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In 2021, Asia Democracy Research Network (ADRN) selected transitional justice and reconciliation as the necessary process to resolve existing grievances and consolidate democracies in each Asian country.

Against this background, ADRN published this special report to evaluate the current state of the trends and trajectories of transitional justice and reconciliation in the region by studying the phenomenon and its impact within three different countries in Asia, as well as their key reforms in the near future.

The report investigates contemporary questions such as:

What are the past events that need to be resolved?

What has been done in the past to address the abuse?

What is the importance of transitional justice and conciliation?

What are the challenges to resolving existing grievances?

What should be done to resolve existing grievances?

Drawing on a rich array of resources and data,

This report offers country-specific analyses, highlights areas of improvement, and suggests policy recommendations to strengthen transitional justice and reconciliation in their own countries and the larger Asia region.

"Transitional Justice and Reconciliation in Asia: Country Cases"

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Transitional Justice and Reconciliation in Asia: Country Cases

Table of Contents

Executive Summary

Country Case 1: South Korea 4
Human Rights Violations and Transitional Justice in South Korea
Korea University, East Asia Institute

Country Case 2: Taiwan 22
The Development of Taiwan's Transitional Justice
Academia Sinica, Asian Barometer

Country Case 3: Sri Lanka 40
The Challenge of Transitional Justice in Sri Lanka
Centre for Policy Alternatives

Executive Summary

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Transitional justice is a government response to past human rights violations. The Asia Democracy Research Network's research on transitional justice and reconciliation in Asia explored three country cases: South Korea, Sri Lanka, and Taiwan.

The nature and scope of human rights violations in each country varies. Compared to Korea and Taiwan, Sri Lanka's human rights violations occurred mostly during the civil war with the Liberation Tigers for Tamil Eelam. Korea and Taiwan experienced both large-scale massacres during conflicts and everyday systematic human rights violations under repressive authoritarian regimes.

In all three countries, some measures of transitional justice were used to address past atrocities. In Korea, criminal prosecutions, truth commissions, and reparations were mostly used. In Taiwan, truth commissions and reparations were widely used with no distinct accountability measures. In Sri Lanka, with pressure from international society, all measures – criminal prosecutions, truth commissions, and reparations – were proposed and adopted. In all three countries, civil society-led transitional justice projects were also initiated.

Authors found important similarities in three country cases. First, human rights violations in these countries are complex and complicated. Past human rights violations are multilayered with multiple events. The existence of diverse human rights violations over a long period of time complicates transitional justice initiatives. In addition, the involvement or acquiescence of external forces in human rights violations makes transitional justice efforts in these countries complicated.

Second, the authors also found there are important effects of international politics. Large-scale massacres of civilians in each country occurred mostly under the context of Cold War. Both the Taiwanese 2.28 incident and Korea's three major massacres – the Jeju, Yeosu, and the Korean War – occurred during the early phase of the Cold War. In the case of Sri Lanka, the Cold War provided an important background for the civil war itself. There was, however, another dynamic between international politics and the local transitional justice process after the peace accord. International society constantly pressed Sri Lanka to implement many and diverse transitional justice measures.

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Third, human rights violations and transitional justice occurs within the domestic political context. It is mainly because perpetrators are mostly government agents in the military, intelligence agencies or police. In many cases, perpetrators and their supporters still have a close tie with contemporary political elites and play the role of ‘spoilers’. Therefore, addressing the past atrocities necessarily cause disruptions in existing political structure. The ‘politicization’ of transitional justice is an inevitable feature.

At the same time, the authors discovered three important lessons. First, in all three cases, though controversial, some meaningful measures of transitional justice have been adopted and implemented. Those measures were something unimaginable in the past. This reflects the rise of a culture of accountability. It does not mean, however, that truth, justice, or reconciliation has been achieved in every country. As seen in social controversies in each country, the culture of impunity remains strong. Nevertheless, the world, even Asia which has lagged in this trend of making the past human rights violations accountable, experienced a transformative moment.

Impunity for past human rights violations is certainly waning in Asia. With increasing numbers of states introducing transitional justice measures, it is likely to achieve accountability. Accountability has not always been exclusively conceived in terms of retributive justice. Rather, many used restorative measures such as truth commissions and reparations. Truth commissions and reparations have taken place in all three countries.

Second, transitional justice in Asia is ongoing and will continue to be so. In all three cases, controversies around transitional justice measures, revision of laws, and multiple initiatives of transitional justice show that transitional justice is not a once-and-for-all resolution to the past atrocities.

As any other political process, the transitional justice process has ups and downs and its proponents and opponents. Thus the overall impact of transitional justice in each Asian case is somewhat mixed. In Korea, where many transitional justice initiatives were used, scholars generally see the positive impact of the transitional justice process in the long term. All the ups and downs worked together to consolidate democracy and develop human rights. Even controversies, backfires, and failures constituted a part of the big story where transitional justice makes an important difference. However, in Taiwan and Sri Lanka, the relationship between transitional justice and positive outcomes seems less apparent.

Third, authors discovered that transitional justice is a whole-of-nation response. Both civil society and state were involved in the transitional justice process. Within the state, both the legislature and administration were involved in the process. In Taiwan, transitional justice measures were mostly discussed in the Legislation Yuan. The legislative process, however, is not the end of transitional justice measures. In Korea, the legislature, judiciary, and executive cooperated to bring meaningful changes for the victims.

The other important actors were civil society actors. There has been an important contribution from civil society in all three countries. In Korea, civil society actors not only initiated the transitional justice movement but also continued to monitor the government initiatives. Victims and activists for a long time pressed the government to adopt transitional justice measures. In Sri Lanka, a Consultative Task Force (2016), which was a civil society body, worked hard to implement transitional justice measures, which was proposed by the international community. In Taiwan, the victims and civil society actors were active as well.

Comparison between three Asian cases is challenging due to a very different political context of each case. However, it also shows that there are considerable commonalities such as the complex nature of human

rights violations and impact of both domestic and international politics. At the same time, juxtaposing three Asian cases reveals that there are important lessons to be learned from comparing three cases. First, although the culture of impunity is still strong, there is an increasing demand for and realization of accountability. Second, the transitional justice process, although not perfect, is an ongoing process with ups and downs. Third, transitional justice in each country shows a whole-of-nation response to the past atrocities.

Country Case 1: South Korea

Human Rights Violations and Transitional Justice in South Korea

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Decades of dictatorial and authoritarian regimes have stifled the voices of the victims, and their families, of gross and systematic human rights violations. Public discussions of past human rights violations began after democratization in 1987, and reached their apex when Kim Dae-jung took office as the eighth president in 1998. Policy measures such as criminal prosecutions, truth commissions, and reparations were adopted by the government, while civil society actively commemorated the victims. Although some measures were praised for their success, others triggered greater ideological tension and conflicts over the past. Korea's experience, therefore, provides some lessons for other countries undergoing a similar democratic process.

Transitional justice is a government response to past human rights violations (Teitel 2000). Different terms—such as accountability, truth-seeking, reparations, compensation, restoration of victims' honor, and reconciliation—are used to refer to transitional justice. In 2004, the principle that countries should address past wrongs was officially adopted as an international norm by the United Nations (United Nations 2004). Nevertheless, there are still many controversies over how to implement transitional justice in each country and how to resolve tension and conflicts thereof.

The first step is to study the individual experience of each country and identify the possibilities and limitations of transitional justice. Some governments, think tanks, nongovernment organizations, and scholars in the United States, the United Kingdom, Germany, and the Czech Republic have long begun documenting transitional justice and systematically compared experiences of different countries to draw lessons. (Bickford 2007; CEVRO 2021; Dancy et al. 2014; Sriram and Mihr 2022).

In Korea, transitional justice is translated as *gudogi jeongui* (Cho 2014), *ihaenggi jeongui* (Lee 2015), or *jeonhwangi jeongui* (Kim 2017), but remain obscure terms. While the concept may be unfamiliar to many Koreans, the phenomenon it refers to is not. Transitional justice has been referred to as *guageo cheongsan* (liquidation of the past affairs), *chaekimja cheobeol* (punishment for those responsible for past atrocities), *huisaengja myeongye hoebok* (restoration of the honor of victims) or *jinsang gyumyeong* (fact-finding or truth-seeking) in lay language even before the post-1987 discussion of historical injustices had publicly begun.

Transitional justice in Korea addresses the sufferings of those, and their families, that were unjustly victimized by the state or through state-supported violence. At the societal level, diverse policy measures have

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also helped in raising awareness of human rights and of the expected responsibility of the state to protect human rights and address past atrocities. This was possible through government- and civil society-led interventions. For example, the state has made official apologies, amended history textbooks and government documents, made efforts to restore the honor of victims, made reparations through retrials, excavated the remains of victims for honorable commemoration, established memorial foundations, provided financial and social support for the victims and their families, and designated major human rights incidents as national commemoration days.

Transitional justice, however, also revived conflicts by rekindling age-old ideologically sensitive histories. Whether to remove graves of a few “national heroes” out of the National Cemetery owing to their newly discovered pro-Japanese activities; whether to enact the Special Act on May 18 Democratization Movement, which would recognize victims of the massacre as national meritorious persons; opposition to the passage of the Special Act on the Yeosu-Suncheon Incident; and the controversy on the proposed bill in 2020, which eventually became a revised act (Special Act On The May 18 Democratization Movement) to punish acts of spreading false information about the Gwangju 5.18 Democratization Movement are all clear examples of transitional justice that courted great controversy.

This study seeks to comprehensively understand human rights violations and the transitional justice process in Korea. By examining the achievements and limitations of this process, the study further explores lessons from the Korean experience for other countries undergoing a similar process. In the remaining study, first, major human rights violations and transitional justice policies in Korea since the Japanese colonial rule are examined. Second, the achievements and limitations of Korea’s transitional justice measures are analyzed. Third, the wider implications of this discussion are discussed.

1. Human Rights Violations and Transitional Justice in South Korea

The modern history of Korea follows the periods of liberation from Japanese colonialism (1910–1945); rule of the US Military Government in Korea (1945–1948); the Korean War (1950–1953); Rhee Syng-man’s dictatorial regime (1948–1960); the Second Republic after the April 19 Student Revolution (1960–1961); the May 16 Military Coup and military dictatorship of Park Chung-hee (1961–1979); the assassination of Park Chung-hee by his subordinates, and the short-lived democratic period called Seoul Spring (1979); the December 12 Military Coup of Chun Doo-hwan and Roh Tae-woo, and their brutal suppression of the May 18 Gwangju Democratic Movement, which followed a repressive authoritarian regime (1980–1987); and the nationwide democratic movement known as the June Democratic Movement in 1987, which finally culminated into full democratization.

Throughout this period, many human rights violations occurred, including mass killings, torture, arbitrary detention, forced disappearances, suspicious deaths, and judicial and extra-judicial killings. The victims and family members have continuously demanded the government an investigation for the truth, punishment of those responsible, reparations, and restoration of the victims’ honor. However, their demands were mostly suppressed under the rule of military leaders, Park Chung-hee, Chun Doo-hwan, and, to a lesser extent, Roh Tae-woo, who claimed that the victims—and even their family members—were “communists.”

Furthermore, students and activists who helped and advocated on the victims and family members' behalf were targeted as well.

As a result, a proper investigation could only begin after the 1987 institutional democratization, and more specifically, after the civilian government of Kim Young-sam was established in 1993. Some argue that a genuine and meaningful transitional justice process began only after 1998 when President Kim Dae-jung took office. Their view is that the first civilian government of Kim Young-sam was a vestige of the military dictatorship and authoritarianism, as it was established with the cooperation of the Democratic Justice Party, a ruling party during the authoritarian regimes. Nonetheless, even with the limitations, some progress was made under the Kim Young-sam administration. For example, the special law was enacted to address the Geochang Massacres, which occurred during the Korean War and military generals Chun Doo-hwan and Roh Tae-woo were convicted for their crimes.

The transitional justice process included many administrative and judicial measures, such as criminal trials, reparations, and truth commissions, with the last being the most frequently practiced.

1.1. Human Rights Violations under the Japanese Colonial Rule

Japanese colonial rule, marked by political repression and economic exploitation, ended in 1945. Korean suffering was exacerbated during and after World Wars I and II. In 1919, a nationwide independence movement known as the March 1 Independence Movement ended in brutal suppression by the Japanese authority, which left 7,500 Koreans dead, 16,000 wounded, and 47,000 arrested. The Japanese forces brutally killed innocent civilians and burned their houses and churches, which was also known at that time as the Jeamri Massacre. Four year later in 1923, the Great Kanto Earthquake took place in Japan. During this period, Japanese vigilante groups, under the auspices of the Japanese government, accused Koreans living in Japan of terror and arson, and killed 6,000 to 20,000 civilians.

Koreans suffered the most since the beginning of the second Sino-Japanese War (1937) until Korea's liberation in 1945. During this period, Korea became a reservoir of labor and resources for the Japanese military and industry. Thousands of Korean women were forced to work as sex slaves, known as "comfort women," for the Japanese military and some 140,000 men and women were victims of forced labor (60,000 in the military and 80,000 in industry). Many independence movement activists, armed resistance groups, religious leaders, and nationalistic educators both in the Korean mainland and overseas (mostly, in China and Manchuria) were constantly monitored, arrested, tortured, and killed.

Shortly after the Republic of Korea was established in 1948, Special Act 3/1948 created the Special Committee and Court to investigate and punish collaborators with the Japanese colonial rule. Sang-Deok Kim, a respected leader of the independence movement, headed the ten-member Committee, which had its own enforcement unit and ten regional offices. The Special Court was composed of sixteen judges with authority to sentence collaborators to death for crimes of treason or murder. Within four months, the Committee arrested 305 suspects and named 1,000 others it planned to investigate. It was the first modern effort to address the past affairs in Korea and many supported and were highly enthusiastic with the new initiative.

However, the Committee and Court were doomed to fail because they lacked the support of President Rhee Syng-man's government, which included many colonial-era elites who themselves were collaborators.

Rhee Syng-man was the Committee's most vocal opponent, refusing to remove identified collaborators such as Roh Deok-sul from his administration. With his protection, collaborators vehemently accused the Committee and Court members of being "communists" who threatened national security by unearthing the past. The members of the Committee and Court were constantly under the threat of assassination, and in 1949, the police even raided their offices. The activities of the Committee and Court withered owing to strong resistance from powerful collaborators and a lack of support from Rhee Syng-man. With the outbreak of the Korean War, the Special Act was annulled in 1951. As a result, the Committee investigated 688 collaborators and prosecuted 293, while the Court considered 79 cases and convicted only 10 collaborators.

Because of this first transitional justice institution's total failure, the issue of collaborators consistently reemerged after democratization. At the request of civil society groups, the Special Committee for the Investigation of Pro-Japanese Collaborators was established by the Special Act 7203 in 2004. The eleven-member Committee, headed by history professor Seong Dae-gyeong, had a mandate limited to investigating and identifying collaborators. In 2010, the Committee published its report, consisting of 25 volumes of 21,000 pages in total and naming 1,005 collaborators. Many of the former collaborators were already deceased by the time the report was published, but there are continuing debates whether those who were registered as national meritorious persons should be delisted or whether those who were buried in the National Cemetery should be relocated.

Furthermore, the Investigative Commission on Pro-Japanese Collaborators' Property was created by the Special Act 7769 in 2005. The nine-member Commission was headed by Kim Chang-kuk, a prominent human rights lawyer. The Commission had a four-year term and was mandated to investigate the properties illegally acquired by collaborators and revert them to the state. The Commission investigated 168 collaborators and ordered them to return 1,114 square meters of property worth KRW 211 billion.

While previous measures all concentrated on punishing collaborators and confiscating their ill-gotten properties, more victim-centered measures designed to make reparations to the victims and family members also existed. The Committee to Support the Victims of Overseas Forces Mobilization and Investigation of Forced Labor under the Japanese Rule was set up by the Special Act 10143 in 2010 by amalgamating the Special Committee for the Investigation of Forced Labor under the Japanese Rule (created by the Special Act 7174/2004) and the Support Committee for the Victims of Overseas Forced Mobilization during the Pacific War (set up by Act 8669/2008). The Committee finished its mandate in December 2015, and confirmed the list of 585,937 victims, including soldiers and civilian employees in the military, sex slaves, miners, and other industry workers. The Committee provided compensation to victims and support for their medical expenses.

1.2. Human Rights Violations during the US Military Government in Korea

Jeju 4.3 Incident and Yeosu–Suncheon Incident are the representative cases of human rights violations during the US Military Government. The Jeju 4.3 Incident is a series of armed communist uprisings and counterinsurgency actions that occurred between March 1, 1947, to September 21, 1954, in the region of Mountain Halla on Jeju Island, which is located in the south of the Korean peninsula. The communist-led uprising of April 1948 and the subsequent counterinsurgency campaign led to prolonged guerrilla warfare on Jeju Island. The counterinsurgency was extremely brutal, involving mass killings, arrests, detentions, torture, and forced relocations, which resulted in an estimated 30,000 deaths (4.3 Committee 2003, 381).

The Yeosu–Suncheon Incident, which occurred in 1948, and the Jeju 4.3 Incident are directly linked. The 14th Regiment in Yeosu and Suncheon, in South Jeolla province, which had been scheduled to depart to Jeju for military operation, mutinied in October 1948. Around 1,000 to 2,000 armed forces under the leadership of Sergeant Ji Chang-su revolted and took two cities and surrounding areas for eight days. During operations, the counter-insurgency forces and paramilitary groups arrested and detained anyone suspected of being “communists” or their supporters, executing around 2,000 to 5,000 civilians on the spot (Truth and Reconciliation Commission 2010, 93).

As of today (June 6, 2022), the total number of victims of the Jeju 4.3 Incident affirmed by the government is 15,830, of which about 11,094 were found killed, 4,108 disappeared, 286 suffered from physical and mental damages, and 342 imprisoned (Jeju 4.3 Peace Foundation 2022). The committee further recognized 82,616 bereaved family members as victims. However, the committee estimates that the actual number of the casualties will be at least over 25,000 as the figure 15,830 is determined based on the review of individual petitions filed by a surviving family member only. More than 80% of human rights violations were committed by the military, police, or ultra-anti-communist right-wing organizations such as *Seobuk Cheongnyeondan* (Northwest Youth Group) (4.3 Committee 2003, 388).

For the Yeosu–Suncheon Incident, the Truth and Reconciliation Commission confirmed that 1,340 suffered illegal execution by the state. However, as in the Jeju 4.3 Incident, this figure only represents the approved cases of filed individual applications, and as a result, the families without a survivor or anyone who did not want to be recognized as victims owing to social stigma were excluded. The commission estimates that about 2,000 to 5,000 were killed (Truth and Reconciliation Commission 2010, 93-94).

A proper investigation, however, was not carried out by both the dictatorial and authoritarian governments, which continued to claim that they were justly fighting against “the communist revolt.” Rather, the government stigmatized the victims and the bereaved as *ppalgaengi* (the Reds, meaning communists) or *pokdo* (rebellions), and suppressed them. Both the Jeju 4.3 Incident and Yeosu–Suncheon Incident were investigated by the Special Investigation Committee for Civilian Massacres for the National Assembly after the April 19 Student Revolution in 1960 but there were no meaningful outcomes from it.

The field investigation for the Jeju 4.3 Incident took place over two days only, and even during this absurdly short period, a proper investigation did not take place. While the Park Chung-hee and Chun Doo-hwan governments did not make any effort in uncovering the truth, continuous efforts were made by victims’ families and civil society. Bereaved families, students, and activists started to commemorate the deceased and some writers initiated the collection of evidence and testimonies of the massacres. After democratization, students, journalists, and activists pushed the regional government to investigate the massacres and a meaningful investigation at the regional level was conducted in 1993.

Nevertheless, proper investigations by the national government only started as the 4.3 Committee was established under the Special Law for Investigation of the Jeju 4.3 Incident and Honoring Victims (Act No. 6117, 2000) during Kim Dae-jung’s administration. For the Yeosu–Suncheon Incident, another ten-year period had to pass before a Truth and Reconciliation Commission was established in Roh Moo-hyun’s administration in 2005. The Yeosu–Suncheon Incident was included as one of the mandates for the Commission. What is more surprising is that it took another 17 years until a national independent commission on the Yeosu–Suncheon Incident was finally set up in 2022 by the Special Act 18303.

1.3. Human Rights Violations during the Korean War

The Korean War has left a deep scar in Korean history, not only with the 640,000 fallen and wounded soldiers but also with countless innocent civilian deaths. Massacres of civilians were committed on both sides of the 38th Parallel, by the North Korean, South Korean, and American militaries. The significant cases include the Geochang Massacre, where about 700 South Koreans were killed by the South Korean army; Nogeun-ri Incident, during which about 400 South Korean refugees were killed by the US army; Bodo League Massacre, during which at least 300,000 South Korean civilians were killed nationwide by the South Korean military, police, and para-military groups; trials and punishments at people's courts executed in the occupied areas by the North Korean military and their collaborators; mass killings both in North and South Korea by the indiscriminate bombing of the US army; slaughter of inmates at prisons after the outbreak of the war, representatively in Daejeon Prison; slaughter of collaborators after the reclaim of Seoul; and the National Defense Corps Incident.

Of all the incidents, Geochang Massacre was the only case for which a joint investigation committee was immediately formed by the National Assembly, Ministry of Home Security, Ministry of Justice, and Ministry of National Defense after the incident, with the goal to reveal the truth and punish those responsible. Five months after the incident, a general court-martial led to the sentencing of Oh Ik-gyeong, Han Dong-seok, and Kim Jong-won on charges of massacre of civilians and concealment of the truth. However, a very similar process of obstruction was started by Rhee Syng-man.

The three convicted were immediately pardoned by Rhee Syng-man. With the pardon of the perpetrators without any proper grounds, it was extremely difficult for the bereaved to commemorate the victims. Moreover, the government suppressed their activities, and thus the bereaved even could not collect the remains of their lost for three years (Geochang Massacre Memorial Park 2020). How this investigation process unfolded had an enormous influence on the bereaved families of other civilian victims of the Korean War, who were completely dissuaded from pursuing and demanding any kind of investigation, punishment of the perpetrators, or restoration of honor during the Rhee Syng-man administration (Kim 2014).

A struggle to take the overdue measures began immediately after the April 19 Student Revolution in 1960, which ousted Rhee Syng-man and his followers from power. The first nationwide association of the bereaved families was established in 1960 and demanded the revelation of the truth and restoration of honor for the victims who were killed by the state. The association further excavated the mass murder sites based on the testimonies of the former military and police personnel and collected the remains of the dead. They erected stone monuments commemorating the victims and established memorial parks and cemeteries.

As a result of the continuous effort, the Special Investigation Committee for Civilian Massacres was established at the 4th National Assembly. The Committee was formed with nine members of the National Assembly, including Choi Cheon, with the goal to collect evidence of the massacre and legislate new law demanding the government for further actions. However, the bereaved suffered a disappointment as the Committee carried out poor investigations and disbanded without any accomplishments. This failure resulted from the fact that it was formed by the 4th National Assembly where lawmakers themselves were close to Rhee Syng-man and sometimes represented the military and police, who committed the massacres in the name of "military operations."

Furthermore, the efforts of the association of the bereaved faced a severe backlash with the May 16 Military Coup headed by General Park Chung-hee. The military authorities oppressed transitional justice movement extensively, and the leaders of the association were sentenced to a capital punishment or life imprisonment. The military police brutally destroyed memorial monuments and cemeteries across the country (Truth and Reconciliation Commission 2010, 77–82). The dictatorship of Park Chung-hee lasted for 18 long years, and any discussions about the mass killings of the civilians during the Korean War were completely suppressed during this time.

It was after the commencement of the civilian government of Kim Young-sam when the issues regarding massacre of civilians were cautiously discussed again. During his presidential campaign, Kim Young-sam pledged an investigation for the truth and restoration of honor for Geochang Massacre, and the Deliberation Committee for Restoration of Honor of the Persons Involved in the Geochang Incident, etc. [*sic*] was established according to Act on Special Measures for the Restoration of Honor of the Persons Involved in the Geochang Incident, etc. [*sic*] (Act No. 5148, 1996).

The committee concluded the responsibility of the massacre on the military and acknowledged 548 victims and 785 bereaved. As evidently found in its name, the Act was enacted to inclusively investigate not only Geochang Massacre but other Korean War-related mass killing incidents as well. Unfortunately, however, the bereaved of other massacres were hesitant to bring their issues upfront during Kim Young-sam administration. On the one hand, it was because the victims were extremely cautious after they experienced a severe backlash with the military coup. On the other hand, victims were suspicious of the Kim Young-sam regime, which still consisted of political figures who actively participated in anti-communist, military dictatorship, and authoritarianism.

Only after year 2000, the bereaved families were able to form a National Bereaved Family Association for Civilian Victims around the Korean War. Victims and activists pushed lawmakers to enact a law to create a truth commission exclusively examining Korean War massacres. However, the opposition party watered down the new act by stuffing it with anti-communist and conservative agenda, such as investigating communist terrorisms, the independence movement during the Japanese colonial rule, and human rights violations committed by hostile forces to the state, meaning North Korea and its “alleged followers” in South Korea. Thus, the Truth and Reconciliation Commission was set up in 2005 with patchwork mandates representing a compromise between the ruling and opposing parties.

1.4. Human Rights Violations by the Dictatorial and Authoritarian Regimes

The anti-communist dictatorial and authoritarian regimes of Park Chung-hee, Chun Doo-hwan, and Roh Tae-woo also committed various violations of human rights. Even though they were not large-scale massacres such as the Jeju 4.3 Incident, the Yeosu–Suncheon Incident, or the Korean War, many innocent civilians were illegally arrested, tortured, detained, and even killed over a long period of time. The symbolic case is the May 18 Gwangju Democratic Movement, which left 223 killed, 140 dead from injury, 448 missing, 5,928 wounded, and 2,146 taken into custody and detained (May 18 Memorial Foundation 2022). However, the transitional justice process for Gwangju was long and painstaking similar to any other human rights incidents in Korea.

After democratization, the National Assembly set up the Special Investigation Committee for May 18 Gwangju Uprising and held a public hearing for which 67 witnesses including the former President Chun Doo-hwan were summoned. Certainly, it was not a preferred method of transitional justice for the incumbent Roh Tae-woo who was also responsible for the massacre. He initially suggested a reparation committee which would provide reparations to the victims but would not investigate the massacres. However, victims, lawmakers, and civil society demanded an investigation. The public hearing was a significant moment, as it was the first time ever a former President was investigated by the National Assembly. The public hearing marked another watershed for the transitional justice movement in Korea.

Nevertheless, the Committee had many limitations at the same time. First, there was no enforcement power to force testimonies. Moreover, the Committee operated under the administration of Roh Tae-woo, who was the accomplice of Chun Doo-hwan's crimes in Gwangju. As a result, unfortunately, the hearing ended without any further legal prosecution. Chun Doo-hwan issued a public apology and promised his retirement from politics. However, it was not over. There was a continued demand for the investigation of the truth and punishment of the perpetrators.

Under the Kim Young-sam regime, human rights attorneys initiated a criminal lawsuit against Chun Doo-hwan and Roh Tae-woo. In 1995, Seoul District Public Prosecutors Office investigated and admitted that a massacre was committed in Gwangju by the military in 1980. Sadly, however, prosecutors did not indict anyone, absurdly stating that the incident was a result of a military coup, which is “a highly political action,” which is beyond any legal consideration. Despite the preposterous justification, there was no way to bring the issue to the court once the prosecutors decided not to indict.

The citizens fiercely fought against this outcome and demanded for the enactment of a special act to invalidate the prosecutorial decision. At the same time, Roh Tae-woo's secret slush fund was revealed, and eventually resulted in the legislation of Special Act on the May 18 Democratization Movement, etc. [*sic*] (Act No. 5029, 1995). At the end, Chun Doo-hwan and Roh Tae-woo were prosecuted and convicted to life imprisonment and 17 years of imprisonment, respectively, with the charges of rebellion, attempted murder of a senior officer, and bribery. Both were pardoned by President Kim Young-sam at the request of President-elect Kim Dae-jung in 1997 as a gesture of reconciliation.

During the dictatorial and authoritarian regimes, besides the May 18 Gwangju Democratic Movement, various violations of human rights, such as deaths under suspicious circumstances, forced disappearance, torture, arbitrary detention, encampment of civilians at the government-run facilities, and extrajudicial killing, were committed. During the Park Chung-hee's dictatorial regime, after his “Yushin (revitalizing reform) constitution” in 1972, students, professors, labor activist, and other dissidents who participated in the anti-government movement were arrested, tortured, and were killed or went missing.

The abduction of Kim Dae-jung by Korean CIA secret agents, suspicious deaths of Jang Jun-ha and Seoul National University Law Professor Choi Jong-gil, and the National Democratic Association of Youth and Students Incident were only some of the brutalities committed by the Park Chung-hee dictatorship. During Chun Doo-hwan administration, which followed Park Chung-hee's dictatorial rule, there were continued cases of human rights violations such as the Samcheong Re-education Camp, forced conscription, suspicious deaths in military, fabricated spy incidents, and the death of a university student Park Jong-cheol owing to torture by

drowning. There have also been incidents wherein hostile foreign governments target civilians, such as the 1983 Korean Air 007 shooting incident by the Soviet Union and the 1987 bombing of Korean Air 858, which was perpetrated by North Korean agents.

Most transitional justice efforts to address human rights violations of this period started with Kim Dae-jung's inauguration. Under his leadership, the ruling party enacted Special Act to Find the Truth on Suspicious Deaths (Act No. 6170, 2000) to pursue the investigation of the truth and restoration of honor of the victims. As a result, a Commission on Suspicious Deaths was set up in 2000, which conducted investigations for two terms until it was dissolved in 2004. The commission investigated individual cases of suspicious deaths to which the government was closely involved. The commission also investigated the cause of deaths that were known to be a suicide or an accident. The commission recommended the government to set up an independent human rights commission to constantly monitor human rights conditions and it was established in 2001.

In addition, between 2004 and 2005, the National Police Agency, the Ministry of National Defense, and the National Intelligence Service (former Korean CIA) individually set up an investigative commission to examine human rights violations committed by their organizations. Much later in 2017, the prosecutorial office, which was the most hesitant government agency, instituted its own truth commission to investigate its past wrongdoings.

The Truth and Reconciliation Commission investigated unsolved suspicious deaths and disappearance cases in 2005, and the Commission on Suspicious Death in the Military was separately established in 2006 to inspect suspicious deaths in the military.

2. Achievements and Limitations of Korean Transitional Justice Process

Measures for transitional justice have affected society at large, as well as the victims and the bereaved families, over a long time. This process in no way could be described as a smooth one. Various obstacles dissuaded victims' activities and interfered with the effects of their initiatives. Transitional justice has not always presented positive effects in Korea and its results have fluctuated. However, a study of the past 20 years since 2000, when transitional justice was first properly attempted, shows that transitional justice has had an important social function in Korea.

2.1. The Positive Impacts of Transitional Justice: Cementing a Culture and Institution of Protecting Human Rights and Democracy

Transitional justice helps form and solidify systems and cultures that protect human rights and democracy. More than any other country, Korea has attempted to resolve human rights violations in the past by using various (fact-finding/compensation/investigation) committees, criminal and civil trials, and compensation / reparation programs. Efforts have been made by the government to apologize, revise textbooks and official documents, restore the honor of victims and provide reparations, commemorate victims and excavate their remains, establish memorial foundations, support victims and bereaved families, and designate national commemoration days (Kim 2017). These efforts have generally resolved the injustices inflicted on victims and raised public awareness of human rights. The National Human Rights Commission of Korea or

memorial/research foundations (e.g., the Jeju 4.3 Peace Foundation), which was made by the recommendations of various committees, protects human rights and keeps past human rights violations from being defamed.

Of course, the domestic evaluation of the effectiveness of these transitional justice efforts is not very generous. From the perspective of victims and activists, efforts thus far have been insufficient and there is still a lot to be solved. The victims of the Jeju 4.3 Incident have very recently started to receive individual reparations from the government and treatment for their trauma. However, many activists claim that much care and attention needs to be further provided. Fact-finding and reporting on the 5.18 Gwangju Democracy Movement still need to be finalized. It was the first national commission to investigate the massacres, but with the change of the regimes, the future of this commission is still unclear. Moreover, a memorial foundation and research institute need to be established for the civilian victims of the Korean War. The second term Truth and Reconciliation Commission was set up in 2021 with a three-year mandate and a possibility of an additional one-year extension. However, as with the Gwangju commission, this commission could face many hurdles under the conservative regime. However, the achievements of transitional justice so far need to be objectively and separately evaluated.

2.2. The Positive Effects of Ongoing Controversy: The Mutual Interaction of Transitional Justice

Although Koreans seem to be severely divided on the topic of transitional justice by ideology, political orientation, region, age, and gender, a very minimum common denominator has been achieved in the course of Korea's transitional justice process. The following events well depict the state of Korea's transitional justice.

In 2020, President Moon Jae-in attended a memorial service for victims of the Jeju 4.3 Incident. In his memorial address, President Moon emphasized that “internationally established universal standards” would be applied to the resolution of the Jeju 4.3 Incident. The next day, the Chosun Ilbo, an ultra-conservative media, argued that “the state should appropriately comfort, apologize to, and compensate any civilians who suffered unjustly,” but that those who used violence should be distinguished from such civilians.

Interestingly, while the two perspectives on the Jeju 4.3 Incident are certainly different, the Chosun Ilbo also believes that the state should “appropriately” comfort, apologize to, and even “compensate” those who sacrificed unjustly. The common denominator between the two is that the state's response to serious human rights violations is “appropriate” and “an internationally established universal standard.” The ultra-conservative media's mention of appropriate “comfort, apology, and compensation” for the victims shows that Korean society has reached some level of agreement on this.

Human rights violations and transitional justice have been the main concerns of the community regardless of the ideological orientation of the government. The unusually rough battle over the past affairs is proof of the general public's or at least politicians' interest in the topic. There has never been a case in which past human rights violations have reached an easy settlement or gone without any controversy.

For example, during the Moon Jae-in administration, there was controversy over the legislation regarding the Yeosu–Suncheon Incident and the rulings of trials regarding the Japanese forced laborers and “comfort women.” During the Lee Myung-bak and Park Geun-hye administrations, controversies included *Nimel Wihan Haengjingok*, symbolic protest song commemorating the Gwangju 5.18 Democratic Movement, cutting the support for victims of the Jeju 4.3 Incident, and the protest against political agreement over the

“comfort women” issue with Japan. As the Kim Dae-jung and Roh Moo-hyun administrations ran the Presidential Commission on Suspicious Death, the 4.3. Commission, the Truth and Reconciliation Commission, and many committees relating to colonization at the same time, controversies emerged each time a report was released or an investigation was initiated. Some imagine a world without any controversies of the past affairs but that is unlikely. Even today, the US continues to debate on its legacy of slavery (Bosman 2021; Hartocollis 2022).

Similar debates will continue under the current Yoon Suk-yeol government. When the conservative government is in place, issues of North Korean human rights, abductees, and persons who performed special espionage military missions in North Korea were usually discussed. Interestingly, the promotion of transitional justice for one period or one particular incident has raised the expectations of victims of other incidents, regardless of the ideological orientation of the government. The 4.3 Commission had an influence on the victims of the Gwangju 5.18 Democratic Movement or the victims of even state terrorism by North Korea. In other words, the experiences of fact-finding, reparations/compensation, trials, and restoration of honor were shared within the community regardless of the ideological orientation of the incident, the region, the perpetrator, and the size of the case. Transitional justice on various issues showed a synergy effect (Hollanda and Kim, forthcoming).

However, there were also limitations in Korea’s transitional justice process. Transitional justice in Korea has gone through many complications and hindrances. For example, numerous transitional justice initiatives under the Kim Dae-jung and Roh Moo-hyun administration suddenly faced an obstruction from February 2008 to May 2017, during the Lee Myung-bak and Park Geun-hye administrations. It was the re-emergence of a government that highly valued the service of the military and police, and thus, did not empathize with the victims.

The Lee Myung-bak and Park Geun-hye regimes suppressed transitional justice through the abolition or merger of truth commissions and reduction of government funding and support for commemoration projects. To make matters worse, throughout the two regimes, the military and police, and anti-communist organizations, which have been opposing transitional justice so far, made many attempts to nullify the fulfillment of transitional justice through constitutional petitions, various administrative litigations, and various anti-transitional justice campaigns. The conservative regime came back with the inauguration of President Yoon Suk-yeol in May 2022. A path to transitional justice is again unclear. However, regardless of the ideological orientation of the regime, there are more fundamental limitations to the transitional justice movement in Korea.

2.3. An External Limitations of Transitional Justice in Korea: The Divided System and the Role of Foreign Countries

Korea’s most unique aspect and its biggest limitation is its division between the North and South. The country’s division causes two problems. First, North Korea’s human rights violations are continuing, and no proper attempt to implement transitional justice policies has yet been made. The characteristics of North Korea, which has maintained Communist Party dictatorships with successive leaders from Kim Il-sung’s family, are quite unique. Massacres, political killings, torture, forced disappearances, forced imprisonment, and forced labor have all taken place. After the great famine, known as the Arduous March in the 1990s, a new round of abuses began with the outflow of refugees from North Korea mostly to China. Women and children were especially

vulnerable and China, which regarded them as “economic migrants,” forcibly repatriated them to North Korea, further exposing them to danger.

Transitional justice in North Korea emerged when defectors began to talk about the reality of life in North Korea. The term transitional justice was specifically mentioned in a report written by the UN Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea organized in 2013, and discussions of fact-finding and punishment of those responsible have also been held in Korea and in other countries. The North Korean Human Rights Center, the Transitional Justice Working Group, and the Korea Institute for National Unification are performing investigations and preparing for eventual transitional justice, but actual discussions will only become possible after some limited changes occur in North Korea.

Second, the division of the North and South puts a structural constraint on the victims of human rights violations of somewhat ideologically sensitive historical incidents. For example, the military for a long time painted the Gwangju 5.18 Democratic Movement as a riot supported by North Korea organized to subvert the South Korean government. Even some ultra-conservative commentators like Ji Man-won claim that North Korean agents were involved. The same is true for the Jeju 4.3 Incident and Yeosu–Suncheon Incident that began as an uprising and mutiny organized by the local communist leaders. These two incidents have long been criticized as “a revolt” ordered or at least supported by North Korea. This interferes with the ability to conduct neutral and objective fact-finding investigations. Some predict that these incidents can only be properly assessed when South Korea is united with North Korea.

Another limitation is the human rights violations that occurred under the watch of external forces such as the Japanese colonial rule or the US military government. In this case, discussion of transitional justice to address past human rights violations easily become current diplomatic controversies. A well-known example is the rulings on the Japanese “comfort women” issues and forced laborers issues, which elicited a strong response from the Japanese government. In addition, since the Jeju 4.3 Incident also began under the US military government, it has repeatedly been suggested that the US, and not just the US military government, should bear some responsibility and apologize to the victims. However, it is highly unlikely that the US government will positively respond. After some confidential US documents relating to the Gwangju 5.18 Democratic Movement were released, the culpability of the US was suggested again. They claim that the brutal suppression was possible because the US government acquiesced to the reality that the Chun Doo-hwan and Roh Tae-woo succeed in obtaining power through the military coup.

Of course, as seen in the controversy over Germany and Namibia and France and Algeria, the controversies over past human rights violations between imperialist countries and former colonies is not solely a Korean problem. However, Korea has suffered the unique and complicated structure of Japanese colonial rule, the US–Soviet military government, and international support and intervention in the Korean War. Unlike Germany, Japan has not yet officially acknowledged their war guilt and their government still makes controversies during prime ministerial and other high-level official visits to the Yasukuni Shrine. The division between the North and South, which originated owing to the division between the Soviet Union and the US, is still ongoing.

2.4. An Internal Limitations of Transitional Justice in Korea: The Long Path to Reconciliation

The ultimate purpose of transitional justice is to achieve social integration and reconciliation by reaching an agreement on the legitimacy and necessity of commemorating past human rights violations. Transitional justice measures, whether they are criminal prosecutions, truth commissions, or reparations, should be evaluated based on how well these policy measures achieve these ultimate goals. However, society may rethink the validity of these policy measures if controversies and conflicts escalate after the implementation of these measures. Certainly, controversy itself is not a negative thing. However, if there is only controversy and if controversy intensifies and society does not come close to reconciliation, then a new course of action should be considered.

There have recently been meaningful reconciliation attempts in Korea regarding the Gwangju 5.18 Democratic Movement and Jeju 4.3 Incident. The leader of the conservative party and Roh Tae-woo's son separately visited Gwangju and paid tribute to the monument. Moreover, they publicly delivered apologies to the victims and family members. More recently, low-ranking perpetrators of Gwangju came forward to the newly established truth commission and confessed their crimes, provided detailed testimonies, and further apologized to the individual victims. Certainly, these attempts are not enough, but they are an important starting point. In Jeju, ministers and vice ministers of National Defense and the National Police Agency, which was a main perpetrator of the massacres, visited Jeju and delivered an official apology. Both the progressive and conservative party visited Jeju, paid tribute to the victims, and participated in a joint commemoration ceremony. Furthermore, the families of the victims and the perpetrators jointly held memorial services in exchange as a token of reconciliation.

However, despite these reconciliation initiatives, there is still a sharp divide when it comes to determining the very details of transitional justice policies. There are still deep divides over how to properly respond to Japan regarding the “comfort women” and forced laborers issues. The new Yoon Suk-yeol government is expected to normalize Korea–Japan relations and the victims and activists are concerned whether Korea's legitimate demand for transitional justice might be compromised. As mentioned, owing to the change of the regimes, the ongoing investigations of the Yeosu–Suncheon Incident, Gwangju 5.18 Democratic Movement, and second term Truth and Reconciliation Commission face an uncertain future.

3. International Implications of Korea's Transitional Justice Process

Human rights violations in Korea are diverse and heterogeneous. Since they have occurred over a long period of time, the perpetrators (e.g., Japanese imperialists, dictators, and authoritarian leaders) and the scale of each incident differ. The nature of each case (e.g., rights violations that occurred during the colonial rule, the war, abuse of power by government personnel, or rights violations that occurred during the process of enforcing coercive policies) and the scale of damages are also different. Incidents wherein more than 1,000 civilians were killed include the March 1 Independence Movement, Kanto Earthquake Massacre, Jeju 4.3 Incident, Yeosu–Suncheon Incident, Korean War civilian massacres (including the prison inmate massacre, Nogeun-ri Incident, slaughter of communist collaborators, US military bombings, and massacres by the North Korean

military and its collaborators), and Geochang Massacre. Incidents wherein 100 people were killed include the April 19 Student Revolution, 5.18 Gwangju Democratization Movement, and Samcheong Re-education Camp.

There are also many incidents that are important even though fewer than 100 civilians were killed. These include the Japanese military sex slavery system (“comfort women”), forced labor, the People’s Revolutionary Party Incident, Kim Dae-jung’s kidnapping by the Korean CIA agents in Japan, the suspicious deaths of Chang Chun-ha and Choi Jong-gil, and suspicious deaths of anti-government activists and students while they were in mandatory military service. While incidents with large numbers of civilian victims have decreased since democratization, human rights violations such as torture and fabricated spy accusations continued even up until the Lee Myung-bak and Park Geun-hye administrations, known as the Yoo Wu-seong Fabricated Spy Incident.

The scope of human rights violations and the targets for transitional justice in Korea are broad. They span over 100 years and geographically encompass Korea, Japan, Manchuria, and international waters. For example, in 1973, Kim Dae-jung was kidnapped by Korean CIA agents in Tokyo, Japan, and was shipped to international waters in the Pacific Ocean. At the very last moment, the operation was aborted owing to the involvement of the US. The perpetrators are also diverse and include the Japanese imperialists; Korean dictators, authoritarians, and members of democratic regimes; North Korea; the Soviet Union; and the United States. Therefore, it is not easy to find a comprehensive model for human rights violations and transitional justice or understand the implications.

Korea’s transitional justice process is both universal and unique. Human rights violations exist in any political community, and humanity has suffered through the shared experiences of imperialism, colonialism, the two World Wars, and the Cold War. The Jeju 4.3 Incident is similar to the Greek Civil War, Taiwan 2.28 Incident, and 1965 massacre in Indonesia (Heo 2014; Kim 2022). As human rights violations are universal, efforts to resolve them are also universal. The recent US racial issues (e.g., the recognition of the Tulsa Massacre and reparation initiative to slavery initiated by Harvard University and city of Evanston), the Canadian and Australian response to ethnic cleansing of indigenous communities, reconciliation between Germany and Namibia, and Germany’s continued efforts to apologize to the victims of the Holocaust and offer international reconciliation (e.g., German Chancellor Angela Merkel’s 2019 visit to Auschwitz) all demonstrate its universality.

However, Korean transitional justice is also clearly unique. One recent example is how the recent domestic rulings by the Korean court regarding forced laborers and “comfort women” have had not only domestic but also international political ramifications on the sensitive Korea–Japan relations. The continued division of the two Koreas is also a unique factor. Past human rights violations are sensitive issues in any country owing to the nature of the perpetrators and victims, ideological divides, and persistent conflicts; however, in Korea, they tend to spark unusual political disputes.

When seeking international implications for Korea’s transitional justice, it is important to discover and distinguish the universal and unique aspects of the Korean case. However, what is universal or what is unique about Korea’s experience should be understood with care. Korea developed in part owing to the influence of the transitional justice experiences of countries such as South Africa, Taiwan, and Argentina, but also the development of international transitional justice norms, that is, a combination of international human

rights norms, international humanitarian law, and international criminal law. Conversely, Korea's transitional justice experience will contribute to creating a new international norm. Based on Korea's experience, the following suggestions can be made to countries that are considering implementing transitional justice policies.

Transitional justice regarding decolonization is the first suggestion. Korea set up a committee to restore victims' honor and administer compensation. The historical issue has recently become a point of conflict with Japan owing to the recent rulings of the Supreme Court and continuous push from the civil society. This suggests to countries dealing with similar issues that addressing past human rights violations could become a diplomatic issue in the present. Increased domestic awareness of human rights, democratic consolidation, and the development of transitional justice may not always go hand in hand with efficient foreign policy and sometimes will contradict it. However, it is too simplistic to view transitional justice as a hindrance to diplomacy. For example, the "comfort women" issue is not just a colonial issue between Korea and Japan. It is a part of the new trend that includes the development of women's rights in international human rights norms and the new victim-centered principle of international criminal and humanitarian law. When all these aspects are considered at the same time, a fine balance between transitional justice and diplomacy could be achieved.

Transitional justice relating to human rights violations during the Korean War and the authoritarian regime is the second suggestion. Korea has promoted various policies to resolve serious human rights violations that occurred before and after its liberation and during the Korean War, and subsequent dictatorships and authoritarian periods. In particular, efforts have been made to investigate human rights violations through the overlapping establishment of various national and regional as well as private and public truth commissions. This has, of course, been met with criticism as a waste of government money and was at one point ridiculed as "the Republic of Commission" by conservative media (Park and Kim 2007).

In Korea, fact-finding and truth commission operations seem to be conducted haphazardly without order. However, from the long-term perspective, all these processes have converged in a positive direction toward human rights, reconciliation, and democracy. Therefore, countries with similar human rights violations should continue investigation at the various levels and must keep records as the basis for future truth commissions, trials, and reparations. Furthermore, this process will provide justifications for the reform of major powerful agencies such as the military, police, prosecutor's office, and intelligence agencies in the future.

4. Conclusion

Transitional justice in Korea is ongoing and will continue to be so. One simple lesson from the Korea case is that transitional justice is never a "once-and-for-all" resolution to historical wrongs. Multiple special acts have been enacted from 1948 to 2021 to address the past human rights violations. These laws have been revised over and over again to further extend the mandate or to provide a better solution such as individual reparation or creation of a permanent commemoration institute. The same historical issue has been investigated by the victims, student activists, regional parliament, national government, and nongovernmental organizations. Before or after the national investigation, individual government agencies separately set up investigatory bodies to explore their own, more specific wrongdoings. In the case of the Jeju 4.3 Incident, even after the

official investigation was over, other private and public organizations embarked upon a follow-up investigation. Thus, the transitional justice process is never a one-time deal.

Of course, as many attempts have been made over a long period of time, there is increasing public fatigue of transitional justice measures. Depending on the ideological orientation of the regime, the victims and activists also face severe backlash and turbulent ups and downs. When the conditions were met, anti-transitional justice groups actively made legal and political efforts to reverse transitional justice. However, these challenges have generally failed to reverse the trend. We have already witnessed this convergence between progressive President Moon Jae-in and an ultra-conservative newspaper the Chosun Ilbo over the Jeju 4.3 Incident. In the case of Gwangju, the leader of the conservative party kneeled in front of the graveyard of the victims in 2021. President Yoon Suk-Yeol participated in the commemoration ceremony in 2022 and committed to visit Gwangju every year.

Both in the Jeju and Gwangju case, something unthinkable 20 years ago, that is official recognition of state wrongdoings and commitment to addressing the victims' longtime suffering by the conservative wing of the society, has been realized. This is progress, for sure. The road to progress, however, was neither smooth nor unhindered. For the Yeosu–Suncheon Incident and the Korean War victims, who have not yet achieved this level of social consensus, the path remains unclear.

References

- 4.3 Committee. 2003. *Jeju 4.3 Incident Investigation Report*. Seoul: National Committee for Investigation of the Truth about the Jeju 4·3 Incident and Honoring Victims.
- _____. 2008. *Reconciliation and Coexistence: White Paper of Jeju 4.3 Committee*. Seoul: National Committee for Investigation of the Truth about the Jeju 4·3 Incident and Honoring Victims.
- Bickford, Louis. 2007. "Unofficial Truth Project." *Human Rights Quarterly* 29, 4: 994-1035.
- Bosman, Julie. 2021. "Chicago Suburb Shapes Reparations for Black Residents: 'It Is the Start.'" *The New York Times*. March 22. <https://www.nytimes.com/2021/03/22/us/reparations-evanston-illinois-housing.html?searchResultPosition=2> (Accessed June 7, 2022)
- CEVRO. 2021. "Memory of Nations: Democratic Transition Guide." <http://www.cevro.cz/en/241492-guide> (Accessed August 27, 2021)
- Cho, Jung Hyun. 2014. "A Study on Transitional Justice in the Context of Reunified Korea." *Seoul International Law Journal* 21, 1: 25-42.
- Commission on Suspicious Deaths. 2004. *A Hard Journey to Justice: Investigation Report of Truth Commission on Suspicious Deaths: Term 2 (July 2003 ~ June 2004) [1]: Occurrences of State violence and Suspicious Deaths*. Seoul: Presidential Truth Commission on Suspicious Deaths.
- Dancy, Geoff, Francesca Lessa, Bridget Marchesi, Leigh A. Payne, Gabriel Pereira, and Kathryn Sikkink. 2020. "The Transitional Justice Research Collaborative Dataset." www.transitionaljusticedata.com (Accessed September 19)
- Deliberation Committee for Restoration of Honor and Reparation for Persons Involved in Democratization Movement. 2015. *White Paper for Democratization Movement - Commissions*. Seoul: Deliberation Committee for Restoration of Honor and Reparation for Persons Involved in Democratization Movement.
- Geochang Massacre Memorial Park. <http://www.geochang.go.kr/case/Index.do> (Accessed May 30, 2022)
- Hartocollis, Anemona. 2022. "The Major Findings of Harvard's Report on Its Ties to Slavery." *The New York Times*. April 26. <https://www.nytimes.com/2022/04/26/us/harvard-slavery-report.html?searchResultPosition=1> (Accessed June 7, 2022)
- Hayner, Priscilla B. 2010. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge.
- Heo, Ho-jun. 2014. *Greece and Jeju, History of Tragedy and its Aftermath: The Greek Civil War and the Jeju 4.3 and the United States*. Seoul: Seonin.
- Hollanda, Cristina Buarque de and Hun Joon Kim. "Commissionism," in *Encyclopedia of Transitional Justice, 2nd Edition*, edited by Lavinia Stan and Nadya Nedelsky (Cambridge University Press, forthcoming).
- Jeffery, Renee and Hun Joon Kim, eds. 2014. *Transitional Justice in the Asia Pacific*. Cambridge: Cambridge University Press.
- Kim, Dong-Choon. 2010. "The Long Road Toward Truth and Reconciliation: Unwavering Attempts to Achieve Justice in South Korea." *Critical Asian Studies* 42, 4: 525-552.

- Kim, Hun Joon. 2014. *Massacres at Mt. Halla: Sixty Years of Truth-Seeking in South Korea*. Ithaca: Cornell University Press.
- _____. 2017. "The Diffusion of Global Transitional Justice Norms and Its impact: A Case of South Korea." *Korean Political Science Review* 26, 1: 101-126.
- _____. 2022. "International Contexts of Transitional Justice in Korea: The Possibilities and Limitations of Regional Diffusion of International Norms," *Journal of East West Studies* 34, 1: 105-130.
- Lee, Byung-Jae. 2015. "Transitional Justice and Human Rights: A Framework for Causal Effect Analysis." *The Korean Journal of International Relations* 55, 3: 85-121.
- May 18 Memorial Foundation. <http://www.518.org/main.php> (Accessed May 30, 2022)
- Park, Sin-hong and Yeong-hun Kim. 2007. "Republic of commissions." *Joongang Ilbo*, December 7. <https://news.joins.com/article/2972037>
- Sikkink, Kathryn. 2011. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: W. W. Norton.
- Sriram, Chandra Lekha and Anja Mihr. "The Impact of Transitional Justice Measures on Democratic Institution Building." <https://www.nwo.nl/en/projects/464-11-041> (Accessed June 2, 2022)
- Teitel, Ruti G. 2000. *Transitional Justice*. Oxford: Oxford University Press.
- _____. 2003. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16: 69-94.
- The Jeju 4.3 Peace Foundation. https://jeju43peace.or.kr/kor/sub01_01_02.do (Accessed June 6, 2022)
- Truth and Reconciliation Commission. 2010. *Comprehensive Report of Truth and Reconciliation Commission*. Seoul: Commission for Verification of Historical Events for Truth and Reconciliation.
- United Nations. 2004. "Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies." UN Doc. S/2004/616.

Country Case 2: Taiwan

The Development of Taiwan's Transitional Justice

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1. Introduction

In this article we first briefly review the history of political repression in Taiwan after WWII. We then discuss the development of transitional justice policies during each presidency after the democratic transition. The next section introduces the transitional justice schemes and the composition and function of the transitional justice committees. We will then depict the general trend of the White Terror cases using the Taiwan Transitional Justice Database. The following section discusses the features of political cleavages in Taiwan and points out their impact on transitional justice policies. In the conclusion, we discuss some of the issues that can be explored further in the future.

By systematically analyzing the development of transitional justice in Taiwan after democratic transition, we seek to identify the unique features of transitional justice in Taiwan. We demonstrate that the ethnic and political cleavages between pan-Blue and pan-Green induce society and the government to place great emphasis on social and ethnic harmony. This factor, along with the continuation of a formal hegemonic party—KMT—as one of the dominant political forces, shapes the sequence of transitional justice mechanisms. The government pushes forward reparations schemes and amnesties while postponing the policies of truth closure, lustration, and trials of public officials involved. In addition, the DPP government, who promised to push through transitional justice policies, went after mainly the institutional perpetrators rather than individual perpetrators.

2. Brief History of the Political Repression in Taiwan

The “228 Incident” occurred shortly after the end of World War II and the 50-year colonial rule by Japan. When the Kuomintang (KMT) government came to Taiwan, native Taiwanese and newly arrived Mainlanders shared rather different cultures and national identities. In the first half of the twentieth century, the Taiwanese enjoyed a relatively higher level of law and order and better infrastructure and public services, while China suffered from prolonged civil wars and a decade of Japanese invasion. On the ground, the Chief Executive Officer Chen

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Yi appointed by the Nanjing government was stubborn and closed-minded, and as such could not understand the needs of the people. In addition, many KMT government officials and soldiers were corrupt and ill-disciplined, which made the relationship between the KMT government and the local people extremely tense. In terms of the economy, due to the civil war happening in Mainland China, the government imposed various controlling measures, industrial production was interrupted, and inflation and unemployment rates were high.

The immediate fuse of the “228 Incident” was triggered by the mishandling of a cigarette-smuggling case by the police. This led some Taipei citizens to go out to the streets and protest on February 28, 1947. The conflict quickly spread across the whole island, turning into a large-scale political and armed uprising. Local leaders took the opportunity to demand comprehensive political and economic reforms and self-governance. Violence and armed conflicts broke out in many parts of the island.

Taipei City was the epicenter of this political storm, but the conflict spread to almost all counties including Taichung, Chiayi, and Kaohsiung. Violence broke out on the streets and many islanders and mainlanders were either killed or injured. Because the KMT’s well-trained army was trapped in the civil war in mainland China, the local troops alone could not effectively suppress the uprisings. Later, the central government in Nanjing sent larger and better-equipped troops to Taiwan to suppress the uprisings. The incident came to an end when soldiers and police shot and killed civilians in the streets. The number of victims has never been accurately counted but is estimated at anywhere between 1,000 to 100,000 people. The 2021 “Report on the Truth and Transitional Justice of the February 28 Incident” (published by the Memorial Foundation of 228, Chen 2021) shows that the number of deaths and disappearances ranges from 8,324 to 11,841. However, if we look at the list of reparations to the victims and their families published by the Foundation, there were merely 686 deaths and 181 disappearance cases.

Unlike the 228 Incident, which lasted only for three months, the White Terror lasted 38 years. This includes the thousands of judicial trials that occurred in the period from 1949 to 1987 under martial law. Situated in the Cold War period, the KMT implemented a special criminal law—the Regulations on Punishing Rebellions—with the aim of eradicating hidden spies and agents from Mainland China and arresting their local allies. Later on, this series of laws was used to target political dissidents and even left-leaning intellectuals. Moreover, the law was implemented with little respect for due process and thereby often violated human rights. The Taiwan garrison command and other intelligence agencies arrested, executed, tortured, beat, and force-disappeared the local residents, and confiscated property to take total control over the island, resulting in a large number of unjust deaths, imprisonments, injuries, and property and health damages. The military courts dealt with between 30,000 and 70,000 political cases and there is an estimate of 200,000 victims.

3. The Development of Transitional Justice Policies in Taiwan

Taiwan’s transitional justice mainly began after the lifting of martial law in 1987, which ushered in a decade of democratic transition. The KMT still maintained its ruling power until 2000. During the 1988 presidential inauguration, President Lee Teng-hui called on people to “forget the past and move forward.” Since the lifting of martial law, there had been persistent voices calling to redress judicial wrongs, rebuild a new constitutional order, convene an inclusive national meeting, and propose a timetable for democratic reforms. For example,

the Wild Lily student movement in 1991 demanded democratic reforms and the dissolution of the two-layer National Assembly system.

In response to the demands from social movements, President Lee Teng-hui pushed for a series of reforms. One of these was to set up an investigation committee on the 228 Incident, combining the capacity of the government, civil society, and academia to conduct a large-scale investigation and research into the 228 Incident. On February 28, 1992, the “228 Incident Investigation Report” was published and this is often considered the beginning of Taiwan’s transitional justice process. Thus far, Taiwan has undergone three party turnovers since martial law was lifted. Therefore, in this article, we divide the development of Taiwan’s transitional justice into four stages: from 1988 to 2000 (KMT President Lee Teng-hui), 2000 to 2008 (DPP President Chen Shui-bian), 2008 to 2016 (KMT President Ma Ying-jeou), and after 2016 (DPP President Tsai Ing-wen).

3.1. 1988 to 2000 (KMT President Lee Teng-hui)

In addition to launching the investigation into the 228 Incident, Lee Teng-hui’s contributions toward transitional justice also included announcing amnesty for the prisoners of the Formosa Incident—an important social protest demanding democratic reform seven years before the onset of democratic transition—responding positively to several large social protests that demanded democratic reforms, and passing three pieces of legislation on reparation and restoration of rights for political victims during the authoritarian era.

The Lee Teng-hui era can be characterized as the transition period from an authoritarian regime to full democracy in Taiwan. His attitude towards transitional justice shifted during his 12 years in power. At the beginning, he called on the people to forget the past and look forward. In the middle of his tenure, in response to pressure from civil society, he launched a transitional justice measure for the victims and their family members for the 228 Incident. However, it was only toward the later stages of his tenure that he apologized to the political victims of the White Terror. These changes also signaled the change in the Kuomintang’s attitude from denial to admitting the political mistakes made during the martial law period.

Several legislative proposals championed by civil society organizations were also adopted by the Lee Teng-hui administration. Three pieces of legislation regarding transitional justice were passed by the parliament: the 228 Incident Disposition and Reparation Act (1995), Regulations on Restoration of People’s Injured Rights during the Martial Law Period (1995), and Reparation Act for Wrongful Trials on Charges of Sedition and Espionage during the Martial Law Period (1998). The latter two pieces of legislation were related to the White Terror, and all three were proposed by the legislators of the opposition party and accepted by the ruling party.

The president himself also admitted the critical role of civil society in Taiwan’s democratization process.³ The 228 Incident involved large-scale ethnic conflict and government crackdowns on local elites in a compact period of time. In contrast, the cases of the White Terror took place over a span of three decades during the martial law era; the state’s violation of human rights spread over time and space targeted individuals of different ethnic backgrounds. Due to the broad scope and duration of the White Terror, identifying and

³ In President Lee Teng-hui’s opening remarks for the seminar on “The 20th Anniversary of People’s Direct Presidential Election and the Development of Democracy in Taiwan.”

vindicating the victims of this incident is relatively harder compared to the 228 Incident. Therefore, Lee Teng-hui's transitional justice effort to redress the 228 Incident has been deemed more successful than efforts regarding the White Terror (Wu 2021).

Wu (2005) explained why President Lee dealt with the 228 Incident, but did not actively deal with the transitional justice of the authoritarian rule of the KMT until the end of his term. This actually has a lot to do with his personal life. Lee Teng-hui was a young local elite at the time of the 228 Incident. As can be seen in his autobiography, the local elite youth had a great deal of regard for the KMT troops before they arrived in Taiwan at that time. The illusion broke soon and the military repression then shook him. However, in the 1950s, Lee Teng-hui had already entered the provincial government, and he seemed to agree with the government's social control measures to prevent the spread of communism.

In the early days of his administration, Lee Teng-hui started up the investigation into the 228 Incident. Amnesty was given to the prisoners of the Formosa Incident, and the transitional justice process for the 228 Incident was initiated in response to calls from civil society. In 1995, the 228 Incident Memorial Foundation was established to provide compensation for victims of the 228 Incident. In 1998, a larger compensation scheme was set up by the Compensation Foundation for Wrongful Trials on Charges of Sedition and Espionage during the Martial Law Period (referred to as the Compensation Foundation hereinafter), which was founded by the Executive Yuan. During the Compensation Foundation's 15-year operation, a total of NTD 19.623 billion (USD \$600 million) was allocated to 20,340 victims and their families, and 7,743 political cases of white terror were investigated and compensation provided.

3.2. 2000 to 2008 (DPP President Chen Shui-bian)

During the Chen Shui-bian government, the Democratic Progressive Party (DPP) was the largest political party, but held less than half of the seats in the parliament. The KMT and the People First Party (PFP), the opposition, formed the KMT-PFP coalition, which became known as the pan-Blue coalition. The coalition held more than half of the legislative seats, rendering the Chen Shui-bian eight-year government a minority government.

In 2002, the Chen Shui-bian government implemented measures to restore the 228 and White Terror victims' reputations. The victims submitted applications and those who passed the review were issued "Reputation-restoration Certificates" by the president. In the same year, the Chen Shui-bian government also designated two locations, "Jingmei Detention Center" and "Lyudao Prison," as historical injustice heritage sites to commemorate the White Terror. The government then built Human Rights Memorial Parks on these two sites a few years later, which were later converted into an exhibition space to show visitors how the authoritarian governments suppressed human rights, and to promote human rights education.

President Chen Shui-bian's transitional justice tasks included an investigation into the KMT's illegal party assets. In 2004, the Ministry of Finance established the "Special Management Committee on Party Assets as State Assets" to deal with improper party assets that the KMT garnered during its authoritarian rule. At the end of the same year, the ruling party (DPP) tried to pass the "Act of Ill-gotten Properties by Political Parties Settlement" in the Legislative Yuan but was blocked by the opposition, the KMT-PFP coalition.

As the DPP did not hold a majority of seats in the parliament and the transitional justice projects did not garner high attention and support from the public, achieving transitional justice during this period was

difficult. Chen Shui-bian changed the name of the Chiang Kai-shek Memorial Hall to the “Democracy Memorial Hall” in 2007. However, after the KMT returned to power in 2008, the name was changed back to the “Chiang Kai-shek Memorial Hall.” During this time, many of Chen Shui-bian’s transitional justice reform proposals were blocked and postponed.

3.3. 2008 to 2016 (KMT President Ma Ying-jeou)

During Ma Ying-jeou’s administration, there were several developments in Taiwan’s transitional justice. In 2009, the government expressed its willingness to re-open the investigation into the Lin I-hsiung family massacre case and the Dr. Chen Wen-cheng murder case, both of which were prominent cases during the martial law period. The Prosecutor’s Office of the High Court set up a “special investigation unit” to be in charge of the two cases. However, the investigation once again decided not to prosecute any of the perpetrators in Dr. Chen Wen-cheng’s murder case.⁴ In 2011, Ma Ying-jeou’s administration established the National Human Rights Museum Preparatory Office under the Ministry of Culture to supervise the Lyudao Prison and Jingmei Human Rights Cultural Parks, both sites being former prison and detention centers.

Some Taiwanese transitional justice scholars argue that for Ma Ying-jeou, transitional justice is just a political rhetoric that lacks substantive meaning. Ma Ying-jeou, after taking office, continued to apologize to the bereaved families of the 228 convicts every year and received some understanding from them. However, some consider his apology as just lip service and deny it (Cheng 2017). In the 228 Commemoration of 2021, the Taipei City Government invited former President Ma Ying-jeou, a second generation Mainlander, to attend. However, one of the event co-organizers believed that “Ma Ying-jeou has never expressed regrets or apologies for the 228 Incident,” so they withdrew from the event. Hearing this news, the former President Ma immediately said that he had “apologized for 30 years” for the 228 Incident, and was therefore “very aggrieved.” Looking back, the former president has repeatedly apologized on behalf of the Kuomintang for the 228 Incident and the White Terror wrongfully convicted. It can also be argued that of all the politicians concerned, he has apologized the greatest number of times. However, there are still many people in Taiwan who think that apologies from the “perpetrators” were not sincere as they did not support the measures that would have redressed the remnants of the human rights abuse (Tai 2021).

During this period, advocates for the commemoration of political victims of the White Terror also emerged in two large university campuses, National Cheng Kung University (NCKU) and National Taiwan University (NTU). On February 28, 2012, the statue of Chiang Kai-shek at the NCKU campus was splashed with red paint, and the actions were found to be affiliated with the NCKU student association. After the incident, the “NCKU Removal of the Statue of Chiang Kai-shek from University Campus Alliance” was formed. In June of the same year, the NTU students lobbied to rename the campus square where Dr. Chen’s body was found, and a formal proposal was placed on the agenda of the NTU’s administration meeting. In 2013, a proposal by NCKU students to name “Nylon Square” in memory of human rights defender Mr. Nylon Cheng,

⁴ The two cases kept being investigated by the Transitional Justice Committee, which was established in 2018; however, in the press conference about the results of the investigation released in 2020, the committee only came up with the conclusion that “the possibility of the authoritarian government being involved in the cases cannot be excluded.”

a pioneer in advocating for freedom of speech and Taiwan's independence, was rejected by NCKU. In 2015, the NTU officially approved changing the name of the campus square to the "Dr. Chen Wen-chen Incident Memorial Square" to memorize Dr. Chen Wen-cheng.

3.4. After 2016 (DPP President Tsai Ing-wen)

On May 20, 2016, Taiwan elected its first female president, Dr. Tsai Ing-wen, and experienced a political turnover for the third time. After the election, the DPP controlled both the executive branch and the parliament, allowing it to push through its transitional justice agenda. The DPP first passed the "The Act Governing the Settlement of Ill-gotten Properties by Political Parties and Their Affiliate Organizations" and created the Ill-gotten Party Assets Settlement Committee. At the end of 2017, the Legislative Yuan passed the "Act on Promoting Transitional Justice." In May 2018, the Transitional Justice Commission was officially launched and in July 2019, the Legislative Yuan passed the Political Archives Act. This period ushered in a new phase of Taiwan's transitional justice development that began to deal with the perpetrators beyond paying reparations. The aforementioned two acts and other bills aimed at confiscating improper or illegal party assets acquired during the authoritarian period, as well as removing authoritarian symbols, disclosing historical truths and investigating crimes, and making institutional corrections to the authoritarian party-state system's legacy (Hirai 2020).

In 2021, President Tsai Ing-wen proposed the next three tasks for Taiwan's transitional justice. First, the government needs to ramp up efforts to organize and publish political archives, particularly the archives of intelligence agencies, to clearly reveal the authoritarian government's repression and surveillance of the people. Second, with the disclosure of these political archives, the government seeks to investigate the historical truth. Only by restoring the process of layer-by-layer persecution during the authoritarian rule, publishing reports, and proposing follow-up policies and legal systems can Taiwan's transitional justice be brought to end the "no-perpetrator, only victims" criticism. Third, enhance cooperation among various government agencies. For example, discussing the reparation plans, dealing with authoritarian symbols, and taking care of the elderly victims requires cooperation among various government agencies, in addition to the Transitional Justice Commission.

4. The Transitional Justice Schemes

The concept of transitional justice emerged along with the third wave of democratization from the 1980s to the 1990s. In Taiwan, the initiation of transitional justice efforts can be said to have started after the lifting of martial law in 1987. However, it was not until May 18, 1992, that the two laws that define political crimes, the "Betrayers Punishment Act" and "Article 100 of the Criminal Law" (the crime of rebellion), were officially abolished. This move denotes the end of the White Terror and ushers in the agenda of transitional justice.

Thousands of cases of human rights violations that occurred during the martial law period (from 1949 to 1987) in Taiwan were collectively referred to as "White Terror political cases." The exact number of political victims during the White Terror period still cannot be accurately calculated. According to the government's official data and estimates, there were more than ten thousand cases and more than two hundred thousand victims during the 38 years of the White Terror (Chiu 2001). In 2021, Taiwan's Transitional Justice Commission released

the “Taiwan Transitional Justice Database,” which compiled the data of people who were prosecuted during the authoritarian period. The total number of cases stands at 13,683, with some individuals being involved in more than one case. This database is now the most complete database of the White Terror convicts.

In order to restore the political, ethnic, and racial cleavages caused by the authoritarian government’s violations of human rights, government policies sought forgiveness from the wrongfully convicted and attempted to achieve social harmony, reconciliation, and peace. Transitional justice involves fact-finding, prosecution of perpetrators, reparation for the convicts, commemorations, reconciliation initiatives, and other institutional reforms (Bassiouni 1996). Although the transitional justice process in Taiwan has developed over the past three decades, some parts of the development still lag behind. As the political victims gradually die off, the pace of transitional justice remains slow, especially in the aspects of fact investigation and the prosecution of perpetrators.

Since 1998, Taiwan has been on the road to democratization, and the initial mission of transitional justice policy has focused mainly on compensating the victims of political repression instead of prosecuting the perpetrators and revealing the truth. This phenomenon has been closely associated with Taiwan’s gradual and moderate path toward democratization, which has attached great emphasis to social harmony and healing major historical wounds. Under such a social atmosphere, the early transitional justice organizations in Taiwan mainly aimed at achieving compensation and memorialization of victims, including the Memorial Foundation of 228 and the Compensation Foundation for Wrongful Trials on Charges of Sedition and Espionage during the Martial Law Period. The compensation schemes in Taiwan’s early transitional justice included monetary compensation and reputation restoration, encouraging people to “look forward” and emphasizing social forgiveness, tolerance, inclusiveness, and harmony.

The Compensation Foundation investigates the persecution that victims of injustices experienced and provides compensation. Taking compensation as the main mechanism of transitional justice has been the main feature of transitional justice in Taiwan over the past 30 years. However, many people who are eligible have not yet applied. Those qualified to apply for compensation were those who were wrongfully convicted and imprisoned or executed. Many people died during the police interview stage, and there were also instances where dead bodies appeared in unlikely locations and were then ruled to have been suicides. Victims in these cases were not eligible for compensation. There have also been cases where family members have been unable to provide evidence to prove the cause of death of their loved ones, and thereby cannot be compensated.

From the 1950s to 1998, the average age of these victims was over 80 years old. Added to the years in jail, with their property confiscated, most of these victims have lived in poverty and endured hard lives. Therefore, compensation of up to 6 million NTD (around USD \$200,000) was provided for the victims and their family, plus frequent visits and cares for investigation purpose, hosting memorial activities, etc. The messages from the recipients of compensation create a positive image of Taiwan’s transitional justice. However, some scholars (Wu 2005) have criticized the government’s attitude of neglecting the truth and devoting their attention to monetary compensation, claiming this did not change even after the DPP took office in 2000. The main feature of Taiwan’s transformational justice is addressing the importance of social harmony.

The situation has not changed since the DPP took control of both the presidency and the parliament. On Human Rights Day 2016, President Tsai Ing-wen publicly promised to draft the first national “White Terror

Truth Report” within three years, but it has not been published as of this writing. On the contrary, in January 2022, the Executive Yuan passed a draft amendment to some provisions of “Act on Promoting Transitional Justice” and a draft of “Regulation on the Recovery of Rights of Convicts of State Wrongful Acts in the Period of Authoritarian Rule” to increase the amount of compensation for those who wrongly suffered the death penalty from NTD 6 million to NTD 12 million. This situation appears to confirm the abovementioned scholarly evaluation of Taiwan’s transitional justice.

The Compensation Foundation established by the Executive Yuan in 1998 conducted an investigation and compensated thousands of political cases accordingly. Before it dissolved in 2013, it played the most important role in Taiwan’s early history of transitional justice. After the DPP government took office in 2016 and began to promote Act on Promoting Transitional Justice and the Act Governing the Settlement of Ill-gotten Properties by Political Parties and their Affiliate Organizations, they started up the Transitional Justice Commission and Ill-gotten Party Assets Settlement Committee accordingly.

In 2017, the Legislative Yuan passed the Act on Promoting Transitional Justice. The following year, the Transitional Justice Commission was formally established. The Transitional Justice Commission was a task-based secondary independent agency under the Executive Yuan of Taiwan, which is responsible for tasks related to transitional justice. It was established under the authorization of the Act on Promoting Transitional Justice. It is mainly aimed at planning and promoting the restoration of historical truth, the opening of political archives, the promotion of social reconciliation, and the confiscating of ill-gotten party property. Under this act, the Transitional Justice Commission has a term of two years, which can be extended if necessary with the consent of the Executive Yuan Premier. The term was extended twice, and their tasks completed in May 2022. The Commission was then dissolved in accordance with this act.

The Transitional Justice Commission was a committee-based body consisting of nine commissioners. The commissioners included a chair, a deputy chair, three full-time commissioners, and four part-time commissioners. The law held that there should be no more than three commissioners from the same political party, and no less than three female commissioners. Legislators and members of the Control Yuan were not allowed to concurrently serve as commissioners of this committee. The nine commissioners were nominated by the Executive Yuan Premier, and appointed after the approval of the legislature. During their term in office, members were not allowed to participate in political party activities.

The main work of the Transitional Justice Commission included archival research, restoration of historical facts, and initiating truth reports on Taiwan’s White Terror. The Committee also had investigative powers, and could request that relevant agencies, groups or individuals submit files, books, and evidence, and could also take the initiative to investigate cases or outsource specific cases to other agencies to handle. The Commission mainly targeted the KMT, and had the power to nationalize their political files. In order to implement transitional justice, in 2019, the Legislative Yuan passed the Political Archives Act, which was the legal basis for transforming the parties’ political archives to the national level. The Commission was also tasked with removing symbols of authoritarianism and discussing the preservation and reconstruction of the “sites of injustice” during the White Terror. The Chiang Kai-shek Memorial Hall was at the top of the list.

The Transitional Justice Commission’s other mission was redressing injustices of judicial trials, re-investigating political trial cases that violated human rights, and making restoration and compensation on

convicts or their families. The Transitional Justice Commission investigated the cases during the White Terror, and wrongfully convicted could apply to the Commission to have their criminal records expunged. Finally, the Taiwan Transitional Justice Database was created by this commission.

After 2016, the government also created the “Ill-gotten Party Assets Settlement Committee” that deals with the ill-gotten properties by political parties and their affiliate organizations. The Ill-gotten Party Assets Settlement Committee is composed of 11 to 13 commissioners for a term of four years, appointed or hired by the premier. A chair and vice-chair are designated, and similarly to the Transitional Justice Commission, commissioners of the same party shall not exceed one-third of the total number of commissioners, and the number of the women commissioner shall not be less than one-third. Since its operation began in 2016, two social groups, the National Women’s League of the R.O.C. and the Chinese Association for Relief and Ensuing Services, have been identified as affiliated organizations of the KMT. The Committee has demanded the transfer of their improperly obtained property to the government.

However, public trust in the neutrality of these two transitional justice legal institutions is not very high. According to a poll released by the Taiwanese Public Opinion Foundation (2020), about 64% of Taiwanese people do not believe that the operation of the Transitional Justice Commission was free of political interference. The number stands at 69% for the similar question regarding the Ill-gotten Party Assets Settlement Committee. As a result, although the DPP has had an absolute majority of power since 2016, the new measures it has proposed regarding transitional justice received some negative social responses.

5. The White Terror Cases

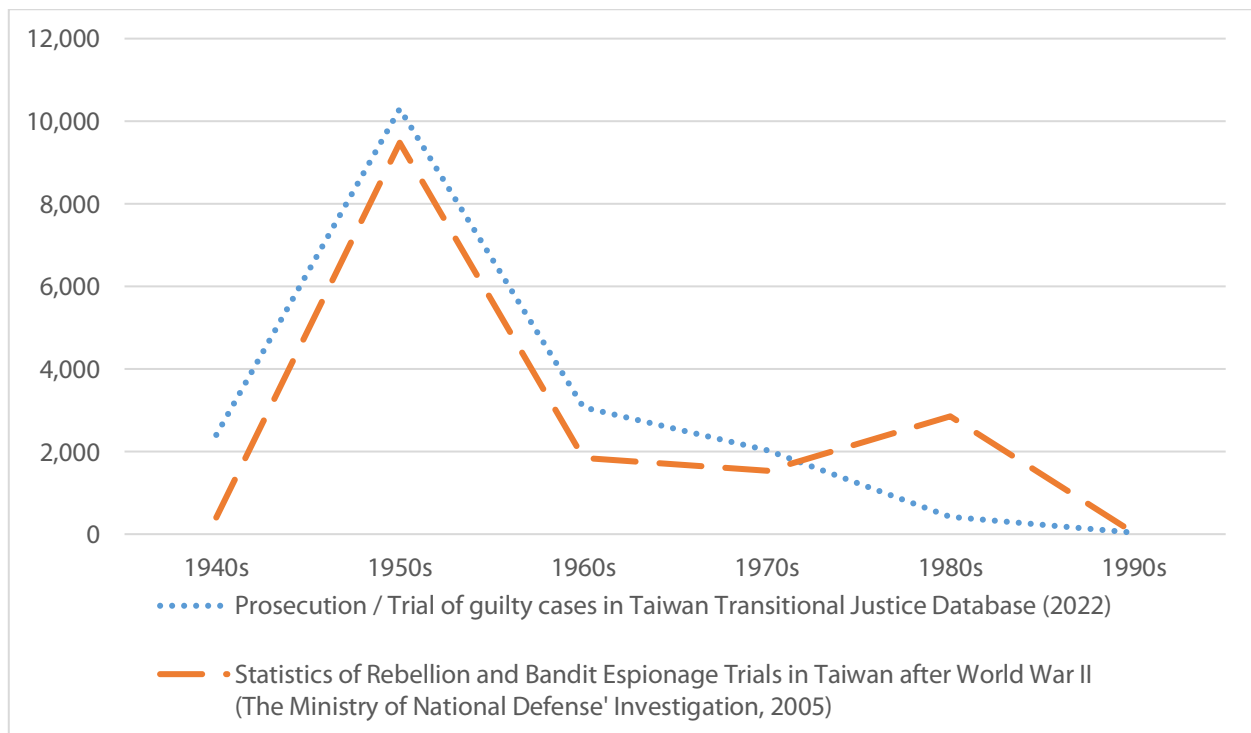
The White Terror period did not really end when martial law was lifted in 1987. At the same time, however, the Legislative Yuan formulated the National Security Act, which specified that during the martial law period, criminal cases that were settled through military judicial trials could be appealed or protested, which delayed the possibility of rehabilitation of many white terror cases until the 21st century. Once Taiwan’s democratization entered its third decade, data about the political judicial cases during the authoritarian period began to be revealed in the Taiwan Transformational Justice Database. Looking back at Taiwan’s transitional justice path, the disclosure of the truth of political judicial cases has been quite limited. The release of the Taiwan Transformational Justice Database has unveiled the details of the trials of the victims. In this section, we depict the general trend of the White Terror cases using the Taiwan Transitional Justice Database.

According to the database, Taiwanese citizens were subjected to military court trials under the Betrayers Punishment Act and Article 100 in the Criminal Code. According to the Taiwan Transitional Justice Database and the Statistics of Rebellion and Bandit Espionage Trials in Taiwan after WWII, the number of prosecutions and trials reached the peak during the 1950s. Those who were convicted in such trials numbered about 10,000.

Table 1. Prosecutions receiving a Guilty Verdict

Period	Cases
1947 to 1950	2,396
1951 to 1960	10,300
1961 to 1970	3,070
1971 to 1980	2,033
1981 to 1990	424
1991 to 1993	36
Total	18,259

Source: Taiwan Transitional Justice Database 2022.

Figure 1. Number of Convicted in the Taiwan Transitional Justice Database, and the Statistics of those convicted in the Rebellion and Bandit Espionage Trials in Taiwan after WWII

Source: Reorganized by the author from the Taiwan Transitional Justice Database, 2022; and Qiu and Xie (2007)

In the Taiwan Transitional Justice Database, the average age of the defendants during the White Terror period was 33. Prosecutions and trials in the 1950s accounted for more than half of all political cases during Taiwan's authoritarian period. Among the occupations of the defendants, 16.22% belonged to agriculture, forestry, fishery and husbandry farming; 13.55% had military and police backgrounds; and those with public and cultural and educational backgrounds accounted for 10.28% and 9.41% respectively.

There were three types of criminal classifications in the Taiwan Transition Justice Database: advocating communism, advocating Taiwan independence, and advocating for democracy. The majority of

those convicted fell into the category of “advocating communism,” accounting for 68.77% in the data; “advocating Taiwan independence” accounted for just 3.95%. This data coincidentally matches with Li Xiaofeng’s (2001) classification of the types of political cases during the martial law period in Taiwan. The first category proposed by Li is the so-called “strike against pro-CCP or left-wing,” including the 1953 Luku Incident (36 people were killed by gunfire, and 97 people were prosecuted, with an average sentence of nine years) and the 1950 Taichung Armed Committee case (four people were killed in the armed attack, 18 people were prosecuted, and nine of those were executed). The second category is the “combating the Taiwan independence movement and advocacy,” including the 1961 Chen Zhixiong case (death penalty) and the 1962 Xingtaihui case (the chief culprit, Chen Sanxing, was sentenced to life imprisonment, which was later commuted and he was released in 1977; the remaining 11 were sentenced to between five and 12 years, including nine juveniles).

In addition, the final sentences recorded in the Taiwan Transitional Justice Database include “death penalty,” “life imprison,” “imprisonment of more than 15 years,” “imprisonment of more than 10 years but less than 15 years,” “imprisonment of more than five years but less than 10 years,” “imprisonment of less than five years,” “probation education,” and “not guilty” accounted for 13.7%, 2.0%, 5.0%, 19.3%, 17.9%, 12.4%, 22.5% and 7.2% accordingly.

Table 2. Characteristic of those convicted during the White Terror (14,946 cases)

	(%)
Gender	
Male	96.52
Female	3.33
Local Taiwanese or Mainland Chinese	
Local Taiwanese	61.36
Mainland Chinese	38.64
Job Background	
Public Sector	26.67
Prisoner	32.83
Business	27.93
Labor Worker	12.57
Education and Culture	9.41
Fishery	8.50
Husbandry	0.02
Police	1.17
Military	12.38
Farmer	7.70
Medical Sector	0.48
Others	0.41
No Data	21.2

Type of Crime (Only 3,445 cases were coded.)	
Pro-Taiwan Independence	3.95
Advocating Communism	68.77
Other	27.29
Final Sentence (Only 8,339 cases were coded.)	
Not Guilty	7.19
Probation Education	22.47
Imprison of Less Than 5 Years	12.43
Imprison of 5 to 10 Years	17.89
Imprison of 10 to 15 Years	19.35
Imprison of More than 15 Years	5.05
Life Imprison	1.95
Death Penalty	13.67

Source: Reorganized by the author from the Taiwan Transitional Justice Database, 2022

6. The Unique Features of Transitional Justice in Taiwan

A defining feature of Taiwan's politics is the ethnic divide or the Blue-Green divide. The Blue-Green divide was originally based on the conflicts and misunderstandings between Mainlanders and native Taiwanese. Moreover, it is a struggle between three claims about Taiwan's statehood—*independence*, *status quo*, or *unification*—and the national identity—*Taiwanese*, *Chinese*, or *both*. On the Green side, the Taiwanese nationalists advocate for a Taiwanese national identity, push for *de jure* independence, and put the brakes on cross-strait economic integration. The pan-Blue side opposes Taiwan independence and favors maintaining the *status quo*, maintaining Chinese identity, and endorsing closer economic integration across the strait.

The Blue-Green divide also shapes how political parties and people view the necessity of harsh measures to stabilize the political regime during the martial law period. In the 1950s, the political and military threats posed by communist China were immense and imminent. The KMT government lost all its territory on the mainland and fled to Taiwan in 1949. Many western governments expected that the Republic of China would not be able to survive and that communism would soon be the only doctrine on the island. The Korean War in the early 1950s led the US to recognize the importance of Taiwan in the East Asia islands chain, and they decided to help Taiwan defend itself. Soon afterwards, Taiwan experienced the Kinmen Bombing in 1958 in which China heavily bombed the island of Kinmen for two months.⁵ Actually, the number of cases and severity of punishment were also the most pronounced in this phase of the country's authoritarian rule. Given the background, for some people, the pan-Blue supporters in particular, some of the harsh measures to stabilize the regime on the island are considered understandable. Of course, there was no due process for the trials at that time and many of those convicted were innocent.⁶

⁵ The Kinmen Bombings in 1958 was followed by a much smaller scale of bombing that continued until 1979.

⁶ Such international political context should also be part of the conversation. So far, this dimension is still missing in the discussion.

Entering the 1960s, the tension between the communist camp and the non-communist camp was less severe, and the political and military situation in the Taiwan Strait had been mostly stabilized.⁷ International conflicts between the two camps in East Asia still existed, such as the military conflicts between North and South Vietnam in the 1960s to 1970s and eventually the fall of South Vietnam in 1975, and the confrontation between South and North Korea. The necessity of imposing political repression to ensure the security of Taiwan reduced significantly. Repression in this period served to a significant degree only to secure authoritarian rule.

In short, when pursuing transitional justice, the level of external threat Taiwan faced in different periods should be taken into consideration when assessing the degree of responsibility that government decision-makers and law-enforcers should bear. This will also serve as the foundation for healing historical wounds. However, the two political camps tend to hold different views about history. Pan-Blue voters in general believe that having such measures in place was necessary. Given this context, they feel that transitional justice campaigns should not target the decision-makers and the officials who were just doing their jobs, and there is no need to systematically reveal the content of the political cases. In contrast, the pan-Green camp refutes this argument and demands more accountability for the wrongdoings, advocating the creation of truth commissions. Truth disclosure is related to the responsibility that the perpetrators have to bear.

Despite a lasting tug of war between the two camps, each side understands that the other side has had a rather different historical experience and acknowledges such difference to some extent. One result of the ethnic divide is that society as a whole tends to place great emphasis on social and ethnic harmony, and avoids policies that harm the core interests and identity of specific ethnic groups. In Taiwan, the argument can sometimes be heard that the aim of transitional justice is the mobilization of hatred to tear society apart. Moreover, the general public is not very enthusiastic about implementing transitional justice. Because of this, the government is reluctant to prosecute public officials who were involved in political cases and introduced lustration policies, and were even hesitant to push through policies that would reveal the truth. In addition, the governments formed by the former opposition party mainly went after institutional perpetrators rather than individual perpetrators. When President Tsai ramped up efforts to implement transitional justice, the government targeted the top authoritarian leaders and refrained from going after middle or low-ranking officials. The government published investigation reports which were not aimed at individual cases. In addition, the government held institutional perpetrators such as the KMT and its affiliated organizations to account instead of individual perpetrators.

Closely related to the ethnic divide, another feature of Taiwan's politics is that the KMT survived as a dominant political force even after the democratic transition. The KMT adopts a comparatively more positive view of the harsh measures during martial law. In addition, the KMT worries that the disclosure of the details of political cases from this time period may further tarnish its image and harm its electoral performance. The direct result is that the pan-Blue camp blocked some mechanisms of transitional justice while letting others go. The KMT favors reparations and amnesties and resists truth disclosure, lustration policies, the return of party assets, and trials of public officials involved. The first two policies ameliorate the discontent of victims while avoiding the exposure of uncomfortable details, whereas the other policies would be likely to harm the KMT's

⁷ Some arguments also state that when the Mutual Defense Treaty between the United States and the Republic of China came into effect in 1955, and thus the political and military security of Taiwan was already ensured.

image and interests. At the same time, as a relatively successful economy, Taiwan's government can afford to pay the bills. Along with the social-harmony concerns, the survival of the former hegemonic party has helped shape the sequence of transitional justice mechanisms by prioritizing reparations and amnesties while postponing efforts to disclose the truth and trial details.

Wu (2006) mentioned that compared to other countries, Taiwan's achievements in transitional justice are not worthy of pride. Wu characterizes Taiwan's transitional justice as "compensating the victims and forgiving the perpetrators." The extent to which perpetrators should be held accountable is the issue of morality, the moral line of transitional justice. He quoted the insight from Huntington (1991) that transitional justice in third wave democratization countries is initiated from the top, rendering retrospective punishment or historical justice difficult. The KMT government continued to rule for the decade following the transition. Since the KMT continued to control the presidency (1986-1999; 2008-2016) and the parliament (1986-2016), it was able to block many transitional justice initiatives.⁸

Jiang (2007), based on the International Center for Transitional Justice's definition, suggests that the specific work of transitional justice includes establishing the truth about the past, prosecution of the perpetrators, reparation for the wrongfully convicted, the publication of memoirs, reconciliation initiatives, institutional reform, and vetting and removing abusive public employees. Taking the transitional justice work of the 228 Incident in Taiwan as an example, by 2007, Taiwan had (more or less) established the general truth about the past, provided reparation for those wrongfully convicted, published memoirs and held memorials, as well as reconciliation initiatives and reformed institutions. However, no effort has been made to prosecute the perpetrators, nor to vet and remove abusive public employees. One direct reason is that the 228 Incident occurred more than seventy years ago and almost all of the perpetrators have since passed away. Similarly, most of the White Terror cases took place in the 1950s, at the beginning of the Cold War era. Most of the perpetrators at that time have also passed away or retired long ago. There are, indeed, few prosecutors and judges that were involved in prosecuting dissidents in the 1970s who are still in their positions or even alive. Certain levels of political and social unrest will be caused by removing or punishing these people and it is uncertain where to set the scope of the investigation.

In 2016, when President Tsai Ing-wen took office, the Legislative Yuan passed the first draft of the Act on Promoting Transitional Justice, and one month later, the Ill-gotten Party Assets Settlement Committee began to deal with the KMT's party assets. At this time, there seemed to be a dual-pronged approach to punishment and reconciliation on both ends of the spectrum (Yeh, 2017). However, the Tsai Ing-wen government, which pledged to ramp up the transitional justice process, has not made much progress in prosecuting perpetrators and vetting and removing abusive public employees. Even the White Terror fact-finding report promised by the president in 2016 remains overdue. One major reason is that the KMT filed a lawsuit to delay the process. The other reason is that the DPP does not want the general public to perceive that the implementation of transitional justice is a kind of political persecution and thereby harm its election performance.

⁸ The experiences of transitional justice in the third wave of democratization are heterogeneous. After the Philippines was overthrown, it did not talk about transitional justice at all; while in Korea, which peacefully transferred its power, active engagement in transitional justice was taken.

Taiwan's transitional justice since the lifting of martial law has slid over the issue of holding individual perpetrators accountable. The DPP government chose to prioritize holding institutional perpetrators accountable and postponed pursuing individual perpetrators to avoid social unrest. Taiwan does not plan to prosecute or purge individual perpetrators. The DPP government in 2018 set up the Transition Justice Commission to deal with the transitional justice issue. Theoretically, it includes both institutional and individual perpetrators. Focusing on institutional perpetrators, the DPP has targeted the KMT, the KMT's ill-gotten assets, and the social organizations affiliated with the ruling party during the period of authoritarian rule. The individual authoritarian strongmen have long passed away, and their descendants do not participate in politics. The high-ranking officials who are acclaimed for steering economic development have less to do with the conduct of the two political events and have also passed away. As indicated, most of the low-ranking public officials who enforced the laws have almost all passed away. The first remaining issue is a few judges and prosecutors who dealt with the participants of the Formosa Incident in the earlier 1980s. The DPP government has no intention of dealing with them. A more important issue is the symbols of the strongman. These include monuments, historical descriptions, and some political symbols. In Taiwan, dealing with the two authoritarian leaders tends to strike the nerve of the ethnic line between native Taiwanese and Mainlanders. The government chooses to remain mute on the issue.

Note that the composition of the Blue-Green divide has not been fixed but has shifted over time, influencing the strength of the two political camps and shaping popular support for transitional justice policies. In the 1990s and 2000s, the idea of transitional justice did not resonate strongly with many people. As the first DPP president, Chen Shui-bian's transitional justice plan did not receive much political or social support. During that period, most people still held certain levels of Chinese identity, and a large portion of people still identified with the KMT. In addition, the experience of fast economic growth during the authoritarian period induced a certain sector of the public to approve the governance of the KMT. As a result, people were less willing to criticize the KMT. In the last decade, the percentage of people who identify as Taiwanese has gradually become an absolute majority, and the percentage of people who identify with the KMT has declined. One reason for this may be that younger generations have received a history education that was Taiwan-centered and had more coverage of the authoritarian rule, a version totally different from the one that their parents received. To them, the KMT is synonymous with the old authoritarian regime. In addition, they grew up in the democratic period and did not experience the rapid economic growth during the authoritarian rule. They tend not to have any authoritarian nostalgia. Instead, they are exposed more to many liberal ideas and disfavor authoritarian values. In short, in the future, the legacy of authoritarian rule such as monuments, organizations, and symbols will face greater pressure to be demolished or transformed.

7. Conclusion

So far, the discussion and redress of transitional justice has focused mainly on the legacy of the KMT's authoritarian rule and largely ignored the aftermath of Japanese colonial rule. Although Taiwan experienced Japanese rule before the end of WWII, reparations for the Taiwanese who served in the Imperial Japan military and those women who were forced to work as comfort women have not been properly redressed. Few political

parties and CSOs seem to be very interested in pointing out the issue of redressing the wrongdoings of Japanese rule. To avoid irritating Japan, an important ally of Taiwan, and to counter China's military threats, both parties in Taiwan, to a different degree, appear to choose to omit the issue. As most of the victims are aging, this is an issue that needs to be addressed soon.

In this paper, we focus mainly on Taiwan. However, the full meaning of the transitional justice experience in Taiwan can only be accurately understood through cross-country comparisons. Several Asian countries such as South Korea, Sri Lanka, Japan, the Philippines, and Indonesia experienced democratization after WWII. Comparative studies of two or more countries would shed light on the way countries in this region have implemented transitional justice and provide valuable lessons for other countries.

Reference

- Bassiouni, M. Cherif. 1996. "Searching for Peace and Achieving Justice: The Need for Accountability." *Law and Contemporary Problems* 59, 4: 9-28.
- Caldwell, Ernest. 2017. "Transitional Justice Legislation in Taiwan before and during the Tsai Administration." *Washington International Law Journal* 27, 2: 449-484.
- Chang-Liao, N. C., & Chen, Y. J. 2019. "Transitional Justice in Taiwan: Changes and Challenges." *Washington International Law Journal* 28, 3: 619-644.
- Chen, Chun-hung. 2015. "United Nations Principles for Handling Transitional Justice." in *Taiwan Civil Society for the Promotion of Truth and Reconciliation, The Struggle of Memory and Forgetfulness: Volume Two - Remembering the Scar of History*. Taipei: Acropolis, 152-154. (in Chinese)
- Chen, Yi-shen, Hua-yuan Hsueh, and Chen-Lung Yang. 2021. *2021 Report on the Truth and Transitional Justice of the February 28 Incident*. Taipei: Memorial Foundation of 228.
- Cheng, Chung-Lan. 2017. "Taiwan promotes "transitional justice" again. Which other countries have tried it?" *BBC News*. December 14. <https://www.bbc.com/zhongwen/trad/chinese-news-42349290> (in Chinese)
- Chiu, Rong-jeo. 2001. "Review on Political Cases During the Martial Law Period in Taiwan." in Zixiu Ni ed., *Law and History of Political Cases during the Martial Law Period*. Taipei: The Compensation Foundation for Improper Verdicts, 143-144. (in Chinese)
- Hirai, Arata. 2020. "Rethinking Transitional Justice in Taiwan from the comparative perspective." *Journal for the Study of the Party Assets* 5: 25-61. (in Chinese)
- Hwang, J. Y. 2016. "Transitional Justice in Postwar Taiwan." In Schubert, G. (Ed.), *Routledge Handbook of Modern Taiwan*. New York: Routledge, 169-183.
- Jiang, Yi-huah. 2007. "Transformational Justice in Taiwan and Its Reflections." *Reflection* 5: 64-81. (in Chinese)
- Li, Xiaofeng. 2001. "Types of Political Cases During the Martial Law Period in Taiwan." in *Law and History of Political Cases During the Martial Law Period*. Taipei: Compensation Foundation for Inappropriate Rebellion and Bandit Espionage Trial Cases During the Martial Law Consortium. (in Chinese)
- Qiu, Ronghua and Xinru Xie. 2007. "Post-war Taiwan Hakka Political Elites and White Terror Political Events: An Analysis of the Relationship of Hsu Hsin-liang with Three Important Political Incidents." *The Rise and Changes of Democracy in Taiwan" The Second Academic Symposium - Characters and Events Proceedings*, Taiwan Provincial Council: 57-60. (in Chinese)
- Shih, Cheng-feng. 2014. "Challenges to Transitional Justice in Taiwan." *Taiwan International Studies Quarterly* 10, 2: 36-620. (in Chinese)
- Transitional Justice Commission. 2022. Taiwan Transitional Justice Database. Retrieved April 20, 2022. from <https://twjtcd.nhrm.gov.tw/News/Detail/1048> (in Chinese)
- Tai, Wens (泰溫斯). "Ma Ying-jeou's lack of sincerity in his apology on 228 is common sense." *Up Media*. https://www.upmedia.mg/news_info.php?SerialNo=107280 (in Chinese)
- Wu, Chun-ying. 2021. "A Framework for Transformational Justice in the Lee Teng-hui Era." in *Symposium on Lee Teng-hui and democratization in Taiwan*, Taipei, Taiwan. <https://www.drn.gov.tw/var/file/3/1003/img/23/526263652.pdf> (in Chinese)

- Wu, Naide. 2005. "Cherish Democratic Assets, Say Goodbye to Authoritarian Era: Transitional Justice and Historical Memory." in *Symposium on Human Rights and Political Events in Taiwan*, Compensation Foundation for Inappropriate Rebellion and Bandit Trials during Martial Law (Taipei). (in Chinese)
- _____. 2005. "Transition without Justice, or Justice without History: Transitional Justice in Taiwan." *Taiwan Journal of Democracy* 1, 1: 77-102.
- _____. 2006. "Transitional Justice and Historical Memory: The Unfinished Business of Taiwan's Democratization." *Reflexion* 2: 1-34. (in Chinese)
- Wu, Rwei-ren. 2015. "Transitional Justice as Politics." *Taiwan Human Rights Journal* 3, 1: 93-102. (in Chinese)

Country Case 3: Sri Lanka

The Challenge of Transitional Justice in Sri Lanka

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Introduction

This chapter will focus on the allegations of war crimes and crimes against humanity made against the government of Sri Lanka (GOSL) and the Liberation Tigers of Tamil Eelam in the course of the twenty-six year long war between them, especially in the last days of the war. It will outline the GOSL position with regard to the political settlement of the conflict, which sets the background for the issue of transitional justice, as well as its attempts through a series of commissions to address the issue, albeit incompletely and inadequately without the seriousness it warrants. The chapter will also look at the activity within the UN Human Rights Council (UNHRC) which has led to a number of resolutions on Sri Lanka, the last expiring in September 2022, which has led to the establishment within the office of the High Commissioner of an accountability project mandated to collect and collate information and evidence relating to the allegations of war crimes and crimes against humanity. The international political dynamics will also be examined. Finally, the conclusion reached is that until there is a paradigm shift in the majority Sinhala community psyche in terms of Sri Lanka as a country founded on the principle of unity in diversity and equality before the law, transitional justice for the victims and their families in the war will remain, broadly speaking, unaddressed.

1. Background

The end of the armed ethnic conflict in 2009 brought the issue of transitional justice to the forefront in Sri Lanka. Transitional justice has come to be seen as integral to reconciliation between communities on the grounds that the culture of impunity has to be reversed and the truth acknowledged.

The war ended with the military defeat of the Liberation Tigers for Tamil Eelam (LTTE) by the forces of the government of Sri Lanka (GOSL). However, the government maintained, as did most other stakeholders, that the military victory over the LTTE had to be followed by a political settlement between the predominantly ethnic Sinhala government and the minority Tamil ethnic community. The previous attempt at a political

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settlement was ushered in following the Indo-Sri Lanka Accord in 1987, which also led to the stationing of Indian troops on Sri Lankan soil. The political settlement came with the Provincial Council Act of the same year, which established a system of provincial devolution throughout the country and, in the north and east, a merger of the two provinces until a referendum was held in the east to decide on the permanence of the merger. However, the referendum was never held—as the President was empowered to postpone it—and the powers of the provincial councils never fully devolved. In particular, land and police powers are yet to be devolved in any province. Subsequent legal action in the Supreme Court abolished the merger of the two provinces and in 2013 the first Provincial Council was elected in the Northern Province. The 5-year term of the Council has ended, but new elections are yet to be held.

On the basis of the inadequacy of the devolutionary powers and the Centre’s control over finances, the argument of Tamil political parties has been for greater devolution and therefore sometimes termed as Thirteen Plus, with the Thirteenth Amendment to the Constitution being the amendment introducing devolution. This demand has been raised in all attempts for constitutional reform and continues to be on the table in the current regime’s attempts at promulgating a new constitution.

Transitional justice for the alleged war crimes and crimes against humanity committed by both GOSL and LTTE forces are associated with the aforementioned political and constitutional demands. The allegations in this respect pertain to the bombing of self-proclaimed no-fire zones and hospitals during the last days of the war, the use of civilians as human shields, and the disappearance of thousands of civilians throughout the nearly three decades of the war. The latter category of the “disappeared” includes those who surrendered to the armed forces at the end of the war. This chapter will focus on the issue of accountability with respect to the above. Other issues of transitional justice relate to reparations, sexual violence and child conscription, land issues, the situation of IDPs, and memorialization of the war dead.

2. Events

In May 2009, at the end of the war, in a joint communique issued by the Sri Lankan President Mahinda Rajapaksa and the UN Secretary-General Ban Ki-moon, Sri Lanka pledged to investigate the aforementioned allegations and to hold those responsible accountable. In the communique, the government:

...reiterated its strongest commitment to the promotion and protection of human rights in keeping with international human rights standards and Sri Lanka’s international obligations. The Secretary General underlined the importance of an accountability process for addressing violations of international humanitarian and human rights law. The government will take measures to address those grievances. (United Nations 2009)

This did not happen, and the UN Secretary-General established a Panel of Experts on Accountability in Sri Lanka headed by the Indonesian politician Marzuki Darusman, with Yasmin Sooka and Stephen Rapp as members. The members of the panel were not allowed into Sri Lanka for investigations, but published their

report in March 2011 and found that there was evidence to further investigate alleged war crimes and violations of international humanitarian law. In their report, the experts wrote that:

The Panel's determination of credible allegations reveals a very different version of the final stages of the war than that maintained to this day by the government of Sri Lanka. The government says it pursued a "humanitarian rescue operation" with a policy of "zero civilian casualties." In stark contrast, the Panel found credible allegations, which if proven, indicate that a wide range of serious violations of international humanitarian law and international human rights law was committed both by the government of Sri Lanka and the LTTE, some of which would amount to war crimes and crimes against humanity. Indeed, the conduct of the war represented a grave assault on the entire regime of international law designed to protect individual dignity during both war and peace (United Nations 2011).

The Panel's report led to the GOSL establishing the Lessons Learned and Reconciliation Commission (LLRC) under the former Attorney General C.R. De Silva. Its report of 2011 found that war crimes or violations of international humanitarian law were not part of government policy, but further stated that there could have been particular incidents involving individual members of the security forces which should be investigated (LLRC Report 2011). On August 15, 2013, President Rajapaksa established the Presidential Commission to Investigate into Complaints regarding Missing Persons headed by Judge Maxwell Paranagama and two others (hereinafter referred to as the Paranagama Commission). The scope of this Commission's mandate was expanded on July 15, 2014 to address the questions of the loss of civilian life in the last phase of the war and the accountability of individuals, groups, or institutions for violations of international law. This expanded mandate is hereinafter referred to as the second mandate. It tasked the Commission to look into matters that were referred to in the LLRC report.

The report of the second mandate of the Paranagama Commission was written by a legal Advisory Council to the Commission comprising international legal experts who benefitted from an expert military report prepared by General John Holmes. The Legal Advisory Council comprised Sir Desmond de Silva, the former United Nations War Crimes prosecutor in Sierra Leone, as Chairman; Sir Geoffrey Nice QC, and Professor David M. Crane. The significance of the report of the second mandate is that it rejects the allegations of war crimes, crimes against humanity, and genocide as part of policy by the GOSL, but acknowledges that further investigations into specific acts should be undertaken. It faults the LTTE for the use of civilians as human shields and attributes major responsibility for the deaths to this. The focus on proportionality in its report and the dismissal of a number of allegations in the Panel of Experts report, especially pertaining to the number killed, has underpinned arguments that this report should be key evidence in support of the Sri Lankan government's case against the charge of war crimes. In the report, the expert legal advisors stated that they were of the view:

...as found by the LLRC, that there are matters to be investigated in terms of specific instances of deliberate attacks on civilians. These matters must be the subject of an independent judicial

inquiry. There are credible allegations, which if proved to the required standard, may show that some members of the armed forces committed acts during the final phase of the war that amounted to war crimes giving rise to individual criminal responsibility (Maxwell Paranagama Commission 2015).

These instances were the “white flag killings” of the Head of the LTTE Political Wing Nadesan and the head of its Peace Secretariat Pulidevan, as well as others who had been given assurances at the highest level that they would not be killed, the alleged executions made in various British TV Channel 4 documentaries, the disappearance of persons who surrendered in the last days of the conflict, and the shelling of hospitals. Finally they concluded:

Whilst noting that the UN Charter places peace and security at a higher level than justice, this Commission is of the view that in order to achieve peace and reconciliation the issue of accountability on all sides of the conflict must be addressed. It is for the political authorities to determine whether a South African-style Peace and Reconciliation Commission without prosecution is the most appropriate mechanism or if the Sierra Leonean model of combining the prosecution of “those who bear the greatest responsibility” coupled with a Truth and Reconciliation Commission will better meet Sri Lanka’s post conflict needs (Maxwell Paranagama Commission 2015).

The failure of the government to launch further investigation brought about the US-led resolution on Sri Lanka at the UN Human Rights Council in 2012, which was followed by two more resolutions. The 2014 resolution called on the Office of the UN High Commissioner for Human Rights to commission a report under its aegis to look into allegations of war crimes and violations of international human rights and humanitarian law. The report, known as the OISL report, was to be submitted to the Council in March 2015, but at the request of the new government in Colombo, submission was deferred to September 2015. The expectation of a robust mandate from the people in anticipation of an adverse report was a factor in the Rajapaksa government’s decision to call for a presidential election. The opposition was not keen on the publication of the report during the general election, especially after their victory in the presidential polls, which were held some months before the general election.

3. The Key September 2015 Resolution 30/1 in the UNHRC

The September 2015 session of the UNHRC marked a watershed in the process of transitional justice. The Foreign Minister of Sri Lanka, Mangala Samaraweera announced to the Council that the GOSL would establish four mechanisms for transitional justice. This included the Office of Missing Persons (OMP), the Office on Reparations, a Truth and Justice mechanism, and an Accountability mechanism—all of which were incorporated into a resolution that Sri Lanka co-sponsored. There was immediate controversy regarding the accountability mechanism over issues such as the participation of international actors, including judges and

prosecutors. Domestic criticism mounted on the grounds that this constituted a violation of Sri Lanka's sovereignty. Resolution 30/1 co-sponsored by the government of Sri Lanka promoting reconciliation, accountability and human rights in Sri Lanka, stated the following in operational paragraph 6:

Welcomes the recognition by the government of Sri Lanka that accountability is essential to uphold the rule of law and to build confidence in the people of all communities of Sri Lanka in the judicial system, notes with appreciation the proposal of the government of Sri Lanka to establish a judicial mechanism with a special counsel to investigate allegations of violations and abuses of human rights and violations of international humanitarian law, as applicable; affirms that a credible justice process should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality; and also affirms in this regard the importance of participation in a Sri Lankan judicial mechanism, including the special counsel's office, of Commonwealth and other foreign judges, defense lawyers and authorized prosecutors and investigators (United Nations Human Rights Council 2015).

This particular paragraph was dismissed by politicians in Sri Lanka on the grounds that it went beyond the constitution of the country and would turn war heroes into war criminals. Leading politicians vowed that they would answer the allegations in person rather than allow a single soldier to face them. Arguments about a Western conspiracy to undermine the Sri Lankan government and of neo-colonialism under the guise of human rights were widely used in the local political discourse.

In response to the inadequacy of information in the public realm regarding transitional justice, the government set up a Consultation Task Force (CTF) in 2016 to ascertain public views on the four mechanisms introduced at Geneva. The CTF was a body entirely of civil society that conducted hearings throughout the country through zonal task forces and through the format of focus group discussions and town hall-style meetings.

Despite initial suspicion and distrust that the CTF was yet another government body to seek public support and not much else, the response improved over time with the CTF receiving some 7,500 submissions. The 900-page final report of the CTF contained over forty-five recommendations and endorsed the view on the basis of opinions expressed by the public. An example of such a recommendation is that the accountability mechanism should have at least one foreign judge on every panel or bench dealing with accountability and, once trust in the judicial system is established for victims and survivors, this could be phased out (CTF 2016). The government deemed the recommendations unacceptable on the grounds cited above and below. The recommendations have largely been unacknowledged by the state.

Whilst the CTF was conducting its hearings, the government decided to go ahead and set up the Office of Missing Persons (OMP) 2016. There are some 22,000 case files of disappeared persons and in order for families to have access to funds and other resources, the government issued Certificates of Absence (COA). This, however, has not been welcomed by the families of the disappeared on the grounds that the COA could constitute acceptance that their loved ones are no longer alive. An additional concern with respect to the OMP is the appointment of certain individuals to the Office due to their past associations and records in previous

positions. An Office of Reparations has also been established. However, the remaining mechanisms on accountability and truth and reconciliation are yet to be created.

The Mahinda Rajapaksa regime appeared to be interested in a Truth and Reconciliation Commission and looked to South Africa for assistance. The current president of South Africa, Cyril Ramaphosa, was appointed by then-President Zuma as his Special Envoy to Sri Lanka in 2014. The attractiveness of South African assistance was largely based on a misunderstanding of the South African experience and the belief that amnesty played a key role in it. Amnesty was posited as key to the process by the Sri Lankan regime, arguing that what was needed was restorative as opposed to punitive justice. In the South African case, amnesty was granted to 849 out of 7,112 applications after full confession and testimonies by perpetrators and victims. The South Africans for their part maintained that the TRC could not be cherry-picked from a series of recommendations for a political settlement and reconciliation.

The key mechanism that caused the greatest degree of uproar and outrage was the accountability mechanism and the provision for the proactive participation of international judges and prosecutors. In September 2015, High Commissioner Zeid clearly stated the rationale for international participation when presenting the OISL report. He said:

The levels of mistrust in state authorities and institutions by broad segments of Sri Lankan society should not be underestimated. It is for this reason that the establishment of a hybrid special court, integrating international judges, prosecutors, lawyers and investigators, is so essential. A purely domestic court procedure will have no chance of overcoming widespread and justifiable suspicions fueled by decades of violations, malpractice and broken promises.

The criminal justice system also needs to be strengthened and reformed, so it can win the confidence of the public, but that is a process which will take several years to achieve and needs to be undertaken in parallel to the establishment of a special hybrid court, not in place of it. Indeed such a court may help stimulate the reforms needed to set Sri Lanka on a new path to justice, building public confidence along the way (United Nations Human Rights Council n.d.).

It must be noted, however, that in 2006 President Rajapaksa appointed a Commission of Inquiry also known after its head as the Udalgama Commission to look into 16 egregious and emblematic cases of human rights violations since 2005. In February 2007, an Independent International Group of Eminent Persons (IIGEP) was attached to this Commission to observe its workings. There were no extra-constitutional implications in the establishment of the IIGEP, and a similar mechanism could at least be attached to court proceedings for accountability. The issue is the commitment to make such a mechanism work and the powers of the international group to highlight shortcomings in the process of investigations. The IIGEP noted in wrapping up that:

The IIGEP is of the opinion that there has not been the minimum level of trust necessary for the success of the work of the Commission and the IIGEP. The IIGEP model may be unique. However, experiences associating national and international persons and processes in the past,

with the view to harmonizing national practice with international norms and standards, have always relied on confidence and trust for their success...

In a concluding press release, they stated that:

The government of Sri Lanka has proclaimed that Justice PN Bhagwati, Chairman of the IIGEP, has clarified the IIGEP's assessment that the government of Sri Lanka lacks the political will to ensure the success of the Commission of Inquiry. The Members of the IIGEP stand by the clear assertions of their concluding public statement, and disassociate themselves from any attempt by the government of Sri Lanka to reformulate and re-interpret that unanimously agreed text.

In fact, the letter to H.E. the president from Justice PN Bhagwati merely expresses the obvious, namely that the IIGEP cannot know for sure, but fears ('apprehends') that the political will is absent. It is lamentable that the government of Sri Lanka continues to divert attention from the central truth in this matter—that is, the problem of impunity for serious human rights violations and the need for the Commission to get to the bottom of that impunity (Asian Human Rights Commission 2008).

There is no legal impediment in the laws of Sri Lanka regarding the participation of internationals in an investigatory process. Nonetheless, the objection to it was framed on the basis that it would violate national sovereignty and most importantly that from a political standpoint, Sri Lanka could not agree to a process in which war heroes would be turned into war criminals. This was the work of traitors, and on both sides of the political divide, protestations were made that no soldier would ever have to face war crimes proceedings. The Prime Minister Ranil Wickremesinghe, now president, pointed out that Sri Lanka was not a signatory to the Rome Statute that set up the International Criminal Court and therefore it had no jurisdiction (Saravanamuttu 2017).

4. UNHRC Resolution 46/1 of 2021

Once the government changed with the 2019 presidential election and the 2020 general election, which saw the return of the Rajapaksa family to power with Gotabaya Rajapaksa as president and a two-third majority in parliament, pressure continued for the establishment of the remaining mechanisms in the 2015 UNHRC resolution from local civil society and internationally. The unwillingness of the new government to go ahead with the implementation of the resolution and their intention to rather to defy it led to another UNHRC resolution in 2021 which called for the establishment of an accountability project within the Office of the High Commissioner to collect and collate information on war crimes and crimes against humanity in Sri Lanka. According to this Resolution 46/1 of the UN Human Rights Council, the Council

Recognizes the importance of preserving and analyzing evidence relation to violations and abuses of human rights and related crimes in Sri Lanka with a view to advancing accountability, and decides to strengthen in this regard the capacity of the Office of the High Commissioner to collect, consolidate, and analyze and preserve information and evidence and to develop possible

strategies for future accountability processes for gross violations of human rights or serious violations of international humanitarian law in Sri Lanka, to advocate for victims and survivors, and to support relevant judicial and other proceedings, including in Member States, with competent jurisdiction... (United Nations 2021)

In order to hold their Sinhala Buddhist constituency together, the Rajapaksas have taken a hardline stance with respect to accountability, and emblematic cases involving members of the armed forces have been dismissed. In one particular case, Sergeant Ratnayake was convicted by all courts for murder, including the slashing of the throat of a five-year old child, only to be pardoned by the president. The pardon is being challenged in the Supreme Court by the Centre for Policy Alternatives and its executive director, the author of this paper. Memorialization is another issue in which the government has taken a hardline stance, disallowing memorialization of family members in the north on the grounds that it constitutes glorification of the LTTE.

The fact that Sri Lanka has remained on the agenda of the UNHRC, informed by local civil society, has been the one motivating factor for the government to make any movement toward transitional justice. In the March 2022 sessions of the Council, the government claimed to have taken some measures in this regard. A key measure was that the Prevention of Terrorism Act of 43 years, first introduced as a temporary measure in 1979, was to be amended. Critics and other states in the Council pointed out that the proposed amendments did not go to the heart of the draconian legislation which allows for long periods of detention, and facilitates torture in obtaining confessions from victims. The Supreme Court of Sri Lanka, in response to a number of petitions filed against the amendments, has ruled that some amendments would require a two-thirds majority and some would require a referendum in the entire country to become law. Other criticisms in Geneva have been of the increased militarization of the government and governance, the appointment of unsuitable individuals to the reconciliation mechanisms established, and hostility towards civil society.

5. The Easter Sunday Bombings of 2019 and Anti-Muslim Violence

In addition to the thirty-year war, focus on transitional justice for the treatment of the Muslim community following the Easter Sunday bombings of 2019 is warranted (Saravanamuttu 2022). That attack was perpetrated by Muslim extremists, killing over 250 persons in churches and hotels. However, it should be noted that violence against the Muslim community preceded the Easter Sunday atrocity. Under the presidency of Mahinda Rajapaksa in which his brother, the current president Gotabhaya, was the defense secretary, Sinhala Buddhist violent hostility was unleashed against the Muslim community in a number of areas. These attacks and hate speech were spearheaded by Venerable Gnanasara Thero, a Buddhist monk who headed the Presidential Task Force for One Country; One Law in the Gotabaya Rajapaksa presidency. Venerable Gnanasara Thero was found guilty of contempt by the Supreme Court but was pardoned by President Sirisena. The issue of the hijab has also been raised by the current government on the grounds of security. The reform of the Muslim Marriages and Divorce law, which allows for child marriages and polygamy, is being firmly resisted by the conservative elements within the community. Another issue in the context of the COVID

pandemic was the requirement that only cremation was permitted and that burial could take place only in one location in the east. This was in defiance of both local and international medical opinion. Burial is now permitted throughout the country.

6. The Challenge

There are a number of reasons for the impediments to transitional justice in Sri Lanka. Some have already been mentioned, stemming from the Rajapaksa family, in particular, presenting themselves to the masses as the defenders of the Sinhala Buddhist nation who defeated the LTTE who were seen as the most bloodthirsty terrorist group in the world causing three decades of damaging armed conflict. The Rajapaksa's political legitimacy is derived from the Buddhist clergy, or Sangha, and the security forces. Neither of these powerful groups in the Sri Lankan polity is willing to consider the possibility of accountability for war crimes. As far as they and the other Sinhala nationalists are concerned, war crimes are a fabrication by the remnant LTTE sympathizers and the West, who in turn are dependent on Tamil diaspora votes to stay in power in their own countries. Suren Raghavan, a scholar of the politics of Sinhala Buddhism, a former Member of Parliament and governor of the Northern Province, has pointed out that:

It is a sociological and psychological fact that Sinhala, especially the Sangha, are looking for a point of pride after three decades of humiliation under a homegrown Tamil-armed rebellion led by a school dropout. The LTTE not only came close to dividing the state, it was nearly successful in dismantling the majoritarian hegemonic mindset of the Sinhala polity. Sinhala as a regional and global minority take pride in their steadfast resilience to hold Lanka as a Sinhala majority Buddhist state even after some 450 years of harsh European colonization. What the LTTE—with its terrible politics—tried to change was not merely the unitary nature of the Lanka but also the historicized Sinhala Buddhist ethno-religious national pride. Sangha as direct recipients and beneficiaries in overcoming such ontological insecurities have become the natural champions of a new order that will not only wipe away such shame but also re-establish overarching control (Raghavan 2013).

There is also the cultural issue of whether full confession will be possible in a society based more on shame than guilt. Societies where TRCs have been established have had a strong Christian influence with a focus on guilt. It must be noted too that the Buddhist Sangha has been silent on the issue, whereas during the war they were vocal on the question of the fight against terrorism.

Another argument made is that accountability will only rake up old wounds and be divisive when the overarching objective is to heal and reconcile. It is argued that accountability leads to punitive justice, whilst what is needed is restorative justice. The Rajapaksa government instead favored focusing on economic development and was open to the charge that they believed that reconciliation could best be achieved through amnesia and the building of toilets. What the government failed, or indeed refused to accept, is the simple demand of the families of the disappeared, for example, to know what happened to their loved ones, especially

when they were witnesses to them being taken in by the security forces or of them surrendering to the security forces at the end of the war. The demand is for the truth and the acknowledgment of the truth by the state. This was echoed in the work of the Consultation Task Force in 2016. Those who appeared before the CTF made this point repeatedly, as well as insisted on their inclusion in the mechanisms for transitional justice. Furthermore, they requested that the mechanisms not be Colombo-based or work in a language unfamiliar to them.

The Sri Lankan demand for accountability and transitional justice confronts the barrier of impunity that has been erected over the years, cloaked in narrow patriotism and nationalism. This leaves the Human Rights Council in Geneva as the only forum in which arguments for transitional justice are taken seriously and, if possible, advanced in terms of implementation. A different perspective is provided by Dr. Kumaravadiwel Guruparan, founder member and co-spokesperson of the Tamil Civil Society Forum, who argues:

The limitations of the UNHRC in dealing with crimes committed during war (as distinct from dealing with ongoing human rights violations) need to be understood. There must be better coordination between the UN's work in Sri Lanka, in Geneva, home to the human rights bodies, and in New York, home to the Security Council. The Sri Lankan experience is instructive of how different agencies of the UN work at cross purposes. The UN in Sri Lanka acts as if the conclusions of the OHCHR do not matter to its work. For instance, it currently is collaborating with the Rajapaksa regime on how to bring the country's counterterrorism legislation in line with international human rights standards, an issue in which the Sri Lankan government has no genuine interest whatsoever. There must be serious reflection on the need for a common strategy across the different UN agencies with regard to engagement with Sri Lanka (Guruparan 2021).

In addition, the international community has issued travel bans on leading members of the security forces, including General Shavendra Silva, currently the head of the Joint Defense Staff and formerly the Army Commander and Kamal Guneratne, the Secretary of Defense as well as the strict vetting of Sri Lankan armed forces personnel for UN peacekeeping operations. Local and international civil society and human rights groups have also called for the application of universal jurisdiction, with the call for former president Gotabaya Rajapaksa's arrest to the Singaporean government being the most recent example.

6.1. The International Dimension

International interest and pressure for reconciliation and accountability has focused on the UN Human Rights Council. In 2009, a resolution was adopted which favored the Sri Lankan government's position and subsequently, since 2012, all resolutions have called on the Sri Lankan government to honor its commitments to accountability and transitional justice. The post-2012 resolutions were informed by local civil society activists who also traveled to the sessions of the Council to lobby Member States and address side events.

The heightened pressure on the Sri Lankan government can be attributed to the United States taking an interest in the affairs of the Council and championing the resolution of 2012 as well as Resolution 30/1 in

2015 (Van Schaack 2021a). In an interview with Beth Van Schaack on February 8, the US Ambassador to the Human Rights Council outlined the reasons for the US interest in the resolution on Sri Lanka as follows:

Why did the United States take such an interest in promoting transitional justice in Sri Lanka during your tenure?

When the UN Panel of Experts report was made public in April 2011, the evidence was so stark and damning that we felt it was impossible not to respond if we could find a creative way to succeed at the HRC. The clear and substantial evidence of war crimes and crimes against humanity committed during the final days of the Sri Lankan civil war simply could not be ignored.

Another important and shocking dimension of the report related to the failure of UN agencies on the ground in Sri Lanka with respect to their responsibility to protect civilians. There also was solid evidence of efforts by UN personnel to suppress the reporting of atrocities by civilians in the field. These UN failures provided significant motivation to get to the truth. In light of the facts that came out in the report, the US delegation simply felt compelled to help support a process of transitional justice in Sri Lanka, and this motivated us to get creative with the diplomatic tools at our disposal.

How was the United States able to build such a diverse coalition of states to support the early Sri Lankan resolutions?

We knew it would be a very challenging to build a winning coalition on the Sri Lankan case. The vote came down to 24 members in support, which was the “magic number” in a voting body with 47 members. But as it turned out, only 15 voted against and eight abstained. We got significant support from the African group, including from Benin, Cameroon, Mauritius, and Nigeria.

To get the level of support we achieved, the single most important element of our diplomacy was emphasis on Sri Lanka’s future, and the value and need for truth if Sri Lanka was to get past the atrocities of its civil war and move on to a peaceful future. In addition, on a more pragmatic level, with the first resolution on Sri Lanka, we utilized an unusual mechanism, Item 2 of the regular agenda, to call on the government of Sri Lanka to investigate, with the advice and technical support from the Office of the High Commissioner for Human Rights. This approach, rather than a confrontational approach, was a new tactic that had not be utilized before. The cooperative tone of the resolution was an important part of why some delegations were able to support the resolution. By taking a step-by-step approach, with a moderate and measured response to the situation, where the government of Sri Lanka was being asked to engage with the support of the UN High Commissioner, more countries were able to get on board (Van Schaack 2021b).

The Trump administration’s attitude towards the Council led to the US taking a back seat in its deliberations. This is unlikely to persist and the US will take a lead role in the core group on Sri Lanka in September 2022, when the current Resolution 46/1 of 2021 has to be extended or replaced by a new resolution. Failure in either case will result in Sri Lanka being removed from the agenda of the Council.

Another key state in the Council is India, which has voted for resolutions on Sri Lanka, but otherwise abstained. Indian abstention is key given the geopolitical and domestic political realities, reinforced by its competition with China, who invariably votes in support of the Sri Lankan government as well as India's influence among Afro-Asian states. India in particular is interested in the Sri Lankan government moving forward on meaningful devolution to the Tamil minority as a political settlement of the ethnic conflict. The Thirteenth Amendment to the Sri Lankan constitution, which provides for this, was a consequence of the Indo-Sri Lanka Accords reached in 1987 between the two countries. Currently, given the economic situation in the country, India's support to Sri Lanka is crucial and securing Indian abstention, if not a vote in favor of a resolution, will be pivotally important. This may well depend on how the issue of the Chinese military surveillance ship that is due to dock in the Hambantota port in Sri Lanka in the third week of August 2022 is resolved. India is adamantly opposed to the ship docking in Sri Lanka. Whilst India has been of singular assistance to Sri Lanka in its current political and economic crisis, China is a key creditor of Sri Lanka's and its assistance is needed in the restructuring of Sri Lankan debt.

US Ambassador Donahoe termed India's favorable position on the 2012 resolution as follows:

What was the significance of India voting in favor of the resolutions?

It would be hard to overstate the significance of India's support in this case. First off, India's support indicated that the case was serious enough that it could not be ignored, even with the political dynamics that it might trigger in the region and at home. Second, it signaled new potential for the approach of encouraging governments to engage with the human rights mechanisms of the UN. India's backing meant that the tone of the resolution was reasonable enough that it would be difficult to reject on the basis of it being overly condemnatory from the start (Van Schaak 2021b).

In 2021, India abstained. According to Pawankumar Badhe, First Secretary, Permanent Mission of India, Geneva, there were two factors underpinning India's decision to abstain on the resolution that had to be taken into account:

One is our support to the Tamils of Sri Lanka for equality, justice, dignity and peace. The other is in ensuring the unity, stability and territorial integrity of Sri Lanka. We have always believed that these two goals are mutually supportive and Sri Lanka's progress is best assured by simultaneously addressing both objectives (PTI 2021).

Attempts by the Sri Lankan government to put a global spin on the issue of transitional justice in Sri Lanka by turning the debate into a Global North versus the Global South issue by highlighting national sovereignty and raising the bogey of the doctrine of the Responsibility to Protect have largely failed, even though the voting patterns on the resolutions do reflect a North-South bias. For instance, the last Resolution 46/1 of March 2021 had 11 countries voting against it—Bangladesh, Bolivia, China, Cuba, Eritrea, Pakistan, Philippines, Russian Federation, Somalia, Uzbekistan and Venezuela. Fourteen countries abstained—Bahrain, Burkina Faso, Cameroon, Gabon, India, Indonesia, Japan, Libya, Mauritania, Namibia, Nepal, Senegal, Sudan and Togo. The

resolution was adopted by 22 votes with Cote d'Ivoire, Fiji, Malawi, Marshall Islands and the Republic of Korea being the countries outside of European and Latin America who voted in favor of adoption (*Op cit.* UN Resolution 46/1).

Commenting on the passage of the 2021 resolution, the Sri Lankan Foreign Minister said that the resolution was brought by countries supported by Western powers that want to dominate the Global South (Al Jazeera 2021).

It should be noted that since Sri Lanka is not a signatory of the Rome Statute, any case before the International Criminal Court would require a resolution of the UN Security Council authorizing such a move. This will most certainly come up against a Russian and Chinese veto. Even at the height of the war, Sri Lanka did not come up for discussion in the Security Council.

7. Recent Events

Recent events in Sri Lanka have indirectly brought the issue of transitional justice and accountability to the fore once again.

The 2015 presidential election, which resulted in the defeat of President Mahinda Rajapaksa's bid for an unprecedented third term as president, highlighted the issue of accountability for war crimes and crimes against humanity amongst the Tamil community in particular and for corruption in the rest of the country. Whilst some measures were taken in respect of the former through the establishment of two mechanisms for reconciliation, little progress was made in respect of the latter. In March of this year, 2022, protests began against President Gotabaya Rajapaksa highlighting accountability for financial corruption, and by mid-July he had to flee the country and subsequently resign in the face of massive protests.

The protest movement, or "Aragalaya," is a non-hierarchical movement of disparate forces and has been hailed for its inclusivity and representativeness of all communities, ethnicities and religions. For instance, they commemorated the end of the war at Galle Face, the main site of their protest. However, people from the predominantly Tamil north and east have not participated as actively as the rest of the country. The argument is that when the north and east suffered acute shortages and repression, especially for the thirty-odd years of the war, the rest of the country was relatively unperturbed. In addition, a political settlement of the ethnic conflict and movement on transitional justice has not featured high up in the political demands of the protesters. It is however expected that once discussions on constitutional reform and effectively a new social contract are commenced in earnest, transitional justice will feature on the agenda. In the meantime, diaspora groups and INGOs have to continue to keep the issue alive.

Gotabaya Rajapaksa's current stay in Singapore has led to the South African-based International Truth and Justice Project headed by former UN Human Rights High Commissioner Yasmin Sooka to write to the Singaporean government calling for the application of universal jurisdiction against Rajapaksa. In an interview with the Al-Jazeera television network, she said:

We believe he has a case to answer. The legal complaint argues that Gotabaya Rajapaksa committed grave breaches of the Geneva Conventions and violations of international

humanitarian law and international criminal law during the civil war in Sri Lanka which include murder, execution, torture and inhuman treatment, rape and other forms of sexual violence, deprivation of liberty, severe bodily and mental harm and starvation.

Gotabaya in September 2008 ordered the immediate withdrawal of the United Nations and relief agencies from the war zone in order to ensure that there would be no witnesses to the carnage that was unleashed on [Tamil] civilians by the Sri Lankan army. Our submission to the attorney general calls for the arrest, investigation and indictment of Gotabaya Rajapaksa. That is the basis of our case (Al Jazeera 2022).

8. Conclusion

Real movement has to take place in Sri Lanka with the majority opinion shifting out of the narrow nationalist paradigm to realize the importance of accountability for reconciliation and the pivotal role of reconciliation for national unity and prosperity. This has been severely inhibited by the shrinking of space for civil society to function through intimidation by the security and intelligence services and the generally confrontational role of the Rajapaksa regimes towards civil society. The current Wickremesinghe government has also exhibited such tendencies in the way in which it evicted demonstrators from their main site at Galle Face Green in Colombo on July 22, 2022.

The government has now changed and the crisis in the country is of an unprecedented nature and scope in its severity. The issues at the forefront of the political discourse are not about accountability for war crimes but rather for theft and looting and the brutality of the government in its use of force against innocent protestors. Consequently, like elsewhere, transitional justice, if it is to happen, has to be sustained with pressure on the national and international agenda in the meantime. The accountability project in the Office of the High Commissioner must be given time to get on with its work and to communicate the progress it is making in this regard to the victims and their families in Sri Lanka. The Tamil political representation in Sri Lanka must decide on the relationship between a political settlement of the conflict and the demand for transitional justice in terms of accountability for alleged war crimes and crimes against humanity. Should one be prioritized over the other, or is there a reconciliation between the two that is possible? The tendency has been to stress the importance of a political settlement and ignore the reconciliation between it and the demand for accountability and transitional justice.

The success of transitional justice in Sri Lanka will depend on the government of the day recognizing its importance and value and the people of Sri Lanka recognizing that our failure to do so will only condemn us to a repetition of history. At the very least, as the surviving victims and family members of those who have been lost have time after time told the Consultation Task Force on Reconciliation Mechanisms, they want an acknowledgement by the state of what happened to them. And to the rest of us.

Abbreviations

COA – Certificate of Absence
CTF – Consultation Task Force on Reconciliation Mechanisms
GOSL – Government of Sri Lanka
LTTE – Liberation Tigers of Tamil Eelam
IIGEP – Independent International Group of Eminent Persons
ITJP – International Truth and Justice Project
LLRC – Lessons Learnt and Reconciliation Commission
UNHCR – United Nations Human Rights Council

References

- Al Jazeera*. 2021. “Explainer: What the UNHRC resolution means for Sri Lanka.” March 25. <https://www.aljazeera.com/news/2021/3/25/what-does-un-human-rights-resolution-mean-for-sri-lanka>
- _____. 2022. “Rights group seeks arrest of ex-Sri Lanka president in Singapore.” July 24. <https://www.aljazeera.com/news/2022/7/24/rights-group-seeks-arrest-of-former-sri-lanka-president>
- Anketell, Niran. 2013. “Hijacked Justice? Truth and reconciliation in Sri Lanka.” *Open Democracy*. December 3. <https://www.opendemocracy.net/en/opensecurity/hijacked-justice-truth-and-reconciliation-in-sri-lanka/>
- Arthur, Paige. 2009. “How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice.” *Human Rights Quarterly* 31, 2: 321-367.
- Asian Human Rights Commission*. 2008. “Sri Lanka: The Members of IIGEP Stand by their Concluding Public Statement.” May 4. <http://www.humanrights.asia/news/forwarded-news/AHRC-FPR-010-2008/>
- Centre for Policy Alternatives: CPA. 2015a. “Benchmarks and Issues to Consider when Exploring Transitional Justice in Sri Lanka.” Discussion Note (March 2015).
- _____. 2015b. “Transitional Justice in Sri Lanka and Ways Forward.” Discussion Paper (July 30, 2015).
- _____. 2020. “The Pardon in the Mirusivil Massacre: Sri Lanka’s Elusive Quest for Justice.” A Comment (April 2020).
- _____. 2021. “Revisiting Ten Emblematic Cases in Sri Lanka: Why Justice Remains Elusive.” January 2021.
- Consultation Task Force: CTF. 2016. “Final Report of the Consultation Task Force Reconciliation Mechanisms – Volume I – Sri Lanka.” <https://missingpersons.icrc.org/library/final-report-consultation-task-force-reconciliation-mechanisms-volume-i-sri-lanka>
- De Alwis, Rhadeena, and Niran Anketell. 2015. “A Hybrid Court: Ideas for Sri Lanka.” South Asian Centre for Legal Studies (SACLS).
- Fonseka, Bhavani. 2015a. “Ideas for a Road Map for Truth and Justice in Sri Lanka.” *Groundviews*. January 19.
- _____. 2015b. “The Need for a Comprehensive Reparations Policy and Package.” Centre for Policy Alternatives (CPA).

- Fonseka, Bhavani, and Luwie Ganesathasan. 2016. "Hybrid vs Domestic: Myths, Realities and Options for Transitional Justice in Sri Lanka." Centre for Policy Alternatives (CPA).
- Fonseka, Bhavani (ed.). 2017. *Transitional Justice in Sri Lanka: Moving Beyond Promises*. Colombo: Centre for Policy Alternatives (CPA).
- Gowing, Richard. 2013. "War by Other Means? An Analysis of the Contested Terrain of Transitional Justice under the 'Victor's Peace' in Sri Lanka." London School of Economics Working Paper 13, 138: 1-39.
- Gunatilleke, Gehan. 2015. *Confronting the Complexities of Loss: Perspectives on Truth, Memory and Justice in Sri Lanka*. Colombo: Law and Society Trust.
- Guruparan, Kumaravadevel. 2021. "Sri Lanka's Evasion of Accountability Tests the limits of the international human rights system." Just Security. March 1. <https://www.justsecurity.org/74987/>
- Haniffa, Farzana, Harini Amarasinghe, and Vishaka Wijenayake. 2015. "Where Have All the Neighbours Gone? Aluthgama Riots and its Aftermath: A Fact Finding Mission to Aluthgama, Dharga Town, Valipanna and Beruwela." Report of Law and Society Trust.
- Human Rights Watch. 2021. "Sri Lanka: Landmark UN Resolution Promotes Justice." March 25. <https://www.hrw.org/news/2021/03/25/sri-lanka-landmark-un-resolution-promotes-justice>
- International Commission of Jurists. 2012. "Authority without Accountability: The Crisis of Impunity in Sri Lanka." <https://www.refworld.org/pdfid/50ae365b2.pdf>
- International Crisis Group. 2011. "Reconciliation in Sri Lanka: Harder than Ever." Crisis Group Report 28.
- Leebaw, Bronwyn Anne. 2008. "The Irreconcilable Goals of Transitional Justice." *Human Rights Quarterly* 30, 1: 95-118.
- Lessons Learnt and Reconciliation Commission Report (LLRC). 2011. "Report of the Commission of Inquiry on Lessons Learnt and Reconciliation." <http://slembassyusa.org/downloads/LLRC-REPORT.pdf>
- Maxwell Paranagama Commission. 2015. "Report on the Second Mandate of the Presidential Commission of Inquiry into Complaints of Abductions and Disappearances." <https://parliament.lk/uploads/documents/paperspresented/report-of-paranagama.pdf>
- PTI. 2021. "UNHRC Adopts Resoulution Against Sri Lanka's Rights Record, India Abstains From Voting." *Outlook*. March 23. <https://www.outlookindia.com/website/story/world-news-unhrc-adopts-resolution-against-sri-lankas-rights-record-india-abstains-from-voting/378082>
- Raghaven, Suren. 2013. "Sri Lanka: Towards a militant Sangha state?" *Colombo Telegraph*. November 23. www.colombotelegraph.com/index.php/sri-lanka-towards-a-militant-sangha-state
- Saravanamuttu, Paikiasothy. 2017. "The Politics of Transitional Justice in Sri Lanka." in Fonseka, Bhavani (ed.). *Transitional Justice in Sri Lanka: Moving Beyond Promises*. Colombo: Centre for Policy Alternatives (CPA).
- _____. 2022. "Victory Celebration and the unmaking of diversity in post-war Sri Lanka." in Elcheroth Guy and de Mel Neloufer (eds.). *In the Shadow of Transitional Justice: Cross-national Perspective on the Transformative Potential of Remembrance*. London: Routledge.
- Senaratne, Kalana. 2014. "The 'Mad Monk' Phenomenon: BBS as the Underside of Sinhala- Buddhism." *Groundviews*. April 15. <https://groundviews.org/2014/04/15/the-mad-monk-phenomenon-bbs-as-the-underside-of-sinhala-buddhism/>

- Sooka, Yasmin. 2021. "UN Should Suspend Sri Lanka from Peacekeeping Over Human Rights Abuses." *Just Security*. March 5. <https://www.justsecurity.org/75138/un-should-suspend-sri-lanka-from-peacekeeping-over-human-rights-abuses/>
- Sunday Times*. 2011. "Panel report: Be realistic and have dialogue with UN." <https://www.sundaytimes.lk/110515/Columns/political.html>
- Teitel, Ruti G. 2003. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16, 69-94.
- United Nations. 2009. "Joint Statement by United Nations Secretary-General, Government of Sri Lanka." <https://press.un.org/en/2009/sg2151.doc.htm>
- _____. 2011. "Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka." <https://www.securitycouncilreport.org/un-documents/document/poc-rep-on-account-in-sri-lanka.php>
- _____. 2021. "Resolution adopted by the Human Rights Council in 23 March 2021." <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/072/88/PDF/G2107288.pdf?OpenElement>
- United Nations Commissioner for Human Rights. 2015. "Report of the OHCHR investigation on Sri Lanka (OISL)." UN Doc. No. A/HRC/30/CRP.2. <https://digitallibrary.un.org/record/803408>
- United Nations Human Rights Council. 2015. "Promoting reconciliation, accountability and human rights in Sri Lanka: resolution." <https://digitallibrary.un.org/record/812282>
- _____. (n. d.) "OHCHR Investigation on Sri Lanka." <https://www.ohchr.org/en/hr-bodies/hrc/oisl>
- Van Schaack, Beth. 2015. "'More than a Domestic Mechanism': Options for Hybrid Justice in Sri Lanka." *Stanford Public Law Working Paper* No. 2705097.
- _____. 2021a. "Spotlight on Sri Lanka as UN Human Rights Council Prepares Next Session." *Just Security*. February 1. <https://www.justsecurity.org/74444/>
- _____. 2021b. "US Re-Engagement in UN Human Rights Council Brings Influence, Leverage, Amb. Donahoe Says." *Just Security*. February 8. <https://www.justsecurity.org/74570/>
- Zuhair, Ayesha. 2016. "Dynamics of Sinhala Buddhist Ethno-Nationalism in Post-War Sri Lanka." Centre for Policy Alternatives (CPA).

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