

Student Note

The Korean Constitutional Court and Kwangju Massacre: Note on the Special Act Concerning the May Democratization Movement Case

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ABSTRACT

The Kwangju massacre in South Korea not only represents the civilian struggle against an authoritarian regime, but also facilitated the Korean democratization in the 1980s and 90s. The Korean National Assembly passed a special law which discloses the facts about this incident and punishes the perpetrators on December 21, 1995. Although the critics to the Act asserted that it was unconstitutional because it is retroactive legislation, the Court upheld the constitutionality of the Act. As a result, former President Chun Doo-hwan was sentenced to life imprisonment and ex-President Roh Tae-woo was imprisoned for seventeen years. Several legal questions, however, remained unanswered by the ruling of the Court. Was the Act retroactive and, therefore, unconstitutional? Secondly, when does the statute of limitations run for prosecution to enforce the Act?

This note analyzes the opinions of the justices and the final decision of the Court. It also discusses the relationship between the decision of the Court and its social and political context. Finally, this note addresses the influence of the decision. This note argues the Korean Constitutional Court made progress in revealing the truth about the evil past and opened the door for further prosecution and legal action. The decisions of the Court also influenced related legislation. It gave a

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sound legal foundation for further legal action to rectify the wrongs of the previous authoritarian administrations and brought a system of justice to the civil society.

Keywords: *Kwangju Massacre, Transitional Justice, Retroactive Legislation, Democratization*

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The “power of people” is so strong that it just cannot be destroyed by violent suppressive means. Such power, from the people, spreads a spirit that will last for generations. Kwangju is a city full of that “people power.” What happened in 1980, in Kwangju, was not just an isolated incident. It has brought new light and hope to many people who are still suffering from brutally oppressive regimes and military-led government . . . the strength and will of people of Kwangju to carry on their agitative actions was very impressive . . . Today many look up to them, paying tribute to what they have achieved . . . Kwangju remains a unique sign that symbolized a people’s power that cannot be suppressed. That sign is a flame of hope for many others.

—Sanjeewa Liyanage

I. INTRODUCTION

The elimination of the authoritarian past is one of the most critical issues in the political transition of a government to democracy. It is almost impossible for a new democracy to establish and broaden its political and legal legitimacy without a reasonable separation from the previous authoritarian regime. Investigating and punishing the past wrongs and corruption are essential for the new regime to legitimately consolidate its fragile democracy.

The Kwangju massacre in South Korea not only represents the civilian struggle against an authoritarian regime, but also facilitated the Korean democratization in the 1980s and 90s.¹ Korean politics was affected for more than twenty years even though the massacre itself lasted for only ten days. It totally changed the relationship between the authoritarian regime and the democratization movement. It functioned as a symbol of the struggle for the democracy and led to other major political reforms.²

The truth about the massacre became an important issue when the authoritarian regime collapsed. On December 21, 1995, the Korean National Assembly passed a special law which discloses the facts about this incident

1. Kwangju (also written *Gwangju*) is the fifth largest city in South Korea with a population of 1.4 million people. Kwangju was the political center of the Honam area, which had been subjected to plundering and oppression and had a long history of resistance and frustration, and had suffered from an uneven development process during the industrialization of Korea after its liberation from Japan. Therefore, some scholar considers that the Kwangju massacre was an explosion of political grievances in South Korea’s regional politics. The grievances had accumulated in the process of the development of Korea capitalism and were condensed in a specific way in the political structure of 1980 with the new military authorities’ intentional choice of the region. Ahn Jean, *The Socio-economic Background of Gwangju Uprising*, 25 NEW POL. SCI. 159, 159-60 (2003).

2. Jung-Kwan Cho, *The Kwangju Uprising as a Vehicle of Democratization: A Comparative Perspective*, in CONTENTIOUS KWANGJU: THE MAY 18 UPRISING IN KOREA’S PAST AND PRESENT 67-85 (Gi-Wook Shin & Kyung Moon Hwang eds., 2003).

and punishes the perpetrators. This Act suspends the statutes of limitation. However, the critics to the Act asserted that it was unconstitutional because it is retroactive legislation. They filed a petition to the Constitutional Court to declare the Act unconstitutional.³ However, the Court upheld the constitutionality of the Act. As a result, former President Chun Doo-hwan was sentenced to life imprisonment and ex-President Roh Tae-woo was imprisoned for seventeen years. The Court in its decision declared that military coups and dictatorships will never be tolerated in South Korea. This ruling is regarded as a milestone for the democratic movement in South Korea.

The ruling by the Court brought justice to the victims of Kwangju massacre. Several legal questions, however, remained unanswered by the rulings of the Court. Was the Act retroactive and, therefore, unconstitutional? Secondly, when does the statute of limitations run for prosecution to enforce the Act? This note analyzes the opinions of the justices and the final decision of the Court. It also discusses the relationship between the decision of the Court and its social and political context. Finally, this note addresses the influence of the decision.

This note argues the Korean Constitutional Court made much progress in revealing the truth about the evil past and opened the door for further prosecution and legal action. The forces behind the decision of the Court were political and military change, the independence of the judiciary and vibrant civil mobilization. These forces encouraged the Court to render this important ruling and diminish the fear of revenge from the old authoritarian regime. The decisions of the Court also influenced related legislation by the Korean National Assembly. It gave a sound legal foundation for further legal action to rectify the wrongs of the previous authoritarian administrations and brought a system of justice to the civil society.

II. THE SPECIAL ACT ON THE MAY DEMOCRATIZATION MOVEMENT CASE

A. *The Facts*

Former President Park Chung Hee was assassinated by Kim Chae-kyu, the director of the Korea Central Intelligence Agency, in October of 1979.⁴ This event resulted in a power vacuum which ended with a coup d'état led by Chun Doo Hwan in December of 1979. Demonstrations against the military junta erupted in the spring of 1980 in Seoul and elsewhere throughout South Korea. Students and civilians demonstrated and resisted

3. The Special Act on the May Democratization Movement Case [hereinafter the Special Act Case], Judgment of Feb. 16, 1996, 96 Hun-Ka 2 (Const. Ct.).

4. JOHN KIE-CHIANG OH, KOREAN POLITICS 75-80 (1999).

the military regime in Kwangju, the central city of the southwestern province of Korea on May 18, 1980. The resistance began with peaceful demonstrations.⁵ The brigades (the Special Warfare Commando), however, dispatched to Kwangju repressed the civilian protest. They attacked the citizens in the streets randomly and ruthlessly. The entire city of Kwangju rose up in protest. Some of the civilians engaged in armed self-defense and the main streets in Kwangju became a battlefield.⁶ The conflict resulted in 161 dead, 64 missing, 2,948 wounded and 1,364 arrested or detained.⁷

Kim Young-Sam was elected President and formed the first civilian government in 1993. The victims in the Kwangju massacre demanded public prosecutors immediately to initiate the criminal prosecution against those involved in the deaths of their family members. The office of the Seoul District Prosecutor weighed in on the request but its decision was disappointing. They announced that there is no evidence for the charge of treason because the new military junta took control solely of the military. They left in tact the constitutional institutions such as the President and the Prime Minister and did not conspire to disrupt the national constitutional order. The prosecutor decided that even though there were sufficient facts to find that the junta was not immune from prosecution in light of various extenuating circumstance, the office of the Prosecutor refused to press charges.⁸

Complainants filed a complaint to the Constitutional Court as a result of this decision. However, the ruling of the Constitutional Court stated that the period of limitation on munity against the accused were suspended and could be reviewed by the court. The charge of treason lacks legally protectable interests because the period of limitation for a charge of treason had expired. However, the Court stated it is hard to deny that the accused have led the country in pivotal roles, established the national order and formed the foundation of the present political, economical and social order. The key player Chun Doo-hwan already resigned from the office and Roh Tae-woo was elected by the people. These facts alone justify its exemption from prosecution on the charge of munity.⁹

This decision did not satisfy the demands of the victims. Another set of criminal complaints were soon filed by three different groups overshadowing

5. *Id.* at 80-87.

6. *See generally* SOUTH KOREA DEMOCRACY: LEGACY OF KWANGJU UPRISING (Georgy Katsiafca & Na Kahn-chae eds., 2006) (providing a detailed analysis of the events of the Gwangju uprising and also analyzing the socio-economic background, the role of women in the uprising, issues of collective identity and the international significance of the revolt).

7. Ahn Jong-cheol, *The Significance of Settling the Past of the December 12 Coup and the May 18 Gwangju Uprising*, 42(3) KOREA J. 112, 121 (2002).

8. December 12 Incident Non-institution of Prosecution Case [hereinafter December 12 Incident Case], Judgment of Jan. 20, 1995, 94 Hun-Ma 246 (Const. Ct.).

9. *Id.*

the decision of the Constitutional Court.¹⁰ The office of the Seoul District Public Prosecutor investigated the new complaints and decided not to prosecute the accused Chun Doo-hwan and other military leaders on the ground that the accused succeeded in the coup and formed a new constitutional order. The prosecutor reasoned that such successful coup is not subject to judicial review and leaves the prosecutor without the power to prosecute.¹¹ Again, the complainants and other citizens became frustrated and infuriated. The complainants petitioned the Constitutional Court for a review of the prosecutorial finding. The Court issued its decision on December 15, 1995. The Court did not announce its review on the merits because the complainants withdrew the complaint before the announcement of the final decision. The Court declared the case closed. The filing of the case however, posted an important issue as to whether a successful coup det'at is subject to criminal prosecution.¹²

The Korean public was not content with this compromised legal solution and kept pressing the government and the legislature to enact a new law to punish the military leaders responsible for the Kwangju massacre. Students demonstrated in the streets demanding the punishment of Chun and Roh. The newly revealed scandal that the two former presidents had amassed huge amounts of money from bribes they had received during their presidency further infuriated the people.¹³ It became clear that the Korean people did not want to leave their crimes to the judgment of history but to seek a legal response. President Kim Young-Sam ordered his ruling party to enact new legislation. in order to calm the anger and discontent of the people. The National Assembly passed the Special Act Concerning the May 18 Democratization Movement (hereinafter *May 18 Act*) in December 1995.¹⁴

The May 18 Act suspended the statute of limitations for the crimes against constitutional order which had been committed during the period between December 12, 1979 and May 18, 1980. It stipulated that the statute of limitations ceased to run during the period of the presidencies of Chun

10. The first one was filed by the victims of the violent suppression, charging treason, murder with treasonous intent, and mutiny against Chun Doo-hwan and twenty four other major figures in the military junta. The second one was filed by Kim Dae-jung and others victimized by the fabricated charges of treasonous conspiracy, charging treason, attempted murder with treasonous intent, and mutiny against Chun Doo-hwan and ten others. The third one was filed by others, charging treason and mutiny against Chun Doo-hwan and thirty five others. May 18 Incident Non-institution of Prosecution Decision Case, Judgment of Dec. 15, 1995, 95 Hun-Ma 221 (Const. Ct.).

11. *Id.*

12. *Id.*

13. James M. West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PAC. RIM L. & POL'Y J. 85, 109-12 (1997).

14. Actually, there are two special laws passed by the National Assembly on December 19, 1995. The first statute is entitled Act on Non-Applicability of Statutes of Limitations to Crimes Destructive of the Constitutional Order, Law No. 5028 of 1995 (Korea). The other is Special Act on the May 18 Democratization Movement, Law No. 5029 of 1995 (Korea).

and Roh in which “there existed obstacles for the State to institute prosecution.” It also allowed courts to review prosecutorial disposition of the cases where a prosecutor had declined to prosecute. The Act also provided for a right to have a special retrial for people who had been punished because of their engagement in the May 18 Massacre, or because of their opposition to crimes against the constitutional order.¹⁵

The office of the Seoul District Prosecutor initiated prosecution as a result of the legislation and detained the two former presidents and former high-ranking officials who led the 1979 military coup and oppressed the May 18 uprising of 1980. The accused challenged the constitutionality of the May 18 Act. They asserted that suspension of the period of limitation in Article 2 of the May 18 Act constitutes an *ex post facto* law prohibited by Article 13(1) of the Constitution. They further maintained that the Act retroactively applied to them and deprived their rights and interest guaranteed by the statute of limitations. They alleged that the statute of limitations had already expired. They also argued that the May 18 Act is a case-specific law which violates Article 11 of the Constitution, the principle of equality.¹⁶

B. *The Response of the Constitutional Court*

There were two issues before the Constitutional Court. The first one is whether case-specific legislation violates Article 11 of the Constitution. The second issue is whether Article 2(1) of the May 18 Act, which stipulates the suspension of the statute of limitations during the time of the disability of the prosecution power for the crimes that took place on December 12, 1979 and May 18, 1980, violates Article 12(1) and 13(1) of the Constitution.

15. The May 18 Act aims to suspend the statute of limitations for the crimes against the constitutional order, particularly the crimes that had been committed on and around December 12, 1979 and May 18, 1980. In Article 2(1) of the May 18 Act, it was deemed that the limitation period should have ceased to run during the period in which there existed obstacles for the State to institute prosecution. In Article 2(2) of the Act, it was also deemed that the period of obstacles means the period from the date the aforementioned criminal acts were committed until February 24, 1993. It was not until the period of presidency of Chun and Roh that prosecution for the aforementioned crimes was realistically possible. In the crimes against the constitutional order, the Article 3 of the Act allowed the court the review prosecutorial dispositions of cases where a prosecutor had declined to prosecute. This Article was necessary to check the abuse of discretionary power by public prosecutors. Additionally, according to Article 4, special retrial was allowed to persons who had been punished because of their engagement in the Kwangju massacre or because of their opposition to crimes against the constitutional order. The special retrial could invalidate past trials that labeled civilian protestors as traitors or rioters and nullify their past wrongful convictions. This Act included provisions to take away any medal of honor awarded solely based on the suppression of the Kwangju Democratization Movement. It also stipulated that government should undertake the commemorative works for the movement. In Sup Han, *Kwangju and Beyond: Coping with Past State Atrocities in South Korea*, 27 HUM. RTS. Q. 998, 1007-08 (2005).

16. The Special Act Case.

The Court unanimously held that case-specific legislation is prohibited by the Constitution. The nature of the May 18 Act is case-specific legislation because it makes clear at the time of enactment that it applies only to the period from December 12, 1979 to May 18, 1980. The Act also limits the range of people affected by the statute and is therefore case-specific legislation. Fundamentally, case-specific legislation is prohibited by the principle of equality in the Constitution. The Court also said that case-specific legislation is not inherently unconstitutional. It can be constitutional if its discriminatory provisions can be justified by reasonable cause. They ruled that in this case the ground of discrimination against the accused in the May 18 Act can be justified in light of the illegalities they committed in coming to power and also in consideration of the mandate of “rectifying the past” and starting us on the right path of constitutional history. The Court ruled that the Act of May 18, even though case-specific legislation, is constitutional.¹⁷

The second issue before the Court is whether Article 2(1) of the May 18 Act, which stipulates the suspension of the statute of limitations during the time of disability of prosecution power for the crimes that took place during the period between December 12, 1979 and May 18, 1980, violates Article 12(1) and 13(1) of the Constitution. The Court stated *ex post facto* criminal law is prohibited according to the Constitution. The Court held if Article 2(1) merely deduces from the preexisting laws (criminal code) another reason for suspension of the period of limitation, then this provision would be solely regarded as a *declaratory* statute and constitutional. If this provision creates a new reason for suspension, then it constitutes retroactive legislation and is unconstitutional.¹⁸

Four Constitutional Court justices maintained that the statute of limitation does not have a constitutional origin but is based on statutes and its interpretation is exclusively the realm of the ordinary courts. They maintained that the issue as to whether this provision is declaratory or formative is to be decided by the ordinary court. Therefore, they held that the question of constitutionality will arise only if the ordinary court rules that the law is formative in nature.¹⁹

Three justices posited that the period of limitation accrues only when there is no legal or systemic obstacle to the exercise of the prosecution power by the related agencies. They argued that there are distortions in the law and their enforcement constituted a disability in the exercise of the prosecution power. The provision only affirmed suspension of the statute of

17. *Id.*; see also Kun Yang, *The constitutional Court and Democratization*, in RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY 33, 39 (Yoon Dae-Kyu ed., 2000).

18. The Special Act Case.

19. *Id.*

limitations for certain crimes against constitutional order in which the prosecution power could not be exercised. They maintained that the Act is not retroactive legislation.

Two justices maintained that the Act is a retroactive law since the provision suspends the statute of limitations for all suspects and specifies the time of suspension.

The Court ultimately ruled that the issue of the constitutionality of the Act depends on the interpretation of the ordinary court. If the ordinary court found the statute of limitations did not expire, the Act is not retroactive law and is constitutional. If the ordinary court found the statute of limitations expired, the Act is retroactive law and is unconstitutional. All Constitutional Court justices agreed that if the ordinary court finds the statute of limitations did not expire and the Act merely extending it, the Act is pseudo-retroactive. The public interest in punishing the crimes against the constitutional order and restoring justice overwhelms the relatively weak interest in the expectation in the law and the Act is constitutional. The Constitutional Court Justices differed in their opinion about the result if the ordinary court found the period of limitation had already expired. The result would be a law which was genuinely retroactive by giving new effects to the acts or legal relations already completed or formed in the past.²⁰

The group of four Constitutional Court justices reasoned that genuine retroactive legislation is prohibited in principle by the rule of law. They agreed that when the protection of the private interest of confidence in the existing status of the law cannot be justified in light of the compelling public interest to change it, it can be constitutional. They found that the provision pursuing the public interest is overwhelmingly more important than the protection of the expectation interests of the criminals and deemed it constitutional.²¹

Five justices argued that in the area of substantive criminal law punishment has direct implications on bodily freedom. They believed that, in this area no public or national interest has precedence over the protection of expectation interest of the accused and the stability of the law. They then reasoned that making a new law to prosecute a crime against which the statute of limitations has already expired is equivalent to legislating new elements into a crime that has been already committed. They ruled that such legislation is not permissible under the Article 12(1) principle of due process²² and Article 13(1) prohibition of *ex post facto* criminal

20. *Id.*

21. *Id.*

22. THE CONSTITUTION OF THE SIXTH REPUBLIC OF KOREA [hereinafter CONSTITUTION], art. 12, available at <http://english.court.go.kr/home/english/welcome/republic.jsp> (English version) (last visited Aug. 18, 2009).

punishment.²³ They maintained that the Act is unconstitutional to the limited extent that it applies to the crimes on which the period of limitation had expired before it was enacted. Four justices maintained the Act is constitutional while five justices argued it is unconstitutional. The vote of five dissenting justices did not meet the requirement for the ruling of unconstitutionality.²⁴ Therefore, the Act is constitutional.

On April 17, 1997, the Korean Supreme Court affirmed the conviction of the defendants for treason and killing for the purpose of treason as a result of the decision of the Constitutional Court in 1996.²⁵ The Supreme Court held that the statute of limitations for the crimes against the constitutional order was lawfully suspended by the Special Act and the prosecution was instituted before the period expired.

They ruled that the defendants grasped political power after they stopped the exercise of the authority of the constitutional state institutions by mutiny and rebellion. They said this was the case even if they had ruled the State based on the Constitution which was revised by popular referendum. It should not be overlooked that a new legal order was established by mutiny and rebellion. It cannot be tolerated under any circumstances under our constitutional order to stop the exercise of the authority of constitutional state institutions and grasp political power by violence, not by following democratic procedure. The mutiny and rebellion can be punishable. Chun was sentenced to life imprisonment and Roh was imprisoned for seventeen years. Others received prison sentences ranging from three and a half to eight years. The decorations given to the military leaders were cancelled in 2006 based on Article 7 of the May 18 Act.²⁶

III. LEGAL ANALYSIS OF THE DECISION OF THE CONSTITUTIONAL COURT

Controversial issues around this decision arose after the Court rendered its ruling. The following is an analysis of the some of these controversial issues.

23. CONSTITUTION, art. 13, available at <http://english.court.go.kr/home/english/welcome/republic.jsp> (English version) (last visited Aug. 18, 2009).

24. According to Article 113(1) of Korean Constitution, the Constitutional makes a decision of the unconstitutionality of a law, a decision of impeachment, a decision of dissolution of a political party or an affirmation decision regarding the constitutional complaint, the concurrence of six Justices or more shall be required. CONSTITUTION, art. 113, available at <http://english.court.go.kr/home/english/welcome/republic.jsp> (English version) (last visited Aug. 18, 2009).

25. The Special Act Case.

26. Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization*, 16 PAC. RIM L. & POL'Y J. 579, 584 (2007). When Kim Dae-jung was elected as President of South Korea in 1998, one of his first acts was an amnesty of hundreds of prisoners. He also pardoned former presidents Chun and Roh.

A. *The Statute of Limitations and Retroactive Legislation*

The first issue before the Constitutional Court was the statute of limitations.²⁷ The final opinion of the Constitutional Court held that the statute of limitations depended upon the interpretation of the ordinary court. The Constitutional Court did not resolve the question of whether the offences of treason and immunity were completed or whether the statute of limitations of fifteen years had expired. The Court leaves that question for the ordinary court to decide. The running of statute of limitations is a matter of fact and its expiration is related to the judgment of the court on criminal facts. How to judge the set of facts will fall within the interpretive power of the ordinary court. The ordinary court has to decide how to count the statute of limitations. The answer to this question is closely connected to the act of treason and how to define the duration of the offense. These questions should be answered according to the facts and evidence presented before the ordinary court. According to the Korean Constitution, the interpretation of the constitutionality of legislation is the major task of the Constitutional Court. Hence, the Court should not rule on the application of individual statutory limitations which are the subject to the ordinary court and its fact finding purpose.²⁸

In addition, the most controversial issue in this case is whether the May 18 Act is retroactive legislation. The statute of limitations for crimes was suspended during the years “in which there existed obstacles for the State to initiate prosecution” according to Article 2 of the May 18 Act. Those years refer to the time from “the date the particular criminal acts were completed until February 24, 1993,” which corresponds to the intervals in which Chun and Roh held the presidency. Former president Chun and Roh were again charged of treason and munity even though the passage of time has gone. However, the accused argued that this provision was applied to retroactive

27. The problem of statute-of-limitation laws commonly arises when societies attempt to prosecute crimes committed under the predecessor regimes. For example, after the political change of 1991, Hungary's Parliament passed a law permitting the prosecution of crimes committed by the predecessor regime in putting down the popular 1956 uprising. Despite the passage of time since these crimes were committed, the law would have lifted statutes of limitations for treason and other serious crimes, effectively reviving these offenses. The constitutionality of this law was challenged. The Hungary's Constitutional Court announced this law is unconstitutional. In court's opinion, the court said the rule of law means predictability and foreseeability. From the principle of predictability and foreseeability, the criminal law's prohibition of the use of retroactive legislation, especially *ex post facto* directly follows. Only by following the formalized legal procedure can be valid law. *See* RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 13-16 (2000).

28. Due to the Constitutional Court's unclear position on the count of statutes of limitation, it is very interesting to see how the Supreme Court deals with the prior judgment of the Constitutional Court. Hence, it could be boldly predicted that there will be a potential conflict between Constitutional Court and Supreme Court when Supreme Court adjudged the specific case upon the statutes of limitation.

punishment and should be ruled as unconstitutional. The opinions among the justices were divided with reference to this question. Four justices stated they would still uphold it even if the period has expired at the time of enactment. They applied the balancing test to the constitutionality of the Act. They reasoned when there is a public interest need for the change of an existing law or when the need for protecting the interest of the individual is relatively small and cannot be objectively justified, such legislation cannot be allowed.

Based upon the judgment of justices, it could be deduced that the value to protect the interest of military insurgents is insignificant. Compared to public interest, their reliance interests could be rejected. Besides, from many evidences in the trial, the acts of Chun and Roh and the other principals resulted in numerous human rights violations. Their atrocities delayed the achievement of democracy in Korea and the suppression of individual freedoms. The interest of the public by the punishment of criminals is far greater than the value of protecting their individual rights and interests. Therefore, the May 18 Act is constitutional.²⁹

On the contrary, five justices agreed that the retroactive May 18 Act was unconstitutional. They reasoned that the interest of the perpetrators, achieved through the expiration of the statute of limitations, could not be denied through an ex post facto punishment under any circumstances. A punishment enacted through a law which deprived those interests was unconstitutional.³⁰ Their arguments express that retroactive legislation offends justice because it deprives those subject to criminal law of adequate advance notice of what conduct is subject to criminal sanctions. The justices claim 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. It is just to punish conduct only if no unfair surprise is involved by the accused. The

29. David M. Waters, *Korean Constitutionalism and the Special Act to Prosecute Former Presidents Chun Doo-hwan and Roh Tae-woo*, 10 COLUM. J. ASIAN L. 461, 474 (1996).

30. The debates over the retroactive of the May 18 Act could be regarded as the debate between the legal positivism and natural law. The legal positivism argued even the political regimes has changed, the prior written law should retain its legal force even immoral. Adherence to rule of law, the legal system has its own stability, continuity and predictability. Hence, the ex post law is prohibited. Under this perspective, the statute of limitation is clearly stipulated in criminal law, its legal force would be respected by the court and the legislature. The legislature could not enact other legislations to destroy its legal force. Meanwhile, from the perspective on protection of human rights, the statute of limitation is the procedure guarantees for the defendant. However, natural law claims that the moral right takes precedence. Accordingly, formalist concepts of the law, such as adherence to the putative prior law, could be overridden by such notions of moral right. In addition, the natural law argues that the legal discontinuity could be justified by the immoral nature of the prior legal regime. On the natural law view, given to the predecessor regime's immorality, the rule of law needs to be grounded in something beyond adherence to preexisting law. In other words, it attempts to offer a procedural understanding of substantive justice values. *See* TEITEL, *supra* note 27, at 12-15.

accused must have had an opportunity to comply with a publicly disseminated law unambiguously prohibiting the conduct in question.³¹

Article 12 of Korean Constitution states that no person shall be arrested, detained, seized, searched, or interrogated except as provided by law, or be subject to punishment, preventive incarceration, or forced labor except in accordance with the law and due process of the law and Article 13(1) and (2) of Korea Constitution stipulated:

- (1) No citizen may be prosecuted for an act which does not constitute a crime under the law in force at the time it was committed, nor may he be placed in double jeopardy.
- (2) No restrictions may be imposed upon the political rights of any citizen, nor may any person be deprived of property rights by means of retroactive legislation.

The judiciary should comply with the legal predictability and foresee ability of the law when they are confronted with legal decisions. The dereliction by the authorities which exercise the punitive powers of the State is a risk borne by the State. Any criminally accused person has the right to immunity from criminal punishment if the statute of limitations has expired.³² The State cannot enact a retroactive law to redress its mistakes and harm the procedural rights of the accused. In other words, the procedural guarantees of the accused should be protected from the principle of the rule of law and legal certainty.

However, the most controversial question will be what the courts can do when the state itself is the complicity in the crime and the legal system is strictly controlled by an authoritarian regime. How do they comply with the rule of law under this extraordinary situation? It is clear from the facts surrounding the Kwangju massacre that the regime suppressed and attacked the victims based solely upon political ideologies and beliefs.³³ Evidence presented suggested that the victims were systematically murdered and injured by the political and military leaders. This is state violence and constituted a crime against humanity.³⁴

The results of the crime do not lessen over time in modern states and in

31. West, *supra* note 13, at 127.

32. CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 214-16 (László Sólyom & Georg Brunner eds., 2000).

33. Kim Chung-Keun, *Days and Nights on the Street*, in THE KWANGJU UPRISING 3, 5-17 (Henry Scott-Stokes & Lee Jae-Eui eds., 2000).

34. Crime against humanity was codified for the first time after World War II in the Nuremberg Charter. In this charter, the crime against humanity comprised grave offenses, such as murder, deportation, and torture, historically proscribed wherever committed in wartime against civilians, as well as "persecution on political, racial and religious grounds." Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

international law. Article 2 of the May 18 Act stipulated that the regime in power from 1980 until February 1993 was an illegal regime. The entire regime engaged in the commission of the atrocity. It is extremely difficult under this situation to anticipate that the judiciary which was tightly controlled by the authoritarian regime could function effectively. Significant aspects of the offense are often covered up and not publicly known at the time of the commission of the acts when the state is itself implicated in the wrongdoing. The truth of the Kwangju massacre was hidden by the authoritarian regime. It is hard to investigate what really happened in Kwangju. The whole judicial and legal systems were under the surveillance of the regime. The criminal system was powerless to bring justice to the victims. If the procedural rights of the accused would be protected by the statute of limitations how could the courts administer justice? It was impossible to try and prosecute the junta members during the presidency of Chun and Roh as a practical concern. Only with the passage of time, when the democratic government was set up, the perpetrators' identities and very facts and character of the offense will be emerged again. Therefore, the suspension on Article 2 of May 18 Act could be considered justified. The May 18 Act is the realization of legal justice.

B. *Case-Specific Legislation*

Another problem faced by the courts with the May 18 Act is that it has the characteristics of case-specific legislation which would violate Article 11 of Korean Constitution. The Court unanimously agreed that although the May 18 Act is equivalent to a type of case-specific legislation, it only applies to the December 12, 1979 Incident and the May 18, 1980 Incident. It limits the range of people to whom it applies and therefore, can be said to be a case-specific legislation. The rule against case-specific legislation is meant to require the legislature to abide by the principle of equality. Case-specific legislation is not inherently unconstitutional. It can be constitutional if its discriminatory provisions can be justified with reasonable cause. The discrimination against the accused in the May 18 Act can be justified in light of the illegalities they committed in coming to power and also in consideration of the mandate of "rectifying the past" and starting us on the right path of constitutional history.

Other objections to the decision of the Constitutional Court include that this Act was enacted by the National Assembly on the basis of political reasons. The decision may have violated Article 11(1) of Korean Constitution which stipulates that "all citizens are equal before the law, and there may be no discrimination in political, economic, social, or cultural life

on account of sex, religion, or social status.”³⁵ Everyone is equal before the law. The purpose of the Act may violate this principle. The court reasoned that case-specific legislation is not inherently unconstitutional and it can be justified by reasonable cause. The question becomes what constitutes reasonable cause. Do the necessity for punishment and the rectifying of the past qualify as reasonable causes? Those terms are connected to value judgments. Is it possible to find an objective reasonable cause to justify this case-specific legislation?

Although there are some concerns to the decision of the court, the note basically aggress the opinion of the court. The desire of the people to formulate a law with specific application to Chun and Roh is understandable owing to the harsh nature and degree of their crimes. This action, however, may infringe on the fundamental rights of the accused. The necessity for punishment and the rectifying of the past injustices is regarded as a compelling interest for the entire nation. The Constitutional Court ruled that the May 18 Act is constitutional.

IV. THE CORRELATION BETWEEN THE CONSTITUTIONAL COURT AND ITS POLITICAL/SOCIAL CONTEXT

This study explores the correlation between the decision of the Constitutional Court and its political and social context.

A. *Changes to the Political and Military Structure*

The major task of democratization for a new country is to end its relationship with the previous authoritarian regime and reverse its political influence on the masses. The new government would then have the chance to reveal the past truth, prosecute the perpetrators and consolidate its democracy. The election of the 1988 National Assembly provided the needed changes in the Korean political structure. The opposition parties won the majority of the seats in the Assembly election.³⁶ The election results empowered the opposition parties to form a union and attack the administration of Roh. They began to push for investigations of the past governments. The National Assembly organized the “Special Committee for the investigation of the Truth of the May 18 Kwangju Democratization Movement” during an extraordinary session in June 1988.³⁷ The committee

35. CONSTITUTION, art. 11(1), available at <http://english.court.go.kr/home/english/welcome/republic.jsp> (English version) (last visited Aug. 18, 2009).

36. Kim Yong-Cheol, *The Shadow of the Kwangju Uprising in the Democratization of Korean Politics*, 25 NEW POL. SCI. 225, 237-38 (2003).

37. *Id.*

began to operate in November 1988 and hearings on the Kwangju massacre were held in the National Assembly. The hearings attracted the attention and discussion of the entire nation because they were broadcast live on radio and television.

The power of the military began to be dissolved and Kim Young-Sam was elected President. He was the first civilian president after a thirty-two-year rule by an authoritarian regime. He decided to reshuffle the top command of the military because of the solid relationship between the military leaders and the authoritarian regime. He removed nineteen generals and admirals who had been involved in the previous coup. He took decisive action to purge military officers who had been most influential and constituted an important support base for his predecessors, Chun Doo-hwan and Roh Tae-woo. The civilianization of the military was seen as a major achievement of South Korea's new democracy.³⁸

The change in the political and military structure in South Korea forced the people who worked for the authoritarian regime to lose their influence. Once they lost their influence it became possible for the court to pursue the truth about the Kwangju massacre. The courts could then prosecute and not fear revenge from the former regime.

B. *The Independence of Judicial Power*

The judiciary in South Korea was criticized for its political vulnerability and the constitutional review agencies only existed nominally under the authoritarian regimes. The judiciary moved toward greater judicial independence in 1988. According to Article 111(2) of the Korean Constitution, the Constitutional Court is composed of nine Justices who are appointed by the president upon nomination by various institutions.³⁹ Three are nominated by the National Assembly, three by the chief justice, and three appointed by the president himself.⁴⁰ Take the 1994 court for an example,

38. Chung-Si Ahn, *Transformation of South Korea Politics and Prospects for Democratic Consolidation*, in *POLITICS AND ECONOMY OF REGIME TRANSFORMATIONS* 23, 38-39 (Chung-Si Ahn & Chon-Pyo Lee eds., 1999); see also Byung-Kook Kim, *Party Politics in South Korea's Democracy: The Crisis of Success*, in *CONSOLIDATING DEMOCRACY IN SOUTH KOREA*, 54-55 (Larry Diamond & Byung-Kook Kim eds., 2000).

39. Article 111(2) of Korean Constitution stipulates the Constitutional Court shall be composed of nine Justices qualified to be the court judges, and they shall be appointed by the President. Article 111(3) of Korean Constitution stipulates three shall be appointed from persons selected by the National Assembly, and three appointed from persons nominated by the Chief Justice of the Supreme Court. For further detail information, please refer to CONSTITUTION, art. 111, available at <http://english.court.go.kr/home/english/welcome/republic.jsp> (English version) (last visited Aug. 18, 2009).

40. As one reviewer mentioned, it is interesting to inquire whether the justices' previous positions as judge or scholar, their political affiliations or ideologies and the nominating agency being the President, Supreme Court or the National Assembly, have any impact on the voting position of these

the nomination power was shared by three constitutional institutions.⁴¹ (See Table 1) They check and balance each other in theory and practice. The Constitutional Court could not be dominated by one constitutional and political branch. This design secures independence of the Constitutional Court.

Table 1 Nine Justices in Korean Constitutional Court

Nine Justices	Nominated by Whom	Term
Kim Yong-joon	President Kim's nominee (The president of the Constitutional Court)	1994.09.15-2000.09.15
Chung Kyung-sik	President Kim's nominee	1994.09.15-2000.09.15
Koh Joong-suk	Supreme Court's nominee	1994.09.15-2000.09.15
Shin Chang-on	National Assembly's nominee	1994.09.15-2000.09.15
Kim Chin-woo	President Kim's nominee	1994.09.15-2000.09.15
Lee Jae-hwa	National Assembly's nominee	1994.09.15-2000.09.15
Cho Seung-hyung	National Assembly's nominee	1994.09.15-2000.09.15
Kim Moon-hee	Supreme Court's nominee	1994.09.15-2000.09.15
Hwang Do-yun	Supreme Court's nominee	N/A

*Source: The First Ten Years of Korean Constitutional Court (The Constitutional Court of Korea ed., 2001).

The Constitutional Court is primarily concerned with the review of the constitutionality of legislation and with constitutional petitions according to Article 107 of the Korean Constitution.⁴² The Court took an active role and judged many significant laws to be unconstitutional. From 1988-1994, the Constitutional Court received 2,361 cases and disposed of 1,897. Among the 1,897 cases handled, the Court decided 626 cases on their merits and dismissed 1,078 cases in the screening process. The other 193 cases were withdrawn by the parties concerned. The Court has rendered 235 judgments on the merits of those cases in which the constitutionality of legislation was reviewed. Fifty-nine laws were declared unconstitutional either in whole or in part. Thus, approximately twenty-five percent of these judgments resulted in the invalidation or partial repudiation of legislation.⁴³ Those highly significant figures can approve Constitutional Court's active role.

Justices. However, the information about the background of the justices is insufficient. The question would be further analyzed when all related information is available.

41. THE FIRST TEN YEARS OF THE KOREAN CONSTITUTIONAL COURT 33-34 (The Constitutional Court of Korea ed., 2001).

42. CONSTITUTION, art. 107, available at <http://english.court.go.kr/home/english/welcome/republic.jsp> (English version) (last visited Aug. 18, 2009).

43. Kun Yang, *Judicial Review and Social Change in the Korean Democratizing Process*, 41 AM. J. COMP. L. 1, 8 (1993).

The justices had more power and space to investigate these controversial issues presented from the May 18 Act case because the Constitutional Court became more independent and active. The court boldly allowed the prosecutions of the perpetrators of the Kwangju massacre to proceed and sent the signals to further political and legal reforms.

C. *Civil and Social Mobilization*

A vibrant civil society in South Korea played an important role in unearthing the truth of the Kwangju massacre.⁴⁴ Many civil groups engaged in protests in order to find the truth about the massacre as well as resolve the issue of the statute of limitations. For example, 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. Moreover, the Korea Council of Professors for Democratization on August 14, 1995, demanded a special law for prosecuting the coup leaders. About 150 professors waged protests and submitted a legal petition which demanded that the statute of limitations not apply to those involved in the May 18 massacre. 221 Seoul National University professors released a statement calling for the enactment of a special law and an immediate reinvestigation of the May 18 massacre. Students also took an active role in the protests. Students at many universities, including Seoul National University, Pusan National University and Chonnam National University, boycotted in the streets on September 29, 1995. They were organized by the leadership of the NCUSC. This was the first nationwide class boycott since the inauguration of the Kim Young-Sam regime.⁴⁵

Lawyers also participated in the antigovernment campaigns. The Korean Bar Association which had been one of the pro-government groups under the past authoritarian regimes appealed for the participation of all lawyers in the campaign to enact a special law dealing with the May 18 Massacre in 1980. On October 16, 1995, 111 law professors at 39 universities submitted to the Constitutional Court an “opinion statement” on the decision of the government not to prosecute those involved in the May 18 coup and massacre. Law professors countered the argument of the government by maintaining that there should be no statute of limitations for the prosecution and punishment of crimes such as insurrections or massive killings. They

44. Linda S. Lewis, *Commemorating Kwangju: The 5. 18 Movement and Civil Society at the Millennium*, in *KOREAN SOCIETY: CIVIL SOCIETY, DEMOCRACY AND THE STATE* 165, 166-69 (Charles K. Armstrong ed., 2002).

45. SUNHYUK KIM, *THE POLITICS OF DEMOCRATIZATION IN KOREA: THE ROLE OF CIVIL SOCIETY* 114 (2000).

argued that the statute of limitations should exclude the period in which the criminals were in political power.⁴⁶

A series of protests and pressure from civil groups, especially the legal community, not only forced the government and the National Assembly to enact the new special law, but also compelled the court to take an active role in reviewing the May 18 Act. Civic mobilization shielded the Court from its critics when it upheld the May 18 Act constitutional.

V. THE INFLUENCES FROM THE DECISION

A. *Leading the Other Legislations*

The decision not only put former President Chun and Roh in prison, but also led to other legislation. The Korean National Assembly passed a series of legislations from 1996 to 2005. Such legislations included the Act for Restoring the Honor of the Democratization Movement Involvers and Providing Compensation for Them the Special Act for Commemorating Democratic Movement, the Act for Privileged Treatment of Kwangju Democratic Movement and the Bill for Basic Law for Finding Truth and Reconciliation.⁴⁷

The National Assembly could pass much new legislation because of the 1995 Constitutional Court decision. This decision provides sound legal arguments and foundations to the legislative and administrative branch to deal with the issue of the transitional justice. A large amount of legal reform concerning transitional justice was implemented and the victims of the massacre acquired more legal protection and monetary compensation. If the Constitutional Court did not render this decision the legislation concerning transitional justice would be delayed or blocked by the conservative powers.

B. *The Impact on Judicial Organs*

The Constitutional Court, according to the Korean Constitution, is the ultimate interpretation authority on constitutional issues. The criminal court system has the legal power to apply this Act to the concrete case because the Constitutional Court upheld that the May18 Special Act was constitutional and the successful coup can be punished.⁴⁸ The Korean Supreme Court

46. *Id.* at 115-16.

47. Cho, *supra* note 26, at 590-610.

48. In May 18 Incident Non-institution of Prosecution Decision case, the court clearly asserted that the prosecutor's non-institution of prosecution decision for reason of immunity of a successful coup engenders misunderstanding of the ideals of the Constitution and the criminal jurisprudence of treason. May 18 Incident Non-institution of Prosecution Decision Case, Judgment of Dec. 15, 1995, 95 Hun-Ma 221 (Const. Ct.).

Table 2 1990-2005 Legislation and Political Event and Constitutional decision in South Korea

Time	Legislation and Political Events	Constitutional Decision
1990/08/06	Act for Compensation for the Victims in the Democratization Movement in Kwangju	
1992/12/18	President Kim Yong Sam elected	
1995/01/21		December 12 Incident Non-institution of Prosecution case
		May 18 Incident Non-institution of Prosecution Decision case
1995/12/21	The Act on the Non-Applicability of the Statutory Limitations to Crimes Destructive of the Constitutional Order	
	The Special Act on the May 18 Democratic Movement Law	
1996/02/16		The Special Act on the May Democratization Movement, etc. case
1997/12/18	President Kim Dae Jung elected	
2001/01/12	The Act for Restoring the Honor of Democratization Movement Involvers and Providing Compensation for Them	
	The Special Act for Truth-Finding of Suspicious Deaths	
2001/07/24	The Special Act for Commemorating Democratic Movement	
2002/01/26	The Act for Privileged Treatment of Kwangju Democratic Movement	
2002/12/18	President Roh Moo Hyun elected	
2004/03/22	The Bill for Basic Law for Finding Truth and Reconciliation submitted as of October 20, 2004	
2005	The Basic Act for Rectifying the Past History for Truth and Reconciliation	

*From: Author.

affirmed the convictions of the defendants for treason and killing for the purpose of treason on April 17, 1997. The Supreme Court additionally held that the statute of limitations for crimes against constitutional order was lawfully suspended by the Special Act and the prosecution was instituted

before the period expired. Based up the decision of the Court, the Supreme Court upheld:

The defendants grasped political power after they stopped the exercise of the authority of constitutional state institutions by mutiny and rebellion. Even if they had arguably ruled the State based on the Constitution which was revised by popular referendum, it should not be overlooked that a new legal order was established by mutiny and rebellion. It cannot be tolerated under any circumstances under our constitutional order to stop the exercise of the authority of constitutional state institutions and grasp political power by violence, not following democratic procedure.⁴⁹

Mutiny and rebellion can be punishable as a result of the decision of the Constitutional Court. Chun was sentenced to life imprisonment and Roh was imprisoned for seventeen years. Others received prison sentences ranging from three and a half to eight years.

C. *Bring Justice to the Civil Society and Consolidate Democracy*

The Constitutional Court resolved the problems with the statute of limitations and as a result a series of criminal trials could proceed. Compared to other truth-finding mechanism such as truth commission model,⁵⁰ the result of the trial model was secured by due process and reviewed by the appeal process. The results of the trials were accepted and respected by the civil society. The people of Korea began to believe in the possibility of judicial independence because of the decision of the Constitutional Court and the peaceful trial process. In the past, the judiciary in South Korea was previously criticized for its political vulnerability and its domination by the authoritarian regime. The court in this case positively deals with the controversial legal and political issues. It became a public forum inviting different voices to debate the legal issues. The Court, through this process, earned and enhanced its reputation and independence. It brought justice to the civil society and consolidated democracy in South Korea.

49. Cho, *supra* note 26, at 584.

50. The most widely known example is the Truth and Reconciliation Commission established in 1995 in South Africa to examine Apartheid-Era crimes. In the past, truth commissions were used to investigate human rights violations in a variety of countries. In particular the commissions were used after countries had undergone major political changes, namely transition from an authoritarian regime to democratic rule, be it in the wake of violent internal conflicts, or a gradual peaceful revolution when civilian leadership took over from a military regime. See Angelika Schlunck, *Truth and Reconciliation Commissions*, 4 ILSA J. INT'L & COMP. L. 415, 416 (1998).

VI. CONCLUSION

This note explores whether the Constitutional Court in Korea made progress in revealing the truth about the evil past and opened the door for further prosecution and legal action since the presidencies of Chun and Roh. It was impossible to prosecute the junta members while the authoritarian regimes were in power. The May 18 Act could be regarded as the realization of legal justice.

The note analyzes the relationship between the decision of the court and its political and social context. This note maintains that as a result of the decision of the Constitutional Court radical changes took place in the political and military structure. The Court can pursue the truth about the Kwangju massacre and not fear revenge from the previous authoritarian regime. The Constitutional Court became more active and independent. The justices, as a result, had more power and space to investigate the controversial issues presented by the case over the enactment of the May 18 Act. A series of protests and pressure from civil groups, especially from the legal community, forced the government and the National Assembly to enact special laws. They also compelled the Court to take an active role in reviewing the May 18 Act. Moreover, vivid civic mobilization shielded the court from the critics when it upheld the May 18 Act as constitutional.

The decision of the Court influenced the enactment of related legislations and laid a sound foundation for other judicial entities to deal with similar issues. It also brought justice to a civil society and consolidated democracy. The actions of the Court were a symbolic break with the old regime and provided education about democracy and the rule of law.

From this decision of the Constitutional Court, we can find that transitional justice in Korea was pursued although the Kim Young-Sam government was established with support from many politicians with military origins. The government had to consider the people's power that overthrew the old regime. The trial of the military leaders declared that military coups and dictatorships will never be tolerated in Korea. The trial of the military leaders was a "political theatre" to provide "collective lessons in justice."

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