Part One

Asia

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Law and the Liberal Transformation of the Northeast Asian Legal Complex in Korea and Taiwan

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I. INTRODUCTION

The capitalist countries of Northeast Asia have received intense scrutiny from political economists for much of the past half century, both because of their stunning economic growth and because of their political institutions. Governance mechanisms in East Asia, we are told, were fundamentally different from those of North America and Europe, and contributed directly to rapid post-war economic growth. Indeed, the East Asian experience is often taken to offer an alternative model of capitalism to that of the West, one in which formal law was less important than long-term relationships, networks and informal contacts. A separate set of claims in the political sphere offered 'Asian Values' as an alternative to liberal democracy. Whereas liberalism emphasised individual freedom, for example, it was asserted that Asian societies had a basic preference for social order and would follow more authoritarian political trajectories.

The continuing viability of these tropes of East Asian studies must be seriously called into question when one looks at the current political leadership in Korea and Taiwan, for the presidents of both countries are former activist lawyers who challenged authoritarian rule. How these bastions of illiberal capitalism became liberal democracies with lawyer-leaders is a fascinating story with implications beyond Northeast Asia. This chapter seeks to draw attention to this story by tracing the transformation of what I call the 'Northeast Asian legal complex', a configuration of institutions that sustained strong state governance from the early post-war period

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through the late 1980s. The chapter describes the complex and traces its institutional evolution during political liberalisation, focusing on Korea and Taiwan. In contrast with accounts that emphasise the cultural specificity of Asian values as contrasted with legal liberalism, I argue that Korea and Taiwan may be the paradigm cases of lawyer-led liberal transformation, and hence offer important clues to the interaction of the legal complex and political liberalism in other countries.

The chapter is organised as follows. Part II describes the ideal type of the Northeast Asian legal complex and its component parts. Part III traces, first in Korea and then in Taiwan, the interactions between this legal complex and emergent patterns of political liberalism, drawing on a series of interviews with activist lawyers involved in the transformation. Part IV draws comparative conclusions and ties the story into the broader themes of this volume.

II. THE NORTHEAST ASIAN LEGAL COMPLEX

The legal systems of capitalist Northeast Asia for most of the last century were based around a configuration of institutions identified here as the Northeast Asian legal complex. The complex has its origins in Japan's peculiar adoption of modern Western law, and it subsequent transfer of western-style legal institutions to its colonies in Korea and Taiwan. Following the Meiji restoration of 1868, Japan embarked on a rapid programme of modernisation 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. 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' (Harding, 2001: 202). With the political economy organised 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.

As Japan's colonial project swept up Taiwan and Korea, a Japanese-style government structure was put in place in each polity, including a form of cabinet government, courts, police and modern legislation (Palais, 1975; Dudden, 2005; Wang, 2000). While the details and the level of professional autonomy varied, this institutional transfer was to have an important impact long after colonialism. Japan remained a 'reference society' for Taiwan and Korean law, both public and private, for several decades after Japan's defeat in World War II. The basic 'six-law' structure of the

Constitution and Codes was retained in both countries,[1] as was the court structure. Legislation in both countries was frequently copied wholesale from Japan, though this influence was greater in Korea than Taiwan.[2] Even today, the recent Japanese experiment of establishing three-year graduate law schools is being adopted in Korea and considered in Taiwan. Local jurists continue to pay attention to developments in Japan.

The term legal complex is meant to highlight the systemic interrelationship and integration of a set of institutions which served to complement and reinforce each other in a stable and remarkably successful way. I use the term Northeast Asian legal complex as an ideal type to describe the similar structures in place in Japan, Korea and Taiwan, although I recognise that individual countries varied and may have deviated from the type in certain ways at particular times. The Northeast Asian legal complex had three main elements: a professional, somewhat autonomous and competent court system; a small, cartelised private legal profession without much independent political influence; and administrative law regimes that insulated bureaucratic discretion exercised by developmental regimes. I treat each in turn.

(a) 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 organised hierarchically, with effective control at the top, and developed an internalised institutional emphasis on providing like solutions to like cases,

[1] Japanese law has traditionally had as its core 6 major laws: the Constitution and the Codes of Civil Law, Civil Procedure, Commercial Law, Criminal Law, and Criminal Procedure.

[2] One might ask why Japan would serve as a legal reference society when it had practised such a brutal form of colonialism in Korea. Theoretically, one might expect post-colonial societies to *reject* legal forms associated with the former ruling power. The answer, I think, is twofold. First, there is path dependence to adopting legal rules and especially those governing institutions. Once an institutional configuration is established, the costs of switching to an alternative are likely to be high and to increase over time. Remaining with the colonial configuration is easier, and provides a comfortable continuity, especially for legal elites schooled in the language of the colonial law. The second reason lies in a general point about legal transplants. Law derives much of its power from its universalism, its position as the embodiment of general principles and generic modernity rather than a product of its particular context. In such circumstances, as Takao Tanase (2001: 191) has pointed out, the identity of the source of the legal transplant can easily be downplayed. Indeed, close identification with Japan as the source might be a means of discrediting the law. The position of Japan as the embodiment of imposed modernity thus led to a kind of bipolar relationship with Japanese law. On the one hand, Japanese law provided a standard of what legal reforms might be appropriate in an East Asian political economy; on the other hand, Japan's adoption of particular reforms provided incentives to surpass and improve on. Just as the goal of catching up with Japan provided a popular motive for development in Korea's political economy, so keeping up with Japan became a goal of legal reform.

helping to render predictable decision-making and thereby contributing to a reasonably sound business environment (Ramseyer, 1988; Ramseyer and Nakazato, 1989; Ginsburg and Hoetker, 2006). Courts had a moderate capacity to handle civil and commercial disputes. This in turn helped to keep litigation rates low in Japan relative to those in other advanced industrial democracies (Wollschlager, 1997).

Many of the features of the judiciaries in Korea and Taiwan can be traced back to their origins in the colonial administrative apparatus. While there were greater concerns about judicial corruption in post-colonial Taiwan and Korea than have ever been observed in Japan, the basic institutional structure of a hierarchically organised judiciary operated effectively, especially when compared with judiciaries in other developing countries coming out of colonial rule. In the economic sphere, the judiciary retained autonomy. It had a distinct professional ideology and norms of neutrality in most cases.

This is not to assert a complete autonomy from political influence. The Kuomintang (KMT) and the Korean strongmen attempted to develop means of monitoring and disciplining judges, particularly in politically sensitive disputes. The Leninist KMT, with its ability to penetrate into the society, had some advantages here compared, say, to Park Chung Hee in Korea, whose interference with judicial independence was clumsier.

(b) Small Private Bar

Northeast Asia is well known for very low rates of lawyers per capita (Haley, 1991; Pratt, 2001: 156). In both Korea and Taiwan (as in Japan), legal training was generalised undergraduate education, with the bar examination treated as a separate goal for a very small proportion of those who graduated. 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 3 per cent for most of the postwar period (Kim, 2002). Most bar passers devoted additional years of study to prepare for the test beyond the undergraduate degree. The few who were able to run the gauntlet to enter the legal profession were rewarded with great status and wealth. The function of the examination was no mere test of basic professional skills and qualifications; rather it was a kind of super-examination, the difficulty of which was itself the point.

One might wonder how economies as advanced as those in Northeast Asia could function without large numbers of private lawyers. The answer lies in part in the fact that law was a popular generalist education, so that many legally trained persons who were unable to pass the bar examination ended up working in quasi-legal jobs with companies and the government. This meant that background notions of legality and predictability were present throughout the system. In addition, a large amount of 'lawyer's'

work is done by adjunct professions such as scriveners, paralegals and others with competence in specific arenas of practice, including tax, administrative filings, and patent applications.[3]

In Japan and Korea, passing the bar examination actually led to further training in a judicial training institute, encouraging bar–bench ties and insulation from other social forces, but Taiwan had a distinct system with separate examinations for lawyers and judges. In addition, military lawyers, judges and professors in Taiwan could gain admission to the elite and lucrative profession by means of a 'special examination' (Winn and Yeh 1995 at 575; Winn 2005.) These lawyers, especially those with the military credentials, in turn offered not so much good legal advice as connections to the judges, reinforcing personalism in the legal profession. When combined with the severe restrictions on formal 'meritocratic' admissions during the period, this system created a de facto political screen for those with wealth and connections.

In each country, the few lawyers who were lucky enough to pass the bar and enter the private legal profession had no incentive to fight for a larger profession because of the monopoly rents they collected. Nor did private business much care to push for more lawyers. 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.

The small, cartelised private bar was relatively quiet for most of the post-war period. The organised bar associations were conservative and inactive. In the 1980s, however, exogenous decisions taken by bureaucratic authorities expanded the number of bar passers. The Korean bar's growth in numbers can be traced to a 1980 decision by the Chun Doo Hwan administration to expand the number of annual passers of the bar examination from the traditional 100; in Taiwan the numbers did not begin to expand dramatically until 1989, before which only a few dozen persons might pass the examination in any given year.[4] Ministry of Examination statistics show that the Taiwan bar passage rate increased to 14 per cent in 1989, a huge jump. The rationales for the changes in policy in Korea and Taiwan remain murky. It is tempting to trace both developments in part to the contemporaneous shift toward liberalisation in economic and financial spheres, which led to greater demand for business lawyers, but there is no independent confirmation of this hypothesis, in part because of the general lack of transparency in government administration at the time.

[3] These include *zenrishi, benrishi, gyosei shoshi,* and *shiho shoshi* in Japan; *falu zhuli* in Taiwan, and *beop-mu-sa* in Korea.

[4] In 1988, 16 lawyers passed the regular examination, while 114 passed the 'special' examination. The next year the number of lawyers passing the regular examination swelled to 288, while those passing the special examination declined to 87. This nearly tripled the number of annual admissions and radically shifted the composition away from those with political connections toward meritocratic selection.

(c) 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 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 (Liu, 2003: 406–7). While a large amount of administrative policy-making 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 proceeded under a consensual policy-making process involving *shingikai*, deliberative councils composed of the parties concerned as determined by the relevant ministry. Similar mechanisms of business–government coordination were prominent in Taiwan and Korea (MacIntyre, 1994). The emphasis was on selective, *ex ante* private participation in policy-making arenas that were structured by ministries. This system provided transparency and predictability for the most interested players, and high levels of compliance once policy was adopted (Kanda, 1997). For outsiders, however, there was no transparency whatsoever.

In implementing regulatory policy, the Northeast Asian state has 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. Network political economy was legally constituted. The controversy concerning the extent to which administrative discretion was exercised in the shadow of political power need not concern us here. For now, it is sufficient to say that the entire structure of Northeast Asian post-war 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 emphasised 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 the flexibility and informality of the regulatory process, private information on ministerial policy became crucial for business planning, and firms had to invest in maintaining relationships with bureaucrats.

It must again be emphasised that this configuration had a particular legal construction. There were no generalised administrative procedure 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.[5] 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 rule-making, and administrative guidance was generally held to a high standard of review (Kanda, 1997; Ginsburg, 2006). 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 firm's business environment.

(d) The Equilibrium of the Legal Complex

Each of these three elements of the Northeast Asian legal complex interacted with the others to produce a set of stable and reinforcing institutions. The predictable courts minimised pressure for private litigation (at least when compared with American 'adversarial legalism' (Kagan, 2002)). This allowed the state to maintain severe rationing of private legal services. A small private bar, in turn, minimised the possibility of social movement litigation challenging the insulated domains of policy-makers (Upham, 1987). 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. In Taiwan this was magnified by the ability of military lawyers to gain preferential admission to the bar without passing the examination. (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 been 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 litigation 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 among bureaucrats and the large industrial firms provided the basic structure, reducing the need for general rules to govern arm's-length transactions. The Northeast Asian legal complex cabined law to a narrow zone.

An additional factor in Korea and Taiwan was authoritarian rule, justified to maintain security from the external threat of, respectively, North

[5] This point is one of divergence from the German model.

Korea and the People's Republic of China (PRC). North Korea and the PRC were not merely neighbouring 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 the South Korean and 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 US support. The presence of liberal constitutional language meant that liberal law was at least a formal ideal on which reformers and oppositionists could draw. For most of the period, however, this potential remained dormant.

III. TRANSFORMATIONS

Beginning in the 1980s, the regimes in Korea and Taiwan faced serious challenges and demands for the restoration of democracy. A key factor was the emergence of broad based social movements involving the middle class, which itself was a product of rapid economic development. In this sense, Korea and Taiwan were paradigms of modernisation theory, which posited that economic growth would lead to social and political change (Lipset, 1963).

Modernisation theory informed the law and development movement of the 1970s, which placed great emphasis on the mobilisation of law for social change. While this movement focused its attention on Latin America and Africa, this section suggests that Northeast Asia was ultimately a more hospitable environment for the dynamic to unfold. In both Korea and Taiwan, small groups of activist lawyers drew on and adapted American social activist strategies to use the law for social change. This section traces the political and legal transformations that developed in the 1980s and 1990s, with an emphasis on the interactions between activist lawyers and the dynamics of democratisation.

(a) 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 labour unions to the middle class. This ultimately led Chun to resign, 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.[6]

The dynamics of democratisation have been traced elsewhere, but it is important for present purposes to recall that legal reform played an important role. 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 (Ginsburg, 2003).

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 (Epp, 1998). The Constitutional Court, as well as the administrative and ordinary courts, soon became a locus of activity for the several thousand new civil society organisations that exploded onto the scene after 1987 (Shin, 2003). 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 organisations 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

[6] Each President entered with a reform programme. Kim Yong Sam's themes were globalisation 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.

1975 as a law student demonstrating against the Park Chung Hee regime, Park had spent time in jail on political charges.[7] 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 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 labour 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, labour 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).[8] 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.

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.[9]

[7] Interview with Park Won Soon, 7 March 2005.

[8] Another lawyer with a similar biographical story was Cho Yung Nae.

[9] 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.

Litigation was also a component of the reform programme. 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 programmes. 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 mobilisation efforts, convinced the public transportation agency to write a charter for citizens. There were hundreds of similar examples of litigation being utilised as part of a broader strategy in diverse arenas.

The growth in civic organisations 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 organisations 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 (Johnson, 2004).

The politics of scandal, as exploited by NGOs, reached a zenith in the months before the April 2000 parliamentary elections, when a coalition of some 450 civil society organisations, chaired by Park, sponsored a blacklist of corrupt politicians.[10] Criteria for being blacklisted included corruption, participation in the National Security Council's legislative committee and other signs of being 'unfit' for support. The blacklist campaign had a significant effect on nomination processes—59 of the 86 on the final blacklist who ran were defeated (Shin, 2003; Johnson, 2004). The coalition also sought to reform the election law, which prohibited civic groups from participating in election activities.

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 organisations. The presence of a forum allowed civic groups to use litigation as a strategy which changed bureaucratic behaviour.

[10] 123 sitting members of the national assembly were blacklisted, roughly evenly divided by party affiliation, but including Kim Jong Pil, a fixture on the political scene who had been prime minister under Kim Dae Jung, and many other prominent politicians. Other organisations compiled similar lists.

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 (for unclear reasons) increased the number of bar passers from the miniscule 100 per year in 1979, 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.[11] 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.

More directly, the culture of scandal forced the traditionally dominant parts of the legal profession to reform. Traditionally, prosecutors had been the highest status group in the level profession because of their close association with political power. Indeed, it was their very *lack* of autonomy that gave them prestige, as they were identified and feared as instruments of the President. The President's desire to use prosecutors for narrow political ends did not change in the democratic era: even Kim Dae Jung was seen as initiating selective prosecutions against uncooperative chaebol. But after democratisation the source of institutional prestige for prosecutors began to erode. A major factor here may have been a prominent scandal involving the Prosecutor-General, but there were lower level concerns about prosecutorial discretion. Beset by scandals, the prosecutors sought to rehabilitate their image and status through aggressive corruption investigations. Thus democratisation, while being used by activists, also triggered a reordering within the legal complex itself, toward greater autonomy from the political system.

Minbyeon's most famous former member is current President Roh Moo-hyun, who had been an activist lawyer in Pusan along with his top advisor Moon Jae In. Former Minbyeon member Koh Yong-Su is now the chair of the Korean CIA, the organisation nearly synonymous with oppression in the minds of many activists from the 1980s. Kang Kum-Sil is now the Minister of Justice. Ahn Kyung Whan, an academic, became Dean of Seoul National University School of Law and also served as an advisor to the Ministry of Justice. In short, these activist lawyers have *become* the establishment, which inevitably changed their perspectives. On the one hand, the domestication of activist lawyers has led to a

[11] 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.

more cooperative relationship between government and NGOs, as civil society organisations 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 are well aware.[12]

The emergence of the activist bar in Korea is a phenomenon that began in the early 1980s and has had a profound impact on Korea's liberal transformation. It adopted a kind of programme of continuous reform. When asked why lawyers took the lead, Park contrasts Korea with Japan, a country with 'real institutions' like an active mass media and an impartial prosecutor general. Korea, in his view, had no real national institutions with any credibility.[13] The political parties, media and legal system all were basically corrupt. The PSPD took over the role of setting the agenda for reform, filling a void in the polity.

Park argues that one key factor in the PSPD's success was the mix of academics, lawyer and activists, each bringing their respective expertise to the PSPD. Academics contributed ideas, but had no political or litigation experience. Lawyers had practical skills, but were elites; activists connected with citizens and thus continually shifted the agenda back to the core vision of participation. Korea's story suggests that lawyers' professional knowledge was most effective when embedded in broader networks of change agents, so that lawyers play a role, but not the only role, in the broader programme

(b) Taiwan

Taiwan enjoyed a softer form of Japanese colonialism, and legal modernisation on the island was shaped by Chinese Republican thought as much as by Japan's legacy. After the establishment of ROC control in 1945, tensions escalated between KMT and the Taiwanese, and many thousands of local activists (and other elites) were rounded up and killed in the so-called 2–28 incident. From then on, native Taiwanese were effectively subordinated to 'mainlander' rule, which combined military efficiency with a Leninist political party. Much of the nominally democratic constitution was suspended by so-called 'Temporary Provisions' that lasted 40 years, and no effective opposition parties were allowed.

Confronted with one-party rule, Taiwanese activists focused on ending KMT rule, and channelled their efforts into securing greater political

[12] Park mentioned a 'time of crisis for civic groups' as government coopts 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. While the legal framework for philanthropy needs work, a problem developed with tax exemption, as the *chaebol* used their organisational sophistication to take advantage of the mechanism.

[13] Interview, 6 March 2005.

liberties to facilitate that goal. This differed slightly from Korea, where political parties were legal but circumscribed, and where activists focused on social and economic issues. Prevented from forming a party, Taiwanese elites eventually developed a category of *dangwai* (out 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 favoured 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. Thus began a long period of gradual democratisation, 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 current President Chen Shui-bian) earned fame by defending arrested activists.[14] 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.

[14] Others in this category include current premier Su Tseng-Chang, who had represented Yao Chia-wen at the court martial, and former Premier Frank Hsieh, who resigned at the beginning of 2006.

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. Chen's own wife Wu Sue-jen was paralysed in an incident many believe was organised by KMT forces.[15] The authorities also closed 15 magazines associated with the opposition.

These strong-arm tactics that had worked in the late 1940s 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 womens's issues, Aborigine civil rights, academic and journalistic freedom, and an end to martial law.

In contrast to the position in the United States and Korea, litigation played a relatively small role in these movements. 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

[15] In the mid-1980s, Chen was jailed for libel for a magazine he was running, but his wife was elected to the Legislative Yuan.

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 signalling that legality was important and that it could serve as an instrument to constrain bureaucratic arbitrariness.

In the 1990s, the Council became much more active, systematically dismantling the tools that had been used to maintain mainlander domination. For example, the Council held that military counsellors could not be required in schools; that labour groups could organise; and that criminal procedure had to accord with international norms.

A crucial symbolic moment came when the Council was called on to resolve the question whether the Taiwan Law Society could register as an organisation, replacing the Chinese Society for Comparative Law. The long-standing policy during the authoritarian period was to deny registration to any 'social organisation' 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 organisation, 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.

What of the role of lawyers in liberal politics? 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). Today, the President, Vice-President, Premier and immediate past Premier are 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 was foreclosed. 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.

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 emphasise social policy and pragmatic accommodation to gain power. The hardliners sought to utilise direct action while the pragmatists sought a slower, more measured

strategy. As the party developed, however, the lawyers gained the upper hand.

One illustration of this domestication of direct action through law was the DPP's adoption of an internal arbitration system, complete with published precedents, to deal with intra-party disputes, both personal and policy. This arbitration system utilises non-party lawyers who are close to the DPP to resolve disputes. The head of the arbitration scheme was Chen Chi-Sun, the activist lawyer whose office had served as informal meeting ground for many years of DPP activists and who had been a mentor of Chen Shui-bian. The idea of intra-party arbitration reflects the association of the DPP with law and legalistic modes of reasoning, while of course advantaging that faction of the party with those skills. It seems plausible that this internal ordering of party affairs in a legalistic way may have both contributed to and reflected Chen's emergence as the Presidential candidate of the DPP for the 2000 election.

The Taiwan story is one of lawyers advancing claims of professional autonomy at the same time as they pushed for a specific political cause. These two causes mutually reinforced each other. Asking for freedom of speech and freedom of assembly was meant to bolster Taiwan independence as well as democracy; developing a vision of a legal profession able to advance claims against the regime served this goal. It is possible, though not verifiable, that the professional goals would have been subordinated to the political ones had the lawyer-activists had to choose.

Interestingly, once the lawyers had triumphed, tensions arose with their former allies. The activist factions within the DPP have been very critical of President Chen, and Huang Hsin-cheh actually left the party after Chen was selected as the Presidential candidate. Chen's performance as President has 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. At this writing, Chen is embroiled in a serious corruption scandal that threatens his Presidency. The liberal lawyers may have transformed Taiwanese society, but may themselves have been transformed in the process.

IV. LESSONS

The Northeast Asian story touches on a number of themes related to lawyers' roles in liberalisation. It concerns, most importantly, activist elements in the legal profession playing a crucial role in the transformation from illiberalism to liberalism, and one in which activists targeted a particularly imposing and effective administrative state complex. But the pathways of the lawyers were different in the two countries discussed here. The Korean

activists mobilised a broadly based strategy for social change, but did so quite self-consciously outside the framework of party politics. Park's remark that the PSPD was a political party without aspirations to power is quite illustrative. In Taiwan, in contrast, a smaller group of activist lawyers sought and gained political power, representing themselves as the vanguard of a long-oppressed Taiwanese majority. The overtly political character of the Taiwanese lawyers may simply reflect the paramount nature of the national identity issue on Taiwan, but more likely has to do with different initial conditions. The KMT one-party regime and the suppression of Taiwanese nationalism made political party organisation a particularly attractive vehicle for change, whereas in Korea political parties were generally seen as corrupt and ineffectual. The Korean activists thus chose the 'purer' strategy of working outside the party system.

At the outset of the chapter, I suggested that many developments in transforming Taiwanese and Korean political economy reflected a kind of paradigm of modernisation theory, with political and economic liberalisation supporting each other and leading to broader cultural changes. In this regard, geopolitics are surely important to understanding the particular transformations in Northeast Asia. The United States played a key role in national defence, as a reference society, and in supplying liberal legal ideology and institutions as a model. The presence of the liberal metropole in the form of the United States meant that liberalism was present in the array of ideas available to reformers. Experiences in the United States, either in exile or in training periods, informed many of the specific strategic choices by the leading activists in Korea and Taiwan.

For example, many prominent members of the Taiwan opposition, including current Vice-President Annette Hsiu-Lien Lu, had studied in the United States, and several were lawyers. Lu has said that Champaign-Urbana, Illinois, was the 'birthplace of her enlightenment' when she observed the women's movement there in the early 1970s.[16] After her release from prison in 1985, she again returned to the US to study at Harvard, before returning to become a central member of the Democratic Progressive Party. She was elected Vice-President in 2000. Park Won Soon in Korea greatly benefited from a two year stint at the London School of Economics and Harvard Law School, followed by an internship at the American Civil Liberties Union in Washington, DC. Park attributes many of his organisational innovations to this period, when he learned about tactics and strategy while collecting legislation on human rights and corruption.

The role of the United States extends beyond providing a model and training ground to actually serving as an alternative means of entry into the legal complex. Indeed, Korean and Taiwanese students at various times

[16] Interview, December 2004.

have looked at US legal qualifications as an alternative degree in a context where bar passage rates have been too low to meet demand (Winn, 2005). All of this suggests why it is that Korea and Taiwan may appear to be a kind of paradigm for the process of legal liberalism in non-Western societies: both were societies that depended on the United States for their continuing viability in the face of nearby communist regimes. This is an atypical, somewhat paradoxical sense in which national security affects liberal transformation: rather than posing a threat to legal liberalism, a country's security relationship with the United States may in fact be the vehicle for liberal ideas to enter, and may provide those ideas with prestige and power.

In terms of broader links between the legal complex and liberalism, the meritocratic character of law and the social mobility offered by professions were key factors. Both Presidents Chen and Roh grew up in poverty. Chen's parents were tenant farmers; Roh did not go to college but instead passed the bar examination out of high school, a feat nearly unheard of anywhere in Northeast Asia. Law provided a field in which these young talents could demonstrate their skill and drive, and hence were able to develop reputational capital that supported political engagement. Professional and economic power was particularly important in Taiwan, where the Leninist regime coopted other channels for advancement.

Finally, it is worth recalling the dynamics by which the Northeast Asian Legal Complex was transformed. In both Korea and Taiwan, a key step was the seemingly innocuous, technical step of expanding the size of the private bar. This was undertaken by the authoritarian regime in Korea and as a technical decision of the Examination Yuan in Taiwan. This step mattered not only because of the absolute increase in the talent available to take on system-transforming tasks, but also because it shifted the proportion of the profession engaged in private practice as opposed to government lawyering and judging. In Taiwan, it allowed the 'meritocratic' elements in the profession, namely those who had passed the examination as opposed to entering the bar through one of the backdoor methods, to expand their numbers and influence in the bar. In a very real sense, the private legal *profession* emerged along with democracy in both countries. Activist lawyers were able to draw on this pool of talent to advance their agendas. In this sense the story is similar to Epp's (1998) account of 'Rights Revolutions'. A support structure of activist lawyers was needed to effectuate and channel broader demands for rights.

At the same time, the 'supply' side of the equation cannot be ignored. Had it not been for the crucial factor of constitutional courts making themselves available to claims challenging the government, the activists' strategies would have been ineffectual. The constitutional courts' willingness to constrain governmental decisions at the highest level had great symbolic importance for scaling back the previously dominant administrative

apparatus. This emboldened activist elements in the legal profession to pursue their agendas more vigorously.

Korea and Taiwan have had similar histories over the last century. Colonisation by Japan introduced modern law, and established institutions that laid the groundwork for further social and economic development. After World War II, both countries were governed by capitalist authoritarian regimes confronted with communist enemies, and were part of a broader American zone of influence. As economies grew, so did pressures for liberalisation, and in both countries lawyers were well situated to take positions of leadership in democratisation. In turn, the legal systems were transformed from the classic pattern of the Northeast Asian legal complex. Passive courts, a miniscule and quiescent profession and administrative insulation have been replaced by constitutional court activism, lawyer-presidents and a new politics of transparency.

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