COMPETITIVE MODERNIZATION:
THE POLITICS OF LEGAL & STATE REFORM IN NORTHEAST ASIA

TOM GINSBURG, UNIVERSITY OF CHICAGO
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Abstract: In the postwar period, Japan, Korea and Taiwan all had similarly structured legal systems, which were rooted in the developmental state model. I characterize this pattern as the Northeast Asian Legal Complex and identify its three main elements: autonomous judges operating in a limited zone of activity; a small private bar; and administrative insulation through law. All three countries experienced significant pressures in the 1990s, resulting from the end of the Showa bubble in Japan, and democratization in Korea and Taiwan. The politics and dynamics of legal and state reform were very different; yet the three countries ended up adopting a similar set of institutions, including lay participation in criminal decision-making, reformed models of judicial selection and legal education, and greater levels of administrative transparency. Japan’s state transformation has been less significant than those of the other countries, as it is still an outlier in two important areas of legal reform: criminal procedure and constitutional adjudication. But broadly speaking, there has been a pattern of regional convergence on reform models, which presents a puzzle. This paper explains the outcome not as a result of global pressures, but of a competition of ideas associated with modernity and national hierarchy.
INTRODUCTION

Looking back to the 1980s, the image of Japan, Korea, Taiwan and the other Asian “Tigers” was very different than it is today. The Japanese economy was soon going to surpass that of the United States, and Japanese companies were buying Pebble Beach, Rockefeller Center and other trophy properties. Popular books warned of the Japanese threat and counseled Americans on how to cope with Japan as Number One.1 Other Asian countries were close behind, and none closer than Korea and Taiwan.2 East Asia was viewed as having developed an alternative, superior model of capitalism, based on an activist “developmental state” rather than the free market orthodoxy of Anglo-American capitalism.3 This model was deemed to be exportable, perhaps even to the United States.

One key feature of this model was that, from the vantage point of North America, it seemed to be a system of capitalism without lawyers. Bar passage in Northeast Asia was notoriously low, and practicing lawyers did not play the same prominent role in business and government as in the United States. Prominent commentators, including Derek Bok, then-President of Harvard University, focused on the fact that there were about one twentieth the number of legal professionals in Japan per capita as in the United States and called for us to become “more like them.”4 If only our best graduates, Bok suggested, became engineers like the Japanese rather than lawyers, we would be better off.5

What a difference a couple of decades make. The Japanese economy spent the 1990s bouncing in and out of recession, and the period was pejoratively (though prematurely) termed the “Lost Decade”. Professor Ezra Vogel, whose 1979 book Japan as Number One? heralded the earlier era of Japanophilia, authored a book entitled Is Japan Still Number One? and answered in the negative.6 Meanwhile, the Korean economy weathered a sudden and severe economic crisis in the mid-1990s, and had to be rescued by the International Monetary Fund. Taiwan’s economy was a bit more resilient, but it too found its economic model criticized as stagnant and corrupt, as analysts of the region excoriated many of the very features they had celebrated a few years earlier.7

As politicians and bureaucrats in Northeast Asia attempted to resolve their economic malaise, one of the most surprising elements to emerge was the idea that restructuring the legal system was part of the solution for these dynamic economies. Rather than focusing on the United States having too many lawyers, the issue today is how the countries of Northeast Asia can produce more lawyers. Major programs of judicial and legal reform were planned and implemented to various degrees in Japan, Korea and Taiwan. Besides introducing substantive legislation designed to deal with a

1 EZRA F. VOGEL, JAPAN AS NUMBER ONE (1979).
5 Id. at 574 (stating that “Engineers make the pie grow larger; lawyers only decide how to carve it up.”).
7 Id.
global economy, these involved major institutional transformations of the legal system that had been fairly stable for decades. For example, in all three countries, there have been moves to develop three-year graduate, legal education programs, a rare development in any country outside the Anglo-American tradition. The bar has expanded in all three countries. And major legal sub-systems such as corporate and administrative governance have been transformed beyond recognition, after decades of stability.8

This story of major institutional restructuring in one of the most dynamic regions of the world requires explanation. Surely the switch toward law marks an important quasi-constitutional shift in the nature of the state. Why did the allegedly superior model of capitalism fail, and why did the reforms take the shape they did? What will be the likely consequences of the new legal systems? This article seeks to address these questions.

Many might chalk these major developments up to globalization or Americanization. Critical scholars argue that the 1990s saw the rapid spread, backed by American carrots and sticks, of a neo-liberal economic model, and view rule of law programs as part of this imposition. Others, placing less emphasis on agency, argue that globalization has produced a common set of pressures on countries to move to an American model of law and regulatory governance.

These explanations are clearly insufficient to explain the total transformation of the Northeast Asian legal systems, which have also seen state restructuring. First of all, while many regions of the world did move toward more American models, the convergence is only partial at best. While there is some evidence that legal procedures in the European Union are becoming more adversarial, there have been no major institutional changes to core elements of the legal systems in Europe comparable to what has happened in Northeast Asia.9 To the extent there have been American influences in European law and regulation, they focus on criminal procedure10 and regulatory style,11 or are driven by structural developments in EU federalism. But there have been no calls to overhaul or expand the legal profession, legal education has been reformed only moderately if at all, judicial systems have not been restructured, and there is no call for “reinvigorating the system through law.”12 Nor have other regions of the world moved dramatically in an American direction in the core matters of judicial structure and the legal profession, notwithstanding large scale intentional efforts to transfer institutions abroad. Law, in other words, is not at the center of modernization discourse as it is East Asia. Furthermore, the architects of legal reform in Northeast Asia who have devoted a good deal of thought to choosing among alternative models and tailoring institutions to local conditions would resist an explanation that they are simply “Americanizing.” Each of the various reforms involves complexities that cannot easily be ascribed to a unified “American model.”

8 See e.g. Gilson and Milhaupt 2005.
9 Kagan, Burke, Keleman?
10 Langer, Amman
11 Keleman?
12 Get quote from Justice System Reform Council
There is, to be sure, much pressure on developing countries to enhance transparency and the rule of law, and this general “rule of law framework” has been applied to the Northeast Asian economies, notwithstanding its inability of conventional theory to explain its economic success. Global pressures to enhance law certainly exist, but we should not uncritically assume that these pressures are the effective cause of legal reforms, especially when considering such powerful economies as those under discussion.

Another reason to reject blanket globalization explanations is that Japan’s economy has arguably become less globalized, at least in relative terms, in the past two decades. Korea’s economy has, to be sure, become a global leader, and Taiwan’s economy has become integrated into that of the mainland. But at this writing Japan has the lowest levels of import penetration, inward foreign investment, and foreign labor force in the 30-member Organization of Economic Cooperation and Development (OECD). If globalization were driving reforms, we should expect to see Japan’s institutions resistant. Yet Japan has undergone major structural transformations in the structure of its legal system in parallel with those of its neighbors.

To explain the transformation in Northeast Asia, a narrower view is required. But how narrow? In lieu of global explanations, one could argue conversely that each legal system in the region is sufficiently distinct that its transformation ought to be studied in isolation. There is no common tradition of “Asian law” and we should therefore treat each system as distinct. This is a valid position, but I believe there is significant payoff to a comparative intra-regional approach, looking at common genealogies and institutional structures in the relationship between law and political economy. Of course, each legal system has its own dynamics and institutional history, just as do the political, economic and social systems in which law is embedded. Nevertheless, I hope to demonstrate that looking at each in light of the others will be useful to illuminate aspects that might not otherwise be apparent if we were to consider each in isolation.

A further justification for looking at Japan, Korea, and Taiwan together is that these legal systems of Northeast Asia share common historical roots. Indeed, the historical layering of Chinese influences, Prussian law (as transmitted through Japanese colonialism) and postwar American hegemony is a common feature with important institutional ramifications. The Meiji model of law was authoritarian in character, yet survived relatively intact even in democratic postwar Japan. Furthermore, legal actors in all three countries pay attention, and increasingly so, to developments in the others, enjoying somewhat of a common vocabulary. The story of these national institutional reforms is partly a chapter in a long story of regional interaction.

I characterize the story as one of competitive modernization. Since the Meiji era in Japan, borrowed law and legal institutions in Northeast Asia have formed the grammar of modernity, used by reformers to help advance competing visions of national development. In all of these visions, law is used instrumentally to achieve certain goals of shaping the polity, be it a bureaucratic developmental state led by elites, a liberal participatory model of democratic activism, or a neo-liberal model of economic freedom.

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13 Ohnesorge
15 Cf. Oquendo.; Marfording etc.
The modernization discourse is competitive because different visions of [Japanese/Korean/Taiwanese/Chinese] society animate the reforms offered by different players. The broader book project of which this article is part traces the reform debates in various fora, and elaborates the micropolitics of reform in each case.

A subtext of the story of domestic legal reform is international competition. Competitive modernization is driven ultimately by elite visions of national power, in which law is used to reinvigorate the nation (as aptly put in the 1999 interim report of the Justice System Reform Council in Japan.) Competition discourse may in part explain why the adoption of a legal institution in one country in the region increases the probability that it will be adopted in one of the others in the region. Competitive modernization may help to explain tightly coupled regional reforms, in which global divergence is accompanied by partial convergence within the region. In this sense, the story is one of diffusion, and emphasizes the importance of the region as a unit of analysis.¹⁶

Diffusion processes have been the subject of a growing literature in recent years, and a variety of mechanisms have been proposed that drive success.¹⁷ One categorization divides mechanisms into emulation, competition, and policy success.¹⁸ Weyland shows that cognitive limitations and behavioral psychology, in particular the search for shortcuts, plays an important role. Much of this work emphasizes elites as the channels through which reforms are borrowed.

Katarina Linos suggests a democratic model of policy diffusion, in which political elites looking for reforms focus on models that voters have information about. The notion here is that voters are weakly informed, and so lack direct information. But entrepreneurial politicians will adopt reforms that have been tested abroad, on the theory that this reduces downside risk to the politicians. Borrowing, in her view, is policy insurance.¹⁹ She also emphasizes that large, rich and proximate countries will be more prevalent among the source countries for ideas, because voters are likely to be exposed to more media coverage of such countries. This view may help to explain why it is that reforms, such as those described here, cluster at a regional level. In my view, domestic politics determines the selection of reforms; domestic politics determines the reformulation or adaptation of reforms; and domestic politics determines the implementation of reforms, which then become fodder for other countries’ considerations.

The article is organized as follows. Part I describes what I call the Northeast Asian Legal Complex. Part II examines the pattern of reforms in summary format. Part III considers the implications for theories of legal and institutional change. Part IV concludes.

I. THE NORTHEAST ASIAN LEGAL COMPLEX

¹⁶ Read Katzenstein
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¹⁹ Katarina Linos, BENCHMARKS FROM ABROAD: SELLING VOTERS ON HEALTH AND FAMILY REFORMS (book manuscript on file with author).
Japan, Korea and Taiwan are successful societies by virtually any metric. Sites of “miraculous” economic growth in the postwar period, they have done a good job of educating their citizens, maintaining social cohesion, and, by the turn of 20th century, establishing vigorous democracies. Scholars of East Asia, however, have paid relatively little attention to the legal system and its role in these developments. Law is seen as a sideshow to more conventional stories of bureaucratic discretion, political coalitions and a benevolent international environment.

This section develops a characterization of the core legal institutions of these legal systems under the rubric of the “Northeast Asian Legal Complex”. I define a legal complex is a set of mutually reinforcing institutions that make up the stable core of a legal system. The term is meant to highlight the systemic inter-relationship and integration of a set of institutions, which served to complement and reinforce each other in a stable way.

The complex has its origins in Japan’s peculiar adoption of modern Western law in the 19th century, and its subsequent transfer of western-style legal institutions to its colonies in Korea and Taiwan. Japan’s modernization was carried out largely under an authoritarian regime, and so the Meiji system can be seen as a species of authoritarian legality. But it was a genuine variant of legality. Following the Meiji restoration of 1868, Japan embarked on a rapid program of modernization that included adoption of a Constitution (1884), a Civil Code (1890) and institutional structures of modern law such as courts, prosecutors and administrative agencies, all as borrowings from Western (mainly German and French) sources. These institutions were subsequently transferred in large part to Japan’s colonies in Korea and Taiwan.

As in political economy, Japan’s adoption of Western legal institutions did not mean that these institutions operated in the same manner as in the West. Japan’s adoption of Western law was a rearguard action to maintain independence, an “inoculation against colonialism rather than infection by it.”20 With the political economy organized around state intervention and late development to catch up with the west, law received much less emphasis as a means of social ordering—instead it provided a kind of formal legitimacy to demonstrate to other nation-states that Japan was a member of the club of modernity. It might thus be considered an embodiment of the Meiji slogan wakon yosai-Japanese spirit, Western technology. Law was a kind of Western technology, adopted for instrumental and symbolic reasons to demonstrate Japan’s status as a “civilized” nation. In this it was remarkably effective.

The Northeast Asian legal complex had three main elements: a professional, hierarchically organized, somewhat competent court system; a small, cartelized private legal profession without much independent political influence; and administrative law regimes that insulated bureaucratic discretion exercised by developmental regimes. These institutions interacted in a particular way that was internally consistent and stable, and understanding them provides insight into what was most important about law’s role in the political economy of the high-growth era. The next section considers each of the core institutions in turn. The focus is on the postwar era.

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A. The Institutions of the Legal Complex

1. Semi-autonomous Judiciary

The judiciary in Japan had emerged by the 1890s as a discrete branch of government, with a strong reputation for consistency and an insistence on resisting overt political pressure. The judicial system was organized hierarchically, with effective control at the top, and developed an internalized institutional emphasis on providing like solutions to like cases, helping to render their decision-making predictable and thereby contributing to a reasonably sound business environment. Courts had a moderate capacity to handle civil and commercial disputes. This in turn helped to keep litigation rates low in Japan relative to other advanced industrial democracies.

While there were greater concerns about judicial corruption in post-colonial Taiwan and Korea, the basic institutional structure of a hierarchically organized judiciary operated effectively, especially when compared with judiciaries in other developing countries coming out of colonial rule. This is not to assert a complete autonomy from political influence. The KMT and the Korean strongmen attempted to develop means of monitoring and disciplining judges, particularly in politically sensitive disputes. These mechanisms of discipline were easier for a Leninist party like the KMT to implement than, say, Park Chung Hee in Korea, whose interference with judicial independence was clumsier. But in both countries, in the economic sphere, the judiciary retained some autonomy. It had a distinct professional ideology and norms of neutrality in most cases.

The relative autonomy of the judiciary is a mark of institutionalization. Huntington defines institutionalization as occurring when an organization has effective internal norms and clear separation from its external environment. What happens in the black box of the institution matters for outcomes. Judges are not merely pure agents of politicians, though their autonomy may be bounded in politically salient cases. For East Asian judges, even if career incentives were manipulated for politically sensitive cases, the judiciary as a whole did fairly well along the dimension of other values such as predictability, efficiency, clarity in the law, and judicial accountability.

A word is in order on the last point. I am not asserting that the judiciary was or was not independent, which is a topic of major debate in English-language studies of the postwar Japanese legal system. Broadly speaking, that debate has pitted John Haley, [21] For arguments about the predictability of Japanese courts see J. Mark Ramseyer and Minoru Nakazato, The Rational Litigant: Settlement Amounts and Verdict Rates in Japan, 18 J. LEG. STUD. 263 (1989); also J. Mark Ramseyer, Reluctant Litigant Revisited: Rationality and Disputes in Japan, 14 J. JAP. STUD. 111 (1988).

[22] While discipline may have been easier for the KMT, selection was more difficult because of the existence of a distinct Examination branch of government responsible for safeguarding the integrity of the entry exams. Nevertheless, there is some evidence that judges were appointed from loyalists, including occasionally military and intelligence figures.


who has argued that the Japanese judiciary enjoys a greater degree of independence from political intrusion than in any other industrial democracy, both with respect to individual cases as well as the composition of the judiciary.”

against J. Mark Ramseyer, who with various co-authors has demonstrated that the Japanese Supreme Court Secretariat manipulates career incentives to punish judges with radical views, or who oppose policies central to the regime. Both scholars have provided convincing evidence, but the debate concerns what might be called the right tail of the distribution of cases. That is, the vast majority of ordinary cases do not involve political matters, the Liberal Democratic Party or other issues salient to the governing elite. For these ordinary cases, justice was fairly uniform and of high quality. This was, at some level, a desirable policy outcome for Japan’s rulers, for it allowed them to make credible commitments and thereby underpinned the market economy.

One need only look at courts in other developing countries, as we might characterize Japan, Korea and Taiwan early in their modern history, to see how rare this is. The typical court system in the typical developing country is corrupt, inefficient, and does not deliver uniform outcomes. It may also be subject to political influence in case high and low. Whether or not East Asian courts were independent in every case in some abstract sense, their bureaucratic structures were relatively immune from case level influences and so we characterize them as semi-autonomous: independent over a limited scope of cases.

One way to think about this is that the bureaucratic structures insulated individual judges from external pressures by making them accountable to internal constituencies in the judicial hierarchies. Such a system facilitates investment in the collective reputation of the judiciary as a whole rather than in the individual reputation of the judge. The judiciary as a whole enjoys a good deal of autonomy, even though individual judges are not independent in the sense of being able to decide cases without regard to the views of other judges.

2. Small Private Bar

Predictable courts working in a relatively small zone meant there was little pressure on the system of state-controlled legal training and rationed legal services, which led to very low rates of lawyers per capita. In all three countries, legal training


27 Pratt reports that rates for the judges exam were comparable to Japanese and Korean rates, while for the private bar pass rates fluctuated between five and fifteen percent. See, e.g., Joseph L. Pratt, The Two Gates of Taiwan National University Law School, 19 UCLA PAC. BASIN L. REV. 131, 156 (2001). My data, presented in Tables __ and __ in Chapter Two, shows three distinct periods. In the early 1950s, the number of applicants for either the judges or lawyers exam was small and the pass rate slightly higher. Around
was generalized undergraduate training, with the bar exam treated as a separate goal for a very small proportion of those who completed undergraduate legal education. Relatively few legal graduates would try to pass the bar, and a very small proportion would actually succeed. The bar pass rates fluctuated, but were below three percent in all three countries for most of the postwar period. Most bar passers devoted additional years of study to prepare for the test beyond the undergraduate degree. In Japan and Korea, bar passage actually led to further training in a judicial training institute, encouraging bar-bench ties, but Taiwan had separate exams for lawyers and judges.

For those lucky and talented few who passed, the bar exam was the gateway to, rather than the end-point of, professional legal training. Special institutions run by the Supreme Courts, called the Judicial Research and Training Institute (JRTI) in Korea, the Legal Research and Training Institute (LRTI) in Japan, and the Judicial Training Institute in Taiwan would accept bar passers and train them together for a two-year period. In Korea and Japan, prosecutors, judges, and practicing lawyers would be trained together, socialized together, and then disseminated into the work force in their respective fields. Taiwan featured a separate school for judges and prosecutors, while practicing lawyers were subject to post-passage training only by the bar.

Thus, legal education was really divided into three different components: undergraduate legal education, a series of cram schools which would prepare one to pass the bar, and, finally, a special professionalized legal education, which came after bar passage and served as the only real practical training one would receive before entry into the various legal professions.

In Japan, the bar exam was administered by a committee consisting of a Justice Ministry official, Secretary General of the Supreme Court, and a practicing attorney recommended by the federation of bar associations (Nichibenren). In Korea, the exam was similarly controlled by the Supreme Court. Exam passage was kept fairly low, basically unchanged for three decades from the early 1960s, through a consensus among the government, courts and, of course, the practicing bar, which preferred to collect monopoly profits from a restricted profession. Once admitted to the Training Institutes, prospective lawyers undertake a combination of classroom and practical training, during which time an individual might work in all three “branches” of the legal profession: the bar, the court and the prosecutors’ office. This tends to facilitate a corporate identity among the three sub-professions.

Again, levels of autonomy from political and social power varied among the few who were able to run the gauntlet to enter the profession. The quasi-Leninist KMT sought to control the bar, while the Japanese bar remained more independent. In each country, though, the few lawyers had no incentive to fight for a larger profession because

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1960, the number of applicants rose dramatically, while the number of passers remained relatively constant. Then after the 1980s reform the numbers of passers rose yet again as did the rate.


31 Subsequently reduced to 12 months in Japan.

32 Actual movement from one profession to another is rare in Japan but a bit more common in Korea, where judges and prosecutors frequently retire into the private bar.
of the monopoly rents they collected. Thus the common element of a small private bar was a feature of the Northeast Asia legal complex. This only began to change very late in the postwar period.

One might wonder how economies as advanced as those in Northeast Asia could function without large numbers of lawyers. The answer lies in part in the fact that many legally trained persons who were unable to pass the bar nevertheless worked in quasi-legal jobs without companies and the government. Although Japanese and Korean capitalism may have functioned with a relatively small number of lawyers, legal education was absolutely central to the systems of governance. As in virtually the entire world, legal education was primarily an undergraduate phenomenon and followed the German concept that legal education serves as a pathway to bureaucracy, and to big business, as well as to distinctively legal professions. Legal education was high status, generalist training, rather than specialized graduate, professional, legal education designed to produce practicing lawyers. At the center of the Japanese system was the undergraduate law faculty at Tokyo University, which produced the majority of elite bureaucrats as well as leaders in law, finance and business. Seoul National University played a similar role in Korea, as did National Taiwan University in Taiwan.

In addition, a large amount of “legal” work is done by adjunct professions such as scriveners, paralegals and others with competence in specific arenas of practice such as tax, administrative filings, and patent applications. This meant that the scope of activity undertaken by members of the formal bar was smaller than the comparable scope in, say, the United States. The system is closer to that of France, with its relatively limited number of attorneys but a set of other quasi-legal professions.

There were many implications of this model of restricted access to the legal profession. It was fairly difficult to obtain legal services in both countries, and much of the supposed non-litigiousness of people in each society can be attributed to the lack of the ability to find a lawyer if one is needed. Furthermore, most lawyers are concentrated in the big cities of Seoul, Taipei, Tokyo and Osaka, leading to concerns about access to legal services for the majority of the population that lives outside those metropolises.

3. Administrative Insulation

One of the most important parts of the Northeast Asian legal complex was the administrative law regime, which has received relatively little attention from political

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33 Johnson, MITI, supra note 3, at 58-62 (detailing career choices of Tokyo law graduates and reporting that at one point 73% of officials at the level of department chief or higher were Tokyo graduates.)

34 These include zenrishi, benrishi, gyosei shoshi, and shiho shoshi in Japan; falu zhuli in Taiwan, and ___ in Korea.

economists but was essential to insulate state management of the economy. Courts in all three countries took a hands-off approach to supervising administration allowing the operation of an informal, flexible style of regulation based on broadly worded statutes. While a large amount of administrative policymaking is inevitable in any modern state, it has been especially apparent in Northeast Asia because of broad delegation to ministries. Less precise legislation requires more making of new rules by ministries. In Japan, this involved a consensual policy-making process governed by shingikai, deliberative councils involving the concerned parties as determined by the relevant ministry. Similar mechanisms of business-government coordination were prominent in Taiwan and Korea. The emphasis was on selective, ex ante private participation in policymaking arenas that were structured by ministries. This system provided transparency for the most interested players, and high levels of compliance once policy was adopted. For outsiders, however, there was no transparency whatsoever.

In implementing regulatory policy during the high-growth period, the Northeast Asian state operated primarily through case-by-case ad hoc determinations, made on the basis of flexible “administrative guidance” rather than pre-announced rules. In such a circumstance, without legislative clarity or clear rules, private actors have no choice but to cultivate relationships with the bureaucrats who will in fact be making distributive decisions on a discretionary basis.

As with judicial independence, there is a large debate concerning the extent to which bureaucratic discretion was exercised in the shadow of political power. I generally lean toward the view that political power mattered. But as with the judiciary, this meant that there was a large number of instances of low political salience in which the de facto decision allocating resources was made by bureaucrats. Furthermore, there is no real controversy over the assertion that the bureaucracy was insulated from public scrutiny. Accountability, to the extent there was any, was oriented to the politicians rather than the public directly. Transparency, as associated with rule-of-law orthodoxy, was not in the interests of either the bureaucrats or their political masters. In this sense, the entire structure of Northeast Asian postwar political economy was reflected in and sustained by the structure of public law.

Private parties were subject to particularistic regulation, embodied in administrative guidance, that emphasized informal business-government relationships rather than general, transparent rules applicable to all. This mode of regulation was sustained by a lack of transparency. Had regulation been transparent, the companies could have made rational calculations. But because of its flexibility, private information on ministerial policy became crucial for business planning. It should also be mentioned that in many sectors there was an implicit bargain at work, particularly among large firms in Korea and Japan. Private entities would be subject to strong regulatory pressures but


37 Hideki Kanda, Financial Bureaucracy and the Regulation of Financial Markets, in Japan: Economic Success and Legal System 315 (H. Baum, ed., 1997) (noting this system reduces uncertainty about policy relative to systems with extensive judicial control.)
received in exchange an implicit promise of no failure. Market entry was tightly controlled as well.

It must again be emphasized that this configuration had a particular legal construction. There were no generalized administrative procedures rules. Government information was not freely available, meaning that bureaucrats could use the regulation of information flows as an important tool in interactions with both private firms and politicians. While administrative litigation was technically possible, the restricted private legal profession meant that litigation rates were fairly low. Administrative law provided some review of retail level application of law as applied to individual cases, but virtually no challenge to wholesale level rulemaking, and administrative guidance was generally held to a high standard of review. Courts would intervene if and only if a private party made absolutely clear its refusal to comply with administrative guidance, a difficult feat given both the high status of bureaucrats and the myriad collateral tools government held to shape an individual firms business environment.

B. The Equilibrium of the Legal Complex

Each element of the Northeast Asian legal complex interacted with the others to produce a set of stable and reinforcing institutions. The predictable courts minimized pressure for private litigation (at least when compared with American “adversarial legalism.” This allowed the state to maintain severe rationing of private legal services. A small private bar, in turn, minimized the possibility of social movement litigation challenging the insulated domains of policymakers. Furthermore, the possibility of judicial and prosecutorial retirement to the bar in Korea and Taiwan led to a comfortable conservatism in those countries among the majority of legal practitioners, particularly in government. In Taiwan this was magnified by the ability of military lawyers to gain preferential admission to the bar without passing the exam. (Interestingly, there is no general pattern of judicial retirement to the bar in Japan, and the private legal profession tends to be more liberal as a result. Left-leaning bar passers have traditionally more likely to select the private bar as a career in Japan than in Korea and Taiwan.)

The basic configuration of administrative discretion exercised by elite bureaucrats and a restricted supply of legal professionals meant that law was relatively unimportant as a means of social ordering, particularly in interactions with the state. Regulated parties, lacking legal recourse, were forced to cultivate particularistic relationships with the state, reinforcing the image of bureaucratic dominance. Long term relationships

38 Kanda, id.

39 This required a failure to continue to borrow from Germany, which instituted an elaborate and transparent regime of administrative law in the postwar period.

40 Kanda, id. at 314. For the retail/wholesale distinction, see Ginsburg The Regulation of Regulation, in CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES AND MARKETS IN EUROPE, JAPAN AND THE U.S. 321-38 (Eddy Wymersch, Hideki Kanda, Harald Baum and Klaus Hopt., eds., Oxford University Press, 2006)


among bureaucrats and the large industrial firms provided the basic structure, reducing the need for general rules to govern arms-length transactions. The Northeast Asian legal complex cabin law to a narrow zone.

In Korea and Taiwan, in particular, there was the additional factor of authoritarian rule, justified to maintain security from the external threat of, respectively, North Korea and the People’s Republic of China. North Korea and the PRC were not merely neighboring communist countries, but regimes that claimed to be the sole legitimate governments of the nation; they provided a very real alternative vision of national identity and legitimacy. The resulting anti-communist ideology and cold war imperatives meant that both South Korea and the ROC regimes needed some degree of formal legality to distinguish themselves from the totalitarian alternative. Thus the very existence of a small private bar and formal institutions of judicial independence was necessary to distinguish the regimes from the totalitarians who lacked any associational life or professional integrity. Formal constitutionalism, too, was needed to maintain U.S. support. The presence of liberal constitutional language meant that liberal law was at least a formal ideal to which reformers and oppositionists could draw on. As Linz noted some time ago, the formal promises and political symbols that accompany authoritarian regime’s birth are themselves constraints. For most of the period, however, this potential remained dormant. Thus, notwithstanding, distinctions between Korea’s bureaucratic-military authoritarian regime and the Leninist KMT on Taiwan, the two countries shared a formal commitment to legality that ended up constraining the regimes somewhat.

This account has emphasized similarities among the three countries in terms of legal institutions and also political economy, reflecting to a certain extent the traditional approach which emphasizes the role of a rationalized state in planning outcomes. To be sure, there were some differences in political economy, for example in the timing and intensity of export-oriented and import-substituting strategies, the openness to foreign investment and the relative roles of the states in producing these strategies. Taiwan focused more on light industries and decentralized policy planning, while South Korea had a highly centralized state directed structure of industrial conglomerates, and Japan’s economy was a bit less centralized. These differences ought in theory to matter somewhat for law: a horizontal, incentive oriented system such as Taiwan’s would be more favorable to legal ordering than the highly discretionary statist Korean regime. But there were also ethnic dimensions, with native Taiwanese having relatively large economic power while the mainlanders maintained political control. This led to a combination of highly fragmented measures for the economy to disperse economic power while inserting the state as a mechanism of control. Thus, while law could have played a relatively greater role in economic ordering in Taiwan, it did not seem to do so, and in any case the scope of activity governed by the judiciary was still relatively small compared to economies of equal wealth elsewhere in the industrialized world.

44 T.J. Cheng, in Manufacturing Miracles, at 141.
45 Cheng at 143.
My account emphasizing the continuities of the Japanese colonial institutions is surely controversial, and contrasts with nationalist imagery that is particularly dominant in Korea that saw all law as a foreign imposition, without any corresponding benefits. Yet it is consistent with recent historical scholarship that emphasizes both the intense contestation within the colonial structure as well as the reforms undertaken before full colonial status was secured. My position might be called post-post-colonial—I am less interested in making a political statement about the nature of colonialism than in understanding how institutional structures are created and evolved. Japanese law in Korea and Taiwan was hardly “performative” but institutionalized, and institutions matter because they endure.

II. Reforms

Many studies of institutional change emphasize the importance of external shocks that form pressures for change. Legal reform in Northeast Asia is no exception, having been triggered by broader transformations in the political and economic spheres. The period 1987-97 saw epochal changes in the political systems of Japan, Korea and Taiwan, though occurring at different magnitudes and paces. In Korea, democratization began in 1987 with mass demonstrations against the regime of General Chun Doo-hwan, and culminated in the adoption of a new constitution in October of that year. In Taiwan, reforms accelerated with the accession of Taiwan-born Lee Teng-hui to the presidency of the country after Chiang Ching-kuo’s death in January 1988. The reform process was more gradual, and the first direct presidential election was held some eight years later, with a transfer of power not occurring until 2000. Japan, of course, was an established democracy throughout the period, but a decade-and-a-half period of reform was launched with the first fall of the LDP in 1993. Big business began to complain about the lack of capacity in the legal system. As the economy declined, more disputes emerged at the same time that deregulation was decreasing government control over the economy. When business is embedded in a network of dense relationships with its workforce, buyers, suppliers and creditors, disputes can be suppressed or dealt with informally. The shrinking pie (or at least less rapidly expanding pie) may have frayed such “social” ties and led to more disputes. All of these developments reflected a sense that the institutions that had promoted high growth were no longer able to function in the era of economic decline, and trust in the government as a kind of steward of the economy disappeared. This section traces the reform process in the three jurisdictions, emphasizing the reciprocal links between legal and political reform.

Coordinated reform of multiple institutions is, perhaps, a distinctive feature of policy reform in Northeast Asia. The distinctive politics of the deliberative council, long

46 Hahm cited in Kim
48 I prefer this term to postnationalist. Kim 1997:1070.
49 Cf. Alexis Dudden, JAPAN’S COLONIZATION OF KOREA: DISCOURSE AND POWER 100 (Honolulu: University of Hawaii Press 2005)
a core institution of Japanese policymaking, is present in this story, though the technocratic model of *shingikai* has been transformed in the rough and tumbly world of democratic politics in Taiwan and Korea, as we shall see. We consider each country separately.

**A. Japan**

1. Introduction

On January 7, 1989, the Showa Emperor died of cancer after the longest imperial reign in Japanese history. As the Heisei era began, Japan was in a confident mood, buoyed by its spectacular economic power, the decline of the Soviet threat, and increasing admiration from neighboring Asian societies for its (allegedly) statist development model. But the economic boom of the late 1980s—spurred by a combination of a high yen, loose monetary policy, and rapid speculation in asset prices—turned out to be illusory and was to begin bursting only a year into the Heisei era. Within three years, asset prices had tumbled and a series of financial scandals developed, revealing a bad credit problem on a massive scale. In the face of these challenges, Japan’s vaunted front-line bureaucrats failed, taking a number of steps (such as pushing for a tax increase) that defied conventional logic, and proved the conventional logic right. The Ministry of Finance, once seen as the central and most powerful ministry, was extensively criticized for mishandling and exacerbating the banking crisis that plagued the Japanese economy for a decade and a half.

The political scene was no better than the economic one. The long-ruling Liberal Democratic Party (LDP) began the Heisei era in what appeared to be downward spiral. The late 1980s Recruit scandal revealed a massive web of bribe-taking, and a further series of scandals forced several top LDP leaders to resign. A loss of the Upper House in the 1989 election led to internal turmoil, and mavericks such as Ozawa Ichiro began to leave the LDP to form new parties. This changing political scene led to a shocking result in the July 1993 lower house election, when the LDP failed to secure an absolute majority. The Socialist party, which had also suffered severe losses, was able to join with six other small parties to form a new government, led by former Kumamoto governor Hosokawa Morihiro.

This short-lived government sought to reform politics by passing an electoral reform, and also launched an administrative reform program, to bring an end the “1955 system” of LDP dominance and Socialist opposition that was ritualized and without substance. It was followed, after a brief prime ministership of Tsutomu Hata, by Japan’s first and only socialist government from 1994-1996. The Hosokawa government’s explicit “reform” policy brought the need for reform to the very center of the political agenda, where it remains today. From then on, the 1990s were the decade of reformism,

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51 See Gregory Noble, *Humpty-Dumpty Had a Great Fall*, 34 ASIAN SURVEY 19, 25 (1994) (attributing the fall of the LDP to the years of scandal, internal fissions in the party and economic and demographic change).
with different groups each claiming the mantle of reform and restructuring. The cozy iron triangle of the LDP, big business and elite bureaucrats was a central target—but even actors within the iron triangle claimed to be reformers.

2. Reforming State Institutions

The administrative reform program turned out to be a major turning point. The perception of widespread bureaucratic mismanagement was exacerbated by a series of scandals involving bureaucrats, and received much public attention through occasional kiss-and-tell tales from elite bureaucrats. These scandals were several. The 1995 Hanshin earthquake saw the Japanese mafia leading the recovery effort, while government did relatively little relatively late. Japan’s government seemed paralyzed, with turf battles hindering the recovery effort. Scandals included massive mishandling of AIDS Policy at the Ministry of Health and Welfare. The ministries appeared to be in cahoots with major blood products distributors, and suppressed information on tainted blood products, leading to the deaths of hemophiliacs. In contrast with traditional approaches to scandal, the cases ended up in court.

As with the electoral reforms, the timing of reforms appears to be largely related to the fall of the LDP. The very first act of the Hosokawa government in 1993 was to pass the Administrative Procedures Law (APL), which had been on the drawing board for forty years, and symbolized the desire to make government more accountable. This law responded to longstanding pressure for administrative transparency from the United States, as well as growing discontent in the business community with the way the Japanese bureaucracy processes information. However, the Hosokawa government made no substantive changes to the draft APL that had been prepared under the LDP. Substantively, the bill reflected a long-standing consensus rather than radical change. But the passage set in motion a number of continuing reforms that culminated with major changes to the Administrative Litigation Law in 2005.

A second reform in this area that had more immediate impact was the passage of the Information Disclosure Law (IDL) in 1999. Like the APL, the IDL had been proposed by academics many years before, but it was only with the emergence of citizen pressure in the mid-1990s, coupled with pressure from the business community, that the proposal became law. A third reform in the administrative area was a Cabinet Order, also passed in 1998, requiring agencies to publicize proposed regulatory rules in advance and to allow public input on the content of the rule. A leading scholar of administrative law attributes this shift from pressure from the business community and from foreign

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52 See, e.g., Takashi Inoguchi, Japanese Bureaucracy: Coping with New Challenges, in JAPANESE POLITICS TODAY 92 (Purnendra Jain and Takashi Inoguchi, eds., 1997) (providing several examples of scandals); E. B. Keehn, Virtual Reality in Japan’s Regulatory Agencies, in JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM 321, 321 (Harald Baum, ed., 1997).


countries. Transparency in government regulation was a source of concern to both Japanese business circles and US and EU trade negotiators. While citizens might prefer to have all rules subject to this more transparent process, only regulatory rules were covered, and this is some evidence of the elite origins of reform.

These changes were occurring in the context of an extensive restructuring of government, proposed by the administrative reform council under Prime Minister Ryutaro Hashimoto, whose term ended in 1998. Hashimoto led the first LDP Government after "the fall" and effectively co-opted the reform issue from the nascent opposition, so effectively that the LDP re-established a lock on leadership for another decade. Administrative reform was a popular issue because of scandals associated with the bureaucracy, as well as LDP anger at bureaucratic cooperation with the opposition in the period when the LDP was out of power. But Hashimoto was also relatively weak within the LDP’s factional structure. Placing the administrative reform council under his own chairmanship, he initiated a trend toward centralized leadership in the prime minister’s office, undercutting the traditional factionalism. This made the shingikai quite different from others, in which the secretariat was used by the bureaucracy to dictate outcomes. The council itself, composed almost entirely of non-governmental members, also reflected a slight shift in style.

Earlier councils had featured at least one representative each from retired local and central government bureaucracies; the Hashimoto Council featured neither, but did have three representatives from political parties.

Their interim report called for decentralization, privatization and deregulation, including privatization of the postal service and ministerial. This prompted intense bureaucratic counterattack, in which the powerful ministries mobilized allies in the LDP policy tribes (zoku) to resist reform, and the final report issued in December 1997 significantly watered down initial recommendations. Diet debates were still contentious. Koji Sato, who would later chair the Legal System Reform Council, foreshadowed some of his later work in remarking that: "The Administrative Reform Council sought to find a way for the nation and individual citizens to lead meaningful lives in the globalized..."

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58 Hashimoto regularly attended the meetings. The Acting Chair was the head of the Management and Coordination Agency, which would be responsible for administering any reforms.
59 Cf Frank Schwartz book
61 Masujima 23
international community. The intention was also to eliminate over-control of the state and society.\textsuperscript{62}

The administrative reform council laid the agenda for the next decade of reforms. The process also triggered an increasing degree of centralization within the national government. The report called for strengthening the cabinet and prime minister, both of which had long been dominated behind the scenes by party leaders. Details here included revising the cabinet law to allow the Prime Minister to take the initiative in cabinet meetings and the creation of a cabinet office (formerly the Prime Minister’s office), which was to play a coordination function on policy under the guidance of the prime minister. As Diet member Hakuo Yanagisawa, who played a major role on administrative reform within the LDP, put it, the goal of the reforms was not so much fiscal discipline as political discipline.\textsuperscript{63} A significant element of the reform, albeit one that attracted little public comment, was the strengthening of the cabinet secretariat.\textsuperscript{64} Increased Prime Ministerial power was also evidenced in the number of assistants he could appoint, and the special assistant cabinet secretaries were appointed, including for both administrative reform (Hashimoto himself under Prime Minister Mori) and eventually justice system reform. The increased role of the Cabinet Secretariat has led the line ministries to send more senior officials on secondment assignments, providing a positive feedback cycle for the shift in locus of policymaking authority. After 2000, some major legislation was initiated at the Cabinet level, such as the Basic Law on the Formation of an Advanced Information and Telecommunications Network Society, known as the IT Basic Law.\textsuperscript{65} In 2001, the Cabinet effectively initiated reform of the civil service system.

The administrative reform process marked a major effort at state transformation, and is a crucial part of understanding the legal reform process. The reform headquarters was tasked with tackling the special public corporations that had been central to political economy, and served as key amakudari posts for bureaucrats. The process of setting up a designated reform bureaucracy, with leadership from the Prime Minister, was to become a model for subsequent reforms in the legal sphere.

Another important reform was the adoption of the Nonprofit Organizations (NPO) Law of 1998. Prior to that time Japan had no clear and easily available category for civil society organizations. Eventually, thousands of new non-governmental organizations were formed, in fields as diverse as agriculture to foreign aid. Many of these organizations came to rely on state funding, and hence the process can be seen as the Japanese version of the “contracting” state. These groups subsequently became vigorous players in some areas of law.\textsuperscript{66} Many of them learned from the experience of Korean

\begin{itemize}
  \item \textsuperscript{62} Masujima 57
  \item \textsuperscript{63} Masujima 32-33
  \item \textsuperscript{64} Tomohito Shinoda, \textit{Japan’s Cabinet Secretariat and its Emergence as Core Executive}, Asian Survey 45 (5): 800-21 (2005).
  \item \textsuperscript{65} Shinoda at 815.
  \item \textsuperscript{66} Jeffrey Kingston; Nicolas J. Vikstrom, Comment, \textit{Creating a System for Citizen Participation: How the Nonprofit Sector can provide citizens a voice in Tokyo’s Urban Development System}, 15 Pac. Rim L. & Pol’y 331 (2006); Nobuko Kawashima, \textit{Governance of Nonprofit Organizations: Missing Chain of Accountability Law in Japan and Arguments for Reform in the U.S.}, 24 UCLA PAC. BASIN L.J. 81 (2006); see Social Science Japan Journal special issue
\end{itemize}
counterparts, who were an exceptionally vigorous group. All of these reforms—legalization of civil society, administrative procedures reform, and state reorganization—can be seen as part of a package of moving the state toward a more liberal model in which interests engage in open and transparent competition. Such a model depends on the courts to serve as referees in the process.

A major episode in Japanese reformism came with the ascension of maverick Prime Minister Junichiro Koizumi in 2001. Koizumi had been a long time advocate within the LDP of structural change, and continued to push against the traditional structure. The controversial Law on Reform of Special Public Corporations was Koizumi’s initial structural reform centerpiece. His goal was to abolish or privatize many of the 66 special corporations, both to minimize amakudari and bring the budget into line. Another key goal of Koizumi’s was postal savings privatization. These changes amounted to nothing less than the transformation of the Japanese state.

3. Reforming Legal Institutions

There had been several attempts to pursue legal reform in Japan over the years. In the late 1980s and early 1990s, the Ministry of Justice expressed support for a larger number of bar passers so as to meet its own personnel requirements. In 1991, the traditional triumvirate of legal policy, the Ministry of Justice, courts and bar, agreed to an expansion of the bar, for the first time being exposed to outside interests to influence the process. These factors do not explain the timing of accelerated reform, however. Clearly the timing in the late 1990s was related to the broader discourse of state transformation in the wake of scandals and underperformance.

The central fulcrum of legal system reform for Japan was the Justice System Reform Council, constituted in 1999. Unlike typical shingikai, it was established under the Cabinet by legislation, reflecting it political importance and the unwillingness of its proponents to let the process get bogged down in the ministries. The Council had 13 members, approved by parliament. The final list included only three from the traditional iron triangle of legal professions: one practicing attorney who was former president of JFBA and a known reformer, one former Chief Judge of a High Court, and one former Chief Prosecutor of a District Office. There were five academics, including the chairman, Koji Sato of Kyoto University. (Sato had been a member of the Administrative Reform Council.) There were also a writer, reps from business, labor and the housewives association. In the law the council was urged to make its deliberations

67 Kozuka interview

69 The complete list is Koji Sato, Chairman, Professor Emeritus, Kyoto University, and Professor, School of Law, Kinki University; Morio Takeshita, Vice-Chairman, Professor Emeritus, Hitotsubashi University, and President, Surugadai University; Hiroji Ishi, President, Ishi Iron Works Co., Ltd.; Masahito Inoue, Professor, Faculty of Law, University of Tokyo; Keiko Kitamura, Dean, Faculty of Commerce, Chuo University; Ayako, Sono, author; Tsuyoshi Takagi, Vice-President, Japanese Trade Union Confederation; Yasuhiko Torii, Executive Adviser for Academic Affairs, Keio University (Former President, Keio University); Kohei Nakabo, Attorney-at-Law (Former President of Japan Federation of Bar Associations); Kozo Fujita, Attorney-at-Law (Former President of Hiroshima High Court); Toshihiro Mizuhashi, Attorney-
publicly accessible—reflecting a general trend toward transparency in Japanese policymaking. Meeting minutes were published and deliberations open to the media. Over the next two years the Council met 63 times, monitored by the media and NGOs.

The final report of the Justice System Reform Council was released on June 12, 2001. The declared aim was nothing less than an overhaul of the justice system and the increased resort to law as a means of social ordering. Specific goals include the establishment of new systems to process certain cases, such as labor, IP and family cases; expanding civil execution; lower fees; adoption of a “loser-pays” rule; revision of the Administrative Case Litigation Law, whose narrow approach to standing and justiciability restricts effective judicial control of administration; establishment of a public defender system and other systems to improve pretrial detention; and development of victims’ rights. The report includes calls for an expansion in the number of judges and prosecutors as part of a transition towards a “law-governed society.” The report also explicitly seeks to loosen political and administrative control and move from “ex ante/planning” toward what the report characterizes as an “ex post review/remedy” society. An overall tone of expanding the popular base for the justice system is a major goal.

The JSRC process provoked conflicting reactions among Japan’s major legal institutions. The bar was divided between those who sought to ignore the report and those who saw it as an opportunity. The JFBA ultimately adopted a resolution of support for the JSRC process in November 2000, accepting the proposed increase in the number of lawyers.

After the JSRC issued its final report in 2001, government passed a Law for Promotion of Justice System Reform, setting up the Shiho Seido Kaikaku Suishin Honbu (Headquarters for Promotion of Justice System Reform), under the office of the Prime Minister. This body consisted of a secretariat and 11 substantive subcommittees. It produced 24 new laws and amendments in three years. The staff of the Office was primarily seconded from the Ministry of Justice, and so it allowed bureaucrats to work out the details of many of the broad plans.

The details of all the reforms are better reserved for a book length treatment, but they include:

* an overhaul of legal education and the creation of 72 new graduate law schools
* adoption of a new system of lay participation in criminal trials

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72 Rokumoto 334.
*adoption of victims’ rights legislation
*reforms to the system of appointing judges
*strengthening prosecutorial review commissions
*major changes to substantive legislation
*making civil litigation easier.

4. Why Legal Reform? Liberalization and Market Demands

Why did legal system reform occur? And why did it occur when it did? Why did it not happen earlier? Senior bureaucrats involved in the reform program attributed it to business pressure. Scholars have also repeated this assertion, focusing on the 1998 Keidanren report and asserting that Japanese companies are no longer happy paying exorbitant fees to American law firms to do work in Japan and elsewhere in Asia. As we shall argue, business pressure was likely a factor, but on its own is insufficient to explain the actual reforms that were produced.

There are several factors leading to a new push to expand access to the legal system by business. First, historically regulation has served as a substitute for dispute resolution. But distrust in the government continued to increase as a result of widespread perceptions of economic mismanagement. The minimal development of private arbitration in Japan meant that there was no real alternative to the government for third party dispute resolution. Well-placed observers report that government officials stopped answering questions as to the legality of proposed activities in the 1990s, which in turn increased demand for private legal advice.

Second, as the economy declined, more disputes emerged, at the same time that deregulation was decreasing government control over the economy. As several scholars have shown, litigation tends to be counter-cyclical, and this was as true in Japan as elsewhere. When business is embedded in a network of dense relationships with its workforce, buyers, suppliers and creditors, disputes can be suppressed or dealt with informally. The shrinking pie (or at least less rapidly expanding pie) may have frayed such “social” ties and led to more disputes. And this might trigger domestic pressure for legal ordering.

The international context is part of the story as well. 1990s saw significant shifts toward liberal political economy in many countries of the world. Liberalization might contribute to greater demand for legal ordering through a number of modalities. First, the elimination of barriers to entry encourages new market participants to conduct economic activity, and these participants may, ceteris perebus, be more likely to litigate when disputes arise. Sociologists of law have long observed that litigation is less likely in close-knit groups because of the relationship-breaking quality of going to court. Close-

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73 Harada, Tanaka comments.
75 Aronson 2007.
76 Ginsburg and Hoetker 2006.
77 (Black 1976; Ellickson 1991; McAdams 1997).
knit groups develop norms through repeated interactions over time. Norms can provide guidance to appropriate behavior, which can reduce the frequency of breach. When breach does occur, repeated interactions allow players to punish opportunism. Punishment can occur directly, when the injured party refuses to transact with the norm-violator; or by third parties who enforce reputational sanctions.

Reputation-based contract enforcement is easier to apply when all participants know each other. As the number of players in a market expands, the use of reputational sanctions becomes more difficult, as it depends on second order norms about sanctioning wrongdoing. New players, in particular, are unlikely to benefit from these reputational sanctioning mechanisms, and also less likely to suffer from them as information on past performance is less available. Hence both new players, and established players who are transacting with new players, may be more likely to go to court when problems occur. New entrants might be more likely to be plaintiffs or defendants than established players.

It was widely reported that foreign banks became much more aggressive about collecting bad loans and debts in the 1990s. Because debt collection is considered a form of civil litigation in Japan, this alone led to increased rates of litigation, and is consistent with our theory linking liberalization to litigation. In addition to the financial sector, non-financial firms invested. Total inward FDI flows increased from 671 billion yen in 1997 to 2.1 trillion by 2001, tripling the stock by 2002.\(^78\) Presumably, the entry of new players into the market corresponded with significant changes in strategy.

We also expect that the entry of foreign firms led Japanese financial institutions to be more aggressive about debt collection. In short, liberalization seemed to lead to a positive increase in incentives to use formal mechanisms of dispute resolution while undermining the leverage that had underpinned firm reliance on government as a resolver of disputes.

Another reason that liberalization is likely to encourage litigation is that liberalization programs, at least in recent decades, are typically accompanied by privatization—the reduction in direct government provision of goods and services that are not true public goods. Privatization by definition means that more of the economy is in private hands. Even assuming that rates of litigation among market actors are constant, we should see greater overall rates of civil litigation as more transactions are subject to that legal regime, as opposed to administrative court systems that sometimes have jurisdiction over government contracting.\(^79\)

Note that the transfer of resources to the private sector interacts with the presence of new entrants to enhance incentives to litigate. Privatization by definition expands the scope of transactions subject to civil litigation regimes; it can also lead to the expansion of the number of firms. When government sells assets, it sometimes does so to new entrants into the market. One can characterize liberalization as leading to the entry of new potential plaintiffs into the economy; while privatization involves the creation of new potential defendants. Together, the presence of new plaintiffs and new defendants makes establishment of the reputational equilibrium difficult. Information on past


\(^{79}\) (Singh 1985).
performance may be unavailable; hence players may be more willing to go to court at the first sign of opportunism.

Liberalization expands legal ordering because the removal of substantive regulation reduces government’s ability to resolve disputes directly. To understand this point, consider that extensive government regulation can dampen or serve as an effective substitute for litigation. When government regulation is extensive, and the government directly involved in the production of goods and services, firms that do business with the government can expend energy in political rent-seeking rather than bringing cases to court. In addition, when government discretion is high, it can exert collateral leverage over private firms and suppress disputes among the various players in a sector. Substantive deregulation, by reducing discretionary controls over the economy, also reduces government ability to impose costs on firms that it wishes to sanction—and this means that government is less attractive as a resolver of disputes.

Japanese political economy provides an example of this second effect. In the high-growth period, the Japanese government retained control over numerous resources that were needed by firms, including capital, export credits, and licenses. The government frequently utilized these tools to direct firms into business decisions that the government felt were desirable, and to eliminate “excess competition” from the system. Indeed, in some cases, government would punish firms for deviations in one area using collateral tools that affected another business decision. This managerial function of government may have been one factor in suppressing litigation during the high growth period. The government role in dispute suppression was hardly visible—but many knowledgeable observers report its existence. As regulatory tools disappeared with liberalization, government’s dispute-suppressing role may also decline.

B. Why Legal Reform? Nominal Rationales

The expressed rationale behind the legal system reforms is found in a document issued by the office of the Justice System Reform Council roughly a year into its deliberations, entitled The Points at Issue in Justice System Reform. First, it ties reform into Japanese history, and explicitly evokes Meiji and Postwar reforms as moments when Japan responded to external crisis with dramatic legal reforms. Second, it talks of the need to reform Japanese society from being an ex ante, administration of rules society toward an “ex post/remedies society.” Indeed, in some cases, government would punish firms for deviations in one area using collateral tools that affected another business decision. This managerial function of government may have been one factor in suppressing litigation during the high growth period. The government role in dispute suppression was hardly visible—but many knowledgeable observers report its existence. As regulatory tools disappeared with liberalization, government’s dispute-suppressing role may also decline.

The Justice System Reform Council quite self-consciously drew on the Meiji reforms as antecedent, quoting instructions given to Iwakura at the outset of his mission to the West in 1871: “We have to recover the dispersed national power; we have to reform poor administrative and justice systems; we have to exclude the remaining practices of arbitrary decision making and restrictions; we have to return to tolerant and simple politics; we have to be engaged in protecting human rights. . . the time has come and we shall have the opportunity to establish an equal foundation with the European and

80 The Points at Issue in Justice System Reform, Dec. 21, 1999, English translation at www.kantei.co.jp/foreign/policy/sihou/singijai/991221_e.htm
American great powers.”81 The Council also notes that, just as the crisis of the postwar era forced a recreation of institutions, Japan at the outset of the 21st century was challenged by a similar series of financial deficits, economic crisis, and “sense of social blockade.” Making the law of the nation its “flesh and blood” is the explicit goal, and so the shift toward legal ordering of society is imbued with a sense of mission to recover national “creativity and vitality.”82 The nationalist justification for re-ordering society evokes Meiji discourse.

Another interesting document in trying to sort out the various rationales for reform is a report entitled Recommendation: Toward the Revitalization of the Japanese Civil Justice System issued by the Keidanren-affiliated 21st Century Policy Institute on December 22, 1998.83 The document suggests that the massive bankruptcies of the jusen housing loan companies in 1995 were a key factor in determining that judicial incapacity was imposing costs on the economy. Recognizing the increased importance of the judiciary, the Institute explicitly identifies the lack of legal services, the slow, expensive court system, and the lack of procedural justice as hindrances to economic restructuring. It also invokes Japanese legal history in the form of Kojima Iken’s famous 1891 ruling (see Chapter One). Again we see the use of history as a justification for reformism.84

Specific proposals in the 21st Century Policy Institute Report included expanding the judiciary and improving training, scheduling early court dates, using expert conciliators, and allowing parties to participate directly without legal representation. It also urged revision of Article 72 of the Attorneys Act, which secures the monopoly of lawyers and urges the Diet to annul its resolution essentially delegating legal exam governance to the triumvirate of the Ministry, Supreme Court and Bar. This remarkable document served as a tacit threat to the bar to go along with proposals, and the bar eventually acquiesced in the reform demands.

Other documents highlighting the sources of pressure for judicial reform include a report of the Research Committee of Business Law of the MITI issued June 1, 1998, calling for private rights of action against unfair trading practices and strengthening the legal aid system.85 An LDP Special Committee on Judicial Reform proposed a comprehensive reform on June 15, 1998. A Keidanren report on the subject was issued the same month at the request of the LDP to provide opinions. The Keidanren report suggests, among other things, that the number of judges should increase, corporate counsel should be allowed to appear in court; and that judges should be appointed from among attorneys. There is no mention of expanding the bar per se, but there are implicit

81 See The Points at Issue in Justice System Reform, Dec. 21, 1999, English translation at www.kantei.co.jp/foreign/policy/sihou/singijai/991221_e.htm
82 Id.
83 An English summary is available at http://www.21ppi.org/english/policy/19981222/summary.html
84 “[Courts] do not provide an opportunity for the parties to express their own subjective opinions.”
85 See also Tetsuya Katada, Legislation to Address the New Century, Monthly Keidanren, Nov. 1999 (“A century ago, prompted by an awareness that the establishment of a legal framework would be essential if Japan were to become a full member of the modern world, the government’s leaders guided the process that resulted in the enactment of basic codes within an extremely short period of time. As a guide, Japan looked to the codes of modern European states, particularly those of Germany and France.”
86 Miyazawa, supra note Error! Bookmark not defined., at 99.
threats to the lawyers’ monopoly in suggestions to allow scriveners and patent agents to handle some routine legal business. These proposals all appear to reflect concern with lack of capacity in the courts and lack of availability of legal services for the business community.

The confluence of these various reports suggests that, out of nowhere, there was a consensus on the broad outlines of a legal reform among Japanese elites apparent by 1998 and that the business community had serious concerns about the continued monopoly of the bar and the lack of capacity in the legal system. It is also clear from rising rates of civil litigation, shareholders’ derivative suits, bankruptcy proceedings, and merger and acquisition activity that there was a genuine increase in demand for legal services on the part of the business community. Coupled with the series of reports issued by business groups, it appears that the second half of the 1990s indeed witnessed a shift in traditional attitudes toward legal ordering, and that business pressure was the crucial factor in leading to reforms. On balance, then, the claims of business as the prime causal force appear to be plausible.

What is less clear is why the various reports from business and governmental sources sought to invoke Japan’s history of successful adaptation of foreign norms to justify and frame the process. Several of the 1998 documents explicitly note the centennial of the Japanese Civil Code, adopted from a German model. Several refer to both Meiji and Occupation periods. This appears to be part of a history of manufactured traditions in modern Japan. Invoking a mythic past while transforming institutions for the future has been a central strategy of Japanese statecraft since the Meiji era. The echoes of modernization discourse are clear.

Increased legalism in the international sphere also supported a shift toward a greater domestic role. Japan had become a more vigorous participant at the WTO, and some have argued that trade-dependent industries had pushed for greater capacity in the legal system. The connection between these groups and domestic legal reforms that emerged was somewhat tenuous, but it is the case that political support from business was essential to trigger reform.

In short, prolonged crises, the failure of bureaucracy to manage the system, and a sense of drift provided an opening for a new coalition of liberal reformers (such as Sato and Miyazawa) and big business to come together and pry open legal system policy from the traditional iron triangle. The reforms were top-down in character, in which one set of elites wielded transparency in the name of modernization to diminish a monopoly of another set of elites.

C. Korea

Korea’s peculiar version of authoritarianism was a series of military dictatorships that lasted virtually uninterrupted from independence in 1953 until the mid-1980s. In the mid-1980s, however, sustained challenges to the Chun Doo Hwan regime spread from activist students and labor unions to the middle class. This ultimately led Chun to resign.

87 See Katada, id. and The Points at Issue in the Justice Reform Sec. II.1.
88 Carol Gluck
89 Saadia Pekkanen 292
and his successor, Roh Tae Woo, to initiate constitutional and political reform leading to direct elections. Roh won the first election in 1987 when the two main opposition figures, Kim Young Sam and Kim Dae Jung, could not form a united front, but each of the Kims has now subsequently occupied the Blue House.90

The dynamics of Korean democratization have been traced elsewhere, but it is important for present purposes to recall that legal reform played an important role.91 Of particular importance was the emergence of a powerful Constitutional Court that became the focus of many reformers frustrated by the cautious and circumscribed jurisprudence of the Supreme Court. The Constitutional Court was created by the 1987 Constitution, and was not expected by its designers to play a significant role. However, the Court developed a jurisprudence that was both careful and activist, making itself available for a wide variety of claims. The Court eventually transformed criminal procedure, administrative law and many other fields, and became the prime locus of a new judicialised politics in Korea.

Because it was a new organisation, the Constitutional Court did not fit easily into the traditional legal complex. Although it was staffed by judges, the process of appointment also involved the President and the National Assembly. It thus broke with the tradition of autonomous, insulated courts that eschewed politics. Instead, the Constitutional Court issued a number of decisions that were relatively generous in terms of granting standing to sue. The Constitutional Court was also a high status forum in a country where status matters a good deal. A new administrative court bench, too, attracted much attention.

A court is only useful if there are parties willing to bring cases to it. The Constitutional Court, as well as the administrative and ordinary courts, soon became a locus of activity for the several thousand new civil society organizations that exploded onto the scene after 1987. This development was spurred in part by the election of former dissident Kim Dae Jung in 1997, who increased government support for and receptiveness to NGOs. The old account of Korea as ‘strong state, weak society’ gave way to a new situation wherein grass roots organizations sought to use law to check the state. Lawsuits became one of the primary channels for these groups.

One of the most visible of these civil society institutions was the People’s Solidarity for Participatory Democracy (PSPD), chaired by a prominent lawyer named Park Won Soon. Expelled from Seoul National University in 1975 as a law student demonstrating against the Park Chung Hee regime, Park had spent time in jail on political charges.92 After leaving prison, Park passed the exceptionally competitive lawyers’ examination. In keeping with the statist orientation of the legal system, the only real options for bar passers in 1980 were to become a judge or a prosecutor, and Park became

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90 Each President entered with a reform programme. Kim Yong Sam’s themes were globalization and administrative reform, as he launched a series of administrative reforms aimed at opening up the bureaucracy, deregulating and reforming the concentration of the economy in the hands of the famous chaebol conglomerates. Kim Dae Jung furthered this agenda, along with a dramatic shift in policy toward the North in the form of the Sunshine policy of rapprochement, ultimately discredited when it was revealed that Hyundai had paid the North some $300 million for the North—South summit.

91 CITATION

92 Interview with Park Won Soon, 7 March 2005.
a prosecutor in Taegu in 1980. He thus became an establishment lawyer, although an unhappy one, and he soon left.

Some years later, student and labor demonstrations against the Chun regime intensified. Arrests of the various demonstrators led Park and a handful of other lawyers to begin to represent political prisoners, intellectuals, labor leaders and students who had been arrested. In 1985, this handful of five or six human rights lawyers formed an informal association, which they called Chun Bo Pae (rights and law association). They treated this as a ‘kind of a secret organisation’ to avoid the gaze of the late authoritarian state, coordinating and assigning cases among themselves because of the heavy workload. After the mass demonstrations of 1986 led directly to Korea’s democratisation, these lawyers formalised their association as the Minbyeon, with 56 lawyers. This association became a kind of alternative bar association, and drew many activist lawyers with political agendas, eventually drawing hundreds of members. In 2007, its membership represented about 7% of the entire bar.

After two years abroad, Park returned to Korea in 1993 and formed an alliance of lawyers, social scientists and student activists as the People’s Solidarity for Participatory Democracy (PSPD). From the beginning, as the name suggests, they sought civil society participation in the sense of providing policy ideas to help consolidate Korea’s democracy. Park describes the PSPD as not just a civic group, but a political party without ambition to occupy power. The existing Parties were seen as too corrupt and weak to propose laws and serve a real representative function. Law and civil society, then, played a key role in substituting for a weak party system that was perhaps unable to cope with the challenges of the constant reform.

The PSPD launched a wide range of activities, including legislative campaigns, litigation strategies, organisation of rallies and generally working for social change. Corruption grew to be seen as an issue with the potential to transform Korean governance in profound ways. Explicitly drawing from foreign models of anti-corruption legislation, including from Singapore, Taiwan, Hong Kong and the Ethics in Government Act of the USA, the PSPD drafted a statute and initiated a lobbying effort at the National Assembly that was ultimately successful.

Litigation was also a component of the reform programme, hardly surprising given the dominance of lawyers among its leadership. The group was not focused on broad based access to justice (for example, through a legal aid strategy) so much as finding key cases to leverage broader reform programs. Relying on a corps of volunteer lawyers, the PSPD used litigation as a strategic mechanism, when it would have a broad effect on citizens’ consciousness. For example, in one case, a subway accident occurred when a light was out for one hour. The PSPD brought the case claiming $1000 per person in damages, but only recovered a small fraction thereof. Nevertheless, the publicity from the case, combined with other mobilization efforts, convinced the public transportation

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93 Another lawyer with a similar biographical story was Cho Yung Nae.
94 Patricia Goedde, From Dissidents to Institution-Builders: The Transformation of Public Interest Lawyers in South Korea, 4 East Asia Law Review 63, 76 (2009).
95 The lawyer-activists made legislation a primary strategy, and within 5 years, they had successfully passed more than 70 pieces of legislation: interview, Park Won Soon, 7 March 2005.
96 Goedde reports that half the steering committee was lawyers and law professors. Goedde at 78.
agency to write a charter for citizens. There were hundreds of similar examples of litigation being utilized as part of a broader strategy in diverse arenas.

Beyond this individual litigation, PSPD-associated intellectuals and lawyers begin to think about structural reform of the legal system. In 1996, the PSPD published a volume entitled *Judicial Reform for the People* that included a blueprint for more significant reforms. The topics included the judiciary, prosecutors office, the bar, corrections system, entry into the legal profession, legal education, legal aid, and lay participation. Within a decade, significant progress had been made in each of these areas.

The growth in civic organizations—and later public interest law firms such as Gong-Gam-- both reflected and contributed to the increasing public distrust of the Korean political establishment. Rooted in professional classes and the so-called 386 generation (30-somethings, educated in the 1980s, born in the 1960s), many of the supporters came of age around the Kwangju massacre. Distrust of the government led the civic society organizations to focus on corruption, and in this regard they have been aided by vigorous print and broadcast media as well as a prosecutor’s office eager to revise its former image as a tool of authoritarian presidents. There has thus been a corresponding increase in the salience and occurrence of scandal.

My argument thus far is that the stable equilibrium of small bar, peripheral judiciary and strong bureaucracy was gradually eroded with democratisation in the 1990s. A key first step was the establishment of the Constitutional Court, and its willingness to grant standing to civil society organizations. The presence of a forum allowed civic groups to use litigation as a strategy which changed bureaucratic behavior.

Internal bar politics changed too. Traditionally, the bar was a minutely small group, with most graduates of the Judicial Research and Training Institute becoming prosecutors and judges. There was very little notion of a profession as an autonomous force in society, but rather a heavily statist orientation. When the Chun regime, responding to perceived economic demands, increased the number of bar passers from the miniscule 100 per year in 1978 (tripling the number to 300 by 1982), the orientation of the profession began to change in unanticipated ways. Since the government offices could absorb only a limited number of graduates each year, an ever-increasing percentage of bar-passers had to become private lawyers. This helped erode the statist orientation of the profession, though of course the existing bar opposed the expansion. Indeed, Ahn (1994, 123) reports that the Ministry of Justice expressed concern that expansion in the bar led to a growing number of ‘dissident’ lawyers because of the difficulty of finding ordinary legal work. Lawyers like Park, who were quite anomalous in the 1970s and 1980s, became more common in the late 1980s with the rise of the 386 generation.

Democratization was accompanied by efforts to transform the state, not only from within the legal complex. The Presidential Commission on Globalization under Kim Young Sam produced a wide ranging series of recommendations, and focused in part on the need for “globalization of legal services and legal education.” The Commission’s report included a proposal to increase the quota of bar passers from 300, by steps up to 1000 in the year 2000. The media followed with intensive coverage of shortcomings of the current system. The proposal, however, generated significant backlash. While the

97 Human rights lawyers did engage in some important activities within the Human Rights Committee of the Korean Bar Association. Ahn 1994

98 Choi 304
bar opposition was predictable, the opposition of the Supreme Court was fatal to many aspects of the reform. The proposal to expand the bar was indeed adopted, but other reforms were put aside for the moment.

When former dissident Kim Dae-Jung became president in 1997, he initiated a more radical program of reform, notwithstanding his lack of majority in the National Assembly. With regard to judicial reform, the government established an advisory committee, the Committee for Propelling Judicial Reform, in May 1999. Yet these efforts did not lead to systemic change. Kim’s major efforts, however, were focused on the rapprochement with North Korea under his “Sunshine Policy” and domestic institutional reform was not high on his agenda.

Kim’s successor was the Minbyeon-associated lawyer Roh Moo-hyun, who had been an activist lawyer in Pusan along with his top advisor Moon Jae In. Roh was the ultimate outsider, a rags-to-riches success story who had passed the notoriously competitive bar without even attending university. Roh’s election marked the ultimate triumph of the activist lawyers group that had been pushing for reform for the previous two decades. Many of them took important positions within the government and thus became the establishment, which inevitably changed their perspectives, while facilitating significant legal reform.  

On the one hand, the domestication of activist lawyers led to a more cooperative relationship between government and NGOs, as civil society organizations can contribute ideas to and receive funding from government. On the other hand, there is the risk of cooptation, of which thoughtful activists like Park Won Soon were well aware.

Legal reform became a major effort for the reformers. Importantly, the Supreme Court became supportive, which had not been the case in the mid-1990s. This was partially due to a change in leadership of the Court; the Chief Justice in the 1990s had been opposed, but Choe Jong-Young had a different view, seeing the possibility for enhancing judicial legitimacy through reform. But it also reflected the fact that Japan had already moved ahead with its reforms. Korean reformers were able to use this fact to mobilize support for change: Japan has special weight in that both American and German educated lawyers have some sense of familial relationship with the Japanese legal system. In addition, the strong pressure from the Blue House was crucial. A Judicial Reform Committee (JRC) was constituted under the Supreme Court in October 2003. It met 27 times over the next fifteen months, and was supported by a staff engaged in extensive discussion and research.

The JRC had 21 members, including ministry of justice staff, judges, journalists, legal academics, and representatives from business community, labor, civil society, the constitutional court, and parliament. The Chair was a senior judge, who had been one of the targets of criticism. The JRC was a significant step towards a more active role for the judiciary in the legal system.

99 contrast Japan, where the traditional ruling party weakened after 1989, but did not fall until after all the judicial reforms

100 Park mentioned a ‘time of crisis for civic groups’ as government co-opts their ideas: interview, 6 March 2005. Always looking forward, Park resigned as secretary of the PSPD and became a Board Member of a new institution called the Beautiful Foundation, which encourages fundraising for charities and NGOs to support civil society. The legal framework for philanthropy needs work, as the chaebol used their organizational sophistication to take advantage of the mechanism.

the founders of Minbyeon in the 1980s. It was charged with making recommendations to enhance public confidence in the judicial system, improve performance and guarantees of rights, and enhance the rule of law. International competitiveness was also part of the expressed rationale for the reform.\textsuperscript{102}

Internal deliberation within the JRC was extensive. The reform-oriented academics like Han and judges such as Kim Sang Jung were well prepared, having had a blueprint for reforms proposed in civil society some years earlier. In contrast, the Ministry of Justice officials and prosecutors were less well-prepared, and thus unable to rebut specific arguments articulated by the reformers.

Reformers paid attention to developments in Japan and other countries. At their first official meeting in December 2003, they received reports on legal education in France, Japan, Germany, the US and the UK.\textsuperscript{103} In February 2004, the Commission received the report of Pusan University Professor Kim Chang Rok on Japan’s legal education reforms.\textsuperscript{104} They also examined a report on American legal system. With regard to specific reforms, Japan was a frequent target.

The JRC submitted its final recommendations to the President at the end of 2004. The President then established a Presidential Committee on Judicial Reform\textsuperscript{105} to review and implement the 2004 JRC recommendations. (In fact, there had been ongoing coordination between the President’s office and the Supreme Court and so the Presidential Committee was able to work quickly.) The recommendations included a lay participation system for criminal trials and a new system of law schools, as well as reforms to criminal procedure to produce a more adversarial system and to improve the rights of the accused. Other topics included expanding the legal aid system, improving legal ethics, and reforming family law.

The Presidential Committee was charged with drafting the implementing legislation, and was instructed by the President to implement all of the JRC recommendations. In the process of fleshing out the proposals, however, there were choices to be made and some further institutional politics. The prosecutors strongly opposed proposed amendments to the Criminal Procedure Act that would have removed automatic acceptance of prosecutorial investigation records as evidence. Under the reform proposal those records would be evaluated like any other piece of evidence. They succeeded in introducing a provision at the Presidential Commission stage, subsequently adopted by the national assembly, to ensure that investigation evidence would be automatically admitted if verified by video or photo showing the scene.

In addition, some of the reforms were seen as being insufficiently aggressive. Law professors and civic groups reacted strongly against the retention of a relatively low quota for entrants to the profession, as will be described in the next chapter.

\textsuperscript{102} http://www.scourt.go.kr/information/jud_rfrm_comm/comm_regu/index.html
\textsuperscript{103} http://www.scourt.go.kr/pds/PdsListAction.work?searchWord=&searchOption=&currentPage=1&pageSize=10
\textsuperscript{104} http://www.scourt.go.kr/pds/PdsViewAction.work?currentPage=&searchWord=&searchOption=&docid=20&gubun=
\textsuperscript{105} Presidential Committee on Judicial Reform Home Page, http://www.pcjr.go.kr (last visited Apr. 15, 2006).
The process of the Commission reflected similar pressures for democratization. There were public hearings and complete transparency. Lawyers and civic groups were active participants in the process, and each meeting was attended by several dozen observers, who could offer their own input. At the same time, the process reflected strong competition from interest groups. The courts were already a battleground for competing groups. For example, one development was the emergence of a conservative lawyers group to counter the Minbyeon. **Lawyers with Citizens** brought several constitutional suits against President Roh, and played an active role in judicial politics. In some sense, this illustrates the triumph of judicialization. Both progressives and conservatives have sought the mantle of defending citizens through law.¹⁰⁶

After the Roh Moo hyun era, the Minbyeon group became less cohesive. Many ended up focusing on legal practice.¹⁰⁷ Incoming conservative administration of Lee Myong Bak was faced with immediate protests and a candlelight vigil, ostensibly over American beef imports, but containing a broader coalition of concerns. The demonstrations led to significant number of arrests, and complaints about police abuse. These arrests and complaints made their way to the human rights commission and courts, posing a test for how well they would function. The verdict was mixed. The human rights commission found some complaints against the police to violate the police guidelines, and Lee struck back by seeking to restructure the Human Rights Commission. He replaced Chairman Ahn Kyung-Whan with a more compliant chair, and sought to restructure and downsize the Commission. The same policy was utilized with Civil Rights Institution, a body that monitors the administrative state; its head, academic Kun Yang, was replaced with a more conservative lawyer. Public interest mega-lawyer Park Won-Soon was sued for libel.¹⁰⁸ A television program, PD Note, was prosecuted for defamation and distributing false information around the American Beef Candlelight vigil.

There were signs that the courts were acting with new confidence and independence, and of increasing gaps between the prosecutors and judges. When called on to adjudicate a criminal case against an opposition legislator, related to physical confrontations in the National Assembly, they found GiGab Gang not guilty. In another incident that resulted from a violent protest that led to the deaths of protestors at Yongsan, the High Court reviewed the prosecutors’ decision not to prosecute the chief of police and ordered the prosecutors to turn over several thousand pages of evidence to the plaintiffs. The TV show PD Note was acquitted as well.

In short, Korea has witnesses a major shift in the role of law in society from the Chun Doo Hwan era. The program of legal reform proceeded with the help of electoral figures. The courts have taken on a more important role and one can speak of judicialization. But there has also been a sense in which legal institutions in the reform era are somewhat politicized, with internal tensions.

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¹⁰⁶ Goedde at 87
¹⁰⁷ Goedde at 85
¹⁰⁸ EXPLAIN
D. Taiwan

Confronted with one-party rule, Taiwanese activists focused on ending KMT rule, and channeled their efforts into securing greater political liberties to facilitate that goal. This rationale differed slightly from Korea, where political parties were legal but circumscribed during the authoritarian period, and where activists focused on social and economic issues. Prevented from forming a party, Taiwanese elites eventually developed a category of dangwai (outside of the party) politicians. Human rights and social change were a key part of their discourse, with the ultimate human right being that of self-determination. Lawyers initially were a small part of the group, with the most prominent leaders being those who favored direct action tactics.

A crucial step came in 1970 with the founding of the Chinese Society for Comparative Law by Chen Chi-sun and other Taiwanese lawyers. They called their association the ‘Chinese’ society so that it would be able to be registered, for any organisation with Taiwan in the title would not be accepted by the government. The Society sponsored research and seminars on democratic legal practice, including such classical liberal issues as freedom of speech and assembly. Like the Minbyeon, this served as a kind of alternative bar association for like-minded lawyers, but also included judges and academics. Nevertheless, the society’s influence in the bar remained tiny, because of the penetration of the formal associations by the effective Leninist organisation of the KMT.

Eventually, Taiwan’s leaders took steps to end authoritarian rule. In 1985, President Chiang Ching-kuo appointed Taiwan-born Lee Teng-hui as his Vice President, and Lee succeeded Chiang on his death shortly thereafter. Chiang also legalized opposition parties, and the long period of gradual democratization began, wherein political and legal reform proceeded apace.

Lawyer involvement came to the fore during the Kaohsiung incident in 1979, when lawyers from the Chinese Society of Comparative Law (including later-President Chen Shui-bian) earned fame by defending arrested activists. The incident began at a rally sponsored by Formosa magazine, one of several journals which were the early focal point for the opposition, to celebrate International Human Rights Day. Police tear-gassed the crowd, and jailed dozens of prominent opposition figures, some for several years. Chen (then 28 years old) and a small group of fellow young lawyers undertook to defend Formosa magazine and the activist leaders against treason charges. The most prominent leaders, including the famous democracy activists Huang Hsin-cheh and Shih Ming-teh, received sentences ranging from 12 years to life, but the trials served as a focal point for opposition, as many defendants were able to testify to their intimidating treatment in pretrial detention. Using classical liberal language of human rights and freedoms, the lawyers used the trials to call attention to the Taiwan nationalist struggle.

Others in this category include former premiers Su Tseng-Chang, who had represented Yao Chia-wen at the court martial, and Frank Hsieh, who resigned at the beginning of 2006. All were graduates of National Taiwan University Faculty of Law. Wen-chen Chang also notes that this same year saw an increased emphasis on environmental justice after contaminated rice oil was distributed in rural Taiwan. This led to the creation of the Consumers’ Foundation in 1980, led by lawyers and academics. Wen-chen Chang, Public-Interest Litigation in Taiwan: Strategy for Law and Policy Reforms in Course of Democratization, in PUBLIC INTEREST LITIGATION IN ASIA (Po Jen Yap and Holning Lau, eds., New York: Routledge, 2010) [www.consumers.org.tw to see if Annette Lu or other lawyers were involved.]
There followed a campaign of intimidation by the KMT, including arrests and even political murders, including in the United States. The targets extended to family members of the dissidents. The authorities also closed magazines associated with the opposition.

These strong-arm tactics that had worked earlier in the authoritarian period were no longer effective in the 1980s, however. Relatives and lawyers of the jailed dissidents ran as independents and won political office in their place; Chen himself was elected to the Taipei City Council in 1981. Political prisoners staged hunger strikes, new dissident publications grew up to replace the closed ones, and new demonstrations emerged focusing on a range of social issues rather than Taiwan independence per se. These campaigns included subjects like environmental and women’s issues, Aborigine civil rights, academic and journalistic freedom, and an end to martial law. New organizations such as the Consumers’ Foundation, the Awakening Foundation, and Taiwan Association for Human Rights were created, with leadership and involvement from the alumni of the Kaohsiung incident.

In contrast to the position in the United States and Korea, litigation played a relatively small role in these movements early on. Rather the activists focused on legislative strategies. Furthermore, the formal bar associations played little part. The Chinese Society of Comparative Law continued to operate but served as a platform for organisation around progressive Taiwanese interests rather than a locus of coordinated litigation. Attempts to change the name of the Chinese Society to the Taiwan Law Society were blocked by the Ministry of the Interior. Still, the Chinese Society continued to thrive, expanding its network to some 400 members, including many local lawyers affiliated with foreign law firms; but when these members sought to advance their positions through the formal bar associations, they were rejected. The struggles to control the formal bar reflected not just political differences, but different approaches to the role of lawyers in society. The activists wanted to eliminate restrictions on bar membership so as to expand the pool of representation; the mainstream groups sought to limit entry, as professions tend to do.

Ultimately, after the bar passage restrictions were ameliorated, the activist lawyers were able to secure victory within the bar through sheer force of numbers. Today, lawyers from the now renamed Taiwan Law Society are prominent in the bar. For example, Remington Huang of Baker and McKenzie has served as the head of both the Taiwan Law Society and the Taipei Bar Association. Once they had achieved success in the bar, the activist group ended the ‘back-door’ entry which had allowed military lawyers special access. This in turn consolidated their leadership within the profession.

As in Korea, one factor that played a role was the re-emergence of constitutional litigation. Although the Council of Grand Justices had had the formal power of judicial review since the establishment of the ROC, they had been a quiescent institution under authoritarian rule. In the early 1980s, however, they began to shift away from their traditional passivity with a series of decisions expanding their jurisdiction and building up some institutional capital. Many of these decisions concerned administrative law, but did not involve particularly high profile issues. Rather the Council seemed to be signaling that legality was important and that it could serve as an instrument to constrain
bureaucratic arbitrariness. However, early attempts by NGOs such as the Taiwan Association of Human Rights to secure human rights gains were not successful.\(^\text{110}\)

In the 1990s, the Council became much more active, systematically dismantling the tools that had been used to maintain KMT domination. For example, the Council held that military counselors could not be required in schools; that labor groups could organize; and that criminal procedure had to accord with international norms. In 1994, lawyers associated with the Awakening Foundation successfully challenged discriminatory provisions of the Civil Code that gave a preference for fathers in child custody cases, with the Council ruling that the provisions violated the constitutional guarantee of gender equality.

A crucial symbolic moment came when the Council was called on to resolve the question whether the Taiwan Law Society could register as an organization, replacing the Chinese Society for Comparative Law. The longstanding policy during the authoritarian period was to deny registration to any ‘social organization’ that sought to include Taiwan in the title, on the ground that this would encourage the Taiwan independence movement. In April 1999, in Interpretation 479, the Council of Grand Justices held that the constitutional guarantee of freedom of association included the right freely to choose the name of the organization, and struck out the Ministry of Interior regulations as unconstitutional. This legitimated the role of the Taiwan Law Society and marked the decline of the authoritarian control over associational life.

As the number of cases continued to grow, political institutions began to tackle judicial reform in more systematic fashion. In the last year of his presidency, Lee Teng-hui called for a National Judicial Conference in 1999. Called under the auspices of the respected President of the Judicial Yuan Wang Yueh-sheng, the meeting brought together all the main actors in the legal system to chart directions for future reforms. We thus see, as in Korea and Japan, multipartite meetings of stakeholders to resolve future reform directions.

The National Judicial Conference final report considered a gamut of issues, including the position of the Judicial Yuan in the legal system; expanding access to the courts through legal aid and public defenders, as well as a more adversarial criminal procedure; lay participation in decision-making and in reviewing prosecutors’ decisions; reform of civil procedure; judicial training; and legal education. There were significant conflicts between the Ministry of Justice and the Supreme Court about the location of the Judicial Training Institute that trains all judges and prosecutors, with the Ministry maneuvering to keep control. The final recommendations of the Conference were not able to resolve this issue. Other recommendations, however, included introducing lay participation; allowing Supreme Court justices to write separate opinions dissenting or concurring with the judgment; moving to an adversary system of criminal procedure; speeding up civil procedure; and enhancing legal practice. On legal education reform, which had proved to be such a controversial issue in Japan and Korea, the approach seemed to be to leave it to the universities themselves to adopt law schools if they wanted. The language was permissive rather than mandatory, perhaps reflecting the fact that there had already been significant developments in the market for graduate legal education.

\(^\text{110}\) See Wen-Chen Chang, supra note __, at __
The implementation of the National Judicial Conference recommendations was somewhat hindered by a lack of political leadership. Lee’s turn to law in the last year of his term appears to be consistent with theories of judicial empowerment that emphasize the value of law as an insurance policy, to provide downstream protection for policies of a departing political force. But in fact, this interpretation is complicated by the fact that Lee was only tangentially tied to the other KMT factions at that point, and soon thereafter founded a Taiwan independence group. In any case, judicial reform was initiated too late to successfully be translated into concrete policy during Lee’s term. For in March 2000, Lee’s designated successor Lien Chan lost the presidential election to Democratic Progressive Party leader Chen Shui-bian.

The DPP regime represented, to some degree, the triumph of the activist lawyers. Not all lawyers were members of the DPP, and not all DPP leaders were lawyers, but the correlation is significant enough to be striking (Winn and Yeh, 1995; Lu, 1992). In the mid 1990s, 30 per cent of DPP members of the Legislative Yuan were lawyers, a rate of lawyer-legislators possibly matched only in the United States Congress (Jacob et al 1996). In the Chen regime, the President, Vice-President, and two successive Premiers were all legally trained, and all were involved either as defendants or lawyers in the Kaohsiung trials. Law had been an elitist profession in the one-party state, and drew ambitious and talented people for whom formal politics were restricted. For these young Taiwanese, law served as a vehicle to channel their considerable energies, while preparing them for the day when public office might be a real possibility.

Though himself an activist lawyer, legal reform was not Chen’s priority, and in any case, he was hampered by KMT control of the legislature for his entire eight years in power. Therefore, the only major reforms that were accomplished were those, like the criminal procedure reforms described in Chapter Four, for which the professionals had indeed achieved a good deal of consensus. The gap between the political regime that planned the reforms and those that was charged with implementing them meant that there was a good deal of drift in Taiwan’s subsequent process. Judicial reform in Taiwan remains a work-in-progress, and major change requiring political institutions—such as

112 It must also be pointed out that this development of the DPP as a lawyer-led party reflected the contingent result of struggles within the Party about tactics and strategy. A hard-line, idealist group continuously pushed for a pro-independence policy, while others sought to emphasize social policy and pragmatic accommodation to gain power. The hardliners sought to utilize direct action while the pragmatists (which included more lawyers) sought a slower, more measured strategy. As the party developed, however, the pragmatist-lawyers gained the upper hand.

Interestingly, once the lawyers had triumphed, tensions arose with their former allies. The activist factions within the DPP became very critical of President Chen, and Huang Hsin-chëh actually left the party after Chen was selected as the Presidential candidate. Chen’s performance as President left many disappointed, as he has neither effectively advanced the independence cause nor delivered much in the way of domestic policy. The skills needed to advance the cause in opposition have not proved to be the same ones needed to govern effectively in a complex international environment.
III. IMPLICATIONS

This paper has traced the grand politics of legal reform in Japan, Korea and Taiwan. In all three countries, legal reform emerged at the center of the political agenda in the late 1990s as a result of broader processes of state transformation. In each country, the imperative was greater transparency and participation, triggered by democratization in Korea and Taiwan and by economic challenges in Japan. New social and political forces led to calls to open up the insular structure of the Northeast Asian legal complex, which had been the province of networks of professionals.

These pressures led to high-profile deliberative processes: deliberative commissions with selective membership, supported by the bureaucracy in the cases of Korea and Japan, and a grand conference of stakeholders in the Taiwanese case. The basic model of a deliberative council, with experts from several sectors, supported by a dedicated secretariat and specialist support, liaising with the government, had been adopted several times earlier in the 20th century in Japan. Indeed, the burst of legal reforms in the 1990s can be instead understood as one iteration in an episodic process of administrative reform, in which deliberative councils established parameters that were then implemented by line level offices. This was the pattern with the Rincho I reforms, proposed 1961-64, and then implemented over the next decade and a half; and the Rincho II established by the Suzuki Cabinet in 1981 with followup councils working until 1993. The latter led to the privatization of Japan Railways, Japan Tobacco and Salt, and Nippon Telegraph and Telephone. From this perspective the Hashimoto reforms were simply another regular instance of reform politics. The number of public corporations, for example was 103 in 1981, 84 in 1993 and 70 in 2000.

It is notable that more market-oriented Taiwan held an open conference, while the others used commissions empowered for a temporally limited period. The open Taiwanese approach, however, ultimately produced less change. Political factors, and an implementation gap between the planners and implementers of reform, delayed several of the initiatives contemplated in 1999 from ever getting off the ground.

In each country, electoral political leadership was required to effectuate the reform processes. In Taiwan and Korea, the presidency took the lead in a process driven in part by the supreme courts and activist lawyers. In Japan, the consensus of the iron triangle itself seemed to be an important trigger in the early 1990s, but the rise of reform politics then led to outsiders to have a stake. The three institutions at the core of the system, the Ministry of Justice, bar and Supreme Court, lost some control of the process, though each eventually came on board the reform bandwagon in the JSRC process. And Koizumi’s embrace of judicial reform was helpful in the crucial period between the design of reforms and their effective implementation.

Political leadership seems to have been a necessary but not sufficient condition, however. In Korea, reformist presidents Kim Young Sam and Kim Dae Jung had each
initiated programs of legal reform but neither was able to leverage the recommendations into policy. The lynchpin actor, it seems, in Northeast Asian legal reform has been the Supreme Court. When it sought to block reforms in Korea in the 1990s it was able to do so. When it takes the lead, as in Taiwan under Wang Yueh-sheng or Korea under Choe Jong-Young, it was able to play a central role.

Reflecting longstanding perceptions about the organization of politics, Korea’s process has been more openly politicized and adversarial than that in Japan. President Roh Moo-hyun pushed through reforms, but his successor has been less supportive. The Diet has been minimally involved in Japan, whereas opponents of judicial reform in Korea were able to use the National Assembly to block proposals in the 1990s. The Japanese process has proceeded through a superficially consensual gradualism, with some areas of legal reform utilizing an iterated set of amendments to allow adjustment to change.

The international environment was important as well. The fact that the Japanese had moved first made it difficult for Koreans to continue to put off reforms in the 1990s. This illustrates a general theme in reform politics, in which reformers try to reframe local interests as international to gain leverage. Consider Tsutsui and Shin’s account of ethnic Korean mobilization in Japan. Residents in Japan of Korean descent were stripped of Japanese citizenship after World War II, but after Japan ratified the international human rights covenants, ethnic Koreans began to frame their claims in terms of global human rights rather than particular and local claims. Arguments that the Japanese or Koreans had adopted a particular reform were utilized in all three places at various times.

Viewing East Asian legal reforms from a broad historical perspective suggests certain continuities across the major junctures in recent legal history. One can characterize Japanese legal history since 1868 as constituting a series of steps, like punctuated equilibria, towards transparency, accountability and expanded public participation in governance. The Meiji reforms unleashed demands for popular participation in government that were ultimately suppressed under the Meiji constitution. Nevertheless, the Meiji period created an infrastructure of institutions through which demands could be advanced, including an autonomous judicial branch and the National Diet. These demands were to resurface during the brief period of Taisho democracy, but were not to blossom until the postwar reforms imposed by the American Occupation.

Even the adoption of universal suffrage and the formal pronouncements of equality between the sexes, however, did not ensure active participation in governance. The so-called iron triangle monopolized policymaking in the postwar period and monopolized the flow of information.

Taiwan and Korea suffered more extended suppression of popular participation, first under colonialism, and then under developmental dictatorships. The recent era has seen an opening in all three countries, with a concomitant increase in transparency and accountability. The emergence of movements demanding freedom of information from

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government, shareholder governance of corporations, and judicial supervision of elections all reflect this trend.

The processes of legal system reform itself seems to provide an illustration of this process at work. Until the 1990s, legal system policy in all three countries was the preserve of a closed circle of actors, who controlled entry into the profession for their own benefit. In Japan, increasing divergence of interests among the three actors (hôsô sansha) allowed participation from those outside the iron triangle, ultimately leading to LDP and Keidanren demands for structural reform. The process of the Justice System Reform Council was a model of openness, as it published minutes on the internet and was the subject of a watch group led by a prominent academic. Yet the promise of transparency is often greater than its practical effect. In the legal system reform process, actual public input was minimal. Fundamental changes that might be in the public interest, such as doing away with the artificially imposed limit on bar entry every year, were apparently not even contemplated. In the end, a more open policy process simply means that, as elsewhere, concentrated interests may be able to win out in the policy process.

The story of legal institutional reform has implications beyond the law. The dynamics seem to parallel a broader shift away from performance legitimacy toward what might be called participation legitimacy. This is a distinctly different form of legitimacy than procedural legitimacy, such as found in, say the United States. The reforms in Northeast Asia—democratizing legal education, encouraging lay involvement in decision-making and criminal procedure, and opening up previously technocratic reserves of policymaking, mark a distinct shift for the East Asian state. It is likely, though beyond the immediate scope of this paper, that similar dynamics can be observed in other countries in the region.

115 Miyazawa, supra note Error! Bookmark not defined..
### Analytic Timetable [In Progress]

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