Legal Diffusion and Judicial Independence in South Korea and Taiwan: Judicial Selection, Education, and Promotion in Comparative Perspective

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Questions considered in this paper

• How is judicial independence contested in Taiwan and Korea?
• What are the influences on the development of judicial independence as a concept and as it is debated in Taiwan and Korea?
  – “Legal diffusion”
• What reforms have resulted from debates?
Concepts

• Diffusion is “the process in which an innovation is communicated through certain channels over time among members of a social system”

• Bringing theoretical rigor to the study of “legal transplants”

• Conceiving of law and legal phenomena (methods, practices, ideas, legal ideologies, documentary forms, etc.) as “innovations” that can spread
What is “judicial independence”? The concept may refer to: the separation of powers (judiciary from executive), the degree to which courts practice judicial review, how judges are appointed, the judiciary’s self governance over administrative affairs, budgetary independence, limits placed on judges by sentencing guidelines, incorruptibility, security against dismissal or discipline, impartiality against pressure from the public, media, lawyers, racial discriminatory attitudes.

A somewhat unclear concept
“it is clear the concept has been more obviously important as a piece of political rhetoric than as a series of legal concepts. It is rarely, if ever, defined. It is generally asserted.”

- Robert Stevens, English legal historian
Judicial Independence debates in Korea and Taiwan

• Judicial tradition vs Judicial reform
  • “Reform” isn’t necessarily good, just new; “pro-innovation bias” in diffusion sociology

• Where does judicial tradition come from?
  • Selection of judges, their education, and promotion

• What have reformers argued? What have they achieved?

• How can we account for success or failure of reform efforts?

• Theoretical considerations
The Origins of Taiwanese and Korean Judicial Tradition I

The German and Japanese inheritance
Origins of Judicial Independence in Germany

• The term “judicial independence” came from USA (John Adams, Federalist Papers) to France; Germans learned the term from France

• Judicial independence clauses spread through German constitutions
  – Kingdom of Bavaria, 1818: “the courts are independent within the limits of their official powers”
  – Kingdom of Saxony, 1831: “[courts] are independent in the exercise of judicial office from the influence of government within the limits of their competence”
  – Kingdom of Prussia, 1848: “judicial power is exercised independently in the name of the king, subject to no other authority than that of the law courts”
Gerichtsverfassungsgesetz

• “Courts Constitution Act”
• Debated from 1871-77; strong National Liberal Party influence
• Article 1: “Judicial power shall be exercised by independent courts that are subject only to the law.”
• Protection against dismissal and discipline
• It established the selection by examination, training in the courts (referendariat), and a promotion system
• “I have nothing against the independence of judges, as long as I promote them.”
  – Adolf Leonhardt, Justice Minister of the German Empire (1871-9) and architect of the GVG
“Though [performance] appraisals can be challenged in court there is a risk that oversight may prompt judges to follow a particular line of reasoning to satisfy their superiors. Accordingly there is a widely held belief among judges that judges in Germany are the most independent in the world, but only if they do not seek promotion.”

— Anja Seibert-Fohr, German judicial independence scholar
Japan’s Saibansho kōsei hō (1890)

- Essentially copied the German GVG
  - Written by a German legal advisor to Meiji government

- Judicial selection by exam, training in the courts, and promotion career path

- Adaptation: control over judge appointment centralized in Japan’s Ministry of Justice vs German Empire’s state MoJ vs Imperial MoJ (landesjustizhoheit)
  - No local vs central government debate in Meiji Japan

- Judicial independence tested
  - Executive fired 158 judges by offering them promotion to higher salary level in exchange for their resignation
  - Shows how bureaucracy can manipulate judges / careers
Origins of Judicial Tradition II

Transmission to Taiwan and Korea
Taiwan

- Republic of China, 1912
  - Article 51: Judges shall adjudicate independently, receiving no interference from higher officials (法官獨立審判，不受上級官廳之干涉)

- Chaos of civil war until 1932 Court Organization Act (法院組織法)

- Pass an exam, internship, and promotion career path through the judiciary
Taiwan II

• KMT ignored requirements to appoint judges by exam until 1955, when the Judges and Prosecutors Training Institute was opened

• Taiwan copied the LTRI of Japan, replacing *referendariat* style court internship
  – Theoretically strengthened judicial independence by putting training in hands of court; separation of powers strengthened

• But not in Taiwan since JPTI is under MoJ
Korea I

• Japanese colonization introduces Japanese Courts
• In 1948, Korea adopts Court Organization Act; essentially copy of Japanese law (selection by exam, training by court internship, promotion system)
• Adopts Japan’s 1947 creation of Judicial administrative agency
• Korea’s agency is under control of Chief Justice of Supreme Court
  – Supreme Court Secretariat in Japan vs Korea’s National Court Administration (司法行政處)
  – Strengthens judicial independence – separation of powers
Korea II

• In 1963, Judicial exam separated from Higher Civil Service Exam and judge school created
  – New judicial school (sapop daehakwon) created at Seoul National University under control of American-educated professor who was friends with ruler Park Chung-hee; LTRI with American law school appearance

• 1971 – Professor calls PCH a “military president,” gets in trouble, school abolished, Judicial Research and Training Institute created

• Seen as centralization over control of judges education in authoritarian environment (Yushin Constitution in 1972)
While formally free to disregard the legal opinions of their superiors, judges continued to look to the high courts for guidance. Although many factors conspired to preserve this deference to superiors, the attitude can most easily be explained as caused and nourished by recruitment, training, and promotion policies, all congenial to hierarchical organizations. Typically, the beginning of a career on the bench was also the beginning of the professional career for a young lawyer, fresh from a period of internship in the judicial apparatus. Rarely was a judge someone entering a second career. The first appointment (or election) was to the lowest court, a position carrying little prestige, and promotion depended at least in part on the approval of those who regularly reviewed lower courts’ decision. In this situation it is hardly surprising that assertion of independence on the part of lower judiciary [sic], even where formally possible, remained quite aberrational. Firmly tied to the mast of civil service, lower judges could hear the seductive music of freedom as Ulysses heard the singing of the sirens.

— Mirjan Damaska, The Faces of Justice and State Authority
The Hierarchical Judicial Bureaucracy under Attack

Post-democratic transition discourse and reforms
Taiwan and Korea - commonalities

• Critics inside courts (judges)
• Critics outside the courts (NGOs)
• Both defenders of judicial tradition and reformers claim they are on the side of judicial independence
• Judicial traditionalists: “We have judicial independence! Strong separation of powers in the administrative bureaucracy!”
• Judicial reformers: “We DO NOT have judicial independence! The bureaucracy constrains the judges’ decision-making!”
• (Judicial Independence is an ambiguous political rhetorical concept)
Commonalities II

• Reformers admire the American system; they often studied there.

• Reformers want to diffuse aspects of US system to their home countries: appointment not by exam but by legislature/executive; no 2-year training school; no bureaucratic promotion, only political appointment

• But the American system functions according to a very different logic...
Trial judges were often amateurs, as is sporadically still the case with village and town justices. But even as judges came to be chosen more often from the ranks of lawyers, political service proved to be a more important prerequisite for getting on the bench than professional legal skills or the extent of professional experience... Trial judges are frequently political figures, more inclined to heed the opinion of their constituencies than the opinions of superior courts, even if these opinions are technically binding. The prospect of promotion to a higher court is not nearly so potent a device for instilling hierarchical discipline as it is in Continental judicial systems because even the lowest rung in the American hierarchy of courts is already a very prestigious occupation.
Conceptualizing the Judiciary II

• US judiciary basically has “absence of professionalization” and “horizontal distribution of authority” rather than verticalized authority and expert application of positive law (civil law)

• Reformers concerned about personal judicial independence (persönliche richterliche Unabhängigkeit) – which is inherently stronger under the horizontal distribution of authority
  • American district court judges often rule against constitutionality of a law; Reformers admire this, wish it happened in their country

• personal judicial independence is an inherent issue in the expertise-oriented judicial bureaucratic style
Reformers in Korea

- **PSPD** – Court Monitoring Center – website constantly criticizing judiciary (1994-present)
  - “Under the Korean Constitution, Korea has only one judge – the Chief Justice of the Supreme Court! And every other judge is his deputy! ...he appoints them”

- **Our Law Research Group** – faction of anti-establishment judges criticizing judicial bureaucracy (1998-present)

- Critics find their moment of opportunity: Judiciary Reform Committee, 2003-4 (司法改革委員會) – succeeded at law school reform
  - Law School reform had cascading effect. Transformation of “judicial exam” into “bar exam” left no role for JRTI (judicial training school). New question: How will judges be selected? From experienced lawyers. JTRI will be closed in 2017. How will promotion work when it no longer occurs according to age-based system (graduation year from JTRI)? Unresolved question
Reformers in Korea II

• Rhetoric criticizing promotion:

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

-Our Law Research Group
Reformers in Taiwan

- Internal reformers emerged. 1993, judges in Taichong courthouse organized revolt against case-assignment system
- Reform spread across Taiwanese courthouses
- Reformers appointed to Personnel Review Council of Judicial Yuan (shows Judicial Yuan support?)
- They tried to reform promotion system and keep it. Did not try to overthrow the promotion system entirely (as in Korea)
  - In interviews, they express support for retaining selection by exam and JPTI training
  - Want to reform the judicial tradition – and keep the structure
Reformers in Taiwan II

- External reformers – mainly, the Judicial Reform Foundation

- Started judicial monitoring / evaluation system (司法觀察 / 評價)
  - Similar to Korean NGO’s 司法監視

- Moment of reform arrived – NOT in the Judiciary Reform Process but, in the debate over the Judge’s Act (法官法) in 2011
Reformers in Taiwan III: The Judges Act

• Reformers privately disagree with the notion of selection by exam, training in a school, and bureaucratic promotion

• But they know this is too idealistic for Taiwan; so they scale down their demands to only changing judicial selection

• JRF’s draft Judges Act had provision that all judges would come from experienced lawyers

• However, negotiations with the Judicial Yuan failed, DPP undercuts JRF, JY’s Judges Act passed; they say they want 50% judges coming from lawyers

• Reform-oriented judges allied with the Judicial Yuan
Reformers in Taiwan IV: JRF and Reformist judges diverge

• Why didn’t reformist judges join JRF?
• They agree with Continental judicial tradition
• Perhaps they were annoyed by JRF’s rhetoric of “baby judges” and “dinosaur judges” – they say they don’t like these terms

Judicial Yuan vs the Judicial Reform Foundation?
The head of the JPTI, even though he studied in America, supports the judicial tradition against diffusion of US style:

I don’t think which is better, the US or Continental system, but since we have selected the Continental system, we should follow it all the way. You cannot use part of the American way, part of the German way. So in the US they choose judges from among practitioners; if you adopt that kind of promotion, then judges must have no ranking. So district court judges have the same rank as high court judges. One decides the fact, the other decides the law. This is a major difference with our current system... In Taiwan, the appellate level decides facts and law, so they need more expertise. Senior judges need more expertise... Recruiting high court judges from lawyers would create problems. So we recruit practitioners at the level of the district courts. Even if one were a lawyer for 30 years, it would not be enough to be a Supreme Court Justice... It’s not easy to mix the common and civil law... Our reformers are very idealistic so they criticize us saying that we’re [the judicial establishment] very conservative, that we impede improvement. It’s not fair.

-Dr. Lin Huei-Huang
Conclusion: Questions

• How do we explain the clash over judicial independence?
  • Ambiguity of “judicial independence” – separation of powers vs personal judicial independence; reformers educated in US; past abuse of promotion

• Why did Taiwan experience a lesser degree of reform than Korea?
  • 1) Taiwanese reformers divided; 2) no strong presidential support; 3) no judiciary reform process; 4) overseas study less in Taiwanese judiciary than Korea

• What is the future for the hierarchical bureaucratic Continental judiciary in East Asia?
  • Will diffusing American judicial ethos cause problems in Korea? They have not prepared new selection, training, and promotion system yet, years after JRC ended. Suggests they are unsure how to proceed.
    – Personal judicial independence is inherently lower in doctrinal expertise-based, hierarchical system
    – If lifetime appointment at the District level, what incentives will it have to look to higher levels for guidance?
    – Will lawyers-turned-judges have enough expertise to apply law?
    – How will promotion occur if no link to JPTI/JTRI graduation year? Judges of mixed age ok?
    – If political promotion, can legislature really choose the most qualified judges for higher levels, or will they select based on politics, harming quality of judicial rulings?
Questions and Discussion

Thank you