The Warren Court in East Asia: An Essay in Comparative Law

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Abstract

The Warren Court was the apex of liberal legalism in America, embodying hopes that courts could play a leading role in social change. It has thus been an inspiration to judges and activists around the world. This paper traces the influence of the Warren Court in East Asia, focusing on three countries, Korea, Taiwan and Japan. Because of the Japanese colonial legacy, these three countries share certain institutional structures and basic orientations of the legal system, providing a useful context for a comparative analysis. The paper first traces the impact of Warren Court jurisprudence in each country in particular doctrinal areas, especially criminal procedure and reapportionment. It then goes on to consider the factors that account for differential levels and modes of impact in different contexts as a way of drawing comparative conclusions about the conditions for transnational judicial influence. It argues that institutional structure, as well as political forces, is the crucial determinant of whether ideas from abroad can become effective legal transfers.

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In 1967, Earl Warren traveled to Seoul to give a speech to the Korean Supreme Court.[1] "I believe," said Warren to the assembled audience, "there is a common bond between men of law in all nations because the law we use is not strictly our own."[2] He went on to describe the United States Constitution and its core principles of individual rights, power residing in the people, and the diffusion of powers, and noted that these principles were not of American origin: all law, he said is continually borrowed and moving around.[3]

Warren's point about borrowing, of course, is a kind of orthodoxy in comparative law, which traces the flow of legal ideas among jurists across time and space.[4] Men of law, he suggests, do not so much invent law as find it from the corpus of legal ideas, and then apply the chosen rules they deem appropriate. This model of comparative law, for all its merits, is largely an apolitical one—it focuses on the quality of legal ideas rather than their distributional consequences or institutional support structures. In this essay, I want to evaluate this model, and seek to interject a more institutional and political element to comparative law. My basic argument is that the success or failure of particular borrowings depends crucially on institutional structure and political environment in which the borrowing occurs.

My method will focus on the influence of the Warren Court in three countries in Northeast Asia, Japan, Korea and Taiwan. Despite their significantly different cultural environments, these three legal systems share certain institutional structures and basic

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[1] Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. L. J. 71, 86 note 89 (1998). It was Warren's second trip to Korea as Chief Justice, having attended the opening of the Graduate School of Judicial Education at Seoul National University in 1962.

[2] Remarks at dinner honoring Warren hosted by Korean Chief Justice Cho Chin-Man, Young Bin Kwan (State Guest House), Seoul, Korea, Sept. 12, 1967, Library of Congress, Register of Earl Warren Papers.

[3] Warren went on to add that "None of these principles was discovered by out Founding Fathers. They had learned for the experience of peoples of all ages. But put together as they were and adapted to our conditions and mores, they have served us well."

[4] Most prominently through the work of ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1983); see also William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995).

orientations originating in the Japanese colonial period. All three were subject to significant American influences after World War II. These similar histories have led to substantial similarities in substantive law and institutional structure.[5] At the same time, political dynamics have diverged in recent years. This combination of similar starting points and different political structures provides a useful context for a comparative analysis.

The paper is structured as follows. Part I considers how we might define the influence of a Court and how it is best measured. Part II traces the specific influence of Warren Court decisions on law in East Asia, focusing especially on the impact of the criminal procedure and redistricting decisions. Part III then considers the broader impact of judicial activism in East Asia. The paper will argue that, regardless of how one characterizes influence, the Warren Court has been more influential in Korea and Taiwan than in Japan. Part IV considers explanations for this finding, ultimately concluding that broader political and institutional factors provide the best account for divergence.

I. What is Influence?

It goes without saying, to this audience at least, that judicial review and social change were intimately linked in the U.S. by the Warren Court. From its very first decision, *Brown v. Board of Education*,[6] the Warren Court signaled a concern with race, equality and substantive notions of justice beyond what legislative actors were willing or able to provide. As it went on to transform the electoral system,[7] take religion out of the public schools,[8] and revolutionize

[5] Indeed, until quite recently, most Korean statutes were simply copied from Japanese counterparts.

[6] 347 U.S. 483 (1954).

[7] Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

[8] Engel v. Vitale, 370 U.S. 421 (1962).

criminal procedure,[9] the Warren Court frequently anticipated social change rather than followed it. This amounted to what Abe Fortas, and many others, called a judicial revolution.[10]

In considering the extent to which this activity influenced courts in East Asia, we must at the outset consider in the abstract what constitutes the influence of a Court. This is a surprisingly complex question. Let us consider four levels at which a court can be said to have influence, each reflected in different evidence: citation, doctrine, judicial style, and extrajudicial actors.

A. Influence by Citation

In recent years, it has become fashionable to refer to the growing willingness of courts to look at practice of other courts beyond the borders as a transnational judicial dialogue.[11] Anne Marie Slaughter has been especially active in documenting this phenomenon and argued that it constitutes a new form of global governance.[12] Adherents of this view celebrate the normative attractiveness of this "dialogue." Slaughter, for example, has encouraged the United States Supreme Court to follow constitutional justices around the world in being willing to look to foreign decisions as persuasive authority when considering the content of particular human rights norms.[13]

This is what might be called influence by citation. The evidence for this global dialogue is found in the allegedly increased propensity of courts to cite foreign decisions. Citation, however, is neither a necessary nor sufficient condition for influence. It is not necessary because a court can adopt a rule or line of reasoning from a foreign court without citing it. It is not sufficient because many decisions that are cited are distinguished and not followed. Moreover, the fact that citation in written opinions is not a universal practice, even among constitutional courts, means that this measure of influence will tend to overweight the European Court of

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[9] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Gideon v. Wainwright, 372 U.S. 335 (1963).

[10] Bernard Schwartz*, Preface*, in THE WARREN COURT: A RETROSPECTIVE v (Bernard Schwartz, ed., 1996).

[11]See, e.g., Anne Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191 (2003)

[12] Anne Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L 1041 (1993).

[13] See, e.g., the opinion of Justice Breyer in Foster v. Florida, 123 S. Ct. 470, 472 (2002).

Justice, the U.S. Supreme Court, the German Constitutional Court, and the European Court of Human Rights as sources and targets of influence. Influence by citation is hardly a workable method for evaluating the impact of external ideas on East Asian courts, because courts in the region are not used to citing cases as extensively as their American counterparts.

B. Influence of Doctrine

A second way one might observe influence is doctrinal, tracing the adoption of specific rules created or identified by the Court. If a Court is associated with a particular rule or decision, then the subsequent adoption of that rule by other courts would demonstrate "influence." This method is promising, though evidentiary and causal issues remain. First, one can have coincidental adoption of similar rules. Second, one can have two decisions by different courts both influenced by a third, prior decision. The term "influence" implies causality at a fairly strong level, probably more than can be justified in as broad a social field as the legal system.

C. Influence on Judicial Style

A third way in which one might evaluate influence is in the style of decision-making. The Warren court may be, in the popular conception, the paradigm of an activist court.[14] Regardless of its influence on doctrine in any particular context, the Warren court has redefined what it means to be a court, and the role of courts in bringing about social change. From this point of view, the Warren Court's greatest influence will be as *an idea*.

Note that in characterizing this influence as a matter of judicial style, I am implicitly assuming that judges and courts have some choice in articulating the judicial role vis-à-vis other political actors. Judges, and courts, can through their decision-making decide to support or to confront legislative and executive authorities. Each case presents an opportunity to position the court in the political system. The net effect of these decisions will determine the reputation of the court, as well as its overall effectiveness.

D. Influence on Extrajudicial Actors

The discussion of judicial style leads one naturally to consider a fourth mode of influence, the influence of a court and its doctrine on non-judicial actors. For Warren Court jurisprudence has been extraordinarily influential on academics and activists in many countries,

[14] Note that Rehnquist court has struck as many or more laws, despite its reputation as being non-activist.

regardless of whether these groups are able to successfully introduce the jurisprudence into the courts or legislature. One might characterize this as the influence of the Warren Court on legal or constitutional culture, broadly speaking.[15]

These various levels of influence bear no logical or structural connection. One can have influence on doctrine without influence on judicial style or extrajudicial actors. Conversely, a court might demonstrate great creativity and social activism, inspired by the Warren court model, in doctrinal areas where the Warren court was relatively silent. It will be important, in the analysis to follow, to ensure that we keep these various strands of influence separate.

II. The Warren Court in East Asia

A. Equality Doctrine

1. Minority Groups

The paradigm of the Warren Court is, of course, *Brown*, and its progeny, in which the Court overturned a caste system through a series of decisions. Despite official ideology to the contrary, no society in Northeast Asia is ethnically homogenous. All societies in the region are becoming, in fact, more diverse because of low population growth and the need to import labor to perform the dirty, dull and dangerous tasks that increasingly affluent citizens are reluctant to perform.[16] In each society, minority groups have established political movements, but none have used litigation as the primary means of social change.

In Japan, descendants of Korean laborers are considered permanent aliens, not subject to full constitutional protections accorded citizens.[17] Over time, many of these discriminatory

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[15] On Constitutional culture, see Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L REV. 4 (2003).

[16] See, e.g., Kenneth C. Wu, *The Protruding Nail Gets Hammered Down: Discrimination of Foreign Workers in Japan*, __ WASH. U. GLOBAL STUDIES L. REV. __(2003); Jae-Hyup Lee, *Controlling Foreign Migrant Workers in Korea*, in LEGAL REFORM IN KOREA (Tom Ginsburg, ed., forthcoming 2004).

[17] See YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS AND JAPANESE Law 157 (19__); Yuji Iwasawa**,** *Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law,* 8 HUM. RTS. Q. __ (19__).

provisions have been dismantled, for example, the mandatory fingerprinting, the requirement of adopting Japanese names, and the provision of health insurance. Yet the mechanisms by which these changes have occurred has primarily been political pressure and administrative revision, rather than judicially imposed adjustment ala *Brown*. And the norms by which the disadvantaged groups have articulated demands for change have been, primarily international, rather than based primarily on Warren Court cases. Thus we see little influence of the Court on any level, either in style or doctrine.

Similarly, in the case of the Buraku minority, a historically-based caste in Japan, Article 14 of the Japanese Constitution would seem to prohibit discrimination on the basis of family origin, and one might therefore expect a strategy of litigation-based social change. The strategy pursued by the activist leadership of this underclass, however, has been to use instrumental violence rather than to use litigation.[18] The consequence of this strategy has been one of group-based affirmative action, but there are no laws to deal with individualized discrimination against buraku, and it does not appear that social discrimination is illegal in any sense.[19]

In Korea as well, usually considered one of the most ethnically homogenous nations on earth, there is substantial class and regional discrimination. Some have recently called for U.S.-style equal protection for Koreans of disfavored classes.[20] Yet for the most part, calls for equality have not emerged through litigation. While Korea features a number of non-governmental activist organizations, some of which are explicitly focused on pursuing justice through the courts, in practice most of the effective gains of these groups have been achieved outside the courts. This has been the case, for example, with efforts to ensure protection for the migrant workers.[21]

Taiwanese ethnicity is more complex yet again. Taiwan is populated by a small aboriginal majority; a larger "indigenous" Taiwanese population; and a group of "mainlanders"

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[18] See FRANK UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 78-110 (1986).

[19] CARL GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 84 (2003) (quoting Roger Goodman and Ian Neary, *In search of Human Rights in Japan* in CASE STUDIES ON HUMAN RIGHTS IN JAPAN 13 [1996]).

[20] Ilhyung Lee, ___, draft on file with author.

[21] Lee, *Controlling Foreign Markets in Korea*, at 16.

namely persons who retreated to Taiwan along with Chiang Kai-shek in the later 1940s and their descendant. The mainlander group dominated politics until recent democratization beginning in the late 1980s. At the same time, these ethnic distinctions may be losing their salience since the Taiwan-born percentage is increasing. Although these 'ethnic' divisions have been an explicit basis of politics, the issue has not been so much discrimination that could be addressed through the courts, so much as political representation that was eventually delivered through the political process. Still, at no time were equality concerns prominent in official Taiwan discourse.

In short, the Warren court jurisprudence on minority groups has not had much doctrinal, stylistic or cultural influence, in East Asia. This is not so much because of the celebrated ethnic homogeneity of the region so much as that courts have either been unavailable or unutilized as vehicles for social change in this area.

2. Elections

Among the momentous decisions of the Warren Court are those in *Baker v. Carr* and *Reynolds v. Sims*. Warren himself considered *Baker* the most important case of his tenure on the Court,[22] and many scholars have echoed this view.[23] *Baker* considered a Tennessee statute that had preserved districts from 1901 despite massive population changes in the interim and a state statute calling for reapportionment every ten years. The effect was that the disparity between certain rural and urban districts in Tennessee was 22:1. Effectively over-ruling the 16 year-old decision in *Colegrove v. Green* that such questions were political questions, to be left to the state legislatures,[24] the *Baker* decision established effective Court jurisdiction over elections, away from local legislatures that had in the view of the Court failed to deal with the issues adequately. It utilized the equal protection clause to do so. Reynolds announces that the goal is equality across districts, "so that the vote of any citizen is approximately equal in weight to that of any

[22] EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

[23] Samuel Issacharoff, *Judging Politics*, 71 TEX. L. REV. 1643, 1647-48 (1993) (arguing that the reapportionment cases made the strongest judicial mark on political institutions since *Marbury*.)

[24] 328 U.S. 549 (1946)

other citizen in the State."[25] Together, of course, these two cases stand for the one man-one vote principle. (The rub, of course, concerns the term 'approximately equal').

These issues were very much alive in East Asia in the postwar period. In Japan, Korea, and Taiwan, land reforms had been designed to provide a strong rural base for the economy. Yet all had enjoyed rapid economic development and consequent urbanization. This left a situation in which the countryside was over-represented in legislative institutions, a situation which suited the conservative majorities perfectly fine. But as in *Baker*, it became apparent that the political process on its own could not correct the imbalances caused by demographic change.

a. Japan

Two out of the handful of Japanese Supreme Court decisions holding legislative acts unconstitutional concern elections. These two decisions were made possible by a 1964 ruling by the Supreme Court in the *Koshiyama* case that rejected an equality-based argument for challenging malapportionement.[26] In this early case, there was a 4 to 1 ratio of malapportionment between rural and city residents, itself a legacy of the fact that voting districts were established when Japan was mainly agricultural. The facts thus closely paralleled *Baker*. The Liberal Democratic Party (LDP) had a strong base in the countryside, and preferred the malapportionment. While the *Koshiyama* court rejected the appeal and adopted language of deference to the Diet as the political body best able to balance competing considerations, it was significant that the case had been allowed to come forward under the auspices of Article 204 of the Public Officials Election Act.[27]

In a separate opinion, Justice Kitaro Saito took issue with the decision's suggestion that where extreme inequality resulted, there might be a judicial remedy. Saito quoted extensively from Justice Frankfurter's dissenting opinion in *Baker*, in which he reiterated the view he had expressed in *Colegrave* that some problems were simply no amenable to judicial resolution. Saito, like Franfurter, thought it better if the Court simply place elections into this category,

[25] 377 U.S. at 579.

[26] Koshiyama v. Tokyo Election Management Commission, 18 Minshu 279 (Sup. Ct. G.B., Feb 5, 1964).

[27] See HIROSHI ITOH & LAWRENCE BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1961-1970, 53, 54 (1978).

arguing that it would better serve the Court's legitimacy were it to do so.[28] We thus see the direct influence, by citation, of a dissenting opinion from the Warren Court

In 1976 the question of the constitutionality of malapportionment was again an issue before the Court in *Kurokawa* v. Chiba.[29] In an election for the House of Representatives, the Grand bench looked at the disparity in the malapportionment, which amounted to nearly 5 to 1 in the Chiba district in question, and decided that it constituted an unreasonable level of malapportionment proportion. In its decision the court asserted that "voting is a historically significant popular political struggle and equal protection under the constitution was aimed at equal voting rights." The Court however refused to set a precise allowable ratio for future cases, nor did it void the contested election in question. Again, a dissenting opinion distinguished United States cases, focusing on institutional distinctions between Japan and the United States that rendered the circumstances different in Japan.[30]

The *Kurokawa* decision strongly implied that the Diet should correct the malapportionment, but by most accounts it failed to do so. This became an issue in 1986, in *Kanao v. Hiroshima*.[31] The Diet had not made any changes to the ratio since the *Kurokawa* decision, and the question of a 4 to 1 ratio was again discussed. This time the court looked at two questions: first, had there been a reasonable time for the Diet to make changes in the ratio? And second, was the ratio reasonably within the Diet's discretionary power?

Because it had been eight years, the court reached the conclusion that the Diet had had sufficient time to revise the system. Still, the Court declined to establish a specific level to be deemed reasonable. Furthermore, as in the *Kurokawa* case, the election was not invalidated. This gave rise to the possibility of "circumstance decision," which allowed the election to stand, even if the election rules were held unconstitutional.

Since then, there have been several cases discussing the constitutionally appropriate or allowable ratio of malapportionment, but no definitive answer has been given. What is clear is

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[28] Ibid., at 55, 56.

[29] Kurokawa v. Chiba Prefecture Election Commission, 30 Minshu 223, (Sup. Ct. G.B., April 14, 1976).

[30] Dissenting opinion of Justice Seiichi Kishi, in ITOH & BEER, CONSTITUTIONAL CASE LAW, at 372.

[31] Kanao v. Hiroshima Election Management Commission, 39 Minshu 1100, (Sup. Ct. G.B., July 17, 1985).

that the court is hesitant to order the Diet to act. Rather, the Court has preferred to set loose standards for the Diet to follow and wait for cases to be brought. A 1994 Act finally suggested that the revised redistricting plan should achieve a ratio of no more than 2:1 between largest and smallest districts. What was the influence of the Warren court here? Goodman claims that the Japanese litigation followed the U.S. one person, one vote rationale.[32] Institutionally, however, the Court's approach to the apportionment cases bears more similarity to German rather than American judicial review. The Court's strong language to the Diet, followed by its subsequent evaluation of whether or not sufficient time was allowed to pass revisions, reminds one of the German system of grades of judicial review. And the Court's caution in failing to void elections certainly does not remind one of the Warren Court in terms of judicial style. Perhaps the lack of equitable powers, oft-commented on by Professor Haley, is a major consideration in determining the Court's approach. In the United States, the court has inserted itself deeply into electoral regulation, prompting a predictable rhythm of reapportionment litigation after each census cycle. In Japan, the Court has tread lightly on the remedial side.

b. Korea

As in Japan, equality jurisprudence has been particularly important outside the context of racial and ethnic minorities. Indeed, Ahn states that as of 1998, the equality provisions are the most frequently used to strike laws.[33] And like both the Japanese Supreme Court and the Warren court, the Korean courts have been very active in using equality jurisprudence in regulating the electoral process to ensure minority representation. The Constitutional Court has played the major role here,

For example, a minority party challenged the Local Election Law of 1990, which required large deposits of money from candidates. This provision served as a strong disincentive for minority parties to field candidates. The Court found that the party had standing, and that the provision in question violated the constitutional guarantee of equality. Similarly, in 1989 the Court struck Article 33 of the National Assembly Members Election Act, which required a higher deposit from independent candidates than from those affiliated with a party. In its decision, the

[32] GOODMAN, THE RULE OF LAW, at 125.

[33] Ahn, *The Influence of American Constitutionalism*, at 102.

Court identified the right to vote and to run for office as core democratic values that could not be granted unequally.[34] In 1992, the Court struck provisions in the same law that provided party-based candidates advantages over independent candidates in campaign appearances and leafletings. The Court found that these provisions limited the Constitution's guarantees of equality of opportunity and of the right to hold public office.[35] The Court thus rejected a party-based view of democratic governance.[36]

The Court in 1995 found several provisions of the electoral law to be "nonconforming" because of excessively disproportional representation for rural districts compared with urban ones. As in Japan, Korean districting had been designed to maximize the influence of rural areas at the expense of urban voters, a problem that had been exacerbated by urbanization. Relying in part on Japanese, German and American cases, the Court declared that disproportionality between urban and rural districts would require restructuring districts.[37] It set a ratio of 4:1 as the maximum possible level of disproportionality between the most and least populous districts. In an instructive contrast with similar cases before the Japanese Supreme Court, the National Assembly amended the election law to conform with the Court's decision.[38]

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[34] See CONSTITUTIONAL COURT OF KOREA, CONSTITUTIONAL JUSTICE IN KOREA 24 (1993).

[35] Article 11 and Article 25.

[36] In doing so, the Court may have paid attention to German precedent. Article 21 of the Basic Law recognizes the role of political parties in democratic governance. The German Constitutional Court has repeatedly used this provision to regulate the functioning of parties. But the Court has also upheld the right of independent candidates to receive state funding for campaigns as do parties. 41 BvergGE 399 (1976), cited in DONALD KOMMERS, JUDICIAL REVIEW AND THE GERMAN RECHTSTAAT, 14 (1992) (unpublished paper on file with author).

[37] 1995, Cases Nos. 224, 239, 285, 373. Ahn ties the case holding directly to *Baker*. Ahn, *The Influence of American Constitutionalism*, at 103.

[38] Cf. Kurokawa v. Chiba Election Commission 30 Minshu 223 (Sup. Ct. G.B., April 14, 1976) where the Court declared that the Diet had failed to correct unconstitutional levels of malapportionment, and declared the system illegal, but refused to invalidate it or the election held under it. The parliament took no action. See also William Somers Bailey, *Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act*, 6 PAC. RIM L. & POL'Y J. 169 (1997).

The issue came up again, some years later, after a redistricting plan adopted by the National Assembly. The Court then held that the ratio should be limited to a 3:1 discrepancy between most and least populous districts, and warned that it would apply a stricter criteria of 2:1 at some date in the future.[39] It held that the election districting scheme was again not in conformity with the Constitution, but allowed it to remain in place through December 2003. The National Assembly is now revising the districting scheme in preparation for elections to be held in 2004.

When compared with the Japanese Supreme Court (which it has cited in its own consideration of the issues) the Korean Constitutional Court has had a relatively successful set of interactions with the legislature in redistricting cases. Ratios of disproportionality are lower in Korea than in Japan, and the National Assembly has quickly complied with its decisions. At the same time, the explicit influence of *Baker* has been less substantial, as Japanese and German approaches have been the more frequently cited.

c. Taiwan

Election issues in Taiwan have not concerned the one man-one vote principle. Redistricting in Taiwan, for whatever reason, has been less contentious than in Japan and Korea and has not implicated the Council of Grand Justices to date.

d. Summary

While individual case results have differed, there has been remarkable convergence around the desirability of the one-man one-vote principle articulated by *Baker*. But all courts in the region, perhaps even more so than *Baker*, have recognized the need to take other factors into account in drawing district lines. Therefore, the courts have differed in their willingness to articulate bright line rules as to precise levels of disproportionality that is tolerable.

B. Criminal Procedure

[39] *National Assembly Election Redistricting Plan* Case, 13-2 KCCR 502, 200Hun-Ma92, 2000Jun-Ma 240 (October 25, 2001).

While *Brown* and *Baker* are recognized within the United States as the paramount Warren Court decisions, it is probably true that criminal procedure has been the area of the Warren court jurisprudence that has been most influential abroad, not only in Northeast Asia, but around the world. Perhaps the paradigm Warren court decision is that of *Miranda v. Arizona* requiring the police to warn each criminal procedure suspect of his or her constitutional rights to silence and counsel, and imposing on the state the burden of showing that any waiver was effected voluntarily, knowingly and intelligently. Other important cases imposed the Fourth Amendment's exclusionary rule on the states as a matter of constitutional law,[40] and provided for a right to counsel for the indigent,[41] and a right to counsel at the preindictment stage.[42]

In considering the influence of these monumental decisions on East Asia, it is worth recalling how the Warren court got into the business of constitutionalizing criminal procedure. It is perhaps the conventional wisdom that the Warren court's primary concern was with race. The criminal justice system was a primary mechanism by which subordination was perpetuated and hence criminal procedure issues are often considered race issues in disguise.[43] It may thus be argued that these issues would be felt less acutely in the more ethnically homogenous environments of Northeast Asia.

Criminal procedure in the United States is typically regulated by state law. As a result of this political decentralization, criminal justice reform could not take place through national legislative processes. Liberal reformers had, essentially, a limited range of choices: the implausible strategy of pursuing change through recalcitrant state legislatures; a strategy of

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[40] Mapp v. Ohio, 367 U.S. 643 (1961).

[41] Gideon v. Wainwright, 372 U.S. 335 (1963).

[42] Escobedo v. Illinois, 378 U.S. 478 (1964).

[43] LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS 492 (2000); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1-67 (1996); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673 (1992); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones."). But see Stephen F. Smith, *Taking Lessons from the Left? Judicial Activism of the Right*, __GEO. J.L. & PUB. POL'Y __ (2002).

working through Congress, which also presented political problems because of Southern congressmen who occupied key veto points, and in any case would raise constitutional questions; or a strategy of using the weapons of the court system by providing constitutional rights. The Supreme Court was the national actor with the capacity to constitutionalize criminal procedure. The Warren Court, using case-by-case lawmaking, detailed national rules for pretrial detention, regulation of interrogations, evidence law, and jury selection, formerly areas of state regulation. It formulated the exclusionary rule and granted a right to counsel. It was in this area that the Warren Court achieved its greatest international influence, in East Asia and beyond.

A. Japan

Perhaps no area illustrates the gap between law on the books and law in action as a comparative study of criminal procedure in Japan and the United States.[44] An American criminal defense attorney reading the Japanese Constitution could be forgiven a sense of familiarity with the expansive series of rights afforded to the criminal defendant. They include a judicial warrant requirement for detention (article 33) and for search and seizure (Article 35), an immediate right to counsel (Articles 34 and 37), a right to speedy and public trial by an independent tribunal (Article 37), a privilege against self-incrimination (Article 38), a proscription against double jeopardy (Article 39), and a right to seek compensation for wrongful arrest (Article 40). These rights were adopted after World War II, along with other aspects of the American adversarial system in the criminal procedure code.

However, the procedural protections contemplated by the American drafters of the Japanese Constitution operate in a very different manner in Japan, in large part because of institutional legacies of the prewar inquisitorial system. The prewar criminal justice system featured a special investigating judge, did not provide for a right to counsel before indictment, and generally did not allow counsel to be present during interrogation of the defendant or witnesses.

[44] References include Daniel Foote, *The Benevolent Paternalism of Japanese Criminal Justice,* 80 CAL. L. REV. 317 (1992) KENNETH WINSTON, ON THE ETHICS OF EXPORTING ETHICS: THE RIGHT TO SILENCE IN JAPAN AND THE U.S., available at www.ssrn.com.

While these institutional features have been reduced or eliminated, certain legacies persist today. Perhaps the foremost legacy of the inquisitorial system is the close relationship between the prosecutor and judge. Prosecutors and judges are trained together and share a common orientation. Both operate within institutional structures in which they have strong disincentives to acquit defendants.[45] Even though the nominal orientation of the inquisitorial system is a collective search for the truth by defense counsel, the prosecutor and judge, the Japanese prosecutor has a number of practical advantages. The fact that the prosecutor is not required to give up exculpatory evidence to the defendant means that Japan has adopted an element of adversaries favorable to prosecutors.[46] The great case of *Gideon* has not been followed in countries in the civil law tradition, and those of Northeast Asia are no exceptions. Hearsay evidence is allowed, and there is no practical counterpart to the exclusionary rule in which American judges automatically exclude evidence that is obtained illegally. Although judges in Japan may exclude, they are quite reluctant to do so when the consequence might be that a guilty person will go free, even when the evidence has been obtained illegally.[47]

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[45] J. MARK RAMSEYER AND ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE (2003); J. Mark Ramseyer and Eric B. Rasmusen, *Why is the Japanese Conviction Rate so High?* 30 J. LEG. STUD. 53 (2001); Setsuo Miyazawa, *Introduction*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT: CONTROVERSIES AND COMPARISONS 1, 3 (Malcolm M. Feeley and Setsuo Miyazawa, eds., 2002).

[46] Art. 299 of Crim. Proc. Code. This has been raised before the Human Rights Committee of the United Nations as a violation of Art. 14 para 3(b) of the international Covenant for Civil and Political Rights. Although a defendant can petition for such evidence, counsel must specify the concrete necessity for its disclosure, difficult to do when not available. This violates an international norm that the accused have access to documents and evidence required to prepare his or her case. Nichibenren report 3.3.D.2. It also denies the defendant the ability to have full evidence on which the detention is based. The Bar has been fighting for full disclosure of all evidence acquired in the investigation upon request by defendant, with the remedy for non-disclosure being dismissal of the case. This proposal would allow the prosecution to fail to disclose if the information was sensitive.

[47] PERCY R. LUNEY, JR. & KAZUYUKI TAKAHASHI, JAPANESE CONSTITUTIONAL LAW 173 (1993); For an example of this attitude towards exclusion, see the Illegally Obtained Evidence Case. Case No. 1976 (A) No. 865 (Sup. Ct. P.B. 9/7/78) 32 Keishu 1672. The Supreme Court Reversed the High Court's exclusion

Confessions have long occupied a special place in East Asian criminal justice. In the imperial Chinese tradition, evidentiary concerns and fear of controlling magistrates in far-flung places led to an emphasis on a complex system of appeals. Evidence was written in character and there was a need for confessions. Judicial torture was a central part of the system.[48] The priority of confessions has been maintained in the modern period in Japan, Korea, and Taiwan. Confessions are called the "King of evidence" in Japan;[49] they are desirable both because they save time and because they insulate the police, prosecution and judiciary from criticism.[50]

Confessions can be procured through what David Johnson characterizes as an analogue to plea bargaining, which is formally disallowed.[51] The system functions by facilitating promises of leniency in exchange for signing confessions drafted by police and prosecutors.

Formally, of course, there is a prohibition against confessions given under duress, threat or torture. The code of criminal procedure (Law 131 of 1948) Article 319 (1), states that confessions made under compulsion, torture, threat, or after prolonged detention, or one that is suspected not to be voluntary shall not be admitted as evidence. Practically speaking however, detention and interrogation practices are such that there is some element of coercion in interrogation. The major difference between Japan, Korea and Taiwan on the one hand and the United States on the other derives from the distinction between suspects and accused persons.

Suspects can be held in detention without charge for up to 23 days before indictment. This period consists of a 72 hour period under the Code of Criminal Procedure, subject to an extension of up to two ten-day additional periods based on a prosecutor's application.[52] There

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even when an officer reached into a suspects pocket without permission, to obtain evidence, knowing it was not a weapon.

[48] DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA (1967).

[49] DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 244 (2002).

[50] Confessions, of course, have a broader role to play in reintegrating the offender and are sometimes seen as normatively attractive part of the East Asian criminal justice system. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (19__); Nichibenren 5.B.1.

[51] David T. Johnson, *Plea Bargaining in Japan*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 140 (Feeley and Miyazawa, eds., 2002).

[52] State Department, 1999.

*have been incidents of repeated charges of allegedly unrelated crimes so as to extend the 23 day period. No bail is allowed during this period.

During the 23-day pre-indictment detention phase, the prosecution and police have asserted that there is a "duty to submit to questioning."[53] The Supreme Court has never held otherwise.[54] Suspects cannot leave the room during interrogation and have no right to terminate the interrogation. Although Article 34 of the Constitution guarantees a right to a lawyer, the courts have not held that this means that one can have a lawyer present during all interrogations. The prosecution can and does impose restrictions on the time, place and manner of meetings with attorneys during preindictment detention. The Bar asserts that interview before indictment are usually restricted to 15-20 minutes.[55] There are examples where no lawyer was present, although requested, and the court allowed both confessions and proceedings to take place.[56]

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[53] Daniel Foote, *Reflections on Japan's Cooperative Adversary Process*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 29, 29 (Feeley and Miyazawa, eds., 2002).

[54] Masayuki Murayama, *The Role of the Defense Lawyer in the Japanese Criminal Process*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 42, 42 (Feeley and Miyazawa, eds., 2002).

[55] Nichibenren 7.D.1.

[56] See, e.g., "The No Coerced Confession Case" Case No. 1993 (0) No. 1189 (Sup. Ct. G.B., 3/24/99). The accused was held incommunicado for several days and denied any right to speak with an attorney. He refused to answer any questions although the police persisted. Finally he claimed a violation of his Article 38 right against self incriminating stating that this action by the police of keeping him in interrogation for hours upon hours, and day after day was a violation of this right. The court denied this claim and responded that he has a duty as a citizen to attend all interrogation requests, but that he did not have to answer any questions. Therefore, there is no self incrimination. Since counsel is not required during questioning, the length of time he may be held (repeated 23 day periods) and that they can question him for hours and wear him down, it is hard to imagine that there really is such a right. *See also* Agawa et al v. Japan (1997) 33 Keishu 5 at p. 416 (Sup. Ct. 3rd Petty Bench, 24 July, 1979. ("The Defense Counsel Rejection Case") (holding that the accused, who allegedly engaged in physical abuse of state-appointed counsel, had shown an intention to reject their right to counsel.) Okuri v. Kageyama, 10 Minshu 7 at p. 785 (Sup. Ct. G.B., 4 July, 1956; and Sun Oil, Inc. et al v. Japan, 4 Keishu 4 at p. 512 (Sup. Ct. G.B., 7 April, 1950).

The system of pre-trial detention has attracted criticism from the United Nations Human Rights Committee,[57] Amnesty International,[58] the United States Department of State,[59] and the Human Rights Committee of the United Nations General Assembly, which has characterized the system as "degrading treatment", a violation of due process, and designed to coerce confessions in violation of the International Covenant on Civil and Political Rights. The law requires that suspects be held in "houses of detention" after arrest, but the court may and frequently does allow detention in a police detention facility called a substitute prison (Daiyo Kangoku).[60] The Japan Federation of Bar Associations has called for abolition of the system and asserted that lawyers are not present during examination of such a request for Daiyo Kangoku.[61]

Notwithstanding the Constitutional warrant requirement in Article 35 (1) of the Japanese Constitution, police in Japan have more leeway than do US police in conducting searches and seizure. Article 220 (1) of the CCP provides an exception to the warrant requirement for searches, seizures and inspection incidental to a valid arrest, and allows exceptions for emergency arrests and those of flagrant offenders. Under the police duty law, Article 2 (2), the police in Japan may stop any person who they believe may have information about criminal activity and a citizen must stop and answer the police. Further, the police may stop whole groups of people for the same reason. The police do not have to have any suspicion to pat down a person, such as in a *Terry* stop.[62] In *Sakai v. Japan*, the Japanese Supreme Court extended the scope of legal warrantless search of the Act to include searches of personal effects.[63]

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[58] Amnesty International Report, 2001.

[59] Human Rights Report for Japan,

[60] The Japanese Government's response to the Human Rights Committee, para. 68-69, 115-43 of the Fourth Periodic Report show that the 97% of all detainees are held in this system.

[61] Nichibenren 3.1.E.2.

[62] See Japan v. Boku, 38 Keishu 295 (Sup. Ct. 2/13/84). Nor are such stops limited to searches for weapons. Kuk Cho, *The Japanese "Prosecutorial Justice" and its Limited Exclusionary Rule,* 12 COLUM. J. ASIAN L. 39, 53 (1998).

[63] Cho notes that the police misconduct at issue in *Sakai* was particularly flagrant in that the suspects were in custody, a search warrant could have been obtained, and the actual search took place almost two hours

Even when such rights are violated, remedies are difficult to obtain. Neither the constitution nor the criminal procedure code explicitly requires exclusion of illegally obtained evidence. The exclusionary rule, however, was introduced in principle by the courts, under pressure from many academics and a number of lower court cases which had excluded such evidence.[64] Finally, in *Japan v. Hashimoto*, the Supreme Court established the Japanese version of the exclusionary rule.[65] However, the Court did so in the context of a case in which they deferred to a police search in which the officer had been looking for a gun, without probable cause, but found drugs. Called the theory of relative exclusion (*sotaiteki haijyo ron*), the theory essentially requires balancing the need to protect the public welfare with the guarantee of fundamental rights. Since the police officer in the *Hashimoto* case only exceeded the limits of

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after a crime was reported. The Court nevertheless held that the search was not restrained by the constitutional warrant requirement.

[64] Cho, *The Japanese "Prosecutorial Justice*," at __, note 125.

[65] Japan v. Hashimoto (1978) 32 Keishu 6 at p. 1672. Late one evening two police officers noticed a man in a car parked on the side of the road. The car had several men standing around it engaged in conversation. When the police drove up, the car drove away and parked in a parking lot. The police followed and asked him to get out of the car. He did, and they asked him to empty his pockets. When he continuously refused, finally the policeman patted him down and felt a bulge in a pocket. He knew it was not a weapon. He reached into the pocket and pulled out what was found to be drugs. The accused claimed that the urgent circumstance exception established by Sakai to the requirement of consent did not apply here. The lower court accepted this argument. However, the Supreme Court did not agree. Because neither the Constitution nor the code of criminal procedure provides regulation concerning illegally obtained objects, interpretation is required. "The purpose of the code is to make the facts of a case clear and to apply and enforce the penal laws fairly and expeditiously while protecting the public welfare and fully guaranteeing the fundamental human rights of individuals." 32 Keishu 6 at 1674. Based on this language as well as the fact that "the officer only exceeded the limits of the law a little," the decision was to allow the evidence.

the law slightly, the Court declined to exclude evidence, though it announced that exclusion would be allowed in principle.[66]

In *Abe v. Japan* (1966), a man accused of taking bribes confessed after denying his guilt repeatedly.[67] He confessed because the prosecutor offered to suspend prosecution if he did. After his confession he was prosecuted and argued that the confession should be excluded. Despite this, the lower court admitted the confession into evidence, stating that the Article requires a much stricter view of duress. Defense counsel argued that a Fukuoka High Court decision which stated that "a confession made on the premise that a prosecuting attorney will suspend a prosecution should not be construed as voluntary."[68] This argument was accepted by the Supreme Court, and remains one of the few cases where exclusion was allowed.[69]

In short, the Warren Court's jurisprudence on exclusion of illegally obtained evidence has had little doctrinal impact in Japan. Although the Japanese Court introduced the notion of relative exclusion in *Hashimoto,* the majority of lower courts have followed Hashimoto in admitting the evidence, and none of the four Supreme Court cases on the issue has excluded evidence.[70]

Institutionally, the bar is the only effective counterweight to the prosecution, and has for years complained about many aspects of the criminal justice system. The Japanese bar has set up systems in which volunteer attorneys will meet with defendants free of charge, distributing work

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[66] Cho argues that Hashimoto shows the influence of the Burger Court's understanding of the Fourth Amendment exclusionary rule, in particular a "deterrence" rationale for the exclusionary rules. See United States v. Calandra, 414 U.S. 338, 347-48 (1974); Alderman v. United States, 394 U.S. 165, 174 (1969); United States v. Janis, 428 U.S. 433, 446 (1976). Cho, *The Japanese "Prosecutorial Justice*," at __.

[67] "The Confession Case," 20 Keishu 6 at 537.

[68] The High Court Criminal Decisions Special Report, no. 26, at 71 (10 March, 1954).

[69] For a comparative view, see Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L COMP. L. 415 (1991).

[70] Kuk Cho, *The Japanese "Prosecutorial Justice"* at 39, 65. The four cases are Yoshikawa v. Japan, 40 Keishu 215 (Sup. Ct., Apr. 25, 1986), Kuroki v. Japan, 42 Keishu 1051 (Sup. Ct., Sept. 16, 1988), Kobayashi v. Japan, 48 Keishu 420 (Sup. Ct., Sept. 16, 1994), Sekita v. Japan, 49 Keishu 703 (Sup. Ct., May 30, 1995).

among the various lawyers in the jurisdiction. But the practical impact of this is relatively limited because of the notoriously small size of the Japanese bar.

More to the point of this paper, the bar has also began a "Miranda society",[71] which encourages defendants to remain silent and refuse to cooperate with interrogations.[72] Directly inspired by the Warren court case, these lawyers have sought to give the nominal right to silence some teeth in the Japanese context. Yet these efforts have been subject to serious criticism by Ministry of Justice officials and prosecutors, including assertions that their efforts are illegal.[73] In addition, the traditionally small size of the bar limits its capacity to provide a true counterweight, and few Japanese lawyers can afford to specialize in criminal defense work.

In short, the formal change in law has not been accompanied by institutional reforms to ensure that the formal rights of the constitution are sufficiently protected. The organization and values of both judges and prosecutors were relatively unaffected by the significant paper reforms in the postwar period. A literalist interpretation of the rights of the criminal suspect have meant that in practice, the Japanese system provides less protections than the American one from which many of the rights were borrowed. The courts have sanctioned this deviation or resistance, if one can call it that. The values of the system and the structural imbalances weighted toward the

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[71] Takashi Takano, *The Miranda Experience in Japan*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 128, 128-39 (Feeley and Miyazawa, eds., 2002).

[72] Miranda type concerns had long been present in Japan, well before the adoption of Miranda. This was in part a legacy of the prewar system. The first Draft of the Japanese Constitution, drafted by American lawyers, had a provision that no confession shall be valid unless made in the presence of counsel for the accused. Takashi Takano, *The Miranda Experience in Japan*, at 128. As Takano points out, this is the more remarkable because it occurred 20 years before the U.S. Supreme Court decision in *Miranda*, and in fact goes further than what Miranda ultimately required. The provision was moderated, however, so that a confession is inadmissible only if made under compulsion, torture or threat, or after "prolonged arrest or detention." Constitution of Japan Art. 38(2).

[73] Ibid., at 132-33.

prosecution leaves the defendant, in Satoru Shinomiya's effective phrase, more of a hostage than an adversary.[74]

In recent years, Japan has undertaken a third great transformation of the legal system, a process less extensive that its Meiji or postwar antecedents but still significant. Beginning in the 1990s, a series of ad-hoc reforms was adopted that has made it easier to sue for shareholders, expanded the size of the bar and streamlined civil procedure. This process has accelerated under the Justice System Reform Council that issued its final report in June 2001. This report recommended a number of fundamental reforms, including the adoption of new graduate law schools which is well under way. Relatively speaking, the most criticized aspects of Japan's criminal justice process remained insulated from these broader transformations. Calls to provide a system of public defenders, or end the system of *daiyo kangoku* in which police stations are used for pretrial detention, or, were not incorporated into the final report.[75]

As this summary makes clear, the doctrinal influence of the Warren criminal procedure decisions have been quite minimal in Japan. At the same time, it would be wrong to limit our perceptions of influence to formal court decisions. The concerns among the bar, both through the new Miranda society, and through invocation in the Nichibenren reports on the criminal justice system, show that the *ideas* first articulated by the Warren court have had significant influence. Academics, too, have drawn inspiration from the Warren jurisprudence, although here the question of influence has been embroiled in broader disputes between those trained in the United States versus those influenced by German thought, which tends to be more deferential to

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[74] Satoru Shinomiya, *Adversarial Procedure without a Jury*, *in* THE JAPANESE ADVERSARY SYSTEM IN CONTEXT at 114, 115 (Feeley and Miyazawa, eds., 2002)..

[75] However, some recommendations may have a significant effect. The adoption of a jury system will no doubt make the process more adversarial. Lay participation in judicial decision-making requires certain institutions such as control of the presentation of evidence, which tend to put the parties in a more adversarial relationship. The judge quite naturally becomes more of a referee policing the process than an inquisitor. No doubt the Japanese system will remain its own distinctive hybrid, but there is at least the possibility of greater protection of rights under a jury or quasi-jury system.

statist arguments.[76] It is perhaps safe to say, then, that the influence has been greatest *outside* the formal domain of the law and more on the broader culture of lawyers. The Warren court criminal justice cases provide for those outside the judiciary and prosecution an alternative normative point from which to critique Japanese criminal justice practices.

B. Taiwan

Taiwan has also had a criminal justice system with a great gap between the law on the books and the law in action. Under authoritarian rule, criminal procedure was singularly underdeveloped. This was only partly attributable to the Japanese colonial period, for the harshness of criminal punishment, especially but not exclusively the repression of political crimes, increased in severity under the Kuomintang regime beginning in the 1950s.[77] The basic structure of criminal trials, however, continued to reflect a particular colonial version of the pre-War Japanese semi-inquisitorial system. Prosecutors and police were granted wide discretion to summon and interrogate suspects without judicial supervision. Counsel was only allowed to be present in interrogation as late as 1982. For certain "administrative" offenses, police could detain suspects without judicial supervision or review of decision-making. Police could also sentence "vagrants" to work at labor camps without judicial review, a practice originated under Japanese rule and expanded under the KMT.[78]

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[76] In the criminal justice area, perhaps the most well known dispute was that between Tokyo University Law Professors Dando Shigematsu, a German influenced academic who argued that the criminal process was inherently inquisitorial, notwithstanding the constitutional introduction of many elements of the adversary system, and Hirano Ryuichi, who emphasized the adversarial nature of the system and argued that the Code of Criminal Procedure should be interpreted with this principle in mind. See Shigemitsu Dando, JAPANESE CRIMINAL PROCEDURE 17 (B.J. George, Jr., trans., 1965); RYUICHI HIRANO, KEIJI SOSHOHO GAISETSU [Outline of Criminal Procedure Law] 11 (1968). Dando became a Supreme Court justice, while Hirano later became President of the University of Tokyo, and each has been more influential in their respective spheres. See generally Kuk Cho, *The Japanese "Prosecutorial Justice,"* at 39, 49-50.

[77] Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country,* 11 PAC. RIM L. & POL'Y J. 531, 551 (2002).

[78] Ibid., at 552-553.

This began to change as part of a growing prominence of constitutional law in the 1990s. Taiwan's democratization, which began in earnest in 1987, initially involved complex legislative politics between different factions of the KMT and the new DPP party. But as it became clear that democratization would proceed, Taiwan's constitutional court (known as the Council of Grand Justices of the Judicial Yuan) began to become much more active since 1990 in dismantling the tools of authoritarianism and expressing the new values of Taiwan's leadership. The gradual nature of the democratic transition left much old legislation and many administrative regulations intact from the authoritarian period. By striking these one at a time, the Council has become the voice of the new Taiwan.

Criminal procedure has been a central focus for the Council. The Council of Grand Justices began to hold criminal procedure laws unconstitutional in the early 1980s. First, in 1980, the Council announced Interpretation No. 166 on November 7, 1980, after nineteen years of deliberation. This case concerned the Police Offenses Law, left over on Taiwan from the Japanese occupation, that allowed police to detain misdemeanor offenders in custody for two weeks without judicial supervision. This was in clear violation of the Constitution's Article 8, providing that "no person shall be arrested or detained otherwise than by a judicial or police organ in accordance with law … [or] shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law." Courts were not supervising the routine arrests that occurred under the Police Offenses Law, in blatant violation of the Constitution. The Grand Justices held that the courts, rather than police authorities, should make the determination as to whether someone could be punished.

However, the Council was in a difficult position with regard to possible compliance, and adopted a strategy that had proved useful earlier to Warren. The Council could not simply ban police-imposed sanctions, or it would be ignored by the one-party regime. Rather the Council held the law unconstitutional and demanded "prompt" compliance with the ruling by the Legislative Yuan, in essence an order to repeal the Police Offenses Law. The Legislative Yuan was slow to respond, even as liberalization proceeded, and amendments to the law to bring it into compliance with the Interpretation were not passed until 1991, some years after democratization

ensued.[79] Police discretion was one of the core tools of the authoritarian regime, and one that it was loath to give up until liberalization was well under way.

Several other cases have arisen since 1990 where the Council held that police action violated criminal procedure rights guaranteed in Article 8 of the Constitution. These have been particularly controversial decisions because of the rising crime rate in the ROC which has accompanied liberalization. For example, in Interpretation No. 384, the Council struck five articles of the "Antihooligan Law" of 1985. These articles had allowed police to administratively detain without a judicial warrant any persons designated as "hooligan."[80] No judicial appeal of one's "hooligan" status was allowed, and there were special procedures used by police to interrogate and punish such people. These rules were held to violate various provisions of Article 8 even though they were technically administrative rather than criminal in nature. In response, the Legislative Yuan passed new anti-gang legislation in conformity with the Interpretation, one day before the deadline imposed by the Grand Justices. these revisions, in turn, were scrutinized by the Grand Justices, and rejected for further amendments .

A similar process of constitutional dialogue occurred in the vagrant law, leftover from the Japanese colonial period. The rules were revised in 1992, but the Grand Justices held in 1995 that some provisions of the vagrant system were contrary to due process and therefore unconstitutional. Accordingly, the Legislative Yuan modified these provisions a second time at the end of 1996.

Another criminal procedure case relying on Article 8, Interpretation No. 392, in 1995 concerned the power of prosecutors to authorize detention of civilians without judicial warrants. The prosecutors argued that they had quasi-judicial status and served as a "court" for purposes of the required hearing within twenty-four hours of detention. The Council, however, disagreed,

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[79] *Legislative Yuan Passes Law on Maintaining Public Order* (Central Broadcasting System, Taipei, 29 June 1991) (*available in* NEXIS, NEWS Library, TXTNEWS File, BBC Summary of World Broadcasts, July 2, 1991).

[80] Lawrence Chu, *Legislators Pass Amendments to Hooligan Control Act* (Central News Agency, December 30, 1996); Sean Cooney, *Arbitrating Reform: Taiwan's Constitutional Reform in the Transition to a Liberal Democratic Political Order*, in LEGAL INSTITUTIONS AND THE RULE OF LAW IN EAST ASIA: CONSTITUTIONAL AND LEGAL REFORM (Kanishka Jayasuriya. ed., 1998).

and insisted that a court means a judicial body and does not include prosecutors. This decision led to a complete revision of the code of Criminal Procedure.[81] Major amendments in the Code of Criminal Procedure followed in September 2003. These amendments include an exclusionary rule, applicable at the discretion of the trial judge; a right to remain silent; and a right to have an attorney present during interrogation, drawn directly from *Escobedo* and *Miranda*'s influence.[82] Another sign of the shift toward more adversarial procedure, is the introduction of a large number of new rules governing the presentation of evidence at trial, largely modeled on the US Federal Rules of Evidence.[83]

In short, the pattern of criminal procedure, and many of its doctrinal features, have been similar to that of the Warren court in the United States. A constitutional court has constitutionalized criminal procedure in an effort to control law enforcement authorities. It has done so, to be sure, in a dialogue with the legislature, encouraging the legislature to revise laws rather than striking them outright. But it has been willing to scrutinize these legislative pronouncements quite strictly, striking the revisions of the vagrant system and the anti-hooligan law. Like the Warren court, the Council of Grand Justices has asserted its primacy in the area of criminal justice. These reforms have increased the doctrinal alignment between the criminal justice system and the normative pronouncements of the Warren Court.

C. Korea

Like Taiwan, the primary influence on Korea public and criminal law has historically been Japanese.[84] Early efforts by the American military government in Korea to de-Japanize the criminal law were unsuccessful, although, as in Japan, constitutional changes to criminal procedure were imposed.

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[81] Cooney, *Arbitrating Reform*, at 20.

[82] However, none of the countries under review has a system of public appointed attorneys for indigent suspects. Thus the right to have an attorney is still limited in practice.

[83] Brian L. Kennedy, *Walking the Fine Line in Taiwan's New Criminal Code,* 10 AM. J. CHINESE STUD. 101, 103 (2003).

[84] Ahn, *The Influence of American Constitutionalism*, at 73.

Also like Taiwan, Korea has been subject to authoritarian rule for much of its postwar history. While the regime types have varied, one of the constants in postwar Korean governance has been the instrumental use of law. The authoritarian rulers of Korea have continuously relied on law to implement their programs and legitimate their authority. Law has been a tool of the rulers, not a constraint on them. Of particular importance were the National Security Act and the Anti-Communist Act, which criminalized anyone who praised, encouraged or supported anti-state or communist organizations. The laws were in tension with constitutional guarantees of freedom of expression.[85] The authoritarian state used the continuous and real threat from North Korea to justify internal suppression of dissent. Allegations of torture were not uncommon.

The NSA and Anti-Communist Act operated by carving out exceptions to normal requirements of criminal procedure. For example, Article 19 of the National Security Act of 1980 allowed longer pre-trial detention for those accused of particular crimes, and this article was struck by the Constitutional Court in 1992.[86] The provisions in question extended pre-trial detention for up to fifty days, an exception from the normal period of 48 hours allowed under the Code of Criminal Procedure.[87] The Court held that the extended period constituted an excessive limitation on basic right to a speedy trial.

Even beyond these special acts, Korean criminal justice was widely criticized along many of the same lines as that in Japan, but close examination of the institutional structure shows that it was in fact a more extreme case than Japan. Prosecutors served as instruments of political power, and were the dominant actor in the criminal justice process. Judges were less independent than those in Japan, who have maintained a reputation for honesty that is unparalleled in Asia (and perhaps the world) The number of private attorneys was even more restricted in Korea than Japan, with the number of new entrants to the Judicial Training academy as low as one hundred per year in 1980.

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[85] DAE KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA 171-76 (1990).

[86] Decision of April 14, 1992, 90 HonMa 82, 4 KCCR 194.

[87] Cho Kuk, *Tension Between the National Security Law and Constitutionalism in South Korea: Security for What?* 15 B.U. INT'L L J. 125, 161 (1997). Again, Cho criticizes the decision for not going far enough by failing to declare the law definitively unconstitutional.

Despite institutional reforms with democratization, many institutional legacies remain. As in Japan, even the "normal" period of detention can be extended with the approval of judges, and these extension requests are routinely granted. Although, like Japan, Korea has an exclusionary rule of sorts, it has traditionally been discretionary and courts have declined to apply it to evidence seized in illegal search and seizures. Korea has also followed Japan's wide berth given to police. While in Korea, probable cause is required for warrantless stops, observers assert that in practice *Terry*-like standards are not observed.[88] Both the Constitution, Article 12(7) and the Criminal Procedure Code as revised provide for the exclusion of confessions made under torture, threat or deceit.

In part because of these concerns, the 1987 constitution contained a number of provisions affecting criminal procedure, including a warrant requirement,[89] a proscription against torture,[90] a privilege against self-incrimination, a right to counsel,[91] right to be informed of the reason of arrest or detention,[92] right to request judicial hearing for arrest or detention,[93] exclusionary rule of illegally obtained confession,[94] protection against double jeopardy,[95] right to fair, speedy and open trial, trial,[96] the presumption of innocence,[97] and right to compensation for the suspect and defendant found innocent.[98]

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[88] Kuk Cho*, The Unfinished "Criminal Procedure Revolution" of Post-Democratization South Korea*, 30 DENV. J. INT'L L. & POL. 377, 388-89 (2002).

[89] Art. 12(3).

[90] Art. 12(2).

[91] Art. 12(4).

[92] Art. 12(5).

[93] Art. 12(6).

[94] Art. 12(7).

[95] Art. 13(1).

[96] Art. 27.

[97] Ibid.

[98] Art. 28.

The Korean Supreme Court has bolstered these rights since democratization. In 1992, the Court made a landmark decision, called the Korean version of *Miranda*.[99] It held that Article 200 (2) of the Code of Criminal Procedure provides that prosecutors or policemen must inform a suspect of the right to silence before interrogation. The right is based on the constitutional privilege against self-incrimination, and so statements elicited without informing the accused of the right to silence *must* be excluded.

The Court also made landmark decisions in two National Security Law cases in the 1990s, characterized by one scholar as the Korean version of *Massiah*.[100] In these cases, the defendants requested an attorney upon detention by National Security Agency officers, but were rejected and subsequently interrogated by prosecutors. The Court excluded the defendant's statements since they were obtained through a violation of their right to counsel.

The Constitutional Court has also been active in transforming criminal procedure. It has been particularly active in constraining prosecutors, formerly the dominant actor in the criminal justice system. Prosecutorial supremacy was reflected in the criminal procedure code, and the Court struck provisions that a decision of a court to grant bail could be automatically stayed by prosecutorial appeal.[101] The Court then struck article 331 of the Code of Criminal Procedure which provided that defendants could remain in custody in certain cases despite the judgment of innocence by the Court.[102] It later struck other provisions requiring lower court records to be channeled through the prosecutor's office on their way to higher courts of appeal.[103] The

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[99] Cho, *The Unfinished "Criminal Procedure Revolution*," at 383.

[100] See Decision of June 26, 1992, 92 Do 682 [Korean Supreme Court]; Decision of Aug. 24, 1990, 90 Do 1285 [Korean Supreme Court]. This case is popularly called the "Legislator Seo Kyeong-Weon Case"; Decision of Sept. 25, 1990, 90 Do 1586 [Korean Supreme Court]. This case is popularly called the "Artist Hong Seong-Dam Case".

[101] Article 97(3) of the Code of Criminal Procedure, struck by the court December 23, 1993, 93 HonKa 2, 5-2 KCCR 578. Ahn, *The Influence of American Constitutionalism*, at note 255.

[102] Ahn, *The Influence of American Constitutionalism*, at 113. December 24, 1992, 92 HonKa 8, 4 KCCR 853.

[103] Article 361(1), (2), struck by the Court November 30, 1995, 92 HonMa 44, 7-2 KCCR 651, 657. Ahn, *The Influence of American Constitutionalism*, at 113-14.

Constitutional Court has explicitly declared that Korean criminal procedure is now based in the adversary system, with the obvious implication that the Court sits above the prosecution. This is another sign of a shift caused by the constitutional revolution of 1987.

Much like the Warren Court, the Korean Constitutional Court has used broad notions of due process as a fulcrum for making substantive decisions, and has said that "due process is a unique constitutional principle, not limited to the criminal procedure … the principle requires that not only the procedures be described by the law, but the law be reasonable and legitimate in its content."[104]

C. Evaluating Influence

The preceding examination of two areas of law has focused on those where the Warren Court's impact in the United States has been great. The pattern of influence abroad varies, depending on the level at which one looks. In terms of actual citation, there are a handful of cites to Warren cases, but this should come as no surprise given the relative paucity of citations in East Asian court practice.

Doctrinal influence shows a more mixed picture. The one-man, one-vote idea of *Baker* has been highly influential, but East Asian courts have declined to adhere to rigid formulae in interpreting it. Furthermore, the pattern has varied, with the Japanese Supreme Court acting in more cautious fashion than counterparts in Korea or Taiwan. *Miranda* has had a strong impact in Korea and Taiwan, but less so in Japan as far as doctrine is concerned. None of the countries under examination has followed *Escobedo*'s requirement that the state provide counsel for indigent defendants before indictment.

On the other hand, when one examines what I have called judicial style, or the way in which a court conceives its role in the political system, the Korean and Taiwan courts look much more like Warren. In certain realms (criminal procedure being one of them) these courts have been fairly active in constraining the legislature and prosecution, in pushing the criminal justice process to show greater concerns with rights, and to establishing new norms that may be unpopular with the society in the short run.

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[104] April 28, 1993, 93 HonBa 26, 6-1, KCCR 355-56. Translation by Ahn, *The Influence of American Constitutionalism*, at 109.

Like Taiwan and unlike Japan, Korea's pattern of constitutionalization of criminal procedure seems to be close to that of the Warren Court pattern. A set of entrenched patterns and procedures in the criminal justice system seems to resist ordinary efforts at reform. A court steps in to turn criminal procedure into a matter of constitutional law, and hence transform recalcitrant institutions.

Broadening our lens even further, it is safe to say that the influence of the Warren court has extended beyond the formal law. In Japan, especially, its influence has been greatest on academics and members of the bar who are not the front line authorities who say what the law is. In Korea and Taiwan, too, close ties to American academia meant that the ideas of the Warren Court were available as part of the background, long before the political environment would allow its doctrines to be utilized. Whether these more diffuse cultural influences will eventually lead to doctrinal change remains to be seen.

III. Institutional Structures and the Possibility of Influence

What determines if and when such latent sources of influence can materialize? The answer depends in large part on the ability of carriers of outside ideas to gain access to the courts. American influence on Korean law, reports Dean Ahn, occurred because a cadre of young judges became aware of American decisions beginning in the 1970s. This generation is now in positions of authority. The vehicle was increasing translation of decisions from American courts, and the translation of important academic books into Korean.[105] Many of these translated texts focused on the role of the Court in social change. Another vehicle in all three countries are programs to send junior judges that travel to the United States for study in American law schools. Ahn believes that these trainees have imported notions of judicial activism into what was a fairly stagnant institution.[106]

An activist bar, in addition, may be an important factor. Although the bar has historically been extremely limited in all three countries, the number of activist lawyers willing to use

[105] Ahn, *The Influence of American Constitutionalism*, at 79 n. 44. Ahn cites, among others, WILLIAM DOUGLAS, POINTS OF REBELLION (1971) and ARCHIBALD COX, THE WARREN COURT (1965).

[106] Ahn, *The Influence of American Constitutionalism*, at 79.

litigation as a strategy for social change seems to be growing in Korea and Taiwan.[107] The Korean civil rights bar has been particularly active. Groups like the MinByun (Lawyers Group for the Achievement of Democratic Society) and the People's Solidarity for Participatory Democracy used litigation and set up Court Watch programs to draw attention to the social impact of legal decisions. They have also submitted constitutional petitions and mobilized demonstrations demanding rights.[108] Whether for doctrinal or political reasons, these groups have been less visible in Japan, although they no doubt exist.[109] Takashi Takano, for example, a leading member of the Japanese Miranda Society, holds a LL.M. degree from SMU College of Law in Texas. He has quite self-consciously drawn on Warren Court ideas for inspiration in his brave campaign to encourage suspects to exercise their thus-far dormant right to silence.[110]

These factors, though, concern the demand side of legal change. I want to focus on institutional structure as the primary variable that determines the conditions for effective influence. The Japanese judiciary retains an extremely tight hierarchical structure. It is a hierarchical structure typical of civilian systems, with superior instances supervising lower instances. Appointments are tightly controlled by the Supreme Court secretariat. With a single political party ruling virtually uninterrupted since 1955, Japan's political establishment has developed a number of collateral mechanisms to discourage judicial activism. The politics of judicial independence—exhaustively analyzed in a new book by Mark Ramseyer and Eric

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[107] Jane Kauffman Winn and Tang-chi Yeh, *Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation*, 20 L. SOC. INQUIRY 561 (1995); Ahn, *The Influence of American Constitutionalism*, at 82; _____, *Civil Society* in RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY (Dae Kyu Yoon, ed., 2000).

[108] Lee, _____ __. [Which Lee? supra n. 16 or supra n. 20?]

[109] Interestingly, in the area I know best, the group has operated with influence from American academic lawyers. See Lawrence Repeta, *Local Government Disclosure Systems in Japan* 4 (The National Bureau of Asian Research, Seattle, 1999), http:// www.nbr.org/publications/executive_insight/no16/index.html.

[110] Takano, *The Miranda Experience in Japan*, at 137 (quoting Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

Rasmusen—show definitively that the composition of the Supreme Court plays a crucial role.[111] Justices are appointed to the Supreme Court after a long career on the bench, as a reward for faithful and uncontroversial interpretation. With a mandatory retirement age of 70, the average terms of the Japanese justice is around 6 years, lower than virtually all constitutional court judges around the world.[112] Indeed, if Ramseyer and Rasmusen are to be believed, the Secretariat is able to sanction judges who do not follow ruling party preferences in certain areas of the law. Such an institutional structure minimizes the ability of lower level judges to effectuate change, even if they should wish to do so.

The late-1980s introduction of a new Constitutional Court in Korea and the removal of authoritarian constraints on the Council of Grand Justices in Taiwan however, meant that in these countries, new for a were available for brining constitutional claims The activation of these constitutional courts has decentralized access to constitutional decision-making. In the Korean Constitution, lower courts are given access to refer cases to the constitutional court when they believe a constitutional issue has been presented.[113] In Taiwan, although there was no such explicit provision allowing lower courts to refer cases, the Council of Grand Justices interpreted the law to allow referral.[114] The decision was significant because it definitively declared that the

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[111] MARK J. RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE; see also article cites.

[112] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003) (table).

[113] Article 111(1) of the Constitution.

[114] Interpretation No. 371 January 1995. This Interpretation actually struck part of the Council Adjudication Law as unconstitutional, specifically the provisions preventing lower court judges from referring cases to the Council. Article 5 of the Adjudication Law said that the Supreme and Administrative Courts, at the top of their respective judicial hierarchies, may adjourn proceedings and refer constitutional questions to the Grand Justices. The question concerned how lower court judges should deal with laws they consider to be unconstitutional. The provisions contemplated the lower court deciding the issue and the Supreme Court considering the issue on appeal, suspending the provisions at that point. The justices extended the adjournment provisions to all lower courts, and voided those provisions incompatible with their Interpretation. Besides empowering lower courts, this interpretation expands citizen access by providing more opportunities for Council rulings earlier in the legal process. GINSBURG, JUDICIAL REVIEW at 138.

Council, not the Legislative Yuan, is the ultimate determiner of its own jurisdiction. The decision is also of import because it explicitly invoked the constitutional review systems in Japan, the U.S. and Germany, which it characterized as "modern countries observing the rule of law." [115]

With appropriate personnel at the constitutional level, this decentralized mechanism of access to a centralized constitutional court greatly facilitates legal change. By providing for immediate and direct certification of constitutional questions to the constitutional court, the decision empowers lower courts relative to the top bodies of their judicial hierarchy. Because the Korean and Taiwanese judicial systems, like that of Japan,[116] rely heavily on the promotion of judges through the hierarchy as a means of political control, the extension of constitutional reference power to every judge in Taiwan and Korea means that ordinary courts can read the constitution broadly, and empowers them relative to the Supreme Court.

The dynamic I am describing is similar to that used by the European Court of Justice (ECJ) under Article 234 in extending its power.[117] European national courts, including lower courts, could halt proceedings to refer questions of European law to the ECJ. This provided lower courts with a vast and expanding new set of legal norms to apply. This amounted to a new set of ammunition to reach decisions that might otherwise be unavailable to them. Previously,

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[115] See, Sean Cooney, *Arbitrating Reform*. The Grand Justices argued that it is an important function of judicial review to safeguard the constitution, and to protect *"judges' independent exercise of powers so that they observe only constitution and legislation and are subject to no other interference*." Sean Cooney, *Taiwan's Emerging Liberal Democracy and the New Constitutional Review*, in ASIAN LAWS THROUGH AUSTRALIAN EYES 173 (Veronica Taylor, ed., 1997). The decision also shows the particular importance of Germany as a reference point for Taiwan law. German Constitutional procedure has a similar device for so-called concrete norm control through certification of questions from ongoing proceedings.

[116] See J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: the Evidence from Japan*, 13 J. L. ECON. & ORG. 259 (1997).

[117] Treaty on European Union and the Treaty Establishing the European Community, 37 I.L.M. 56, 125-6 (January 1998). See also ALEC STONE & JAMES CAPORASO, FROM FREE TRADE TO SUPRANATIONAL POLITY: THE EUROPEAN COURT AND INTEGRATION, Working Paper (Berkeley: Center for German and European Studies, 1996) and THE EUROPEAN COURT AND NATIONAL COURTS, DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT (Anne-Marie Slaughter et al., eds., 1998).

conflicting national law would be enforced on appeal by higher courts. So the provision allowing them to use European law had the dual effect of enhancing lower courts' power relative to that of higher courts at the national level, as well as expanding the normative reach of European law as quasi-constitutional law.

A similar dynamic has unfolded in Korea and Taiwan. Lower courts can now "constitutionalize" issues where they are unhappy with the precedents of their respective judicial hierarchies. This expands their power relative to the Supreme and Administrative Courts, while at the same time allows the Constitutional Court to undercut the jurisdictional autonomy of those branches. Finally, it suggests that a steady stream of new cases may be brought to the Constitutional Courts, essential for the continued exercise of constitutional power.

The Japanese Supreme Court has had no such competitive institution that might spur it to become more active. There is some evidence that this dynamic may also allow the Supreme Court to be more active as well. Virtually every observer of the Japanese Supreme Court characterizes it as a conservative institution, not prone to activism. It remains true that the Japanese Supreme Court has held legislative acts unconstitutional in only a handful of cases in its post-war history. [118] Judicial review has been sporadic in Japan, and by and large these have been in peripheral areas.

Now contrast the Warren Court. With justices appointed for life, they had much more freedom to pursue individual and institutional agendas than their short-serving Northeast Asian colleagues. Furthermore, in the aftermath of the New Deal, they did not face a unified dominant disciplined party ala the LDP in Japan. This no doubt made it easier for the judges to exercise independent will.

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[118] The complete universe is Sumiyoshi v. Governor of Hiroshima, 29 Minshu 572 Case No. 1968 (Gyo-Tsu) No. 120 (Sup. Ct. G.B., 4/30/75); Aizawa v. Japan, 27 Keishu 265 (Sup. Ct. G.B., 4/4/73); Hiraguchi v. Huraguchi, 41 Minshu 408 (Sup. Ct. G.B., 4/22/87); Koshiyama v. Tokyo Metropolitan Election Commission, 18 Minshu 270 (Sup. Ct. G.B., 2/5/64); Kurokawa v. Tokyo Metropolitan Election Commission, 30 Minshu 223 (Sup. Ct. G.B., 4/30/76); Ehime Prefecture Case, Case No. 156 of 1992 (Sup. Ct. G.B., 4/2/97) See BEER & ITOH, CONSTITUTIONAL CASE LAW OF JAPAN 1970-1990 at 188; Goodman, *The Rule of Law in Japan,* at 121; www.courts.go.jp/index.htm.

It would be too much to argue that this institutional structure, on its own, bears more than facilitative power in a model of law and societal change. Nevertheless, I argue that institutional openness provides a necessary, if not sufficient, factor in transnational legal change.

Politics matter, too, in determining the conditions for influence. Warren's 1967 visit came at a time of optimism for Korean judicial independence. Although a military coup in 1961 had dampened democracy, the Supreme Court had retained the power of judicial review. A year after Warren's visit, a lower court decided a landmark case constraining the government, holding that a government act that denied military personnel the right to compensation for injury violated the equality principle of the Korean constitution.[119] The lower court held that this provision violated the constitutional guarantee of equality.

The case was appealed to the Supreme Court. Anticipating an unfavorable decision at the Supreme Court level, the political authorities amended Article 59(1) of the Judiciary Organization Act in July 1970 to raise the voting threshold required to declare a law unconstitutional from a simple majority to two-thirds of all Justices. This obviously would have hampered the future exercise of judicial review, and more importantly sent a signal to the judiciary that the executive was willing to interfere with its institutional autonomy to achieve the result it desired. Despite this clear signal from the politicians, the Supreme Court upheld the lower court's decision that the Government Compensation Law violated military personnel's constitutional right to equal treatment. The Court also struck the amendment raising the vote threshold as a violation of the separation of powers, arguing that majority rule was a "basic principle of judgment."[120] If the Constitution did not provide otherwise, held the Court, the political authorities could not raise the threshold for a judicial decision through ordinary legislation. This was the only instance of the Supreme Court striking a statute during the Third Republic. The decision provoked major controversy and led ultimately to the government's replacing every justice who had voted for it after the establishment of the Fourth Republic, known as *Yushin*, in 1972. This round of constitutional amendments centralized power in the Presidency, and specifically gave President Park the power to renominate all judges, which he

[119] YOON, LAW AND POLITICAL AUTHORITY, at 185.

[120] Ibid., at 186.

subsequently used to exclude every judge who had voted to strike down Article 2(1) of the Government Compensation Law.

The story illustrates how a tolerant political environment is crucial for a court to engage in Warren-style activism. Despite is long democratic pedigree, Japan has been governed by a single political party for nearly half a century, with brief interruption. A dominant disciplined party is easily able to constrain activist courts that disagree with its views. Seoul, too, in the late 1960s represented such a politically constrained environment. While we can only speculate on the particular influence of Warren's remarks on the Korean Supreme Court's decision to challenge the authorities, the story illustrates how an attempt at activism can lead to grave consequences in an unfriendly political environment.

In Korea and Taiwan in the 1990s, in contrast, the environment was ideal. Political parties are notoriously weak in Korea, and each Korean President since 1987 has had to bear a period of divided government. In Taiwan, a rapid democratization program gave the Council of Grand Justices both the ideological cover and the opportunity to reshape criminal procedure. Regardless, then, of latent sources of information about the Warren court, the necessary condition for influence was an institutional and political environment that was hospitable.

Conclusion: The Ambiguities of Legal Transfers

In Warren's 1967 speech he noted that "A Constitution is like a tree. If a tree is transplanted to alien soil and inhospitable climate, it will not grow. Nor will a constitution unless it reflects the culture the history and the innermost desires of a people. There can be no model constitution for the nations of the world. I believe that too often we are all inclined to apprise other systems of government according to whether or not they conform to our own."

A study of the influence of the Warren Court must unavoidably shade into the slippery normative terrain that Warren warns us against. Warren may be right in arguing that doctrinal transfers require domestication to be effective. But at the level of ideas, and of what I have called a judicial style, the Warren court legacy has been an inspiration to judges in Asia. As a beacon of judicial activism, as a source of judicial creativity, and as a provider of justice, the Warren Court will not be paralleled, in Asia or elsewhere.