

# KOREAN CONSTITUTIONALISM AND THE 'SPECIAL ACT' TO PROSECUTE FORMER PRESIDENTS CHUN DOO- HWAN AND ROH TAE-WOO

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The Republic of Korea has undergone extensive political change over the past few years. After decades of military and quasi-military dictatorships, in December 1992 Korea elected a civilian president, former dissident leader Kim Young-sam. Although a milestone at the time, representing a break from the authoritarian past, events since then have in many ways transcended Kim's election. The disclosure in October 1995 that former president Roh Tae-woo had amassed a slush fund of over \$650 million while in office, and later allegations that Chun Doo-hwan, who served as president prior to Roh, had coerced \$900 million from Korea's *chaebols*, sent shockwaves throughout the nation. But in all probability the most stunning development was the decision of President Kim, in late November 1995, to direct his ruling party to enact a law to prosecute Chun and Roh for their respective roles in a 1979 coup d'etat and 1980 bloody crackdown on Korean citizens in Kwangju. This law, enacted in December 1995, and dubbed the 'Special Act Concerning the May 18th Democratization Movement' ("Special Act"), has been the subject of criticism for its seeming disregard of significant constitutional issues.<sup>1</sup>

The Special Act was enacted to seek retribution for the past acts of bloodshed and military usurpation, and to give closure to an unfortunate chapter in the recent history of Korea. However, because the law enables prosecution of a past act for which the statute of limitations has run, it raises issues about its retroactivity, and whether it is a violation of the Korean Constitution's prohibition against ex post facto laws.<sup>2</sup> Other objections have been raised concerning whether the law encroaches on Korean principles of legality and equality before the law, also issues of a

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1. See, e.g., *5-18 T'ŭkpyôlbôp wihônyôbu nollan* [Controversy over the Constitutionality of the May 18th Special Act], THE LAW TIMES, Dec. 18, 1995, at 1.

2. *Id.* See also *Pôpsawi "5-18 bôp" sôlchôn* [Heated discussion at the Legislative and Judiciary Committee over the "May 18th Law"], HAN'GUK ILBO [HAN'GUK DAILY], Dec. 12, 1995, at 4.

constitutional nature.<sup>3</sup> It has also been protested that Chun and Roh were subjected to double jeopardy as a result of the law's enactment.<sup>4</sup> Although these challenges to the Special Act are formidable, one cannot feel much sympathy for the former presidents, whose acts showed total disregard for the Constitution which they now seek to hide behind. Still, important negative consequences may result from the current circumventing of constitutional law. Significant strides have been made in Korea towards the foundation for the rule of law. This foundation is still weak, and it is important that corners not be cut.

This Note points out and discusses the constitutional faults in the Special Act and the related concerns behind the prosecution of Korea's former presidents. Part I gives the reader an overview of the events leading up to and following the enactment of the Special Act. Part II lays out the legal responses, including the handling of the Act by the Korean Constitutional Court, and examines the specific issues of unconstitutionality raised by the Act. Part III consists of some discussion and concluding remarks.

## I. BACKGROUND OF THE SPECIAL ACT<sup>5</sup>

On December 12, 1979, less than two months after the assassination of former president Park Chung-hee, General Chun Doo-hwan, who was at the time head of the Defense Security Command, seized power from martial law commander Chung Seung-hwa. Chun was aided by several other top military officers, including a two-star general, Roh Tae-woo, whose dispatchment of a regiment of troops helped provide the muscle for

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3. See, e.g., *T'ûkpyôlbôp mirosokesô* [Inside the maze of the Special Act], HANKYÔRE SINMUN [HANKYÔRE NEWSPAPER], Dec. 14, 1995, at 5.

4. See, e.g., *5·18 T'ûkpyôlbôp wihônjech'ông sinch'ôngsô* [Unconstitutionality Petition Regarding the May 18th Special Act] (submitted by former President Chun) reprinted in DONGA ILBO [DONGA DAILY], Jan. 18, 1996 [hereinafter "Chun's Unconstitutionality Petition"].

5. For an overall chronology of events, see Appendix.

Chun's coup.<sup>6</sup> Roh was rewarded a week later by being elevated to head of the Seoul Garrison Command.<sup>7</sup>

As Chun expanded his power, assuming, for example, the position of acting director of the Korean Central Intelligence Agency in April 1980, student demonstrations and labor strikes spread throughout the nation.<sup>8</sup> On May 17, Chun's forces surrounded the Capitol Building and forced the Choi government to expand martial law throughout the nation, banning all political activity. Chun at this point effectively took control of the government. Citizens of Kwangju, capital of the South Cholla province in the south-western part of the Korean peninsula, responded with outrage and widespread demonstrations. The following day, on what has since euphemistically been termed the 'May 18th Incident,' Korean soldiers, mostly special forces troops, were dispatched to Kwangju to suppress the uprising. Citizens' rallies and a siege followed, resulting in a final assault by the Korean army forces. The resulting nine-day bloody suppression ended in an estimated three hundred or more civilian deaths.<sup>9</sup> There remain today many unanswered questions about the incident, including who ordered the troops to open fire and what role the United States played in

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6. The day after President Park's assassination on October 26, 1979, Prime Minister Choi Kyu-hah became Acting President and martial law, under Army Chief of Staff Chung's command, was imposed throughout South Korea, except for Cheju Island. On December 12, without the approval of President Choi, Chun effected the arrest of General Chung. Eventually, Chun seized all military power and captured all intelligence and investigative organs, including the police. *See, e.g.,* PAK SE-KIL, TASI SSŪNŪN HAN'GUK HYŌNDAESA: 3 - 1980 NYŌN ESŌ 90 NYŌNCH'Ō KKAI [REWRITING MODERN KOREAN HISTORY: VOL. 3 - 1980 TO 1990] 15-22 (Dolbegae Tosŏ Ch'ulp'an 1992); *The Classmates' Coup: Army struggle behind Park's assassination*, FAR E. ECON. REV., Jan. 12, 1989, at 25, 26.

7. Roh and Chun have had a long relationship going back to when the two were classmates at the Korean Military Academy. The two were among several officers who formed the base of the *hanahoe* (one mind) society, a secretive group of elite Academy graduates. *See, e.g.,* *The Sure Successor: All signs point to Chun's friend Roh Tae-woo*, FAR E. ECON. REV., June 4, 1987, at 15, 16.

8. Students demanded an end to martial law and called for campus reforms and the reinstitution of student councils, banned under the Park regime. Workers wanted payment of unpaid back wages plus wage increases. *See, e.g.,* THE KWANGJU UPRISING: SHADOWS OVER THE REGIME IN SOUTH KOREA 11-12 (Donald N. Clark ed., 1988) [hereinafter "THE KWANGJU UPRISING"]; *Kwangju Revisited: Rewriting history*, FAR E. ECON. REV., May 26, 1994, at 44, 45.

9. PAK SE-KIL, *supra* note 6, at 66 n.18. While it seems unlikely that the exact number of Kwangju Uprising casualties will ever be determined, hospital and other reports place the total number of dead and injured at close to 2,000. *Id.*

these events.<sup>10</sup> Roh has been a target of blame for the incident along with Chun and several others.

Chun subsequently served as president from 1980 to 1988, when he was succeeded by Roh, who stepped down in 1993. Because these two key instigators of the above events remained in power for so long, the truth behind the Kwangju incident has remained obscured. While Chun and Roh were in power, prosecution of any of the military officers involved, to say nothing of the two presidents, was rendered impossible. Even so, the families of the victims and opposition groups made repeated calls for investigations and the bringing to justice of Chun, Roh, and other military officers for their roles in the coup d'état and the bloody suppression, but these calls were not answered.

In 1993, when former dissident leader Kim Young-sam became Korea's first civilian president in over 30 years,<sup>11</sup> there was hope that history might finally be "corrected" (*yôksa barojapki*). Such hopes seemed forlorn, however, when it became clear that Kim was opposed to dragging the former presidents before court over the Kwangju incident, choosing instead to let "history be the judge."<sup>12</sup>

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10. Much has been written on the events in Kwangju and the U.S. government's role in countenancing the suppression. See, e.g., Samsung Lee, *Kwangju and America in Perspective*, *ASIAN PERSPECTIVE*, Fall-Winter 1988, at 69; Mark Peterson, *Americans and the Kwangju Incident: Problems in the Writing of History*, *THE KWANGJU UPRISING*, *supra* note 8, at 52. A recent article in *The Nation*, which examines newly declassified U.S. government documents regarding the U.S. role in Korea during 1979 and 1980, indicates that high level U.S. officials likely knew of and gave prior approval to the crackdown in Kwangju. Tim Shorrock, *Debate in Kwangju: Were Washington's cables read as a green light for the 1980 Korean massacre?*, *THE NATION*, Dec. 9, 1996. An even more detailed version of this story including full quotations from the declassified documents can be found on the Internet at Korea Web Weekly. Tim Shorrock, *The U.S. Role in Korea in 1979 and 1980* (visited Dec. 20, 1996) <<http://www.kimsoft.com/korea/kwangju3.htm>>.

11. On April 19, 1960, student-initiated protests against the autocratic Syngman Rhee regime led to the overthrow of that government and the establishment of the Second Republic. This provided Korea with the opportunity to set up a truly democratic order with a government that would be responsible to the people. However, the new parliamentary leadership, in which governmental authority was placed with the cabinet and prime minister, may have been too weak, and a military coup d'état in May 1961 brought the new civilian government to an end. See, e.g., James B. Palais, "Democracy" in *South Korea, 1948-72*, in *WITHOUT PARALLEL: THE AMERICAN-KOREAN RELATIONSHIP SINCE 1945* 318, 326-331. Successive military governments reigned from 1961 until Kim took office in 1993.

12. *South Korea: Whirlwind Honeymoon*, *FAR E. ECON. REV.*, June 24, 1993, at 18. Shortly after taking office, President Kim did make some efforts to appease Korean citizens over Kwangju. On May 17, 1993, the government announced that it would take measures to restore honor and compensate victims of the Kwangju tragedy. These measures included designating May 18th as a national holiday, eliminating police records of those involved in the uprising, and the discontinuing of searches for identified protesters. *South Korea to Honor, Compensate Kwangju Uprising Victims*, *ASIAN POL. NEWS*, May 24, 1993.

State prosecutors followed the lead of President Kim in refusing to file any charges against the former presidents. On the one hand, an investigation by the Seoul Prosecutor's Office regarding the December 12th military takeover reached the conclusion, on October 29, 1994, that the takeover constituted the crime of "military insurrection."<sup>13</sup> However, the prosecution failed to follow through with charges, instead announcing that it would suspend prosecution (*kiso yuye*).<sup>14</sup> Later, on July 18, 1995, after questioning 269 people for one year and two months, and reviewing more than 100,000 pages of material, the Seoul Prosecutor's Office announced that the acts of the former presidents in the May 17th coup and Kwangju crackdown were "unindictable offenses" for which the state had "no authority to prosecute" (*kongsokwôn ôpsûm*).<sup>15</sup>

Following the Prosecution's July 18th announcement, some 300 citizens filed a constitutional petition in late July with the Korean Constitutional Court<sup>16</sup> appealing the conclusion of unindictability.<sup>17</sup> A reversal of the Prosecution's conclusion by the Constitutional Court would mean that the Prosecutor's Office would have no choice but to indict,<sup>18</sup> and

13. *Kômch'al palp'yo: "'12·12' nûn kunsâ ballan"* [Prosecution: Dec. 12th Incident constitutes military insurrection], DONGA ILBO, Oct. 30, 1994, at 1.

14. *Id.*

15. The Prosecution made the laughable conclusion that it had "no authority to prosecute the leaders of a *successful* coup d'état, though criminality is recognized in the course of their ascension to power" (emphasis supplied). Announcement of the Results of Investigations into the 'May 18th Incident,' Ministry of Defense, Division of Prosecution, Seoul Prosecutor's Office, July 18, 1995, printed in 5-18, PÔPCHÔK CH'AEGIMGWA YÔKSACHÔK CH'AEGIM [LEGAL AND HISTORICAL RESPONSIBILITY FOR THE MAY 18TH INCIDENT] 225 (Pak Eun-jong and Han In-sop, eds., Ihwa Yôjja Taehakkyo Ch'ulp'anbu 1995) [hereinafter "5-18, PÔPCHÔK CH'AEGIM"].

16. The Korean Constitution was amended in 1987 to include, among other things, a Constitutional Court, similar to the Federal Constitutional Court of Germany. It is the duty of the Constitutional Court to adjudicate on: the constitutionality of legislation, impeachment matters, dissolution of political parties, competence of disputes between state organs, and constitutional petitions. HÔNÔP [Constitution] art. 111(1). At least six out of the nine justices must concur on most Constitutional Court decisions. *Id.*, art. 113(1). See also James M. West and Dae Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?* 40 AM. J. COMP. L. 73 (1992). Many key principles in the Korean legal system are derived from Germany and other civil law countries. For more on the Korean legal system, see KOREAN LAW IN THE GLOBAL ECONOMY (Sang-Hyun Song ed., Bak Young Sa 1996).

17. Hônôpsowôn simp'an ch'ônggusô: pulgiso ch'ôbun ch'wisô [Petition for Judgment of the Constitutional Court requesting cancellation of the unindictability conclusion], July 24, 1995, printed in 5-18, PÔPCHÔK CH'AEGIM, *supra* note 15, at 258.

18. Most civil law jurisdictions provide a mechanism for court review of a prosecutor's failure to indict. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1352-53 (1993). Contrast this practice to that in the U.S., where courts cannot normally second-guess a prosecutor's decision not to indict. *Id.* at 1337; see also *Newman v. Davis*, 382 F.2d 479, 480-82 (D.C. Cir. 1967) (for observations on judiciary's limited role in reviewing prosecutorial discretion).

thus the Court's ruling was widely anticipated. However, over the months that followed, there were several shocking developments. First, in October, an opposition party member revealed former President Roh's amassment of a huge slush fund while in office. Roh subsequently confessed to the accumulation of 500 billion won (\$654 million). Former President Chun was accused of taking even greater amounts in bribes. Then, on November 24, 1995, President Kim dropped the bombshell: he ordered his ruling party to enact a special law to unearth the truth about the 'May 18th Incident' and which would enable prosecution of those involved in both the massacre and the 1979 coup.<sup>19</sup> By this time, the fifteen-year statute of limitations had expired for the crimes for which Chun, Roh and the other conspirators were to be charged.<sup>20</sup> Therefore, by suspending the running of the statute of limitations for the years Chun and Roh were in power, the law in effect extended the fifteen-year deadline long enough so that everyone could be charged.<sup>21</sup>

Two days later, on November 26, 1995, it was disclosed that the Constitutional Court had reached a ruling on the Prosecution's July decision not to indict the leaders. The ruling, which was leaked before its official pronouncement, concluded that the decision not to indict was "improper," and that "a successful coup is also subject to the law."<sup>22</sup> However, at this point, since it was clear to the petitioners that the Special Act would mandate the prosecution of all the perpetrators, and since a portion of the ruling appeared disadvantageous, the petitioners withdrew their petition on November 29, 1995, thereby annulling the Court's ruling

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19. "5-18 T'ûkpyôlbôp" mandûnda ["May 18th Special Act" to be enacted], DONGA ILBO, Nov. 25, 1995, at 1.

20. But see discussion *infra* note 23 and Part II.1.

21. See discussion *infra* Part II.1.

22. Hônjae: "Sônggongghan naerando chô'bôlga'nûng" [Constitutional Court: "Successful coup is also subject to the law"], DONGA ILBO, Nov. 28, 1995, at 1.

before it was pronounced.<sup>23</sup> As a result, all public attention turned to the passing of the law.

After some struggle between the parties over the exact form the new law should take,<sup>24</sup> the 'Special Act Concerning the May 18th Democratization Movement'<sup>25</sup> was passed on December 19, 1995. Ultimately, in a rare show of cooperation, the ruling and opposition parties (minus Kim Jong Pil's United Liberal Democrats) combined their votes to pass the Act into law by a vote of 225-20.<sup>26</sup> Relevant portions of the Act follow:

*Special Act Concerning the May 18th Democratization Movement*

*Article 1 (Purpose)* The purpose of this Act is to prescribe the matters concerning the suspension of the period of limitations for the crimes subverting the constitutional order, which took place on and around December 12, 1979 and May 18, 1980, so that national order may be set straight, democracy established, and the national spirit uplifted.

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23. The ruling was considered to be disadvantageous because it was thought to create constitutional obstacles for the new Special Act. In its ruling, the Court had also concluded that the fifteen-year statute of limitations for most crimes does not apply to presidential terms, since the president remains beyond legal action. According to this determination, the statute of limitations is viewed to have been legally suspended during the period in which the presidents were in office, and to have resumed after they stepped down. However, the Court was careful to point out that this suspension of the statute of limitations did not apply to every crime; in fact, the crime of treason was not entitled to this reprieve, since it is one of the two crimes for which the Constitution specifically permits legal action against the president during the time he is in office. This is according to Article 84 of the Constitution, which states: "The President shall not be charged with a criminal offense during his tenure of office *except for* treason or inducement of foreign aggression" (emphasis supplied). This impending ruling of the Court was seen to possibly create conflicts with the new law, since the law would enable prosecution for crimes including treason.

Actually, the Constitutional Court had reached the same conclusion in another ruling issued in January 1995. *Judgment of January 20, 1995, 94-Hônma-246*. In this light, the decision to withdraw seems fruitless, since technically the constitutional conflict exists either way. *See discussion infra* Part II.1.

24. In particular, there was disagreement as to whether a special independent prosecutor should be empowered by the new law to probe the incidents without government influence. Kim Dae-jung's opposition party, the National Congress for New Politics ("NCNP"), argued for such a prosecutor, while the ruling party opposed it. *See, e.g., T'ûkkômje yôbu "ch'oedae kôllindol" [Decision on Special Prosecutor is greatest sticking point], CHOSŌN ILBO [CHOSŌN DAILY], Dec. 14, 1996, at 6*. The final version of the bill did not include an independent prosecutor.

25. Special Act Concerning the May 18th Democratization Movement, Law No. 5029, Dec. 21, 1995 [hereinafter "Special Act"].

26. *T'ûkpyôlbôp t'onggwa anp'akk [Both sides of the passing of the Special Act], HANKYŌRE SINMUN, Dec. 20, 1995, at 4*.

*Article 2 (Suspension of the Period of Limitations)* (1) For the crimes subverting the constitutional order prescribed in Article 2 of the Special Application Act<sup>27</sup> concerning the period of limitations for the afore-mentioned crimes, which took place on and around December 12, 1979 and May 18, 1980, the limitations period shall be deemed to have ceased during the period in which there existed obstacles for the State to institute prosecution.

(2) In Paragraph 1 of this Article, "the period in which there existed obstacles for the State to institute prosecution" refers to the period from the date the particular criminal acts were completed until February 24, 1993.

The Act proclaims the suspension of the statute of limitations applicable to the December 12th and May 18th crimes of "subverting the constitutional order," during the period of the presidencies of Chun and Roh, ending on February 24, 1993, the date of President Kim Young-sam's inauguration. It thereby enables the prosecution of Chun, Roh, and others for their roles behind the December 12th insurrection and May 18th massacre.

Both Chun and Roh were already in custody when the Act was promulgated on December 21, 1995.<sup>28</sup> That same day the two ex-presidents were charged with military insurrection for their roles in the December 12th revolt. In January 1996, treason charges were added to both.

Also in January, the Seoul Prosecutor's Office filed arrest warrants for the particular generals and other alleged few dozen high-level conspirators of Chun who had played large roles in the acts targeted by the law. Several of these conspirators filed petitions to the Seoul District Court claiming that the Special Act was unconstitutional on various grounds, including the fact that it was an ex post facto law.<sup>29</sup> The District Court

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27. The corollary Special Application Act Concerning the Statute of Limitations for Crimes of Subverting the Constitutional Order, passed at the same time as the Special Act, defines specifically the crimes to which the Special Act applies, including military insurrection and treason. *Printed in DONGA ILBO*, Dec. 20, 1995.

28. Roh was arrested on November 16, 1995, after confessing to the accumulation of approximately 500 billion won in slush funds while in office. Chun was arrested on December 3, 1995, after he refused to respond to a summons regarding an investigation into the December 12th military insurrection.

29. Petition application case nos. 96-Ch'o-178, 96-Ch'o-362.

agreed and submitted the Act for review by the Korean Constitutional Court. Since the decision of the Constitutional Court is binding and final, it was clear that the fate of not only the petitioners but Chun and Roh as well lay in the hands of the Court.

## II. THE RESPONSE OF THE CONSTITUTIONAL COURT

The Constitutional Court's decision was announced on February 16, 1996.<sup>30</sup> On the crucial issue of whether the Special Act constitutes an unconstitutional retroactive law, five of the nine Justices agreed the Act was unconstitutional. The four remaining Justices declared that though the Act may be retroactive, it is not unconstitutional because retroactive laws may be acceptable under the particular circumstances of the case. Because in Korea a legislative act will not be deemed unconstitutional unless at least six of the nine Justices declare it to be in violation of the Constitution,<sup>31</sup> the Special Act could not be struck down.

Despite the Court's ruling, the Special Act clearly raises issues of a constitutional nature. Following is an analysis of the issues.

### A. *Retroactivity of the Act*

Perhaps the most disturbing aspect of the Special Act is its retroactive nature. The Act suspends the period of limitations for crimes during the years "in which there existed obstacles for the State to initiate prosecution."<sup>32</sup> Those years refer to the time from "the date the particular criminal acts were completed until February 24, 1993,"<sup>33</sup> which correspond to the intervals in which Chun and Roh held the presidency, respectively.

Before deciding whether the law constituted unconstitutional retroactive legislation, the Constitutional Court first looked to see whether it would be proper to term the law retroactive. In order to do this, it questioned whether the statute of limitations had expired at all. The Special Act prescribes for the suspension of the period of limitations during the time in which Chun and Roh were in office. For the crimes which the Special Act targets, notably military insurrection and treason, the

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30. Consolidated Judgment of Feb. 16, 1996, 96-Hôn'ga-2, 96-Hônba-7, 96-Hônba-13.

31. HÔNÔP [Constitution] art. 113(1).

32. Special Act, *supra* note 25, art. 2(1).

33. Special Act, *supra* note 25, art. 2(2).

applicable statute of limitations is fifteen years,<sup>34</sup> a period which had passed by the time the Special Act was passed in December 1995.<sup>35</sup> The placing of a time limitation on the exercise of the state's authority to prosecute originated in the concept of a speedy trial.<sup>36</sup> The right to a speedy trial is guaranteed by Article 27(3) of the Constitution,<sup>37</sup> and a speedy trial is now recognized as one of the guiding tenets of criminal procedure in

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34. Under Article 249(1) of the Code of Criminal Procedure, Law No. 341, Sept. 23, 1954 (as amended Nov. 28, 1987) [hereinafter "Code of Criminal Procedure"], the period of limitations for the prosecution of crimes punishable by the death penalty is fifteen years: "Public prosecutions shall expire after lapse of the following terms: (i) Fifteen years for crimes punishable with the death penalty; . . . ."

For the crimes of military insurrection and treason, the maximum applicable punishment is the death penalty.

Article 5 of the Military Penal Code, Law No. 1003, Jan. 20, 1962 (as amended Dec. 31, 1983) provides for the crime of military insurrection:

Persons who engage in insurrection in a group and with arms shall be punished in accordance with the following classifications: (1) The mastermind shall be punished by death; (2) Persons who participated in the conspiracy, directed, or served in any other important capacity shall be punished by death, or seven years to life of imprisonment or penal servitude; . . . .

Article 87 of the Criminal Code, Law No. 239, Sep. 18, 1953 (as amended Dec. 31, 1988) provides for the crime of treason:

A person who creates a disorder for the purposes of usurping the national territory or subverting the Constitution shall be punished according to the following classifications: (1) A mastermind shall be punished by death, penal servitude for life or imprisonment for life; (2) A person who participated in the plot or directs, or engages in other material activities shall be punished by death, penal servitude, or imprisonment for life, or for not less than five years; the same will also apply to a person who has committed acts of killing, wounding, destroying or plundering; . . . .

35. The limitations period begins to run after the criminal act has been completed. Code of Criminal Procedure, art. 252(1). In pegging the date of the crimes' "completion" there was some dispute as to determining which day the coup d'état actually culminated. In addition to the more intuitive view that the coup culminated at the end of the nine-day Kwangju crackdown, other views are that the coup ended on August 16, 1980, when Choi Kyu-hah was forced to resign as the interim president, or on September 1, 1980, when Chun was elected in an indirect vote to succeed Choi. Another view is that the coup ended on March 3, 1981, when Chun officially took office as President. However, the Constitutional Court ended the dispute in late November 1995, by concluding that the coup ended on August 16, 1980, the day President Choi stepped down. *See, e.g., 5·17 kwallyôn chônwônch'ô'bôl kûn'gô'maryôn* [Establishing grounds for punishment of all those implicated in May 17th coup], DONGA ILBO, Nov. 29, 1995, at 3.

36. LEE JAE-SANG, HYŎNGSASOSONGBŎP [CRIMINAL PROCEDURE] 33 (Pakyongsa 1991).

37. "All Citizens have the right to a speedy trial. A criminal defendant shall have the right to a public trial without delay in the absence of justifiable reasons to the contrary."

Korea.<sup>38</sup> However, prosecution of Chun or Roh was virtually impossible during the time they were in office, from 1980 to 1993. The same is true of the other generals and officers involved. They were politically untouchable, being able to hide behind the shield of the two presidents.

The inability to prosecute any of the principals of the military coup and acts of treason gave rise to a theory, supported by some members of the Court, that the statute of limitations should be assumed to have been suspended regardless of the passing of the Special Act. As such, the law should be viewed as no more than an act of "affirmative legislation" (*hwaginjôk pômnyul*), i.e., affirming the legal principle that the statute of limitations had been suspended. According to this theory, barriers to the exercise of the state's prosecutorial authority resulted in a distortion of the law that could only be rectified by *assuming* a suspension to the limitations period for all potential suspects, despite the fact that no such statutory grounds for suspension exist.

An opposing theory to the "affirmative legislation" view, also elaborated by the Court, is the "formative legislation" (*hyôngsôngjôk pômnyul*) view. This view rejects the assumption that the statute of limitations had already been suspended before the passage of the Special Act. On the contrary, it holds that the Special Act retroactively enacted legal grounds for the suspension of the statute of limitations. Such "formative legislation" unquestionably constitutes retroactive legislation.

Therefore, in determining whether the Special Act is constitutional, it is necessary to first declare whether, because of the nature of the statute of limitations or due to a legal interpretation of the statute of limitations, the Act simply affirms the causes for suspending the statute of limitations (an affirmative law) or whether, on the other hand, the Act retroactively creates, through an *ex post facto* law, causes for the suspension of the statute of limitations (a formative law). If this Act is no more than a law which affirms existing causes for the suspension of the statute of limitations, the Act has no effect on legal relationships, and there is no room for questions of constitutionality.<sup>39</sup>

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38. LEE, *supra* note 36, at 30.

39. Consolidated Judgment of Feb. 16, 1996, 96-Hôn'ga-2, 96-Hônba-7, 96-Hônba-13.

The Court was unable to reach a consensus on this issue. Three justices concluded that the Special Act was merely a type of "affirmative legislation," and thus not retroactive.<sup>40</sup> Two justices supported the view that the law was a retroactive type of "formative legislation."<sup>41</sup> And the remaining four justices<sup>42</sup> refused to commit either way, maintaining that the issue was out of their jurisdiction since the statute of limitations is provided for not by the Constitution but by the Code of Criminal Procedure, thus making it an issue for the ordinary courts, not the Constitutional Court.

An examination of the circumstances in which the Act was passed, however, makes it clear that the Act is definitely "formative," and consequently, retroactive. Intuitively speaking, if the statute of limitations had been legally suspended before the passage of the law, there would be no need for the law. The fact that the government and the National Assembly felt the need to pass the Special Act in order to prosecute Chun and Roh is evidence that the statute of limitations had not been legally suspended.

Furthermore, in January 1995, the Constitutional Court concluded that the fifteen-year statute of limitations should not apply to most crimes committed by a president during his presidential term because the president remains beyond legal action.<sup>43</sup> However, it specified that for the crimes of treason or inducement to foreign aggression, the statute of limitations should run as normal since these are the two crimes that Article 84 of the Constitution provides that a president can be charged with while in office.<sup>44</sup>

40. According to these three Justices (Kim Chinu, Lee Jaehwa, and Cho Sŭnghyŏng),

[I]n cases such as this where criminal prosecution of the perpetrators of the insurrection and treason was impossible because of the distortion to the functions and enforcement of the laws, we should view this . . . as an obstacle within the legal and democratic systems; and for the period in which the perpetrators could not be punished because of this obstacle, we must view the statute of limitations to be suspended, *even though* there are no such textual provisions in the Constitution or laws.

*Id.* (emphasis supplied).

41. According to these two Justices (Kim Munhŭi and Hwang Doyŏn), "the suspension of the statute of limitations is enacted by this Act, and the statute of limitations for all of the suspects has been suspended solely by this Act." *Id.*

42. Justices Kim Yongjun, Chŏng Kyŏngsik, Ko Jungsŏk, and Sin Ch'angŏn.

43. Judgment of January 20, 1995, 94-Hŏnma-246. *See supra* note 23.

44. HŌNBŌP [Constitution] art. 84 ("The President shall not be charged with a criminal offense during his tenure of office *except for* treason or inducement of foreign aggression.") (emphasis supplied).

So, even though passage of the Special Act was not needed to effect a suspension of the statute of limitations for certain crimes<sup>45</sup> with which Chun and Roh were charged, for the crime of treason, which both former presidents eventually faced,<sup>46</sup> passage of the Special Act was needed. Furthermore, since Article 84 of the Constitution only applies to the office of the president, the statute of limitations for any crimes committed by the other conspirators cannot be deemed to have been suspended. Viewed in this matter, the Special Act qualifies as a type of retroactive "formative legislation" since it creates, after the fact, legal grounds for the suspension of the statute of limitations.

### *B. Unconstitutional Retroactivity*

Even though the Special Act might be considered as a type of retroactive legislation, the Court questioned whether this fact alone would make the Act unconstitutional. Although five members<sup>47</sup> of the Court agreed that a retroactive law of this nature was unconstitutional, four members<sup>48</sup> of the Court maintained that it was not.

The five justices who agreed that the retroactive Special Act was unconstitutional based their opinion on the fact that the reliance interest of the perpetrators, achieved through the expiration of the statute of limitations, could not be denied through an ex post facto punishment under any circumstances. A punishment enacted through a law which deprived those interests was, therefore, unconstitutional.

The four justices supporting the law attempted to turn the issue of constitutionality in this case into a balancing test, whereby the reliance interest of the perpetrators had to be weighed with the public's interest in seeing the perpetrators punished.

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This conclusion was confirmed by the Constitutional Court in its late November 1995 ruling on the petition of the Seoul Prosecutor's Office's failure to indict the leaders of the May 18th coup. As mentioned previously (*see supra* notes 16-23 and accompanying text) this latter ruling was never pronounced by the Court, as the petition was withdrawn prematurely out of concern that the ruling might render the Special Act unconstitutional. And by withdrawing the petition, the petitioners ensured that the ruling would have no precedential value.

45. E.g., for military insurrection, a charge which both former Presidents faced.

46. Chun and Roh were indicted for treason on January 23, 1996. CHOSŌN ILBO, Jan. 24, 1996.

47. Justices Kim Yongjun, Kim Munhui, Hwang Doyŏn, Ko Jungsŏk, and Sin Ch'angŏn.

48. Justices Kim Chinu, Yi Jaehwa, Cho Sŏnggyŏng, and Chŏng Kyŏngsik.

[U]nder extraordinary circumstances, such as when there is a public interest need for the change of existing law, or on the other hand, when the need for protecting the individual's reliance interest is relatively small, and the meeting of that reliance interest cannot be objectively justified, such [ex post facto] legislation can be allowed.

....

Therefore, compared to the *insignificant value* of protecting the military insurgents' and traitors' interests in relying on the legal status attained through the expiration of the statute of limitations for the crimes of military insurrection and treason, even though the reliance interests and legal stability of these insurgents are being rejected, the public interest being achieved is far greater.<sup>49</sup>

According to these justices, the acts of Chun, Roh, and the other principals resulted in numerous deaths and other physical human rights violations, delay to the achievement of democracy in Korea and the suppression of individual freedoms. Therefore the public interest achieved by punishing them is far greater than the value of protecting their reliance interests.

The above argument is not convincing, for several reasons. It is not correct to say, with regard to this case, that the "reliance interest [of the perpetrators] is relatively small" because the crimes charged in this case carry with them a maximum penalty of death. As such, the balancing test approach used by the supporters of the Act's constitutionality should not be applicable to this situation. A balancing test may be proper in a situation where interests of similar weight are contrasted. But this is a situation where individuals have attained a procedural defense to being pulled before a court. Denying to these individuals this procedural defense qualifies as a breach of those individuals' constitutional due process rights. The due process rights of the individual are founded in fundamental notions of individual liberty, and are guaranteed by the Korean Constitution.<sup>50</sup> Of course, in certain circumstances the constitutional rights of the individual have to be tempered by the interests of the public, especially when the individual's exercise of his right causes or threatens to cause harm to the public. Thus, Article 37 of the Korean Constitution

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49. Consolidated Judgment of Feb. 16, 1996, 96-Hôn'ga-2, 96-Hônba-7, 96-Hônba-13 (emphasis supplied).

50. HÔNBOŨP [Constitution] art. 12(1).

provides that "[t]he freedoms and rights of citizens may be restricted by law *only when* necessary for national security, the maintenance of public order or public welfare. Even when such restriction is imposed, no essentials of the freedom or right shall be violated."<sup>51</sup> In this case, however, no public harm is threatened by the exercise of a procedural defense by Chun or Roh. There is little doubt that many if not most in the public would like to see them punished, but this desire does not transfer into a cessation of Chun and Roh's individual rights. The right not to be prosecuted attained by the expiration of the statute of limitations is a fundamental one, guaranteed by the Constitution,<sup>52</sup> and not subject to a balancing test of the kind used by the Court.

The Special Act is an *ex post facto* law, and, in addition to the above reasons, there are solid grounds within Korean constitutional law for declaring that it is unconstitutional for that reason alone. The Special Act enables the punishment of persons for acts in the past which could no longer be punished. The principle of legality, or *nulla poena sine lege* (without law there can be no punishment) is recognized by modern legal theorists in Korea as an extrapolation of the guarantee of the Korean Constitution that "[n]o person shall be arrested, detained, seized, searched, or interrogated except as provided by law, or be subject to punishment, preventive incarceration, or forced labor except in accordance with law and due process of law."<sup>53</sup> Furthermore, Article 1(1) of the Criminal Code provides that "[e]stablishment and punishment of a criminal act shall be in accordance of the law at the time of the act," again making clear the principle against *ex post facto* legislation.

In the United States, by comparison, "a law is unconstitutionally 'ex post facto' if it deprives the defendant of a defense to criminal liability that he had prior to enactment of the law."<sup>54</sup> In *The Federalist*, James Madison stated clearly that "[b]ills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation."<sup>55</sup> Today, "Congress, of course, has the power to extend the period of limitations without running afoul of the *ex post facto* clause, *provided* the period has

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51. HONBOP [Constitution] art. 37(2) (emphasis supplied).

52. *Id.*

53. HONBOP [Constitution] art. 12(1). See also TSCHOLSU KIM, HONBOPHAK KAERON [TREATISE ON CONSTITUTIONAL LAW] 354 (Pakyongsa 1991).

54. BLACK'S LAW DICTIONARY 580 (6th ed. 1990); U.S. CONST. art. 1, § 9, cl. 3 and § 10.

55. THE FEDERALIST NO. 44 (James Madison) (emphasis supplied).

not already run.”<sup>56</sup> The defendant acquires a right to rely once the statute of limitations has fully run.<sup>57</sup>

### C. *Selective Legislation — Equality before the Law*

Another problem which the Special Act faces is that it has the characteristics of “selective legislation” (that is, legislation which, in this case, singles out a specific person or persons as the target of enforcement) which may be in violation of the principle of equality under the law, guaranteed by Article 11(1) of the Constitution.<sup>58</sup> The Special Act deals specifically with the perpetrators of “crimes subverting the constitutional order, which took place on and around December 12, 1979 and May 18, 1980.”<sup>59</sup> According to the Korean Constitutional Court, the principle prohibiting selective legislation under the Korean Constitution “exists for the purpose of preventing, before the fact, the possible intervention of the arbitrariness of legislators in the legislation process.”<sup>60</sup> Although there is no specific provision within the Constitution prohibiting selective legislation, permitting the enactment of selective legislation such as the Special Act could be equivalent to the accomplishment of arbitrary legislation in violation of the Constitution’s principle of equality under the law.

The Court unanimously agreed that although the Special Act is equivalent to a type of selective legislation, it is not an unconstitutional violation of the principle of equality before the law. It held that when there are justifiable reasons for the passing of the laws, such that the laws do not constitute the arbitrary legislative persecution of certain individuals for political or personal reasons, the laws may be justified. The Special Act

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56. *United States v. Richardson*, 512 F.2d at 106 (3d Cir. 1975) (emphasis supplied).

57. *See* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 484 n. 9 (1978). According to the U.S. Supreme Court, “two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.” *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The Special Act satisfies both of these elements. It retroactively suspends the limitation period for the years 1980-93, and it enables the prosecution of Chun and Roh. This is not to assume that U.S. law applies to the Special Act, but it is valuable as a comparison.

In the United States, one of the important purposes served by the ex post facto prohibition articulated by the Supreme Court is that the prohibition “restricts government power by restraining arbitrary and potentially vindictive legislation.” *Id.* at 28 (1981).

58. “All citizens shall be equal before the law, and there shall be no discrimination within the fields of political, economic, social or cultural life on account of sex, religion, or social status.”

59. Special Act, *supra* note 25, art. 1.

60. Consolidated Judgment of Feb. 16, 1996, 96-Hôn’ga-2, 96-Hônba-7, 96-Hônba-13.

"deals with crimes of . . . such egregiousness as has never been seen in the history of [the Republic]." <sup>61</sup> Therefore, "[w]e cannot but view that there is more than convincing rational reasons for the special treatment of [these crimes] to distinguish them from other crimes." <sup>62</sup>

Because of the harsh nature and degree of Chun and Roh's crimes, the people's desire to formulate a law with specific application to Chun and Roh is understandable. However, despite the Court's endorsement, there are certain arbitrary and political aspects to the Special Act which are causes for concern on a constitutional law level. There was considerable public speculation as to the reasons why President Kim Young-sam called for the passage of the Special Act in late November 1995, after having refused to condone prosecution of the former presidents during the first half of his term. <sup>63</sup> Undoubtedly, one of the reasons for the decision to pass the law was the concern about the low popularity of his party in light of the general elections scheduled for April 1996. Kim had also hoped to distance himself from the old guard and its remaining elements within his ruling party. <sup>64</sup> There have been further rumors that Chun and Roh were planning on pooling their money to create a new party, <sup>65</sup> in a direct affront to President Kim, and the call for the Act to prosecute Chun and Roh was Kim's response. Of course the disclosure that Chun and Roh had accumulated astronomical slush funds during their respective terms as president (and especially Chun's refusal to repent for his improprieties) served as an added catalyst for the desire to punish the former leaders. <sup>66</sup> President Kim was also concerned about rumors that he himself had taken

61. *Id.*

62. *Id.*

63. See, e.g., *YS kyôldanûn sunsuhaetnûn'ga?* [Was Kim Young Sam's motive genuine?], HANKYÔRE 21, Dec. 7, 1996, at 12; "*5-18 T'ûkpyôlbôp*" *kyôldan chôngnyak iyong ûisim* [Doubt regarding the political motivations behind the "May 18th Special Act"], DONGA ILBO, Nov. 29, 1995, at 4.

64. In 1988, for the first time in three decades, the president's party lost its majority in the National Assembly. After a period of legislative stalemate, the political scene was abruptly realigned on January 22, 1990, when Kim Young-sam and Kim Jong-pil announced the merger of their opposition parties with the party of Roh Tae-woo to form the Democratic Liberal Party (DLP). Jin Park, *Political Change in South Korea: The Challenge of the Conservative Alliance*, 30 ASIAN SURVEY 1154 (1990). Since becoming president, Kim has tried to distance himself from the *Minjôngp'a*, the faction of the DLP which consists of former followers of Chun and Roh. In November of 1995, the DLP announced that it would change its name to the New Korea Party ("NKP").

65. See, e.g., *Skong sindangsôl, chijajesôn'gôhu dûng su ch'arye "tolch'ul"* [Repeated "surfacing" of rumors surrounding the creation of a new party by former 5th Republic leadership after the local autonomy elections], CHOSŌN ILBO, Feb. 5, 1996.

66. *YS kyôldanûn sunsuhaetnûn'ga*, *supra* note 63.

money from Roh Tae-woo before the 1992 presidential elections. It was felt that the passing of a law to prosecute Chun and Roh would get the spotlight off of him.

In light of this political situation, and considering the power of President Kim to order his ruling party to enact legislation of this sort, it seems that there should be concern about the "intervention of the arbitrariness of legislators" in the passing of the Special Act to prosecute past crimes. On the other hand, this may be overblown, since the Act did receive broad-based support across the entire political spectrum,<sup>67</sup> and was strongly endorsed by the public as well. In that light, it is difficult to determine conclusively that the Act infringes on constitutional principles of equality before the law, and the concern of arbitrariness may be excessive.

#### *D. Double Jeopardy Claim*

Another claim asserted regarding the Special Act was that it constituted the placing of former Presidents Chun and Roh in a position of double jeopardy of punishment. Double jeopardy punishment is proscribed by the Korean Constitution: "[n]o citizen . . . shall be subject for the same crime to be twice put in jeopardy of punishment."<sup>68</sup> In 1994 and 1995, the Seoul Prosecutor's Office conducted investigations into the roles of Chun and Roh in the December 12 and May 18 incidents, respectively, but refused to file any charges.<sup>69</sup> On this basis Chun has claimed that he was already placed in jeopardy of punishment for his role in the above incidents.<sup>70</sup> And since the Special Act enables punishment of Chun regarding those incidents, it is unconstitutional as a violation of the double jeopardy clause.<sup>71</sup>

In the United States, the Fifth Amendment of the Constitution protects against a second punishment for the same offense, provided there has been a court judgment of an acquittal or conviction.<sup>72</sup> Korean law of double jeopardy, however, is not as clear as double jeopardy law in the United States. Under Korean law, it is unclear whether a court judgment

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67. Recall that the Act was passed by a vote of 225-20 in the National Assembly. *See supra* text accompanying notes 24-26.

68. HONBOP [Constitution] art. 13(1).

69. *See supra* text accompanying notes 13-15.

70. Chun's Unconstitutionality Petition, *supra* note 4.

71. *Id.*

72. U.S. CONST. amend. V.

is needed before a defendant can claim to be protected by the double jeopardy principle. Chun contends that an investigation by the prosecution is sufficient to claim this protection.

The Constitutional Court, in its February 16, 1996 opinion, did not deal with the issue of double jeopardy. However, Chun's view is erroneous. The Constitution places judicial powers in the courts.<sup>73</sup> Accordingly, it is the job of the courts, and not the public prosecutor's office, to determine the guilt and innocence of individuals suspected of a crime. It is the criminal trial that puts an individual in jeopardy of punishment, and not the prosecutor's investigation. Furthermore, to extend the rule proscribing double jeopardy to the case of a prosecutor's decision, for whatever reason, not to indict a suspect would lead to unintended consequences. Often, prosecutors refuse to indict for lack of evidence to convict. Furthermore, such a rule would seem out of place in a civil law country such as Korea, where prosecutors may normally appeal an acquittal without violating the double jeopardy principle. As such, the constitutional double jeopardy clause should not be affected by the Special Act.

### III. DISCUSSION AND CONCLUDING REMARKS

The passing of the Special Act does not mark the first time that retroactive legislation has been pushed forward by popular demand in Korea. After the fall of the Syngman Rhee government in 1960, the Korean people demonstrated in the streets and took over the National Assembly Hall demanding a law to punish those officials in the Rhee regime responsible for election irregularities and other crimes.<sup>74</sup> Faced with this pressure, the government passed a constitutional amendment which enabled the passing of legislation to retroactively punish those guilty of improprieties.<sup>75</sup> Similar attempts at retribution took place after the end of World War II, against Korean pro-Japanese collaborators during the Colonial Period.<sup>76</sup>

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73. HONBOP [Constitution] art. 101(1).

74. Dae Kyu Yoon, *Constitutional Amendment in Korea*, 16 KOREAN J. COMP. L. 1-13 (1988); see also TSCHOLSU KIM, *supra* note 53 at 54-55.

75. *Id.* It is important to note, however, that the difference between this legislation and the Special Act is that the latter was not achieved through an amendment of the Constitution.

76. See, e.g., BRUCE CUMMINGS, *THE ORIGINS OF THE KOREAN WAR* 72 (1981).

Although in Korea, as in most constitutional democracies, there is a requirement that all citizens shall be "equal before the law,"<sup>77</sup> there are compelling arguments for the handling of this case differently. First, and most importantly, the law guaranteed prosecution of figures, including not only the former presidents but also their co-conspirators, who committed unforgivable criminal acts against the Korean nation and its people. Constitutional Court justices supporting the law matter-of-factly pointed out that:

If we only permit the enactment of a retroactive law regarding the statute of limitations once in our constitutional history, this is the very occasion on which we should permit it.

If this occasion does not warrant the application of an exception to the principle prohibiting retroactive legislation, there cannot but be real doubt as to when and to what such an exception should apply.<sup>78</sup>

On a moral level, there is little doubt that these perpetrators deserve the punishment and denunciation of the state. To allow Chun and Roh to evade punishment on the basis of what amounts to a "technicality" may be viewed as a greater injustice than the strict adherence to the law. In fact, the use of the legal system to achieve the punishment and denunciation of the perpetrators instills into ordinary Koreans a certain amount of trust and faith for a system of law which has been used against them in the past by successive authoritarian governments. Article 1 of the Constitution places the ultimate authority over the country in the people,<sup>79</sup> and justification for the circumvention of the statute of limitations, in a broader sense, may derive from this provision. Finally, the passing of the Special Act serves as an important deterrent against the usurpation of power by current and future politicians, leaders, and the military.<sup>80</sup>

On the other hand, some counterarguments have been advanced for why Chun and Roh should not be subjected to punishment. The accounts

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77. HÔN BÔP [Constitution] art. 11(1).

78. Consolidated Judgment of Feb. 16, 1996, 96-Hôn'ga-2, 96-Hônba-7, 96-Hônba-13.

79. HÔN BÔP [Constitution] art. 1(2) ("The sovereignty of the Republic of Korea shall reside in the people, and all state authority shall emanate from the people.").

80. In addition, the news that Korea is imprisoning two of its former presidents does not fall on deaf ears in other countries throughout Asia. It also may be of particular concern to current North Korean leaders, especially if the North should collapse within the next few years, as many have predicted.

of the Special Act and the trial of the former presidents in Western media, for example, seem to weigh in the favor of forgiveness and reconciliation.<sup>81</sup> These accounts tend to look at the achievements of the past presidents in bringing economic growth, democracy and reform to Korea. No doubt, the regimes did have their share of accomplishments, including the successful hosting of the 1986 Asian Games and the 1988 Seoul Olympics, credited to Chun. Furthermore, it was Roh who, on June 29, 1987, announced the implementations of democratic reforms, including the direct election of the president.<sup>82</sup> In turn, in an open election, the Korean people chose Roh to succeed Chun in 1988. In fact, it has been argued, it is through the people's awakening to democracy and the country's newfound political maturity, changes which were initiated under Roh, that Korea can even think of bringing the former presidents before court today.

The above view, however, suffers from a certain degree of oversimplification. First of all, Roh was chosen as president in the 1987 election not because of overwhelming popularity (he received barely more than a third of the votes), but because of failure of the opposition candidates to agree on one challenger to the ruling party's ticket.<sup>83</sup>

Furthermore, it is not quite fair to suggest that Chun and Roh should be credited for bringing democracy to Korea. It was not Korea's former presidents, but the Korean people, engaging in massive nationwide demonstrations throughout 1986 and the first half of 1987, which put the pressure on Roh, as Chun's chosen successor, to succumb to demands for fundamental changes.<sup>84</sup> Compared to the Korea of 1980, which was able to turn its guns on its people, the Korea of 1987 was much more wary of

81. See, e.g., *Darkness in Korea: The score-settling continues*, FAR E. ECON. REV., Apr. 4, 1996; *Korean Portents*, WALL ST. J., Mar. 15, 1996.

82. Interestingly, in the memoirs of Lee Soon-ja, wife of Chun Doo-hwan, portions of which recently were made public, Lee claims that the so-called "June 29th Declaration" was formed by Chun, not Roh. *Yi Sunjassi hoegorok'an: "6-29 sôn'on'un nampy'ôn chônssi chakp'um"* [*Memoirs of Lee Soon-ja: "June 29th Declaration was Chun's brainchild"*], CHOSŌN ILBO, Dec. 19, 1996.

83. The two main opposition candidates, Kim Young-sam and Kim Dae-jung, received about 27% each to Roh's 36% of the vote. The third opposition candidate, Kim Jong-pil, took approximately 8%. GAVAN MCCORMACK & STUART LONE, *KOREA SINCE 1850* 162 (1992).

84. Opposition to the despotism of the Chun regime took several forms, including the self-immolation of students and fierce battles in the streets with riot police. Although student action formed the core of extremist resistance, public criticism of the Chun government came from individuals in all areas of society, including educators, Christian clergy members (some of whom engaged in hunger strikes), and women's community leaders. The nationwide Grand Peace march, on June 26, 1987, comprised hundreds of thousands and served to convince Roh of the need for broad concessions. Roh's announcement of reforms came three days after the march. *Id.*, at 160-62.

its actions. In light of its commitment to host the Summer Olympics the following year, Korea could not afford the international criticism that would have resulted from another crackdown on the level of Kwangju. Just as massive demonstrations brought down the Syngman Rhee regime in 1960, Chun and Roh succumbed to the will of the people by opting for reform.

However, the fact that change towards a nation governed by the rule of law was initiated by the Korean people is a further argument for the impartial application of the constitutional law in evaluating the Special Act. Elements of the law to punish the former Korean leaders raise clear constitutional doubts. Most fundamentally, the removal through a retroactive law of a defense to the prosecution of the former presidents constitutes *ex post facto* legislation. Furthermore, the law raises questions as to its violation of the principle of equality before the law, as a piece of selective legislation targeting specific acts of persons.

Although not as obvious, the Special Act is also problematic for its designation of the specific acts subject to the law as "crimes,"<sup>85</sup> a determination that should properly be made by the courts.<sup>86</sup> This seems to be in violation of the principle of separation of powers. Furthermore, the designation is a violation of the principle of presumption of innocence guaranteed by Article 27(4) of the Constitution.

After the Special Act was endorsed by the Constitutional Court, Chun Doo-hwan and Roh Tae-woo faced prosecution in the Seoul district criminal court before a three-judge panel. Following a five-month trial, on August 26, 1996, Chun was convicted and sentenced to death (later commuted to life), and Roh was given a 22-and-a-half years sentence (later commuted to 17 years). The trial was marred in part, however, by the resignation in July 1996 of Chun and Roh's defense team, along with claims that the defense was not being given enough time to prepare, were not allowed to call needed witnesses, and that the trial's schedule was being accelerated.<sup>87</sup> The resignation left Chun and Roh to be defended by state-appointed attorneys. Under Korean criminal procedure law, defendants must be freed for the duration of a trial if the court takes longer

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85. The Special Act designates for exclusion from the statute of limitations "the *crimes* subverting the constitutional order, which took place on and around December 12, 1979 and May 18, 1980 . . ." (emphasis supplied). Special Act, *supra* note 25, art. 1.

86. HONBOP [Constitution] art. 101(1) ("Judicial power shall be vested in courts composed of judges.").

87. *Swift, Tough Justice: Due-process questions raised in Chun-Roh trial*, FAR E. ECON. REV., Aug. 15, 1996, at 16.

than six months to reach a verdict. The court was concerned that Chun and Roh would be freed if the trial were not finished by August, but the court's behavior has raised further due process issues regarding the trial.<sup>88</sup>

The decision of President Kim Young-sam to pass a law of constitutionally questionable nature in order to punish his predecessors in the Blue House raises puzzling questions. Before the passage of the Special Act, there were two basic charges that were leveled at Chun and Roh: military insurrection and treason. The death penalty can be imposed for both of these serious crimes. Although in November 1995, when Kim planned to pass the Special Act, the fifteen-year statute of limitations had passed for treason, the Constitutional Court had already made it clear that for other crimes, including military insurrection, the statute of limitations had not yet expired.<sup>89</sup> Furthermore, the Constitutional Court was on the verge of clearing the way for the prosecution of Chun and Roh by overturning the Seoul Prosecutor's Office's previous decision not to indict.<sup>90</sup> The former presidents could have been pulled before court on charges of military insurrection, not to mention on the unrelated charges of graft, without the need for the passage of the Special Act. Thus, President Kim could have avoided the constitutional breach while still taking credit for pressing the prosecution of his predecessors.

Regardless of the passing and enforcing of the Special Act, Chun Doo-hwan and Roh Tae-woo will likely be identified in Korean history primarily for the brutalities they committed to the Korean people. Their crimes cannot be forgotten, nor should they be forgiven. Punishment and denunciation of Chun and Roh through the Special Act may, in certain ways, enable Korea to move farther away from its tyrannical past. Still, punishment could have been achieved without running amiss of the Constitution, by simply charging the two in accordance with the Constitutional Court's mandate to the Prosecutor's Office, and not at the whim of President Kim. One cannot but feel that an easy opportunity has been missed.

The negative consequences of the Special Act cannot be dismissed. At a time when Korea is still in the early stages of a new constitutional democracy, it is important not to allow any major deviations to be made. But just as the framework of the constitutional rule of law in Korea is being set, a glaring circumvention is taking place. The stated purpose of

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88. *Id.*

89. *See supra* text accompanying notes 43-46.

90. *See supra* text accompanying notes 16-23.

the Special Act is to enable “national order [to] be set straight, democracy established, and the national spirit uplifted,”<sup>91</sup> and yet the Act’s disregard for the Constitution runs the risk of bringing new damage to the national order.

Korea has a dangerous history of trying to bend the law for the sake of justifying excesses of the state. The nation has made tremendous strides over the last eight-to-nine years towards democracy, constitutionalism, and the rule of law. It must be careful, though, of the precedents that it is setting for future generations.

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91. Special Act, *supra* note 25, art. 1.

## APPENDIX

### Chronology of Events

October 26, 1979	President Park Chung-hee assassinated. Prime Minister Choi Kyu-hah becomes Acting President.
December 12, 1979	General Chun Doo-hwan, with the aid of several other military officers, including Roh Tae-woo, arrests martial law commander Chung Seung-hwa, without the approval of Acting President Choi.
May 17, 1980	Chun, head of the Defense Security Command ("DSC"), forces the Choi government to approve his plan to expand martial law to a nationwide level, allowing Chun, as DSC head, to take the lead in state affairs.
May 18-27	Citizens in Kwangju demonstrate in opposition to martial law and demand resignation of Chun. Troops dispatched to Kwangju to suppress uprising. Struggle ensues, eventually resulting in hundreds of deaths.
August 16, 1980	President Choi resigns.
September 1, 1980	Chun is sworn in as new President after being chosen in an indirect election.
March 3, 1981	Chun officially takes office as President.
June 29, 1987	In response to nationwide demonstrations by Koreans demanding reforms, Roh, Chun's chosen successor for President, announces acceptance of direct presidential election and other reforms.
December 16, 1987	Roh elected President with 36.6% of the popular vote.
January 22, 1990	After Roh's ruling party had lost its majority in the National Assembly, Kim Young-sam and Kim Jong-pil announced the merger of their opposition parties with the ruling party, forming the Democratic Liberal Party ("DLP").

December 18, 1992	Kim Young-sam elected President with 42% of the popular vote.
February 24, 1993	Kim inaugurated as first civilian president in over 30 years.
June 3, 1993	In response to calls that past presidents should be charged for their roles in military coup and Kwangju crackdown, Kim says that people should let "history be the judge."
October 29, 1994	Seoul Prosecutor's Office concludes that December 12 military takeover constituted military insurrection, but chooses to suspend prosecution anyway.
January 20, 1995	Constitutional Court concludes that, under Article 84 of the Constitution, the statute of limitations must be suspended for crimes which a president is not criminally prosecutable for while in office.
July 18, 1995	Seoul Prosecutor's Office announces that the state has "no authority to prosecute the leaders of a successful coup," and it cannot charge former Presidents for May 18th incident.
July 24, 1995	Approximately 300 citizens file a constitutional petition with the Constitutional Court appealing the Prosecution's July 18 decision not to indict former Presidents.
November 16, 1995	Former President Roh arrested after confessing to having amassed about 500 billion won (roughly \$630 million) in slush funds while in office.
November 24, 1995	President Kim announces that he will direct his ruling party to enact a special law (Special Act) to prosecute those involved in the Dec. 12 and May 18 incidents.
November 26, 1996	It is disclosed that the Constitutional Court has reached a ruling on the Prosecution's decision not to indict. According to the ruling, the official pronouncement of which is expected to follow within a matter of days, the statute of limitations has expired for a charge of treason against Chun and Roh, and for all charges against the remaining perpetrators.

November 29, 1995	Prior to the Constitutional Court's scheduled pronouncement of its ruling, petitioners withdraw appeal, out of concern that it might render the Special Act unconstitutional.
November 30, 1995	Constitutional Court announce postponement of ruling on the petition.
December 3, 1995	Former President Chun arrested for his role in the Dec. 12th rebellion.
December 5, 1995	Roh indicted on graft charges.
December 16, 1995	Constitutional Court announced termination of petition of the Prosecution's decision not to prosecute participants in May 18th incident.
December 19, 1995	National Assembly passes May 18th Special Act.
December 21, 1995	Special Act promulgated. Chun and Roh charged with military insurrection for roles in Dec. 12, 1979 rebellion.
January 12, 1996	Chun indicted in graft charges.
January 18, 1996	Seoul District Court accepts a plea of unconstitutionality of the Special Act filed by two of Chun's co-conspirators, and submits this to the Constitutional Court for review.
January 23, 1996	Chun and Roh indicted on Treason charges. Six others are also indicted on similar charges.
January 30, 1996	Several other accused co-conspirators file petition with the Seoul District Court, and this petition is also submitted to the Constitutional Court.
February 16, 1996	Constitutional Court rejects petitions and rules the Special Act constitutional.
March 11, 1996	Trial of Chun and Roh for military mutiny and treason begins.
August 26, 1996	Chun convicted and sentenced to death; Roh convicted and sentenced to 22-and-a-half year sentence.

December 16, 1996	Appeals Court commutes Chun's death sentence to life in prison; Roh's sentence reduced to 17 years.
December 23, 1996	Attorneys for Chun and Roh announce that the two will not appeal convictions to Supreme Court.

# GLOSSARY OF CHINESE PERIODICALS

FAXUE	Jurisprudence
FAXUE YANJIU	Studies in Jurisprudence
FAXUE ZAZHI	Journal of Jurisprudence
FAZHI RIBAO	Legal System Daily
GONGYE CHANQUAN	Industrial Property
HEILONGJIANG RIBAO	Heilongjiang Daily
LIAOWANG	Outlook
MINZHU YU FAZHI	Democracy and Law
RENMIN RIBAO	People's Daily
RENMIN RIBAO	People's Daily
(HAIWAI BAN)	(Overseas Edition)
SHEHUI KEXUE	Social Science
TIANJIN RIBAO	Tianjin Daily
XIANDAI FAXUE	Modern Jurisprudence
ZHENGFA LUNTAN	Tribune of Political Science and Law
ZHENGFA YANJIU	Political-Legal Studies
ZHENGZHI YU FALU	Politics and Law
ZHISHI CHANQUAN	Intellectual Property
ZHONGGUO FAZHIBAO	Chinese Legal System News
ZHONGGUO ZHUANLI BAO	China Patent News
ZHONGGUO ZHUANLI YU	China Patents & Trademarks
SHANGBIAO	Quarterly
ZHONGWAI FAXUE	Chinese and Foreign Legal Studies

