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PROSECUTORIAL INDEPENDENCE REGAINED? MIXING  
THE CONTINENTAL AND ANGLO-AMERICAN STYLES IN  
SOUTH KOREA

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ABSTRACT

*After prosecutorial independence is lost, how should it be regained? Should a Continental European-style jurisdiction consider importing Anglo-American prosecutorial ideas? This Article analyzes recent changes to and reform debates surrounding South Korea's Prosecutors' Office, which follows the Continental European style of*

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This article is based significantly on interviews with Korean prosecutors, ex-prosecutors, judges, lawyers, scholars, and activists. Virtually all interviewees requested or agreed to speak on the condition of anonymity. Several had serious concerns about prosecutorial retribution for criticism. Therefore all interviewee sources for this article are left anonymous. All quotations and factual assertions in this article without footnotes come from interviewees. Notes from interviews are on file with the author.

Regarding translations, the author translated all texts from the original Korean. Citations to statutes and regulations contain links to official government English translations where available, and these slightly differ from the author's translations. The author takes responsibility for any errors. This article uses Revised Romanization, except where a name is well-known or self-chosen in English.

Late in the Article's editorial process, in December 2024, a major controversy erupted over President Yoon Seok-Yeol's imposition of martial law, his impeachment, removal from office, and investigation by prosecutors and the CIO. These events cannot be discussed here, but they have, to date, not significantly affected this Article's analysis.

*prosecutorial organization. It argues that Korea's case reveals the stark theoretical dichotomy between the Continental and Anglo-American styles of prosecutorial independence: each aims to secure independence primarily through either bureaucratic or democratic accountability.*

*Korea's prosecution reform discourse is sophisticated, featuring a clash of well-informed comparative legal visions. Radical reformers, disenchanted with their German-Japanese derived paradigm, argue for adopting Anglo-American institutions that check-and-balance, decentralize, and democratize the prosecution. Reformers propose mechanisms such as prosecutor elections, special prosecutor systems, strengthened police autonomy, and grand juries, despite knowing their drawbacks. Traditionalists advocate for maintaining or improving existing Continental-style mechanisms of centralization, meritocracy, regulation, and hierarchical supervision. The reforms that were ultimately enacted are explained, including the creation of the Corruption Investigation Office for High-Ranking Officials (CIO), quasi-grand jury institutions, and the expansion of police powers. This Article's account of how prosecutorial independence is endeavored to be regained highlights the differences between the styles of prosecutorial independence and demonstrates how these styles can mix.*

*This Article is the last in a series of three articles on how Korea's struggle for prosecutorial independence offers a window into the nature of the concept. The first Article explains the historical and doctrinal foundations of Korea's system and the second is an interview-based study of how prosecutorial independence is lost.*

**Keywords:** Prosecutorial independence, prosecutorial politicization, prosecution reform, law and democratization, democratic consolidation, South Korean prosecutors, Continental European prosecutors, comparative criminal procedure, comparative prosecution, Corruption Investigation Office for High-Ranking Officials, CIO, Korean police reform, Korean grand jury, Korean special prosecutors

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“Wishing that there would be no political controversies connected with the Prosecutors’ Office’s actions, given its personnel system and decision-making structure, is like wishing that in a fireplace smoke would not follow fire, is it not?”<sup>1</sup> — Lee Sun-Hyeok, journalist and writer

“The political Prosecutors’ Office must definitely be judged and liquidated. We must do all that we can for the judiciary’s democratization and political neutrality.”<sup>2</sup> — Moon Jae-In, President of South Korea (2017-22), speaking as legislator in 2015

# I. INTRODUCTION: ANGLO-AMERICAN SOLUTIONS TO CONTINENTAL PROBLEMS?

How can prosecutorial independence be recovered? Would it be advisable for a bureaucratically organized, Continental-style prosecution system to adopt the mechanisms of democratic accountability found in Anglo-American jurisdictions? Or would such

<sup>1</sup> LEE SUN-HYEOK, GEOMSANIMUI SOKSAJEONG [THE INSIDE STORY OF MR. PROSECUTOR] 136 (2011).

<sup>2</sup> Press Release, Deobureo minjudang [Democratic Party of Korea], Je77cha uiweonchonghoe modubareon [77th National Assembly Member General Meeting Statement] (Aug. 21, 2015), <https://old.theminjoo.kr/board/view/briefing/128579?page=1193> [<https://perma.cc/PL9W-MMUJ>].

reforms import ideas that are too alien and problematic in their home jurisdictions?<sup>3</sup> This Article examines how South Korea (hereinafter Korea) has dealt with these questions. It argues that Korea's case reveals that there exists a stark theoretical dichotomy between the Continental and Anglo-American styles of prosecutorial independence.

The first Article in this series explained the history and doctrinal structure of Korea's prosecution system.<sup>4</sup> It demonstrated that Korea's doctrinal framework for prosecutorial independence is derived from Continental Europe and that it has failed to stop the politicization of prosecutors—i.e., the use of prosecutors to attack enemies and protect friends. Furthermore, the Article revealed the “paradox of democratization:” that controversies over prosecutorial independence tend to intensify after a transition from authoritarianism to democracy, as democracy's respect for procedural legality induces prosecutors to take over the secret police's previously dominant role in regulating politics. The second Article relied on findings from interviews to elucidate the practical details of how prosecutorial independence is lost.<sup>5</sup> It argued that Korea's European-style prosecution's bureaucratic centralization, while intending to facilitate rational management, actually enables its politicization. Managerial control over the most senior prosecutors equals control over the whole system. In this way prosecutorial independence may be threatened externally, by executive commands, or internally, by bureaucratic superiors. The present Article builds on the arguments advanced in the previous two and explains how Koreans consider reforming and restructuring their Prosecutors' Office to establish prosecutorial independence. It also interprets recent reforms, many undertaken late in Moon Jae-In's presidency.

The Korean public views prosecution reform as a top political issue. In 2017, during a presidential impeachment that implicated

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<sup>3</sup> For theoretical discussion on how legal transplants can become “legal irritants,” see Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

<sup>4</sup> See generally Neil Chisholm, *Prosecutorial Independence in Comparative Perspective: Continental Legal Tradition and the “Paradox of Democratization” in South Korea*, 23 WASH. U. GLOB. STUD. L. REV. (forthcoming 2024) [hereinafter Chisholm, *Prosecutorial Independence in Comparative Perspective*].

<sup>5</sup> 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*].

prosecutors,<sup>6</sup> 90% of respondents to a poll said that prosecution reform was necessary.<sup>7</sup> A May 2020 opinion poll—taken during the COVID-19 pandemic—found that prosecution reform was the second highest priority for the country after health and welfare.<sup>8</sup> By 2023, a poll showed that 87% of the public described prosecutors as “authoritarian,” 85% said they are power-driven, and only 33% described them as just.<sup>9</sup> Moreover, the repeated prosecutions of presidents and presidential candidates have made many believe that “if we intend to end the vicious cycle in which the Prosecutor’s Office is used as a sword of ‘political revenge’ every time the government changes, systemic control measures are necessary.”<sup>10</sup>

Yet there have been fears that no Korean president would want to de-politicize the Prosecutors’ Office because it would mean voluntarily surrendering a valuable political weapon. As one ex-prosecutor put it, “[presidents] don’t have any reason to fix the system. They want the power. . . . Even a progressive president maybe wants to keep [the status quo].” When the author asked a professor whether significant prosecutorial reforms could be passed just as judicial reform had been,<sup>11</sup> the response was: “The government could be

<sup>6</sup> Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.7; *see also* Mark Turner, Seung-Ho Kwon & Michael O’Donnell, *Making Integrity Institutions Work in South Korea: The Role of People Power in the Impeachment of President Park in 2016*, 58 ASIAN SURV. 898, 910 (2018).

<sup>7</sup> “*Geomchal gaehyeok, haeya handa*” 90% [“Prosecutors’ Office Reform Must Be Done” 90%], REALMETER (Jan. 6, 2017), <http://www.realmeter.net/검찰-개혁-해야-한다-90/?ckattempt=1> [<https://perma.cc/J6HK-83JX>].

<sup>8</sup> Kim Soo-yeon, *Moon Gov’t Performs Best in Health, Welfare Sector over Past 3 Years: Poll*, YONHAP NEWS AGENCY (May 11, 2020), <https://en.yna.co.kr/view/AEN20200511002351315> [<https://perma.cc/FW7E-NZ9N>].

<sup>9</sup> Lee Oh-Seong, *Yoon Seok-Yeol jeongbuneun ‘geomchalgonghwaguk’inga, simindeurege mureobwatda [daegungmin geomchal yeoronjosa] [Is the Yoon Seok-Yeol Government a ‘Prosecutors’ Office Republic,’ Citizens Asked [Nationwide Prosecutors’ Office Opinion Poll]]*, SISAIN (Nov. 8, 2023, 6:43 AM), <https://www.sisain.co.kr/news/articleView.html?idxno=51486> [<https://perma.cc/9AK3-PDAJ>].

<sup>10</sup> This quotation describes President Moon’s thinking but represents an attitude often expressed in interviews for this study. Kim Yun Na-Yeong, *Munjaeinui mot da irun kkum, geomchalgaehyeok [Moon Jae-In’s Dream That Could Not Come True, Prosecution Reform]*, KYUNGHYANG SHINMUN (Sep. 13, 2019), <https://www.khan.co.kr/politics/politics-general/article/201909131508001> [<https://perma.cc/2Q8R-N8ZD>].

<sup>11</sup> President Roh Moo-Hyun pushed through judicial reforms in the mid-2000s. His prosecutorial reform attempts failed. Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.5 (on President Roh’s push for judicial and prosecutorial reforms); *see also* MOON JAE-IN & KIM IN-HOE, MOON

generous and allow changes to the courts, but the Prosecutors' Office is the most important tool for controlling the country."<sup>12</sup> For its part, the Prosecutors' Office has been highly reluctant to lose its powers to reform.<sup>13</sup>

As Koreans, ordinary and expert, have wrestled with the question of how to improve their prosecution system, they have created one of the world's most sophisticated prosecutorial independence discourses. Debates over reform have been marked by comparative legal analyses and a boldness in considering possible solutions. Because law in modern Korea has often originated from outside the country, there is little popular or sentimental attachment to domestic legal tradition. As such, participants in reform discussions are open to solutions from both inside Korea's Continental legal tradition and outside it, from Anglo-American systems.

Before examining the specifics of the reform discourse, it is necessary to first appreciate certain general contours of the debate. According to Korean jurists and activists, some of the potentially problematic aspects of Korean prosecutorial organization are widely accepted as necessary, including the existence of specialized departments to handle political cases, prosecutors' differentiation into elites and non-elites, and hierarchical control over lower-ranking prosecutors. Instead, most reform discussion focuses on how to create institutional checks on the Prosecutors' Office, reduce the system's centralization, and restrain improper hierarchical interference into prosecutorial decision-making. When President Moon, an ally of reformists in most instances, engaged in prosecution reform from 2020 to 2022, he primarily aimed at establishing such checks and decentralization.<sup>14</sup>

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JAE-IN, KIM IN-HOEUI GEOMCHAREUL SAENGGAKHANDA [MOON JAE-IN, KIM IN-HOE'S THINKING ABOUT THE PROSECUTORS' OFFICE] 114-15 (2011) (discussing Minister of Justice Kang Kum-Sil's reform plan). For details on how prosecutors successfully rebelled against reform, see *id.* at 108-13, 116-23.

<sup>12</sup> Although President Moon Jae-In pushed through reforms, he seemed to have delayed them until about halfway through his term, possibly to give his government time to use prosecutors politically. Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.8.

<sup>13</sup> See, e.g., MOON & KIM, *supra* note 11.

<sup>14</sup> The Moon administration's main reforms were setting up a second Prosecutors' Office, the Corruption Investigation Office for High-Ranking Officials (CIO) and giving prosecutors' investigative powers to police. Many civil society reformers supported the former but not the latter, as they distrusted the police. On the CIO reform, see *infra* Section II.C. On police reform, see *infra* Section III.C.

Additionally, most expert observers reject reforms that would enhance prosecutorial independence by strengthening institutional independence from the executive. Making the prosecutorial bureaucracy more autonomous or enhancing the Prosecutor General's security of tenure are widely seen as bad ideas because such reforms would empower the prosecution's leadership, allowing it to act on its own political inclinations. Even if it were perfectly free from executive control, the Prosecutors' Office could interfere in politics. As a judge explained, a fully independent Prosecutor General "could be very powerful, even more powerful than the president. He could arrest members of the ruling party. He could change the outcome of elections" and effectively pick presidents. Because of this widespread view, Korean reformists often prefer the term "prosecutorial neutrality" (*geomchal jungnipseong*, 검찰 중립성), toward political parties, rather than "independence."

This Article is based on interviews, prosecution reform writings, and analysis of recent legislation. It examines reforms that have been proposed to improve personnel policy, investigations, and charging decision-making in Korea's prosecution system. Some reform ideas aim to reinforce the prosecution's centralized, bureaucratic nature, while others seek to radically alter it through democratic or decentralizing measures. Several of the democratizing proposals are inspired by Anglo-American systems. This Article thus considers the many reform ideas in Korea from the perspectives of bureaucratic accountability, democratic accountability, and decentralization.

## II. PERSONNEL POLICY

The key independence problem with the Korean Prosecutors' Office's personnel policy has been that prosecutors' desire for promotion or fear of not receiving it makes them susceptible to pressures from prosecutorial leadership or the executive branch. A related concern is that the Prosecutors' Office's organizational culture causes lower-ranking prosecutors to defer excessively to the upper ranks.

### A. Bureaucratic Reform

Existing methods for selecting, training, and promoting prosecutors might be considered as establishing a meritocracy. As explained in greater detail elsewhere, Korean prosecutors have



traditionally been selected by examination, trained within the judiciary through internships or school, and promoted through a series of posts on the basis of merit and reputation.<sup>15</sup> But the promotion system also emphasizes seniority, which is based on the year in which a prosecutor graduated from the training program.<sup>16</sup> Each year's graduating class is promoted more-or-less in lockstep.<sup>17</sup> As one reformist argued regarding merit selection and lockstep promotion: "This kind of ranking system, maintains fairness and transparency in juristic personnel matters and plays an important role, but it also becomes the source of [negative] bureaucratization. . . ."<sup>18</sup> In other words, scrupulously meritocratic personnel management that also accounts for seniority can foster an excessively hierarchical culture. Such a stratified work environment can deprive lower-ranking prosecutors of independence by making it difficult to disagree with their superiors.<sup>19</sup>

<sup>15</sup> For a historical and doctrinal perspective on the system, see Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.A. The personnel system's contemporary operation is analyzed anthropologically and using interviews in Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Section II.

<sup>16</sup> The promotion system's seniority-based elements are explained in LEE, *supra* note 1, at 67-70.

<sup>17</sup> A commentator compared the prosecutorial hierarchy to those of the army and large companies:

However, the prosecution-style pyramid organization, when compared to the military and business, has a far more stiff form because it is a system that passes down its positions to the inferiors that graduated one year after [those presently holding them] . . . . Exceptionally, the Minister or Prosecutor General can assign someone to a special job without regard to the training institute graduation year, but such a case is exceedingly rare.

LEE, *supra* note 1, at 41.

<sup>18</sup> KIM DU-SIK, BULMYEORUI SINSEONGGAJOK: DAEHANMINGUK SABEOP PAEMILLIGA SANEUN BEOP [THE IMMORTAL HOLY FAMILY: THE WAY THE KOREAN JUDICIAL FAMILY LIVES] 234 (2012).

<sup>19</sup> A Korean newspaper discussed the role of job promotions in private firms from a cultural perspective. The writer's insights are applicable to the Prosecutors' Office as well:

The competition gets more intense if internal politics play a more critical role in promotion rather than performance. In this case, individuals do not need to take a risk and challenge big projects. It is best to manage their career by taking a stable project and

### 1. Improving Organizational Culture

President Roh Moo-Hyun attempted to fix this organizational culture. Although his more direct prosecutorial reforms failed to be implemented,<sup>20</sup> he tried to indirectly improve the prosecution (and judiciary) by reforming legal education. First, Roh sought to make jurists more broad-minded by introducing graduate-level law schools to replace the judicial examination as gateway to the legal professions.<sup>21</sup> Through the reform establishing law schools, newly qualified lawyers would be required to complete an undergraduate course in a non-law subject, undergo a more humanistic legal education, and pass a bar examination that was relatively easier than its predecessor.<sup>22</sup> The judicial examination was a fiercely competitive contest of memorization, a “meritocracy of memory” with a low pass rate.<sup>23</sup> Second, Roh wanted to undermine the “culture of graduation year” (*gisu munhwa*, 기수문화) by closing the Judicial Research and Training Institute (JRTI), the judiciary-run school for passers of the exam.<sup>24</sup> The term “culture of graduation year” refers to the seniority element in prosecutorial personnel policy, according to which career

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focusing on networking while staying on people’s good side. Under such circumstances, there is no place for creative thinking.

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Han Ae-Ran, *The Evolving Promotion System*, KOR. JOONGANG DAILY (Dec. 31, 2020, 7:42 PM), <https://koreajoongangdaily.joins.com/2020/12/31/englishStudy/bilingualNews/hierarchybased-positions/20201231194300412.html> [https://perma.cc/L7G8-9Z8M].

<sup>20</sup> See *supra* note 11.

<sup>21</sup> Jeong Hui-Wan, *Roseukul v. sabeobsiheom, dangsinui seontaegeun?* [*Law School v. Bar Exam, What Is Your Choice?*], KYUNGHYANG SHINMUN (Feb. 13, 2022, 9:46 AM), <https://m.khan.co.kr/national/national-general/article/202202130946001> [https://perma.cc/MMG3-5BQT].

<sup>22</sup> *Id.*

<sup>23</sup> JAMES M. WEST, *EDUCATION OF THE LEGAL PROFESSION IN KOREA* 18-20 (1991).

<sup>24</sup> Reformers criticized the existing personnel system as leading judges and prosecutors to “lack social experience” and become “bureaucratized.” KIM SEON-SU, *SABEOPGAEHYEOK RIPOTEU* [JUDICIAL REFORM REPORT] 349-51 (2008) [hereinafter JUDICIAL REFORM REPORT]. The Judicial Reform Committee, set up by President Roh, debated the issue and recommended abolishing personnel management based on the years judges and prosecutors graduated from the JRTI. *Id.* at 353-55. Although reformers focused mainly on judges, because prosecutors’ training took place alongside judges, in the JRTI, the reforms would affect prosecutors also.

progression depends on the year one graduated from the JRTI.<sup>25</sup> With legal training shifted to law schools and away from the judicial exam and JRTI, prosecutors would be hired from qualified lawyers, as is the case in the United States.<sup>26</sup> Roh's legal education reform thus aspired to improve the prosecution's bureaucratic culture by changing the character of its personnel intake.

According to interviewees, however, these hoped-for effects did not materialize. The Continental tendency towards intensive training for juristic personnel asserted itself.<sup>27</sup> Eventually, the prosecution, like the courts, opened its own training school for new hires, the Institute of Justice.<sup>28</sup> The "culture of graduation year" continued, although now it is based on the year one graduated from the new institution. Legal education reform thus failed to alter the prosecution's rigid bureaucratic culture,<sup>29</sup> which is likely encouraged by Korea's Confucian cultural background.<sup>30</sup>

<sup>25</sup> For an analysis of the Prosecutors' Office's "culture of graduation year" and how Yoon Seok-Yeol's 2019 appointment as Prosecutor General ran counter to it, see Kim Jeong-Pil, *23gi chongjang deungchange geomchal 'gisu munhwa' kyunyeol gasokhwa?* [*In a Year-23 Prosecutor General's Appearance, Is the Fracturing of the Prosecutors' Office's 'Culture of Graduation Year' Accelerating?*], HANKYOREH (June 29, 2019, 1:16 PM), [https://www.hani.co.kr/arti/society/society\\_general/899817.html](https://www.hani.co.kr/arti/society/society_general/899817.html) [<https://perma.cc/TF97-8W3K>]. An anonymous prosecutor in senior management (working at the Supreme Prosecutors' Office) told the newspaper: "Doing personnel by graduation year is just a way of organizational management. But most prosecutors consider this an unchangeable truth. If there is no thought of searching widely for talent, which is bound up in the graduation years, then personnel choices are quite narrow." He went on to defend the system as establishing fairness and preventing the emergence or worsening of cliquishness in personnel policy. *Id.* But reflecting the hopes of some, an anonymous deputy chief prosecutor (*chajang geomsa*, 차장검사) said that, "Going forward, the Prosecutors' Office's culture of graduation year will be broken gradually. Within the culture of graduation year, the personnel system will be reorganized focusing on work ability. It must become this way." *Id.* There are no signs that this has yet occurred.

<sup>26</sup> This reform idea has been known as the "unification of jurists" (*beopjo ilweonhwa*, 법조일원화). Its general meaning is that judges and prosecutors ought to be appointed from lawyers. Such a reform would entail the decline of the "culture of graduation year" by lessening its relevance as a marker for bureaucratic seniority. JUDICIAL REFORM REPORT, *supra* note 24, at 351-57 (2008).

<sup>27</sup> MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 32-33 (1986).

<sup>28</sup> See generally *Yeonsuweon sogae* [*Introduction to The Institute*], INST. OF JUST., <https://www.ioj.go.kr/repository/uploadfiles/common/board/src/IrtiKor.PDF> [<https://perma.cc/T66B-YZRY>] (last visited Feb. 4, 2024).

<sup>29</sup> For a sample of ongoing debate over this bureaucratic culture, see *supra* note 25.

<sup>30</sup> Doh Chull Shin has found that Confucianism's emphasis on deference to authority and hierarchical social norms persist. See generally Doh Chull Shin,

## 2. *Making Promotion Fairer and Less Driven by Relationships and Ambition*

The larger problem, according to interviewees, is the promotion system. Because prosecutors are eager to receive promotions to desirable posts, they seek to please their superiors and the executive. Direct political instructions are not even necessary, interviewees say, because prosecutors read between the lines to discern and gratify their superiors' intentions.<sup>31</sup> One bureaucratic reform solution would be to make the promotion process more meritocratic and less dependent on reputation and connections.<sup>32</sup> Yet this idea is hardly proposed in reform discourse, and interviewees suggested it was impossible. This is likely because the promotion process is already putatively based on personnel evaluations, and it would be difficult to entirely eliminate reputation and connections from consideration. Also, the Minister of Justice decides promotions, and it is difficult to conceive of another office or organization that could be entrusted with this task without creating a new political influence problem.<sup>33</sup>

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*President Park Geun-hye and the Deconsolidation of Liberal Democracy in South Korea: Exploring its Cultural Roots* (U.C. Irvine Ctr. for the Study of Democracy Working Papers, 2017), <https://escholarship.org/uc/item/1t68c47v> [<https://perma.cc/E9XZ-6EJP>]. Moreover, the introduction of law schools with American-style pedagogy has not altered the Confucian values of their students. Richard Wu & JaeWon 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 (2022).

<sup>31</sup> A Korean expression often used in this context is *nunchireul boda* (눈치를 보다), literally, to read someone's countenance. It means to tactfully figure out what another person desires without asking.

<sup>32</sup> For analysis of how the promotion system works, see Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Section II.

<sup>33</sup> Geomchalcheongbeop [Prosecutors' Office Act] art. 34 (S. Kor.) [hereinafter POA (2022)], <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=242095> [<https://perma.cc/7QZY-V52L>], translated in Korean Legislation Research Institute's online database, [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=60725&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60725&lang=ENG) [<https://perma.cc/GW3D-PH49>]. This provision states that "[a] prosecutor's appointment and assignment is made by the President, at the recommendation of the Minister of Justice. In the case of assignments, the Minister of Justice listens to the Prosecutor General's opinion and recommends a prosecutor's assignment." *Id.* According to interviewees, the reality is that the President ratifies the Minister of Justice's selections, meaning that the Minister determines most prosecutors' promotions. The President typically only gets involved in certain high-ranking positions, such as those around the level of Prosecutor General.

One idea that has been floated is to allow some prosecutors to opt into a career track for “provincial prosecutors” (*hyanggeom*, 향검).<sup>34</sup> Such prosecutors would remain in their chosen provincial area during their careers, instead of pursuing the normal career path in which most prefer to work in or near the capital.<sup>35</sup> However, the proposal has been criticized as conducive to corruption because it would allow prosecutors to develop strong relationships in a region, creating dangerous temptations to improperly use their powers.<sup>36</sup> This perennial concern is the reason why prosecutors rotate to a new post every one to two years.<sup>37</sup>

Another personnel reform idea is to abolish the office of “chief prosecutor” (*geomsajang*, 검사장).<sup>38</sup> The goal of this reform would be to get rid of the privileges and benefits holders of this position enjoy<sup>39</sup> and reduce the power and prestige of a problematic echelon of executive management.<sup>40</sup> However, the reality is that even if this office were formally abolished, a similar set of executives would necessarily exist and operate under different titles. Therefore, this reform could only be symbolic.

<sup>34</sup> Kang Han, ‘*Geomsa insajedo gaehyeogane geomchal ‘sulleong’* [Prosecutors’ Office ‘Commotion’ over ‘Prosecutors’ Personnel System Reform Proposals], BEOMNYUL SINMUN (May 21, 2020, 8:50 AM), <https://m.lawtimes.co.kr/Content/Article?serial=161626> [<https://perma.cc/HDJ5-LVLJ>].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> This idea was proposed during Moon Jae-In’s presidency by the “Judicial Affairs and Prosecutors’ Office Reform Committee.” Jeong Dae-Yeon, *Beommubu-geomchal sanha wiweonhoe ‘hanmoksori’ “geomsajang jikgeup pyeji-chukso. . . charyang deung teukhye pyeji”* [Committee Affiliated with Ministry of Justice & Prosecutors’ Office ‘with One Voice’ “Abolish & Reduce the Chief Prosecutor Job Level. . . Abolish Benefits Such as Cars, Etc.”], KYUNGHYANG SHINMUN (Apr. 5, 2018, 11:44 AM), <https://m.khan.co.kr/national/court-law/article/201804051144001> [<https://perma.cc/X7AH-T88J>]. However, the suggestion also arose fifteen years earlier during Roh Moo-Hyun’s presidency. Lee Jin-Seok, *Beommubu, geomsajang jikgeup pyeji chujin* [Ministry of Justice, Pushing for Abolition of the Chief Prosecutor Job Level], CHOSUN ILBO (Nov. 4, 2003, 6:24 PM), [https://www.chosun.com/site/data/html\\_dir/2003/11/04/2003110470425.html](https://www.chosun.com/site/data/html_dir/2003/11/04/2003110470425.html) [<https://perma.cc/Z3B9-GA4N>].

<sup>39</sup> In 2018, the Ministry of Justice announced that it would be ending the custom of treating chief prosecutors as vice ministers. The order included ending the provision of ministerial cars and drivers for chief prosecutors. Park Mi-Yeong, *Geomsajang ‘chagwangeupyeu’ pyeji* [Abolition of Chief Prosecutor ‘Vice-Minister Respectful Treatment’], BEOMNYUL SINMUN (May 16, 2018, 1:31 PM), <https://www.lawtimes.co.kr/news/143120> [<https://perma.cc/A42X-W47W>].

<sup>40</sup> Jeong, *supra* note 38.

*B. Democratic and Decentralizing Reform*

Reforms that aim to make prosecutors accountable to democratic processes could give elected officials or the public a say on personnel management. If bureaucratic meritocracy and hierarchical supervision have failed to prevent prosecutorial politicization, might democratic reform be worth trying? And if centralized management of the prosecution has facilitated politicization, perhaps decentralization is necessary?

*1. Decentralization: Legislative Oversight, Dispersing Power, and Creating Separate Hierarchies*

A minor democratic reform arrived in 2009 during President Lee Myung-Bak's term. The Prosecutors' Office Act was amended to stipulate that the president's nominee for Prosecutor General "shall undergo a personnel hearing at the National Assembly."<sup>41</sup> This modest change did not require the Prosecutor General to be confirmed by a vote, but it enabled the legislative branch to scrutinize the appointee. This reform, by a president who often used the prosecution as a political weapon, has not reduced politicization, although it has enhanced transparency by requiring the Prosecutor General nominee to answer questions from legislators.<sup>42</sup> But even if the Prosecutor General's appointment required legislative assent, such a mild reform might not make much of a difference with regards to politicization.

Reformists discuss decentralizing the prosecution system in a few different senses. In one sense, they argue that decentralization is necessary to reduce politically-charged commands<sup>43</sup> from

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<sup>41</sup> Geomchalcheongbeop [Prosecutors' Office Act], amended by Act No. 10858, July 18, 2011, art. 34 para. 2 (S. Kor.), <https://www.law.go.kr/lsInfoP.do?lsiSeq=97024> [<https://perma.cc/EV37-NL DL>].

<sup>42</sup> On President Lee Myung-Bak's political use of prosecutors, see generally Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.6. For discussion of his successors' politicization of the Prosecutors' Office, see generally *id.* at Section III.C.7-8.

<sup>43</sup> According to the "principle of prosecutorial unification," senior prosecutors can give mandatory orders to their inferiors. For example, the Prosecutors' Office Act states: "The Prosecutor General handles the work of the Supreme Prosecutors' Office, deals with all work of the Prosecutors' Office, and commands and supervises the officers of the Prosecutors' Office." POA (2022), *supra* note 33, art. 12 para. 2. Lee Sun-Hyeok, journalist and observer of Korean prosecutors, remarked on this rule:

prosecutorial executives (such as *geomsajang*-level prosecutors) and the Prosecutor General.<sup>44</sup> In another sense, decentralization can mean transferring prosecutorial functions to other institutions, breaking the Prosecutors' Office's monopoly on investigations and charging decisions.<sup>45</sup> Arguments for decentralization can also involve personnel management, especially the promotion system. For example, one professor suggested in an interview that the prosecution's nationwide organization ought to be split into numerous provincial hierarchies and a separate national-level hierarchy, like the federal and state prosecutorial structures in Germany.<sup>46</sup> Under such a system, bureaucratic promotion could be at least partially decentralized, depending on the degree to which provincial hierarchies could determine or influence promotions. A senior researcher interviewee at the reformist civil society group, People's Solidarity for Participatory Democracy (PSPD, 참여연대) also endorsed this idea in an interview.

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It is a simple legal provision, however, based on this the Prosecutor General wields great power. First of all, in relation to important or politically sensitive cases, the Prosecutor General can give various directions. Normally, there are many instances in which political cases become problems, and internally there are many abuse of authority problems as well. This is because, naturally, since great power is granted to one individual, the Prosecutor General wields absolute power.

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LEE, *supra* note 1, at 135. For Lee's other detailed criticisms of the centralization of prosecutorial authority, see *infra* notes 183 & 184 and accompanying text. On the principle of prosecutorial unification, see *infra* note 135 and accompanying text.

<sup>44</sup> KIM HUI-SU, SEO BO-HAK, O CHANG-IK & HA TAE-HUN, GEOMCHALGONGHWAGUK, TAEHANMINGUK [PROSECUTORS' OFFICE REPUBLIC, REPUBLIC OF KOREA] 256-60 (2011) [hereinafter KIM ET AL., PROSECUTORS' OFFICE REPUBLIC]. This pro-reform book advocates for decentralization of the prosecution. The authors write: "Centralized power is bound to produce its own variety of problems. Thus decentralizing the internal power of the prosecutorial organization will be a core theme of Prosecutors' Office reform." *Id.* at 256. The authors go on to argue that "political considerations" in investigations are a reason that corruption prosecutions have had a relatively higher acquittal rate (around 10%) compared to ordinary crimes (about .31%). *Id.* at 259.

<sup>45</sup> *Id.* at 260-61. The reformist authors conclude their discussion on the need for decentralization by advocating that the Prosecutors' Office be divided into two organizations, one which only investigates ("similar to the U.S.-style FBI") and another that only prosecutes. *Id.* at 261.

<sup>46</sup> For a brief explanation of Germany's state and federal prosecution systems' differing responsibilities, see Shawn Marie Boyne, *Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases*, 67 WASH. & LEE L. REV. 1287, 1304-05 (2010).

## 2. Elections for Top Prosecutors

A more radical approach would combine decentralization with democracy. Some reformers argue that elections should be held for executive-level “chief prosecutors” that lead major offices. People’s Solidarity for Participatory Democracy (PSPD)—a network of activists, scholars and concerned citizens—has become a notable proponent of this idea. In 2016, one of its policy papers recommended the election system for six reasons: (1) to “obtain neutrality to and autonomy from [political] power”; (2) for “vertical decentralization of the centralized prosecution’s authority”; (3) to “renovate the Prosecutors’ Office through mutual checks and monitoring” (which would come from electoral competition); (4) “to prevent abuse of personnel power by setting a standard for evaluating prosecutors”; (5) to “hold prosecutors accountable for abuse of prosecutorial authority”; and (6) to strengthen democratic accountability.<sup>47</sup>

PSPD’s plan calls for elections for the heads of the eighteen provincial-level prosecution offices.<sup>48</sup> Candidates would be non-partisan and could serve a term of four years, for a maximum of three terms.<sup>49</sup> They would be required to have ten years of experience as judges, prosecutors, lawyers, or law professors.<sup>50</sup> Under the plan, elected chief prosecutors could partly influence the bureaucratic promotion process.<sup>51</sup> Their immediate hierarchical inferiors, deputy chief prosecutors, would be chosen after consultations between chief prosecutors and the Prosecutor General.<sup>52</sup>

A reformist professor who has advocated for elections explained in an interview that he wanted the system to be “like the U.S., where prosecutorial power is spread over fifty states and then city district attorneys, creating hundreds of local centers of power.” He contrasted

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<sup>47</sup> KIM HUI-SOON, CHAMYEOYEONDAEGA JEANHANEUN GEOMCHALGAEHYEOK I: JIBANGGEOMCHALCHEONG GEOMSAJANG JUMINJIKSEONJE [PEOPLE’S SOLIDARITY FOR PARTICIPATORY DEMOCRACY (PSPD)’S PROPOSED PROSECUTORS’ OFFICE REFORM I: DIRECT ELECTIONS FOR PROVINCIAL PROSECUTION OFFICE CHIEF PROSECUTORS] 13-14 (2016) [hereinafter KIM, PROPOSED PROSECUTORS’ OFFICE REFORM I].

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* Allowing non-prosecutors into executive management alone would be a revolutionary reform.

<sup>51</sup> *Id.* at 10.

<sup>52</sup> *Id.*



this with Korea's "monolithic prosecutorial power," which he went on to criticize:

I think they [the Prosecutors' Office] have built a persistent culture that is not consistent with a developed democracy. Under that culture, protection of the president becomes one of the most important operating principles. And also stamping out leftists is another. Why is that? . . . . The Prosecutors' Office is completely bureaucratized by promotion in lockstep. That's why I'm looking at its persistent culture with fear and awe. Somehow the Prosecutors' Office knows how to select or promote people who implement its operating principles, even though there is no textbook that indoctrinates them. But in the end, the chief prosecutor top dogs invariably come out on that side of politics—not even "conservative" which has a libertarian side, but a kind of authoritarianism.

The professor added that, "What we really need is reform from without. Add someone other than the president to hold prosecutors accountable, and I don't see anyone besides the electorate."

But even as scholars and activists have argued for prosecutorial elections, they have understood the limitations of elections. In an interview, a senior researcher at PSPD stated that he and his colleagues were aware of American criticisms of prosecutor elections, but that Korean reformers were desperate to change the current system. They were prepared to accept the negative consequences of such reforms, reasoning that they could not be worse than the status quo in Korea. PSPD's policy paper on prosecutorial elections frankly listed potential problems with holding elections: elections might politicize prosecutors more than before; candidates might ally themselves with local politicians or businesses, especially to finance their campaigns; and disruption to the central management of the prosecution system could produce

law enforcement disparities from region to region.<sup>53</sup> PSPD honestly considered these objections, but its view of the urgency of reform and its faith in democracy prevailed over doubts about prosecutor elections. Democracy could be trusted to overcome chief prosecutors' populism because ultimately the people would control the prosecution, a PSDP-affiliated professor argued in the press.<sup>54</sup>

Korea's recent democratization experience makes prosecutorial elections attractive to activists and scholars. Many reformist professors and lawyer-activists participated in the democracy movement, and after the transition they continued to agitate for reforms.<sup>55</sup> PSPD was founded by a former democracy activist and lawyer, Park Won-Soon.<sup>56</sup> Left-leaning reformists of this generation often consider democratization to be incomplete until it is extended

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<sup>53</sup> KIM, PROPOSED PROSECUTORS' OFFICE REFORM I, *supra* note 47, at 15-16.

<sup>54</sup> Ha Tae-Hun & Lee Yun-Jae, (*Nonjaeng*) *Geomsajang jikseonje, eotteoke bol geosinga?* [(Dispute) How about Chief Prosecutor Local Direct Elections?], HANKYOREH (Feb. 23, 2012, 7:17 PM), <http://www.hani.co.kr/arti/opinion/argument/520514.html> [<https://perma.cc/FC47-PB6F>].

<sup>55</sup> For example, the organization "Lawyers for a Democratic Society" (*Minbyeon*, 민변) started under authoritarianism as an "underground" network of human rights lawyers. After democratization, it shifted its focus to other areas, including environmental law, women's rights, and consumer protection. Patricia Goedde, *The Making of Public Interest Law in South Korea via the Institutional Discourses of Minbyeon, PSPD and Gonggam*, in *LAW AND SOCIETY IN KOREA* 131, 132-34 (Hyunah Yang ed., 2013).

<sup>56</sup> Patricia Goedde, *From Dissidents to Institution Builders: The Transformation of Public Interest Lawyers in South Korea*, 4 *E. ASIA L. REV.* 63, 78 (2009). For information on Park's activism under authoritarianism, see *Park Won-soon*, BERGGRUEN INST., <https://web.archive.org/web/20190504145617/https://www.berggruen.org/people/park-won-soon/> [<https://perma.cc/A89K-QYS2>] (last visited Nov. 5, 2024).

into other areas, such as the economy,<sup>57</sup> the judiciary,<sup>58</sup> and even the prosecution. For example, one proponent of prosecutorial elections states that such elections would be the natural next step toward realizing popular sovereignty in government.<sup>59</sup> Democratization has thus been a central concept in Korean legal reformist thinking.

President Moon Jae-In did not push for prosecutorial elections.<sup>60</sup> This inaction may reflect concerns among reformists of negative side-effects of elections, such as populism, or President Moon may have decided that he did not want to surrender control over the prosecution. Such elections would also be vigorously resisted by prosecutors, according to interviewees. One ex-prosecutor loyal to the Prosecutors' Office explained that he believed the current bureaucratic promotion system was "not ideal" but that chief prosecutor elections would produce the same poor results as elections for provincial-level education bureaucracy chiefs. Voicing a common concern, he said that those elections were a "waste of time, money, brought no

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<sup>57</sup> Some argue that democratization of the economy means more closely regulating large businesses. See, e.g., Seong Han-Yong, *Gyeongjeminjuhwa jeolhoui gihoereul jabara* [Seize the Golden Opportunity for Economic Democratization], HANKYOREH (Sept. 7, 2020, 3:13 PM), <http://www.hani.co.kr/arti/opinion/column/961077.html> [https://perma.cc/B4DX-LDG7]. Others suggest that economic democratization involves building a stronger welfare state. See, e.g., Kwon Geon-Bo, *Gyeongjeminjuhwa bokjiui gongbeopjeok gichowa gwaje* [The Public Law Foundations and Theme of Economic Democratization and Social Welfare], 41 GONGBEOBYEONGU [PUB. L. RSCH.] 61 (2012) (S. Kor.).

<sup>58</sup> 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, 9 (Neil Chisholm ed., 2020).

<sup>59</sup> KIM IN-HOE, MUNJENEUN GEOMCHALIDA [THE PROBLEM IS THE PROSECUTION] 207-08 (2017) [hereinafter KIM, THE PROBLEM IS THE PROSECUTION]. In particular, Kim argues that "[r]egarding the operation of the Prosecutors' Office and courts, in order to apply popular sovereignty, first, the public must directly participate in the Prosecutors' Office's and courts' composition; second, the public must directly participate in the Prosecutors' Office's and courts' administration process . . ." *Id.* at 207. Additionally, it is noteworthy that the book's cover declares in bold red letters: "Without prosecutorial reform, there is no democracy." *Id.*

<sup>60</sup> Late in President Moon's term, activists were concerned that he had not seriously reformed the prosecution and called for the prosecutor election system. [Toronhoe] geomsajang jikseonje, jugweonjae geomchal gweollyeok dollyeojuneun geomchalgaehyeok [Discussion Event] Chief Prosecutor Direct Election System, Prosecutorial Reform Which Returns Prosecutors' Office Power to the Sovereign], CHAMYEOYEONDAE SABEOPGAMSISENTEO [PEOPLE'S SOLIDARITY FOR PARTICIPATORY DEMOCRACY JUD. MONITORING CTR.] (Aug. 24, 2021), <https://www.peoplepower21.org/judiciary/1811959> [https://perma.cc/BNK7-6YAN].

improvement in quality, and politicized education.” In fact, in 2022 a candidate standing in a superintendent election told a newspaper that “it is the most vulgar form of election with all kinds of foul play.”<sup>61</sup>

### 3. *Legislative Branch Prosecutors: Depending on Other “Centers of Power”*

A different reform idea that would decentralize the prosecution and bring a measure of democratic accountability is the “permanent special prosecutor system” (*sangseol teukbyeolgeomsa jedo*, 상설 특별검사 제도).<sup>62</sup> This plan would create a permanent special prosecutor’s office under the legislature’s control. When scandals arise, a certain number of legislators—less than a majority in the National Assembly—would be able to make a formal accusation that would trigger an investigation by the permanent special prosecutor. In terms of personnel policy, the new office’s separation from the Prosecutors’ Office would establish not only independence from the latter’s hierarchical orders but also would ensure that its prosecutors could not be punished for their work through the promotion system. According to a reformist professor, the system is beneficial because it places some prosecutors under other “centers of power,” establishing a check on the executive-dominated Prosecutors’ Office. Objections on the grounds of separation of powers—namely, that the National Assembly has no right to manage prosecutors—would be irrelevant because “legislatures around the world do more than make law.”<sup>63</sup> Nonetheless, this professor did not support the idea because “it’s just too small.” An office of between five and ten independent prosecutors could not truly check the much larger Prosecutors’ Office hierarchy, he argued.

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<sup>61</sup> Korea’s election system for superintendents is the subject of much controversy and discontent. *The Mess of Education Superintendent Races*, KOR. JOONGANG DAILY (May 13, 2022, 10:31 AM), <https://koreajoongangdaily.joins.com/2022/05/13/opinion/editorials/The-race-for-education-superintendent-positions/20220513103143445.html> [<https://perma.cc/58FD-F3CQ>].

<sup>62</sup> See generally Kim In-Hoe, *Sangseol teukbyeolgeomsaje doip beomnyuran siron* [A Study on the Introduction of the Permanent Independent Counsel Bill], 16 BEOBHAKYEONGU [LEGAL RSCH.] 339 (2013) (S. Kor.) (discussing the benefits of the institution but viewing it as only a part of needed reforms).

<sup>63</sup> Legal innovations in Korea are often legitimated by comparisons with leading foreign systems. Neil Chisholm, *American Law in Korea: A Study of Legal Diffusion*, 273-80 (Feb. 16, 2011) (D.Phil. thesis, University of Oxford) (on file with author).

*C. Reform Adopted: “The Corruption Investigation Office for High-Ranking Officials”*

An idea similar to the permanent special prosecutor system gained greater support among reformers: the “Corruption Investigation Office for High-Ranking Officials” (CIO) (*Gowigongjikja beomjoe susacheo*, 고위공직자범죄수사처).<sup>64</sup> PSPD wrote a blueprint for this reform in 2017.<sup>65</sup> With President Moon’s support,<sup>66</sup> a version of this idea was passed into law in 2020 and amended in 2022 and 2025.<sup>67</sup> The CIO concept combines the principle of decentralization with a more bureaucratic type of accountability than prosecutorial elections or a legislator-controlled special prosecution system. Decentralization can be seen in how the CIO represents a second prosecution. Bureaucratic accountability is evident from the CIO’s hierarchical operation, as described below.<sup>68</sup> The CIO builds upon the permanent special prosecutor proposal in that

<sup>64</sup> For an explanation of the CIO’s creation and analysis of its legislative framework, see Gwendolyn Domning, *Challenging the Power of the Prosecution? The First Phase of the Establishment of the Corruption Investigation Office for High-ranking Officials (Kowigongjikchabömjoesusach’ō) in the Republic of Korea*, 54 VERFASSUNG UND RECHT IN ÜBERSEE [LAW AND POLITICS IN AFRICA, ASIA, AND LATIN AMERICA] 279, 296 (2021) (Ger.).

<sup>65</sup> See generally KIM HUI-SUN, CHAMYEOYEONDAEGA JEANHANEUN GEOMCHALGAEHYEOK III: GOWIGONGJIKJABIRISUSACHEO – NUNCHIBOGI · BWAJUGI · SEONGYEOK EOBNEUN DONGNIPJEOK SUSAGIGU SEOLCHI [PSPD’S PROPOSED PROSECUTION REFORM III: CORRUPTION INVESTIGATION OFFICE FOR HIGH-RANKING OFFICIALS: ESTABLISHING AN INDEPENDENT INVESTIGATIVE BODY WITHOUT READING THE COUNTENANCE, LETTING PEOPLE OFF, OR SACRED GROUND] (2017). In the title of this report, the term “sacred ground” refers to prosecutors’ customary refusal to investigate wrongdoing in sensitive places, such as the Presidential Office or the Prosecutors’ Office itself. For “reading the countenance,” see *supra* text accompanying note 31.

<sup>66</sup> Stressing his longstanding support, President Moon said in 2020: “I promised [to launch] the CIO not only during the last election, but also in the 2012 election.” Lee Wan, *Moon Emphasizes CIO as Necessary Check Against “Omnipotent” Authority of Prosecutors*, HANKYOREH (Dec. 16, 2020, 6:23 PM), [https://english.hani.co.kr/arti/english\\_edition/e\\_national/974547.html](https://english.hani.co.kr/arti/english_edition/e_national/974547.html) [<https://perma.cc/QHA3-JPYP>].

<sup>67</sup> *Gowigongjikjabeomjoesusacheo seolchi mit unyeongge gwanhan beomnyul* [Act on the Establishment and Operations of the Corruption Investigation Office for High-Ranking Officials] (S. Kor.) [hereinafter CIO Act (2025)], <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=268893> [<https://perma.cc/S9JF-G5SR>].

<sup>68</sup> For example, the CIO’s staff, including prosecutors, are required to obey the CIO’s Chief Officer. *Id.* art. 17 para. 1, art. 20 para. 2. See also *infra* note 221 and accompanying text (explaining how the CIO’s hierarchical command structure mirrors the principle of prosecutorial unification).

it is larger, staffed by twenty-five prosecutors and forty investigator assistants.<sup>69</sup>

The key purpose of the CIO is its jurisdiction over certain individuals of public importance that have often been protected by the Prosecutors' Office. According to Article 2 of the CIO Act, the CIO can investigate and prosecute crimes involving the following offices: the president, National Assembly members, Supreme Court justices, Constitutional Court members, the Prime Minister and his staff, Presidential Office staff, various senior civil servants, city mayors, prosecutors, judges, police, and general-level military officers.<sup>70</sup> Furthermore, the CIO can target these officials, whether they are currently serving or retired, as well as their family members.<sup>71</sup>

Exclusivity of jurisdiction is another key feature of the CIO. Article 24 of the CIO Act states that if another investigative agency discovers corruption, it must report the case to the CIO immediately.<sup>72</sup> The CIO can then decide to take the case away from the other investigators.<sup>73</sup> In real terms, this provision means that the CIO can deprive the Prosecutors' Office of jurisdiction over high-profile corruption cases. And to establish a degree of mutual accountability, the Prosecutors' Office and CIO can prosecute each other's employees for corruption.<sup>74</sup>

Details of the CIO's personnel policy are as follows. To appoint the CIO's head, a committee must nominate two people from among judges, lawyers, or prosecutors with at least fifteen years of experience, and the President chooses one for a three-year non-renewable term.<sup>75</sup> This "Recommendation Committee" is appointed by the National Assembly Speaker.<sup>76</sup> It is composed of seven members: the Minister of Justice, the Director of the National Court Administration (NCA, which is the Supreme Court office that oversees the judicial bureaucracy<sup>77</sup>), the president of the Korean Bar

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<sup>69</sup> CIO Act (2025), *supra* note 67, art. 8 para. 2, art. 10 para. 2.

<sup>70</sup> *Id.* art. 2 para. 1.

<sup>71</sup> *Id.* art. 2 paras. 1-3, art. 23.

<sup>72</sup> *Id.* art. 24 para. 2.

<sup>73</sup> *Id.* art. 24 para. 3.

<sup>74</sup> *Id.* art. 25.

<sup>75</sup> CIO Act (2025), *supra* note 67, art. 5.

<sup>76</sup> *Id.* art. 6 para. 4.

<sup>77</sup> For further information on the NCA, see 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. COMPAR. L. 893, 914-16, 923-24 (2014).

Association (KBA), two persons named by the parliamentary negotiating body of parties affiliated with the president, and two persons named by the parliamentary negotiating body of parties not affiliated with the president.<sup>78</sup>

Interpreting the CIO's personnel policy, it is likely that most appointees to the Recommendation Committee would be allied with the president and would thus propose nominees favorable to the president's political interests. At least three Committee members would favor the president: the Minister of Justice and the two partisan allies.<sup>79</sup> The opposition would control the two non-presidential party nominees. Two members remain: the KBA president and the head of the NCA. The KBA selects its own president,<sup>80</sup> so there is no guarantee that the KBA's president would support the executive. The NCA's Director is likely to be a presidential ally because this officer is appointed by the Chief Justice of the Supreme Court,<sup>81</sup> and most presidents have the opportunity to appoint a Chief Justice.<sup>82</sup>

<sup>78</sup> CIO Act (2025), *supra* note 67, art. 6 para. 4.

<sup>79</sup> *Id.*

<sup>80</sup> Licensed lawyers nationwide vote to choose the KBA's president. Chun Sung-woo, *We Chul-Whan Elected Bar Association President*, KOR. HERALD (Jan. 22, 2013, 6:50 PM), <http://www.koreaherald.com/view.php?ud=20130122000826> [<https://perma.cc/85PK-L469>].

<sup>81</sup> Beopweonjojikbeop [Court Organization Act] art. 68 (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=265769> [<https://perma.cc/QLC9-QRNN>], translated in Korean Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=599&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=599&lang=ENG) [<https://perma.cc/JYH8-JSSD>].

<sup>82</sup> A confluence of factors creates this likelihood. First, Korean presidents hold office for only one term of five years. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 70 (S. Kor.), translated in Korean Legislation Research Institute's online database, [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=1&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=1&lang=ENG) [<https://perma.cc/VA6P-LNKX>]. Second, each Chief Justice of the Supreme Court is appointed for a fixed, non-renewable term of six years. The Chief Justice is also required to retire upon reaching the age of seventy. Woo-young Rhee, *Judicial Appointment in the Republic of Korea from Democracy Perspectives*, 9 J. KOREAN L. 53, 61 (2009). Because the president's and Chief Justice's terms are similar in length, each president is likely to face a vacancy for the Chief Justice position. Indeed, every Korean president to date has appointed a Chief Justice, except Park Geun-Hye (2013-17), who was removed from office by impeachment in 2017. The periods of service for former Supreme Court Chief Justices show that every president except Park has appointed a Chief Justice. *Former Chief Justices*, SUP. CT. OF KOR., [https://eng.scourt.go.kr/eng/supreme/chief/chief\\_former.jsp](https://eng.scourt.go.kr/eng/supreme/chief/chief_former.jsp) [<https://perma.cc/VE86-92YZ>] (last visited Oct. 18, 2024).

Regardless of this general analysis, when the CIO opened, the KBA President was a supporter<sup>83</sup> of President Moon Jae-In and was the fourth or fifth pro-government vote on the inaugural Recommendation Committee.<sup>84</sup> The right-wing opposition in the minority when the CIO Act passed vociferously attacked the CIO.<sup>85</sup> One party filed a complaint with the Constitutional Court and boycotted the nomination process for Committee members, frustrating the CIO's launch.<sup>86</sup> The Constitutional Court dismissed the party's complaint and allowed the CIO's opening to proceed.<sup>87</sup> The President and the ruling party later amended the CIO Act to counter the opposition's failure to nominate members to the Recommendation Committee.<sup>88</sup> Article 6 was changed to say that if any parliamentary negotiating body failed to propose two committee members, they would be replaced with the head of the Korean Law Professors Association and the head of the Law School Deans Association.<sup>89</sup>

<sup>83</sup> KBA President Lee Chan-Hee publicly defended several of President Moon's prosecutorial policies, including his controversial deployment of prosecutors against judges and former Supreme Court Chief Justice Yang Seung-Tae. Cho Kang-Soo, *Bar Association President Decries Courts' Elitism*, KOR. JOONGANG DAILY (Apr. 19, 2019, 6:42 PM), <https://koreajoongangdaily.joins.com/2019/04/19/people/Bar-association-president-decries-courts-elitism/3062086.html> [<https://perma.cc/R8N6-45D6>].

<sup>84</sup> Shim Kyu-Seok, *Process Begins to Select Head of New Anticorruption Agency*, KOR. JOONGANG DAILY (Nov. 9, 2020, 7:14 PM), <https://koreajoongangdaily.joins.com/2020/11/09/national/politics/CIO-candidates-Korean-Bar-Association/20201109191300408.html> [<https://perma.cc/K4Y8-Y8DK>].

<sup>85</sup> The main opposition party accused the governing party of having "railroaded the worst bill in history." *Parliament Passes Corruption Probe Unit Bill amid Opposition Lawmakers' Protest*, KOR. HERALD (Dec. 30, 2019, 7:17 PM), <https://www.koreaherald.com/view.php?ud=20191230000785> [<https://perma.cc/3KN5-BSTM>].

<sup>86</sup> Park Boram, *Process to Launch Corruption Investigation Office Poised to Spark Another Bipartisan Spat*, YONHAP NEWS AGENCY (July 6, 2020, 4:56 PM), <https://en.yna.co.kr/view/AEN20200706006100315> [<https://perma.cc/9BPJ-LP6N>].

<sup>87</sup> Bae Ji-hyun, *Constitutional Court Rules CIO Act Is Not Unconstitutional*, HANKYOREH (Jan. 29, 2021, 6:20 PM), [https://english.hani.co.kr/arti/english\\_edition/e\\_national/981054.html](https://english.hani.co.kr/arti/english_edition/e_national/981054.html) [<https://perma.cc/DB4W-87HM>].

<sup>88</sup> Lee Ji-Hye, *[Gukhoe hyeonjang]'Gongsucheobeop gaejeongan' bonhoeui tonggwa... yeonnae chulbeom gasihwa* [*On-the-scene at the National Assembly*] *'Amendment to the CIO Act Passed in Plenary Session... Launch Expected Within the Year'*, HANKYOREH (Dec. 10, 2020, 2:42 PM), <https://www.hani.co.kr/arti/politics/assembly/973638.html> [<https://perma.cc/UCP5-LZ8S>].

<sup>89</sup> CIO Act (2025), *supra* note 67, art. 6 para. 6.



As for the rest of the CIO's prosecutors, the CIO chief selects the deputy chief,<sup>90</sup> and the remaining twenty-three prosecutors are selected by a "Personnel Committee."<sup>91</sup> This Committee is comprised of seven members: the chief, the deputy chief, a member appointed by the chief, two persons named by the parliamentary negotiating body of parties affiliated with the president, and two persons named by the parliamentary negotiating body of parties not affiliated with the president.<sup>92</sup> Notably, no more than half of the CIO's prosecutors may be current or former members of the Prosecutors' Office,<sup>93</sup> a rule that clearly aims at limiting the influence of the old prosecution upon the new prosecution. These twenty-three prosecutors serve for three-year terms that may be renewed twice.<sup>94</sup>

### 1. *Evaluating the CIO*

The CIO's convoluted personnel policy system is meant to establish a second prosecutorial organization separate from the Prosecutors' Office. The CIO's independence, which the statute declares three times,<sup>95</sup> is theoretically secured by its chief's selection by an independent Recommendation Committee and its operational-level prosecutors being chosen by a Personnel Committee with some degree of political balance. These personnel measures appear to be intended to dilute the agency's allegiance to the executive. Nonetheless, there may be a significant danger of the CIO being dominated by presidential allies. Such a danger cannot be known for certain until more time passes and the institution builds a record that can be assessed.

As for the origins of the CIO, the first legislative proposal for a CIO-like organization appeared in 1996, although it contained differences with the system that was eventually passed into law.<sup>96</sup> The

<sup>90</sup> *Id.* art. 7 para. 1.

<sup>91</sup> *Id.* art. 8 para. 1.

<sup>92</sup> *Id.* art. 9 para. 3.

<sup>93</sup> *Id.* art. 8 para. 1.

<sup>94</sup> *Id.* art. 8 para. 3.

<sup>95</sup> CIO Act (2025), *supra* note 67, arts. 3, 6, 22.

<sup>96</sup> For example, according to the 1996 plan, the CIO would be staffed by Prosecutors' Office prosecutors. Yun Dong-Ho, *Gowigongjikjabirisusacheo sinseolui jeongdangseonggwa pilyoseong* [*The Justifiability and Necessity of Establishing a Corruption Investigation Office for High-Ranking Officials*], 85 HYEONGSA JEONGCHAEK YEONGU [KOREAN CRIMINOLOGICAL REV.] 65, 66-67 (2011) (S. Kor.).

1996 bill originated with PSPD and specifically with Park Won-Soon, a founder of the group and former democratization activist lawyer.<sup>97</sup> Over time, however, the leading promotor of the CIO concept became Cho Kuk, the PSPD-involved activist law professor who President Moon appointed as Senior Secretary for Civil Affairs.<sup>98</sup> According to interviewees, the CIO was loosely inspired by anti-corruption agencies in Hong Kong (the Independent Commission against Corruption) and Singapore (the Corrupt Practices Investigation Bureau). Unlike the Korean CIO, both agencies are mainly investigative, rather than prosecutorial, institutions.<sup>99</sup>

In the battle of ideas among reformists, the CIO likely surpassed the permanent special prosecutor system in attractiveness because of its larger size. Being a fully staffed bureaucracy rather than a small office would make the CIO an effective “check and balance” against the Prosecutors’ Office, a key goal of reformers. In an interview, a reformist professor stated that the CIO would “compete with the Prosecutors’ Office to prove efficacy to the people.” Essentially, reformers believe that having two prosecution offices vying with each other would encourage both agencies’ prosecutorial independence in political cases. Another pro-reform interviewee explained that the idea of improved performance through competition has become attractive because of Korea’s experience with apex courts. Since the

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<sup>97</sup> Lee Jeong-Kyu, *23nyeon jeon gongsucheo cheoeum jujanghan Pak Won-Soon “simjang teojil deusi gippeuda” [Park Won-Soon, Who First Pushed the CIO 23 Years Ago: “Rejoicing Like My Heart Will Explode”]*, HANKYOREH (Dec. 31, 2019, 2:43 PM), [http://www.hani.co.kr/arti/area/area\\_general/922690.html](http://www.hani.co.kr/arti/area/area_general/922690.html) [<https://perma.cc/KNR2-S2A6>].

<sup>98</sup> As soon as the CIO became a topic of conversation, Seoul Mayor Park Won-Soon said:

In 1998, I worked as PSPD’s Secretary General argued for establishing the CIO. Although Mayor Park had some role, Senior Secretary Cho Kuk appears to have a larger role. This is because in PSPD’s organization, the Judicial Monitoring Center came to be exclusively entrusted with the CIO [reform idea]. From 2000 to 2005, PSPD’s Judicial Monitoring Center’s Directorship and Vice-Directorship was held by Senior Secretary Cho Kuk.

Ha Ju-Hui, *Gongsucheobeop dwieneun Cho Kukui chamyeyeondaega itda [Behind the CIO Act Is Cho Kuk’s PSPD]*, JUGANJOSEON (May 15, 2019, 12:00 AM), <https://weekly.chosun.com/client/news/viiv.asp?nNewsNumb=002557100007&ctc=c=C03> [<https://perma.cc/KA2T-UWZ4>].

<sup>99</sup> Yun, *supra* note 96, at 70.

Constitutional Court's creation in 1988, it has rivaled the Supreme Court for institutional prestige by making bold decisions and acting where the Supreme Court has not.<sup>100</sup> Interviewees suggested that as the newer Court has challenged the older, the Supreme Court's jurisprudence has shifted, proving the success of this kind of judicial competition in Korean cultural context. Reformers hope that a similar beneficial rivalry will emerge between the CIO and the Prosecutors' Office.

According to interviewees, the CIO is widely regarded as having had little impact on politics. One professor blamed the CIO's inactivity on its cautious first chief and the fact that its staff lacks the expertise of the Prosecutors' Office. Indeed, the CIO's deputy chief admitted that the CIO has been "amateurish."<sup>101</sup> Recent news reports echo this criticism, with a January 2024 article remarking that "the CIO has come under skepticism for sluggish performance, with none of its three indictment cases resulting in a guilty sentence."<sup>102</sup> (One conviction was under appeal at the time of this writing<sup>103</sup> and therefore is not considered as finalized).<sup>104</sup> Another newspaper went further,

<sup>100</sup> See Seokmin Lee & Fabian Duessel, *Researching Korean Constitutional Law and the Constitutional Court of Korea*, 16 J. KOREAN L. 265, 269-71 (2016).

<sup>101</sup> *Shame on Kim the CIO Chief*, KOR. JOONGANG DAILY (Mar. 23, 2022, 7:59 PM), <https://koreajoongangdaily.joins.com/2022/03/23/opinion/editorials/Kim-Jinwook-CIO/20220323195944745.html> [<https://perma.cc/MH48-3TSW>].

<sup>102</sup> Park Boram, *(LEAD) Retirement of Head, Vice Head Leaves Leadership Vacuum at Anti-Corruption Probe Body*, YONHAP NEWS AGENCY (Jan. 28, 2024, 3:22 PM), <https://en.yna.co.kr/view/AEN20240128001651315> [<https://perma.cc/GHZ8-NH3T>].

<sup>103</sup> In Korea's Continental judicial system, a guilty verdict is not considered finalized until appeals have been exhausted. Thus, Korea's Constitutional Court rendered a favourable decision—postponing his impeachment proceedings—for a defendant prosecutor appealing a conviction obtained through a CIO prosecution, on the basis that his "criminal case is ongoing." Shim Sun-ah, *Constitutional Court to Halt Impeachment Trial of Senior Prosecutor*, YONHAP NEWS AGENCY (Apr. 3, 2024, 8:08 PM), <https://en.yna.co.kr/view/AEN20240403008400315> [<https://perma.cc/A87A-GK8C>]; see also *infra* note 104.

<sup>104</sup> Damaška's analysis of Continental European-style appeals is insightful:

The first important point to recognize is that the reviewing stage is conceived not as an extraordinary event but as a sequel to original adjudication to be expected in the normal run of events . . . . Thus, in contrast to the situation in [Anglo-American] systems, where the initial decision is presumptively final . . . until hierarchical supervision has been given the chance to run its course, the decision is not yet *res judicata*.

writing “[t]he CIO’s reputation has nose-dived.”<sup>105</sup> However, the institution is still new, and a fuller evaluation of its track record will be made in coming years.

### III. INVESTIGATIONS

Investigative processes can be manipulated for political purposes. Prosecutors may enlarge or narrow the scope of an investigation to protect the executive’s friends, punish its enemies, or uncover politically damaging information for future use—such as blackmail, indictments, or to leak to the press—at an opportune moment.<sup>106</sup> Judicial reforms have expanded judicial accountability for prosecutors but have not solved the problem.<sup>107</sup>

#### A. Bureaucratic Reform

It might be suggested that prosecutorial independence in investigations can be guaranteed through bureaucratic regulation of

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DAMAŠKA, *supra* note 27, at 48.

<sup>105</sup> The article noted that eleven out of the CIO’s original thirteen prosecutors quit, leaving only two working at the institution. Faulting the CIO’s first head as ineffective (particularly because of his background as a judge, not a prosecutor), the newspaper quoted former CIO prosecutors as saying its internal management system was dysfunctional, its prosecutors inexperienced, and the paper suggested that the CIO was politically biased against President Yoon Seok-Yeol and his right-leaning party. Park Hyeon-Jun & Lee Soo-Jung, *CIO Has Little to Show but Losses as First Chief Prosecutor Retires*, KOR. JOONGANG DAILY (Jan. 8, 2024, 7:25 PM), <https://koreajoongangdaily.joins.com/news/2024-01-08/national/politics/CIO-has-little-to-show-but-losses-as-first-chief-prosecutor-retires/1953312> [<https://perma.cc/VWD3-GVPA>].

<sup>106</sup> The Prosecutors’ Office’s “Special Investigations Department” has historically handled investigations with political implications. For discussion of its manipulation of investigations, see Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Section III.B. On the issue of prosecutors’ leaks to the press, such disclosures played a significant role in the investigation of former President Roh Moo-Hyun after he left office in 2008 and are viewed by many as having driven him to suicide. See Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.

<sup>107</sup> With regards to judicial reforms related to criminal procedure and reducing prosecutors’ powers, see Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C. See also Kuk Cho, *The Reformed Criminal Procedure of Post-Democratization South Korea*, in LITIGATION IN KOREA 58 (Kuk Cho ed., 2010). For example, a prosecutor’s decision to not file charges may now be appealed to judge for review. *Id.* at 74. Another major reform gave trial judges real power to assess the admissibility of the prosecutor’s interrogation records, which were previously difficult for defendants to contest. *Id.* at 82-84.

prosecutors' work. While criminal procedure lays down the most important principles, additional rules could regulate prosecutors' actions more closely, forcing them to follow rational procedures and behave fairly.

### 1. Rules and Regulations

In fact, extensive Ministry of Justice regulations and presidential decrees already govern prosecutors. There are numerous rules on mundane matters, such as prosecutors' preservation of records,<sup>108</sup> the seal for official documents,<sup>109</sup> prosecutors' courtroom robes,<sup>110</sup> their official oath,<sup>111</sup> and handling of property seized as evidence.<sup>112</sup> Other rules have regulated issues that are central to investigations, such as prosecutorial control over police,<sup>113</sup> the hierarchical relations among prosecutors,<sup>114</sup> and the system for reporting to superiors.<sup>115</sup> One

<sup>108</sup> Geomchal bojonsamu gyuchik [Prosecutors' Office Preservation of Work Regulations] (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=265295> [<https://perma.cc/HA2E-E32B>].

<sup>109</sup> Geomchalcheong gwanin gwalli gyuchik [Prosecutors' Office Seal Management Regulations] (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=267881> [<https://perma.cc/9BZR-WJ4K>].

<sup>110</sup> Geomsaui beopboge gwanhan gyuchik [Rules for the Prosecutor's Gown] (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=240197> [<https://perma.cc/2RBT-LZGT>].

<sup>111</sup> Geomsa seonseoe gwanhan gyujeong [Prosecutor Oath Related Regulations] (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=91924> [<https://perma.cc/VXW5-7BV7>].

<sup>112</sup> Geomchal apsumul samu gyuchik [Prosecutors' Office Seized Property Regulations] (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=262687> [<https://perma.cc/J4AT-9LMW>].

<sup>113</sup> Prosecutorial supervision of police was substantially abolished in 2020. *See infra* Section III.C. For the final version of the old rules governing prosecutors' control over police, see Geomsaui sabeopgyeongchalgwallye daehan susajihwi mit sabeopgyeongchalgwallye susajunchige gwanhan gyujeong [Prosecutors' Investigative Commands Regarding the Judicial Police and Investigative Standards Regarding the Judicial Police Related Regulations], *amended by* Presidential Decree No. 31089, Oct. 7, 2020 (S. Kor.), <https://www.law.go.kr/lsInfoP.do?lsiSeq=195538> [<https://perma.cc/8FYV-U8LM>].

<sup>114</sup> Geomchal geunmu gyuchik [Prosecutors' Office Service Regulations] (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=240199> [<https://perma.cc/YZ7V-MJFZ>].

<sup>115</sup> Geomchal bogosamu gyuchik [Prosecutors' Office Work Reporting Regulations] arts. 3, 4, 8 (S. Kor.), <https://www.law.go.kr/lsInfoP.do?lsiSeq=240201> [<https://perma.cc/RR5F-N3W5>].

lengthy regulation details how cases should be received, investigated, disposed of, and tried.<sup>116</sup>

At the statutory level, the Prosecutors' Office Act (POA (2022)) explicitly requires prosecutors to act with "political neutrality"<sup>117</sup> and forbids them from participating in political activities or seeking monetary gain.<sup>118</sup> This provision is reinforced by another statute, the Prosecutor Discipline Act (PDA),<sup>119</sup> which dates back to 1957.<sup>120</sup> Article 2 of the current version of the PDA states that prosecutors can be punished if they breach the POA (2022) by participating in political activities or seeking monetary gain.<sup>121</sup> The PDA also provides for discipline where prosecutors violate or are negligent in their duties<sup>122</sup> or, most broadly, "commit[] any act detrimental to his or her prestige or dignity as a prosecutor, regardless of whether it is related to his or her official duties."<sup>123</sup> Disciplinary measures include dismissal, suspension, salary reduction, or reprimand.<sup>124</sup>

Furthermore, the Prosecutor Code of Ethics has regulated Korean prosecutors since 1999.<sup>125</sup> The current version of the Code requires prosecutors to act with "political neutrality,"<sup>126</sup> "maintain

<sup>116</sup> Geomchal sageonsamu gyuchik [Prosecutors' Office Case Work Regulations] (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=258893> [<https://perma.cc/9PSN-HKFS>].

<sup>117</sup> POA (2022) *supra* note 33, art. 4 para. 3.

<sup>118</sup> *Id.* art. 43.

<sup>119</sup> Geomsa jinggyebeop [Prosecutor Discipline Act] (S. Kor.) [hereinafter PDA (2022)], <https://www.law.go.kr/lsInfoP.do?lsiSeq=238789> [<https://perma.cc/P4ET-GTMQ>], translated in Korean Legislation Research Institute's online database, [https://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=60146&lang=ENG](https://elaw.klri.re.kr/kor_service/lawView.do?hseq=60146&lang=ENG) [<https://perma.cc/GW3D-PH49>].

<sup>120</sup> For the original 1957 law, see Geomsa jinggyebeop [Prosecutor Discipline Act], amended by Act. No. 1153, Sept. 24, 1962 (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=56817> [<https://perma.cc/Y3SQ-VB3D>].

<sup>121</sup> PDA (2022), *supra* note 119, art. 2 para. 1. This provision expressly refers to Article 43 of the POA (2022). POA (2022), *supra* note 33, art. 43.

<sup>122</sup> PDA (2022), *supra* note 119, art. 2 para. 2.

<sup>123</sup> *Id.* art. 2 para. 3.

<sup>124</sup> *Id.* art. 3.

<sup>125</sup> Geomsa yulli gangnyeong [Prosecutor Code of Ethics], amended by Ministry of Justice Decree No. 581, Mar. 7, 2007 (S. Kor.), <https://law.go.kr/LSW/admRulLsInfoP.do?chrClsCd=&admRulSeq=2000000000875> [<https://perma.cc/8WLQ-UV37>].

<sup>126</sup> Geomsa yulli gangnyeong [Prosecutor Code of Ethics] art. 3 (S. Kor.) [hereinafter PCE (2021)], <https://law.go.kr/LSW/admRulLsInfoP.do?chrClsCd=&admRulSeq=2100000196659> [<https://perma.cc/9FMW-ZJYE>].

integrity,”<sup>127</sup> “ceaselessly strive for self-improvement,”<sup>128</sup> protect the rights of “suspects, defendants, victims, and other persons related to the case,”<sup>129</sup> apply the law reasonably and not abuse their power of indictment,<sup>130</sup> recuse themselves from cases with conflicts of interest,<sup>131</sup> cooperate with and supervise police reasonably,<sup>132</sup> and not leak investigative information to outside parties.<sup>133</sup>

The problem with these comprehensive regulations and statutory rules is that they have not prevented the politicization of investigations. The persistence of scandals proves that bureaucratic reforms have so far failed to secure investigational independence.<sup>134</sup>

## 2. Weakening the “Principle of Prosecutorial Unification”

Other rule changes have also been attempted, notably to the “principle of prosecutorial unification” (*geomsa dongilche ui weonchik*, 검사동일체의 원칙). According to this concept, the prosecution system is a unified and hierarchical organization in which subordinates follow their superiors’ instructions.<sup>135</sup> The principle has

<sup>127</sup> *Id.* art. 4.

<sup>128</sup> *Id.* art. 5. This striking provision reads: “Prosecutors face social phenomena that are changing, and they accumulate new knowledge, as the times demand, and deep insights, and in order to eliminate the insufficiency [of knowledge] in the execution of their duties, prosecutors [must] ceaselessly strive for self-improvement.” *Id.*

<sup>129</sup> *Id.* art. 6.

<sup>130</sup> *Id.* art. 7.

<sup>131</sup> PCE (2021), *supra* note 126, art. 9.

<sup>132</sup> *Id.* art. 13. The provision in the first paragraph of Article 13 specifying that prosecutors “must cooperate” with police is new to this latest version of the code of ethics. This obligation did not exist in the previous version of the code. *See* Geomsa yulli gangnyeong [Prosecutor Code of Ethics], amended by Ministry of Justice Directive No. 1336, Dec. 31, 2020, art. 13(S. Kor.), <https://law.go.kr/LSW/admRulLs.do?chrClsCd=&admRulSeq=2100000155230> [<https://perma.cc/6BBP-MVBZ>]. The appearance of the new requirement for prosecutors to cooperate with the police is likely because of the recent reform giving police independent powers of investigation. *See infra* Section III.C.

<sup>133</sup> PCE (2021), *supra* note 126, art. 22.

<sup>134</sup> *See* Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C (explaining prosecutorial independence scandals since Korea’s 1988 democratization).

<sup>135</sup> Cho, *supra* note 107, at 63. *See also supra* note 43 for discussion of how the principle establishes the Prosecutor General’s control over the entire prosecution system.

existed throughout the history of South Korean criminal procedure<sup>136</sup> and is derived from Japanese and German law.<sup>137</sup> Indeed, the principle arises from the Continental attitude that the machinery of justice ought to be bureaucratized and professionalized, which leads to the corollary that “the institution must be univocal so as not to be equivocal.”<sup>138</sup> The principle of prosecutorial unification has been criticized in Korea as enabling politicization.<sup>139</sup> A Japanese legal scholar has also critiqued the principle, writing that “the independence of prosecutors is merely nominal because, as a matter of fact, prosecutors are not allowed to independently exercise authority.”<sup>140</sup>

In 2004, during President Roh Moo-Hyun’s term, a revision to the POA deleted mention of the principle of prosecutorial unification from Article 7 of the Act.<sup>141</sup> The change was symbolic because while the phrase was removed, the spirit and mechanisms of hierarchical control remained. In fact, the language of the revised article retained the principle in all but name.<sup>142</sup> The amendment also inserted a new provision into Article 7 that allowed a prosecutor to “raise an objection” to a supervisor’s command, even though the command still had to be obeyed.<sup>143</sup> Although the new rule was weak, it was hoped

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<sup>136</sup> Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.A.

<sup>137</sup> *Id.* at Sections II.B.1 & II.C.1.

<sup>138</sup> DAMAŠKA, *supra* note 27, at 19.

<sup>139</sup> See Cho, *supra* note 107, at 63 (“In cases involving powerful politicians or high-ranking government officials, prosecutors in charge had to unwillingly quit their investigation, often facing pressure or persuasion from prosecutors in higher office, and through the Supreme Prosecutor’s Office, the ruling political party has kept a substantial influence on the prosecutors in charge of the cases. Consequently, public distrust of the prosecution has increased.”).

<sup>140</sup> DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 121-22 (2002).

<sup>141</sup> Cho, *supra* note 107, at 63.

<sup>142</sup> “Each prosecutor shall follow the direction and supervision of his or her superiors with respect to prosecutorial affairs.” POA (2022), *supra* note 33, art. 7 para. 1.

<sup>143</sup> The provision reads: “Any prosecutor may raise an objection, when he or she has different views on the legality or justification of the direction and supervision under paragraph (1) in connection with a specific case.” *Id.* art. 7 para. 2.



that it would “lessen this stringent superior-subordinate command relationship.”<sup>144</sup> This has not happened.<sup>145</sup>

### 3. *Restricting Prosecutorial Proximity to the Executive: Forbidding Prosecutors from Working in the Presidential Office*

As aforementioned, the Kim Young-Sam administration revised the POA in 1997 to attempt to ban prosecutors from working in the Presidential Office.<sup>146</sup> The new rule,<sup>147</sup> Article 44-2, was intended to prevent presidents from using prosecutors to informally intervene in prosecutorial business.<sup>148</sup> Later presidents have circumvented the rule by hiring recently retired prosecutors, some of whom would rejoin the Prosecutors’ Office afterwards. For example, over the course of their terms, President Roh employed eight former prosecutors and President Lee Myung-Bak retained twenty-two.<sup>149</sup> President Moon Jae-In tightened the rule in 2017 by adding that a full year must pass before an ex-prosecutor can work in the Presidential Secretariat.<sup>150</sup> Whether the new regulation will succeed remains to be seen. It is possible that future presidents will hire eligible ex-prosecutors. Regardless, it is also possible that non-prosecutors in the Presidential Office could meddle in prosecutorial affairs.

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<sup>144</sup> Dai-Kwon Choi, *Legal System: Korea, in* JUDICIAL SYSTEM TRANSFORMATION IN THE GLOBALIZING WORLD: KOREA AND JAPAN 3, 24 (Dai-Kwon Choi & Kahei Rokumoto eds., 2007).

<sup>145</sup> LEE, *supra* note 1, at 66-67 (commenting on the ineffectiveness of reforms to the principle of prosecutorial unification).

<sup>146</sup> 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, 95 (Hannes B. Mosler, Eun-Jeung Lee & Hak-Jae Kim eds., 2018).

<sup>147</sup> POA (2022), *supra* note 33, art. 44-2.

<sup>148</sup> According to interviewees, presidents have used prosecutors seconded to the Presidential Office to liaise with the Prosecutors’ Office. These prosecutors, usually expert and accomplished, know how to translate presidential wishes into prosecutorial activity. For example, they are believed to order investigations to either be vigorously pursued or halted, and they can influence decisions to lay charges or not. See Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Section III.C.

<sup>149</sup> Mosler, *supra* note 146, at 95.

<sup>150</sup> POA (2022), *supra* note 33, art. 44-2 para. 2.

4. *Reorganizing Departments: Mere Renaming or Beneficial  
"Rectification of Names?"*<sup>151</sup>

Another path for reform involves abolishing or reorganizing Prosecutors' Office departments. In 2013, President Park Geun-Hye closed the Central Investigation Department (CID), a division at the Supreme Prosecutors' Office (SPO) level,<sup>152</sup> against the wishes of the Prosecutor General.<sup>153</sup> The CID, which handled the highest-profile investigations, became synonymous with prosecutorial politicization, especially after it was widely perceived as having driven ex-President Roh Moo-Hyun to suicide.<sup>154</sup> However, special investigations departments, which the CID formerly supervised, continued to exist at the district-level prosecution offices nationwide after the CID was abolished.<sup>155</sup> This meant that other offices could perform the CID's tasks, but with reduced official centralization. Moreover, a few months after the CID's closure, the Prosecutors' Office recommended creating a new SPO-level office to take over most of the CID's functions,<sup>156</sup>

<sup>151</sup> The "rectification of names" (*jeongmyeong* / *zhèngmíng*, 正名) is a crucial concept in the Confucian philosophy that continues to influence Korean culture. Although some might dismiss nomenclature as unimportant symbolism, "[i]n the Confucian perspective, correct terminology and transparent language is of the utmost importance. Names and titles are powerful tools in this regard as they create clear role expectations." ROEL STERCKX, *WAYS OF HEAVEN: AN INTRODUCTION TO CHINESE THOUGHT* 146 (2019). Sterckx also writes: "For Confucius, the use of language is an important issue. He insists that it matters greatly how you speak and choose your words. To lead and persuade others, things should be correctly named. The theory is known as 'the rectification of names' (*zheng ming*)."<sup>Id.</sup> at 145. Renaming prosecution departments may therefore have more impact in a Korean cultural context than outside observers might believe. That said, one Korean interviewee dismissed such a renaming reform as ineffective.

<sup>152</sup> Lee Yul, Park Daehan & Kim Dongho, *Daegeom jungsubu daeche 'banbupaebu' hwakjeong... susagiheokgwan pyeji* [Confirmation of the Anti-Corruption Department Replacing the Supreme Prosecutors' Office CID... Investigative Planning Abolished], YONHAP NEWS AGENCY (Nov. 22, 2013, 6:00 PM) [hereinafter Lee et al., *Confirmation of the Anti-Corruption Department*], <https://www.yna.co.kr/view/AKR20131122166000004> [https://perma.cc/BM94-GY48].

<sup>153</sup> Prosecutor General Chae Dong-Wook floated an alternative idea of reducing prosecutorial politicization by expanding the scope of a type of independent prosecutor office, the "specially appointed prosecutor," which was designed to investigate prosecutors accused of corruption. For discussion of this office, see Park, *infra* note 203 and accompanying text.

<sup>154</sup> Hyang-Joo Lee, *Monopolizing Authority: The Construction of Presidential Power in South Korea*, 46 KOREAN STUD. 195, 211 (2022).

<sup>155</sup> Lee et al., *Confirmation of the Anti-Corruption Department*, *supra* note 152.

<sup>156</sup> *Id.*

and the Anti-Corruption Department (*banbupae bu*, 반부패부) was established.<sup>157</sup> Although the new office had less power to manage investigations, the CID's closure may be interpreted as a renaming exercise.

Similarly, in 2019, President Moon's government reorganized the Prosecutors' Office's departments. Two departments have often been criticized for political prosecutions: the "special investigations department" (*teukbyeol susa bu*, 특별수사부), which handled cases involving corruption and politicians, and the "public security department" (*gongan bu*, 공안부), which dealt with anti-communism, North Korean subversion, espionage, labor unions, demonstrations, elections, and terrorism.<sup>158</sup> Each of these departments is comprised of a network of individual departments within certain prosecution offices nationwide.<sup>159</sup> The special investigations and public security departments have been considered to be possibly the most prestigious segment of the Prosecutors' Office, where the elite top 20% of prosecutors work.<sup>160</sup>

Under President Moon, the special investigations departments were renamed "anti-corruption departments" (*banbupae susa bu*, 반부패수사부)<sup>161</sup> while the public security departments were retitled "public investigation departments" (*gonggong susa bu*, 공공수사부).<sup>162</sup> Figures from the political left have long demanded

<sup>157</sup> See Geomchalcheong samugigye gwanhan gyujeong [Prosecutors' Office Official Functions Regulations], amended by Presidential Decree No. 25569, Aug. 27, 2014, art. 4 para. 1, art. 6 para. 1 (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=146948> [<https://perma.cc/Y7P9-8RF8>].

<sup>158</sup> For detailed discussion of these institutions, see Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Section III.B. See also Park, *infra* note 162.

<sup>159</sup> Park, *infra* note 162.

<sup>160</sup> For an account of the Korean Prosecutors' Office's elite members and their career paths, see Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Section II.C.

<sup>161</sup> Kim Gye-Yeon, *Teuksubu yeoksa sokeuro... 'geoak cheokgyeol' naegeorotjiman 'jeongchi geomchal' omyeongdo* [Special Investigations Department Fades into History... Flew the Banner of 'Eradicating Great Evil' but Also Disgraced as 'Political Prosecution'], YONHAP NEWS AGENCY (Oct. 14, 2019, 11:23 AM), <https://www.yna.co.kr/view/AKR20191014070400004> [<https://perma.cc/HV8X-JB99>].

<sup>162</sup> Park Cho-Rong, *Geomchal gonganbu yeoksasogeuro...naejubuteo 'gonggongsusabu'ro heyonpangyoche* [The Public Security Department of the Prosecutors' Office Pass into History... The Signboard Will Be Replaced with 'Public Investigation Department' Starting Next Week], YONHAP NEWS AGENCY

the closure of the public security department<sup>163</sup> because of its history of targeting left-wing activists. President Roh Moo-Hyun's Minister of Justice, Kang Kum-sil, attempted to close the public security department but failed.<sup>164</sup> At the SPO level, the anti-corruption and strength departments were merged into a single "anti-corruption and strength department" (*banbupae gangnyeok bu*, 반부패강력부).<sup>165</sup>

The changes may prove to be mainly a symbolic renaming, notwithstanding hopes for improvement through the "rectification of names."<sup>166</sup> But, there is additional significance to these reforms. By combining the elite special investigations and non-elite strength departments, the reorganization may weaken the elite career path in the Prosecutors' Office.<sup>167</sup> It may therefore possibly undermine the 20% elite versus 80% non-elite divide in the prosecution.<sup>168</sup> So far, however, elite stratification has persisted, according to interviewees. Indeed, prosecutors continue to use the "special investigations" and "public security" terminology when speaking among themselves. More time is needed to judge these reforms.

### 5. Self-Regulation and the "Objective Duty:" Preferable to

(Aug. 7, 2019, 5:00 PM), <https://www.yna.co.kr/view/AKR20190807131900004> [<https://perma.cc/Y87B-MVCP>].

<sup>163</sup> See, e.g., KIM, THE PROBLEM IS THE PROSECUTION, *supra* note 59, at 197-98.

<sup>164</sup> For an explanation of Kang's reform attempt, as well as Roh's later ironic reliance on the public security department for riot control, see Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.5.

<sup>165</sup> Lee Yoon-Hui, *Geomchal daedaejeok jikjegaepyeon... gangnyeokbu eopsaego hyeongsabu neullinda* [Prosecutors' Office Wide-Ranging Reorganization... Strength Departments Eliminated and Criminal Affairs Departments Expanded], NEWSIS (Aug. 20, 2020, 4:55 PM), [https://newsis.com/view/?id=NISX20200820\\_0001136464](https://newsis.com/view/?id=NISX20200820_0001136464) [<https://perma.cc/U34K-E2UQ>].

<sup>166</sup> See STERCKX, *supra* note 151.

<sup>167</sup> Discussion of the Prosecutor's Office's elite may be found in Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Section II.C.

<sup>168</sup> The elite versus non-elite divide refers to the fact that the top 20% of prosecutors exist in elite career paths that involve cases with political implications and executive management of the organization. On the other hand, the 80% non-elite deal with mundane prosecutorial work and usually cannot work in high positions reserved for the elite. Entry to the elite is determined around the fifth or sixth year of a prosecutor's career. The 80% are often dismayed at being relegated to the lower ranks of the Prosecutors' Office while receiving blame from society for the political intrigues of the 20%. *Id.*; see also LEE, *supra* note 1, at 119-23 (providing a detailed journalistic account of the 20% versus 80% divide).

*Checks and Balances?*

Calls for new rules can often be heard from insiders who want to minimize reform. For example, the Prosecutor General in 2018 suggested that his reform priorities included requiring investigative decision-making to be recorded in writing, asking prosecutors to “limit the indiscriminate gathering of information,” and establishing a committee of outside experts to re-examine a handful of historical cases in which prosecutorial cover-ups were suspected.<sup>169</sup> One expert with close knowledge of that committee’s operation (and of Moon’s prosecution reform advisors) told the author afterwards that he doubted the Moon Jae-In government’s commitment to lasting reform.

Others argue that enhancing prosecutors’ self-regulation, specifically by strengthening the prosecutorial objective duty toward the defendant, would be far better than creating an external check and balance on the centralized prosecution.<sup>170</sup> The objective duty is the European-derived requirement that prosecutors weigh and act upon evidence favoring a suspect or defendant.<sup>171</sup> Korea inherited this concept from Germany<sup>172</sup> and Japan,<sup>173</sup> although it has even deeper historical roots<sup>174</sup> and has existed in Korean criminal procedure since

<sup>169</sup> Yeo Hyeon-Ho, *Munmuil chongjang, geomchalgehyeok nonuie “yeollin mae-umeuro chamyeo”* [Prosecutor General Mun Mu-Il, “Participating with an Open Mind” in Prosecutorial Reform Discussion], HANKYOREH (Apr. 10, 2018, 3:52 PM), [http://www.hani.co.kr/arti/society/society\\_general/839941.html](http://www.hani.co.kr/arti/society/society_general/839941.html) [<https://perma.cc/YS6R-QSHC>]; Kim Seung-Mo, *Mun mu-il geomchalchongjang “geomchal naebu gaehyeok jeolban sihaeng... nameojineun chagi chongjang mok”* [Prosecutor General Mun Mu-Il “Internal Prosecutorial Reform Half-Finished... Remainder Is for the Next Prosecutor General”], NOCUT NEWS (Apr. 25, 2018, 5:39 PM), <https://www.nocutnews.co.kr/news/4960529> [<https://perma.cc/R44K-UYYS>].

<sup>170</sup> Seong-Min Park, *Gaekgwanimuui guchehwawa geomsaui gweonhantongje* [Materialization of the Objective Duty and Controlling the Prosecutor’s Power], 24 HYEONGSABEOPYEONGU [CRIM. L. RSCH.] 237, 237 (2012) (S. Kor.).

<sup>171</sup> The historical development of the objective duty in mid-nineteenth century Germany is outlined in Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section II.B.1.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at Section II.C.1.

<sup>174</sup> The objective duty also existed earlier in embryonic form in Napoleonic French criminal procedure. *See e.g.*, Code de procédure pénale [C. pr. pén.] [Criminal Procedure Code] art. 37 (Fr.), [https://ledroitercriminel.fr/la\\_legislation\\_criminelle/anciens\\_textes/code\\_instruction\\_criminelle\\_1808/code\\_instruction\\_criminelle\\_1.htm](https://ledroitercriminel.fr/la_legislation_criminelle/anciens_textes/code_instruction_criminelle_1808/code_instruction_criminelle_1.htm) [<https://perma.cc/M87Q-UF6M>] (authorizing prosecutors’ seizure of items that “can serve for conviction or for exculpation,” as if prosecutors confiscated property for the purpose of proving suspects’ innocence). This provision reflects an underlying policy similar to the objective duty.

its independence.<sup>175</sup> In Korea, the objective duty is currently reinforced by regulations. For example, the prosecutorial Code of Ethics requires prosecutors to “strive to treat persons related to a case kindly, from an objective and neutral perspective.”<sup>176</sup> Regulations establishing quasi-grand jury systems, as discussed below, also reference the objective duty.<sup>177</sup>

Strengthening the objective duty, however, is more of an academic idea that lacks political support. Mainstream reformists dismiss the self-regulating objective duty, like the idealistic language of the prosecutorial oath, as ineffective.<sup>178</sup>

In sum, bureaucratic style reforms involving regulation and internal reorganization are often associated with nominal or symbolic change. Bureaucratic style reform may be the easiest path because of its compatibility with the prosecution’s bureaucratic nature. In the end, however, bureaucratic reform has not sufficiently established prosecutorial independence, and it is no longer a politically meaningful focus of pro-reform discourse.

### B. Democratic and Decentralizing Reform

Reformers tend to emphasize democratic and decentralizing rather than bureaucratic solutions to investigational independence problems. They often prefer to create structural checks and balances rather than bureaucratic regulations.

According to reform literature<sup>179</sup> and interviews with reformists, investigational abuses mainly originate from the prosecution’s

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<sup>175</sup> Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.A.

<sup>176</sup> PCE (2021), *supra* note 126, art. 9.

<sup>177</sup> See *infra* notes 342, 343 & 360 and accompanying text.

<sup>178</sup> See, e.g., Jeong Ji-Ung, *Geomchalgwa jayuhangukdangui jaegangwa jaesaengui gil, gongsuqueo doipimnida* [The Road of Regenerating and Re-establishing the Liberty Korea Party and Prosecutors’ Office Is Introducing the CIO], CHAMYEOYEONDAE SABEOBGAMSISENTEO [PEOPLE’S SOLIDARITY FOR PARTICIPATORY DEMOCRACY JUD. MONITORING CTR.] (Dec. 11, 2018), <http://www.peoplepower21.org/Judiciary/1601236> [<https://perma.cc/U7KW-BD6H>].

<sup>179</sup> In journalist Lee Sun-Hyeok’s book, which is based on his years of reporting on and interviews with prosecutors, a chapter summarizing the causes of prosecutorial politicization is bluntly titled, “You idiot! The problem is the organization!” The chapter opens with discussion of the principle of prosecutorial unification and the Prosecutor General’s absolute command authority over the system. LEE, *supra* note 1, at 134-35. The quotations in *infra* notes 183 & 184 and accompanying text come from these pages.

hierarchical command structure. The operational-level prosecutors who obey politically influenced orders from managerial and executive-level elites are required to do so,<sup>180</sup> and their promotions depend on impressing their superiors.<sup>181</sup> Therefore, for reformers, weakening the bureaucratic hierarchy strengthens investigational independence.

Lee Sun-Hyeok, a journalist and observer of the Prosecutors' Office, emphasizes that the principle of prosecutorial unification grants the Prosecutor General total operational control and enables the holder of this office, at the peak of the hierarchical pyramid, to "wield absolute power."<sup>182</sup>

When some case is reported to his office, the Prosecutor General may say, "Hey, has he been arrested yet?" or "The country's situation is so-and-so, what kind of investigation is this? Leave it alone for now." If he says the word, the Prosecutor General's desire is conveyed right away to the frontline prosecution offices and carried out as it is. As much as the times have changed, although the Prosecutor General does not frequently give irrational orders to cover up a suspected crime that has already been exposed, his discretion can be sufficiently acted upon, from sending down orders to detain and indict, indict without detention, or suspend prosecution. Or he can put the brakes on an investigation and, in fact, even do so to let someone off of a crime. According to whether the Prosecutor General is a political player or not, there will be a variation in the intensity of the authority he exerts; however the Prosecutor General symbolizes the prosecutorial organization and his determinations are the Prosecutors' Office's entire decision-making.<sup>183</sup>

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<sup>180</sup> *Id.*

<sup>181</sup> Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Section II.C (explaining the promotion system).

<sup>182</sup> LEE, *supra* note 1, at 135. For a translation of the passage in which this phrase appears, see *supra* note 43.

<sup>183</sup> LEE, *supra* note 1, at 135.

Lee further criticizes the centralization of authority in the Prosecutors' Office:

In such a structure, what is the meaning of an ordinary prosecutor? He is nothing but a member of the organization. To put it harshly, he is a component. In an ordinary case forwarded by the police, it will be handled according to the prosecutor's own authority and judgment. However, the greater the figure, such as a politician or *chaebol*, the prosecutor's duty to dig up the facts increases, but his authority to handle things decreases. Although the prosecutor's role extends to diligently exposing the great social evil of corruption, the disposal of this is structurally assigned to the higher-ups.<sup>184</sup>

The three main solutions to the perceived problem of excessively centralized authority over investigations are: creating independent prosecutor institutions, breaking up the national hierarchy, and depriving prosecutors of investigative powers.

### *I. Special Prosecutor Institutions*

First, there are two systems of independent prosecutors with similar names. The more important "special prosecutor" (*teukbyeol geomsa*, 특별검사) system has been employed several times through ad hoc statutes directed at specific scandals, although a general procedure for the special prosecutor was legislated in 2014.<sup>185</sup> The system of ad hoc special prosecutors was clearly inspired by the United States' system of federal independent prosecutors, while the limits imposed on a given investigation's scope and time reflect attempts to improve on perceived flaws in the U.S. model.<sup>186</sup> In terms

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<sup>184</sup> *Id.* at 244.

<sup>185</sup> *Teukbyeolgeomsaui immyeong deunge gwanhan beomnyul* [Act on the Special Prosecutor's Nomination, Etc.], amended by Law No. 18861, May 9, 2022, art. 1 (S. Kor.) [hereinafter Act on the Special Prosecutor's Nomination, Etc. (2014)], <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=152099> [<https://perma.cc/W6G8-JNHP>].

<sup>186</sup> See Han In-Sup, *Choegeun hangugui jeongchibupae daehan geomchalgywa teukgeomui dojeon – Geu seonggwawa hangye* [Challenging Political Corruption in Korea – The Conflicting Role between the Public Prosecution and the



of content, the ad hoc statutes were relatively similar: the National Assembly Speaker could demand a special prosecutor, the KBA would recommend two candidates from among lawyers, the president would select one, and a special prosecutor would be empowered to investigate the scandal for a certain number of days, completely free from Prosecutors' Office control.<sup>187</sup>

For example, an ad hoc special prosecutor law was passed for the investigation into a secret payment from South Korea to North Korea in exchange for a summit meeting between President Kim Dae-Jung and Chairman Kim Jong-Il in 2000.<sup>188</sup> Under the statute, the president was required to select the special prosecutor from two candidates suggested by the KBA.<sup>189</sup> The candidates could not be members of any political party.<sup>190</sup> The scope of the investigation was limited to specific matters laid out in the statute,<sup>191</sup> and the special prosecutor was given a twenty-day preparatory period, seventy days to investigate, and could request thirty additional days from the president,<sup>192</sup> who could refuse to grant the request. After the investigation period, the special prosecutor was required to decide whether to issue indictments.<sup>193</sup> The statute provided for accelerated trial proceedings and appeals,<sup>194</sup> and after all trials and appeals were completed, the special prosecutor was obligated to provide a written

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*Independent Counsel*], 45 SEOULDAEHAKGYO BEOBHAK [SEOUL NAT'L U. LEGAL STUD.] 332, 343-44 (2004).

<sup>187</sup> See, e.g., *infra* notes 189 & 198 and accompanying text.

<sup>188</sup> See, e.g., Doug Struck, *Alleged Payoff to North Tarnishes S. Korea's Kim*, WASH. POST (Feb. 10, 2023), <https://www.washingtonpost.com/archive/politics/2003/02/10/alleged-payoff-to-north-tarnishes-s-koreas-kim/308e691a-8468-42ac-84ff-6a3bbe8a7859/> [<https://perma.cc/KB7M-3MWK>].

<sup>189</sup> Nambukjeongsanghoedamgwallyeondaebukbimilsonggeumuihoksageondeunguijinsanggyumyeongeulwihanteukbyeolgeomsaimmyeongdeungegwahanbeomnyul [Act on the Nomination of a Special Prosecutor for Ascertaining the Truth of the Suspicious Case of the Secret Transfer of Funds to the North Related to the South-North Summit] art. 3 (S. Kor.) [hereinafter Act on the Nomination of a Special Prosecutor for Ascertaining the Truth], <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=58019> [<https://perma.cc/4WB5-U7B9>].

<sup>190</sup> *Id.* art. 4 para. 3.

<sup>191</sup> *Id.* art. 2.

<sup>192</sup> *Id.* art. 9.

<sup>193</sup> *Id.* art. 9 para. 2.

<sup>194</sup> *Id.* art. 10.

report to the president and National Assembly.<sup>195</sup> Notably, the law expressly declared the special prosecutor's independence twice.<sup>196</sup>

When the special prosecutor process was standardized in 2014,<sup>197</sup> the Act resembled the previously passed ad hoc legislation, such as the one analyzed in the preceding paragraph.<sup>198</sup> However, the Act has almost never been used, and the National Assembly continues to pass ad hoc special prosecutor laws.<sup>199</sup> The reason why the Act remains nearly unused is unclear. Nonetheless, the special prosecutors have provided a measure of independence in the specific scandals they have investigated, with some exceptions.<sup>200</sup> The main drawback of the

<sup>195</sup> Act on the Nomination of a Special Prosecutor for Ascertaining the Truth, *supra* note 189, art. 11.

<sup>196</sup> *Id.* arts. 1, 5.

<sup>197</sup> Act on the Special Prosecutor's Nomination, Etc. (2014), *supra* note 185, art. 1.

<sup>198</sup> The standardized procedure for appointing special prosecutors under the 2014 Act is as follows. The National Assembly could demand a special prosecutor. *Id.* art. 2 para. 1. A recommendation committee, most of whose members would be appointed by the National Assembly, would suggest two lawyers for the job. *Id.* art. 3. Neither could be political party members. *Id.* art. 5 para. 4. The President would have to select one. *Id.* art. 3 para. 3. After this, the special prosecutor would have 20 days to prepare, 60 days to investigate, and could request another 30 days from the President. *Id.* art. 10. As with earlier laws, judicial proceedings would be expedited and the special prosecutor had to write a report for the President and National Assembly. Act on the Special Prosecutor's Nomination, Etc. (2014), *supra* note 185, arts. 11-12. Prosecutorial independence was asserted in arts. 1 & 6, the latter of which reads: "The special prosecutor keeps political neutrality and is independent in carrying out duties."

<sup>199</sup> For example, an ad hoc special prosecutor statute was enacted for the scandal that led to President Park Geun-Hye's impeachment. Seok Jin-Hwan, *For Third Consecutive Week, Pres. Park's Approval Rating at Rock Bottom*, HANKYOREH (Nov. 19, 2016, 2:44 PM), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/771020.html](http://english.hani.co.kr/arti/english_edition/e_national/771020.html) [<https://perma.cc/H53A-G6CX>]. The permanent special prosecutor statute has only been used once, in 2021, because it is considered to be less favorable to the opposition than ad hoc laws. Lee Sang-Eon, *Daejangdong uihok, sangseolteukgeomi tagimnida* [*Daejang-dong Scandal, Permanent Special Prosecutor Office Is Perfect*], JOONGANG ILBO (Sept. 16, 2021), <https://www.joongang.co.kr/newsletter/themorning/514> [<https://perma.cc/TK2J-Z9EB>].

<sup>200</sup> At least one special prosecutor appeared to show favoritism to his investigative target. Interviewees suggested that the most famous example of this was the special prosecutor for the BBK scandal. *See, e.g.,* Jennifer Veale, *Probe Roils South Korea Election*, TIME (Dec. 18, 2007), <http://content.time.com/time/world/article/0,8599,1695742,00.html> [<https://perma.cc/TX78-LZDE>]. The special prosecutor and his team formally interrogated President-Elect Lee Myung-Bak only once, at a restaurant over a meal, before clearing him of all wrongdoing. Editorial, *Samcheonggakeseo gomtang meogeumyeo han teukgeomui* 'Leemyeongbak josa' [*Eating Beef-Bone Soup at Samcheonggak, One Special Prosecutor's 'Lee Myung-*

system, however, is that it is used in only highly exceptional cases,<sup>201</sup> leaving the rest of the Prosecutors' Office's caseload vulnerable to hierarchical manipulation.

The other type of special prosecutor is the internally selected but independent "specially appointed prosecutor" (*teugim geomsa*, 특임검사).<sup>202</sup> The Prosecutors' Office first used the specially appointed prosecutor in 2010 and again later for two other scandals, all of which were related to accusations of corruption against prosecutors.<sup>203</sup> The system was in fact designed for the Prosecutors' Office to internally deal with prosecutor corruption cases.<sup>204</sup> In 2013, Prosecutor General Chae Dong-Wook suggested expanding the scope of the institution to include other kinds of politically important cases.<sup>205</sup> His motive was widely understood as preventing tougher reforms; he publicly argued that other reform proposals, such as establishing the CIO or a permanent special prosecutor office, would unconstitutionally encroach upon the Prosecutors' Office's charging monopoly and violate the separation of powers.<sup>206</sup>

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*Bak Interrogation* ], CHOSUN ILBO (Feb. 20, 2008, 3:56 PM), [https://www.chosun.com/site/data/html\\_dir/2008/02/19/2008021901905.html](https://www.chosun.com/site/data/html_dir/2008/02/19/2008021901905.html) [<https://perma.cc/SPY8-CEV2>].

<sup>201</sup> The special prosecutor system is only used occasionally, when the legislature finds the political will to pass an ad hoc special prosecutor law. The difficulty in commencing the process means that not every political scandal can be investigated by a special prosecutor. For a list of cases in which a special prosecutor has been appointed, see Mosler, *supra* note 146, at 92.

<sup>202</sup> For a comparison of the two special prosecutor systems, see Kim Seung-Uk, 'Teukbyeolgeomsa-teukimgeomsa' eoddeotke dareunga [ 'Special Prosecutor Specially Appointed Prosecutor,' How Do They Differ], YONHAP NEWS AGENCY (Nov. 11, 2012, 4:03 PM), <https://www.yna.co.kr/view/AKR20121111055200004> [<https://perma.cc/FE5Z-4GZE>].

<sup>203</sup> Park Dae-Han, *Chaedonguk, jungsubu pyeji daean 'teukimgeomsa hwakdae' kadeu jesi* [Chae Dong-Wook Reveals a Card, "Expand Specially Appointed Prosecutors" Counterproposal to Abolishing the Central Investigation Department], YONHAP NEWS AGENCY. (Apr. 1, 2013) [hereinafter Park, *Counterproposal to Abolishing the Central Investigation Department*], <https://www.yna.co.kr/view/AKR20130401070100004> [<https://perma.cc/247V-U748>].

<sup>204</sup> Teukimgeomsa unyeongge gwanhan jichim [Guidelines on the Operation of the Specially Appointed Prosecutor] art. 1 (S. Kor.) [hereinafter Guidelines on the Operations of the Specially Appointed Prosecutor], <https://www.spo.go.kr/commo%20n/board/Download.do?bcIdx=668927&cbIdx=1304&streFileNm=195767.hwp> [<https://perma.cc/YXD6-U6WB>].

<sup>205</sup> Park, *Counterproposal to Abolishing the Central Investigation Department*, *supra* note 203.

<sup>206</sup> *Id.*

The gist of the specially appointed prosecutor framework is that the Prosecutor General can appoint a prosecutor to investigate criminal accusations against another prosecutor.<sup>207</sup> This specially appointed prosecutor operates independently from hierarchical supervision.<sup>208</sup> However, the specially appointed prosecutor must periodically report to a committee of senior prosecutors that “can suggest necessary measures.”<sup>209</sup> Problematically, such suggestions are likely to be de facto hierarchical orders. More importantly, interviewees explained, because the specially appointed prosecutor comes from within the organization and must return to regular service afterward, he can be punished or rewarded through the promotion system.

Reformers have been suspicious of the institution, arguing that it has “never once functioned properly,” “already failed,” and was designed to prevent more serious reforms, such as the establishment of the CIO.<sup>210</sup> They have pointed to a statement by the Prosecutor General who created the specially appointed prosecutor that “there is no organization cleaner than the Prosecutors’ Office” to cast doubts on his sincerity.<sup>211</sup>

In sum, while the original “special prosecutor” institution represents reform with a decentralizing and democratic spirit, the “specially appointed prosecutor” office signifies nominal decentralization within the bureaucracy. The former system is more likely than the latter to evade the hierarchical investigative controls that enable political influence. But because both special prosecutor systems are used in only a handful of extraordinary cases, their capacity to promote independence is limited.<sup>212</sup>

<sup>207</sup> “When national suspicions arise or social attention is focused on criminal suspicions of a prosecutor and the Prosecutor General determines it necessary, the Prosecutor General can appoint a specially appointed prosecutor who will be entrusted with the case.” Guidelines on the Operation of the Specially Appointed Prosecutor, *supra* note 204, art. 2 para. 1.

<sup>208</sup> *Id.* art. 4 para. 1.

<sup>209</sup> *Id.* art. 4 para. 3.

<sup>210</sup> [Nonpyeong] Teukimgeomsaneun geomchalgaehyeok hoeipyong myeongchingsagida [Commentary] Specially Appointed Prosecutor Is a Fraud in Name to Avoid Prosecution Reform], CHAMYEOYEONDAE SABEOPGAMSISENTEO [PEOPLE’S SOLIDARITY FOR PARTICIPATORY DEMOCRACY JUD. MONITORING CTR.] (Nov. 13, 2012, 4:03 PM), <https://www.peoplepower21.org/judiciary/969610> [https://perma.cc/N9WG-Y3ZQ].

<sup>211</sup> *Id.*

<sup>212</sup> Yet the special prosecutor may offer indirect benefits. In one scholar’s estimation, “the mere existence of the system may actually function as an effective

## 2. *Splitting up the Singular National Hierarchy*

A second possible solution to the problem of investigational independence is to divide the national prosecutorial hierarchy into semi-autonomous pieces. A leading reform proposal in this vein is to hold elections for the heads of Korea's eighteen provincial-level offices.<sup>213</sup> While this idea's personnel implications are discussed above,<sup>214</sup> from the perspective of investigations it would abolish the Prosecutor General's operational control over prosecutors nationwide. Instead of the principle of prosecutorial unification,<sup>215</sup> prosecutors would be ultimately responsible only to their elected provincial leader. The province's elected prosecutorial head would be empowered to give orders in investigations and charging.<sup>216</sup> The Prosecutor General would remain a bureaucratically appointed office<sup>217</sup> and the Supreme Prosecutors' Office, the hierarchical level in which the Prosecutor General is formally based, would function primarily as a central inspectorate to monitor the provincial offices.<sup>218</sup> In terms of investigative authority, this system would decentralize the Prosecutors' Office and expand its democratic accountability without entirely replacing bureaucratic accountability.

Another way of dividing the prosecutorial hierarchy is to establish a second prosecutorial organization. This occurred when the CIO was opened in 2021. The CIO has jurisdiction over politicians, judges, prosecutors, a myriad of high-level civil servants, and their families.<sup>219</sup> It can commence investigations into such persons or it can take over applicable cases uncovered by prosecutors or police.<sup>220</sup> The CIO follows the principle of prosecutorial unification in that its prosecutors must obey the orders and supervision of the CIO's

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tool to pressure the ordinary prosecutor's office [sic] into being more impartial and fair in handling politically sensitive cases so as to avoid reinvestigation by the special prosecutor." DAE-KYU YOON, *LAW AND DEMOCRACY IN SOUTH KOREA: DEMOCRATIC DEVELOPMENT SINCE 1987* 77-78 (2010).

<sup>213</sup> See generally KIM, PROPOSED PROSECUTORS' OFFICE REFORM I, *supra* note 47 and accompanying text.

<sup>214</sup> *Id.*

<sup>215</sup> For an explanation of this idea, see *supra* note 43 and accompanying text.

<sup>216</sup> KIM, PROPOSED PROSECUTORS' OFFICE REFORM I, *supra* note 47, at 11.

<sup>217</sup> *Id.* at 9.

<sup>218</sup> *Id.* at 15. Reformers have expressed concern that local political powers could exert influence on decentralized prosecutor offices. *Id.*

<sup>219</sup> CIO Act (2025), *supra* note 67, art. 2 para. 1.

<sup>220</sup> *Id.* art. 23, art. 24 para. 2, art. 25 para. 2.

Chief.<sup>221</sup> It also adopts the 2004 elaboration<sup>222</sup> on this principle that permits prosecutors to express opinions disagreeing with their supervisors.<sup>223</sup>

Assessing the investigational independence of the CIO is difficult because it has only recently been established.<sup>224</sup> Some observations can be made on its legal framework, however. On the one hand, the statutory language indicates that the CIO will duplicate the top-down hierarchical control of the Prosecutors' Office that has enabled its politicization.<sup>225</sup> On the other hand, the CIO operates according to a different personnel policy,<sup>226</sup> one that experiments with expanding democratic accountability to improve independence. For example, the CIO's staff prosecutors are selected by a Personnel Committee that includes members appointed by governing and opposition legislators.<sup>227</sup> It is likely that the CIO's investigational independence will depend on personnel independence.

*C. Reform Adopted: Expanding Police Authority and the  
"Adjustment of Investigative Powers"*

The final idea for achieving investigational independence is to remove prosecutors' powers to investigate crimes and reassign them to other agencies—mainly the police but other possibilities exist.<sup>228</sup> Such a reform would decentralize the prosecutorial system without increasing democratic accountability because it would shift investigative functions to another nationwide bureaucratic organization, such as the police.

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<sup>221</sup> *Id.* art. 17 para. 1, art. 20 para. 2.

<sup>222</sup> *See supra* note 143 and accompanying text (discussing the revision to criminal procedure that allowed subordinate prosecutors to express disagreements with their superior).

<sup>223</sup> CIO Act (2025), *supra* note 67, art. 20 para. 3.

<sup>224</sup> The CIO began its operations in January 2021. Lee Jaceun, *Nominee for Chief of Anti-Corruption Body Pledges 'Independence, Effectiveness'*, KOR. HERALD (Apr. 28, 2024, 3:07 PM), <https://www.koreaherald.com/view.php?ud=20240428050129> [<https://perma.cc/2JSA-Q655>].

<sup>225</sup> CIO Act (2025), *supra* note 67, arts. 17-20.

<sup>226</sup> *Id.* arts. 6, 9 (on appointment processes for the CIO's Chief and its staff prosecutors, respectively).

<sup>227</sup> *See supra* note 91 and accompanying text; *see also* CIO Act (2025), *supra* note 67, art. 9 para. 3.

<sup>228</sup> President Moon and his party proposed establishing a new investigative agency in 2021. *See infra* note 271 and accompanying text.

The gist of the “adjustment of investigative powers” idea (*susagweon jojeong*, 수사권 조정), as this proposal is known, is that it would give police the ability to start and close their own inquiries as well as apply for warrants. While certain reformists desire to empower the police in order to check the prosecution,<sup>229</sup> the National Police Agency (NPA) primarily wants to expand its institutional clout. In interviews, individual officers involved in pressing for more powers said they hoped to end what they say is prosecutorial micromanagement of investigations, insulting language that accompanies prosecutorial orders, and prosecutors’ informal punishments.<sup>230</sup> Some police officers also claimed in interviews that they had witnessed prosecutors manipulating investigations to exculpate certain suspects and shift blame onto others, producing unfair results.

Proponents of granting police independent investigative powers are broadly inspired by leading foreign systems in which police routinely manage most criminal investigations.<sup>231</sup> In interviews before President Moon’s major reform, police officers working on the NPA’s research and strategizing efforts to win investigative powers explained that they preferred the United States’ model, in which police can investigate crimes independently. At the time, however, they said that the NPA had decided to concentrate on lobbying for the Japanese model, whose key feature is that prosecutors cannot give police commands until the police investigation is concluded.<sup>232</sup> Interviewees

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<sup>229</sup> See KIM, THE PROBLEM IS THE PROSECUTION, *supra* note 59, at 107 (“The division of investigative powers and charging powers is the most important core idea of prosecutorial reform. The division of investigative and charging powers refers to decentralizing the criminal judicial authority that is highly centralized in the Prosecutors’ Office and granting investigative powers to the police and indictment powers to the prosecution. Through this, the danger that political power will use the prosecution or the possibility that the Prosecutors’ Office will make itself politically powerful is shut off. Through the division of investigative and charging powers, using government authorities to check each other, the fundamental goal is guaranteeing the people’s liberty and civil rights.”).

<sup>230</sup> Police say these punishments include excessive demands for documents, repeatedly sending officers on pointless errands, and ordering police searches of premises when the prosecutor knows the suspect will not be there.

<sup>231</sup> See, e.g., *infra* note 272 (quoting a Korean legislator arguing that police management of investigations is the “global standard”); see also *infra* notes 273 & 274 for Korean debates on whether foreign systems allow prosecutors direct investigative powers.

<sup>232</sup> Dae-Hyun Choe, *Prosecutors’ Role and Their Relationship with the Police in South Korea: In a Comparative Perspective*, 55 INT’L J. L. CRIME & JUST. 88, 93 (2018) (explaining differences between Korean and Japanese prosecutor-police

also said that the NPA preferred such a gradualist reform effort in order to increase their chances of winning more powers.

Prosecutors tend to oppose such reforms. In an interview, one ex-prosecutor said that the adjustment of investigative powers was “very dangerous” and a threat to democracy because police would conduct investigations less professionally and less impartially than prosecutors. Scholars and activists also expressed these concerns. The distrust between prosecutors and police on this issue is mutual, and they have engaged in contentious public arguments over reform in recent years.

For example, early in President Moon Jae-In’s term, there was a dispute about adjusting investigative powers by deleting language<sup>233</sup> from the Korean Constitution’s due process clause stating that prosecutors alone can apply for warrants.<sup>234</sup> The NPA publicly stated that “[t]he problematic Constitutional article is irrelevant to civil rights protections, because after the 5/16 [1961] coup d’état the military government made the Prosecutors’ Office into the puppet of [political] power.”<sup>235</sup> The Prosecutors’ Office responded: “The prosecutor’s warrant screening represents the constitutional resolve, after the Japanese colonial period, to control the police’s abuse of coercive investigations and stop its civil rights violations.”<sup>236</sup> These scathing statements, typical of the debate, show how the question of investigative reform is connected to the Korean Constitution and argued in incendiary terms of dictatorship and Japanese colonial oppression.

Law professors interested in prosecutorial reform have tended to oppose expanding police powers. One law professor distinguished between different parts of the police bureaucracy: “The intelligence offices are bad. They will cause scandals. But detectives are ok.” Another law professor involved in civil society reform efforts stated that, “In my experience, police are more dangerous because they are not trained in procedural safeguards that prosecutors are trained in. In

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relations, including that Japan’s prosecutors do not “intervene” in cases until police finish their investigation).

<sup>233</sup> Yeo Hyeon-Ho, *Geomchalgaehyeok-geomgyeong susagwon jojeong nonui ‘tallyeok’* [Prosecution Reform and Prosecutor-Police Investigative Powers Adjustment Argument ‘Flexibility’], HANKYOREH (Mar. 20, 2018), [http://www.hani.co.kr/arti/society/society\\_general/836968.html](http://www.hani.co.kr/arti/society/society_general/836968.html) [<https://perma.cc/P6DJ-YZJ8>].

<sup>234</sup> DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 12 para. 3 (S. Kor.).

<sup>235</sup> Yeo, *supra* note 233.

<sup>236</sup> *Id.*



the investigative stage, we will have more human rights violations if police are given too much independent power.”

Behind these professors’ concerns is the reality that NPA officers are recruited from a much lower stratum of society than prosecutors. Whereas prosecutors have traditionally passed difficult exams and undergone intensive legal training to enter their profession, becoming a police officer requires less education. Viewed through Korea’s Confucian cultural context, in which education is equated with personal virtue, police and prosecutors will likely not be seen as equally reliable. To this point, an activist working on PSPD’s prosecutorial reforms said, simply, “[w]e cannot trust the police.” Historically, PSPD has not supported the adjustment of investigative powers, but because it was an ideological ally of President Moon Jae-In, who pushed the reform, it has refrained from forcefully criticizing the change.<sup>237</sup>

Judges interviewed for this study seemed indifferent to or supportive of empowering police to conduct investigations. This may be because such a reform would not adversely affect judges and could raise their prestige relative to prosecutors. Judges would remain the ultimate arbiters of warrant applications, while the quasi-judicial status of prosecutors, who claim to be judges’ peers,<sup>238</sup> would be diminished.

In January 2020, the National Assembly approved a bill on the adjustment of investigative powers.<sup>239</sup> The main points of the reform can be summarized as follows. The legislation revised the Criminal

<sup>237</sup> At the time the legislature passed police investigations reforms, PSPD offered some tepid, diplomatically-phrased criticism. A leader of the group explained: “We do not have an opinion. Internally, we debated it, but opinions were not gathered. Opinions are mixed on raising the autonomy and accountability of police investigative powers.” He added that “[i]f the Prosecutors’ Office’s control of police investigations loosens, the possibility that people’s fundamental rights will be infringed rises.” Pak Tae-In, ‘*Susagwonjojeong uryeo jijeokaeya’ chamyeoyeondae buwiwonjangdo sapyo deonjyeotda* [‘Investigative Powers Adjustment Concerns Must Be Pointed Out:’ Even PSPD Vice-Chairman Resigns], JOONGANG ILBO (Jan. 15, 2020), <https://www.joongang.co.kr/article/23682839#home> [<https://perma.cc/5L8V-WQZF>].

<sup>238</sup> For a Korean jurist’s analysis of prosecutors’ image as “half-judge,” see generally Heekyoon Kim, *The Role of the Public Prosecutor in Korea: Is He Half-Judge?*, in LITIGATION IN KOREA 87 (Kuk Cho ed., 2010).

<sup>239</sup> Son Hyun-soo, Jeon Gwang-joon & Kang Jae-gu, *S. Korea’s 68-year Debate over Investigative Authority of Prosecutors, Police*, HANKYOREH (Apr. 21, 2022, 5:46 PM), [https://english.hani.co.kr/arti/english\\_edition/e\\_national/1039912](https://english.hani.co.kr/arti/english_edition/e_national/1039912) [<https://perma.cc/NPX5-ZGMS>].

Procedure Code's<sup>240</sup> overarching principle that prosecutors have the general right to command police. The Code now declares that the relationship between prosecutors and police is one of "mutual cooperation,"<sup>241</sup> although the Code continues to specify situations in which prosecutors can give police orders, such as in handling seized evidence.<sup>242</sup> Nonetheless, observers have considered the general elimination of prosecutors' powers to command police a momentous change.<sup>243</sup>

One important part of the 2020 reform is that it allows police to seek warrants, though they must apply to prosecutors, who then formally request the warrants from judges.<sup>244</sup> This indirect process is necessary because of the Korean Constitution's due process clause, which states that only prosecutors can apply for warrants.<sup>245</sup> To prevent prosecutors from using their new intermediary position to seize de facto control over investigations from the police, the revised criminal procedure admonishes prosecutors not to reject police warrant requests without a "valid reason."<sup>246</sup> If they do, the police can appeal to the prosecutor's superiors who serve at the appellate-level High Prosecutors' Office within the relevant jurisdiction.<sup>247</sup> Each High Prosecutors' Office must establish a Warrant Review Committee to handle such appeals, and new regulations stipulate that the Committee is obliged to operate with "fairness and objectivity."<sup>248</sup>

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<sup>240</sup> For the latest version of the Criminal Procedure Code, see Hyeongsasosongbeop [Criminal Procedure Code] (S. Kor.) [hereinafter CPC (2025)], <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=265773> [<https://perma.cc/JV6A-33R9>].

<sup>241</sup> *Id.* art. 195 para. 1.

<sup>242</sup> *Id.* art. 218-22 para. 4.

<sup>243</sup> Kim Seung-Uk, *Geomchal susa jihwigwon 66 nyeonmane pyeji . . . gyeongchare Icha susa jonggyeolgwon* [Prosecutors' Office Investigative Command Authority Abolished After 66 Years . . . Police Get Right to Close First Investigations], YONHAP NEWS AGENCY (Jan. 13, 2020, 8:37 PM), <https://www.yna.co.kr/view/AKR20200113159900004> [<https://perma.cc/RGG5-DTU6>].

<sup>244</sup> The Code provides for police to obtain warrants "through the prosecutor's request" in four places. See CPC (2025), *supra* note 240, art. 200-2 para. 1, art. 200-4 para. 1, art. 201 para. 1 (for arrest and detention warrants); art. 215 para. 2 (for search and seizure warrants).

<sup>245</sup> See DAEHANMINKUK HUNBOEB [HUNBOEB] [CONSTITUTION] art. 12 para. 3 (S. Kor.).

<sup>246</sup> CPC (2025), *supra* note 240, art. 221-5 para. 1.

<sup>247</sup> *Id.*

<sup>248</sup> Yeongjangsimuiwiweonhoe gyuchik [Warrant Review Committee Regulations] art. 12 (S. Kor.),

This new institution and its rules are likely meant to prevent prosecutors from attempting to sabotage police investigative autonomy.

In 2021, another reform limited prosecutors' investigations mainly to only six types of crimes, while giving police no such restrictions. The 2021 Prosecutors' Office Act<sup>249</sup> specified that prosecutors could only examine cases involving corruption, economic crimes, civil servants, elections, the defense industry, and large-scale disasters.<sup>250</sup> The same article of the Act also allowed prosecutors to investigate crimes by the police, which seems to create a check-and-balance relationship between the two organizations.<sup>251</sup> Finally, the Act created a significant loophole by adding that prosecutors could also investigate "important crimes determined by presidential decree."<sup>252</sup> This vague language enables a president to add additional types of crimes to the list of those specified by the statute, leaving open-ended the theoretically strict limits on prosecutorial investigations.

At the heart of the reform, according to interviewees, police are permitted to open and close their own investigations, and the Prosecutors' Office has limited powers to review their work. A presidential decree specifies the rules of this delicate aspect of police-prosecutor relations.<sup>253</sup> The so-called "right to open investigations" (*susa gaesigweon*, 수사 개시권) is explicitly provided by Article 16 of the decree.<sup>254</sup> Similarly, the decree grants police the "right to close investigations" (*susa jonggyeolgweon*, 수사 종결권).<sup>255</sup> Criminal

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<https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=228425> [<https://perma.cc/Q93M-A5M6>].

<sup>249</sup> This version of the Act, which passed in 2020 but came into effect in 2021, was the first version of the POA to deal with the "adjustment of investigative powers." *Geomchalcheongbeop* [Prosecutors' Office Act], amended by Act No. 18861, Sept. 10, 2022 (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=213775> [<https://perma.cc/9HXS-3VL5>].

<sup>250</sup> *Id.* art. 4 para. 1.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Geomsawa sabeopgyeongchalgunui sanghohyeomnyeokgwa ilbanjeok susajunchige gwanhan gyujeong* [Regulations on Mutual Cooperation between Prosecutors and Judicial Police Officers and General Investigation Standards] art. 3 (S. Kor.) [hereinafter *Prosecutor-Police Cooperation Decree* (2023)], <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=255305> [<https://perma.cc/DU3A-WUNE>].

<sup>254</sup> *Id.* art. 16.

<sup>255</sup> *Id.* art. 51.

procedure instructs police to send their charging recommendations and evidence to prosecutors when they close their investigations.<sup>256</sup>

Under the “adjustment of investigative authority” reform framework, prosecutors can intervene in police investigations in four main ways.

First, prosecutors have the “right to demand” that police conduct a “supplementary investigation” (*bowansusa yogugweon*, 보완수사 요구권) if prosecutors feel a need for additional information on whether to make an indictment or apply for a warrant the police have requested.<sup>257</sup> But the statutory language is unclear on whether police must obey a prosecutor’s demand. Paragraph 3 of Article 197-2 of the Criminal Procedure Code states that a police officer can be disciplined or removed from the case for not carrying out a supplementary investigation “without a valid reason.”<sup>258</sup> Commentators believe that this vague provision lets police officers refuse requests to further investigate if they can claim a “valid reason” (*jeongdanghan iyu*, 정당한 이유).<sup>259</sup> This phrase is not defined in the Code<sup>260</sup> or presidential decree.<sup>261</sup>

<sup>256</sup> CPC (2025), *supra* note 240, arts. 245-55.

<sup>257</sup> *Id.* art. 197-2 para. 1.

<sup>258</sup> *Id.* art. 197-2 para. 3.

<sup>259</sup> See Im Sun-Hyeon, [Paekteuchekeu] *susagweonjojeongbeop tonggwaro gyeongchal mamdaero sageonjonggyeol?* [(Fact Check) Through the Adjustment of Investigative Powers Law, Can Police Close Cases as They Please?], YONHAP NEWS AGENCY (Jan. 14, 2020), <https://www.yna.co.kr/view/AKR20200114129300502> [https://perma.cc/FNC8-KW3K].

<sup>260</sup> A Supreme Prosecutors’ Office source expressed concerns that “[i]t is unclear what the justification is, the police may make up arbitrary reasons and refuse to accept supplementary investigations or corrective measures.” A police source said that “legitimate reason” would need to be defined by presidential decree. See *id.*

<sup>261</sup> The relevant presidential decree was updated in 2023 but remained largely the same. See Prosecutor-Police Cooperation Decree (2023), *supra* note 253. This decree elaborates on the idea of a “valid reason” in the context of the supplementary investigation provision in two places. First, the decree mentions situations in which a prosecutor and police officer have differing opinions. In these cases, the two sides are required to engage in a “consultation.” *Id.* art. 8 para. 2. Curiously, the decree does not define “valid reason” here or assert prosecutorial command supremacy, but rather it assumes that any disagreement will be resolved by negotiations. Second, the decree provides that if a prosecutor demands that a police officer be disciplined or removed from a case, the Police Chief to whom the demand is addressed can deny it if the Chief has a (still undefined) “valid reason.” *Id.* art. 61 para. 2.

Second, prosecutors can “demand corrective measures” (*sijeongjochi yogugwon*, 시정조치 요구권) during a police investigation if they believe that there has been a “violation of law, infringement of civil rights, or a noticeable abuse of investigative powers.”<sup>262</sup> However, according to the presidential decree on prosecutor-police cooperation, police can refuse to carry out the corrective measures if they have a “valid reason.”<sup>263</sup> Again, the phrase is undefined.

Third, if the police decide not to recommend charges, prosecutors can “request” that police “reinvestigate” (*jaesusa yocheong*, 재수사 요청) the case.<sup>264</sup> Under Moon Jae-In’s 2021 presidential decree, if police again declined to indict after a reinvestigation, prosecutors could not request another reinvestigation.<sup>265</sup> It appeared that police could effectively ignore a prosecutorial request to reconsider the charging decision by reaching the same conclusion again.

President Yoon Seok-Yeol’s 2023 decree, however, rolled back this aspect of the reform and allowed prosecutors to take cases from the police, if, after reinvestigation, prosecutors believed police actions to be “illegal or improper.”<sup>266</sup> The lack of a definition for “improper” seems to return significant investigative powers to prosecutors.

Finally, the law allows prosecutors to take investigations out of police hands in one particular circumstance: if victims or surviving family members disagree with a police decision not to charge a suspect, they can file an objection with the police station’s head, who must forward the case to prosecutors for investigation.<sup>267</sup> This rule originally allowed third-party accusers to object and obtain a prosecutorial investigation, but President Moon again altered the law

<sup>262</sup> CPC (2025), *supra* note 240, art. 197-3 paras. 1-3.

<sup>263</sup> Prosecutor-Police Cooperation Decree (2023), *supra* note 253, art. 45 para. 4.

<sup>264</sup> CPC (2025), *supra* note 240, art. 245-8 para. 1.

<sup>265</sup> Geomsawa sabeopgyeongchalgunui sanghohyeomnyeokgwa ilbanjeok susajunchige gwanhan gyujeong [Regulations on Mutual Cooperation between Prosecutors and Judicial Police Officers and General Investigation Standards], amended by Presidential Decree No. 33808, Oct. 17, 2023, art. 64 para. 2 (S. Kor.) [hereinafter Prosecutor-Police Cooperation Decree (2021)], <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=222281> [<https://perma.cc/V8NR-U8EL>]. If a prosecutor believed the police refusal to indict was unjust, the prosecutor could pursue the procedure to “demand corrective measures.” *Id.* But the police could again refuse if they claimed a “valid reason.” *Id.* art. 45 para. 4.

<sup>266</sup> Prosecutor-Police Cooperation Decree (2023), *supra* note 253, art. 64 para. 2; see also *id.* art. 64 paras. 3-4.

<sup>267</sup> CPC (2025), *supra* note 240, art. 245-7.

in 2022, updating the provision to remove this right.<sup>268</sup> The motivation behind the revision appears to be that the President and ruling party wanted to restrict prosecutors' investigative powers further, just days before President Yoon, from an opposing political party, took office. The legislature likely aimed at weakening a soon-to-be politically hostile prosecution vis-à-vis the police.

*1. Evaluating the Reform and Later Attempts to Push the Separation of Investigation and Charging Further*

The complicated rules outlined above were designed to free police from total prosecutorial control while creating a system of checks and balances between police and prosecutors. These rules preserve prosecutors' traditional role of reviewing police work while simultaneously reducing prosecutorial authority. Conceptually, the reform can be considered from the perspectives of bureaucratic accountability, democratic accountability, and decentralization. On the one hand, the new rules rely on bureaucratic accountability in how they grant prosecutors some scope to make investigative demands on police. Prosecutors retain some supervisory role over the police. On the other hand, the newly reformed system significantly decentralizes oversight of investigations, handing much new authority to the police. The new rules also add a mechanism of democratic accountability in that they allow a non-professional, private individual connected to a crime to trigger a traditional direct prosecutorial investigation by filing an objection to the outcome of a police investigation.

How the new system will function in practice remains to be seen. Time will tell whether the police will succeed in their new role as independent investigators and whether the working relationship

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<sup>268</sup> President Moon's first version of reformed criminal procedure empowering police (passed in 2020 and going into effect in 2021) allowed accusers to demand prosecutors investigate. Hyeongsasongbeop [Criminal Procedure Code], *amended by* Law No. 18398, Aug. 17, 2021, art. 245-7 para. 1 (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=223447> [<https://perma.cc/8NUV-RMN6>]. In the last days of President Moon's term, in May of 2022 (after Yoon Seok-Yeol had won election to the presidency), President Moon's party in the legislature revoked an accuser's right to demand a prosecutorial investigation. The legislature added the words "excluding an accuser" to the relevant provision. Hyeongsasongbeop [Criminal Procedure Code], *amended by* Law No. 20265, Feb. 13, 2024, art. 245-7 para. 1 (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=242053> [<https://perma.cc/QH9B-J94Q>]. This rule continues to exist today. CPC (2025), *supra* note 240, art. 245-7 para. 1.

between police and prosecutors will improve. During the legislative process in 2020, the police were reportedly “unsatisfied” and concerned they could remain under prosecutorial control.<sup>269</sup> Interviewees expressed concerns that the police lack the capacity for independent investigations and argued that reform of the police was necessary. In an interview, an expert at PSPD complained that the police are overly centralized, bureaucratized, and lack local control. Desire for police reform may parallel the wish for prosecutorial reform in some respects, but the former is much less discussed than the latter because prosecutorial reform has been the priority for reformers. One scholar close to President Moon has suggested that strengthening the publicly funded defense lawyer system is the next measure that must be taken after giving police investigational independence.<sup>270</sup>

Controversy over the adjustment of investigative powers continued after the law was amended. In early March 2021, President Moon announced that he wanted to further separate investigations and charging, stating that “[f]or checks and balances, for civil rights protection, the direction that we must steadily go towards is the separation of charging power and investigative power . . . . The reform of the power institutions [i.e., the Prosecutors’ Office] is not yet complete.”<sup>271</sup> This statement followed his party’s proposal to establish a “Serious Crime Investigation Office” (*Jungdaepeomjoe susacheong*, 중대범죄수사청), ostensibly modelled on England’s Serious Fraud Office, that would take over much of the prosecution’s remaining investigative power.<sup>272</sup> This proposal was based on the ruling party’s

<sup>269</sup> Park Han-na, *Police Unsatisfied with Revised Law on Investigative Power*, KOR. HERALD (Sept. 23, 2020), <https://www.koreaherald.com/view.php?ud=20200923000798> [<https://perma.cc/MB7W-G583>].

<sup>270</sup> See KIM, THE PROBLEM IS THE PROSECUTION, *supra* note 59, at 212 (“If state power expands, the possibility that citizens’ civil rights will be jeopardized rises. In particular, the police suppressed citizens for political powers of the past, and even recently they could not completely rid themselves of this history. Accordingly, control over police authority, [which will expand] according to the separation of investigation powers and charging powers, must be strengthened. The core of this is the criminal public [defense] lawyer system.”).

<sup>271</sup> Kang Tae-Hwa, *Mun daetongnyeong “susa-giso bulli, kkujunhi naagaya hal banghyang”* [President Moon: “Separation of Investigation and Prosecution, A Direction That Must Be Steadily Pursued”], JOONGANG ILBO (Mar. 8, 2021), <https://www.joongang.co.kr/article/24007397> [<https://perma.cc/XGH9-RYJK>].

<sup>272</sup> A representative who proposed creating the agency in the legislative said: “Our Serious Crime Investigation Office follows the UK’s SFO model. In the UK, a special investigative institution dealing with serious crimes has been established, and we also should go toward the global standard.” Yun Hyeon-Seong, *Jungdaepeomjoesusacheong modeliraneun yeongguk ‘SFO’ . . . silsangeun*

claim that leading foreign countries tend to separate institutions that are engaged in investigations and charging and, as such, Korea ought to follow their lead.<sup>273</sup> A comparative law debate over the truth of this proposition erupted in the press.<sup>274</sup>

The Serious Crime Investigation Office announcement prompted Prosecutor General Yoon Seok-Yeol to resign in protest, making him the fourteenth post-1988 democracy-era Prosecutor General to quit before completing his two-year term.<sup>275</sup> Yoon argued that the idea was a political attack that would represent the “dissolution of the Prosecutors’ Office,” the “annihilation of the rule of law,” and “a step backwards for democracy and the destruction of the constitution’s spirit.”<sup>276</sup> It should be noted that the ruling party’s Serious Crime Investigation Office proposal emerged after an acrimonious yearlong feud between the Prosecutor General and President Moon that was

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‘geulsse’ [United Kingdom’s SFO Is Said To Be the Model for the Serious Fraud Office. . . in Reality ‘Not Sure’], NYUSEU WEOKSEU (Mar. 6, 2021, 8:00 AM), <https://www.newsworks.co.kr/news/articleView.html?idxno=531658> [<https://perma.cc/ZY4C-D78C>].

<sup>273</sup> *Id.*; see also, Ko Do-Ye, “Yeo, susa-giso bulli daeseraneunde. . . OECD 77% geomsusagweon bojang” [“Ruling Party Says, Investigation-Charging Division is the General Trend... but 77% of the OECD Guarantees Prosecutors’ Investigative Powers”], DONG-A ILBO (Mar. 1, 2021, 3:13 AM), <https://www.donga.com/news/Society/article/all/20210301/105656220/1> [<https://perma.cc/7HPR-Z8X2>].

<sup>274</sup> While the pro-government *Hankyoreh* newspaper argued that “the majority of developed democratic states” separate charging and investigations, the anti-government *Chosun Ilbo* pointed out that Japan, Germany, and America allow prosecutors to conduct investigations. *Susa giso bulli, gaya hal girina gongnonhwa deo pillyohada* [Separating Investigations and Charging Is the Way We Must Go, But More Public Discussion Is Needed], HANKYOREH (Feb. 28, 2021), <http://www.hani.co.kr/arti/opinion/editorial/984830.html> [<https://perma.cc/5TJW-DGTR>]; Lee Jeong-Gu, (*Paekteu chekeu*) yeo “seonjinguk daebubun susa giso bulli” sasirilkka [(Fact Check) Ruling Party Says “Most Developed Countries Separate Investigations and Charging” – Is It True?], CHOSUN ILBO (Feb. 25, 2021), [https://www.chosun.com/national/court\\_law/2021/02/25/4GMX2NBPMZABRLQRCAKRTQAKS4/](https://www.chosun.com/national/court_law/2021/02/25/4GMX2NBPMZABRLQRCAKRTQAKS4/) [<https://perma.cc/8VVH-NEM3>].

<sup>275</sup> Lee Tae-Hun, *Yunseongnyeol satoe “eotteon wichie itdeun jayuminjuuigunghmin jikigetda”* [Yoon Seok-Yeol Resigns, “I Will Protect Liberal Democracy and The People, No Matter What Position I Hold”], DONG-A ILBO (Mar. 4, 2021), <https://www.donga.com/news/Society/article/all/20210304/105719268/1> [<https://perma.cc/88HK-PJKE>].

<sup>276</sup> Seo Yu-Geun, *Yunseongnyeol “geomchal susagweon baktareun beopchi malsal . . . 100beonirado jik geolgetda”* [Yoon Seok-Yeol: The Deprivation of the Prosecution’s Investigative Power Is the Annihilation of the Rule of Law . . . I Would Stake My Job on This 100 Times Over], CHOSUN ILBO (Mar. 2, 2021), [https://www.chosun.com/national/court\\_law/2021/03/02/MBRX5N57MJBJLMHP06NOUYSUDI/](https://www.chosun.com/national/court_law/2021/03/02/MBRX5N57MJBJLMHP06NOUYSUDI/) [<https://perma.cc/SCD9-EDSV>].



precipitated by the investigation and prosecution of Cho Kuk, the President's close friend and ally.<sup>277</sup> This reform designed to weaken the Prosecutors' Office may have been a direct attack on the Prosecutor General.

The public battle between Yoon and President Moon elevated Yoon's political profile. He became a leading right-wing opposition figure, ran for president, and narrowly won the March 2022 presidential election. Surprised by Yoon's victory, President Moon and the National Assembly, controlled by his party, rushed to remove some of the Prosecutors' Office remaining investigative powers.<sup>278</sup> This was likely done to protect President Moon and his political allies from the prosecutorial retribution that has become customary when there is a turnover of party control over Korea's executive branch.<sup>279</sup> And because Yoon Seok-Yeol was a well-known "special investigations expert" (*teuksutong*, 특수통) who had indicted two presidents already (Lee Myung-Bak and Park Geun-Hye),<sup>280</sup> he would presumably know exactly how to use the Prosecutors' Office. Prosecutorial reform thus became especially urgent for the outgoing executive.

And so it was that, days before he left office, President Moon signed this additional reform into law. When it was proposed, President-elect Yoon and his team denounced the measure as the "complete deprivation of prosecutorial investigative authority" (*geomsuwanbak*, 검수완박).<sup>281</sup> This phrase became the name of the

<sup>277</sup> See, e.g., (LEAD) *S. Koreans Hold Massive Rally Against Justice Minister*, YONHAP NEWS AGENCY (Oct. 3, 2019), <https://en.yna.co.kr/view/AEN20191002008651315> [<https://perma.cc/AL9D-XC2R>]; Ock Hyun-Ju, "We Are Cho Kuk:" Protesters Condemn 'Political' Prosecution, KÖR. HERALD (Oct. 5, 2019), <http://www.koreaherald.com/view.php?ud=20191005000097> [<https://perma.cc/45JR-EYBC>].

<sup>278</sup> Ha Nam-Hyeon, *Geomchal susagweon baktal wae hanayo: noranui geomsuwanbak A to Z* [Why Deprive the Prosecutors' Office of Investigative Powers: Controversy over Complete Deprivation of Prosecutorial Investigative Authority A to Z], THE JOONGANG (Apr. 27, 2022), <https://www.joongang.co.kr/atoz/7> [<https://perma.cc/Q5CE-FNT9>].

<sup>279</sup> See, e.g., Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.

<sup>280</sup> Hyung-A Kim, *Yoon Suk-yeol's Rise from Rebel Prosecutor to President*, E. ASIA F. (Apr. 22, 2023), <https://eastasiaforum.org/2022/04/23/yoon-seok-yeols-rise-from-rebel-prosecutor-to-president/> [<https://perma.cc/2FZZ-EJDS>].

<sup>281</sup> Han Dong-Hun, who later became President Yoon's Minister of Justice, led the attack. He said:

reform.<sup>282</sup> But with the legislature still ruled by the opposing party, Yoon and his allies could only petition the Constitutional Court to throw out the law. They argued that the last-minute parliamentary tricks used to pass the law amounted to an unconstitutional legislative process<sup>283</sup> and that because the Korean Constitution explicitly states that only prosecutors can apply for warrants, it impliedly gives prosecutors significant investigative powers.<sup>284</sup>

Setting aside the public controversy and constitutional complaint (which the Constitutional Court rejected),<sup>285</sup> President Moon's final reform is unlikely to have much impact. Central to the 2022 reform was the reduction of the types of cases prosecutors are permitted to investigate. Whereas the 2021 reform limited prosecutorial investigations to six areas,<sup>286</sup> the 2022 reform reduced this to two: corruption and economic crimes.<sup>287</sup> However, the reformed Article 4

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This country's common-sense jurists, journalists, academics, civil society groups with one voice are opposing the law. To me, such unanimous opposition has been unheard of recent public discourse . . . . Even Lawyers for a Democratic Society [Minbyun] and PSPD are opposing it . . . . The reason is self-evident. If this proposal passes, the nation will suffer.

Seo Yeong-Ji & Jang Na-rae, *Handonghun beommubu janggwan huboja "geomsuwanbak beoban bandeusi jeojidwaeya"* [Han Dong-Hun Minister of Justice Candidate "Complete Deprivation of Prosecutorial Investigative Authority Legislative Proposal Definitely Must Be Stopped"], HANKYOREH (Apr. 13, 2022), [https://www.hani.co.kr/arti/politics/politics\\_general/1038751.html](https://www.hani.co.kr/arti/politics/politics_general/1038751.html) [https://perma.cc/Y9ZR-X4XG].

<sup>282</sup> See Ha, *supra* note 278.

<sup>283</sup> Michael Lee, *Laws Declawing Prosecutors Challenged Constitutionally*, KOR. JOONGANGDAILY (June 28, 2022), <https://koreajoongangdaily.joins.com/2022/06/28/national/politics/Korea-prosecution-Constitutional-Court/20220628175044097.html> [https://perma.cc/B2KL-G846].

<sup>284</sup> As one newspaper put it, "Article 12 of the constitution stipulates prosecutors as officials with authority to request warrants for arrest, detention, search or seizure. A dominant view among legal professionals is that the article means that request for warrants is based on the premise that prosecutors do investigative activities." [Editorial] *Ball in Constitutional Court*, KOR. HERALD (May 6, 2022), <https://www.koreaherald.com/view.php?ud=20220505000246> [https://perma.cc/L3NY-ES6E].

<sup>285</sup> [Editorial] *Justice Ministry Must Take Court's Ruling on Prosecutor Reforms to Heart*, HANKYOREH (Mar. 24, 2023), [https://english.hani.co.kr/arti/english\\_edition/english\\_editorials/1085072.html](https://english.hani.co.kr/arti/english_edition/english_editorials/1085072.html) [https://perma.cc/ZGE4-7Q58].

<sup>286</sup> See *supra* note 250 and accompanying text.

<sup>287</sup> POA (2022), *supra* note 33, art. 4 para. 1.

kept the earlier loophole allowing prosecutors to also investigate “important crimes determined by presidential decree.”<sup>288</sup> This means that—by executive action—President Yoon, or a future president, may designate “important crimes” that prosecutors will be permitted to investigate directly. In any event, the definitions of “corruption” and “economic crimes” may be interpreted with exceeding broadness to widen the scope of offenses prosecutors can directly investigate.<sup>289</sup>

President Moon’s rushed 2022 reform therefore seems poorly designed to achieve its intended outcome of reducing the number of crimes that prosecutors can prosecute. The “complete deprivation of prosecutorial investigative authority” is unlikely to occur, especially if a president friendly to the Prosecutors’ Office is in power.<sup>290</sup>

#### IV. CHARGING AUTHORITY

Politically motivated prosecutors may use their charging powers to punish or pressure the government’s enemies or refuse to indict its friends. Moreover, certain vaguely defined offences energize prosecutorial discretion, creating opportunities for prosecutors to attack or protect suspects with political connections. How should prosecutorial charging authority be restrained? With bureaucratic rules that signify rational professionalism? Or with more democratic means, such as inviting non-specialist community members into the decision-making process?

##### A. Bureaucratic Reform

###### 1. Self-Regulation: Debates over the Opportunity Principle versus

<sup>288</sup> *Id.*

<sup>289</sup> President Yoon’s Ministry of Justice announced plans to widen the definitions of “important crimes determined by presidential decree,” “corruption,” and “economic crimes.” Press Release, Ministry of Just., Geomsaui susagaesi beomjoe beomwie gwanhan gyujeong gaejeongan deung ipbeopyego [“Prosecutor’s Investigation Initiation Crime Scope-Related Regulation” Revision Draft Legislative Notice] (Aug. 11, 2022), <https://www.moj.go.kr/bbs/moj/182/562061/artclView.do> [<https://perma.cc/26EB-9YQC>].

<sup>290</sup> One newspaper has said that the reform has already been “handily defanged” by government rules on how the reform is to be implemented. Jeong Hye-min, *After Elections, Prosecutorial Reform Will Likely Make Legislative Agenda*, HANKYOREH (Apr. 18, 2024), [https://english.hani.co.kr/arti/english\\_edition/e\\_national/1137209](https://english.hani.co.kr/arti/english_edition/e_national/1137209) [<https://perma.cc/QJ86-288Z>].

*Legality Principle, the Objective Duty, and Other Rules*

Korea's criminal procedure follows the German "principle of opportunity" that gives prosecutors discretion in deciding whether to file charges when they believe a crime has been committed.<sup>291</sup> Theoretically, however, the law constrains prosecutors by specifying criteria that must be assessed when making a charging decision.<sup>292</sup> These include the suspect's character, relationship with the victim, motive, and circumstances after the crime.<sup>293</sup> Although the law thus offers a technical standard to guide prosecutors, it hardly seems to constrain them. At the level of academic discussion, a few scholars believe that the statutory criteria should be reformed to be more precise and rational.<sup>294</sup>

Others argue that Korea should switch from the *Opportunitätsprinzip* (the "principle of opportunity") to the *Legalitätsprinzip* (the "legality principle") which holds that prosecutors must charge suspects when they believe that sufficient evidence exists to convict.<sup>295</sup> Such a reform would align Korea more closely with its German legal tradition.<sup>296</sup> Adopting the legality

<sup>291</sup> See CPC (2025), *supra* note 240, art. 247 ("Article 247 (Opportunity Principle) The prosecutor, taking into account the items in Criminal Code article 51, is able to not file charges.").

<sup>292</sup> *Id.*

<sup>293</sup> Criminal procedure refers to a provision in the substantive criminal code: "Article 51 (Conditions of Sentencing) In determining the sentence, the following items must be taken into account: 1) the suspect's age, character, intelligence, and environment; 2) relationship with the victim; 3) the crime's motives, method, and result; 4) circumstances after the crime." Hyeongbeop [Criminal Code] art. 51 (S. Kor.), <https://www.law.go.kr/LSW/lsInfoP.do?lsiSeq=270563> [<https://perma.cc/YF2Z-E3G5>].

<sup>294</sup> Ko Gyeong-Hui & Lee Jin-Guk, *Geomsaui bulgisochobun siltaewa gaeseonbangan* [Prosecutorial Non-Charging Disposition: Reality and an Improvement Proposal], 06-16 HYEONGSAJEONGCHAEGYEONGUWEON YEONGUCHONGSEO [CRIM. POL'Y RSCH. INST. RSCH. SERIES] 11 (2006) (S. Kor.).

<sup>295</sup> See, e.g., Kim Ha-Joong, *Urinara gisojedoui munjejeome daehan gochal – geomchalgaehyeogui gwanjeomeseo* [A Study on the Problems of Our Country's Prosecution System: From the Perspective of Prosecution Reform], 443 INGWEONGWA JEONGUI [HUM. RTS. & JUST.] 49 (2014) (S. Kor.) (advocating the legality principle as a means to reduce prosecutorial politicization).

<sup>296</sup> See Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMPAR. L. 508, 509 (1970) ("Its historical origins show, however, that the German prosecuting attorney's office was not only intended to take over the function of pressing criminal charges, but at the same time to guarantee the unstinting prosecution of criminality, and, as an organ of judicial administration, to represent the state's will for justice. A wide-ranging freedom of action in the institution of criminal proceedings would, however, be in contradiction

principle would force prosecutors to institute proceedings in some cases where they currently might not, especially political cases. One scholar reasons that this rule change is more important than structural reforms such as creating the CIO or allowing independent police investigations because those reforms depend on institutional cultures rather than a fundamental rule to be followed.<sup>297</sup> It is possible, however, that prosecutors might respond to a legality principle reform by manipulating their interpretation of the sufficiency of the evidence in deciding whether or not to indict, just as they currently can adjust their view of the statutory charging discretion criteria to arrive at a preferred outcome. In any case, the debate over adopting the legality principle is largely academic, and there is no discernable sign that it has reached the political level.

Other bureaucratic reforms have been proposed. Some suggest strengthening prosecutors' quasi-judicial objective duty to take the interests of suspects and defendants into account.<sup>298</sup> This proposal could theoretically reduce abusive indictments by enhancing prosecutorial professionalism. But like the legality principle reform mentioned above, however, this idea is mainly discussed in academia, takes little notice of the social reality of Korean prosecutorial organization, and is consequently not often advocated by political-level reformers. Another reform proposal is to increase the paperwork

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to these latter functions. For this reason—and in contrast to the French situation, where the opportunity principle of prosecutorial discretion was retained—Germany statutorily adopted a policy of limiting the prosecutor's freedom of choice in instituting criminal proceedings where he is presented with evidence of criminal conduct (the so-called legality principle—*Legalitätsprinzip*)."). But note also:

There are a number of cases in which prosecution and filing of a complaint lie within the discretion of the prosecutor. In these situations one speaks of the principle of expediency (*Opportunitätsprinzip*). The cases in which this principle may be applied have been gradually widened by statute over the course of the last decades; nevertheless this development has not changed the basic fact that the structure of German criminal process is built upon the legality principle.

*Id.* at 513.

<sup>297</sup> Kim Bong-Su, *Geomchalgaehyeok, eodiro gago itneunga?* [*Prosecution Reform, Where Is It Going?*], 22 BIGYOHYEONGSABEOP YEONGU [KOREAN J. COMPAR. CRIM. L.] 21 (2020) (S. Kor.).

<sup>298</sup> For analysis of reform discourse on the objective duty, see *supra* notes 170-178 and accompanying text.

prosecutors must complete to force them to commit to writing the reasons for their actions.<sup>299</sup> As noted above, this is a weak reform that has been proposed by the Prosecutors' Office itself.<sup>300</sup>

Lastly, there is one idea that has *not* been advanced—namely, increasing internal bureaucratic supervision of charging decisions. It is widely understood that the existing system already contains extensive mechanisms of bureaucratic accountability and that this oversight has not prevented prosecutorial politicization.

### *B. Democratic and Decentralizing Reform*

Many reform ideas discussed in earlier sections affect prosecutors' charging authority. For instance, special prosecutor systems offer increased independence not only in investigations but also for charging decision-making.<sup>301</sup> In addition, the "application for adjudication" procedure has been expanded to permit victims of more types of crimes to ask courts to force prosecutors to indict suspects.<sup>302</sup> Decentralizing prosecutorial power by introducing elections for chief prosecutors (*geomsajang*, 검사장) at the provincial-level would mean that the hierarchical overseers of charging decisions would become democratically accountable.<sup>303</sup>

An alternative form of decentralization, the establishment of the CIO,<sup>304</sup> also has implications for charging decision-making. The fact that the CIO's staff appointments are determined in part by the legislature signifies a certain degree of democratic accountability for its work, including laying charges. It is also possible that, if the CIO makes corrupt or seriously perverse indictment decisions, the Prosecutors' Office could indict the CIO's staff. The two prosecutorial hierarchies have jurisdiction over the other's members, enabling them to check each other's actions, including charging, using laws criminalizing offenses such as corruption, abuse of power, or

<sup>299</sup> See Yeo, *supra* note 169.

<sup>300</sup> *Id.*

<sup>301</sup> Act on the Special Prosecutor's Nomination, Etc. (2014), *supra* note 185, art. 1.

<sup>302</sup> Cho, *supra* note 107, at 74. The "application for adjudication" occurs when a victim or someone affected by a crime applies to a court for review of a non-prosecution decision. A reform expanded the list of types of offenses eligible for judicial review. *Id.*

<sup>303</sup> KIM, PROPOSED PROSECUTORS' OFFICE REFORM I, *supra* note 47, at 8.

<sup>304</sup> See *supra* Section II.C.

dereliction of duty. The success of this system of checks and balances remains to be seen.

Transferring prosecutorial investigative powers to the police represents a shift in the prosecution's role, from investigations to charging and trials. If police preserve their new position as the primary investigative institution, then prosecutors will have less scope to manipulate their indictment decisions by increasing or decreasing the intensity of investigations. Prosecutors' hands will not be fully tied, but their charging discretion will be restrained if they must accept the investigative facts as found by the police.

Finally, another significant reform idea bears directly upon charging authority: the question of whether to introduce an Anglo-American style grand jury system.

### *C. Reform Adopted: Quasi-Grand Jury Experimentation and Korean Discourse on the Grand Jury*

Why would Korean reformers want to adopt the grand jury? Grand juries have been abolished in England<sup>305</sup> and are distrusted by academic commentators in the United States.<sup>306</sup> To be sure, the grand jury is relatively less mentioned in reform discourse than other ideas. But what attracts reformers to the grand jury is the idea of allowing ordinary citizens to determine charging decisions rather than professional public prosecutors—that is, replacing bureaucracy with democracy. Curiously, the Prosecutors' Office has expressed interest in the idea too, possibly because it believes it can dominate the grand jury as American prosecutors reportedly do.

#### *1. Origins of Grand Jury Reform: Democratization to Overcome "Bureaucratic Authoritarianism" versus the*

<sup>305</sup> England ended the grand jury in 1933. Nathan T. Elliff, *Notes on the Abolition of the English Grand Jury*, 29 AM. INST. CRIM. L. & CRIMINOLOGY 3, 21-22 (1938).

<sup>306</sup> Korean observers are well aware of developments in England and of disapproval of grand juries in the United States. See, e.g., Kim Tae-Myeong, *Geomchalsiminwiweonhoe mit gisosimsahoe jedoe daehan bipanjeonk gochal: migukui daebaesimjedowa ilbonui geomchalsimsahoejedoreul chamgohayeo* [*A Critical Inquiry into the Citizen Committee and Indictment Review Committee Systems with Reference to America's Grand Jury and Japan's Prosecution Review Commission*], 84 HYEONGSAJEONGCHAEGYEONGU [KOREAN CRIMINOLOGICAL REV.], 149, 153, 162-63 (2010) (S. Kor.) [hereinafter Kim, *A Critical Inquiry*].

*Prosecutors' Office Response to a Loss of Trust*

Calls to adopt the grand jury became prominent around 2009, following ex-President Roh Moo-Hyun's suicide,<sup>307</sup> which was widely blamed on prosecutorial harassment and propelled the issue of prosecutorial reform into the national consciousness.<sup>308</sup> Because judicial and prosecutorial reform activists are the ideological descendants of the 1980s democracy movement, many believe that ordinary citizens should be empowered to restrain judicial elites. As professor Jung Han Joong reasoned in 2009:

Citizen participation-type power control in the criminal judiciary strengthens democratic legitimacy in the judiciary and makes it into, not "a judiciary for the people" [a government slogan of the time], but "a judiciary *according to the people*" and "a judiciary respected by the people." For this, the introduction of a citizen participation-type charging authority control mechanism is what will realize and strengthen the principle of democracy in criminal judicial procedure and overcome the orientation of "bureaucratic authoritarianism" that is the structural disease of Korea's criminal judiciary.<sup>309</sup>

He went on to argue that the principle of popular sovereignty in the Korean Constitution means that the general public ought to check

<sup>307</sup> 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> [https://perma.cc/JK2C-E8JV].

<sup>308</sup> Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.6 (discussing former President Roh's suicide, its relation to the Prosecutors' Office, and effect on public opinion towards prosecutors). Prosecutorial scandals early in Lee Myung-Bak's 2008-13 presidency also alarmed activists. In a 2008 meeting of pro-reform activists, lawyers, and scholars, a professor argued for adopting the U.S.-style grand jury or Japanese-style quasi-grand jury to enable citizen oversight of prosecutors' charging discretion. Pak Keun-Yong, Han Sang-Hui, Lee Ho-Jung, Kim Jin-Uk & Min Gyeong-Han, *Geomchal 60junyeon, geomchalui jeongchihwawa gweonlyeokhwa eotteotke hal geosinga* [The Prosecutors' Office's 60th Anniversary, How to Deal with the Prosecution's Politicization and Power-ification?], 14 SIMINGWA SEGYE [CITIZEN & THE WORLD] 387, 391 (2008) (S. Kor.).

<sup>309</sup> Jung Han Joong, *Siminchamyehyeong gongsogweontongjejedoui mosaek* [The Search for a Citizen Participation-Type Charging Authority Control System], 12 INHA BEOMNYUL RIBYU [INHA L. REV.] 213, 233 (2009) (S. Kor.).



prosecutors' inherently defective charging discretion.<sup>310</sup> In conclusion, the professor recommended introducing U.S.-style grand juries. Acknowledging that American grand juries are widely considered to be overly controlled by prosecutors,<sup>311</sup> he suggested fixing this problem with careful rules of evidence and by allowing defense lawyers into the process.<sup>312</sup>

Despite growing interest in the idea, the grand jury has not been a priority for reformers. Strangely, however, the Prosecutors' Office itself abruptly announced that it would establish a grand jury-like system. Four months after ex-President Roh's suicide, and after news broke of a prosecutorial scandal that revealed systemic corruption,<sup>313</sup> the Prosecutor General told journalists that:

In order to do investigations that receive the people's love and support, we see the need to do investigations that gain backing from the people. In the long term, when we decide the direction of investigations, such as detention or indictment in important cases, there is a plan to implement the American-style grand jury system, in which the people participate. However, it is difficult to achieve this right now, so as an intermediate

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<sup>310</sup> *Id.* at 240 (“Popular sovereignty under the constitution is not simply an ornamental provision, and in all modern democratic states popular sovereignty is an ideological pillar that demands ‘citizen participation, monitoring, and power control’ of all power institutions. However, even while our Prosecutors’ Office has enormous power and wide-ranging official duties, it has not had a rational control mechanism. In particular, in the field of charging authority – the core of prosecutorial power – with the principle of prosecutorial unification in combination with the opportunity principle and charging monopoly, there is a danger of structural abuse of prosecutorial charging discretion. In this way, the pre-decision control mechanism for prosecutorial power is flimsy, and in particular, there is a lack of a mechanism in which ordinary people participate in the exercise of charging authority, as in foreign countries.”).

<sup>311</sup> See Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process when Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 106 (2013) (“Traditionally, of course, the grand jury was seen as the major bar to prosecutorial overreaching. The effectiveness of this approach may be seen in the longstanding aphorism that a good prosecutor can persuade a grand jury to indict a ham sandwich.”).

<sup>312</sup> *Id.* at 239.

<sup>313</sup> KIM ET AL., PROSECUTORS’ OFFICE REPUBLIC, *supra* note 44, at 266. An investigative journalism television program exposed the issue of prosecutorial “sponsors”—wealthy businessmen who pay prosecutors for legal protection. See also Mosler, *supra* note 146, at 96.

step we are coming up with a plan for an investigation deliberation committee.<sup>314</sup>

Precisely why the Prosecutor General proposed this idea is unclear. He may have genuinely wanted to change the culture of the organization. Or perhaps he wanted to mollify the public with a small reform in order to reduce political pressure to implement larger reforms.

It can be assumed that the Prosecutors' Office's vision of a grand jury reform was plotted by its internal think tank, the Future Planning Group (*Geomchal mirae giheokdan*, 검찰미래기획단). This powerful department, staffed by elite prosecutors and based at the Supreme Prosecutors' Office, was established in 2005<sup>315</sup> during the judicial reform process to help the prosecution with high-stakes negotiations over Korea's judicial organization.<sup>316</sup> At its founding, the Group declared that its purpose was to restore public trust in the Prosecutors' Office, especially through comparative research into prosecution systems of "developed countries."<sup>317</sup> Interviewees explained to the author that, during judicial reform negotiations, the Prosecutors' Office was caught unprepared by the arguments and data marshalled by the pro-reform side (civil society groups, legal academia, and the judiciary), much of which referenced foreign models. Thus, during and after the judicial reform process, the Future Planning Group's unofficial mission was to build up the prosecution's knowledge base and prepare for contingencies and calls for reform so that it could prevent further erosion of prosecutorial powers. In other words, the Future Planning Group was the intellectual center of the Prosecutors' Office's defenses against reform. The Group's work was

<sup>314</sup> Gu Gyo-Hyeong, *Gungminchamyeo daebaesimje dangjang eoryeoweo susasimuiwiro gongjeong-tumyeongseong jego* ["People Participation Grand Jury System Difficult Right Now, Investigative Deliberation Committee to Enhance Fairness and Transparency"], KYUNGHYANG SHINMUN (Sept. 29, 2009), [http://news.khan.co.kr/kh\\_news/khan\\_art\\_view.html?art\\_id=200909291807345](http://news.khan.co.kr/kh_news/khan_art_view.html?art_id=200909291807345) [<https://perma.cc/FJ28-HPTX>].

<sup>315</sup> Press Release, Daegeomchalcheong [Supreme Prosecutors' Off.], *Geomchalmiraegihoekdan chulbeom* [Launch of the Prosecutors' Office Future Planning Group] (July 19, 2005), <https://www.korea.kr/news/pressReleaseView.do?newsId=80057961> [<https://perma.cc/9KDS-SG8L>].

<sup>316</sup> Anonymous interviewee jurists informed the author about the Future Planning Group's true mission of assisting the Prosecutors' Office during the judicial reform process of 2005-7.

<sup>317</sup> Press Release, Daegeomchalcheong, *supra* note 315.

highly secretive,<sup>318</sup> and it was abolished in 2019 amid President Moon's drive to reform the Prosecutors' Office and deprive it of its historical prerogatives.<sup>319</sup> In 2009, however, widespread calls for prosecutorial reform likely presented the Future Planning Group with a crisis to respond to, and it must have conducted preparatory research on the grand jury.

## 2. The "Prosecutors' Office Citizen Committee"

The institution that was introduced in October 2010—the "Citizen Committee"<sup>320</sup>—ought to be understood as only a quasi-grand jury because it is merely advisory and affords no compulsory check on indictment decisions.<sup>321</sup> Moreover, Citizen Committees were established not by legislation but by regulations promulgated by the Prosecutors' Office.<sup>322</sup> This signifies that the system exists at the whim of the Prosecutors' Office.

The rules on the "Prosecutors' Office Citizen Committee" (*Geomchal simin wiweonhoe*, 검찰시민위원회) that were promulgated by the Prosecutors' Office contain the following provisions. In terms of scope of responsibility, the regulations initially limited the Committee to deliberating on charging, non-charging, and detention decisions.<sup>323</sup> However, after several amendments,<sup>324</sup> the

<sup>318</sup> While the author was able to visit the judiciary's reform planning office and interview researchers there, an ex-prosecutor interviewee who once worked at the Future Policy Group refused to comment on its operations even anonymously.

<sup>319</sup> See Lee Cheong-Hyeon, *Daegom miraegihoe dan hyeongsajeongchaekdan sarajinda* [Supreme Prosecutors' Office Future Planning Group & Criminal Policy Group Disappear], BEOMNYUL SINMUN (Apr. 18, 2019, 9:08 AM), <https://m.lawtimes.co.kr/Content/Article?serial=152142> [<https://perma.cc/PB5G-FD74>].

<sup>320</sup> The name of the institution created in October 2010 ("Prosecutors' Office Citizen Committees") differed from the name the Prosecutor General used in September ("investigation deliberation committee"). Gu, *supra* note 314. But the "investigation deliberation committee" nomenclature was applied to a different quasi-grand jury institution created in 2018. See *infra* note 350 and accompanying text.

<sup>321</sup> *Geomchal siminwiweonhoe unyeongjichim* [Prosecutors' Office Citizen Committee Operation Guidelines], amended by Supreme Prosecutor's Office Established Rule No. 553, Oct. 21, 2010 (S. Kor.), <https://www.law.go.kr/LSW//admRulLsInf.do?chrClsCd=&admRulSeq=2000000014897> [<https://perma.cc/SB4E-EN43>].

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* art. 3.

<sup>324</sup> The latest version of the rules governing this quasi-grand jury is: *Geomchal siminwiweonhoe unyeongjichim* [Prosecutors' Office Citizen Committee Operation

regulations now cover a wide set of prosecutorial issues, including the length of sentences that should be sought,<sup>325</sup> whether prosecutors should appeal,<sup>326</sup> and anything else a district-level prosecution office chief wants advice on.<sup>327</sup> A Citizen Committee may be empaneled in cases involving government “officials” (formerly, “high-ranking officials”),<sup>328</sup> large scale fraud and financial crimes,<sup>329</sup> violent crimes,<sup>330</sup> and “cases which become the focus of social attention.”<sup>331</sup> As for the institution’s overall mission, the first article reads:

In order to directly reflect the people’s opinions in the Prosecutors’ Office decision-making process, enhance the transparency and fairness of prosecutorial power actions, and guarantee the people’s civil rights, these Guidelines aim to regulate necessary items related to the Prosecutors’ Office Citizen Committee subjects of deliberation, composition, deliberation process, etc.<sup>332</sup>

This quasi-grand jury operates at the discretion of the prosecutorial hierarchy. The head of a prosecution office can convene a Citizen Committee upon determination of a need, and its size must be between eleven and sixty citizens.<sup>333</sup> The members of the Committee must be Korean citizens over nineteen years old who possess “robust common

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Guidelines] (S. Kor.) [hereinafter Citizen Committee Guidelines (2024)], <https://www.law.go.kr/LSW//admRulLsInfoP.do?chrClsCd=&admRulSeq=2100000241958> [<https://perma.cc/75U4-593F>].

<sup>325</sup> *Id.* art. 3 para. 2 subpara. 6.

<sup>326</sup> *Id.* art. 3 para. 2 subpara. 8.

<sup>327</sup> *Id.* art. 3 para. 1 subpara. 5, art. 3 para. 2 subsection 9.

<sup>328</sup> *Id.* art. 3 para. 1 subpara. 1. This provision in the 2018 Citizen Committee Guidelines used the phrase “High-ranking officials,” the same term as the one used in the CIO’s Korean name: *gowi gongjikja*, 고위 공직자. The 2018 Citizen Committee Guidelines might therefore have represented the Prosecutors’ Office’s attempt to preempt the creation of the CIO by indicating that the CIO’s mission was already being undertaken by the Citizen Committee. Geomchal siminwiweonhoe unyeongjichim [Prosecutors’ Office Citizen Committee Operation Guidelines], amended by Supreme Prosecutor’s Office Established Rule No. 1438, May 29, 2024, art. 3 para. 1 subpara. 1. (S. Kor.), <https://www.law.go.kr/LSW//admRulLsInfoP.do?chrClsCd=&admRulSeq=2100000156769> [<https://perma.cc/9ARD-A7EW>].

<sup>329</sup> Citizen Committee Guidelines (2024), *supra* note 324, art. 3 para. 1 subpara. 2.

<sup>330</sup> *Id.* art. 3 para. 1 subpara. 3.

<sup>331</sup> *Id.* art. 3 para. 1 subpara. 4.

<sup>332</sup> *Id.* art. 1.

<sup>333</sup> *Id.* art. 4 paras. 1-2.

sense and a sense of balance” and come from a diverse range of occupations, ages, and sexes.<sup>334</sup> The Prosecutors’ Office selects Citizen Committee members from people who have “received a recommendation” or from among respondents to public advertisements soliciting participation.<sup>335</sup> The office head selects the Committee’s foreman.<sup>336</sup> A vague provision allows the prosecution office head to dissolve the Committee if “its duties become difficult to fulfill through unavoidable circumstances.”<sup>337</sup>

The basis for the Citizens Committee deliberations is a written “explanatory report” prepared by prosecutors.<sup>338</sup> Before the Committee deliberates, prosecutors may not inform them about the case.<sup>339</sup> In deliberations, a prosecutor or investigator may explain aspects of the case to the Citizen Committee.<sup>340</sup> The Committee can also request testimony from prosecutors, investigators, and outside experts.<sup>341</sup> A remarkable comparative law mixture of the Anglo-American grand jury and the Continental objective duty can be found in the subsequent provision: while a prosecutor “can explain or set forth an opinion on the case,” “the prosecutor must explain facts and evidence with the highest objectivity.”<sup>342</sup> Indeed, the explanatory report must be composed “objectively.”<sup>343</sup> It is also noteworthy that this quasi-grand jury deliberates on procedural bases that are both documentary and oral, pragmatically offering Citizen Committee members prosecutor-vetted case information through both modes.<sup>344</sup>

<sup>334</sup> *Id.* art. 4 para. 4.

<sup>335</sup> Citizen Committee Guidelines (2024), *supra* note 324, art. 4 para. 5.

<sup>336</sup> *Id.* art. 5.

<sup>337</sup> *Id.* art. 8 para. 2. The same provision states that the prosecution office head can also dissolve the Citizen Committee if “the Committee does an act that damages its dignity as a Committee,” terminology that implies acceptance of a bribe or other corruption. *Id.*

<sup>338</sup> *Id.* art. 10 para. 1. Prosecutors can also take steps to conceal identities of persons related to the case, which may be disclosed in the prosecutors’ file, in order to protect their privacy. *Id.*

<sup>339</sup> Citizen Committee Guidelines (2024), *supra* note 324, art. 10 para. 2.

<sup>340</sup> *Id.* art. 14 para. 1.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* art. 14 para. 2.

<sup>343</sup> *Id.* art. 10 para. 1.

<sup>344</sup> Esmein, the great historian of Continental criminal procedure, emphasized, in describing the French revolutionary experimentation with the grand jury, that its power was weakened when the government changed the grand jury from oral to written taking of evidence. According to him, this curtailed the French revolutionary grand jury’s ability to assess proof and challenge the official written account of the case. ADHÉMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 444-

Citizen Committee deliberations must be kept secret.<sup>345</sup> As for the decision-making process, “[t]he Committee should reason towards a unanimous opinion through sufficient discussion, but when it cannot reach unanimity, the Committee can reach a decision through the approval of the majority of seated members.”<sup>346</sup> After deliberating, the Committee completes a form containing its opinion, which includes the signatures of members and, if any Committee members wish, written statements of dissent.<sup>347</sup> Most significantly, Article 18 states that “the prosecutor must have the highest respect for the Committee’s deliberative opinion. But the Committee’s opinion does not bind the prosecutor’s decision.”<sup>348</sup>

These rules manifestly place prosecutors in control of the Citizen Committee quasi-grand jury system.

### 3. *The “Prosecutors’ Office Investigation Deliberation Committee”*

In 2018, the Prosecutors’ Office again experimented with popular participation in the charging process.<sup>349</sup> It created another quasi-grand jury institution called the “Prosecutors’ Office Investigation Deliberation Committee” (*Geomchal susa simui wiweonhoe*, 검찰수사심의위원회).<sup>350</sup> The rules’ first article declares the system’s mission: “In order to enhance the people’s trust regarding Prosecutors’

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45 (John Simpson trans., 1913). Esmein quotes an opponent of the shift arguing that: “‘Without the oral testimony of witnesses,’ said Chabot, ‘and with written documents, there is, in reality, no grand jury.’” *Id.* at 444. In comparison, Korea’s Citizen Committee only hears case information that is officially prepared, rather than evidence directly from witnesses, making it unlikely for the Korean institution to challenge the prosecutors’ official record.

<sup>345</sup> Citizen Committee Guidelines (2024), *supra* note 324, art. 14 para. 3.

<sup>346</sup> *Id.* art. 14 para. 4.

<sup>347</sup> *Id.* art. 15.

<sup>348</sup> *Id.* art. 18 para. 1.

<sup>349</sup> The institution’s first regulatory framework was finalized on December 15, 2017, and came into effect on January 2, 2018. *Geomchalsusasimuiwiweonhoe unyeongjichim* [Prosecutors’ Office Investigation Deliberation Committee Operation Guidelines], *amended by* Supreme Prosecutors’ Office Established Rule No. 967, Sept. 20, 2018 (S. Kor.), <https://www.law.go.kr/LSW//admRulLsInfoP.do?chrClsCd=&admRulSeq=2100000107160> [<https://perma.cc/W2GB-QCKP>].

<sup>350</sup> The latest version of its rules is: *Geomchalsusasimuiwiweonhoe unyeongjichim* [Prosecutors’ Office Investigation Deliberation Committee Operation Guidelines] (S. Kor.) [hereinafter *Investigation Deliberation Committee Guidelines* (2024)], <https://www.law.go.kr/LSW//admRulLsInfoP.do?chrClsCd=&admRulSeq=2100000242180> [<https://perma.cc/YZ5G-URLU>].

Office investigative procedures and results, these Guidelines aim to regulate necessary items for the operation of the ‘Prosecutors’ Office Investigation Deliberation Committee’ (called ‘the Committee’ below) which is established.”<sup>351</sup> Like the Citizen Committee, an Investigation Deliberation Committee considers charging decisions, non-charging decisions, detention warrants, and any other matter the Prosecutor General may request.<sup>352</sup> What differentiates the Investigation Deliberation Committee from the Citizen Committee is that the former can review the question of whether an investigation should be continued.<sup>353</sup>

The rules governing the Investigation Deliberation Committee may be summarized as follows. Investigation Deliberation Committees are convened in cases that “arouse the people’s suspicions or become the focus of social attention.”<sup>354</sup> The Committee may be convened in two ways. First, a high-ranking prosecutor (a “chief prosecutor,” *geomsajang* 검사장) can ask the Prosecutor General to establish a Committee,<sup>355</sup> and the Prosecutor General can accept or reject that request.<sup>356</sup> The role of the Prosecutor General in empaneling an Investigation Deliberation Committee indicates formal centralized management of the process, compared to the Citizen Committee.

The second method for empaneling an Investigation Deliberation Committee is complex and written in dense, bureaucratic language. Persons connected to the case—“a case-related person (meaning an accuser, organizational complainant [e.g., a prosecutor], victim, suspect, and their representatives and lawyers)” —have standing to petition the Prosecutors’ Office to assemble an Investigation Deliberation Committee.<sup>357</sup> This request triggers a complicated process in which the relevant prosecution office arranges a Citizen Committee acting as a “Referral Deliberation Committee,” on which

<sup>351</sup> *Id.* art. 1.

<sup>352</sup> *Id.* art. 3 para. 1.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* art. 8 para. 1.

<sup>356</sup> Investigation Deliberation Committee Guidelines (2024), *supra* note 350, art. 9 para. 1. This provision is written in indirect language. It states that when a chief prosecutor’s request is received, “the Prosecutor General can convene the Committee,” which implies that the Prosecutor General could decline to do so. In contrast, the following paragraph states that the Prosecutor General “must convene” the Committee when the other, complicated request method is made (i.e., involving the Referral Deliberation Committee). *Id.* art. 9 para. 2.

<sup>357</sup> *Id.* art. 6 para. 1.

ten to fifteen people, including three prosecutors, serve.<sup>358</sup> The Referral Deliberation Committee considers both the petition and a written opinion from the “lead prosecutor” investigating the case.<sup>359</sup> The objective duty is mentioned when the lead prosecutor is specifically instructed to follow the objective duty in composing an opinion “faithfully reflecting facts and evidence that favor the suspect.”<sup>360</sup> By a majority vote, the Committee determines “whether or not to refer” the convocation of an Investigation Deliberation Committee to the Prosecutor General,<sup>361</sup> and such a recommendation is binding on the Prosecutor General.<sup>362</sup>

After the Committee’s formation is determined, its members are chosen from a roster of 150 to 300 people compiled by the Prosecutor General.<sup>363</sup> This pool is drawn from “people with learning and experience, experts from all walks of life with good moral reputations and abundant knowledge,”<sup>364</sup> who come from various occupations including the legal profession, academia, news media, civil society groups, and the arts.<sup>365</sup> Out of this high-class set, fifteen people are randomly selected for the Investigation Deliberation Committee;<sup>366</sup> but, if some members quit, a minimum of eleven persons are required for the Committee to continue to operate (ten plus the foreman).<sup>367</sup> The Prosecutor General chooses the Committee foreman.<sup>368</sup> An Investigation Deliberation Committee can be dissolved if “its duties

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<sup>358</sup> *Id.* art. 7 paras. 1, 2, 4.

<sup>359</sup> *Id.* art. 7 paras. 3, 5.

<sup>360</sup> *Id.* art. 7-2. The provision reads in full: “Article 7-2 (The prosecutor’s objective duty) The lead prosecutor must compose the opinion for article 7 paragraph 3 based on objective and sufficient evidence and documents, faithfully reflecting facts and evidence that favor the suspect.” Investigation Deliberation Committee Guidelines (2024), *supra* note 350, art. 7-2.

<sup>361</sup> *Id.* art. 7 paras. 5-6.

<sup>362</sup> *Id.* art. 9 para. 2.

<sup>363</sup> *Id.* art. 4 paras. 1-3.

<sup>364</sup> *Id.* art. 4 para. 2.

<sup>365</sup> *Id.* art. 4 para. 3.

<sup>366</sup> Investigation Deliberation Committee Guidelines (2024), *supra* note 350, art. 10 para. 2; *see also id.* art. 21.

<sup>367</sup> *Id.* art. 12 paras. 1-2.

<sup>368</sup> *Id.* art. 4 para. 5.



become difficult to fulfill through unavoidable circumstances”<sup>369</sup>—mirroring a provision in the Citizen Committee’s regulations.<sup>370</sup>

The regulations provide for two kinds of Investigation Deliberation Committee. First, there is a “Pending Issue Committee” (*Hyeonan wiweonhoe*, 현안위원회)<sup>371</sup> that considers “whether to continue an investigation,” “whether to apply or reapply for an arrest warrant,” or “other items the Prosecutor General refers to a Committee.”<sup>372</sup> In its deliberations, the Pending Issue Committee considers the prosecutorial actions under scrutiny in the petition—made by the case-related person (e.g., the suspect or defendant) or lead prosecutor on the case—as well as the lead prosecutor’s written opinion.<sup>373</sup> The Committee hears oral testimony from the lead prosecutor, petitioner, and suspect for thirty minutes each.<sup>374</sup> Committee members may ask them questions.<sup>375</sup> It can also request testimony from outside experts.<sup>376</sup> After deliberations, the Pending Issue Committee attempts to reach a decision unanimously, but if this is not possible, then it decides by a majority vote.<sup>377</sup> It then produces a written opinion signed by its members, which may include individual members’ reasons for their majority or dissenting opinions.<sup>378</sup> The Committee’s deliberations are held in secret,<sup>379</sup> and it determines whether, when, and how to make its conclusions public.<sup>380</sup> Finally, its decisions do not bind the Prosecutors’ Office.<sup>381</sup>

<sup>369</sup> *Id.* art. 5 para. 2. This provision also allows the Prosecutor General to end the Committee if “[the Committee] does an act that damages its dignity as a Committee.” *Id.*

<sup>370</sup> See Citizen Committee Guidelines (2024), *supra* note 324, art. 8 para. 2; see also *supra* note 337 and accompanying text.

<sup>371</sup> Investigation Deliberation Committee Guidelines (2024), *supra* note 350, art. 10 para. 1. This provision states that art. 3 para. 1 subparas. 1, 3, and 5 are the basis for the committee.

<sup>372</sup> *Id.* art. 3 para. 1 subparas. 1, 3 & 5.

<sup>373</sup> *Id.* art. 13 para. 1.

<sup>374</sup> *Id.* art. 14 para. 1.

<sup>375</sup> *Id.* art. 14 paras. 2-3.

<sup>376</sup> *Id.* art. 14-2.

<sup>377</sup> Investigation Deliberation Committee Guidelines (2024), *supra* note 350, art. 15 para. 2.

<sup>378</sup> *Id.* art. 16.

<sup>379</sup> *Id.* art. 15 para. 1.

<sup>380</sup> *Id.* art. 18.

<sup>381</sup> The relevant rule simply reads: “Article 19 (Effect of deliberations) The lead prosecutor must respect the Pending Issue Committee’s deliberative opinion.” *Id.* art. 19.

The second type of Investigation Deliberation Committee is the “Investigation Inspection Committee” (*Susa jeomgeom wiweonhoe*, 수사점검위원회).<sup>382</sup> It reviews “the appropriateness or legality of an investigation of a case in which there were charges or a non-charging disposition.”<sup>383</sup> According to the rules, upon the Investigation Inspection Committee’s convocation, it forms a subcommittee-like body called the “Investigation Inspection Unit” (*Susa jeomgeom dan*, 수사점검단).<sup>384</sup> The rules’ reasoning for this is that the common people on the committee require assistance from experts and professionals.<sup>385</sup> The rules balance power between the Committee’s ordinary citizens and the Prosecutors’ Office,<sup>386</sup> but they place the Prosecutor General ultimately in control of the composition of the Investigation Inspection Unit.<sup>387</sup> Bureaucracy and professionalization overrules democracy and amateurs.

The Investigation Inspection Unit’s body of specialists reviews the case<sup>388</sup> and produces a written report<sup>389</sup> that is the basis for the Investigation Inspection Committee’s deliberations.<sup>390</sup> The

<sup>382</sup> *Id.* art. 20. This provision states that art. 3 para. 1 subpara. 4 is the basis for the committee.

<sup>383</sup> Investigation Deliberation Committee Guidelines (2024), *supra* note 350, art. 3 para. 1 subpara. 4.

<sup>384</sup> *Id.* art. 22 para. 1.

<sup>385</sup> *See id.* art. 22 paras. 1-4 (“Article 22 (Investigation Inspection Unit Formation) 1) In order to inspect the appropriateness and legality of the investigation and accordingly suggest work improvement measures, the Investigation Inspection Committee shall form an Investigation Inspection Unit of outside experts and Prosecutors’ Office civil servants. 2) In order to give consideration to the gravity, complexity, etc., of the matter, the Investigation Inspection Committee shall, by approval of a majority of the Investigation Inspection Committee, select the size, inspection time period, and the ratio of outside experts and Prosecutors’ Office civil servants whom will participate on the Investigation Inspection Unit. 3) The Prosecutor General appoints the outside experts after receiving the recommendation of the Investigation Inspection Committee, and, in accordance with paragraph 2 above, designates the Prosecutors’ Office civil servants whom will participate in the Investigation Inspection Unit. 4) The Committee foreman nominates the head of the Investigation Inspection Unit from among the outside experts.”).

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* art. 22 para. 3.

<sup>388</sup> *Id.* art. 23 paras. 1-3. The Unit can request case documents and oral testimony from the prosecutor responsible for the case as well as a written opinion and testimony from case-related persons. Investigation Deliberation Committee Guidelines (2024), *supra* note 350, art. 23 paras. 1, 3.

<sup>389</sup> *Id.* art. 24 para. 1.

<sup>390</sup> “The Investigation Inspection Committee, on the basis of the Investigation Inspection Unit’s inspection result, deliberates on the necessity of requesting discipline, following from the investigation’s appropriateness, legality, work

Committee deliberates in secret and can request that case-related prosecutors and non-prosecutor investigators come to the Committee to give their opinions.<sup>391</sup> The information that the Investigation Inspection Committee hears about the case is therefore delivered through the professionalized Unit. In terms of the Committee's end product, it deliberates in secret<sup>392</sup> with the aim of reaching conclusions unanimously, although, failing that, it can decide by majority vote.<sup>393</sup> The Committee's written opinion, which is signed by its members, states the "necessity of requesting discipline, following from [the assessment of] the investigation's appropriateness, legality, work improvement measures, and matters of blame."<sup>394</sup> Whether, when, and how the Investigation Inspection Committee's opinion will be publicized is left for the Committee to determine autonomously.<sup>395</sup> Most importantly, the Committee's decisions are not binding on the Prosecutor General.<sup>396</sup>

#### 4. *Evaluating Korea's Quasi-Grand Jury Systems*

In evaluating the design of the quasi-grand jury systems outlined above, it is important to compare mechanisms of bureaucratic accountability versus those of democratic accountability. The quasi-grand jury is meant to bring accountability to prosecutorial decision-making, but to whom does it make prosecutors accountable? Ordinary people (democracy) or professionals (bureaucracy)?

The Citizens Committee seems closer to a system of bureaucratic accountability for prosecutors than one of democratic accountability. This is because prosecutors empanel the Citizens Committee,

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improvement measures, and matters of blame; and, in necessary circumstances, the Committee can order the Investigation Inspection Unit head to inspect additional specific items and can demand additional inspection." *Id.* art. 25 para. 2.

<sup>391</sup> *Id.* art. 25 para. 1.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* art. 25 para. 3. This provision's language is identical to that of the decision-making rule for the Pending Issue Committee (art. 15 para. 2), except that it requires the majority to approve its conclusions "item-by-item." Investigation Deliberation Committee Guidelines (2024), *supra* note 350, art. 25 para. 3. This provision represents the prosecutorial bureaucracy's demand for exactness from the lay members when they assess the bureaucracy's review (made the Unit) produced with special effort.

<sup>394</sup> *Id.* art. 26 para. 2.

<sup>395</sup> *Id.* art. 28.

<sup>396</sup> *Id.* art. 29 ("The Prosecutor General must respect the Investigation Deliberation Committee's deliberative opinion.").

significantly control it, and can disregard its result. Moreover, Korean observers largely do not believe that the institution serves as a check on prosecutors. For example, two scholars, Oh Cheong-Yong & Song Kwang-Seop have criticized the non-binding nature of Citizen Committee opinions, their lack of deliberative standards, and the arbitrariness of the member selection process.<sup>397</sup> Professor Pak Chan-Geol has made similar critiques and proposed several changes, including that the system should be mandatory for corruption cases, that it should be codified in legislation rather than regulation, that the Citizens Committee should pick its own foreman, that its term should be fixed and its dissolution forbidden, and that the Committee's decisions on whether to allow charges or reverse a non-charging decision should be binding on prosecutors.<sup>398</sup> Meanwhile, the reformist group PSPD has dismissed the Citizen Committee in its current configuration as "nominal and without effect" (*yumyeongmusil*, 有名無實).<sup>399</sup>

Like the Citizen Committee, the Investigation Deliberation Committee is dominated by the Prosecutors' Office. Prosecutors determine the pool of potential Committee members, choose the foreman, and can easily dissolve the body. Prosecutors substantially screen the case information that is given to Committee members. An ordinary petitioner's role in triggering the Committee's creation is a noteworthy mechanism of democratic accountability. But the three prosecutors on the Referral Deliberation Committee voting on whether to allow the Investigation Deliberation Committee—a grand jury upon a grand jury—are likely, as professionals, to have significant sway on the decision. Alternatively, a chief prosecutor's request to convene the Committee would likely come at the informal request of the

<sup>397</sup> Oh Cheong-Yong & Song Kwang-Seop, *Geomchalsiminwiweonhoejedoui hyeonhwanggwagwa gwaje* [*The Current Status and Discourse on Prosecutors' Office Citizen Committees*], 55 BEOPHAK YEONGU [LEGAL RSCH.] 243, 262-65 (2014) (S. Kor.).

<sup>398</sup> Pak Chan-Geol, *Gisojaeryangui tongjebanganeurosseo geomchalsiminwiweonhoeui hapniyeongin unyeongbangan* [*A Reasonable Proposal for the Prosecutors' Office Citizen Committees to Control Prosecutorial Discretion*], 28 HANYANGBEOPHAK [HAN YANG L. REV.] 81, 103-05 (2017) (S. Kor.).

<sup>399</sup> Press Release, Chamyeyeondae [People's Solidarity for Participatory Democracy], *gowigongjikjabirisusacheo doip bandae jujange daehan bipan uigyeonseu balpyo* [People's Solidarity for Participatory Democracy Presents a Written Criticism of Arguments Against the Introduction of a CIO] (Feb. 16, 2017), <https://www.peoplepower21.org/Government/1483348> [<https://perma.cc/7P4N-PJPK>].

Prosecutor General instead of independent initiative, given the bureaucratic culture within the prosecution. Additionally, a quasi-grand jury composed of social elites rather than ordinary citizens may cause its decisions to not fully reflect community values and common sense, which the system aspires to represent. Most importantly, prosecutors need not follow the Investigation Deliberation Committee's final recommendations, making this quasi-grand jury institution merely advisory.

Aspects of the second kind of Investigation Deliberation Committee deserve additional comment. The Investigation Inspection Committee is a quasi-grand jury that is dependent on a specialist subcommittee, the Investigation Inspection Unit, which gathers and analyzes information. Prosecutors can even serve on the Unit. The attachment of prosecutors to the quasi-grand jury body may be interpreted as a creative comparative legal blend of bureaucratic and democratic accountability. Alternatively, attaching prosecutors so closely to quasi-grand jury deliberations may be considered as undermining the overriding purpose of a grand jury—that non-professionals check professionals.

Recent controversies have provoked criticism of the system. One high-profile case of its use involved Samsung's de facto head, Vice-Chairman Lee Jae-Yong.<sup>400</sup> In 2020, prosecutors indicted Lee for securities and accounting crimes related to his consolidation of control over Samsung.<sup>401</sup> The charges went against the advice of the Investigation Deliberation Committee that Lee had requested, however.<sup>402</sup> Civil society groups politically hostile to Samsung dismissed the Committee's recommendation of no charges as ridiculous and possibly corrupt.<sup>403</sup> In an interview, a professor opined that "this institution was abused by the establishment. The Committee

<sup>400</sup> Ser Myo-Ja, *Experts Weigh Criminal Probe of Samsung's Lee*, KOR. JOONGANG DAILY (June 26, 2020, 4:11 PM), <https://koreajoongangdaily.joins.com/2020/06/26/national/socialAffairs/Lee-Jaeyong-Samsung-prosecution/20200626161000275.html> [https://perma.cc/T43R-YQA3].

<sup>401</sup> Choe Sang-Hun, *Samsung Heir Is Indicted but Avoids Jail*, N.Y. TIMES (Sept. 1, 2020), <https://www.nytimes.com/2020/09/01/business/samsung-lee-south-korea-indicted.html> [https://perma.cc/N6DJ-T997].

<sup>402</sup> *Id.*; see also Gu Bon-Gweon, "Susasimuiwi bulgiso gweongoneun geomchal-beobwon gyeoljeong dwijibneun 'sangsikbakk gyeollon'" ["Investigation Deliberation Committee Non-Charging Recommendation Is 'Conclusion Beyond Common Sense' That Overturns Decision of Prosecutors' Office and Courts"], HANKYOREH (June 28, 2020, 12:19 AM), [https://www.hani.co.kr/arti/economy/economy\\_general/951245.html](https://www.hani.co.kr/arti/economy/economy_general/951245.html) [perma.cc/D38G-LPL6].

<sup>403</sup> Gu, *supra* note 402.

was captured by Samsung, and its result is more conservative and pro-business than the arrogant, elite prosecutors.” In 2021, another Investigation Deliberation Committee recommended by a vote of eight to six that prosecutors end their investigation into allegations of Lee Jae-Yong’s illegal use of anesthetic injections.<sup>404</sup> The Committee may have been lenient toward Lee because its social elite members favored him or because they desired not to undermine one of the industrial pillars of the nation’s economy.

The Committee system has not been short of critics. In 2020, a survey of two dozen criminal law professors revealed that only one trusted the Investigation Deliberation Committee process.<sup>405</sup> Critical responses from the survey suggested that the system was rushed into operation and deliberated without clear rules. Scholars were closely split on whether they wanted to see the system utilize “ordinary people” or continue to rely on “experts,” because of the complexity of certain cases.<sup>406</sup> They were also divided on whether to introduce the Anglo-American style grand jury for charging: twelve supported this, eleven did not, and one abstained.<sup>407</sup>

### 5. Debates over Japanese and American Models

Korean experimentation with and discussion of grand jury systems has been inspired not just by the United States’ example but by a similar Japanese institution. After World War II, the U.S. military occupation government forced Japan to adopt a quasi-grand jury system.<sup>408</sup> Although the American side originally wanted to impose the U.S.-style grand jury, as part of its goal of democratizing Japan, the U.S. military government altered its demands to suit Japanese culture, resulting in the creation of the “Prosecution Review Commission” (PRC; *kensatsu shinsakai*, 検察審査会).<sup>409</sup> Rather than

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<sup>404</sup> (LEAD) *Prosecution Needs to Stop Probe into Samsung Chief’s Alleged Propofol Use: Expert Panel*, YONHAP NEWS AGENCY (Mar. 26, 2021, 8:41 PM), <https://en.yna.co.kr/view/AEN20210326013251315> [perma.cc/J2W2-64TK].

<sup>405</sup> Kang Han, *Bujagyong geomtoeobsi doip... jumeokgugu un-yeonge hollan gajung* [Introduced without Considering Side-Effects. . . Intensifying Confusion by Operating by Rule of Thumb], BEOMNYUL SINMUN (July 23, 2020, 9:03 AM), <https://m.lawtimes.co.kr/Content/Article?serial=163128> [perma.cc/8PBY-C8GW].

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> Mark D. West, *Prosecution Review Commissions: Japan’s Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 694-95 (1992).

<sup>409</sup> *Id.* at 694-96.

determine *ex ante* whether an indictment should be made, PRCs evaluate *ex post facto* whether prosecutors' charging or non-charging decisions were proper.<sup>410</sup>

Commissions are composed of eleven ordinary citizens randomly selected from voter registries.<sup>411</sup> The PRCs' review of a small fraction of indictment decisions is initiated either by a victim or accuser's application or on its own accord.<sup>412</sup> Under the original system, a Commission's verdict on an indictment was not binding on prosecutors, but after Japan's judicial reforms in the early 2000s, Prosecution Review Commissions were, in 2009, granted the power to force prosecutors to charge suspects they had previously declined to charge.<sup>413</sup> Statistics suggest that the effect of this quasi-grand jury institution on Japanese prosecutors' behavior has been minimal, before and after the reform that made PRC decisions binding.<sup>414</sup> Yet scholars argue that the Commissions subtly benefit criminal justice by indirectly pushing prosecutors to be more careful in their indictment

<sup>410</sup> *Id.* at 697-98.

<sup>411</sup> Hiroshi Fukurai, *Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution*, 6 U. PA. E. ASIA L. REV. 1, 3 (2011).

<sup>412</sup> A flow chart explaining the system (after the 2009 reforms) may be found in David T. Johnson & Mari Hirayama, *Japan's Reformed Prosecution Review Commission: Changes, Challenges, and Lessons*, 14 ASIAN J. CRIMINOLOGY 77, 81 (2019).

<sup>413</sup> Fukurai, *supra* note 411, at 2-4. Fukurai's reasoning for supporting the Prosecution Review Commission system's enhancement resembles the thinking of Korean reformists:

The refusal of the government to facilitate the prosecution of a select group of the privileged elites, despite their egregious conduct, has been well documented throughout Japan's modern history. Even today, both unethical conduct and outright illegal activities by high-ranking government officers are not subjected to prosecutorial scrutiny, indictment, or trial. . . the new binding power bestowed upon the PRC can exert a significant authority over, and insert public sentiments and equitable judgments into, prosecutorial decisions on politically sensitive cases or controversial issues that may affect the broader public interest. In addition, the PRC can help expose the fortified terrain of special protection and immunity given by the Japanese government to influential political heavyweights, high-ranking bureaucrats, and business elites.

*Id.* at 4.

<sup>414</sup> Johnson & Hirayama, *supra* note 412, at 81-83.

decisions.<sup>415</sup> Commissions have also introduced social common sense into white collar criminal and political cases, pressuring prosecutors into indicting where they have preferred not to.<sup>416</sup> Hiroshi Fukurai assesses the reformed PRC system's impact more positively.<sup>417</sup>

Korean jurists, policymakers, and even ordinary people generally view Japan as a culturally similar role model whose successful development makes its policies worth careful consideration. Japan's Prosecution Review Commissions are evaluated and sometimes praised in newspapers, legal scholarship, and prosecutorial reformist writings.<sup>418</sup> In 2010, for example, a leading Korean newspaper issued an editorial that explained and commended Japan's Prosecution Review Commissions, suggesting that Korea should introduce them.<sup>419</sup> That same year, a law-focused newspaper published an article written by a judge named Shin Weon-Il who was dispatched to Tokyo University.<sup>420</sup> After describing the PRCs' function and role in politics, the judge argued that although they enabled citizens to beneficially check the prosecution, if the Commission were adopted in Korea its verdicts should not be binding.<sup>421</sup>

In academic discourse, for example, Kim Tae-Myeong, a law professor, argued that Korea's prosecution was in a scandal-driven "vicious cycle" of "never-ending collapse of public trust" that would best be remedied by allowing ordinary people to check the prosecutorial charging monopoly.<sup>422</sup> After considering the benefits and weaknesses of American federal grand juries and Japan's Prosecution Review Commissions, the professor recommended using

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<sup>415</sup> David T. Johnson, Hiroshi Fukurai & Mari Hirayama, *Reflections on the TEPCO Trial: Prosecution and Acquittal after Japan's Nuclear Meltdown*, 18 ASIA-PAC. J.: JAPAN FOCUS 1, 8-9 (2020).

<sup>416</sup> *Id.* at 8-10.

<sup>417</sup> See, e.g., Fukurai, *supra* note 411, at 42. ("The PRC's legally binding resolution has also become an important channel through which ordinary people's moral sentiments—their sense of justice, fairness, and accountability—can be expressed, articulated, and reflected in the deliberation of criminal cases.").

<sup>418</sup> *Geomsaui gisodokjeom seongyeok kkaen ilbon geomchalsimsahoe* [Japan's Prosecutor Review Committee That Has Smashed the Prosecutor's Charging Monopoly Sanctuary], JOONGANG ILBO (Apr. 29, 2010), <https://news.joins.com/article/4139569> [<https://perma.cc/L8KN-HBQD>].

<sup>419</sup> *Id.*

<sup>420</sup> Shin Weon-Il, *Ilbon geomchalsimsahoe jedo* [Japan's Prosecution Review Commission System], BEOMNYUL SINMUN (June 14, 2010, 12:43 PM), <https://www.lawtimes.co.kr/opinion/52918> [<https://perma.cc/U6HW-VSZH>].

<sup>421</sup> *Id.*

<sup>422</sup> Kim, *A Critical Inquiry*, *supra* note 306, at 185.



either system as a basis for adopting popular participation in charging decisions.<sup>423</sup> Bae Sang-Hyeon, another scholar, analyzed the Japanese system and compared it to Korea's Citizen Committee quasi-grand jury, concluding that the Korean institution lacks independence from the Prosecutors' Office.<sup>424</sup> As a solution, he advocated for legislative codification of the Citizen Committee and a shift toward Japan's system of binding verdicts.<sup>425</sup>

Activist reformers have also encountered Japan's Prosecution Reform Commissions through their comparative search for solutions to Korea's problems. For example, one reformist, Kim In-Hoe, researched the historical statistics of the PRC system's advisory and binding reversals of indictment decisions and found reversals to be too few to make the Commissions worth introducing to Korea.<sup>426</sup>

Korean reformers are divided over whether any kind of grand jury arrangement should be adopted at all. While Kim In-Hoe was not inclined to, other PSPD-linked scholars have called for a U.S.- or Japanese-style system, with verdicts that must be binding on prosecutors, without which the institution would be "meaningless."<sup>427</sup> However, a leading PSPD activist stated in an interview that he was "not convinced it would fit in Korea because the [grand] jury could be manipulated by prosecutors." Korean reformers are well aware of this American criticism<sup>428</sup> of grand juries, according to interviewees.

The idea of adopting a grand jury arose during the legislature's 2019 debate on the bill for the Corruption Investigation Office for High-Ranking Officials. A right-wing opposition party proposed that the CIO's indictment decisions should be entrusted to a grand jury of seven to nine randomly selected citizens twenty years old or older.<sup>429</sup>

<sup>423</sup> *Id.* at 186-87.

<sup>424</sup> Bae Sang-Hyeon, *Ilbonui gisogweon tongjee gwanhan bigyobeopjeok geomto: geomchalsimsahoejedoreul jungsimeuro* [A Comparative Investigation into Control of Charging Authority in Japan: Focusing on Prosecution Review Commissions], 111 HYEONGSAJEONGCHAEK YEONGU [CRIM. POL'Y RSCH.] 137, 163-65 (2017) (S. Kor.).

<sup>425</sup> *Id.* at 167-68.

<sup>426</sup> KIM, THE PROBLEM IS PROSECUTION, *supra* note 59, at 211.

<sup>427</sup> KIM ET AL., PROSECUTORS' OFFICE REPUBLIC, *supra* note 44, at 269.

<sup>428</sup> See Reynolds, *supra* note 311 and accompanying text.

<sup>429</sup> Choi Ko-Ya & Kang Seong-Hui, Yeo "gongsucheoro geomgaehyeok wanseong"... Hangukdang "gongsucheoneun daetongnyeong hongwi geomchal" [Ruling Party "Prosecution Reform Complete with the CIO"... Opposition "CIO Is the President's Red Guard Prosecution"], DONG-A ILBO (Oct. 18, 2019, 3:00 AM), <https://www.donga.com/news/Politics/article/all/20191018/97932748/1> [<https://perma.cc/H6Y7-YRF6>].

This bold idea ironically originated from a side of politics associated with fending off prosecutorial reform. Equally ironic is the rejection of the grand jury idea by the left-wing ruling party,<sup>430</sup> which has been associated with radical reforms to the Prosecutors' Office<sup>431</sup> and even revolutionary rhetoric of democratizing the judiciary and prosecution.<sup>432</sup> This episode of political role reversal is difficult to interpret. The opposition party may have proposed the grand jury as a mischievous legislative ploy to derail the CIO bill, pose as the better reformers, or even improve the CIO system that they vigorously opposed but knew would be enacted anyway. Ruling lawmakers likely wanted to adhere to their predetermined reform plans without interference from their political enemies. More recently, in 2022, the CIO's head proposed establishing a grand jury to decide CIO charging decisions, but this idea was not acted upon.<sup>433</sup>

Another unlikely call for the grand jury came from an ex-prosecutor with a background in the public security department. While most ex-prosecutors staunchly defend prosecutorial powers, Im Su-Bin wrote a book arguing that the system is prone to politicization and must be reformed.<sup>434</sup> During Lee Myung-Bak's presidency, Im was an

<sup>430</sup> *Id.*

<sup>431</sup> Choi Sung-jin, *How to Attain Prosecutorial Reform*, KOR. TIMES (Dec. 15, 2020, 5:17 PM), [https://www.koreatimes.co.kr/www/opinion/2024/05/638\\_300911.html](https://www.koreatimes.co.kr/www/opinion/2024/05/638_300911.html) [<https://perma.cc/9V7R-KNQ3>].

<sup>432</sup> Consider two examples. Moon Jae-In, before becoming President, spoke as a Member of the National Assembly in 2015: "The political Prosecutors' Office must definitely be judged and liquidated. We must do all that we can for the judiciary's democratization and political neutrality." Democratic Party of Korea, *supra* note 2. In 2022, Democratic Party of Korea Assembly Members held a panel discussion event entitled, "Democratization of the Judiciary, What Is to Be Done?" Jeon Hyeong-Jun, "*Hyeongsasabeopchegye, heonbeopui minjujeok gachi suho mit minjujeok tongje ganeughaeaya*" ["*Criminal Judicial System Must Protect the Constitution's Democratic Values and Have Democratic Control*"], PRESSIAN (Nov. 15, 2022, 6:15 PM), <https://www.pressian.com/pages/articles/2022111518121940598> [<https://perma.cc/KC4M-2A6M>].

<sup>433</sup> In May 2022, the CIO's chief told a press conference that he was considering proposing that a grand jury-type system be introduced to determine CIO charging decisions. He suggested that citizen involvement would be beneficial and that a grand jury would fit with the idea of separating investigation and charging functions. Kang Han, '*Gisopaesim*' *eodiro*. . . Gongsucho "*doip chujin*" *daegeom* "*ildan boryu*" ['*Prosecuting Jury*' to Where. . . CIO "*Promoting the Introduction*" Supreme Prosecutors' Office "*Postpone for Now*"], BEOMNYUL SINMUN (May 19, 2022, 9:11 AM), <https://www.lawtimes.co.kr/news/178834> [<https://perma.cc/64Y4-B9Y3>].

<sup>434</sup> See IM SU-BIN, GEOMSANEUN MUNGWANIDA [THE PROSECUTOR IS A CIVIL SERVANT] (2017). The book's title is a play on words. Im hints that the prosecutor

elite prosecutor on a team managing the investigation<sup>435</sup> into journalists that had attacked the government in the press and provoked mass street protests.<sup>436</sup> He refused his superiors' command to indict the journalists and instead resigned.<sup>437</sup> In his book, Im considered the Korean Citizen Committee, American grand jury, and Japanese Prosecution Review Commission, weighing the advantages and disadvantages of each institution. Praising the American grand jury as enhancing "democratic legitimacy and fairness, objectivity, and transparency," he recommended that it be "grafted" onto Korean criminal justice.<sup>438</sup> Im also supported introducing the Japanese Prosecution Review Commission system.<sup>439</sup> As a former elite insider, Im's support for popular participation in prosecutorial decision-making is notable.

Yet, the grand jury may be the least favored of the prosecutorial reform ideas that aim to strengthen democratic accountability. The grand jury was backed by a political party averse to reform<sup>440</sup> and experimented with by the Prosecutors' Office, but PSPD, the leading legal reformist civil society group in Korea, has long hesitated to support its adoption, interviewees explained. These facts indicate that prosecutors and reformers share the suspicion that a Korean grand jury system may ultimately be dominated by the prosecution, as it is in the United States.<sup>441</sup> But in late 2020, PSPD shifted its stance and formally called for a grand jury system.<sup>442</sup> This change in PSPD's position came

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should *not* be a *mu gwan* (武官, military officer) deployed to attack enemies, but a *mun gwan* (文官, civil official). *Id.* at 8-9.

<sup>435</sup> See generally *Urgent Appeal Concerning Prosecution of Producers of PD Notebook*, MINBYUN (Nov. 25, 2010), <https://eng.minbyun.or.kr/?p=166&ckattempt=1> [<https://perma.cc/K5RT-6LW2>].

<sup>436</sup> For discussion of these street protests and the prosecutorial response, see Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.6.

<sup>437</sup> See *Urgent Appeal Concerning Prosecution of Producers of PD Notebook*, *supra* note 435; see also CHAMYEOYEONDAE SABEOPGAMSISENTEO [PEOPLE'S SOLIDARITY FOR PARTICIPATORY DEMOCRACY, JUDICIAL MONITORING CENTER], GUKMINUI GEOMCHALLO GEODEUPNAYA HAL JEONGCHIGEOMCHAL: YIMYEONGBAK JEONGBU 5NYEON GEOMCHAL BOGOSEO [THE POLITICAL PROSECUTION THAT MUST BE REBORN AS THE PEOPLE'S PROSECUTION: THE LEE MYUNG-BAK GOVERNMENT 5-YEAR PROSECUTION REPORT] 148 (2013).

<sup>438</sup> IM, *supra* note 434, at 137-38.

<sup>439</sup> *Id.* at 148.

<sup>440</sup> See Choi & Kang, *supra* note 429 and accompanying text.

<sup>441</sup> See Reynolds, *supra* note 311 and accompanying text.

<sup>442</sup> Jeong Seong-Jo, *Chamyeoyeondae* "geomchal, susasimuiwi jauijeok unyeong... yeoronmuma yongdo" [People's Solidarity for Participatory Democracy

after the CIO reform was passed, suggesting that reformists felt safe to test the grand jury after their higher priority had been legislated.

#### V. DEMOCRATIZING A BUREAUCRATIC PROSECUTION?

Korea's Continental European-style prosecution system has experienced political manipulation throughout its history, under both authoritarianism and democracy. In the culture that exists within the Prosecutors' Office, individual prosecutors are dependent on their superiors for career advancement, while hierarchical control over investigations and charging decisions facilitates political interference.<sup>443</sup> Reforms have long been debated and some have materialized.

Many Korean observers have blamed the bureaucratic and centralized nature of the prosecution system for its failings. Some existing rules and recent changes, which are discussed above, have aimed at improving bureaucratic accountability: legal education was overhauled; regulations on prosecutorial activities have proliferated; prosecutors have been banned from working in the Presidential Office; prosecutorial departments have been abolished or renamed; the principle of prosecutorial unification was deleted from the statute book; an internally-appointed special prosecutor system was created; and quasi-grand jury institutions have been asked to advise prosecutors.

These reforms have evidently not de-politicized the Prosecutors' Office, resulting in calls for deeper changes. As discussed above, reformers have wanted to decentralize the prosecution system and introduce mechanisms of democratic accountability. For instance, the new CIO institution is an anti-corruption prosecution agency that breaks the prosecutorial charging monopoly and is staffed with input from the legislature. The police have been granted some freedom from prosecutorial control and expansive new investigative powers, while those of prosecutors have been curtailed. Some reformists advocate for further change. They demand direct elections for provincial-level prosecutorial bosses as well as grand juries to determine indictments

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*"Prosecutors' Office Investigation Deliberation Committees Operates Arbitrarily... Used to Placate Public Opinion," HANKYUNG (Aug. 13, 2020, 7:37 PM), <https://www.hankyung.com/society/article/202008136644Y> [<https://perma.cc/S6ND-H33Q>].*

<sup>443</sup> Chisholm, *Prosecutorial Independence Lost*, *supra* note 5, at Sections II.C, III.A, IV.

for serious crimes. The grand jury proposal has been endorsed by the foremost judicial reform NGO, PSPD, which has stated that the post-CIO reform agenda must “go beyond the ‘decentralization of power’ and toward the democratization of power.”<sup>444</sup>

Yet the major reforms that have been enacted remain controversial in Korean politics and are therefore insecure. Opposition politicians and media members have assailed President Moon Jae-In’s CIO and police reforms as trickery designed to protect his political allies from prosecution.<sup>445</sup> In particular, the Cho Kuk scandal cast a shadow on the reforms.<sup>446</sup> This was because, while reforms were underway, Moon’s party and Minister of Justice attacked the Prosecutor General who oversaw Cho’s indictment.<sup>447</sup> One commentator suggested that some of Moon’s prosecutorial policies contributed to “democratic decay”<sup>448</sup> and “democratic backsliding.”<sup>449</sup> Although Moon’s prosecution reforms and improprieties can be distinguished, they were often lumped together in political debate.

Since the political right reclaimed the presidency in 2022, with Moon’s nemesis Yoon Seok-Yeol assuming office, the future of Moon’s reforms has become uncertain. Although President Yoon cannot unilaterally undo the changes, he can oversee their implementation in ways that limit their success. Had his party won the 2024 legislative elections, President Yoon might have been able to repeal the law creating the CIO and the legal changes that empowered

<sup>444</sup> Kim Tae-Il, *Gongsucho ihuui geomchalgahyeok ‘gweollyeok bunsan’eul neomeo gweollyeogui minjuhwaro* [Prosecution Reform After the Corruption Investigation Office: Beyond ‘Decentralization of Power’ to Democratization of Power], WOLGAN CHAMYEOSAHOE [PARTICIPATION SOC’Y MONTHLY] (Mar. 1, 2021), <https://www.peoplepower21.org/Magazine/1770196> [<https://perma.cc/A9GN-LPBU>].

<sup>445</sup> *Beobwon-geomchal modu bangtan wanseong, Mun ije bal ppeotgo jal su inna* [(Editorial) With Both Prosecutors’ Office and the Courts’ Bullet-Proofing Completed, Can Moon Now Rest Easy?], CHOSUN ILBO (May 5, 2021, 9:47 AM), <https://www.chosun.com/opinion/editorial/2021/05/05/BHN345YUJRHVBNDIAI CCXIB2IQ/> [<https://perma.cc/B8QZ-SY28>].

<sup>446</sup> Erik Moberg, *Prosecution Reform and the Politics of Faking Democracy in South Korea*, 53 CRITICAL ASIAN STUD. 259, 264-68 (2020) (discussing the Cho Kuk scandal, its relation to President Moon’s push for prosecution reform, and opposition to the reform and Cho—from a perspective supportive of Cho and President Moon).

<sup>447</sup> See generally Chisholm, *Prosecutorial Independence in Comparative Perspective*, *supra* note 4, at Section III.C.8.

<sup>448</sup> Gi-Wook Shin, *South Korea’s Democratic Decay*, 31 J. DEMOCRACY 100, 105-07 (2020).

<sup>449</sup> *Id.* at 111.

police to conduct independent investigations. But President Yoon did not win control of the legislature, which has protected the major reforms from repeal for the time being.<sup>450</sup> Moreover, even if Moon's reforms endure, if the CIO and police were to use their new powers to protect one side of politics and attack the other, the public may lose faith in the new institutional arrangements.<sup>451</sup>

In Korea, the idiom "republic of public prosecutors" (*geomchal gonghwaguk*, 검찰공화국) is commonly used to critique the prosecutorialization of politics.<sup>452</sup> The phrase reflects the public's

<sup>450</sup> "The verdict from the voting public was a resounding rejection of Yoon, making it difficult for him to implement any part of his agenda that requires parliamentary approval." Kyle Pope, *South Korea's Legislative Election: What Went Wrong for the PPP?*, THE DIPLOMAT (Apr. 11, 2024), <https://thediplomat.com/2024/04/south-koreas-legislative-election-what-went-wrong-for-the-ppp/> [https://perma.cc/G6RH-MQGT].

<sup>451</sup> Some have argued that the reforms are "irreversible" because they have become politically mainstream, with rightist politicians supporting them to a degree. Seong Han-Yong, *Geomchalgaehyeog'eun sidaejeongsin... Yoon Seok-Yeol chongjangi doedollil su eopda* [Prosecution Reform Is the Spirit of the Times. . . Prosecutor General Yoon Seok-Yeol Cannot Reverse It], HANKYOREH (Dec. 20, 2020, 10:59 AM), <https://www.hani.co.kr/arti/politics/polibar/975023.html> [https://perma.cc/53HN-K6N7]. A journalist recounted private comments from opposition right-wing National Assembly Members: "Even we are extremely afraid of the great power of the Prosecutors' Office, and are thankful in a way that the Moon Jae-In administration spent its energy on this." Seong Han-Yong, *Geomchalgaehyeok, sogdoneun jojeolhaedo banghyangeun mot bakkunda* [Prosecution Reform, the Speed Can Be Adjusted but the Direction Cannot Change], HANKYOREH (Jan. 17, 2021, 9:52 AM), <https://www.hani.co.kr/arti/politics/polibar/979054.html> [https://perma.cc/FG5A-BTTW].

<sup>452</sup> A former prosecutor has explained the meaning of this slogan.

There is a saying that the Republic of Korea is a "Republic of Public Prosecutors." The meaning is that prosecutors collude with political power and they replace the democratic republican Republic of Korea with their own world. In the Republic of Public Prosecutors, a vicious cycle is repeated in which prosecutors, for the sake of promotion, conspire with political power, and, for the sake of even greater personal success [e.g., better promotions or desirable jobs after retirement from the prosecution], they consider themselves tools of political power. As politics-oriented prosecutors dominate the organization, the Prosecutors' Office responds to the demands of political power with increasing sensitivity. Rather than consider the job of "prosecutor" as a vocation, prosecutors consider it a stepping stone for personal success.

dismay with prosecutorial interventions in politics. It remains to be seen whether reforms passed so far will reduce this phenomenon or whether additional changes are needed.

## VI. CONCLUSION: THE STYLES OF PROSECUTORIAL INDEPENDENCE

From a comparative law perspective, Korea's reforms illustrate the differences between prosecutorial independence based on bureaucratic accountability versus prosecutorial independence based on democratic accountability. Korea's Prosecutors' Office, standing in the Continental European tradition, has historically secured its political independence through bureaucracy, hierarchy, professionalism, and centralization. Its prosecutors are recruited through meritocratic examinations, intensively trained at a professional school and within the organization, and regularly rotated and promoted based on merit, at least in theory. Hierarchically senior prosecutors, with greater expertise and years of service, oversee less-experienced subordinates, providing quality control and leadership over investigations. Prosecutors have also supervised the police, ensuring that legal expertise governs the muscle of law enforcement. Charging decisions have been centralized into a single prosecutorial hierarchy, a rational ordering that ensures that only one organization can perform the accusatorial role that has great social repercussions. Duty-bound to objectively consider evidence for and against suspects, prosecutors are obligated to lay charges with quasi-judicial impartiality.<sup>453</sup> Rules, regulations, guidelines, and a code of ethics notionally guarantee fairness and professionalism across virtually all fields of prosecutorial activity. Political independence would seem to be assured by the bureaucratic accountability of such an enlightened prosecution system.

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<sup>453</sup> Civil law prosecutors are viewed as judges' colleagues – collaborators in a joint effort to deliver justice. For example, for an empirical study of French prosecutors in the 1990s, one judge said: "It can be difficult to release somebody if the *juge d'instruction* [a kind of prosecutor] has worked hard on a case. There is a pressure from being part of the same institution. You want to satisfy your colleagues." Another stated, "There is a solidarity. We are the same, we come out of the same [judicial training] college, we know each other." Jacqueline Hodgson, *The Police, the Prosecutor and the Juge D'Instruction: Judicial Supervision in France, Theory and Practice*, 41 BRIT. J. CRIMINOLOGY 342, 358 (2001). A similar situation has existed in Korea. But in the Anglo-American courtroom, the idealized image is of prosecutors as theoretical equals to defendants, not judges.

Yet this prosecutorial design is widely perceived as having failed. As a result, reformers in Korea have looked to the Anglo-American tradition, which has historically secured political independence through mechanisms of democratic accountability and decentralization. Common law jurisdictions formerly granted significant prosecutorial powers to individuals, following their tradition of private prosecution. After the relatively late development of regularized public prosecution, prosecutors have been selected from ordinary lawyers without significant specialist training. Appointment to leadership posts has often been determined by elected officials or by elections directly, as in the United States. Career advancement on bureaucratic and meritocratic principles has been unknown until recent times. Investigations have usually been entrusted to independent police agencies, with prosecutors rarely formally in command. National and local-level prosecution systems have been able to check each other, to some extent, by investigating or bringing charges where the other has failed to act. Charging decisions for serious crimes have been determined by grand juries, giving ordinary citizens direct oversight of professional prosecutors.

Prosecutorial independence based on checks, balances, amateurs, and democratic accountability appears to be medieval and irrational to Continental observers. Trusting such devices to tamp down politicization relies on the public itself to stop political bias among prosecutors. Against tradition and against expectations, however, this Anglo-American style of prosecutorial independence has inspired Korea's recent reforms.

Korea's experience also highlights the mixed nature of modern prosecutorial independence. Today, prosecution services worldwide rely on both styles of prosecutorial independence. Contemporary Anglo-American and Continental prosecution systems have elements of both bureaucratic and democratic accountability, although. Modern prosecutorial independence may thus be understood as a philosophical composite. Just as a composite material, such as steel-reinforced concrete, may be stronger than its constituent parts alone, prosecutorial independence may be strengthened by blending democratic accountability and bureaucratic accountability. But in what proportions should the concrete of democratic accountability be combined with the steel of bureaucratic accountability to produce optimal prosecutorial independence from politics? Experimentation to discover the ideal amalgam is necessary. Indeed, Korea's efforts to



expand democratic accountability for prosecutors represent bold  
experiments in the comparative legal laboratory.