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FAIRNESS IN TRANSITIONAL JUSTICE INITIATIVES: THE CASE OF SOUTH KOREA

Tae-Ung Baik*

INTRODUCTION

South Korea has experienced a remarkable transition over the last half century. The nation was once one of the poorest countries in Asia. After thirty-five years of Japanese colonial rule from 1910 to 1945 and with the three-year Korean War from 1950 to 1953, the GDP per capita income of South Korean nationals was only $79 in 1960.1 South Korea has now become the world’s tenth largest trading country, with $20,759 per capita income as of 2010.2 Even more impressive, the country’s rapid economic development was accompanied by phenomenal democratization in the late 1980s and 1990s.3

Korea’s historical transition has nevertheless been far from smooth. Following the establishment of the South Korean government in 1948, Korea was led by a wave of authoritarian or military regimes. The first president, Syngman Rhee (1948-1960), was forced to step down by the so-called April Revolution in 1960 for his authoritarian and corrupt rule. Park Chung-Hee took power shortly thereafter by launching a military coup in 1961. His authoritarian military regime lasted until 1979, when he was assassinated by his right-hand man, the head of the Korean intelligence services (KCIA). After staging military coups in 1979 and 1980, Chun Doo-Hwan (1981-1988) and Roh Tae-Woo (1988-1993) succeeded Park Chung-Hee, and they controlled the presidency one after another until 1993. Owing to the growing strength of the people power movements in the 1980s and 1990s, however, the country headed for democracy by the early nineties. After Kim

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3. Chang Yun-Shik, Introduction: Korea in the Process of Globalization, in KOREA CONFRONTS GLOBALIZATION 9-10 (Chang Yun-Shik et al. eds., 2009); Tae-Ung Baik, Public Interest Litigation in South Korea, in PUBLIC INTEREST LITIGATION IN ASIA 115-18 (Po Jen Yap & Holning Lau eds., 2010).
Young-Sam's civilian regime ended the history of military dictatorship in Korea. Chun and Roh were arrested and prosecuted in 1995 for corruption and their roles in the 1979 and 1980 military coups. They were both found guilty and sentenced in 1997 to life and a seventeen-year prison term, respectively. Although both were amnestied that same year by President Kim Young Sam, this development was possible only because strong networks of civil society committed to fighting for democratization had been formed under the prior authoritarian regimes. Such networks greatly contributed to the transformation of South Korean into a democracy once civilian rule was restored.

During this process of transition, South Korea has adopted multiple truth commissions in pursuit of transitional justice. As many as eighteen truth commissions have been established since 1996 to deal with the historical legacies of Korea's authoritarian and colonial past. Given the sensitive subjects they were mandated to address, each of these commissions has faced important issues of fairness as they carried out their work. Very little critical attention has nonetheless been paid to these issues of fairness either within the reconciliation entities themselves or by the academic community. This Article aims to begin to fill that gap.

In spotlighting the importance of substantive and procedural fairness in transitional justice initiatives, this Article focuses on two of Korea's most visible commissions: the Korean Truth and Reconciliation Commission (hereafter "TRCK") and the Presidential Committee for the Inspection of Collaborations with Japanese Imperialism (hereafter "Collaborator Inspection Committee"), both established in 2005. The former was given a broad mandate to investigate the activities of national liberation movements, civilian massacres before and during the Korean War, and human rights violations caused by past authoritarian regimes. Investigating more than 10,000 cases before its dissolution on December 31, 2010, the TRCK recom-
mended that the government compensate victims for damages suffered, re-
store victims’ defamed names, and take legal or political measures for re-
conciliation with regard to the perpetrators. It also recommended the re-
trial of many victims who had been wrongly convicted of national security
crimes. These judicial proceedings have led to multi-million dollar compen-
satory damage awards for a small number of victims. Such awards raise
important substantive fairness concerns with regard to the thousands of
other victims of state crimes, who have received either much smaller ad-
ministrative reparation awards or nothing at all.

The Collaborator Inspection Committee, by contrast, focused on the
investigation of collaborationist activities under Japanese colonialism; by
2009, it had officially named over a thousand individuals as collaborators
with Japanese imperialism. The activities of the Collaborator Inspection
Committee were followed by the establishment in 2006 of a sister commis-
sion, the Investigative Commission on Pro-Japanese Collaborators’ Prop-
erty (hereinafter “Property Investigative Commission”), which inspected
the property of those determined by the Collaborator Inspection Committee
to be serious or “significantly pro-Japanese” collaborators. Under a special
legislative act recognizing such property as state-owned once verified as
belonging to the named collaborator, significant properties have been con-
verted to state ownership. Indeed, by 2009, a total of 2,475 square kilome-
ters of land owned or inherited by 168 pro-Japanese collaborators (with a
registry value of 237.3 billion won, or approximately USD 217.3 million)
had been put in the process of redemption by the government.

As I discuss, the work of these two commissions raises important but
underappreciated substantive and procedural fairness concerns for both vic-
tims and alleged collaborators. Given the frustration these fairness concerns
are likely to engender among key stakeholders, the failure to attend to them
sufficiently in Korea’s transitional justice initiatives may, I contend, have
serious implications for the long-term effectiveness of national reconcilia-
tion efforts. As such, they deserve heightened and sustained attention.

In particular, key substantive fairness concerns arise with respect to the
monetary reparation schemes associated with South Korea’s multiple truth
commissions. Because of the changing political circumstances in which

8,450 of them. The TRCK determined that it was unable to establish the facts with
respect to 528 cases, while the remaining 2,197 were dismissed or otherwise aborted for
other reasons. See id. For precise figures, see TRUTH AND RECONCILIATION COM-
MISSION, REPUBLIC OF KOREA, http://www.jinsil.go.kr/appdealing/app_index.asp (last vis-
ited May 1, 2012).

7. The broad kinds of recommendations the TRCK is authorized to issue are speci-
ified in Framework Act, supra note 5, art. 32.

8. See discussion infra Part IV.
each was established, some of these commissions were statutorily empowered to offer monetary reparation to victims while others were not. At the same time, although the TRCK has greatly contributed to the promotion and protection of human rights in Korea, the gross disparity between the multi-million dollar compensation awards received by the small number of victims for whom the TRCK recommended retrial in the nation’s courts, the larger number of victims who received much smaller administrative compensation awards, and the still larger number of victims who received nothing at all, creates important fairness concerns that may threaten the credibility and legitimacy of the truth commission project moving forward.

Likewise, the activities of the Collaborator Inspection Committee and the Property Investigative Commission raise important procedural fairness concerns. Numerous administrative lawsuits and constitutional petitions have been filed by the families of those identified as pro-Japanese collaborators against the activities and decisions of the two commissions, as well as against the statutory provisions that established them. This level of contestation, together with the weakly reasoned opinions of the Korean Constitutional Court in upholding the special acts,9 presents important questions for the future of reconciliation efforts in Korea. At a minimum, this Article raises a flag of caution in arguing that greater attention to issues of fairness is necessary in all transitional justice initiatives.

This Article proceeds in four parts. Following this introduction, Part I considers the process of transitional justice in Korea generally, as well as the importance of substantive and procedural fairness to such initiatives. Part II looks at the TRCK and how the uneven implementation of its recommendations has raised key substantive fairness concerns. Part III reviews the procedural arrangements of the Collaborator Inspection Committee and the Property Investigative Commission, discussing the contestations they have raised in Korea. Part IV concludes with a brief discussion of how Korea might better address the issue of fairness in its transitional justice mechanisms.

I. TRANSITIONAL JUSTICE IN KOREA AND THE IMPORTANCE OF SUBSTANTIVE AND PROCEDURAL FAIRNESS

Transitional justice can broadly be defined as the principles and mechanisms that aim to guarantee justice during a transition from an authoritarian regime or internal armed conflict to democratic rule.10 During such

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9. See discussion infra accompanying notes 105-108.
10. See Tae-Ung Baik, Justice Incomplete: The Remedy for the Victims of Jeju April Third Incident, in RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN
transitions, special measures are often necessary for dealing with the abuses of the past, given that the mass scale of human rights violations and the weakness of domestic institutions make it impossible to seek satisfactory redress through the ordinary justice system. In deciding what special measures are appropriate, each society must evaluate for itself the fundamental elements of transitional justice, such as truth, retribution, restoration, reconciliation and new institutions. In particular, in determining its own path, each state must decide whether the primary focus of transition should be on establishing the truth of past events, prosecuting and punishing perpetrators, or rebuilding broken institutions, community bonds, and social trust. In many cases, each of these transitional elements will be addressed to varying degrees and in overlapping ways.

For its part, Korea has witnessed many types of human rights violations in its history. Under the severity and strictness of colonial occupation, the Korean people suffered greatly. Both the unwanted division of the Korean peninsula after liberation from Japanese rule and the Korean War fought between North and South Korea on ideological grounds have left incurable scars on the people. At the same time, under successive military dictatorships in the South, state-sponsored violence, torture and other human rights violations were widespread. Given the scale and scope of these abuses, ordinary justice could not sufficiently rectify the wrongs of the past. For these reasons, special measures of transitional justice were employed in an effort to right the wrongs of Korea's conflict-ridden past.

The transitional justice measures that Korea has pursued have been both restorative and retributive in nature, although greater emphasis has tended to be placed on restorative justice. Retributive justice measures

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11. For more discussion, see Juan E. Mendez, Accountability for Past Abuses, 19 HUM. RTS. Q. 255 (1997).

12. For more information, see Hahm Chaihark, Human Rights in Korea, in HUMAN RIGHTS IN ASIA 265-97 (Peerenboom et. al. eds., 2006).

13. Rarely are these two kinds of justice pursued in complete isolation. In Germany, for example, the Nuremberg tribunal punished war criminals, but victims have subsequently been allowed to seek compensation through various mechanisms for the harm they suffered. See, e.g., NATIONAL FUND OF THE REPUBLIC OF AUSTRIA FOR VICTIMS OF NATIONAL SOCIALISM, http://www.en.nationalfonds.org/sites/dynamic6843.html?rub=59 (describing fund created in 1995 to make gesture and other payments to victims of National Socialism in Austria between 1938 and 1945). Likewise, South Africa declined to pursue a strategy of prosecuting all perpetrators, establishing a Truth and Reconciliation Commission that offered perpetrators the opportunity to avoid pros-
generally focus on the punishment of wrongdoers under the view that such punishment is a necessary moral response to wrongful acts. Restorative justice measures, on the other hand, focus on restoring the rights and dignity of victims. Korea has placed special attention on restorative justice, and in particular, on the reinstatement of people’s impaired reputations as part of victim redress, especially through the use of fact-finding truth commissions. A limited number of retributive measures have also been adopted, including the criminal prosecution of certain high level actors in former military regimes, and the reclamation of properties belonging to pro-Japanese collaborators or their descendants in Korea.

In all of these efforts, due process and fairness issues have been central. Nonetheless, such issues do not typically receive sustained attention in academic discussions of transitional justice, except with respect to one limited kind of retributive mechanism: the criminal prosecution of alleged perpetrators. In particular, a growing literature has been written on the importance of procedural due process in international criminal proceedings, especially for defendants brought before the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). This literature emphasizes the importance of due process in transitional justice for two complementary ends. On the one hand, its guarantee helps to ensure the legitimacy of the transitional justice mechanism itself, thus promoting its broader effectiveness. On the other, it reinforces the principle of legal due process and the protection of human rights in society at large, especially in light of past institutional practices characterized by their total absence or disregard.

These two functional attributes are nevertheless equally important with regard to other kinds of transitional justice mechanisms, including those focused more directly on restoring the dignity of victims through reparations as a measure of restorative justice and those that impose civil burdens in exchange for confessing their crimes and exposing the truth about past events. See Mahmood Mamdani, Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC), 32 DIACRITICS 433, 433 (2002).


15. Id. at 309-12.


17. See discussion infra in Part III.

or administrative penalties on perpetrators for retributive ends. Indeed, the presence of substantive and procedural fairness in such mechanisms is critical for achieving both the short and long-term goals of transitional justice.

Because so little has been written on these issues both generally and specifically in the Korean context, the following two parts examine issues of substantive and procedural fairness with regard to the TRCK and the Collaborator Inspection Committee. The first part introduces the TRCK as part of a broader emphasis on establishing truth in Korean transitional justice initiatives. It then discusses some of the limitations it has faced from a substantive fairness perspective. The second part examines the Collaborator Inspection Committee and the legal contestations it has faced on account of the weaknesses in its due process provisions.

II. SUBSTANTIVE FAIRNESS AND TRUTH COMMISSION REPARATION SCHEMES

There are many factors in the political environment of Korea that have made the pursuit of transitional justice difficult. In particular, the continued presence in power of many of those involved in military regimes and human rights abuses of the past has presented a significant hurdle. Likewise, the very existence of North Korea and the security threats (both real and imagined) it poses to the South have long been a justification for human rights violations and have limited efforts to redress abuses of the past. The continuous abusive application of the National Security Act has led both domestic and international human rights networks to call actively for its repeal. Legal barriers to justice, like statutes of limitations that bar victim access to the courts, have likewise made the pursuit of transitional justice initiatives more difficult.

19. The two major parties in contemporary Korean politics view the past authoritarian regimes from completely different angles and hence cannot easily reach agreement on transitional justice measures. The conservative party (currently Saenuri party) tends to look favorably upon the former authoritarian regimes, while the liberal opposition party (currently Democratic United Party) denounces them.


Despite these difficulties, transitional justice mechanisms in Korea have achieved remarkable success during the 1990s and 2000s owing to the growth of civil society-led democracy and human rights movements.\(^2\) The prosecution and punishment of two former presidents and their military staffs as wrongdoers of military rebellion was an extremely unusual and unlikely development, even if they were subsequently amnestied. At the same time, Korea has established a remarkable number of truth commissions – at least eighteen – since 1996.\(^3\) The mandates of these truth commissions have nevertheless varied considerably as the political context and circumstances have changed. With the fact-finding activities of these commissions narrowly limited for the most part to a particular historical incident or massacre, the reparative mandates of the earliest commissions were largely limited to reinstating the reputations of victims associated with a given incident as part of victim redress. As the political environment became more favorable, the mandates of new truth commissions nonetheless moved increasingly toward the direct provision of compensation and other forms of material reparation to victims for human rights harm, although even this varied by the set of victims at issue.

The first of this modern set of truth commissions in Korea was established under the “Special Act on the Geochang Incident”\(^2\) adopted on January 5, 1996. Although it focused on only one well-known tragedy of the Korean War – the 1951 Geochang massacre – it constituted the first law in South Korean history aimed directly at reinstating the impaired reputation of victims of the Korean War.\(^5\) The associated “Inquiry Commission for the Reinstatement of the Impaired Reputation of Persons Associated with the Geochang Incident” was correspondingly mandated to acknowledge the innocence of victims, maintain the graveyards in which they were buried,

\(^{22}\) See Chang, supra note 3, at 9-10; Baik, supra note 3, at 115-18.

\(^{23}\) See Byung-Wook Ahn, Hanguk Guageo Cheongsameui Hyeonhuanggwa Guajeh [The Present Conditions and Tasks of Past Settlement in Korea], 93 YEOKSA BIPYEONG 32, 45-46 (2010). The subjects that are covered include: the 5.18 Democracy Movement, Geochang victims, Jeju 4.3 Incidents victims, democracy movements participants during 1964 until 1993, special mission operators, Samcheong Rehabilitation Camp victims, No Gun Ri victims, Donghak Peasant Revolution participants, forced laborers drafted by Japanese Imperialism, pro-Japanese collaborators, special agents during Korean War, suspicious death during the military services, pro-Japanese collaborators’ property, abductees by North Korea, wrongful treatment of people with Hansen disease, forceful drafting during Pacific War, and 10.27 suppression of Buddhist priests. In addition, the broad-mandated TRCK was also established in 2006.


\(^{25}\) Id. art. 3.
hold official memorial ceremonies, and build memorial monuments.\textsuperscript{26} It was not mandated to award monetary reparation or compensation.

Following the election of Kim Dae-Jung as president and the prosecution of Chun and Roh for their military rebellions, the “Special Act on Reparation for Persons Associated with the Gwangju Democracy Movement”\textsuperscript{27} (hereinafter “Gwangju Special Act”) was amended on December 17, 1997 to authorize the provision of reparation measures to the victims of the Gwangju massacre of 1980, a heroic resistance against the seizure of power by the Chun Doo-Hwan military regime. Specifically, it sought to reinstate the impaired reputations of those involved with the uprising by officially redefining the uprising as a “democracy movement.”\textsuperscript{28} At the same time, owing to the more favorable political environment and to society’s positive attitude toward the movement, the Gwangju Special Act went significantly further than its predecessor by including a generous compensation package for the victims or their families. This package included monetary compensation,\textsuperscript{29} medical assistance for the wounded,\textsuperscript{30} and living expense assistance for victims and their families.\textsuperscript{31} A Reparation and Support Commission and a Reparation Review Committee were each established to decide on reparation measures as well as compensation awards under the Act.\textsuperscript{32} As of December 31, 2009, a total of 5,185 cases of the total 8,721 applications received were accepted as Gwangju massacre-related and approximately 233 billion KRW (approximately USD 202 million) was paid as compensation to the victims. The average compensation award per person amounted to about 45 million Korean won or 39,000 US dollars.\textsuperscript{33}

As the political atmosphere became increasingly liberal in the late 1990s, additional special acts were passed by the Korean National Assembly. On January 12, 2000, the special act to investigate the Jeju 4.3 inci-
dent was adopted. Although the object and purpose of the Jeju 4.3 Special Act was similar to that of the 1996 Geochang Special Act, the former authorizes the provision of monetary reparation to Jeju victims in the form of medical assistance and living expense aids. Reparation awards for Jeju victims were nevertheless less comprehensive than those awarded to victims of the Gwangju massacre, who also received substantial direct damages. This disparity owed to long-standing ideological positions and the association of Jeju victims with pro-guerrilla activities.

Disparate treatment for Jeju victims is also found in the reparation scheme associated with the “Act on the Reinstatement of the Impaired Reputation and Reparations for the People Associated with the Democracy Movement,” adopted on the very same day as the Jeju Special Act. That compensation scheme included not only medical assistance and living expense support for victims and their families, as did the Jeju Special Act, but also recommendations for amnesty, the reinstatement of lost jobs, clearance of disciplinary decisions, and direct monetary compensation. As of December 31, 2009, 11,913 cases of 13,358 applications were accepted as de-


35. Article 1 of the Jeju 4.3 Special Act provides, “The purpose of this Act is to find the facts of Jeju 4.3 and reinstate the impaired reputation of the victims and their families related to the incidents so that we can promote human rights, democracy and national reconciliation.” See id. art. 1.

36. See Baik, supra note 10, at 107-11.


38. In its original version, “Democracy movement” was defined in the Democracy Movement Act as involving “activities after August 7, 1969 to resist authoritarian rule that infringes constitutional rights, and to contribute to the establishment of democratic constitutional order and the restoration and promotion of the freedom and rights of the people.” Id. art. 2 (author’s translation). In its 2011 amended version, the cut-off date was pushed back to March 24, 1964.

39. The calculation of compensation awards was based on the Hoffman Method. For its part, living expense support was calculated as follows: (1) more than 30 days incarceration after conviction—days of detention times 44,200KRW (approximately $38); (2) Disability lighter than 4th degree—4.8 million KRW (approximately $4,172); (3) dismissal from jobs: from 2,934,000KRW (approximately $2,550) to a maximum of 50,000,000 (approximately $43,460). However, if the person’s household income is greater than 24,537 KRW (approximately $21,327), no support for living expenses will be allowed. See Executive Decree for Act on the Reinstatement of the Impaired Reputation and Reparations for the People Associated with the Democracy Movement, Presidential Decree No. 23277, Nov. 1, 2011, art. 12.2.
Fairness in Transitional Justice

...and around 102 billion KRW (approximately 88 million USD) has been paid in reparation for associated deaths, disappearances, injuries, imprisonment, job dismissals and other abuses. The average payment per person is around 8.6 million KRW, or 7,458 USD, significantly lower than the amounts awarded to Gwangju victims.40

The same disparity is found in the “Special Act on Fact-finding of Suspicious Deaths,”41 which authorizes special investigations into suspicious deaths associated with the democracy movement.42 Once a death was identified as democracy-movement-related, it was referred to a special “Commission on the Democracy Movement” and became eligible for administrative compensation.43 Such compensation packages were likewise more generous than those awarded to Jeju victims given favorable public attitudes to the victims of “democracy movements” and, in the case of Jeju victims, the continuing negativity associated with the label of enemy collaborators.

Many more commissions related to past human rights violations were established during the administration of President Roh Moo-Hyun, himself a human rights activist and lawyer. In 2004, for example, truth commissions were established to investigate the forced mobilization and draft to foreign countries during the fight against Japanese imperialism,44 the massacre at No Gun Ri,45 abuses associated with the Samcheong Rehabilitation Camp,46 and the honor of participants in the Donghak Peasant Revolution.47 Each of the commissions nonetheless had different reparation packages ranging

40. See Lee, supra note 33, at 213.


42. Id. art. 18.

43. Id, art. 26.


from measures of pure honor restoration to generous monetary compensation schemes.48

Because so many truth commissions covering distinct incidents and historical abuses were established with similar or sometimes overlapping mandates, the National Assembly finally moved in 2005 toward the establishment of a comprehensive truth commission with a broader mandate. Accordingly, in May 2005 the “Basic Act on the Investigation of Past Incidents for Truth and Reconciliation”49 was legislatively adopted, and the Truth and Reconciliation Commission of Korea (TRCK) was established.50

The TRCK has performed a very important role in providing redress to human rights victims. Over the five years of its operation, the TRCK received 11,175 petitions and investigated the truth of 8,978 cases.51 In so doing, it revealed the truth about hidden independent movement activists, unlawful civilian deaths by the army and police during the Korean War, wrongful convictions during prior military regimes, suppressions of reporters and teachers, wrongful charges of manufactured espionage cases, and numerous incidents of torture and other abuses of power.52 In response to the TRCK’s recommendations, President Roh Moo-Hyun issued a formal apology to the victims of a Korean War-era massacre in Ulsan.53 At the same time, several retrials have been commenced in courts to reinstate the reputations of those wrongfully convicted of national security crimes, each upon the recommendation of the TRCK. As a result, some of the wrongful convictions have been cleared after decades of suppression and the victims have received multi-million dollar awards.

The first case in which the TRCK recommended a retrial was the Minjok Daily Jo Yong-Soo case, decided on November 28, 2006.54 The TRCK found that the sixty-six day illegal detention of Jo Yong-Soo follow-

48. Many of the victims whose rights were violated during the Korean War period were not offered any compensation until the TRCK, with its broad mandate, began its operation.


50. Id. art 3.

51. See supra note 6.

52. See TRCK COMPREHENSIVE REPORT, supra note 6, at 99-133 (summarizing key findings).

53. Ahn Hong-Wook, Roh, Guageo Gukga Gonggwonryeok Jalmot Sagua [Roh, Apologizes for the Wrongdoings of State Authority in the Past], THE KYUNGHYANG SHINMUN, Jan. 23, 2008 This was the second formal apology after one given to Jeju 4.3 victims on Oct. 31, 2003.

54. TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, JINSIL HWAAHE WIWONH OI 3 JUNYEON HWALDONG HYEONHWANG [TRUTH AND RECONCILIA-
ing his arrest violated the Criminal Procedure Act. Based on the recommendation, the case was retried and in 2008 the Korean Supreme Court found Jo Yong-Soo not guilty of the offense on which he was convicted. His descendants filed an action against the government under the State Compensation Act\(^5\) seeking 9.7 billion Korean Won (approximately 8.3 million USD) in compensation. On January 13, 2011, the Supreme Court awarded Jo’s descendants 2.3 billion Korean Won – approximately 2 million USD.\(^6\) It likewise awarded the thirty-seven Aramhoi victims 86 billion KRW plus interest, amounting to approximately 7.9 million USD.\(^7\) The Supreme Court has continued to award high damage awards in cases referred to it by the TRCK. Thus, in November of 2011, the victims of Osonghoi were awarded approximately 1.3 million USD,\(^8\) while the Taeyoungho ship crew seized by North Korea was awarded approximately 2.1 million USD.\(^9\) In the manufactured espionage case of Lee Su-Geun, 276,000 USD was awarded to the victim’s nephew.\(^6\) Though this award was relatively small considering Lee’s twenty-one year wrongful imprisonment, it was still significantly more than awards granted under the nation’s many administrative compensation schemes.\(^6\)

\(^5\) State Compensation Act, Act No. 9803, Oct. 21, 2009. The State Compensation Act was first legislated in 1951. It enables individuals to file claims against the government for the State’s tortious acts or omissions.

\(^6\) Supreme Court [S. Ct.], 2009Da103950, Jan. 13, 2011.

\(^7\) See Daehoep Aramhoi Sageon 90 eok Gukga Baesang Huakjeong [Supreme Court Orders State Compensation of 9 billion KRW in Aramhoi Case], YONHAP NEWS AGENCY, Jan. 13, 2011. The Supreme Court reduced the total award amounts by changing the method of interest calculation. See Kwon Ji-Yoon, Guageosa Sageon Gukga Baesangaek Daepok Juleo Deunda [State Compensation Amounts for Past Human Rights Cases Reduced], HANGOOKILBO, January 13, 2011.

\(^8\) Yun Ju-Heon, Osonghoe Sageon Pihaejaeh 150eok Gukga Baesang Pangyeol [Decision that State shall compensate 15 billion KRW to victims of Osonghoe Case], THE CHOSUNILBO, Nov. 10, 2011 (reporting holding that State should award victims 15 billion Korean Won).

\(^9\) Id. The Supreme Court found that the State should award the ship crew 2.375 billion KRW in compensatory damages, plus 110 million KRW in interests.

\(^6\) See Sung Hye-Mi, Daehoep, Inhyukdang, Taeyoungho and Lee Su-Geun Sageon Baesanggeuem Gamaek [Supreme Court, Reduces Amount of Compensation for Cases of Inhyukdang, Taeyoungho, and Lee Su-Geun], YOUNHAP NEWS AGENCY, Jan. 27, 2011 (reporting holding that State should award Lee’s nephew 300 million KRW plus five percent interest, totaling 315 million KRW).

\(^6\) For example, the well-known activist Jeon Tae-II who self-immolated in 1970 while demanding the observance of labor law was awarded only 7.3 million KRW (approximately 6,345USD) under the Democracy Movement Act. See Won Hee-Bok, Jeon Tae-II ssi deung 74 myung Minjuhwa Undong Bosangaek Gyeoljeong [Compensation Amounts for Democracy Movement is Decided for 74 Activists including Jeon Tae-II],
The TRCK’s work with respect to individual economic reparation correspondingly raises important issues of substantive fairness. Indeed, Korean victims of past human rights abuse have to date had two options for receiving compensation. Those covered by Special Acts may receive administrative compensation directly under those acts. The narrow subject matter mandates of the corresponding truth commissions — each for the most part focused on discrete incidents in the past — nevertheless leave thousands of victims without access to such administrative reparation packages. As a second option, uncovered victims might bring an action against the government for compensation under the State Compensation Act. Yet, the feasibility of this option is, as a practical matter, limited by statutes of limitations and the large numbers of victims who might otherwise flood the courts with claims. Indeed, if every victim of human rights violations were to receive multi-million dollar pay-outs through the courts, the national coffers would soon be depleted. Such large judicial pay-outs thus create significant substantive fairness issues with respect to the much smaller administrative compensation packages associated with the various truth commission processes.

The TRCK did recommend that the government establish a general reparations program (for civilian massacre victims) as part of its 2009 policy recommendations. Nonetheless, the government has failed to implement such a program, relying instead on the piecemeal compensation policies described above. These policies lead to inconsistent and arguably unfair outcomes that depend on whether a particular incident has been recognized under a special act that in fact recognizes a victim’s right to compensation or, alternatively, whether the TRCK has recommended a

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62. The administrative victim compensation schemes used by Korea’s various truth commissions are divided into two general categories: first, compensation and benefits for “national meritorious persons;” and, second, compensation for “human rights victims.” The former is administered by the Ministry of Patriots and Veterans Affairs (MPVA) of the South Korean Government, which is a similar institution to the Department of Veterans Affairs in the United States. The latter is administered by special committees established by each special act. Currently, MPVA provides compensation and benefits to patriots, veterans with service-related disabilities, members of bereaved families, veterans with war service and long-term service who are eligible for limited benefits, and civilians who sacrificed themselves in the Gwangju Democratization Movement in May 1980. Interestingly, the victims of the 4.19 Revolution and of the Gwangju Democratization movement are being dealt with by the MPVA because the activities are considered as national meritorious activities. For more information, see Baik, supra note 10, at 103-04.

63. TRCK Comprehensive Report, supra note 6, at 35.
particular case to be retried in the courts. The unfairness in this approach may lead to resentments, both in relation to the availability of individual economic reparations for some, but not all, victims and with respect to the amounts provided. These resentments may in turn weaken the legitimacy of the transitional justice endeavor itself. The issue of fairness with regard to individual economic reparations thus deserves increased attention in Korean society today and, particularly, with respect to the implementation of the TRCK’s recommendations.

III. PROCEDURAL FAIRNESS AND PRO-JAPANESE COLLABORATORS IN KOREA

As discussed above, most of the truth commissions in South Korea focused on restorative justice measures. They have sought to find the truth, clear defamed names, and provide monetary compensation to victims. However, certain retributive justice measures have also been pursued to deal with past wrongdoings. The punishment of former presidents Chun Doo-Hwan and Roh Tae-Woo for their military rebellions and acts of corruption is a prominent example. The “Special Act for the Inspection of Anti-Nationalist Activities during the Period of Japanese Colonial Occupation”64 (hereinafter “Pro-Japanese Collaborator Inspection Act”) and the “Special Act to Redeem Pro-Japanese Collaborators’ Property”65 (hereinafter “Property Redemption Act”) also seek a form of retributive justice. The respective commissions created under these acts investigate the past with the purpose of identifying the names of wrongdoers – in this case, collaborators in Japanese imperialism – and nationalizing their property.

The public supported retribution against the so-called Chinilp’a, or Pro-Japanese Collaborators.66 This was due both to the failure to punish such collaborators in the period between 1948 and 195167 and to growing awareness in the late 1990s of efforts by collaborators’ descendants to reclaim their ancestors’ lands, which strengthened the momentum to publi-


67. See id. at 16-8.
cally redeem the illegitimately-acquired property. When adopted in 2004, the Pro-Japanese Collaborator Inspection Act was correspondingly supported by both the ruling party and some of the lawmakers from opposition parties; it was adopted by 151 out of 163 member votes in the South Korean National Assembly. The Property Redemption Act was adopted with similarly broad support on December 8, 2005.

Under Article 2 of the Pro-Japanese Collaborator Inspection Act, "pro-Japanese anti-nationalist activities" are defined as encompassing a set of twenty distinct activities, including attacking forces that were fighting against Japanese imperialism to protect national sovereignty and working as a high advisory committee member to the Governor-General of Japanese imperialism. The Act correspondingly created a Presidential Committee ("Collaborator Inspection Committee") composed of eleven commissioners to determine who qualified as a collaborator under the Act. Once this determination is made, the individual's name may be transferred to a sister commission, the Investigative Commission on Pro-Japanese Collaborators' Property ("Property Investigative Commission"), established in 2006 to investigate the properties of certain pro-Japanese collaborators. That property is defined as "properties acquired by pro-Japanese collaborators, or inherited, as rewards for collaborating with imperialist Japan or properties left as estate or gifted with the full knowledge of their pro-Japanese nature" between 1904 and 1945. This period covers the start of the Russo-Japanese War in 1904, when "national rights began to crumble," and August 15, 1945, when Korea gained its independence. A statutory presumption exists that properties acquired during this period by pro-Japanese collaborators were "obtained as rewards [for] their pro-Japanese acts."

The Property Redemption Act nevertheless defines a "Pro-Japanese Anti-Nationalist Collaborator" more narrowly than the Pro-Japanese Col-

68. See id. at 26-30.
70. Chinilbanninjokhaengwija jaesanguisokteukbyeolbop gukhoi tonggua [The Special Act to Redeem Pro-Japanese Collaborators' Property passes the National Assembly], LAW TIMES, Dec. 9, 2005.
71. See Pro-Japanese Collaborator Inspection Act, supra note 64, art. 2(1)-(20).
72. Id. art. 2.1.A.
73. For details of the procedure followed, see ICPCP REPORT 2010, supra note 66, at 42-56.
74. Property Redemption Act, supra note 65, art 2.2
75. Id.
76. Id.
laborator Inspection Act, excluding sixteen of the twenty “pro-Japanese anti-nationalist activities” identified in the later Act in its definition. That is, a “Pro-Japanese Anti-Nationalist Collaborator” is defined as “[o]ne who committed acts” listed only in subsections 2 through 9 of Article 2 of the Pro-Japanese Anti-Nationalist Collaborator, considered the most “serious” offenses. These include, for example, cooperating with Japan in implementing the annexation treaties and assuming high governmental positions. A person otherwise deemed “significantly pro-Japanese” will also qualify under the Act. This label attaches to anyone who “command[ed] or fol-
low[ed] commands to massacre, execute or abuse independence movement activists, anti-Japanese activists or their families.” A person who qualifies as a “Pro-Japanese Anti-Nationalist Collaborator” may avoid the label only by demonstrating that s/he “has rejected or returned rewarded titles or has been an activist in the independent movement.”

Most significantly, the statute provides that “Pro-Japanese property shall be state-owned at the time of such acquisition or receipt of the gift.” The Act tries to protect the property interests of third parties by stating that it shall not infringe the right of a third party who has acquired [property] with good faith or who obtained it by paying due consideration. The Act thus appears to make an effort to target pro-Japanese collaborators narrowly, minimizing any additional disruptions to property interests.

As recognized by the Property Investigative Commission, the investigation into the property of pro-Japanese collaborators acquired sixty to one hundred years ago is undoubtedly a complicated work. Such investigation begins with the designation of a subject property as a target for state redemption, followed by the mapping of a genealogical chart. A list of potential pro-Japanese collaborators’ property is then made and a preliminary investigation is conducted. After a decision is made by the nine-member commission to commence a formal investigation, the Property Investigative Commission files a temporary injunction and notifies interested parties, such as spouses and immediate family members, of the resolution to com-

77. Id. art 2.1.A.
78. Id. art. 2.1.B.
79. Id.
80. Id. The ICPCP determines whether a person will be considered as an exception or not in accordance with Article 4 of the Pro-Japanese Collaborator Inspection Act.
81. Id. art. 3.
82. Id.
83. ICPCP REPORT 2010, supra note 66, at 45.
84. Id. at 47.
85. Id. at 48.
mence an investigation.\textsuperscript{86} Such interested parties have the opportunity to file written objections within sixty days.\textsuperscript{87} However, the Act does not provide interested parties a right to a formal hearing. Following in-depth document review and verification of the facts of any written objection,\textsuperscript{88} which may include an onsite visit,\textsuperscript{89} the final resolution for state redemption of a particular collaborator’s property is adopted by the General Meeting of Commissioners.\textsuperscript{90} Failure to comply with the Commission’s decision may give rise to a fine of up to 10 million Korean Won, or $98,000.\textsuperscript{91}

Given the limits of this process and the valuable property interests at stake, the descendants of alleged collaborators – many of whom are influential figures in Korea – have vigorously challenged the provisions in the Special Acts, including through multiple law suits challenging their constitutionality. These suits have raised four central claims. First, they have insisted that Article 2 of the Pro-Japanese Collaborator Inspection Act, which defines pro-Japanese anti-nationalist activities, violates personal integrity rights under Article 10 of the Korean Constitution, which protects human dignity and the right to pursue happiness.\textsuperscript{92} Second, they have alleged that the official determination that a person is a “pro-Japanese anti-nationalist collaborator” constitutes a criminal punishment, hence violating the right not to be punished retroactively and the prohibition on double jeopardy under Article 13(1) of the Constitution, as well as the right to trial under Article 27(1).\textsuperscript{93} Third, they have claimed that the presumption under Article 2(2) of the Property Redemption Act that the properties were obtained as rewards for pro-Japanese conduct violates constitutional due process rights.

\begin{itemize}
\item \textsuperscript{86} Id. at 49.
\item \textsuperscript{87} Property Redemption Act, supra note 65, arts. 19(8), 21.
\item \textsuperscript{88} ICPCP REPORT 2010, supra note 66, at 50-51.
\item \textsuperscript{89} Property Redemption Act, supra note 65, art. 20(3).
\item \textsuperscript{90} ICPCP REPORT 2010, supra note 66, at 51.
\item \textsuperscript{91} See Pro-Japanese Collaborator Inspection Act, supra note 64, art. 35; Property Redemption Act, supra note 65, art. 28. The amount of the fine is the same in the Framework Act, supra note 49, art. 47.
\item \textsuperscript{93} See Constitutional Court [Const. Ct.], 2008Hun-Ba111, Mar. 31, 2011. Article 13(1) of the Korean Constitution provides, “No citizen shall be prosecuted for an act which does not constitute a crime under the statute in force at the time when it was committed, nor shall he/she be punished over again for the criminal act for which he/she has been once punished.” Article 27(1) of the Korean Constitution provides, “All citizens shall have the right to trial according to law by judges qualified and appointed under the Constitution and Act.” DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] arts. 13, 27.
\end{itemize}
or the right to trial under Article 27(1). Finally, they have contended that the Pro-Japanese Collaborator Inspection Act, even if not a criminal punishment, constitutes retroactive legislation in violation of Article 13(2) of the Korean Constitution, which forbids the deprivation of property rights by means of retroactive legislation.

In upholding the constitutionality of both Acts, the Korean Constitutional Court issued at times divided rulings, the reasoning of which may be open to question on certain claims. In response to the first claim, the Court held that, although decisions made by the Collaborator Inspection Committee had elements that restrict personal integrity rights, those restrictions are nonetheless justified under Article 37(2) of the Korean Constitution, which allows restrictions on rights when “necessary for national security, maintenance of law and order or for public welfare.” The descendants of alleged collaborators had argued that the decisions on pro-Japanese activities were unreasonably disproportionate restrictions on individual rights. The Court nonetheless found the restrictions proportionate under Article 37(2). Using standard proportionality analysis, it held that they were necessary for a justifiable purpose (i.e. public welfare, gonggongbokli), utilized appropriate means for achieving that purpose (i.e. an official determination of activities and publication in reports), and constituted minimum restrictions on the rights in question given the democratic social consensus on which they were based and the opportunity to rebut the allegations. It likewise held that the State had properly balanced the conflicting legal interests in its effort to establish a community ethic through publication of historical data.

On the second claim, the Constitutional Court held that neither statute imposed any “punishment,” and hence neither can be viewed as a violation

95. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 13(2) (“No citizen shall be restricted in his/her political rights, nor be deprived of property rights by means of retroactive legislation.”).
96. The Court agreed that a designation of pro-Japanese anti-nationalist collaborator might defame the person’s name, and consequently might restrict the person’s integrity right.
97. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 37(2) (“Free- doms and rights of citizens may be restricted by Act only when necessary for national security, maintenance of law and order or for public welfare. Even when such restriction is imposed, essential aspects of the freedom or right shall not be violated.”).
99. Id.
of the prohibition on retroactive punishments and double jeopardy in Article 13(1) of the Constitution.\textsuperscript{100} With regard to the third claim, the Constitutional Court held that the provision shifting the burden of proof to the collaborators or their family did not violate the due process rights of property owners under Article 27 of Constitution considering the minimum restriction on their rights and the availability of other procedural guarantees, such as the opportunity to submit written objections and the ability to file an administrative law suit.\textsuperscript{101}

Finally, in a divided and questionable ruling, the Court rejected the arguments on general retroactivity. Although the Court found that Article 3 of the Property Redemption Act was in fact legislation with “true retroactivity,” otherwise prohibited under Article 13(2) of the Korean Constitution,\textsuperscript{102} it reasoned that legislation with true-retroactivity can nonetheless be justified in certain exceptional circumstances, such as where a reasonable expectation existed that retroactive legislation would be forthcoming.\textsuperscript{103} Referring to the Korean Constitution’s Preamble, which expressly “uphold[s] the cause of the Provisional Republic of Korea Government born of the Independence Movement” against Japanese Colonialism, the Court reasoned that, since 1948, a reasonable expectation existed that retroactive redemption of pro-Japanese collaborators’ property would be forthcoming.

\begin{footnotes}
\item[100] Constitutional Court [Const. Ct.], 2006Hun-Ma1298, Sept. 24, 2009.
\item[102] Korean jurisprudence distinguishes legislation with “true retroactivity” from that with “non-true retroactivity,” with only the former considered impermissible. The referenced decision of the Korean Constitutional Court was the first to uphold the constitutionality of legislation retroactively depriving individuals of property rights. The only somewhat similar decision was the Court’s 1996 decision upholding the constitutionality of the Special Act on 5.18 Democracy Movements. In that case, the Court held that even if there might be a “true retroactivity” problem in extending the statute of limitations on the punishment of those involved in military rebellions, the Special act was constitutional. See Constitutional Court [Const. Ct.] 96Hun-Ga2, Feb. 16, 1996.
\item[103] See Constitutional Court [Const. Ct.], 2008Hun-Ba141, Mar. 31, 2011. In this regard, the Korean Constitutional Court’s decision resembles in some ways arguments made by one of the presiding justices in the Nuremberg Trials. The Honorable Lord Justice Lawrence argued that although the crime of aggression had already been established under international law at the time the Germans initiated their wars of aggression, “the maxim \textit{nullum crimen} is not a limitation of sovereignty but merely a general rule of justice to which there may be exceptions of which the present [case] in any event was one.” Justice Lawrence, \textit{The Nuremberg Trial}, 23 \textsc{Int’l Aff.} 151 (1947), available in Beth Van Schaack \& Ronald C. Slye, \textsc{International Criminal Law and Its Enforcement} 366-67 (2010). See also The United States of America, et al. v. Hermann Wilhelm Goering, et al. (1946), reprint in 41 \textsc{Am. J. Int’l L.} 172, 186 (1947), available in Van Schaack \& Slye, \textit{supra}, at 355-60.
\end{footnotes}
Accordingly, Article 3 of the Special Act did not violate the Constitution, even though it did constitute "true" retroactive legislation.\textsuperscript{104}

In this latter decision, the Court was divided. Two justices wrote a dissenting opinion; they agreed with the Court that the Act was legislation with true retroactivity, but concluded that this fact rendered it unconstitutional under Article 13(2).\textsuperscript{105} By contrast, two other Justices argued in separate concurrences that the legislation was not one with true retroactivity. One pointed to an annex to the First Constitution, arguing that pro-Japanese collaborators’ property is not protected by the Constitution.\textsuperscript{106} The other argued that the redemption provision was not legislation with true retroactivity but one with non-true retroactivity that is permitted under the Constitution.\textsuperscript{107}

With this recent Constitutional Court decision, due process challenges to the Special Acts have faced a temporary set-back. Such challenges will not, however, go away given the contested nature of the decision and the lack of persuasiveness in the Constitutional Court’s retroactivity reasoning. In many ways, the Court’s ruling appears to be a political decision, rather than one relying on sound legal principles.

How might the continuous contestations regarding the Act have been avoided? In large part, they have proliferated because the Collaborator Inspection Committee and the Property Investigative Commission did not offer sufficient opportunities for the families of alleged collaborators to participate in the decision making process. In particular, the descendants of the Pro-Japanese Collaborators were not given sufficient opportunity to defend their cases in the process of investigation. Under the Property Redemption Act, the Collaborators’ family may file a written objection to the Property Investigative Commission within sixty days of receiving notification of the commencement of an investigation.\textsuperscript{108} A person with direct interests may file a written objection against the Commission.\textsuperscript{109} However, the procedural guarantee to protect the rights of interested parties is quite limited. Specifically, the Act does not provide a right to a formal hearing. Of course, a party objecting to the decision of the Committee or Commission may pursue a formal legal proceeding through the administrative court or other legal avenues. The Committee/Commission could nevertheless have contributed more to the consensus-building process of transitional justice if

\textsuperscript{104} Constitutional Court [Const. Ct.], 2008Hun-Ba141, Mar 31, 2011.
\textsuperscript{105} See id. (dissenting opinion by Lee Gang-Guk and Cho Dae-Hyun).
\textsuperscript{106} See id. (concurring opinion by Justice Kim Jong-Dae).
\textsuperscript{107} See id. (concurring opinion by Justice Mok Young-Jun).
\textsuperscript{108} See Property Redemption Act, supra note 65, art. 19(8).
\textsuperscript{109} See id. art. 21.
it had tried to enhance the procedural fairness guarantees in their work. Doing so would have allowed it to contribute to a permanent solution to past wrong-doings without having to transfer cases to the ordinary justice system. The commissions should likewise have existed longer and been given more personnel to support their work, thus increasing their ability to provide greater procedural fairness in the process of inspection itself.\textsuperscript{110}

The Pro-Japanese Collaborator Inspection Act and the Property Redemption Act thus each present issues of procedural fairness that undermine their roles in advancing transitional justice. On the one hand, they may be criticized as retroactive legislation depriving citizens of their property rights in violation of the Korean Constitution. The Acts’ use by the State as a way to reckon with past abuses may thus jeopardize the legitimacy of the transitional justice project itself. On the other hand, by offering persons determined to be pro-Japanese collaborators and their descendants so few opportunities to defend their cases in the process of investigation, the legitimacy of property redemption proceedings may be called into question.

Although affected persons may challenge the Property Investigative Commission’s authorization of the deprivations of their property by initiating formal legal proceedings through the ordinary court system, it seems unwise to create a transitional justice measure that affords affected individuals so few procedural fairness guarantees. Permanent solutions to past wrongs should be attainable through transitional justice mechanisms without having to bring cases through the ordinary justice system.

IV. CONCLUSION

The unique package of transitional justice measures that South Korea has chosen represents a negotiated response to political conflict in the National Assembly. It likewise reflects the demands of the Korean people in the process of democratization. What is the best form of transitional justice? While it is not possible to produce a uniform answer to this question, the more important consideration is whether transitional justice measures are able to forge a consensus among people in society that such measures contribute to the process of overcoming historical injustice, bridging the gap

\textsuperscript{110} The powers of the PCICJ and the ICPCP should have been at least as strong as those of the TRCK. Nevertheless, the ICPCP was not granted the power to issue an Attendance Order compelling a witness to appear in the investigative process, a key power possessed by the TRCK. At the same time, the PCICJ and ICPCP possessed fewer commission members and standing members than the TRCK. The fine for non-compliance with commission rulings was nonetheless the same for all three bodies: KRW 10 million (approximately 98,000 USD).
between a violent past and democratic future. Substantive and procedural fairness is critical to this end.

Based on the compromises Korean society has reached, the TRCK and the Collaborator Inspection Committee/Property Investigative Commission have achieved some justice during the nation's transition. Yet far more could be done to promote justice and reconciliation by paying greater attention to issues of fairness in their administration. There is still time to make necessary improvements. In particular, the Korean National Assembly should implement the TRCK's recommendations on adopting a comprehensive reparations policy that promotes fairness in awards. Likewise, changes may still be made in the investigative procedures of the Collaborator Inspection Committee and Property Investigative Commission. No justice can be perfect, but it is never too late to improve systems of transitional justice, as it is upon their foundation that a nation's new democratic institutions will be built.