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# 遲來正義不是正義？台韓轉型正義方法的比較

# Justice Delayed or Justice Denied? A Comparison of Transitional Justice Approaches in Taiwan and South Korea

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# Abstract

Recent changes in the political landscape and dialogue of Taiwan and South Korea have led to a renewed focus on justice, specifically the concept of historical justice for abuses of human rights that occurred under the rule of these countries' authoritarian regimes. Taiwan and South Korea both experienced similar 20th century historical development. However, they have approached accounting for human rights abuses committed before political transition, a process called transitional justice, in very different ways. Whereas the post-transition government of South Korea embarked on a series of official truth commissions, the criminal trials of two former dictators, and multiple reparations schemes for victims of state violence, Taiwan has taken a much more piecemeal approach. It has pursued weak truth-finding methods, provided compensation to victims of violence during martial law rule, and is currently working on settling the contentious issue of KMT party assets. This thesis examines the two areas in which these two East Asian "third wave" democracies have differed most drastically in their approach – truth-finding and criminal accountability – and asks what the underlying circumstantial, historical, and institutional reasons for these differences are. It then investigates what was missing from the South Korean approach, despite looking very comprehensive on paper, and provides a vision for moving forward with a moderate policy of transitional justice that can satisfy victims' desire for truth and healing and promote reconciliation between traditionally conflicting groups in both Taiwan and South Korea.

**Key Words**: Taiwan, South Korea, transitional justice, democratization, truth commission

# 摘要

由於台灣與南韓近期的政權與溝通的更迭，兩國國內的政治焦點又再次轉向正義，尤其是針對在獨裁政權統治下，受到迫害的人民而言的歷史正義。雖然台灣與南韓在二十世紀時，都經歷了相似的政治進程，但兩國在處理政治轉型前的人權迫害問題，即所謂的轉型正義的方法卻不盡相同。在南韓，轉型後的政府開始推行一系列的政策，包括成立真相委員會、審判兩名前任總統、為國家暴力的受害者建立多重補償法案。相對的，台灣政府的作法則較為零碎，使用相對消極的方法尋找真相、提供戒嚴時期的受害者賠償、目前則處理長久以來具有爭議性的國民黨黨產問題。本論文將檢視此兩個東亞「第三波」民主國家，在處理轉型正義的問題上（亦即尋求真相與責任歸屬）為何會採用兩種徹底不同的解決之道，並對不同解決方式背後的環境、歷史、制度下的原因提出疑問；接著探討南韓政府這看似合理的做法為何僅是紙上談兵，究竟有何欠缺。針對兩國的轉型正義議題，本論文試著提出一項溫和的轉型正義推動政策，以滿足受害者對於真相、對於平復的渴望，以促進兩國內部對立團體的和解。

**關鍵字**： 台灣，南韓，轉型正義，民主化，真相委員會

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# Chapter 1 – Introduction

## 1.1 Research Background

Recent developments in the political landscape of Taiwan and South Korea have led to a renewed interest in the concept of justice, specifically for historical abuses of human rights perpetrated by these countries' previous authoritarian regimes. In Taiwan, Democratic Progressive Party (DPP) presidential candidate Tsai Ing-wen was elected in January 2016 and pledged to carry out broad reforms in the justice system, as well as push for renewed transitional justice measures for violations that occurred during the 228 Incident[1] and the succeeding four decade period of martial law imposed by the KMT.

Since then, the Tsai administration and DPP-controlled Legislative Yuan have been working to carry out some tangible transitional justice measures. The Act Governing the Handling of Ill-Gotten Party Properties by Political Parties and their Affiliate Organizations was passed in July 2016, and the next month the Ill-Gotten Party Assets Settlement Committee (Budang dangchan chuli weiyuanhui, 不當黨產處理委員會) was inaugurated (EY Press Release, 2016). Currently, the DPP caucus in the legislature is attempting to draft a transitional justice promotion act, which would "focus on judicial redress, legal remedy and collection of political archives," as well as "deal with the misappropriation or illegal occupation of government properties" (Chiu, April 2017). These are important developments for Taiwan, where, in a poll taken by the Taiwanese magazine *Business Today* (今周刊) in March 2016, 76.3% of respondents believe that transitional justice is still incomplete (Taiwan chengwei zhenzheng minzhu guojia, 2016).

Meanwhile, in South Korea, two consecutive conservative presidencies seemed to have proved regressive in relation to the large strides that had been made in democracy, respect for human rights, and transitional justice throughout the late 1990s and early 2000s there. This includes an unpopular deal between the Park Geun-hye government and

[1] Also known as the February 28 Incident or the 228 Massacre, although the latter carries a much more politically charged connotation. For the purposes of maintaining academic neutrality, this thesis will use "228 Incident," with the exception of quotes or titles in which another term is used.

that of Japan to compensate Korean "comfort women,"[2] in return for the removal of a bronze "comfort woman" statue erected by protesters outside the Japanese consulates in Seoul and Busan. Park, daughter of deceased former military dictator Park Chung-hee, was elected in 2011 in part due to nostalgia amongst older conservative Koreans for the economic prosperity and heightened security experienced under her father's despotic rule. This was an interesting choice of president for what is considered to be a consolidated democracy.

However, in late 2016, it was revealed that President Park had been entrusting an extremely large amount of decision-making power to a childhood friend, the daughter of a cult leader named Choi Soon-sil, and had also helped Choi extort bribes from a number of the large Korean conglomerates, called *chaebol*. In response to these revelations, massive demonstrations took place in city centers throughout South Korea, comprised mainly of younger Koreans, and reminiscent of the democracy movement protests that had erupted across the country thirty years before. In March 2017, Park was impeached, removed from office, and is currently facing a prison sentence. Moon Jae-in, once a human rights lawyer and aide to Roh Moo-hyun, the late former president who pushed forward the vast majority of transitional justice legislation in South Korea, won the vacant presidential seat in May 8, 2017. His victory will likely entail a change in both international and domestic policy, and there is hope that this change will include a renewed focus on addressing South Korea's troubled authoritarian past.

Transitional justice can generally be understood as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes" (Teitel, 2003, p. 69). Change here means the transition of a country's governing system from non-democracy to democracy, as in the case of South Africa or Chile; it might also include a post-conflict scenario, such as Rwanda. This notion of justice is based on the "increased expectation that

[2] "Comfort women" is the euphemism given to females forced, coerced, or tricked into sex slavery for the Japanese Imperial Army during World War II. They were taken from Japan's former colonial and territorial holdings, and included women from Taiwan, Korea, Manchuria, Indonesia, and the Philippines, among others. The system of "comfort stations" was expanded to fight the negative image the Japanese military gave itself with incidents such as the Nanjing Massacre, in which indiscriminate rape of young women and girls took place.

accountability is due after atrocity" (Hayner, 2011, p. 8). Atrocity in this sense can take any of a number of forms, including genocide, civil warfare, imprisonment for political offences, disappearing of dissidents, and arbitrary execution, among others.

The modern conception of transitional justice is said to have originated in the period following World War I, gaining more traction after 1945, with the Nazi war crimes trials and reparations paid to German Jewish victims of Nazi atrocities. The democratization of many Latin American, African, Asian, and post-communist governments in the period leading up to and following the end of the Cold War represented a new direction for the pursuit of justice in the aftermath of various civil wars and democratic transformations, moving away from the international criminal trials of postwar Europe to a more restorative form of justice seeking. This change "included questions about how to heal an entire society and incorporate diverse rule of law values, such as peace and reconciliation" (Teitel, 2003, p. 77).

The pursuit of transitional justice varies from country to country, but invariably involves one or more of "three main mechanisms (i.e. human rights trials, truth commissions and amnesties), along with lustration, reparations, institutional reform, and commemorative acts, monuments, and museums" (Dancy, et al., 2013, p. 1). The mechanisms will be discussed in further detail in the second section of the literature review.

Lastly, in order to understand the foundation for arguments in favor of accountability for past abuses of power and human rights in Taiwan and South Korea, it is necessary to provide some discussion of each country's democratization process. This is because transitional justice is a concept almost inextricably linked with democratic transitions or post-conflict situations. It is inherently difficult to apportion some form of accountability in a country still under authoritarian rule because wrongdoers are still in positions of significant power. However, democratization is not a black-and-white condition, as extenuating circumstances can lead to a democratized country instituting either stronger or weaker methods of transitional justice, or not pursuing the matter at all. A brief examination of democratization in Taiwan and South Korea presents a better idea of how such a process can differ from one case to another.

Before delving into the specifics of the democratic transitions that took place in Taiwan and South Korea, it is important to understand the broad similarities in each country's 20th century histories. Both carry the legacy of colonization by the Japanese; both remained under authoritarian rule for a similar amount of time, and began democratizing in the 1980s (Jacobs, 2007); both experienced rapid economic growth before becoming democracies by utilizing similar, yet unique, developmental state models; both underwent a smooth and relatively peaceful transition from autocratic rule to democracy (Huntington, 1992); and both, despite having faced numerous challenges to democratic consolidation and institutionalization over the years since transition, have prevailed as open and liberal democracies.

In South Korea, a process of what Huntington terms "transplacement," in which moderate elements in both the ruling military dictatorship and the opposition negotiated the terms of the transition, was responsible for the large-scale democratic reforms of the late 1980s and early 1990s (Huntington, 1993, Ch. 3). The nature of this transition and the "different power structures" that exist "in the post-transition politics" have greatly influenced how democratic South Korea has dealt with its authoritarian predecessor regime (Wu, 2005, p. 6)

Kim (1997) argues that "the main impetus" for democratization in Korea "came from the authoritarian regime's overconfidence about its legitimacy and stability" (p.1135) in its move to liberalize in the early 1980s and then to hold direct elections in 1987 (Robinson, 2007, p. 167). These measures were also taken in response to the growth of strong civil society elements, including people's movement groups, "such as the Korea Teachers' Union, the Korea Trade Union Confederation, and student organizations" (Kim, 1997, p. p. 1137). In fact, it was the student protests organized by the National Coalition of University Student Representatives that "sparked off a series of political demonstrations" and culminated in Roh Tae-woo's Eight Point Declaration, a concession which catalyzed the process of democratization in 1987 (Lee, 2002, p. 832).

Taiwan, meanwhile, experienced a transition to democracy without a change of regime, although reforming the one-party system was a gradual process of liberalization and "Taiwanization (本土化)" of the ruling party, the KMT (Tien, pp. 40-43; Jacobs, 2005).

This has had a determining effect on its achieving transitional justice, as power structures have remained fundamentally the same post-transition.

The main thrust of democratization in Taiwan was a process of what Huntington calls "transformation," in that moderate elites in the KMT regime led the charge in facilitating the transition (Huntington, 1993, Ch. 3; Jacobs, 2012, pp. 12-14). The decision not to arrest members of the newly established DPP in 1986 and the lifting of martial law in 1987[3] showed the influence of these more liberal elements in the KMT may have had on then-dictator Chiang Ching-kuo. In the years since democratization, this argument has been challenged. Many who took an active part in pushing for democracy and rule of law in Taiwan believe that their efforts, like those of democracy activists and civil society organizations in South Korea, were just as responsible for Taiwan's transition.

Some have pointed to local elections which took place in Taiwan from the 1950s onward as possibly having laid the groundwork for democratization (Jacobs, 2007, p. 236; Chao & Meyers, 2000). Others have noted the development of a free press, which began with the creation of the *Free China Fortnightly* in the 1950s and the *Formosa Magazine Group* in the 1970s was a significant contributing factor (Cheng, 1989; Tien, 1992, pp. 41-42). Lee (2002) points to large-scale protest movements, such as the *Tangwai*[4] and Wild Lily student demonstrations[5], as playing a central role in the transformation process, something which it had in common with South Korea (p. 833). Most agree, however, that it was a confluence of different factors that set the stage for a gradual, yet peaceful transition to democracy in Taiwan.

[3] Under the martial law rule of the KMT, political parties that were not approved of by the ruling party were considered illegal. Political organizations that had formed in the past, such as Lei Chen's China Democratic Party, were crushed and their leaders imprisoned. This made the peaceful development of the DPP's formation all the more notable (Cheng, 1989; Jacobs, 2013)

[4] Literally meaning "outside the party," the *tangwai* is the term used for what began as a loosely organized group of middle-class Taiwanese who worked to campaign for empty parliamentary seats after the original mainlander legislators began to pass away. They eventually congealed into a bona fide group of opposition politicians in the 1980s and were the core of the Democratic Progressive Party, Taiwan's first true opposition party.

[5] The largest student movement in Taiwan's history, the Wild Lily protests began in March of 1990 to urge reform of the National Assembly, whose terms of membership were heavily skewed in favor of the ruling mainlander elite. The protests were nonviolent and extremely well-organized, included sit-ins and hunger strikes, and estimates of the number of demonstrators range from 4,000 to 30,000 (Katsiaficas, 2013; Roy, 2003).

## 1.2 Research Purpose and Questions

As evinced in the preceding section, large-scale political changes are taking place in both Taiwan and South Korea at the moment of this writing. Understanding the strong desire to have some sort of settling of past accounts by many in Taiwan and the consistent discussion of similar issues in South Korea, this thesis is important not only for those whose interests lie in transitional justice as a subject of comparative politics, but also for the broader topics of democratization and respect for human rights.

What will be explored in the following chapters is the vastly different approaches to transitional justice of two East Asian democracies. Whereas South Korea has embarked on a comprehensive, or holistic, process of accounting for human rights abuses committed under their previous colonial and authoritarian regimes, including multiple truth commissions, criminal trials for major perpetrators, and broad reparations schemes, Taiwan's approach has been much more piecemeal. Its post-transition administrations instead pursued weak truth-finding methods, avoided historical criminal accountability, and provided compensation to victims of the 228 Incident and the White Terror. This comparative description gives rise to the two major research questions this thesis intends to explore in the following sections:

1) What are the major circumstantial, historical, and institutional reasons for this divergence?

2) What is missing from the South Korean holistic approach that has led to the argument amongst victims and advocates that justice has not yet been served?

There is no dearth of literature offering normative theories of transitional justice, as well as the mechanisms used to carry it out. There is also a growing body of scholarship on the respective transitional justice approaches of Taiwan and South Korea. And despite some excellent comparative studies on the democratization process in the two countries, to date no comparison of their system of accounting for past atrocities has yet been explored in English. This thesis intends to add to the existing literature by offering a comprehensive examination of the two areas in which their approaches differed most significantly –

truth-finding and punishment – and by adding some novel ideas to the discussion of why this difference exists.

## 1.3 Research Method

The author has utilized a fairly simple qualitative research method for this thesis. Since the vast majority of research on transitional justice is predicated on normative analysis, and because statistical data directly related to the topic is extremely limited, a more or less descriptive historical approach seems more forthcoming. The central aim of this method is to tell the story of South Korea and Taiwan's relative circumstances in relation to pursuing transitional justice, while shining some necessary light on the key reasons as to why they have taken such disparate approaches.

The primary tool of this method is an analysis of the major academic literature on transitional justice as a broad topic, as well as that focused on the transitional justice efforts of either Taiwan or South Korea. Because the pursuit of historical justice in Taiwan is ongoing and is a topic of major focus in the current Tsai administration, articles from local news sources will at times be used to demonstrate the topic's relevance to contemporary political dialogue.

In addition, semi-structured interviews were conducted with several academics and experts from both Taiwan and South Korea. Five to ten questions related to the main research questions were prepared beforehand in order provide a broader and more nuanced understanding of the subject. Those interviewees involved in the research of this thesis are cited as (Name, Personal Correspondence, Date) in the main chapter portion. The details of the interviews and the questions provided to the interviewees are listed in the appendices following the reference section.

## 1.4 Limitations

A major limitation in this study is the author's unfamiliarity with the Korean language. The entirety of the research was conducted in either English or Mandarin Chinese, which may leave some gaps in the discussion of South Korea's specific situation as it pertains to the subject material. It is hoped that the information gleaned from reliable English

language literature, as well as the interviews with South Korean-based human rights lawyers and academics, can provide a clearer, fuller picture of its pursuit of transitional justice.

## 1.5 Organization of the Thesis

The body section of this thesis will be divided into three separate chapters. A literature review and theoretical perspectives section comprise Chapter 2. Chapter 3 will look at the truth-finding processes in Taiwan and South Korea. It will focus on three of the many truth commissions established in South Korea, the three truth finding efforts completed or underway in Taiwan, and a brief examination of post-colonial justice pursued by the KMT in Taiwan in the late 1940s. It will also compare their respective methods of determining criminal accountability and dealing with perpetrators of past human rights abuses. Chapter 4 will address the two central research questions. Chapter 5 provides some concluding remarks and offers several actionable suggestions for a future approach to transitional justice in both countries.

# Chapter Two – Literature Review and Theoretical Framework

## 2.1 Literature Review

The literature review for this thesis is broken into two sections considered most relevant to a comparative analysis of the transitional justice of Taiwan and South Korea. The first section is a summary of theories related to transitional justice as a broad topic. The second section delves into the specific mechanisms used to carry out a process of transitional justice in a newly democratized governing system.

### 2.1.1 Theories of transitional justice

Transitional justice is a field that has seen a large growth of scholarship over the past few decades. Despite this, many who research transitional justice admit that it is undertheorized (De Greiff, 2012; Dancy, et al., 2013). The purpose of this section, then, is to discuss a few of the major arguments in this area and to show the relative lack of consensus amongst scholars.

Teitel (2000) creates a paradigm of transitional justice in which the rule of law is extraordinary and symbolizes normative change in periods of political transformation, with each mechanism of jurisprudence a tool to separate the new order from the old, nondemocratic one (p. 215). For example, perpetrators of human rights violations are brought to justice via criminal trials after transition, despite the fact that when they committed those crimes, it was perfectly within the limits of that legal system. As the author states, "what is deemed fair and just during periods of radical political innovation is not necessarily arrived at in deliberations under idealized conditions and regular procedures" (p. 224). Furthermore, she argues that entrenching the response used in the transitional period towards violations of human rights misses "the core transformative message: the belief in the human possibility of averting the tragic repetition of the past in the liberalizing state" (p. 228).

De Greiff (2010), however, disputes Teitel's argument, which he calls the "distinctive thesis," declaring it a mischaracterization of law during normal periods. He argues that law "by its very essence [is] always and inevitably as Janus-faced as Teitel suggests it is

only in transitions" (p. 60). He also critiques the conclusion her theory produces, that transitional justice is a complex and sensitive process and that no one response is correct in addressing past wrongs, but that how it should be pursued is contingent on several historical, social, and political circumstances (p. 60). He believes that this statement is too elementary for an actual theory, in that it provides no "guidance with respect to which of the compromises that politics and history seem to force upon us are legitimate and which are not" (p. 61)

De Greiff instead advances a theory of transitional justice that displays the relationship between the different mechanisms of transitional justice and how they work together as a whole to accomplish two "mediate goals," recognition and civic trust, and two "final goals, which are reconciliation and democracy (p. 34). In contrast to Teitel's thesis, De Greiff believes that "transitional justice articulates the requirements of a general understanding of justice when applied to the peculiar circumstances of a very imperfect world" (p. 34).

Like De Greiff, Philpott (2012) views justice in periods of political change as a means to an ultimate end. However, he views the overarching goal of transitional justice measures to be that of reconciliation. This, he writes, is a gradual process of restoration of normalized relationships between those who govern and those who are governed in a given political order (p. 288). Philpott's ethic of reconciliation must include a combination of six practices, which are "building socially just institutions, acknowledgement, reparations, punishment, apology, and forgiveness" (p. 172). Two of the practices, apology and forgiveness, differentiate his ethic from what he terms the "liberal peace,"[6] the "dominant paradigm of peacebuilding" (p. 288).

### 2.1.2 Transitional Justice Mechanisms

The mechanisms involved in carrying out transitional justice in the wake of a political transition or post-conflict situation are varied and their applicability and appropriateness

[6] The Lockean concept adopted by the West and prominent supranational organizations of a peacetime arrangement that includes free elections, constitutions that guarantee human rights and independent judiciaries, reform of police and military branches, establishment of free markets, and accountability for human rights violators (Philpott, 2012, p. 1-2).

are a source of debate between different scholars. Olsen, Payne, and Reiter (2008) group the arguments for different transitional justice mechanisms into three separate approaches: “maximalists who support prosecutions as the best mechanism…, minimalists who consider amnesties the best mechanism…, and moderates who advocate truth commissions to produce positive results” (p. 3) Each of these approaches also proposes other, additional means of pursuing transitional justice, including reparations, vetting for official positions, apologies, institution building, and memorialization for victims.

Among those that push for the maximalist approach, trials are seen as a means of establishing norms of accountability in a transitional society, and as a way to deter would-be violators from committing human rights abuses in the future (Mendez, 1997; Kim and Sikkink, 2010). There also exists the argument that both the rule of law in civilized societies and standards set by international law necessitates prosecutions of human rights violators (Orentlicher, 1991). Finally, proponents of criminal trials point to their tendency to apportion accountability to individuals, thereby avoiding “the dangerous culture of collective guilt and retribution that produces further cycles of resentment and violence” (Kritz, 1996).

The minimalist approach, on the other hand, argues that criminal trials in states where democratic institutions and the rule of law are still weak and where spoilers, those who benefitted from the *ancien regime,* are still empowered, enforcing norms of criminal accountability may have a negative impact on democratic consolidation (Snyder and Vinjamuri, 2003). Mendeloff (2004) asserts that simply not enough empirical evidence exists to determine whether trials or other truth-seeking processes actually have any effect, positive or negative, on peace and reconciliation, and that the arguments in favor of these measures tend to rest on assumptions based on faith, rather than on logic.

The main standard for the minimalist approach, then, is reparations for victims. Peté and du Plessis (2007) note that reparatory justice may take a number of forms, including “restitution in kind, compensation, satisfaction, and assurances and guarantees of non-repetition” (p. 15) and that the definition of these can be nebulous and hard to pinpoint. They argue that reparations are an “integral part of the obligation imposed on states by

international human rights law and humanitarian law" (p. 13) citing Article 8 of the UN Declaration of Human Rights and the International Covenant on Civil and Political Rights (hereafter the ICCPR), among others. Similarly, De Greiff (2012) believes that reparations improve civic trust "by demonstrating the seriousness with which institutions now take rights violations" in that monetary remuneration has more material value than a verbal apology (p. 46). Hayner (2011) agrees that reparations are a valuable means of attempting to atone for the past. She mentions that money is only one way of compensating victims, that it can be linked to development policies, like social services or public works, noting "there may be a way to link the service delivery capacity of the economic development field with a community-based approach to reparations, presuming that this link is made explicit" (p. 166).

The basis for the moderate approach is that some form of accountability for human rights violations is necessary, but that a less retributive mechanism than criminal trials can ensure political stability in a transitional period. Truth commissions serve this purpose in that they "establish accountability, officially condemn past violations, and promote restorative justice" and "at the same time they avoid the political risks associated with prosecuting perpetrators" (Olsen, Payne, & Reiter, 2008). Hayner (2011) also notes that "their broader mandate to focus of the patterns, causes, and consequences of political violence allows truth commissions to go further in their investigations and conclusions than is generally possible (or even appropriate) in a trial" (p. 13) Gibson (2004), in a study that surveyed the effects of the Truth and Reconciliation Commission on ethnic reconciliation in South Africa, found that, overall, these were positive. He concludes that "the truth and reconciliation process seems not to have had a negative influence among Africans, while having positive influences on whites, Coloured people, and those of different origin" and that this "indicates that the process has clearly been a net benefit to South Africa" (p. 215).

Lastly, a growing portion of the literature on transitional justice has focused on the merits of what a number of scholars and NGOs have dubbed a "holistic" approach, or the use of multiple, overlapping mechanisms (Mendez, 1997; Olsen, Payne, & Reiter, 2010; De Greiff, 2012; Philpott, 2012). There seems to be a fairly broad consensus among

transitional justice scholars that this kind of approach is more beneficial than the use of only one mechanism or another, or a lack of any mechanisms at all.

Mendez (1997) posits that accountability for human rights abuses gives rise to a set of obligations of the successor state to the victims of those abuses. The obligations, he notes, are "multifaceted and can be fulfilled separately, but should not be seen as alternatives for one another" (p. 255). His argument is that prosecutions and trials, in addition to other, peripheral instruments, must serve as the focal point of any approach towards transitional justice.

In a similar vein, De Greiff (2012) in his chapter on theorizing transitional justice, maintains that each mechanism of addressing past human rights abuses are "parts of a whole" (p. 34) and that "the weakness of each of these measures provides a powerful incentive to seek ways in which each can interact with the others in order to make up for their collective limitations" (p.35) Furthermore, he states that each mechanism is closely connected in "bi-directional" relationships, and that the use of one naturally necessitates the use of another (De Greiff, 2012, p. 37).

Philpott (2012) also argues for a combination of different mechanisms, which he classifies under the general practices of building socially just institutions, acknowledgement, reparations, punishment, apology, and forgiveness (pp. 172-175). Reminiscent of De Greiff, he contends that "the practices complement one another, complete one another, and weave together" and that "a surfeit of one practice cannot make up for a deficit of another" (p. 171). The end goal of these practices and transitional justice in general, then, is to bring about reconciliation, "the broad restoration of right relationship with respect to the wounds that political injustices enact" (p. 288).

Lastly, a large, cross-national empirical study undertaken by Olsen, Payne, & Reiter (2010) finds that two specific combinations of mechanisms positively affect a transitioned country's democracy and human rights. The "justice balance" as they term it, consists either of amnesties and criminal trials for perpetrators (in that order), or amnesties, trials and truth commissions (p. 996). The second combination is especially effective in the case of a negotiated transition, as in that of South Korea or, to some extent, Taiwan (p. 1002).

To conduct this study, the researchers used five separate indices that measure human rights and democracy: the Freedom House Civil Liberties and Political Rights scales, the CIRI Physical Integrity index, and Amnesty International and the U.S. State Department's Political Terror Scales (p. 998). They found that any other combination of mechanisms or mechanisms used alone either had a negative impact or no discernible effect on a newly democratized country's human rights and democracy (p. 998).

It is important to note that South Korea is named specifically in the academic paper produced from the justice balance study, in that it first instituted a policy of amnesty towards political prisoners under the final authoritarian leader, Roh Tae-woo, and then proceeded with both trials and truth commissions after democratization (p. 1003).

## 2.2 Theoretical Perspectives

This thesis sets out to detail the relative approaches to transitional justice of Taiwan and South Korea, as well as to determine some of the primary factors that have caused South Korea to seemingly perform much better in this area, despite the two having similar 20th century histories and cultural backgrounds. A secondary objective is to determine what is missing from the South Korean model, and how Taiwan can learn from the pitfalls of this model as it embarks on a renewed pursuit of justice for past human rights abuses.

Five major contributing factors are identified in regard to the first research goal: 1) the KMT's continued grasp on power post-transition due to its comparatively stronger position than that of Roh Tae-woo's Democratic Justice Party at the time of democratization; 2) the three consecutive liberal presidencies in South Korea of Kim Young-sam, Kim Dae-jung, and Roh Moo-hyun; 4) the disparate cleavage structures of regionalism in South Korea in contrast to that of national identity in Taiwan 3) the divergent constitutional history of the two countries, as evidenced in their constitutional court systems; and 4) the time elapsed between incidents or periods of large-scale state violence and each country's democratization process. This is based on a difference in the internal security apparatus in either country, and is related a given dictator's threat perception (Greitens, 2016). The factors listed here are mostly of an institutional nature.

In response to the second question, the conclusion is that South Korea's comprehensive transitional justice strategy looks good on paper, but the mechanisms used have been, in varying degrees, somewhat toothless. South Korea also did not go through a process of vetting, something supported by most of the literature on holistic transitional justice (De Greiff, 2012; Mendez, 1997; Philpott, 2012), to bar those who had held positions in the previous authoritarian regime or security forces from participating in the new democratic government.

The consensus among many scholars that a comprehensive approach to transitional justice, using multiple mechanisms that work in conjunction with one another, is preferable to using a less coordinated approach, provides a unique foundation for the subject matter of this thesis. It will play a role in considering how Taiwan can learn from the South Korean experience, and in determining an ideal approach to transitional justice that either or both could follow in the future.

# Chapter 3 – Truth-finding and Criminal Accountability in Taiwan and South Korea

Truth-finding is something of a nebulous term; it may encompass any number of tools used to uncover the full story of events that took place when authoritarian rulers still maintained a monopoly on truth. The South African Truth and Reconciliation Commission embodies most wholly the concept of the truth commission described earlier in the literature review, but not every truth-finding process can accurately bear this label.

One of the major distinctions between the transitional justice of South Korea and Taiwan is that, despite both experiencing autocratic rule for the period following the end of World War II until near the end of the Cold War, South Korea's truth-finding efforts drastically exceed those undertaken by Taiwan, in both scope and sheer number. The South Korean mechanisms also differ in nature from Taiwan's, tending to be closer to Hayner's description of a truth commission outlined in Chapter 2. This chapter will first look at three major South Korea truth-seeking mechanisms, and compare them with the three that have taken place so far in Taiwan. The KMT's postwar attempt at justice for Japanese collaborators in Taiwan will also be examined briefly. The second part of the chapter will explore criminal accountability, or lack thereof, for human rights violations that occurred during either countries' period of authoritarian rule.

## 3.1 Korea's Search for Truth, Justice, and Reconciliation

For Koreans, transitional justice is not a commonly used phrase. Rather, those who study the country's method of accounting for past abuses have adopted a term that has at times been awkwardly translated into English as "historical liquidation." (Chu, 2016; Jung, 2015, p. 26) A more accurate translation of this concept might be "settling the past." This has consisted of multiple truth-finding bodies[7] which were established to investigate

[7] There are different estimates of how many truth commissions took place in South Korea, depending on different criteria. Wolman (2013) claims that "at least ten have been implemented over the past fifteen years" (p. 28). Hayner (2011) refers to her correspondence with Hunjoon Kim in placing the number at between fourteen and eighteen bodies that could be considered truth commissions (p. 55), although "some of these were committees or commissions established within existing agencies, such as the intelligence service, department of justice, or national police" (p. 307). Also, some commissions only focused on

different periods of Japanese colonial and Korean autocratic rule, including abuses that occurred during the Korean War in the early 1950s.

The model for truth-finding in South Korea, according to Jung (2015), has consisted of a desire to release its society from the burden of three separate areas of its past: the authoritarian, colonial, and Cold War past. This gave rise to three separate methods of truth-finding: the "truth and justice" model of 1988-1995, the honor-restoration model, and the truth and reconciliation model. Instead of outlining every truth-finding effort that has taken place in South Korea, a monumental task, the author has chosen to focus on three organizations most often mentioned in the English language literature on this topic and which closely conform to Jung's three truth-finding models: the Presidential Commission on Suspicious Deaths, the Commission on the Confiscation of Properties of Pro-Japanese Collaborators, and the Truth and Reconciliation Commission of Korea (TRCK).

### 3.1.1 The Presidential Commission on Suspicious Deaths (2000-2004)

Thirteen years after the country held its first free national elections in 1987, the first truth commission to investigate deaths that had occurred during the Park Chung-hee and Chun Doo-hwan military dictatorships was established. In 2000, the Act for Restoring the Honor of Democratization Movement Involvers and Providing Compensation for Them was passed. The law, in addition to performing the tasks evident in its name, also provided a definition for who was to be considered to have been involved in South Korea's democratization movement (Cho, 2007). The following year, the Special Act for Truth-Finding about Suspicious Deaths was passed, which established the Presidential Commission on Suspicious Deaths. The commission consisted of 9 commissioners and was headed by Professors Yang Seung-Kyu and Han Sang-Beom (Ibid.).

The commission was tasked with investigating specific deaths deemed "suspicious," and was imbued with a number of powers to carry this out. This included the ability to request individuals to appear before the commission, conduct field investigations, file

reparations for victims, not necessarily on fact-finding (Minbyun, Personal Correspondence, February 7, 2017).

complaints to the Attorney General or the Chief of the Military General Staff, petition law enforcement to investigate chosen cases, and issue orders to impel individuals who had "refused to appear without just cause" (Cho, 2007, p. 598). It was originally mandated to last for two years, but was extended another two in response to pressure from civil society.

In spite of a very large expected caseload, reflecting the equally large amount of state violence that occurred in the decades-long period of authoritarian rule, only eighty cases were presented to the commission for investigation; five more were then added by the commission itself (Hayner, 2011, p. 55). Although "victims advocated for a witness protection program, public hearings, and even for an amnesty-for-truth arrangement that might have brought forth more information…these elements were not included" (Ibid., p. 55). This could have had a significant effect on the amount of people who came forward to testify, both victims and perpetrators.

Other criticisms of the Presidential Commission on Suspicious Deaths abound. For one, it did not "undertake a broader historical review of patterns, causes, and consequences" of the deaths and violence (Hayner, 2011, p. 55). As Wolman (2013) notes, this deficiency is antithetical to the common argument amongst transitional justice scholars "that truth commissions should be fundamentally concerned with understanding the causes and consequences of human rights abuses, and not just whether or not they occurred" (p. 53).

Secondly, notwithstanding its broad capacity to investigate past abuses, the commission had relatively weak subpoena power. It could only issue a fine to those who refused to appear for investigation. It also had a limited ability to gather necessary information from state authorities or enforce their compliance, leaving many questions related to the cases it investigated unanswered (Cho, 2007, p. 603). Pressure from families and civil society pushed the commission to include barring application for the statute of limitations in cases of state violence in its recommendations, but this has yet to be implemented (Cho, 2007, p. 603; Hayner, 2011, p. 55).

The Presidential Commission on Suspicious Deaths was able to, however, unravel the mystery of a number of deaths at the hands of the state that had previously been officially accepted as unsolved or accidents. It also set a precedent as the first official truth

commission in South Korea to pursue truth, justice, and reconciliation for victims of human rights abuses prior to democratization.

### 3.1.2 The Commission on the Confiscation of Properties of Pro-Japanese Collaborators (2005-2010)

In stark contrast to Taiwan, which shares a similar past of colonization by the Japanese, yet where many of those who advocate for transitional justice for the abuses that took place during the KMT authoritarian period tend to minimize those of its former colonial master, a large portion of South Korea's truth-finding process has been dedicated to this portion of its own past. This has included a very emotional and consistent focus on the issue of Korea's "comfort women" (Hanley, Personal Correspondence, February 17, 2017), investigation of forced labor and conscripted Korean soldiers during the Pacific War (Minbyun, Personal Correspondence, February 7, 2017), as well as a desire for retributive justice for those who had been found to have collaborated with the Japanese colonial government in undermining Korea's sovereignty and freedom.

Truth commissions on wrongs committed during the Japanese colonial era stemmed from two bills titled the "Special Act to Redeem Pro-Japanese Collaborators' Property," passed in 2004 by the National Assembly and the "Special Act for the Inspection of Anti-Nationalist Activities during the Period of Japanese Colonial Occupation" in 2006 (Baik, 2012, p. 183). This and other legislation was adopted during the liberal administration of Roh Moo-hyun to not only address the issue of collaborators, but also of forced conscription of Koreans by the Japanese during WWII (Kim, 2016, p. 162). The 2004 act supplied a definition of "anti-nationalist activities" and created a list of those who had taken part in these, publishing their names and details in two public reports. The bill also defined collaborators' property as that "'acquired…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' during 1904 and 1945" (Baik, 2012, p. 184). This established the framework through which the Truth Commission on the Confiscation of Properties of Pro-Japanese Collaborators would conduct its investigation.

The Commission began work in 2005. As per its mandate, it "searched for land and other properties under the names of alleged collaborators and their descendants, and began to seize the assets" (Kim, 2016, p. 165), placing them in state coffers. In its four years of existence, the commission succeeded in confiscating approximately 13 million square meters of land from 168 collaborators (Ibid., p. 165). Some of its most notable cases included the seizure of 254, 906 square meters of land inherited by the family of Lee Wan-yong, a minister from the Joseon kingdom who had been instrumental in selling out Korea to imperial Japan (Kim, August 2007), and property that had been acquired by Song Byeong-jun, another infamous collaborator.

The commissions dealing with the Japanese colonial period were popular amongst the Korean public, due to widespread sentiment against the *Chinilp'a*, the Korean word for the alleged collaborators. Many of these people and their descendants had benefited greatly both during colonial rule and after in large part due to their conduct benefitting the Japanese regime (Kim, 2016, p. 160). The post-WWII government of Rhee Syngman had failed to punish those deemed collaborators; an abortive attempt to establish a committee in charge of investigating "anti-nation activities" in 1948 was undermined by "Rhee and his allies…from the start" as they were "deriving political support from former collaborators" (Wolman, 2013, p. 33). Lastly, public opinion concerning the *Chinilp'a* was largely affected by a series of legal cases in the late 1990s, in which the court ruled in favor of the descendants of former collaborators' in their claims to ancestral land (Baik, 2012, p. 183; Cho, 2007, p. 606; Kim, 2016, p. 165).

According to Kim (2016), the commissions were originally intended to be less about retribution or punishment, and instead to "acknowledge historical injustices and relieve the grievances of victims of state violence" (p. 162). Despite such honorable intentions, both the Committee to Investigate the Truth of Pro-Japanese Anti-National Activities and the Commission on the Confiscation of Properties of Pro-Japanese Collaborators encountered some significant blowback. The law and the redemption of properties were viewed as unconstitutional by conservatives and the descendants of alleged collaborators. Several parties dispossessed of their property brought lawsuits against the commission's activities. This litigation focused on the "legal definition of collaboration and the

government seizure of their inheritance," mostly losing their cases in the courts of a justice system created after Korea's democratization (Kim, 2016, p. 166).

In the largest case, the one that went before the Constitutional Court of Korea, 64 descendants of alleged collaborators filed a joint action suit to protest the laws (Kim, 2016, p. 166). The basis of their argument was that the act on confiscation of properties constituted retroactive legislation, violating the Korean constitution (Baik, 2012, p. 187). They also pointed to the commission's lack of a legal dispute mechanism and presumption of all properties as rewards for pro-Japanese activities, violating their right to due process. Lastly, the plaintiffs argued that being labeled a "pro-Japanese collaborator" was equivalent to a criminal punishment, and that redemption of their property violated their right to own property or to pursue happiness (Baik, 2012; Minbyun, Personal Correspondence, February 7, 2017).

The Constitutional Court ultimately decided against the plaintiffs, although it was a divided ruling. The reasoning behind their decision in this case was that the law did in fact constitute retroactive punishment, but that it did not violate the Constitution because the property could have been seized by the government upon Korean independence (Kim, 2016, p. 166). Secondly, the Court claimed that the confiscation of these properties did restrict the personal integrity rights of the plaintiffs, but that this was justified because it was necessary for public welfare (Baik, 2012, p. 187). Finally, it was observed that act did not violate due process of law, in that the descendants of pro-Japanese collaborators did have "other procedural guarantees, such as the opportunity to submit written objections and the ability to file an administrative law suit" (Baik, 2012, p. 188; Kim, 2016, p. 166).

### 3.1.3 The Truth and Reconciliation Commission of Korea (TRCK) (2005-2010)

In 2005, South Korea's National Assembly passed the Basic Act for Coping with Past History for Truth and Reconciliation. This act set the foundation for a long-term official truth-finding body, similar to the South African Truth and Reconciliation Commission, from which the Korean commission took its name. As with the Commission on the

Confiscation of the Properties of Pro-Japanese Collaborators, the TRCK was established during the Roh Moo-hyun administration of 2002-2007. Roh and other civil society activists saw the need for a broader and more institutionalized form of investigating the past, in order to avoid an endless process of granting courtroom time and reparations packages on a case-by-case basis (Kim, 2012, p. 3). The resultant organization did indeed have a broad mandate, covering three different historical periods: Japanese colonialism, the Korean War, and violations committed during the period of democratization. The time frame covered by the TRCK was from roughly 1904 to 1987 (Ibid., p 4).

The TRCK was composed of fifteen commissioners, of which "eight [were] recommended by the National Assembly, four appointed by the president, and three nominated by the Supreme Court" (Hanley, 2014, p. 157). It was commissioned for a four year term, and according to the report it ultimately produced, its purpose was to promote "national legitimacy and reconcile the past for the sake of national unity by honoring those who participated in anti-Japanese movements and by exposing the truth through investigation of human rights abuses" (TRCK Report, p. 13).

To realize its core goals, the TRCK was entrusted with a number of distinct powers. These were

> request[ing] relevant individuals to submit an affidavit and appear for inquiry, and relevant individuals and authorities to submit pertinent data and materials…conduct[ing] a field investigation in the place where the cause of a case has occurred…[and] issu[ing] an order of accompaniment to a person who refuses to appear more than three times without just cause (Cho, 2007, p. 608).

It also had the power to make recommendations to the government throughout its work and in its report. These recommendations usually involved restorative, victim-centered measures aimed at political reconciliation. They included official apology, memorialization, and reparations (TRCK Report, pp. 31-34).

At the time of its conclusion, the TRCK had investigated "11,175 claims submitted by the public, of which 8,468 claims (75 percent) were verified, 1,725 claims (15 percent) were dismissed, and 510 claims (4.5 percent) were unverified" (Wolman, 2013, p. 47).

The TRCK was definitely a breakthrough in the push for transitional justice in South Korea, but the scope of its investigation was the result of a compromise between the liberals and conservatives in government (Wolman, 2013, p. 46), and it had some severe weaknesses that prevented it from being the kind of truth-finding process Roh Moo-hyun and his supporters had imagined.

One of the biggest issues was the lack of a strong subpoena power. Like the Presidential Commission on Suspicious Deaths, the TRCK was able to request the appearance of relevant individuals, but the "Framework Act lacked provisions authorizing the Commission to force perpetrators to testify or to offer immunity for their testimonies" (Kim, 2012, p. 9). As a result, alleged perpetrators did not come forward, and, unfortunately, neither did as many victims as expected. Professor Kim Dong Choon, who was at one point the standing commissioner of the TRCK, believes this is because they were "unwilling to open old wounds between neighbors caught up in the political and ideological struggle of decades ago" (Ibid., p. 9) In an interview with the author, Daegu-based human rights lawyer and international law professor Paul Hanley offered a more rational theory of why so few victims found the nerve to give their side of the story. He mused that South Korea's extremely strict libel laws and the fact that witnesses weren't sworn in under oath caused people to refrain from testifying for fear of a retributive defamation suit (Personal Correspondence, February 17, 2017).

## 3.2 Taiwan's Official Attempts at Truth-Finding

In contrast to South Korea, "there exists no official Truth Commission or similar institution in Taiwan to formally address the issue of truth-finding" (Hwang, 2016, p. 173). Government-driven truth-finding has in fact been quite minimal up until the current Tsai Ing-wen administration. Instead, two separate research teams were formed to produce "study reports" on the 228 Incident based on the declassification of hundreds of official files. Both of these reports present their findings as "'historical accounts' instead of 'legal facts'" (Ibid., p 173). These research teams were both composed solely of academics, rather than the combination of academics, lawyers, and community leaders that comprised the Truth and Reconciliation Commission of Korea. They produced reports, but had none of the powers of truth commissions like the Presidential

Commission on Suspicious Deaths or the TRCK. Additionally, they only focused on the 228 Incident, and not on the thousands of deaths that occurred after it during the period of martial law known as the White Terror.

It should be noted, though, that a large amount of work focused on transitional justice was put in during the Chen Shui-bian administration between the years 2000-2008, despite the DPP at that time lacking a majority in the Legislative Yuan. A former human rights lawyer, Chen dedicated a large portion of his domestic platform to further democratization and implement more comprehensive transitional justice measures. According to Schafferer (2010), "the aims of [Chen's] government policies were to separate the State from the KMT, to make people aware of the wrongfulness of the atrocities committed during the martial law era, to find ways of reconciliation, and to set preventive measures" (p. 25). These measures including declassifying thousands of government files, commissioning the second report on the 228 Incident based on these newly-released documents, drafting laws on the issue of KMT party assets, rehabilitating victims' reputations with the issuing of certificates of good citizenship, and attempting to rid Taiwan of remnants of the authoritarian period by renaming places dedicated to Chiang Kai-shek and removing status of him (Ibid., p. 26). Still, truth-finding during this period unfortunately remained limited in scope and depth due to the continued domination of the legislature by the KMT throughout Chen's presidency.

However, only a few months after the DPP assumed control of the presidency and a majority in the Legislative Yuan in 2016, a commission on ill-gotten party assets was formed and has been in operation ever since. A draft bill on transitional justice is currently awaiting passage in the legislature, which would "focus on judicial redress, legal remedy and collection of political archives," as well as "deal with the misappropriation or illegal occupation of government properties" (Chiu, April 2017). Tsai also announced in December 2016 the commissioning of a report on the White Terror to be completed within three years, although no research team or organization has yet been announced. Despite having promised to establish a truth and reconciliation commission during her campaign and inauguration speech, no concrete moves have yet been made to do this. Overall, besides very actively pursuing KMT assets, the majority of

promises concerning transitional justice since Tsai assumed presidency have been extraordinarily vague, or have not seen a lot of positive action to ensure their realization.

The three truth-finding efforts that have taken or are taking place in Taiwan are listed in detail below. A fourth section on the KMT's attempt at postwar retributive justice concludes the first half of the chapter.

### 3.2.1 Research Report on the 228 Incident (Ererba shijian yanjiu baogao, 二二八事件研究報告) (1992)

In response to massive pressure from civil society groups to investigate the details of and determine responsibility for the 228 Incident following democratization, then-President of Taiwan Lee Teng-hui formed the 228 Incident Research Subcommittee (Yanjiu ererba shijian xiaozu, 研究二二八事件小組) under the auspices of the Executive Yuan in 1991 (Su, 2013, p. 119). A major task of this group was to mull through the recently declassified documents related to 228 released from the Ministry of National Defense (Shih and Chen, 2010, p. 107). The Examination Yuan also photocopied and stored these archives in the Academia Sinica's Institute of Modern History, in order to provide the subcommittee with documentation for their consultation (Chang, 2009). The research team, headed by Academia Sinica researcher Lai Jeh-hang, and staffed with several other Taiwanese academics, produced the "Study Report on the February 28 Incident" after months of meticulous research. This was a major undertaking for an event whose mention had been taboo for so long.

The report described the 228 Incident as "truly a massive tragedy in modern Taiwanese history," (Lai, 1994, p. 412), estimated the number killed "at between 18,000 and 28,000" (Hwang, 2016, p. 173), and outlined in great detail the factors leading up to the island-wide crackdown. It also did away with the notion that the uprisings that occurred in reaction to the assault of a woman selling contraband cigarettes was a "rebellion" or that those who took part in the backlash were "armed rebels" or a "mob" (Chang, 2009). While the authors do acknowledge the indiscriminate killing of *benshengren* Taiwanese by KMT soldiers sent in to pacify the uprising, as well as the rounding up and summary execution of suspects, it also pointed out the large number of innocent mainlanders who

were scapegoated and targeted for violence. This subethnic conflict between mainlanders and native Taiwanese deepened the divide between Taiwan and mainland China and caused a lasting enmity between the two groups, according to the report (Lai, p. 408).

The Research Report on the 228 Incident was important in that it helped to effectively change the official historiography of a defining event in Taiwanese history, one that had been a taboo subject for the intervening years until democratization. While being very thorough and impartial, however, many at the time criticized it for its failure to more finely apportion accountability for the violent event (Shih and Chen, 2010, p. 108). It instead names Chen Yi, Peng Meng-chi, and Ko Yuan-fen as the party guilty of ordering and carrying out the bloody crackdown (Lai, 1994; Shih and Chen, 2010; Wu, 2005). In regards to Chiang Kai-shek's involvement in how the uprising was handled, the report "avoids giving a clear answer by saying that Chiang was too busy in the civil war with the Chinese communists at that time to closely look into the problem" (Wu, 2005, p. 10). The report also frequently mentions a lack of military discipline amongst KMT troops and the government-general and that Chiang was too trusting of Chen Yi, accepting his request for backup troops without question (Lai, 1994, p. 411).

### 3.2.2 Research Report on Responsibility for the 228 Massacre (Ererba shijian zeren guishu yanjiu baogao, 二二八事件責任歸屬研究報告) (2006)

The election of opposition DPP presidential candidate Chen Shui-bian in 2000 opened the door for a more intensive accounting of martial law-era abuses. However, without a DPP majority in the Legislative Yuan, transitional justice was to be an uphill battle for Chen's administration. One area in which his government saw some success was compiling a second research report on the 228 Incident in 2006.

This new project was commissioned by the Executive Yuan and carried out by the Memorial Foundation of 228 (Caituanfa ererba shijian jinian jijinhui, 財團法人二二八事件紀念基金會), the "investigative organization established by the KMT government" (Shih and Chen, 2010, p. 109) in the early 1990s and also the nonprofit in charge of disseminating compensation payments to victims of the 228 Incident. The research team,

titled the "228 Massacre Truth Research Task Force," was formed in 2003 and consisted of seven academics from a number of Taiwanese institutions, as well as people representing victims of the 228 Incident and their families (Memorial Foundation of 228, 2006). The effort was headed by Chang Yen-hsien, the late former president of the Academia Historica, and also included other well-known historians Hsueh Hua-yuan and Chen Yi-shen, both of whom are active in current Taiwanese transitional justice efforts.

The 2006 report was seen as a breakthrough in that it outlined in great detail those individuals the research team found to bear the most responsibility. In Taiwan, officials of the government-general, namely "administrative leader and commander-in chief of Taiwan Provincial Garrison Command Chen Yi,…chief of Staff of Taiwan Provincial Garrison Command Ke Yuan-Fen and commandant of Kaohsiung fortress Peng Meng-Ci, Military police's fourth regimental commander Chang Mu-Tao, commandant of Keelung fortress Shih Hong-Si" and "commander of 21st military division Liou Yu-Cing" (Memorial Foundation of 228, 2006), were found to bear blame for the violence. The order in which those names were listed indicated descending levels of responsibility.

The report goes further to lay blame on individual perpetrators, including "informers, people who framed others, media workers, and members of public organizations," (Memorial Foundation of 228, 2006, Ch. 4) though none of these people are publically named. It clarifies the complicated situation of the *banshan*, those Taiwanese who had gone to China during the period of Japanese rule, only to return years later as officials in the KMT provincial government. They are, as a group, fingered as shouldering responsibility for not acting as effective mediators in the violence surrounding the 228 Incident, as well as providing "blacklists to the military and intelligent units, and via the hands of the military and intelligent agents, root[ing] out Taiwan's social elites" (Ibid., Ch. 4).

Finally, the report laid the greatest responsibility for the incident on the head of Chiang Kai-shek, with the reasoning "that he not only was oblivious to warning cautioned by the Control Yuan prior to the Massacre, he was also partial to Chen Yi afterward" (Memorial Foundation of 228, 2006, Ch. 2). Furthermore, he sent troops into Taiwan, despite being presented with overwhelming evidence that the situation was set in motion by the

government-general's corruption, dictatorial rule, and general mismanagement. He also did not punish those responsible for the violence.

The Research Report on Responsibility for the 228 Massacre was also significant in that it once again reformed the national narrative on 228. Whereas the 1992 report, due to the continued rule of the KMT and the fear of an infant democracy regressing back to authoritarianism, skirted around the question of Chiang Kai-shek's involvement in 228, the research team commissioned by a DPP-led executive was emboldened to expound more definitively on responsibility for the tragic event. This new narrative is very likely an important factor in the current drive to eliminate positive portrayals of Chiang, including statues bearing his likeness at the Chiang Kai-shek Memorial Hall in Taipei and on school campuses and public spaces around the country.

### 3.2.3 Settling Party Assets under Chen Shui-bian and Tsai Ing-wen

The KMT's assets have been a frequent target of pan-green camp resentment and public criticism since democratization, but became a real cause for concern for the party after the election of Chen Shui-bian in 2000. As mentioned previously, Chen's election signaled a turning point in how issues concerning the KMT's authoritarian past were handled. During his eight-year tenure, Chen made numerous attempts to push forward human rights and moderate transitional justice measures.

Party assets are not limited to monetary or financial resources, but also include wealth scurried out of China after the Nationalist defeat in 1949, property expropriated from the Japanese following the retrocession of Taiwan, as well as the party-owned enterprises (POEs) that have generated billions of dollars in revenue since the KMT's arrival in Taiwan (Li, 2008; Matsumoto, 2002). According to Hwang (2016), "it is estimated that the KMT, a quasi-Leninist political party, has accumulated $2 to $20 billion dollars during its rule in Taiwan" (p. 181). These resources have made the KMT one of the richest political parties in the world, an aspect that opponents maintain is antithetical to true democratic competition.

The Chen Shui-bian administration made the investigation and purge of KMT party assets one of its prime directives, beginning in 2002 with the draft bills of the Political

Parties law (政黨法) and the Statute Regarding Improperly Obtained Party Assets (政黨不當取得財產處理條列). The Political Parties Law was designed to "ban political parties from operating or investing in a profit-making enterprise," while the statute on party assets aimed to "empower the government to investigate and confiscate assets that have been unlawfully obtained by political parties" (Ko, September 2002). However, these two draft bills were stalled 75 times by the pan-blue majority coalition (the KMT and Peoples' First Party) in the legislature "via parliamentary maneuvering in the fifth legislature's Procedures Committee" (Yang, July 2016).

The Control Yuan, led by Huang Huang-hsiang, also released a report on KMT assets that were appropriated from the exiting Japanese colonial government, as well as the content of KMT account transfers, on April 2, 2001. The investigation that led to this report discovered "19 movie theaters transferred from the Taiwan Provincial Chief Executive Administration to the KMT as well as favorable land ownership, land structure and materials" (Lin, 2007, p. 190). The report was important in determining the legal status of the KMT's assets as it "considered [them] not to conform to the 'Principle of the Fundamental Rule of Law' and advised the KMT to return them back to the government" (Ibid., p. 190).

The DPP legislative caucus attempted to petition for a referendum on investigating party assets in 2006, and continued to pursue such a referendum throughout the sixth legislative session until 2008, when the bill finally made it to the review process (Luo, 2012; Shih, August 2006; Yang, July 2016). However, "by then the DPP administration had been voted out of office, and when then-president Ma Ying-jeou's cabinet was sworn in, Ma withdrew the bill from the legislature, effectively freezing party-assets reform for the eight years of his presidency" (Yang, July 2016). Ma, according to Yeh (2017), made several promises to settle the question of the KMT's assets during his term of office, but these promises consisted of placing the assets in a trust rather than returning them to the state's coffers (p. 28).

However, Ma and the KMT experienced a sharp drop in popularity during his second term in office. This led to several large-scale popular protests, a crushing defeat in the 2014 9-in-1 local elections, in which the KMT lost several key municipalities and

counties, and ultimately the election of DPP presidential candidate Tsai Ing-wen and a DPP legislative majority in the 2016 presidential and parliamentary elections. Tsai and the pan-green legislators came into office on May 20, 2016 with a renewed promise of settling the issue of the KMT's assets. By July, the Act Governing the Handling of Ill-Gotten Party Properties by Political Parties and their Affiliate Organizations was passed, and the next month the Ill-Gotten Party Assets Settlement Committee (Budang dangchan chuli weiyuanhui, 不當黨產處理委員會) was inaugurated (EY Press Release, 2016). The committee currently has twelve members and states its mission as being the investigation, recovery, and return of improperly obtained assets by political parties and their affiliate organizations (Ill-gotten Party Assets Settlement Committee, 2016).

So far, the committee has frozen a number of assets and financial accounts, including hundreds of millions of NT dollars in bank account funds and two large holding companies, one of which owns the party's headquarters (Economist, December 2016). It is also currently in the process of investigating two organizations deemed affiliated with the KMT, the China Youth Corps and the National Women's League.

Due to the actions of the committee, the party has had to lay off more than half of its staff because it is now unable to continue paying their salary. This has led party leaders to push back against what they see as a political witch hunt. In November 2016, the KMT petitioned the Taipei High Administrative Court on the legality of the freezing of several of its bank accounts. This was done in response to the KMT cutting 10 checks from these accounts worth a collective NT$520 million, an action which violated the Committee's strictures on attempting to dispose of illegitimate assets (Pan and Hsiao, 2016). The Court ruled in the KMT's favor, however, stating the Committee's action "lacked some of the legal requirements needed to freeze the KMT's bank accounts, and therefore…may have violated provisions in Article 9 of the act" governing ill-gotten assets (Pan and Hsiao, 2016).

In some regards, the persistent pursuit of KMT assets could be viewed as retributive in nature, quite similar to the South Korean Pro-Japanese Collaborators investigations. After all, these efforts have largely been led by the DPP and have targeted a specific political party to investigate, confiscate, and liquidate their assets, as well as punish them if they

don't comply. Meanwhile, the party in question has no discernible recourse of action – no dispute mechanism – under the July 2016 law if it disagrees with the committee's findings, except to file an administrative suit. However, as Yeh (2017) points out, the DPP have painstakingly avoided inciting severe punishment as a justification in their discussion of party assets, neither have they advocated the prosecution or lustration approach adopted by countries like Hungary and Germany. In the end, party assets settlement is more of a mild form of retributive punishment on the transitional justice spectrum (p. 28).

### 3.2.4 Postwar Justice under the KMT

Bearing similarities to the abortive efforts to root out and prosecute those who had collaborated with the Japanese in South Korea, the KMT did pursue some form of retributive justice for the *hanjian*, the derogatory term for those Chinese or Taiwanese who had collaborated with the Japanese imperial government. In local elections set up by the KMT in Taiwan shortly after the war, they declared their intention to vet any candidate who had been involved with the Association of the Royal Subject, "an organization composed of native social and political elites to solicit political support from the native Taiwanese" (Wu, 2005, p. 7) or those deemed traitors, though no one was ever identified in this process.

However, former General Secretary of the Taiwan Association for Truth and Reconciliation Su Ching-hsuan mentioned in an interview with the author that the search for and lustration of so-called *hanjian* lasted for only a few months and focused on those Taiwanese who had joined the Japanese Imperial Army (Su, Personal Correspondence, May 5, 2017). In fact, 173 soldiers were prosecuted as war criminals in Taiwan at the end of the war, of which 26 were executed (Kushner, 2015, p. 8). These soldiers suffered high rates of conviction, due to the fact that many of them had served as guards in POW camps and were remembered by their prisoners during trial (Baron, July 2015).

This was not the sort of justice described by Teitel (2003) in the Transitional Justice Genealogy, which arose from the post-World War II notion of criminal accountability for atrocity, nor was it based solely on emerging notions of international law. Instead, the

KMT method of prosecuting *hanjian* "offered a means to resolve the upturned former imperial hierarchies, deal with grudges, and seek righteousness to atone for committed atrocities" (Kushner, 2015, p. 137).

## 3.3 Criminal Accountability and Punishment

A recurrent question pertaining to the pursuit of transitional justice for past human rights abuses is whether the perpetrators should be criminally prosecuted. And if prosecuted, whether or not they should experience some form of punishment, usually imprisonment, the loss of title and power, or the ability to serve in leadership positions again. Oftentimes this decision is political, hinging on who is in power at the time of democratization. Other times, issues of morality come into play, with new, democratic regimes and civil society debating whether victims have a right to see justice done, and if so, whether this right is conducive with the newly established system of rule of law Also, the question of who should be punished – the top leaders or their subordinates – will inevitably arise. Lastly, how does the justice system determine who was committing the abuses out of malice and who was following orders or coerced into committing them?

Punishing perpetrators of human rights abuses that occurred during the former authoritarian regime was handled very differently in South Korea and Taiwan. In the former, criminal accountability was dealt with most notably in the criminal trials – and convictions – of former authoritarian presidents Chun Doo-hwan and Roh Tae-woo for their involvement in the May 18, 1980 uprising and subsequent crackdown that took place in the city of Gwangju. However, Taiwan has yet to have such a discussion, at least amongst its political elite and the broader society. Up to now, not a single leader or person who was in a position of using or ordering state violence during the authoritarian period has been held criminally liable for their actions. This chapter will explore both South Korea and Taiwan's approach to this sensitive area of transitional justice, looking at how the situation in each country developed.

### 3.3.1 South Korea – Criminal Trials, Subsequent Amnesty

Kim Young-sam, the first civilian leader in South Korea since Rhee Syngman, was a moderate, compromise choice in the 1992 presidential election. His election was the

outcome of a surprise merging of the Democratic Justice Party of Roh Tae-woo and his own opposition Democratic Reunification Party, a political calculation performed to defeat his opposition rival, Kim Dae-jung. Because of this move, "most civil society groups remained profoundly suspicious about what he could and would do to break with the authoritarian past and to further the democratic consolidation of South Korea" (Kim, 1997, p. 1140). Contrary to their suspicions, however, the Kim Young-sam government embarked on a number of liberalizing reforms, including changing the patronage-based banking system, demilitarizing South Korean politics and society, and meeting with both moderate and radical civil society groups to engage in dialogue.

At first, Kim refused to take any kind of action in regard to rectifying the wrongs of the past, including the horrific Gwangju events that were still fresh in many Koreans' minds, and instead argued "that the truth should be reserved for historical judgement in the future" (Kim Young-sam, as quoted by Cho, 2007, p. 581). This is not surprising, considering his party and part of his support base consisted of politicians with military backgrounds. Despite strong public pressure to investigate and punish the architects of the coup and perpetrators of the Gwangju 5.18 Incident, Kim stalled, and the judicial branch followed suit.

Between July 1993 and October 1994, the Seoul Prosecutor's Office conducted an investigation at the behest of a number of military officers who had been arrested by Chun in the course of the December 1979 coup d'état (West, 1997, p. 104). It found the military takeover carried out by Chun Doo-hwan and other military leaders constituted "military insurrection," but it did not pursue charges against them. Further investigation took place nearly a year later, after which the Office decided Chun's December 12th coup and the crackdown in Gwangju were "'unindictable offences' for which the state had 'no authority to prosecute'" (Waters, 1996, p. 465). According to Cho (2007), the Seoul Prosecutor's Office was "concerned that prosecuting the military leaders might cause political, social, and legal confusion because, legally speaking the democratic-civilian government was a legal successor to the previous Chun and Roh governments" (p. 582).

Meanwhile, a petition requesting constitutional review was submitted in 1995 to the Constitutional Court, filed by some 300 citizens (Waters, 1996, p. 465; West, 1997, p.

105). The Court handed down a decision deeming the prosecution of the two former presidents to be constitutional because the statute of limitations "automatically ceases during the incumbencies of the former presidents according to Article 84 of the Constitution," which stipulates that sitting presidents can't be charged with any crime except for mutiny or treason (Cho, 2007, p. 582). Chun and Roh could no longer be charged with treason for the 1979 coup, but the statute of limitations could apply from the end of their five-year terms, allowing for prosecution of other offences (West, 1997, p. 105). The Court's ruling also condemned the Prosecutor's Office's refusal to indict Chun and Roh, stating that "a successful coup is also subject to the law" (Waters, 1996, p. 466).

While Korean society waited for the Constitutional Court's ruling, revelations of large-scale corruption surfaced. It was first revealed that Roh Tae-woo had amassed a slush fund of about US$650 million during his presidency, and later that Chun Doo-hwan had "coerced US$900 million from Korea's *chaebols*" (Waters, 1997, p. 461). This information was extremely damning, not only for those directly involved, but even for Kim Young-sam's newly formed Democratic Liberal Party, as it still had ties to the previous government. Some opposition politicians, including Kim Dae-jung, alleged that Kim Young-sam had benefited from Roh's slush fund during his 1992 campaign. In reaction to this, the Kim government arrested Roh on charges of corruption in November 1995, stating later that Roh, Chun Doo-hwan, and other instigators of the 1979 coup and 1980 Gwangju crackdown would be punished with "special legislation" which would "demonstrate to the people that justice, truth and law live on this land" (West, 1997, p. 113). Chun was also arrested and interrogated in December about the events of May 1980 and charged with mutiny and treason, although not before dramatically refusing to cooperate with the Seoul District Prosecutor's Office (Ibid., p 115).

The combination of the Roh Tae-woo scandal and immense public pressure, including petitions, student protests, and civil suits pushed the National Assembly to, in a rare example of bipartisan cooperation, pass the Special Act Concerning the May 18 Democratization Movement (also called the Special Act) in December 1995 (Cho, 2007, p. 583; Han, 2005, p. 1007; Waters, 1996, p. 461). The Special Act was intended to "suspend the statute of limitations for the crimes against the constitutional order which

had been committed on and around December 12, 1979 and May 18, 1980" (Cho, 2007, p. 583). The statute also granted a retrial to those who had been prosecuted for their involvement in the Gwangju Uprising or for opposing the authoritarian state.

The trial of the Roh Tae-woo began the same month that the Special Act was passed, but only on charges of corruption. Nine of Korea's most prominent business leaders were also put on trial for allegedly providing funds to Roh in the form of bribes, the main sources of his slush fund (WuDunn, December 1995). Chun, who had gone on hunger strike while being held in a Seoul detention cell, was additionally indicted for bribery in January 1996. Both had destroyed the account ledgers that would have divulged who had provided how much money and what that money was for (Roehrig, 2001, p. 176).

As the judicial process pressed on, a second set of charges was added to the docket on December 21, 1995, this time for mutiny in relation to the December 12 coup d'état. Chun had imprisoned several high level military officials in order to seize power from the sitting president at that time, Choi Kyu-ha, who had "quickly acquiesced in the seizure of the military command structure by Chun." (Roehrig, 2001; West, 1997). Roh, "whose dispatchment of a regiment of troops helped provide the muscle for Chun's coup" was "rewarded a week later by being elevated to head of the Seoul Garrison Command" (Waters, 1996, p. 463).

Finally, in January 1996, the last set of indictments were handed down on the matter of treason and the Gwangju crackdown. It was argued by the prosecution that Chun, who had not yet coerced himself into the position of president, and Roh, had "mobilized troops without presidential approval, encircled the Capitol Building and forced the cabinet to extend martial law nationwide" (Roehrig, 2001, p. 178). In Gwangju, where the uprising in reaction to the coup d'état was gaining traction, Chun had ordered troops into the city and to use live ammunition against the protesters.

The trial was a national spectacle and was massive in scale and scope, with court legal documents exceeding 150,000 pages (Han, 2005, p. 1008), but it also represented the first significant break from the authoritarian past, giving Koreans a sense of justice being served. Not surprisingly, the two former presidents were found guilty on all charges of "mutiny, treason, and corruption in office" (Robinson, 2007, p. 172), while thirteen

officers involved in the coup and the Gwangju crackdown were also convicted. Chun was sentenced to death and fined US$283 million, while Roh was given 22½ years imprisonment and a fine of US$355 million. The other involved officers were sentenced to between four and ten years (Roehrig, 2001, p. 179). Chun's sentence was then commuted to life imprisonment, and Roh's to seventeen years. All were subsequently pardoned by the outgoing president Kim Young-sam in December 1997, the result of an agreement he reached with Kim Dae-jung.

The suspension of the statute of limitations was extraordinary, and it took a considerable amount of legal manipulation to defend it as being compatible with rule of law in a newly-democratized country. The Special Act "stipulated that the limitation period ceased to run during the period of the presidencies of Chun and Roh" (Cho, 2007, p. 583) with the rationale being that it would have been extremely difficult to level any charges against either president during their dictatorial rule. Some legal scholars have questioned the constitutionality of the Special Act, as it constitutes ex post facto legislation, possibly violates the principle of equality before the law, and treats specific acts as crimes, which goes against the notion of presumption of innocence (Waters, 1996, p. 482). If Korea was to disassociate itself from a past in which authoritarian regimes justified their excesses by bending the law to their whims, the new democratic government would need to consider how it pursued processes of transitional justice in the future.

Also, in an ironic twist, Chun had the audacity to claim that his due process rights were violated in the course of the trial (Minbyun, Personal Correspondence, February 7, 2017; West, 1997, p. 102), though his claim may have some validity, as the latter part of the trial was rushed to ensure that he and Roh would not be freed. Waters (1996) believes that these issues could have been avoided "by simply charging the two in accordance with the Constitutional Courts mandate to the Prosecutor's Office, and not at the whim of President Kim" (p. 483).

### 3.3.2 Taiwan – A Total Lack of Accountability?

As mentioned earlier, Taiwan has yet to have a full accounting of the truth of its authoritarian past through the application of a truth commission mechanism, let alone a

process of apportioning criminal responsibility for violations of human rights that occurred during the nearly forty years of KMT party-state rule. To this day, there have been no criminal trials for leaders involved in political repression or state violence. Because of the KMT's continuous withholding of archives related to the White Terror and the penetrative nature of the security apparatus led by Chiang Ching-kuo throughout the period of martial law, it's extremely hard to determine, even at this point, where one would even begin assigning responsibility.

The closest Taiwan has come to determining accountability is naming a few major actors responsible for the indiscriminate violence that resulted in the deaths of tens of thousands during the 228 Incident in the two reports detailed in the first part of this chapter. However, as Hwang (2016) points out, none of these officials were alive by the time the reports were written, nor were they brought to justice before they died (p. 176). Chiang Kai-shek, who was allotted the highest responsibility for 228 in the 2006 report, is still held in high repute by many in the KMT, with any attempt to remove memorialization of him strongly condemned by this group. Hwang also notes that "some victims brought damage claims and criminal charges against several still-living high-ranking officials believed to be key perpetrators" but that "none has so far been successful" (Ibid., p. 176). Many of those considered wrongdoers are immune from prosecution due to the statute of limitations (Ibid., p. 176).

Not only does Taiwan currently have little means of determining individual liability, its victims also have no legal path to restoring their reputations, which were gravely damaged by being convicted of crimes against the state in martial law era military courts. This absence of legal recourse finds its origin to Article 9 of the National Security Act, legislation passed on July 15, 1987, that stated:

> After martial law was lifted, the non-active military personnel trialed by the military judicial authorities during the period of martial law and within the region of martial law shall be processed by the following:
> 1. Pending cases of military justice shall be transferred to civilian prosecutors concerned for investigation or to civilian courts concerned for trial.
> 2. Decided criminal cases shall not be subject to appeal or resistant

announcement, while the case with legitimate grounds to retrial or extraordinary appeal shall be subject to retrial and extraordinary appeal according to the applicable laws.

3. Cases under or pending execution shall be transferred to civilian prosecutors concerned (Ministry of Justice).

To make matters worse, Article 9 "was later declared constitutional by Taiwan's Grand Justices in its JY Interpretation No. 272 on January 18, 1991" (Hwang, 2016, p. 171). The court's reasoning was vague; it stated that

> …the reasons why the final court decisions with respect to criminal cases adjudicated in the military tribunals may not be appealed to the competent court, are due to the long-term enforcement of the Martial Law, the difficulty in gathering and investigating evidence after such a long period of time has elapsed and circumstances have changed, and the need for maintaining the stability of judgments and social order (Interpretation No. 272, 1991).

Victims of imprisonment for political offenses during martial law from that point forward have not had any legal means of restoring their reputations, but starting with former president Chen Shui-bian, the government began awarding certificates of good citizenship to those unable to appeal their convictions.

Taiwan's circumstances in this regard stand in stark contrast to South Korea, where the Special Act of 1995 specifically granted "a right to have a special retrial…to people who had been punished because of their engagement in the May 18 Uprising or because of their opposition to crimes against the constitutional order" (Cho, 2007, p. 583). This is unfortunate, given Taiwan's major strides in improving its record on human rights over the past two decades since democratization. The majority of Taiwanese society's acknowledgement of the unjustifiable nature of the actions taken by the authoritarian government during martial law further adds to the necessity of repealing this part of the National Security Act.

# Chapter 4 – What Lies Behind the Different Approaches

The previous chapter focused on the major differences between the approaches to transitional justice taken by the governments of Taiwan and South Korea, specifically in the areas of truth-finding and criminal accountability for perpetrators of human rights abuses under each country's respective *ancien regime*. This chapter will now discuss the major factors that have contributed to this disparity, drawn from the author's analysis of the literature and interviews with experts. It will also look at what is missing from South Korea's approach that has caused so many to argue that transitional justice has yet to be finished.

## 4.1 Key Contributing Factors

This thesis has so far demonstrated that, while South Korea has embarked on a comprehensive process of transitional justice, including multiple truth commissions, criminal trials for former presidents Chun Doo-hwan and Roh Tae-woo, and reparations schemes for victims of state violence, Taiwan has had a much more piecemeal, minimalist approach. In Taiwan, victims and their families have been provided compensation for their loss and suffering, while the perpetrators of human rights abuses have been protected from even having their names publicized, what Wu (2005) calls "a case of ten thousand victims but not a single perpetrator" (p. 2).

In researching this subject, the author has determined five separate, yet somewhat interrelated factors that have had a significant impact on the different approaches Taiwan and South Korea took in accounting for their authoritarian pasts. Firstly, the KMT stayed in power long after Taiwan's democratization due to its position of strength relative to that of Roh Tae-woo's Democratic Justice Party in South Korea. This allowed it to, even with a native Taiwanese president and pressure from civil society, control the progress and scope of official transitional justice. Secondly, South Korea post-transition voted in three consecutive politically liberal presidential administrations, each one more progressive than the last. Each of these presidents, Kim Young-sam, Kim Dae-jung, and Roh Moo-hyun, embarked on some form of transitional justice, with Roh likely making the greatest inroads (Minbyun, Personal Correspondence, February 7, 2017). Thirdly, the

political and social cleavage structure in South Korea has historically been regional, and support for democracy or transitional justice was not always evenly divided along these lines. Taiwan, on the other hand, has largely been divided on the issue of national identity, a cleavage that manifests itself in markedly different collective memory and historical narratives between the competing groups there. Fourthly, on an institutional level, the constitutional court of either country has its distinct beginning and development. The Constitutional Court of Korea as it exists today was established in 1988 with the adoption of a new constitution. The Council of Grand Justices in Taiwan, on the other hand, did not experience any reform until five years after martial law was lifted. This had a demonstrable effect on its review of issues related to transitional justice during that period.

Lastly, the time elapsed between events of severe state violence against the population and the beginning of democratization in Taiwan and South Korea varied between the two based on the type of internal security apparatus that was in place during authoritarianism. Whereas events like the 228 Incident and the height of the White Terror were well in the past for many Taiwanese, the horrors of the Gwangju 5.18 Incident were still fresh in the minds of South Koreans, young and old. This may have lent more popular support to transitional justice reforms in South Korea's post-transition era.

### 4.1.1 The KMT's Continued Grip on Power

Taiwan is a unique example of the third wave of democratization, in that it experienced a political transition to democracy without a simultaneous change in regime. South Korea, on the other hand, established its democratic system of governance with the voting out of the Democratic Justice Party in 1992, although a new constitution for the Sixth Republic was written in 1988 and political liberalization had been taking place since then. This has had a major bearing on the type and scale of transitional justice measures that have been carried out in either country.

Why was the KMT able to continue to hold its grasp on governing power, despite being the same organization that upheld the authoritarian party-state apparatus for almost four decades, inflicted tremendous wounds on the population through selective, yet

widespread, state violence, and created a climate of fear and repression amongst ordinary Taiwanese? As Slater & Wong (2013) find, "the KMT conceded democracy from a position of extraordinary strength, not weakness" and that "this reflected the party's deep reserves of antecedent strengths accumulated during the postwar period" (p. 723). It lacked no confidence in itself and believed that by allowing liberalization and free elections, it would not lose its position of power, and it was correct in this assumption. The KMT had two major sources of antecedent strength: 1) its use of local elective institutions and 2) the Taiwan "economic miracle" experienced during the latter part of authoritarian rule.

The KMT introduced local elections from early on in their control of the island, using a single-vote, multi-member district framework they had inherited from the Japanese (Roy, 2003, p. 37). This was intended to create a sense of legitimacy for the ruling party; elections "created a feedback loop through which the KMT heard peoples' concerns and meant the KMT could scout and recruit new talent from the grassroots into the party's rank-and-file" (Slater & Wong, 2015, p. 723). It was an effective way of incorporating local elites into the party's clientalist politics.[8]

Furthermore, the party's recruitment of local Taiwanese into its central leadership, a tactic whose use increased rapidly during the rule of Chiang Ching-kuo, created a much wider support base for the KMT once Taiwan democratized. This is reflected in the two competing factions of the diminishing mainlander elite and the native islanders who joined the KMT in the decade leading up to transition, a divide that still exists in some form today. The generation that came of age during the martial law period, both mainlander and native Taiwanese, and particularly civil servants or those who worked in the public sector, are much less likely to be persuaded that investigating KMT human rights abuses is a necessary or good thing (Su Ching-hsuan, Personal Correspondence, May 5, 2017).

[8] Clientelism is the trading of goods, services, or privileges in exchange for political support. The KMT engaged in a variety of clientelist practices during authoritarian rule, including offering local factional elites significant economic privileges, which they in turn offered for the clients below them. This kind of relationship also took place in the military and with influential families and large, mainlander-owned enterprises throughout the martial law period. It was a primary means of maintaining the ruling legitimacy of the KMT (Wang, 1994).

Taiwan's robust economic performance during the 1960s and 1970s has historically been attributed to savvy policy instituted by the KMT leadership, namely the evolution of a well-run developmental state, following the flying geese model[9] of moving from import substitution to export-led growth, and instituting large-scale land reform (Roy, 2003, pp.96-99). In reality, KMT policy that was enacted to maintain political and social control, coupled with a very large amount of aid from the U.S. during the 1950s, as well as the hard work and flexibility of local small- and medium-sized enterprises, comprised the core foundation for the "economic miracle" that took place in Taiwan.

South Korea at the time of democratization was a country that had for decades been rocked by "military coups and political turmoil," had developed a "multi-party system but little true democracy," and "its political parties lacked the KMT's institutionalization; when a party leader was deposed or assassinated, his party disintegrated" (Clough, 1996, p. 1065). It maintained two similar facets of strength upon transition: elections and economic success experienced during the Park Chung-hee era.

Park, after gaining initial power in the May 16 Coup, the 1961 military coup d'état that ended South Korea's Second Republic, was elected as president of the Third Republic in 1963. This denotes a key difference in the authoritarian-era elections of Taiwan and South Korea. As Jacobs (2007) notes, "Taiwan had many local elections, but only very limited central elections, and in Korea local elections were abolished in 1961 while the regime continued controlled central elections" (p. 245). Like those in Taiwan, though, South Korea's "elections generated important feedback from society giving the party recurrent opportunities to gauge its popular appeal" (Slater & Wong, 2013, p. 725).

The era of Park Chung-hee, like that of post-KMT reform in Taiwan, saw rapid economic growth that also ensured a high amount of income equality, facilitated by the utilization of an effective developmental state, but also spurred on by a large, well-educated, and disciplined labor force, a massive amount of post-World War II aid from the U.S., and compensation for South Korea's participation in the Vietnam War (Paul Hanley, Personal

[9] The theory of post-World War II East Asian development that places Japan as the leading power and views the production of commoditized goods as moving from more economically advanced countries to less advanced ones.

Correspondence, February 17, 2017; Robinson, 2007, p. 134). This is the major reason why, even now, many of the older generation in South Korea look back on the Park regime fondly, and is partly why his daughter, now-deposed Park Geun-hye, was elected president in 2012.

Still, when democratization took place in South Korea, it had already been a long, hard, and violent battle by democracy activists, and the Democratic Justice Party of Chun Doo-hwan was hugely unpopular. One of the main reasons Roh Tae-woo was able to clench the presidency in the 1987 election was his decision to paint himself as a reformer, with a June 29 eight-point speech that made a number of concessions to the opposition, including direct presidential elections and the freeing of political prisoners (Jacobs, 2007, p. 241). The other reason is that the two opposition candidates, Kim Young-sam and Kim Dae-jung, split the opposition vote, allowing Roh a miniscule victory (Slater & Wong, p. 726). Roh's presidency in some ways resembled the twilight years of the KMT party-state: a sort of liberalized, or soft, authoritarianism.[10] However, his party did not have a legislative majority, "holding only 125 of 299 parliamentary seats" (West & Yoon, 1992, p. 74). Slater and Wong (2013) thus argue that by the beginning of Roh's presidency, the "DJP was deeper into its bittersweet spot than Taiwan's KMT was during the same period" (p. 725).

Wu (2005) observes that "when democratic reform is launched from above by, or negotiated with, an authoritarian ruler, the latter is likely to wield greater power, even to stay in power, as in the case of Taiwan" and that "in such cases, both the prosecution of crimes and historical justice are unlikely to occur" (p. 6). However, even though South Korea experienced a relatively peaceful, negotiated transition, its authoritarian regime's comparatively weak position caused it to lose power very quickly after democratization.

### 4.1.2 South Korea's Liberal Presidents

Another point relevant to the pursuit of comprehensive transitional justice in South Korea during the period of 1992 until 2007 was the consecutive election of three separate

[10] A type of governing system in which some facets of democracy exist, such as elections and political parties, but politics and economic growth are dominated or tightly controlled by a ruling entity, and where many political and civil freedoms are still circumscribed.

presidents from the liberal camp, two of whom had been part of the democratic opposition during the military dictatorships of Park Chung-hee and Chun Doo-hwan. This, at times coupled with a liberal majority in the National Assembly, as well as support from civil society, had a notable effect on what measures the government was able or willing to take in regards to accounting for the authoritarian past.

In addition to pursuing the criminal convictions of Chun Doo-hwan and Roh Tae-woo discussed in Chapter 3, the Kim Young-sam government also revised the Gwangju Compensation Act for democracy movement victims of the Gwangju Massacre of 1980. They did this in 1993, expanding the scope of compensation to those who had been arrested during the incident, and also in 1997, during which another revision "newly covered nine deaths, seventeen disappearances, and 210 injuries" (Han, 2005, p. 1033; Wolman, 2013, p. 1032-1033). The 1997 update also widened the net to anyone "who had been suspected of involvement in any form outside the Kwangju area" (Han, 2005, p. 1003). As noted in Chapter 3, the Special Act of 1995 also changed the wording of payments from compensation, a term that possible avoids the issue of state accountability, to reparation, which connotes the state's need to repair damage it caused.

Kim also established the first post-democratization truth commission. This commission was an investigation into the 1951 Geochang massacre, "where the Korean army slaughtered several hundred unarmed civilians in South Gyeongsang Province" (Wolman, 2013, p. 36). According to Kim (2013), this commission "acknowledged the responsibility of the military and identified 548 victims and 785 family members" (p. 32). However, the extent of the commission proved unsatisfactory to the public, as it recommended no reparations payments and "no further actions were taken beyond this investigation except a few subsequent commemoration projects" (Ibid., p. 32).

Succeeding Kim Young-sam, was Kim Dae-jung, another opposition activist who had been jailed during the Park Chung-hee regime. Following on the heels of the 1997 Asian Financial Crisis, which hit the South Korean economy particularly hard and forced it to accept an IMF bailout, Kim ran as a member of the newly-formed National Coalition for New Politics party, with running mate Kim Jong Pil (Robinson, 2007, p. 174). He won a

narrow victory – 39.7% in a three-way race – due to public scandals that plagued all the candidates.

In addition to reforming the *chaebols*, the massive private conglomerates that had for decades enjoyed a close relationship with government and thus maintained a large amount of political influence, and pursuing rapprochement with North Korea through his Sunshine Policy, Kim focused much more attention on a moderate, restorative form of transitional justice. Mosler (2015) puts forth that "only with the Kim Dae-jung administration did a serious institutionalization of settling with the past begin to take off by installing a row of truth commissions" (p. 34).

During his tenure of office, the Kim Dae-jung government, with the help of the National Assembly, passed laws that established the Commission for Restoring Honor and Compensation for Victims of Democratization Movements, the Presidential Commission on Suspicious Deaths, and the Commission for Truth-Seeking and Honor Restoration for Victims of the Jeju April 3rd Events. The latter was a multi-faceted investigative body created at the behest of Jeju-based civil society organizations to dig into the "series of leftist uprisings and brutal counterinsurgency actions undertaken between 1948 and 1954 on [J]eju Island, which caused an estimated fifteen to thirty thousand deaths" (Wolman, 2013, p. 38).

Kim Dae-jung's successor, Roh Moo-hyun, was a human rights lawyer who had participated and been briefly jailed during the Chun Doo-hwan military dictatorship. Mosler (2015) posits that "under President Roh Moo-hyun, dealing with the past became fully entrenched as an institution as a result of the enactment of the Act of Truth and Reconciliation Commission in 2005" (p. 34). His administration saw the establishment of several new truth commissions, including the aforementioned TRCK, and the continuation of several others. Besides the content of the TRCK, Wolman (2013) observes that two other areas of Korea's 20th century past were investigated: issues involving the Japanese colonial regime and collaborators, and "issue-specific commissions that dealt with human rights violations from the post-1945 era of authoritarianism" (p. 38).

In Taiwan during the same period, a much different story played out. In 1987, the death of the dictator Chiang Ching-kuo signaled the end of the KMT's "soft authoritarianism" and ushered in a new era of political change. Chiang's vice president, Lee Teng-hui, took over as the first native Taiwanese, or *benshengren*, president in 1988. Straddling the line between moderates and hardliners in his own party, Lee made very minimal and gradual concessions to civil society groups calling for an examination of the February 28 Incident and the White Terror. The largest achievement of the Lee administration was setting up a system of compensation, later called reparations, for victims of 228 and the White Terror, but as one of the author's interviewees expressed, "you can't say reparations are the core of transitional justice. They do not indicate completion" (Su Ching-hsuan, Personal Correspondence, May 5, 2017).

The first DPP presidency of Chen Shui-bian saw little further concrete progress, although this was not for a lack of trying. During his eight year tenure, the Chen administration made attempts to open official KMT archives, drafted laws for and holding a referendum on the settling of KMT assets, removal of Chiang Kai-shek statues and changing the name of the Chiang Kai-shek Memorial Hall to Liberty Square, and restoring victim's honor through government-issued certificates. Every step of the way, however, he encountered resistance from the KMT-dominated Legislative Yuan. Corruption scandals and a strong focus on divisive identity politics led a majority of Taiwanese voters to elect KMT chairman and former Taipei City mayor Ma Ying-jeou in 2008. Similar to moves by conservative president Lee Myung-bak in Korea, Ma reversed a lot of the progress Chen had made to rid Taiwan of what he saw as remnants of the authoritarian-era government. The lack of concrete mechanisms to settle the past has led to a majority of Taiwanese polled to respond that they do not believe that transitional justice has been completed (Taiwan chengwei zhenzheng minzhu guojia, March 2016).

Attorney Chang Wan Ick, a former colleague of Roh Moo-hyun, argued that the central factor in a country becoming more democratic lies in the "characteristics of its leader," whether or not that leader expresses "democratic ideals or approaches," and that this is no different in the case of administering historical justice (Minbyun, Personal Correspondence, February 7, 2017). The three consecutive left-leaning presidencies of

Kim Young-sam, Kim Dae-jung, and Roh Moo-hyun, bolstered by having, at times, legislative majorities in the National Assembly, allowed South Korea to make significant headway in resolving issues of human rights violations committed during its 20th century colonial and authoritarian regimes and promoting some sort of political reconciliation. On the other hand, moderate Lee Teng-hui, a self-proclaimed disciple of non-democratic ruler Chiang Ching-kuo, made some significant contributions to Taiwan's democracy, but very little in the way of transitional justice. His successor, Chen Shui-bian, though at the outset being much more dedicated to pursuing justice for past human rights abuses and improving Taiwan's record on human rights, was consistently thwarted by a KMT majority in the Legislative Yuan. Efforts at addressing issues of historical justice in Taiwan's democratization period have thus manifested as somewhat piecemeal attempts to come to terms with some, but not all, past abuses.

### 4.1.3 Disparate Cleavage Structures

One of the most salient differences between Taiwan and South Korea in general is the relative ethnic homogeneity of Korean society in relation to the existence of several ethnic and sub-ethnic groups in Taiwan, as well as competing notions of national identity. This is not to say that no similar societal split exists in Korea. In fact, there is a historical regional cleavage between southeastern Youngnam and southwestern Honam, which reached its height in the years following the end of World War II. Robinson (2007) observes that, starting with Park Chung-hee, the authoritarian governments aimed economic development projects at the Youngnam provinces, where their leaders originated, while those of Honam were not only passed over in terms of economic development, but people from that region were also "systematically excluded from government leadership positions" (p. 169). The Gwangju 5.18 Incident deepened the sense of exclusion and resentment amongst those from Honam, including Kim Dae-jung, as it allowed the government to smear them as communist sympathizers (Ibid., p. 169).

This rift carried over into the democratic period. According to Kim, Choi, & Cho (2006), "electoral competition since the democratic opening was used as an expression of regional frustration and/or animosities," and Koreans consistently voted along regional lines (p. 1). However, starting in the mid-2000s, the existing cleavage began to dissipate.

A notable indicator of this change was the election of Roh Moo-hyun of New Millennium Democratic Party. Kim, Choi, & Cho note that "the NMDP was a regional party representing the Honam region, but Roh himself came from the rival Youngnam region" (p. 2). The split has now all but shifted from regional rivalries to a gap in generational issues, with older Koreans preferring conservative parties and candidates, while the younger generations tend to be more progressive. In any case, the regional identity cleavage has not defined politics or collective memory pertaining to the authoritarian past for at least a decade.

Taiwan, on the other hand, has found its population polarized on the issue of national identity, meaning between those who align themselves more closely with the idea of being a part of Greater China, and those who identify more with Taiwan as a unique nation-state separate from China. These competing national identities bear at least some relation to Taiwan's ethnic and subethnic makeup. The most well-known of the various groups in Taiwan and the two that have the most bearing on the national identity issue are the *benshengren,* those islanders who immigrated to Taiwan from China between the 17th and 19th centuries and spoke the Fujian or Hakka dialects, and *waishengren,* also called "mainlanders," those who arrived in Taiwan in 1949 in collective retreat with the KMT from the Chinese Civil War. The contentious relationship between these two groups has its origins in the history of Taiwan's governing systems, exclusionary practices of the mainlander-dominated KMT, and the horrific violence and aftermath of the 228 Incident (Shih and Chen, 2010; Yeh, 2017).

During Japanese rule, Taiwanese Hoklo, Hakka, and aboriginals were given official designations by the government that separated them from the colonial settler Japanese. This gave them a distinct sense of collective identity, and helped pave the way for later nationalist movements (Shih and Chen, 2010, p. 90). They were also made citizens of the Japanese Imperial government, with some serving in low-level official positions or volunteering as soldiers in the military. The Taiwanese did still resist Japanese colonialism, quite fiercely, and suffered greatly because of it. Jacobs (2007) cites three estimates, writing that "close to 8,000 Taiwanese died resisting the Japanese in 1895" and that "the Japanese killed 12,000 'bandit-rebels' during 1898-1902, while a Japanese

source states that the Japanese colonial regime executed over 32,000 'bandits,' more than one percent of Taiwan's population, in the same period." (p. 231).

Taiwan's retrocession injected a renewed sense of nationalism in the war-torn island's residents, and there was enthusiasm in becoming part of a Chinese constitutional republic after fifty years of repressive rule by the Japanese. However, the vehemently hostile attitude of many KMT officials and military leaders towards vestiges of the Japanese colonial state alienated the Japanized native population and government mismanagement and corruption incited anger and resistance (Shih and Chen, 2010, p. 91). To many of the *benshengren*, the KMT came to be seen as the "second colonizer," and this gave rise to the belief that "compared to the Japanese colonial rule by law and order, the KMT colonial style and authoritarian rule seemed even worse and unacceptable" (Hsu Ching-fang, quoted in Denney, August 2015). Taiwanese associated Japanese rule with violence and repression, but also with modernization, the taming of disease, and the building of vital infrastructure. Taiwanese nationalist historical narratives tend to compare this with the chaotic and despotic governing style of the KMT, and this comparison further ingrained a unique sense of ethnic and national identity. Tensions between the *benshengren* and the newly arrived *waishengren* culminated in the 228 Incident, which marred the relationship between them for decades and has at times divided politics along contentious ethnic and sub-ethnic lines.

This divide has a large impact on how either group views who is responsible for what occurred following the KMT's arrival in Taiwan as well. Although a number of prominent mainlander intellectuals and politicians have acknowledged Chiang Kai-shek and the KMT's culpability in the 228 Incident and subsequent White Terror, "Chinese mainlanders tend to identify strongly with the KMT and its historical legacy" (Wu, 2005, p. 5), meaning there may be an acknowledgement of violence or injustice committed, but it is generally justified with the argument that many bad elements desired to destroy the regime or cause chaos on the island. This split in collective memory and historiography is all the more curious due to the fact that, at the height of the White Terror, a very large number of mainlanders were targeted by the Chiang regime. This is because the party was desperate to root out communist infiltrators and spies, most of which they suspected

would have come with the KMT from China in 1949 (Huang, Personal Correspondence, May 23, 2017). Nevertheless, Wu (2005) posits that because such a split exists, "a reassessment of the [KMT's] performance on moral grounds is likely to worsen ethnic tensions" (p. 5). In other words, transitional justice, if handled improperly, could have severe negative consequences in regard to the prospect of ethnic reconciliation in Taiwan.

Of course, this explanation does not fully account for who does and doesn't support transitional justice in Taiwan. Despite the tendency of those who identify as sub-ethnically *benshengren* Taiwanese to also take the view opposite that of the pan-blue camp, that Taiwan is an entity separate from China and that the KMT committed wrongs in the past for which its leaders need to be held accountable, identity is complicated and beliefs are not evenly divided along ethnic lines. Not all *benshengren* Taiwanese are invested in the idea of transitional justice, and some may even outright oppose it. This has a lot to do with the KMT's political education and permeation of almost all facets of society during party-state rule.

During the martial law period, the KMT controlled political ideology through a combination of clientelism, educational indoctrination, and social penetration in the form of professional and other organizations (Wachman, 1994, p. 247-248). As mentioned in section 4.1.1, the KMT also recruited native Taiwanese into its party ranks, in increasing numbers after Chiang Ching-kuo came to power, with the effect being that many of these non-mainlander members have also maintained a significant connection to the party and are willing to defend it against criticism of its authoritarian roots. These factors add a separate layer to the already complicated issue of identity politics in Taiwan and play just as big a part in how different Taiwanese view transitional justice as does ethnic or subethnic identity.

Nevertheless, as in the case of South Korea, Taiwan's cleavage structure is evolving, albeit slowly, towards that of generation and party affiliation. The Taiwanese label has taken on a more civic connotation, with citizens of all backgrounds claiming a Taiwanese identity and an increasingly small number who identify solely as Chinese. There is uncertainty over whether this shift will have a strong effect on the pursuit of transitional justice in Taiwan, however, as the majority of the younger generation who weren't

directly impacted by authoritarian rule are increasingly more concerned with post-materialist, forward-looking issues.

### 4.1.4 The Constitutional Courts

To be sure, Roh Moo-hyun, like Chen Shui-bian in Taiwan, faced considerable political opposition from a conservative Grand National Party legislative majority in the National Assembly, as well as a rift in the Millennium Democratic Party between the older liberals of former president Kim Dae-jung's era, and those of Roh's generation (Lee, 2005, p. 409). However, a number of important events signal the existence of a separate force that helped make headroom for some important transitional justice measures.

In Chapter 3, the Constitutional Court of Korea's decision in favor of the activities of the Commission on the Confiscation of Properties of Pro-Japanese Collaborators was discussed, demonstrating one instance in which the Court showed a tendency to support the constitutionality of transitional justice mechanisms, despite conservative pushback. An examination of the Court's 1995 conclusion of the inapplicability of the statute of limitations in the case of crimes committed by a president during their term of office also showed this tendency. Additionally, former president Roh Moo-hyun's impeachment at the hands of the National Assembly on charges of illegal electioneering, was overturned by the Constitutional Court, an unprecedented action in any modern constitutional democracy (Lee, 2005, p. 407). Considering the fact that the impeachment was an unpopular political move to begin with, these two rulings show the Court's lack of attachment to conservative interests.

The Constitutional Court of Korea was established with the constitutional amendment process of 1987, becoming part of what is known as the Constitution of the Sixth Republic of Korea in 1988. It is modeled on the Federal Constitution Court of Germany and consists of nine justices: three appointed by the president, three by the National Assembly, and three by the Chief Justice of the Supreme Court (Lee, 2005, p. 413; West & Yoon, 1992, p. 78). It is, in most cases, subordinate to the Supreme Court of Korea, the highest judicial body in the country, although in the constitution it is specifically delegated the power to adjudicate five different areas: "review of constitutionality of

legislation, disposition of competence disputes amongst state organs, and decisions of constitutional petitions" (West & Yoon, 1992, p. 84), as well as decisions on impeachment of public officials and dissolution of political parties (Ibid., p. 85).

The Constitutional Court of Korea has, from its beginning, included a significant liberal element amongst its justices. West & Yoon (1992) note that

> In 1988 when the first members of the Court were appointed, the National Assembly was controlled by a coalition of parties opposed to the president's Democratic Justice Party. The three justices appointed by the legislature thus reflected the contending forces in that organ, including the opposition parties that had played roles in negotiating the revision of the Constitution that created the Court (p. 80).

Rhee (2016) also argues that the Constitutional Court "itself is the outcome of the nation's democratization and human rights movement" (p. 5). It is not surprising, then, that the Court has "assumed significant and sometimes critical roles in implementing restorative and transitional justice in Korea" (Ibid., p. 18).

Taiwan, in contrast, only began amending its constitution five years after martial law was lifted, but during that period, it remained virtually the same institution as it had been during authoritarian rule. The judicial system only started to become more democratic with the introduction of additional articles in 1992, and again in 2005.[11] The Judicial Yuan, according to the 1947 version of the ROC Constitution, is "the highest judicial organ of the state" and has "charge of civil, criminal, and administrative cases, and cases concerning disciplinary measures of public functionaries" (Chapter VII, Article 77). The

[11] The 1992 additional articles included Article 13, which specified the titles of president, vice president, and Grand Justices of the Judicial Yuan and established that they all be nominated, with the National Assembly's consent by the President of the ROC. They also call for the formation of a Constitutional Tribunal to adjudicate the dissolution of unconstitutional political parties and define such parties as ones whose "goals or activities jeopardize the existence of the Republic of China" (Chiu, 1993, p. 57). The 2005 articles change the consent of the by then defunct National Assembly to nominations of the highest offices of the Judicial Yuan to that of the Legislative Yuan. They also limited the tenure of grand justices to one eight-year term, set up rules for the Judicial Yuan's budget, and directed the grand justices to "form a Constitutional Court to adjudicate matters relating to the impeachment of the president or the vice president, and the dissolution of unconstitutional political parties" (Additional Article 5).

Council of Grand Justices is Taiwan's counterpart to the Constitutional Court of Korea, and the sole institution entrusted with the power of judicial review.

High level officials of the Judicial Yuan were originally nominated, with the consent of the Control Yuan, by the President (Chapter VII, Article 79), but the additional articles of 1992 switched the consenting body to the National Assembly, reflecting the democratic reforms taking place at the time. In 2005, a new set of additional articles to the ROC constitution effectively dissolved the National Assembly, and conferred the power of consent to the Legislative Yuan. Since then, the political leanings of the court depends on which party is in power in the executive and legislative branches, and who they appoint to the position of grand justice.

The Council of Grand Justices is supposed to be free of partisanship, but as with the Constitutional Court of Korea, this is simply not the case. However, in Korea, a judicial branch created with the forging of a new, democratic constitution has favored legislation and policy bolstering the system that gave birth to it. This has included, significantly, legislation dealing with transitional justice, even if these decisions have, at times, been questionable. Meanwhile, the five year period between the lifting of martial law and the amending of the ROC Constitution in 1992 in Taiwan saw the continuation of a judicial system and constitutional court that was more beholden to KMT interests. The most important example of this situation is the Court of Grand Justices' issuing of Interpretation No. 272, which confirmed the constitutionality of Article 9 of the National Security Act.

### 4.1.5 A Matter of Time

One of the issues that engendered great public sentiment in South Korea at the time of democratization was determining accountability for and getting a more accurate idea of the events surrounding the Gwangju 5.18 Incident. This is partly due to the fact that, at that time, only a decade had passed since the violent incident had occurred. Even during the Roh Tae-woo administration, the National Assembly began holding hearings on Gwangju, which led to compensation payments for victims and their families. This minimalist first step, combined with pressure from a strong South Korean civil society,

eventually snowballed into the comprehensive approach to transitional justice that has been described in previous chapters. A similar situation unfolded in Taiwan, yet ended only with compensation payments for the 228 Incident and the White Terror. This, the author finds, may be due to the fact that a much larger amount of time had elapsed between the height of the KMT's use of state violence and Taiwan's democratic transition. The author additionally found that this difference in time between violent events and democratization was caused by a separate, underlying factor – the nature of either country's internal security apparatus – which will be discussed in the proceeding paragraphs.

Despite a growing consensus in Taiwan on the wrongs committed by the KMT authoritarian regime, and especially on those of Chiang Kai-shek, it is useful not to think of the KMT or its actions on Taiwan during martial law as having been solely controlled by Chiang. In fact, it has been noted that, from the 1950s onward, Chiang Kai-shek took a much less active role in governmental affairs, leaving his son and the future leader of Taiwan, Chiang Ching-kuo, to manage everything from the KMT bureaucracy to national security (Taylor, 2000, p. 223; Wu, 2003, p. 473). Part of this was leading a campaign of brutal suppression, known to many as the White Terror, as the head of a new, unified, and far-reaching system of internal security.

The KMT, after retreating to Taiwan, was forced to make a number of large reforms between 1950 and 1952. By 1949, Chiang Kai-shek had realized that "the Communist victory was not due to military factors, but to the superior organizational power of the CCP" (Dickson, 1993, p. 58). The KMT's lack of cohesion and weakness, absence of mechanisms to judge feedback from the population, and factionalism of rival elites within the party, led Chiang to push for a complete organizational overhaul (Ibid., pp. 58-59). This included founding an academy for training party cadres, purging the KMT of officials deemed to be "corrupt, incompetent, or disloyal," forcing older leaders to retire at the hands of the Central Advisory Council, founding a political commissar system for the military and universities, and establishing a Central Reform Committee composed of younger cadres that was tasked with making "recommendations on restructuring the party" (Roy, 2003, pp. 80-81).

In reforming and reorganizing the party, the KMT essentially "reinvigorated those aspects that had become dormant because this dormancy was believed to be a primary cause of its defeat on the mainland" (Dickson, 1993, p. 60). These reform measures effectively promoted "growth in discipline, efficiency, and morale within the KMT, resulting in a dramatic increase in membership" (Roy, 2003, p. 81). They also gave way to an increase in the suppression of criticism, although in a targeted and clever manner. A certain amount of political dissent was accepted, as long as it wasn't consistent and didn't violate core KMT tenets (Ibid., p 81).

Importantly, party reforms also included the reorganization of the KMT's internal security apparatus. Before arriving in Taiwan, Chiang Kai-shek had opted for a disjointed, exclusive system of overlapping security organizations. This reflected his perception of military and political elites as being the biggest threat to the legitimacy and survival of his rule, as a fragmented security apparatus would encourage infighting among its agencies and discourage cooperation in possibly overthrowing the dictator (Greitens, 2016). Once the KMT arrived in Taiwan, however, that threat perception shifted to the native Taiwanese population. This is in no small part due to popular resistance the KMT had encountered during and after the 228 Incident. Also, the elites that had posed the risk of a coup or takeover, like K.C. Wu or Sun Li-jen, were effectively neutered by the mid-1950s, and this, combined with "the warning that American aid was contingent on domestic political reform, enabled and, in fact, compelled Chiang to concentrate on managing the threat of popular unrest" (Ibid., p. 89).

What emerged was a unified, inclusive system of administering internal security, what Greitens (2016) calls the "coercive apparatus." All of the previous organizations with overlapping powers and jurisdictions were incorporated into the National Security Bureau, the "central intelligence coordinating body," administered by Chiang Kai-shek's son, Chiang Ching-kuo, who "held the nominal title of deputy head of the NSB, but in reality acted as chief" (Taylor, 2000, p. 212). The new system, which included the aforementioned political commissar, infiltrated every level of Taiwanese society. The aim was not social or economic control, but rather consistent and accurate surveillance of political activities. On its face, this was a Cold War era tactic to stop the spread of

communism, but in reality “Taiwanese nationalism, stimulated by the disillusionment of the late 1940s, provided the single greatest target for internal security forces” (Roy, 2003, p 90). Nevertheless, the unification of the coercive apparatus in Taiwan, as well as its newly inclusive nature, allowed for significantly higher quality intelligence on threatening popular activity, and thus the rate of state violence became more targeted, more discriminate, and declined sharply over the last few decades of martial law rule.

The South Korean experience in regards to the establishment and development of its postwar security apparatus differed markedly compared to Taiwan. For one, the specter of North Korea defined the relationship between military and government, in that the overwhelming external threat of an attack by North Korea and heavy U.S. influence in military affairs prevented “coup-proofing fragmentation within the military” (Greitens, 2016, p. 142). Internally, however, the perception of threat shifted from one autocratic leader to the next, and with it the structure of South Korea’s coercive apparatus.

The first dictator, Syngman Rhee, “promoted internal competition and social exclusivity” in order to prevent the wresting of power by political rivals (Greitens, 2016, p. 143). However, the emphasis Rhee placed on political loyalty may be the key to his use of this kind of fragmented, exclusive system of internal security. As Robinson (2007) notes, “Rhee faced little opposition within his own government and the new ROK constitution granted few powers to the newly elected National Assembly with which it might curb the power of the ROK presidency” (p. 111).

Park Chung-hee, inheriting the fractured system of competing security forces, centralized it by creating the KCIA, named after the U.S. intelligence organization, which would have “unitary powers of coercion over the rest of the coercive agencies,” and “establishing broadly inclusive intelligence networks” (Greitens, 2016, p. 148). This was to combat popular anger over the coup d’état orchestrated by Park that ended the short-lived period of democracy under the Second Republic. It included infiltrating college campuses to suppress student protest, arresting suspected radicals and communists, and strengthening the National Security Law to clamp down on the press (Robinson, 2007, p. 135).

Park's threat perception changed after the promulgation of the Yushin Constitution, an internal restructuring of not just the security apparatus, but of the government in general. Whereas Park had been an elected president in his first term, he now became a full-blown dictator; he "declared martial law, dissolved the National assembly, abrogated the old constitution, had a new constitution written by an Extraordinary State Council made up of his appointees, and then legitimated the new structure in a referendum in November of 1972" (Robinson, 2007, p. 136). This period marked an uptick in the number of cases of political persecution and suppression of popular dissent, but also of a refocusing of the internal security apparatus towards controlling the threat of elite rivals (Greitens, 2016, p. 156). This was not without warrant: Park experienced numerous attempts on his life; one succeeded in killing his wife, and the last brought about his own demise. He therefore moved towards a system of "increased fragmentation and exclusivity" which led to a "deterioration of Park's rule during the 1970s" (Ibid., p. 159).

Chun Doo-hwan, the final truly autocratic leader in South Korea, who had also gained power by way of coup d'état, was and still is extremely unpopular. This can be largely attributable to his government's handling of the Gwangju Incident of 1980. His threat perception, unlike that of Yushin-era Park Chung-hee, was of another popular uprising like the one that had erupted in Gwangju. Greitens (2016) posits that "Chun also worried about the risk of assassination, but appears to have thought it most likely that the assassin would be a disgruntled member of the population" (p. 167). This pushed him to unify his coercive apparatus under the Defense Security Command, the central coordinating agency, and then diminish the remaining authority of the KCIA, the organization that had essentially been Park Chung-hee's bodyguard but whose director had also been Park's assassinator (Ibid., p. 169).

Greitens notes that an internal security apparatus that is unitary and inclusive produces a decreasing level of violence in an authoritarian state because intelligence is of better quality and thus suppression can be used more sparingly to eliminate true threats. An exclusive and fragmentary coercive apparatus, on the other hand, produces the opposite. It is marked by an increasing level of violence because this kind of system "creates interagency competition that provides motivation to escalate rather than minimize

violence" (Greitens, 2016, p. 53). Taiwan's situation falls into the first category, while South Korea's presents an interesting grey area, as three different leaders with varying threat perceptions created a situation in which state violence both increased and decreased over certain periods of time.

What bearing does this have on the method of transitional justice used in either country? The nature of the KMT's perceived threat was that of a popular uprising against the regime, and it forged a security apparatus in the early 1950s that used violence discriminately. By the time martial law was lifted in 1987, most of the horrors of the 228 Incident and the White Terror had long ended. In South Korea, varying levels of violence meant that some very violent episodes, especially the Gwangju Incident, were still fresh on everyone's mind. This situation, combined with an incredibly strong civil society that had taken an active part in South Korea's democratization and desired to see justice served for the years of repressive autocratic rule, was a driving force in the more comprehensive transitional justice approach taken by South Korea's democratic government.

## 4.2 What Was Missing?

South Korea appears to be an exemplar of comprehensive, victim-centered, moderate transitional justice, at least in comparison to Taiwan. The multiple truth commissions the governments of Kim Young-sam, Kim Dae-jung, and Roh Tae-woo employed meant that a broad range of topics and time periods were covered, victims of human rights violations were more able to have their side of the story publicly recorded, and they and their families were awarded compensation for the loss they suffered due to these violations. The criminal trials of Chun Doo-hwan and Roh Tae-woo, the two former authoritarian leaders responsible for the coup d'état and brutal Gwangju crackdown, relieved some of the pressure of Korean society's yearning for some sort of accountability. However, a deeper review of the literature, especially that written by Korean scholars and those who actively took part in transitional justice efforts, as well as in-person interviews with lawyers and other experts, revealed a gap between what South Korea's transitional justice looks like on paper, and what the reality of it was.

The majority of arguments against the success of South Korea's transitional justice tend to emphasize the places where it was not strong or effective enough, rather than it being too strict or retributive. The Minbyun lawyers that were interviewed for this thesis mentioned that not enough of the past was investigated, that the names of wrongdoers were not publicized, and that the large time lapse between when many of the human rights abuses were committed and when the South Korean government actually decided to investigate them meant that those wrongdoers went unpunished (Minbyun, Personal Correspondence, February 7, 2017). Professor Paul Hanley felt that too much focus was placed on the injustices committed by the Japanese during the colonial period and the Pacific War, and that there was "less incentive to dig into crimes committed by South Koreans against South Koreans" (Hanley, Personal Correspondence, February 17, 2017). He also noted that punishment for perpetrators was extremely limited, attributing this to the Confucian notion amongst ordinary Koreans that Chun Doo-hwan and Roh Tae-woo being brought to trial and losing their power and money was punishment enough (Ibid.).

In terms of the trials, the guilty verdicts and convictions of Chun and Roh only temporarily assuaged the fears among Korean society that justice would not be served. However, the fact that both former presidents were pardoned two years after their convictions caused a lot of Koreans to lose faith in the power of post-transition justice. When the author argued that both still carried the burden of their convictions in an interview with Professor Hanley, the latter replied: "But again, [Chun] was acquitted and now lives in a palace in Seoul" (Hanley, Personal Correspondence, February 17, 2017). This is true. In fact, since his pardon, "Chun has mostly been living discreetly in a quiet upscale neighborhood in Seoul with his wife and a string of bodyguards" (Choi, April 2017). He continues to publicly deny his guilt, most recently in a 2,000- page memoir published in mid-2017 (Ibid.). To many both within and outside of Korean society, this does not even remotely constitute accountability.

Another criticism of South Korea's efforts in addressing is colonial and authoritarian past stems from the nature of the truth commissions, and how they were structured. One issue is of recommendations, especially those given by the TRCK. Wolman (2013) summarized these recommendations, which were comprised of three different categories:

> In massacre cases, the recommendations focused on providing State apologies, revising family registries, instituting memorial events, revising historical records, peace and human rights education, law revisions, and medical subsidies for the wounded. In human rights abuse cases, the TRCK recommended retrials, state apologies, deletion of records, and the provision of compensation and medical services for victims and bereaved families. Although the TRCK does not have the power to award compensation, it has recommended that the government pass a law awarding compensation to victims (p. 48).

However, he notes that these suggestions were not always followed, especially in terms of apology beyond that given by Roh Moo-hyun to the victims of the Jeju 4.3 Incident (Ibid., p. 48-49). Kim (December 2013) also points out that major, all-encompassing recommendations have been largely ignored, and that recommendations for individual cases, while having a much better record of being fulfilled, were not entirely what they appeared. He states that "a closer look reveals that almost half of implemented recommendations involved measures that required very little effort, such as placing the TRC's report in government offices (117 cases) and participating in memorial services (55 cases)" (Ibid.).

One of the major issues with the truth commissions was that they were, by and large, administrative proceedings, not legal bodies, and, as mentioned in Chapter 3, had weak subpoena power (Cho, 2007, p. 608-609; Hanley, 2014; Hayner, 2011). Kim (2012) observes that the TRCK was particularly weak in this area in that "its investigative authority as a temporary truth commission was curtailed by the law, which did not provide conditions to facilitate victims' testimony (p. 9) This barred it from being able to properly account for the harm inflicted on victims, their families, and their descendants, as "both the perpetrators of violence and victims' families have been reluctant to come forward to speak for both legal and social reasons" (Ibid., p. 9). Lastly, the TRCK was shut down somewhat prematurely during the Lee Myung Bak administration, after the replacement of the head of the commission with a conservative "who was known to be unwilling to accomplish the TRCK's work in accordance with the former two

chairperson's plan" (Kim, 2012, p. 11). Thus, only 8,450, or 85.6%, of the 11,175 petitions brought before the commission were fully investigated (Hanley, 2014, p. 160).

The administrative nature of the commissions, trials, and reparations has also led to arguments on the other side of the spectrum, noting that the justification for some parts have been constitutionally questionable, and also that they have been used as a political weapon. For example, the discussion of whether or not the act that established the Commission on the Confiscation of the Properties of Pro-Japanese Collaborators respected the right of due process of the accused, and could be considered retroactive legislation, was discussed in Chapter 3. Baik (2012), the author who brought up this issue, also pointed to a disparity in the amount of reparations given to victims of certain events, noting that the victims of the Jeju 4.3 Incident were provided significantly less reparations than those of the Gwangju 5.18 Incident. This may indicate a regional bias, as Gwangju is part of the southwestern Honam region, the historically liberal stronghold, while Jeju is not. The timing of the Gwangju Incident, which happened in 1980, also put it much closer to democratization than Jeju, which took place over a six year period almost half a century earlier.

Attorney Chang of Minbyun contended that lack of proper education about human rights and the purpose of transitional justice is yet another issue that has yet to be resolved. During his interview, he stated:

> There are some severe problems of distorted history education in Korea, so I think distorted Korean history education gives wrong impression to those offspring or future generations in Korea…up until 2010, there was quite active process of truth commissions and so on, but with the governmental change to the conservative party, the Lee Mung Bak administration stopped the [commission]…so I think there should have been some afterwards works after the commission…such as educating the children how the committee works or what the truth commission has done so far in Korean society. There was nothing about it, so the only thing the commission has done was the investigation itself (Minbyun, Personal Correspondence, February 7, 2017).

Education has been a serious issue not only for Korea, but for other East Asian countries that experienced some sort of authoritarian dictatorship in the past as well. This has been an ongoing issue in Japan, where nationalist politicians and groups use history education in an attempt to whitewash or glorify the brutality of Japan's colonization of, and violence in, multiple nations in the Asia-Pacific. It is also true of Taiwan, where in 2015, student activists stormed and occupied the Ministry of Education headquarters, protesting history curriculum that glosses over the wrongs the KMT committed during its one-party authoritarian rule (Cole, July 2015).

# Chapter 5 – Conclusion

This thesis has compared broadly the approach to transitional justice taken by two East Asian third wave democracies, South Korea and Taiwan. These two countries were chosen for comparison because both experienced similar developments in their 20th century histories, yet have taken very different approaches to accounting for human rights abuses that occurred during their periods of colonial and authoritarian rule. While the post-transition Korean governments have chosen a comprehensive process of multiple truth commissions covering a broad range of events and time periods, criminal trials for major perpetrators, and reparations for victims, Taiwan has pursued only fact-finding studies performed by research teams organized by the Executive Yuan, compensation schemes for victims of the 228 Incident and the White Terror, and, currently, the settling of the KMT's party assets. In conducting the research and production of this thesis, the author chose to focus on truth-finding and criminal accountability, the two aspects where South Korea and Taiwan differ most strikingly in this process, and to determine why these differences exist.

The findings were likely only a portion of the full array of different factors that influenced how Taiwan and South Korea have approached this issue, but were the most noticeable from a deep review of the literature and speaking with experts, academics, and lawyers in both countries. Perhaps the most important reason they differed in tackling transitional justice, save the divergent cleavage structures in Taiwan and South Korea, was the staying power of the KMT. The KMT, which possessed more antecedent strengths at the beginning of Taiwan's democratic period than the Democratic Justice Party of Roh Tae-woo in Korea, maintained governing control of the presidency and law-making body, as well as influence in the judiciary for over a decade after the country's transition from authoritarianism. This allowed it to pass laws like the National Security Act, Article 9 of which is a deliberate move to protect perpetrators and legitimize authoritarian era court martial decisions. This also gave it the ability to staff its constitutional court during the first five years following the democratic transition with justices who would use their review power to rule Article 9 constitutional.

Lastly, the amount of time elapsed between incidents of intense state violence and democratization varied between Taiwan and South Korea. This is because the coercive apparatus Chiang Ching-kuo cultivated in Taiwan was unitary and penetrative, and used targeted, discriminate violence against those it suspected of subversion or treasonous activity. The tragic brutality of 228 Incident and the height of the White Terror violence were not forgotten, but were not fresh on the minds of the generation who came of age during the latter years of the KMT's martial law rule. Meanwhile, the government's use of violence against South Koreans during authoritarian rule depended on the perceived threat of different dictators. In particular, the Gwangju 5.18 Incident had occurred only ten years before democratization and became South Korean civil society's jumping off point to push for further transitional justice measures.

It was with this information in mind that the author started research on this topic one year ago, with the belief that South Korea's comprehensive approach was a good model for Taiwan to emulate. Indeed, even the well-regarded work of Olsen, Payne, & Reiter (2010) specifically mentioned Korea's success with such an approach, noting that even though the high expectations for truth commissions such as the TRCK were not fully met, the different mechanisms of the "justice balance" process that the country adopted "complemented and reinforced" the "stability and accountability functions" that evolved from its use (p. 1004).

However, after endless hours of scouring the literature, as well as interviews with lawyers and academics in South Korea, some of whom had taken a very active part in creating the transitional justice legislation that was implemented in the late 1990s and early 2000s, a different picture began to emerge. The multiple mechanisms used there had ended up being toothless. Truth commissions lacked subpoena power, severely limiting the ability to apportion responsibility for past wrongs, and possibly preventing some victims from feeling safe enough to tell their own side of the story. Similar to Taiwan, victims were awarded compensation, but it was a hodgepodge of different reparatory schemes, with some victims, like those affected by the Gwangju Incident, awarded much higher sums than those who experienced political suppression elsewhere (Baik, 2012). Reconciliation, in the views of many, has yet to be achieved. Despite Korea's success in reforming

institutions through the promulgation of a new constitution in 1987, remnants of the turbulent and repressive past, such as the National Security Law, still exist and have continued to serve as tools of political repression by conservative politicians.

Unfortunately, these are some of the common pitfalls of transitional justice anywhere, comprehensive or not. De Greiff (2012) describes this best by stating:

> We should acknowledge from the outset the limited reach of each of the measures that is part of a transitional justice policy. In fact, there is no transitional country that can legitimately claim great successes in this field. That is, there is no country that has undergone a transition that has prosecuted each and every perpetrator of human rights violations…; that has implemented a truth-seeking strategy that disclosed the fate of each and every victim…; that has established a reparations program providing each and every victim with benefits proportional to the harm he or she has suffered; or that, particularly in the short run, has reformed each and every institution that was implicated in the violations in question (p. 35).

In other words, no approach is perfect or can be applied to every case. Authoritarian regimes like those that governed Taiwan and South Korea, did so for so long, and violated the rights of so many, that a totally thorough accounting would be impossible. Furthermore, it would take necessary focus away from other pressing issues of the present that also affect a country's democracy and human rights.

It then must be asked how these two countries, particularly Taiwan, can move forward with its program of transitional justice in a way that at least helps promote reconciliation, healing, and healthy acceptance of the past. It is also relevant to reflect on the lessons that Taiwan can learn from the weak points observed in South Korea's transitional justice process. Information from the interviews the author conducted, as well as that gathered from the literature has helped form a more nuanced and informed answer to these questions.

Neither interviewee in Taiwan thought that the process of transitional justice there had been completed, which is not surprising, but they also believed that the current DPP-controlled presidency and legislature are not doing anything substantial to get started on a

feasible approach. Su Ching-hsuan attributed this to ambivalence on the part of many politicians towards most transitional justice measures:

> I think one of the issues is, they believe this is a troublesome topic. Many of them have no idea how to accomplish transitional justice. The other issue is some of them believe that party assets settlement is the extent of transitional justice, it's possible that some of them think this. So to me, this is pretty alarming. I personally don't think that settling party assets is enough (Su, Personal Correspondence, May 5, 2017).

Professor Huang Cheng-yi reiterated this point, noting that, beyond the Party Assets Settlement Committee, the only other move towards formulating an approach has been the draft bill on promoting transitional justice. He argued that this is ridiculous, in that it sets up a commission to draft legislation on transitional justice, rather than make any concrete steps toward its realization. He and other members of the Taiwan Association for Truth and Reconciliation "have been criticizing the Tsai administration because they don't have any clear picture for transitional justice" (Huang, Personal Correspondence, May 23, 2017).

Both Su and Huang thought that a truth and reconciliation commission would be the best plan of action for the case of delayed justice in Taiwan. Su noted the most important aspect of this would be a final report issued at the end of the commission's investigation. He posited that this should focus less on the White Terror "political case" aspect that a lot of the previous work of civil society organizations emphasized, and more on parsing the intricacy of the surveillance network that defined the KMT's internal security apparatus (Su, Personal Correspondence, May 5, 2017). Professor Huang, being a legal scholar, pointed to the repeal of Interpretation No. 272, the Council of Grand Justice's ruling on the constitutionality of Article 9 of the National Security Act, as being of primary importance. (Huang, Personal Correspondence, May 23, 2017). These suggestions appear to be a viable start to a more complete transitional justice program in Taiwan.

On the other hand, the opinion of Attorneys Chang and Seo that better education on human rights and transitional justice, as well as the work of civil society organizations in continuing to push for more truth-finding and reconciliation efforts, especially in the

aftermath of the Park Geun-hye debacle, is not to be understated. It's difficult to gain public support for a project as large as a truth and reconciliation commission if the public is not exactly clear on the benefits such a commission can bring. On the other hand, Professor Paul Hanley's observation that many of the transitional justice measures in South Korea were used more as political weapons against the conservative party than as tools of restoration and reconciliation also raises concerns for Taiwan's situation, where the Party Assets Settlement Committee is seen by many as a partisan attempt at revenge against the KMT.

It is because of these concerns that the author has settled on four broad overarching goals that a future approach to transitional justice in either Taiwan or South Korea should strive to achieve. Firstly, it should focus as much attention as possible on the rehabilitation and healing of the victims. Both countries, despite the flaws in their respective transitional justice processes, have made significant steps towards this goal. In South Korea, although some measures were more punitive in nature, the majority of the transitional justice legislation passed was moderate, focusing on truth-finding, compensation for victims, and restoration of their reputations. A similar situation can be observed in Taiwan's experience: although truth-finding was not as strong or comprehensive as that which took place in South Korea, victims of the 228 Incident and the White Terror were provided compensation if it was applied for. One of the most important actions the current administration can now take is to work towards repealing Article 9 of the National Security Act, in order to allow those convicted of crimes during martial law to appeal their convictions in civilian courts.

Secondly, it should make truth-finding an official process. In order to do this in Taiwan, all documents related to the White Terror and martial law must be moved from the Ministry of Defense to the National Archives Administration and declassified (Huang, Personal Correspondence, May 23, 2017). The information gathered from these archives should be investigated along with the testimony of victims and perpetrators, if they are still living, in the form of a truth commission. As Hayner (2011) observes, truth commissions not only "focus on victims, usually collecting thousands of testimonies, and honoring these truths in a public and officially sanctioned report" (p. 13), they also have a

"broader mandate to focus on the patterns, causes and consequences of political violence" which allows them "to go much further than is generally possible (or even appropriate) in a criminal trial" (Ibid., p. 13).

However, in order to be more effective and to learn from the lessons of the South Korean experience, a subpoena incentive must be applied in such a commission, and all involved should give testimony under oath. Exception must be made for the very wide reach that the former surveillance apparatus had, with the acknowledgement that in many cases cooperation was forced or coerced. Victims and perpetrators also must face each other in the controlled environment of a commission, in order to promote, if not engender, some sort of reconciliation.

Thirdly, a truth commission of this kind must be as nonpartisan as possible and maintain respect for all groups who may become involved. In Taiwan, this means a commission composed of academics, historians, and civil society leaders from all backgrounds and ethnic groups. Because so many of those targeted during the White Terror and the martial law period were of mainlander origin, special attention must be given to this detail. Success in promoting reconciliation in this area can expand to other painful or controversial areas of Taiwan's history, including Japanese colonialism and justice for aboriginal peoples, although the latter appears to be a more pressing issue at this point, as protestors for aboriginal land rights have been protesting on Ketagalan Boulevard in Taipei for over three months (Gerber, June 2017).

Fourthly, the purpose and importance of rule of law, human rights, democracy, and transitional justice must be made clear to the public. Mendeloff notes that "formal truth telling alone is unlikely to be sufficient. It is probably more likely to be effective if sustained and institutionalized, such as through public education" (p. 376). This sits with both Attorney Chang's recommendation, as well as Su Ching-hsuan's, who argued that a report submitted by a truth commission and made available to the public would improve civic education in Taiwan. Specifically it would be the process of producing the report that would have the biggest impact:

> …in the process of writing the report, you need to continuously ask the public: this person was treated like so by the government. Exactly what is wrong with this

> treatment? Was this treatment acceptable or was the government wrong for doing it? The report writers need to keep putting this information forward and letting society discuss it. And finally, they can produce a final report, so that when it's published, society basically already has a way of thinking about these issues. Of course, there will be different opinions, but at the very least, they will have already faced these questions as a society (Su, Personal Correspondence, May 5, 2017).

Su's suggestion would be a viable means of providing such a civic education and garnering more public support for a transitional justice program.

These proposals, while still difficult to implement, are nowhere near impossible in Taiwan or South Korea. Snyder and Vinjamuri (2003), proponents of a minimalist approach, argue that "when a country's political institutions are weak, when forces of reform there have not won a decisive victory, and when potential spoilers are strong," attempting anything more than very superficial transitional justice is "likely to increase the risk of violent conflict and further abuses, and therefore hinder the institutionalization of the rule of law" (p. 15). None of these conditions are present in current-day Taiwan or South Korea. In fact, the opposite is true: pro-transitional justice parties are in positions of significant power.

Additionally, as Mendeloff suggests, "truth-telling is likely to be most effective when groups want to discuss the past" (p. 376). It is apparent that different groups do want to discuss the past, they are just at odds as to how that discussion should take place. This will be the main difficulty to overcome. The upside is that both Taiwan and South Korea are paragons of democracy, respect for human rights, and governance by rule of law, especially in relation to their East Asian neighbors. Both are also in a position to pursue or continue to pursue a policy of moderate restorative justice. It is the author's hope that the governments of both countries act on this opportunity to finally help settle their complex pasts.

There is no easy answer as to how Taiwan, or South Korea for that matter, can most effectively plot the way forward in its pursuit of transitional justice for human rights abuses committed during the pre-democratic period of rule. The suggestions provided

above seem feasible, but cannot accommodate all victims or assign responsibility to all perpetrators. In addition, an air of cynicism pervaded the interviews the author conducted on this subject, both in Taiwan and in South Korea, with all interviewees expressing similar ideas of mild, restorative justice and an emphasis on education, but none believing even this was very possible in either country's specific circumstances. In Taiwan, this sentiment was even more pronounced, as the Tsai administration's actions, despite multiple promises of a renewed project of transitional justice, have come to nothing more than a dogged pursuit of KMT party assets. Interviewees in both countries expressed their belief that a lot of what is done or proposed by certain parties in the name of transitional justice is a partisan political weapon, a way to demonize and marginalize the other, opposing party (Hanley, Personal Correspondence, February 17, 2017; Huang, Personal Correspondence, May 23, 2017).

Yet there were still expressions of hope for the future. The election of liberal President Moon Jae-in and his ties to the younger progressive movement that emerged with Roh Moo-hyun in South Korea, encouraged human rights attorney Chang Wan Ick, who also noted the persistence of victims and their family members in pushing for a continuance of the truth-finding process. He made clear his belief that transitional justice is not just "the work of one administration or government" but rather "the common work of all" (Minbyun, Personal Correspondence, February 7, 2017). The same can be said of Taiwan, where intelligent, influential, and compassionate scholars and members of civil society organizations, such as the Taiwan Association for Truth and Reconciliation, also continue their work in consulting the government and educating the public on the benefits of restorative, victim-centered transitional justice, reform of outdated institutions, and respect for human rights. Their contribution, coupled with a government that is more amenable to instituting these changes, stands the best chance of helping to ensure that justice long delayed is not necessarily justice denied.

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## Interviews

Korea:

Mr. Chang Wan Ick, Attorney and Committee Member, Committee on Transitional Justice and Reparations, Minbyun Lawyers for a Democratic Society, Seoul, Republic of Korea

Mr. Seo Joong-hee, Attorney and Committee Member, Committee on Transitional Justice and Reparations, Minbyun Lawyers for a Democratic Society, Seoul, Republic of Korea

Paul Hanley, Professor of International Law, Keimyung University, Daegu, Republic of Korea

Taiwan:

Su Ching-hsuan. Former General Secretary of the Taiwan Association for Truth and Reconciliation

Huang Cheng-yi, Associate Research Professor at Academia Sinica Institutum Iurisprudentiae and member of the Taiwan Association for Truth and Reconciliation

# Appendix

The following section contains the questions prepared beforehand to conduct conversational, semi-structured interviews with participants in Taiwan and South Korea, as well as basic details relevant to those interviews.

**Appendix 1: Interview with Minbyun Lawyers for a Democratic Society**

Interviewee names: Chang Wan Ick & Seo Joong-hee

Interpreter: Lyu Dasol

Location: Minbyun Office, Seoul, Republic of Korea

Date: February 7, 2017

Time: 7:00 PM

1. What is your name and your title?
    a. How long have you been a part of Minbyun?
    b. What is your connection to transitional justice in Korea?
    c. How did you come to be involved in this process?
2. What has been the overall approach of Korea towards accounting for human rights abuses committed during its authoritarian period?
    a. What are some of the strengths and weaknesses of this approach?
    b. What would you consider to be the main focus of such an approach?
    c. Would you consider anything missing or anything that should not have been used?
3. Do you believe that the transitional justice mechanisms used in Korea have been sound from a legal standpoint?
4. What lessons (legal or otherwise) can Taiwan take away from Korea's experience with transitional justice?

a. Since the statute of limitations for prosecuting wrongdoers in Taiwan is now expired, what choices does it have in terms of assigning accountability?

**Appendix 2: Interview with Professor Paul Hanley**

Location: Keimyung University, Adams College, Taegu, Republic of Korea

Date: February 17, 2017

Time: 10:00 AM

1. What has been the overall approach of Korea towards accounting for human rights abuses committed during its authoritarian period?
    a. What are some of the strengths and weaknesses of this approach?
    b. What would you consider to be a focal point of such an approach?
    c. Would you consider anything missing or anything that should not have been used
2. In what way do you think transitional justice in Korea has contributed to democratic consolidation?
    a. To respect for and protection of human rights?
    b. To political reconciliation?
3. Do you believe that the transitional justice mechanisms used in Korea have been sound from a legal standpoint?
4. What lessons (legal or otherwise) can Taiwan take away from Korea's pursuit of transitional justice?
    a. Since the statute of limitations for prosecuting wrongdoers in Taiwan is now expired, what choices does it have in terms of assigning accountability?

5. Considering the recent events concerning President Park Geun-hye, do you think that Korea's historical experiences with authoritarianism, democratization, and transitional justice are playing (or will play) a role in how this situation is dealt with? How?

**Appendix 3: Interview with Su Ching-hsuan**

Location: National Taiwan University, College of Social Sciences Building

Date: May 5, 2017

Time: 11:00 AM

Note: Interview conducted in Mandarin Chinese and translated to English by the author

1. 你覺得臺灣的轉型正義已經完成了嗎？如果沒有的話， 你覺得它缺了什麼？

   Do you think that Taiwan's process of transitional justice is complete? If not, what, do you believe, to be missing from its approach?

2. 蔡總統常講臺灣轉型正義這個話題，他競選的時候也說了不少的跟轉型正義有關的承諾。除了黨產清算以外，你認爲蔡政府還有做到什麼過去清算的事情？

   President Tsai Ing-wen has consistently brought up the topic of transitional justice; during her campaign she also made a number of promises pertaining to transitional justice. Besides the settling of KMT party assets, what else would you say the Tsai government has done to help settle Taiwan's authoritarian past?

3. 爲什麼臺灣沒有組過像南非或南韓的真相與和解委員會？你覺得這個方式適合臺灣現在的情況嗎？

   Why hasn't Taiwan pursued a truth and reconciliation commission approach like that of South Africa or South Korea? Do you think this approach is appropriate for Taiwan's current situation?

4. 好像現在臺灣大部分的民眾都瞭解蔣介石的過錯， 可幾乎沒有人會提出蔣經國的過錯，其實很多臺灣人還是覺得他功大于過。對你來說，蔣經國爲何仍然被很多臺灣政客和知識分子崇敬？

   It seems that a majority of Taiwan's public understand and acknowledge the wrongs committed by Chiang Kai-shek, but very few will bring up the topic of Chiang Ching-kuo and his abuses. In fact, many Taiwanese still believe his contributions outweigh his errors. In your view, why is Chiang Ching-kuo still so revered by so many Taiwanese politicians and intellectuals?

5. 假設你能跟蔡總統推薦她可以從明天開始做的轉型正義策略，你覺得她該從哪個方面開始？

   If you could recommend a strategy for the Tsai government to follow from tomorrow forward, what do you think such a strategy would start with?

**Appendix 4: Interview with Huang Cheng-yi**

Location: Institutum Iurisprudentiae, Humanities and Social Sciences Building, Academia Sinica

Date: May 23, 2017

Time: 4:30 PM

1. What are the mechanisms of transitional justice that have been used in Taiwan? What are the strong/weak points of Taiwan's approach?
2. What do you think are the overriding factors in Taiwan having a comparatively weak process of transitional justice? Legal, institutional, societal, etc.
3. What has been the focal point of the Tsai administrations pursuit of transitional justice? What do you think of this approach?
    a. What explains the overwhelming focus on ill-gotten assets?
4. Were a systematic analyzation of KMT party archives to expose the names of those responsible for repression during 228 and the White Terror, would Taiwan's

particular situation necessitate criminal trials for perpetrators of human rights abuses?

   a. Do you think criminal accountability is or can be a constitutional means of redressing past human rights abuses?

5. Does the pursuit of transitional justice have the potential to exacerbate existing tensions between different groups in Taiwan (Hoklo, mainlander, Hakka aboriginal)?

6. What do you see as the best way forward for achieving a more comprehensive or satisfying form of transitional justice in the future?