deeply concerned with the matter," Roh said.[124]

Roh's ill-timed gaffe may not have directly caused his ensuing downfall, but around the same time, rumors began circulating widely in Seoul that a former president was found to have deposited huge sums in borrowed-name bank accounts, contrary to anti-corruption laws requiring use of real names in financial transactions. In mid-October, Park Kye-Dong, an opposition legislator, alleged in the National Assembly that Roh Tae-Woo had amassed an immense "slush fund" while in office and had kept a large portion of this money, hundreds of millions of dollars, after leaving office, hiding it in nominee accounts.[125] Based on testimony by Lee Hyun-Woo, Roh's former bodyguard, prosecutors quickly confirmed that Roh was holding over US$60 million in a single commercial bank.[126] The massive scale of the "slush fund" gradually was verified as others with knowledge of the affair began to confess in hopes of saving themselves.[127]

Kim Young-Sam was out of the country on a state visit in North America when the "slush fund" scandal broke. Initially, Kim's party took the position that investigation of Roh should be confined to the US$60 million managed by Lee, but opposition parties demanded a full investigation and immediate arrest of the former president for corruption.[128] On October 26, 1995, prosecutors announced they had found another cache of about US$35 million, and the next day, Roh himself admitted in a public statement that while in office he had collected political funds totalling over 500 billion won (US$650 million), of which 170 billion (US$215 million) had been retained when his presidential term expired in February 1993.[129] Roh denied that the money came from bribes or extortion and claimed that collection of "donations" from businessmen and distribution of such funds for political purposes had long been an established practice of Korean presidents.[130]

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[124] *Id.*

[125] *Opposition Demands Probe of Roh on Political Funds*, KOREA HERALD (Oct. 24, 1995) <http://www.koreaherald.co.kr>.

[126] *More Secret Funds of Roh Revealed*, KOREA HERALD (Oct. 27, 1995) <http://www.koreaherald.co.kr>.

[127] *S. Korean Slush Fund Probe Moves to Conglomerates*, REUTERS, Nov. 2, 1995, *available in* clari.net at <clari.world.asia.koreas>.

[128] *Opposition Demands Probe of Roh on Political Funds*, *supra* note 125.

[129] *Opposition Demands Probe of Roh on Political Funds*, *supra* note 125.

[130] *See* Byeong-Seog Park, *Political Corruption in Korea: Concentrating on the Dynamics of Party Politics*, 19(1) ASIAN PERSP. 163 (1995).

Following his return to Korea, President Kim Young-Sam spent several days consulting with his party leaders before issuing a public statement.[131] Kim Yoon-Whan, the DLP Chairman and a member of the *Minjong* faction associated with Chun and Roh, floated the idea of sparing Roh from prosecution in consideration of his past service to the nation and permitting him to go into internal exile after disclosing "slush fund" details to the prosecution.[132] This suggestion attracted little support. The media speculated that the real origin of the disclosures about Roh had been Kim Deog-Ryong, a DLP lawmaker close to Kim Young-Sam who reputedly was trying to engineer an expulsion of the Chun/Roh era holdovers from the party and a merger with reformist elements in the opposition. Accusations flew back and forth among the leaders of the various political parties concerning their acceptance of political funds from Roh in 1992.[133]

By the time President Kim issued a statement on October 31, the prosecution already had disclosed that it had located more than 200 billion won (US$250 million) in funds retained by Roh and had declared its intention to conduct a full investigation and to confiscate all funds illegally retained by the former president. Kim was quoted as saying: "Our handling of this case should prove that everyone is equal before the law . . . all cannot be forgiven simply because they were old practices. We must not hesitate in severing the collusive links between businesses and politics on the basis of the legitimacy and morality of the civilian government."[134]

In response to charges by Kim Dae-Jung and others alleging that he had enjoyed massive financial support from Roh's "slush fund" in the course of his 1992 campaign, Kim Young-Sam asserted that he had carried out his promise to do his best to cure political diseases and to not accept any money while in office.[135] Skeptics pointed out that although President Kim may not have accepted money after he was elected, it was scarcely credible that his 1992 presidential campaign had been conducted without using party funds "inherited" from his predecessor, Roh.

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[131] *President Kim Silently Ponders Gains, Losses of Prosecution of Roh*, KOREA HERALD (Nov. 5, 1995) <http://www.koreaherald.co.kr>.

[132] *Ruling Party Call for Roh's Punishment If Found Guilty*, KOREA HERALD (Oct. 27, 1995) <http://www.koreaherald.co.kr>.

[133] *Roh's Secret Fund Scandal Creates Chain of Rumors—Conspiracy Theory Suggests Shinhan Bank Deposit was Tipped Off by Rep. Kim Deog-Ryong*, KOREA HERALD (Oct. 27, 1995) <http://www.koreaherald.co.kr>.

[134] *Kim Denies Receiving Money from Roh; President Stands Firm on Thorough Investigation for Slush Fund*, KOREA HERALD (Oct. 31, 1995) <http://www.koreaherald.co.kr>.

[135] *Id.*

One of President Kim's senior secretaries elaborated by telling reporters that "a decision on whether to file criminal charges against Roh will be made on the basis of the outcome of the prosecution probe and in consideration of public opinion."[136] It apparently did not occur to this spokesman that he was confirming that the actual decision to prosecute would be made by the President instead of by the prosecutors in charge of the case. Neither did he see any problem in acknowledging that "public opinion" would influence a law enforcement decision that was supposed to be made strictly on the basis of law and the evidence. The spokesman went on to say that prosecution would be "inevitable" if it were found that any portion of the funds in Roh's possession originated with "bribes" rather than "donations of political funds."

The drama picked up speed as prosecutors delved deeper into the corruption that for many years had flourished at the interface of state and economy in South Korea. The distinction between "bribes" and "donations" seems to have been jettisoned along the way. A prosecutor remarked to the press:

> Considering the realities that the presidential power reaches out to the entirety of business activity and that the future of a business hinges on its relations with the President, a President's acceptance of any contributions or political funds from businessmen is tantamount in a broad sense to an act of receiving bribes.[137]

On November 16, 1995, former president Roh Tae-Woo was arrested and detained at a prison on the outskirts of Seoul.[138] Also named in the warrant were several well-known businessmen, including the chairmen of Dong-Ah and Daewoo Groups, though they were spared detention.[139]

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[136] *Id.*

[137] *Ex-President Roh Put Behind Bars, Charged with Illegal Amassing of Fortune While in Office*, KOREA HERALD (Nov. 17, 1995) <http://www.koreaherald.co.kr>.

[138] *South Korean Ex-Chief Arrested and Apologizes in a Huge Bribery Scandal*, N.Y. TIMES, Nov. 17, 1995, at A1, A14.

[139] Prior to the arrest, the prosecutors let it be known that businessmen under investigation would only be indicted if found to have benefited economically from contributions to the former president. *Roh Summoned Again: Possible Detention Predicted as Early as Today*, KOREA HERALD (Nov. 16, 1995) <http://www.koreaherald.co.kr>.

4. *"Judges! Let's Rectify History!"*

With the nation in an uproar over the arrest of Roh and the investigation of wealthy industrialists expanding, on November 24 President Kim Young-Sam abruptly announced that he had changed his mind about "letting history judge."[140] Spinning 180 degrees, Kim issued a statement as follows: "The May 17 *coup d'état*, trampling on the honor of our countrymen and the nation, has caused us boundless grief. Enactment of special legislation will demonstrate to the people that justice, truth and law live on in this land."[141] The *New York Times* reported Lee Shin-Bom, a former dissident acting as a spokesman for Kim's party, as stating that "Chun Doo Hwan will be arrested and others will not escape prosecution."[142]

Kim Dae-Jung and other opposition figures charged that Kim Young-Sam's about-face was a cynical ploy to deflect public attention from the "slush fund" scandal at a time when it was threatening to spill back upon the ruling party. Moreover, the November 24 announcement came less than a week before the Constitutional Court was expected to render judgment in the case challenging the prosecution's refusal to indict Chun and Roh for the Kwangju massacre. Three days later, on November 27, the content of the judgment was leaked to the press, who reported that the Constitutional Court would rule on November 30 that the prosecution erred in declining to prosecute Chun, Roh, and their associates.[143] Given these unseemly leaks (which tarnished the Court's reputation), observers speculated that President Kim's reversal of position, preempting the imminent Court decision, may have been influenced by advance notice that the Court was about to contradict his "let history judge" posture.

The situation became increasingly confused in the following weeks as various institutions and individuals scrambled to preserve credibility despite the changed circumstances. On November 28 and 29, the Seoul District Prosecutor's Office, acting in response to the presidential announcement

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[140] Shim Jae Hoon, *Beating the Heat: Kim Turns on Scandal-hit Party with Kwangju Probe*, FAR E. ECON. REV., Dec. 7, 1995, at 18.

[141] *Id.*; Sang-Hun Choe, *South Korean Backs Prosecution Over 1980 Crackdown*, BOSTON GLOBE, Nov. 25, 1995, *available in* LEXIS, News Library, Bglobe File.

[142] Nicholas Kristof, *Korea May Charge Ex-Presidents in the 1980 Killings of Protestors*, N.Y. TIMES, Nov. 25, 1995, at A4.

[143] *Constitutional Court to Overrule Earlier Decision on Kwangju Case*, KOREA HERALD (Nov. 28, 1995) <http://www.koreaherald.co.kr>; *Successful Coup Subject to Punishment*, KOREA TIMES (Nov. 28, 1995) <http://www.korealink.co.kr/times.htm>.

rather than waiting for the Constitutional Court's formal decision, immediately reopened their criminal investigations and announced that they had put the accused under surveillance to prevent their flight.[144] President Kim's instruction to the DLP leadership in the National Assembly to expedite enactment of special legislation was complicated by opposition calls for an independent special prosecutor and by uncertainty over the statute of limitations issues.[145]

By November 29, it turned out that prior unofficial reports of the contents of the impending Constitutional Court decision had been incorrect in some particulars—the Court in fact planned to rule, consistent with its January 1995 judgment, that the statute of limitations for treason and insurrection expired as of August 16, 1995, the fifteenth anniversary of the resignation of Choi Kyu-Ha as President, while other offenses would remain subject to prosecution because limitations had been suspended during the former presidents' terms of office.[146]

Before the Constitutional Court could hand down its formal decision on November 30, however, the complainants who had filed the case hastily submitted to the Court a document purporting to withdraw their petitions.[147] This step, avowedly designed to prevent the rendition of a binding judgment that would legally constrain the envisaged special legislation, meant that the Court was confronted with a novel procedural question as to whether such a withdrawal of the petition at the eleventh hour made the case moot.[148] Of course, it was highly irregular for litigants to have such an opportunity to withdraw their legal action based on an improper leak disclosing an imminent result unfavorable to them. The entire episode was something of an embarrassment, given that the judicial process in theory should be insulated from such manipulations.

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[144] *Reinvestigation Opens into 1979 Coup: Chun, Roh May Face Insurrection Charge*, KOREA HERALD (Nov. 28, 1995) <http://www.koreaherald.co.kr>.

[145] *Special Law Must Find Out Who Ordered Troops to Fire on Kwangju Protestors*, KOREA HERALD (Nov. 26, 1995) <http://www.koreaherald.co.kr>; *Legal Debate Focuses on Statute of Limitations*, KOREA TIMES (Nov. 29, 1995) <http://www.korealink.co.kr/times.htm>; *Ruling, Opposition Camps to Clash Over Introducing Special Prosecutor*, KOREA TIMES (Nov. 27, 1995) <http://www.korealink.co.kr/times.htm>.

[146] *Ruling, Opposition Parties Puzzled by Constitutional Court Decision*, KOREA HERALD (Nov. 29, 1995) <http://www.koreaherald.co.kr>.

[147] *Ruling Camp Faces Controversy Over Constitutionality of Special Law*, KOREA HERALD (Nov. 30, 1995) <http://www.koreaherald.co.kr>; *Court's Ruling Fails to End Dispute on Constitutionality of Special Law*, KOREA HERALD (Dec. 16, 1995) <http://www.koreaherald.co.kr>.

[148] *Constitutional Court Cancels Ruling as Petition Withdrawn*, KOREA TIMES (Nov. 30, 1995) <http://www.korealink.co.kr/times.htm>.

Eventually, on December 15, 1995, the Constitutional Court issued its judgment. By a close vote of 5-4, the Court decided that the Kwangju-related case had been rendered moot by withdrawal of the petition.[149] Four justices dissented, however, and their opinion explained why the Court, had the case not been mooted, would have ruled that the prosecution abused its discretion by declining to institute criminal proceedings against Chun, Roh, and the other perpetrators of the Kwangju massacre.[150]

Meanwhile, the Seoul District Prosecutor's Office summoned Chun Doo-Hwan to appear in person on December 2, 1995, for interrogation on the events of May 1980.[151] A few hours before he was due to appear, Chun made a televised speech, declaring: "I will not cooperate with the summons. But if the prosecutors want to bring charges against me, I will follow the law. I've already given the best answers I could."[152] Chun then lashed out at Kim Young-Sam: "If I am a criminal who brought confusion to society, then is it not reasonable that President Kim take due responsibility for having allied himself with such insurrectionists?"[153] Defying the summons, Chun engaged in political theater by stopping at the National Cemetery to pay his respects to dead military veterans, then left Seoul and drove to his hometown of Hapchon in southeastern Korea. He was taken into custody there early on December 3 and brought back to Seoul for interrogation under detention.

The effort to enact special legislation to facilitate prosecution of the former military junta was disorderly at first. Bills had been submitted by the party of Kim Dae-Jung back in September, but the DLP opposed the concept of a special prosecutor and also opposed demands that special compensation provisions be included in the law.[154] Moreover, confusion persisted over the statute of limitations issue. Some leaders in the DLP, including Kang Sam-Jae, told reporters that the Constitution would be amended, if necessary, to resolve any problems with the constitutionality of

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[149] Constitutional Court Judgment of December 15, 1995, 95 Honma 221, 233, 297; *Court's Ruling Fails to End Dispute on Constitutionality of Special Law*, KOREA HERALD (Dec. 16, 1995) <http://www.koreaherald.co.kr>.

[150] *Constitutional Court Clears Way for Special Law*, KOREA HERALD (Dec. 16, 1995) <http://www.koreaherald.co.kr>.

[151] *Chun Summoned for Probe*, KOREA HERALD (Dec. 2, 1995) <http://www.koreaherald.co.kr>.

[152] *S. Korean ex-Leader Defies Inquiry*, BOSTON GLOBE, Dec. 2, 1995, at 38.

[153] *S. Korea ex-President Arrested*, BOSTON GLOBE, Dec. 3, 1995, at 1.

[154] *DLP To Submit Kwangju Bill to Assembly Next Week*, KOREA HERALD (Dec. 2, 1995) <http://www.koreaherald.co.kr>.

the proposed special laws.[155] The content of such a constitutional amendment was not well-defined, and some DLP members misunderstood the legal issues presented—even if the Constitution were amended, such amendments themselves normally would apply only prospectively, not retroactively.

The notion of amending the Constitution was greeted with suspicion by the opposition parties, and the idea soon was jettisoned in favor of statutory measures.[156] On December 1, 1995, Han Seung-Soo, the presidential chief of staff, declared:

> The Blue House [i.e., President Kim] is not considering revising the Constitution as we can handle the problem [of punishing former presidents Chun Doo-Hwan and Roh Tae-Woo and other junta members for their coup on May 17, 1980, and the massacre in Kwangju] without causing legal disputes on the constitutionality of the envisaged special law. According to legal experts, it is possible to write a special law which can bypass a controversy on constitutionality. With such a law, we can deal with those responsible on charges of treason as well as military rebellion.[157]

Negotiations among the political parties on the content of the special legislation continued in early December with the main point of conflict being the demand by the opposition parties that the law should entrust the cases to a special prosecutor rather than to the same prosecutorial apparatus which previously had declined to indict Chun and Roh.[158]

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[155] *Amendment to Constitution Proposed to Remove Obstacles to Special Law*, KOREA HERALD (Dec. 1, 1995) <http://www.koreaherald.co.kr>.

[156] *DLP's Constitutional Amendment Plan May Touch Off Heated Debate*, KOREA HERALD (Dec. 1, 1995) <http://www.koreaherald.co.kr>; *Opposition Parties Baffled by DLP Move*, KOREA HERALD (Dec. 1, 1995) <http://www.koreaherald.co.kr>.

[157] *Pres. Kim Has No Plan to Revise Constitution*, KOREA TIMES, Dec. 1, 1995, at 1.

[158] *Lawmakers Pass Bill to Allow Punishment of Chun, Roh*, KOREA HERALD (Dec. 1, 1995) <http://www.koreaherald.co.kr>.

III. THE CONSTITUTIONAL CONTROVERSY OVER RETROACTIVITY

A. Differing Assessments of Limitations Constraints

To grasp why special legislation was deemed necessary, a brief exposition of the relevant Korean legal rules may be useful. Under the Korean Code of Criminal Procedure, periods of limitation vary according to the maximum sentences the court may impose following conviction of a defendant. The longest limitation period, fifteen years, applies only to offenses punishable by death.[159] If the crime is punishable by life imprisonment, the limitation period is ten years, and for offenses punishable by imprisonment for not less than ten years, the period of limitation is seven years.[160] Where a defendant is charged with an offense allowing multiple or concurrent penalties, then the longest applicable limitation period applies.[161]

The period of limitation commences to run at the completion of the criminal act.[162] A prosecution is timely if, prior to expiration of the statutory period, an indictment naming the accused is presented by a prosecutor to a court of competent jurisdiction. The running of the limitation period is suspended if a co-perpetrator has been indicted in good time for the same criminal offense.[163] Once an indictment is presented, the limitation period does not commence running again until the criminal trial proceeds to a final judgment or until the charges are finally dismissed.[164] If the statute of limitations has already expired for a defendant against whom an indictment has been presented, then the court is obliged to dismiss the case with a judgment of "acquittal," which is not a finding that the defendant is innocent, but rather a determination that the legal basis for prosecution is defective.[165]

The fifteen-year period of limitations applied to Chun and Roh, for the criminal charges included insurrection (treason) and military mutiny,

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159 HYONGSA SOSONGPŎP [C. CRIM. PROC.] art. 249.

160 *Id.*

161 C. CRIM. PROC., art. 250.

162 C. CRIM. PROC., art. 252(1).

163 C. CRIM. PROC., art. 253(2).

164 C. CRIM. PROC., art. 253(1).

165 C. CRIM. PROC., art. 326. (The same disposition is required if the court finds that the accused is entitled to the benefit of an amnesty or if the law under which the indictment was brought has been repealed before trial).

offenses punishable by death.[166] The fifteen-year period is measured from the date when relevant offenses are found to have been "completed," a finding that turns both upon the factual record and upon the court's substantive definition of the offense. With respect to the military mutiny and insurrection charges, disagreements arose over whether to deem the offense completed as of December 13, 1979, with the arrest of senior martial law commanders, or rather to deem the offense completed at some later date, such as August 15, 1980, when Chun Doo-Hwan took over the presidency from Choi Kyu-Ha.

At the close of their original investigation, prosecutors suggested that the offenses were completed in August 1980. However, after the case was reopened, they argued that offenses should be regarded as having continued until martial law was lifted on January 24, 1981, given that an essential element of the junta's unconstitutional conduct was imposition of nationwide martial law as a means to enable seizure of political power. This argument, if ultimately sustained on appeal, would mean that the limitation period had not expired as of the indictments dated January 23, 1996, and that those indictments were timely irrespective of the special legislation.

Apart from uncertainty over how the courts would define the duration of the offenses charged in the indictments, the limitations issues have been complicated by the status of Chun Doo-Hwan and Roh Tae-Woo as former presidents. An incumbent South Korean president enjoys a limited immunity from criminal prosecution under the following constitutional provision: "The President shall not be charged with a criminal offense during his tenure of office, except for insurrection or treason."[167] Based on the foregoing, it was argued in the cases of Chun and Roh that the statute of limitations should be deemed to have been suspended from running for the entire terms of their incumbencies as president. As noted above, the Constitutional Court endorsed this basic view in its January 1995 judgment; however, such suspension was held inapplicable to insurrection or treason because insurrection and treason were crimes for which the presidents

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[166] The homicide charges against several of the defendants also were punishable by death. In the separate corruption case against Roh Tae-Woo, the statute of limitations issue was less significant, for the corruption charged against Roh took place in the 1988-1993 period which fell entirely within the ten-year limitation period applicable to most of the offenses charged. The corruption case against Chun Doo-Hwan, on the other hand, has been significantly constrained by the ten-year limitation period, which prevents prosecutors from charging offenses that took place in the portion of Chun's presidential term from 1980 to late 1985.

[167] HŎNPŎP [S. KOREA CONST.] art. 84 (1987).

remained subject to prosecution even while in office. From a formal legal perspective, the constitutional procedure for impeachment also is potentially relevant to a determination of the circumstances in which a sitting president may be subject to criminal prosecution.[168] In theory, though not in reality, the former presidents at any time could have been removed from office by impeachment. Once removed, they were in principle subject to prosecution for crimes committed in office, notwithstanding the constitutional immunity previously mentioned.

The statute of limitations issues seemed sufficiently murky that in November 1995, it was believed necessary to enact special legislation to preclude the defendants from invoking a limitations defense. The special legislation was spurred in part by the fact that prosecutors in charge of the July 1995 investigation into the Kwangju massacre had assumed that the offenses were completed as of August 15, 1980. This meant that the court likewise might rule that prosecution was barred by prescription as of mid-August 1995. Had the defendants prevailed with a limitations defense, such an outcome would highlight the fact that Kim Young-Sam had disfavored prosecution in 1993 and 1994, when no such time problems existed. The President intended to avoid this potential political calamity.

B. Special Laws to Resolve Prescription Impediments

Once President Kim Young-Sam announced in late November 1995 that he favored enactment of special legislation to deal with statute of limitations concerns, action was taken quickly. Two special laws were

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[168] Since the October 29, 1987, amendment of the Constitution, the procedure has been as follows: Under Article 65, a president who has violated the Constitution or other laws in the course of execution of his duties may be impeached upon a motion proposed by at least one-third of the National Assembly and concurred with by at least two-thirds of that body. Upon passage of a motion for impeachment, the person impeached is suspended from office pending adjudication by the Constitutional Court pursuant to Article 111(1)(2). Under Article 113(1), six of the nine members of the Court must concur in order to remove an impeached president from office.

Under Articles 53 and 54 of the Constitutional Court Act, a judgment of impeachment entails that the official concerned is ejected from office with immediate effect and is barred from any public office for a period of five years from the judgment. Removal from office upon impeachment does not exempt the concerned official from criminal or civil liability, and any criminal proceeding which may have been suspended pending the impeachment may be resumed once the impeachment proceeding has resulted in ejection from office. The impeachment procedure under the Korean Constitution as amended in 1987 has never been employed in practice, thus no cases have come before the Constitutional Court for adjudication. Accordingly, several debatable issues, such as the subject-matter of offenses which are sufficiently serious to warrant impeachment, or the effect of a preemptive resignation by the concerned official, are yet to be resolved.

enacted concurrently by the National Assembly on December 19, 1995, the last day of the regular session. These laws were promulgated and became effective on December 21, 1995.

The first statute is entitled *Act on Non-Applicability of Statutes of Limitations to Crimes Destructive of the Constitutional Order.*[169] This legislation is brief and simple. It defines treason and insurrection, whether committed by civilians or by active duty military personnel, as "crimes destructive of the constitutional order" and provides that there shall be no time bar to prosecutions of the designated crimes.[170] This enactment

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[169] Law No. 5028, promulgated December 21, 1995 (Kwanbo 13195).

[170] An unofficial translation of the full text of the first special act is as follows:

Act on Non-Applicability of Statutes of Limitations to Crimes Destructive of the Constitutional Order

Article 1. (Purpose)

The purpose of this Act is to protect the basic order of liberal democracy by establishing provisions concerning non-application of statutes of limitations for crimes destructive of the constitutional order which have the goal of undermining the existence of [subverting] the Constitution or destroying the constitutional order.

Article 2. (Definition of Terms)

In this Act, "crimes destructive of constitutional order" shall mean and include the following offenses: Insurrection (Criminal Code, Part II, Chapter 1); Treason (Criminal Code, Part II, Chapter 2); Mutiny (Military Penal Code, Part II, Chapter 1); and Benefiting the Enemy (Military Penal Code, Part II, Chapter 2).

Article 3. (Non-Application of Statutes of Limitations)

In the case of the following crimes the statutes of limitations prescribed in Articles 249 to 253 of the Code of Criminal Procedure, and in Articles 291 to 295 of the Courts Martial Act, shall not apply:

1. Crimes destructive of constitutional order as defined in Article 2 above.

2. Crimes proscribed by Article 250 of the Criminal Code which constitute mass murder for purposes of the Convention on the Prevention and Punishment of [the Crime of] Genocide.

Article 4. (Exceptional Application for Judgment)

(1) Any victim or third-party complainant who, in connection with a crime mentioned in Article 2 above, has received from a prosecutor or a military prosecutor a notice declining to institute a prosecution may apply for a judgment to the High Court or to the Military Court of Appeals, as the case may be, corresponding to the High Prosecutors Office to which the prosecutor belongs or to the Military Prosecutors Appellate Division to which the military prosecutor belongs.

contains no mention of the events of December 1979 through May 1980; it is of general scope and applies to any situation falling within its terms. Like normal legislation, its enforcement presumably is prospective only.[171]

The second special law, entitled *Special Act on the May 18th Democratization Movement*[172] and hereinafter called the "5.18 Special Act," expressly addresses the events of 1979 and 1980.[173] Unlike the first statute, this statute in fact is a "special" law tailored to deal with the conduct of

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(2) With respect to applications under the preceding section, the applicable rules of the Code of the Criminal Procedure or of the Courts Martial Act shall apply.

[171] Why this law took the form it did is unclear. The same legal effect would have been achieved more elegantly by amending the Code of Criminal Procedure and the Courts Martial Act.

[172] Law No. 5029, promulgated December 21, 1995 (Kwanbo 13195).

[173] The first two articles of the 5.18 Special Act provide:

Article 1. (Purpose)

The purpose of this Act is properly to establish national discipline, to consolidate democratization, and to foster the national spirit and energy by prescribing provisions concerning the suspension of statutes of limitations for crimes destructive of constitutional order that were committed around December 12, 1979 and May 18, 1980.

Article 2. (Suspension of Statutes of Limitations)

(1) With respect to the crimes destructive of constitutional order mentioned in Article 2 of the Act on Non-Applicability of Statutes of Limitations to Crimes Destructive of Constitutional Order which were committed around December 12, 1979, and May 18, 1980, statutes of limitations are hereby deemed to have been suspended from running during the period in which there existed a cause preventing the nation from exercising its prosecutorial powers.

(2) The expression "period in which there existed a cause preventing the nation from exercising its prosecutorial powers" shall mean the period from the date upon which the criminal conduct in question was completed until February 24, 1993.

Articles 3-7 briefly may be summarized. Article 3 is identical to Article 4 of the first special law. This provision common to the two laws apparently stems from a compromise by the Democratic Liberal Party ("DLP") with opposition demands for establishment of a special prosecutor. It has no application in the pending case, however, because prosecutors reopened the investigations and proceeded to indictments. If they had declined to indict, under Article 3 complainants could have applied to an appellate court for appointment of a private attorney as a kind of special prosecutor. A similar procedure is set forth in Art. 265 of the Code of Criminal Procedure. Article 4 provides for judicial rehabilitation of certain persons convicted of crimes under prior military regimes for their participation in the Kwangju democratization movement. Article 5 enjoins the government to carry out an unspecified "memorial project" to transmit to younger generations "the consciousness of the May 18th Democratization Movement." Article 6 concerns characterization of monetary compensation received by victims under prior special legislation, apparently for purposes of offset against monetary damages claimed through other channels such as litigation. Article 7 rescinds the award of medals or other military decorations and honors to military personnel who took part in the pacification of the Kwangju uprising.

Chun's military junta.[174] After currently pending matters are resolved, the 5.18 Special Act will have no further future application.

The operative provision of the 5.18 Special Act focuses exclusively upon "crimes destructive of constitutional order" connected with the events of December 12, 1979, and May 18, 1980; that is, it deals with the offenses of military insurrection and treason. It suspends the statute of limitations from running with respect to such offenses "during the period in which there existed a cause preventing the nation from exercising its prosecutorial powers" and expressly defines such interval of suspension as "the period from the date upon which the criminal conduct in question was completed until February 24, 1993."

The rationale of the 5.18 Special Act is relatively transparent. Basically, the statute of limitations is deemed to have been suspended for the entire period in which members of the military junta held supreme executive power; that is, it was suspended until civilian president Kim Young-Sam was inaugurated on February 24, 1993. Such suspension is considered justified because during that interval there was, as a practical matter, no possibility that junta members would be prosecuted for crimes committed in the course of their seizure of power. In other words, the statute implicitly characterizes the military regime in power from 1980 until February 1993 as an illegal regime that deliberately impeded the administration of criminal justice by shielding its own members from legal accountability for prior crimes. In Korean legislative practice, the National Assembly does not normally include fact findings in its bills; hence, no textually explicit rationale was incorporated into the bill as enacted. Nevertheless, the foregoing rationale is fairly clear from the wording of the statute.

Two features of the 5.18 Special Act merit comment. First, the 5.18 Special Act makes no distinction between cases in which the otherwise applicable fifteen-year limitation period expired prior to December 21, 1995 (when the 5.18 Special Act entered into force), and cases in which such period had not yet expired. Second, unlike similar legislation adopted elsewhere,[175] it requires no specific *judicial* finding that particular

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[174] The Korean Constitution contains no limitation on the legislature comparable to the prohibition of bills of attainder in the United States Constitution.

[175] An example of such a statute is Act No. 198/1993 of the Czech Republic, Article 5 of which provides: "[T]he period of time from 25 February 1948 until 29 December 1989 shall not be counted as part of the limitation period for criminal acts if, due to political considerations incompatible with the basic principles of the legal order of a democratic State, [a person] was not finally and validly convicted or the

defendants had been beneficiaries of politically-motivated discrimination by prosecutorial functionaries of the prior regime. The National Assembly, in passing the law, conclusively presumed that the military junta prevented any prosecutions for insurrection or treason from being instituted against its members or minions in connection with the December 1979 coup and the May 1980 Kwangju massacre.

C. *The Constitutional Court Judgment of February 16, 1996*

The constitutionality of the 5.18 Special Act was rapidly placed in question when a Seoul district court judge was asked by prosecutors to issue arrest warrants against Chang Se-Dong and Choi Sae-Chang. Chang and Choi claimed that the 5.18 Special Act was unconstitutional, and the district court suspended issuance of the warrants, referring their claim to the Constitutional Court on January 18, 1996.[176] The case was handled with unprecedented alacrity by the Constitutional Court, and judgment was rendered only three weeks later, on February 16, 1996.[177]

The challenge to the 5.18 Special Act asserted that it was unconstitutional because it violated due process of law and, when retroactively applied, deprived accused persons of their right to rely upon a statute of limitations which, the defendants alleged, had already expired.[178] Like most modern written constitutions, the Korean Constitution contains an express prohibition against retroactive legislation.[179] In reviewing the 5.18 Special Act, the nine justices of the Constitutional Court became divided on the issue. Four justices were of the opinion that the 5.18 Special Act was not unconstitutional. They reasoned that even if the procedural rights of the individual defendants arguably were impaired in some way by

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charges [against him] were dismissed." The constitutionality of this statute was upheld on December 21, 1993, by the Constitutional Court of the Czech Republic. *See Czech Republic: Constitutional Court Decision on the Act on the Illegality of the Communist Regime*, 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES: LAWS, RULINGS, AND REPORTS 620-27 (Neil J. Kritz ed., 1995).

[176] *Court Starts Deliberation on Appeal Against Special Law*, KOREA HERALD (Feb. 2, 1996) <http://www.koreaherald.co.kr>.

[177] Constitutional Court Judgment of Feb. 16, 1996, 96 Heonka 2, 96 Heonpa 7, 13.

[178] *Constitutional Court Rejects Appeals by Chun*, KOREA HERALD, Feb. 17, 1996, at 3.

[179] Article 13 of the Korean Constitution provides, in pertinent part: "(1) No citizen shall be prosecuted for an act which does not constitute a crime under the law in force at the time it was committed, nor shall [a citizen] be placed in double jeopardy. (2) No restrictions shall be imposed upon the political rights of any citizen, nor shall any person be deprived of property rights by means of retroactive legislation . . . ." S. KOREA CONST. ch. II, art. 13.

the special law, the National Assembly, articulating the demand of the entire nation for justice, was competent to determine that this public interest outweighed the individual rights of the accused.[180] Presiding Justice Kim Yong-Joon wrote: "The May 18 Special Law does not run counter to the Constitution because it is deemed necessary for safeguarding substantial public interests, that is, the realization of legal justice."[181]

Five members of the Court, however, took the position that the constitutionality of the 5.18 Special Act depended upon how it was applied—in their opinion it would be inconsistent with the Constitution to apply the Act with retroactive force to prosecute persons for whom the statute of limitations already had expired before the special law became effective. That this majority of five found the Act unconstitutional under such circumstances did not suffice to invalidate the Act, however, because under Korean law a judgment of unconstitutionality requires a majority of at least six of the nine justices of the Constitutional Court.[182] By the slimmest of margins, therefore, the defendants' constitutional challenge to the 5.18 Special Act failed.

Significantly, the Constitutional Court judgment of February 16, 1996, did not resolve the questions of when the offenses of insurrection, mutiny, and treason were "completed" or when the fifteen-year limitation period expired. Kim Yong-Joon, the president of the Court, wrote: "The Constitutional Court is not in a position to rule on the application of individual statutory limitations because they are subject to the individual court for a specific case."[183]

In referring the case to the Constitutional Court, the district court preliminarily had drawn a distinction between (1) defendants charged only for their participation in the December 12, 1979, coup, and (2) those who also or alternatively had been charged for acts related to the May 1980 massacre at Kwangju. The district court evidently was inclined to accept

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[180] This "balancing" approach, it may be noted, has something in common with the idea—incorporated in the German Constitution but not in the South Korean Constitution—that persons who have engaged in subversion of the constitutional order may "forfeit" the legal rights they otherwise would enjoy as responsible citizens. *See* DAVID P. CURRIE, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY IN THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 351 (1994).

[181] Shin Hak-lim, *Court Rules May 18 Special Law Not Unconstitutional*, KOREA TIMES (Feb. 17, 1996) <http://www.korealink.co.kr/times.htm>. The Court's analysis of the retroactivity claim referred to two German statutes that suspended statutes of limitation in order to facilitate prosecution of Nazi criminals after World War II and East German criminals in the wake of German reunification.

[182] *See* West & Yoon, *supra* note 100, at 78.

[183] Shin Hak-lim, *supra* note 181.

the prosecution's contention that the 5.18 Special Act was superfluous for the latter class of defendants, given the argument by the prosecution that the normal prescription period had not yet expired as of January 23, 1996. As noted above, this contention depends on a finding that the offenses of treason and insurrection continued through the lifting of martial law on January 24, 1981.

The Constitutional Court's judgment came perilously close to invalidating the 5.18 Special Act, but what might have been a political disaster for Kim Young-Sam was averted. Still, the outcome highlighted, once more, the circumstance that President Kim blocked prosecution of the military junta during the first two years of his administration, when no formal impediments would have interfered with the legal reckoning. Moreover, an impression was created that the constitutional challenges raised by Chun, Roh, and the other defendants were far from frivolous. Given that a 5-4 majority of the Court concluded that the special legislation had potentially dispositive constitutional defects, and that circumvention of such defects was left to turn upon an outcome-determinative, yet seemingly discretionary, definition of the duration of the offenses, the defendants and their sympathizers were emboldened to try to turn the tables by attacking the prosecutions as irregular.

D. International Aspects of the Retroactivity Problem

The Korean Constitution is unusual in expressly incorporating international law. That is, the Constitution makes public international law norms an integral part of the Korean legal order.[184] The Constitutional Court, in its judgment reviewing the 5.18 Special Act, attached no crucial importance to international law, although it did in passing invoke one treaty, the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[185]

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[184] Article 6(1) of the Korean Constitution provides as follows: "(1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea . . . ." *See* S. KOREA CONST. ch. I, art. 6, § 1.

[185] Constitutional Court Judgment of Feb. 16, 1996, p.22. The Convention has been published as 754 U.N.T.S. 73 (1970). Korea, however, has not acceded to this treaty; thus, it would only be applicable as domestic Korean law if the treaty were determined to be a case of codification of independently effective rules of customary international law. The text of the Convention has been frequently reproduced, *see, e.g.*, 3 TRANSITIONAL JUSTICE, *supra* note 175, at 615-16.

The special legislation enacted on December 19, 1995, contains only one reference to a treaty, namely, the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"), to which the Republic of Korea acceded in 1950.[186] Part of the significance of this reference to the Genocide Convention is that a strong argument may be made that domestic statutes of limitations are ineffective to terminate criminal liability for violations of peremptory and non-derogable international law norms, including the rules prohibiting genocide and crimes against humanity.[187] Regardless of whether the offenses charged against the former military junta in connection with the Kwangju massacre also constituted crimes under substantive international law, the procedural relevance of international law merits further comment.

The prohibition against *ex post facto* punishment is embodied in international standards of criminal procedure, most notably in the International Covenant on Civil and Political Rights, which provides:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed . . . . Nothing in this article shall prejudice the trial and punishment of any person for any act or omission

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[186] The reference occurs in Article 3 of the Act on Non-Applicability of Statutes of Limitations to Crimes Destructive of the Constitutional Order, and provides that an offense of homicide shall be deemed to constitute a "crime destructive of constitutional order" if it also constitutes "mass murder" for purposes of the Genocide Convention.

[187] Given that the Genocide Convention is directly effective in Korea by virtue of Article 6 of the Constitution, the following definitional provision may be relevant:

> Article II. In the present Convention, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.

The full text of the Genocide Convention has been widely reproduced. *See, e.g.*, THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT 84-87 (W. Michael Reisman & C. Antoniou eds., 1994).

> which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations.[188]

The above formulation shows that the non-retroactivity rule expresses the rationale underlying the "due process" principles *nullum crimen sine lege* and *nullum poena sine lege*.[189] Retroactive legislation offends justice because it deprives those subject to criminal law of adequate advance notice of what conduct is subject to criminal sanctions—it is fundamentally unjust to define a criminal offense or to impose an increase in punishment with retroactive effect because doing so is not rationally related to the criminal law's function of deterring antisocial behavior. In other words, it is just to punish conduct only if no unfair surprise is involved—the accused must have had an opportunity to comply with a publicly disseminated law unambiguously prohibiting the conduct in question.

As the next section will discuss, Chun, Roh, and the other defendants have contended, apart from the statute of limitations issue, that their prosecution is constitutionally improper because it amounts to a retroactive definition of treason. They assert that their indictments are based on current opinions that the Korean Constitution and laws in effect in 1979 and 1980, when viewed in hindsight, were illegitimate even if formally valid. The defendants argue that they cannot therefore defend themselves by showing that their conduct, including emergency martial law measures, conformed to the law in force at that time.

This argument, although superficially plausible, begs the critical question of whether the measures taken in 1979 and 1980 were intended to preserve law and order in the national interest, or rather, whether Chun's junta seized power in order to maintain military authoritarian rule and to obstruct pending democratic reforms, including constitutional revisions, that would soon have been implemented but for the military coup. If the actual intent of Chun, Roh, and the other junta members was to preserve military rule and hence to consolidate their own power by coercively suppressing then-imminent democratic reforms, then there is no retroactivity problem concerning the substantive definition of the offenses. If the defendants have

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[188] *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16 at 55, U.N. Doc. A/6316 (1967). Korea has acceded to and ratified this Covenant, as well as its Optional Protocol.

[189] *See, e.g.*, FRANZ NEUMANN, THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY 223 (1986).

consistently lied about their motives, as many believe, and if martial law measures were introduced on the basis of exaggerated or fabricated pretexts, then the offense of treason may be sustained by reference to the contemporaneous legal order of 1979-1980. These issues turn, in the end, on findings of fact by the court.

IV. DICTATORS IN THE DOCK: "THE TRIAL OF THE CENTURY"

A. The Trial Begins

On March 11, 1996, the trial of sixteen former generals charged with mutiny and treason, including ex-presidents Chun and Roh, commenced at the Seoul District Court in Socho-dong before a panel of three judges.[190] The mutiny charges related to the forcible arrest of senior martial law commanders loyal to General Chung Seung-Hwa on and after December 12, 1979, while the treason charges focused upon the declaration of nationwide martial law, the dissolution of the National Assembly, the arrest of opposition politicians, and the murder of Kwangju citizens by military commandos between May 17 and 27, 1980.[191] Eight of the sixteen defendants—Chun Doo Hwan, Roh Tae Woo, Lee Hak-Bong, Yu Hak-Song, Cha Kyu-Hon, Hur Sam-Soo, Hur Hwa-Pyung, and Hwang Yung-Si—were charged with both mutiny and treason; five of the defendants—Pak Jun-Byung, Chang Se-Dong, Choi Sae-Chang, Shin Yoon-Hee, and Pak Jong-Kyu—were charged with mutiny; and three of the defendants—Chung Ho-Yong, Lee Hui-Song, and Chu Yong-Bok—were charged with treason.[192]

At the opening session of the trial, the prosecution questioned Roh Tae-Woo, seeking to prove that Chun, without the necessary prior approval of acting President Choi Kyu-Ha, had ordered the arrest of General Chung Seung-Hwa despite failure to turn up any evidence of Chung's complicity in the assassination of Park Chung-Hee by Kim Jae-Kyu. The prosecutors

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[190] Preliminarily, the team of eight prosecutors headed by senior prosecutor Kim Sang-Hi agreed with Presiding Judge Kim Yong-Il that the first three hearings, on consecutive Mondays, would focus on the December 12 mutiny, the May 17 declaration of nationwide martial law, and the suppression of the Kwangju uprising, respectively. This extraordinarily expeditious schedule suggested an effort was under way to close the trial as rapidly as possible. Once the trial opened, however, it became clear that the case would take substantially longer.

[191] *See Chun, Roh to Stand Trial Together Tomorrow*, KOREA HERALD (Mar. 10, 1996) <http://www.koreaherald.co.kr>.

[192] *Id.*

further alleged that the defendants, along with other members of *Hanahoe*, a military secret society organized by Chun, had conspired in advance to carry out their putsch, and that they moved to preempt Chung's plan to reassign Chun to a remote post outside the capital.[193] Defense attorneys issued to the press a point-by-point written rebuttal of all the charges, arguing that the arrest of Chung was "inevitable," that the ratification of the arrest by Choi Kyu-Ha the following day was legally sufficient, and that troop movements in support of the coup were actually intended to prevent a counterattack by forces loyal to Chung, the martial law commander, which might have thrown the nation's military into chaos.[194]

The second session of the trial, held on March 18, saw the prosecution interrogate Chun Doo-Hwan and thirteen other defendants about the December 12 arrests of senior commanders and the May 17 declaration of martial law.[195] As expected, Chun denied any intent to seize political power and continued to claim that his arrests of senior commanders were justified because they were carried out in the course of his investigation into Park's assassination. Chun Sang-Suk, one of the attorneys for the defendants, issued a statement claiming it was inconsistent for the former presidents to be charged both with treason and with official corruption, for the first charge denies the legal effectiveness of their tenure in office while the latter presumes it—the point, nonsensical though it may appear, was said to be that the corruption indictments "acknowledged" the "legitimacy" of the former presidents.[196] Unsurprisingly, the court rejected the contention that this alleged "inconsistency" required dismissal of either the treason or the corruption charges.

At the third hearing on March 25, nine other co-defendants were questioned, and all testified along the same lines previously followed by Roh and Chun, disclaiming that they had taken part in any conspiracy to seize power.[197] Many of those questioned responded with "I don't know,"

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[193] *Juridical Battle Between Prosecutors, Defense Lawyers*, KOREAN PRESS SERV. (Mar. 12, 1996) <http://203.254.53.1/NEWS/KPS/9603/960318.4.html>.

[194] *Chun, Roh on Trial Together Side by Side*, KOREA HERALD (Mar. 12, 1996) <http://www.koreaherald.co.kr>; *Two Former Presidents Deny Charges of Mutiny*, CNN INTERACTIVE (Mar. 11, 1996) <http://www.cnn.com>.

[195] *Chun Questioned About Role in Military Mutiny*, KOREA TIMES (Mar. 18, 1996) <http://www.korealink.co.kr/times.htm>; *Chun Denies Coup as Trial Reopens*, CNN INTERACTIVE (Mar. 18, 1996) <http://www.cnn.com>.

[196] *Second Trial Session for Chun*, Roh Opens, KOREA PRESS SERV. (Mar. 18, 1996) <http://203.254.53.1/NEWS/KPS/9603/960318.4.html>.

[197] *Chun-Roh Confidants Echoing Chun in Third Hearing*, KOREA HERALD (Mar. 26, 1996) <http://www.koreaherald.co.kr>.

"I don't remember," or "I just followed orders."[198] Park Jun-Byung, however, testified that he recalled that Chun, prior to ordering the arrest of Chung Seung-Hwa, disclosed that "his group had failed to find any evidence of Chung's involvement in Park's slaying by Kim Jae-Kyu."[199]

The fourth session of the trial on April 1, 1996, focused on the May 17, 1980, expansion of martial law and Chun Do-Hwan's subsequent assumption of the presidency.[200] Roh Tae-Woo testified: "I believed the military had to end social unrest by strengthening martial law as the government was not capable of handling the situation."[201] Following the National Assembly elections on April 11, the mutiny and treason trial was interrupted for two weeks because Chun Doo-Hwan's corruption trial, before a different panel of the same criminal court, reconvened on April 14.[202]

The treason trial resumed on April 22 with prosecutors seeking to prove that Chun had executed a pre-existing conspiracy to seize political control and that he had intimidated Choi Kyu-Ha into stepping aside in August 1980 so that Chun could assume the presidency.[203] Chun flatly denied that he had drawn up an elaborate plan code-named "Operation K" in March 1980, pursuant to which prosecutors charged he expanded martial law, detained political leaders, and dissolved the National Assembly in May 1980 in order to remove obstacles to his own ascension to power.[204] Chun further denied coercing Choi to acquiesce in his plans, stating: "Choi is still alive and you may ask him."[205]

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[198] *Former South Korean Generals Deny Mutiny Charges*, REUTERS, Mar. 25. 1996, *available in* LEXIS, Asiapc Library, SKOREA File.

[199] *Associates of Ex-Pres. Chun, Roh, Questioned on Military Coup*, KOREA TIMES (Mar. 25, 1996) <http://www.korealink.co.kr/times.htm>.

[200] *Roh, Others to Face Kwangju Bloodshed Questions Monday*, KOREA TIMES (Mar. 30, 1996) <http://www.korealink.co.kr/times.htm>.

[201] *Roh Defends Martial Law in Korea Mutiny Trial*, REUTERS, Apr. 1, 1996, *available in* LEXIS, Asiapc Library, SKOREA File.

[202] Chun's five co-defendants in the corruption trial were: Sakong Il, former presidential secretary for economic affairs, Chung Ho-Yong, ex-defense minister (also charged with treason and homicide), Ahn Hyun-Tae, Chun's bodyguard, and two former tax officials, Ahn Moo-Hyuk and Song Yong-Uk. *Chun Admits Giving Roh Some 200 Billion Won in 1987 Presidential Election*, KOREA TIMES (Apr. 15, 1996) <http://www.korealink.co.kr/times.htm>.

[203] *Chun Denies Pressuring Choi to Resign Presidency*, KOREA HERALD (Apr. 23, 1996) <http://www.koreaherald.co.kr>. Prosecutors claimed to have obtained a copy of a "secret history" of the coup written in 1982 at Chun's instruction. The existence and authenticity of the book, entitled "History of the Birth of the Fifth Republic", were confirmed in testimony from defendant Park Jun-Byung. *Two Books Show Chun Seizing Power*, KOREA HERALD (Mar. 27, 1996) <http://www.koreaherald.co.kr>.

[204] *Chun Denies Pressuring Choi to Resign Presidency*, *supra* note 203.

[205] *Id.*

On April 29, 1996, prosecutors continued their interrogation of Chun and also questioned Hwang Yung-Si, focusing on the inauguration of Chun's new political party, the Democratic Justice Party, the arrests of political leaders, and Chun's crackdown on journalists who had criticized his rise to power.[206] At the next trial session on May 5, prosecutors sought to extract admissions from Chun, Hwang, Lee Hui-Sung, Chu Yong-Bok, and Chung Ho-Yong, that in the course of a conference of military commanders on May 18, 1980, orders were given to use deadly force against protestors in Kwangju.[207] Chun claimed that the commander in charge of Kwangju operations had been Lee Hui-Sung.[208]

B. The Cross-Examination of the Defendants

The next phase of the trial saw the defense attorneys conduct cross-examination of their own clients, beginning with friendly questioning of Chun Doo-Hwan on May 19, 1996.[209] In the course of a twelve-hour long session, Chun asserted that his arrest and interrogation of Chung Seung-Hwa and other senior army commanders was "legitimate and inevitable" because of the suspicious circumstances of Park Chung-Hee's assassination.[210] On May 26, questioning of the other defendants focused on the December 12, 1979, clash between Chun's faction and Chang Tae-Wan's troops following Chun's arrest of Chung Seung-Hwa, with the defendants depicting Chang as the aggressor.[211] On June 2, 1996, the focus of the case shifted again to the events of May 1980.[212] Chun was interrogated once more on June 9 concerning the expansion of martial law and other measures of May 1980, and again he testified that such measures

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[206] *Prosecutors Demand Prison Terms for Chun's Aides*, KOREA HERALD (Apr. 30, 1996) <http://www.koreaherald.co.kr>.

[207] *Chun Denies He Gave Order to Fire*, KOREA TIMES (May 6, 1996) <http://www.korealink.co.kr/times.htm>.

[208] *Chun Denies He Masterminded Kwangju Massacre: Says Movement of Paratroopers was Approved by President Choi*, KOREA HERALD (May 7, 1996) <http://www.koreaherald.co.kr>.

[209] *Ex-Pres. Chun Justifies Arrest of Chung SH in December 1979*, KOREA TIMES (May 20, 1996) <http://www.korealink.co.kr/times.htm>.

[210] *Chun Claims 1979 Military Clashes Were 'Accidental'*, KOREA HERALD (May 21, 1996) <http://www.koreaherald.co.kr>.

[211] *Ex-Coup Soldiers Echo Assertion of Ex-President Chun*, KOREA HERALD (May 28, 1996) <http://www.koreaherald.co.kr>; *Defense Lawyers Complete Cross-Examination of Defendants in 1979 Mutiny Trial*, KOREA TIMES (May 27, 1996) <http://www.korealink.co.kr/times.htm>.

[212] *Defense Attorneys' Questioning on 1979 Mutiny Ends*, KOREA TIMES (June 3, 1996) <http://www.korealink.co.kr/times.htm>.

were approved by President Choi and that they were not part of any plot to seize power.[213] With respect to the dissolution of the National Assembly, Chun claimed it was "inevitable" because of the clash between the government and opposition legislators over constitutional revision.[214]

On June 12, Roh Tae-Woo underwent questioning and denied any intent to usurp power. However, defense counsel for eleven of the sixteen defendants, including Chun, refused to appear in court and announced that they were boycotting the proceedings because they strongly objected to the court's decision to schedule two trial sessions per week in order to expedite the proceedings.[215] The court's determination to hold two hearings each week reflected a desire to complete the trial prior to the expiration of six months, the maximum period of detention for the defendants.[216] In a theatrical move, Lee Yang-Woo, one of Chun's lawyers, walked out of the court after registering an oral protest, saying that bringing the truth to light was of "paramount importance," and that by expediting the proceedings the court was preventing the accused from presenting an effective defense.[217] The court rejected the objections and directed that defense counsel be assigned for all defendants whose attorneys declined to appear.[218]

At the fourteenth session of the trial on June 16, 1996, Chun Doo-Hwan asserted that as the general in charge of the Defense Security Command ("DSC"), he had exercised no control over the troops dispatched to Kwangju in May 1980, that the commanders in the field had issued live ammunition for purposes of self-defense, and that deaths were "accidental."[219] Three days later, on June 19, presiding judge Kim Yong-Il announced a list of twenty-six further witnesses to be summoned at the prosecution's request, including former President Choi Kyu-Ha.[220] The

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[213] *Chun Denies Involvement in 'Illegal' Arrest of Politicians*, KOREA TIMES (June 10, 1996) <http://www.korealink.co.kr/times.htm>.

[214] *Chun Denies Treason Charges for Acts in 1980*, KOREA HERALD (June 11, 1996) <http://www.koreaherald.co.kr>.

[215] *Chun's Defense Boycotts Trial Over Frequency of Session*, KOREA TIMES (June 13, 1996) <http://www.korealink.co.kr/times.htm>.

[216] During a criminal trial, the permitted period of detention is initially two months from the indictment, and detention may be extended by court order not more than twice, for not more than two months each time, for a total detention period not to exceed six months. C. CRIM. PROC. art. 92.

[217] *Chun's Defense Lawyers Boycott Mutiny Trial*, KOREA HERALD (June 14, 1996) <http://www.koreaherald.co.kr>.

[218] *Id.*

[219] *Chun Denies 'Double Chain of Command' in Kwangju Massacre*, KOREA TIMES (June 17, 1996) <http://www.korealink.co.kr/times.htm>.

[220] *Ex-president Choi, 25 Others to be Called as Prosecution Witnesses*, KOREA TIMES (June 20, 1996) <http://www.korealink.co.kr/times.htm>.

defense deferred submission of its list of proposed witnesses for the time being.[221] The court promptly issued a summons to Choi and several other prominent witnesses, ordering them to appear for questioning on July 1, 1996 with respect to the mutiny charges.[222]

The phase of the trial involving questioning and cross-examination of the defendants was completed on June 23, 1996, and the prosecution submitted to the court the witnesses and the documentary evidence on which it sought to rely to prove the treason and homicide charges.[223] Throughout the proceedings, the defendants consistently denied any intent to commit the offenses charged in the indictments, and the defense attorneys sought to point out inconsistencies between the prosecutors' case and the results of their prior investigation that had initially led them to decline prosecution in 1994 and early 1995.[224] Generals Chu Yong-Bok and Lee Hui-Sung denied that they had issued "shoot to kill" orders,[225] either under instructions from Chun or on their own authority.

The hearing on June 27 saw defense attorneys engaged in "foot-dragging" tactics, seeking to extend their witnesses' time on the stand by asking questions of marginal relevance. This tactic purportedly led the court to impose a time limit of thirty minutes for defense examination of each witness.[226] Meanwhile, former president Choi Kyu-Ha announced he would not appear to give testimony, despite the summons issued to him.[227] The July 1 hearing went forward despite Choi's defiance of his summons, and the prosecution took testimony on events surrounding the December 12 mutiny from Sin Hyon-Hwak, who served as prime minister for about six

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[221] *Ex-President Choi May Appear in Trial of Chun*, KOREA HERALD (June 21, 1996) <http://www.koreaherald.co.kr>.

[222] *Court Summons Served on Former President Choi*, KOREA TIMES (June 21, 1996) <http://www.korealink.co.kr/times.htm>.

[223] *Prosecutors, Lawyers Formally End Questioning of 16 Defendants*, KOREA HERALD (June 24, 1996) <http://www.koreaherald.co.kr>.

[224] *Id.*

[225] *Defendants Choo [Chu], Lee Deny Roles in Shooting of Kwangju Protestors*, KOREA HERALD (June 25, 1996) <http://www.koreaherald.co.kr>.

[226] *Sentences for Ex-Pres. Chun, Roh Expected in Early August*, KOREA TIMES (June 28, 1996) <http://www.korealink.co.kr/times.htm>.

[227] *Id.* Choi issued a press release saying that he regarded it as a kind of obligation to future presidents that he decline to testify on matters connected with the execution of his official duties as president, and that such an immunity was necessary to safeguard the legitimacy and continuity of the state. He also said that no former president ever had stood as a witness. *Ex-Pres. Choi Explains Why He Refuses to Give Testimony*, KOREA TIMES (June 28, 1996) <http://www.korealink.co.kr/times.htm>.

months following Park Chung-Hee's assassination and Choi's assumption of the presidency.[228]

The boycott of the trial from the July 4 session was joined by the entire team of defense lawyers for Chun, Roh, and the other defendants.[229] The court, rejecting as dilatory tactics contentions by the defense that preparation time was insufficient, appointed two attorneys to represent the defendants and proceeded with the trial.[230] Former martial law commander Chung Seung-Hwa appeared again and declared, with corroborating testimony by former defense minister Ro Jae-Hyun, that Chun's arrest of his superior officers was groundless.[231]

Among the more significant testimony presented in the following sessions was a declaration by former General Lew Byong-Hyon that one of Chun's Defense Security Command adjutants had drafted a reminder to martial law troops informing them that they would be justified in defending themselves by force.[232] Another key prosecution witness, former DSC Colonel Kwon Jung-Dal, also testified that Chun Doo-Hwan formed a Special Committee for National Security Measures in May 1980 for the purpose of exercising *de facto* legislative powers and implementing Chun's plan to consolidate power.[233] On July 25, 1996, Chung Woong, a field commander of an Army division stationed near Kwangju at the time of the massacre, testified that the tragic killings "resulted from the Chun group's reckless decision to send paratroopers" into the city.[234] Chung said he was dismissed as martial law commander after refusing to carry out an order from Hwang Yung-Si to use attack helicopters against protestors, and that

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[228] *Ex-P.M. Shin Testifies Over 1979 Coup*, KOREA HERALD (July 2, 1996) <http://www.koreaherald.co.kr>.

[229] *Lawyers for Ex-Presidents Chun, Roh Boycott Trial*, KOREA TIMES (July 4, 1996) <http://www.korealink.co.kr/times.htm>.

[230] *Id.* Several days later, eight members of the defense team—six attorneys for Chun and two for Roh—formally resigned, claiming that the court was rushing to a foreordained outcome. *Eight Lawyers for Chun, Roh Quit Trial in Protest at What They Call Unfair Proceedings*, KOREA HERALD (July 9, 1996) <http://www.koreaherald.co.kr>.

[231] *Former Commander Chung Accuses Ex-President Chun of Mutiny*, KOREA HERALD (July 5, 1996) <http://www.koreaherald.co.kr>.

[232] *Chun's Aide Drafted Order for Self-Defense Rights in Kwangju*, KOREA TIMES (July 15, 1996) <http://www.korealink.co.kr/times.htm>.

[233] *Witness Kwon Says Ex-President Chun Ordered Plans for a New Party*, KOREA HERALD (July 23, 1996) <http://www.koreaherald.co.kr>.

[234] *Chun, Cronies Responsible for Bloody Kwangju Clashes*, KOREA HERALD (July 26, 1996) <http://www.koreaherald.co.kr>.

command of the paratroopers on the scene was shifted to defendant Chung Ho-Yong.[235]

On July 25, 1996, the court announced that the trial would be closed on August 5, at which time prosecutors were ordered to submit their proposed sentences.[236] To meet this timetable the court ruled, over defense objections, that certain of the witnesses previously requested by the defense and the prosecution would not appear.[237]

Even before the August 5 hearing, the thirtieth and penultimate session of the trial, prosecutors let it be known that they intended to recommend severe punishment for the defendants.[238] When the court convened, the prosecutorial team entered a request that Chun Doo-Hwan be sentenced to death; that Roh Tae-Woo, Hwang Yung-si and Chung Ho-Yong be sentenced to life imprisonment; that eight other defendants receive fifteen years; that one be given twelve years; and that ten years be imposed for the remaining three.[239] The public gallery in the courtroom burst into applause.[240] Prosecutor Kim Sang-Hi said that the coup leaders merited severe punishment so that "this trial will serve as a historic landmark by showing that laws and justice rule this land."[241]

The sentencing request was followed by final statements from the defendants. Chun Doo-Hwan said: "The state case against me has been carried out by the incumbent government under the banner of 'righting the wrongs of history', but I believe that, however omnipotent the regime in power may be, it is not empowered to interpret history at its own convenience or dress it up in colors of its liking."[242] Chun continued: "Had my presidency been an era that could be defined only by tyranny and

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[235] *Id.*

[236] *Sentences for Coup Plotters to be Sought on August 5*, KOREA TIMES (July 26, 1996) <http://www.korealink.co.kr/times.htm>.

[237] *Id.*

[238] *Tough Penalties Sought for ex-S. Korean Presidents*, REUTERS, Aug. 3, 1996, *available in* clari.net at <clari.world.asia.koreas>.

[239] *Prosecution Asks Death, Life Term for Chun Doo-Hwan, Roh Tae-Woo*, KOREA HERALD (Aug. 6, 1996) <http://www.koreaherald.co.kr>. The defendants for whom 15 years was requested were: Yu Hak-Song, Cha Kyu-Hon, Choi Sae-Chang, Hur Hwa-Pyung, Hur Sam-Su, Lee Hak-Bong, Lee Hui-Sung and Chu Yong-Bok. Twelve years was requested for Chang Se-Dong, and 10 years for Park Jun-Byung, Park Jong-Kyu and Shin Yun-Hi. *Id.*

[240] *Seoul Prosecutors Ask Death for ex-President Chun*, REUTERS, Aug. 5, 1996 *available in* clari.net at <clari.world.asia.koreas>.

[241] *Graft Trial Seen as Boost for South Korea's Kim*, Reuters, Aug. 6, 1996, *available in* clari.net at <clari.world.asia.koreas>.

[242] *Inappropriate for Successor Regime to Question Legitimacy*, KOREA TIMES (Aug. 5, 1996) <http://www.korealink.co.kr/times.htm>.

corruption, how would [the] prosperity and abundance we enjoy today be possible?"[243]

Public reaction to the sentencing requests for Chun and Roh generally was positive; however, some citizens expressed concern that heavier sentences were not sought for the other defendants, and others speculated that the punishments actually carried out would be much lighter in the end.[244] The New Korea Party ("NKP") of President Kim Young-Sam, which previously had ruled out any special leniency for the accused, was internally divided.[245] The opposition party of Kim Dae-Jung criticized the proceedings for failing to compel testimony from former President Choi Kyu-Ha and expressed outrage that Chun and many of the other defendants had shown no remorse over their crimes.[246]

C. *Sentencing and Appeals*

Originally, the court had fixed August 19, 1996, as the date for handing down sentences in the trial. However, on August 15, the court announced that the sentencing would be delayed for one week until August 26.[247] On the same day, a national holiday commemorating Korea's liberation from Japanese colonial rule in 1945, President Kim Young-Sam surprised many observers by declaring a broad amnesty that included the early release of a number of persons associated with the military governments of Chun and Roh who had been convicted of serious corruption.[248]

In another surprise on the eve of sentencing, the politically conservative mass circulation monthly *Wolgan Chosun* disclosed a cassette

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[243] *Id.*

[244] *Citizens Admit Prosecution Move as 'Natural,'* KOREA TIMES (Aug. 5, 1996) <http://www.korealink.co.kr/times.htm>.

[245] *NKP's Sec.-Gen. Kang Brushes Aside Possibility of Leniency for Ex-Pres. Chun, Roh*, KOREA TIMES (Aug. 5, 1996) <http://www.korealink.co.kr/times.htm>.

[246] *Parties Show Mixed Reactions on Trial of Chun*, KOREA HERALD (Aug. 6, 1996) <http://www.koreaherald.co.kr>.

[247] *Court Delays Sentencing for Chun and Roh*, KOREA HERALD (Aug. 15, 1996) <http://www.koreaherald.co.kr>.

[248] *597 Prisoners to be Freed on Liberation Day*, KOREA HERALD (Aug. 14, 1996) <http://www.koreaherald.co.kr>; *Ex-Pres. Aide Kim, 10 Other Convicts in Bribery Scandals to be Given Amnesty*, KOREA TIMES (August 13, 1996) <http://www.korealink.co.kr/times.htm>; *Civil, Religious Bodies Denounce Amnesty*, KOREA TIMES (Aug. 14, 1996) <http://www.korealink.co.kr/times.htm>; *Liberation Day Amnesty Leaves Bitter Aftertaste*, KOREA TIMES (Aug. 15, 1996) <http://www.korealink.co.kr/times.htm>.

tape containing contemporaneous August 1980 statements by former president Choi Kyu-Ha concerning the reasons for his resignation.[249] The twenty-minute recording, made as Choi spoke before Chun's constitutionally irregular Committee for National Security Measures just minutes before resigning on August 16, 1980, contained such stilted and ritualistic statements as: "It is really heartbreaking that our armed forces committed a grave mistake in Kwangju. I hereby decide to resign as commander-in-chief, taking political and moral responsibility. I want this issue never to be discussed again in the future."[250]

Given Choi's refusal to appear at the trial and face cross-examination, the disclosure of this evidence constituted an embarrassment to the prosecution, who apparently had failed to discover its existence. The *Wolgan Chosun*, by electing to exploit the tape for commercial gain rather than turn it over to the court as evidence in an important criminal trial, revealed a certain incomprehension of legal due process and journalistic ethics. Apart from calling Kwangju a "grave mistake," the content of Choi's statements in other respects supported certain contentions of the defendants. It remained unclear, though, whether Choi might have been coerced into making such declarations or whether disclosure of the tape was a premeditated ploy to aid the defendants.

The suspense over sentencing ended on August 26, 1996, when the Seoul District Court handed down the following sentences, concurrently covering the mutiny and treason charges as well as corruption charges.[251] Chun Doo-Hwan was sentenced to death and to a fine of 226 billion won (about $282 million), which amounted to a confiscation of the political funds illegally retained by him after leaving office.[252] Roh Tae-Woo received twenty-two years and six months in prison and a confiscatory fine of 283.8 billion won (about $355 million).[253] Chung Ho-Yong, Hwang Yung-Si, Hur Hwa-Pyong, and Lee Hak-Bong were each sentenced to ten

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[249] *Ex-Pres. Choi Terms Kwangju Incident "Mistake,"* KOREA TIMES (Aug. 19, 1996) <http://www.korealink.co.kr/times.htm>.

[250] *Id.*

[251] Shim Jae-Hoon, *A Break With the Past: Harsh Verdicts for Chun, Roh and Their Era*, FAR E. ECON. REV., Sept. 5, 1996, at 21.

[252] *Chun Sentenced to Death, Roh to 22 Years 6 Months in Jail*, KOREA PRESS SERV. (Aug. 26, 1996) <http://203.254.53.1/NEWS/KPS/9603/960318.4/html>; Sandra Sugawara, *South Korean Court Sentences Ex-Rulers to Prison, Death*, WASH. POST, Aug. 26, 1996, at A1.

[253] *Chun Sentenced to Death, Roh to 22 Years 6 Months in Jail*, *supra* note 252; Sugawara, *supra* note 252.

years in prison.[254] Lee Hui-Sung, Hur Sam-Su, Yu Hak-Song, and Choi Sae-Chang each received eight years; while Chu Yong-Bok, Cha Kyu-Hun, and Chang Se-Dong each received prison terms of seven years; Shin Yun-Hi and Park Chong-Gyu received four-year terms; and Park Jun-Byung was the only defendant entirely acquitted.[255] Six of the defendants who had not been detained during the trial were taken into custody after judgment was pronounced.[256]

The homicide charges related to the Kwangju massacre did not result in convictions, for the court found the prosecution's proof to be insufficient.[257] This outcome generated protests from the crowd gathered outside the courthouse.[258] With the exception of the death sentence for Chun, the press characterized other sentences as lighter than expected, and speculation about appeals and possible pardons began almost immediately.[259] Presiding Judge Kim Yong-Il explained that capital punishment was fitting for Chun because, in addition to his monumental corruption, he had "destroyed the military chain of command by illegally mobilizing troops, and disrupted the constititutional order," whereas Roh was given a lesser sentence because he had not been the leader of the coup and had accomplished many diplomatic achievements while serving as president.[260]

After the sentences were announced, there was brief speculation that the defendants might decline to appeal, thereby pressuring President Kim Young-Sam to grant some form of amnesty or commutation of punishment.[261] The industrialists whose sentences also had been announced on August 26, 1996, all filed prompt appeals, and the prosecution did not file any counterappeals seeking harsher punishment in those cases.[262]

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[254] *Chun Sentenced to Death in Coup Trial*, KOREA TIMES (Aug. 27, 1996) <http://www.korealink.co.kr/times.htm>.

[255] *Id.*

[256] *Id.*

[257] Sugawara, *supra* note 252.

[258] Kim Ji-Soo, *Chun Convulsed, Shut Eyes as Death Sentence was Announced*, KOREA TIMES (Aug. 27, 1996) <http://www.korealink.co.kr/times.htm>.

[259] Lee Sung-Yul, *Trial Attempts to Come to Grips with History: Two Ex-Presidents Face Judgment on Dark Era in Nation's Past*, KOREA HERALD (Aug. 27, 1996) <http://www.koreaherald.co.kr>.

[260] *Chun Sentenced to Death, Roh to 22 Years 6 Months in Jail*, *supra* note 252; *See* Kim Ji-Soo, *supra* note 258.

[261] *On Death Row, Chun Keeps South Korea Guessing*, REUTERS, Aug. 28, 1996. *available in* clari.net at <clari.world.asia.koreas>.

[262] *See* David Holley, *S. Koreans' Sentences Likely to Amount to Wrist Slaps*, L.A. TIMES, Aug. 29, 1996, at D-1, *available in* <http://www.latimes.com>.

However, by the end of the week, Chun, Roh and the other ex-military junta members had announced that appeals to the Seoul High Court would be filed on their behalf.[263] On August 31, 1996, prosecutors announced that, they would pursue counterappeals seeking to increase the punishments imposed by the trial court for all sentenced except for ex-president Chun.[264]

The appeal was assigned to be heard before a three-judge panel of the Seoul High Court headed by Senior Judge Kwon Sung, and the opening session was set for October 7, 1996.[265]

D. Martial Law Powers: Limited or Unlimited?

The defense mounted by the junta members on appeal denies that they are guilty of mutiny or treason and alleges that they were victimized by a "political circus."[266] The defendants basically contend that (1) the actions of December 12, 1979, were taken in the course of a legally authorized investigation of the assassination of Park Chung-Hee and did not involve any conspiracy to subvert the constitution then in force, (2) martial law measures implemented on May 17-18, 1980, were "inevitable" to prevent social chaos and were legally warranted under the extraordinary conditions then existing, (3) the use of the military to pacify "riots" in Kwangju was also "inevitable," and efforts were made to minimize casualties—although citizens died and were wounded in quelling the civil disorder, and although some Special Forces members used excessive force, the operation as a whole was a legitimate exercise of martial law authority during a period of national emergency, and (4) the treason charges are politically motivated and disregard the facts that the governmental roles of the defendants were recognized as legitimate by the international community, including the United States, and also by the Korean people, who elected Roh Tae-Woo as president in December 1987. Three other defendants also point to their service as legislators in the National Assembly as proof that the public never regarded them as traitors.

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[263] *S. Korea Ex-Presidents File Appeals*, UPI, Aug. 31, 1996, *available in* clari.net at <clari.news.corruption, clari.world.asia.koreas, clari.world.gov.politics>.

[264] *S. Korean Prosecutors to Appeal Court Sentence*, REUTERS, Sept. 1, 1996, *available in* clari.net at <clari.world.asia.koreas>.

[265] *Judges Assigned to Appeal Trial of Chun and Roh*, KOREA HERALD (Sept. 4, 1996) <http://www.koreaherald.co.kr>; *Second Trial of Coup Begins Oct. 7*, KOREA TIMES (Sept. 10, 1996) <http://www.korealink.co.kr/times.htm>.

[266] *Former South Korean Leaders Sentenced*, MSNBC NEWS SERV. (visited Aug. 27, 1996) <http://www.msnbc.com>.

As the foregoing suggests, much turns in this case upon the legal requirements for valid declaration of martial law and upon the constitutional limits that continue to govern exercises of state power during a period of martial law. The substantive legal issues lack well-defined precedents in Korea, and frequent oversimplifications and mischaracterizations of the indictments by the press have generated some confusion. An extensive analysis cannot be offered here, but a few observations may at least put the case in better perspective.

The key charges against the defendants are (1) military insurrection (commonly translated as "mutiny"), an offense defined in the Military Penal Code,[267] and (2) insurrection under the Criminal Code.[268] The media often have spoken of the defendants being charged with "sedition," and this word is commonly used as a synonym for "treason," but in legal usage the word "sedition" normally refers to *public* incitement of revolution through speech or other expressive conduct. Korean law does specifically criminalize sedition, not in the Criminal Code, but in the notorious National Security Act, long used by the Chun and Roh regimes to jail critics of the military dictatorship.[269]

The military secret society at the core of the Chun-Roh junta, *Hanahoe*, apparently could have been designated by the prosecution as an "anti-state organization" for purposes of the National Security Act.

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[267] KUNHYŎNGOPŎP [C. MIL. PEN.] art. 5 (S. Korea). This provision contains no definition of "insurrection," but implicit reference to the definition in Articles 87 and 91 of the Criminal Code may be presumed. The term "mutiny" also comprehends other offenses defined in the Military Penal Code, e.g., desertion of guard post, arts. 27-28; dereliction of duty, art. 35; insubordination, art. 44; mass assault against superiors, art. 49, and so on.

[268] Criminal Code article 87 provides: "A person who creates a disorder for the purpose of usurping the national territory or of subverting the Constitution shall be punished . . . ." *See* C. CRIM., book II, ch. 1, art. 87. Although the term "treason" is commonly used for the charges, in English "treason" is broader in scope, covering not only insurrection but also "crimes of foreign aggression" which are defined in articles 92-104 of the Criminal Code. The defendants in these cases have not been charged with inducing foreign aggression against the Republic of Korea; thus, the primary focus is on the charges of insurrection (*naeran*) and military insurrection.

[269] One of Chun Doo-Hwan's repressive steps upon seizing power was to revise The National Security Act on December 31, 1980, incorporating into it anti-sedition provisions formerly in the Anti-Communist Act, a statute used by Park Chung-Hee to prosecute dissidents deemed to be sympathetic to North Korea. The National Security Act, largely modeled on the 1925 Japanese Peace Preservation Law, criminalizes "anti-state organizations," defined as groups formed for the purpose "of assuming the title of government or disturbing the state." It substantially overlaps in coverage with the insurrection provisions of the Criminal Code, but differs procedurally in authorizing investigation and, in some instances, prosecution by internal security organs other than the normal prosecutors. For a comprehensive history of the National Security Act, *see* PARK WON-SOON, KUKABOANBOP YONGU [A Study of the National Security Act] (1989-92).

Indictments concurrently could have been presented under that law as well as under the Criminal Code and Military Penal Code provisions on insurrection.[270] Victims of repression under the Chun dictatorship have long called for the repeal of the National Security Act, which is inherently open to abuse because of its vagueness. Even so, these victims might have regarded it as uniquely fitting had Chun, Roh, and their comrades themselves been prosecuted under the National Security Act, a weapon mercilessly deployed against dissidents struggling for democratic reforms. Despite non-inclusion of National Security Act charges in the indictments against the former junta, some Koreans expect that convictions of Chun, Roh, and their clique will implicitly delegitimate the National Security Act and perhaps provide a needed impetus to its long overdue repeal.[271]

1. The Insurrection Charges

A successful prosecution for insurrection under the Criminal Code requires a showing that the "purpose of subverting the Constitution" was pursued by acts which either sought "to extinguish the function of the Constitution or laws without observing the procedure provided by the Constitution or laws," or else sought "to overthrow government organs established by the Constitution to make impossible by force the exercise of their functions."[272] The Constitution at issue is not the current Constitution as last amended in 1987, but rather the *Yusin* Constitution as amended on December 27, 1972, which was in force when Park was assassinated in

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[270] As of December 1979, the Anti-Communist Act and the old National Security Act were yet to be merged, and the former law explicitly targeted only North Korean agents and sympathizers on the left, not political extremists on the right. The obvious one-sidedness of the Anti-Communist Act was an international embarrassment for South Korea, and one of the main reasons that a cosmetic merger of the legislation was engineered by Chun soon after the Yusin Constitution was amended in late 1980. In reality, however, the post-1980 National Security Act was no less repressive than the Anti-Communist Act and various Martial Law Special Measures Decrees had been under Park Chung-Hee.

[271] Repeal or amendment of the National Security Act has long been advocated not only by domestic organizations but also by international human rights groups. *See, e.g.*, AMNESTY INTERNATIONAL, OPEN LETTER FROM AMNESTY INTERNATIONAL TO POLITICAL PARTIES ON THE OCCASION OF THE APRIL 1996 NATIONAL ASSEMBLY ELECTIONS (Feb. 1996), AI Index: ASA 25/06/96, but also by the U.S. State Department. President Kim Young-Sam, apparently eager to maintain support of the right wing of his increasingly fragile party coalition, has refused since taking office to advocate repeal, or even substantial amendment of the National Security Act, even though as an opposition leader before 1990 he often assailed its use for political persecution.

[272] C. CRIM., book II, ch. I, art. 91.

October 1979 and was not changed until October 27, 1980.[273] The *Yusin* Constitution itself was of questionable legitimacy, for the 1972 amendments were adopted by irregular and undemocratic processes during a period of emergency rule declared by Park Chung-Hee to foreclose a democratic succession to the presidency.

Under the *Yusin* Constitution, the President had authority to declare a national emergency if "public safety and order is seriously threatened or anticipated to be threatened," in which case he could "temporarily suspend the freedom and rights of the people . . . and enforce emergency measures" he deemed appropriate, without judicial review.[274] A separate provision enabled the President to declare "extraordinary or precautionary martial law" when he deemed it necessary "to maintain the public safety and order by mobilization of the military forces."[275] Once martial law was declared, the President was immediately to notify the National Assembly, and if at least one-half of the National Assembly "requested" the President to lift martial law, he was obliged to do so.[276] The President also was allocated a power to dissolve the National Assembly at any time, provided that in such case new elections were to be held within sixty days.[277]

The appellate proceedings sought to clarify the factual question of whether Chun Doo-Hwan and his supporters coerced or intimidated the acting civilian president, Choi Kyu-Ha, into approving their decisions and actions, whether presented to Choi as *faits accomplis* or as measures proclaimed "inevitable" for security reasons. If it were established that Chun's clique deliberately and forcibly usurped the legal prerogatives of the President, then the case of insurrection would be made, despite the lamentable efforts of Choi to maintain some semblance of authority, or at least to avoid personal humiliation, by acquiescing in certain military moves.

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[273] *See* Yoon Dae-Kyu, *Constitutional Amendment in Korea*, 16 KOREAN J. OF COMP. L. 1, 8-9 (1988).

[274] S. KOREA CONST. ch. IV., art. 53 (1972). A full English translation of the Yusin Constitution is available in KOREAN POLITICS IN TRANSITION 357-383 (Edward R. Wright, ed., 1975). Quotations are from this translation, first published by the Korea Overseas Information Service.

[275] S. KOREA CONST. art. 54, §§ 1-2 (1972).

[276] *Id.*, art. 54, §§ 4-5. In the case of an emergency declaration under art. 53, however, the President was not obliged to heed a National Assembly request to lift the state of emergency if he decided that "special circumstances or reasons" made that inappropriate. Art 53 § 6.

[277] *Id.*, art. 59.

Choi was summoned to appear before the Seoul High Court on October 28; however, he announced that he would not appear voluntarily.[278] After initially indicating that no physical compulsion would be applied to force Choi's appearance, Senior Judge Kwon Song announced on November 11 that the seventy-seven-year-old former president's defiance of the summons would not be tolerated and that he would be brought to the courtroom without fail on November 14.[279] The court's change of mind may have been occasioned by a remark by Choi's lawyer, Lee Ki-Chang, to the effect that Choi did not consider Chun Doo-Hwan's seizure of power an act of rebellion.[280] In due course, Choi on the appointed day was brought from his home to the court by four investigators of the Seoul Prosecutor's Office.[281] Upon his arrival, the court granted a motion by defense attorney Suk Jin-Gang to allow Chun Doo-Hwan and Roh Tae-Woo to leave the courtroom during Choi's appearance because it is "a tragedy in our constitutional history that three former Presidents are appearing in the same court."[282]

Choi responded to the court's call for him to identify himself, but he refused to be sworn as a witness and proceeded to read a written statement which said: "My testimony would set a bad precedent for succeeding presidents. [It] also could violate the constitutionally guaranteed division of power among the government, legislative and judiciary."[283] Choi went on: "It is regretful that I am standing in this court against my will . . . Such a precedent, a former president appearing in court, could damage our national interests and hurt our image abroad. It can also create a political controversy."[284] For more than thirty minutes, the court persistently asked Choi to reconsider and to testify on critical matters of which he had special

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[278] *Ex-Pres. Choi Called as Witness for Coup Trial*, KOREA TIMES (Oct. 7, 1996) <http://www.korealink.co.kr/times.htm>; *Former President Choi to Avoid Court Testimony*, KOREA HERALD (Oct. 26, 1996) <http://www.koreaherald.co.kr>.

[279] *Ex-President Choi Faces Forced Testimony in Trial*, KOREA HERALD (Nov. 12, 1996) <http://www.koreaherald.co.kr>.

[280] *Id.*

[281] *Ex-President Choi Keeps Silent in Court*, KOREA TIMES (Nov. 14, 1996) <http://www.korealink.co.kr/times.htm>.

[282] *Choi Refuses Testimony*, KOREA HERALD (Nov. 15, 1996) <http://www.koreaherald.co.kr>.

[283] *Id.*

[284] *S. Korean Prosecutors Demand Death for Chun Doo-Hwan*, REUTERS, Nov. 14, 1996, *available in* clari.net at <clari.world.asia.koreas>.

knowledge; however, Choi obstinately remained silent.[285] In all, more than forty questions were posed to Choi by prosecutors, but apart from complaining about a backache, he only said: "You may question, but I will not answer."[286] The Korean press by and large was critical of Choi's posturing, mentioning that the former president was believed to be writing his memoirs for eventual, perhaps posthumous, publication.[287] The issue of whether compelled testimony might raise self-incrimination problems for Choi was not raised, either at trial or in the press.

2. *The Treason Charges*

The treason charges against Chun, Roh and the other defendants reflect popular beliefs that: (1) the arrest of Chung Seung-Hwa and other senior generals on December 12, 1979, was not justified by any probative evidence implicating those officers in the assassination of Park Chung-Hee, (2) the usurpation of the military command was not motivated by authentic security concerns, and in fact, the *Hanahoe* clique imperiled national security by generating internal strife within the Korean Army, (3) from the outset the defendants conspired to seize political power as well as military command, even if initially they were uncertain as to whether they would need to govern from behind the scenes rather than openly, and (4) the May 1980 measures, again, were not justified by national security pretexts, for the civil unrest had been provoked by the military's own blockage of democratic reforms, and Chun's clique could have calmed the unrest at any time merely by allowing democratization to go forward expeditiously.

The insurrection and treason charges thus register a popular belief that the defendants themselves were responsible for creating a legitimacy crisis that they aggravated by their overreaction at Kwangju in May 1980 and then used as a pretext for expanding their power from the sphere of military command to the sphere of politics. On this view, the practical imperative of maintaining "order," completely detached from popular demands for a more responsive and legitimate political process, did not excuse their forcible seizure of power, either at the time or in retrospect.

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[285] *Choi Refuses Testimony, supra* note 282; *Choi's Refusal Leaves Truth on History Unknown; Despite Public's Desire to Know Facts, Ex-President Remains Tight-Lipped*, KOREA HERALD (Nov. 15, 1996) <http://www.koreaherald.co.kr>.

[286] *Ex-President's Silence a 'Shame,' Judge Says*, KOREA HERALD (Nov. 15, 1996) <http://www.koreaherald.co.kr>.

[287] *See id.*

The legitimacy of a political succession is not reducible to the formal continuity of legal effectiveness. Treason, like corruption, may be conceptualized diachronically and in terms of qualitative content, not only synchronically and formalistically.[288] The Constitution may be subverted not only by abrogating the basic law or modifying it against the popular will, but also by blocking displacement of vestiges of a prior autocracy or by failing to restore, after a period of illegitimate suspension, the rights of political participation to the governed.

3. *Abuse of Martial Law Power*

From a less formalistic perspective, most Koreans believe the fundamental issue is that martial law powers were grossly abused to keep in place a repressive military-dominated regime that already, even before Park's death, effectively deprived the Korean people of meaningful participation in self-government. From this perspective, the issue of whether the measures taken by Chun conformed to the legal order of the *Yusin* Constitution is not the end, but only the beginning, of an inquiry into whether Chun and his supporters betrayed their fellow Koreans. As the Korean public sees it, Chun and his accomplices acted as self-appointed guardians to keep Korea's political evolution frozen in the mode of 1972 military authoritarianism. Were it not for Chun's coup, the democratic reforms implemented incompletely and against resistance in the 1988-1993 period almost certainly would have commenced in 1980, sparing the Korean people much unnecessary grief and suffering.

The constitutional validity of dictatorship, after all, is an issue which seldom has been elaborated for judicial decision. The most important historical precedents stem from the Third Reich. As a country influenced by German law, Korea has a full complement of jurists familiar with the rise to power of the National Socialist regime.[289] The best known—some would say most infamous—theorist of "states of emergency," Carl Schmitt, drew a basic distinction between "commissarial dictatorship" and "sovereign dictatorship."[290] According to Schmitt: A commissarial dictator "is not a

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[288] Contextual change in the concept of corruption is illuminated in Terence Ball, *A Republic—If You Can Keep It*, *in* CONCEPTUAL CHANGE AND THE CONSTITUTION 137-64 (Terence Ball & J.G.A. Pocock eds., 1988).

[289] The German influence upon Korean law had been both direct and via Japan. *See generally* SANG-HYUN SONG, *supra* note 100.

[290] *See* JOSEPH W. BENDERSKY, CARL SCHMITT: THEORIST FOR THE REICH 31-35 (1983).

tyrant and the dictatorship is not an absolute form of rule, but an exclusively republican and constitutional method of preserving freedom."[291] A sovereign dictator, by contrast, is an autocrat pursuing long-term power, not merely temporary stabilization of disorder which threatens a legitimate constitution.

In Korea, prior to the creeping coup by *Hanahoe*, Park Chung-Hee already had instituted a system of sovereign dictatorship, for presidential supremacy was the transparent essence of the *Yusin* legal order. In Schmitt's terms, Park reserved to himself the decision on "the exception."[292] That is, Park had exclusive control over when to use the normal public instruments of the legal order and when to use the military or the secret, extra-legal instruments of a sprawling internal security apparatus accountable to nobody but himself. As the subsequent record of human rights abuses under Chun's junta confirmed, Chun's seizure of power represented a move to preserve a military-orchestrated sovereign dictatorship, and the "commissarial dictatorship" speciously authorized in Articles 53 and 54 of the *Yusin* Constitution was essentially a sham. This also was indicated by Chun's dissolution of the National Assembly, made concurrently with his declaration of nationwide martial law at midnight on May 17, 1980. Like his predecessor Park, Chun had nothing but contempt for the National Assembly and its theoretical legal right to require the President to lift martial law.

The repeated claims by the defendants that their usurpation of power was "inevitable" bespeaks a limitless contempt for law. In their minds, whatever they did was justifiable and just, as long as they had determined it to be "necessary" for national security. This mindset recalls Schmitt's description of the unlimited powers at the disposal of a leader upon declaration of an emergency:

> Once this state of emergency has been declared, it is clear that the constituted authority of the state continues to exist, while the law is placed in abeyance . . . . The decision exempts the normative authority from every constraint and renders it absolute in the true sense of the word. In a state of emergency, the constituted authority suspends the law on the basis of a

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[291] *Id.* at 33, *quoting* DIE DIKTATUR, pp. 6-7.

[292] "Sovereign is he who decides on the exception." CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., MIT Press, 1985) (1934).

> right to protect its own existence . . . . Here the decision making and the legal norm diverge, and . . . authority proves that it need not have a basis in law in order to establish justice.[293]

By identifying its own interest in wielding power with the security, even the survival, of the nation-state as a whole, a dictatorship attempts to invoke a moral imperative capable of overriding any legal norm. However, such an identification of the interests of the state with the interests of a military regime fails to justify a suspension of law when martial law powers are being abused for anti-democratic ends or self-aggrandizement of a ruling group. Such patterns of abuse, historically all too common, have been explicitly recognized in international law, which distinguishes between emergency measures temporarily applied in a democratic society for protection of national security, and extraordinary restrictions imposed by undemocratic regimes to consolidate an illegitimate monopoly on coercion.[294]

The criminal charges against Chun Doo-Hwan and the other defendants were limited in focus to events in 1979 and 1980, but popular attitudes toward the defendants are likely to be misunderstood unless it is kept in mind that the military regime committed gross human rights abuses throughout the 1980s. In his inaugural address of March 3, 1981, Chun Doo-Hwan declared:

> To prevent the recurrence of political repression and abuse of power, I will clearly demonstrate that affairs of state will be conducted according to law and I will lead the government according to law. The key to freedom from political repression and abuses of power is faithful compliance with the Constitution and the other laws of this land. I want to emphasize that while the government should set an example by abiding by the laws of the country, it is equally important that all citizens obey them. Expecting the government to be lenient with violations of the law could create a dangerous situation in

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[293] Carl Schmitt, *quoted in* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 46 (Deborah Lucas Schneider, trans., 1991) (1987).

[294] *See, e.g., International Covenant on Civil and Political Rights*, arts. 4, 14(1), 21, 22(2), G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52-58, U.N. Doc. A/6316 (1966).

> which power is placed above law. The rule of law cannot prevail if individuals violate the laws they do not like, or if citizens feel no pangs of conscience when they do. Laws must be observed by all, neither high government officials nor politicians should be exceptions.[295]

Given the abuses of power and blatant crimes in which Chun and his comrades continuously indulged throughout the 1980s, the hypocrisy of his inaugural invocation of the Rule of Law will be long remembered in Korea.

V. LOOKING AHEAD: UNRESOLVED ISSUES

At the time of writing, the criminal case against the former junta was under appeal before the Korean Supreme Court; however, the fact-finding process had been concluded with the rendition of the Seoul High Court's judgment described below in the Conclusion.[296] The following aspects of the Kwangju legal drama, among others, stand in need of further study.

A. Potential Impact on Popular Attitudes Toward Law

Despite obvious and quite serious problems with the process, subjection of the former military dictators to criminal sanctions constitutes an important breakthrough in Korean legal culture. As a 1993 survey by the Korea Legislation Research Institute disclosed, most Korean citizens have been cynical about bias and unfairness in the legal system.[297] One of the "evil legacies" of the period of military dictatorship has been a widespread belief that the legal system itself is a domain of injustice. Many Koreans may feel that the so-called "Trial of the Century" has been tainted by political opportunism; nevertheless, most seem to believe that fundamental

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[295] *12th President Chun's Inaugural Speech of March 3, 1981*, *available in* Chongwadae WWW Homepage <http://www.bluehouse.go.kr/english/library/shun2a-e3.html>.

[296] *Trial Focuses on Reasons for Opening Fire at Kwangju*, KOREA HERALD (Oct. 15, 1996) <http://www.koreaherald.co.kr>.

[297] For example, 56.7% of respondents expressed opinions that the legal order is "biased" or "authoritarian," rather than "fair" or "democratic." When asked who were the worst violators of law, 61.8% of the respondents said "politicians" and another 11% said "public officials." Korea Legislation Research Institute, *A Survey on the Korean People's Attitude Towards Law*, *in* SANG-HYUN SONG, *supra* note 100, at 128, 138.

justice is being served.[298] Despite constant speculation that leniency would eventually be shown to the former presidents, popular sentiment against pardons was sufficiently strong to cause the ruling New Korea Party of Kim Young-Sam to disclaim any intent to grant an early amnesty.[299]

A successful transition from dictatorship to democracy brings a transformation through which legislative and judicial institutions acquire enhanced legitimacy. At a certain point, the public no longer is inclined in the first instance to resort to street protests and other forms of civil disobedience to pressure the government to be responsive to public sentiment—these extra-institutional forms of political action become exceptional rather than routine and recourse is pursued mainly through state institutional channels. In the contorted process of bringing Chun Doo-Hwan and Roh Tae-Woo to justice after more than fifteen years, a critical function was discharged by demonstrations, petitions by civic groups, and other modes of direct political pressure. These moral pressures from civil society—permitted by the civilian government in 1995 when they would have been suppressed in the past—influenced reversals of position by the President, by the prosecutors in charge of the investigation, and by the Constitutional Court. The men entrusted with application of the law ultimately took action consistent with popular sentiment, even when this entailed abandoning ostensibly "principled" prior decisions declining prosecution.

From a standpoint seeking to assess "legal regularity," the issue of whether the outcome of the trial has been "right" depends on whether one believes that President Kim's original posture disfavoring prosecution was the "politically opportunistic" stance, such that the subsequent reversal represented, in substance, a recovery of a principled administration of justice. Clearly, total impunity for the men responsible for the Kwangju massacre—and for countless other abuses of power—would have served no coherent conception of justice.

Unfortunately, the passage of time also engendered a complex constitutional controversy over retroactivity. Supposedly settled, this controversy still has a potential to embarrass the President and to discredit the administration of justice. For the ex-presidents to be acquitted on

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[298] *Sentences Draw Positive Public Reaction*, KOREA HERALD, Aug. 27, 1996 <http://www.koreaherald.co.kr>; Lee Sung-Yul, *supra* note 259.

[299] *PM Lee Rules Out Amnesty for Ex-presidents Chun Doo-Hwan and Roh Tae-Woo*, KOREA TIMES (Oct. 25, 1996) <http://www.korealink.co.kr/times.htm>.

appeal solely because the prosecution was untimely seems almost unthinkable, however. The political fallout would be dire—the outcome of the April 11 National Assembly elections has been interpreted as endorsing the NKP's "reform agenda," including the prosecution of the former military junta. Paradoxically, if the Supreme Court were to render a judgment of acquittal, dramatically demonstrating judicial independence from executive pressure and a commitment to legal principle above all else, public disillusionment with the legal system might be seriously aggravated.

It seems premature, consequently, to assert that the conviction of the ex-presidents proves that Korea has ascended to a new plateau in its transition from military authoritarianism to a democratic Rule of Law. The independence of criminal law enforcement from the political power remains problematical. The institutional design of the Constitutional Court also requires reconsideration: five of nine justices found constitutional problems with the 5.18 Special Act, but this majority was insufficient to affect the validity of the statute. Such an anomalous outcome naturally exacerbates confusion and tends to undermine the authority of the Court at a time when it is striving to develop a principled jurisprudence worthy of public support. Such an inconsequential judicial process may aggravate political polarization, precisely the opposite of the legal order's aim of resolving conflict.

B. Potential Conflict between the Supreme Court and the Constitutional Court

The appeal process almost certainly will end up in the Supreme Court in early 1997. In principle, the validity of the 5.18 Special Act has already been adjudicated by the Constitutional Court, if only in a back-handed sort of way. Still, that tribunal declined to resolve the potentially dispositive issue of when the fifteen-year statute of limitations should be deemed to have commenced running; thus, this question may recur when the Supreme Court finally adjudicates the statute of limitations issue. In this case, it will be interesting to see how the Supreme Court judgment deals with the prior pronouncements of the Constitutional Court.

A conflict between the two highest courts is possible, though not inevitable. The Constitutional Court ostensibly is the ultimate authority on constitutional issues. However, its split decision on the validity of the 5.18 Special Act left some space for the Supreme Court to assert its role as an

alternate expositor of Korean law. In the past, institutional rivalry has occasioned some friction between the two highest judicial bodies.[300]

C. *Collaboration with Past Regimes*

As Professor Carter Eckert remarked at a panel discussion at Harvard Law School on March 14, 1996, the prosecutions have a "Pandora's Box" character. One reason no extensive formal procedure for rehabilitation of victims of the past dictatorial regimes has been legislated is that such a process would risk highlighting the fact that sitting government officials, including prosecutors and judges, actively collaborated in repressive measures carried out under the Chun and Roh regimes.

The felt need to contain this process was a key reason why President Kim Young-Sam announced on November 25, 1995, that prosecution would be limited to "masterminds" and then firmly rejected opposition demands that prosecutions be conducted by an independent special prosecutor.[301] Were rehabilitation carried out by truly independent tribunals, dilemmas might proliferate. In each case in which persons are determined to have been victimized by biased, unsound criminal prosecutions, the prosecutors and judges in charge of those past cases would be implicated as collaborators with the former junta. More than a few legal functionaries are vulnerable to such collaboration charges. Any extensive process of judicial rehabilitation might amplify calls for their resignation, if not for more serious legal retribution against them. This contingency explains why the more politically expedient device of amnesty has been used. Various technocrats, journalists and academics who closely cooperated with the past military regime or shared in the fruits of its corruption also may be exposed to denunciation for collaboration.

Concern about potentially destabilizing effects of a broadened reckoning with collaborators appears likely to mitigate public pressure in that direction. The outcome of the April 11, 1996, general elections, in which Kim Young-Sam's NKP lost fewer seats than many had predicted, may entail that little or no further action will be taken against collaborators with the discredited former regimes. Given the apparently widespread

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[300] As recently as April 1996, indeed, this friction flared up into an overt jurisdictional conflict. *Supreme Court Challenges Constitutional Court*, KOREA TIMES (Apr. 16, 1996); *Two Highest Legal Institutions in Turf Battle*, KOREA HERALD (Apr. 17, 1996) <http://www.koreaherald.co.kr>.

[301] *President Kim Limits Prosecution to 1980 Kwangju Masterminds: Those Deemed 'Involved' in Military Crackdown Will Not be Tried*, KOREA HERALD (Nov. 26, 1995) <http://www.koreaherald.co.kr>.

acquiescence in the relatively lenient treatment accorded industrialists found to have bankrolled Chun and Roh with political funds in exchange for economic favors, the legal reckoning may come to an end with disposition of the charges against the sixteen ex-generals, though victims of past abuses would remain dissatisfied.

Even if lower echelon collaborators are spared prosecution, private civil actions may be pursued against some of them by persons seeking monetary compensation for past abuses of official power. The Korean legal system may be faced with a set of issues relating to the legal immunities that government officials, including police, prosecutors, and judges, can invoke as shields when they are sued for alleged abuses of power. If the highest officials are finally convicted of treason, then lower officials who executed their orders may not be absolutely immune from suit simply because such measures were executed under color of legal authority. In these cases, too, statute of limitations issues might well be pivotal—the 5.18 Special Act does not attempt to address these situations, though it does perhaps set a precedent for further special legislation in the future.

D. "Rectification" of History

One professed goal of prosecuting the former junta was to "clear the air" by generating a more accurate factual record of the episodes in question. To date, however, this aim appears not to have been greatly advanced by the legal proceedings in Seoul. Defendants have been evasive or disingenuous about their roles in the events under scrutiny. No testimony was given by former president Choi Kyu-Ha. The fruits of investigation released to the public by the prosecution have been limited and conclusory. No consensus has been possible on the scale of casualties. For some Koreans, the prosecutors lack credibility and are suspected of conducting a less than thorough investigation with a politically foreordained outcome. Their initial decisions declining to indict the defendants, later reversed only under public pressure, undermined public confidence in their dedication to uncovering the whole truth.

Critics of the Kim Young-Sam administration have called for an independent commission of inquiry to review all the evidence and conduct further investigations as deemed necessary, so as to assemble a definitive report on the historical episodes in question. A few have pointed to such international precedents as the "U.N. Truth Commission" set up in El

Salvador, with foreign participation, to uncover the true extent of past human rights abuses committed by the military.[302] The scope of such an independent investigation into the misdeeds of Chun, Roh, and their clique would be highly sensitive—if a commission looked not only into the Kwangju massacre but into the entire record of human rights abuses, a larger cross-section of collaborators with the military regime would have cause to fear reprisal. With many government officials exposed to charges of collaboration, strong opposition to any such independent commission will persist.

Another area of evasion concerns access to secret archives of the past regimes, particularly to files on dissidents kept by the KCIA (which in 1980 was renamed the "Agency for National Security Planning"), the Defense Security Command, and other internal security agencies. In Seoul, there has been talk of enactment of a Freedom of Information Act as part of broader pending reforms of administrative law, but to date this has not been done. Individuals disadvantaged because they were secretly targeted for investigation by the prior military regimes still have no effective entitlement to legal recourse.

Neither historians nor the general public have any legal right to compel disclosure of information in government files. There is no process whereby declassification of formerly secret materials can be subjected to impartial judicial review to verify that national security concerns actually warrant nondisclosure. This whole area of law may be changed in Korea as democracy takes root in the future; however, the legal aftermath of Kwangju has not yet brought light into these shadows.

One development in the United States attracted considerable attention in Korea just as the insurrection trial of Chun and Roh got under way. Hundreds of pages of recently declassified U.S. government documents dating from the period between Park Chung-Hee's assassination and Chun Doo-Hwan's assumption of the presidency were released under the Freedom of Information Act and publicly discussed in a *Journal of Commerce* article by journalist Tim Shorrock.[303] The newly disclosed secret documents—including cable traffic between Ambassador Gleysteen in Seoul and the highest levels of the State Department in Washington, D.C.—contradict

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[302] *See* Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 498-544 (1994), *reprinted in part in* 1 TRANSITIONAL JUSTICE, *supra* note 175, at 292-325.

[303] Tim Shorrock, *Ex-Leaders Go on Trial in Seoul*, J. OF COMMERCE, Feb. 27, 1996, at 1A. *See also*, R. Jeffrey Smith, *South Koreans Protest After Disclosure of U.S. Decision in '80 Uprising*, WASH. POST, March 5, 1996, at A5.

some portions of an official statement on Kwangju issued by the U.S. government in 1989, such as claims that U.S. officials had no advance knowledge about deployment of Special Forces to control demonstrators.[304]

The recently declassified documents undoubtedly will attract scrutiny from historians in both countries.[305] They show, among other things, that (1) the U.S. government was aware by early May 1980 that Chun was planning possible use of the military, including Special Forces, for "riot control," and (2) prior to the Kwangju massacre, the United States indicated to Chun that coercive "stabilization measures" would be supported in the short-term provided that Chun moved toward political liberalization in the longer term.[306] Nothing in the documents proves that the United States specifically approved the killings and other excesses in Kwangju, but the documents do confirm the longstanding convictions of many Koreans that the United States gave priority to its own perceived strategic interest in "stability" in dealings with Chun, even when this meant support for continued military rule and indefinite postponement of democratic reforms.[307]

While the legal proceedings may bring new disclosures, "rectification" of history is a task future historians will find perplexing, for the volume of accurate new information being made public is probably less than the volume of self-serving misrepresentations, outright lies, and other "noise" generated by the politicized judicial process now under way. A perjury complaint against Chun Doo-Hwan, alleging that he lied in his December 31, 1989, testimony before the National Assembly, has been dismissed by the prosecution. The trial court's judgment contains some factual clarifications; however, records of prosecutorial interrogations, documents of great interest to historians, normally are not released to the public.

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[304] United States Government Statement on the Events in Kwangju, Republic of Korea, in May 1980 *issued on* June 19, 1989.

[305] Some of the documents have been deposited in the Harvard-Yenching Library and the full set no doubt will be published in due course.

[306] *See* Tim Shorrock, *Debacle in Kwangju: Were Washington's Cables Read as a Green Light for the 1980 Korean Massacre?*, THE NATION, Dec. 9, 1996.

[307] The documents also indicate that Chun looked for approval from multiple civilian and military channels that did not always coordinate their positions. They allude to ties between Chun's group and retired U.S. generals known to favor a hard anti-communist line. The Kwangju tragedy thus may reflect an overextension of counterinsurgency tactics Chun and his cohort learned during training in the United States and service in Vietnam. *See generally* D. MICHAEL SHAFER, DEADLY PARADIGMS: THE FAILURE OF U.S. COUNTERINSURGENCY POLICY (1988).

E. *The Relevance of International Law*

International law has at least four kinds of potential relevance here. First, as already noted, international law is an integral part of Korean municipal law. Consequently, international law norms may, at least potentially, directly impact the criminal cases. Second, domestic legal proceedings in Korea may be viewed by other states as precedents providing guidance for how analogous cases elsewhere should be handled in the future. That is, Korea's dispositions may, as "state practice," contribute to the forging of more universal understandings on the requirements of international law, particularly if the Korean courts expressly invoke international law norms in their judgments. Third, these legal proceedings may catalyze important modifications in Korean law based on recognition of ways in which international law overrides or constrains inconsistent domestic laws. Such changes may unfold on the plane of domestic legislation, on the plane of treaty commitments, or both.[308] Fourth, international law may *require* that certain further actions be taken by the present Korean government so that past offenders do not enjoy impunity.[309] Thus, the categorization of the Kwangju events for purposes of international law is a question of some importance.[310]

1. *"Genocide" and "Crimes Against Humanity"*

The term "genocide" has been used by victims' advocates in Korea who are convinced that military rulers with roots in Kyongsangbukdo, after

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[308] This has already occurred with respect to the elimination of prescriptive limitation for "crimes destructive of the constitutional order."

[309] *See* Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2539 (1991). For a response, *see* Carlos S. Nino, *Response: The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 1 TRANSITIONAL JUSTICE, *supra* note 175, at 417-38.

[310] The international reaction to the death sentence against Chun has been varied. Some commentators have insisted that the case will make it more difficult to persuade dictators in other Asian countries to relinquish power voluntarily. *See, e.g.*, Frank Ching, *Korean Trial Sets Bad Precedent: Law Is Used as Instrument to Exact Vengeance by Those in Power*, FAR E. ECON. REV., Oct. 10, 1996, at 40. The mainland Chinese press commented favorably on the conviction of Chun as a case involving a counterrevolutionary rebellion. *See* Rone Tempest, *Chinese Media Treat S. Korea Verdict Openly*, L.A. TIMES, Aug. 28, 1996, at A4 <http://www.latimes.com>. The Bangkok daily, THE NATION, commented that Chun's fate would be "a good lesson" for corrupt and repressive leaders elsewhere in Asia who abuse power. *Southeast Asian Newspapers Comment on Verdicts*, KOREA PRESS SERV., (Aug. 28, 1996) <http://203.254.53.1/NEWS/KPS/9603/960318.4.html>.

malignantly neglecting the economic welfare of the Honam region for many years, carried out the massacre to terrorize a "disloyal" insular minority. Such an argument sees the people of Cholla as a discrete ethnic group or subculture, although regional differences in Korea present neither marked racial heterogeneity nor linguistic discontinuity beyond the distinctiveness of the Honam dialect. [311]

Given that the Kwangju violence was of limited duration and its scale never approached the mass murder in Cambodia, Rwanda or Bosnia, a characterization of the Kwangju massacre as an instance of "genocide" is difficult to sustain from a legal standpoint. Even if "genocide" rhetoric is hyperbolic, less a legal argument than an expression of moral outrage, might the atrocities at Kwangju (as well as other gross human rights abuses, such as torture, by the former military regime) properly be deemed "crimes against humanity" for purposes of public international law? This contention, though debatable, is more defensible.[312]

The notion of "crimes against humanity" stems from Charters of the Nuremberg and Tokyo Military Tribunals, and the definition comprehends "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, . . . or persecutions on political, racial or religious grounds . . . , whether or not in violation of the domestic law of the country where perpetrated."[313] Crimes against humanity are in some respects analogous to war crimes, yet differ in two critical respects: there is no requirement that a state of war have been declared, and

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[311] It is unclear whether the reference to the Genocide Convention in the 5.18 Special Act (*see* notes 170, 186, *supra*) manifests a carefully considered finding that the killings at Kwangju are now regarded by the government as "hate crimes" motivated by prejudice. It is possible that it was more of a concession to political pressure than a reflection of the government's (i.e., the Foreign Ministry's) understanding of the international law criteria for defining the crime of genocide.

[312] Some writers concerned with Kwangju have doubted the relevance of legal argument, quoting Georg Lukács for the proposition that "the problem of legality and illegality is purely tactical in nature" and denouncing the "cretinism of legality." *See, e.g.*, Park You-Me, *And They Would Start Again: Women and Struggle in Korean Nationalist Literature*, 3 POSITIONS: EAST ASIA CULTURES CRITIQUE 392, 409 (1995). While such skepticism may be warranted in the special context of democratic struggle against a dictator who deploys law as an instrument of oppression, Lukács also appreciated the necessity of transforming the law to secure a change in regime, precisely so that democratically-enacted law can supersede the "priority of tactics" characteristic of autocratic regimes. *See* GEORG LUKÁCS, THE PROCESS OF DEMOCRATIZATION 129-36 (1988) (Susanne Bernhardt & Norman Levine trans., State Univ. of N.Y. Press 1991).

[313] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. , Art. 6 (c) 279. The Tokyo Charter differed from the Nuremberg Charter by eliminating reference to religious persecution. *See generally* M. Cherif Bassiouni, *'Crimes Against Humanity': The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 463 (1994).

perpetrators and victims may share a common nationality.[314] The definition of crimes against humanity thus constitutes an essential exception to the doctrine of exclusive domestic jurisdiction over a state's conduct against its own citizens. It establishes the principle that grave atrocities committed by state functionaries against citizens of that state are to be criminally punished under international law irrespective of the content of domestic law. The random murders and other atrocities carried out at Kwangju arguably constituted crimes against humanity under the admittedly ambiguous definition of such an offense. Moreover, torture and other grossly inhumane practices carried out in the 1980s under the direct or indirect command of the Chun Doo-Hwan regime also should be considered as potential instances of crimes against humanity.

2. *The United States and the Kwangju Massacre*

Assuming that the Kwangju massacre indeed violated international criminal law, further questions immediately arise. Did other countries have a right or even a duty to intervene, directly or through the United Nations Security Council, for humanitarian purposes?[315] Or, were the Kwangju events under the exclusive domestic jurisdiction of the South Korean government, regardless of its doubtful legitimacy, such that any outside intervention itself would have violated Korean sovereignty and transgressed international law? An adequate exploration of these controversial issues cannot be offered here, though they certainly merit debate.[316]

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[314] According to one widely held view, it is required that crimes against humanity be committed in connection with armed conflict, either international or internal, although it is not necessary that war shall have been formally declared. *See, e.g.*, Yoram Dinstein, *International Criminal Law*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS, *supra* note 75, at 1027. If this criterion is accepted, then it would be necessary to evaluate whether the Kwangju situation ought to be legally characterized as an "internal armed conflict" for purposes of international criminal law. However, disregarding prior practice, in theory there appears to be no cogent reason temporally to limit the definition of crimes against humanity to "before or during" armed conflict.

[315] The ongoing debate over humanitarian intervention and intervention against illegitimate regimes is illuminated in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (Lori Fischler Damrosch & David Scheffer eds., 1991).

[316] In the wake of the recent United States military intervention in Haiti to displace an illegitimate military regime, support has been expressed for a new approach to collective enforcement of the right of political self-determination enshrined in the United Nations Charter.

See generally Thomas Franck, *Intervention Against Illegitimate Regimes*, *in* LAW AND FORCE IN THE NEW INTERNATIONAL ORDER, *supra* note 315, at 159-76. *See also* Henry Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77-134 (1988).

The substantial physical presence of U.S. military forces in Korean territory pursuant to the 1954 ROK-U.S. Mutual Defense Treaty, as well as coordination arrangements under the derivative 1978 agreement establishing a "Combined Forces Command," led many Koreans to believe that the United States was exercising a decisive practical influence (tantamount to *de facto* control) over the South Korean armed forces. In the words of Selig Harrison: "Given the peculiar intimacy of the American-South Korean security relationship, the United States inescapably became a target for popular opposition to the military-dominated regimes of Park Chung-Hee and Chun Doo-Hwan."[317]

Few Koreans were convinced when the United States asserted in 1989 that it had "exerted its best efforts for Korean democratization and for restraint of military actions against civilians during this troubled [December 1979 to May 1980] period."[318] Legalistic arguments distinguishing between command and operational control have been central to U.S. explanations that Chun acted independently and that "approval" by the United States was not required, sought, or given. Still, many Koreans today are convinced that (1) Chun's seizure of power was "tolerated" if not ratified or even encouraged by the U.S. military, and (2) blood was shed at Kwangju because Chun believed, rightly it appears, that the United States concurred in his view that maintenance of order was the highest priority for the ROK military, and, critically, that even a massacre of demonstrators would not induce the United States to withdraw its longstanding security support.

Korean accusations of United States complicity in the Kwangju massacre vary, but one common claim has been that the United States was in a position to deter Chun's clique from deploying lethal force in Kwangju, but failed to do so. This has been answered in several ways.

First, it has been urged that such an accusation exaggerates the power of the United States.[319] It is argued that Chun was a fully independent actor, with emphasis on a claim that the Special Forces, unlike most Korean Army units, were not under the command or practical control of the U.S.

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[317] Selig Harrison, *Political Alignments in the Two Koreas: The Impact of the American Presence*, *in* THE U.S.-SOUTH KOREAN ALLIANCE: TIME FOR A CHANGE 121, 123 (Doug Bandow & Ted Galen Carpenter eds., 1992).

[318] U.S. Statement on Kwangju, *supra* note 304, at 22.

[319] *See, e.g.*, James Fallows, *The Burden of Omnipotence: Dependence on the United States Has Led the South Koreans to Magnify Our Power Over their Domestic Affairs*, ATLANTIC MONTHLY, Oct. 1987, at 20-26.

Combined Forces Commander when they were sent into Kwangju. This will be called the "impotence" argument.

Second, it is said that, even assuming that the United States could have prevented dispatch of military forces for crowd control, it did not actually know what was happening until after the killings had occurred, had been assured by Chun that moderate force would be used, and thus had no chance to take timely action. This will be called the "lack of opportunity" argument.

Third, it is contended that the sovereign independence of South Korea imposed real limits on what the United States could do, or be expected to do, by way of intervention into internal security affairs being handled by the ROK military. This will be called the "sovereignty" argument.

Fourth, it has sometimes been suggested that any U.S. action to restrain the Chun junta was practically foreclosed by a concern that such action would risk destabilizing the very alliance that the United States was in Korea to support—the alliance against North Korean threats. This will be called the "Cold War realism" argument.

From the standpoint of international law, only the sovereignty argument is relevant. The force of the "impotence" argument ultimately depends on factual considerations—references to the legal structure of command and control have been introduced into these arguments in order to reduce its seeming implausibility. But the formalities of the military chain of command are not really at issue in the "impotence" argument—the question is whether the United States had at its disposal effective means, formal *or informal*, to restrain the Korean military.

The "lack of opportunity" argument, again, strikes most Koreans as implausible. Even if it is absurd to charge the United States with omniscience about the intentions and activities of the *Hanahoe* clique, it is difficult to believe that American intelligence capabilities were so limited that the United States remained in the dark about Chun's move into Kwangju. It is, of course, possible that errors were committed in anticipating how the ROK military would deal with the civil unrest in Kwangju, but this is a different matter. Such errors would explain American inaction, but would furnish no moral or legal excuse.

The "sovereignty" argument is plausible at first glance. Why should the United States be blamed for failing to intervene when it also could be condemned for violating Korean sovereignty if it had intervened? Many Koreans argue that this argument obfuscates the reality because Korean

sovereignty already was chronically impaired by a *de facto* U.S. protectorate embodied in the U.S. military presence, and that this U.S. force on the ground was in no way neutral as between the military junta and the general population. From their perspective, the United States, precisely because the military alliance purported to protect a democratic nation from communist threats, was committed to an ideal of democratic self-determination for the Republic of Korea. Disillusionment with the United States was based on this notion of an actual commitment to defend democracy in Korea, an idea that probably struck "Cold War realists" as unspeakably naive and utopian. To them, the United States as a nation was no more altruistic than any other—it was in Korea to secure America's interests, period.

The "Cold War realism" argument is perfectly amoral; hence, it does not answer the need of defending American interests against moral condemnation by Korean democrats. It provides a useful explanation of American inaction during the Kwangju episode, but it does not provide a justification. From a Machiavellian standpoint, the United States would have been extremely stupid to have engineered or actively supported terror tactics at Kwangju, for the consequences which ensued—an explosion of anti-Americanism and a polarization of South Korean domestic politics—were entirely predictable. The United States may have deemed it desirable to appear "neutral" in domestic politics during a period of disarray simply to avoid being trapped in an ill-considered alliance with a group destined to lose power. However, from the Korean people's point of view, "neutrality" was no longer an option. If you were not against Chun Doo-Hwan and his junta, you were for them.

International law, unfortunately, still is struggling to emerge from its "prehistory." The scope of international law was and is disputed, and international law seldom was an effective constraint on policies adopted in furtherance of "Cold War realism." The moral content of international law was of interest to policymakers exclusively as it seemed likely to influence mass psychology and therefore future politics. Korean democrats were legally right, however, to think that the bearer of the "right of self-determination" enshrined in the United Nations Charter was and is the Korean people, not a military clique that has seized control of the state apparatus by force. The United States leadership—which changed rather decisively with the inauguration of Ronald Reagan—did nothing decisive to redeem this right in South Korea in 1979 and 1980. Supporting Chun Doo-

Hwan in 1980 evidently was regarded as a lesser evil than risking civil war in South Korea by encouraging a countercoup or risking North Korean invasion by disengagement. The decision might in retrospect have been forgiven had the United States actually exercised its influence to push Chun toward meaningful democratization in the 1981-1985 period. Such was not done, however, and that is one reason why so many Koreans today instinctively reject claims that the United States had honorable intentions in May 1980.

F. Legal Precedents for Korean Reunification

Finally, the constitutional jurisprudence being developed in the cases against members of the former military junta may acquire broadened significance in the future context of reunification of North and South Korea. One commentator has asserted that the criminal convictions of Chun and Roh will be seen by North Korean elites as a preview of their own fate, and hence that "elites in Pyongyang are now all the more likely to use everything in their power—including military threats or even war—to perpetuate the peninsula's North-South division."[320] This claim that the convictions of the former military junta pose a grave impediment to unification is largely misconceived, yet the precedent surely will have an impact on any future integration negotiations between the two Koreas.

As the process of German reunification shows, many legal problems—including constitutional controversies over retroactivity—can be expected to arise in the course of merging two states which each historically have denied the legitimacy of the other.[321] Difficult choices between reconciliation and retribution similar to those that have shaped the legal proceedings against the former military dictators will have to be faced when the people of the Korean peninsula forge a new integrated legal order for the post-partition era.

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[320] Nicholas Eberstadt, *Korean Unification on Trial*, WALL ST. J. INTERACTIVE EDITION (Sept. 9, 1996) <http://update.wsj.com>. Eberstadt's analysis is defective in several important respects: He erroneously claims that under a Seoul-dominated unification, "virtually all of North Korea's current leadership would be culpable for high crimes" because "under Korean law there is no statute of limitations for murder" and because "South Korean law claims jurisdiction over the whole peninsula." *Id.* In fact, murder remains subject to a 15-year statute of limitations. Moreover, under any negotiated structure of reunification, it is possible, even likely, that amnesties or immunities would be proposed and reflected in post-unification Korean law.

[321] *See generally* Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475 (1991).

VI. CONCLUSION

The downfall of two former presidents has brought unusual drama to the legal reckoning under way in Seoul, although similar reckonings have been unfolding with mixed results in Latin America, Eastern Europe, South Africa, the Philippines, Haiti and in other nations undergoing transitions from undemocratic political systems. Democratic governments who assume power after a long period in which the law was an instrument of injustice face serious practical problems, and Korea is no exception. The new regime's legitimacy may be undermined if criminal excesses of the predecessor regime go unpunished. On the other hand, the new government may have cause to fear destabilization if exaction of retribution threatens too many in the military and the bureaucracy.

Recalling that South Korea enjoyed sustained and rapid economic growth in the 1980s under the regimes of Chun Doo-Hwan and Roh Tae-Woo, and that Roh was elected president (albeit by a plurality) after the military allowed a non-violent constitutional reform in 1987, popular vindictiveness against the former military rulers seems excessive to some outsiders. Moreover, given that current President Kim Young-Sam won the presidency in December 1992 with the moral and material support of Roh Tae-Woo and other key figures of the former junta, President Kim's November 1995 reversal of stance to support prosecution of Chun and Roh seemed to lend credence to claims by the latter that they were victims of an opportunistic vendetta. The foregoing circumstances have complicated the task of evaluating the "trial of the century," but they should not overshadow its real historic significance.

In South Korea, impunity for the former military junta has been consistently opposed by the majority of citizens. Naturally, citizens of Kwangju and of Cholla-do have been most vocal in calling for punishment, but such sentiment has been broad-based. President Kim, after his inauguration in February 1993, persisted for more than two years in opposing prosecution of his predecessors. It is unclear whether this stance disfavoring prosecution may have reflected a secret "pact" forged in 1990 when Kim aligned himself with Roh. Neither is it clear to what extent caution may have stemmed from concerns about a possible backlash from the military. Early in his administration, President Kim publicly committed himself to a "Rule of Law" and to a crackdown "without sanctuary" against

government corruption, but he appears to have misjudged that the initial prosecutorial acquiescence in impunity for Chun and Roh would meet with resigned acceptance by the public. Instead, popular outrage steadily mounted. Moreover, most citizens believed President Kim himself was responsible for the prosecutorial decisions declining prosecution—the transition to a civilian government seemed to have brought no progress in delinking criminal law enforcement from presidential control. Ever since, President Kim has been beleaguered by widespread suspicions that prosecutorial decisions remain subject to partisan manipulation.[322]

Revelations about the monumental scale of political corruption during the tenure of Chun and Roh, and especially about their illegal retention and concealment of huge sums after leaving office, only fueled public outrage against impunity. Moreover, these revelations furnished President Kim Young-Sam with a plausible basis for reversing his position on prosecution. The most likely reason Chun and Roh would keep such vast sums, many believed, was that they intended to continue intervening in South Korean politics, perhaps in hopes of orchestrating a political comeback for their Taegu-Kyongbuk-based faction. At a minimum, their ill-gotten hoard of wealth could translate into political clout to help shield them from reprisals. Even if Kim Young-Sam had agreed to spare his predecessors from prosecution back in 1990, implicit in any such "pact" would have been an understanding that Chun and Roh never would subsequently re-enter politics in opposition to Kim and his faction. Once it appeared the former presidents had not actually retired to private life, but planned to go on bankrolling their political loyalists from behind the scenes, to condemn President Kim Young-Sam for reneging on any prior "pact" with his predecessors became more difficult.

In the appellate proceedings in the Seoul High Court, the anticlimactic appearance by former president Choi Kyu-Ha must rank as the low point of a drama with many tragicomic episodes. Absurdly, Choi invoked the constitutional principle of "separation of powers" to rationalize his refusal to testify about a coup that brought ten years of disempowerment of the legislature and the judicial branch by a militarized executive. The Korean Supreme Court may not permit Choi's ill-conceived invocation of "executive privilege" to stand uncondemned, given that his refusal to testify

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[322] *See, e.g., NKP Accept[s] Opposition's Demands for Political Neutrality*, KOREA TIMES (Nov. 20, 1996) <http://www.korealink.co.kr/times.htm>.

is likely to be alleged to be a serious impairment of the defendants' right to mount an effective defense by compelling testimony from a crucial witness.

Whether the sentences imposed on Chun, Roh, and the other defendants would be upheld or modified by the Seoul High Court on appeal, and whether any form of amnesty or commutation subsequently would be granted, were favorite topics for speculation in Korea through the fall of 1996. With a presidential election approaching in South Korea in late 1997, a common view was that any amnesty or pardons would be deferred until early 1998, given the likelihood that any earlier action by President Kim Young-Sam to mitigate penalties would meet with widespread condemnation and damage prospects for the New Korea Party candidate. Chun Doo-Hwan, the only defendant sentenced to death, initially appeared confident that his life was not actually at serious risk. Public opinion in support of Chun's execution appeared somewhat stronger than had been expected, however. An abortive attempt to have American Congressman Thomas Foglietta lobby for a commutation of Chun's death sentence to life imprisonment suggested that Chun was taking the prospect of capital punishment somewhat more seriously.[323] Coincidentally, in late November the Korean Constitutional Court issued a ruling upholding the constitutionality of the death penalty by a 7-2 majority.[324]

On December 16, 1996, the Seoul High Court handed down its judgment: All fifteen of the ex-generals found guilty by the trial court had their convictions affirmed; however, the sentences of all but one of the fifteen were substantially mitigated.[325] To the surprise of many, the death sentence of Chun Doo-Hwan was converted to life imprisonment, and Roh Tae-Woo's term of imprisonment was reduced to seventeen years from

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[323] *U.S. Congressman Abruptly Cancels Mission to Save Ex-Pres. Chun*, KOREA TIMES (Nov. 30, 1996) <http://www.korealink.co.kr/times.htm>.

[324] *Death Penalty Still Indispensable in Korea*, KOREA HERALD (Nov. 28, 1996) <http://www.koreaherald.co.kr>. The court's opinion declared: "In case one person arbitrarily takes another person's life or violates the public interest in an issue of utmost importance, the Court sees the priority lying in the rights of the victims and the tool to guarantee this is the death penalty." *Id.* The reference to violation of the "public interest in an issue of utmost importance" might be read as directed at the treason convictions of the former dictators.

[325] Kevin Sullivan, *S. Koreans' Penalties Reduced: Court Revokes Ex-President's Death Sentence*, WASH. POST, Dec. 16, 1996, at A19. In the related corruption cases against major industrialists, two of the defendants were acquitted on appeal and others were given suspended sentences, such that none of the higher-profile businessmen convicted of bribery will actually serve any time in prison. *See* Kevin Sullivan, *Political, Economic Concerns Tinge Quality of Seoul Court's Mercy*, WASH. POST, Dec. 17, 1996, at A14.

twenty-two years and six months.[326] According to Presiding Judge Kwon Sung: "It is not possible to dispute that there was a strong presence of a mutinous intention in the December 12 coup [and] equally unacceptable were [the] prosecutors' [initial] decisions not to indict those involved, based on their own interpretation that a 'successful coup' is not something which can be punished after the fact."[327]

Nevertheless, the Seoul High Court said it had decided to commute Chun's sentence in consideration of his "contribution to economic development" and to "the peaceful transfer of the presidency to Roh in 1988."[328] Judge Kwon emphasized a need to transcend a political culture of revenge: "We must . . . establish the principle that death does not follow a transfer of power," quoting an ancient Chinese maxim that "a general who surrenders should not be put to death."[329] In respect of Roh Tae-Woo, the court declared: "Although Roh is guilty of similar charges, we have to differentiate between a mastermind and a follower."[330]

Predictably, the Seoul High Court's reduction of the criminal penalties assessed against the former dictators elicited cries of outrage and dismay from advocates for the victims of the Kwangju massacre.[331] One mother of a permanently incapacitated Kwangju victim told foreign reporters: "This is obviously a prepared script."[332] BBC World News Seoul correspondent Charles Scanlon, as well as domestic observers, noted that the court's action raised serious questions about possible political influence over the case, particularly in a legal system without any strong tradition of judicial independence in political trials. The outcome greatly eased pressure on President Kim Young-Sam from conservatives in his own party to grant a pardon or amnesty. Moreover, the court's highly controversial

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[326] *Chun's Death Commuted to Life in Prison*, KOREA TIMES (Dec. 16, 1996) <http://www.korealink.co.kr/times.htm>. The only ex-general whose sentence was affirmed without change was former Defense Minister Chu Yong-Bok, who had been sentenced to seven years. Park Jun-Byung's acquittal was affirmed. The other 12 defendants, whom the trial court had sentenced to terms ranging from four to 10 years, had their sentences reduced to terms ranging from three and a half to eight years. *Id.*

[327] *With End of "Trial of Century" Way Paved for Nation to Move Ahead*, KOREA TIMES (Dec. 16, 1996) <http://www.korealink.co.kr/times.htm>.

[328] *Chun's Death Commuted to Life in Prison, supra* note 326.

[329] *South Korean Court Spares Ex-Presidents, Generals, Tycoons*, REUTERS, Dec. 17, 1996, *available in* clari.net at <clari.world.asia.koreas>.

[330] *South Korean Judge Muses on Justice and Coups*, REUTERS, Dec. 17, 1996, *available in* clari.net at <clari.world.asia.koreas>.

[331] *Emotions Running High in Kwangju Against Appellate Court's "Lenient" Decision*, KOREA TIMES (Dec. 16, 1996) <http://www.korealink.co.kr/times.htm>.

[332] *South Korean Judge Muses on Justice and Coups, supra* note 330.

rationale for mitigation of punishment is identical with that expected to be invoked for any presidential decision granting executive clemency. Given the overall circumstances, suspicions that the court had consulted with the President in deciding the case were understandable, even if impossible to substantiate.[333] Having clemency dispensed by an ostensibly "apolitical" judicial institution might be thought to insulate Kim Young-Sam from adverse political consequences, yet it risks an unwelcome politicization of the judicial process at a time when skepticism remains rife about the political neutrality of the courts.

Critics of the court's action pointed out that the June 29, 1987, declaration by which Chun and Roh acquiesced in direct presidential elections was in no sense a voluntary act, but rather "the result of the strenuous struggle for the nation's democratic forces."[334] Post-judgment reports in the press disclosed that Chun Doo-Hwan's wife, Lee Soon-Ja, had submitted to the court a self-serving affidavit in which she claimed that not Roh Tae-Woo, as commonly believed, but Chun was the "architect" of the June 29 Declaration.[335] These disclosures appeared designed to answer public criticism of Judge Kwon's notion—paradoxical given the historical record—that Chun deserved credit for not moving in 1987 to obstruct a transition to democracy that he had opposed ever since 1980. Chun's forbearance from violence in 1987 is better characterized as involuntary and self-interested than voluntary or altruistic. As for Chun's entitlement to credit for Korea's economic success in the 1980s, this rationale for leniency also struck many as ironic, for it tacitly assumed that repressive military rule was a *sine qua non* for Korea's rapid industrialization, a premise hotly disputed by many at home and abroad.

In sum, the rationale advanced by Judge Kwon for according priority to "reconciliation" when the trial court had favored "deterrence" and "retribution" raised as many questions as it answered. The former presidents have continued to deny that their conduct was unconstitutional, and in Korea such refusal to show repentance normally would be a strong

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[333] For instance, the abrupt cancellation of Congressman Foglietta's mission, *see supra* note 323, suggests prior knowledge in the executive branch of the impending judicial commutation of Chun's death sentence.

[334] *Editorial: Reduced Sentences for Ex-Presidents*, KOREA TIMES (Dec. 16, 1996) <http://www.korealink.co.kr/times.htm>.

[335] *Wife Says Chun is Real Architect of the June 29, 1987 Declaration*, KOREA TIMES (Dec. 18, 1996) <http://www.korealink.co.kr/times.htm>; *Chun Devised 1987 Democratization*, KOREA HERALD (Dec. 19, 1996) <http://www.koreaherald.co.kr>.

factor weighing against leniency. The fact that Chun, particularly, has enjoyed total impunity for a spectrum of other serious crimes, including the institutionalized use of torture and other brutal means of suppressing democratic activists, has not been forgotten or forgiven by many Koreans skeptical about the impartiality and independence of the criminal justice system.

The criminal convictions will not become final until around April 1997, after review of various legal challenges by the Korean Supreme Court.[336] Despite some unfortunate complications in the judicial proceedings to date, the historic convictions almost certainly will stand. Whatever the sentences ultimately carried out, South Korea's "trial of the century" will be seen in retrospect as a historic landmark in a marathon struggle for democracy, a struggle still under way despite declarations of victory. Despite problems with the process, the convictions of the former dictators have begun to restore the legitimacy of South Korea's legal institutions after a dark period in which gross violations of human rights were the dark lining in the silver cloud of Korea's much-trumpeted "economic miracle." The reason why Chun Doo-Hwan and Roh Tae-Woo have not been accorded more sympathy from the Korean people is that hardly anyone believes that the brutality, greed, nepotism, and other excesses exhibited by Chun's junta were in any way necessary or useful for South Korea's economic success. Koreans who lived and suffered under military dictatorship are less likely than outsiders to argue that repressive authoritarian rule was indispensable for the economic advances the nation has realized. They are more prone to believe that a transition to democracy beginning in 1980 would have been consistent with rapid industrialization and would not have imperiled national security in any serious way. Such beliefs are what lead so many Koreans to feel that the treason convictions of Chun and Roh are richly deserved.

One of the most important positive results of the trial was that it began to heal the festering wounds of regional antagonism that were so gravely aggravated by the Kwangju massacre. The reduction in sentences by the Seoul High Court threatened to rekindle regional resentments, however. Moreover, the anti-Americanism that was a conspicuous and predictable consequence of American support for Chun Doo-Hwan in the wake of the Kwangju tragedy has not been allayed by the trial, which has

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[336] *See Former Pres. Chun, Roh Plan to Appeal Sentences*, KOREA HERALD (Dec. 18, 1996) <http://www.koreaherald.co.kr>.

failed to advance the professed objective of "rectifying history." No factual record has been generated that is capable of commanding an international consensus. More than a few Koreans, including leading academics and politicians, remain deeply critical of America's acquiescence in Chun's seizure of power and of subsequent protestations by the United States that the U.S. military had no responsibility whatsoever for the Kwangju bloodshed. Kwangju's aftermath seems destined to bedevil relations between the United States and South Korea, less legally than politically, for some time to come.