

# Transitional Justice and Beyond in South Korea



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# Commissioning the Past: South Korean Efforts at Truth and Justice after Democratization

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## I. Introduction: Why South Korea?

This paper above all introduces to the global community the barely known but very remarkable efforts and achievements by the post-democratization South Korean governments to uncover truths regarding various types of injustices and human rights abuses afflicted upon the Korean people by the state. It then tries to draw out, from a comparative perspective, the factors of success and the lessons for other countries which are still struggling to settle the past injustices.

Although South Korean experience of transitional justice is little known to the outside world, it is a very interesting case from a comparative perspective. South Korea's contemporary history was full of turbulence and violence, from which many Koreans suffered. The 35 year colonial rule was followed by bitter and violent struggle between the left and the right, which in turn culminated in the fratricidal Korean War. Hundreds of thousands of civilians perished in the hands of the two hostile forces in waves of atrocities. After the war, human rights were relegated to the secondary consideration in pursuit of national security and economic growth until democratic transition in 1987-88.

Nonetheless, there was little clamor for justice at the time of democratic transition in a striking contrast to some countries where such a clamor was one of the facilitating factors of democratization. Since democratic transition, however, there was tremendous progress toward truth and justice. Two former Presidents were brought to justice on the charges of disrupting the constitutional order and convicted to life sentence. A dozen or so truth commissions were set up to deal with virtually all dark chapters of contemporary Korean history. Not only the human rights abuses under the immediately preceding authoritarian regimes were redressed but also some incidents as old as 100 years have been reevaluated. In this sense, Korea appears to move beyond transitional justice toward “historical justice.” This is a remarkable feat considering there was little, if any, open demand for justice at the time of transition.

The paper will discuss key features and contributing factors of successful truth-seeking in South Korea. It will also try to draw lessons for other countries and regions. Specifically, it will try to contribute to an ongoing debate among the scholars and practitioners of transitional justice: which should be the first, transition or justice.

## II. A Historical Sketch: From Colonization to Democratization

In 1905, Korea became a Japanese protectorate and lost its diplomatic sovereignty as the result of the Japanese-forced Korea-Japan Protection Treaty. Five years later, the country was forcibly annexed to the Japanese Empire and placed under Japanese imperial rule for 35 years. Independence fighters were tortured, jailed, or killed. Millions were uprooted, drafted for labor in mines and industrial and military facilities home and abroad. Students were enlisted into the Japanese Imperial Army. Young girls were conscripted or lured into sexual slavery in Japanese military brothels in China and Southeast Asia.

When Korea was finally liberated from the Japanese yoke in 1945, a major transition-related issue was the purge of the pro-Japanese collaborators. Though supported by a large segment of the public, however, the issue was submerged in the growing tide of the global and local Cold War. In its arduous struggle against the communists which instigated a series of revolts, the US military government (USMGIK) that ruled the southern half of the Korean Peninsula in 1945-48 called back most of the former Japanese-trained officials, police officers, and soldiers into its service.

When the Republic of Korea (ROK) was set up in 1948, the ROK Constituent Assembly (the 1<sup>st</sup> National Assembly) set up the Special Committee to Investigate Anti-Nation Activities (SCIANA) in 1948. But with little support from the Syngman Rhee government, the committee became moribund within a year and was officially disbanded in January 1951, accomplishing very little. Some scholars and activists are disposed to view the collapse of the SCIANA as an outcome of collusion and conspiracy between and among Rhee and collaborators. Considering his life-long career as an independence movement leader, his staunch anti-Japanese attitude, and his personal disdain of pro-Japanese collaborators, however, Syngman Rhee's refusal to endorse the special committee appears to result more from the state-building needs than from any conspiracies. Rhee must have found building the state and protecting it from the communists more urgent than purging the un-Korean activities. In fact, his was a typical dilemma a post-transition regime faces (Posner and Vermeule 2004: 777-779). Confronting strong communist challenges, the ROK government under Rhee had little choice but to continue the accommodating policies of the USMGIK. Since the collapse of the special committee, the purge of pro-Japanese collaborators remained an issue apparently dormant but ready to erupt when the caps loosen.

As mentioned above, in the south, the communists were staging armed revolts against the USMGIK and later the US-backed ROK government. To name a few, in October 1946 the Harvest Uprising broke out in North Gyeongsang Province and spread "like a grassfire," engulfing the whole country in turmoil for several months until it was finally suppressed. On April 3, 1948, a communist-led rebellion broke out in the island of Jeju, which lasted several years. Later in the year, the 14<sup>th</sup> Regiment of the ROK Army insurrected in the southern port city of Yeosu. The unit was temporarily stationed there to be dispatched to the Jeju Island to quell the communist revolt there. All these armed uprisings of the communists were eventually unsuccessful but the surviving rebels went into the mountains and continued their fighting until the Korean War. Caught between the government forces and the communist partisans, tens of thousands of villagers were killed by both sides. Government forces summarily executed villagers suspected of helping the rebels, while the rebels killed those who cooperated with the government forces.

Then broke out the Korean War (1950-1953). During the war there were four waves of mass killing of the civilians. In the first weeks of the war when the invading North Korean People's Army (NKPA) swept over the whole south except a small patch of land in the southeast, the retreating ROK army and police units killed the convicted communist

rebels and preemptively arrested and killed former communists and suspected communist sympathizers. Then, in the area occupied by the NKPA, the so-called “reactionaries” were killed in the “People’s Court.” When the tides of the war changed after the UN forces’ amphibious landing at Incheon, the retreating NKPA and the local communists, at the order of the North Korean Workers’ Party, “eliminate[d] all the elements that will support the landing UN forces” (Kim, N-S 1984: 454-455). In the recovered occupied areas, the ROK military and police frequently delivered a summary execution for those who were known or suspected to have collaborated with the communists.

The killing of the “innocent civilians” by the government forces became a public issue briefly when the National Assembly in 1951 demanded an investigation into the Geochang Incident, one of such civilian massacres. But the issue was suppressed and muzzled under the strong anti-communist regime of Syngman Rhee.

Only when the Rhee regime was toppled in the wake of the April Student Revolution of 1960, the issue was brought up again. The National Assembly began investigations into the wartime atrocities of the government forces. And the bereaved families of the victims began to organize themselves, demanding punishment of the perpetrators and reparations. But these efforts at truth and justice were cut short with the collapse of the Democratic Party rule by the military coup d’etat in 1961.

Even after the war, the country had been under the authoritarian rule until the late 1980s, except for a brief democratic interlude in 1960-61. The authoritarian rule turned harsh from 1972, when President Park Chung Hee proclaimed the Yushin or Revitalizing Reform Constitution. Before the Yushin, elections had been competitive and held regularly. Park’s assassination in 1979 by one of his confidantes ended the Yushin system and brought forth varying desires, ideas and proposals for democratizing the political system. But the “Spring of Seoul” was short-lived. After ruthlessly quelling a popular revolt that broke out in the southwestern city of Gwangju, a group of the hardliners in the military gathered around General Chun Doo Hwan established an authoritarian regime that was even harsher than the preceding Yushin system.

Highly repressive as it was, Chun’s so-called “Fifth Republic” experienced difficulty in securing political stability. In the first place, its hands were stained with the blood of Gwangju. Gwangju remained a nemesis for Chun. The regime was successful in restoring economic stability and growth, which had proved effective in legitimating

the previous regime. But habituated to a high rate of economic growth for almost two decades, the public took it almost for granted and gave little credit to the Chun regime. The National Assembly election, which was carefully designed to guarantee the ruling party a comfortable majority of the seats and was devoid of its function to translate popular vote into seats,<sup>1)</sup> became a virtual plebiscite on the regime. On the other hand, the middle class ballooned in the course of the “Miracle on the Han River” began to join the students, activists, and opposition parties in demanding greater freedom and democracy. The regime could not help but to come to the table, if half-heartedly, to negotiate for the constitutional revision.

In the middle of a prolonged tug-of-war on the constitutional revision, on June 29, 1987, Roh Tae Woo, the presidential candidate of the ruling Democratic Justice Party (DJP), declared he would accept unconditionally the opposition demands for new election rules. In fact, Roh’s declaration was a “blitzkrieg” against the military hard-liners,<sup>2)</sup> whose coup could have derailed his candidacy, as well as against the ever-hardening opposition. Roh posed himself as acting on his own without consulting Chun, but in fact it was a public relations stunt carefully designed and perfectly staged to boost Roh’s chance of winning the direct presidential election.<sup>3)</sup> Following Roh’s wholesale concessions, a new Constitution and political party and election laws were quickly drawn up. In November 1987, Roh was elected new President by a direct popular vote for the first time in sixteen years and was sworn into office in February 1988. Two months later, the National Assembly election was held under the new election laws. Democracy, a procedural one at least, was restored.

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1) Under the Fifth Republic (1980-February 1988) electoral law, two-thirds of the 276 National Assembly members were elected from 92 two-member districts. The remaining one-third (or 92 seats) was elected through a “proportional” representation system. Two-thirds of these seats were allotted to the party winning the largest number of district seats, while one-third was allocated in proportion to the seats won by the other parties. Thus, in the 1985 parliamentary election, the ruling DJP won 54% of the seats with 35.4% of the popular vote.

2) Observing the democratization processes in Southern Europe and Latin America, Guillermo O’Donnell and Philippe Schmitter observe that the beginning of transition to democracy was either direct or indirect consequence of the divisions in the authoritarian regime itself between the hard-liners and the soft-liners (O’Donnell and Schmitter 1986: 15-21). Often developing in the face of the growing opposition, the cleavage in the ruling bloc constrains its will, if not ability, to apply the coercive institutions (See Stepan 1988: chap. 3). This was also the case with the Korean transition.

3) It was later revealed that Roh acted at Chun’s prodding. Chun is quoted as saying, “If necessary, you may step on my body.”

### III. Post-Democratization Efforts at Truth and Justice

#### 1. Little Clamor for Justice in Democratic Transition

In this process leading to democratic transition, there was notably little, if any, public clamor for justice. The reasons were manifold.

As we have seen, a feature of Korean democratization was the speed with which new democratic procedures were adopted by the authoritarian regime pressured from below. Urgency of establishing political democracy as such precluded many other important potential reform issues from the agenda.

Also contributing to this were the yet modestly articulated opposition demands. Believing that the authoritarian regime would not give in easily, the opposition concentrated its demands on the direct popular election of the national president and fairer National Assembly election rules. It also believed that democratization or transfer of power would in due course solve other problems.

A third factor that helped the justice issue off the agenda was that the final endgame negotiation on the specific contents of constitutional and electoral law revisions was concluded between the regime and its institutional opposition, that is, opposition parties and their leaders. The *jaeya* or extra-institutional opposition added its strength to the institutional opposition when the latter had suffered setbacks throughout the 1980s. But the extra-institutional opposition, which included Families of the Arrestees and the like, was excluded from the final negotiation table and had little chance to get its voices heard.

#### 2. Roh Tae-Woo Administration (February 1988~February 1993)

Obviously, the Korean transition to democracy deviates from the two generally discernible modes of democratic transition: replacement and transformation (Huntington 1984: 212-213). The process was not characterized by a clear-cut democratic rupture, as in Portugal and Argentina, in which an authoritarian regime was replaced by a democratic one. Nor was it a reform initiated by the authoritarian regime itself, as in Spain and Brazil, which involved a prolonged and gradual process of taming, negotiating, and pact-making.

The lack of a “pact” and the rapidity of the process seem to have serious implications for the nature of Korean democracy of the time and its further democratization in the coming years. The most immediate effect was democratization of the electoral regime on the one hand and the basic continuity of the administrative regime on the other. The state, be it understood as the summation of government organs and personnel or as an apparatus guaranteeing the class domination, was still there little changed.

Considering such continuity from the Chun Doo Hwan’s Fifth Republic and Roh Tae Woo’s close personal and political relationships with Chun, one may be puzzled by the fact that it was the Roh Tae Woo administration that began handling the past human rights abuses, especially the Gwangju massacre which had cost nearly 200 lives. But the fact the Sixth Republic was born from the womb of the Fifth Republic was paradoxically one of the factors that motivated Roh, under the circumstances, to take measures to relieve grievances of the victims of the Kwangju massacre.

First of all, Roh’s mandate to rule was tenuous at best. In the 1987 presidential election, he won the presidency but with 36.6% of the votes cast. If the opposition votes had not been split among the three Kim’s, he would have been defeated. Besides, Roh faced a formidable opposition in the National Assembly, which became much stronger in power and authority than before in the new constitution. In the 1988 National Assembly election, the ruling DJP won only 125 out of 299 seats. One of the major campaign issues in that election was the Gwangju massacre. On top of that, feeling that their expectations and aspirations were betrayed with Roh installed in presidency, the victims, their families, and the civic groups became increasingly vocal. Thus, politically vulnerable Roh was inclined to play along the opposition and distance himself from the previous regime.

To uncover truths regarding the Gwangju Incident, the National Assembly from June 1988 to February 1989 held a total of seventeen hearings in which 67 high profile witnesses, including the former President Chun Doo Hwan, were called to the stand. After witnessing, Chun made a public apology and put himself on a self-imposed exile in a remote Buddhist temple in the mountainous Gangwon Province. Roh also made a special speech to the nation and released convicts of conscience to appease the opposition and wind down the hearings. In February 1990, Roh succeeded in merging his DJP, Kim Young Sam’s Reunified Democratic Party, and Kim Jong Pil’s New Democratic Republic Party into Democratic Liberal Party (DLP), which now came to control 218 of 299 National Assembly seats. In August 1990, the DLP-dominated National Assembly enacted the Law

for Compensation for Gwangju Democratic Movement Participants, which the opposition criticized tried to buy off the victims and the bereaved families. Until 2000, the law was revised four times mainly to expand eligibility for compensation. The actual examination, investigation, and judgment on individual petitions were made by the government commission specifically set up for the purpose.

### 3. Kim Young Sam Administration (February 1993~February 1998)

Although his administration ended somewhat ignominiously because of the foreign exchange crisis and some scandals that involved his second son, Kim Young Sam really tried to reform the country (For details, see Lee 2000). Although he entered the tiger's den (DLP) to catch the tiger (the presidency), as a Korean proverb goes, he never liked the DLP nor the entrenched legacies of authoritarianism. The DLP was a grand coalition of the heterogeneous conservative forces based on the anti-Honam regionalism. The three-party merger allowed the badly needed political wherewithal for the Roh administration but at the same time signaled the closure of reformism and the retrenchment of conservatism. Despite democratization at the formal level, the politics in democratized Korea was as usual. Authoritarianism died hard. Old guards were well and alive. Calling his administration the "Civilian Government," President Kim Young Sam tried to break up whatever authoritarian legacies there were in sweeping reform measures, relying more on the executive decrees than the laws. Table 1 summarizes the major reform measures taken by Kim Young Sam since he assumed presidential powers on February 25, 1993.

Table 1: Reforms under Kim Young Sam Administration and Their Outcomes

	Political Arena	Economic Arena	Social Arena
First Stage (1993/03-1994/02)	<ul style="list-style-type: none"> <li>● Registration of Wealth of Public Figures</li> <li>● Purge of Public Figures</li> <li>● Military Reform</li> <li>● Anti-Corruption*</li> </ul>	<ul style="list-style-type: none"> <li>● Financial Real-Name System*</li> <li>● Deregulation/ FinancialAutonomy/ Privatization**</li> <li>● National Competitiveness*</li> <li>● Chaebol Reforms/Fair Competition***</li> </ul>	<ul style="list-style-type: none"> <li>● Consciousness Reform/ Burden Sharing***</li> <li>● Restoration of National History</li> <li>● "Upstream" Purification***</li> <li>● Anti-Corruption*</li> </ul>

Second Stage (1994/03-1995/12)	<ul style="list-style-type: none"> <li>● Unified Electoral Codes***</li> <li>● Local Elections</li> <li>● Decentralization*</li> <li>● Administrative Reform**</li> <li>● Rectification of History</li> </ul>	<ul style="list-style-type: none"> <li>● Globalization*</li> <li>● Real-Estate Real-Name System</li> <li>● Structural Reform of the Primary Sector*</li> <li>● Support for Small and Medium Enterprises*</li> </ul>	<ul style="list-style-type: none"> <li>● Educational Reforms**</li> <li>● Judiciary Reform**</li> <li>● Unemployment Insurance</li> <li>● Welfare Reforms**</li> <li>● Informatization***</li> <li>● Environmental Reforms***</li> </ul>
Third Stage (1996/01-1998/02)	<ul style="list-style-type: none"> <li>● Party System Reform**</li> <li>● Political System Reform**</li> </ul>	<ul style="list-style-type: none"> <li>● Integrated Taxation on Financial Assets***</li> <li>● Tax Reform***</li> <li>● Labor Reform**</li> </ul>	<ul style="list-style-type: none"> <li>● Quality-of-Life Reforms***</li> </ul>

Note: \*Implemented but poor outcome; \*\*Attempted but failed or distorted by the interested parties; \*\*\*poorly implemented or retrogressed

Source: Lee (2000).

As for the past affairs, three items stand out in Table 1: Military Reform, Restoration of National History, and Rectification of History. All three are among his most successful reforms.

Immediately after being sworn into his office, President Kim embarked on the reform of the military that involved purge of senior officers closely linked to Chun Doo Hwan and Roh Tae Woo. Contrary to the advice not “to take or even to circumscribe too closely the movements of the transitional regime’s queen [the military]” (O’Donnell and Schmitter 1986: 86), President Kim dethroned the queen. He discharged, reassigned, or postponed promotion of generals and colonels who belonged to the *Hanahoe* or the Society of One on charges of corruption and incompetence. *Hanhoe* was an unofficial fraternity of military officers organized by Chun Doo Hwan and had been a major pillar of authoritarianism before 1993. Thus, he preempted any possible revolt by the military against his possible further actions against Chun and Roh.

The so-called restoration of national history concerned dealing with the Japanese colonial legacies. In June 1993, President Kim disclosed that the government would not seek material compensation for the “comfort women,” whose livelihood would be supported with the government budget. What mattered, according to him, was the Japanese government acknowledging the truth, not compensation. That way, Korea could approach a new Korea-Japan relationship from a position of moral superiority. In late

1993, he also ordered to tear down the colonial Government General building.<sup>4)</sup> At the same time, he ordered to bring home the remains of the independence fighters that had been left behind in China.

In May 1994, 32 victims of the Gwangju incident filed criminal charges against 35 persons who they believed were responsible for the massacre. But the prosecution refused to indict them, arguing that a successful coup cannot be punished. In December 1995, while the Constitutional Court adjudicated that even a successful coup can be punished, Kim Young Sam, in the name of “rectification of history,” had the National Assembly pass a special law to remove the statute of limitations for those responsible for what had happened in Gwangju in May 1980. At last, in April 1997, eight former military elites, including two former presidents Chun Doo Hwan and Roh Tae Woo, were convicted for military insubordination, subversion of the constitutional order, and corruption. The military coup d’etat was neither forgotten nor forgiven. In addition, many of his other reforms, the financial real-name system for one, were also designed, among others, to uncover the acts of corruption committed by the former leaders of the military regime.

In the meantime, Kim also had a special law passed to uncover the truths regarding the mass killing of the civilians that had taken place in Geochang, South Gyeongsang Province in 1951. The truth commission that was set up three months later in accordance with the law was the first of its kind: the first post-democratization truth commission that looked into the civilian massacre by the government forces before and during the Korean War.

#### 4. Kim Dae Jung Administration (February 1998~February 2003)

For the first two years, Kim Dae Jung administration paid little attention to the issue of transitional justice. Reasons were twofold. Obviously, he was preoccupied with recovery from the economic crisis that had hit Korea in 1997-1998. Perhaps more important than that, he lacked in the National Assembly a base strong enough to ram special laws through. His party, the National Congress for New Politics, had only 79 seats vis-à-vis more conservative New Korea Party’s 139 seats and Unified Liberal Democrats’ 50 seats.

But in the 2000 National Assembly election, his New Millenium Party succeeded in

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4) At the time the public opinion was evenly split between for and against the destruction.

securing a rough balance with the Grand National Party (GNP) (115 seats versus 133 seats). Starting 2000, his administration took five major steps, setting up three truth commissions and one foundation, and securing preferential treatment of the Gwangju victims. In January 2000, a commission was set up for Truth-Seeking and Honor Restoration for Victims of Jeju April 3 Incident. In January 2001, two commissions were set up for Truth-Seeking and Compensation for Democratic Activists and Truths of Suspicious Deaths. In July 2001, a government-funded foundation was set up to implement Projects Commemorating Democratic Movement. And in January 2002, a special law was enacted for Privileged Treatment of the Gwangju Democratic Movement Participants.

If Kim Young Sam's approach to transitional justice was more open and frontal attack against the perpetrators, using the judicial means where possible, Kim Dae Jung's was, under the circumstances, more cautious and more focusing on restituting the names and damages of the victims than bringing perpetrators to justice. By hindsight, the pattern of "truth-commissioning the past" began to be established under his administration.<sup>5)</sup>

## 5. Roh Moo Hyun Administration (February 2003~February 2008)

Among the post-democratization Korean presidents, President Roh Moo Hyun was most keenly interested in coming to terms with the past injustices.<sup>6)</sup> His administration set up as many as eleven governmental commissions that were in different degrees related to the past affairs, as shown in Table 2.

Table 2: A List of Past Settlement Laws and Commission under Roh Moo Hyun Administration

Enacted Date	Law	Commission
2004/01/19	Restitution and compensation for Samcheong reeducation camp detainees	Yes
2004/01/19	Compensation for special operations agents	Yes
2004/03/05	Identification and restitution of No Geun Ri victims	Yes
2004/03/05	Restitution of Tonghak Peasant Revolutionaries	Yes

5) In addition to these transitional justice measures, in 2000 Kim Dae Jung also set up the National Commission for Human Rights, which deals with human rights abuses that are less than two years old.

6) Some political calculations must have been there. In addition, some say that he was motivated by family history and others say it was a matter of his political convictions.

2004/03/05	Truths of damages of Japanese-forced emigration	Yes
2004/03/22	Truths of anti-Nation activities under Japanese rule	Yes
2005/05/31	Past settlement for truth & reconciliation	Yes
2005/06/29	Truths of suspicious deaths in the military	Yes
2005/12/29	Confiscation of properties of pro-Japanese collaborators	Yes
2007/10/29	Truths of and livelihood support for victimized Hansen patients	No
2007/12/10	Support for victims of Japanese-forced emigration during the Pacific War	No

In addition to these, the Defense Ministry, the National Information Service, and the National Police set up their own truth commissions, after President Roh Moo Hyun emphasized in his 2004 Independence Day speech the need for the past wrongs committed by the state agencies to be looked into by the responsible agencies themselves.

## 6. Truth and Reconciliation Commission (TRC: December 1, 2005~December 31, 2010)

The TRC is one of the eleven governmental commissions that deal with the past injustices. But the TRC is almost unique and outstanding among these. While, the other truth commissions dealt with a single incident or a particular type of incidents, the TRC is by law entrusted to investigate a wide range of incidents. It was intentionally designed so.

By the time the TRC law was enacted, President Roh and the ruling Uri Party came to realize that the single-incident approach was not a proper way of handling the past affairs. Some commissions were more oriented toward truth verification while others were oriented toward compensation and restoration. This inconsistency across different commissions in terms of levels of truth verification and compensation was causing many problems. Similar incidents were treated differently. President Roh himself expressed the need for a more comprehensive approach.

Thus, the TRC was designed to be the ultimate truth commission that will deal with the major remaining past injustice issues. Indeed, if you look at the Table 2, except the commission on the Hansen patients, you can see that the other two commissions were just extensions of the earlier commissions.

The original Uri Party bill was to include the mass killing of the civilians before and during the Korean War and the human rights abuses under the authoritarian regimes.

But in the course of negotiating with the main opposition party (GNP), the atrocities committed by “those that deny the legitimacy of the ROK or are opposed to the ROK,” a euphemism for North Korean army and the local communists, were also included for investigation. The GNP demand to investigate the brighter side of Korean history as well as the darker side was also accommodated. Thus, the anti-Japanese independence movement and the history of the overseas Koreans that contributed to preservation of Korean sovereignty and to the national development were included in the scope of investigation. By the end of June 30, 2010, the TRC completed investigations into all the individual petitions that numbered more than 11,000.

## 7. Lee Myung-Bak Administration (February 2008~ )

Although President Lee Myung-Bak is often criticized for being lukewarm in coming terms with the past injustices, in fact his administration has so far established three truth commissions that are significant in their own rights. The first one, set up in 2008, is a commission to restore honors of the victims of a violent attack on the Buddhists that took place in October 1980. At the time, for reasons unknown yet, the Joint Investigation Corps under the Martial Law Command forcibly arrested 153 Buddhists and mobilized 32,000 strong military and police troopers to search 5,731 temples across the country. The victims claim that they were indiscriminately beaten and tortured. Some of the victims were even sent to the infamous Samcheong Reeducation Camp.

The second commission was established in 2010 to investigate the damages caused by forced emigration during the Japanese rule and to provide aid to the victims. In fact, this commission was to pick up and continue the works of two defunct commissions that had been set up by the previous administration for the same purposes.

Another commission set up in 2010 is to investigate the truths regarding the abduction of South Koreans by North Koreans during the Korean War and to restore the honor of the victims. Nearly 100,000 South Koreans are believed to have been abducted and taken to North Korea by the retreating NKPA. In the past, however, the authoritarian regimes ignored them on the ground that they could not tell who had been forcibly abducted and who not. In their typical cautiousness, the security agencies treated virtually all of them as voluntary deserters. Thus, the families of these abductees suffered not only the loss of a family member, but also the suspicion in the form of the so-called “guilt by association.”

## IV. Key Features

### 1. “Commissioning the Past”

The most obvious feature of the South Korean approach to transitional justice is what can be termed “the commissioning of the past.” Among the different means of establishing the transitional justice, South Korea relied preponderantly on truth commissions. The number may vary how the truth commission is defined, but however you count, the post-democratization administrations have so far set up more than ten truth commissions. The government and the political parties had no initial blueprint concerning the matter. This had much to do with the fact that there had been little demand for justice at time of democratization. Thus, the whole process was just “muddling through,” reacting to particular demands and political context of the time. Since the issue of transitional justice could still prove controversial, the political forces settled for a compromise that is the truth commission.

### 2. Micro-approach

Another feature is the micro-approach that these commissions took. Since the Gwangju Commission of 1990 had set a precedent, the truth-seeking was done on the basis of the petitions filed by the victims and their families. Of course, depending on the nature of the cases, a micro-approach may be necessary and desirable. And, in case the ultimate goal of the truth-seeking is to make individual compensations the individual victims or to bring the perpetrator to justice, the pursuit of truth regarding a particular victim is a necessity. But in South Korea even where the micro-approach was not necessary nor appropriate, the laws dictated such an approach.

A good example can be the mass civilian killings before and during the Korean War that were investigated by the TRC. As for these cases, the individual compensation was never intended; only a collective kind of commemorative projects was envisioned. Perpetrators were not only difficult to identify but also never meant to be indicted. The ultimate goal was to devise ways that will prevent similar incidents from happening again. And yet, the micro-approach was adopted by law.

In these cases, a macro-approach would have served the purpose better. The macro-truth could be relatively easily verified. With documentary evidences and oral witnesses, the investigators could easily tell whether, when, where, how, and perhaps by whom these killings were committed. Of course, the micro-approach had the benefit of adding “flesh” to the story with a wealth of individual episodes. But often times it hindered reconstructing the whole picture and drawing out the significance of the incidents by forcing the investigators to look through small windows.

### 3. Restorative Justice over Criminal Justice

Except the Kim Young Sam Administration, few efforts were made in South Korea to bring perpetrators to the court of law. Instead, the emphasis was on truth-seeking and restoration of names and sometimes damages as well.

One of the reasons was that, these incidents having occurred long time ago, the exact perpetrators could not be easily identified for most of them. For the same reason, even when they were identified, they could not be brought to justice due to the statute of limitations, unless a special law is enacted. Even then, a political and/or legal controversy might have ensued over how to interpret the incident, how much responsibility to place on acts done under order, and so forth.

Although in many countries the trial has been the preferred means of transitional justice, it always carries the problem of selectivity (Minow 1998: 31, 40-45, 50). The trial is always directed toward particular perpetrators. You may bring some conspicuous ones to justice, but tend to pass over others and the whole system that was behind the human rights abuses. In Korea, the perpetrators may have been little touched, but the state was ultimately held responsible for the abuses, at least for failure of proper oversight of those working in its name.

## V. Evaluation

### 1. Problems

By hindsight, the “muddling through” approach to transitional justice had several problems. The first problem was inconsistency across truth commissions. Created in the different political contexts, they had different relative emphases. Some were more oriented toward compensation, while others, truth. Thus, the same kind of abuses was handled differently depending on which particular commission was in charge, causing confusion, dissatisfaction, and additional demands on the part of the victims.

Another problem was the diffuse and the overlapping authority and the scope of investigation between and among the different commissions and government agencies. Thus, there sometimes were circular, duplicate, or even triplicate investigations of the same incident. In the TRC, for example, there were tens of petitions that had been investigated at the Patriots and Veterans Administration Agency; many human rights abuse cases have been those that had been dealt with in other commissions: the Democratic Movement Commission, the truth commissions of the Defense Ministry and the National Intelligence Service, and the Suspicious Deaths Commission.

A third problem, from an insider’s perspective, was inefficiency of these commissions. The TRC, regarded as the most effective of all, spent on average 250 million won per report. For five years, an investigator produced on average less than two reports. This makes one question the utility of having own investigation teams on the truth commissions.

### 2. Criticisms

The critics, mostly conservative ones, question how true truths “verified” by the past affairs commissions are. According to an analysis of a middle-of-the-road NGO, 65.5% of the investigators recruited by the TRC were of progressive backgrounds, many of which had worked in the organizations that had stakes in the settlement of the past affairs. This was not an isolated case. It was the same with all 15 commissions that were studied (*Dong-A Ilbo*, January 31, 2007: <http://www.donga.com/fbin/output?n=200701310096>). While the commissions were “captured” by the particular interests, the critics ask how the investigations could be fair.

In the case of the commissioners, the ideological representation was not as skewed as the investigators, according to the same study. But still the progressive commissioners were overrepresented, averaging at 49.4% in all 15 commissions. Many were representing the organizations and groups they were working for. Considering the “bandwagon behavior” of the middle-of-the-roaders, one may say the outcomes were virtually predetermined. Thus, the critics say the “truth” of the truth commissions is a “voted truth,”<sup>7)</sup> a truth based not on facts but on the majority.

Another criticism is that these truth commissions were practicing retroactive justice. Not only the critics but also the police and security officers who were investigated complain that the today’s human rights standards are applied to what happened several decades ago when the standards were laxer and less strict. The most common retroactivity is what Posner and Vermeule (2004: 794-795) call “taking nominal law seriously.” What were perfectly acceptable practices in the past are condemned on the basis of legal provisions that were “strictly normal - rarely enforced and constantly belied by administrative practice” (Posner and Vermeule 2004: 794). The examples are arrest without warrant and extended detention especially in espionage cases.

In the case of the TRC, another source of retroactivity was interpretation of a legal clause. The Truth and Reconciliation Law excludes from investigation those cases on which the court passed down the final and conclusive judgment, unless there are grounds for a retrial as specified in the Civil or Criminal Procedure Law (Article 2, Paragraph 2). But the Commission liberally interpreted the clause as meaning that even the irrevocable cases can be investigated if the retrial reasons appear likely to be found when the investigation is completed. Many such cases were indeed investigated, retrial grounds found, verified by majority, and recommended a retrial. And the retrial court, without an exception so far, reversed the original judgment. Virtually declaring that bad laws were not laws at all, it threatens to undermine legal stability, so argue the critics.

### 3. Achievements

While these problems and criticisms must be duly noted, overall there has been substantial accomplishment. For the last two decades, by the efforts of different

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7) The expression is the author’s.

administrations mostly carried out through the past affairs commissions (*gwageosa wiwonhoe*), virtually all conceivable victims of historical injustices were restituted, their honors restored and their sufferings acknowledged. These include: Donghak rebels (Now they are called revolutionaries), the Righteous Army, independence fighters, especially those of socialist and anarcho-syndicalist strains, Japanese-forced émigrés, comfort women, victims of state atrocities before and during the Korean War, victims of Communist atrocities, political victims under the authoritarian regimes, democracy fighters, and other victims of human rights violations. At the same time, pro-Japanese collaborators were documented and listed and their bequeathed properties are being redeemed by the state. Perpetrators, if identified, were officially defamed, if few were convicted due to the expired statute of limitations.

This is quite remarkable achievement, especially considering little, if any, pre-transition clamor for justice unlike some countries where such clamor itself contributed to democratic transition. Besides, the whole process was just “muddling through” without a blueprint, creating one commission after another in response to the public demands and political circumstances.

## VI. Factors of Success

This remarkable progress in past settlement naturally begs a question: how was it possible? One facilitating factor was the growing number and voice of the activist groups that had stakes or interest in the settlement of past injustices. In a strong contrast to some countries such as Chile where the pro-democracy activists disappeared after democratization (Oxhorn 1994), in Korea civic groups and organizations sprouted “like bamboo shoots after rain.” Feeling “their” democracy was betrayed by Roh Tae Woo’s election and taking advantage of the new opportunity structure created by democratic transition, former democracy fighters began organizing in the civil society. Among them were victims, their families, researchers, and activists. For example, a 422-day sit-out in front of the National Assembly was instrumental in the passage of the suspicious deaths law in 2000.

Secondly, there were some attentive politicians. They were willing and ready to mobilize the issue and the civic movements to their political advantage. Political parties

have lineages and some parties were more steeped in the past than others. Some politicians even made a political career out of this movement.

The third but probably as much important factor was what I call “dictatorship by law.” In Korea, a ‘rule by law,’ if not a rule of law, was practiced even under the preceding regimes. They may have enacted crooked laws or they may have abused the existing laws, but had done so largely within the legal system and with recourse to laws and legal procedures. Thus, the meticulous records were left behind by the authoritarian regimes like in Nazi Germany.<sup>8)</sup> Thus, atrocities and human rights abuses could be relatively easily confirmed owing to these documents. This state of affairs strikes a good contrast to some other countries including Chile, Argentina, and South America where kidnappings and killings were more often than not done outside the legal system and left few documental evidences behind.

## VII. By Way of Conclusion: Which First? Transition or Justice?

Although transitional justice combines two separate words transition and justice into one word, there is certain tension between the two, as practitioners in the field well know. From a practical point of view, to induce perpetrators to stop killing or abuses and to step down from positions of power, it may be necessary to grant them an amnesty, if not full but partial. But justice demands that they be brought to the court of law. Even today one big question is whether it is all right to give amnesty for the sake of transition. As late as 2007, a huge international conference was called in Nuremberg to address if and how the two could be reconciled.<sup>9)</sup>

Along with experiences of some other countries, the Korean case attests to the primacy of transition over justice. Whether you have given amnesty to the perpetrators or not, in due course you will have a chance to punish them, to bring them to justice. Or you will have at least a chance to rebuild truth regarding the human rights abuses committed under the authoritarian rule. Ten years later or twenty years later when the balance of power tilts

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8) A US prosecutor at the Nuremberg Tribunal is quoted as saying, “they left all the evidences to indict themselves with.”

9) “Building a Future on Peace and Justice,” June 25-27, Nuremberg. Peace here meant none other than transition. The conference was organized by agencies from Germany, Jordan, and Finland.

toward the justice against perpetrators, then you can start a new investigation and a new trial. In Chile and Argentina, pre-transition amnesty was eventually revoked and more perpetrators were brought to the court of law. In Spain, the all the major parties agreed to forget what had happened during the Spanish Civil War and under Franco dictatorship. Now that their democracy was consolidated enough, they decided to uncover the truths and to compensate for the victims under the Historical Memory Law. If you have to make an unpleasant choice between transition and justice, you are advised to choose transition.

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# Remembering the Almost Forgotten Killings: The Civilian Victims in the Korean War

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## I. Introduction

### 1. Problem: Civilian Mass Killings in the Korean War Era<sup>1)</sup>

Democratization has brought many transitional justice issues to the government agenda and Truth and Reconciliation Commission(TRC) was also partly a result of Korean democratization. But it was in 2004 that idea of launching a comprehensive organization to cleanse past state misdeeds in total was introduced by some legislative members of Korean national assembly. The special law for TRC was made possible in large part to sudden emergence of big government party [Open Woori Party] in the wake of success of parliamentary elections in May 2004 in Roh Mu Hyun government. The President Roh addressed necessities of setting up comprehensive government agency of transitional justice as one of key policy tasks of his government.

One of the basic tasks of Korean TRC was establishing truth of victims of many mass killing cases during and before the Korean War. The task was to retrieve repressive and painful past memory of Korean society.

So many people have died for unidentifiable reasons during the War period. Our initial question was: are these done by massive state crimes or by inevitable necessary measures

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1) The Basic Law of the commission, known as the Framework Act of Truth and Reconciliation, defines Korean war civilian mass killing cases to include pre-war period of Aug. 1945 to June 1950.

during the war?

“Why were they unknown to general public so far,” many have asked. Was it because there were oppressive state agents that tried to cover them up? Or did fear and threats play some key role in suppressing the desire to reveal the truth of mass killings? Who were killed and who killed them? Why were they killed and how?

For over four and half years Korean TRC has explored over 8000 cases and revealed an alarming fact that over eighty percentage of victims were in fact innocent individuals slain by various types of state violence. As a matter of fact there were some people who were not innocent civilians. But the rate of these people, who were dismissed, was very low. There are still others whose sacrifices were unable to be determined, the so-called un-verifiable victims.

Typical explanation by the military authorities was that they were exceptions, no ordinary civilians. They were either armed or involved in anti-state activities, helping enemies by providing shelter or foods or executed their orders. “Assuming these victims as innocent”, they argue, “reveals naiveté of the investigator and it is far from the truth.” The opposing view is more often commonly found in progressive civic groups. It is a common anger that we see when they explain with passions insanity of collective killings before and during the Korean war such as Koch’ang massacre or Nogunri massacre. The task is to overcome preconceptions, angers, fears and rebuilding common understanding and social trust based upon scientific investigations of the TRC.

## II. Identifying Four Types of Mass Killings in the Korean War

Common basic questions for our investigations are such as: “What really happened in the Korean war?” or “Who killed whom, and how many people died in total?” or “Who are responsible and who are to blame?” We have found four types of mass killings before and during the Korean War.

&lt;Table 1&gt;. Four Types of Mass Killings in the Korean War

Periods/ Types of Killings	Occupation Era, 45-48.7.	1st republic, 1948.8- 50.6	Korean War 1 1950. 7-9	Korean War 2 1950. 10 ~
Mass Killings by Police & Military	1946 Taegu Uprisings	Yosu- Sunch'on Rebellions		Collaborator Case/ Cholla Region Mil Operations
Communist Atrocities		y	y	y
Preventive Detention Killings			Prison cases Bodo cases	
US Bombing Cases			y	y

## 1. Victims of the Police and the Military Mass Killings

Most of the victims of civilian massacres were those who were killed by the police and the military. The pattern of the violent collective actions and the subsequent brutal suppressions by the police or military dates back to the pre-Korean war era. Two of the most powerful cases of violent mass mobilizations took place in Taegu and Yosu-Sunch'on areas that caused massive civilian killings. These controversial incidents when they were erupted they rapidly developed into violent cases of riots or rebellions causing widespread communist killings of rightists or the local policemen. The civilian mass killing cases submitted to the TRC took place in the next stage when the suppressive forces of the state retaliated in brutal manner, causing arbitrary murders of local, mostly leftist residents. As there were so many petitions regarding the Yosu-Sunch'on incident, TRC decided to investigate over-all level of victimization by extending the scope of investigations to the whole cholla region and verified as many as 2000 incidents that took place in 1948 alone.

## 2. Victims of Communist Atrocities Cases

The second most popular type of civilian killings is involved in communist atrocities cases. Forced abductions, or bodily injuries were also commonly found in this type. In some regions before evacuating from the communist controlled areas, massacres of rightist prison detainees took place. Sometimes these civilians were killed as a measure of vengeance for their prior activities in relations to the South Korean government. Many of the massacre cases were caused by North Korean army personnels but some killings were done by the local leftists for personal motives. Those who were not cooperative to partisan army as well as those who helped to inform the suppressive government forces were selected as targets of killings. Oftentimes, the type two and the type three cases are commonly found in a same region at the same time. This shows some cause of the complexities of the Korean war mass killings. Most of the victims were concentrated in the Southern Cholla province.

## 3. Victims of Preventive Detention and Killing Cases

The third most popular type of mass killings is Preventive Detention and Killing Cases. There are two subtypes- Bodo League cases, Prison Detainees killing cases. The most shocking scenes that TRC revealed were scenes of excavation of these massacred bodies.

The Bodo League was initially organized in the spring of 1949 to convert former communists and socialists into loyal subjects of the South Korean government.<sup>2)</sup> The government design was focused on leftists as well as on many of the inmates of prison. But this efforts were apparently thwarted by the outbreak of war and to make the matter worse many of the liberated members of the Bodo League in Seoul area collaborated with North Korean people's army.

Hence, South Korean government in the very early days of war issued summons of Bodo League members and put them in preventive detention in prisons of the nation. And it was not long after they were put in prison that large scale inmate killings took place

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2) The meaning of the name of the organization was literally "National Federation of Protection and Guidance." The title clearly resembled state sponsored national organ in Japanese colonial era and it was built to be mobilized for specific purpose of controlling leftist population groups in South Korea.

throughout the southern part of South Korea. As many as five thousand victims were identified as a result of TRC investigation, which is the first report that acknowledged state crimes in public since the ceasefire of the Korean war took place 60 years ago.

Prison inmate killings also fit in this case. Prison detainees killing cases were another tragic and gloomy incidents, revealing the darkest moment of the Korean war. Several dozens of helpless inmates, many of political prisoners, were transferred by trucks to near mountains at night and were killed instantly to be dumped into improvised pits and buried hurriedly. Among the petitioned cases, over 1250 prison detainees killings were verified. This also is the first case of official recognition by the state of the past heinous state crimes. Many of the political prisoners had been involved in former local revolts or rebellions such as the incident of Taegu or Jeju of Yosun-Sunsh'on. Jeju, Taejon and Taegu were three of the major areas where large scale prison inmates killings took place.

#### 4. Victims of US Bombing Cases

US Bombing cases that entailed massive casualties reveal the fact that price of Korean war was high. Objections on bombardment on civilian refugees were first presented by communists during war and US retorted communist violations of international law as initial cause of large scale civilian deaths.

Some of US Military activities in Korean War that caused high casualties are beyond criticism when the situation permitted it without infringing on existing laws.

Air bombing was the primary cause of civilian massacres by UN forces and 67% of incidents owed it's cause to air bombing. There were 4 major incidents (2 Uljin cases, Pohang, Haenam) caused by naval bombings and army shootings were also responsible for 7% of the mass civilian killings. Heavy casualties were concentrated in Kyongsang provinces where most fierce early battles were located around the Pusan perimeter for two months. There were some key reasons of heavy tolls of civilian massacres in early days of the Korean war. One was the obvious communist policy of intermingling the fifth columns in civilian refugees. Penetration of North Korean soldiers in plain cloth was one of the key reasons that UN forces lost city of Taejon in mid-July 1950. For this reason, the US army requested strict refugee controls to the South Korean government. However, refugee control policy of South Korean government in early war days were never quite established. As a result of

this poor state of war time administration by the South Korea, large scale allied bombing involved large civilian casualties oftentimes. Nogunri was perhaps the most publicized incident.

<Table 2>. US Bombing Cases during Korean War

Province	Cases	Claimed Victims	Intensive cases
(1)Seoul-Kyonggi	13	80	1
(2)Kangwon	6	28	1
(3)Ch'ungchong	77	310	2
(4)Cholla	59	99	1
(5)North Kyongsang	38	431	7
(6)South Kyongsang	141	266	3
(7)Ground Troops	74	191	2
Total	408	1405	17

(\*Note: All numbers are US Air Bombings except (7).)

War time atrocities are most typically tragic cases that needs extensive historical research and Truth commissions of Korea worked hard to clarify exact causes of these tragedies. However, air bombing cases are typically the hardest one to decipher its past exact happenings.

### III. Determining and Verifying Truth-Findings

#### 1. Three step processes of Truth Finding

##### 1) Investigations of Petitions at Bureau of Mass Victimization

Normal procedure of TRC's investigation starts with exploring petitioned facts. The next stage is finding witnesses in the area of incident. It takes several weeks to find relevant witnesses on both victim's and perpetrator's sides.

## 2) Subcommittee Deliberations

Subcommittee on civilian mass killings was established to examine and investigate petitions of victims of the Korean War. There are some special occasion when subcommittee makes a decision on initiating independent investigations on some significant cases. This is so-called autonomous decision case is limited to some historically salient incidents.

Identifying situations and the types of mass killings should help us to find plausible causes of death. Defense department continually have presented dissenting opinions to TRC that the military has never conducted illegal activities and those incidents took place because of precedent illegal and anti-state behaviors of population.

It is one thing to see the police or the military to repeat same disappointing excuses that there were no such records as mass civilian killings in military archives. However, it is another thing to listen to the military experts critique that the situation is complex and fuzzy. Often the battlefields are full of uncertainties and information is so unreliable that plain explanation often misses key elements of reality. Subcommittee deliberations on each investigative report often raises this complexity issue and challenge investigator's claim. Because of absence of interview with alleged perpetrator group, the US forces, it is a common mistake for investigator to agree with the victim's advocate group's opinions.

Thus, bringing up often thorny questions such as "aren't these civilian looking people disguised enemy soldiers in plain clothes?" or "didn't they ignore evacuation order and chose to stay within the vicinities of enemy forces?" is important part of discussions and deliberations in the subcommittee.

There are a few ways to determine cases of truth finding, meaning innocent victimization. Objective standards are required and truth commission tried to establish rules and principles. The end result is the principle of two source policy. The principle has been widely accepted and in use in global society. Without it, there is no sure way of guaranteeing certitude of committee's decisions. The importance of TRC's decision is that the previous status of mere opinions are tested and either accepted or negated of its verity.

There were some opinions that favored of investigating without definite standard. The idea was that each case is different and maximum autonomy of investigators should

be respected. But the result might easily lead into anarchical confusions. At least two sources of independent and supporting witness opinions should be retrieved in order to decide truth of innocent death. For extreme cases, such as prison killings and anti-partisan war victims, additional category of near certitude[Ch'ujong] was adopted as intermediate category to redeem borderline cases. The motive of adopting assumed case was humanitarian concerns to the most vulnerable and the weakest.

Another key debate was brought up in the area of US bombing cases. The question of illegality by international humanitarian law standard. The careful review of battle history of the Korean War was vitally important. The complex nature of changing situation of battle field requires collection of various types of information on top of witness statements. But oftentimes, investigators disregard key comments that might affect the nature of civilian casualties such as presence of enemy troops in the vicinities of bombing area. Some investigators defy duties of neutrality by consciously siding with victims, utterly denying necessities of military considerations.

## 2. Three Results of Investigation

### 1) Verified Cases

Among the 11,172 cases TRC have investigated so far, about 75%, 8468 of the cases were verified. Dismissed cases are 1725 (15%), and unverified cases are 510 (4.5%). Comparing these relatively small number of cases with verified cases, the rate of verifying cases is very high.

The largest group of killings were civilian massacres which amounted as much as 8173 cases and the second largest was communist atrocities, which came up as many as 1761 cases. Included are non-petitioned cases. There were also 661 human rights abuse cases and 274 independence movements cases and 16 overseas ethnic Koreans historical cases.

&lt;Table 3&gt;. Results of Verification

	Victims Verified	Perpetrator Identified	Existence of Illegality
Type I: Verified cases	y	y	y
Type II: Unverified cases	y	y	n
Type III: Dismissed cases	y/n	n	n

## 2) Unverified Cases

Cases unable to verify illegal nature of particular incidents were found abundantly in the category of US bombing cases. These cases revealed many unfortunate and tragic mass civilian death. However, it was not apparent whether the mass civilian killings were caused by breach of international law or not. Another common reason of this failed attempt was lack of information on perpetrators.

Other main causes that blocked verifying processes was lack of supporting evidences, difficulties of retrieving basic background information regarding the mass killing incidents most importantly absence of mission reports of the allied forces that participated in the combat operation.

## 3) Dismissed Cases

Civilian killing cases that involved participation to outright illegal actions such as partisan army or guerrilla warfare, rebellions, and riots are dismissed. Other cases where there were records of related previous court's decisions were also dismissed.

Decisions of partial verification of truth claims were made in human rights abuse cases in authoritarian regime era but it was impossible to make such decisions in Korean war victim cases. The core problem was the Basic Act's core statement in the second clause (no 1., item 4) which delimits objects of investigations to "illegal" civilian mass victimization. The notion of illegality is clearly different from less strict notion of "injustice" clause of human rights abuse cases. Oftentimes TRC clearly lacked capacity to provide sufficient material evidences to prove a case of violation of international law.

## IV. How to Draw Big Picture: Beyond individual cases

### 1. Origin of the Mass Killings in South Korea

Why so many people were killed? The structural cause may be traced to political situation of the Korean peninsula- division, civil war and cold war. The game of mass killing began as early as Fall of 1946. It was the second year of liberation and division. The previous year's competition among political leaders in left and right wings turned into fierce power struggles entailing mass mobilization in 1946. One of the leftist groups led by Park Hon-young staged a series of mass strikes and popular uprisings in Pusan and Taegu areas in the Fall of 1946. The Taegu uprising, which took place on the 1st day of October, turned into a riot the next day and spread to the northern Kyongsang province in next week. This is the so-called "internal origin" of the Korean war. However, this was only a sign of the beginning of the waves of violence in the decolonized Korean peninsula.

The Taegu incident incurred widespread clashes between leftist wing groups and the police in October 1946, and caused suppressions by police [backed by US military government]. And radical socialist dissenters, who fled to near mountains, formed rebellious groups and were joined by partisan groups from the North subsequently. The partisan groups were increased dramatically in the next two years especially when Yosusunch'on Rebellion hit the Southern Cholla province hard in Oct 1948. The incident that started as a local military rebellion spread to two major cities of southern Cholla province and to the surrounding areas and rebellious groups again fled to mountainous areas and joined in old partisan groups and confronted combined suppressive forces- the military and the police- of the South Korean government. So the war of subversion and suppression has started years before and has continued to the Korean war.

### 2. Key Question: Illegality

The key question is illegality. Opinions are divided on the salient issue of illegality even among the government organizations, not to speak of the contrasting views of victims and perpetrators of mass killings. Sixty years have passed since the breakout of the Korean war but tensions and feelings seem to be still as fresh as before.

Some investigators neglected to pin down exact causes of mass killings. They did not

understand why they needed to provide evidence of illegality of the mass killings. Intuitive truth of wrongful behaviors for them was so obvious that they did not feel that they needed to prove accountability of certain military actions. The problem can be restated as a problem of bridging the gap between subjective truth and objective truth.

### 1) War Time Civilian Victims

“We should not judge war time incidents according to peace time standards,” said one of military experts in the defense department of Korean government. As a member of armed forces protection of civilians who failed to obey orders and guidance of state agents is not an easy task to achieve.

“Even in war time, legal procedure should be respected,” retorted one of a human rights activist working as a staff of one civic group. Constitutional guarantee of human rights or citizens should be respected by all means. Mass killings by South Korea's authorities in early months of Korean war are much to blame overstepping norms of the civilized nations.

In considering the time being the crisis of the state, civilian victims should be put in a broad context of war time casualties. We first have to put these victims back into the war and battlefield context.

## 3. Regional Distribution of War Victims

Many of civilian victims were concentrated in Southern Cholla province. But major area that suffered most severe casualties during US air bombardment is Northern Kyongsang province. Jeju has experienced the highest level of violence in the Bodo League incidents cases perhaps because the infamous rebellions in the spring of 1948. Southern Kyongsang and Pusan area suffered most severe level of Prison massacres witnessing over 500 victims in Pusan and Masan prisons. The second most sacrifices were to be found in Taejon area where there were over 350 civilian victims executed by the state. The Actual number was always claimed to be only a part of the much larger real casualties. The alleged real number of mass killings in prisons by the South Korean state might be as big as 12,000 in overall.

## V. Democracy, Reconciliation and Transitional Justice

### 1. General Impacts of TRC

The major contribution of Korea's TRC is discovery of unjustifiable state-led wrongdoings. TRC's major finding-existence of huge number of innocent individual victims during Korean War- may give impacts on young generation's public understanding of the Korean history. However, in time it will change public perception of the role of the Korean state during the Korean War. TRC's decisions will encourage some victims' family groups to litigate and number of trials will be held in coming several years. And these trials can further change the popular conceptions of historical justice.

The attempt to use trials as a means to justify special notion of historical justice has a potential danger to risk politicizing the procedure (Teitel 2000). In Korean case, the mass media have played double functions: (1) they publicized the truth commission's activities, and (2) they also politicized the issue and polarized the audience. Oftentimes some of the media are very actively involved as key player in the whole processes of transitional justice.

The overall impact of TRC's truth-findings will instill positive attitudes to grieved families of victims of the Korean War. The sixty years' scars left in the heart of family members' victims will be finally healed when Korean government publicly recognizes the state misdeeds or crimes as old as 60 years.

To build a truly fair and democratic society, recognition of TRC's monumental finding of Korean war victims is vitally important. At first, the hard fact of huge number of innocent civilians slain before and during the Korean War might be too intimidating. But by declaring state's own misconduct in public, the chance of Korean state's committing same type of brutal and savage actions becomes very low. By bravely admitting one's own past mistakes, one can move forward with optimism that one has changed completely. This can be equally true not just to individual but to the big bureaucratic group or even to the whole nation.

Acknowledging shameful actions is not an act of shame but an act of bravery, because the action is based on the resolution that one would never repeat same type of disasters in future.

The spirit of reconciliation seems to remain as a rather minority opinion within progressive civic groups or victim's alliance. But these minorities can make a big difference in future. They can give warnings to outside divisive influence to use these victim groups as a means to increase one's own power.

## 2. Considerations on Reconciliations

### 1) How to turn anger into forgiving

After sixty years since war has started, it is inevitable that most of the Korean people want to restore dignity of the victims of Korean war. Theological notion of reconciliation was also part of Korean TRC, since the first term president of TRC was Catholic Priest.

There should be forgiving first, then reconciliation should be made possible. But reconciliation mood is very rare in much of the discourses of the Korean victim's advocacy groups. Maybe it's because they have still unreleased anger and agony that barely began to seek for an exit. Many of bereaved family members often vent their feelings of animosity and sadness whenever they have a chance to talk about their lost family member.

Therefore, this uncovering of the tragedy of war really needs extra redemptive element to be able to turn negative impulses into positive power to reach cleansing effects that ultimately will lead into forgiving. The role of civic groups looms large in this leadership vacuum.

### 2) Restore dignity and provide deterrence to State misdeeds

#### (1) Advisory Opinions

TRC proposed advisory opinions to Korean and the U.S. governments. Regrets are expressed on the military measures and actions taken during the Korean war by the US forces. Cooperations between U.S. and Korea to further investigate some of the cases were also recommended. In many of the reports on Central and Eastern region military operations that led into heavy civilian casualties were main cause of mass killings. TRC members have recommended that military leaders need to take precautionary warnings as well as to have more careful and close communications with Korean government not to make the same type of mistakes in future.

## (2) Critique on TRC

There have been criticisms on recent changes of commissioners by current regime. Some of those who criticized recent changes of commissioners as conservative turn of Korean TRC.<sup>3)</sup> In fact there were some adjustments and changes made, but that was done not to hinder any meaningful activity of the commission. Some individual reports devoid of evidences or lacking sketches of battles needed to go through revision processes that included redirecting research questions and adding alternative suggestions.

What's important for investigators are a fair mind with imaginative ability that can lead him or her to full understanding of war and battle situation. For this artificial and conscious efforts to understand military perspective is vital. But many of the TRC investigators defy referring to military personnel's views and reasoning. Because of lack of understanding, they become easily irritable for what they regard as inhumane scenes such as heavy bombings where there were many refugee victims.

## V. Conclusion

Korean democratization has been steadily functioning for more than two decades. The current Lee administration is very democratic and seeks for fairness as one of chief goals of the state. The use of the term transitional justice should draw no particular repulsion. The only problem is the presence of security threats by external enemies such as North Korea. As evidenced by Chonan Vessel case this year, the immanence of enemy penetration and subversion is not imaginary but real threats.

There is a fundamental limit of truth commission of Korea to verify victims of Korean war because the war is only temporarily stopped. The peace has not been achieved in the Korean peninsula, as demonstrated by the existence of the DMZ one of the most heavily guarded line of military confrontation in the 21st century.

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3) Is current leadership of TRC Korea sceptical about truth findings? Surely not! For a group of same mind, outside member's view is highly required to correct group think. For this see appendix.

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# Analysis of the Main Legal Issues Relating to Human Rights Abuse Cases Under the Framework Act for Truth and Reconciliation

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Analysis of the Main Legal Issues Relating to Human Rights Abuse Cases Under the Framework Act for Truth and Reconciliation

Review of issues and future direction of the Truth and Reconciliation Commission through the evaluation of the main legal issues relating to human rights abuse emerging from the Framework Act of the Reexamination of the Past for Truth and Reconciliation

## I. Outline

1. Human Rights Abuse
2. Enactment of the Framework Act
3. Establishment of the TRC

## II. Major Legal Issues

1. Framework Act Stipulations
2. Period of Abuse
  - Liberation and Division of the Korean Peninsula
  - Korean War
  - Authoritarian Rule
3. Types of Abuse
  - Abuse perpetrated by government authorities, issue of abuse through negligence
  - Abuse committed by the court system, retrial cases

- Abuse perpetrated by the legislature
- So-called 'Bad Law' Issue, Emergency Measures, National Security Law, Security

#### 4. Outcomes of Abuse

- Essential Human Rights
- Rights concerning the human body
- death, injury, disappearance, kidnapping, suspicious killings, imprisonment, torture
- the press, conscience
- Right to property
- Right to labor
- other issues

#### 5. Suggestions

- Apology, monument to recognize sacrifice (statue, plaque)
- legal/monetary compensation
- retrials
- measures to prevent repetition of the past, education, memorial hall

### III. Case Examples by Issue

1. Period
2. Type
3. Outcome
4. Suggestions

### IV. Problems and suggestions for improvement

1. Issues, investigations (head investigator, committee members, investigation methods ,etc)
2. suggestions for improvement – comparative legal characteristics, direction of the establishment of a TRC in the future

## **I. Introduction**

### **1. Human Rights Abuse Cases**

#### **1) Human Rights**

Human rights refer to the concept that as a basic condition for humans to live in a human way, all people are endowed with the right to dignified, equal and happy lives. In a sovereign nation, human rights refers to the universal right entitled to all citizens to be protected and have the right to protest against a government's excessive use of force.

#### **2) Human Rights Abuse**

Human rights abuse, however, does not include all cases where human rights have been abused. Instead, Human rights abuse, reflecting the establishment of truth and reconciliation committees (TRC) worldwide in the process of societies transitioning from dictatorship to democracy or from civil war, refers to the human rights abuses committed by governments before the transition to democracy.' Thus, human rights abuse in this context refers to human rights abuses that occurred within the borders of the Republic of Korea and those cases where human rights abuses were committed by the Republic of South Korean government and/or those employed under its administration.'

#### **3) State Violence**

The concept of 'State Violence' is used in some discussions of human rights abuse. The political forces that make up a country and govern its citizens through a constitutionally sound set of laws may be misperceived as a group that uses excessive physical force illegally. However, because human rights abuse and state violence, are not always two concepts that can be use to replace one another, like two sides of a coin, the concept of state violence has not been chosen as a replacement for human rights abuse.

## 2. Enactment of the Framework Act

### 1) Enactment Process

Following the liberation from Japanese rule on August 8, 1945, the Republic of Korea successfully industrialized in a short period of time, and soon after the democratization of the country, a number of issues moved into the public sphere, including the issue of erasing of pro-Japanese elements in South Korean society, civilian massacres during the division of the Korean Peninsula and the Korean War, and human rights abuses that occurred during the country's period of industrialization. Initially, these issues began to be reexamined through the passing of a number of individual acts of legislation including the 'Legislation concerning the compensation of participants in the Kwangju Democracy Movement' in 1990, the 'Special Measure concerning the restoration of honor to those involved in the Geochang Incident' in 1996, 'Special Legislation concerning the investigation of suspicious deaths' in 1999, and in the year 2000, the 'Special Law concerning the restoration of honor and truth investigation into those killed during the 4-3 Incident on Jeju Island'.

### 2) General Measure on the Reexamination of Past History

However, once criticism that these separate acts of legislation failed to show effective results in the reexamination of past history due to the uniqueness of the Republic of Korea's history began to grow, there was a switch to reexamining past occurrences of human rights abuses by **more comprehensive measure**. **Following a presidential proposal for a comprehensive reexamination of past history made in August of 2004**, the National Intelligence Service, National Police Agency, Ministry of National Defense and other centers of power in the Republic of Korea were tasked with establishing their own truth and reconciliation committees. These committees investigated cases of suspected human rights abuses and reported their findings to the public. In addition, a full-scale discussion concerning the enactment of a law concerning past history began in the National Assembly and this was followed by the enactment of the Framework Act on the Reexamination of Past History for Truth and Reconciliation in May of 2005.

### 3. Establishment and Structure of the Truth and Reconciliation Commission

#### 1) Establishment

Following the enactment of the Framework Act in December of 2005, the Truth and Reconciliation Commission (TRC) was established, and began its first investigation in April of 2006, marking the beginning of full-scale investigations into past allegations of human rights abuses. The TRC ended its investigation responsibilities on June 30, 2010 and following the writing and submission of a general report outlining the results of all completed investigations, the TRC is set to be officially disbanded on December 31, 2010.

#### 2) Structure

Jurisdiction covering investigations and decision-making on important matters is held by four standing commissioners, including the TRC president, and a committee (General Committee) made up of 11-15 commissioners. The General Committee's decisions are supported by three other standing committees, which include the National Independence Investigation Committee, Massacre Investigation Committee and the Human Rights Abuse Investigation Committee (Subcommittee), and three standing commissioners other than the TRC president preside as leader over each of these standing committees. The Human Rights Abuse Investigation Committee took charge and investigated most of the cases relating to human rights abuses.

## II. Main Legal Issues

### 1. Stipulation for Human Rights Abuse Cases under the purview of the Framework Act

The fourth provision of the first clause in second article of the Framework Act stipulates that any death, injury or missing person case and any important cases of human rights abuse and fabricated allegations that occurred from August 15, 1945 to the end of authoritarian rule as a result of unconstitutional acts, including acts aimed at interrupting constitutional order, or the excessive exercise of government force, can be made an object for a TRC truth investigation.' Human rights abuse cases, one of the main focus of the TRC truth investigations, are limited to those cases, as stipulated as those human rights abuse cases

in the second article, first clause, fourth provision in the first and second clause of the 19<sup>th</sup> article of the Framework Act that ‘have been submitted to the TRC for a truth investigation within one year of the enactment of the Framework Act by a victim and/or the remaining family of the victim or those with close ties to the family, or those with special information concerning an ongoing truth investigation by the TRC.’ However, in following with article two, first clause, sixth provision of the Framework Act, ‘Those cases that hold important historical significance and recognized by the TRC as needing a truth investigation to comply with the goals set out in the Framework Act,’ may become **objects for a TRC investigation** through a decision by a committee to include even those cases where there has been no application for a truth investigation by an outside party. In summary, the Framework Act stipulates that while objects for investigation by the TRC are limited to those submitted by an outside party, the fact that supplementary jurisdiction over the direct management of investigations concerning historically important cases, and that application qualification is given to not only those with close ties to the victim, including relatives, but also eyewitnesses, demonstrates that the Framework Act provides a broad scope of investigation power to the TRC.

## 2. Period of Abuse

### 1) Period

Concerning the period when abuse took place, the Framework Act restricts the objects for investigation to those human rights abuses that occurred from August 15, 1945 to the end of authoritarian rule. Taking into account that TRCs worldwide have been established to help ‘countries in the true realization of democratic transition,’ the **objects for investigation** by the TRC have concerned all those cases occurring from the ‘establishment of the Republic of Korea to the period of democratization’ in the country. However, the Framework Act has included the ‘beginning of United States military rule from August 15, 1945 to August 15, 1948, marking the establishment of the Republic of Korea.’ In summary, those human right abuse cases that occurred before the establishment of the government of the Republic of Korea are **objects for investigation**. **Two initial pieces of Framework Act legislation** stipulated for the investigation period to begin from August 15, 1948 and August 18, 1945, respectively. However, upon further consideration, the second measure was adopted under the prospect that truth investigations would be comprehensively reexamining the modern history of the Republic of Korea following investigations into pro-Japanese col-

laborator activities during the Japanese Occupation Period.

## 2) Conclusion of Abuse Period

The Framework Agreement stipulates that the abuse period ends at the ‘conclusion of the period of authoritarian rule,’ however the interpretation of the period of authoritarian rule has been made an issue a number of times not only in the process of legislation, but also in discussions within the TRC. Defining differently the period of authoritarian rule as ‘before democratization’ reflects the purpose of the establishment of the TRC, and in the end the issue always returns to the question of pinpointing when exactly the Republic of Korea’s period of democratization began. In initial legislative deliberations a wide range of conflicting opinions were presented; ‘Given that there is room for debate over what period authoritarian rule extends to, I believe that there should be a clear and concrete definition of when that period was.’ ‘While it is being defined as the period of authoritarian rule, it should be made clear that because there is much room for debate to what period exactly this authoritarian rule applies to, I would recommend that the authoritarian period be set for all those governments before the election of Kim Dae-jung in 1998.’ ‘Perspectives toward authoritarian rule is not something that is the same for all people, and the same logic applies for human rights abuse, which may not all fall into the same exact period. Questionable institutions and practices from past authoritarian governments have remained even after the fall of those governments, making the job of cleaning up the mess they have left behind that much harder. This leaves me worrying that such a precondition will make the process of cleaning up the mess through the use of the law very difficult.’ ‘I think that the depending on what your answer is for the question of when the democratization process ended after the country began its gradual transition to democracy will color your opinion of this issue. Political history wise, there needs to be a clear idea of when this period after began. Did it began after the 6.18 Movement and the direct election of Ro Tae-woo Or, because that was still a military government, did it began on February 25, 1993 with the election of Kim Young-sam Or how about February 25, 1998 with the election of Kim Dae-jung.’ A heated debate over this issue progressed, but in the end the Framework Act stipulated the authoritarian rule period.

Heavy debate also raged among members of the TRC General Committee over the overarching scope of the authoritarian rule period, and this led to the decision to mark the end of Chun Doo-whan’s rule as the end of the authoritarian period. Three reasons for this were given including, 1) given that the classification of a republic follows the revision of the

constitution, there had been no revision of the constitution since 1987, 2) there had been no change in the power structure since the direct presidential election in 1988, 3) the TRC had been given the power to investigate all historically significant cases, even those occurring after 1988. However, this issue continued to be an important matter and before the decision was made the General Committee had even decided to conduct a truth investigation on a case that had occurred on February 25, 1988.

### 3) Civilian Massacres During the Korean War

The Korean War began on June 25, 1950 when North Korea invaded South Korea and reached its conclusion on July 27, 1953 with the signing of an armistice. Human rights abuse that occurred as a result of the war was not considered an object for investigation given that it holds a wide-range of differences from those cases of human rights abuses caused by excessive use of governmental power. A strict definition of human rights abuse would include those human rights abuses that occurred during the war, however, as stipulated in the second article, first clause, third provision of the Framework Act, 'cases of illegal civilian massacres occurring from August 15, 1945 to the period surrounding the Korean War' fall under a separate investigation category as civilian massacre cases, they have been exempted from those cases related to human rights abuse. Accordingly, most human rights abuse cases that occurred during the period surrounding the war have not been investigated as human rights cases. A number of civilian massacre cases not handled as massacre cases have been dismissed by the General Committee, but there is at least one case where a truth investigation has been called for following a decision finding that it was a human rights abuse case.

## 3. Types of Abuse

### 1) Abuse perpetrated by government authorities

The Framework Act limits investigation responsibility only to those human rights abuse cases that 'occurred as a result of excessive use of government force and/or those acts deemed unconstitutional, including the interruption of constitutional order.' Thus, only those cases that occurred as a result of unconstitutional government force are objects for investigation.

Examining of the types of abuse by those government organizations that hold state power shows that abuse by government authorities (or executive authority) is most often the state power used so typically there are no unique problems. In other words, taking into account that the TRC was established to investigate cases of arrest, imprisonment, abduction, torture, murder and execution by government authorities, there is no argument that the use of state power, which manages visible physical force, is included in the use of state power.

## 2) Abuse by the Judiciary

Given that the judiciary falls under the power of the state, those human rights cases that occurred as a result of the judiciary are included as objects for truth investigations. However, taking into account that the main responsibility of the judiciary is making legal judgments, and holds little to no visible physical authority, human rights abuse that fall under the purview of having occurred due to judicial decisions fall under a different category than those that occurred as a result of excessive executive authority. In other TRC investigations throughout the world, human rights abuse by the judiciary has more often than not been exempted from investigation. This has been the result of the perception that the judiciary, reflecting judiciary independence, the principle of public trials and the right for citizens to have access to courts, is a government organization tasked with protecting human rights, and does not commit human rights abuse. Taking into account that the court system verifies facts through systematic evidence, creates legal stability by solving disputes to their conclusion and ensures that wrong judgments are minimalized through a three step court system or through retrials a government organizations other than the judiciary investigate past court cases can instead prevent reconciliation of judiciary human rights abuse cases. The Framework Act takes this point into account, stipulating in article two, clause one, provision four that ‘fabricated allegation cases occurring as a result of unconstitutional state authority’ are objects for investigation. However, the Act also stipulates in article two, clause two that ‘cases that have been settled by the judiciary are exempted, including cases that fall under the purview of being a object for a truth investigation stipulated in clause one.’ However, because there have been cases when the court system has not been operating normally during certain periods, a provision attached to clause two of article two of the Framework act stipulates that ‘However, cases judged by the TRC to fall under the category of requiring a retrial based on the Code of Civil Procedure and/or the Criminal Procedure Code and are recognized as needing a truth investigation will be viewed as exceptions.’ In summary, the Framework Act stipulates that the TRC is given the authority to investigate

fabricated allegation cases that have been settled by the judiciary if there is a reason for a retrial. Among the total cases managed by the TRC, 145 cases are those cases which have been settled by the judiciary, and 79 of these have been the object for truth investigations. A large degree of the work done by the Human Rights Abuse Investigation Committee has concerned decisions on investigating cases already having received a final ruling by the judiciary. The Framework Act stipulates that the TRC has the power to investigate cases that have received a final ruling under the condition that these cases carry grounds for being retried. However, a debate began from the decision to initiate the initial truth investigation of whether the applicant for a particular case should be the one to ask for and provide evidence of the need for a retrial, and how much proof would be needed to be acceptable. Before a case is retried, the applicant requesting a retrial must request and prove the grounds for a retrial before the judiciary grants a retrial.

The Framework Act reflects this practice, stipulating that even decisions to initiate investigations by the TRC must be based off the request and evidence for the need for a reexamination provided by the applicant. In other words, clause two of the Framework Act exempts cases that have had a final ruling from being objects for investigation while also allowing investigations in exceptional cases if there are proven grounds for carrying out a retrial. Further, clause one, provision two of the operating rules of the TRC stipulates that a subcommittee has the power to review and decide ‘matters concerning decisions to initiate an investigation,’ and in the case of settled cases, article four, clause one, provision five stipulates that the General Committee has the power to review and decide on ‘matters that concern investigations of cases that have already received a final ruling.’ If there are no grounds for a retrial, article twenty-one, clause one, provision one of the Framework Act stipulates that a request for a retrial by an outside party must be made because the case ‘does not fall under the purview of those cases which are objects for investigation by the TRC.’ However, similar to a retrial in the judiciary, if evidence is requested to initiate a retrial, any investigation made by the TRC into settled cases becomes impossible. In light of this, the TRC has chosen to require a minimal amount of evidence to initiate a retrial through its interpretation of article twenty one and twenty two of the Framework Act. First, following the stipulation of article twenty two, clause one which states that, ‘In those cases where an application for a truth investigation does not fall under those reasons for dismissal as stipulated in article twenty one, clause one, the TRC must first make a decision to initiate an investigation, and then without fail initiate and complete an investigation into the case concerned.’ Thus, only an argument for a retrial on a particular case must be made before an investigation is initiated. Regardless of whether the case concerns abuse by government

authorities or concerns a retrial, if the case does not fall under one of the conditions for dismissal, the TRC is given the power to initiate an investigation.

However, if by chance there is a request for decisive evidence or conclusion to a particular case, whether it will be an government power abuse case or a request for a retrial, an investigation into the case by the TRC is not possible. Thus, in both the aforementioned abuse cases if there is a request for a reexamination in the application, a decision must be made to initiate an investigation into the case. During the first decision making process to initiate the initial truth investigation, this method was adopted by a vote. Secondly, following the stipulation made in article twenty two, second clause that, ‘The TRC has the authority to initiate preliminary investigations to decide whether to investigate a case any further as deemed appropriate,’ preliminary investigations are performed to decide whether there exists a need for a retrial and/or dismissal of the case. Once the applicant asserts the reasons for a retrial and submits a number of evidence reports, a subcommittee reviews and decides on matters relating to a preliminary investigation on the case. Depending on the results of the investigation, if there are grounds for a retrial than all that remains is for the TRC to make a decision to initiate an investigation. A large number of cases have been handled through this second method. However, in contrast with a retrial in the judiciary, regardless of the use of either the first or second method, if the applicant argued that there are grounds for a retrial, the TRC then initiated an investigation into the case.

A sharp dispute surrounds judgments on grounds for a retrial. The structure of a retrial in the judiciary typically has the court where the retrial will take place first evaluate the existence of grounds for a retrial, and if there are no grounds for a retrial the case is dismissed. If there are grounds for a retrial to do exist, a decision to initiate a retrial is made and a judgment is then made to whether or not the accused is innocent or guilty. The structure of the TRC’s decision making process is similar with this, however, as has just been overviewed, because the judgment on the grounds for a retrial during the decision-making stage for initiating an investigation does not hold much weight, unlike a judiciary retrial the view that a judgment on the grounds for a retrial must be evaluated exerted tremendous influence on the final decision. The grounds for a retrial that have been the point for controversy among settled cases has been ‘when there has been the new discovery of clear evidence that shows that the accused, who was proven guilty in a court of law, has committed a crime less serious than that they were found guilty of, are innocent or have grounds for a dismissal of their case.’ (article 420, provision five of the Criminal Procedure Law), ‘when there is evidence based on a final ruling that a court, which was involved in the investiga-

tion that brought forth a ruling, or a prosecutor and/or judicial officer, who brought up allegations or was involved in the investigation of those allegations, is found to have committed a crime in the execution of their assigned duties, however, this is limited to only those cases when the court that made the final judgment has no knowledge of those grounds in those cases where prosecution has been brought against the court, prosecutor or judicial official before the announcement of the final judgment.’(Article 7)

The grounds for a retrial in clause five require the new insight and clarity that newly discovered evidence can bring to a settled case, however, opinions concerning this vary and are a heavily disputed issue. As mentioned before, the first method was a point for even more heavy debate because it simply requires a request by the applicant to start the decision-making process for a retrial, making a judgment on the main issue of the case without considering the new insight and clarity that new evidence can provide. In summary, new evidence was not material used to examine whether there existed firm ground for a retrial, but was instead used to evaluate the true nature of the case. As a result, due to judgments that placed too much confidence in evidence discovered by the applicant themselves, pre-existing evidence that was contradictory with new evidence was excluded without a proper review.

The grounds for a retrial as stipulated in clause seven include, ‘those instances when a court, prosecutor or judicial official **committed a crime during the execution of their assigned duties.**’ However, the definition of unlawful imprisonment and acts of violence were topics for heated discussion. While there were disputes about verifying the existence of unlawful imprisonment and acts of violence by judicial officers, if the testimony of typically applicants were logical and full of detail, the testimony of the investigation supervisor was rejected and any illegal imprisonment or acts of violence were acknowledged. However, in those cases where there occurred an issue of unlawful imprisonment during when martial law, special decree or emergency measures were in effect and arrest and imprisonment without a warrant were allowed by law, there remained dispute to whether or not those grounds for a retrial stipulated in clause seven existed. Arrest and imprisonment without a warrant was not an issue in the past because authorities were not acting under a system that required the use of warrants under the Criminal Procedure Code, stipulations did not apply to warrants issued, and only those extensions on imprisonment period by those stipulations made by the court concerning imprisonment time applied. Thus, there were opinions that any imprisonment that extended over a certain number of days was unlawful, and another that stated that only the steps taken to issue a warrant were ignored, but be-

cause stipulations on imprisonment time and extension of the period of imprisonment in the Criminal Procedure Code had to be followed, violation of these would be unlawful.

There was one case that was decided as unlawful imprisonment applying this logic. Further, in this case because judicial officers had no way of understanding or evaluating the unlawfulness of a confinement there was a debate over whether unlawful confinement alone carries grounds for a retrial. In light of the interpretation covering those grounds for a retrial where ‘a crime was committed during the execution of job responsibilities’, among the two following opinions that 1) if there was an act of corruption was committed by an official this was sufficient to fall under the category of being a prerequisite, and even if a crime was committed this did not call for demanding responsibility for the crime, and 2) that because it is stipulated that there must a guilty verdict specified by law in order for grounds for a retrial to take place, this falls into the category of being a prerequisite. If a crime is committed someone must take responsibility, and a perspective of a crime through the lenses of the first opinion falls into the category of being grounds for calling into account those responsible. Thus, there were decisions to initiate investigations and decide on initiating a retrial using the argument that there are in fact grounds for a retrial.

However, there are stark differences that exist in the stipulations and fine details of article 124, clause one of the Criminal Code (illegal arrest, illegal confinement) which states that punishment for ‘any court, prosecutor, police officer or related official that holds the authority to detain individuals or aids these officials in a support position, faces no more than seven years of imprisonment or no more than 10 years of work discontinuance if they abuse their authority to arrest or imprison’ for government officials, and article 276 (arrest and confinement) of the Criminal Code that states ‘any person that arrests or imprisons a person faces no more than five years of imprisonment or no more than 7,000,000 won monetary penalty’ for civilians. Civilians are not provided the authority to arrest or imprison anyone, however, judicial officials are not only given the authority to arrest and imprison, but in certain cases, if they choose not arrest or imprison have the actual duty inflict punishment, including arrest and imprisonment. Following this, in the civilian case, because the understanding of crime is a matter of responsibility, a mistake concerning the authority over an arrest or imprisonment simply carries grounds for being exempted from responsibility. However, because the perspective of illegality carries with it elements of a normative standard, in the case the judicial officers make any mistake concerning jurisdiction over arrest and imprisonment, this provides ground for regulations to come into effect. Thus, regardless of whether an arrest or imprisonment occurred by decree and with-

out a warrant, there are no grounds for a retrial. There are cases that have been decided through the logic is this viewpoint.

Concerning grounds for a retrial, there was a dispute over how to evaluate and decide cases that, having already been re-investigated, have been fabricated. Whether not a case has been fabricated is dependent on whether the existence of the crime stated in the court's final ruling itself really exists, but there is a dispute on how to evaluate this. The court itself evaluates whether the defendant is innocent or guilty using evidence submitted by the prosecution during the trial process through principles of evidence-based and independent judicial practices. However, according to results by TRC investigations, there remains the question of whether those cases where a guilty verdict was given due to lack of evidence, because some evidence used by the court was found to be lacking evidential value, can be considered fabricated.

Because the court violated the principle of an evidence-based trial, where a guilty verdict should be based off of sufficient evidence collected legally and delivered a guilty verdict, the TRC should, after considering the case again from the perspective of the court of the time, initiate a truth commission saying that the facts constituting the crime that lead to a guilty verdict due to a lack of evidence were fabricated. 2) Because the Framework Act gives the TRC the power and duty to uncover the truth of the case concerned, there should be an effort to find out if the facts constituting the criminal act written on the guilty verdict were in fact fabricated intentionally. In the case where evidence of fabrication cannot be found, the TRC should rule that the case is unable to be reexamined.

Among the cases decided upon by the TRC, there are cases that have been reexamined following the logic of opinion number one, and there are others that have been deemed impossible to investigate any further following the logic of opinion number two. Regardless of either opinion, because most of the grounds for retrial acknowledged by the decision of the TRC have been filed as material for retrials, the final word in most cases will be the judgment of the retrial court. In line with the spirit of the Framework Act, insufficient evidence only generates mistrust about the outcomes of trials in the past, and is not a principle for demonstrating misjudgment concerning the outcomes of past trials.

Finally, there is a debate to whether mistakes made by the court on evaluating facts or making legal judgments fall under the purview of case fabrication. For example, there are two opinions 1) in the case where the judgment of a past court cases are invalid concerning

a) whether or not there was favoritism toward the perpetrator in documents submitted as evidence b) whether or not there was favoritism displayed towards the perpetrator in those remarks stated as facts concerning the crime and c) whether or not there were facts stated as facts concerning the crime regarding state confidentiality, and taking into account current High Court rulings, the TRC judges the case to be fabricated, and 2) Because there is no way to fabricate the ruling these cases are not objects for investigation.

Among the decisions made by the TRC, there have been truth investigations that have reflected the first viewpoint and others that have reflected the second viewpoint. In either case, the final decision is made by the retrial court. The flow of time can lead to changes in values that are capable of transforming the present, but there is no denying the past.

### 3) Abuse perpetrated by the Legislature

The legislature is one branch of government authority, thus according to the law, any human rights abuses that have been perpetrated by the legislature are **objects for investigation**. However, because the legislature, which acts as a creator of laws, has no visible physical authority in its control, the form of human rights abuse by the legislature is different from those cases perpetrated by the executive or the judiciary. In other TRCs worldwide, human rights abuse cases perpetrated by the legislature were not dealt with. This is because all those laws created by legislative organizations are made public, thus there are few cases of concealed or hidden information. Further, the points of establishing TRCs have not been to investigate the legitimacy of laws from past governments, and have been instead tasked with bringing to light facts that have been previously not available to the public. This issue was at the heart of discussions from the beginning of initiating investigations, and taking into account that the Framework Act exempts human rights abuse committed by the judiciary while limiting retrials in certain cases when there are grounds for such a step, human rights abuse committed by the legislature has been interpreted to be not included either. There is a case that has been decided based on this stance. In accordance with this line of thinking, the issue of so-called 'Bad laws' **must be an problem brought to resolution politically** through laws passed by the legislature itself, rather than an issue that can be evaluated and decided upon after investigation by the TRC.

### 4) Illegal or unjust use of government authority

The use of government authority was made an object for investigation in only those cases of illegal or excessive use of government authority. However, there was a diverse set

of opinions over the definition of 'illegal,' due to it being a term of indefinite and diverse meaning. In those cases where there is a clear violation of legislation, legislation is illegal when it only stipulates not only the details of the matter concerned, but also the procedural matters for the protection of human rights. However, there is a debate to whether it is considered illegal when the principle that makes up regular, not specific, legislation is violated. For example, would it be considered illegal to violate the principle of equality or proportionality to an individual that is incarcerated? Because the concept of 'unjust' is not easily definable, if the violation of the principle of a law is given the limited interpretation of being unjust, the violation of the principle of a law is not a violation, but is unjust. Thus, following this line of logic, because the Framework Act limits unjust to only those cases that demonstrate a noticeable degree of unjustness any of those cases which involve a clear violation of the principle or 'spirit of the law' are objects for investigation. For example, in the case of arbitrary accompaniment to the police station, past governments have given the police the right to detain suspects legally without any limit on their period of incarceration. However, can this kind of 'arbitrary accompaniment' be considered the result of the unjust or illegal use of state power? Laws in the past have made it legal for this kind of case to exist, however, the actual meaning of 'arbitrary' does not necessarily mean that unrestricted imprisonment is permitted, and in accordance with the principle of proportionality only imprisonment occurring during a time period deemed rational is acceptable. However, if this rational time period passes and an individual are incarcerated for a period that would be considered by anyone to be excessive, this would be grounds for a case of unjust use of state power.

If, for example, there is a case where an individual is incarcerated every couple of months through arbitrary accompaniment from a motel, or such similar place, this would be considered an exceptionally unjust use of state power. However, if the six hours set by current laws has been slightly exceeded, but is a permitted period taking into account the practices at time, this would not be considered an excessively unjust use of state power. There is one case that has been decided as illegal imprisonment through arbitrary accompaniment, and another case has been deemed legal. The TRC has generally decided that cases where military investigation agencies used the cover of being part of the Korea Central Intelligence Agency to investigate cases involving civilians were illegal, the main evidence being that there was no investigator on site at the time. However, there was a debate that if an investigation presumed without the clear presence of an investigator, there is no way to confirm that this was in fact illegal.

There is a debate to whether a breach of the constitution is considered a crime or a case of injustice. For example, are arrests and imprisonment that occurred without a warrant through a decree with elements deemed unconstitutional be **objects for truth investigations**? Two views show opposing sides to this question, 1) that announcements by the president of martial law or emergency measures are acts of governance that are highly political are not objects for investigation, 2) that no matter how political, if the action taken infringes the basic rights of the people an investigation must be initiated. Further, there are two other views that state 1) because TRC can only review whether the case is the result of criminal activity, it has no jurisdiction to evaluate and decide whether there has been an infringement of the constitution, and 2) because unconstitutionality is included in the concept of illegality the TRC has the power to evaluate and decide whether there has been an infringement of the constitution. If in the case the state violated a decree, thus violating an individual's human rights, this can be not only a **object for investigation as a case of illegality**, but the TRC has the power to also evaluate and decide whether there has been a case of illegal conduct.

However, can there be an investigation into whether or not an pronouncement for martial law by the president carried a constitutional prerequisite and whether the contents of a decree violated the constitution? There are cases where evaluations and decisions were made to whether there were unconstitutional elements, and other cases where unconstitutionally was not taken into account. On another level, is the constitution itself violating the higher-ranking law of nature (the underlying principle of the constitutions of constitutional democracies)? Is the use of power given to the president by the constitution violating this law of nature? While there is a debate to whether this can be investigated, evaluated and decided upon, there are cases where these questions have been considered. The constitution that was in effect before democratization was reformed during the period democratization and because the constitution went through a reform process people is aware of the issues with old constitution. Thus the TRC decided to investigate facts known widely throughout the public, and through this decision the TRC was criticized as being too politicized for condemning those who did not protest against events that took place in the past.

##### 5) Non-exercise of state power and the issue of negligence

Those cases where there has not only been the intentional illegal use of state power, but also those cases where an agent of state power has intentionally used illegal authority both fall under the purview of being objects for investigation. However, there is a debate to

whether human rights abuse that has occurred either through negligence on the part of an agent of state authority or the non-exercise of state power should be made an **object for investigation**. Because the Framework Act includes stipulations for both those cases of abuse that occurred through a deliberate and non-deliberate use of state authority and thus does not differentiate between conscious and negligent use of state power, there is the view that all cases of human rights abuse caused by the non-exercise and negligent use of state power must be objects for investigation. On the other hand, the Framework Act only stipulates the use of state power as a prerequisite and because, taking into account the purpose of establishing the TRC to uncover concealed truth, concealment itself is deliberate act, there is another view that human rights abuse caused by the non-exercise and negligence of state authority should not be made **objects for investigation**. **There is a cast where the TRC followed in accordance with the former view to make a decision to initiate a truth investigation.**

## 4. Abuse Findings

### 1) Important Human Rights

The Framework Act limits the overall scope of investigation objects to those ‘cases that resulted in death, injury, disappearance, and any significant human rights abuse or fabricated allegation cases.’ Death, injury and disappearance cases are those limited to one category of human rights abuse cases that concern abuse toward the life or body of an individual. Those cases that concern fabricated allegations, too, are considered another category of human rights cases because they involve the abuse of the life and body of an individual who received death or imprisonment as the result of a court verdict. In summary, the abuse findings stipulated as objects of investigation in the Framework Act signify those cases where ‘important human rights violations’ took place.

As reviewed earlier, there is a debate surrounding the Framework Act restricting the scope of cases to only those where ‘important’ human rights are concerned. As illustrated by the Framework Act presenting cases deemed important human rights abuse cases involving death, injury and disappearance, and cases of fabricated allegations, the Act includes rights of life and body in its definition of important human rights. Thus all cases involving not only injury, which is part of the category of abuse concerning that of the body, but also acts of torture, acts of violence, arrest, imprisonment and kidnapping are included

in this definition. This is a natural outcome given that TRCs throughout the world have been established to investigate a wide range of harm caused by disappearances, kidnapping, torture, arrest and imprisonment.

However, there is a debate surrounding the inclusion of a host of different civil liberties into the scope of important human rights including, freedom of conscience, freedom of the press and publication, religious freedom and academic freedom. Two views 1) that within human rights there is no right that is more important than the other and civil rights especially should be considered important because they are the heart of all human rights, and 2) the only important human rights are those that concern an individual's life and body, including those cases involving death, injury and disappearance. There are cases that have been chosen for a truth investigation that have dealt not only with cases of violations of press and publication freedom, but also cases involving religious freedom abuse as well. There is debate into whether or not to include fundamental rights in society to a broader definition of human rights, however, there is a truth investigation that decided that the right to labor was violated in a case concerning labor union and labor members.

## 2) Rights Concerning Property

The question of whether property rights was included in the definition of human rights or were considered part of the important human rights stipulated in the Framework Act was a subject for debate from beginning of the establishment of the TRC. Regardless of whether property rights are included in the scope of a universal set of human rights, the Republic of Korea considers property rights to be a basic human right by stipulating in article 23, clause one of the Constitution that 'all citizens are guaranteed the right of property ownership.' Thus, the right to own property in the Republic of Korea is considered a basic human right by constitutional law.

However, as previously reviewed, TRCs around the worldwide were established specifically to deal with investigations concerning murder, kidnapping, torture, injury and other cases of civil liberty and right to life violations. Thus, it cannot be concluded that the right to property is included in the definition of important human rights stipulated in the Framework Act. Additionally, unlike the right to life or civil liberties, the constitutional violation of the right to property cannot only be possible through the expectation of compensation, but the right can also be restored at a later date. Because of this, whether or not to include the right of property in the definition of important human rights was a

point of contention from the beginning of the establishment of the TRC. In fact, as the TRC began to manage a number of individual cases without making any clear conclusions, a small number of truth investigations were initiated on cases concerning violations of property rights.

According to one viewpoint, property rights abuse cases can be better dealt with through the civil court system, through such accommodation methods as civil damage suits or damage compensation, because it has a higher level of neutrality and professionalism than the TRC. Thus, cases concerning property rights have no need to be included in the definition of important human rights stipulated in the Framework Act. On the other hand, another viewpoint states that following the logic of property rights violations, property rights can be included in the scope of cases considered human rights violations. In other words, regardless of the form of property rights violations, whether it is through unjust forfeiture, expropriation or abandonment, the case cannot be considered a case of human rights abuse if the only issue at hand was purely a property rights violation. However, if in the process of violating an individual's property rights there were any cases of intimidation or torture, the case can then be seen as a violation of human rights. This viewpoint, however, confuses the form and outcome of the abuse and as such is unacceptable.

### III. Outcome of Analysis

Two characteristics arose during the operation of the Republic of Korea TRC including, 1) a large number of heated discussions occurred during the decision-making process due to the use of unclear concepts in the Framework Act and while a number of differences in decision-making occurred due to who was making the decisions, the final decision to initiate a truth investigate was made by a vote by the General Committee, and 2) human rights abuse by trial was handled with importance, and decisions made to reexamine cases were followed by a retrial by the courts.

In the future, in the event that a new TRC is established there needs to be an effort to improve the efficiency of the organization by having the legislature clearly stipulate those issues of legal significance, and prevent the occurrence of needless conflict coming from differences of opinion.

- 1) For example, in South Africa, where persecution based on race had existed for more than 300 years, a 17-member Truth and Reconciliation Committee was established after the passing of the 'Promotion of National Unity and Reconciliation Act 34' on July 25, 1995. This committee investigated and assessed the truth of human rights abuse cases that occurred from March 1, 1960 until May 10, 1994.
- 2) Legislation issue number 7542, March 3, 2005. Passing the National Legislature was enacted on March 31, 2005. Put into law on December 1, 2005.
- 3) The name of the Standing Committee was changed to subcommittee 1, 2 and 3. Subcommittee 3 corresponds to here.
- 4) Article two of the enforcement ordinance of the TRC Framework Act stipulates that, 'individuals with special information are those who have either experienced or witnessed the case at hand, or have heard directly information about the case from the person who experienced or witnessed the case. However, in regards to those cases where an individual has heard facts concerning the case directly from an individual who experienced or witnessed the case, the individual who experienced or witnessed the case must be specific and still living in order for an investigation to be initiated.' There is a debate between interpreting this 1) narrowly by limiting witnesses to only those who have essential information for the progress of a truth investigation or 2) broadly by accepting the testimony/knowledge of all those who have information about human rights abuse, even if that information is not related to a truth investigation. The TRC rarely made an issue of the qualifications of the applicant, initiating investigations following an application for one.
- 5) Soon after being freed from Japanese rule on August 15, 1945, the Korean Peninsula was divided into North and South by the U.S. and Soviet Union. On August 15, 1948, the government of the Republic of Korea was established in the South, and in the North, the Democratic People's Republic of Korea was established on September 9, 1948.
- 6) Remark by Chang In-sik, director of the Self-Government Committee, during a speech made at the 250th regular meeting on December 9, 2004.
- 7) Remark made by Open Woori Party Legislator Chae Gyu-sik at the 251th extraordinary session of the Self-Government Committee on December 14, 2004.
- 8) Testimony by An Byong-uk at the 251th extraordinary session of the Self-Government Committee on December 20, 2004, who was appointed as the second TRC Director.
- 9) Remarks by One-Nation Party Legislator Kim Gic-hun at the 251th Self-Government Committee on December 30, 2004.
- 10) Assessing the Impact of Transitional Justice, page 25, united states institute of peace press, 2009
- 11) Inauguration Day of President Ro Tae-woo
- 12) Official title of the Korean War Armistice Agreement is: Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's volunteers, on the other hand, concerning a military armistice in Korea.
- 13) The TRC initiated its first truth investigation on March 25, 2006. Article 25 of the Framework Act stipulates this day as the beginning of the 'investigation period'. 1) The TRC will conduct truth investigations from the day the decision made to initiate the first investigation for a period of four years. 2) If it is for any case difficult to end investigations within the period stipulated in the first clause, it is possible to extend the period of investigations by two years after making a report to both the president and the legislature three months before the end of the original investigation period. 3) If it is judged that there is no further need to conduct investigations ahead of the investigation period stipulated in clause one and two, the investigation period may be terminated through an internal decision by the TRC.
- 14) Article 14, clause one of the operating regulations for the TRC state that 'subcommittees review and decide the following matters.' Provision three states, 'matters relating to preliminary investigations in article 22, clause two of the law' (created 2006.8.8)

- 15) A retrial as stated in article 420 (grounds for retrial) of the Criminal Procedure Code stipulates that an individual who has received a guilty verdict may file a petition to protest this verdict in each of the following cases. 1) when it has been proven that evidence or documents used to reach the verdict have been altered or fabricated, 2) when those testimony, analysis, written or verbal translations used to reach the verdict are proven to have been fabricated, 3) when a false accusation has been proven in the case of an individual receiving a guilty verdict due to a false accusation. 4) The trial that reached the verdict has been changed 5) when it is determined that a review or verdict is invalid concerning a case where a guilty verdict has been reached for a violation of a the rights regarding a trademark, copyright, patent, design or practical idea.
- 16) Article 422 (evidence in lieu of a final ruling) of the Criminal Procedure Code states that 'in the case evidence of a crime is being provided through the use of a final ruling in order to file a petition for a retrial in following stipulations in article two, and this final ruling cannot be obtained, and is proven so, a petition for retrial can be filed.
- 17) For example, presidential emergency measures for national defense and the protection of public order (put into law June 3, 1975) [Presidential Emergency Measure Number 9, enacted March 13, 1975] states that 'any individual who violates this or any measure based on this measure made by the director of a capable department may be arrested, imprisoned, seized or investigated without a warrant.'
- 18) According to article 201 of the Criminal Procedure Code, 1) when there is substantial evidence to believe that a suspect has committed a crime, and the grounds for prosecution exist in one of the provisions stated in article 70, clause one, a prosecutor may file a petition for a
- 19) In those cases where a substantial reason has been accepted to continue an investigation based on the application of a prosecutor, a county court judge may permit a one-time extension, for no more than ten days, of the imprisonment period stipulated in clause 203.
- 20) Criminal Procedure Code Article 202 (period of custody by an official of the judiciary) a suspect in the custody of a judicial officer must be released if the suspect has not been forcibly taken into custody by the prosecutor within a period of ten days. Article 203 (custody period by a prosecutor) states that when a suspect in the custody of a prosecutor or judicial officer has been taken into custody by force, they must be released if no charges are made against the suspect within a period of ten days.
- 21) Opinions given by Professor Kang Gu-jin and Lee Jae-sang.
- 22) A majority of cases were judged to have been lacking evidence of any real value because they were obtained by torture or unlawful imprisonment, including written testimony and records of suspect cross-examination written by judicial officials. There were also cases judged to be lacking evidence of real value where testimony was based on evidence obtained through constant physical torture.
- 23) There are no differences in opinion when the investigation result of the case is in actual existence.
- 24) Is the legislature included in the definition of state power when confronted with a case of serious abuse perpetrated by the state? One viewpoint expressed disapproval toward those interpretations stating that the legislature committed human rights abuse because it had enacted a law that in the end violated human rights.
- 25) The second article of the Act on the Performance of Duties by Police Officers (before being reformed on December 31, 1988) states 1) A police officer may stop and question a person that he/she has a) judged logically to have either committed or is intended to commit a crime by logically evaluating any suspicious action, etc, or b) a person that alleges that they know about a crime that has already been or will be committed. 2) when the questioning mentioned in the above clause is known to either be detrimental to the officer his/herself or is obstructing traffic, the officer may request that the individual accompany his/herself to a nearby police station or police box for questioning. 3) The individual stipulated in the above two clauses will not face imprisonment, nor will he/she be forced to answer questions or accompany the officer to the police station if the conduct of the officer is not in accordance with regulations concerning criminal lawsuits 4) When the individual stipulated in the first clause being questioned avoids answering the questions being asked by the officer, the officer may conduct a body search for any weapons on the person of the individual.

Current Act on the Performance of Duties by Police Officers, article three, 1) A police officer may stop and question a person that he/she has a) logically judged to have either committed or is intended to commit a crime by through the observation of any suspicious action, etc, taken by the individual or b) a person that alleges that they know about a crime that has already been or will be committed. 2) when the questioning mentioned in the above clause is known to either be detrimental to the officer his/herself or is obstructing traffic, the officer may request that the individual accompany him/herself to a nearby police station or police box (here on called 'police station,' but also includes regional police stations) for questioning. If this occurs, the individual may reject the request by the officer to accompany him/her to a police station 3) the officer may conduct a body search of the individual described in clause one during questioning. 4) In accordance with stipulations in clause one and two, when an officer is questioning or requesting an individual to accompany him/her to the police station, he/she must present a badge confirming his/her identity, declare his/her name and place of work, explain the grounds for the questioning and, in the case of escort, must declare the place of destination. 5) in accordance with stipulations in clause two, if the officer escorts the individual to a nearby police station, he/she must either give notice to the family or relatives of the individual being escorted the officer's identity, place of destination, grounds for assortment, or provide an opportunity for others to be able to quickly contact him/herself directly. Further, the officer must give notice that the individual may receive the assistance of a lawyer. 6) In accordance with stipulations in clause two, after escorting the individual to the destination, the officer may not hold the individual in his/her custody for no more than six hours. 7) In the case of clause one to clause three, if conduct is not in accordance with legislation concerning criminal lawsuits, the individual in concern will not be held in custody, nor will the concerned be forced to answer questions in the event they refuse to.

- 26) On January 31, 2007, the TRC publicly released the real names of those judges who had laid down a guilty verdict on those cases concerning violations of the emergency measures (during the authoritarian period). Calling into account and release the names of those judges who bore the responsibility for human rights abuse occurring due to their decisions to hand down guilty verdicts for those in violation of the Yusin Constitution and Emergency Measures brought charges by some of a 'witch-hunt' and 'peoples court' being perpetrated by the TRC.
- 27) The constitution of the Republic of Korea first enacted in July 17, 1948 stipulates in clause 15 that 'the right to property is guaranteed.'



# ‘진실·화해를 위한 과거사정리 기본법’ 상 인권침해사건 관련 주요 법적 쟁점에 대한 분석

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## I. 서론

### 1. 인권침해사건

#### 1) 인권

인권이란 ‘인간이 인간답게 살기 위한 최소한의 조건으로서 존엄한 인간으로 높은 가치를 발휘하며 평등하고 행복하게 살 수 있는 권리’를 의미하는데, 주권 국가에 있어서는 ‘정부의 일방적 권력 남용과 억압에 대항하여 인간이 요구할 수 있고 보호, 보장을 받을 수 있는 보편적 권리’를 의미한다.

#### 2) 인권침해

본 논문에서의 인권침해란 인권이 침해된 모든 경우가 아니라, 세계의 진실위원회<sup>1)</sup>가 통상 내전 또는 독재를 거쳐 민주화로 이행되는 민주화 과도기 상태에서 설립되는 점 등에 비추어 ‘민주화 전 정부에 의해 인권이 침해된 경우’를 의미하고, 본 논문이 대한민국 내 발생한 인권침해를 다룬다는 점에서 ‘대한민국 정부 또는 그 종사자에 의해 인권이 침해된 경우’를 의미하게 된다.

#### 3) 국가폭력

인권 침해의 가해자를 강조하는 측면에서 ‘국가폭력’이란 개념을 사용하는 견해가 있는데, 합법적으로 정당한 법에 의해 국민을 통치하는 정치조직인 국가가 불법적으로 비합리적인 물리

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1) 예컨대, 약 300여년 동안 인종차별이 있었던 남아프리카공화국에서는 1995년 7월 25일 「국민통일 및 화해촉진법」이 제정되어 17인의 ‘진실과 화해 위원회’가 만들어졌고, 이 위원회는 1960년 3월 1일부터 1994년 5월 10일 사이에 벌어진 인권침해 사건의 진실을 규명하고 평가하였다.

력인 폭력을 사용하는 집단처럼 오인될 소지가 있을 뿐만 아니라 국가가 합법적으로 행사하는 일체의 물리적 유형력이 폭력으로 오인될 소지가 있으며, 나아가 인권침해와 국가폭력이 동전의 양면처럼 반드시 일치하는 개념이 아니기 때문에 국가폭력이 인권침해의 대체 개념은 아니다.

## 2. 진실·화해를 위한 과거사정리 기본법의 제정

### 1) 개별적 과거사 정리 과정

대한민국이 1945년 8월 15일 해방 이후 단기간에 산업화에 성공하고 민주화를 달성하자, 일제강점기에 발생한 친일청산 문제, 남북 분단과 한국전쟁으로 인한 희생사건 정리 문제, 산업화 과정에서 발생한 인권침해 사건 정리 문제 등이 현안으로 등장하였다. 우선 개별법에 의해 과거 문제를 정리하기 시작하였는데, 1990년경 ‘광주 민주화 운동 관련자 보상 등에 관한 법률’, 1996년경 ‘거창사건 등 관련자의 명예회복에 관한 특별조치법’, 1999년경 ‘의문사 진상 규명에 관한 특별법’, 2000년경 ‘제주 4·3사건 진상규명 및 희생자 명예 회복에 관한 특별법’ 등이 제정되었다.

### 2) 포괄적 과거사 정리 방안

이러한 개별법에 의한 방식이 대한민국 역사의 특수성으로 인하여 과거사 정리에 효율적이 못하다는 비판이 제기되자, 과거사 정리 방법이 과거 인권침해 문제를 포괄적 총체적으로 정리하는 방식으로 바뀌게 되었다. 2004년 8월경 대통령의 포괄적 과거사 정리 제안에 따라 대한민국의 권력기관인 국가정보원, 경찰청, 국방부 등이 과거사진상규명위원회를 자체적으로 설치하여 과거 인권침해 의혹이 제기되고 있던 사건에 대해 조사하여 결과를 발표하였다. 그리고 국회에서도 과거사법 제정 논의가 본격적으로 시작되었고, 2005년 5월경 ‘진실·화해를 위한 과거사 정리 기본법(이하 기본법이라 함)’이 제정되었다<sup>2)</sup>.

### 3) 기본법의 개요

기본법은 제1장 총칙, 제2장 위원회의 구성과 운영, 제3장 위원회의 업무와 권한, 제4장 화해를 위한 국가와 위원회의 조치, 제5장 보칙, 제6장 벌칙, 부칙 등 부칙을 제외하고 6장, 47조로 구성되어 있다. 기본법은 제1장 제2조에서 조사대상을 첫째 일제 강점기 전후 항일독립운동과 주권과 국력을 신장시킨 해외동포사, 둘째 한국전쟁 전후의 시기에 민간인 집단희생사건, 셋째 해방 이후 권위주의 통치시까지 발생한 인권침해사건 등으로 규정함으로써 해방 후부터 민주

2) 법률 제7542호 2005. 5. 3. 국회 본회의 통과, 2005. 5. 31. 제정, 2005. 12. 1. 시행

화 전까지 시기에 발생한 인권침해를 포괄적 총체적으로 조사한 후 결정하는 방식을 채택하고 있다. 특히 기본법은 제1장 제1조에서 ‘이 법은 항일독립운동, 반민주적 또는 반인권적 행위에 의한 인권유린과 폭력·학살·의문사 사건 등을 조사하여 왜곡되거나 은폐된 진실을 밝혀냄으로써 민족의 정통성을 확립하고 과거와의 화해를 통해 미래로 나아가기 위한 국민통합에 기여함을 목적으로 한다.’고 규정함으로써 기본법 제정의 목적을 분명하게 밝히고 있다.

### 3. 진실·화해를 위한 과거사 정리 위원회 설립과 구성

#### 1) 설립

기본법의 제정에 따라 2005년 12월경 진실·화해를 위한 과거사 정리 위원회(이하 진실화해위원회라고 함)가 설립되었고, 2006년 4월경 첫 조사개시를 결정하면서 본격적으로 조사활동을 시작하였다. 2010년 6월 30일 조사업무가 완료되었고, 그간의 조사결과 등을 담은 종합보고서를 작성하여 국회 등에 보고하면 2010년 12월 31일 진실화해위원회가 종료된다.

#### 2) 구성

조사와 결정 등 중요 업무에 대한 권한은 위원장을 포함한 상임위원 4명과 비상임위원 11인 합계 15인으로 구성된 위원회(이하, 전원위원회라고 함)에 있다. 전원위원회의 결정을 보조하기 위해 3개의 상임위원회 즉, 민족독립규명위원회, 집단희생규명위원회, 인권침해규명위원회(이하, 소위원회라고 함)가 설치되었고, 위원장이 아닌 상임위원 3명이 각 상임위원회 위원장으로 업무를 처리하였다. 인권침해규명위원회<sup>3)</sup>가 대부분의 인권침해 사건을 담당하여 조사하였다.

## II. 주요 법적 쟁점

### 1. 기본법상 인권침해사건 관련 규정

기본법은 제2조 제1항 제4호에서 ‘1945년 8월 15일부터 권위주의 통치 시까지 헌정질서 파괴행위 등 위법 또는 현저히 부당한 공권력의 행사로 인하여 발생한 사망·상해·실종사건, 그 밖에 중대한 인권침해사건과 조작의혹사건’을 인권침해사건과 관련하여 진실화해위원회의 진실규명 대상으로 규정하고 있다. 진실화해위원회의 진실규명 대상인 인권침해사건은 기본

3) 상임위원회의 명칭이 이후 1소위, 2소위, 3소위로 변경되었는데, 3소위가 이에 해당된다.

법 제2조 제1항 제4호에 규정된 인권침해사건 중 기본법 제19조 제1항 및 제2항에 의해서 ‘희생자, 피해자 및 그 유족이나 이들과 친족관계에 있는 자나 위원회 진실규명사건에 관하여 특별한 사실을 알고 있는 자가 기본법 시행일로부터 1년 이내 위원회에 진실규명을 신청한 인권침해 사건’으로 한정된다. 다만, 기본법 제2조 제1항 제6호에 의해 ‘역사적으로 중요한 사건으로서 진실화해위원회가 기본법의 목적 달성을 위하여 진실규명이 필요하다고 인정한 사건’은 예외적으로 신청이 없어도 위원회의 결정으로 진실화해위원회의 진실규명 대상인 인권침해사건이 된다. 즉, 기본법은 진실화해위원회의 조사대상을 신청사건으로 한정하면서도 보충적으로 역사적 중요사건을 직권 조사할 수 있도록 하고, 나아가 신청인 자격을 친족 등 이해관계인뿐만 아니라 목격자 등<sup>4)</sup>에게도 부여함으로써 광범한 조사가 가능하도록 규정하고 있다.

## 2. 침해 시점

### 1) 시기(始期)

기본법은 조사대상 범위를 침해시점과 관련하여 ‘1945년 8월 15일부터 권위주의 통치시까지’ 발생한 인권침해 사건으로 제한하고 있다. 세계의 진실위원회가 ‘자국의 민주화 과도기 정의 구현’이라는 목적을 달성하기 위해 설립된다는 점에서 진실화해위원회의 조사대상도 ‘대한민국 수립 후부터 민주화되기 전까지’ 발생한 인권침해사건이 타당하지만, 기본법은 미군정기인 ‘1945년 8월 15일 해방 후 1948년 8월 15일 대한민국 정부 수립 전까지’도 포함시키고 있다.<sup>5)</sup> 즉, 대한민국 정부 수립 이전에 발생한 인권침해 사건도 조사대상이 된다. 최초 법안 제출 당시 ‘제1안은 1948년 8월 15일부터, 제2안은 1945년 8월 15일부터’ 등으로 규정된 2개 법률안이 있었는데, 검토과정에서 대한민국 모든 근현대사 정리와 역사적 실체의 진상규명이라는 측면에서 일제강점기 친일반민족행위에 대한 조사 이후 시점부터인 제2안이 채택되었다.

4) 진실화해를 위한 과거사정리 기본법 시행령 제2조에서 ‘특별한 사실을 알고 있는 자라 함은 진실규명 사건을 경험 또는 목격한 자와 경험 또는 목격한 자로부터 그 사실을 직접 전하여 들은 자를 말한다. 다만, 경험 또는 목격한 자로부터 그 사실을 직접 전하여 들은 자의 경우에는 경험 또는 목격한 자가 특정되고 생존하고 있는 등 조사가 가능한 경우에 한한다.’고 규정하고 있다. 목격자 등의 자격에 관하여 진실규명에 필요한 중대한 사실을 알고 있는 사람 등으로 한정적으로 해석하는 견해와 진실규명과 상관없이 인권침해사실을 알고 있는 사람으로 넓게 해석하는 견해 등 논란이 있다. 진실화해위원회는 후자의 입장에서 신청인 자격을 거의 문제 삼지 않았기 때문에 사실상 신청이 있으면 조사·결정하였다.

5) 한반도는 1945년 8월 15일 일제강점으로부터 해방되면서 미·소에 의해 남북으로 분단되었고, 1948년 8월 15일 남쪽에 대한민국 정부(이하, 대한민국이라 함)가, 1948년 9월 9일 북쪽에 조선 민주주의 인민공화국 정부(이하, 북한이라 함)가 각 수립되었다.

## 2) 종기(終期)

종기와 관련하여 기본법이 ‘권위주의 통치 시’까지로 규정하고 있는데, 권위주의 통치시에 대한 해석이 입법과정에서 뿐만 아니라 위원회 결정과정에서도 수차례 문제되었다. 진실화해위원회 설립 취지에 비추어 권위주의 통치시는 ‘민주화 이전’으로 달리 표현할 수 있는데, 결국 대한민국의 민주화 시점이 언제인가라는 문제로 귀착된다. 최초 법안 심의 당시 ‘권위주의 통치를 어느 시기로 볼 것인지를 해석에 대하여 논란의 여지가 있으므로 그 시기를 구체적으로 명확하게 규정할 필요가 있다고 보았습니다.<sup>6)</sup>’, ‘권위주의적 통치 시기로 되어 있는데, 권위주의 통치시기에 대해서는 논란의 소지가 좀 있을 수 있으니까 1998년 김대중 정부 출범 이전으로 명확히 하는 것이 어떤가 하는 의견을 밝힙니다.<sup>7)</sup>’, ‘권위주의 통치에 대한 인식이 모든 사람에게 동일한 것도 아니고 또 인권 침해 등이 꼭 그 같은 시기에만 발생한 것도 아닙니다. 권위주의 정권의 잔재로 남아 잘못된 제도나 관행 등이 그 이후에도 지속되면서 많은 해악을 끼친 경우 처리하기 어렵게 됩니다. 이 전제조건은 법을 운영하는 주체들의 원활한 업무 수행을 어렵게 할 우려가 있습니다.<sup>8)</sup>’, ‘우리나라가 점진적으로 민주화되어 오다가 언제 민주주의가 완성되었다고 보느냐, 보는 관점에 따라서 정치사적으로 6.10항쟁을 해서 직선제를 한 노(태우) 대통령 때부터인가 아니면 그때도 군사 정부니까 김영삼 정부가 출범한 1993년 2월 25일까지인가 아니면 김대중 대통령이 취임한 1998년 2월 25일까지인가 이런 것을 분명히 해 주는 것이 나는 맞다고 봅니다.<sup>9)</sup>’ 등으로 논란이 심했지만, 결국 기본법이 권위주의 통치 시로 규정하였다. 이 문제에 대해 전일 위원회 결정과정에서도 위원들 사이에 수차례 격론이 있었고, 결국 표결로 ‘전두환 대통령 통치 시’까지를 권위주의 통치시로 결정하였다. 첫째 헌법 개정에 따른 공화국 분류에 따르면 1987년 헌법이 개정된 이후 변화가 없다는 점, 둘째 정치체제에 따르면 1988년 대통령 직선제와 이에 따른 권력구조에 대한 변화가 없다는 점, 셋째 1988년 이후 사건이라도 역사적으로 중요한 사건이라면 위원회 결정으로 직권 조사할 수 있다는 점 등이 고려되었다.<sup>10)</sup> 그러나 이 문제가 중요한 안건으로 등장하여 결정되기 전에 전일위원회가 1988년 2월 25일<sup>11)</sup> 이후에 발생한 사건을 진실규명 결정한 사안도 있다.

6) 2004년 12월 9일 제250 정기회 행정자치위원회 수석전문위원 장인식 발언

7) 2004년 12월 14일 제251 임시회 행정자치위원회 열린우리당 최규식 의원 발언

8) 2004년 12월 20일 제251 임시회 행정자치위원회 공청회 진술인 안병욱 발언, 동인은 진실화해위원회 2대 위원장을 역임하였다.

9) 2004년 12월 30일 제251 임시회 행정자치위원회 한나라당 김기춘 의원 발언

10) Assessing the Impact of Transitional Justice, page25, huge van der merwe victoria baxter audey r. chapman, united states institute of peace press, 2009

11) 노태우 대통령 취임일

### 3) 한국전쟁 중에 발생한 민간인 집단희생

1950년 6월 25일 북한의 침략으로 인해 한국전쟁이 발생된 후 1953. 7. 27. 정전협정<sup>12)</sup> 체결로 전쟁이 중지된 상태로 있는데, 전쟁으로 인해 발생한 인권침해는 공권력에 의한 인권침해와 여러 측면에서 상이하기 때문에 조사대상의 범위에서 제외된다. 엄밀한 의미에서 전쟁 중에 발생한 인권침해도 인권침해사건에 해당될 수 있지만, 기본법 제2조 제1항 제3호에서 '1945년 8월 15일부터 한국전쟁 전후의 시기에 불법적으로 이루어진 민간인 집단 희생사건' 규정됨으로써 민간인 집단 희생사건으로 별도의 조사대상 처리되기 때문에 인권침해사건에서는 제외된다. 이처럼 한국전쟁이나 이에 준하는 상태에서 발생한 인권침해사건은 대부분 인권침해 사건에서 제외되었고, 집단희생에 포함되지 않는 일부 민간인 희생사건을 전원위원회에서 '각하' 처리하였지만, 인권침해사건으로 보아 진실규명 결정한 사안도 있다.

## 3. 침해 형태

### 1) 행정권에 의한 침해

기본법은 조사대상 범위를 침해형태와 관련하여 '헌정질서 파괴행위 등 위법 또는 현저히 부당한 공권력의 행사로 인하여 발생한' 인권침해 사건으로 한정하고 있다. 즉, 위법한 공권력의 행사로 인한 인권침해 사건만이 조사대상이 된다.

공권력을 담당하는 기관에 따라 침해의 형태를 살펴보면, 행정권(또는 집행권)에 의한 침해는 공권력 행사의 전형적 형태이기 때문에 별다른 문제가 되지 않는다. 즉, 일반적으로 진실위원회가 행정권에 의한 체포, 구금, 납치, 고문, 살해, 처형 등을 조사하기 위해서 설치되었다는 점을 고려하면 물리적 유형력을 담당하고 있는 행정권의 행사는 당연히 공권력의 행사에 포함된다.

### 2) 사법권에 의한 침해

사법권도 공권력에 해당되기 때문에 사법권에 의한 인권침해도 진실규명 대상에 포함된다. 그러나 사법부는 법적 판단 업무를 주로 담당하고 거의 물리적 유형력을 행사하지 않는다는 점에서 사법권에 의한 인권침해의 태양은 행정권의 경우와는 다르다. 다른 나라의 진실화해위원회에서도 사법권에 의한 인권침해가 거의 다루어지지 않았다. 이는 사법권의 독립, 공개 재판의 원칙, 국민의 재판청구권 등에 비추어 사법부가 인권을 보호하는 국가기관으로서 인권을 침해하지 않는다는 인식 때문으로 보인다. 더구나 재판제도가 엄격한 증거에 의해 사실을 확정한다는 점, 분쟁을 최종적으로 해결함으로써 법적 안정을 도모한다는 점, 오판의 위험을 3심제와 재

12) 정식 명칭은 '국제연합군 총사령관을 일방으로 하고 조선민주주의인민공화국 최고사령관 및 중공인민지원군 사령원을 다른 일방으로 하는 한국 군사정전에 관한 협정'이다.

심 재판을 통해 시정하도록 제도화하고 있다는 점 등에 비추어 법원 이외의 국가기관이 과거 법원의 재판 내용을 조사하는 것이 오히려 화해를 방해할 수도 있다. 따라서 기본법도 이런 점을 고려하여 제2조 제1항 제4호에서 ‘위법한 공권력의 행사로 인한 조작의혹사건’을 진실규명 대상으로 규정하면서도, 한편으로 제2조 제2항 본문에서 ‘제1항의 규정에 의한 진실규명 범위에 해당하는 사건이라도 법원의 확정판결을 받은 사건은 제외한다.’고 규정하고 있다. 그러나 시대 상황에 따라 재판이 정상적으로 진행되지 않은 경우도 있기 때문에 기본법 제2조 제2항 단서에서 ‘다만, 진실화해위원회의 의결로 민사소송법 및 형사소송법에 의한 재심사유에 해당하여 진실규명이 필요하다고 인정하는 경우에는 예외로 한다.’고 규정하고 있다. 즉, 기본법은 진실화해위원회가 법원의 확정 판결이 있는 조작의혹사건(이하 확정판결사건이라 함)에 대하여 법원의 재심 재판과 유사하게 재심사유가 있으면 조사 결정할 수 있도록 규정하고 있다. 진실화해위원회에서 처리한 인권침해 사건 중 확정판결 사건이 145건이고 이중 79건이 진실 규명되었는데, 임권침해규명위원회의 활동은 확정판결 사건의 조사 결정에 집중되었다.

기본법은 확정판결사건에 대해 재심사유의 존재를 조건으로 진실화해위원회가 조사할 수 있도록 규정하고 있지만, 신청인이 재심사유를 주장·입증해야 되는지 또는 어느 정도 입증해야 되는지 여부에 대해 최초의 진실규명 조사개시 결정 일부부터 논란되었다.<sup>13)</sup> 재심재판의 경우에는 재심신청인이 재심사유를 주장·입증해야만 법원이 재심개시 결정하는데, 기본법의 조문 구성에 비추어 진실화해위원회의 조사개시결정도 재심재판과 동일하게 신청인이 재심사유를 주장·입증해야 된다. 즉, 기본법 제2조가 확정판결사건을 조사대상에서 제외하면서 예외적으로 재심사유가 있으면 조사할 수 있도록 규정하고, 진실·화해를 위한 과거사정리 위원회 운영규칙 제14조 제1항 제2호에서 소위원회에서 ‘조사개시 결정에 관한 사항’을 심의·의결하도록 규정하면서도 확정판결사건의 경우에는 제4조 제1항 제5호에서 전원위원회에서 ‘확정판결을 받은 사건의 조사에 관한 사항’을 심의·의결하도록 규정하기 때문이다. 재심사유가 없으면 기본법 제21조 제1항 제1호 ‘진실규명 신청이 위원회의 진실규명 조사대상에 해당하지 아니한 경우’에 해당된다는 이유로 신청을 각하해야 되는데, 재심 법원과 동일하게 재심사유의 입증을 요구하면 확정판결사건에 대한 진실화해위원회의 조사 자체가 불가능하기 때문에 진실화해위원회는 기본법 제21조와 제22조의 해석을 통해 재심사유의 입증 정도를 완화시키고 있다. 첫째 제22조 제1항 ‘위원회는 진실규명 신청이 제21조 제1항에서 정한 각하 사유에 해당하지 아니하는 경우에는 조사개시결정을 하고 지체 없이 그 내용에 관하여 필요한 조사를 하여야 한다.’는 규정에 따라 재심사유의 주장만 있으면 조사개시를 하는 방식이다. 공권력에 의한 침해든 확정판결에 의한 침

13) 2006년 4월 25일 진실화해위원회는 최초의 진실규명 조사개시 결정하였다. 기본법 제25조에서 이 날을 기준으로 ‘조사기간’을 규정하고 있다. ① 위원회는 위원회가 구성되어 최초의 진실규명 조사개시 결정일 이후 4년간 진실규명활동을 한다. ②위원회는 제1항의 규정에 의한 기간 이내에 진실규명활동을 완료하기 어려운 경우에는 기간 만료일 3월 전에 대통령 및 국회에 보고하고 2년 이내의 범위에서 그 기간을 연장할 수 있다. ③위원회는 제1항 및 제2항의 규정에 의한 조사기간 만료 이전에도 조사의 필요성이 없다고 판단할 경우에는 위원회 의결로서 조사기간을 만료할 수 있다.

해든 각하 사유에 해당되지 않으면 조사개시 결정하도록 규정되어 있고, 만약 공권력 침해든 재심사유든 확정적 증거나 결론이 요구된다면 위원회의 조사가 불가능하기 때문에 신청에서 공권력 침해의 주장이든 재심사유의 주장이든 주장만 있으면 조사개시 결정해야 된다는 견해다. 최초의 진실규명 조사개시 결정에서 이와 같은 방식이 표결에 의해서 채택되었다. 둘째 제22조 제2항 ‘위원회는 조사개시결정 이전에 필요한 경우에는 조사개시 여부를 결정하기 위한 사전 조사를 할 수 있다.’는 규정에 따라 재심사유의 존부와 각하 여부를 판단하기 위해 사전조사를 하는 방식이다. 신청인이 재심사유를 주장하고 일부 소명자료를 제출하면 소위원회가 사전조사에 관한 사항을 심의·의결하고<sup>14)</sup>, 이후 조사 결과에 따라 재심사유가 있으면 위원회가 조사개시 결정하면 된다는 견해이다. 많은 신청사건이 두 번째 방식으로 처리되었다. 첫 번째 방식이든 두 번째 방식이든 법원의 재심 재판과 달리 신청인이 재심사유를 주장만하면 진실화해위원회가 직접 조사하는 방식으로 사건이 처리되었다.

재심사유에 대한 판단에 있어서도 첨예한 논란이 있다. 재심재판의 구조는 일단계로 재심법원에서 재심사유의 존부를 심사한 후 재심사유가 없으면 재심 기각 결정을 하고 재심사유가 있으면 재심개시 결정한 후 이단계로 사건 실제에 대하여 유무죄를 판단한다. 위원회 결정의 구조도 재심재판의 구조와 동일하지만 이미 살펴 본 바와 같이 조사개시 결정단계에서 재심사유의 판단을 완화하고 있기 때문에 재심재판과 달리 재심사유 판단을 판단해야 된다는 견해가 결정에 막강한 영향을 미쳤다. 통상 확정판결사건에서 논란이 되는 재심사유는 오류형 재심사유 중 형사소송법 제420조<sup>15)</sup> 제5호 ‘유죄의 선고를 받은 자에 대하여 무죄 또는 면소를, 형의선고를 받은 자에 대하여 형의 면제 또는 원판결이 인정한 죄보다 경한 죄를 인정할 명백한 증거가 새로 발견된 때’와 제7호 ‘원판결, 전심판결 또는 그 판결의 기초 된 조사에 관여한 법관, 공소의 제기 또는 그 공소의 기초된 수사에 관여한 검사나 사법경찰관이 그 직무에 관한 죄를 범한 것이 확정판결에 의하여 증명된 때<sup>16)</sup> 단, 원판결의 선고 전에 법관, 검사 또는 사법경찰관에 대하여 공소의 제기가 있는 경우에는 원판결의 법원이 그 사유를 알지 못한 때에 한한다.’의 사유이다.

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- 14) 진실·화해를 위한 과거사정리 위원회 운영규칙 제14조 제1항 ‘소위원회는 다음 사항에 관하여 심의·의결한다. 제3호 ‘법 제22조 제2항의 사전조사에 관한 사항’[2006. 8. 8. 신설]
- 15) 형사소송법 제420조 (재심이유) 재심은 다음 각호의 1에 해당하는 이유가 있는 경우에 유죄의 확정판결에 대하여 그 선고를 받은 자의 이익을 위하여 청구할 수 있다. 1. 원판결의 증거된 서류 또는 증거물이 확정판결에 의하여 위조 또는 변조된 것이 증명된 때 2. 원판결의 증거된 증언, 감정, 통역 또는 번역이 확정판결에 의하여 허위인 것이 증명된 때 3. 무고로 인하여 유죄의 선고를 받은 경우에 그 무고의 죄가 확정판결에 의하여 증명된 때 4. 원판결의 증거된 재판이 확정재판에 의하여 변경된 때 6. 저작권, 특허권, 실용신안권, 의장권 또는 상표권을 침해한 죄로 유죄의 선고를 받은 사건에 관하여 그 권리에 대한 무효의 심결 또는 무효의 판결이 확정된 때
- 16) 형사소송법 제422조 (확정판결에 대신하는 증명) ‘전2조의 규정에 의하여 확정판결로써 범죄가 증명됨을 재심청구의 이유로 할 경우에 그 확정판결을 얻을 수 없는 때에는 그 사실을 증명하여 재심의 청구를 할 수 있다. 단, 증거가 없다는 이유로 확정판결을 얻을 수 없는 때에는 예외로 한다.’는 규정을 확대 해석하는 방법으로 위원회는 신청사건의 대부분이 이미 공소시효 등이 도과되어 확정판결을 얻을 수 없는 때에 해당되고, 재심사유에 해당되는 사실의 증명을 요구하면 사실상 위원회의 활동이 불가능하다는 이유로 재심사유에 해당되는 주장만 있으면 재심개시 결정이나 조전조사 결정하였다.

5호의 재심사유는 새로운 발견된 증거의 신규성과 명백성을 요건으로 하는데, 신규성과 명백성에 대한 견해가 다양해서 특히 논란이 심하다. 위에서 본 바와 같이 재심사유에 대한 신청인의 주장만 있으면 재심개시 결정하는 첫째 방식에서는 증거의 신규성과 명백성을 고려할 필요 없이 사건 본안을 판단하게 되기 때문에 결정에서 논란이 더욱 심했다. 즉, 새로운 증거가 재심사유의 존부를 판단하는 자료가 아니라 사건의 실체를 판단하는 자료로 사용되었기 때문에 자신이 발견한 증거를 과신하는 판단의 속성 등으로 인하여 새로운 증거와 배치되는 기존의 다른 증거가 충분한 검토 없이 배척되는 결과가 초래되었다.

7호의 재심사유는 ‘법관, 검사 또는 사법경찰관이 직무에 관한 죄를 범한 경우’라야 되는데, 불법구금, 가혹행위와 관련하여 논란이 심했다. 사법경찰관 등에 의한 불법구금이나 가혹행위의 존부에 대한 사실인정에서도 논란이 있었지만, 통상 신청인의 진술이 합리적이고 구체적이면 수사 담당자의 진술을 배척하고 불법구금이나 가혹행위를 인정하였다. 그런데 비상계엄, 포고령, 긴급조치 등에서 영장 없이 체포·구금할 수 있도록 규정하고 있는 경우<sup>17)</sup>에도 불법구금의 문제가 발생하여 7호의 재심사유가 존재하는지 여부에 대한 논란이 있었다. 영장 없이 체포·구금할 수 있도록 한 규정에 대해 당시 실무는 형사소송법상 영장주의 규정 전체가 적용되지 않기 때문에 불법 구금의 문제가 생기지 않는다는 입장이지만, 법관에 의한 영장발부 규정<sup>18)</sup>과 법관에 의한 구속기간 연장 규정<sup>19)</sup>만 적용되지 않을 뿐 구속기간 규정<sup>20)</sup>은 적용되기 때문에 전체구속일수를 초과한 구금은 불법이라는 견해와 형식적으로 법관에 의한 영장발부 절차만 제외될 뿐 형사소송법상 구속기간 규정이나 구속연장 규정을 준수해야 되어야 하기 때문에 이를 위반하면 불법이라는 견해 등이 있었고, 이러한 견해에 입각해 불법구금으로 결정한 사안도 있다. 나아가 이런 경우 사법경찰관 등이 구금의 불법성을 인식하거나 판단할 수 없기 때문에 불법구금만으로 재심사유가 되는지 여부에 대하여 논란이 있었다. 재심사유인 ‘직무에 관한 죄를 범한 경우’에 대한 해석에서 공무원의 독직행위가 있으면 족하기 때문에 구성요건에 해당되고 위법하면 충분하고 책임까지 요구되는 것이 아니라는 견해<sup>21)</sup>와 법문에 유죄확정 판결이 있어야 재심사유가 된

17) 예컨대, 국가안전과공공질서유지수호를위한대통령긴급조치 [시행 1975. 6. 3] [대통령긴급조치 제9호, 1975. 5.13. 제정] ‘8. 이 조치 또는 이에 의한 주무부장관의 조치에 위반한 자는 법관의 영장없이 체포·구금·압수 또는 수색할 수 있다.’

18) 형사소송법 제201조 (구속) ① 피의자가 죄를 범하였다고 의심할 만한 상당한 이유가 있고 제70조제1항 각호의 1에 해당하는 사유가 있을 때에는 검사는 관할지방법원판사에게 청구하여 구속영장을 받아 피의자를 구속할 수 있고 사법경찰관은 검사에게 신청하여 검사의 청구로 관할지방법원판사의 구속영장을 받아 피의자를 구속할 수 있다.

19) 형사소송법 제205조 (구속기간의 연장) ① 지방법원판사는 검사의 신청에 의하여 수사를 계속함에 상당한 이유가 있다고 인정한 때에는 10일을 초과하지 아니하는 한도에서 제203조의 구속기간의 연장을 1차에 한하여 허가할 수 있다.

20) 형사소송법 제202조 (사법경찰관의 구속기간) 사법경찰관이 피의자를 구속한 때에는 10일 이내에 피의자를 검사에게 인치하지 아니하면 석방하여야 한다. 제203조 (검사의 구속기간) 검사가 피의자를 구속한 때 또는 사법경찰관으로부터 피의자의 인치를 받은 때에는 10일 이내에 공소를 제기하지 아니하면 석방하여야 한다.

21) 강구진 교수, 이재상 교수의 견해

다고 규정하고 있기 때문에 구성요건에 해당되고, 위법하며, 책임이 있어야 한다는 견해 중 전자의 견해를 취하면서 위법의 인식은 책임조각사유에 해당되기 때문에 재심사유가 된다는 주장에 따라 조사개시 결정과 재심권유 결정한 사안도 있다. 그러나 형법 제276조 (체포, 감금) ‘사람을 체포 또는 감금한 자는 5년 이하의 징역 또는 700만원 이하의 벌금에 처한다.’는 일반인의 체포감금죄와 형법 제124조 제1항 (불법체포, 불법감금) ‘재판, 검찰, 경찰 기타 인신구속에 관한 직무를 행하는 자 또는 이를 보조하는 자가 그 직권을 남용하여 사람을 체포 또는 감금한 때에는 7년 이하의 징역과 10년 이하의 자격정지에 처한다.’는 독직체포감금죄는 규정과 내용에서 본질적인 차이가 있다. 일반인은 사람을 체포·감금할 수 있는 권한을 부여받지 못하였지만, 사법경찰관 등은 사람을 체포·감금할 수 있는 권한을 부여받았을 뿐만 경우에 따라서는 체포·감금하지 않으면 형사 처벌되는 등 체포·감금할 직무상 의무도 부여받았다. 따라서 일반인의 경우에는 위법의 인식이 책임요소이기 때문에 체포·감금 권한에 대한 착오가 책임조각사유에 불과하지만, 사법경찰관 등의 경우에는 위법의 인식이 규범적 구성요건요소이기 때문에 체포·감금 권한에 대한 착오는 구성요건조각사유에 해당된다. 따라서 포고령 등에 의하여 영장주의가 배제된 경우에 발생한 체포·구금은 불법구금인지 여부와 상관없이 재심사유가 되지 않는다. 이런 입장에서 결정한 사안도 있다.

재심사유가 있어 사건 실체를 재조사한 후 판단, 결정함에 있어 ‘사건조작’을 어떻게 판단·결정할 것인지 여부에 논란이 있었다. 사건조작 여부는 법원의 확정판결문에 적시된 범죄사실이 실재하지 않는 허위인지 여부인데, 그 판단 방식에 있어서 논란이 있다. 법원은 검사가 기소한 공소사실에 대해 재판과정에서 현출된 증거를 토대로 증거재판주의와 자유심증주의에 의해 유·무죄를 판단하는데, 진실화해위원회의 조사 결과 당시 재판에서 채택된 일부 증거가 증거능력이 없는 사실이 밝혀진 경우<sup>22)</sup>에 증거의 부족을 이유로 유죄 확정판결문에 실시된 범죄사실이 조작되었다고 판단할 수 있는지 문제이다. 첫째는 법원이 적법하게 수집된 충분한 증거로 유죄를 선고해야 된다는 증거재판주의 원칙을 위반하여 유죄로 판단하였기 때문에 진실화해위원회가 과거 법원의 입장에서 사건을 다시 판단한 후 증거부족을 이유로 유죄 판결문에 실시된 범죄사실이 조작되었다고 진실규명 결정하는 견해이다. 둘째는 기본법이 진실화해위원회에 사건의 진실을 밝힐 권한과 의무를 부여하기 때문에 유죄 판결문에 실시된 범죄사실이 적극적으로 조작되었다는 점을 밝혀야 되고, 조작사실을 밝히지 못한 경우에는 유죄 판결문에 실시된 범죄사실이 조작되었는지 여부를 알 수 없기 때문에 진실규명 불능 결정하는 견해이다. 진실화해위원회 결정 중 첫째 견해에 따라 진실규명 결정된 사안도 있고, 둘째 견해에 따라 진실규명 불능 결정된 사안도 있다.<sup>23)</sup> 첫째 견해든 둘째 견해든 통상 재심사유를 인정한 진실화해위원회의 결정문을 재심자료로 재심재판이 청구되기 때문에 최종 결론은 재심법원 판단의 몫이 된다. 기본법의

22) 불법구금이나 고문 가혹행위로 인해 사법경찰관 작성의 피의자신문조서 또는 진술조서 등이 증거능력 없다고 판단되는 사안이 대부분이고, 고문 가혹행위의 상태가 지속되어 검사 작성의 피의자신문조서가 증거능력이 없다고 판단되는 사안도 있었다.

23) 조사결과 사건이 실재하는 경우에는 어느 견해에 따르든 차이가 없다.

취지에 따르면 증거의 부족은 과거 재판 결과에 대한 불신을 초래할 뿐 과거 재판 결과에 대한 오판을 입증하는 원리가 아니다.

마지막으로 법원의 법률적 판단이나 사실 평가에 대한 오류가 사건조작의 범주에 포함되는지 여부에 논란이 있다. 예컨대, 증거로 제출된 서적에 대한 이적성 여부 또는 범죄사실로 적시된 발언에 대한 이적성 여부, 범죄사실로 적시된 사실에 대한 국가 기밀성 여부 등에 대한 과거 재판 당시의 판단이 현재 대법원 판결 등에 비추어 틀린 경우에 사건이 조작되었다고 진실규명 결정하는 견해와 판단은 조작될 수 없기 때문에 조사대상과 결정대상이 아니라는 견해가 있다. 위원회 결정 중 첫 번째 견해에 따라 진실규명 결정된 사안도 있고, 두 번째 견해에 따라 결정된 사안도 있다. 이 부분도 첫 번째 견해든 두 번째 견해든 최종 결론은 재심법원 판단의 몫이 된다. 시간의 경과에 따른 가치 변화가 현재를 변경시킬 수 있지만 과거를 부정할 수는 없다.

### 3) 입법권에 의한 침해

입법권도 공권력에 해당되기 때문에 법문에 따르면 입법권에 의한 인권침해도 조사대상에 포함된다. 그러나 입법권은 법 정립작용으로 물리적 유형력을 직접 행사하지 않는다는 점에서 인권침해의 태양이 행정권·사법권의 경우와는 다르다. 다른 나라의 진실위원회에서 입법권에 의한 인권침해가 다루어지지 않았는데, 이는 입법기관에 의해서 정립된 법이 공개되기 때문에 은폐되거나 숨겨진 사실이 거의 없고, 진실화해위원회의 설립 목적이 과거 정권이나 과거 정권에서 제정된 법의 정당성 등을 조사하기 위한 것이 아니라 은폐된 사실을 밝히는 것이 때문이다. 이 문제는 조사개시 전부터 논란이 있었는데<sup>24)</sup>, 이미 기본법이 사법권에 의한 입법권침해를 제외하면서 예외적으로 재심사유 있는 경우로 한정하고 있는 점에 비추어 입법권에 의한 인권침해는 포함되지 않는다고 해석된다. 이런 견해에 따라 결정된 사안이 있다. 따라서 소위 악법의 문제는 진실위원회가 조사한 후 평가·결정할 수 사안이 아니라 법을 제정한 입법기관이 정치적으로 자체 해결해야 할 과제다.

### 4) 위법 또는 현저히 부당한 공권력의 행사

공권력의 행사가 위법 또는 현저히 부당한 경우에 한하여 조사대상이 되는데, ‘위법’이 불확정 다의적 개념으로 위법에 대한 다양한 견해가 존재하기 때문에 논란이 있다. 구체적 법령을 위반한 경우라면 법령이 인권 보호를 위한 실체적 내용을 규정하고 있는 경우뿐만 아니라 절차적 내용을 규정하고 있는 경우라도 모두 위법이다. 그러나 구체적 법령이 아닌 일반적인 법의 원칙이나 원리를 위반한 경우에 위법인지 여부에 논란이 있다. 예컨대, 구금된 자에게 평등의 원칙 또는 비례의 원칙을 위반하여 처우한 경우에 위법이라고 할 수 있는가? ‘부당’이라는 측

24) 공권력에 의한 중대한 침해라고 할 때 국가공권력에 입법기관이 포함되는 것이냐? 국회의 입법행위로 해서 실정법이 제정되었고, 실정법에 의해 결과적으로 인권이 침해되었다고 해석하는 것은 무리라는 견해임.

면에서 보면 부당의 개념이 지극히 다의적 개념이기 때문에 일반적인 법의 원칙이나 원리의 위반을 부당으로 한정 해석하면 일반적인 법의 원칙이나 원리의 위반은 위법은 아니지만 부당에 해당된다. 이런 견해에 따르면 기본법이 부당은 ‘현저하게’ 부당한 경우로 한정하고 있기 때문에 누가 보더라도 명백하게 일반적 법의 원칙이나 원리를 위반한 경우에 진실규명 결정의 대상이 된다. 예컨대, 임의동행<sup>25)</sup>은 과거 정권에서 구금시간의 제한 없이 법에서 허용되었는데, 이러한 임의동행이 위법 또는 현저히 부당한 공권력의 행사에 해당되는가? 과거의 법이 임의동행을 구금시간의 제한 없이 허용하더라도 ‘임의’라는 개념자체에서 무제한적 구금이 허용되는 것이 아니고 비례의 원칙에 따라 합리적 시간 내의 구금만이 허용된다고 해석되고, 합리적 시간을 초과하여 누가 보더라도 지나치게 오래기간 구금하였다면 현저히 부당한 공권력의 행사가 된다. 여관 등지에서 몇 개월씩 임의동행 형식으로 구금한 경우라면 위법 또는 현저히 부당한 공권력의 행사에 해당되지만, 현행법상 요구되는 6시간을 일부 초과하였으나 당시 관행에 비추어 허용되는 기간이라면 현저히 부당한 공권력의 행사에 해당되지 않는다. 임의동행에 의한 구금을 불법으로 결정한 사안도 있고, 합법으로 결정한 사안도 있다. 유사한 사안으로 군 수사기관이 중앙정보부의 명의를 이용하여 민간인을 수사한 문제도 위원회가 대부분 불법으로 결정하였고 결정 주된 근거가 수사권이 없다는 이유였지만, 수사권이 없음이 명백하지 않은 상태에서 수사하였다면 반드시 불법이라고 단정할 수 없기 때문에 논란이 있다.

25) 1988년 12월 31일 개정전 경찰관직무집행법 제2조 (불심검문) ① 경찰관은 수상한 거동 기타 주위의 사정을 합리적으로 판단하여 어떠한 죄를 범하였거나 또는 범하려 하고 있다고 의심할 만한 상당한 이유가 있는 자 또는 이미 행하여진 범죄 혹은 행하여지려고 하는 범죄에 관하여 그 사실을 안다고 인정되는 자를 정지 시켜 질문할 수 있다. ② 그 장소에서 전항의 질문을 하는 것이 본인에게 불리하거나 또는 교통의 방해가 된다고 인정되는 때에는 질문하기 위하여 그 자에 부근의 경찰서, 지서, 파출소 또는 출장소에 동행할 것을 요구할 수 있다. ③ 전2항에 규정하는 자는 형사소송에 관한 법규에 의하지 아니하고는 신체를 구속당하지 아니하며 또 그 의사에 반하여 경찰서, 지서, 파출소 또는 출장소에 동행되거나 답변을 강요당하지 아니한다. ④ 제1항에 규정된 자가 질문을 받을 때에 경찰관은 피질문자에 대하여 그 신체에 흉기의 소지여부를 조사할 수 있다. 현행 경찰관직무집행법 제3조 (불심검문) ① 경찰관은 수상한 거동 기타 주위의 사정을 합리적으로 판단하여 어떠한 죄를 범하였거나 범하려 하고 있다고 의심할 만한 상당한 이유가 있는 자 또는 이미 행하여진 범죄나 행하여지려고 하는 범죄행위에 관하여 그 사실을 안다고 인정되는 자를 정지시켜 질문할 수 있다. ② 그 장소에서 제1항의 질문을 하는 것이 당해인에게 불리하거나 교통의 방해가 된다고 인정되는 때에는 질문하기 위하여 부근의 경찰서·지구대·파출소 또는 출장소(이하 “경찰관서”라 하되, 지방해양경찰관서를 포함한다)에 동행할 것을 요구할 수 있다. 이 경우 당해인은 경찰관의 동행요구를 거절할 수 있다. ③ 경찰관은 제1항에 규정된 자에 대하여 질문을 할 때에 흉기의 소지여부를 조사할 수 있다. ④ 제1항 또는 제2항의 규정에 의하여 질문하거나 동행을 요구할 경우 경찰관은 당해인에게 자신의 신분을 표시하는 증표를 제시하면서 소속과 성명을 밝히고 그 목적과 이유를 설명하여야 하며, 동행의 경우에는 동행장소를 밝혀야 한다. ⑤ 제2항의 규정에 의하여 동행을 한 경우 경찰관은 당해인의 가족 또는 친지 등에게 동행한 경찰관의 신분, 동행장소, 동행목적과 이유를 고지하거나 본인으로 하여금 즉시 연락할 수 있는 기회를 부여하여야 하며, 변호인의 조력을 받을 권리가 있음을 고지하여야 한다. ⑥ 제2항의 규정에 의하여 동행을 한 경우 경찰관은 당해인을 6시간을 초과하여 경찰관서에 머물게 할 수 없다. ⑦ 제1항 내지 제3항의 경우에 당해인은 형사소송에 관한 법률에 의하지 아니하고는 신체를 구속당하지 아니하며, 그 의사에 반하여 답변을 강요당하지 아니한다.

위헌이 위법 또는 현저한 부당에 포함되는지 여부에 논란이 있다. 예컨대, 위헌적 요소가 있는 포고령에 의한 영장 없는 체포·구금이 진실규명 대상인가? 대통령의 비상계엄 선포 또는 긴급명령 등은 고도의 정치성을 지니는 통치행위(또는 정치문제)로서 조사대상이 되지 않는다는 견해와 고도의 정치성을 지니더라도 국민의 기본권과 관련이 있으면 조사대상이라는 견해 등 논란이 있다. 나아가 진실화해위원회가 위법 여부만을 심사할 수 있을 뿐 헌법 위반 여부까지 판단·결정할 권한이 없다는 견해와 위법의 개념에 위헌도 포함되기 때문에 헌법 위반 여부까지 판단·결정할 수 있다는 견해 등 논란이 있다. 공권력이 포고령을 위반하여 인권을 침해한 경우라면 위법으로 조상대상일 뿐만 아니라 진실화해위원회가 위법 여부를 판단·결정할 수 있다. 그러나 대통령의 비상계엄 선포가 헌법상 요건을 갖추었는지 및 포고령의 내용이 헌법에 위반되는지 여부를 조사할 수 있는가? 위헌 여부를 판단·결정한 사안도 있고, 위헌 여부를 판단·결정하지 않은 사안도 있다. 더 나아가 실정 헌법이 상위의 자연법(입헌민주국가 헌법의 기본원칙)을 위반하고 있는가? 헌법에 의해 부여된 대통령의 권한 행사가 상위의 자연법을 위반하고 있는가? 이런 점을 조사하고 판단·결정할 수 있는지 여부도 논란이 있지만, 조사하여 판단·결정한 사안이 있다. 과거 민주화 전에 시행되던 헌법이 민주화 과정을 거치면서 개정되었고, 헌법의 개정 절차를 거쳐 국민들이 과거 헌법의 문제점을 인식하고 있기 때문에 위원회가 공지된 사실을 조사 결정하였고, 이런 결정을 통해 과거에 저항하지 않은 사람을 비난했다는 측면에서 위원회가 지나치게 정치적이라는 비판을 받았다<sup>26)</sup>.

## 5) 공권력의 불행사 및 과실의 문제

위법한 공권력 행사가 의도적으로 이루어진 경우뿐만 아니라 공권력 담당자가 고의로 위법한 공권력을 행사한 경우는 조사대상의 범위에 포함된다. 그러나 공권력의 불행사 또는 담당자의 과실 등으로 인하여 의도하지 않은 인권침해의 결과가 발생한 경우에 조사대상인지 여부에 논란이 있다. 기본법이 고의·과실을 구별하지 않고 공권력의 행사로 인한 인권침해에는 적극적인 형태인 행사로 인한 침해와 소극적 형태인 불행사로 인한 침해가 포함되기 때문에 공권력의 불행사와 과실로 인한 인권침해 모두 포함된다는 견해가 있다. 다른 한편으로 기본법이 공권력의 행사만을 요건으로 규정하고 있으며, 은폐된 사실을 밝힌다는 진실화해위원회의 설립 취지에 비추어 은폐가 고의를 전제로 하기 때문에 공권력의 불행사와 과실로 인한 인권침해는 포함되지 않는다는 견해가 있다. 위원회에서 전자의 견해에 따라 진실규명 결정한 사안이 있다.

26) 2007년 1월 31일 진실화해위원회는 긴급조치 위반사건을 유죄로 판결한 판사들의 실명을 공개하였고, 이로 인하여 유신헌법과 긴급조치로 인한 인권침해의 책임을 당시의 판사들에게 묻고 실명을 공개하는 것은 마녀사냥 또는 인민재판이라는 거센 비판이 있었다.

## 4. 침해 결과

### 1) 중대한 인권

기본법은 조사대상 범위를 침해결과와 관련하여 ‘사망·상해·실종사건, 그밖에 중대한 인권침해사건과 조작의혹사건’으로 한정하고 있다. 사망·상해·실종사건은 생명에 관한 권리와 신체에 관한 권리에 대한 침해라는 측면에서 인권침해사건의 한 유형에 불과하고, 조작의혹사건은 확정판결로 사형 또는 징역형을 받은 사건이기 때문에 역시 생명에 관한 권리와 신체에 관한 권리에 대한 침해로서 인권침해사건의 또 다른 유형이다. 결국 기본법이 규정하고 있는 조사대상인 침해결과는 ‘중대한 인권’이 침해된 경우를 의미한다.

앞에서 인권의 개념에 대하여 살펴보았지만, 기본법이 ‘중대한’ 인권이라고 한정함으로써 중대한 인권의 범위에 대하여 논란이 있다. 기본법이 중대한 인권침해사건의 유형으로 제시하고 있는 사망·상해·실종사건과 조작의혹사건 등에 비추어 생명에 관한 권리와 신체에 관한 권리는 중대한 인권의 범위에 포함된다. 따라서 신체에 관한 권리가 침해된 유형 중 상해를 입은 경우뿐만 아니라 고문, 가혹행위, 체포, 구금, 납치 등을 당한 경우도 포함된다. 이는 세계의 진실화해위원회가 실종, 납치, 고문, 체포, 구금 등으로 인한 피해를 조사하기 위해 설립되었다는 측면에서도 당연한 결론이다.

그러나 양심의 자유, 언론·출판의 자유, 종교의 자유, 학문의 자유 등 자유권이 중대한 인권에 포함되는지 논란이 있다. 인권 중 중대하지 않은 인권이 없고 특히 자유권은 인권의 핵심이기 때문에 포함된다는 견해와 중대한 인권은 사망·상해·실종사건과 조작의혹사건 등에 비추어 생명에 관한 권리와 신체에 관한 권리에 준한 권리만 포함된다는 견해 등 논란이 있다. 언론·출판의 자유가 침해된 경우뿐만 아니라 종교 활동의 자유가 침해된 경우 등도 진실규명 결정된 사안이 있다. 나아가 사회권적 기본권도 범위에 포함되는지 논란이 있지만, 노조나 노조원에 대한 사건에서 노동의 권리가 침해되었다고 진실규명 결정된 사안이 있다.

### 2) 재산에 관한 권리

재산권이 인권에 포함되는지 또는 기본법에 규정된 중대한 인권에 해당되는지 여부가 진실화해위원회 설립 초기부터 논란되었다. 재산권이 보편적 인권개념 범주에 포함되는지 여부와 상관없이 대한민국은 헌법 제23조 제1항에 ‘모든 국민의 재산권은 보장된다.’고 규정함으로써 재산권을 기본적 인권으로 보장하고 있다. 따라서 대한민국에서는 헌법적 결단<sup>27)</sup>에 의해 재산권은 기본적 인권의 범주에 포함된다. 그러나 이미 살펴본 바와 같이 세계의 진실화해위원회가 살인,

27) 1948년 7월 17일 대한민국 헌법이 최초로 제정될 당시부터 제15조에 ‘재산권은 보장된다.’라고 규정되어 있다.

납치, 고문, 상해 등 생명권이나 자유권의 침해에 대한 조사를 염두해서 설립되었기 때문에 재산권이 기본법에서 규정하고 있는 중대한 인권의 범위에 해당된다고 단정할 수 없다. 나아가 재산권은 생명권이나 자유권과 달리 보상을 전제로 합법적인 침해가 가능할 뿐만 아니라 사후 회복도 가능하다. 이런 점 때문에 진실화해위원회 설립 초부터 재산권이 중대한 인권의 범위에 해당되는지 여부가 논란되었는데, 진실화해위원회는 분명한 결론 없이 개별 사건을 처리하면서 일부 재산권 침해사건도 진실규명 결정하였다. 재산권의 침해는 민사적 방법에 의한 손해배상이나 손실보상 등 조절의 방식으로 이루어 질수 있을 뿐만 아니라 재산권 침해에 대한 구제는 위원회보다 법원이 중립성과 전문성이 높기 때문에 재산권은 기본법에 규정된 중대한 인권의 범위에 포함되지 않는다는 견해도 있다. 한편, 재산권 침해의 방식에 따라 인권침해사건의 범위에 포함될 수 있다는 견해도 있다. 즉, 재산권의 침해가 부당한 몰수, 징발, 포기 등의 방법으로 이루어지더라도 단순한 재산권 침해만이 문제되는 경우라면 인권침해사건으로 볼 수 없지만, 재산권을 침해하는 과정에서 협박, 고문 등의 방법으로 이루어지면 인권침해사건으로 볼 수 있다는 견해다. 이런 견해는 침해 형태와 침해 결과를 혼돈하였다는 측면에서 타당하지 못하다.

### III. 분석 결과

대한민국 진실화해위원회 활동 과정에서 나타난 특징은 첫째 기본법에 불확정 개념이 사용됨으로 인하여 결정 과정에서 많은 격론이 발생하였고, 위원의 구성에 따라 결정 내용에 차이가 발생하였는데, 최종적으로 전원위원회의 표결에 의해 진실규명 결정된 점, 둘째 재판에 의한 인권침해가 중요한 과제로 다루어졌고, 결정 이후 법원에 의해 재심재판이 이루어진 점 등이다.

향후 새로운 진실화해위원회가 설치되는 경우라면 입법 과정에서 법률 쟁점을 보다 분명하게 규정함으로써 위원회의 활동이 신속 효율적으로 이루어 질 수 있도록 하고, 견해차에서 오는 불필요한 갈등이 발생되지 않도록 해야 할 것이다.

진실화해를 위한 과거사정리 기본법에서 나타난 인권침해와 관련된 주요 법적 쟁점을 통해 본 진실화해위원회의 문제점과 개선방향

## I. 개요

1. 인권침해
2. 기본법 제정
3. 진실위원회 설립 활동

## II. 주요 법적 쟁점

1. 기본법 규정
2. 침해 시기
  - 해방과 분단,
  - 전쟁
  - 권위주의 통치
3. 침해 형태
  - 행정권에 의한 침해
  - 과실에 의한 침해 문제
  - 사법권에 의한 침해
  - 재심사건
  - 입법권에 의한 침해
  - 소위 악법의 문제, 긴급조치, 국가보안법, 보안감호
4. 침해 결과
  - 중대한 인권
  - 인신에 관한 권리
  - 사망, 상해, 실종, 납치, 의문사
  - 구금, 고문
  - 언론, 양심
  - 재산에 관한 권리
  - 노동에 관한 권리
  - 기타
5. 권고
  - 사과, 위령탑,
  - 배상, 보상
  - 재심
  - 재발방지대책, 교육, 기념관

### Ⅲ. 쟁점별 사례

1. 시기
2. 형태
3. 결과
4. 권고

### Ⅳ. 문제점과 개선방향

1. 문제점, 조사(조사담당자, 위원, 조사방식 등)
2. 개선방향 - 비교법적 특징, 미래에 설립될 방향

