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Legal Diffusion and Judicial Independence: The East Asian Legacy of the Imperial German Judiciary and its Collision with American Ideals

"I have nothing against the independence of judges, as long as I promote them."

-Adolf Leonhardt, Justice Minister of the German Empire (1871-1879) and architect of its judiciary

I. INTRODUCTION

The idea of judicial independence can be difficult to define. As one scholar notes, "it is clear the concept has been more obviously important as a piece of political rhetoric than as a series of legal concepts. It is rarely, if ever, defined. It is generally asserted."[1] In contemporary usage, judicial independence may refer to judges' institutional and individual freedom from pressure from the executive and legislative branches of government (the separation of powers), the degree to which courts practice judicial review, judicial selection, the judiciary's self-governance over administrative affairs, budgetary independence, individual judges' autonomy in reaching decisions, limits placed on judges by sentencing guidelines, incorruptibility, security against undue discipline or dismissal, and impartiality in the face of pressure from the public, media, members of the bar, or racially discriminatory attitudes.[2] The term "judicial independence" may thus signify varying ideas depending on the context, but it is usually understood as a desirable accoutrement of a modern government. It is this positive image and expansive definition that enable the concept to be frequently deployed as a political rhetorical device rather than understood as a clearly defined doctrine.

This paper analyses how the political rhetoric of judicial independence has been used to challenge its doctrinal form in East Asian debates, as reformers have clashed with traditionalists and both sides have been influenced by their own sets of foreign concepts. To be sure, several issues relating to judicial independence are hotly debated in the democratic nations of Northeast Asia, including questions about the independence of the judiciary from the prosecution, the adoption of jury systems, the establishment of sentencing commissions, discipline and impeachment regulations, and

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[1] Robert Stevens, *Judicial Independence in England: A Loss of Innocence*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 155, 158 (Peter H. Russell & David M. O'Brien eds., 2001).

[2] For further discussion of each of these issues, *See* Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301(1988); Erik S. Herron & Kirk A. Randazzo, *The Relationship Between Independence and Judicial Review in Post-Communist Courts*, 65 J. POL. 422 (2003); Daniel Klerman, *Nonpromotion and Judicial Independence*, 72 S. CAL. L. REV. 455 (1998); Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 990-2 (1996) (for analysis of administrative and budgetary independence); Gordon Bermant & Russell Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 839-44 (1995) (discussing individual judges' decisional independence); Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523 (2007); Keith **S.** Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 7 (1987) (on corruption and independence); John Ferejohn, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 978-80 (2002) (on disciplining judges); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997) (on public pressure); Frank Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 636-41 (1999) (for discussion of media criticism of judges); Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703 (1997); Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817 (1998).

the way cases are assigned to particular judges. This paper sets aside these issues and focuses on three that are at the core of judicial independence controversies in democratic East Asia: the process for selecting and training judges and the judicial promotion system. These foundational judicial structures are seen as the strengths and traditions of the judiciary by some, or the fundamental sources of its problems by others.

This paper focuses on South Korea (hereinafter, Korea) and Taiwan because their shared legal heritage from Japan and Germany and parallel historical experiences of democratization movements have contributed to their having substantially similar debates over judicial independence. While there are similar controversies in Japan over judicial training and promotion, since it is a progenitor of the Korean and Taiwanese judicial bureaucracies, those debates will be excluded from this paper because they differ significantly in style and tone as they do not arise out of a democratization protest movement, as is the case in Korea and Taiwan.

This paper's claims are based on qualitative interview data obtained from Taiwanese and Korean judges, lawyers, and law professors. Many interviewees have been directly involved in judicial independence debates and thus were able to explain their motives and feelings as participants. Other interviewees have not been involved in debates and provided their perspectives as interested observers of the state of judicial independence, often as judges directly affected by the issue. Because of most interviewees' concerns about speaking publicly on sensitive issues, I have left all quotes anonymous. When this paper is complete, I will contact quoted individuals to request permission to name them. In the meantime, I have not footnoted quotes to prevent repetitive citations to anonymous interviewees.

This paper is arranged into two main parts: a preparatory investigation of the origins and evolution of what are currently the judicial traditions familiar to Taiwanese and Korean judges and an analysis of local discourses over the status of judicial independence within these traditions. In the first part, I trace the development the German Empire's judicial institutions and its conception of judicial independence. Next, I explain the diffusion processes through which the judicial structures of the German Empire were transmitted to Japan, where they were altered to suit local conditions, and how these institutions were later passed on to Taiwan and Korea. I then describe the state of judicial independence in Taiwan and Korea between WWII and democratization. In the second part, I examine the emergence of reformers and reforms after the advent of democracy in these nations, focusing on the debates over the methods for selecting, training, and promoting judges. I conclude by analyzing the role of legal diffusion processes in framing arguments over judicial independence and in the formulation of reforms.

This paper is a work in progress. Several further interviews are planned, and the data gleaned from them will affect the content of this paper. I look forward to your comments.

II. THE ORIGINS OF JUDICIAL TRADITION IN TAIWAN AND KOREA

Institutional development in the German Empire

Because Taiwan and Korea received their judicial structures from the German Empire, it is important to understand how judicial independence developed there and subsequently diffused to Asia. Starting in the early 19th century, various German states began to adopt basic laws and constitutions with clauses proclaiming the independence of the judiciary. Shortly after the end of the Napoleonic era in Europe, several southern German principalities adopted constitutions because of public pressure, which was spurred as the promulgation of constitutions in the United States and revolutionary France popularized the idea of written constitutionalism.[3] Many of these constitutions included judicial independence clauses, which can be seen as a sign of the influence of Montesquieu's writings

[3] Michael Stolleis, *Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic*, 16 RATIO JURIS 266, 268 (2003); *see generally* ERNST RUDOLF HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789: BAND I [GERMAN CONSTITUTIONAL HISTORY SINCE 1789] 314-335 (1990).

emphasizing the separation of powers.[4] The concept of judicial independence would likely been attractive to many in the German states because of the history of judicial meddling by 18th century German monarchical executives like Frederick William I and his son Frederick the Great of Prussia.[5] Yet Montesquieu did not use the term "judicial independence" or a variation of it. The use of the word "independence" to describe the judiciary seems to have originated in America. The Federalist Papers appear to be the earliest widely-circulated political manifesto to repeatedly use the words "independent" and "independence" to refer to the judiciary, courts, judges, and judicial character.[6] The Federalist Papers quickly diffused to France, where they captured the imaginations of intellectuals.[7] It was mainly from France that Germans learned of the term "judicial independence."[8] Independence terminology was written into many German state constitutions, as seen in the Figure 1.

Figure 1 – The diffusion of judicial independence phraseology in German constitutions

State	Year	Constitutional Clause
Kingdom of Bavaria	1818	"the courts are independent within the limits of their official powers"[9]
Grand Duchy of Baden	1818	"the courts are independent within the limits of their competence"[10]
Kingdom of Württemberg	1819	"the courts… are independent within the limits of their profession"[11]
Grand Duchy of Hesse	1820	"…justice-bestowal and judicial proceedings, within the limits of their legal form and validity, are independent of the influence of the government."[12]
Electorate of Hesse	1831	"the courts for civil and criminal justice are independent within the limits of their judicial profession in all instances."[13]
Kingdom of Saxony	1831	"[courts] are independent in the exercise of judicial office from the influence of government within the limits of their competence"[14]

[4] M. DE MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. &trans., 1989) (1748) (for the famous passage on separation of legislative, executive, and judicial powers).
[5] KARL KROESCHELL, DEUTSCHE RECHTSGESCHICHTE: BAND 3: SEIT 1650 [HISTORY OF GERMAN COURTS: VOLUME 3: SINCE 1650] 68-71 (2005).
[6] Independence terminology appears in THE FEDERALIST NO. 16, 78, 79, 80 & 81 (Alexander Hamilton). The first usage of "independent", or a variation, to describe the judiciary may be in JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *in* 4 THE WORKS OF JOHN ADAMS 193, 198 (Charles Francis Adams, ed. 1851) (The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive and independent upon both, that so it may be a check upon both, as both should be checks upon that.").
[7] GEORGE BILLIAS, AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE 70 (2009) ("*The Federalist* also was recognized instantly as a classic. When the French Assembly took the extraordinary step of making Madison and Hamilton honorary citizens in 1792, the citation read: 'Considering that men who, by their writing and courage, have served the cause of liberty and paved the way for the enfranchisement of man, cannot be regarded as strangers by a nation which was made free by their guiding light and courage.'").
[8] OTTO RUDOLF KISSEL, GERICHTSVERFASSUNGSGESETZ KOMMENTAR, 3. AUFLAGE [COMMENTARY ON THE COURTS CONSTITUTION ACT, 3RD EDITION] 125 (2001)
[9] VERFASSUNGSURKUNDE FÜR DAS KÖNIGREICH BAYERN [BAVARIA CONST.] 1818, tit. VIII, § 3.
[10] VERFASSUNGSURKUNDE FÜR DAS GROßHERZOGTUM BADEN [BADEN CONST.] 1818, ch. II, § 14.
[11] VERFASSUNGSURKUNDE FÜR DAS KÖNIGREICH WÜRTTEMBERG [WÜRTTEMBERG CONST.] 1819, ch. 7, § 93.
[12] VERFASSUNGSURKUNDE FÜR DAS GROßHERZOGTUM HESSEN [HESSE CONST.] 1820, tit. III, art. 32.
[13] VERFASSUNGSURKUNDE FÜR DAS KURFÜRSTENTUM HESSEN [HESSE CONST.] 1831, ch. VIII, §123.

Duchy of Braunschweig	1832	"the courts are subject to sovereign supervision, but independent in judging cases" [15]
Kingdom of Hanover	1833	"the courts are independent within the limits of their competence"[16]
Kingdom of Hanover	1840	"the courts are independent within the limits of their judicial competence"[17]
Kingdom of Prussia	1848	"judicial power is exercised independently in the name of the king, subject to no other authority than that of the law courts"[18]

The spread of judicial independence clauses among German states shows clear signs of being the result of policy diffusion processes similar to those political scientists have long observed among American states.[19]

Upon the Prussian-led merger of various German territories into the German Empire in 1871, the new nation began an ambitious program of legal unification and reform. The Constitution of the German Empire did not contain a clause asserting judicial independence and in fact left the issue of establishing a national court system to the passage of a future law.[20] That law, the 1877 *Gerichtsverfassungsgesetz* (GVG), or Courts Constitution Act, specified in its first clause that, "Judicial power shall be exercised by independent courts that are subject only to the law."[21] This clear and prominently-placed statement reflects the legacy of judicial independence clauses in earlier German constitutions as well as the liberal tendencies of many of the law's authors. The Justice Commission established by the *Reichstag* to draft the GVG had twelve members out of twenty-eight from the National Liberal Party.[22]

The law also codified procedures for the selection and training of would-be judges. The GVG stipulated that in order to be licensed as a lawyer, one needed to finish three years of university education, pass a state examination, undertake a three-year internship (*referendariat*) in the courts and a lawyer's or prosecutor's office, and then pass a second state examination. Discussions in formulating the GVG centered on issues of national centralization versus state control in regulating the legal profession and judiciary, and so the law allowed states to administer the exam and add time to the university requirement while asserting that lawyers qualified in one state were qualified for appointment to judicial office anywhere in the Empire. The court system consisted of four levels: the district, territorial, and superior levels, which were administered by the states, and the Imperial Court, which was overseen by the Emperor.[23] Accordingly, judges of the state courts were to be appointed by state ministers of justice, while judges of the imperial court were selected by the national Justice Minister. To enter a career in the judiciary, an aspiring judge would apply to a state ministry of justice, with the applicant's exam scores playing a strong role in the result. The GVG took further steps to secure judges' independence by making judicial appointments life-long, mandating disciplinary procedures for judges, setting salaries and pensions according to years served rather than rank, and banning transfer to another court against a judge's will.[24]

These rules governing the judicial office fixed several important sociological characteristics of the German judiciary that would later be reproduced in Taiwan and Korea. First, the state

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[14] VERFASSUNGSURKUNDE FÜR DAS KÖNIGREICH SACHSEN [SAXONY CONST.] 1831, ch. 5, § 47, cl. 1.
[15] NEUE LANDSCHAFTSORDNUNG FÜR DAS HERZOGTUM BRAUNSCHWEIG [BRAUNSCHWEIG COMPACT] 1832, ch. VII, § 193.
[16] GRUNDGESETZ DES KÖNIGREICHES HANNOVER [HANOVER BASIC LAW] 1833, ch. VIII, § 156.
[17] LANDESVERFASSUNGS-GESETZ FÜR DAS KÖNIGREICH HANNOVER [HANOVER CONST.] 1840, ch. VII, § 170.
[18] VERFASSUNGSURKUNDE FÜR DEN PREUßISCHEN STAAT [PRUSSIA CONST.] 1848, tit. VI, art. 85.
[19] For a critical review of the literature and theories regarding policy diffusion, see ANDREW KARCH, DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES (2007).
[20] VERFASSUNG DES DEUTSCHEN REICHES [GERMAN EMPIRE CONST.] 1871, ch. VIII, art. 75.
[21] Gerichtsverfassungsgesetz [Courts Constitution Act] 1877, tit. I, § 1.
[22] Kenneth W. Reynolds, "A WISH IN FULFILLMENT": THE ESTABLISHMENT OF THE GERMAN REICHSGERICHT, 1806-1879 239 (unpublished PhD dissertation, McGill University, 1997).
[23] For further discussion of the court hierarchy, see James W. Garner, *The Judiciary of the German Empire. I.*, 17 POL. SCI. Q. 490, 498-500 (1902); James W. Garner, *The German Judiciary. II.*, 18 POL. SCI. Q. 512, 520 (1903).
[24] These provisions are elaborated on at Reynolds, *supra* note 22, at 311-12.

examination system established a model of qualifying judges via a meritocratic test rather than through executive appointment with legislative consent, as in the US. This feature of the German judiciary creates a kind of judicial independence in which judicial selection is, to some degree, legitimated independently from executive and legislative choice, unlike the style of judicial independence known in America. Second, by dividing legal education between university and the *referendar* internship in the courthouse and, often, the prosecutor's office, the GVG gave the judiciary a central role in training future judges, as well as all lawyers.[25] In terms of time, about half of an aspiring judge or lawyer's education took place in the judiciary. Additionally, both state examinations for licensing lawyers were graded by judge-led committees, underscoring the judicial role in reproducing the judiciary and qualifying the legal profession.[26]

Third, by appointing judges for life and giving judicial selection power to state and national-level ministers of justice, Germany unified and sanctioned judicial promotion practices that had existed earlier in the German states. It is noteworthy that careers in the judiciary often began young, and judges could even be sworn in during their early twenties in some cases.[27] While the GVG does not explicitly mention a promotion system, one existed. The system was hardly regulated in the national-level law, as a just few clauses of the GVG refer to it, indirectly.[28] States regulated the judicial office at the three inferior court levels. For example, Prussia created the office of *assessor*, a non-tenured apprentice judge whose term lasted for five years. After this term, an *assessor* could be hired to a fully-tenured, lifetime judicial appointment – or possibly not, and this would not run afoul of disciplinary rules made to protect judicial independence.[29] In all court levels except the lowest, the office of president was established to assign judges to panels within courthouses, in consultation with other panel presidents chosen according to seniority and, at the Imperial level, the "four oldest members of the court." Thus, the de facto promotion system explicitly contained age-based elements.[30]

It is important to note that the promotion system could be used to discipline judges indirectly by denying them promotions to higher office during the course of their careers. Germany's maintenance of this system may have been a deliberate move by Minister of Justice Adolf Leonhardt, who is considered to be the main author of the GVG.[31] Leonhardt is believed to have said, "I have nothing against the independence of judges, as long as I promote them." This statement seems to be an oral tradition, or even a myth, as it is often quoted in German legal circles without being cited from a definitive source.[32] In any case, national and state ministers tended to rely on "qualification reports" on judges' performance when making personnel decisions.[33] At the imperial level, political pressure from the states, eager for their judges to be employed, was accepted by the Justice Ministry in

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[25] In contrast to the Anglo-American tradition, prosecutors are included in the Germanic conception of the judiciary, and they were according regulated by the GVG. This creates further judicial independence issues in Taiwan and Korea that are not discussed in this paper.

[26] For details, *see* Edward V. Raynolds, *Legal Education in Germany*, 12 YALE L.J. 31, 33 (1902).

[27] For examples of various kinds of judicial career paths in the different states by 1877, *see* Reynolds, *supra* note 22, at 391-427.

[28] For example, §127 sets the minimum age of judges at the Imperial Court, the highest level, at thirty-five years, and §134 prohibits the employment of low-ranking auxiliary judges at the Imperial Court. GVG tit. 9, §127, §134.

[29] DIETER SIMON, DIE UNABHÄNGIGKEIT DES RICHTERS [THE INDEPENDENCE OF JUDGES] 42-3 (1975).

[30] Reynolds, *supra* note 22, at 312. Additionally, for regulations regarding age-based seniority in court governance, *see* GVG tit. IV, § 63 and § 65; tit. VIII § 121; and tit. IX § 133 and § 139.

[31] Werner Schubert, *Leonhardt, Adolf*, 14 NEUE DEUTSCHE BIOGRAPHIE 253 (1985), *available at* http://www.deutsche-biographie.de/sfz50391.html.

[32] The quote takes on various forms, and this rendering come from a Bavarian Ministry of Justice and Consumer Protection officer, Gregor Vollkommer, *Doctrinal and Practical Background to Judicial Independence in Germany*, 24 Jun. 2011 at *Judicial Independence Conference* (Office of the Attorney General for Northern Ireland), *available at* http://www.attorneygeneralni.gov.uk/gregor_vollkommer_presentation__pdf_354_kb_.pdf. Another variation on the phrase can be found at, Tayal Senol, *Unabhängigkeit der Justiz und Rechtspraxis*, *in* DER SCHUTZ STAATLICHER EHRE UND RELIGIÖSER GEFÜHLE UND DIE UNABHÄNGIGKEIT DER JUSTIZ 97, 101 (Otto Depenheuer, Ilyas Dogan & Osman Can eds., 2008).

[33] Simon, *supra* note 29, at 44.

deciding some judicial appointments.[34] Thus, in practice, the promotion system created opportunities for political control over the judiciary, whether by the ministries or the presiding judges writing the qualification reports. Ministries rarely deviated from the recommendations of the reports.[35]

The combined effects of these structural features on a judiciary's style of self-governance and adjudication have been noted by comparative law scholar Mirjan Damaska. He aptly characterized the typical Continental-style judiciary as a hierarchical bureaucratic organization:

> While formally free to disregard the legal opinions of their superiors, judges continued to look to the high courts for guidance. Although many factors conspired to preserve this deference to superiors, the attitude can most easily be explained as caused and nourished by recruitment, training, and promotion policies, all congenial to hierarchical organizations. Typically, the beginning of a career on the bench was also the beginning of the professional career for a young lawyer, fresh from a period of internship in the judicial apparatus. Rarely was a judge someone entering a second career. The first appointment (or election) was to the lowest court, a position carrying little prestige, and promotion depended at least in part on the approval of those who regularly reviewed lower courts' decision. In this situation it is hardly surprising that assertion of independence on the part of lower judiciary [sic], even where formally possible, remained quite aberrational. Firmly tied to the mast of civil service, lower judges could hear the seductive music of freedom as Ulysses heard the singing of the sirens.[36]

Damaska's idealized description largely fits the system created by the GVG. And, as will be seen, East Asia would be deeply influenced by the German Empire's style of judicial selection, training within the court system, and judge promotion.

The diffusion of German judicial structures to Japan

The Meiji restoration that began in 1868 set Japan on a course of legal reform. The initial step of formally separating the judiciary from other government powers occurred in 1872, but many reforms remained.[37] In 1882, the Emperor dispatched Ito Hirobumi, a leading statesman, to Europe for about 18 months to study constitutionalism in order to prepare for the drafting of a Japanese constitution. Two of the items the Emperor instructed Ito to learn about concerned "conduct, promotion, or degradation of judicial officials" and "relations between judicial officials and both houses of the diet."[38] Ito and his entourage spent about 9 months in Berlin, during which time he had discussions with and lectures from Rudolf von Gneist, a famous constitutional scholar.[39] Gneist was well-known for his idealistic view of judicial independence, which he developed while studying the English constitution.[40] Additionally, Gneist participated in the drafting of the GVG. Perhaps because of

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[34] Reynolds, *supra* note 22, at 342-72. *See also* Kenneth W. Reynolds, "DER RICHTER IST KONSERVATIV.": THE GERMAN REICHSGERICHT AND THE REICHSTAG FIRE TRIAL OF 1933 20 (unpublished Master's thesis, McGill University, 1992)

[35] KENNETH F. LEDFORD, PRUSSIAN JUDGES AND THE RULE OF LAW IN GERMANY: 1848-1914 (forthcoming 2013).

[36] MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 36-7 (1986).

[37] Tom Ginsburg, *Studying Japanese Law Because It's There*, 58 AM. J. COMP. L. 15, 19 (2010).

[38] WILHELM RÖHL, HISTORY OF LAW IN JAPAN SINCE 1868 47 (2004)

[39] Id. 46-7.

[40] Gneist's complex intellectual development is chronicled in Erich Hahn, RUDOLF VON GNEIST (1816-1895): THE POLITICAL IDEAS AND POLITICAL ACTIVITY OF A PRUSSIAN LIBERAL IN THE BISMARCK PERIOD (unpublished PhD dissertation, Yale University, 1971).

Gneist's influence, the constitution Ito produced upon his return to Japan included an article protecting judges from being deprived of office except after criminal or disciplinary proceedings.[41]

The first draft of the *Saibansho kōsei hō*, or Courts Constitution Law (CCL), was written by Otto Rudorff, a German judge employed as a legal advisor, and other foreign advisors were consulted about the draft afterwards.[42] The proposed law was considered by a committee presided over by the Minister of Justice and other executive officers, with no foreign members. In contrast to the German GVG, the central purpose of the law was not to unify disparate state judiciaries into a single system, but to satisfy Western demands for the renegotiation of unequal treaties. In realizing judicial independence, the image presented to foreigners was of paramount concern, and internal public or intellectual pressures were negligible at best – quite unlike the process from which the GVG emerged. Yet while concessions to provincial control over courts were kept out of the CCL, it remained "largely a copy of the German model" GVG.[43] The CCL took steps to establish judicial independence by creating lifetime tenure, disciplinary procedures, and protections against involuntary transfer.[44] Yet it essentially transplanted the bureaucratic ethos that had the potential to harm judges' independence. The law, passed in 1890, established the systems for judicial selection by exam, judge training through court internship, and promotion through a hierarchy of positions in the judiciary. Moreover, control over these systems was consolidated under the Ministry of Justice by the CCL, in contrast to the GVG's delegation of administrative power to states under the theory of their *landesjustizhoheit*, or state judicial sovereignty.[45] Thus, the German judicial model was modified to have a higher degree of bureaucratic centralization when it diffused to Japan.[46]

What was the state of judicial independence under this law? The record is not clear. In 1891, one year after the CCL's passage, judiciary's independence was tested by a case in which a police officer mistook the Russian crown prince for a spy as he visited a provincial town and attempted to kill him. The executive branch pressured the Supreme Court sentence the officer to death in order to appease Russia, but the Chief Justice refused and judged the policeman according to the letter of the law. From this case, it seems that judicial independence was protected by the CCL and that the concept was even internalized in the minds of leading judges.[47] However, soon after this affair, the Ministry of Justice desired to fire several senior judges and replace them with better-trained younger judges. After failing to transfer some to undesirable locations or impeach them, the Ministry of Justice simply bribed judges into quitting by offering them promotions on condition of retirement at the new positions' higher pension level.[48] One hundred and fifty-eight judges were induced to retire this way, illustrating how a judicial bureaucracy can be used to manipulate court personnel.[49]

From Transmission to Tradition in Taiwan and Korea

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[41] DAI NIHON TEIKOKU KENPŌ [THE CONSTITUTION OF THE EMPIRE OF JAPAN] 1889, art. 58, cl. 2, available at http://www.ndl.go.jp/constitution/e/etc/c02.html. Additionally, two German advisors worked on the drafting process of the Meiji Constitution. Röhl, *supra* note 38, at 50.

[42] Röhl, *supra* note 38, at 737.

[43] Röhl, *supra* note 38, at 738.

[44] Saibansho kōsei hō [Courts Constitution Law] 1890.

[45] Reynolds, *supra* note 22, at 144, 170, and 194 (discussing the role of the idea of *landesjustizhoheit* in the formulation of the GVG).

[46] The adaptation of diffused law to a new context is analogous to the concept of reinvention, which is "the degree to which an innovation is changed or modified by a user in the process of adoption and implementation." EVERETT ROGERS, DIFFUSION OF INNOVATIONS 180-88 (5ed. 2003).

[47] This would run counter to the expectations of some theorists, who hold that while laws can be copied across jurisdictions, legal mentalities cannot. See Pierre Legrand, *The Same and the Different*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 240, 277 (Pierre Legrand & Roderick Munday eds., 2003).

[48] J. MARK RAMSEYER & FRANCES M. ROSENBLUTH, THE POLITICS OF OLIGARCHY: INSTITUTIONAL CHOICE IN IMPERIAL JAPAN 76-81 (1998).

[49] A German historian of Japanese law, clearly familiar with this type of problem, writes that, "...one must take into consideration the fact that under any system that leaves it up to the bureaucracy to appoint the judges... and where a hierarchical order prevails it may happen that persons of not very steadfast personality endeavour to not make themselves unpopular with the personnel department..." Röhl, *supra* note 38, at 746-7.

i) Taiwan

Japan's centralized, bureaucratic judicial style was brought to Taiwan in two waves: first, by the Japanese colonization of Taiwan that began in 1895, but ended in 1945; second, by reforms carried out by the Republic of China government when it existed on the mainland and superseded the Japanese colonial judicial system.[50] By the late Qing Dynasty, ideas about judicial independence began to arrive in China, coming mainly through Japan because the similarity between Japanese *kanji* and Chinese characters made reading Japanese texts easier than reading Western materials.[51] Upon the establishment of the Republic of China in 1912, a constitution containing a judicial independence clause was promulgated.[52] As in Japan, legal reform in many spheres began apace, with the main goal of eliminating the extraterritorial jurisdiction enjoyed by Westerners that was viewed as a humiliation by the Chinese.[53] However, the country's slide into the chaos of the warlord era and war with Japan soon thereafter slowed efforts to establish a functioning, nationwide judiciary. A series of reforms to the judiciary were enacted, but because they would be largely swept away by system of government created by the 1947 constitution, they will not be recounted here. But it is worth noting the development of two institutional features that would affect the judiciary later. First, appointments to the office of judge were by the executive, and even after the launching of an examination system in 1928, the overwhelming majority of judges were not chosen by the exam.[54] Second, the executive, controlled by the Kuomintang (KMT) party by that year, adopted a policy of "legal partyization" (*fălǜ yi dănghuà*), which meant requiring judges to, "apply party doctrines to adjudication and that judges be selected from among those who understood and would carry out party doctrines."[55] These two developments established a pattern of executive interference in the judicial branch that would continue for many years.

In 1932, the *Fǎyuàn zǔzhī fǎ*, or Court Organization Act (COA), was promulgated, and it created a requirement that judges be educated in law at specialized schools or foreign universities, pass an examination, and undergo an internship.[56] Additionally, the law created a career path for promotion through a judicial hierarchy.[57] The law appears to be influenced by the Japanese CCL, although judicial bureaucratic elements of the law, like the later 1947 constitution, are partially interpreted through the political theory of Sun-Yat Sen. Under Sen's theory, governmental powers were to be divided into five branches, rather than three, one of which would be the judiciary. Thus the judicial bureaucratic structure was placed under the Judicial Yuan. The COA did not contain a judicial independence clause, but the 1946 constitution did.[58] When the KMT lost the Chinese Civil War to the Communists and fled to Taiwan in 1949, they brought with them the judicial structure of the COA as well as the habit of violating its independence with little legal pretext.

Since the KMT was attempting to modernize a large nation while in a state of war for most of its time in power up to 1949, it is perhaps not surprising that it did not follow rules regarding judicial appointment. But when the Republic of China settled in Taiwan, it started to reform its judicial personnel practices. In 1955, the government began strictly applying the legal requirements for judges to pass the judicial examination. That same year it also established the *Sīfǎ guān xùnliàn suǒ*, or Judge

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[50] Ironically, the two regimes' legal systems were very similar. Tay-sheng Wang, *The legal Development of Taiwan in the 20th Century* (forthcoming).

[51] Xu Xiaoqun, *The Fate of Judicial Independence in Republican China, 1912-37*, 149 CHINA Q. 1 (1997).

[52] ZHŌNGHUÁ MÍNGUÓ LÍNSHÍ YUĒFǍ [PROVISIONAL CONSTITUTION OF THE REPUBLIC OF CHINA] 1912, ch. 6, art. 51. ("Judges shall adjudicate independently, receiving no interference from higher officials").

[53] Xu, *supra* note 51, at 7.

[54] Xu, *supra* note 51, at 21-2. Judges were often appointed by provincial government, without central government approval. Some local judges were even appointed by local executive officers. Xu, *supra* note 51, at 23.

[55] XIAOQUN XU, TRIAL OF MODERNITY: JUDICIAL REFORM IN EARLY TWENTIETH-CENTURY CHINA 92 (2008)

[56] Fǎyuàn zǔzhī fǎ [Court Organization Act] Ch. 6, art. 33, cl. 5.

[57] *Id*. Ch. 6.

[58] "Judges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference." CONSTITUTION OF THE REPUBLIC OF CHINA (1946), Ch. 7, art. 80, available at http://english.president.gov.tw/Default.aspx?tabid=1114.

and Prosecutor Training Institute (JPTI), to provide classroom instruction to passers of the judicial examination, replacing their internship requirement.

The founding of the JPTI was the result of the diffusion to Taiwan of an analogous Japanese institution, the Legal Training and Research Institute (LTRI). Set up in 1947, the LTRI was designed to enhance judicial independence by removing the Ministry of Justice's power over the appointment of judges and transferring it to the Supreme Court, which has operated the institute. The American occupation government and Japanese officials believed that putting judicial personnel policy entirely into the hands of the Supreme Court would better protect judicial independence. This move supplanted the previously-existing *referendariat*-style court internship with classroom instruction for judges and prosecutors. The Republic of China followed this postwar Japanese development voluntarily, with one key difference – the JPTI was under the control of Chiang Kai-shek's Executive Yuan through the Ministry of Justice, rather than being placed under the authority of the Judicial Yuan.

By 1955, Taiwan's judicial system's selection, training, and promotion practices had settled into a style of operation that has remained essentially constant, down to the present time, resulting in the making of a tradition. Judicial selection was by examination, judges were trained for a year and a half at JPTI, and they would be promoted through a judicial hierarchy. The state of judicial independence under this system was greater than in the pre-1955 era, due to the professionalization of judicial personnel. But there were still scandals because of the KMT's desire to exert political control over the judiciary. For example, activist Lei Chen was given ten years in prison for founding a dissident political journal. Chen's trial judges received the sentence from President Chiang.[59] Additionally, the imposition of martial law, lasting until 1991, allowed for even more direct executive control over court proceedings as many political cases would be transferred to military jurisdiction. The Formosa Magazine affair – in which protestors supporting a pro-democracy magazine were arrested and convicted in military court – is perhaps the most famous example of this.[60] Less visibly, judges who received unfavorable personnel reports would often receive transfers to undesirable provincial courts, perceived to be those located in rural Eastern Taiwan or, even worse, the tiny three-judge courthouse in the Pescadores archipelago off the west coast. Before democratization, courts had two personnel offices – one for ordinary job evaluations, and Personnel Office II (*Rén èr*) for political assessment.

ii) Korea

As in Qing China, late Chosŏn Korea attempted to Westernize its legal system with limited success.[61] Japan's colonization of Korea, formally beginning from 1910, saw the creation of a modern court system modeled on the Japanese judiciary through a series of colonial decrees.[62] After liberation in 1945, and amidst the gradual division of North and South and occupation by a temporary US military government that would last until 1948, independent South Korea began to build a legal system that largely indigenized its colonial inheritance.[63] In 1948, a committee of Korean judges finished drafting the *Pŏpwŏn jojik pŏp*, or Court Organization Law. The law essentially maintained the colonial system, but contained one new element: the establishment of a National Court Administration (NCA, *Sapŏp haengjŏng ch'ŏ*) under the supervision of the Chief Justice of the Supreme Court. This organization was charged with handling the administrative functions of the court system including budgeting, accounting, inter-court relations, managing court property, construction of new courts, management of

[59] For a description of the case in English, see Ko Shu-ling, *Hsieh Launches Electronic Book on Lei Chen's Life*, TAIPEI TIMES, Sep. 3, 2007, http://www.taipeitimes.com/News/taiwan/archives/2007/09/03/2003376996.
[60] Tom Ginsburg, *Law and the Liberal Transformation of the Northeast Asian Legal Complex in Korea and Taiwan*, *in* FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM 43, 56-7 (Terence C. Halliday, Lucien Karpik & Malcolm M. Feeley eds., 2007).
[61] See CARTER J. ECKERT ET AL., KOREA OLD AND NEW: A HISTORY 233 (1990) (Discussing the separation of judicial power in late 19th century Chosŏn).
[62] Edward J. Baker, *The Role of Legal Reforms in the Japanese Annexation and Rule of Korea, 1905-1919*, in STUDIES ON KOREA IN TRANSITION 17 (David R. McCann, John Middleton & Edward J. Shultz eds., 1979)
[63] Gregory Henderson, *Human Rights in South Korea, 1945-1953*, in HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES 125 (William Shaw ed., 1991).

court vehicles, and personnel policy.[64] The NCA was modeled on the Japanese Supreme Court's General Secretariat, which was created a year earlier in 1947.[65] As in Japan,[66] Korea's creation of a judicial body for administrative self-rule was perceived by its designers as a step towards enhancing judicial independence, as it theoretically insulated the courts from executive and legislative controls.[67]

The exam for a law license was a section of the Higher Civil Service examination until 1963, up to which time those who passed would serve as probationary judges for over a year, before sitting another examination to become a regular judge.[68] This can be seen as Korea's adaptation of the *referendariat* system. In 1963 the judicial examination (*sapŏp sihŏm*) was established. Passers of the examination were sent for two years' training to the Graduate School of Law (*Sapŏp daehakwŏn*), which was established at Seoul National University. It was an LTRI-like institute with an American-style law school veneer. Authoritarian leader Park Chung-hee approved its creation as he was consolidating political control over the judiciary, having seized power in 1961, and handed oversight of this school to Paul Ryu, an American-educated law professor. When Ryu fell out with President Park, the Graduate School of Law was closed, and in 1972 the Supreme Court-controlled Judicial Research and Training Institute (JRTI, *Sapŏp yŏnsuwŏn*) was opened in its place.[69] The JRTI was more obviously a replica of the Japanese LTRI than its predecessor, and its founding represented the centralization of training over future judges, prosecutors, and lawyers in an authoritarian political climate.[70]

Korea's use of the judicial examination and JRTI to select and train judges paved the way for career path of bureaucratic promotion through a hierarchy of positions in the judiciary. This system continues to exist to the present. But Korea's judicial promotion system has a unique feature found neither in Taiwan or Japan: forced retirement. Promotion usually occurs at two-year intervals, and if a judge fails to receive a promotion from the personnel department of the NCA twice in succession, he or she faces a tremendous informal expectation to resign from the judiciary. This occurs even though judges are formally guaranteed freedom from dismissal without disciplinary hearings by the 1987 constitution.[71] According to judges interviewed for this article, judges always resign after failing to be promoted. "Some tried to stay on, but they all resign in the end", as one judge explained. How did this informal custom come to exist in the judiciary? Historically, it might be explained by the state's restrictions on the number of licensed lawyers since independence. Passers of the judicial examination nearly all became judges or prosecutors while the practicing bar was populated by retirements from these two groups – until the 1980s. This practice seems to have established a career pattern of judges resigning to join the bar. Sociologically, there is a strong culture of "honorable resignation" (*myŏngt'oe*) in Korean society, according to which employees are signaled to quit when symbolic downgrades in their status are made by employers – which failure to be promoted is certainly perceived as among judges.

Judicial independence in Korea has often been threatened by the NCA's personnel power, as was the case in the German Empire, Japan, and Taiwan. During the years of authoritarian rule, lasting until 1987, Korean Presidents could rely on the Supreme Court Chief Justices they appointed to

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[64] A historical overview of the NCA's establishment can be found at NATIONAL COURT ADMINISTRATION, PŎPWŎNSA [HISTORY OF THE COURTS] 190-192 (1995).

[65] Saibansho-hō [Court Act] (1947) Law No. 59, art. 13. Given the US military governments in both nations at the time, and their involvement in judicial reforms, it is conceivable that they facilitated the diffusion process. For further analysis of the American role in the creation of the first South Korea Court Organization Law, see Joon-young Moon, *Migunjŏnggi Pŏpwŏnjojikŭi Ippŏpgwajŏng: Migungnipmunsŏgwan Pŏpwŏnjojikpŏp Gwangye Munsŏ Ch'ŏlŭi Sogaewa Punsŏk* [The Legislative Process of the American Military Government Period's Court Organization Act: Introduction and Analysis of US National Archives Court Organization Law-related Records], 32 PŎPSAHAK YŎNGU 235 (2005)

[66] Takaaki Hattori, *The Role of the Supreme Court of Japan in the Field of Judicial Administration*, 60 WASH. L. REV. 69, 85-6 (1984).

[67] National Court Administration, *supra* note 64, at 192.

[68] National Court Administration, *supra* note 64, at 539-40.

[69] Neil Chisholm, AMERICAN LAW IN KOREA: A STUDY OF LEGAL DIFFUSION 165-168 (D.Phil. thesis, University of Oxford, 2011).

[70] JAMES WEST, EDUCATION OF THE LEGAL PROFESSION IN KOREA 9 (1991)

[71] Constitution of the Republic of Korea, art. 106.

punish politically non-compliant judges with transfers to village courthouses or even effectively fire them by not promoting them.[72] This tendency has continued even after the adoption of a democratic constitution in 1987 that contained a judicial independence clause.[73]

II. The Hierarchical Judicial Bureaucracy under Attack: Post-Democratic Transition Discourse and Reforms

The transition to democracy in Korea and Taiwan was accompanied by an increase in criticism of the state of judicial independence in these countries. This happened not only as a result of greater protections for the freedom of speech, but also because political dissident groups continued to fight for systematic legal reforms, viewing the advent of electoral democracy as only a step toward liberalizing their society. People in these groups believed that further reforms would be needed to the laws and the architecture of the judiciary for ideals like the rule of law, or even "full" democracy to be realized. Much of the public in Taiwan and Korea supported the idea that democratization was incomplete, lending popular legitimacy to reformist groups.[74] At the same time, as an increasing number of law degree-holders returned from studying in the US, they brought with them new ideals regarding the shape of judicial independence. Formative educational experiences abroad caused many future professors, lawyers, and judges to view their home countries' legal systems as not only different, but inadequate in many ways, including in relation to judicial independence. Many joined reform efforts, acting in manner reminiscent of the "palace wars" phenomenon identified by Dezalay and Garth among American-educated economists and jurists in Latin America during the 1980s.[75]

Yet, the comparative frame of reference that influenced many reformers was informed not only by another country, but by another judicial organizational style altogether. The entirely different methods of judicial selection, training, and promotion in the US seemed to reformers to create a judiciary that avoided the judicial independence problems associated with hierarchical oversight of judges. Damaska depicts the American style of judicial organization as characterized by the "absence of professionalization" and having a "horizontal distribution of authority" that enabled judges to have a higher degree of judicial decision-making freedom vis-à-vis the court hierarchy.[76] This judicial independence issue has historically been more pronounced in the Continent, due to its promotion and evaluation of judges by higher bureaucratic authorities, and is termed in Germany *persönliche richterliche unabhängigkeit*, personal judicial independence.[77] Damaska's conceptualization of the US judicial style illustrates some elements that have attracted Korean and Taiwanese reformers:

> Trial judges were often amateurs, as is sporadically still the case with village and town justices. But even as judges came to be chosen more often from the ranks of lawyers, political service proved to be a more important prerequisite for getting on the bench than professional legal skills or the extent of professional experience… Trial judges are frequently political figures, more inclined to heed the opinion of their constituencies than the opinions of superior courts, even if these opinions are technically binding. The prospect of promotion to a higher court is not nearly so potent a device for instilling hierarchical discipline as it is in Continental judicial

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[72] Dae-Kyu Yoon, Law and Political Authority in South Korea (1990)
[73] Constitution of the Republic of Korea, *supra* note 71, at art. 103.
[74] Yun-Han Shu, Larry Diamond & Doh Chull Shin, *Halting Progress in Korea and Taiwan*, 12 J. Democracy 122 (1991)
[75] Yves Dezalay & Byrant G. Garth, The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States (2002).
[76] Damaska, *supra* note 36, at 27.
[77] Even after reforms to the German promotion system since World War II, personal independence concerns remain. One scholar notes that, "Though [performance] appraisals can be challenged in court there is a risk that oversight may prompt judges to follow a particular line of reasoning to satisfy their superiors. Accordingly there is a widely held belief among judges that judges in Germany are the most independent in the world, but only if they do not seek promotion." Anja Seibert-Fohr, *Judicial Independence in Germany*, *in* Judicial Independence in Transition 447, 475-6, 507 (Anja Seibert-Fohr eds., 2012). (quote on 507).

> systems because even the lowest rung in the American hierarchy of courts is already a very prestigious occupation.[78]

The very different logic that US judicial selection, training (or lack thereof), and promotion operate according to has influenced reform-minded activists in Korea and Taiwan. The following section analyzes the ways the hierarchical judicial style has been criticized and reformed in the two countries in ways that represent the diffusion of judicial independence ideals and institutional organizational principles.

Judicial independence discourse and reforms in Korea

The leading critic of the Korean judiciary is the civil society group People's Solidarity for Participatory Democracy (PSPD, *chamyŏ yŏndae*). PSPD was founded in 1994 by Park Won-Soon, a human rights activist since the authoritarian era who had just returned from two years' studying abroad at the London School of Economics and Harvard Law School, during which time he interned at Human Rights Watch and the ACLU. Under the leadership of Park and other long-time activist colleagues, PSPD developed into the leading legal activist NGO in Korea.[79] From its founding, PSPD has operated the Judicial Monitoring Center (*sapŏp gamsi sent'ŏ*), a program focused on commenting on developments in the judiciary and advocating various reforms. The website for the Judicial Monitoring Center contains many articles criticizing the personnel management system of the judiciary. A recent example may be seen in a write-up of a 2011 symposium of PSPD-associated lawyers and law professors discussing their vision for the Supreme Court. The head of the Judicial Monitoring Center, Professor Ha T'ae-hun, made the following comment in the discussions:

> The judicial personnel system is also important. All judges want promotion, want to go to good places, and want to come to Seoul. The problem of judges retiring to become lawyers and using their connections to influence court proceedings [*jŏngwan yewu*] comes from here, and distrust of the judiciary inevitably arises. A personnel system that can appoint judges for life must be made. Finally, distrust comes from bureaucratization and elite-ification. If these are to be broken, a diversification in the composition of the Justices of the Supreme Court must be shown.[80]

The final sentence refers to Ha's desire to see Supreme Court justices favorable to his views appointed so that they can use their influence with personnel policy to prevent abuse in the promotion system. But it is more important to notice that Ha specifically attacks the "bureaucratization" and "elite-ification" that are inherent in the Continental-style judiciary and Korea's judicial tradition. To combat this, he calls for a lifetime appointment system in which promotion does not occur bureaucratically, a proposal that runs counter to the logic of the Continental judicial style.

In an interview, another law professor with ties to PSPD made the critique more plainly. "Under the Korean Constitution, Korea has only one judge - the Chief Justice of the Supreme Court! And every other judge is his deputy! …he appoints them," the professor asserted. He was referring to article 104 of the Constitution, under which the Chief Justice is selected by the President with the consent of the National Assembly, but the remaining judges on the Supreme Court are nominated by the Chief Justice, and all other judges in the court system are "appointed by the Chief Justice with the consent of the Conference of Supreme Court Justices."[81] In practice, the other judges almost always

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[78] Damaska, *supra* note 36, at 45.

[79] Patricia Goedde, *From Dissidents to Institution Builders: The Transformation of Public Interest Lawyers in South Korea*, 4 E. ASIA L. REV. 63, 78-9 (2009); See generally Joon Seok Hong, *From the Streets to the Courts: PSPD's Legal Strategy and the Institutionalization of Social Movements*, in SOUTH KOREAN SOCIAL MOVEMENTS: FROM DEMOCRACY TO CIVIL SOCIETY (Gi-wook Shin & Paul Y. Chang eds.).

[80] Judicial Monitoring Center, *(Jwadam) Urinŭn Ŏtddŏn Taepŏpwŏnjangŭl Kidarinŭnga* [Dialogue: What Kind of Supreme Court Chief Justice Are We Waiting For?], 9 Aug. 2011, *available at* http://www.peoplepower21.org/Judiciary/816128

[81] Constitution of South Korea, art. 104, cl. 3.

agree with Chief Justice on personnel decisions, despite nominal power to disagree. This professor, perhaps owing to his American educational background, interprets the bureaucratic appointment of judges by higher-level judges as their deputization and as a violation of their independence.

But, to defenders of the judicial status quo, the judiciary's control over its personnel policy is in fact a sign of its independence from other branches of government. The official history of the court system, written by the NCA, states that the judiciary's autonomy created "the complete independence of judicial power from the executive branch, according to the American principle of the separation of three powers."[82] The ambiguity of the concept of judicial independence thus causes reformers to essentially talk past defenders of the judiciary's traditional patterns of organization. The former are concerned about personal judicial independence in bureaucratic context, while the latter feel judicial independence is realized by the very separation from executive oversight created by the bureaucracy.

There are not only external critics of the judicial bureaucracy, but also internal critics. Korean judges are often members of one or many associations that are known as "study groups" or "research groups" (*hakhoe* or *yŏnguhoe*). Study groups are a form of social organization found in East Asia, functioning somewhat differently from country to country.[83] In an academic context, study groups generally consist of people with shared interests meeting regularly to present papers and hold discussion on the group's theme. In Korea, judges often belong to study groups and active ones usually meet monthly. Some groups are organized around a given courthouse while most others are organized on a specific theme, such as medical law. Some study groups are judge-only, while others are operated by professors and bring together academics, lawyers, judges, and government officials. The sociological functioning of study groups deserves serious study that unfortunately does not yet exist and cannot be undertaken here. What is important to note is that there are two powerful study groups in the judiciary that have political agendas.

The Civil Law Precedent Research Group (CLPRG, *Minsapallye yŏnguhoe*) is perceived by judges to be a conservative elite group within the judiciary. Membership in this research group is invitation only, and members are expected to produce high-quality research papers for publication in the group's edited volumes. Unlike other research groups that give away their volumes free-of-charge, CLPRG sells their books. This is cited in Korean legal circles as a sign of the group's elite status. Being a member of this group is widely seen as being beneficial to a judge's career, as many members are said to hold high-ranking positions in the court system. In interviews, Korean professors, lawyers, and judges stated that they believe members of the CLPRG usually control the NCA and make sure to appoint fellow members to the positions in the NCA – a prestigious assignment on the judicial career path. This perception is impossible to verify due to the opacity of both organizations. In 2008, the first Korean law professor to be appointed to the Supreme Court was the President of CLPRG, Yang Ch'ŏl-su, of Seoul National University.

On the other end of the ideological spectrum is the Our Law Research Group (OLRG, *Uripŏp yŏnguhoe*). The OLRG was founded in 1998 during the presidency of left-leaning Kim Dae-jung with the intention of criticizing the judiciary and promoting change in what they saw as an institution that was too conservative with regards to its traditional patterns of behavior. Kim's successor, Roh Moo-hyun, appointed Lee Yong-hoon as Chief Justice of the Supreme Court – the man who is reportedly the founder of the OLRG. Lee attempted to use his position to promote other members of the OLRG to higher positions in the judiciary. Some of his appointees were famous for their outspoken criticism of the courts, with one judge noted for making public comments such as "the Korean judiciary must confess its past sins and cut relations with the prosecutors' office" and, "judges should throw away their case files, since they are made by the prosecutors." Statements like these are considered taboo in the criticism-sensitive Korean judiciary. Because of its nature as a critic of judicial tradition, the Our Law Research Group has been even more secretive than the CLPRG. It was believed to have been ordered to disband upon the election of Lee Myung-bak as President in 2007, but it only went into hiding and has resurfaced in recent years.

In 2005, the OLRG published two volumes of its judges' research papers, which generally espouse critiques of a variety of legal issues, including judicial organization, and especially personnel

[82] National Court Administration, *supra* note 64, at 191.
[83] They are known in Chinese as *xuéhuì* or *yánjiùhuì* and in Japanese as *gakkai* or *kenkyūkai*.

policy. One paper's representative comment sums up OLRG's main concern regarding judicial independence:

> The biggest problem related to the Chief Justice's court personnel policy is that all power boils down to only one person – the Chief Justice. This problem bears a close relation to the bureaucratization of court personnel. At this peak, the Chief Justice is the person who controls personnel policy and causes judges to take positions through the concept of promotion, which is not the concept of changing assignments. This creates a "rank culture," which sets judges in a line from Supreme Court Justice to Associate Judge. Using this kind of a promotion system, the person who rules over personnel policy can dominate the court personnel system.[84]

Here we see the classic concern of personal judicial independence at the forefront of judicial independence anxieties in OLRG. Other papers in the OLRG raise fears about the role of Court Presidents and superior judges in writing personnel reports about judges underneath them in the hierarchy, thus influencing their degree of compliance to higher authority. A variety of changes are proposed, including establishing personnel committees to vote on assignments and one paper even suggests adopting executive appointments along the lines of the American Federal court confirmation system.

III. CONCLUSION

The logic of the bureaucratic judiciary is evolving in both Korea and Taiwan. In both nations, judges within the judiciary and critics outside it call for an end to the culture of promotion that is used to control judges scope for deciding cases. Judges are encouraged to search for higher court decisions and obey them, with the Supreme Court decisions playing a strong role. If judges decide in ways that are not in accordance with Supreme Court precedent, they risk negative performance evaluations. This has created a powerful incentive for judges to hew close to precedent in order to rise through the judicial bureaucracy.

Many of the critics, though not all, oppose the concept of judicial promotion in its entirety, and have sought ways to limit or even abolish it. The related problem of how judges are selected and trained has also been addressed by critics, with some degree of success. In Korea, with the adoption of the law school system has set the stage for the JRTI to be abolished in 2017, although an exact date has not been set. The reformers who created the law school system succeeded in changing the qualifying examination from a Japanese-style "judicial exam" with an extremely low passage rate to an American-style "bar exam" with a passage rate above 70% whose passers become lawyers, rather than judges and prosecutors. The transformation of the bar exam and establishment of graduate-level legal education necessitated a change in how the JRTI system. Reformers within the judiciary, many of whom has become familiar with the US system through study-abroad trips, agreed to abolish the JRTI's role in selecting judges and replacing it with a system that selects judges from among experienced lawyers – although the precise details are still being worked out.

The limits of space in this conference paper have not allowed a full discussion of the Taiwanese reform movement. I will state them here in brief. In the early 1990s, a group of reformist judges (the Room 303 movement at the Taichong Court) succeeded in defying their hierarchical superiors' control, and pressed for changes to the promotion system that de-emphasized promotion and emphasized judicial decision-making in judges' careers. Outside the judiciary, critics at the Judicial Reform Foundation (JRF) – an offshoot of the democratization activism oriented lawyers of the Taipei Bar Association – pressed for changes in judicial authority. Using the media-driven outrage over "baby judges" (those selected in their early twenties) and "dinosaur judges" (those who cling too closely to the letter of the law to the point of overriding common sense ideas of justice), the JRF has attacked the Judicial Yuan's personnel management. Their attacks led to some compromise: The

[84] Yun Sŏng-sik, *Taepŏpwŏnjangŭi Kwŏnhangwa kŭ Pŏmwi-e Kwanhayŏ* [On the Authority and Limits of the Chief Justice of the Supreme Court], *in* URIPŎP YŎNGUHOE NONMUNJIP (I) [Our Law Research Group Collected Theses, Volume I] (Pak Sang-hun ed., 2005).

Judicial Yuan agreed to the establishment of a judicial council with outside members to manage personnel policy transparently, transparent personnel management procedures, and is considering the possibility of lifetime appointments to particular court houses to replace promotion. While JRF reformers view the complete abolition of the current exam-based selection, training in the JPTI, and bureaucratic promotion as the ideal, they are willing to accept the current reforms directly affecting personnel policy. Unlike Korea, the internal and external reformists in Taiwan are divided over the necessity of altering the judicial bureaucracy, as many Taiwanese reformist judges still believe in selection by examination and training the JPTI. However, the JRF critics have shifted their energies toward a strategy of reforming the judiciary through the adoption of a jury system, and they have challenged the Judicial Yuan's proposal for a non-binding jury with one that is binding. Promoting this idea publicly as a way to rein in out-of-touch "baby judges" and "dinosaur judges," they hope it can alter the culture of judicial decision-making, making it more responsive to society's needs, although perhaps fitting uncomfortably with the Continental judicial ethos of expert decision-making.

Today, Taiwan and Korea are rewriting their Germanic judicial tradition. Adolf Leonhardt's stated goal of controlling judges by managing their careers is widely believed to be a problem in the judiciary, although disagreements on precisely how to reform the hierarchical judicial bureaucracy still exist. But reforms are underway. It is unclear whether the new anti-bureaucratic elements will succeed in fitting into the Taiwanese and Korean judiciaries, given their traditions. An experiment in legal diffusion is underway.