

Prosecutorial Independence in Comparative Perspective: Continental Legal Tradition and the “Paradox of Democratization” in South Korea

Neil Chisholm*

ABSTRACT:

What is prosecutorial independence? What is its relationship with democracy? The case of South Korea, where prosecutorial independence is highly contested in democratic politics, sheds light on these questions. Two styles of prosecutorial independence prevail in the modern world: (i) the Continental European based on mechanisms of bureaucratic accountability for prosecutors, and (ii) the Anglo-American that depends on democratic accountability. Korea offers a window onto these two styles, since its prosecution system has Continental origins but is adopting certain Anglo-American features.

This article analyzes the historical and doctrinal roots of prosecutorial independence in Korea, showing its close embrace of the Continental style. Nineteenth-century Germany devised a doctrinal framework for prosecutorial independence that Japan later adopted and transplanted to its colony, Korea. This framework had considerable political implications in the German and Japanese Empires. Next, the article explains how Korea’s inherited prosecutorial independence framework has functioned by giving an account of prosecutors’ role in political history. During the period of authoritarianism (1948-88), Korean presidents manipulated the prosecution to attack enemies and protect friends (and themselves). Curiously, after democratization, this pattern intensified. Korea’s experience reveals a “paradox of democratization”—prosecutorial politicization tends to increase after a democratic transition. Why? The more authoritarian an executive, the more it controls politics using extra-legal

* Lecturer, International Center for Legal Studies, University of London. This work was supported by the Academy of Korean Studies Grant AKS-2014-R42 and a Korean Collections Consortium of North America Research Grant. The people to thank for assistance in producing this article are too numerous to list. I wish to thank all the informants who spoke to me on the condition of anonymity and provided much of the background information needed to prepare this article. I am also grateful for insights offered by Moon Joon-Young, KJH, Seo Yoon Lee, and others. My thanks for access to much useful information goes to Mikyung L. Kang, Andrew S. Burke, Nongji Zhang, Shiori Tamura, and Nativ Kovalenko. This article uses Revised Romanization, except where a name is well-known or self-chosen in English. This article refers to South Korea and Korea interchangeably. The formal name for Korea’s Prosecution Office is “the Prosecutors’ Office.” This article uses “the Prosecutors’ Office” and other terms like “the prosecution” or “Korea’s prosecution” interchangeably.

means, such as secret police, to whom prosecutors tend to be subordinated. After democratization, as law becomes central to governance, prosecutors, as agents of legality and procedural legitimacy, rise in importance, while secret police decline. An inverse relationship exists. Accordingly, temptations to politically misuse prosecutorial powers increase as democracy's respect for law grows and electoral competition intensifies. This historical pattern has precedents in the German and Japanese histories that continue to influence Korea.

This article is the first in a series of three on how Korea's experience illuminates the nature of prosecutorial independence. The second is an ethnographic study of the Prosecutors' Office's inner workings, and the third examines reforms.

TABLE OF CONTENTS

I. Introduction.....	4
A. Prosecutorial Independence: An Underdeveloped Theory in Need of Comparative Insights.....	4
B. South Korea: A Window onto the Continental and Anglo- American Styles	11
II. The Historical Foundations of the South Korean Prosecution and its Independence	14
A. Origins of the Continental European Public Prosecution... ..	15
B. The Development of Public Prosecution in Nineteenth- Century Germany	18
1. The German Doctrinal Framework	20
2. Political Dimensions and Implications	26
C. The Diffusion of Continental Prosecutorial Organization to Japan and Colonial Korea	31
1. The Japanese Doctrinal Framework.....	32
2. The Prosecution’s Political Ascendance Under Democracy and Paradoxical Decline in the Authoritarian Police State	35
III. South Korea’s Postwar Prosecution: A History of Politicization and Executive Dominance	47
A. The Doctrinal Framework of the Korean Prosecutors’ Office and its Independence	48
B. The Prosecution under Authoritarianism (1948-88)	53
1. Syngman Rhee (Rightist, 1948-60)	53
2. Park Chung-Hee (Rightist, 1961-79)	55
3. Chun Doo-Hwan (Rightist, 1980-88)	58
C. The Prosecution Under Democracy (1988-Present).....	61
1. Constitutional Reform and Democratic Consolidation .	61
2. Roh Tae-Woo (Rightist, 1988-93).....	63
3. Kim Young-Sam (Left-right Coalition, 1993-98)	63
4. Kim Dae-Jung (Leftist, 1998-2003)	66
5. Roh Moo-Hyun (Leftist, 2003-08)	68
6. Lee Myung-Bak (Rightist, 2008-13).....	72
7. Park Geun-Hye (Rightist, 2013-17).....	77
8. Moon Jae-In (Leftist, 2017-2022).....	81
IV. Conclusion: The Continental Model, Historical Patterns, and the “Paradox of Democratization”	85

I. INTRODUCTION

This country's greatest cancer was the Prosecutors' Office. It was far too vengeful, political, and regionally cliquish. It was deplorable. [Like a hunting dog,] prosecutors were submissive to political power and mauled the weak. It was concerning that the country appeared to be degenerating into a republic of public prosecutors.

– Kim Dae-Jung, President of the Republic of Korea, 1998-2003¹

In the era of democratic governance, the Prosecutors' Office rapidly grew up and came to display its enormous strength as a power elite. It was the paradox of democratization.

– South Korean legal scholar-activists²

A. Prosecutorial Independence: An Underdeveloped Theory in Need of Comparative Insights

Prosecutorial independence is an important yet underdeveloped concept. For the law to be enforced fairly in politically connected cases, prosecutors must be free from outside pressure and act with impartiality. It is generally agreed that the prosecution ought to be politically independent in some sense, but precisely how this is achieved has been unclear.

Although this issue has recently risen in salience over controversies involving former American President Donald Trump,³ prosecutorial independence from political manipulation is an issue worldwide. The classic problem occurs where the executive uses prosecutors to attack

1 Ex-President Kim wrote this passage in his memoirs about his feelings after the suicide of his successor and ally, Former President Roh Moo-Hyun. Roh's death was widely blamed on prosecutors who had been investigating him. *Infra* note 568 and accompanying text. The rendering of the quotation is a composite of the official English translation from Kim's autobiography and the author's translation of the original Korean. The reference to a "hunting dog" is a common Korean metaphor for the Prosecutors' Office and is implied by the wording in the original. KIM DAE-JUNG, CONSCIENCE IN ACTION: THE AUTOBIOGRAPHY OF KIM DAE-JUNG 867 (Jeon Seung-hee trans., 2019). For the Korean text, see 정문영 [Jeong Mun-Yeong], '검찰 정상화'... "김대중-노무현 정신, 잊었나?" [*Prosecutors' Office Normalization*]: ... "Have You Forgotten the Spirits of Kim Dae-Jung & Roh Moo-Hyun?", 굿모닝충청 [GOOD MORNING CHUNGCHONG] (Apr. 22, 2022), <https://www.goodmorningcc.com/news/articleView.html?idxno=268211>.

2 These lines come from a book that recounts a critical history of the Prosecutors' Office and calls for reform. In this passage, the authors explain that during the authoritarian era, the Prosecutors' Office "took a backseat" to the secret police agencies but that it gained strength in the late-authoritarian and early-democratic period. Eventually, they argue, the prosecution emerged as an "equal partner with the government." The tension between politicized prosecutorial autonomy and capture by the executive is considered further in Part IV. 김희수, 서보학, 오창익, 하태훈 [KIM HUISU, SEO BO-HAK, O CHANG-IK & HA TAE-HUN], 검찰공화국, 대한민국 [PROSECUTORS' OFFICE REPUBLIC, REPUBLIC OF KOREA] 111 (2011) [hereinafter KIM ET AL.].

3 Several controversies have surrounded former President Trump. For example, during a special counsel's investigation of foreign interference in the 2016 elections, observers wondered whether President Trump would seek to control the investigation in a way that would infringe upon prosecutorial independence. See generally Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018).

enemies or protect friends—or itself. In China, the government has undertaken an anti-corruption campaign that appears to have resulted in the selective prosecution of rivals to the country’s leaders.⁴ In Russia, important prosecutions are centralized into a powerful Investigative Committee that reports directly to the president, giving him firm control over sensitive law enforcement matters.⁵ To take a more concrete example, in Malaysia, following its 2018 election, Prime Minister Mahathir Mohamad moved to prosecute his predecessor over the disappearance of billions of dollars of public funds.⁶ The outgoing prime minister would likely have continued to avoid prosecution had he remained in power. This swift redirection of prosecutorial power from protective to attack mode following a turnover of the executive highlights both sides of the classic prosecutorial independence problem.

Other independence problems can arise however, and mature democracies are not immune to questionable political interventions into prosecutorial affairs. In 2015, Germany experienced one of its most serious postwar prosecutorial independence controversies, which culminated in the firing of the Prosecutor General for using his discretion to investigate two journalists for treason.⁷ Canada in 2019 saw the “SNC-Lavalin affair,” in which a demoted Minister of Justice and Attorney General accused the Prime Minister’s Office of pressuring her to defer the bribery prosecution of a large construction firm over economic considerations.⁸

4 “[B]y implicating scores of high-ranking officials . . . the campaign has sent out a clear signal that [Chairman] Xi and his allies have now consolidated political power against rival factions, and that any political opposition to Xi personally or economic reforms generally can be ruthlessly removed.” Samson Yuen, *Disciplining the Party: Xi Jinping’s Anti-Corruption Campaign and Its Limits*, 3 CHINA PERSPS., 41, 41, 47 (2014). See generally Luminita Ionescu, *Has China’s Anti-Corruption Strategy Reduced Corruption or Purged Political Rivals?*, 8 CONTEMP. READINGS L. & SOC. JUST. 245 (2016).

5 Ethan S. Burger & Mary Holland, *Law as Politics: The Russian Procuracy and Its Investigative Committee*, 2 COLUM. J. E. EUR. L. 143, 182-94 (2008). President Putin understands prosecutorial power well. As FSB chief in the 1990s, he is believed to have orchestrated the firing of Russia’s Prosecutor General to protect then-President Yeltsin from an investigation, a move that boosted his career and was a milestone in the country’s loss of prosecutorial independence. *Id.* at 148-49, 171-72 & n.108. *Vladimir Putin*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/biography/Vladimir-Putin> (last visited Mar. 29, 2024); Julia Ioffe, *How State-Sponsored Blackmail Works in Russia*, ATLANTIC (Jan. 11, 2017), <https://www.theatlantic.com/international/archive/2017/01/kompromat-trump-dossier/512891/>.

6 Hannah Ellis-Peterson, *‘This Election Is Personal’: Mahathir Mohamad, 92, Vows to Stop ‘Corrupt’ Protege*, GUARDIAN (May 1, 2018), <https://www.theguardian.com/world/2018/may/02/mahathir-mohamad-92-vows-to-stop-corrupt-protege-malaysia>.

7 Harald Range seems to have followed the letter of the law in a politically tone-deaf way in scrutinizing a small media outlet’s publication of government secrets. Shawn Boyne, *German Prosecutors and the Rechtsstaat*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 138, 161-65 (Máximo Langer & David Alan Sklansky eds., 2017).

8 Scholarly commentary on this incident can be found at Craig Forcese, *L’Affaire SNC-Lavalin: The Public Law Principles* (Feb. 9, 2019), <https://discourse.ron-mckinnon.ca/wp-content/uploads/2019-02-09-Forcese.pdf>.

Despite the importance of the issue, prosecutorial organization and activities are inadequately analyzed from the perspective of independence. In the United States, the literature on prosecutors has conventionally focused on their discretion⁹ and misconduct,¹⁰ although other topics such as their role in plea bargaining,¹¹ sentencing,¹² and zeal for crime control¹³ also feature prominently. These subjects sometimes relate to prosecutorial independence, insofar as they involve external or internal pressures on prosecutors that lead to their politicization. More pertinently, independence has been discussed in the contexts of federal-level special prosecutors¹⁴ as well as the dismissal of senior Department of Justice prosecutors.¹⁵ This line of scholarship has tended to examine prosecutorial independence from the perspective of the separation of powers¹⁶—i.e., whether federal prosecutors ought to be considered as being under the full control of the executive.¹⁷ Here, the term “independence” may be used not only in the sense of insulation from executive interference but also to mean freedom of action generally.¹⁸

9 Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 720 (1996); William Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1327 (1993).

10 “Misconduct” refers to prosecutors’ violations of law or ethics. See, e.g., Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Alafair Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119 (2010) (suggesting that fault-based discussion of misconduct is counterproductive).

11 Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988).

12 Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427 (2007).

13 Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process when Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102 (2013).

14 Scholarship on specially appointed prosecutors has tended to ebb and flow with presidential scandals since the Nixon era. A review of the debates central to these writings may be found in J. Richard Broughton, *Politics, Prosecutors, and the Presidency in the Shadows of Watergate*, 16 CHAP. L. REV. 144 (2012).

15 This issue arose when President Bush fired several federal prosecutors in 2006. David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707 (2008). Bruce A. Green & Fred C. Zacharias, *The U.S. Attorneys Scandal and the Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187 (2008).

16 Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (arguing that there is a historical basis for constitutionally independent prosecutors and agencies under the executive branch). Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989) (discussing the compatibility of the independent counsel with the separation of powers).

17 Justice Scalia’s view that prosecutors ought to be under the absolute authority of the executive is often discussed in this connection. *Morrison v. Olsen*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting).

18 Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001) (contending that American prosecutors generally share the Independent Counsel’s excessive freedom of action and lack of accountability).

American writings on prosecutorial accountability have addressed the ways in which prosecutors' discretion or capacity for misconduct may be restrained by internal bureaucratic controls and transparency mechanisms.¹⁹ Much of this literature impliedly deals with independence concerns since mechanisms of accountability can regulate political motives in decision-making.²⁰ Likewise, independence is often an implied theme in writings on the relationship between prosecutors and politics: political pressures are a subplot of the misconduct literature;²¹ partisan politics can influence local-level prosecutors;²² elections for prosecutors affect their ideology;²³ and political considerations may drive exemplary prosecutions²⁴ or non-prosecutions²⁵ of high-profile figures. Independence has been discussed more directly in the context of prosecutors' partisan neutrality.²⁶ Writings on prosecutorial professionalism refer to independence—sometimes to suggest that bureaucratization equals independence²⁷ and sometimes to discuss internal bureaucratic threats to independence.²⁸ Finally, independence is often mentioned in

19 James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-72 (1981) (recommending accountability measures to be taken by prosecutors' offices, legislatures, and the judiciary). Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 996-1011 (2009) (arguing that internal regulations and hierarchical structure in prosecutors' offices would be more effective than external regulation at mitigating prosecutorial misconduct). Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 172-96 (2008) (suggesting that internal hierarchical regulations that increase transparency can improve prosecutors' exercise of discretion). Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016).

20 For example, one scholar calls for fixing prosecutorial discretion through expansion of private prosecution and "bringing more oversight to all prosecutors," public and private. The bureaucratic element of the suggested reform would, by implication, certainly impact political motives in prosecution. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1570, 1594-95 (2020).

21 Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 13-18 (2009).

22 James N. Johnson, *The Influence of Politics upon the Office of the American Prosecutor*, 2 AM. J. CRIM. L. 187 (1973).

23 David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 673-74 (2017).

24 Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 592-95 (2005) (analyzing prosecutors' treatment of Al Capone, President Clinton, and television personality Martha Stewart).

25 Lonnie T. Jr. Brown, *A Tale of Prosecutorial Indiscretion: Ramsey Clark and the Selective Non-Prosecution of Stokely Carmichael*, 62 S.C. L. REV. 1 (2010).

26 Fred C. Zacharias & Bruce A. Green, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 860-70 (2004).

27 Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 125-26 (2014) ("The reformers' vision was to increase professional independence by increasing bureaucratic accountability to the Attorney General, not to the President.").

28 Bruce A. Green, *Prosecutors' Professional Independence – Reflections on Garcetti v. Ceбалlos*, 22 CRIM. JUST. 4 (2007) (on a deputy prosecutor's employment dispute with his elected district attorney following the former's investigation of a deputy sheriff).

passing as a desirable feature of prosecutors.²⁹ To summarize, problems with American prosecutors are not normally conceptualized as political independence issues, but when independence is analyzed, it is usually from the perspective of the separation of powers.

The problem with the American prosecutorial independence literature, to the extent it exists, is that it is small, often approaches the issue indirectly,³⁰ and is excessively focused on the separation of powers.³¹ Even the latest writings on prosecutorial independence inspired by the Trump presidency primarily reason in terms of the separation of powers.³² But just as with judicial independence,³³ prosecutorial independence can involve political impartiality from forces other than the executive—such as legislators,³⁴ public opinion,³⁵ economic interests,³⁶ the

²⁹ See, e.g., Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 241 (2017) (“[P]rosecutors should frequently act as independent guardians of constitutional rights.”).

³⁰ For example, one scholar defends American Federal prosecutorial decentralization as benefiting prosecutors’ independence and “depoliticization.” The author reasons mainly from the perspective of the separation of powers. Leslie B. Arffa, *Separation of Prosecutors*, 128 YALE L.J. 1078, 1116-18, 1129 (2019).

³¹ See, e.g., Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL’Y 219, 223 (2020).

³² *Id.*

³³ Neil Chisholm, *The Faces of Judicial Independence: Democratic Versus Bureaucratic Accountability in Judicial Selection, Training, and Promotion in South Korea and Taiwan*, 62 AM. J. COMP. L. 893, 894 (2014) [hereinafter Chisholm, *Faces of Judicial Independence*].

³⁴ Conceivably, legislators can seek their enemies’ prosecution, their allies’ protection, or to change the law in ways that would politically influence prosecutors. For an example of legislators seeking a prosecution, see *infra* note 522 and accompanying text (on Korean opposition lawmakers seeking President Kim Dae-Jung’s prosecution over payments to North Korea). To take another example, a German ex-senior prosecutor (*Oberstaatsanwalt*) has written that legislators attempt to influence prosecutors. Poetically describing prosecutors as harried soldiers in trenches of case files, he claims:

And if one has the time and the courage to peer over the mountains of files, one sees on the other side one or two lobbyists or one or two Mistert Executive and Legislative. Then one ducks one’s head quickly again, so as not to get shot . . .

Klaus Pfortner, *Die deutsche Staatsanwaltschaft: Marionette der Politik? Unabh. . . ngigkeit muss sein!*, 91 KRITISCHE VIERTELJAHRSSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 455, 458 (2008).

³⁵ Public outrage can sometimes pressure prosecutors to bring charges where they might otherwise not. See *infra* note 613 and accompanying text (on Korean President Park Geun-Hye’s prosecution after her poll ratings collapsed).

³⁶ Businesses can lobby prosecutors in ways that have political implications. Samsung has reportedly received special favor from prosecutors. See *infra* note 400 and accompanying text. Also, an anonymous ex-prosecutor interviewee told the author that he witnessed a prosecutor-turned-lawyer for Samsung visiting Korea’s Supreme Prosecutors’ Office for lobbying in the early 2000s. Smaller business interests can also pay prosecutors for legal protection. In Korea they are called “sponsors.” See generally 정용재, 정희상 & 구영식 [JEONG YONG-JAE, JEONG HUI-SANG, & KU YEONG-SIK], *검사와 스폰서, 묻어버린 진실* [PROSECUTOR AND SPONSOR, THE BURIED TRUTH] (2011). See also Gwendolyn Domning, *Challenging the Power of the Prosecution? The First Phase of the Establishment of the Corruption Investigation Office for High-ranking Officials (Kowigongjichabömjoesusach’ö) in the Republic of Korea*, 54 VERFASSUNG UND RECHT IN ÜBERSEE 279, 296 (2021).

media,³⁷ or prosecutors themselves.³⁸ In other words, it is possible for agents apart from the executive to politicize prosecutors. But such agents are invisible to conventional executive-prosecutor separation of powers analyses. Nor should prosecutorial independence be approached as purely an issue of constitutional principle. Deductions from broad constitutional rules cannot definitively answer all the myriad questions of prosecutorial organization affecting independence.³⁹ There is much room for institutional design within the spaces allowed by constitutions. And as with judicial independence, prosecutorial independence is a broad overarching principle that is not wholly defined within any single jurisdiction's understanding.⁴⁰ Indeed, to have wide applicability, prosecutorial independence must account for the global diversity of legal systems and experiences. Comparative law's insights are necessary.

In contrast to the US, in Continental Europe prosecutorial independence is discussed more often and with greater directness,⁴¹ probably

37 News publications can advocate for the prosecution or non-prosecution of politically linked suspects. *Infra* note 440 and accompanying text (on the media working with an authoritarian government to discredit a torture victim). They can also cooperate with prosecutors in shaping public opinion during high-profile investigations. *Infra* notes 564 & 570 and accompanying text (discussing how prosecutors' leaks to media and publication of likely false allegations affected public opinion during the prosecution of former President Roh Moo-Hyun). Commentators in Korea, moreso than in America, recognize that journalists sometimes improperly cooperate with prosecutors. Two journalists wrote a book critical of the role of the media in prosecutorial independence scandals, and they conclude that politicians, prosecutors, and the press are often in a "triangular alliance." 김요한 & 김정필 [KIM YO-HAN & KIM JEONG-PIL] 부당거래 대한민국: 권력, 검찰 그리고 언론 [UNCONSCIONABLE BARGAIN KOREA: POWER, THE PROSECUTORS' OFFICE AND THE PRESS] 403 (2019).

38 For example, internal prosecutorial hierarchies, senior executive prosecutors, and individual prosecutors' political beliefs can all pose threats to prosecutorial independence from politics. See generally Neil Chisholm, *Prosecutorial Independence Lost: How Prosecutorial Bureaucracy Is Politicized in South Korea*, 38 EMORY INT'L L. REV. 585 (2024) [hereinafter Chisholm, *Prosecutorial Independence Lost*].

39 Concerns have been voiced that constitutional law may be doing "too much" and that by reducing the scope of permissible institutional design, "the risk increases that constitutional law will excessively rigidify democratic institutions." Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 41, 153 (2004).

40 Just as judicial independence theory takes comparative analysis into account, prosecutorial independence ought to as well. See, e.g., Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345 (2009). As for prosecutorial independence, one scholar has outlined principles of prosecutorial independence, from a European perspective, that some may not entirely agree with, including prosecutors' duty to supervise the police. This scholar also finds "a considerable divergence" in the application of the principles of prosecutorial independence. Stefanie Lemke, *Judicial and Prosecutorial Independence in Europe: How Politicized Judges and Prosecutors Undermine the Right to a Fair Trial in Eastern Europe and Central Asia*, in THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 235, 238-39 (Stephanie Schiedermaier, Alexander Schwarz & Dominik Steiger eds., 2022).

41 European authors have written a significant share of the English literature on comparative prosecutorial independence. See, e.g., Stefan Voigt & Alexander J. Wulf, *What Makes Prosecutors Independent? Analysing the Institutional Determinants of Prosecutorial Independence*, 15 J. INST. ECON. 99 (2017); Anne van Aaken, Lars P. Feld & Stefan Voigt, *Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation Across Seventy-Eight Countries*, 12 AM. L. & ECON. REV. 204 (2010); Anne van Aaken, Eli Salzberger & Stefan Voigt, *The Prosecution of Public Figures*

because the civilian conception of prosecutors as quasi-judicial officers makes comparisons with judges and judicial independence more natural. To take a rough measure, as of January 2024, a google search for the exact phrase “prosecutorial independence” returned about 29,800 results,⁴² while searches for the equivalent French and German terms, *indépendance du parquet* and *Unabhängigkeit der Staatsanwaltschaft*, yielded about 63,900 and 41,000 results, respectively. The leading Continental jurisdictions of France and Germany have lively prosecutorial independence discourses and institutional protections. In France, prosecutors are, like judges, selected by examination, trained within the National School of the Judiciary (*École nationale de la magistrature*), and are bureaucratically accountable to superiors. A hybrid judge-prosecutor, the “examining magistrate” (*juge d’instruction*), oversees pretrial investigations and charging decisions for some serious crimes. France’s constitutional court, the *Conseil constitutionnel*, has many times declared⁴³ that prosecutors are part of the “judicial authority” whose independence is constitutionally guaranteed.⁴⁴ The situation is similar in Germany: there, prosecutors are selected by examination, trained through a rotating judicial internship (*Referendariat*), are hierarchically accountable, and enjoy judge-like job tenure.⁴⁵ Italy is the leading jurisdiction of a variant model: Article 107 of its Constitution explicitly guarantees prosecutors’ independence as an extension of judicial independence.⁴⁶ Given these institutional arrangements, prosecutorial independence is a familiar theme in European legal and political discourse. French⁴⁷ and German⁴⁸ commentators

and the Separation of Powers. *Confusion Within the Executive Branch – A Conceptual Framework*, 15 CONST. POL. ECON. 261 (2004).

42 Many of even these results were not about the United States but rather referred to Canada or other foreign jurisdictions.

43 Laurène Soubise & Alice Woolley, *Prosecutors and Justice: Insights from Comparative Analysis*, 42 FORDHAM INT’L L.J. 587, 611-12 (2018).

44 1958 CONST. art. 64 (Fr.) (“The President of the Republic shall be the guarantor of the independence of the Judicial Authority.”).

45 Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT’L & COMP. L. REV. 317, 320 (1995).

46 Art. 107 COSTITUZIONE [COST.] (It.) (1947) (“The state prosecutor enjoys the guarantees established in the prosecutor’s favor by the provisions concerning the organization of the Judiciary.”).

47 For example, the leading left-wing magistrates’ union has demanded prosecutors be given security of tenure, budgetary independence, firmer control over police, and autonomy in determining personnel policy, through the judicial council, rather than dependence on the Minister of Justice. Syndicat de la magistrature, “L’indépendance du parquet, une urgence constitutionnelle,” Press Release, Dec. 8, 2017, <https://www.syndicat-magistrature.fr/notre-action/independance-et-service-public-de-la-justice/independance/1789-lindependance-du-parquet-une-urgence-constitutionnelle.html>. To take another example, it has been argued that strong crime control policies strain prosecutorial independence by forcing prosecutors to emphasize their executive rather than judicial nature, creating a “tension between [their roles as] operators of penal policy and guarantors of civil liberties in control of the legality of proceedings.” Philip Milburn, *Les procureurs de la République: passeurs de justice ou gestionnaires des « politiques pénales »?*, 74 DROIT ET SOCIÉTÉ 73, 89 (2010).

48 To list some examples: First, a senior prosecutor has complained of executive interference in the prosecution in various ways, including that prosecutors’ promotions often depend on their

worry about deficits of prosecutorial independence, while Italians debate whether their relatively politically activist prosecution is too independent.⁴⁹ Yet the varied application of prosecutorial independence principles and contested nature of current arrangements⁵⁰ suggest that, even in the European civil law world, the concept requires further refinement.

B. South Korea: A Window onto the Continental and Anglo-American Styles

While the foregoing sketch has passed over some issues,⁵¹ it is clear that the idea of prosecutorial independence is taken more seriously in

political views. Pförtner, *supra* note 34, at 459. Secondly, another prosecutor has argued that independence is weakened in three main ways: senior prosecutors' right to instruct subordinates, reporting requirements to superiors, and prosecutors' "anticipatory obedience" to bosses to obtain promotions. Winfried Maier, *Wie unabhängig sind Staatsanwälte in Deutschland?*, 36 ZEITSCHRIFT FÜR RECHTSPOLITIK 387 (2003). (Dr. Maier uncovered and prosecuted a political finance scandal in the late 1990s and early 2000s despite obstruction by his colleagues and bosses). Thirdly, a judge has suggested that Germany can learn from Portugal's self-governing Prosecutors' Office, whose independence, like Italy's, is secured by its Constitution (Article 219). Heinz Stötzel, *Was „unabhängige Staatsanwaltschaft“ heißen kann*, 93 KRITISCHE VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT 268 (2010).

49 Giuseppe Di Federico, *Prosecutorial Independence and the Democratic Requirement of Accountability in Italy: Analysis of a Deviant Case in a Comparative Perspective*, 38 BRITISH J. CRIMINOLOGY 371 (1998) (arguing that Italy's prosecutors are too powerful and lack democratic controls). For a contrary view, see David Nelken, *Can Prosecutors Be Too Independent? An Italian Case Study*, in EUROPEAN PENOLOGY 249 (Tom Daems, Dirk van Zyl Smit & Sonja Snacken eds., 2013).

50 Supra-national European courts have recently challenged France and Germany on prosecutorial independence. The European Court of Human Rights ruled in 2010 that part of the French prosecution, the *procureur*, is neither independent nor a judicial office, although the *juge d'instruction* is both. *Medvedev & Others v. France*, App. No. 3394/03, Eu. Ct. H.R. at ¶¶ 124, 128 (2010). (The judgment led to unease among French prosecutors over "Anglo-Saxon drift" and prompted reforms "to win back the status of judicial officer for the *procureur*": Soubise & Woolley, *supra* note 43, at 617-19). Similarly, in 2019 the Court of Justice of the European Union decided that the German prosecution is not independent from the executive because the Minister of Justice can give orders to prosecutors. *Joined Cases C-508/18 and C-82/19 PPU, Minister for Just. & Equal. v O.G. & P.I.*, ECLI:EU:C:2019:456 (May 27, 2019). In a related judgment, Lithuania's prosecution was held to be independent because its Constitution's prosecutorial independence clause in Article 118 prevents the executive from giving it orders. *Case C-509/18, Minister for Just. & Equal. v P.F.*, ECLI:EU:C:2019:338, (Apr. 30, 2019). The two decisions were unsettling to German observers, partly because the Court's surprising conclusions were based on the widely approved 2015 firing of Prosecutor General Harald Range. See Boyne, *supra* note 7 and accompanying text. See also Markus Sehl, *Deutsche Staatsanwaltschaft nicht unabhängig genug*, LEGAL TRIB. ONLINE (Apr. 30, 2019), <https://www.lto.de/recht/justiz/j/eugh-schlussantraege-c508-18-deutsche-staatsanwaltschaft-unabhaengigkeit-eu-haftbefehl/>.

51 Prosecutorial independence is often discussed in connection with three other areas: England and Commonwealth systems, the International Criminal Court (ICC), and Latin America. In England and throughout the Commonwealth, executive non-interference in prosecution decisions is a constitutional convention (a politically, but not legally, binding practice). See Bruce A. MacFarlane, *Sunlight and Disinfectants: Prosecutorial Accountability and Independence Through Public Transparency*, 45 CRIM. L.Q. 272, 275 (2001). Regarding the ICC, its independence from states and the UN Security Council in initiating investigations is sometimes celebrated. See, e.g., Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 515 (2003). In recent years, however, African commentators have complained of selective prosecutions, following the ICC's mostly African caseload.

civil law than common law systems. Why, then, would a Continental-style jurisdiction consider adopting aspects of the Anglo-American style of prosecutorial independence, especially since the US's prosecution system is the subject of so much self-criticism?

The exceptional case of South Korea ("Korea") shows how this is possible. A series of three articles will use Korea's experience to illuminate the underdeveloped theory of prosecutorial independence. This first article explains the historical and doctrinal origins of Korea's prosecutorial independence framework and how it has functioned. In domestic politics, Korea's bureaucratically organized, German-style prosecution system has become synonymous with scandal, owing to politically motivated investigations and charging decisions. The second article⁵² provides an empirical, interview-based study of the Prosecutors' Office's inner workings, demonstrating how politicization happens. Finally, the third article⁵³ examines reform discourse on enhancing independence. The Prosecutors' Office's many interventions into politics have triggered thoughtful debates, which are often informed by comparative law. Reform proposals include Anglo-American-inspired ideas, such as the introduction of grand jury-like processes, greater powers for police, independent prosecutor institutions, and elections for top prosecutors. Some of these have been adopted.⁵⁴ Analyzing Korea's prosecutorial struggles and the legal and political responses to them can shed light upon the fundamental nature of prosecutorial independence and its civil and common law expressions.

To elucidate the concept of prosecutorial independence, this article's analytical framework draws upon the theoretical insights of Mirjan Damaška, whose interpretation of comparative procedure and legal history suggests that Continental and Anglo-American justice operate according to profoundly different logics.⁵⁵ As Damaška has pointed out,

Awol K. Allo, *The ICC's Problem Is Not Overt Racism, It Is Eurocentricism*, AL JAZEERA (July 28, 2018), <https://www.aljazeera.com/indepth/opinion/icc-problem-simple-racism-eurocentricism-180725111213623.html>. Finally, some Latin American countries, such as Argentina, have made prosecutors constitutionally independent of the executive in response to corruption, organized crime, and civil conflicts. Alejandro M. Garro, *Staffing the Judiciary and Prosecutorial Offices in Argentina: Trials and Tribulations in Search of Merit, Integrity, and Accountability*, 7 SW. J. L. & TRADE AM. 349 (2000). Philip B. Heymann, *Should Latin American Prosecutors Be Independent of the Executive in Prosecuting Government Abuses?*, 26 U. MIAMI INTER-AM. L. REV. 535 (1995). It has also been argued that independence is important for prosecuting human rights abuses committed by state agents. Verónica Michel, *The Role of Prosecutorial Independence and Prosecutorial Accountability in Domestic Human Rights Trials*, 16 J. HUM. RTS. 193 (2017).

⁵² Chisholm, *Prosecutorial Independence Lost*, *supra* note 38.

⁵³ Neil Chisholm, *Prosecutorial Independence Regained? Mixing the Continental and Anglo-American Styles in South Korea*, 8 CARDOZO INT'L & COMPAR. L.R., (forthcoming 2024) [hereinafter Chisholm, *Prosecutorial Independence Regained?*].

⁵⁴ *See generally id.*

⁵⁵ MIRJAN DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

Continental Europe has developed an administration of justice that has emphasized centralization, hierarchical organization in courts, their staffing by trained experts, and the utilization of “technical standards” in adjudication.⁵⁶ Conversely, the Anglo-American machinery of justice has come to emphasize decentralization, the “horizontal distribution of authority,” the use of amateur and lay officials, and adjudication that is informed by community norms.⁵⁷ Although Damaška’s theory does not go into details on prosecutorial organization, it implies that, as with judicial independence,⁵⁸ the Continental and Anglo-American systems have embraced different styles of accountability to establish and control prosecutors’ independence. Broadly speaking,⁵⁹ civilian jurisdictions have tended to rely on bureaucratic mechanisms of accountability (e.g., centralization, recruitment by exam, hierarchical oversight, merit promotion, regulation, etc.), while common law justice has traditionally depended on democratic methods of accountability (e.g., decentralization, appointment by election or elected politicians, oversight by community representatives, private prosecution, etc.).⁶⁰ There is tension between these types of accountability. To an extent, features of both types can be found in the modern Continental and Anglo-American prosecution services—although systems fundamentally incline to one side or the other.

From a theoretical perspective, contemporary South Korea offers a window onto the two styles of prosecutorial independence, revealing their contrasting ideals and methods of pursuing political impartiality. Analysis of Korea’s prosecution demonstrates how mechanisms of bureaucratic accountability function in reality and how such a system can fail to establish independence. To state the conclusions upfront, this study confirms the implications of Damaška’s theory: that there are two distinct styles of prosecutorial independence and that they are philosophically opposed to each other. This will become clearer in the third article in this series,⁶¹ which analyzes Korea’s importation of Anglo-American reform ideas and the mixing of the styles.

56 *Id.* at 18-23.

57 *Id.* at 23-28.

58 Chisholm, *Faces of Judicial Independence*, *supra* note 33, at 934-40.

59 Like Damaška’s theory, this article generally treats the Continental and Anglo-American styles as ideal types. DAMAŠKA, *supra* note 55, at 10. Continental and Anglo-American legal systems have adopted features from each other or independently developed attributes akin to those of their counterparts.

60 Some American scholars have noticed this phenomenon. See Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010); Sara Sun Beale, *Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control*, in DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT 28 (M. Caianiello & J. Hodgson eds., 2015).

61 Chisholm, *Prosecutorial Independence Regained?*, *supra* note 53.

This study focuses on three key aspects of prosecutorial organization: personnel policy, investigational authority, and the decision to lay charges. Since these are the three most important areas of prosecutorial independence, understanding mechanisms of accountability associated with them is crucial. This article therefore examines the concept of prosecutorial independence through the lens of these three conceptual domains of its expression.

Korea's experience reveals another theoretical lesson, namely, the "paradox of democratization" alluded to in the quotation at the start of the article. As will be seen in the history of German, Japanese, and Korean prosecutorial independence, there is an inverse relationship when it comes to the importance of politically suppressive police agencies versus prosecutors. Under authoritarian rule, the executive tends to rely on secret police to manage political threats. But, in more democratic periods, when such extra-legal means are less permissible, prosecutors rise in political value. Because prosecutors are agents of legality and procedural propriety, they can attack the executive's political opponents with legitimacy. Control over the prosecution thus becomes highly tempting—indeed, a political imperative—in competitive democratic politics. Nonetheless, prosecutors may challenge the executive and seek a degree of autonomy, not necessarily to establish political independence, but for other motives such as a desire to build their own political influence, gratify public demands, or to earn favor with politicians believed to be ascendant.

The article proceeds as follows. Part II of this article investigates the historical origins of Korea's Prosecutors' Office, explaining how public prosecution arose in Europe, how Germany reworked its inheritance into a modern system, and how Japan adapted those institutions and transplanted them to Korea. Part III provides a historical overview of Korea's prosecutorial independence landscape in the postwar era, demonstrating how authoritarian rulers and democratically elected presidents have politicized the prosecution. Part IV concludes by considering historical patterns in the history of Continental prosecutorial independence, how they have applied to Korea, and prosecutorial autonomy's independence problems. It also discusses the paradoxical tendency for prosecutorial independence to, in some ways, come under greater threat after a transition from authoritarianism to democracy.

II. THE HISTORICAL FOUNDATIONS OF THE SOUTH KOREAN PROSECUTION AND ITS INDEPENDENCE

The Korean Prosecutors' Office has been patterned after foreign models. It is derived from the prosecution system of the German Empire

(1871-1919) and was introduced to Korea by the Japanese Empire (1868-1945). Understanding the German and Japanese influences on Korea's prosecution can assist in making sense of contemporary arrangements and comprehending the Continental style of prosecutorial independence.

A. *Origins of the Continental European Public Prosecution*

Civilian jurisdictions adhere to a radically different kind of prosecutorial organization than has traditionally existed in common law systems. The modern Continental prosecutor is descended not only from the inquisitorial judge of the Middle Ages, but from offices known as promotor and procurator fiscal. The development process of the European public prosecutor can be summarized as follows.

Inquisitorial procedure arose as a response to the preexisting medieval "accusatory" procedure (*processus per accusationem*), under which prosecutions were based on private accusers' applications to courts.⁶² One problem with the accusatory process was that private parties were often reluctant to seek prosecution, either because of "inertia, fear, or corruption,"⁶³ or on account of the rule that, if a prosecution failed, the accuser would suffer the punishment sought for the defendant. As an improvement, judges came to be able to initiate prosecutions of notorious crimes, and they would take an active role in investigating evidence.⁶⁴ This "inquisitorial" procedure (*processus per inquisitionem*)⁶⁵ appeared first in the canon law courts and then diffused into the secular courts across Europe in the following way.

Within the canon law's inquisitorial judicial system, there developed over time the office of promotor, which originally administered ecclesiastical estates.⁶⁶ Promotors gained powers to assist judges in investigating criminal evidence, and they were known as *promotores iudicis officii*.⁶⁷

62 See DAMAŠKA, *supra* note 55, at 3. The origins of "accusatorial" vs "inquisitorial" terminology, especially following the French Revolution and its aftermath, are discussed in Amalia D. Kessler, *Toward an Account of the Nineteenth-Century Emergence of the Comparative Accusatorial/Inquisitorial Divide*, 71 AM. J. COMP. L. 296, 299-305 (2023).

63 ADHÉMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 11 (John Simpson trans., 1913).

64 Mirjan Damaška, *The Quest for Due Process in the Age of Inquisition*, 60 AM. J. COMP. L. 919, 922-26 (2012). See also ANTONIO PADOA-SCHIOPPA, A HISTORY OF LAW IN EUROPE: FROM THE EARLY MIDDLE AGES TO THE TWENTIETH CENTURY 141 (Caterina Fitzgerald trans., 2017).

65 See DAMAŠKA, *supra* note 55, at 3. For a fuller discussion of the historical origins of the definitional divisions between accusatorial and inquisitorial procedure, see generally Kessler, *supra* note 62.

66 TONY PAUL MARGUERY, UNITY AND DIVERSITY OF THE PUBLIC PROSECUTION SERVICES IN EUROPE. A STUDY OF THE CZECH, DUTCH, FRENCH AND POLISH SYSTEMS 32-33 (2008).

67 Henry Ansgar Kelly, *Inquisition and the Prosecution of Heresy: Misconceptions and Abuses*, 58 CHURCH HIST. 439, 446 n.34 (1989).

Eventually, promotor could investigate crimes and initiate proceedings without the need for a private accuser.⁶⁸ The promotor thus became a kind of public prosecutor, a significant development in the history of inquisitorial procedure, and this office of promotor influenced the secular courts' office of procurator fiscal.

The concept of procurator fiscal can be traced back to the Roman Republic. A *procurator* was a "general agent" acting on behalf of another, in either legal or non-legal matters.⁶⁹ In the Republican era, procurators seem to have been mostly managers for persons who were abroad (*procuratores absentium*), and they could sometimes be bankers or litigate on behalf of a principal.⁷⁰ In later times, the emperor used procurators (e.g., *procuratores Augusti*),⁷¹ and one kind was the *procurator fiscalis*, a powerful officer that handled treasury affairs, including in court. The Roman jurist Ulpian hinted at their special authority when he warned provincial governors to avoid intervening in litigation involving a procurator fiscal: "[I]f the case is pecuniary and concerns the Treasury, which is the business of the emperor's procurator, he (the governor) will do best to keep out."⁷²

It can be inferred from the disappearance of procurators after the fall of the Roman Empire and their reappearance in the Middle Ages that the general concept of *procurator* was revived and altered with the reception of Roman law. In other words, the European procurator fiscal's public prosecutorial function did not truly originate in the Roman era, but in the Middle Ages.⁷³ When it reemerged, the office developed primarily in France before diffusing elsewhere in Europe. In its medieval form, the office of procurator originally administered estates on behalf of kings or lords.⁷⁴ In France, monarchical procurators were called *procureurs du roi* while procurators for the nobility were known as *procureurs fiscaux*.⁷⁵ The former were active in the royal courts and the latter in the seigniorial courts. Either of these procurators could assert royal or seigniorial interests through lawsuits for taxes, fines, and forfeitures, often as the

⁶⁸ MARGUERY, *supra* note 66, at 36. See also ESMEIN, *supra* note 63, at 87-88 for a slightly differing account of the development of the promotor.

⁶⁹ J.A. CROOK, *LAW AND LIFE OF ROME*, 90 B.C. – A.D. 212, at 237-38 (1967).

⁷⁰ Cicero, for example, wrote letters to friends recommending that they employ certain trustworthy procurators. *Id.* at 238.

⁷¹ *Id.*

⁷² *Id.* at 73.

⁷³ MARGUERY, *supra* note 66, at 31-32. The author explains the "non-Roman origins" of France's *procureur du roi* and the "public ministry," which was prosecutors' institution. *Id.* at 36-38.

⁷⁴ *Id.* at 33.

⁷⁵ *Id.* at 42-43.

monetary penalties for crime.⁷⁶ In some criminal matters, the *procureur du roi* could “participate in the proceedings once the interests of the Crown were affected.”⁷⁷

Over time, like the promoters, the *procureur du roi* became an assistant to the inquisitorial judge and eventually could initiate criminal charges on behalf of the public, instead of the judge or a private accuser.⁷⁸ This shift was motivated by the central government’s drive to accumulate power. As one scholar put it, “The embodiment of the institution as specifically upholding the law and safeguarding the public interest evolved from the political need to enhance the Crown’s power over the French realm.”⁷⁹ The *procureur du roi* also controlled the scope of the preliminary investigation.⁸⁰ Indeed, these officers’ investigatory functions went beyond criminal proceedings: they constituted a “fantastic intelligence service expanding the power of the Crown everywhere... aware of almost everything occurring in the cities or in the realm,” and their reports shaped major legal reforms.⁸¹ The office of *procureur du roi* thus strengthened the centralization of royal authority, as it was meant to. Furthermore, the line between judge and *procureur du roi* was indistinct. The *procureur du roi* swore an oath to obey the king’s orders, but this was balanced by the oath’s terms requiring him to render justice impartially as well as his status as part of the quasi-independent judiciary.⁸²

This nascent public prosecutor office spread from France throughout Europe under the title of procurator fiscal. Esmein traced their arrival in Spain, Italy, Germany, and the Netherlands.⁸³ Today, it is noteworthy that prosecution services in South America and Spain are still called *la Fiscalía*.⁸⁴ Indeed, Spanish-language media in the United States refer to American district attorneys as *los fiscales*, despite conceptual differences between Continental and American prosecutors.

76 ESMEIN, *supra* note 63, at 115. See also MARGUERY, *supra* note 66, at 32-33 (discussing predecessor offices).

77 MARGUERY, *supra* note 66, at 36.

78 *Id.* at 35-36.

79 *Id.* at 34.

80 “The system stipulated a judicial investigation of every suspicion which the procureur took seriously.” JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 227 (1974).

81 MARGUERY, *supra* note 66, at 50-51. The 1670 Ordinance, a landmark of pre-revolutionary criminal procedure, was supported by such intelligence work.

82 *Id.* at 34, 39-40. The judiciary of the French *ancien régime* had asserted a degree of independence by periodically resisting the king.

83 The office of procurator fiscal developed in Spain from the 1400s to 1560s: ESMEIN, *supra* note 63, at 301. In Italy, procurators fiscal began to appear in some regions by the late 1400s: *Id.* at 294-95. German states had fiscals since the 1550s. *Id.* at 311-12. In the Netherlands, they existed since at least the early 1600s. *Id.* at 312.

84 See, e.g., *Ministerio Fiscal*, MINISTERIO FISCAL DE ESPAÑA, <https://www.fiscal.es/> (last visited Mar. 29, 2024), for Spain’s prosecution service.

This history demonstrates that the European public prosecutor has traditionally been an amalgam of executive and judicial offices: a powerful promotor of royal interests seconded to the role of judicial assistant. These origins established the trajectory of the Continental public prosecutor, not as a theoretical equal to the defendant in litigation, but as a strong executive officer entrusted with judicial functions.⁸⁵ Although the later development of Montesquieu's idea of the separation of powers has forced civilian jurisdictions to categorize public prosecutors as either judicial or executive officers,⁸⁶ they have often retained both identities.

B. The Development of Public Prosecution in Nineteenth-Century Germany

The French Revolution prompted reforms in French criminal procedure. Napoleon's⁸⁷ 1808 *Code d'instruction criminelle* created a public prosecution system that was bureaucratically organized⁸⁸ and somewhat more adversarial than its inquisitorial predecessor.⁸⁹ Prosecutorial tasks were formally separated from those of the trial judge, enhancing the appearance of judicial impartiality.⁹⁰ Napoleon's conquest of Europe spread this model abroad,⁹¹ and it became the basis for reforms in nineteenth-

85 See also DAMAŠKA, *supra* note 55, at 187-88 (arguing that it would be mistaken "to imagine that contemporaries viewed the official promotor and defendant as adverse parties battling each other before a passive umpire of their disputation: the promotor was instead seen as an official assistant to the judge").

86 Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 3, 15, 27 (2012) (noting that European prosecutors, whether categorized as executive or judicial personnel, tend to behave "indistinguishably").

87 "Only the *Code Civil* was given the name *Code Napoléon*, and it has been said the Emperor refused this title to the *Code d'Instruction Criminelle*, because he realized it was not a perfected work and that shortcomings would not be long in appearing." Edwin R. Keedy, *The Preliminary Investigation of Crime in France*, 88 U. PENN. L.R. 385, 388 (1940).

88 See *id.* at 404-05 for a description of the personnel hierarchy.

89 The "Napoleonic compromise" has been described as "the restoration of the inquisitorial system in the pretrial phase and the retention of the accusatory system in the trial phase of felonies." JAMES M. DONOVAN, JURIES AND THE TRANSFORMATION OF CRIMINAL JUSTICE IN FRANCE IN THE NINETEENTH & TWENTIETH CENTURIES 44 (2010). Another scholar characterizes the compromise thusly,

The outcome was the 1808 *Code d'Instruction Criminelle*, which retained just enough due process adversariality (notably the trial in open court with the participation of counsel) to satisfy the liberal elites of post-revolutionary France, while ensuring absolute state control of the investigation process, unhindered by any exercise of adversarial rights.

Richard Vogler, *Due Process*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 929, 940 (Michel Rosenfeld & Andrés Sajó eds., 2012).

90 Keedy, *supra* note 87, at 405. ("By 'independence' is meant that the members of the *ministère public* [including prosecutors] are not subject to control or direction by the court.")

91 Vogler, *supra* note 89, at 940. Vogler points out that Napoleonic criminal procedure's influence also extended peacefully, "since it provided a model for newly emerging regimes in Europe, Africa, Asia, and Latin America." *Id.*

century German states.⁹² Across German states, dissatisfaction with the judiciary contributed to the 1848 uprisings against governments.⁹³ The revolutionaries' demands included making court proceedings accusatory rather than inquisitorial, more oral and open rather than secret and written, and adopting a jury system.⁹⁴ In Prussia, the king ordered legal reforms that included the reorganization of the public prosecution to establish a more accusatorial and oral criminal procedure.⁹⁵ Prussia's reformed criminal procedure thus combined French influences and aspects of liberal ideology⁹⁶—although the executive had ulterior motives too, as will be seen.⁹⁷ Following the Prussian-led unification of Germany in 1871, Prussia's model of prosecutorial organization served as an influential template for the new nation.⁹⁸

Germany's unification created a need to standardize the fundamental laws of the new nation and establish "legal unity" (*Rechtseinheit*) among

92 After Napoleon's fall, French criminal procedure was left "obtaining as law in many parts of Germany" and influenced debates in others. ESMEIN, *supra* note 63, at 575. Esmein goes further in saying of the German Empire's 1877 criminal procedure: "The German Code of Criminal Procedure is directly derived from the [1808] French Code of Criminal Examination." *Id.* at 580. *See also* HETT, *infra* note 96, at 31-32.

93 In Prussia, there were public calls for criminal procedure reforms to prevent so-called "demagogue prosecutions" (*Demagogenverfolgungen*) and to allow the public to view proceedings in order to stop "state arbitrariness." Peter Collin, *Die Geburt der Staatsanwaltschaft in Preußen*, F. HISTORIAE IURIS, March 12, 2001, at ¶ 11.

94 These demands were inserted into the revolutionary pan-German Frankfurt Constitution of 1849. VERFASSUNG DES DEUTSCHEN REICHES [Constitution of the German Empire], 1849, §§ 178-79 (§ 178 states, "The court proceedings should be public and oral." § 179 states, "In criminal cases, the accusatory process applies" and "Juries should adjudicate in at least serious criminal cases and in all political offences.").

95 *See generally* Collin, *supra* note 93.

96 Some commentators emphasize the importance of liberal ideology to reform. "Efforts to weave [English] conflict-solving patterns into the fabric of Continental criminal procedure were inspired by the tenets of liberal ideology." DAMAŠKA, *supra* note 55, at 190. Others stress legal diffusion from France. Benjamin Carter Hett states,

[T]he state prosecutor was a recent development. The office was a product of revolutionary France, carried into Germany by revolutionary and Napoleonic armies. Since the German Rhineland kept its French legal institutions after Napoleon's defeat, the revolution's legal innovations, including not only the office of the public prosecutor but also juries and the public conduct of trials, found a foothold in German-speaking Europe, from which they could gradually spread east. It was [Friedrich Karl von] Savigny who brought the prosecutor to Prussia in the 1840s.

BENJAMIN CARTER HETT, DEATH IN THE TIERGARTEN: MURDER AND CRIMINAL JUSTICE IN THE KAISER'S BERLIN 31-32 (2004). Hett also mentions "the hopes and demands of liberal reformers since at least the time of the French Revolution." *Id.* at 30.

97 *Infra* notes 157-164 and accompanying text.

98 One historian stresses the ideological suitability of the Prussian prosecutor for the new German government:

On the other hand, their political function was clearly defined: [prosecutors] were considered as 'organs of the state government for the safeguarding of the public interest in matters specified by law.' With that, the Prussian public prosecutor's office was given exactly the form that was to make it a model for the German Empire.

UWE WILHELM, DAS DEUTSCHE KAISERREICH UND SEINE JUSTIZ: JUSTIZKRITIK – POLITISCHE STRAFRECHTSPRECHUNG – JUSTIZPOLITIK 56 (2010).

the formerly independent kingdoms.⁹⁹ As it debated new laws, the Reichstag recognized the difficulty of the task and in 1875 delegated legislative work to a special Judicial Commission (*Justizkommission*).¹⁰⁰ Its purpose was to draft the “Imperial Justice Laws” (*Reichsjustizgesetze*) that would regulate courts, lawyers, and civil and criminal procedure in the *Kaiserreich*.¹⁰¹ The Commission consisted of 28 members, of whom the largest political bloc was a 12-member contingent selected by the National Liberal Party.¹⁰² Almost all of the Commission’s members were legally trained, and most were judges.¹⁰³ An eminent legal historian has described their output as “the product of the intelligent policies of an upright and expert judiciary.”¹⁰⁴ Their work reflected the post-French Revolution view that, “in order to be modern a nation must organize its whole legal life on a codified rational plan.”¹⁰⁵ This Judicial Commission wrote the main statutes governing the German Empire’s prosecutors: the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG)¹⁰⁶ and Criminal Procedure Code (*Strafprozessordnung*, StPO).¹⁰⁷ These laws were passed in 1877 and entered force in 1879. They went to the foundation of the German *Rechtsstaat*, a vision of procedural regularity in government that was championed by liberals.¹⁰⁸ Indeed, these statutes have been so highly regarded that their essential features have been maintained down to the present day.¹⁰⁹

1. The German Doctrinal Framework

In terms of prosecutorial organization and independence, the GVG and StPO have had four general characteristics. First, they created a prosecution service that was partly decentralized, leaving individual states to regulate prosecutors at the three lower levels of a four-level

99 Kenneth W. Reynolds, “A Wish in Fulfilment”: The Establishment of the German *Reichsgericht*, 1806-1879, at 116-17, 121 (Mar. 1997) (unpublished Ph.D. thesis, McGill University).

100 *Id.* at 237-38.

101 *Id.* at 221-22, 231-32.

102 *Id.* at 239.

103 The Commission included fifteen judges, six lawyers, two prosecutors, two law professors, two legally trained government officers, and one medical doctor. Kenneth F. Ledford, *Lawyers, Liberalism, and Procedure: The German Imperial Justice Laws of 1877-79*, 26 *CENT. EUR. HIST.* 165, 186 n.73 (1993). See also REYNOLDS, *supra* note 99, at 239-40.

104 FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE* 369 (Tony Weir trans., 1995).

105 *Id.* at 364.

106 GERICHTSVERFASSUNGSGESETZ [GVG] [Court Constitution Act], Feb. 1, 1877, DEUTSCHES REICHSGESETZBLATT (Ger.) [hereinafter GVG (1877)]. Text of this historical law can be found at: <https://de.wikisource.org/wiki/Gerichtsverfassungsgesetz>.

107 STRAFPROZESSORDNUNG [StPO] [Criminal Procedure Code], Feb. 1, 1877, DEUTSCHES REICHSGESETZBLATT, (Ger.) [hereinafter StPO (1877)]. Text of this historical law can be found at: <https://de.wikisource.org/wiki/Strafproze%C3%9Fordnung>.

108 Ledford, *supra* note 103, at 167-69, 171-72, 191-93.

109 See *infra* note 155 and accompanying text.

court system.¹¹⁰ This was in line with “the German theory of centralization in legislation and decentralization in administration.”¹¹¹

Secondly, criminal procedure declared itself to be adversarial by codifying the “principle of accusation” (*Akkusationsprinzip* or *Anklagegrundsatz*). This concept, that no one can be put on criminal trial unless that person has been charged,¹¹² may sound like a tautology to a common law lawyer, but in a Continental system it represents the reaction against the inquisitorial past, in which a judge could serve as both accuser and adjudicator. Furthermore, the two statutes abandoned the old terminology of “*Staatsprokurator*” (state procurator)¹¹³ in favor of “*Staatsanwalt*” (state lawyer), symbolizing a shift in the image of the prosecutor as a party to proceedings rather than holding the special status of procurator fiscal.

Thirdly, this theoretical adversarialism was counterbalanced by the continued treatment of prosecutors as quasi-judicial officials. For example, rules on prosecutors were placed in the law on court organization, the GVG, which dealt mainly with judges. In terms of courtroom layout at trials, prosecutors sat alongside judges on the elevated bench, rather than on the floor with the defense counsel, indicating a special status as judicial assistant.¹¹⁴ Prosecutors were also directed to objectively consider evidence that would exonerate the accused¹¹⁵ and were even permitted to lodge appeals in favor of the accused.¹¹⁶ These two provisions, in tension with pure adversarialism, formed the basis of the prosecutor’s “objective duty” (*Verpflichtung zur Objektivität*). This concept can be traced back to the idea, discussed in an influential 1846 memorandum by

110 See, e.g., GVG (1877), *supra* note 106, § 148 (on oversight of prosecutors by national or state level authorities). With regard to the levels of the court system at the time, “[T]he imperial law of 1877 created a system of courts of four grades: the district court (*Amtsgericht*), the territorial court (*Landesgericht*), the superior court (*Oberlandesgericht*) and the Imperial Court (*Reichsgericht*).” J.W. Garner, *The Judiciary of the German Empire. I.*, 17 POL. SCI. Q. 490, 498 (1902) [hereinafter Garner, *German Judiciary I*]. Only the highest court was considered a national-level imperial court. *Id.* at 499. “The imperial prosecutors are under the control of the Chancellor, while the state and district attorneys are under the supervision of the respective ministers of justice, and every prosecutor is required to obey without question the commands of his superior. The imperial attorneys are appointed by the Emperor in the same manner as the imperial judges. The state and district prosecutors, although the creation of imperial law, are regarded as officers of their particular states (*Landesbeamte*)...” James Wilford Garner, *The German Judiciary II*, 18 POL. SCI. Q. 512, 520 (1903) [hereinafter Garner, *German Judiciary II*].

111 Garner, *German Judiciary I*, *supra* note 110, at 500.

112 StPO (1877), *supra* note 107, § 151 (“The opening of a judicial investigation is conditional on the laying of charges.”).

113 Archaic job titles such as, *Unterstaatsprokurator*, *Staatsprokurator*, and *Generalstaatsprokurator* can be seen in the biographies of senior judges in the 1870s. REYNOLDS, *supra* note 99, at 395, 409-10, 418, 424, 426.

114 John N. Hazard, *Furniture Arrangement as a Symbol of Judicial Roles*, 19 ETC: A REV. GEN. SEMANTICS 181, 185 (1962).

115 StPO (1877), *supra* note 107, § 158.

116 *Id.* § 338.

Friedrich Karl von Savigny (Prussian Minister of Legislation) and Karl von Uhden (Prussia's Justice Minister), that the prosecutor should be "guardian of the law [*Wächter des Gesetzes*]... a position which obligates him as much to protect the accused as to come forward against him."¹¹⁷

The drafters of the Imperial Justice Laws in fact debated whether prosecutors should be given judicial status. Both sides of the dispute were led by Liberals who had served as judges. Hermann Heinrich Becker wanted prosecutors to be considered as judges in order to enhance prosecutors' independence from the executive, while Friedrich Ludwig Gaupp argued that they should be non-judicial in order to have adversarial party status.¹¹⁸ Ultimately, it was left to the states to determine the status of their prosecutors, while those at the Imperial level were not to be regarded as judges.¹¹⁹ A minority of states treated their prosecutors as judges.¹²⁰ One historian has suggested that the government was pleased with the result, although it had earlier backed Becker, because it wanted prosecutors to be executive officers in order to facilitate political intervention in criminal justice.¹²¹

Fourthly, the concept of prosecutorial independence was underdeveloped in the GVG and STPO, and was far less important than judicial independence, which was proclaimed in § 1 of the GVG.¹²² Where prosecutorial independence was referenced, it was to declare that "prosecutors are independent of the courts in their official duties."¹²³ This provision was another marker of the break with the inquisitorial past. But while independence from the judiciary was guaranteed, independence from the executive was not. As will be explained below, prosecutors were under the management of the Imperial or state-level ministries of justice.

Beyond these general observations, prosecutorial independence can be evaluated by examining prosecutorial organization in three important areas: investigatory powers, charging authority, and personnel policy.

In the area of investigations, prosecutors required judicial permission for "coercive measures" (*Zwangsmittel*) such as detention, search, and

¹¹⁷ Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508, 510-11 (1970).

¹¹⁸ Kerstin Hammeke, *Die Entwicklung der deutschen Staatsanwaltschaft seit 1871*, at 8-10 (May 11, 2009), (unpublished paper). This paper is available at: https://www.ruhr-uni-bochum.de/lis-muscheler/downloads/seminar09/Kerstin_Hammeke_Die_Entwicklung_der_deutschen_Staatsanwaltschaft_seit_1871.pdf.

¹¹⁹ GVG (1877), *supra* note 106, §§ 122, 149.

¹²⁰ Hammeke, *supra* note 118, at 15.

¹²¹ ERNST CARSTEN, *DIE GESCHICHTE DER STAATSANWALTSCHAFT IN DEUTSCHLAND* 62-64 (1971).

¹²² "The judicial power is exercised through independent courts, subject only to the law." GVG (1877), *supra* note 106, § 1.

¹²³ *Id.* § 151. § 152 secures judges against supervision by prosecutors, thus establishing mutual independence. *Id.* § 152.

seizure.¹²⁴ But the statute allowed prosecutors and police to conduct searches and seizures on their own authority “in case of imminent danger,”¹²⁵ and they used this power routinely until relatively recently.¹²⁶ Additionally, prosecutors were granted the right to request information from any government office, and the latter had to comply,¹²⁷ a significant investigatory power in Germany.¹²⁸ Finally, the GVG defined police as prosecutors’ “assistants” and gave them the authority to issue instructions (*Weisungsbefugnis*) that the police were required to obey.¹²⁹ The reason police were made subject to prosecutorial control was that they were historically considered a tool of authoritarian government, and it was thought necessary to limit their power.¹³⁰ Savigny, a pioneer of this idea, recommended to the Prussian government, that:

the police if possible be put under [the prosecutor’s] control, and there be ascribed to him a genuine power over the whole police force in a manner that the police be required to subordinate their own investigative activities to the authority of the prosecutor, to satisfy his wishes in this respect, and in those situations where he might intervene, to refrain from any independent activity.¹³¹

In sum, the statutes generally put prosecutors’ investigatory powers under judicial oversight, but prosecutors retained significant scope for investigating on their own authority. Prosecutorial control over police investigations may have helped limit police abuses, but it created a new potential for abuse by effectively giving prosecutors a monopoly on investigations.¹³²

In the area of charging decisions, prosecutors were granted substantial authority with some limits. The aforementioned principle of accusation¹³³ was clarified by the principle of prosecutors’ “monopoly of accusation” (*Anklagemonopol*). Although a few crimes required a

¹²⁴ Provisions on these powers may be found, respectively, at STPO (1877), *supra* note 107, §§ 114, 105, 98. For serious crimes, the German preliminary criminal process relied on the French-style examining magistrate (*juge d’instruction* or *Untersuchungsrichter*) to determine judicial authorization for such measures, but this was abolished in the postwar period. DAMAŠKA, *supra* note 55, at 192.

¹²⁵ STPO (1877), *supra* note 107, § 105. Seizures required subsequent judicial approval, apart from reading papers. *Id.* §§ 98, 110.

¹²⁶ Germany’s Constitutional Court curbed these discretionary powers in 2001. EBERHARD SIEGISMUND, THE PUBLIC PROSECUTION OFFICE IN GERMANY: LEGAL STATUS, FUNCTIONS AND ORGANIZATION 53, 62 (2001).

¹²⁷ STPO (1877), *supra* note 107, § 159.

¹²⁸ SIEGISMUND, *supra* note 126, at 61.

¹²⁹ GVG (1877), *supra* note 106, § 153. Police also had to obey the examining magistrate. STPO (1877), *supra* note 107, § 187.

¹³⁰ Jescheck, *supra* note 117, at 508.

¹³¹ *Id.* at 510.

¹³² In modern Germany, prosecutors tend not to exercise their power to assume direct control over police investigations, although police still clamor for independent investigative authority. SIEGISMUND, *supra* note 126, at 67-69.

¹³³ See *supra* note 112 and accompanying text.

complainant's consent for prosecution, the general rule was that "the prosecutor is assigned the laying of public charges."¹³⁴ The drafters of the criminal procedure code rejected private prosecution for "standing in blatant contrast with German legal opinion."¹³⁵ To balance the prosecutor's exclusive power over charging, the drafters put three constraints on prosecutorial charging discretion. First, they gave prosecutors the responsibility to bring charges if an investigation uncovered sufficient evidence against a suspect.¹³⁶ This "principle of legality" (*Legalitätsprinzip*) was meant to be the main check on the prosecution.¹³⁷ During the drafting process, the *Kaiserreich's* illiberal executive branch supported introducing the legality principle as a kind of concession to consolidate its gains.¹³⁸ This support suggests that the executive did not view the legality principle as a major impediment to political intervention in prosecutions. The second restraint on prosecutors was the aforementioned quasi-judicial "objective duty" to consider evidence in a suspect's favor. Finally, criminal procedure gave injured parties the right to complain to a prosecutor's superior and afterwards to a judge if they were dissatisfied that no charges were brought.¹³⁹ Either could order that charges be filed.

The first two constraints on charging discretion optimistically depended on prosecutors' ability to impose rules on themselves. These provisions seemed to overlook the possibility that a prosecutor might manipulate his interpretation of the evidence to produce a desired outcome in charging. The third check on the charging monopoly implied that senior prosecutors would need to discipline subordinates or correct their errors, as if the latter were operating autonomously and unpredictably—which would have been unlikely, as will be seen. And an application to a judge to order charges would depend on the degree of professional detachment between judges and prosecutors. If judges generally viewed prosecutors as trusted colleagues, judicial oversight of prosecutorial discretion might be lax.

With respect to personnel policy, especially selection, training, and promotion, prosecutors in some ways resembled judges.¹⁴⁰ Selection to the prosecutorial career involved, as with judges, examinations. The meritocratic ethos of the German judiciary thus extended to prosecutors.

¹³⁴ STPO (1877), *supra* note 107, § 152.

¹³⁵ CARSTEN, *supra* note 121, at 65.

¹³⁶ STPO (1877), *supra* note 107, § 152.

¹³⁷ The legality principle was reinforced by the rule that charges could not be withdrawn after the start of the judicial preliminary inquiry (*Untersuchung*). STPO (1877), *supra* note 107, §§ 154, 156.

¹³⁸ Hammeke, *supra* note 118, at 13.

¹³⁹ STPO (1877), *supra* note 107, §§ 170-173.

¹⁴⁰ For an overview of the German Empire's judicial personnel policy, see Chisholm, *Faces of Judicial Independence*, *supra* note 33, at 900-03.

Prosecutors' training process began in the *Referendariat*, a then-three-year rotating internship required for all who sought legal qualification.¹⁴¹ Trainees would serve as interns in the courts or a prosecutor's or lawyer's office.¹⁴² The national and state executives determined which interns would be selected to the prosecution.¹⁴³ After selection, training would continue on-the-job as prosecutors would begin a bureaucratic career path at a low level.¹⁴⁴ Promotion to higher levels of the prosecution, as in the judiciary, was determined by the state or Imperial-level ministries of justice, likely with input from hierarchically superior prosecutors who evaluated those beneath them.¹⁴⁵ This practice theoretically enhanced meritocracy within the prosecution, but it also created the potential for senior prosecutors to control their subordinates through the possibility of denying promotion. A scholar of European courts described this paradoxical danger:

The almost universal desire for promotion, coupled with the comparatively few possibilities, places great power in the hands of those who control advancement. The promise of promotion may easily be used to obtain a judiciary subservient to the executive authority. The first ostensible purpose of regulating promotion is to rule out political influence. If promotion could be made on the basis of seniority alone there would be no room for politics.

141 GVG (1877), *supra* note 106, § 2. The provision allowed states to extend the period of studies and internship. It states,

Between the first and second examinations there must be a period of three years, which is to be used in service with the courts and with the lawyers, and also can be used in part with the public prosecutor's office. In the individual states it can be determined that the designated period for university studies or preparatory service will be extended . . . at most for one year

Id.

142 *Id.* For a description of the *Referendariat* around the early 1930s, see Morris Ploscowe, *The Career of Judges and Prosecutors in Continental Countries*, 44 YALE L.J. 268, 270-71 (1934).

143 GVG (1877), *supra* note 106, § 150. "The Senior Imperial Prosecutor and Imperial Prosecutors are appointed by the emperor . . ." In reality, the emperor decided appointments in consultation with the Minister of Justice. Edward Zimmermann, *The Public Prosecutor System in Germany*, 3 LAW MAG. & REV. 630, 631-32 (1874). At the state level, prosecutors were appointed by state executives. Garner, *German Judiciary II*, *supra* note 110, at 520-21.

144 Ploscowe, *supra* note 142, at 271.

145 Ministers of Justice could determine appointments. See Ploscowe, *supra* note 142, at 270-71, 280. After initial selection, appointments were promotions to various posts within the hierarchy. *Id.* at 275. (Ploscowe speaks of the "magistracy" as including prosecutors: *Id.* at 268). Ploscowe further observes that "Germany has no . . . complex of rules and methods to fetter the executive authority in the promotion of magistrates." *Id.* at 280. As for senior prosecutors' role in assisting Ministers of Justice in determining promotion, Ernst Carsten described the intensive oversight by senior prosecutors in post-unification Prussia, who had powers to reprimand and impose administrative penalties on their underlings. CARSTEN, *supra* note 121, at 75-76. This suggests that they influenced promotions too. Carsten also relates that in Prussia a senior prosecutor (*Oberstaatsanwalt*) would decide appointments for posts under him after consulting with the executive head of an administrative area, the "district president" (*Regierungspräsident*). *Id.* at 76. For a comparison with German judges, whose promotions depended on their senior colleagues' written reports sent to justice ministers, see Chisholm, *Faces of Judicial Independence*, *supra* note 33, at 902-03. If judges, with their greater independence, faced such a situation, it would be *a fortiori* for prosecutors. Thus, it is likely prosecutor promotions operated similarly, although the paucity of research into this issue makes it difficult to advance the point in detail.

But there is no constant correlation between seniority and merit. Good justice requires that the more capable magistrates occupy the higher posts. Some discretion must be lodged somewhere for the purpose of perceiving and rewarding merit.¹⁴⁶

Prosecutors could sometimes switch career paths to become judges, a practice that further indicates prosecutors' quasi-judicial status.¹⁴⁷ But German prosecutors were treated radically differently from judges in one aspect of personnel policy: they had to accept direct supervision from their senior colleagues. According to the principle of "unity and indivisibility of the prosecution" (*Einheit und Unteilbarkeit der Staatsanwaltschaft*),¹⁴⁸ all prosecutors in an office were to act as representatives of the "first official" in that office.¹⁴⁹ This top prosecutor had the power to take over an individual prosecutor's work and assign it to another.¹⁵⁰ Furthermore, prosecutors were obliged to follow the orders of their supervisor,¹⁵¹ and the power of oversight was given to the Chancellor for Imperial-level prosecutors and state ministries of justice for state-level prosecutors.¹⁵² Imperial-level prosecutors could be fired by imperial decree at any time.¹⁵³ These rules might beneficially prevent the emergence of rogue prosecutors and contribute to uniformity in law enforcement. But they could also ensure hierarchical control. While these provisions left prosecutors' independence internally low and externally compromised, the principle of legality was supposed to limit control over prosecutors. In other words, an improper order from the executive or a senior colleague could not prevent a charging decision if sufficient evidence existed.

2. *Political Dimensions and Implications*

How has this prosecution system been evaluated? The conventional wisdom in Germany has been that the prosecutorial organization established by the 1877 laws was rational and liberal.¹⁵⁴ The statutes' emphasis on orality and the accusatorial process, despite some equivocation on prosecutors' quasi-judicial status (which could be interpreted as a vestige of inquisitorialism), has made the prosecution appear comparatively liberal in historical perspective. Other features of the system, such as its

¹⁴⁶ Ploscowe, *supra* note 142, at 275-76.

¹⁴⁷ This can be seen, for example, in biographical summaries of the first judges of the *Reichsgericht*, the German Empire's highest court. REYNOLDS, *supra* note 99, at 391-427.

¹⁴⁸ This idea was derived from the French *principe d'indivisibilité du parquet* (principle of indivisibility of the prosecution), which is explained in Keedy, *supra* note 87, at 404-05.

¹⁴⁹ GVG (1877), *supra* note 106, § 145.

¹⁵⁰ *Id.* § 146.

¹⁵¹ *Id.* § 147.

¹⁵² *Id.* § 148.

¹⁵³ *Id.* § 150.

¹⁵⁴ See, e.g., Jescheck, *supra* note 117, at 508-09.

partial decentralization, the legality principle, and prosecutors' duty to objectively consider evidence in a defendant's favor, contribute to the overall positive assessment. This sentiment is why the system has essentially been maintained to this day.¹⁵⁵

But the conventional wisdom has been challenged.¹⁵⁶ Peter Collin has argued that the antecedent to the 1877 system, the Prussian prosecution, was in fact illiberal and repressive.¹⁵⁷ The creation of the Prussian public prosecution was ordered by King Friedrich Wilhelm IV in August 1849, and he was motivated not by liberal benevolence but by his own dissatisfaction with the judiciary,¹⁵⁸ whose independence had been recognized in 1815.¹⁵⁹ The King desired to take control over the initiation of proceedings away from inquisitorial judges and hand it to politically reliable prosecutors.¹⁶⁰ Most importantly, the King wanted prosecutors to be able to appeal lower court judgments on the basis of law and fact because by doing so the executive could alter case law that it disapproved of.¹⁶¹ This appellate power, the King's main goal, was designed to be a politically acceptable replacement for the unpopular medieval-style power of royal confirmation of court decisions, through which a king could nullify judgments. Meanwhile, the supervisory elements of prosecutorial personnel

155 WIEACKER, *supra* note 104, at 370. According to Wieacker, These imperial enactments are evidence of a successful political compromise between a state which still had power and authority and a civil society set on economic and political self-determination. It might seem that despite the quality of these enactments they must be outdated in view of their age and ideological background. In fact they have survived extremely well . . . [without] any major change in their system.

Id.

156 Damaška's comparative legal skepticism is worth note: Sooner or later, liberal reforms were inaugurated in all Continental countries. In assessing the flavor of the resulting amalgam, however, it is crucial to distinguish between the aspirations of reform legislation and the reality—by no means an easy task. It is bedeviled by the natural inclination of many Continental commentators—committed agents of change in their domestic systems—to exaggerate the extent to which their liberal aspirations have become reality.

DAMAŠKA, *supra* note 55, at 190.

He goes on to critique the claim that European criminal procedure has become adversarial, arguing that the tendency for prosecutor-controlled preliminary proceedings to dominate trials represents continuity with inquisitorial tradition. *Id.* at 190-93.

157 Collin's principal work on the subject is PETER COLLIN, „WÄCHTER DER GESETZE“ ODER „ORGAN DER STAATSREGIERUNG“? KONZIPIERUNG, EINRICHTUNG UND ANLEITUNG DER STAATSANWALTSCHAFT DURCH DAS PREUßISCHE JUSTIZMINISTERIUM VON DEN ANFÄNGEN BIS 1860 (2000) [hereinafter COLLIN, „WÄCHTER DER GESETZE“ ODER „ORGAN DER STAATSREGIERUNG“?]. A short article summarizes his conclusions: Collin, *supra* note 93.

158 Collin, *supra* note 93, ¶ 22. Despite Collin's detailed archival research, he states that “It is no longer ascertainable which specific judgement triggered the King's displeasure.” *Id.*

159 *Id.* ¶ 6.

160 *Id.* ¶ 23.

161 COLLIN, „WÄCHTER DER GESETZE“ ODER „ORGAN DER STAATSREGIERUNG“?, *supra* note 157, at 236-38 (2000). See also Collin, *supra* note 93, at ¶¶ 22-24. “Here lay the focus, not on creating an autonomously acting prosecution authority; rather the reform proposal concentrated on the creation of a corrective instrument for the state [for case law].” *Id.* ¶ 23.

policy would ensure that prosecutors remained loyal to the executive.¹⁶² Executive oversight of the prosecution included the Ministry of Justice's authority to issue prosecutors instructions on the interpretation of law and procedure, which could influence adjudication.¹⁶³ Additionally, it was hoped that the public prosecutor could accelerate proceedings, especially in political cases, where drawn out inquisitorial trials could win sympathy for defendants.¹⁶⁴ In sum, the government intended that the new prosecution system serve as a check on the courts, and executive control over the prosecution was advanced as a response to the growth of judicial independence.

With major benefits secured for the Prussian executive, it could agree to minor concessions to liberalism, such as the "objective duty" requiring prosecutors to objectively examine evidence exculpating the defendant. Justice Minister Uhden considered this provision and viewed it as irrelevant, writing that it would be used rarely.¹⁶⁵ The new Prussian prosecution system was adopted for Berlin in 1846 and, following the revolution, it was extended nationwide in 1849—although revolutionary demands had little impact on the reform.¹⁶⁶ This legislation then became the model for the post-German unification public prosecution,¹⁶⁷ although some significant changes were made.¹⁶⁸ Collin's concluding assessment is:

The public prosecution was therefore neither a "child of the Revolution" [of 1848-49] nor can its introduction be put down to liberal rule of law ideas. Nearly unimpressed with reform discussion ongoing in the literature, the ministerial bureaucracy designed a public prosecution that met the government's needs. It was primarily about creating an authority that represented a counterweight to courts suspected of being politically unreliable and that initiated, checked, and if necessary controlled their activities. In this way, it was hoped that political aims could be taken into consideration in criminal law. The "organ of state government" hid itself behind the "guardian of the law [*Wächter des Gesetzes*]." ¹⁶⁹

162 COLLIN, „WÄCHTER DER GESETZE“ ODER „ORGAN DER STAATSREGIERUNG“?, *supra* note 157, at 128-29.

163 *Id.* at 156-57 (quoting a Minister of Justice explaining his authority to give instructions to prosecutors in specific cases). Generally, Collin argues, "The prosecution was the gateway for the executive's attempts to influence the administration of criminal law." *Id.* at 170.

164 In particular, the government wanted speedy justice for Polish nationalists who revolted in 1847. *Id.* at 83, 88-89. See also Collin, *supra* note 93, ¶ 33.

165 Collin, *supra* note 93, ¶ 29.

166 *Id.* ¶ 36. This is not to say that liberal ideas had no influence. The timing of the system's introduction and the fact that it was more accusatory than its predecessor was at least somewhat because of liberal agitation.

167 See the footnote text in WILHELM, *supra* note 98.

168 The pre-unification Prussian prosecution followed the "principle of opportunity" (*Opportunitätsprinzip*), which gave prosecutors discretion in charging. *Id.* at 55. The debate over moving toward the legality principle in the 1877 GVG is discussed in Herm Ortloff, *Gesetzes- oder Interessenherrschaft (Legalitäts- oder Opportunitätsprinzip) im Strafverfahren? Eine öffentlichrechtliche Grundfrage*, 12 ARCHIV DES ÖFFENTLICHEN RECHTS 83, 119-21 (1897).

169 Collin, *supra* note 93, ¶ 37.

How independent was the German Empire's prosecution in practice? The literature on this topic is scant, but it indicates that there was some politicization, especially in prosecutorial policy toward anti-Jewish movements and threats to the political establishment. For example, prosecutors often refused requests from the Jewish community to prosecute the anti-Jewish press for disseminating libelous accusations of "ritual murders."¹⁷⁰ And after some acquittals of Jewish defendants in ritual murder cases, anti-Jewish agitators accused the judicial system of pro-Jewish bias. In response, the Justice Minister ordered defamation prosecutions against such critics.¹⁷¹ Thus, public prosecutors would not indict the anti-Jewish press for libel against Jews but it would for attacks on the justice system. This disparity in law enforcement highlights how prosecution decisions could be politically selective, despite the *Legalitätsprinzip*.

Regarding threats to the political establishment, prosecutors' professional identity as "*Gesetzwächter*," or law guardians, conflicted with their status as agents of executive interests.¹⁷² In the latter capacity, a historian has concluded that "prosecutors did answer to their superiors within the government, and they were often tasked directly with the prosecution of enemies of the state and the suppression of dissent."¹⁷³ In particular, socialist leaders, radical political opposition figures at the time, complained of unfair prosecutorial harassment¹⁷⁴ and "class justice" (*Klassenjustiz*).¹⁷⁵ The executive was hostile towards the social democracy movement¹⁷⁶ and explicitly ordered¹⁷⁷ prosecutors to attack it, demonstrating the ineffectiveness of the legality principle in restraining

170 Barnet Hartston, *Reluctant Justice: Government Legal Intervention on Behalf of Jews in Imperial Germany*, 27 GERMAN STUD. REV. 83, 84-85 (2004). The term "ritual murder" refers to the accusations that Jewish people used the blood of non-Jews in religious rituals.

171 *Id.* at 102 n.45. Newspaper criticisms that prosecutors had been "shielding Jews from prosecution" resulted in several prosecutions for defamation. *Id.* at 97.

172 BARNET HARTSTON, *THE TRIAL OF GUSTAV GRAEF: ART, SEX, AND SCANDAL IN LATE NINETEENTH-CENTURY GERMANY* 190 (2017).

173 *Id.*

174 *Id.* at 188-90.

175 WILHELM, *supra* note 98, at 504-10.

176 See generally ALEX HALL, *SCANDAL, SENSATION AND SOCIAL DEMOCRACY: THE SPD PRESS AND WILHELMINE GERMANY 1890-1914* (1977).

177 To take one example, in 1890, Chancellor Leo von Caprivi sent a secret memorandum to chief prosecutors which stated:

I would also consider it prudent to advise all state prosecutors to play a full part in opposing Social-Democracy. In order to prevent situations which threaten the state and society, it is necessary for prosecutors to be guided not by the consideration of whether or not a conviction can confidently be expected, but they should also institute proceedings whenever the remotest probability of success is apparent.

Alex Hall, *By Other Means: The Legal Struggle Against the SPD in Wilhelmine Germany 1890-1900*, 17 HIST. J. 365, 369 (1974).

political prosecutions. Moreover, during the 1890s,¹⁷⁸ there was a public “crisis of confidence” (*Vertrauenskrise*) in the prosecution and courts over concerns that the justice system protected the political establishment.¹⁷⁹

For a fuller evaluation, further studies on the political independence of the German Empire’s prosecution are needed. Too little has been written on this important topic. But it should also be remembered that during the National Socialist period (1933-45), an essentially similar system lost its independence. In brief, the executive seized control over the prosecution system by appointing pro-government senior prosecutors, enabling the top-down political takeover of the prosecution, and paving the way for its subordination to the Nazi secret police, the Gestapo.¹⁸⁰ The prosecution’s hierarchical organization and executive dependence made it inherently vulnerable to political pressures. In the words of an American jurist, writing in 1936, during the consolidation of fascist regimes in Germany and Italy: “It is well-recognized in Europe that the promotion system makes judges and prosecutors as a class subservient to the group in power.”¹⁸¹ Similar criticisms have even been made in recent times.¹⁸²

From a comparative perspective, the German Empire’s prosecutorial bureaucracy differed significantly from the largely private prosecution-based system in England at the time. An English lawyer commented in 1874 that, while England needed a public prosecution service, he was averse to recommending the philosophically alien Prussian system:

the introduction of such a system of prosecution would be utterly repugnant to the British character, that it is the very contradiction of the organisation of English procedure, that it would be an insult to the Bench to create an administrative body entrusted with the monopoly of prosecutions, and at the same time, in respect of their office, exempted from the control of the courts of justice. In short, there is no room within the English system for this Napoleonic invention.¹⁸³

But from a Continental perspective, the shift from procurator fiscal to *Staatsanwalt* in nineteenth-century Germany was marked by continuity of the tradition of prosecutors as quasi-judicial guardians of

178 Commenting on 1890s prosecutions, one scholar argues that prosecutors were politically pressured to bring charges more often in cases involving public morals and libel of the Kaiser. HETT, *supra* note 96, at 35-37.

179 WILHELM, *supra* note 98, at 323-35, 477-78, 635-36.

180 Norman S. Marsh, *Some Aspects of the German Legal System Under National Socialism*, 62 L.Q. Rev. 866, 867-68 (1946) (on how the Nazis captured the prosecution system).

181 Morris Ploscowe, *The Organization for the Enforcement of the Criminal Law in France, Germany and England*, AM. INST. CRIM. L. & CRIMINOLOGY 305, 317 (1936).

182 Excoriating the prosecution service as a “marionette of politics” in 2008, one German senior prosecutor (*Oberstaatsanwalt*) wrote: “So far as I observe in the prosecutorial field, promotions are often unashamedly openly according to party political points of view.” Pfortner, *supra* note 34, at 459.

183 Zimmermann, *supra* note 143, at 643.

executive interests. And although the prosecutor was distanced from the judicial office, the new accusatorial process was not entirely adversarial. The public prosecutor's extensive investigatory and charging powers, combined with executive oversight, meant that he was by no means reduced to equivalent status with the defendant. As Damaška has observed,

In such a state there is no equality and no mutuality of rights between the individual implicated in proceedings and the state attorney: individual and state interests are not on the same plane. The state official maintains a superior, perhaps even an exalted position; he can even be on a par with the adjudicator and can exercise coercive powers over the individual (the other "party"). . . . In short, rather than facing a roughly equal adverse party with whom he contends before the court, the private individual is confronted by a powerful watchdog of state policy who is distinguishable from the adjudicator only because of his special function [of advancing proceedings].¹⁸⁴

The development of the German prosecution in the nineteenth century gave rise to a new leading model of Continental prosecution, alongside the French. This model would influence prosecutorial organization in other lands, not only in Europe, but also in Asia.

C. The Diffusion of Continental Prosecutorial Organization to Japan and Colonial Korea

In 1868, Japan's Meiji Restoration set the country on a course of rapid modernization. The government desired to create a Westernized system of laws that would end extraterritoriality¹⁸⁵ and lay a foundation for national strength. Legislation establishing the structure of the judiciary would be particularly important, and codification along Continental lines was selected over the impracticality of transplanting Anglo-American case-based law.¹⁸⁶ Reforms to criminal procedure occurred in essentially two stages. First, a French legal advisor, Gustave Boissonade, was tasked with overseeing the drafting of a "Code of Criminal Instruction" modelled on the corresponding French statute of 1808.¹⁸⁷ This law was passed in 1880. The second stage of reform came in 1922,¹⁸⁸ when the old law was replaced with the Code of Criminal Procedure (刑事訴訟法)

¹⁸⁴ DAMAŠKA, *supra* note 55, at 157.

¹⁸⁵ Western powers had negotiated "unequal treaties" with Japan in the 1850s under which Japanese laws were inapplicable to their citizens. The system of foreigner-run extraterritorial courts was seen by the Japanese government as a national insult. Ending it required legal reforms to satisfy the Western powers, which occurred by 1899. PÄR CASSEL, *FOUNDATIONS OF JUDGMENT: EXTRATERRITORIALITY AND IMPERIAL POWER IN NINETEENTH-CENTURY CHINA AND JAPAN* 160 (2012).

¹⁸⁶ Wilhelm Röhl, *Chapter One: Generalities*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, at 1, 23-24 (Wilhelm Röhl ed., 2005).

¹⁸⁷ Petra Schmidt, *Law of Criminal Procedure*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, at 681, 688-89 (Wilhelm Röhl ed., 2005). Schmidt comments that, "the Code was hardly more than a translation or at least a very close adaptation of the *Code d'Instruction Criminelle*" *Id.* at 690.

¹⁸⁸ *Id.* at 699-700.

modelled on the German STPO.¹⁸⁹ The shift in Japan's preference from French to German procedure occurred after Imperial Germany's program of codifying fundamental laws had won international prestige for its law.¹⁹⁰

This trend was underway by 1890, when the Court Organization Law (裁判所構成法) was passed.¹⁹¹ This law, crucial for the removal of extra-territorial courts, was drafted by a German legal advisor to the Japanese government, Otto Rudorff, who used the GVG as a template.¹⁹² Both the Court Organization Law (COL) and Code of Criminal Procedure (CCP) essentially followed their German predecessors, although they contained some alterations.

1. *The Japanese Doctrinal Framework*

From the perspective of prosecutorial organization, the post-1922 Imperial Japanese regime resembled the German Empire's system. In investigations, prosecutors required judicial approval for arrest and detention¹⁹³ as well as searches and seizures.¹⁹⁴ These provisions stated that relevant warrants would be granted by judges of the preliminary proceedings, which could be an ordinary judge or an examining magistrate (*yoshin hanji*, 予審判事; equivalent to the German *Untersuchungsrichter* and French *juge d'instruction*).¹⁹⁵ But such coercive measures could be undertaken without warrants: suspects could be detained and interrogated for 48 hours¹⁹⁶ and their property searched and evidence

189 KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.], 1922 (Japan) [hereinafter CCP (1922)]. Text of this historical law can be found at: <https://dl.ndl.go.jp/pid/914828>.

190 The trend began in the 1880s, but was waning by the 1910s, following Germany's defeat in World War I ("WWI") as well as growing Japanese criticisms that the German abstract style of "conceptual jurisprudence" (*Begriffsjurisprudenz*) did not fit well with the local emphasis on concrete and intuitive legal thinking. Röhl, *supra* note 186, at 26-28.

191 Saibansho kōseiho [Court Organization Law], 1890 (Japan) [hereinafter COL (1890)]. Text of this historical law can be found at: <https://ja.wikisource.org/wiki/%E8%A3%81%E5%88%A4%E6%89%80%E6%A7%8B%E6%88%90%E6%B3%95>.

192 Wilhelm Röhl, *The Courts of Law, Appendix: Execution of Penalty*, in HISTORY OF LAW IN JAPAN SINCE 1868, at 711, 737-40 (Wilhelm Röhl ed., 2005). Röhl notes that, "even after some changes the final law was largely a copy of the German model." *Id.* at 738.

193 CCP (1922), *supra* note 189, art. 97.

194 *Id.* arts. 150 & 154.

195 Examining magistrates could be used for serious cases to conduct a more objective investigation. CCP (1922), *supra* note 189, art. 295. But a custom arose that examining magistrates for particular cases would be selected at the recommendation of the prosecutor. This prosecutorial influence undermined their role as a check on prosecutors' investigatory powers. Some judges called the examining magistrate "the prosecutor's clerk" or "assistant," and one Japanese judge in 1916 commented that, "There is a tendency for the examining magistrate in reality to become almost the prosecutor's hands and feet." 문준영 [MOON JOON-YOUNG], 법원과 검찰의 탄생: 사법의 역사로 읽는 대한민국 [THE BIRTH OF THE COURTS AND PROSECUTION: THE REPUBLIC OF KOREA READ THROUGH THE HISTORY OF THE JUDICIARY] 510 (2010) [hereinafter MOON].

196 CCP (1922), *supra* note 189, art. 89.

seized during this period.¹⁹⁷ Prosecutors were required to investigate if they believed a crime was committed.¹⁹⁸ They were also entrusted with command of police investigations.¹⁹⁹

With regard to charging authority, prosecutors were given a monopoly in a provision that mirrored the German STPO's provision.²⁰⁰ But, in a significant departure from the German law, the Japanese prosecutor had discretion over the filing of charges and was not bound by a rule of mandatory prosecution.²⁰¹ This meant that the criminal procedure's drafters chose the "opportunity principle" (*Opportunitätsprinzip*) over the "legality principle" (*Legalitätsprinzip*).²⁰² Thus, there were hardly any checks on Japanese prosecutors' charging discretion. Neither of the two limbs of the German "objective duty," to consider evidence exonerating a suspect and to lodge an appeal in his favor, were codified. However, a leading Japanese jurist of the time, who participated in the law's drafting, wrote that the objective duty was inherent in the quasi-judicial nature of the prosecutor even though this duty was not explicit in the statute.²⁰³ Criminal procedure did contain a provision requiring the prosecutor to be careful not to damage a suspect's honor, which represented a Japanese elaboration on the prosecutor's objective duty.²⁰⁴ Regarding a mechanism to appeal a decision not to charge a suspect, an injured party was permitted to appeal to a higher-ranking prosecutor and after that the Minister of Justice.²⁰⁵ But there was no way to request that a judge order prosecutors to charge the suspect. Thus, only one of the two German mechanisms to check non-prosecution decisions was adopted.

In the area of personnel policy, prosecutors were appointed by the emperor and were answerable to him, although these tasks were delegated to the Minister of Justice.²⁰⁶ Prosecutors could only be dismissed if they consented or were sentenced by a court or sanctioned by a

197 *Id.* art. 170.

198 *Id.* art. 246.

199 COL (1890), *supra* note 191, art. 84.

200 CCP (1922), *supra* note 189, art. 278. For the corresponding German provision, see STPO (1877), *supra* note 107, § 152.

201 CCP (1922), *supra* note 189, art. 279.

202 The opportunity principle is the rule that prosecutors have discretion over whether to file charges or not, even if they believe an offence was committed. The legality principle requires prosecutors to lay charges when they believe a crime was committed. *Supra* notes 137 & 168 and accompanying text.

203 平沼騏一郎 [HIRANUMA KIICHIRO], 新刑事訴訟法要論 [MAIN POINTS OF THE NEW CODE OF CRIMINAL PROCEDURE] 689 (1923).

204 CCP (1922), *supra* note 189, art. 253.

205 COL (1890), *supra* note 191, art. 140. This article contains vague language allowing for "appeals regarding judicial treatment, especially . . . rejections" in accordance with "supervisory powers." In practice, this article was interpreted as creating the appeal process for non-prosecution decisions. MOON, *supra* note 195, at 106.

206 COL (1890), *supra* note 191, art. 79.

Rosenbluth, however, have uncovered evidence that before World War II (“WWII”) politicians manipulated prosecutors’ promotions.²¹⁷

One key overarching difference between the German and Japanese prosecutorial systems was the greater centralization of the latter. The lack of strong local governments in Japan meant that, unlike Germany, there were no regional-level ministries of justice overseeing prosecutors. The central government’s Ministry of Justice managed all prosecutors. Prosecutorial centralization plus codification of discretion in charging meant that Japanese prosecutors were somewhat more powerful and more vulnerable to politicization than their German counterparts.²¹⁸

2. *The Prosecution’s Political Ascendance Under Democracy and Paradoxical Decline in the Authoritarian Police State*

How politically independent was the Imperial Japanese prosecutorial system in practice? Near the end of the Meiji reign (1867-1912), after the 1890 Court Organization Law but before the 1922 Code of Criminal Procedure,²¹⁹ the Ministry of Justice, which housed the prosecution, was “in a state of chaos.”²²⁰ Senior figures were controlled by the Meiji oligarchs (*hanbatsu*, 藩閥), while lower-ranking officials were “notoriously irresponsible, some spending much of their time at geisha houses... while others rarely appeared at work before noon.”²²¹ This changed in 1898, when the Vice Minister of Justice worked with a young charismatic prosecutor, Hiranuma Kiichirō, to expel corrupt officials from the ministry and raise its standards.²²² By the late Meiji and early Taishō period (1912-26), the newly invigorated Prosecutors Office began to confront the

217 J. MARK RAMSEYER & FRANCES ROSENBLUTH, *THE POLITICS OF OLIGARCHY: INSTITUTIONAL CHOICE IN IMPERIAL JAPAN* 76, 82-86 (1995).

218 A British legal advisor to the Japanese government wrote in 1916:

The Minister of Justice, who is a member of the Cabinet, and subject to the uncertainties of party government, has extensive powers of supervision and control over all the courts and their officers, and there is no doubt but that he *can, and does*, at times, interfere with the ordinary course of justice by manipulating the prosecuting officials.

Richard B. Appleton, *Reforms in Japanese Criminal Procedure under Allied Occupation*, 24 WASH. L. REV. & STATE BAR J. 401, 402 (1949).

219 It has been said that there was little real difference between the pre-1922 French-influenced criminal procedure and its more Germanized successor. “However, this [1922] Code made little basic change in the pattern of procedure, which remained within the great historical current of the Continental European rather than the Anglo-Saxon system.” *Id.* at 402. Recall that Esmein viewed the 1877 German criminal procedure as “directly derived” from the French. *See supra* note 92 and accompanying text.

220 Richard Yasko, *Bribery Cases and the Rise of the Justice Ministry in Late Meiji – Early Taishō Japan*, 12 LAW JAPAN 57 (1979).

221 *Id.*

222 *Id.* at 58.

political establishment,²²³ which had formerly blocked prosecutorial action in high-profile cases.²²⁴

In 1909, the Greater Japan Sugar Refining Company bribed members of the Imperial Diet in order to obtain tax favors and nationalization.²²⁵ Hiranuma supported the efforts to prosecute this first major bribery case in modern Japanese history, resulting in the conviction of over twenty current and former Diet members.²²⁶ This success was followed by the Prosecutors Office's 1914 investigation of the so-called "Siemens scandal,"²²⁷ involving bribes in military procurement, which contributed to the collapse of the cabinet.²²⁸ In 1915, Home Minister Ōura Kanetake was caught organizing bribes for members of the Imperial Diet to buy votes to raise military spending.²²⁹ When the Minister of Justice attempted to prevent charges from being laid, then-Prosecutor General Hiranuma refused.²³⁰ Finally, after negotiations with powerful elder statesmen (*genrō*), Hiranuma agreed not to indict Ōura if he resigned from politics, which he did.²³¹

Japanese patterns of social organization, factionalism, and culture were central to Hiranuma's anti-corruption crusade. In accordance with the strong culture of mentor and protégé (*senpai-kōhai* or *oyabun-kobun* relationships), Hiranuma acted as leader of a clique of prosecutors that came to dominate the Prosecutors Office.²³² The clique's goals were to

223 Moon Joon-Young's book on the origins of Korea's judiciary and prosecution argues that this period of Japanese history shaped Korea's Prosecutors' Office. MOON, *supra* note 195, at 491. In making his case, Moon explains the political rise of Japan's prosecutors in more detail than most English-language sources. He analyzes events in Japan from the perspective of judicial and prosecutorial organization and as foreshadowing developments in Korea. For his account, see *id.* at 511-24. Richard H. Mitchell discusses many of the same cases, in English, from the perspective of bribery in politics. RICHARD H. MITCHELL, POLITICAL BRIBERY IN JAPAN 22-40 (1996) [hereinafter MITCHELL, POLITICAL BRIBERY IN JAPAN].

224 For example, in 1905, the Prosecutor's Office charged protestors that had rioted and committed arson over perceived leniency in the treaty concluding the Russo-Japanese War, which Japan had won (the "Hibiya Incendiary Incident"). But after members of the ruling party, *Rikken Seiyūkai*, denounced the prosecution over its response, it abandoned its appeals in the cases. MOON, *supra* note 195, at 511-12.

225 For a discussion of this scandal, see MITCHELL, POLITICAL BRIBERY IN JAPAN, *supra* note 223, at 22-26.

226 Yasko, *supra* note 220, at 63. See also MOON, *supra* note 195, at 512.

227 MOON, *supra* note 195, at 512-13. For discussion of this scandal in English, see MITCHELL, POLITICAL BRIBERY IN JAPAN, *supra* note 223, at 28-31.

228 MITCHELL, POLITICAL BRIBERY IN JAPAN, *supra* note 223, at 30-31.

229 Yasko, *supra* note 220, at 64-65. See also MITCHELL, POLITICAL BRIBERY IN JAPAN, *supra* note 223, at 31-38 (for an overview of the scandal).

230 Yasko, *supra* note 220, at 65-66.

231 *Id.* at 66. See also MITCHELL, POLITICAL BRIBERY IN JAPAN, *supra* note 223, at 33.

232 Richard Yasko, Hiranuma Kiichirō and Conservative Politics in Pre-War Japan 41 (Aug. 1973) (unpublished Ph.D. dissertation, University of Chicago). This source can be retrieved from: <https://www.proquest.com/openview/4ef27a91dc5d3cb36738f9a647d3b9f2/1?pq-origsite=gscholar&cbl=18750&diss=y>.

“rid the Procurators Office of outside loyalties, to expand the effective authority of the procuracy, and to compete with other factions for political power.”²³³ To this end, the prosecution attacked political parties without partisan preference,²³⁴ expanding its own influence and independence,²³⁵ earning itself a status as one of the leading players in politics (as the so-called *kenbatsu*, 検閲).²³⁶ Nonetheless, much of Hiranuma’s motivation for prosecuting politicians appears to have been his abstemious ethics and traditional beliefs,²³⁷ reminiscent of a censorious Roman statesman.²³⁸

The source states,

[J]unior officials fashioned an emotional commitment to Hiranuma patterned on the oyabun-kobun model. In this quasi-familial relationship the oyabun took the role of mentor or leader to certain favored proteges (kobun). These kobun, or followers, in this case procuracy officials like Suzuki, Yamaoka, and Shinno, responded with their loyalty and support. . . . By thus engaging his followers in kinship-like sets of mutual social and professional obligations Hiranuma instilled a marked cohesiveness and organizational solidarity into his group of young officials.

Id.

²³³ Yasko, *supra* note 220, at 61.

²³⁴ *Id.* at 61-62.

²³⁵ MOON, *supra* note 195, at 514 (“At the same time as the period of party cabinets, the new problem called ‘the relationship between the cabinet and prosecution’ raised its head. As soon as party politicians appointed a prime minister and minister of justice, the prosecutorial bureaucrats asserted an expanded conception of judicial independence that included prosecutorial authority and insisted on the ‘independence of prosecutorial power.’”).

²³⁶ MOON, *supra* note 195, at 514-15. The term *kenbatsu* means “prosecutor clique,” just as *zaibatsu* means “financial clique,” and *hanbatsu* is translated “Meiji oligarchs.” Other influential groups included the bureaucracy (*kanryōbatsu*) and military (*gunbatsu*). *Id.* at 515. That the prosecutorial bureaucracy under Hiranuma earned this “*batsu*”/clique nickname indicates how powerful it had become.

²³⁷ A biographer of Hiranuma described him as:

Simple and austere in his personal habits, he was devoted to the spiritual exercises of Zen Buddhism and the scholarly pursuit of the Confucian classics. He was rather taciturn by nature, with a cold and unsociable manner . . . though Hiranuma came to earn a reputation as a backstage political conniver, his personal ethics were regarded as beyond reproach.

Yasko, *supra* note 232, at 14.

Hiranuma wrote of himself:

In my career in the Ministry of Justice I naturally opposed the rich and powerful of the times. I opposed the remnants of the hanbatsu and later the political parties and the zaibatsu. I was admonished from the time I was a child by my parents and elders not to pursue fame or wealth but to follow a course I considered just.

Id. at 15.

Finally, Hiranuma disdained party politicians while worshipfully idealizing the emperor, whom he believed ought to exercise “direct imperial rule,” which the Diet should merely assist. *Id.* at 17-19. He once argued: “Our Diet system is nothing more than one of the organs to gather national opinion in cooperation with direct Imperial rule.” *Id.* at 18.

²³⁸ Hiranuma’s stern discipline in an age of laxity, devotion to upright government, and wariness of foreign ideas call to mind Cato the Elder (234-149 BC). PLUTARCH, MAKERS OF ROME 119 (Ian Scott-Kilvert trans., 1965). Plutarch wrote of Cato:

But a man who observed the ancestral custom of working his own land, who was content with a cold breakfast, a frugal dinner, the simplest clothing, and a humble cottage to live in, and who actually thought it more admirable to renounce luxuries than to acquire them—such a person was conspicuous by his rarity.

Id. at 123.

As professional standards rose, the acquittal rate, which had been 30% in 1897, fell to under 7% by 1916.²³⁹ The office of Prosecutor General, which had mainly been symbolic, took command of important investigations under Hiranuma's tenure (1912-21), wresting this power from senior prosecutors working at appellate levels.²⁴⁰ This represented an important step in the centralization of prosecutorial activity.

In 1921, Hiranuma, now a powerful statesman, arranged with the Prime Minister his appointment as Chief Justice of the Supreme Court and that of his right-hand man (Suzuki Kisaburō) as Prosecutor General.²⁴¹ Moreover, the Ministry of Justice, which also supervised the courts, had come under the control of prosecutors, giving rise to an aphorism: "the prosecutors have risen and the judges have fallen" (檢尊判卑).²⁴² These developments illustrate how preeminent prosecutors had become in the judiciary and in politics.

It must be emphasized that the prosecution's resistance to executive dominance did not equate to political independence. On the contrary, the Prosecutors Office autonomously set its own political agenda. Prosecutorial leadership harnessed the confluence of legislative and executive pressures to aggrandize its own political power:

Hiranuma recalls that parties in power generally carried the favor of the procurator chief and even encouraged investigations by the procurator's staff into the affairs of their political rivals. If the Justice Ministry investigated or convicted members of one party of election law violations or of bribery, the opposition party tended not so much to view the procuracy as a threat to the effective political functions of the parties, as to simply regard the legal case as a setback for a rival and an advantage for itself. This short-sighted outlook was to result in relentless bureaucratic interference with the

"In his political life he seems to have concerned himself most of all with the impeachment and trial of wrongdoers. He undertook many prosecutions himself . . ." *Id.* at 135. When the Roman people erected a statue of Cato the Elder, the inscription read, "[W]hen the Roman state was sinking into decay, he became censor and through his wise leadership, sober discipline, and sound principles restored its strength." *Id.* at 140. Moreover, "[Cato] pronounced with all the solemnity of a prophet that if ever the Romans became infected with the literature of Greece, they would lose their empire." *Id.* at 146.

On Hiranuma's view of foreign ideas as corrupting, see *infra* note 258 and accompanying text.

²³⁹ Yasko, *supra* note 220, at 61.

²⁴⁰ *Id.* See also MOON, *supra* note 195, at 513-15.

²⁴¹ MOON, *supra* note 195, at 513.

At the time of the Ōura scandal, Hara Takashi, leader of the top opposition Rikken Seiyūkai party, feared the collusion of the Meiji oligarchs with the Prosecutors Office, which had raised its head politically. After appointment as Prime Minister in 1918, Hara intentionally tried to win over to his political side the prosecutorial bureaucrats, such as Prosecutor General Hiranuma and Suzuki Kisaburō (Vice Justice Minister at the time). In 1921, with Hara's support . . . [they received the appointments].

Id.

²⁴² *Id.* at 516-17.

parties and their pursuit of power. Party myopia encouraged the Hiranuma group to use its legitimate legal powers as political instruments.²⁴³

Another member of Hiranuma's faction, Shiono Suehiko,²⁴⁴ wrote in his memoirs that he "picked corruption targets with care, playing off one major political party against the other. . . 'If we had not used the scalpel skillfully, our own heads would have been in danger.'"²⁴⁵ Such prosecutorial political maneuvering cannot be considered genuine independence, even if prosecutors possessed a degree of autonomy. Whether prosecutors intervened in politics to achieve their preferred outcomes or the Prosecutors Office aimed at raising its institutional prestige, these are political motives.

As the Taishō period went on, the prosecution attracted public and academic criticism for its accumulation of power and political interventions. After the Ōura scandal, opposition figures criticized the decision not to prosecute the ex-Home Minister, arguing that individual prosecutors ought to be granted independence and freedom from the orders of superiors.²⁴⁶ Also, prosecutorial discretion was designed for minor crimes, not serious crimes, it was said.²⁴⁷ Several reforms were suggested to remedy abuse of charging discretion: adopting a system of prosecution by victims, allowing an appeal to a court over non-prosecution, partial adoption of the legality principle (mandatory prosecution), the grand jury, or a grand jury-like panel of citizens and prosecutors.²⁴⁸

243 Yasko, *supra* note 232, at 48. Yasko continues:

The conviction of Seiyukai leaders in the sugar scandals made Hiranuma an important actor on the political stage of Twentieth Century Japan. We note however, that Hiranuma did not launch a zealous moral crusade to totally eradicate moral corruption from government, but that he had compromised with [Prime Minister] Katsura to limit the investigation of the scandal. The agreement with Katsura assured the procuracy faction of a certain sphere of political influence and set a precedent for future political bargaining. Hiranuma was usually ready to compromise if the bargain he obtained would build or solidify useful alliance with other elite factions. He was always fully cognizant of any potential for political gain in procuratorial investigations. He easily rationalized his tactical concessions for power by invoking the formula of 'power perfects virtue.'

Id.

244 *Id.* at 37.

245 RICHARD H. MITCHELL, JUSTICE IN JAPAN: THE NOTORIOUS TEIJIN SCANDAL 207 (2002) [hereinafter MITCHELL, NOTORIOUS TEIJIN SCANDAL]. Shiono also said that his high-profile prosecutions resulted in prosecutors being "covered with prestige." *Id.* at 18.

246 MOON, *supra* note 195, at 515 ("Among academic circles and opposition jurists, arguments were made that the top-down command relationship among prosecutors should be abolished, that individual prosecutors should be granted independent positions, and that the Minister of Justice's powers of command and supervision of prosecutorial business should be abolished, etc.").

247 *Id.*

248 *Id.* at 516, citing 岡本吾市 [Okamoto Goichi], 起訴猶予処分, 留保処分, 刑の執行猶予の教育学的考察 [An Educational Examination of Suspension of Indictment, Deferred Disposition, and the Suspended Sentence] 43 (1935). "Deferred disposition" refers to a non-prosecution and probation arrangement for thought criminals claiming to have converted ideologically. If after one year of inspection they had not reoffended, prosecution would be suspended. MOON, *supra* note 195, at 526-27.

Ultimately, the mechanism that was adopted to check the Prosecutors Office was trial by jury. It was hoped that lay participation would curb the excesses of the judicial bureaucracy, which included the prosecution.²⁴⁹ Prime Minister Hara Takashi, a noted liberal, pushed for a jury law from the start of his government in 1918.²⁵⁰ A later government passed the jury law in 1923, and it was in operation from 1928–43.²⁵¹ Ironically, the prosecution (and Hiranuma) supported this law because it perceived an opportunity to potentially abolish the examining magistrate’s role in preliminary investigations and thus expand prosecutorial power.²⁵² The law was ultimately watered down by the political need to protect the sacred status of the emperor as overseeing justice,²⁵³ and it was not widely used. It fell further into disuse as Imperial Japan slid toward war and authoritarianism.²⁵⁴

By the early 1920s, a series of crimes, protests, and political incidents involving radical leftists created anxiety among politicians and intellectuals. They saw “‘frightening foreign ideologies’ surging into Japan,”²⁵⁵ threatening to plunge it “into the revolutionary storm breaking in Europe.”²⁵⁶ As a leading statesman, Hiranuma organized meetings of opinion leaders to discuss the situation and devise ways of winning the war of ideas.²⁵⁷ In general, Hiranuma opposed foreign philosophies of government because they diminished veneration of the emperor.²⁵⁸ Eventually, he mobilized support for—and oversaw the drafting²⁵⁹ of—a law that would be broad enough to catch even mildly subversive activities.

249 MOON, *supra* note 195, at 518–24.

250 *Id.* at 519.

251 *See generally* DIMITRI VANOVERBEKE, JURIES IN THE JAPANESE LEGAL SYSTEM: THE CONTINUING STRUGGLE FOR CITIZEN PARTICIPATION AND DEMOCRACY 60–81 (2015).

252 MOON, *supra* note 195, at 519–20.

253 DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [Constitution], art. 57, (Japan) (“The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.”)

254 VANOVERBEKE, *supra* note 251.

255 Richard H. Mitchell, *Japan’s Peace Preservation Law of 1925: Its Origins and Significance*, 28 MONUMENTA NIPPONICA 317, 335 (1973) [hereinafter Mitchell, *Japan’s Peace Preservation Law*]. These ideologies included socialism, anarchism, and communism. *Id.*

256 *Id.* at 321. One contemporary politician recalled that “intelligent people were exceedingly anxious about the rapid changes in the world of ideas. Politicians at every level had a strong feeling that the state was endangered.” *Id.*

257 *Id.* at 329, 335.

258 According to a biographer, Hiranuma believed “that the most basic danger to Japan was the intrusion of foreign unassimilable doctrines which would weaken and corrupt the essential fabric of Japanese society. It was the *kokutai* which made Japan unique. If this were destroyed all that it meant to be Japanese would perish with it.” Yasko, *supra* note 232, at 189. *See also id.* at 23–24 for Hiranuma’s belief in “a purging of superfluous foreign influence and a return to the original pristine spirit of the race.” *Id.*

259 Hiranuma and Suzuki managed the drafting of an anti-radical bill that failed to become law in 1922. Mitchell, *Japan’s Peace Preservation Law*, *supra* note 255, at 329, 333. As for the drafting process of the bill that eventually passed, Hiranuma and Suzuki (who was then Minister of Justice) likely supervised its preparation as well. RICHARD H. MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN 55–56, 96 (1976) [hereinafter MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN].

The Peace Preservation Law (治安維持法) was passed in 1925, and its first article forbade any attempt to alter Japan's *kokutai* (國體), or national system as connected to reverence for the emperor.²⁶⁰ This vague prohibition,²⁶¹ designed to subdue revolutionary socialist movements, became a tool for the suppression of “thought crimes”²⁶² and played a pivotal role in the rise of what has been called totalitarianism.²⁶³ The ambiguousness and emotional power of the term *kokutai* placed the judiciary in an awkward position, nearly compelling judges to rule against thought criminals,²⁶⁴ while energizing the prosecution.²⁶⁵ Prosecutors could now act as powerful implementers of the expansive executive

260 Chian ijihō [Peace Preservation Law], Law No. 46 of 1925 (Japan).

261 Even Japanese jurists could not agree on the meaning of *kokutai*. Mitchell, *Japan's Peace Preservation Law*, *supra* note 255, at 342.

262 “The Supreme Court, seven appeals courts, and ten main district courts were assigned ‘thought procurators’ (*shisō kenji*). They were ordered to prosecute ‘thought criminals’ whose illegal actions were called ‘thought crimes’ (*shisō hanzai*).” MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN, *supra* note 259, at 93-94.

263 Whether the concepts of totalitarianism and fascism should be applied to Japan from 1925-1945 is debated. Some scholars, such as Moon Joon-Young use this terminology to describe the Japanese judiciary and prosecution of the period. MOON, *supra* note 195, at 524-48. Taking the opposite view, Richard H. Mitchell, among others, argues that these concepts are unsuitable because they are too European and implicitly disregard indigenous factors in what might better be termed “highly authoritarian” governance. MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN, *supra* note 259, at 188-89.

264 Two points ought to be understood. First, that despite the difficulty in defining the terms “thought crime” and “*kokutai*,” “the Supreme Court consistently rejected appeals by those convicted under the peace law.” MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN, *supra* note 259, at 95. Second, the term *kokutai* aroused quasi-religious sentiments and “in one word symbolized everything worth protecting.” Mitchell, *Japan's Peace Preservation Law*, *supra* note 255, at 343. Prohibiting, in a broad and vague sense, any change to the nation's fundamental character, created a serious problem for the fair application of the law. One scholar described it this way:

Unfortunately, the inclusion of the term ‘*kokutai*’ would result in a direct confrontation between that holy word and the rule of law, with the former overpowering the latter . . . by allowing this highly emotional term to be included in the peace law, the parliamentarians placed their judicial allies in a highly embarrassing and tactically inferior position. The courts had been caught between the establishment and antiestablishment forces from their beginnings, but the inclusion of ‘*kokutai*’ in the peace law opened the door wide to an attack upon the legal system itself . . . Furthermore, the use of ‘*kokutai*’ in the peace law forced judges to enter a hazy area of motivation in leftist trials. If the term had not been included, judges could have rejected any attempt to inject it into trials. As things turned out, leftists pleaded that they violated the peace law in order to destroy the *kokutai* which was leading the people in the wrong direction. Rightists, although usually not involved in cases tried under the provisions of the peace law, were quick to demand that their actions be considered in light of extenuating circumstances, since they also claimed to have acted with the *kokutai* in mind. They attacked those misadvising the emperor or violating some other rightist commandment in order to strengthen the *kokutai* and to reroute the nation's course. Thus, judges found themselves on trial in their own courtrooms, along with the body of law, by the very suspects and lawyers who lined up below them.

Id. at 344-45.

265 “The development process of the thought judiciary was, in other words, the strengthening process of prosecutorial power.” MOON, *supra* note 195, at 527.

policy of “improving the whole of society”²⁶⁶ by attacking any ideological deviations from political orthodoxy. By enabling such political prosecutions, the Peace Preservation Law undercut the forces of liberalism that had flourished during the “Taishō Democracy” period (1912-26) and reinforced the illiberal tendencies of the coming wartime political situation.²⁶⁷

The Peace Preservation Law was used for the mass arrests of over a thousand Marxists in 1928 (the “3.15 incident”)²⁶⁸ and again in 1929 to snuff out of the reestablishment of the Japanese Communist Party (the “4.16 incident”).²⁶⁹ The statute could be used for intra-elite competition too. In 1941, then-Home Minister Hiranuma used the Peace Preservation Law to attack political rivals in the “Cabinet Planning Board incident.”²⁷⁰ Arrests of thought criminals would continue until the end of WWII.²⁷¹ The courts established “thought divisions,” with which prosecutors worked, specializing in the adjudication of ideological offenses.²⁷² The prosecution did not enforce this law as stringently upon ultranationalist, militaristic groups as it did with leftists, despite the rightists committing a wave of crimes that violated the Peace Preservation Law.²⁷³

Although the political power of Japan’s Prosecutors Office had risen to the heights, it declined following a failed overzealous prosecution known as the Teijin incident (1934-37).²⁷⁴ A textile firm called the Teijin

266 林尚之 [Hayashi Naoyuki], 近代日本の思想司法: 検察権と国体をめぐって [*The Thought Judiciary of Modern Japan: On Prosecutorial Power and Kokutai*], 97 立命館大学人文科学研究所紀要 [RITSUMEIKAN UNIVERSITY HUMANITIES INSTITUTE BULLETIN] 63, 85 (2012).

267 Schmidt, *supra* note 187, at 703.

268 MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN, *supra* note 259, at 85-86.

269 On how these incidents affected the development of Japanese anti-Marxism policy, see Max Ward, *Crisis Ideology and the Articulation of Fascism in Interwar Japan: The 1938 Thought-War Symposium*, 26 JAPAN F. 462, 471 (2014). See also Hayashi, *supra* note 266, at 82 (interpreting the 3.15 and 4.16 incidents as demonstrating the “political supremacy of prosecutors over the judiciary”).

270 Yasko, *supra* note 232, at 167-71. In this scandal (*kikakuin jiken*, 企画院事件), Hiranuma was trying to stop the radical wartime mobilization of national resources, which he believed to be redolent of communism and a threat to the Emperor’s rule. *Id.* at 160-64. See also Hayashi, *supra* note 266, at 83.

271 Janice Matsumura, *Internal Security in Wartime Japan (1937-45) and the Creation of Internal Insecurity*, 31 CANADIAN J. HIST. 396, 406-11 (1996) (on thought crime scandals and arrests near the end of WWII).

272 MOON, *supra* note 195, at 527.

273 Although the Communist Party was suppressed by mass arrests, militaristic secret societies flourished and committed assassinations. For instance, members of the pro-military “Blood Pledge Corps” killed Prime Minister Inukai Tsuyoshi in 1932 for his attempts to rein in the increasingly autonomous military. After eliciting public sympathy, Inukai’s murderers escaped the death penalty, and the prosecution did not appeal their lenient sentences. Stephen S. Large, *Nationalist Extremism in Early Shōwa Japan: Inoue Nisshō and the ‘Blood-Pledge Corps Incident,’ 1932*, 35 MOD. ASIAN STUD. 533, 547-48, 560-61 (2001). Generally, because violent rightists “did support the *kokutai*,” “[m]ost ultranationalists were viewed by officials more as a nuisance than as a serious threat.” MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN, *supra* note 259, at 159-60.

274 The long, complicated, and often misunderstood scandal is summarized in MITCHELL, POLITICAL BRIBERY IN JAPAN, *supra* note 223, at 70-89. An entire book on the Teijin incident explains it in-depth. MITCHELL, NOTORIOUS TEIJIN SCANDAL, *supra* note 245.

Company went bankrupt, and most of its shares were transferred to the Bank of Japan, with the permission of the Finance Ministry.²⁷⁵ Later, the value of the shares rose, speculators tried to purchase some, and the press began airing accusations of corruption.²⁷⁶ Prosecutors aggressively investigated, interrogated, and indicted senior bureaucrats, businessmen, and politicians.²⁷⁷ “Emboldened” by their earlier successes in attacking corruption,²⁷⁸ prosecutors managing the investigation had rashly expanded their targets. But the case collapsed in court after prosecutors’ brutality in wringing confessions from suspects was exposed.²⁷⁹ The lack of other evidence led the incident to be called the “no facts trial.”²⁸⁰ Subsequently, the press’s “severe battering” of prosecutors created a public and political backlash against them.²⁸¹ Demands for reforms to disempower prosecutors proliferated, including a proposal to abolish the Ministry of Justice.²⁸² Another consequence was that a Prosecutors Office-backed revision to strengthen the Peace Preservation Law failed in the mid-1930s, with passage delayed until 1941.²⁸³

Curiously, as the authoritarian Shōwa period (1926-45) drew on, prosecutorial activity shifted toward investigations, especially of thought criminals. The number of local and district-court level prosecutors grew by 22%, from 513 in 1925 to 626 in 1938, but this “was due less to an increasing number of criminal cases in court than to the growth of investigations.”²⁸⁴ Prosecutors came to work more closely with the secret police (the “Special Higher Police” or Tokkō) on thought crime cases, surveillance of thought offenders, and the ideological conversion system.²⁸⁵

275 MITCHELL, POLITICAL BRIBERY IN JAPAN, *supra* note 223, at 70.

276 *Id.*

277 See MITCHELL, NOTORIOUS TEIJIN SCANDAL, *supra* note 245, at 95-105 (detailing prosecutors’ pressure tactics against suspects and the political controversy over the infringement of their rights).

278 MITCHELL, NOTORIOUS TEIJIN SCANDAL, *supra* note 245, at 206.

279 *Id.* at 162-63, 177-79. One of the prosecutors leading the case “viewed businessmen, politicians, and most government officials as corrupt. If he were to become procurator general, he told suspects, he would root out corruption and reform society from top to bottom.” *Id.* at 208.

280 *Id.* at 157.

281 *Id.* at 184.

282 *Id.* at 181-83.

283 MOON, *supra* note 195, at 527-28.

284 Wilhelm Röhl, *Chapter Ten: Legal Education and Legal Profession*, in HISTORY OF LAW IN JAPAN SINCE 1868, at 770, 796-97 (Wilhelm Röhl ed., 2005). Röhl continues: “The State Police or Secret Service (*kenpeitai*) were vigorously busy supervising the people and their thinking. Especially under the militaristic government in the early years of the Shōwa era (from 1926) they hunted for dissidents and provided the public prosecutors with a lot of material to be examined.” *Id.* at 797. The *Kenpeitai* were the army’s secret police, and their civilian counterpart was the *Tokkō*. See generally *id.*

285 MITCHELL, THOUGHT CONTROL IN PREWAR JAPAN, *supra* note 259, at 113-19, 141.

The Prosecutors Office was not only becoming “dependent”²⁸⁶ on the police—a reversal of their traditional and *de jure* relationship—but the secret police even began to defy prosecutors.²⁸⁷ In 1941, prosecutors complained that the Tokkō were withholding 80-90% of their reports as well as its official monthly gazette.²⁸⁸ Secret police manuals emphasized independence from prosecutors and the need to act autonomously from them and without their knowledge.²⁸⁹ In the 1930s, secret police started engaging in torture, extra-legal censorship of newspapers, and ignoring laws requiring warrants for searches and detentions.²⁹⁰ Such acts should have been checked by prosecutorial oversight. Suppressive police arrests were often conducted without consulting prosecutors.²⁹¹ Because of the scarcity of prosecutors and relatively low rate of indictments in the ideological conversion system, the secret police “exercised considerable discretionary power in the disposition of cases.”²⁹² All these developments indicate that thought police were often operating without prosecutorial supervision and with much lawlessness.²⁹³ Indeed, the Tokkō’s extra-legal terrorizing effect on society can be summed up in a saying common in pre-1945 Japan: “If you say ‘Tokko,’ even a crying child falls silent.”²⁹⁴

Why did police begin to escape prosecutorial control? The answer is that the secret police agencies—not prosecutors and judges—took the lead on suppressing ideological threats, often using extra-legal powers.²⁹⁵ This illustrates how prosecutors, as agents of legality and procedural regularity, may be the preferred tools of political warfare in times and places where these ideals are valued, such as in democratic societies. In authoritarian countries, which Shōwa Japan was becoming and where law and procedure are less important, it is easier for the executive to use secret police agencies to summarily deal with political enemies.

It may thus be theorized that the balance of power between secret police and prosecutors was determined by Japan’s respect for law.

286 *Id.* at 116.

287 ELISE K. TIPTON, *THE JAPANESE POLICE STATE: THE TOKKŌ IN INTERWAR JAPAN* 116-18 (1990).

288 *Id.* at 117.

289 *Id.*

290 *Id.* at 66-67. The police claimed they were following the law but broadly interpreting it to fit new social conditions. *Id.* at 67-68.

291 *Id.* at 117.

292 *Id.* at 117-18. Only about 8% of people arrested under the Peace Preservation Law were prosecuted. MITCHELL, *THOUGHT CONTROL IN PREWAR JAPAN*, *supra* note 259, at 141.

293 Although the thought control system was ostensibly governed by laws, including the Peace Preservation Law and the 1936 Thought Criminals Protection and Supervision Law, it essentially relied upon expansive administrative discretion rather than judicial oversight. MITCHELL, *THOUGHT CONTROL IN PREWAR JAPAN*, *supra* note 259, at 135-37, 141.

294 Itsuhiro Namazugoshi, *Book Reviews*, 3 *POLICING & SOC’Y* 68 (1992) (reviewing ELISE K. TIPTON, *THE JAPANESE POLICE STATE: THE TOKKO IN INTERWAR JAPAN* (1991)).

295 TIPTON, *supra* note 287, at 118. *Supra* notes 286-294 and accompanying text.

Although Japan maintained a relatively high degree of legality in governance until the end of the war, unlike Nazi Germany,²⁹⁶ the political defenders of legality, especially Hiranuma,²⁹⁷ struggled to hold back anti-law, fascist radicals.²⁹⁸ (As a result of his stand against the far right and his engineering of a prosecutorial purge against them, the radicals nearly assassinated Hiranuma, which had the surprising historical effect of facilitating Japan's decision to go to war with the US).²⁹⁹ Consequently, the Prosecutors Office remained important, but its authority suffered erosion. Similar historical patterns would be visible in Korea during its authoritarian and democratic periods.³⁰⁰

Japan's prosecution system was transmitted to Korea during its 1910-45 colonization of the country. The geopolitical contest for control over the Korean peninsula that began in the late nineteenth century ended when Japan prevailed in the Russo-Japanese War in 1905. That year, Japan forced Korea to sign a protectorate agreement, and an annexation treaty followed in 1910. Ordinances issued by the Japanese Governor-General essentially extended the operation of Japanese laws,

296 See *infra* note 665 and accompanying text. See also Marsh, *supra* note 180, at 872 (“As in civil cases, the attempt was to take business out of the hands of the Courts altogether, so in criminal cases an increasing number of cases were exclusively dealt with by the Gestapo.”).

297 Hiranuma's prosecutions and factional following enabled him to rise in politics. He ultimately became Prime Minister in 1939 and was afterwards a member of the senior advisory council to the emperor (*jūshin*, 重臣). Yasko, *supra* note 232, at 123-28, 181-82. Leading the opposition to radical rightists, he upheld the “fundamental principle that imperial rule was to be administered by a bureaucracy that combined legal expertise and moral rectitude.” *Id.* at 4-5.

298 When, in 1940, a faction of radical politicians, military adventurers, and ambitious “reform bureaucrats” sought to restructure the government to mobilize Japan for war, Hiranuma “criticized the movement as a simple imitation of European fascist systems and consequently not at all suited to Japan's peculiar political structure.” *Id.* at 160-62. He condemned the drive for Japanese “national socialism,” saying: “At one time they were infatuated with democracy and internationalism. Recently they have abandoned England and America and now idolize Germany and Nazism. They claim we must construct a similar system, but that would be a violation of the *Kokutai*.” *Id.* at 162. Moreover, Hiranuma maintained significant control over the prosecution later in his career. Specifically,

[t]he loyalties which bound his personal supporters in the procuracy to him had not been destroyed by his official departure from the ministry. Even while he served in the privy council his personal influence in the ministry of justice remained very high. . . . His personal domination of the procuracy became a matter of common knowledge.

Id. at 76.

Wielding such unofficial control over prosecutors, Hiranuma was able to orchestrate prosecutions in the Cabinet Planning Board incident in January 1940, which was the culmination of his maneuvering to thwart Japanese national socialism. *Id.* at 162, 165-70.

299 Enraged by Hiranuma's opposition to transforming government to mobilize the nation for war, including with the United States, ultra-nationalists attempted to assassinate Hiranuma in August 1941. *Id.* at 177-79. As Hiranuma recuperated, he was unable to exercise political influence, allowing his militarist rivals to obtain imperial approval for the Pearl Harbor attack on America in December 1941. *Id.* at 179-82. Despite Hiranuma's efforts to prevent war with the US, after WWII the jurist's remarkable career ended with a life sentence upon his conviction as a Class A war criminal. *Id.* at 192-93.

300 For further discussion on the relationship between prosecutorial independence and democracy, see *infra* section IV.

including the Code of Criminal Procedure and Court Organization Law, to Korea.³⁰¹ Through this mechanism, the statutory framework of the Japanese prosecution was transplanted to Korea, with some differences stipulated in ordinances. Japanese judges, prosecutors, lawyers, and police were dispatched to Korea to implement the legal system as well as to train and supervise Korean personnel. Japanese judges and prosecutors greatly outnumbered their Korean counterparts.³⁰² Some colonial ordinances made criminal procedure harsher in Korea than Japan. For example, police were granted summary judgment powers to punish suspects caught committing minor crimes.³⁰³ In such situations, Korean suspects could be flogged but not Japanese.³⁰⁴ Indeed, Japan's authoritarian rule over Korea involved the secret police taking a major role in governance.³⁰⁵

Much more could be said about how the Japanese prosecution system functioned in colonial Korea,³⁰⁶ and it is clear that repressive aspects of the Japanese system were exacerbated by the nature of the colonial situation. But the legacy of the colonial prosecution on the postwar Korean judicial system was not so much in the special colonial application of criminal procedure, but rather Japan's transmission of the overall system to Korea, as part of its assimilationist policy. After liberation, the drafters of Korean laws affecting prosecutors took the Japanese model as their starting point, and many colonial prosecutors continued in office, bringing the spirit of the Japanese prosecution to their work.

In summary, there was a degree of prosecutorial independence in Imperial Japan, but it was complicated by autonomous politicization, executive pressures, and factional interference in the management of the Prosecutors Office. Several observations on independence may be made. First, beginning in the late Meiji era, the prosecution challenged political forces in order to build its institutional clout. Yet this form of prosecutorial independence, in which the prosecution seeks to aggrandize its own political power, is problematic because it can lead prosecutors to

301 EDWARD J. BAKER, *THE ROLE OF LEGAL REFORMS IN THE JAPANESE ANNEXATION AND RULE OF KOREA, 1905-1919*, in *STUDIES ON KOREA IN TRANSITION* (David R. McCann, John Middleton & Edward J. Shultz eds., 1979), reprinted in 9 HARV. L. SCH. OCCASIONAL PAPERS 17, 28-31, 41 (1979).

302 For instance, in 1937 (which was the last year that government statistics counted Korean and Japanese judicial personnel separately) there were 169 Japanese judges and 45 Korean judges working in colonial Korea. With regard to prosecutors, there were 87 Japanese and 11 Koreans. MOON, *supra* note 195, at 451.

303 BAKER, *supra* note 301, at 31, 40-41.

304 Suspects would be flogged with a bamboo cane while tied down, which sometimes resulted in fatalities. This punishment was abolished in 1920. While it was practiced, it has been estimated that up to 600,000 people, or about 10% of the population, were flogged. *Id.* at 32.

305 "The police/*kempei* apparatus was indeed 'the root and trunk of the Government-General system.'" *Id.* at 41.

306 Indeed, much more has been said in Moon Joon-Young's magisterial history. MOON, *supra* note 195, at 435-88, 549-601.

intervene in politics for reasons of organizational self-interest rather than to apply the law impartially. Second, the prosecution's movement toward political autonomy involved factionalism within the Prosecutors Office—namely, Hiranuma's clique. But factional power groups within the prosecution pose a threat to political independence because these may set their own agenda for biased law enforcement. Third, prosecutorial independence declined³⁰⁷ when the executive moved toward authoritarian rule and policed the public for ideology. With the rise of totalitarian thought control, prosecutors became tools of radical intervention into society. Fourth, as rule-through-law declined relative to the ideological police state, the prosecution began losing authority to the secret police, which led the effort to suppress threats to the executive. This indicates a positive correlation between the government's concern for legality and prosecutorial authority, which in turn suggests that prosecutorial authority and political independence is more important in law-abiding democracies than in authoritarian governments, where procedural legality is devalued and prosecutors take a lesser role in politics.

Japan's interpretation of the German style of public prosecution would prove influential in Korea. There, the Continental tradition of prosecutors as powerful promoters of executive policy and intervention into politics would persist.

III. SOUTH KOREA'S POSTWAR PROSECUTION: A HISTORY OF POLITICIZATION AND EXECUTIVE DOMINANCE

This section examines the history of the South Korean prosecution from the perspective of its political independence.

307 As an aside, Ramseyer and Rosenbluth interpret prosecutorial independence in Imperial Japan differently from the analysis here. They argue that prosecutorial independence was already compromised by the time of the 1890 Court Constitution Law because it treated prosecutors more like bureaucrats than judges—especially in how they had to follow superiors' orders. RAMSEYER & ROSENBLUTH, *supra* note 217, at 76. They further claim that prosecutors' limited independence was lost when Prime Minister Inukai Tsuyoshi made extensive personnel changes from 1931-32. For example, he replaced about half of Japan's district court-level prosecutor office chiefs. *Id.* at 86-87. The authors contend that the primary reasons for the loss of prosecutorial independence were that the Meiji oligarchs and party politicians wanted to control the institutions most influential on electoral politics and that economic logic suggests that granting independence is mainly desirable to rulers when they anticipate alternating power predictably with others, because they want fair treatment. Since neither the oligarchs nor politicians expected being out of power, they did not allow prosecutorial independence. *Id.* at 87-89.

The historical facts might better be interpreted by recognizing that: (i) the requirement that prosecutors follow superiors' orders was not fundamentally a policy choice made by Japan's political rulers, but rather was a key feature of the French and German legal models they imported; and (ii) independence is not entirely granted by political rulers, but can be at least partially won by the prosecution, as the history of Hiranuma's clique and its anti-corruption prosecutions illustrates.

A. The Doctrinal Framework of the Korean Prosecutors' Office and its Independence

At the end of World War II in 1945, Korea was liberated from Japanese rule and occupied by Soviet and American troops. When the occupying powers could not agree on how to turn Korea over to self-rule, they divided the peninsula. The Soviet Union founded a communist government in North Korea, and the US attempted to set up a democratic government in South Korea. America created the US Military Government in Korea (USMGIK) and gave it the mission of preparing South Korea for democracy. The interim government lasted from 1945-48, and part of its work involved judicial and prosecutorial reform.³⁰⁸ However, these efforts were not pursued as intensively as those of the American occupation in Japan, and its impact was relatively limited.³⁰⁹

The USMGIK established a relatively independent judiciary but did not change the bureaucratic culture within the courts and prosecution, or screen personnel from the colonial regime for suitability to serve again. Thus, the judicial structures and practices of the Japanese colonial period survived liberation, and modern Korean critics lament this as a lost opportunity.³¹⁰ After the USMGIK handed control to the Republic of Korea's government in 1948, many Japanese laws remained in effect until revised Korean versions could be drafted. This legislative activity was interrupted by the Korean War (1950-53) and was completed afterwards.

The framework establishing Korea's judiciary and prosecution, including the 1949 Court Organization Act³¹¹ and 1954 Criminal Procedure Code,³¹² resembles the German and Japanese laws on which it was based. One salient difference is that Korean legislators removed the section on prosecutors from the court organization law and placed it in a standalone statute with several new provisions: the 1949 Prosecutors' Office Act.³¹³ Other basic elements of the laws line up with the Continental tradition. As in Germany and Japan, prosecution offices were to be established

³⁰⁸ See generally Gregory Henderson, *Human Rights in South Korea, 1945-1953*, in HUMAN RIGHTS IN KOREA: HISTORICAL AND POLICY PERSPECTIVES 125 (William Shaw ed., 1991).

³⁰⁹ The military government's legal advisors urged Korean legal elites to make their judicial system more compatible with democracy than the prewar Japanese system. See MOON, *supra* note 195, at 605-763 for the best discussion of this period.

³¹⁰ *Id.* at 763.

³¹¹ Beobwon jojikbeob [Court Organization Act], 1949, amended by Act No. 12886, Dec. 30, 2014 (S. Kor.). Text of this historical law can be found at: <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=5111>.

³¹² Hyeongsasosongbeob [Criminal Procedure Code], 1954, amended by Act No. 9765, June 9, 2009 (S. Kor.) [hereinafter CPC (1954)]. Text of this historical law can be found at: <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=59297>.

³¹³ Geomchalcheongbeob [Prosecutors' Office Act], 1949, amended by Act No. 9815, Nov. 2, 2009 (S. Kor.) [hereinafter POA (1949)]. Text of this historical law can be found at: <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=4602#0000>.

corresponding to the different court levels: district courts, high courts, and the Supreme Court.³¹⁴ But because the country has a unitary rather than federal system of regional government, the Korean Prosecutors' Office is a centralized, nation-wide organization, as in Japan and unlike Germany. Prosecutorial independence was not directly codified, but the law forbade prosecutors from participating in "political movements."³¹⁵

In terms of investigatory powers, prosecutors required judicial warrants to carry out "coercive measures"³¹⁶ such as detention³¹⁷, search, and seizure.³¹⁸ Prosecutors were required to investigate if they believed there was suspicion of a crime.³¹⁹ Notably, judicial preliminary proceedings,³²⁰ presided over by a *juge d'instruction*-like office, were abolished, and therefore prosecutors could investigate and charge any crime. Prosecutors could undertake coercive measures without judicial permission in certain circumstances. For crimes punishable by imprisonment of three years or more, prosecutors or police could execute an emergency detention if they had an "appropriate reason" (*sangdanghan iyu*, 상당한 이유).³²¹ The emergency detention period was stipulated as forty-eight hours, and if no warrant were obtained in this time, the suspect had to be freed.³²² During the emergency detention, prosecutors or police could conduct searches and seizures of the suspect's property without a warrant.³²³

Police were required to obey prosecutors' orders in the course of an investigation.³²⁴ In other words, police lacked independent investigatory powers, and prosecutors essentially supervised investigations. Prosecutorial control over police³²⁵ has often been justified in Korea as necessary because of police abuses of power during the colonial period. Yet it is also

314 *Id.* art. 2.

315 *Id.* art. 25.

316 I.e., the German term *Zwangsmittel* is known in Korean as *gangje cheobun* (강제처분 / 強制處分).

317 CPC (1954), *supra* note 312, art. 73.

318 *Id.* art. 113. "Search and seizure" in Korean, *apsu susaek* (압수수색 / 押收搜索), follows the Japanese term, (i.e., literally "seizure and search").

319 *Id.* art. 195.

320 I.e., the *Untersuchung* or *yesim* (예심 / 豫審).

321 CPC (1954), *supra* note 312, art. 206.

322 *Id.* art. 207.

323 *Id.* arts. 216-18.

324 POA (1949), *supra* note 313, art. 35. See also Jonson Nathaniel Porteux, *Police, Paramilitaries, Nationalists and Gangsters: The Processes of State Building in Korea 40-41* (2013) (unpublished Ph.D. dissertation, University of Michigan). This source can be retrieved from: <https://deepblue.lib.umich.edu/handle/2027.42/102333>.

325 The German term for "the prosecution's authority to issue instructions" (*Weisungsbefugnis der Staatsanwaltschaft*) is known in Korean as "the duty of supervision of the judicial police" or *sabeop gyeongchalgwalliui uimu* (사법경찰관리의 의무 / 司法警察管理의 義務).

true that this provision, like the other investigatory rules, maintains continuity with the German and Japanese rules.

With respect to powers of indictment, Korean prosecutors were given a monopoly³²⁶ over charging authority.³²⁷ Furthermore, Korean criminal procedure followed the Japanese rather than German example by adopting the principle of discretionary prosecution,³²⁸ allowing prosecutors to decide whether to lay charges.³²⁹ This charging power was somewhat constrained by the same weak checks that existed in German and Japanese law. First, the prosecutor's "objective duty"³³⁰ was partly codified. Prosecutors were authorized to lodge appeals for the benefit of the defendant,³³¹ but the other limb of the objective duty, to consider facts beneficial to a suspect, was absent from the Code.³³² However, as in Japan,³³³ this other limb has been considered to exist implicitly, based on the prosecutor's status. On this point, the law declares the prosecutor to be the "representative of the public interest."³³⁴ Second, the law provided accusers who were dissatisfied with a non-prosecution decision the right to appeal to both the prosecutor's supervisor³³⁵ and the courts.³³⁶ The basic ideas for these remedies come from German law,³³⁷ and Japan adopted only the former.³³⁸ The Korean drafters' decision to create a judicial review of non-prosecution decisions³³⁹ was settled after much consideration over how to make the law more democratic and responsive to the people.³⁴⁰

The personnel policy system of the Prosecutors' Office remained in alignment with its Continental tradition. Selection to the prosecution

326 I.e., the *Anklagemonopol* or *giso dokjeomgwon* (기소독점권 / 起訴獨占權).

327 CPC (1954), *supra* note 312, art. 246.

328 I.e., the *Opportunitätsprinzip* or *giso pyeonuijuui* (기소편의주의 / 起訴便宜主義).

329 CPC (1954), *supra* note 312, art. 247.

330 I.e., the *Verpflichtung zur Objektivität* or *gaekgwon uimu* (객관의무 / 客觀義務).

331 CPC (1954), *supra* note 312, art. 420.

332 The law did contain the Japanese-derived caution against harming the honor of the suspect during the investigation. *Id.* art. 116.

333 *Supra* note 203 and accompanying text.

334 POA (1949), *supra* note 313, art. 5. This provision, now in Article 4 of the current law, is regarded as grounds for deducing the existence of the objective duty. 노명선 [No Myeong-Seon], *검사의 객觀義務와 檢察改革의 바람직한 방향* [*The Prosecutor's Objective Duty and the Desirable Direction for Prosecution Reform*], 26 *성균관법학* [SUNGKYUNKWAN LEGAL STUD.] 117, 120 (2014) (S. Kor.).

335 POA (1949), *supra* note 313, art. 12. CPC (1954), *supra* note 312, art. 261.

336 CPC (1954), *supra* note 312, arts. 262-65.

337 *Supra* note 139 and accompanying text.

338 *Supra* note 205 and accompanying text.

339 This system is called "application for adjudication" (*jaejeong sincheong*, 재정신청 / 裁定申請).

340 MOON, *supra* note 195, at 712-16.

was through the annual judicial examination³⁴¹ with a low pass rate.³⁴² Early in the history of the Republic of Korea, there was a shortage of qualified judicial officers and lawyers.³⁴³ Therefore, virtually all passers of the judicial examination could become judges or prosecutors.³⁴⁴ Professional lawyers tended to be judges and prosecutors who had retired, often after not receiving promotion, to the consolation of lucrative careers in a country with very few lawyers.³⁴⁵ As time went on and the judiciary's personnel needs were satisfied, the lower scorers on the judicial exam were forced to become lawyers straight away.³⁴⁶ Training for passers of the judicial examination was originally conducted through a German-style *Referendariat* internship in the courts and prosecution.³⁴⁷ However, in 1962, this system shifted toward classroom education at a pseudo-law school established at Seoul National University.³⁴⁸ In 1971, this law school was closed and its functions reassigned to the Judicial Training and Research Institute, which was modelled on the Legal Research and Training Institute established in postwar Japan.³⁴⁹

With regard to promotions for prosecutors, these were to be decided by the Minister of Justice in consultation with the president and, after revisions to the law, the Prosecutor General.³⁵⁰ According to the statute,

341 Initially, the qualifying exam was the “Judicial Section” of the “Higher Civil Service Examination” (*godeunggosi sabeopgwa*, 고등고시 사법과), but it was replaced in 1963 by a separate “judicial examination” (*sabeop gosi*, 사법고시). 法院行政處 [NATIONAL COURT ADMINISTRATION], 法院史 [HISTORY OF THE COURTS] 329, 541-42 (1995). See also Chisholm, *Faces of Judicial Independence*, *supra* note 33, at 914.

342 “From among the 10 to 20 thousand applicants, there were less than 200 passing students per year; even less than 100 in some years, during the 1960s and 1970s. In the 1980s, and up through to 1995, 300 students could pass the examination.” Dai-Kwon Choi, *Judicial Reform in Perspective with Particular Focus on Legal Education*, in JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD: KOREA AND JAPAN 287, 301 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

343 Chisholm, *Faces of Judicial Independence*, *supra* note 33, at 915.

344 *Id.*

345 *Id.*

346 *Id.*

347 The interns (*sabeopgwan sibo*, 사법관시보) would spend four months with the prosecution and eight months in the courts. NATIONAL COURT ADMINISTRATION, *supra* note 341, at 329-31.

348 This law school was actually the only law school in the country. It trained all who passed the judicial examination. JAMES M. WEST, EDUCATION OF THE LEGAL PROFESSION IN KOREA 9 (1991). Undergraduate law departments also existed, but these must not be confused with post-examination training. Richard Wu & Jae Won Kim, *An Empirical Study of Values of Law Students in South Korea: Does ‘Americanized’ Legal Education Impact Their Confucian Ethics*, 17 U. PA. ASIAN L. REV. 209, 213-14 (2022).

349 See Chisholm, *Faces of Judicial Independence*, *supra* note 33, at 914-15 for further details on the history of the judicial examination and the training process for judges and prosecutors.

350 POA (1949), *supra* note 313, art. 20 (providing that the president determined promotions to senior levels of the prosecution); Geomchalcheongbeob [Prosecutors’ Office Act], 2022, art. 34 (S. Kor.) (Currently, the law stipulates that the president determines promotions “at the recommendation of the Minister of Justice,” who must listen to the Prosecutor General’s opinion. In practice, it is likely that the Minister of Justice conventionally follows the Prosecutors’ Office’s suggestions on low-level promotions and consults the President and his advisors on senior-level promotion decisions). Text of this law can be found at: <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=242095>.

prosecutors had significant security of tenure: they could not be fired unless they were impeached, imprisoned, or formally disciplined.³⁵¹ In reality, according to longstanding custom, the denial of a promotion had the effect of inducing a prosecutor to voluntarily retire to private practice.³⁵²

Prosecutors were required to follow the instructions of their superiors³⁵³ in accordance with the “principle of prosecutorial unification.”³⁵⁴ This provision limiting the independence of individual prosecutors might be justified by the need to ensure consistency in law enforcement or to rein in rogue prosecutors. However, it has centralized prosecutorial power and given senior prosecutors the power to stop investigations or charging decisions of which they disapprove. The Prosecutor General, the highest prosecutor in the system, was empowered to give orders in any specific case.³⁵⁵ The same provision declared the Minister of Justice to be the “highest supervisor” of prosecutors but did not permit him to give prosecutors orders in individual cases.³⁵⁶ The Minister of Justice has thus been entrusted with setting criminal law enforcement priorities and overseeing personnel management but cannot legally intervene in specific cases. In theory, this division of labor between the Prosecutor General and Minister of Justice creates a degree of separation between prosecutorial activity and politics. In practice, this political insulation is weak, as will be seen.

The statutory framework for prosecutorial organization sketched above has lasted throughout the postwar era. Although the statutes have been revised and some provisions have changed location, the structure has remained essentially the same. Important changes are indicated below. From the perspective of independence, the Korean Prosecutors’ Office has virtually monopolistic powers of investigation, an explicit charging monopoly, and a personnel policy system that has left it vulnerable to control by senior prosecutors, the executive, and even the presidential office. Furthermore, the doctrinal underpinnings of the Korean prosecution and its independence were unmistakably derived from the law of the German Empire, as interpreted by Imperial Japan. How has this system operated in practice?

351 POA (1949), *supra* note 313, art. 22.

352 Korean prosecutors and ex-prosecutors interview notes (on file with author). *See also* Chisholm, *Prosecutorial Independence Lost*, *supra* note 38, at section II.C for details on promotion and retirement.

353 POA (1949), *supra* note 313, art. 11.

354 The German concept of the “unity and indivisibility of the prosecution” (*Einheit und Unteilbarkeit der Staatsanwaltschaft*) has been translated into Korean, following the Japanese term, as *geomsa dongilcheui wonchik* (검사동일체 원칙 / 檢事同一體原則).

355 POA (1949), *supra* note 313, art. 14.

356 *Id.*

B. The Prosecution under Authoritarianism (1948-88)

The hope of a democratic Korea after liberation from Japan was soon lost. Successive presidents would rule without respect for fair elections, and some came to power by military *coup d'état*. The Korean Prosecutors' Office served the authoritarian presidents of this period. Dictators' maintenance of a veneer of democracy and somewhat independent courts meant that prosecutors could lend procedural legitimacy to their politically suppressive or protective actions.

There are too many prosecutorial scandals³⁵⁷ to recount here, and therefore only a selection of notable cases will be discussed.

1. Syngman Rhee (Rightist, 1948-60)

In 1948, Syngman Rhee was elected president of the First Republic of Korea, and he ruled until he was forced from power by mass protests in 1960.³⁵⁸ One of the earliest signs of the politicization of the prosecution came in the country's first major public corruption scandal, the 1949 "Im Yeong-Shin Commerce Minister corruption incident."³⁵⁹ Im, a close ally of President Rhee, was suspected of illegal fundraising to secure her election to the National Assembly, and the senior prosecutor investigating the case, Choe Dae-kyo, wanted to indict her.³⁶⁰ However, the Minister of Justice, after urging the prosecutor not to charge Minister Im, created a rule that his prior approval needed to be given via the Prosecutor General before a Member of the National Assembly could be charged.³⁶¹ The Minister of Justice then ordered a suspension of prosecution in Im's case.³⁶² The senior prosecutor protested that the order was illegal³⁶³ and indicted Im anyway.³⁶⁴ At President Rhee's urging, the Chief Justice of the Supreme Court moved the case to a specially

357 In Korea, as in other East Asian countries, a scandalous event is widely referred to as the such-and-such "case" (*sageon*, 사건 / 事件). This word can also be translated as "incident," "affair," or more loosely as "scandal." This terminology and conceptualization are useful in demarcating specific scandals for analysis and will be used in this article.

358 PAUL Y. CHANG, PROTEST DIALECTICS: STATE REPRESSION AND SOUTH KOREA'S DEMOCRACY MOVEMENT, 1970-1979, at 2 (2015).

359 This scandal is summarized in KIM ET AL., *supra* note 2, at 36-38.

360 *Id.* at 36.

361 *Id.* at 37.

362 *Id.* Suspension of prosecution (*giso yuye*, 기소유예 / 起訴猶豫) is a type of non-prosecution decision that is made when some evidence exists to lay charges but for other reasons the prosecution will not indict. The power to suspend prosecution flows from the charging discretion that prosecutors enjoy. *Id.*

363 POA (1949), *supra* note 313, art. 14 (only the Prosecutor General and not the Minister of Justice was permitted to instruct prosecutors in specific cases).

364 KIM ET AL., *supra* note 2, at 37.

constituted court, which then found Im not guilty.³⁶⁵ The prosecutor leading the case then resigned.³⁶⁶

It is worth noting that this early scandal was reminiscent of Hiranuma Kiichirō's Taishō-era prosecutions of corrupt politicians in Japan.³⁶⁷ Choe might have been inspired by Hiranuma's example, especially since Choe served as a prosecutor under the Japanese colonial government.³⁶⁸ However, the political conditions for such corruption prosecutions were not as favorable, because President Rhee did not sufficiently respect democracy and law.

Another prosecutorial independence failure occurred in the "Korean Political Operation Unit scandal."³⁶⁹ In April 1950, two months before the start of the Korean War, a private group called the Korean Political Operation Unit (KPOU) claimed to have found a North Korean army base in northern Seoul and confiscated its weapons cache.³⁷⁰ Soon afterwards, a media report claimed that opposition party leaders were secretly communicating with North Korean spies.³⁷¹ As the Prosecutors' Office began to investigate these reports, President Rhee ordered them not to get involved, but it pressed ahead.³⁷² The prosecution quickly learned that the KPOU was set up by the government, its findings were fabricated, and that the newspaper story was a deception engineered by a police officer.³⁷³ In May, to the embarrassment of the government, prosecutors indicted eleven KPOU members. Three days later, a furious President Rhee replaced the Minister of Justice and a month later the Prosecutor General.³⁷⁴ In the following month of July, the former Prosecutor General was baselessly charged with abetting a murder and circulating false information.³⁷⁵ He was found not guilty in a case that was seen as political revenge from the President, whose anger was not averted even by the outbreak of the Korean War in June.³⁷⁶ Some observers claim that the end of this incident "began to regularize the Prosecutors' Office's domination" by the executive.³⁷⁷

365 *Id.*

366 *Id.* at 37-38.

367 *See supra* notes 225-231 and accompanying text.

368 KIM ET AL., *supra* note 2, at 36-37.

369 This scandal is summarized in KIM ET AL., *supra* note 2, at 38-40.

370 *Id.* at 38-39.

371 *Id.* at 38.

372 *Id.* at 38-39.

373 *Id.* at 39.

374 *Id.* at 39-40.

375 *Id.* at 40.

376 *Id.*

377 *Id.*

In 1958, in the latter and more authoritarian years of President Rhee's rule, the "Progressive Party incident" occurred.³⁷⁸ Cho Bong-Am, the leader of the opposition Progressive Party, was accused of being a communist agent planning an uprising because of his contact with a suspected spy.³⁷⁹ He had won over two million votes in the 1956 presidential election,³⁸⁰ making Cho a political threat to Rhee in the upcoming 1960 vote. Cho's party's advocacy of peaceful unification was ran counter to Rhee's hardline.³⁸¹ The Progressive Party's registration was abruptly cancelled.³⁸² Prosecutors indicted Cho for various offenses under the National Security Law, which was modelled on Imperial Japan's suppressive Peace Preservation Law.³⁸³ At the first instance, Cho was found not guilty of the most serious charge of planning an uprising.³⁸⁴ But after prosecutors appealed, he was convicted of the charge and sentenced to death by the Seoul High Court, which was confirmed by the Supreme Court.³⁸⁵ Through his execution, President Rhee had used the legal process to eliminate a political opponent. In 2007, Korea's Truth and Reconciliation Committee stated that Cho Bong-Am was the subject of a biased investigation.³⁸⁶ In 2011, the Supreme Court reviewed Cho's case, overturned his conviction, and confirmed that he was not guilty.³⁸⁷

2. Park Chung-Hee (Rightist, 1961-79)

President Rhee was driven from office by the "April Revolution" mass protests in 1960.³⁸⁸ The subsequent Second Republic was cut short by Major General Park Chung-Hee's *coup d'état* of 1961.³⁸⁹ Although Park was eventually elected democratically and at times enjoyed popular support because of his successful economic policies, he grew more

378 This scandal is summarized in *id.* at 48-50.

379 *Id.* at 48.

380 *Id.*

381 *Id.*

382 *Id.* at 48-49.

383 Korea's first version of this law was brief and clearly resembled its Japanese forerunner. Gukga boanbeob [National Security Law], 1948, amended by Act No. 11042, Sept. 15, 2011 (S. Kor.). Text of this historical law can be found at: <https://www.law.go.kr/LSW/lInfoP.do?lsiSeq=7221>. For the 1950 version of the law, operative when Cho was indicted, see Gukga boanbeob [National Security Law], 1950, amended by Act No. 11042, Sept. 15, 2011 (S. Kor.). Text of this historical law can be found at: <https://www.law.go.kr/LSW/lInfoP.do?lsiSeq=7223>.

384 KIM ET AL., *supra* note 2, at 49.

385 *Id.*

386 *Id.*

387 *Id.*

388 CHANG, *supra* note 358, at 5.

389 *Id.* at 4-5.

authoritarian over time.³⁹⁰ He was not above using the Prosecutors' Office for political reasons. For example, in August 1964, the Korean Central Intelligence Agency (KCIA) accused dozens of people of organizing the "People's Revolutionary Party" and seeking to overthrow the government on the orders of North Korea.³⁹¹ This incident arose around the time of large-scale street protests against diplomatic negotiations on normalizing relations with Japan, and some have suspected that the scandal was designed to divert public attention.³⁹² The four prosecutors that investigated the suspects found that evidence of wrongdoing was absent and that the suspects had been tortured by the KCIA.³⁹³ When their superiors ordered them to charge the suspects, the prosecutors instead resigned.³⁹⁴ Most of the defendants were acquitted, although after the prosecution appealed, thirteen out of the originally forty-seven accused were convicted.³⁹⁵ Government re-investigations in recent decades have suggested that the evidence underlying the "People's Revolutionary Party incident" was forged by the KCIA.³⁹⁶

In 1966, the "saccharine smuggling scandal"³⁹⁷ revealed that Park's government, in its determination to grow the economy, would overlook large companies' illegal behavior. That year, a newspaper reported that Lee Byung-Chul, the founder of Samsung, had smuggled fifty-five tons of saccharine from Japan in materials he was importing to build a fertilizer factory.³⁹⁸ It later emerged that Lee was also smuggling into Korea various household goods, such as toilets, freezers, and stainless steel pans.³⁹⁹ Despite public outrage, Lee escaped prosecution, probably because of his ties to President Park.⁴⁰⁰ When an opposition National Assembly Member, Chang Chun-Ha, attacked President Park and called him a "smuggling kingpin," he was prosecuted for criminal defamation.⁴⁰¹

390 Guy Podoler, "Who Was Park Chung-hee?" *The Memorial Landscape and National Identity Politics in South Korea*, 33 E. ASIA 271, 271-72, 283-84 (2016). Fuji Kamiya, *The Korean Peninsula After Park Chung Hee*, 20 ASIAN SUR. 744, 744-46 (1980).

391 This scandal is summarized in KIM ET AL., *supra* note 2, at 52-54. For a brief account in English, see Kim Jeong-pil, *Two People's Revolution Party Incidents Show Injustice*, HANKYOREH (Sep. 12, 2012), https://english.hani.co.kr/arti/english_edition/e_national/551333.

392 KIM ET AL., *supra* note 2, at 52-53.

393 *Id.* at 53.

394 *Id.* at 53-54.

395 *Id.* at 54.

396 *Id.*

397 This scandal is summarized in *id.* at 55-57.

398 Sohn Ji-young, *History of Probes Involving Samsung Chiefs*, KOREA HERALD, (Feb. 17, 2017), <http://www.koreaherald.com/view.php?ud=20170217000679>.

399 KIM ET AL., *supra* note 2, at 55-56.

400 *Id.* at 56.

401 *Id.* See also 한국민족문화대백과사전 [Encyclopedia of Korean Culture], 장준하 [Chang Chun-Ha], <https://encykorea.aks.ac.kr/Article/E0048800>.

In 1971, an event known as the “First Judicial Crisis” (*ilcha sabeop padong*, 1차 사법파동) occurred.⁴⁰² A series of adverse judgments offended the Prosecutors’ Office.⁴⁰³ Shortly thereafter, prosecutors investigated two judges and found that they had received payments from lawyers for expenses, including travel, to hear testimony in a case.⁴⁰⁴ This was customary, if technically wrong, at the time.⁴⁰⁵ Preparing to indict the judges, the prosecution applied to a court twice, unsuccessfully, for detention warrants.⁴⁰⁶ Most judges in that court then resigned, protesting the infringement of judicial independence.⁴⁰⁷ Within a few days, over a third of Korea’s judiciary submitted their resignations, creating a political crisis.⁴⁰⁸ Judges drew up a list of grievances against the prosecution, including that prosecutors suggested judges were pro-communist if they acquitted defendants in national security cases and that prosecutors had sometimes threatened judges’ careers if they ruled for the defendant in a case.⁴⁰⁹ Ultimately, the Judicial Crisis was settled by negotiations between the Chief Justice of the Supreme Court, Prosecutor General, and Minister of Justice.⁴¹⁰ This historical episode demonstrates how the prosecution could semi-autonomously assert itself, even against the judiciary, to enhance its institutional authority.

In 1972, President Park established the Fourth Republic with a Constitution that granted the presidency dictatorial powers. The president’s emergency powers allowed him to rule by decree and declare martial law.⁴¹¹ Emergency Decree No. 1 of January 1974 criminalized any insult of or attempt to alter the Constitution, making it punishable by up to 15 years’ imprisonment.⁴¹² That year, the “National Democratic Young Student Alliance incident” took place, and it involved prosecutions of

402 This scandal is summarized in KIM ET AL., *supra* note 2, at 69-71. For an English account, see also DAE-KYU YOON, *LAW AND POLITICAL AUTHORITY IN SOUTH KOREA* 143-46 (1990).

403 Prosecutors representing the government lost indemnity lawsuits at the Supreme Court, and the lower courts dismissed some National Security Law cases. “The prosecution took this as an affront to its prestige and credibility in the eyes of higher executive authorities.” DAE-KYU YOON, *supra* note 402, at 144.

404 *Id.*

405 *Id.*

406 *Id.* at 143.

407 *Id.* at 144-45.

408 *Id.* at 145.

409 *Id.* Like prosecutors, Korean judges have worked within a bureaucratically managed, Continental-style organization, and their promotions are determined by the Supreme Court-operated National Court Administration (NCA; *beopwon haengjeongcheo*, 법원 행정처). There are suspicions that the NCA has made personnel decisions under political pressure. See Chisholm, *Faces of Judicial Independence*, *supra* note 33, at 914-19.

410 DAE-KYU YOON, *supra* note 402, at 145-46.

411 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], amended by Constitution no. 7, Dec. 27, 1972, arts. 53 & 54 (S. Kor.) (Article 53 provided for emergency decrees and Article 54 for martial law).

412 KIM ET AL., *supra* note 2 at 65-66.

democracy protestors.⁴¹³ Emergency Decree No. 4 of April 1974 criminalized membership in this group, as well as direct or indirect involvement with it, under penalty of imprisonment or even death.⁴¹⁴ Prosecutors indicted dozens of protestors under this decree and asked for, and received, heavy sentences for the defendants, including the death penalty for seven people, life imprisonment for seven, twenty years in jail for twelve, and fifteen years for six people.⁴¹⁵ Even former President Yun Posun, of the short-lived Second Republic, was arrested for allegedly supporting the protests.⁴¹⁶

At around the same time, in the “People’s Revolutionary Party Re-establishment Committee incident,”⁴¹⁷ the KCIA alleged that student protestors and others were in contact with North Korea to re-constitute the Party that was supposedly dismantled in 1964. Prosecutors indicted twenty-five defendants; eight received the death penalty and seventeen were given life sentences.⁴¹⁸ The death penalty was administered within less than a day.⁴¹⁹ Without permission from their families, the convicts’ bodies were cremated, possibly to conceal signs of torture.⁴²⁰ Modern re-investigation of this incident has suggested that it, like the 1964 case, was orchestrated by the KCIA for political purposes.⁴²¹

3. *Chun Doo-Hwan (Rightist, 1980-88)*

President Park Chung-Hee was assassinated by a bodyguard in 1979, and soon afterwards General Chun Doo-Hwan seized power in a *coup d’état* and ushered in the Fifth Republic.⁴²²

During Chun’s reign, several scandals involving the torture of dissidents occurred. The “Kim Geun-Tae incident” was one.⁴²³ In 1985, the authorities illegally arrested Kim, leader of a pro-democracy protest organization, and tortured him.⁴²⁴ Kim remembered details of his custody and torture by electricity and simulated drowning, and after he was released, he formally accused the police officers by name to prosecutors.⁴²⁵

413 This scandal is summarized in *id.* at 65-69.

414 *Id.* at 66.

415 *Id.* at 66-67.

416 *Id.* at 67.

417 *Id.* at 74-76.

418 *Id.* at 74.

419 *Id.*

420 *Id.*

421 *Executions Still Smart 30 Years After*, CHOSUN ILBO, (Apr. 8, 2005), http://english.chosun.com/site/data/html_dir/2005/04/08/2005040861025.html.

422 CHANG, *supra* note 358, at 33. Park Chung-Hee, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/biography/Park-Chung-Hee> (last visited May 19, 2024).

423 This scandal is summarized in KIM ET AL., *supra* note 2, at 79-81.

424 *Id.* at 79.

425 *Id.* at 79-80

Following their rejection of the accusation, with the help of a team of pro-democracy lawyers, Kim filed an “application for adjudication” (*jae-jeong sincheong*, 재정신청)⁴²⁶ at a court to force the prosecution of his torturers.⁴²⁷ The court delayed a decision for about two years, until late 1988, after democratization and after another torture scandal had provoked public outrage.⁴²⁸ The prosecutor who handled Kim’s accusation in the 1980s said that his superiors never responded to his request to investigate.⁴²⁹ It was later reported that senior prosecutors held a meeting on how to cover up the torture.⁴³⁰

The scandal that pushed the court to accept Kim Geun-Tae’s application for adjudication was the “Bucheon Police Station sexual torture case.”⁴³¹ In 1986, Kwon In-Sook, a Seoul National University student and activist, was caught trying to use forged documents to get a job.⁴³² She wanted to hide her student status and experience working-class life.⁴³³ In police custody at the Bucheon Police Station, Kwon confessed.⁴³⁴ Determined to build a bigger case, the detective forced her to remove her clothes and sexually assaulted her as he continued the interrogation.⁴³⁵ Upon her release, Kwon accused the police detective at the local prosecution office.⁴³⁶ The detective responded with an accusation of defamation.⁴³⁷ After investigating, the prosecution admitted that Kwon’s accusation was partly true, but added that the detective was a fine officer who probably did something wrong accidentally.⁴³⁸ They closed the case with a suspension of prosecution.⁴³⁹ When it became public, Kwon’s case exploded into a national outrage, despite the government working with the media to discredit Kwon as an extreme leftist.⁴⁴⁰ The Korean Bar Association filed Kwon’s application for adjudication, but the Seoul High Court

426 See *supra* note 339 and accompanying text.

427 KIM ET AL., *supra* note 2 at 80-81.

428 *Id.* at 80-81.

429 *Id.* at 81.

430 *Id.*

431 *Id.* at 80-81. The “Bucheon Police Station sexual torture case” is summarized in *id.* at 89-91.

432 *Id.* at 89.

433 Chun Su-jin, *Courage to Break the Silence*, KOREA JOONGANG DAILY (Jan. 6, 2003, 12:51 AM), <https://koreajoongangdaily.joins.com/2003/01/06/features/Courage-to-break-the-silence/1912943.html>. Thousands of university students did this in the 1980s. The goal was often to influence workers to become activists. YOUNG WHAN KIHIL, *TRANSFORMING KOREAN POLITICS: DEMOCRACY, REFORM, AND CULTURE* 97 (2005).

434 KIM ET AL., *supra* note 2 at 89.

435 *Id.*

436 *Id.*

437 *Id.*

438 *Id.* at 89-90.

439 *Id.* at 90.

440 *Id.* at 90-91.

dismissed it.⁴⁴¹ Kwon appealed this decision to the Supreme Court in 1988, after democratization, and the Court accepted it.⁴⁴² In the end, the detective received a five-year sentence.⁴⁴³ This incident, like Kim Geun-Tae's, exemplifies not only prosecutorial cover-ups, but also how ineffective the application for adjudication can be at checking non-prosecution decisions—unless popular outrage forces the judiciary to act.

Two other prosecutorial scandals during President Chun's rule demonstrate the political implications of prosecutorial abuses. First, in the 1981 "Burim incident," twenty-two people were arrested for participating in a social science book club alleged to have supported North Korea.⁴⁴⁴ The arrests and detentions were warrantless and therefore illegal, and they were tortured.⁴⁴⁵ Prosecutors secured convictions for nineteen members of the group under the National Security Law and other laws.⁴⁴⁶ The significance of the case is not only in how it shows how prosecutors were used to suppress even mild dissent against the executive; this incident prompted a tax lawyer named Roh Moo-Hyun to act as counsel to the defendants, become a lawyer for the democracy movement, and eventually enter politics.⁴⁴⁷ He became President in 2003.

The second notable scandal was the death of student activist Park Jong-Chul in January 1987.⁴⁴⁸ Park was illegally arrested and tortured for hours, leading to his death.⁴⁴⁹ The government initially claimed he died of shock during a normal interrogation, but doctors who saw Park's body revealed the truth.⁴⁵⁰ This truth was publicized by an association of Catholic priests in May.⁴⁵¹ Days after the priests' disclosure, the previously inactive prosecution arrested and indicted some police officers who were

441 *Id.* at 90.

442 *Id.* at 91.

443 *Id.*

444 Kang Jin-Kyu, *Five 'Burim' Defendants Acquitted 33 Years Later*, KOREA JOONGANG DAILY (Feb. 13, 2014, 22:30), <https://koreajoongangdaily.joins.com/2014/02/13/socialAffairs/Five-Burim-defendants-acquitted-33-years-later/2984946.html>.

445 Kim Gwang-soo, *Better late than never for victims in the Burim Case*, HANKYOREH (Feb. 14, 2014), https://english.hani.co.kr/arti/english_edition/e_national/624192.

446 윤성호 [Yun Seong-Hyo], *부림사건 피해자들 "당시 사건 검사들, 그 입 다물라"* [*Burim Incident Victims: "At the Time of the Case, the Prosecutors Told Us to Shut Our Mouths"*], OHMYNEWS, (Jan. 21, 2014), http://www.ohmynews.com/NWS_Web/View/at_pg.aspx?CNTN_CD=A0001950369.

447 Claire Lee, [*Herald Review*] *Revisiting Roh Moo-hyun*, KOREA HERALD (Jan. 1, 2014), <https://www.koreaherald.com/view.php?ud=20140101000210>.

448 This scandal is summarized in KIM ET AL., *supra* note 2, at 95-99. See also Clyde Haberman, *Seoul Student's Torture Death Changes Political Landscape*, N.Y. TIMES (Jan. 31, 1987), <https://www.nytimes.com/1987/01/31/world/seoul-student-s-torture-death-changes-political-landscape.html>.

449 KIM ET AL., *supra* note 2, at 95-96.

450 *Id.* at 96.

451 *Id.* at 97-98.

involved.⁴⁵² But it was too late. The cover-up of Park's death, with prosecutorial support, ignited waves of street protests demanding democracy that plunged President Chun's government into an insurmountable crisis.⁴⁵³

Facing massive pro-democracy demonstrations in June 1987, President Chun conceded political defeat and agreed to a transition to democracy.⁴⁵⁴ But the Prosecutors' Office's 40-year history of service to authoritarian leaders was not forgotten. Its acquiescence to political suppression damaged the public's trust in it, with effects to this day. And the politicization of the prosecution did not end with democratization.

C. The Prosecution Under Democracy (1988-Present)

1. Constitutional Reform and Democratic Consolidation

To achieve a transition to democracy, the South Korean constitution was revised in 1987 and brought into effect in 1988.⁴⁵⁵ In negotiations over the constitution, pro-democracy reformers focused on codifying basic rights, strengthening the judiciary, and establishing fair elections.⁴⁵⁶ Enhancing prosecutorial independence was not among their priorities. It may be anachronistic for us to expect it to have been. At the time, opposition leaders must have perceived the secret police agencies and military as the most obvious sources of political suppression. Indeed, in many of the authoritarian-era scandals outlined above, prosecutors' roles were secondary to the intelligence services.⁴⁵⁷ The Constitution of the Sixth Republic thus banned active-duty military officers from senior positions in the executive branch⁴⁵⁸ while the secret police agencies were gradually reined in during the early democratic period.⁴⁵⁹

The absence of reform of prosecutorial powers during the democratic transition can be seen in how the current Korean Constitution's due

452 KIM ET AL., *supra* note 2, at 96-98.

453 Lee Seung-Eun, *30 Years on, Son's Murder Still Haunts Family*, KOREA JOONGANG DAILY (Jan. 12, 2017), <https://koreajoongangdaily.joins.com/2017/01/12/socialAffairs/30-years-on-sons-murder-still-haunts-family/3028599.html>.

454 The memoirs of the American ambassador at the time explain these events and his role in them. JAMES LILLEY, *CHINA HANDS: NINE DECADES OF ADVENTURE, ESPIONAGE, AND DIPLOMACY IN ASIA* 274-80 (2004).

455 KIHLE, *supra* note 433, at 82-85.

456 Jong-sup Chong, *Political Power and Constitutionalism*, in *RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY* 11, 11, 24 (Dae-Kyu Yoon ed., 2000).

457 "Under the authoritarian military government [of Chun Doo-Hwan], however, its investigation authority had often been curtailed by other security agencies . . ." *Id.* at 17.

458 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], arts. 86(3) & 87(4) (S. Kor) [hereinafter *KOREAN CONSTITUTION* (1987)].

459 In Sup Han, *A Dilemma of Public Prosecution of Political Corruption*, in *RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY* 363, 369 (Dae-Kyu Yoon ed., 2000).

process clause⁴⁶⁰ closely resembles the corresponding Article of the previous authoritarian constitution.⁴⁶¹ Article 12(3) continues to give prosecutors the sole power to apply to judges for warrants for search, seizure, detention, and arrests. Prosecutorial control over investigations was retained as a constitutional principle. In terms of criminal procedure reform, the Supreme Court and legislature made a few modest reductions in prosecutorial powers in the early years of democracy. These included the guarantee of a suspect's right to silence, right to meet with counsel, and right to request a judicial hearing to review a detention warrant.⁴⁶²

One constitutional change unexpectedly created a mild check on prosecutors' power. The new Constitution established a Constitutional Court that had the jurisdiction to hear petitions from citizens complaining of government acts infringing on their constitutional rights.⁴⁶³ Soon after the Court opened, it interpreted this jurisdiction to include appeals against prosecutors' decisions to charge or not to charge.⁴⁶⁴ From 1988-98, sixty percent of all constitutional petitions to the Constitutional Court were complaints over non-prosecution decisions, demonstrating public dissatisfaction with prosecutors.⁴⁶⁵ However, this new check on prosecutorial power has been weak—the Constitutional Court has only been able to force prosecutors to reconsider a charging decision. Sometimes prosecutors have simply restated their earlier decision, virtually ignoring the Court.⁴⁶⁶ Yet some observers suggest that constitutional complaints against indictment decisions hold at least some symbolic value in challenging prosecutorial authority.⁴⁶⁷

The Prosecutors' Office emerged from Korea's democratic transition largely unscathed. In the democratic era, the prosecution would continue to play a role in politics under governments of both the political right and left.

460 KOREAN CONSTITUTION (1987), *supra* note 445, art. 12.

461 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], amended by Constitution no. 10, Oct. 29, 1987 (S. Kor.). Article 11 of the authoritarian 1980 Constitution is nearly identical to Article 12 of the 1987 Constitution. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION], amended by Constitution no. 8, Oct. 27, 1980 (S. Kor.).

462 Kuk Cho, *The Reform of Korean Criminal Procedure after Democratization*, in RECENT TRANSFORMATIONS IN KOREAN LAW AND SOCIETY 135, 138-39 (Dae-Kyu Yoon ed., 2000).

463 Justine Guichard, *The Role of the Constitutional Court of Korea in the Transition from Authoritarian to Democratic Rule*, in THE SPIRIT OF KOREAN LAW: KOREAN LEGAL HISTORY IN CONTEXT 202, 211 (Marie Seong-Hak Kim ed., 2016).

464 Han, *supra* note 459, at 370.

465 *Id.* at 376.

466 James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMPAR. L. 73, 101-02 (1992).

467 Guichard, *supra* note 463, at 216-17.

2. Roh Tae-Woo (Rightist, 1988-93)

Roh Tae-Woo was the first elected president of the democratic period. He was President Chun's protégé and preferred successor.⁴⁶⁸ The most noteworthy aspect of Roh's prosecutorial policy was what it did not do: prosecute Chun Doo-Hwan for his actions in seizing and maintaining political power.⁴⁶⁹ Most particularly, in 1980, Chun ordered the military to suppress a revolt against his rule in the southwestern city of Gwangju.⁴⁷⁰ The army killed around 200 civilians, or more—the casualty count is contested.⁴⁷¹ The inaction of the Prosecutors' Office on these matters indicated that elected presidents could continue to control prosecutors and use them to protect political friends.

3. Kim Young-Sam (Left-right Coalition, 1993-98)

Kim Young-Sam was an opposition politician and democracy activist under authoritarianism.⁴⁷² Yet he won the 1992 presidential election by merging his party with the incumbent center-right party and becoming its candidate.⁴⁷³ This political maneuver involved backroom political dealings that many observers suspected included an agreement to protect former Presidents Roh Tae-Woo, Chun Doo-Hwan, and their allies from prosecution.⁴⁷⁴ Early in Kim's term, military officers adversely affected by Chun's 1979 *coup d'état* formally requested that its plotters be indicted for treason and mutiny.⁴⁷⁵ The Prosecutors' Office declined, saying that public opinion was divided over former President Chun, that former President Roh had contributed to national development, and that the judiciary could not adjudicate the establishment of a new constitutional order.⁴⁷⁶ Meanwhile, in 1994, victims of the 1980 Gwangju uprising filed a criminal complaint against Chun, Roh, and others involved.⁴⁷⁷ Again, the prosecution refused to indict the ex-presidents, saying that violent suppression of the protests was a high-level political decision and not justiciable.⁴⁷⁸ This second non-prosecution decision of July 1995 triggered protests and criticism that put pressure on President Kim, who had been publicly saying that history should judge these cases, not the

468 CHANG, *supra* note 358, at 1.

469 James M. West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PAC. RIM L. & POL'Y J. 85, 97-99, 103-04 (1997).

470 *Id.* at 93-96.

471 *Id.* at 93. *See also* KIHLE, *supra* note 433, at 78.

472 CHANG, *supra* note 358, at 184, 202.

473 KIHLE, *supra* note 433, at 134-35.

474 West, *supra* note 469, at 103.

475 *Id.* at 104, 163.

476 KIM ET AL., *supra* note 2, at 101-02.

477 West, *supra* note 469, at 106.

478 *Id.* at 107.

courts.⁴⁷⁹ Kim was in a difficult political position, as his unnaturally amalgamated party contained Chun and Roh supporters as well as ex-opposition figures who favored prosecuting the former leaders.⁴⁸⁰

The tide turned in October 1995 when prosecutors discovered that former President Roh had hundreds of millions of dollars in bank accounts.⁴⁸¹ He claimed that they were informal donations from big businesses for political activities, while the opposition called them bribes.⁴⁸² These events and the ensuing public outrage intensified the pressure on President Kim to prosecute the ex-leaders.⁴⁸³ As an indictment of Roh for bribery became inevitable, President Kim announced in November that he favored the prosecution of his predecessors for the *coup d'état* and suppression of the Gwangju uprising.⁴⁸⁴ Within days, prosecutors reopened their investigation into the coup.⁴⁸⁵ Eventually, they vigorously prosecuted both presidents, although they were pardoned by President Kim shortly before he left office.⁴⁸⁶ Rather than serving as examples of how no one is above the law, the prosecutions of Presidents Chun and Roh showed how democratically elected presidents would continue to influence prosecutorial decisions.⁴⁸⁷

Another scandal again highlighted the interplay between public opinion, executive interference, and prosecutorial independence. In 1997, the owner of a major steel company, the Hanbo Group, was discovered to have bribed legislators and bank executives in order to secure loans.⁴⁸⁸ Because the government had long cooperated with Korea's financial sector as part of the nation's economic development strategy,⁴⁸⁹ politicians could pressure banks to make such loans. The Hanbo Group's subsequent collapse into insolvency, as one of the first dominoes to fall in the Korean part of the Asian Financial Crisis,⁴⁹⁰ and the huge size of

479 *Id.* at 105, 107-09.

480 *Id.* at 109.

481 *Id.* at 110.

482 *Id.* at 110, 112. For more on how Roh Tae-Woo and other Korean presidents extracted political donations from large businesses, see Byeong-Seog Park, *Political Corruption in South Korea: Concentrating on the Dynamics of Party Politics*, 19 ASIAN PERSP. 163, 172-79 (1995).

483 West, *supra* note 469, at 111-12.

484 *Id.* at 111-13, 116.

485 *Id.* at 113-15.

486 KIHLE, *supra* note 433, at 132-33, 136.

487 As some commentators have written: "Public fury built up and political power moved; the judgment of law became possible through the Prosecutors' Office only because political power moved the Prosecutors' Office." KIM ET AL., *supra* note 2, at 107.

488 This scandal is summarized in *id.* at 107-09.

489 This is commonly known as in Korea as the "adhesion of government and business" (*jeonggyeong yuchak*, 정경유착 / 政經癒着). 오성규 [O Seong-Gyu], 경제개발 이데올로기가 만들어낸 정경유착의 역사 [The History of Jeonggyeong Yuchak, Which Was Created by Economic Development Ideology], 월간참여사회 [Participation Society Monthly] (Oct. 1, 2005), <http://www.peoplepower21.org/Magazine/717371>.

490 KIHLE, *supra* note 433, at 127-28.

the bribes involved made this incident the largest government-business scandal up to the time.⁴⁹¹ Reports that Kim Young-Sam's son, Kim Hyeon-Cheol, served as an intermediary in the bribery, created a political problem for the president, who had pushed anti-corruption policies.⁴⁹² The department of the prosecution that handled the most politically sensitive cases, the Supreme Prosecutors' Office Central Investigation Department (CID),⁴⁹³ probed the President's son and announced that it would not charge him.⁴⁹⁴ A popular backlash followed. Opinion polls showed that 74% of the public doubted the result of the investigation.⁴⁹⁵ As President Kim's popularity declined in this final year of his term, he relented and allowed an investigation. Within a month of the CID's exoneration of the President's son, its chief was replaced, and the case was reinvestigated.⁴⁹⁶ The new CID head indicted Kim Hyeon-Cheol and secured his conviction for bribery related offences.⁴⁹⁷

The Hanbo Group scandal illustrated some new features of Korea's prosecutorial independence problem in the democratic era. First, the president could restrain the prosecution to protect his friends (and family), but there were boundaries, namely public opinion and the executive's limited time in office. President Kim's thinking in allowing the prosecution is unknown. But it can be inferred that he understood that even if he prevented the prosecution of his son during his time in office, the next president would likely pursue the prosecution in order to gain popularity. Secondly, the Prosecutors' Office was itself aware of public opinion and desired to protect its own prestige. President Kim's extremely low approval rating towards the end of his term, as low as 9%, likely limited his capacity to control the prosecution.⁴⁹⁸ As the prosecutor who reinvestigated Kim's son said in his retirement speech: "The Prosecutors' Office has served the role of faithful handmaiden [to political power]. But political power is a limited thing. The prosecution cannot be bound by political power."⁴⁹⁹ The Prosecutors' Office's emerging sense of autonomy and desire to defend its own institutional position would not necessarily equate to political independence.

491 KIM ET AL., *supra* note 2, at 107.

492 *Id.* at 109. See also KIHIL, *supra* note 433, at 133-34.

493 For further discussion of this department (*daegeomchalcheong jungangsusabu*, 대검찰청 중앙수사부), including its creation and closure, see Chisholm, *Prosecutorial Independence Lost*, *supra* note 38, at 615.

494 KIM ET AL., *supra* note 2, at 109.

495 *Id.*

496 *Id.*

497 *Id.*

498 *Id.* at 110.

499 *Id.* at 109.

4. *Kim Dae-Jung (Leftist, 1998-2003)*

Kim Dae-Jung was the first left-wing politician to capture the presidency without relying on a center-right party and is thus widely considered to be the first president from the leftist opposition. As a former dissident leader under the authoritarian governments of the 1970s and 80s,⁵⁰⁰ President Kim now supervised the prosecutorial apparatus that had persecuted him. His record on prosecution reform was mixed. One of his earliest moves was to order the rapid promotion of prosecutors from the Southwestern Jeolla provinces—Kim’s geographical political base and a bastion of the left—to high-ranking positions in the Prosecutors’ Office.⁵⁰¹ This decision could be positively interpreted as remedying decades of discrimination against prosecutors from the region,⁵⁰² a fair use of executive appointment authority, or even a kind of personnel management reform aimed at changing the institutional culture of the Prosecutors’ Office. Alternatively, this move could be understood as an improper executive intervention into meritocratic promotion processes in order to secure political control over the prosecution. What is clear, though, is that the Prosecutors’ Office became loyal to President Kim, and the promotion of his allies created little enduring improvement for prosecutorial independence⁵⁰³ since later presidents could similarly promote loyalists.

The most important reform Kim Dae-Jung introduced was the regular use of a “special prosecutor” system. Inspired by the American special counsel, the idea in Korea was that a non-prosecutor would be selected to handle a high-profile case for which the Prosecutors’ Office could not be trusted.⁵⁰⁴ As an opposition legislator during Kim Young-Sam’s term, Kim had proposed this system to deal with the prosecutions of former Presidents Chun and Roh.⁵⁰⁵ During his campaign, Kim promised to enact such a system into law.⁵⁰⁶ However, after he was elected, Kim’s

500 CHANG, *supra* note 358, at 206.

501 For example, statistics show that in 1992, only seven out of thirty-nine senior-level “chief prosecutors” (*geomsajang*, 검사장) were from the Jeolla region. In 1997, this figure was unchanged at 18%. But under President Kim, by 2000, 30% (or twelve out of forty) chief prosecutors were from Jeolla provinces. In 2001, the percentage rose to 37.5%. 조성식 [JO SEONG-SHIK], 대한민국 검찰을 말한다, 제1권 [TALKING ABOUT THE REPUBLIC OF KOREA’S PROSECUTORS’ OFFICE, VOL. 1] 99 (2010).

502 Geographical background has played an important role in prosecutors’ promotions, and Southeastern areas have historically been favored. *See id.* at 96-103. *See generally id.*

503 In an investigative journalist’s view: “First of all, in the Kim Dae-Jung government, prosecutors from Jeolla took power and it is said that the result was that they caused political controversies that did not particularly differ from the past . . .” 이순혁 [LEE SUN-HYEOK], 검사님의 속사정 [THE INSIDE STORY OF MR. PROSECUTOR] 224 (2011).

504 Han, *supra* note 459, at 371-73.

505 West, *supra* note 469, at 108-09, 114-16.

506 KIM ET AL., *supra* note 2, at 112.

enthusiasm turned to reluctance⁵⁰⁷—probably because he desired to keep a firm grip on the Prosecutors’ Office, a powerful tool of governance. But a series of scandals led the rightist-dominated National Assembly to pass laws that created special prosecutors for specific scandals.⁵⁰⁸ Three such special prosecutors were appointed through two statutes.⁵⁰⁹ Thus, instead of an institutionalized special prosecutor system, Kim, under political duress, acceded to customarily appointing special prosecutors for specific high-profile scandals.

The special prosecutor procedure generally worked as follows: First, a statute⁵¹⁰ would empower the Speaker of the National Assembly to request a special prosecutor for a specific case.⁵¹¹ Second, the Korean Bar Association would nominate two candidates for special prosecutor, and then the President would select one from between them.⁵¹² Third, the special prosecutor could investigate and indict only in relation to the specific cases.⁵¹³ In the Kim Dae-Jung years, the time allotted for the investigation was limited to about two months and could be extended for

507 *Id.*

508 *Id.* at 113.

509 The first statute dealt with the “clothes lobbying case” (*otrobi sageon*, 옷로비 사건) in which a businessman’s wife gave luxurious clothes to the wife of the Prosecutor General in order to influence an investigation into her husband’s finances. This statute also allowed for a special prosecutor to investigate allegations that prosecutors induced a labor union to strike at the government mint in order to weaken more radical unions. The second statute involved the “Lee Yong-Ho Gate” scandal, in which Lee allegedly made a fortune in financial markets by corruptly using high-level political connections. 한인섭 [Han In-Sup], 최근 한국의 정치부패에 대한 검찰과 특검의 도전 – 그 성과와 한계 [*Challenging Political Corruption in Korea – The Conflicting Role Between the Public Prosecution and the Independent Counsel*], 45 서울대학교 법학 [SEOUL NAT’L UNIV. LEGAL STUD.] 332, 342 (2004). For discussion of the clothes lobbying and mint strike scandals in English, see Sun Woo Lee, A Civil-Law Prosecution System, Presidentialism and the Politicisation of Criminal Justice in New Democracies: South Korea and Russia in Comparative Perspective 99-101, 112-17, 120 (Oct. 2014) (unpublished Ph.D. thesis, University of Glasgow). This thesis is available at: <http://theses.gla.ac.uk/5653/>.

510 Of the awkwardly named laws, the first addressed two scandals. Hangukjopyegongsa nongjohappaop yudo mit jeongeomchalchongjangbuinedaehan otrobi uihok sageon jinsang-gyumeongeul wihan teukbyeolgeomsai immyeongdeungegwahan beomnyul [Act for the Nomination of a Special Prosecutor for Truth Investigation of the Korean Mint Public Corporation Labor Union Strike Inducement and Previous Prosecutor General’s Wife Clothes Lobby Suspicion Cases], Act No. 601 of 1999 (S. Kor.) [hereinafter Korean Mint Strike and Clothes Lobby Special Prosecutor Act]. The text of this act is available at: <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=8799>. The second law focused on only one scandal. Jusikoesa jjaenji daepyoisa iyonghoui jugajojak hoengnyeong sageon mit iwagwallyeondoeng jeonggwangye robi uihok sageon deungui jinsang-gyumeongeul wihan teukbyeolgeomsai immyeong deungegwahan beomnyul [Act for the Nomination of a Special Prosecutor for Truth Investigation of G&G Stock Corporation CEO Lee Yong-Ho’s Stock Manipulation and Embezzlement Case and Related Government Relationship Lobbying Suspicion Case], Act No. 6520 of 2001 (S. Kor.) [hereinafter Lee Yong-Ho Special Prosecutor Act]. The text of this act is available at: <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=51583>.

511 Han, *supra* note 509, at 341.

512 *Id.*

513 *Id.*

thirty days only with presidential permission.⁵¹⁴ Limits on the scope of work and time granted the special prosecutor were designed to prevent the perceived American problem of open-ended political investigations dragging on for years.⁵¹⁵

The most significant instance of politicized restraint on the prosecution during Kim's tenure was the "North Korea funds transfer case" (*daebuksonggeum sageon*, 대북송금 사건). The crowning achievement of Kim's Sunshine Policy—a set of measures aimed at reducing tensions with North Korea and bringing about peaceful unification—was his summit meeting with Chairman Kim Jong-Il in Pyongyang in 2000.⁵¹⁶ President Kim was awarded the Nobel Peace Prize that same year for his efforts to engage with the North.⁵¹⁷ Opposition legislators later found evidence that Kim made a huge illegal payment to North Korea.⁵¹⁸ The Board of Audit and Inspection checked the claim and confirmed the accounting irregularities.⁵¹⁹ The Prosecutors' Office refused to open an investigation, saying that the issue should be investigated by the legislature first and that it was in the national interest that the prosecution's inquiry be "postponed."⁵²⁰ Because this scandal arose at the end of Kim's presidential term, its disposition would be left to his successor. Ultimately, it was found that around half a billion dollars was funneled through Hyundai and given to North Korea in exchange for it agreeing to the 2000 summit.⁵²¹

5. Roh Moo-Hyun (*Leftist, 2003-08*)

As an ex-dissident lawyer-activist in the democracy movement, Roh Moo-Hyun understood the shortcomings of the Korean judicial system. He moved quickly to reform the judiciary and Prosecutors' Office early in his presidential term.

514 Korean Mint Strike and Clothes Lobby Special Prosecutor Act, *supra* note 510, art. 9 (each of the two scandals was allotted thirty days for investigation). Lee Yong-Ho Special Prosecutor Act, *supra* note 510, art. 9 (sixty days were permitted for the investigation).

515 Korean legal scholars were aware of United States special prosecutor controversies. Han, *supra* note 509, at 343-44.

516 KIHIL, *supra* note 433, at 251-52.

517 *Press release*, THE NOBEL PRIZE (Oct. 13, 2000), <https://www.nobelprize.org/prizes/peace/2000/press-release/>.

518 Park Shin-Hong, *Audit Unable to Trace Loan Funds*, KOREA JOONGANG DAILY (Jan. 21, 2003, 1:04 AM), <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=1922763>.

519 *Id.*

520 최훈, 김원배 & 고정애 [Choe Hun, Kim Won-Bae & Ko Jeong-Ae], 검찰 "北송금 수사 유보" [*Prosecutors' Office: "Funds Sent North Investigation Postponed"*], 중앙일보 [JOONGANG ILBO] (Feb. 3, 2003, 3:21 AM), <https://www.joongang.co.kr/article/114078>.

521 Kil Jin-Kyun & Yun Jae-Dong, *Independent Counsel Examines Hyundai Chairman Chung*, DONG-A ILBO (May 30, 2003, 10:01 PM), <https://www.donga.com/en/article/all/20030530/229095/1>.

But as soon as he was inaugurated, President Roh faced the challenge of dealing with the wrongdoing of his predecessor, a respected figure from the same side of politics. After the prosecution continued its inactivity, Roh accepted the conservative-controlled National Assembly's passage of a special prosecutor statute for the North Korea funds transfer scandal.⁵²² However, he refused to grant the special prosecutor additional time to expand the investigation beyond senior executive officials and to former President Kim Dae-Jung.⁵²³ Roh effectively protected Kim from prosecution. It is debatable whether this was appropriate. Whether former presidents should be criminally prosecuted for major political acts can be a difficult question. However, as with Chun Doo-Hwan and Roh Tae-Woo, the Prosecutors' Office did not settle this issue independently, but was likely following orders from the executive throughout the scandal.

President Roh's determination to reform the prosecution was made clear early in his term. In February 2003, he appointed Kang Kum-Sil to oversee the Prosecutors' Office as his Minister of Justice, which has historically been controlled by prosecutors rather than other civil servants.⁵²⁴ The fact that Kang was female, younger than senior prosecutors (at 46), and an activist lawyer shocked the prosecutorial establishment, as well as the country.⁵²⁵ Then in March 2003, Roh, in another unprecedented move, held a two-hour live televised discussion with dozens of prosecutors on the need for prosecutorial reform, publicly putting them on the spot.⁵²⁶ The Prosecutors' Office, feeling threatened and insulted, resisted Roh's efforts. For example, Kang's appointee for Prosecutor General unexpectedly worked against and undermined her.⁵²⁷ She became isolated as she faced unified bureaucratic obstruction, including

522 Don Kirk, *South Korean Leader Allows Inquiry into Payments to North*, N.Y. TIMES (Mar. 14, 2003), <https://www.nytimes.com/2003/03/14/international/asia/south-korean-leader-allows-inquiry-into-payments-to-north.html>.

523 One news article offered a glimpse of executive influence over prosecutions. A source in the Presidential Office told a journalist that most of Roh's advisers "share the opinion that the president should not be investigated." Don Kirk, *South Korean President Blocks Extension of Bribe Probe*, N.Y. TIMES (June 23, 2003), <https://www.nytimes.com/2003/06/23/international/asia/south-korean-president-blocks-extension-of-bribe-probe.html>.

524 문재인 & 김인회 [MOON JAE-IN & KIM IN-HOE], 문재인, 김인회의 검찰을 생각한다 [MOON JAE-IN, KIM IN-HOE'S THINKING ABOUT THE PROSECUTORS' OFFICE] 107 (2011).

525 *Id.* at 107-08. For a chronology of Kang's career, see 조성식 [JO SEONG-SHIK], 대한민국 검찰을 말하다, 제1권 [TALKING ABOUT THE REPUBLIC OF KOREA'S PROSECUTORS' OFFICE, VOL. 2] 226 (2010). See also Bae Young-hwan, *Interview with New Minister of Justice Kang Kum-sil*, WOMEN'S NEWS (Mar. 8, 2003), <https://www.womennews.co.kr/news/articleView.html?idxno=170188>.

526 Roh Moo-Hyun, 노무현 대통령 전국 검사들과의 대화 [President Roh Moo-Hyun's National Conversation with Prosecutors], YOUTUBE (Mar. 9, 2003), https://www.youtube.com/watch?v=2Eu2Mbp_Dbk.

527 She described nominating Song Kwang-Su as her "greatest mistake," but added that it would have been difficult to find any suitably pro-reform senior prosecutor for the role. MOON & KIM, *supra* note 524, at 112.

prosecutors' threats of politically damaging mass resignations.⁵²⁸ Her main reform plans were to add external members to the Prosecutors' Office personnel assignment committee, set up an independent body to investigate politically related crimes, expand the scope of "application for adjudication" of non-prosecution decisions, grant police independent investigatory powers, and abolish or remodel the "Public Security Department" of the prosecution that had dealt oppressively with leftists and dissidents in the past.⁵²⁹ Kang could not implement these policies⁵³⁰ and resigned after about eighteen months.⁵³¹

But there was greater success with judicial reforms, which impacted prosecutors' role in criminal procedure. In October 2003, President Roh established the Judicial Reform Committee (JRC) under the auspices of the Supreme Court.⁵³² The JRC brought together representatives from the judicial establishment, prosecution, bar association, legal academia, and civil society to debate how to transform the judicial system to make it more efficient and responsive to society in the democratic era.⁵³³ Rising popular anger and collapsing public trust in the judicial system made all sides, pro-tradition and pro-reform, understand that some change was necessary.⁵³⁴ When Roh's party won control of the legislature in 2004, this strengthened the negotiating position of the pro-reform side of the discussion and raised the chances that the JRC's recommendations would actually be adopted by the legislature.⁵³⁵ The stars had aligned for judicial reform.

Many judicial reforms emerged from the JRC process, and they cannot be fully discussed here.⁵³⁶ Although the Prosecutors' Office was able to exclude from the JRC agenda several issues directly affecting prosecutorial organization,⁵³⁷ criminal procedure was one major focus of the

528 *Id.* at 108, 110-11. For an account in English, see Patricia Goedde, *From Dissidents to Institution Builders: The Transformation of Public Interest Lawyers in South Korea*, 4 E. ASIA L. REV. 63, 84 (2009).

529 MOON & KIM, *supra* note 524, at 114-15.

530 For an example of prosecutorial insubordination that reveals the prosecution's murky office politics, especially regarding age-based promotion and retirement, see Jong-Dae Ha, *Some Prosecutors Resist Being Forced Out*, DONG-A ILBO (Mar. 5, 2003), <https://www.donga.com/en/List/article/all/20030305/227621/1>.

531 JO, *supra* note 525, at 226.

532 Neil Chisholm, *Taiwan's Judicial Reform Process: East Asian Context, Democratization, and Diffusion*, in JUDICIAL REFORM IN TAIWAN: DEMOCRATIZATION AND THE DIFFUSION OF LAW 3, 8 (Neil Chisholm ed., 2020).

533 *Id.*

534 *Id.* at 7.

535 *Id.* at 9.

536 Similar judicial reforms were undertaken in Japan and Taiwan around the same time. For an overview of Korea's judicial reform process in comparative context, see *id.* at 7-11, 26-29.

537 For example, the subject of providing police with independent investigatory powers had to be delegated to a separate police-prosecutor committee, which failed to reach an agreement. Dai-

Committee.⁵³⁸ In sum, the JRC decided to shift criminal procedure in the direction of adversarialism and a greater emphasis on oral proceedings.⁵³⁹ These changes were promoted by the government, civil society groups, and influential scholars, who looked outside of their Continental legal tradition to American law for solutions to their problems.⁵⁴⁰ Essentially, the reformist side believed suspects and defendants were so weak relative to prosecutors and judges that it made the administration of justice unfair.⁵⁴¹ The JRC recommendations that were realized in the 2007 revision of the Criminal Procedure Code included enhancing orality at trial by forcing prosecutors to speak and argue in the courtroom rather than simply submit documents to judges.⁵⁴² Reformers also introduced a strong exclusionary rule to prevent illegally obtained evidence from being admitted into trials.⁵⁴³ And, through a change fervently resisted by prosecutors, defendants were given more opportunity to challenge prosecutors' written interrogation records, which had hitherto been considered highly compelling evidence rather than challengeable as hearsay.⁵⁴⁴

The overall effect of these reforms was not only a moderating of the traditional civilian "trial by dossier," but a downgrading of prosecutors' status, moving it away from that of a judicial colleague and bringing it closer to parity with the defendant.⁵⁴⁵ Prosecutors, aware of their Continental heritage, have long jealously guarded their quasi-judicial position in criminal proceedings and were highly displeased with the judicial reforms.⁵⁴⁶

Although President Roh fought for judicial and prosecutorial reforms, there is some evidence that his administration was not above using the Prosecutors' Office to undertake politically important tasks. For example, Roh pursued a policy of relocating the main American military

Kwon Choi, *Legal System: Korea*, in JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD: KOREA AND JAPAN 3, 24-25 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

538 Kuk Cho, *The Reformed Criminal Procedure of Post-Democratization South Korea*, in LITIGATION IN KOREA 58, 62 (Kuk Cho ed., 2010).

539 *Id.* at 77-78.

540 *See generally* Cho, *supra* note 538. One exception was the criminal procedure reform that expanded the scope of the German-inspired "application for adjudication" of non-prosecution decisions to include all crimes rather than a select few involving public corruption. *Id.* at 74.

541 *Id.* at 77.

542 *Id.* at 78.

543 *Id.* at 80-82.

544 *Id.* at 82-84.

545 The term "trial by dossier" is a cliché description of the Continental-style trial. It emphasizes how the prosecutor's preparation of written documents for the court's deliberations is preferred to oral evidence given in court. Jacqueline Hodgson, *Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations*, 29 J. L. & SOC'Y. 227, 234 (2002). For a fuller discussion of the concept, see DAMAŠKA, *supra* note 55, at 50-51.

546 Korean prosecutors, judges, and professors interview notes (on file with author).

base in central Seoul further south, near a small town called Daechuri.⁵⁴⁷ Local residents protested the move, which would bring around 40,000 US soldiers and their families to the area.⁵⁴⁸ The protests attracted sympathy nationwide, drawing left-leaning students, unions, and other activists to join the demonstrations.⁵⁴⁹ In May 2006, the movement culminated in the “Battle of Daechuri,” a violent clash of around a thousand protestors with riot police and soldiers, which a prosecutor called “a head-on challenge to state authority.”⁵⁵⁰ Police arrested over 800 demonstrators, and prosecutors moved to indict seventy-four, while collecting fines totaling over \$250,000 from protestors.⁵⁵¹ Ironically, the prosecutions were led by the Public Security Department that Roh’s government had earlier tried to abolish.⁵⁵² The “Daechuri Incident” showed the willingness of the Roh government to deploy prosecutorial power for intensified law enforcement, even against its supporters, to push through a geopolitically important policy.

6. Lee Myung-Bak (Rightist, 2008-13)

The political pendulum swung back to the right when businessman Lee Myung-Bak won the 2007 presidential election. President Lee had narrowly survived an investigation into the “BBK scandal” during the election. An investment company called BBK, which Lee had invested in via firms he controlled, had committed fraud and manipulated stock prices.⁵⁵³ During the primary election, Lee’s rival for his party’s nomination, Park Geun-Hye, accused Lee of being BBK’s true owner. Lee won the nomination anyway. The Prosecutors’ Office investigated in a manner that became less and less energetic as the general election approached and polls indicated that Lee would win. A few weeks before Election Day, prosecutors publicly cleared Lee, benefiting his candidacy.⁵⁵⁴ They

547 Shin Hyeong-cheol, *Camp Humphreys: A Sprawling Symbol of the SK-US Alliance Where War and Life Blur*, HANKYOREH (May 15, 2023), https://english.hani.co.kr/arti/english_edition/e_national/1091859.

548 *Id.*

549 *Arrest Warrants Sought for Violent Protesters*, KBS WORLD (May 6, 2006, 2:07 PM), http://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=36011.

550 *Id.*

551 김윤형 [Kil Yun-Hyeong], (평택 캠페인) “떠날 테니 세 가지 들어달라” [*Pyeongtaek Campaign*] “I’m Leaving, So Listen to Three Things”, HANKYOREH21 (Jan. 1, 2007), <http://legacy.h21.hani.co.kr/section-021024000/2007/01/021024000200701110643052.html>.

552 문병주 [Mun Byeong-Ju], 다시 힘 받는 ‘검찰 공안부’ [‘Prosecutors’ Office Public Security Department’ Gains Strength Again], JOONGANG ILBO (Oct. 28, 2006), <https://news.joins.com/article/2489747>.

553 Song Sang-Ho, *A Look into the BBK Scandal*, KOREA HERALD (Apr. 6, 2010), <http://www.koreaherald.com/view.php?ud=20071117000029>.

554 참여연대 사법감시센터 [PEOPLE’S SOLIDARITY FOR PARTICIPATORY DEMOCRACY, JUDICIAL MONITORING CENTER] 국민의 검찰로 거듭나야 할 정치검찰: 이명박 정부 5년 검찰 보고서 [THE POLITICAL PROSECUTION THAT MUST BE REBORN AS THE PEOPLE’S PROSECUTION: THE LEE MYUNG-

apparently accepted Lee's explanation that his admission of ownership of BBK on a video that surfaced was merely an exaggeration.⁵⁵⁵ Even though a special prosecutor was later appointed and also cleared Lee, suspicions remain to this day that Lee was the true owner of BBK.⁵⁵⁶ Signs of prosecutorial politicization reappeared when in 2008 prosecutors secured a criminal defamation conviction against an opposition legislator for claiming that Lee was BBK's owner.⁵⁵⁷ Other politicians, including Park Geun-Hye, had said the same but were never indicted.⁵⁵⁸ Overall, the BBK scandal shows how prosecutors can intervene in intra-party political rivalries, shift political loyalty to an anticipated incoming new executive, and possibly autonomously act to influence a presidential election.

The other major prosecutorial independence scandal of President Lee's term was the set of investigations aimed at former President Roh Moo-Hyun. In November 2008, the National Tax Service accused a shoe manufacturing tycoon close to Roh, Park Yeon-Cha, of tax evasion.⁵⁵⁹ The following month, prosecutors began an investigation that found that Park had distributed 4.5 billion won (around 3.5 million US dollars) in bribes to figures in the Presidential Office, National Assembly, the civil service, and business.⁵⁶⁰ People from both sides of politics were implicated in the scandal, although prosecutors appeared to have more zealously prosecuted those close to Roh while covering up the wrongdoing of a businessman advisor to President Lee Myung-Bak.⁵⁶¹

The investigation into "Park Yeon-Cha Gate," as it was called, quickly branched out to cover Roh and his family.⁵⁶² Prosecutors found that Roh's family members had received gifts and money from Park, although

BAK GOVERNMENT 5-YEAR PROSECUTION REPORT] 137-38 (2013) [hereinafter PSPD, LEE MYUNG-BAK REPORT].

555 Jennifer Veale, *Probe Roils South Korea Election*, TIME (Dec. 18, 2007), <http://content.time.com/time/world/article/0,8599,1695742,00.html>.

556 PSPD, LEE MYUNG-BAK REPORT, *supra* note 554, at 139.

557 *Id.* at 143-44.

558 Jong-sung You & Jiun-Da Lin, *Liberal Taiwan Versus Illiberal South Korea: The Divergent Paths of Election Campaign Regulation*, 20 J. E. ASIAN STUD. 437, 443 (2020) (discussing this incident and Park's non-prosecution).

559 *Id.* at 211-15. See also Yoojung Lee & Sterling Wong, *How Nike Sneakers Made a Billionaire of Park Yen-cha*, BUS. FASHION (Sept. 12, 2017), <https://www.businessoffashion.com/news/news-analysis/nike-sneakers-made-a-billionaire-of-this-ex-convict-south-korean/>.

560 Park Si-soo, *Park Gets Prison Term, Heavy Fine*, KOREA TIMES (Sept. 16, 2009), http://www.koreatimes.co.kr/www/news/nation/2014/12/117_51957.html.

561 "Park Yeon-cha Gate" Has Humiliated Government Circles and the Prosecution Service, KYUNGHYANG SHINMUN (Jan. 28, 2011), http://english.khan.co.kr/khan_art_view.html?code=790101&artid=201101281443457 (the businessman, Chun Shin-Il, was prosecuted but received a suspended sentence); PSPD, LEE MYUNG-BAK REPORT, *supra* note 554, at 212-13.

562 For a timeline of the investigation, see PSPD, LEE MYUNG-BAK REPORT, *supra* note 554, at 179-81.

Roh continued to deny that he had taken bribes.⁵⁶³ For months, the prosecution leaked information about their aggressive investigation to the media,⁵⁶⁴ humiliating Roh, who had projected an image of being a clean and humble politician. As prosecutors suspected that he had taken around 6 million US dollars in bribes,⁵⁶⁵ the proudly progressive Roh came to be seen as behaving similarly to ex-Presidents Chun and Roh Tae-Woo, although they took hundreds of millions of dollars.⁵⁶⁶ In May 2009, Roh committed suicide by jumping from an escarpment near his home.⁵⁶⁷

Public opinion suddenly shifted from cynicism to pity for Roh and outrage at the Prosecutors' Office for its "excessive" prosecution and degrading leaks against him.⁵⁶⁸ For example, there were demands for the abolition of the Central Investigation Department that handled the most politically salient cases, including Roh's.⁵⁶⁹ Years later, it was also alleged that the National Intelligence Service fabricated a scandalous news item: that during the investigation Roh's guilt-ridden wife threw illegally received luxury watches into a rice paddy.⁵⁷⁰ The rumor likely aimed at arousing public sentiment against Roh during the investigation. A left-wing NGO gave its perspective: "Our evaluation is that the government in power selected the retired President at the heart of the political opposition and used the prosecution to carry out a targeted and excessive investigation."⁵⁷¹ It is also conceivable that the elite prosecutors that control the Prosecutors' Office were seeking revenge against Roh for his judicial reforms that had damaged their institutional power and status.

Prosecutors continued to harass figures from Roh's government—most notably, former Prime Minister Han Myeong-Sook.⁵⁷² During an

563 Park Si-soo, *Roh Heads Back Home After Being Quizzed*, KOREA TIMES (Apr. 30, 2009), https://www.koreatimes.co.kr/www/nation/2023/09/113_44140.html.

564 Kim Rahn, *Roh's Bribery Suspicion Will Remain Mystery*, KOREA TIMES (June 12, 2009), https://www.koreatimes.co.kr/www/nation/2024/01/113_46751.html.

565 *Id.*

566 Choe Sang-Hun, *Roh Moo-hyun, Ex-President of South Korea, Kills Himself*, N.Y. TIMES (May 22, 2009), <https://www.nytimes.com/2009/05/23/world/asia/23korea.html>. Former President Chun took "more than \$200 million in bribes." Emily Stephenson, *U.S. Says It Helps Recover \$28.7 Million Tied to Former South Korean President*, REUTERS (Mar. 4, 2015, 3:08 PM), <https://www.reuters.com/article/usa-southkorea-chun/u-s-says-it-helps-recover-28-7-million-tied-to-former-south-korean-president-idINKBN0M02C120150304/>. As for former President Roh Tae-Woo, he admitted to collecting "political funds" of over \$650 million. West, *supra* note 469, at 110.

567 Choe Sang-Hun, *supra* note 566.

568 Song Sang-ho, *Prosecutors Face Public Backlash*, KOREA HERALD (May 25, 2009), <http://www.koreaherald.com/view.php?ud=20090525000039>.

569 PSPD, LEE MYUNG-BAK REPORT, *supra* note 554, at 181.

570 Kim Myong-sik, *Ghost of Roh Moo-hyun Lurks in 2018 Korea*, KOREA HERALD (Jan. 17, 2018), <https://www.koreaherald.com/view.php?ud=20180116000901>. For details on the watch story, see Song, *supra* note 568.

571 PSPD, LEE MYUNG-BAK REPORT, *supra* note 554, at 181.

572 For a summary of the investigation and trials, see *id.* at 182-83.

investigation into a businessman for amassing a political slush fund, the businessman told prosecutors that he had given Han \$50,000 US dollars. Based on the businessman's testimony alone, prosecutors indicted Han in December 2009. She was found not guilty at her district court-level trial. Prosecutors appealed to the high court and Supreme Court levels, which both found Han not guilty. At yet another retrial, prosecutors' persistence paid off,⁵⁷³ and Han was jailed from 2015-17.⁵⁷⁴ Her conviction was annulled by order of President Moon Jae-In in 2021,⁵⁷⁵ following suspicions that it was based on false testimony obtained by prosecutorial coercion.⁵⁷⁶ Han Myeong-Sook's prosecution⁵⁷⁷ may be seen as a clear-cut example of how prosecutors can pressure the executive's political enemies.

The prosecution under President Lee was also famous for aggressively indicting his critics in the media. In 2008, amid the global financial crisis, an anonymous internet financial commentator calling himself "Minerva" became a sensation when he correctly predicted the collapse of Lehman Brothers and the decline of the Korean won against the dollar.⁵⁷⁸ He also criticized the government.⁵⁷⁹ In early 2009 prosecutors arrested and indicted him under a telecommunications statute for spreading false information against the public interest.⁵⁸⁰ A district court found him not guilty.⁵⁸¹ Prosecutors cancelled their appeal after the Constitutional Court ruled that the statutory provision was unconstitutional for lack of

573 Prosecutors launched a related investigation to continue prosecuting Han, accusing her of receiving about \$680,000 US dollars in illegal political funding. For details on this, see *id.* at 184-85.

574 Jo He-rim, *Former PM Han Released After 2-Year Sentence*, KOREA HERALD (Aug. 23, 2017), <https://www.koreaherald.com/view.php?ud=20170823000826>.

575 Lee Bo-ra, *Park Geun-hye Pardoned and Han Myeong-sook Exonerated, but Lee Myung-bak Excluded from Amnesty*, KYUNGHYANG SHINMUN (Dec. 24, 2021), https://english.khan.co.kr/kh_an_art_view.html?artid=202112241724217.

576 There were suspicions that prosecutors were improperly bargaining with the businessman to limit the investigation into his activities in exchange for testimony against Han. PSPD, LEE MYUNG-BAK REPORT, *supra* note 554, at 182-83. After he died, former inmates gave hearsay testimony against Han, which attracted new accusations of prosecutorial pressure. Yonhap, *Prosecution Decides to Close False Testimony Case Related to Ex-PM*, KOREA HERALD (Mar. 21, 2021), <https://m.koreaherald.com/amp/view.php?ud=20210321000054>. The Ministry of Justice later admitted "that prosecutors forced witnesses to commit perjury." *Ministry Concludes Prosecutors Forced False Testimony in Ex-PM's Bribery Trial*, KBS WORLD (Jul. 14, 2021), http://world.kbs.co.kr/service/news_view.htm?src=ilaw&Seq_Code=162833.

577 A book supportive of Han details her ordeal: 황창화 [HWANG CHANG-HWA], 피고인 한명숙과 대한민국 검찰 [DEFENDANT HAN MYEONG-SOOK AND THE REPUBLIC OF KOREA PROSECUTORS' OFFICE] (2012). The foreword was written by Moon Jae-In before he became President, indicating his longstanding sympathy for Han. *Id.* at 5-8.

578 *Prosecutors Arrest Man Known as 'Minerva'*, HANKYOREH (Jan. 9, 2009, 10:11 AM), https://english.hani.co.kr/arti/english_edition/e_national/332232.html.

579 *Id.*

580 For a summary of the investigation and trials, see PSPD, LEE MYUNG-BAK REPORT, *supra* note 554, at 160-61.

581 Park Si-Soo, *Online Blogger Minerva Found Not Guilty*, KOREA TIMES (Apr. 20, 2009), http://www.koreatimes.co.kr/www/news/nation/2010/11/117_43503.html.

clarity in its use of the term “public interest.”⁵⁸² As an epilogue to the story, the prosecutor leading the case received a favorable promotion, despite losing, which suggests a political reward.⁵⁸³

In another 2009 case, prosecutors indicted five journalists who worked on a television show called *Producer’s Notebook*.⁵⁸⁴ They helped to create April and May 2008 programs that suggested that American beef imports put Koreans at risk of contracting Mad Cow Disease.⁵⁸⁵ These broadcasts triggered months of massive street protests against Lee’s policy of liberalizing US beef imports, which he supported as part of negotiations for the US-Korea Free Trade Agreement.⁵⁸⁶ Prosecutors charged the journalists with criminal defamation and criminal restraint of trade against beef importers. In the courts, they were found not guilty at the district, high, and Supreme Court levels.

Finally, there have been other kinds of prosecutorial independence failures. Many Koreans have long suspected that the Prosecutors’ Office protects social elites from criminal punishment for their wrongdoing. One such infamous case occurred during Lee’s term. In 2009, Jang Ja-Yeon, a 29-year-old rising actress, committed suicide at the height of her career. She left a note accusing her talent management agency of forcing her to engage in sexual acts with powerful men from the worlds of government, business, finance, news media, and entertainment.⁵⁸⁷ The thirty-one names she listed were not formally published because of fears of libel lawsuits.⁵⁸⁸ Prosecutors investigated men on the list but minimized the legal consequences of the scandal by only charging Jang’s manager. He was convicted of assaulting and threatening her and received a one-year sentence.⁵⁸⁹ Years later, it emerged that at least one of the social gatherings Jang was forced to join was attended by a senior prosecutor who later became Minister of Justice from 2011-13.⁵⁹⁰ This corroborates

582 Bae Ji-sook, *Prosecution Confirms ‘Minerva’ Innocent*, KOREA HERALD (Jan. 4, 2011), <http://www.koreaherald.com/view.php?ud=20110104000750>.

583 LEE, *supra* note 503, at 130.

584 PSPD, LEE MYUNG-BAK REPORT, *supra* note 554, at 148-50.

585 *Urgent Appeal Concerning Prosecution of Producers of PD Notebook*, MINBYUN (Nov. 25, 2010), <http://minbyuneng.prizma.co.kr/?p=166>.

586 Hyun J. Jin, *The 2008 US Beef Scare Episode in South Korea: Analysis of an Unusual Public Reaction*, 35 J. PUB. HEALTH POL’Y 518, 519-20 (2014).

587 Kwon Mee-yoo, *Late Actress Was Forced to Have Sex with Showbiz VIPs*, KOREA TIMES (Mar. 15, 2009, 6:20 PM), (S. Kor.), https://www.koreatimes.co.kr/www/news/nation/2009/03/117_41308.html.

588 Lee Yoo Eun, *South Korea: Suicide Actress’s Memoirs Claim Sex Exploitation*, GLOB. VOICES (Mar. 9, 2011, 1:17 PM), <https://globalvoices.org/2011/03/09/south-korea-suicide-actress-memoirs-claim-sex-exploitation/>.

589 Yonhap, *Actress Jang Ja-yeon’s Suicide Case Reopened*, KOREA TIMES (Mar. 19, 2019, 3:49 PM), https://www.koreatimes.co.kr/www/nation/2019/03/251_265636.html.

590 Jo He-rim, *Former Justice Minister Implicated in Jang Ja-yeon Sexual Abuse Case: Investigators*, KOREA HERALD (Dec. 4, 2018, 6:23 PM), <http://www.koreaherald.com/view.php?ud=20181204000772>.

the widely held suspicions that powerful prosecutors allowed Jang's wealthy and well-connected abusers to escape justice.⁵⁹¹

7. Park Geun-Hye (Rightist, 2013-17)

Like her father, former President Park Chung-Hee, Park Geun-Hye was a right-wing politician. Likely out of political expediency, she claimed to desire to reform the prosecution. Former President Roh's suicide created a national outrage at the Central Investigation Department, and Park acted in line with the public sentiment by abolishing it—a symbolic but weak reform.⁵⁹² She also signed into law a special prosecutor statute that regularized the system for appointing special prosecutors without the need for specific statutes for each scandal.⁵⁹³ Nonetheless, numerous prosecutorial independence controversies occurred during her presidency. The Prosecutors' Office indicted Park's critics in the news media,⁵⁹⁴ undertook high-profile prosecutions of opposition figures,⁵⁹⁵

591 In 2018, a media group reviewed thousands of pages of court documents and police reports related to Jang's case and found that there was enough evidence to indict at least some of the men she accused of sexual abuse. Claire Lee, *Reopened Actress Suicide Case Shows Prosecution Did Not Indict Any of Key Suspects in 2009*, KOREA HERALD (July 6, 2018, 6:24 PM), <http://www.koreaherald.com/view.php?ud=20180706000719>.

592 Lee Ka-young & Sarah Kim, *Prosecution Agrees to End Its Powerful Probe Unit*, KOREA JOONGANG DAILY (Jan. 23, 2013, 9:19 PM), <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2966034>. This office's functions could be carried out by other prosecutorial departments just as easily.

593 Teukbyeolgeomsai immyeong deunge gwanhan beomnyul [Special Prosecutor Appointment Act], Law No. 12423 of 2014 (S. Kor.). The text of this act is available at: <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=152099>.

594 For example, a Japanese newspaper's Seoul bureau chief wrote a column about Park's mysterious whereabouts immediately after the sinking of the *Sewol* ferry, a disaster that killed over 300 people. He mentioned a rumor that Park was having a romantic encounter. Choe Sang-Hun, *Court Acquits Journalist Accused of Defaming South Korean President*, N.Y. TIMES (Dec. 17, 2015), <https://www.nytimes.com/2015/12/18/world/asia/south-korea-park-geun-hye-defamation-verdict.html>. After a conservative nationalist NGO complained to prosecutors, they indicted the journalist for criminal defamation in 2014. A district court found him not guilty. 참여연대 사법감시센터 [PEOPLE'S SOLIDARITY FOR PARTICIPATORY DEMOCRACY, JUDICIAL MONITORING CENTER], *빼앗긴 정의, 침몰한 검찰: 박근혜정부 4년 검찰보고서* [THE PROSECUTION THAT HAS DEPRIVED JUSTICE AND SUNK: THE PARK GEUN-HYE GOVERNMENT 4-YEAR PROSECUTION REPORT] 289-90 (2017) (S. Kor.) [hereinafter PSPD, PARK GEUN-HYE REPORT]. The title's metaphor of a sunken ship is a reference to the *Sewol* ferry disaster that shocked Korean society.

595 After Park won the 2012 presidential election, the defeated leftists suspected that the National Intelligence Service (NIS) had intervened in the election to help Park. The NIS eventually admitted to trying to manipulate public opinion by posting comments online that attacked left-wing politicians. Early on in this scandal, there was a report that a certain NIS employee had posted such comments. Opposition legislators and party members brought journalists to this NIS agent's front door and asked her to open it and answer questions about the scandal. She refused to come out for over twenty-four hours as politicians and reporters camped outside. In June 2014, prosecutors charged five opposition legislators with false imprisonment of the NIS employee. PSPD, PARK GEUN-HYE REPORT, *supra* note 594, at 341-43. They were found not guilty at the district, high, and Supreme Court levels. 김민경 [Kim Min-Gyeong], *대법, '국정원 '맷글직원 감금사건' 전·현직 의원 무죄 확정* [Supreme Court, 'NIS Comment Employee Imprisonment Incident' Former & Current Legislators Not Guilty Confirmation], 한겨레 [HANKYOREH] (Mar. 29, 2018), http://www.hani.co.kr/arti/society/society_general/838224.html.

and was manipulated to protect Park and her political allies.⁵⁹⁶ Park was also criticized for giving top jobs to “public security” prosecutors who some believed were complicit in past suppression of democracy.⁵⁹⁷ However, these episodes of prosecutorial politicization were surpassed in gravity by the scandal that led to Park’s impeachment and removal from office, known as “Choi Soon-Shil Gate” or “The National Affairs Monopolization incident” (*gukjeong nongdan sageon*, 국정농단 사건).

The events surrounding President Park’s impeachment cannot be fully discussed here for considerations of space.⁵⁹⁸ To summarize, in September and October 2016, reports emerged that Park had a close friend and advisor on whom she relied significantly. Eventually, journalists discovered evidence that this confidant, Choi Soon-Shil, was editing drafts of Park’s speeches.⁵⁹⁹ Other news reports suggested that Choi had set up charitable foundations to receive large donations from major businesses. As public alarm at these revelations grew, pressure mounted on prosecutors to investigate Park’s relationship with Choi. From late October, protesters began holding large rallies demanding Park’s resignation.

Up to this point, Park had protected herself and her allies from prosecutorial investigations by bringing powerful prosecutors into the Presidential Office—as is customary for Korean presidents.⁶⁰⁰ Two of these prosecutors, Woo Byung-Woo⁶⁰¹ (Senior Secretary for Civil Affairs) and

596 A striking, if unusual, example is as follows. Prosecutor General Chae Dong-Wook displayed a degree of independence in supervising the investigation of the 2012 NIS election interference scandal. In 2013, the pro-Park *Chosun Ilbo*, Korea’s most circulated newspaper, published articles accusing him of having a secret illegitimate child. These embarrassing claims led the Prosecutor General to resign. Cho Chung-un & Lee Hyun-jeong, *Chief Prosecutor Offers to Resign, Insists Love Child Claim ‘Groundless’*, KOREA HERALD (Sept. 13, 2013), <http://www.koreaherald.com/view.php?ud=20130913000689>. There are suspicions that the government gave the newspaper the well-timed damaging report, which was meant as retaliation for the NIS investigation and to divert the public’s attention. In a similar move, days after Chae’s resignation, several prosecutors on the team probing the NIS were demoted. Cho Kang-Soo, *Former Prosecutor General Discusses What Went Wrong*, KOREA JOONGANG DAILY (June 7, 2017, 8:34 PM), <https://koreajoongang-daily.joins.com/news/article/article.aspx?aid=3034352>.

597 Hong Jae-won, Jo Mi-deop & Kim Gyeong-hak, *Shameless! Counterattack of Officials Who Once ‘Kept Public Order’*, KYUNGHYANG SHINMUN (Oct. 5, 2015, 6:07 PM), https://english.khan.co.kr/khan_art_view.html?artid=201510051807347&code=710100. For further discussion of public security prosecutors, see Chisholm, *Prosecutorial Independence Lost*, *supra* note 38, at 594, 603, 613-14.

598 For an overview of the scandal, see Mark Turner, et al., *Making Integrity Institutions Work in South Korea: The Role of People Power in the Impeachment of President Park in 2016*, 58 ASIAN SURV. 898, 907-13 (2018).

599 발표 전 받은 ‘44개 연설문’... 극비 ‘드레스덴’까지 [Before They Were Delivered, 44 Speech Drafts Sent Secretly to Dresden], JTBC (Oct. 24, 2016), <https://news.joins.com/article/20772736>.

600 Chisholm, *Prosecutorial Independence Lost*, *supra* note 38, at 621-25.

601 Woo was famous for his charisma, arrogance, and toughness. He was on the Central Investigation Department team that investigated ex-President Roh Moo-Hyun, and Woo interrogated him using harsh language. 우병우 노무현, “그는 대단히 건방졌다... 오만함과 거만함이 태도에 가득 묻어 있었다” 문재인 회고록 재조명 [Woo Byung Woo to Roh Moo-Hyun, “He Was Highly Arrogant, Filled with Rudeness and Insolence;” Moon Jae-In’s Memoirs Re-examined], *조선일보*

Hwang Kyo-An⁶⁰² (Prime Minister), were exceptionally influential figures within the Prosecutors' Office.⁶⁰³ At the early stages of the scandal, temporarily seconded prosecutors in the Blue House, especially Woo, were widely understood to have been using their formal or informal authority to impede investigations and protect Park.⁶⁰⁴ For example, the investigations into Choi's foundations were initially assigned to a low-ranking prosecution department specializing in land transactions,⁶⁰⁵ not to the high-powered "special investigations department" focused on politically linked crimes.⁶⁰⁶ Additionally, when prosecutors raided the offices of one of Choi's foundations, the press photographed their investigative assistants carrying out large boxes of evidence. However, the photos showed that many of the boxes were empty, revealing that their actions were for political theater.⁶⁰⁷ Finally, when prosecutors summoned Secretary Woo for questioning, journalists photographed the interrogation room with a telescopic lens, revealing Woo standing with his arms crossed, turned away from two hapless-looking younger prosecutors, chuckling to himself. This surreal image of a prosecutorial interrogation fueled distrust in prosecutors' investigations into Park. The picture spoke a thousand words.⁶⁰⁸

[CHOSUN ILBO] (Nov. 7, 2016), https://www.chosun.com/site/data/html_dir/2016/11/07/2016110701384.html.

602 Hwang, a career public security prosecutor, was Minister of Justice and later Prime Minister in President Park's government. For details on his career, see Park Sun-bong, *Hwang Kyo-ahn as Leader, Where Will the Liberty Korea Party Head to Now?*, KYUNGHYANG SHINMUN (Feb. 18, 2019, 6:08 PM), http://english.khan.co.kr/khan_art_view.html?artid=201902281808367&code=910100. He likely won President Park's confidence by leading the effort to abolish a pro-North Korean political party. His abolition petition to the Constitutional Court succeeded, marking a historic first for the Court. Koichi Kato, *Meet South Korea's New Leader*, Hwang Kyo-ahn, NIKKEI ASIA (Dec. 10, 2016, 4:51 AM), <https://asia.nikkei.com/Politics/Meet-South-Korea-s-new-leader-Hwang-Kyo-ahn>. For more on the controversy of the party's abolition, see James Pearson & Ju-Min Park, *Opposition Cries Foul as South Korea Moves to Ban Pro-North Party*, REUTERS (Nov. 5, 2015, 1:11 AM), <https://www.reuters.com/article/us-korea-politics-idUSBRE9A405X20131105/>.

603 An anonymous prosecutor and an anonymous scholar expressed the view that Woo and Hwang possessed great influence inside the Prosecutors' Office. Korean prosecutor and scholar interview notes (on file with author).

604 *Id.* See also *Woo Byung-Woo Should Take Witness Stand or Resign*, DONG-A ILBO (Oct. 19, 2016, 7:45 AM), <http://www.donga.com/en/article/all/20161019/763581/1/Woo-Byung-woo-should-take-witness-stand-or-resign> ("Critics say that the prosecution was wary of Woo and the Park administration.").

605 *Id.*

606 Detailed analysis of the special investigations department may be found in section III.B of Chisholm, *Prosecutorial Independence Lost*, *supra* note 38.

607 Not only were investigators carrying several "filled" boxes at once with impossible ease, but light from a ceiling lamp could be seen passing from top to bottom through at least one large box. 박상은 [Park Sang-Eun], "이런 검찰 믿겠나" 미르재단 압수수색 '빈 박스 논란' 사진 [“We Should Trust Such a Prosecutors' Office?” *Mir Foundation Search and Seizure 'Empty Box Controversy' Photos*], 국민일보 [KOOKMIN ILBO] (Oct. 31, 2016), <https://www.kmib.co.kr/article/view.asp?arcid=0011034371>.

608 It was the front-page, above-the-fold photo of the conservative *Chosun Ilbo* on Nov. 7, 2016. 김아사 [Kim A-Sa], 팔짱끼 채 웃으며 조사받는 우병우 [While Crossing His Arms and

President Park's political support collapsed under the weight of perceptions that she was acting as a puppet of a Rasputin-like spiritual guru, Choi Soon-Shil, who had "monopolized" control over the government.⁶⁰⁹ By the first week of November 2016, a feeling of national shame⁶¹⁰ led Park's approval in the polls to collapse to 5%,⁶¹¹ as massive protests demanding her ouster continued. In December, much of Park's own party abandoned her, and the National Assembly voted to appoint a special prosecutor to look into her relationship with Choi. The legislature also impeached her, sending the question of removal from office to the Constitutional Court. In January 2017, Acting President Hwang Kyo-An refused to extend the special prosecutor's allotted time to investigate Park. But it was too late. In March, the Constitutional Court approved the legislature's petition for Park's removal from office.⁶¹²

The protective influence of President Park's prosecutorial guardians in the Blue House vanished along with her political support. As they could no longer hold back the tide of investigations, the Prosecutors' Office autonomously switched from protective to attack mode, in line with public opinion. Its investigations became more serious by late October and early November 2016.⁶¹³ Precursor scandals that had been contained were now vigorously pursued. For example, Woo Byung-Woo—whom the media nicknamed "The Emperor" for his power and arrogance—was thoroughly investigated and prosecuted for various crimes, including corrupt real estate dealings that he had been suspected of prior to the

Laughing, Woo Byung-Woo Is Investigated], 조선일보 [CHOSUN ILBO] (Nov. 7, 2016), https://news.chosun.com/site/data/html_dir/2016/11/07/2016110700194.html.

609 For a sense of the shock and rumor surrounding the early unfolding of Park's scandal in November 2016, see David Volodzko, *Cults, Cabals and Corruption in South Korea*, INTERPRETER (Nov. 14, 2016), <https://www.lowyinstitute.org/the-interpreter/cults-cabals-corruption-south-korea>. An opposition politician said that Korea was descending into a cultic "terrifying theocracy." *Id.* For a closer look at the cult background of Park's Rasputin-like guru, see Ser Myo-Ja, *Pseudo-Christian Shamanistic Cult Alleged to Have Influence Over President Park*, KOREA JOONGANG DAILY (Oct. 27, 2016, 7:06 PM), <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3025416>. At Choi Soon-Shil's first-instance trial, the court condemned Choi's undue spiritual influence, declaring that she "took advantage of this [President Park's neglect of her constitutional duties] to monopolize government functions and pursue private interests." Kim Min-kyung & Hyun So-eun, *Choi Soon-sil Hit with 20 Year Prison Sentence in Government Interference Case*, HANKYOREH (Feb. 14, 2018, 6:43 PM), https://english.hani.co.kr/arti/english_edition/e_national/832333.html.

610 The Korean public's sense of humiliation over President Park's Rasputin-like relationship was enormous. Choe Sang-hun, *South Koreans 'Ashamed' Over Leader's Secretive Adviser*, N.Y. TIMES (Nov. 5, 2016), <https://www.nytimes.com/2016/11/06/world/asia/south-koreans-ashamed-over-les-secretive-adviser.html>. A national association of shamans even requested that the media refrain from labelling Park's guru a shaman. Choi Ha-young, *Don't Call Choi Soon-sil a Shaman, It's Disgrace to Shamans*, KOREA TIMES (Nov. 8, 2016), https://www.koreatimes.co.kr/www/nation/2023/12/113_217758.html.

611 Seok Jin-hwan, *For Third Consecutive Week, Pres. Park's Approval Rating at Rock Bottom*, HANKYOREH (Nov. 19, 2016), http://english.hani.co.kr/arti/english_edition/e_national/771020.html.

612 Turner, Kwon, & O'Donnell, *supra* note 598, at 911-12.

613 PSPD, PARK GEUN-HYE REPORT, *supra* note 594, at 119-20.

presidential scandal.⁶¹⁴ Woo's downfall was a dramatic reversal of fortune. As for Park herself, after her removal from the presidency, the Prosecutors' Office zealously prosecuted her for bribery and influence peddling related to Choi. In 2018, a district court found her guilty of sixteen counts of corruption-related charges and in 2020 the Supreme Court sentenced her to twenty years in prison.⁶¹⁵

8. Moon Jae-In (Leftist, 2017-2022)

A former top aide to President Roh Moo-Hyun, President Moon was the first president from the political left in ten years. He grasped the need for prosecutorial reform, having seen the prosecution's attack on Roh. Moon co-authored a critical book on the Prosecutors' Office⁶¹⁶ and promised prosecutorial reform during his election campaign.⁶¹⁷ Once in office, Moon selected a staunch reformist for the post of Senior Secretary for Civil Affairs, a powerful position in the Presidential Office that supervises the Prosecutors' Office.⁶¹⁸ He appointed Cho Kuk, a prominent public intellectual and Berkeley-educated Seoul National University law professor who worked on judicial reforms during the Roh presidency.⁶¹⁹

Early in President Moon's term, prosecutors undertook high-profile investigations into the previous decade of right-wing governments. Under the slogan of "liquidating deep-rooted evils" (*jeokpye cheongsan*, 적폐청산),⁶²⁰ the Prosecutors' Office secured corruption or abuse of power convictions for ex-President Park, and dozens of senior government officials and business leaders.⁶²¹ Prosecutors also won guilty

614 참여연대 사법감시센터 [PEOPLE'S SOLIDARITY FOR PARTICIPATORY DEMOCRACY, JUDICIAL MONITORING CENTER], *쟁걸을 적폐수사 더딘걸음 검찰개혁: 문재인정부 1년 검찰보고서* [HURRIED STEPS TO INVESTIGATE DEEP-ROOTED EVILS, SLOW STEPS TO PROSECUTORIAL REFORM: THE MOON JAE-IN GOVERNMENT FIRST-YEAR PROSECUTION REPORT] 183-87, 195-97 (2018).

615 *Park Geun-hye: South Korea Court Upholds 20-Year Jail Term for Ex-Leader*, BBC (Jan. 14, 2021, 2:40 PM), <https://www.bbc.com/news/world-asia-55657297>. See also Hyung-Jin Kim & Kim Tong-Hyung, *Ex-S. Korean Leader Park Gets 24-Year Prison Term*, ASSOCIATED PRESS, (Apr. 6, 2018, 11:21 AM), <https://apnews.com/1d19140f02274766b7c4021ad80f9aa5/>.

616 MOON & KIM, *supra* note 524.

617 Park Moo-jong, *Eradication of Deep Rooted Evils*, KOREA TIMES (Mar. 16, 2017, 5:07 PM), https://www.koreatimes.co.kr/www/opinion/2024/02/638_225839.html.

618 For further discussion of this office's role in monitoring and supervising the Prosecutors' Office, see Chisholm, *Prosecutorial Independence Lost*, *supra* note 38, at 621-25.

619 *Berkeley Law Alum Cho Kuk Appointed Senior Presidential Secretary for Civil Affairs in South Korea*, U. CAL. BERKELEY SCH. L., <https://www.law.berkeley.edu/center-article/berkeley-law-alum-cho-kuk-appointed-senior-presidential-secretary-civil-affairs-south-korea/> (last visited May 20, 2024); Um Ji-won, *S. Korean Democrats' Long Road to Reforming Prosecution Service: Victory or blunder?*, HANKYOREH (May 4, 2022), https://english.hani.co.kr/arti/english_edition/e_national/1041606.html; Kim Rahn, *Moon's Era: Roh Moo-hyun Administration 2.0?*, KOREA TIMES (May 15, 2017), https://www.koreatimes.co.kr/www/nation/2024/05/113_229354.html.

620 Park, *supra* note 617 (explaining the meaning of the phrase).

621 Kim & Kim, *supra* note 615.

verdicts against her predecessor, Lee Myung-Bak, for various corruption charges.⁶²²

In a striking move that showed Moon's determination to shake up the judiciary, prosecutors also indicted a Park-era former Chief Justice of the Supreme Court, Yang Seung-Tae. The main issues in the forty-seven charges against him were that he allegedly traded court decisions for favor with President Park,⁶²³ and that he abused his control over the bureaucratic judicial personnel system by blacklisting left-leaning judges in job promotions.⁶²⁴ Scores of other judges and some Supreme Court justices were indicted or disciplined in connection with this scandal.⁶²⁵ However, there were indications that Moon's prosecutors went too far. In 2020, courts found some of the prosecuted judges and Supreme Court justices not guilty while some ex-presidential aides had their convictions overturned.⁶²⁶ Former Chief Justice Yang was acquitted in January 2024.⁶²⁷ Although the Moon administration's Prosecutors' Office may have, to a degree, legitimately prosecuted the wrongdoing of past governments, it may also have excessively charged the executive's political enemies, accomplishing another iteration in cycles of political revenge.

Doubts about President Moon's commitment to prosecutorial reform arose as structural changes failed to materialize early in his term and political scandals occurred in which prosecutors appeared to protect Moon's political allies. For example, in the "Dru King incident," a popular left-wing blogger using the alias Dru King⁶²⁸ designed software to manipulate social media in favor of candidate Moon during the 2017

622 Choe Sang-Hun, *Former South Korean President Gets 15 Years in Prison for Corruption*, N. Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/world/asia/lee-myung-bak-south-korea-convicted.html>.

623 Chief Justice Yang allegedly tried to earn Park's approval for his idea of creating a new appellate court (*sanggo beopwon*, 상고법원) below the Supreme Court to relieve the latter's heavy case load. 이지현 [Yi Ji-Heon], '피고인 양승태' 47개 혐의... 재판거래-블랙리스트 [Defendant Yang Seung-Tae' 47 Charges... Trial Bargaining & Blacklist], YONHAP NEWS AGENCY (Feb. 11, 2019), <https://www.yna.co.kr/view/AKR20190211081200004>.

624 Lim Jae-woo & Kim Yang-jin, *Prosecutors to Seek Arrest Warrant for Former Chief Justice Yang Seung-Tae*, HANKYOREH (Jan. 14, 2019), http://english.hani.co.kr/arti/english_edition/e_national/878330.html.

625 Yonhap, *Senior Judge Acquitted in Power Abuse Scandal*, KOREA HERALD (Feb. 14, 2020), <http://www.koreaherald.com/view.php?ud=20200214000599>.

626 JoongAng Ilbo, *Refreshing Rulings*, KOREA JOONGANG DAILY (Feb. 14, 2020), <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3073794>.

627 Cho Jung-Woo, *Korea's Former Supreme Court Chief Justice Acquitted of 47 Charges*, KOREA JOONGANG DAILY (Jan. 26, 2024), <https://koreajoongangdaily.joins.com/news/2024-01-26/national/socialAffairs/Koreas-former-Supreme-Court-chief-justice-acquitted-of-47-charges/1968076>. See also Seong Han-yong, *The Rise of Korea's Cowardly Prosecutor-Politicians*, HANKYOREH (Feb. 6, 2024, 10:48 AM), https://english.hani.co.kr/arti/english_edition/e_national/1127402.html (for criticism of the collapse of Chief Justice Yang's prosecution, discussion of the politics of its rise and fall, and analysis of the media's treatment of the affair).

628 "Dru King" (sometimes transliterated as "druking") refers to skillful magician "druid" characters in a popular video game, "World of Warcraft."

presidential election.⁶²⁹ He and his associates posted comments on news websites and inflated the “likes” and “dislikes” of comments.⁶³⁰ The scandal came to light when Dru King turned against the government after it refused to reward him by appointing one of his associates as ambassador to Japan.⁶³¹ Early in the investigation, prosecutors denied a police request to review the bank records of Kim Kyoung-Soo, a top aide to Moon and a provincial governor.⁶³² Kim was suspected of green-lighting the scheme and coordinating with Dru King. Fears that the government would intervene in the investigation led the National Assembly to appoint a special prosecutor.⁶³³ Ultimately, the blogger and Governor Kim were convicted of crimes related to the scandal.⁶³⁴

A much larger scandal erupted when Moon’s key aide overseeing prosecutorial affairs, Cho Kuk, was accused of corruption. Cho was reputed to be a virtuous veteran of judicial reform and the ideal architect of Moon’s prosecutorial reform strategy. Almost overnight, however, Cho turned from hero to villain. He reportedly put money into a private equity firm controlled by a relative and that profited when a company the firm had invested in won government procurement contracts.⁶³⁵ This suggested that Cho had insider knowledge and used his position to enrich himself.⁶³⁶ Cho also allegedly helped his daughter gain admission to medical school using fabricated credentials and achievements.⁶³⁷ The latter charge of academic admissions fraud is a sensitive issue in Korea, where entering top schools is seen as a necessary condition of a successful life, and competition is resultantly fierce.⁶³⁸ While Cho was widely scorned as a hypocrite for engaging in the same corruption that he, as a political

629 Lee Kyung-Min, *Moon’s Aide Conspired with Blogger*, (Aug. 27, 2018), KOREA TIMES, http://www.koreatimes.co.kr/www/nation/2018/08/251_254560.html.

630 *Id.*

631 Esther Chung et al., *Druking Spills All on Former Rep in a Letter*, KOREA JOONGANG DAILY (May 18, 2018), <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3048315>.

632 Choi Kyu-Jin & Esther Chung, *Authorities Grill Former Aide in Druking Case*, KOREA JOONGANG DAILY (May 1, 2018), <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3047593>.

633 Kim Soo-yeon *Moon’s Confidant Gets 2-Year Prison Term for Opinion Rigging*, YONHAP NEWS AGENCY (Jan. 30, 2019), <https://en.yna.co.kr/view/AEN20190129008854315>.

634 *Id.*

635 Lee Sung-Eun et al., *In Cho Affair, Prosecutors Zero in on Equity Fund*, (Aug. 28, 2019), KOREA JOONGANG DAILY, <https://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3067322>.

636 *Id.*

637 *Cho Kuk’s Daughter*, KOREA TIMES (Aug. 22, 2019), https://www.koreatimes.co.kr/www/opinion/2019/08/202_274395.html.

638 Ock Hyun-ju, *[From the Scene] Students Angered by University Admission Allegations Involving Cho Kuk’s Daughter*, KOREA HERALD (Aug. 22, 2019), <https://www.koreaherald.com/view.php?ud=20190822000765>. See also Kwon Ji-dam & Yi Ju-been, *Young South Koreans and Their Outrage at the Cho Kuk Controversy*, HANKYOREH (Sept. 15, 2019, 8:52 AM), https://english.hani.co.kr/arti/english_edition/e_national/909526.

commentator, condemned in others,⁶³⁹ his left-wing supporters claimed that the Prosecutors' Office was mounting an attack in order to thwart prosecutorial reform.⁶⁴⁰ A tale of two protest movements ensued. Right-wing rallies near the Blue House attracted hundreds of thousands, demanding Cho's resignation and prosecution.⁶⁴¹ Left-wing demonstrations in front of the Supreme Prosecutors' Office drew tens of thousands, demanding prosecutorial reform and an end to politicized investigations.⁶⁴² Public opinion, however, was decisively against Cho.⁶⁴³

Amidst a continuing popular uproar, such were President Moon's affections for Cho that he appointed him as Minister of Justice and charged him to carry out prosecutorial reform.⁶⁴⁴ It quickly became clear that this was politically impossible. For example, Cho's home was raided by prosecutors during his tenure as Minister of Justice.⁶⁴⁵ Opposition critics said it was ridiculous that Cho should continue as Minister of Justice, supervising the Prosecutor General that was personally managing the investigation into his finances, family, and work in the Blue House.⁶⁴⁶ After about a month, Cho resigned.⁶⁴⁷ The next Minister of Justice, days after she arrived, reassigned top lieutenants to the Prosecutor General and prosecutors leading investigations into Cho, demoting some to far-flung prosecution offices often seen as places of exile.⁶⁴⁸ She also forbade the establishment of teams investigating high-level political corruption without her permission.⁶⁴⁹ It is difficult to interpret such personnel

639 Joyce Lee, *Moon Appointee's 'Privileged' Daughter Angers Young South Koreans*, REUTERS (Sept. 6, 2019, 1:43 AM), <https://www.reuters.com/article/idUSKCN1VR06K/>.

640 Kim Yeong-dong & Jung Dae-ha, *Intellectuals Around Country Demand Reform of S. Korean Prosecutors*, HANKYOREH (Sept. 28, 2019), https://english.hani.co.kr/arti/english_edition/e_national/911260.

641 *S. Koreans Hold Massive Rally Against Justice Minister*, YONHAP NEWS AGENCY (Oct. 3, 2019), <https://en.yna.co.kr/view/AEN20191002008651315>.

642 Ock Hyun-Ju, *'We Are Cho Kuk': Protesters Condemn 'Political' Prosecution*, KOREA HERALD (Oct. 5, 2019), <http://www.koreaherald.com/view.php?ud=20191005000097>.

643 Yoo Cheong-mo, *Gallup Poll Shows 57 Percent Oppose Cho Kuk as Justice Minister*, YONHAP NEWS AGENCY (Aug. 30, 2019), <https://en.yna.co.kr/view/AEN20190830005500315>. See also Erik Moberand, *Prosecution Reform and the Politics of Faking Democracy in South Korea*, 53 CRITICAL ASIAN STUD. 259 (2020) (defending Cho Kuk and arguing that protests against him appropriated the symbols of democracy to undermine prosecution reform).

644 *Id.* See also Yonhap, *Moon Orders Prosecution to Draw up Its Own Reform Plan*, KOREA HERALD (Sept. 30, 2019), <https://www.koreaherald.com/view.php?ud=20190930000651>.

645 Yonhap, *supra* note 645.

646 Kim Arin, *Top Prosecutor Reaffirms Commitment to Reform*, KOREA HERALD (Sept. 29, 2019), <http://www.koreaherald.com/view.php?ud=20190929000225>.

647 Lee Minji, *Justice Minister Cho Kuk Offers to Resign*, YONHAP NEWS AGENCY (Oct. 14, 2019), <https://en.yna.co.kr/view/AEN20191014004754315>.

648 Kim Kwang-tae, *S. Korea Replaces Senior Prosecutors Leading Probes into High-Profile Scandals*, YONHAP NEWS AGENCY (Jan. 8, 2020), <https://en.yna.co.kr/view/AEN20200108009951320>.

649 Kim Han-Joo, *Justice Minister Ratchets up Reform Pressure on Prosecution*, YONHAP NEWS AGENCY (Jan. 10, 2020), <https://en.yna.co.kr/view/AEN20200110010400320>.

changes as anything but political interference into investigations, especially the Cho inquiry.

As these major prosecutorial independence scandals were unfolding, in December 2019 President Moon finally pushed structural prosecution reforms through the legislature, after prosecutors had jailed many of his enemies. The National Assembly passed legislation establishing a new institution to undertake politically connected prosecutions. It also granted police some independent investigatory powers. Both of these belated reforms are considered in the final article in this series.⁶⁵⁰

IV. CONCLUSION: THE CONTINENTAL MODEL, HISTORICAL PATTERNS, AND THE “PARADOX OF DEMOCRATIZATION”

The history outlined above has recounted a sample of the Korean prosecution’s political independence failings. More could be said, especially about politicized prosecutions and non-prosecutions involving large businesses.⁶⁵¹ South Korea’s history challenges us to understand how a Continental-style, bureaucratically organized prosecutorial organization can produce such results. Although the German and Japanese-derived legal framework of the Prosecutors’ Office theoretically establishes judicial oversight of significant investigative actions, internal hierarchical supervision of charging decisions and personnel assignments, and a degree of separation from the executive, these safeguards have not prevented political influences on law enforcement. Korea’s story suggests theoretical lessons on prosecutorial independence in two areas: comparative law and democracy.

From the perspective of comparative law, Korean history demonstrates how the Continental style of prosecutorial organization and independence can make prosecutors vulnerable to the executive. By tradition, the Continental European prosecutor has been a powerful quasi-judicial promoter of executive interests. In Mirjan Damaška’s apt interpretation,

[T]his official is regarded as a watchdog of state policy, engaged in the collaborative effort of state officialdom to discover and to implement a correct decision; he does not appear as a party on the same plane parallel with a citizen implicated in the legal process. . . . Consider the example of a state prosecutor who is part of a hierarchical organization. Where he is incorporated into a pyramid of state authority, he clearly cannot be fitted with shoes of approximately the same size as those worn by the defendant: even the lowest prosecutor is linked to the center of state power. To place him, as a

650 For details on the establishment of the “Corruption Investigation Office for High-Ranking Officials” and the “adjustment of investigative powers,” see sections II.C and III.C in Chisholm, *Prosecutorial Independence Regained?*, *supra* note 53.

651 For a lengthy account in English, see Lee, *supra* note 509, at 73-142.

party, in a position parallel to that occupied by the criminal defendant would violate the hierarchical sense of proper order.⁶⁵²

This image of the prosecutor radically differs from its Anglo-American counterpart, who is considered not an equal to the judge but to the defendant in court—a vestige of the private prosecutorial past. Common law public prosecutors are also less hierarchically organized and less centralized. An American comparativist in the 1930s contrasted the American and European machinery of justice, finding that locally accountable US prosecutors suffer local failures, while nationally organized Continental prosecutors experience failures on a national level. He lamented American prosecutors' vulnerability to corruption by organized crime and disputes with mayors.⁶⁵³ He also remarked on how Continental prosecutors' organization imperils their independence:

Obviously, on the other hand, the unified and strong administrative control creates the possibility for those in control to manipulate the machinery of criminal justice for personal and party ends. . . . The use of the criminal law as an instrument to destroy opponents of the political group in power, is also a familiar evil in Europe. The Reichstag fire trial is but a recent and striking example of this type of political manipulation of justice. Less flagrant instances were known in Pre-Hitler Germany, in France and in Italy.⁶⁵⁴

It must also be noted that since the democratization of Europe, the executive may not always be entirely dominant in politics or over the prosecution. Other sources of political power exist, such as legislators, economic interests, public opinion, the media, or prosecutors themselves. It is therefore possible for political factors besides the executive to politically influence prosecutors. Prosecutorial autonomy is considered below, in light of the question of why prosecutors sometimes defy the executive.

Turning to the theoretical lessons for prosecutors' role in democracy, it must first be grasped that the historical patterns of prosecutorial politicization differed between the authoritarian and democratic eras. Under authoritarianism, Korea's Prosecutors' Office was a loyal agent of the executive, attacking presidential enemies and protecting friends. But notably, authoritarian-era Korean prosecutors often worked as junior partners to the secret police, acting to create the appearance of procedural regularity to fabricated plots or torture schemes carried out to suppress threats to the executive. This illustrates the tendency for prosecutors in an undemocratic government to be relatively weak, as the job of policing

652 DAMAŠKA, *supra* note 55, at 184.

653 Ploscowe, *supra* note 181, at 326-27.

654 *Id.* at 316-17.

politics is primarily undertaken by the secret police, the military,⁶⁵⁵ and or even ordinary police administering extra-judicial punishments.

After democratization, the role of the secret police tends to decline, and they can no longer take the lead on attacking the executive's enemies. As their position falls, the prosecution rises in importance. Prosecutors' capacity to conduct procedurally legitimate assaults on the executive's enemies, and similarly protect its friends, raises the value of prosecutors to politicians. Democracies' respect for law and procedure drives this tendency. Opposition figures may only be attacked legally, not extra-legally. Thus, prosecutorial authority is "claimed or curbed by more powerful political forces."⁶⁵⁶ Certain Korean scholars have written about their surprise in discovering that the prosecution was relatively less important in the dictatorial period and intervened more in politics under democracy. As they put it: "In the era of democratic governance, the Prosecutors' Office rapidly grew up and came to display its enormous strength as a power elite. It was the paradox of democratization."⁶⁵⁷ Indeed, the idea that democracy's prosecutors replace autocracy's secret police is expressly argued in contemporary Korean political discourse.⁶⁵⁸

Korea's Continental legal progenitors, Germany and Japan, experienced these same patterns of prosecutorial politicization. Prussia's liberalization after its 1848 revolution involved a transfer of authority from suppressive police to prosecutors,⁶⁵⁹ and its prosecutorial model was adopted for all of unified Germany after 1879.⁶⁶⁰ In that age of partial democratization, the German Empire's executive used prosecutors to attack its political enemies, most notably the Social Democratic Party.⁶⁶¹ In Japan, prosecutorial independence was affected by the political shifts from Meiji oligarchy to Taishō Democracy to Shōwa authoritarianism and wartime totalitarianism. Democratization in the early 1900s elevated

655 For example, during Taiwan's period of authoritarian rule, under Generalissimo Chiang Kai-Shek, the government relied on martial law, military police, and military courts. Tzung-Mou Wu, *The Long Century of Taiwan's Westernized Justice System: Historicizing the Dynamics of Her Judicial Reform of 1999*, in JUDICIAL REFORM IN TAIWAN: DEMOCRATIZATION AND THE DIFFUSION OF LAW 38, 56-57 (Neil Chisholm ed., 2020).

656 Hannes B. Mosler, *Democratic Quality and the Rule of Law in South Korea: The Role of Public Prosecution*, in THE QUALITY OF DEMOCRACY IN KOREA: THREE DECADES AFTER DEMOCRATIZATION 73, 108 (Hannes B. Mosler, Eun-Jeung Lee & Hak-Jae Kim eds., 2018).

657 KIM ET AL., *supra* note 2, at 111.

658 The director of the editorial board at a left-leaning newspaper recently opined that, "[t]he role the military and the KCIA played during military dictatorships is being played by inspection agencies like the prosecution and the Board of Audit and Inspection." The latter agency audits the accounts of government bodies. The author's complaint refers to the current government investigating the previous one in order to uncover scandals and possibly initiate prosecutions. Kwon Tae-Ho, *The Real Reasons for Yoon's Far-Right Lurch*, HANKYOREH (July 4, 2023), https://english.hani.co.kr/arti/english_edition/english_editorials/1098699.html.

659 See *supra* note 130 and accompanying text.

660 See *supra* notes 98 & 108 and accompanying text.

661 See *supra* note 177 and accompanying text.

the prosecution's power. In an era of relatively weak executives influenced by behind-the-scenes statesmen, the prosecution under Hiranuma Kiichirō was able to seize a leading role in politics.⁶⁶² But as Japan's democracy decayed into authoritarianism, the prosecution came into conflict with assertive secret police, who served on the frontlines of repression—the paradox of democratization operating in reverse.⁶⁶³

In simple terms, this account's theoretical lesson is that the more authoritarian a government, the less it values legality, the less it politically depends upon prosecutors, and the more it relies on secret police or other extra-legal means. The more democratic a government, the more politics values law, the more powerful its prosecutors in politics, and the more alluring prosecutorial politicization becomes. These theoretical propositions have implications. For one, we may expect harsh dictatorships to have powerful prosecutors, but, in reality, they do not; their prosecutors are likelier to be tools of security services. For example, as aforementioned, during Germany's Nazi period, prosecutors were subordinated to the Gestapo and their future abolition was contemplated,⁶⁶⁴ as if there would be no need for prosecutors where law is irrelevant to governance.⁶⁶⁵

Another implication is that the status of prosecutors may be an overlooked indicator of how democratic or despotic a government is and the degree to which it values legality. Democracy and authoritarianism are not Manichean opposites but exist on a spectrum. Extreme dictatorships, such as Stalinist Russia, Nazi Germany, or North Korea, may be distinguished from less despotic countries that present a façade of democracy or legality, such as modern Russia or China. On one end of the spectrum, in extreme dictatorships, prosecutors' role in political affairs may be minimal. In the middle of the spectrum, in moderately harsh authoritarian governments, prosecutors may assist secret police to create the pretense of procedural regularity.⁶⁶⁶ The further on the spectrum towards legality

662 See *supra* note 236 & 242 and accompanying text.

663 See *supra* notes 286-295 and accompanying text.

664 Marsh, *supra* note 180, at 867.

665 The Nazis governed with "utter contempt for law." THOMAS CHILDERS, *THE THIRD REICH: A HISTORY OF NAZI GERMANY* 235 (2017). Hitler "hated the law, the courts, and the lawyers" and fell out with his handpicked legal theorist and "law führer" (*Reichrechtsführer*), Dr. Hans Frank. R.C. VAN CAENEGEM, *EUROPEAN LAW IN THE PAST AND THE FUTURE* 101, 118-20 (2002).

666 Consider China, for example. In 2014 a senior Korean prosecutor received a delegation of Chinese prosecutors. She reported discovering that Chinese police are more powerful than their prosecutorial counterparts, despite the latter representing legality and procedural propriety:

'I was told that prosecutors in China are not allowed to investigate criminal cases as powerful Chinese public security officials, who are equivalent to police in Korea, dominate the legal process, including investigations. Chinese delegates appeared to be impressed by the Korean prosecution system as prosecutors here are allowed to investigate cases and are in a position to supervise the police.' Her remarks were

and democracy, the more prosecutors handle political cases according to law and the more they act with independence. As rule-through-force gives way to rule-through-law, secret police decline while prosecutors rise.

This theory implies a question. If, as democratization progresses or democratic competition intensifies, prosecutors rise in political prominence, does the increasing temptation to abuse prosecutorial powers necessarily mean that that temptation will be followed? The temptation may be overwhelming if the prosecution is a centralized, bureaucratic apparatus at the executive's right hand. Taking steps to mitigate this temptation is vital for establishing prosecutorial independence. Insights that assist in considering this question are presented in the next article, which details the inner workings of Korea's prosecutorial organization.

Another striking feature of Korea's prosecution under democracy is that the Prosecutors' Office's loyalty to the executive has been high, but imperfect. Both in the early post-liberation years of the Republic and after democratization, prosecutors sometimes defied the president. Why? If Continental-style prosecutors are the executive's subservient agents, why do they sometimes challenge it? Several non-exclusive explanations are possible.

First, because of turnover in democratic executives, prosecutors may transfer their loyalty to an anticipated future president or party before an election. For example, this seemed to occur late in the presidencies of Kim Young-Sam and Park Geun-Hye, as prosecutors attacked them or their allies. Second, prosecutors may pay attention to public opinion. They may desire to satisfy popular sentiments, defend their institutional prestige, or even win popular acclaim as individuals or for the Prosecutors' Office as an organization. Third, prosecutors may want to carve out a degree of autonomous institutional authority within the political order. This seems to have partly motivated Hiranuma Kiichirō's prosecution of politicians during the early twentieth century flowering of democracy in Japan. Prosecutors may seek to expand their institutional clout by felling powerful political and business elites, sometimes against the wishes of the executive. Fourth, a weak executive may lose control of the prosecution, allowing prosecutors to set their own political agenda. This may have happened late in several Korean presidencies and in Japan's Hiranuma-era corruption prosecutions. Fifth, it cannot be excluded that prosecutors may choose to pursue their view of justice and prosecutorial

construed as meaning that no entity can control public security officials in China and this provided a loophole for abuses of power.

Kang Hyun-kyung, *'K-Prosecution' Attracts Global Attention*, KOREA TIMES (Dec. 31, 2014), https://www.koreatimes.co.kr/www/nation/2024/06/719_170855.html.

ethics, even if this means defying political pressure from the executive or elsewhere.

To return to the larger question, why is the Korean Prosecutors' Office so vulnerable to political manipulation? History and legal doctrinal analysis can only explain things so far. An empirical, interview-based examination can yield deeper insights into the internal dynamics of prosecutorial politicization. The second article in this series takes up this task.⁶⁶⁷

⁶⁶⁷ Chisholm, *Prosecutorial Independence Lost*, *supra* note 38.