

The Fight for First Generation Rights:
A Comparative Essay on the Mobilization of the Legal Complex for Basic Legal Freedoms^{1 2}

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Rights discourse is now global discourse (Hajjar 2004). International organizations such as the United Nations propagate universal human rights (Boyle 2002; Merry 2003;

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² This paper builds upon a collaborative project whose principal results were published as Halliday, Terence C. , Lucien Karpik, and Malcolm M. Feeley (Eds.). 2007a. *Fighting for Political Freedom: Comparative Studies of the Legal Complex for Political Change* Oxford: Hart Publishing. I am particularly grateful to my colleagues, Lucien Karpik and Malcolm Feeley, for their comments on earlier fragments of this paper. This research was supported by the American Bar Foundation and two grants from the National Science Foundation (SES-9213156; SES _____).

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⁴ A full version of this paper (as well as all other papers in this collection) can be viewed on the American Bar Foundation website: www.americanbarfoundation.org

Merry 2005). International courts prosecute military personnel and political leaders for the abrogation of basic human rights (Hagan 2003; Hagan 2005; Hagan, Rymond-Richmond and Parker 2005). International financial institutions champion property rights and a rule of law that will uphold them (La Porta et al. 1997). National governments appraise other governments against the standard of their fealty to human rights (CECC 2006). Citizens claim rights, not only in countries where they are well institutionalized, but in countries where they are regularly abrogated. Indeed, one of the principal ways that citizens or residents of a country now hold their government accountable is by alleging the government's breach of a right thoroughly institutionalized in global normative scripts, such as the UN Universal Declaration of Human Rights.

This paper argues for a sociological analysis of rights from two angles, one particular, and the other potentially universal. The particular focus is on those foundational rights of western political liberalism, variously referred to as core civil rights, basic legal freedoms, or first generation rights (Marshall 1949). Frequently these rights, which emerged in the 17th and 18th centuries, are taken for granted as the frontier of rights has successively pushed forward to social, economic and political rights. I argue that core civil rights remain immanent, especially when set in the framework of political liberalism more generally. Understanding of their institutionalization, their advance and retreat, warrants careful sociological inquiry. The universal focus relates to the agents of rights-consciousness. Who are the primary bearers of rights, their advocates and defenders? I shall propose that a new concept, that of the "legal complex," helps specify the contingent conditions under which rights will emerge, which rights will be institutionalized, and which will be maintained (Halliday, Karpik and Feeley 2007b).

My examination of both themes draws upon a collective project on lawyers, the legal complex and the fates of political liberalism. For the past fifteen years, a collaborative of social scientists, historians and legal academics has examined some twenty to thirty cases of transitions towards and away from political liberalism. These cases range from Continental and North American states in the 18th to 19th centuries to countries in Latin America, the Middle East, Asia and Europe in the 20th century (Halliday and Karpik 1997a; (Halliday, Karpik and Feeley 2007a)). Our purpose has been to identify the conditions under which political liberalism has been advanced or retarded by lawyers and other legally trained occupations, including law professors and judges. The activism of these professions seems particularly salient to core civil rights or basic legal freedoms since these rights are the basis for liberal legal systems, and correlatively, cannot survive without them. In this respect the study of the legal complex reflects a growing scholarship on the politics of professions, and particularly, of the legal profession, a scholarship that is intent on getting beyond the narrow focus on professional control of markets (Halliday 1999; Halliday and Karpik 1997b; Halliday and Karpik 1998b; Halliday and Karpik 2001; (Karpik 1988; Karpik 1998) Scheingold and Sarat 2004).

Although the wider project treats political liberalism more broadly (Halliday, Karpik and Feeley 2007a), this paper provides a re-analysis of the case studies with primary attention to core civil rights. After defining the theoretical concepts and describing our methodology, I analyze mobilization profiles of the legal complex at three moments of transition—obtaining, maintaining and defending political liberalism. On this basis, I draw some tentative conclusions and hypotheses about success or failure in institutionalizing basic legal freedoms that may be attributable to the legal complex.

I. The Legal Complex and Basic Legal Freedoms

The transition to politically liberal regimes has been amongst the most notable macro-sociological changes in western countries over the past three centuries. The prospect of contemporaneous transitions of illiberal political systems towards liberal regimes now animates not only scholars, but foreign policy debates in the U.S., the scope of interventions by international financial institutions, and aid programs of rich nations.

I. 1. Political Liberalism

What is political liberalism? For methodological reasons we formulated a concept that would be meaningful across centuries and across the world.⁵ For theoretical reasons, we preferred “political liberalism” because it enabled us to specify more precisely what we intend and to distinguish its content from exceedingly vague and contested terms such as “democracy,” which leans heavily towards universal suffrage at its conceptual core, or “rule of law,” which has become as much a slogan as a scholarly concept.

We define “political liberalism” as a cluster of three attributes. First, at its core lie civil rights or *basic legal freedoms*, expressions we use inter-changeably. These core rights of citizenship usually also extend to all residents within a nation-state, the putative organizational guarantor of those rights. They include the so-called *negative* freedoms from arbitrary and unrestrained state power, such as habeus corpus, due process, representation by counsel, and freedom from arbitrary arrest, detention, torture and death. *Positive rights* include freedoms of speech, religion, association, and movement, as well as protection of property rights. Second, in the matrix of political liberalism core rights are nested within a moderate state. This we define in terms of a fragmenting of internal state power such that various branches of the state check and balance each other. Most significant for basic legal freedoms is some autonomy of courts from executive and legislative control and the power of the judiciary to exercise binding restraint on executive power in particular. Third, core civil rights and the moderate state are sustained by civil society, a necessary condition of a liberal polity. Civil society comprises both voluntary associations and publics. Civil society organizations may be facilitated by the state but they owe their existence, governance and activities to their members, not to state authorities. Publics are a more diffuse expression of opinion and association outside the state, not necessarily organized formally, but available for

⁵ While the details have varied from situation to situation, historians and historical sociologists have found the definition we adopt meaningful in 17th and 18th century England and France, 19th and early 20th century Germany, and 20th century United States (See Bell, David A. 1997. "Barristers, Politics, and the Failure of Civil Society in Old Regime France." in *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*, edited by Terence C. Halliday and Lucien Karpik. Oxford: Oxford University Press, Ledford, Kenneth F. 1997. "Lawyers and the Limits of Liberalism: the German Bar in the Weimar Republic." in *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*, edited by Terence C. Halliday and Lucien Karpik. Oxford: Oxford University Press, Pue, W. Wesley. 1997. "Lawyers and Political Liberalism in Eighteenth- and Nineteenth-Century England." Pp. 167-206 in *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*, edited by Terence C. Halliday and Lucien Karpik. Oxford: Oxford University Press, Rueschemeyer, Dietrich. 1997. "State, Capitalism, and the Organization of Legal Counsel: Examining an Extreme Case-the Prussian Bar, 1700-1914." Pp. 207-228 in *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries*, edited by Terence C. Halliday and Lucien Karpik. Oxford: Oxford University Press., 1997).

mobilization by leaders of civil society and the legal complex, among others. A liberal political society depends upon an active civil society to present a counter-point to executive power and a potential ally for that weakest branch of the state—the judiciary. Civil society cannot exist without core civil rights, or civil rights without civil society.

* * *

I. 2. The Legal Complex

Because many of the core civil rights are basic *legal* freedoms, and have a strongly juridical flavor, it is not surprising that lawyers are heavily implicated in their creation, reproduction and defense. Earlier historical research demonstrates that in 18th and 19th century Britain (Pue 1998), 19th century Germany (Rueschemeyer 1997), 17th and 18th century France (Bell 1997; Karpik 1998a), and 19th and 20th century United States (Halliday 1987), individual lawyers and often their collective associations fought for rights which are now part of the civil rights canon. When lawyers failed to mobilize on behalf of rights, their retraction became all the easier for illiberal regimes (Ledford 1996; Ledford 1997). At best lawyers are limited liberals, not always mobilizing on behalf of core civil rights, and seldom mobilizing collectively on social, economic and political rights (Halliday and Karpik 1997b).

The historical case studies produced what should not have been an unexpected finding. The likelihood that lawyers would mobilize on behalf of rights, and their efficacy in doing so, frequently depended on their relationships with the judiciary. Where there were strong mutually supportive ties with the judiciary, as in 18th century France or 20th century United States, then the capacity of lawyers to institutionalize and then defend rights against the executive increased markedly. This opened up the hypothesis that lawyers' relationships with other legally trained occupations might offer more complete explanations of the rise and fall of political liberalism, with civil rights at its core. The concept of the *legal complex* therefore seeks to capture the set of relationships among all legally trained occupations that are practicing law.⁶ These will include (a) private lawyers, (b) public lawyers, who serve in ministries of justice or regulatory agencies of government, (c) judges, (d) prosecutors, a particular genus of public lawyers, and (e) legal academics.

Once the concept of “legal complex” problematizes the collective action of legal occupations, it opens up a rich site for research on configurations of alliances, or of fault-lines within and across occupations. Two contrasting configurations intimate how dynamic the options may be. On the one hand, the legal complex might be divided segmentally: private lawyers, legal academic and judges unite against public lawyers and prosecutors. On the other hand, the legal complex might be divided horizontally: a fraction of private lawyers, judges, prosecutors and public lawyers coalesce to find on behalf of rights against another fraction of private lawyers, judges, prosecutors and public lawyers who fight against them. Many more complicated alliances and divisions are possible. Research must discover which configurations arise in what circumstances.

Nevertheless, it is not to be supposed that the legal complex is static across issues and time. Although we expect that while there may be stable alliances, it is more cautious

⁶ The stipulation of “practicing law” excludes those large numbers of legally-trained graduates of universities in Europe and Latin America who never practice law but go into business, politics or government bureaucracies.

theoretically to analyze the dynamics of the legal complex episode by episode. Thus we seek to discover on what issues at a certain historical moment certain configurations of the legal complex will mobilize and on what issues at another historical moment will a different configuration be evident. The implicit hypothesis therefore is that the more expansive and durable the mobilization of the legal complex on basic legal freedoms, the greater probability of their institutionalization and protection.

It should follow that configurations of the legal complex may vary not only from episode to episode (e.g., against arbitrary arrest and indefinite detention; against restriction of political speech and public protests; against arbitrary seizure of private property), but also by the phase of national movements towards and away from political liberalism. I turn, therefore, to classify numbers of case studies by the phase of political transitions they treat and observe which rights are championed. I then return to show that distinctive patterns of mobilization roughly correlate with particular moments of transition.

III. Three Moments in Struggles for Basic Legal Freedoms

The fight for political liberalism reveals itself in three moments. The first involves the legal complex in fights to *obtain* freedom. These struggles sometimes are to advance towards a political society that has never existed before (e.g., China, Egypt, Korea, Taiwan); at other times they are to regain a political society that has been lost to illiberal politics in an intermission of fascism (e.g., Nazi Germany, 1933-1945), military dictatorship (Chile, 1973-1980s), or totalitarianism (e.g., Poland, Hungary, 1945-1989), among others. The second moment involves a struggle by the legal complex to *maintain* political liberalism once its core components are in place. Efforts to maintain political liberalism occur in the face of challenges to one or more of its elements—challenges to narrow the gap between constitutional aspirations and everyday defense of basic liberties (e.g., Brazil, Argentina), challenges from internationally-sponsored threats to security (e.g., US), challenges from domestic threats to security (e.g., Italy, Brazil, Argentina), challenges from threats to territorial integrity (e.g., Turkey), challenges that result from the conflict of one set of freedoms (e.g., religious expression, political speech) with sanctified principles of state constitutionalism (e.g., secularism, national integrity in Turkey), challenges from the expansiveness or entrenchment of an administrative state (e.g., Japan). The third scene concerns the readiness or ability of the legal complex to fight against a dramatic *loss* of freedom, which takes many forms, such as a military coup (Chile, 1973), the systematic dismantling of liberalism's institutions (Venezuela, 2005), or the progressive consolidation of a one-party state (e.g., Zimbabwe), among others. In the following sections I shall review a selection of countries that exemplify each moment of transition (Table 1).

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[*Editors note:* The author's review of specific countries provides a nuanced discussion of the fight for political liberalism around the world. He addresses the unique challenges, successes, and attributes of the legal complex in each country. In table 1, presented below, the author offers a summary of his discussion and data.]

Table 1. Actions of Legal Complex and Rights in Play by Moments of Transition and Country/Episode

Moments of Transition	Country	Episode	Action of Legal Complex	Basic Legal Freedoms
Obtaining Basic Legal Freedoms	Egypt	1990s-2000s	Against Mubarak's assault on human rights, suppression of civil society and freedoms of speech	Legal rights: HR groups documenting HR abuses, bringing cases, monitoring detention, torture, prison conditions. Problem of recurrent detention. Championing right of defense by lawyers Political freedoms--SCC enabling political life, legalization of opposition parties; SCC striking down provisions in criminal law that limited freedom of press and ability of press to unmask government corruption and inefficiency; limiting prosecutions of opposition leaders via libel law; championing right of defense. SCC acting as a "shield" for opposition parties, human rights groups, etc.
	Hong Kong	1970s-1980s	Against colonial arbitrariness	Legal rights: legal accountability, legal redress, legal transparency. Bill of Rights. Full political rights excluded but political rights advocated
	Korea	1980s-1990s	Against military dictatorship	Political rights: formation of Minbyeon.
	Spain	1960s-1970s	Against Franco's authoritarianism	Legal rights: rights for detainees, against extended preventive detention, for due process, and <i>habeus corpus</i> . Political rights—liberty of expression, assembly
	Taiwan	1970s-1990s	Against Kuomintang one-party rule	Political rights: freedom of speech & association. Defense against treason charges. Treatment in detention. Aboriginal rights.
	China	2002-2006	Against arbitrary repression in criminal justice system	Legal rights: lawyer representation (meeting suspects, collecting evidence, protection from prosecution), for due process (extended detention, confession by torture, sentence before trial) Political rights: autonomous lawyers associations
	Japan	1886-1920s	Against arbitrary	Defense of labor and party leaders; challenges

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			state administration	to illegal land seizures; human rights protection; Political rights, e.g., Japan Civil Liberties Union established in 1946 to defend freedom of speech and other basic rights.
Maintaining Basic Legal Freedoms	U.S.	2000-2006	Against executive assaults on international conventions, basic legal freedoms	Legal rights: lawyer representation, access to civil courts, protection from torture, <i>habeus corpus</i> , against extended detention
	Brazil	1990s-2000s	Against police killings	Legal rights: lawyer representation; prosecution of unlawful police homicides
	Argentina	1990s-2000s	Against police killings	Legal rights: lawyer representation; prosecution of unlawful police homicides
	Italy	1970s	Against domestic terrorism & organized crime	Legal rights: representation by lawyers, due process
Losing Basic Legal Freedoms	Argentina	1990s	Failure to mobilize against police killings	Legal rights: due process, arbitrary police power, police killings
	Brazil	1990s	Failure to mobilize against police killings	Legal rights: due process, arbitrary police power, police killings
	Israel	1990s-2000s	Failure to mobilize against torture, arbitrary arrests & killings of Palestinians	Legal rights: extra-judicial targeted killings; torture; extended detention Political rights: freedom of movement by Palestinians
	Chile	1980s	Complicity with Pinochet's military Junta and loss of basic legal freedoms	Legal rights: arbitrary detention, torture, extra-judicial killings, due process, legal representation Political rights: freedom of speech, association, movement
	Fascist Italy	1920s-1930s	Complicity with fascist domestication of the judiciary and attacks on basic legal freedoms	Legal rights: arbitrary detention, torture, extra-judicial killings, due process, legal representation Political rights: freedom of speech, association, movement
	Militaristic Japan	1920s-1930s	Complicity with national repression of legal rights and civil society	Legal rights: arbitrary detention, torture, extra-judicial killings, due process, legal representation Political rights: freedom of speech, association, movement
	Venezuela	2000s	Failure to forestall retreat from political liberalism	Legal rights: due process; legal representation
	Hong Kong	1998-2000s	Limits to defense of rule of law	Legal rights:

III. Mobilization Profiles and Moments of Transition

The case studies reveal that the legal complex varies dramatically in its mobilization. We can observe, first, that the legal complex can be configured in distinctive ways across quite different nation-states and issues; and, second, that affinities begin to appear between the type of mobilization and the conduciveness of the legal complex to political liberalism (Table 2). To ease comparisons I concentrate primarily on the nexus of the legal complex—the axis between the private bar and the judiciary.

Table 2. Mobilization Profiles of the Legal Complex

Profiles	Moment of Freedom		
	Obtaining	Maintaining	Losing
Progressive mobilization	Korea (succeeded) Egypt (failed)		
Parallel mobilization	Spain (succeeded) Taiwan (ditto) Hong Kong (ditto)		
Persistent Segmentalism	Japan (failed) China (failed)		Venezuela Chile
Antagonistic mobilization		Brazil Argentina Uruguay	
Selective Mobilization		Israel Turkey	
Delayed Mobilization		US	
Progressive de-mobilization			Venezuela Egypt
Non-mobilization			Fascist Italy Militaristic Japan Military dictatorship Chile

III. 1. Progressive Mobilization

In this configuration, a small rump group of private lawyers stands at the forefront of a national movement on behalf of political liberalism. Their mobilization is enabled by the creation or activation of a court that is sufficiently autonomous, bold, and even courageous enough to rule against the state on behalf of core citizenship rights. Essentially these two fragments of the legal complex join forces to mutually reinforce each other. From this beginning two developments can be discerned. In one, the rump group of lawyers may come to dominate the entire bar and move into political leadership. In another, the liberal agenda may spread to forge coalitions with other fragments of the legal complex, including prosecutors and academics. Over years or decades, this configuration involves a progressive widening of the mission for political liberalism.

A positive manifestation of lawyer-led mobilization can be observed in Korea. But success is scarcely inevitable. A negative manifestation of lawyer-led mobilization can be seen in Egypt where the aspirations of progressive mobilization ultimately seem to be unrealized.

III. 2. Parallel mobilization

In a slight but discernible variation, small liberally-inclined groups across several segments of the legal complex combine forces from the outset and seek to expand their mass across those respective segments. A coalition of rump groups of lawyers and judges is at the core of this mobilization from the outset. They seek to infect other members of their respective segments with their enthusiasm and to embrace sections of the legal academy and even prosecutors.

Parallel mobilization is not necessarily coordinated. At one extreme, various elements of the legal complex may proceed in similar directions, perhaps in mutual awareness, but without any concertation. The Hong Kong case comes closest to this type. At another extreme, the elements of the legal complex may be unified or coordinated. This can be formal, as in the association of Taiwanese ethnic legal professionals, or informal, when groups such as *Judicia Democratica* and other with shared political orientations proceed in mutual support without formal ties. There is a price for both approaches: formal coordination can present a unified force but is more vulnerable to state attack; mutual awareness may present less of a target for a threatened state but its lack of coordination may diffuse its impact.

III. 3. Persistent Segmentalism

The collective force of alliances across the legal complex is inhibited in countries which have a liberal bar, or judiciary, and/or academy, but each is segmented from other parts of legal complex. This problem is exacerbated when the segmentalism keeps apart the private bar from the judiciary. As two of our cases reveal, this segmentalism often has deep historical roots. In either country the persistence of segmentalism appears correlated with incomplete or retarded transitions to political liberalism.

III. 4. Antagonistic mobilization

This orientation is counter-intuitive. It occurs in regimes where political liberalism is relatively established but on issues where an activist segment of the legal complex, usually lawyers, is not directly able to mobilize any other part of the legal complex. As a result the activist segments turn not inwards to the legal complex but outwards to civil society groups. This produces an oppositional mobilization where lawyers or activist judges seek allies outside the legal complex to mobilize their opponents within the legal complex. A notable example can be found with private prosecutions in Latin America—individuals or victims involved in a crime can bring a prosecution if they are not satisfied with the state prosecutor.

III. 5. Selective Mobilization (or Non-Mobilization)

Previous profiles of mobilization relate to structural alliances across the legal complex and their temporal deployment. However it is possible for a legal complex that is unified on many issues salient to political liberalism to exclude others. On some issues—national security, national stability, terrorism, minority insurgencies, religious expression—they agree, tacitly or explicitly, to take certain issues off their political agendas. Lawyers and judges effectively collude to restrict full consolidation of political liberalism. It should be noted that I refer here not to mobilization over social, economic and political rights, because this is outside our theoretical frame, in large part because the legal complex seldom mobilizes around these less legalistic rights. Selective mobilization occurs on issues otherwise fundamental to the constitution of a liberal polity. Turkey and Israel provide two cases in point.

III. 6. Delayed Mobilization

Here the temporal element of mobilization by the legal complex comes to the fore. This situation involves a legal complex accustomed to cooperation across the internal divides among segments of the legal complex. But when confronted with a crisis situation that threatens political liberalism, such as terrorism, the legal complex mobilizes hesitantly, haphazardly and uncertainly. One group may press forward but its allies are reluctant to move. Lawyers may bring cases but courts are resistant to offer the protections sought for vulnerable populations.

III. 7. Progressive de-mobilization

Just as legal complexes can be forged progressively over time, they can also be dismantled. An authoritarian ruler can assault each of the legally-trained occupations, in some instances by tightening bureaucratic controls over civil servants, in others by directing prosecutors to attack dissident lawyers or judges on flimsy pretexts, in yet others by undermining the autonomy of the bench. Perez Perdomo maintains this is precisely what has been occurring in contemporary Venezuela during the government of President Chavez.

Moustafa describes a similar pattern in Egypt where an even more vulnerable legal complex has been progressively domesticated by President Mubarak.

III. 8. Non-mobilization

Finally, there are those cases where the executive effectively co-opted or intimidated the legal complex to forestall its capacity to resist the anti-liberal practices of the regime. In fascist Italy Mussolini's state effectively co-opted the legal professions. The drift of Japan into a military government in the mid-1930s also appears not to have been impeded by the legal complex. During Chile's military dictatorship in the 1970s Chilean legal professions and judges were quickly silenced.

Our analysis of the cases enables us to draw some preliminary conclusions about a correspondence between type of mobilization profile and political transition (Table 2).

In the cases where basic legal freedoms were achieved, progressive and parallel mobilization, especially by the private bar and courts, contributed to a liberal transition. Both the positive and negative cases indicate that there are two necessary conditions for effective mobilization of the legal complex on behalf of political liberalism: (1) an activist, relatively autonomous *court* that is prepared to accept and rule against the executive or legislature on contentious issues around political liberalism. This sometimes involves formation of a new court (e.g., Constitutional Court in Korea) *or* activation of a dormant court (Taiwan). (2) At least a fraction of the *private bar* must be prepared to mobilize for or before a court. In China, the second condition pertains but not the first. In Egypt both conditions pertained but the executive struck back on both fronts before the lawyer-judiciary alliance could widely mobilize the rest of the legal complex or civil society. Persistent segmentalism in the legal complex has inhibited the establishment of liberalism, so far in authoritarian China, but also in the incomplete transition to political liberalism in contemporary Japan. A history of segmentalism in the legal complex also weakens the capacity for unified resistance when political regimes turn away from liberalism.

Maintaining and consolidating freedom can never be taken for granted. Its continuing challenge can be observed in several countries where the legal complex mobilizes to defend or sustain political liberalism, but with impediments. In Argentina and Brazil, the failure of the legal complex to act in concert led to an adaptive strategy that forced lawyers to find allies in civil society that would pressure public prosecutors and judges to defend victim rights. In long established democracies of Israel and Turkey the legal complex selectively fails to mobilize on issues construed as problems of national security, religion and ethnicity. Even in the U.S., the attacks of Al Qaeda triggered a response to defend individual rights by the activist bar and even military lawyers, but the courts delayed for years any restraints on executive authority, despite the pressures from longtime allies in the private bar and legal academy. I conclude that an otherwise cohesive legal complex on many issues can never be assumed to be unified on all issues. In certain circumstances, private lawyers may align with their victim clients rather than prosecutors and judges who are aligned with the state. In other circumstances, judges and even lawyers may align with the state against populations whose rights go undefended and are unable to mobilize for themselves. In all these cases the proposition holds that the conditions for obtaining freedom must be sustained for maintaining it: an activist, relatively autonomous court prepared to fight either the executive or public on behalf of political liberalism, and at least a significant and vocal fraction of the legal profession prepared to mobilize before courts, often with allies in civil society.

Finally, the dismantling of political liberalism in several instances is accompanied—indeed enabled—by the cowing or co-opting of lawyers and judges, a level of aggression by the state that leads to de-mobilization or non-mobilization of the legal complex. Some of the same conditions that led to failure to attain political liberalism pertain to an inability to defend it successfully. Legal complexes that are segmented historically or detached from civil society have little capacity under pressure to join forces against a repressive state.

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V. Limits to Mobilization by the Legal Complex

A comparative theory of the legal complex and basic rights must specify not only when some or all of the legal complex mobilizes, but also those occasions on which it does not. We have previously shown (Halliday, Karpik and Feeley 2007b) that there are three configurations in which mobilization is incomplete or fails altogether (Table 3).

Table 3. Limits to Mobilization of Legal Complex

Lawyers Mobilize without Judges			
Country	Moment	Episode	Issue
China	Obtaining	2000s	Legal rights: lawyer representation (meeting suspects, collecting evidence, protection from prosecution), for due process (extended detention, confession by torture, sentence before trial) Core political rights: autonomous lawyers' associations
Japan	Obtaining	Periodic, 1920s, Late 1940s	Defense of labor and party leaders; challenges to illegal land seizures; human rights protection; not core civil rights such as due process, etc. Core political rights, e.g., Japan Civil Liberties Union established in 1946 to defend freedom of speech and other basic rights.
Kenya	Obtaining	1987-2002	Legal rights: lawyer representation, protections against arbitrary detentions, torture, extra-judicial killings Core political rights—speech, assembly, association
Lawyers and Judges Mobilize Selectively			
Argentina	Maintaining	1990s-2000s	Legal rights: due process, arbitrary police power, police killings
Brazil	Maintaining	1990s-2000s	Legal rights: due process, arbitrary police power, police killings
Israel	Maintaining	1990s-2000s	Legal rights: due process (failure on torture, targeted killings)
US	Maintaining	Post-2001	Legal rights: arbitrary detention, suspension of habeus

			corpus, invasions of privacy
Neither Lawyers nor Judges Mobilize			
Chile	Losing	1970s-1980s	Legal rights: arbitrary arrest, no due process, torture, disappearances. Political rights: association, speech, movement
Fascist Italy	Losing	1920s-1930s	Legal rights: arbitrary arrest, little due process, torture, death. Political rights: association, speech, movement
Militaristic Japan	Losing	1920s-1930s	Legal rights: arbitrary arrest, little due process torture, death Political rights: association, speech, movement
Fascist Germany	Losing	1920s-1930s	Legal rights: arbitrary arrest, little due process, torture, death. Political rights: association, speech, movement

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VI. Explanations: The Legal Complex and Civil Society

We have seen exceptionally variegated patterns of engagement by the legal complex in obtaining, maintaining and defending freedom. We have distinguished between instances where elements of the legal complex chose to mobilize and facilitate the cause of political/legal freedom and contrary instances where they would not or could not. We now turn to consider hypotheses which connect the two. Can the case studies provide evidence about the conditions under which the legal complex finds itself in the vanguard of the march towards political liberalism and those in which it remains passive or even complicit in the face of illiberal politics? We shall show that the present state of research raises more questions than it answers. Nevertheless it impels us along a theoretical path that may progressively lead at least to the refinement of hypotheses on the way to a general theory.

VI. 1. Structure and Dynamics of the Legal Complex

Segments of the Legal Complex. Each of the segments (e.g., private lawyers, prosecutors) of the legal complex has its own logic. With respect to the *organized bar*, considerable evidence supports the proposition that the development of an autonomous bar in recent decades depends upon the emergence of a private market for legal services (China, Venezuela, Kenya, Israel, Korea, Spain) or, relatedly, the construction of a legal system that will at least deliver the minima of the rule of law for legal certainty in the market. While we return to the politics of lawyers and markets in more detail below, the significance of the market for the politics of lawyers contrasts contemporary bases of lawyers' mobilization from the early modern period where, at least in France, Karpik finds that a decision to define themselves against the market permitted lawyers to lead movements for political/legal reform (Karpik 1988; Karpik 1998b).

Lawyers organize themselves in three ways. Most commonly, every profession has official associations, sometimes local (e.g., U.S., Venezuela, Turkey), usually national (e.g., Egypt, Turkey, Israel, Korea, Taiwan, Italy) that purport to represent and sometimes regulate the profession as a whole. Less commonly, but integral to mobilization, many professions also form voluntary, alternative or even clandestine associations that are sharply focused on advocacy or defense of political freedom (e.g., Japan, Korea, Taiwan, U.S., Spain). Not infrequently, a third form of association occurs informally, as networks of lawyers or invisible groupings come together around a shared cause but repression requires them to maintain a low organizational profile (e.g., Spain, China, Korea).

Structural and temporal permutations of these three forms of organization provide the infrastructures around which mobilization can occur. In cases of severe repression, the informal relationships grow outside (e.g., Spain, Korea) and occasionally inside (e.g., China) formal structures which provide infrastructures for dissident lawyers; some subsequently formalize as interest groups on behalf of political liberalism (e.g., Spain, Korea, Taiwan, Japan); and, on occasion, the rump groups come to overtake the formal associations that represent the entire profession (e.g., Taiwan). In many countries (e.g., Chile, Venezuela, Italy, China) the official associations appear to choke off any appearance of potential rivals. In these settings the official associations are more susceptible to state incursions on their autonomy. Nevertheless, in the modern period, across very different states of political liberalism, we observe that leadership on behalf of political liberalism mostly comes not from the center but the periphery of the organized bar, although with the prospect that sometimes the periphery will capture the center. Hence the organized bar finds itself in a quandary: as a national entity of all practitioners its associational strength might better ward off incursions on lawyers' responsibilities but at the risk of co-optation by the state, or inertia and divisiveness from within; by taking the route of organizing as marginal rump groups of lawyers dedicated to well-defined causes, ideological purity and focused energy may render the group more vulnerable to state attacks and to opposition from professional peers less convinced or less committed.

Judges bear an ambivalent relationship to political liberalism. In numbers of cases judges aligned themselves with the state apparatus, sometimes aiding and abetting their repression (e.g., Chile), and sometimes defining their calling so narrowly that they carried on business as usual while turning a blind eye to incursions on liberal ideals (e.g., Chile, Italy, Egypt). The cases of Egypt, Spain and Italy support the hypothesis that courts against political liberalism may be explained partially as a combination of jurisprudence and structure: a positivist jurisprudence insulates courts from substantive standards of justice and rights; a hierarchical structure of organization rigidifies this insulation through the court system such that dissident judges obtain few degrees of freedom to deviate from the "apoliticism" of positivist jurisprudence.⁷ Ironically, some of the most complicit courts were also the most independent. Autonomy of courts does not guarantee either the ability or willingness to act as a check on executive power.

Ironically, in many situations, the cause of political liberalism advances only when judges in a regular court system are prepared to co-exist with special courts that lie outside the jurisdiction of conventional courts. Special courts sharply contrast in their significance for political liberalism. On the one hand, repressive regimes regularly create security courts to remove troublesome political agitators from the public view, suspend or abrogate procedural rights, substitute regular judges by military officers, and insulate their detainees from the

⁷ Just the contrary argument has been made for the bureaucratic integration of courts—that by coordinating all courts in one coordinated structure that is administered by a court administration, this provides some protection for the incursions on local courts by local politics. See, Halliday, Terence C. 1987. *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment*. Chicago: University of Chicago Press.

jurisdictional of regular appellate courts (cf. Italy, Spain, Egypt, Chile, China). This enables these countries to project from their regular courts a patina of legalism to their populations and the world while engaging in arbitrary, brutal, cruel and often murderous treatment far from the public eye. On the other hand, we have seen that the advance towards political liberalism and its defense frequently relies on another type of special court—the constitutional court. As Egypt dramatically exemplifies (cf. also Korea, Taiwan, Italy), the formation of a powerful constitutional court with a capacity to hold state actions accountable to the local formulation of universal standards can constructively unsettle a reactionary established judicial system. It offers a forum in which grievances can be aired; it permits styled argumentation that might otherwise be censored; it provides a counterpoint to the executive; and thus offers a stage for lawyer-leaders to address and even crystallize publics. Its disruptive functions can extend to the lower courts in the regular judiciary insofar as it sends signals about cases and arguments that it will accept on appeal (cf. Korea, Taiwan, Egypt). Nevertheless, constitutional courts within repressive regimes are particularly vulnerable. Their viability depends upon an acute sensitivity about the balance between their perceived legitimacy and support in relation to the scope and expansiveness of their powers. Excessively muscular decisions (cf. Egypt) or premature over-reaching (e.g., Mongolia) can lead to sudden dismemberment or partial dismantlement ((Ginsburg 2003).

The trajectory of court *systems*, therefore, sometimes follows the course of differentiation and sometimes of supplementation. Differentiation occurs insofar as regular courts, and a supreme court in particular, obtain some degrees of freedom from executive or legislative control, whether through financing, decision-making, or administration (cf. Japan, Chile, etc.). Supplementation occurs when the state elaborates the structure of the court system by creating new courts that exist substantially outside the administrative organization of regular courts and may recruit their judges by distinctive methods and from different pools. These two processes form axes of struggle because repressive states may manipulate differentiation, either in the direction of fusion with state administration, whereby the court has little autonomy, or insulation (cf. Egypt), whereby the court's independence keeps it away from issues sensitive to executive power. States similarly manipulate supplementation, creating sometimes one kind of special court (e.g., constitutional courts), or another (e.g., political tribunals), or even both simultaneously, to enable them to pursue political repression in one channel while offering the semblance of legality in another.

Repeatedly the case studies show that the potential of judiciaries for political liberalism depends upon their social embeddedness. In relation to the executive arms of the state, too few benefits to state administration or reputation render them dispensable; too great an affinity with state politics renders them impotent. In relation to political parties, too distant a position from the policy ideals of parties renders courts irrelevant; too deep an immersion of judges in party politics converts courts into yet another arena of politics and subverts justice from within. In relation to the bar, too attenuated a relationship leaves courts vulnerable; too integral a relationship with lawyers diminishes courts' authority. In relation to the public, too little public support denies judiciaries a primary source of legitimation; too much sensitivity to public opinion makes courts manipulable. In these respects, courts face a three-fold problem of autonomy: from the state, from markets (e.g., corruption), from publics.

A new legal actor within the legal complex has emerged over the past one hundred and fifty years—the *legal academy*. We observe three stances of the legal academy in fights for political liberalism. First, when not fully professionalized, when steeped in a positivist jurisprudence, and when riven by partisan political factionalism, a legal academy, even if quite prestigious, offers no leadership for political liberalism (cf. Chile, 1973; Italy during fascism). Second, a professionalized and prestigious legal academy whose jurisprudence is responsive to

juridical, religious and philosophical ideals celebratory of political liberalism, and institutionalized within a university, will frequently obtain some autonomy from the state. Many of its members will craft the ideologies for mobilization of the legal complex, academics will provide intellectual legitimacy and support for reformist courts and lawyers, and the legal academy can offer a cosmopolitanism and internationalism less pervasive in other parts of the legal complex (cf. China, Spain, Korea, Venezuela, Hong Kong). Third, the legal academy appears never to act as a collectivity. It mobilizes through congeries of like-minded individuals who share networks or orientations (cf. Deans in Venezuela). In this respect it is the least susceptible to collective mobilization as a social organization.

State prosecutors in principle stand closest to the exercise of executive power by the state. Their natural allies are the police—who frequently are subversive of basic legal freedoms (cf. China, Brazil, Argentina, Hong Kong, Italy). They appear in the drama of political liberalism as actors in several guises. Most commonly they are the unspoken or designated agents of repression either through zealous prosecution on behalf of repressive states (cf. China, Chile, Venezuela) or through failure to hold accountable actors in a justice system that threaten basic rights (e.g., Brazil, Argentina). On occasion, some prosecutors aligned themselves eventually with the forces for liberalism, as Hilbink shows in Francoist Spain and Ginsburg discovers in democratizing Korea. Or they may be seen in the guise of protecting the state and society from threats to the social and political fabric without abrogating core rights. But in many countries, the story of prosecutors is caught up in the dynamics of differentiation and coordination. In China, it is the differentiation of prosecutors from the Party, police and courts that marks a current struggle for a re-equilibration of power in criminal defense. In Italy, the differentiation of prosecutors from the judicial side of the magistracy has ebbed and flowed over recent decades. In Brazil and Spain, it is the differentiation of the prosecutors from police. In Korea, it was the differentiation of prosecutors from administrative guidance by an imperative state. For liberalism, differentiation must be complemented by coordination, not least with the practicing bar where liberalism usually finds its natural affinity. Effective societal response to threats requires sufficient coordination to protect social order within the ideals of core rights but sufficient differentiation from a sometimes brutal arm of state enforcement.

The most intriguing hybrid role in the legal complex can be found in the Latin American *private prosecutor*. Here the corrective for a failure of state prosecutors to differentiate themselves appropriately from the police, courts or demagogic politicians comes from private lawyers whose clients are the victims of police brutality and homicides. This straddling of the private/public divide, or the legal complex and civil society, has the effect of compelling a retributive justice system to conform to the constitutional ideals of political liberalism. The necessity for this kind of mobilization on behalf of justice suggests that the re-equilibration of power within the legal complex, thereby moderating the state, will not infrequently result from a common cause being found between the margins of the legal complex and the margins of civil society against the inertia of the state apparatus.

Finally, another usually unsung hero of the legal complex arises in struggles for liberal political society—the *government lawyer*. Three studies yield intriguing results about government officials whose commitment to ideals of legality result in the championing of the rule of law. Hilbink finds that in the last years of Franco's rule, as he opened Spain to Europe's market by invigorating the economy, a group of conservative technocrats (lawyers and economists) decided that a rule-of-law regime would provide the institutional preconditions for market development. They advocated an *Estatu de Derecho* with a reinvigorated Council of State and revitalized administrative courts. Jones makes the unexpected discovery that the hidden heroes of Hong Kong's political development were 'in-house' legal and political advisors whose interventions ranged from the restraints on highly repressive anti-Chinese regulations in the mid-

19th century through the exercise of leadership in moderating the Government's repressive tendencies in the 1950s and 1960s. When Hong Kong took its rapid strides towards political liberalism in the 1970s, it was the government lawyers who were integral to its design and implementation, though by now they were joined by individuals from various other fragments of the legal complex. Richard Abel discovers, surprisingly, that much resistance to the Bush Administration's cavalier disregard for rights of detainees came from inside the military—from the judge advocate's corps, and from others lawyers farther removed from the ideological heights of the Justice Department and Pentagon. In this resistance they were joined by distinguished retired military lawyers who can now speak with less restraint about the abrogation of fundamental protections. It can be deduced from these three instances that a different kind of careful research, interior to government agencies and far removed from public view, may yield yet other examples and circumstances in which the state apparatus itself contains professionals whose loyalties to professional ideals trump their bureaucratic loyalties to the party in power of the moment.

Cleavages and Alliances within the Legal Complex. On the basis of 18th and 19th century reforms towards political liberalism we advanced the hypothesis that an alliance between the bar and courts can advance the cause of legal and political freedom (Halliday and Karpik 1998a). Our findings certainly confirm the opposite is frequently the case—that when the bench and bar join forces in reactionary support of a repressive state, or indeed, both independently decline to uphold basic legal freedoms, its moderation is doomed, as Argentina and Chile demonstrate during their military dictatorships and as Korea, Taiwan and Japan experienced during their respective years of illiberal politics. In several instances we discover that neither the entire bar nor the entire bench are necessary to enable a liberal opening: in Egypt, a vanguard of human rights lawyers appearing before the Constitutional Court was sufficient to arrest and even reverse some of the government's authoritarian actions; in Korea and Taiwan, small voluntary cause-oriented associations found that a responsive constitutional court sufficed to add momentum towards liberalization. Here there a sense of powerful human agency from groups whose formation came from the edges of the profession.

In fact, actual patterns of alliance and division across the legal complex are far more complex than we originally envisaged. One pattern, *segmental divisions*, takes the form of a split between and among segments, where judges and prosecutors, for instance, array themselves against lawyers and academics (e.g., China). A far more common pattern, *cross-cutting cleavages*, splits pro-liberal from anti-liberal professionals across all segments of the legal complex. In Spain, activist lawyers, activist judges, some academics, some civil servants, and even prosecutors found common cause against the bulk of reactionary lawyers, judges, academics, civil servants and prosecutors. With various adjustments, this pattern is repeated in Korea, Egypt, Taiwan, Hong Kong, and Venezuela. What differs are the types of mobilization. In some cases, a *coordinated* mobilization takes the form of explicit ties forged among activists in order to develop a common platform and to coordinate actions. Thus Kenyan lawyers combined forces and coordinated strategy with civil society in order to push President Moi towards multiparty elections. In other cases, a weaker *concomitant* mobilization takes the form of a coincidence of interests or the actions of several groups acting in parallel with each other without any explicit coordination. This appears to be the de facto practice in Venezuela. Each of these patterns has its vulnerabilities.

In short, a cohesive autonomous bar joining forces with a unified independent judiciary is rare in our cases. Concomitant non-mobilization occurs of relatively coherent bars and benches (cf. Chile). Rather, the legal complex mobilizes for political liberalism in fragmentary

patchworks of association, at least in the earlier phases of obtaining freedom. Later, as the pace quickens, a transition occurs, and consolidation begins, the bar and bench as a whole may coalesce around the ascendant standards of liberalism. And later still, if regression from political liberalism begins, it will again be a concomitant or coordinated coalition of fragments rather than entire segments of the profession that join forces. We are therefore confronted with a formidable explanatory task for predicting which course of action is likely in varying circumstances.

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VI. 2. The Legal Complex and Civil Society

At once lawyers themselves partially constitute civil society and have an unusual capacity to lead it. In the case studies it can be observed that no account of lawyers, the legal complex, and liberalism, proceeds without relying on the mutual reliance among the legal complex and civil society.

Society and Publics. It is important to distinguish between organized civil society, and its manifestation in associations and networks, and unorganized civil society, and its expression in amorphous publics. In country after country, NGOs feature as frequent partners of the legal complex. Most common are justice-related NGOs, such as generalist human rights groups (e.g., Egypt, Venezuela, Israel) or indigenous NGOs that are focused on a specific problem within the justice system, such as CORREPI in Argentina on the victims of police homicides. They undertake a tremendous range of functions, monitoring judicial decisions and prisons (cf. Egypt), monitoring the police (cf. Brazil, Argentina), mounting demonstrations and hunger strikes (cf. Egypt), formulating legal reform manifestoes (cf. Korea), mobilizing the public for vocal criticism of deficiencies in the justice system (cf. Brazil, Argentina), submitting amicus briefs to courts (cf. US), and pointing to solidarity with international organizations. Most justice-related NGOs straddle the legal complex/society divide for they are led by lawyers or depend heavily for advice and expertise from lawyers. Not infrequently, lawyers exasperated with the inertia of their colleagues reach into civil society to form associations that will lend force and sometimes protections for their advocacy (cf. Korea).

In several countries (cf. Egypt) justice-related NGOs depend heavily on foreign resources—money, advice, access to foreign media, visibility and protection. But the Egyptian case also shows the paradoxical impact of external funding. On the one hand, the vibrancy of the human rights and NGO sector within Egypt depended heavily on overseas funding. On the other hand, when the government became increasingly upset by the success of local NGOs in the SCC, it found it relatively easy to cut them down to size. It painted groups receiving outside money as unpatriotic or even treasonous. On those grounds, it was able to cut overseas funding to a trickle and cut the heart out of the NGO and HRs leadership of civil society. It is a technique well understood by many other repressive regimes or those that are headed in an authoritarian direction, such as Venezuela.

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Civil Society: Politics and Religion. The legal complex bears an ambiguous relationship to partisan politics. On the one hand, a mutuality can co-exist between the two. In several countries where oppositional parties are banned, parts of the legal complex have served as a shadow opposition in lieu of a developed party system (e.g., Spain, Egypt, Korea, Taiwan). Furthermore, the legal complex has often been a primary agent in the breaking open of a formal competitive party system, breaking bans on previously banned opposition parties (e.g., Egypt, Taiwan). Not infrequently lawyers emerge as the leaders of the new parties, which sometimes go on to assume political power (e.g., Korea, Taiwan). Yet the legal complex can also be coopted by state partisanship when repressive regimes directly or indirectly ensure that the leadership of parts of the legal complex, especially the organized bar, maintains the line of the ruling party.

On the other hand, in many civil law countries the relationship between the legal complex and political parties appears to diminish the capacity of the organized bar in particular to assert a distinguish authority that is not irreducible to party politics. Where the institutions of the legal complex—bar, bench, legal academy—are themselves internally divided by partisan political affiliations, and leadership contests or orientations to issues of the day follow partisan lines, then the political complex has effectively colonized the legal complex (cf. Chile, Venezuela, Italy, Spain). This forecloses the prospect of a professional solidarity that transcends other social cleavages and it inhibits the emergence of a legal ‘class.’ Put another way, the permeation of the legal complex by political parties potentially subverts the capacity of lawyers and other parts of the legal complex to act on singularly legal grounds above the political fray. The effect of close party alliances is to link the fortunes of fractions of the legal complex to the fortunes of the parties. This means that the legal complex follows the rise and fall of dominant parties and thereby cannot easily act as a counterweight to parties-in-power (e.g., Chile, Italy, Spain). It is not surprising, then, that a legal complex dominated by a political party supportive of Pinochet did not resist his attacks on liberalism. It is perfectly consistent that when an opposition party came to dominant the *collegio*, then lawyers began to speak out against political repression. Even in the case of bar associations acting in lieu of opposition parties a similar danger exists—a potentially distinctive lawyers’ voice becomes susceptible to attack on grounds it is another political voice in lawyerly disguise.

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The encounter of the legal complex with religious institutions in the fight for political liberalism is even more difficult to understand comparatively. First, in several cases the alliance of progressive elements of the legal complex and church are decisive. Hilbink shows that the liberal wing of the Catholic Church in Spain provided shelter, infrastructure and even protection for dissident churches and lawyers, the famous monastery at Montserrat at one point being the meeting place for clandestine councils and the printing press for its manifestos. Brinks finds that it is an NGO formed by the Roman Catholic diocese of Sao Paolo that is most effective in bringing private prosecutions against homicidal police. Halliday points to the alliance between the Law Society of Kenya and a mainline church coalition that led the move away from Moi’s authoritarian rule. Abel shows that some Christian and Jewish groups stood with those members of the legal complex who resisted the Bush Administration’s cavalier attitudes to the rule of law, although these were in the distinct minority. Second, there are numerous cases where the church was either silent or complicit in retreats from political liberalism, Spain, Chile and Argentina being notable cases in point. Third, the permeation of a bar group by a religious movement can have a similar effect as its takeover by a particular political party. In Egypt, as thousands of conservative Moslems poured into the Lawyers Syndicate, the government found an excuse to

put the entire organization into receivership as part of its crackdown against the Moslem Brotherhood (Moustafa 2006). Fourth, in Turkey and Israel it appears that conservative religious groups may work against a liberal society (Arslan 2006, Barzilai 2006). What is common to all these is that Protestant and Roman Catholic Christians, Muslims and Orthodox Jews influenced the trajectory of liberalism. But we are unable, as yet, to explain when they will align with a liberalizing legal complex and when they will be complicit with the forces against political liberalism.

The Market. At the conclusion of *Lawyers and the Rise of Western Political Liberalism* we hypothesized that an orientation towards the market might distract lawyers from politics. The findings in this collaboration do not permit such a broad conclusion. Several authors argue that the expansion of the market for legal services has positive consequences for lawyers and politics. In Venezuela, the opening up of legal services in the market gave lawyers a foothold outside the state and thus some capacity to stand against the regime. It also multiplied the number of lawyers. In Taiwan and Korea Ginsburg similarly maintains that liberalization of the market increases numbers of lawyers. This gives them some independence and moves people out from under the government umbrella into the private sphere. This autonomy at work makes it easier for them to brace the government, a view that also appears to be shared by Feeley and Miyasawa for Japan . . . For many reasons, therefore, the market nurtures capacities for political lawyering.

But markets also seduce lawyers away from political engagement and, indeed, may actively dampen activist sentiments in the bar. The overwhelming majority of solicitors in Hong Kong is entirely absorbed with market activities and express some disgruntlement with barristers who stir up trouble on behalf of the rights of workers, or protections of basic rights, or express reservations about intrusive police surveillance and powers. The shape of the market has affected the nature of representation in China. In the 1980s, before the major expansion of the market, all lawyers had to do some criminal work and therefore were available as counsel. Now many can avoid it and do. Most of the best lawyers find extraordinary rewards in commercial practice and they distance themselves from the “dirt” of criminal practice. They present mobilization of the profession as a whole for “political” causes rather than allowing business lawyers to keep on making money. Even in criminal law there can be a market distortion as defense lawyers gravitate to those areas of practice that are lucrative, such as corruption cases against officials, than those areas where repression is more pronounced, if less well remunerated.

Finally, the situation in Singapore demonstrates that it is a hollow hope to suppose that the entrenchment of an independent judiciary for the market, and the establishment of the rule of law in commercial dispute resolution, will spill over into issues that threaten the discretionary powers of the state. It is entirely possible for a liberal market and legal system to exist side by side with an illiberal polity and a legal system that insulates itself from “political” engagement.

VI. 3. Tactics of Constraint and Repression

The legal complex and its progressive allies exist within a frame, and develop a repertoire of action, set by repressive or potentially repressive states. The array of case studies of illiberal regimes reveals commonalities of tactics used by repressive leaders to limit the mobilization of the legal complex. The use of these tactics itself depends on domestic and international contexts.

Attacks on judges and courts come from all sides. A common option is to set up an alternative court or justice system that siphons off politically sensitive cases from regular into special courts (cf. Egypt, Israel) or to remove suspects from any sort of justice system altogether (cf. China's labor camps, U.S. and Guantanamo Bay, Pinochet and the "disappeared."). A higher profile option that depends on a riskier legitimation strategy is to set up a Constitutional Court that signals conformity to global norms while limiting the court's jurisdiction or powers of judicial review or binding nature of its decisions (cf. Constitutional Court, Egypt). A softer version of this, also used by Mubarak in Egypt, is to threaten the removal of powers from the courts in order to dampen judicial activism. Court-packing offers an alternative approach that does not require changing the structure of the courts: as Chavez has demonstrated in Venezuela, judges may be removed from courts and replaced by those who are politically compliant. And if the capacity to replace judges is not available, then targeting judges in smear campaigns or with prosecutions may compel them to resign or flee into exile. Alternatively, repressive leaders may have the capacity to replace troublesome with compliant judges.

Against lawyers, repressive regimes can take the frontal approach and drive lawyers out of the profession, as Mussolini did of anti-fascist lawyers in the 1920s, or make lawyers vulnerable to imprisonment for zealous advocacy, as is the case in contemporary China, or place the entire profession under government control, as in China and Egypt. Attenuation of the private profession's influence can be a by-product of other actions, such as removing the financial underpinnings of practice or flooding the profession with poorly qualified candidates.

Repressive states may also cut off or starve the potential allies of the legal complex in civil society. This can be done by preventing the emergence of a civil society (e.g., China), or terrorizing civil society (e.g., Chile), or starving civil society of overseas resources or support (e.g., Spain, Egypt). Control of civil society can be managed by demanding formal registration or adopting restrictive standards of registration which include political screenings. Civil society is further impoverished if the media are either controlled by the ruling party, or cowed into submission, or diverted by commercial interests. Even when civil society groups are allowed to exist, often in restrictive circumstances, their leaders can be silenced through petty harassment (e.g., detained episodically for questioning) or removal (e.g., through prosecution for embezzling moneys, as in Egypt).

In moderately repressive states it is these tactics that the legal complex confronts and must combat. It is not surprising that potential reformers falter in the face of such odds. It is quite surprising how heroically so many leaders of the legal complex, when confronted with high risks to their persons, reputations, livelihoods and families, nevertheless choose to fight on.

VII. Conclusion: Success and Failure

There are many instances where lawyers and the legal complex mobilize on behalf of basic legal freedoms. Why do some succeed and others do not? We define successes as instances where (a) lawyers or the legal complex mobilize for political liberalism on particular issues at a moment in time, and (b) they succeed in partially institutionalizing it. We find such successes in Korea, Taiwan, Spain, Hong Kong, contemporary Japan, Uruguay, and Kenya.

I define failures at two ways. First, there are failures when (a) lawyers or the legal complex mobilize, but (b) do not (yet) succeed in institutionalizing reforms. We find such failures in Egypt and contemporary China. Second, there are failures where neither lawyers nor the legal complex mobilize in the face of the absence of, or threats to, basic legal freedoms. Complete failures to mobilize are found in fascist Italy, Japan (1920-1945) and Chile. Partial failures to mobilize are found in the U.S., Argentina, Brazil and Israel.

Let me summarize a set of conclusions that may also serve as hypotheses for more refined and extensive empirical research.

1. *Threat.* The cases indicate that strong threats to security usually limit success. The threat can be external (Korea, Taiwan, U.S., Israel, Japan) or internal (e.g., Communism in Spain and Chile, Islamic fundamentalism in Egypt, lawlessness in Argentina, Brazil). Whether the threat is “real” or made to seem real may be immaterial. If publics can be persuaded they are under threat, then leaders obtain support for repression. An exception is Hong Kong in the 1960s and 1970s: the rule of law was expanded by Hong Kong authorities precisely as a counterpoint to the ideology of Communist China. When the threat diminishes in fact or perception then the likelihood of success increases.
2. *Properties of the legal complex.* There is evidence that mobilization will not be successful when (a) the private bar is too small to exercise leadership or to make sufficient impact (cf. Japan); (b) when the private bar is unduly reliant on the state (cf. Venezuela); (c) when the private bar and others parts of the legal complex dissolve into warring political factions; or (d) when there is a deep divide between the private bar and other parts of the legal complex (but Japan a partial exception). Success is unlikely when the judiciary (a) subscribes to a positivist jurisprudence, (b) is recruited for its political fealty, (c) is controlled hierarchically by judicial elites that eschew engagement on behalf of universal juridical rights, and (d) historically is regarded as an arm of state administration. The commitment of the legal complex to a jurisprudence or legal ideology that transcends sectional party politics, i.e., is a quintessentially legal ideology, seems highly correlated with cohesion, the willingness to mobilize, and the success of mobilization.
3. *State.* Success by the legal complex is associated with (a) a need of the state for international capital, international trade, or legitimacy; and (b) the establishment or extension of rule of law institutions, such as constitutional and administrative courts, to satisfy foreign observers or the domestic economy. Failure is associated with (a) imperative state-led models of economic development, (b) rampant nationalism, and (c) international conflict.
4. *Civil society.* Success requires either (a) a robust alliance of leaders in the legal complex with leading groups in civil society, which may include human rights groups, liberal religious groups, and the media; and (b) the openness of the public to be led and mobilized by lawyer-spokesmen. Alliances with (c) international civil society increase the probability of success, although they can make local movements vulnerable to nationalist

attacks (cf. Egypt, Venezuela). Success can be undermined (d) by fearful publics who demand or respond affirmatively to demagogic leaders for repression and, in a descending vicious cycle, (e) by the suspension or abolition of basic legal protections. It is not clear why some key civil society groups, such as religious organizations, sometimes are key supporters and sometimes key opponents, of struggles for basic legal freedoms. This is true also for the media, although their degree of freedom from government control presumably has a significant impact.

5. *Politics.* Success seems positively correlated with (a) multi-party politics, (b) the absence of party politics and partisanship from intra-professional politics, and (c) the existence in the legal complex of a jurisprudence or legal ideology that transcends sectional party politics.
6. *Markets.* In virtually all cases success in transitions towards political liberalism was accompanied by a shift of command to market economies or some loosening of national markets from state direction. Expanding markets appear (a) to provide more independence and resources for lawyers, (b) to attract higher quality, higher prestige classes to legal professions, (c) to compel governments to increase the size of the legal profession, (d) to increase protection for property rights, and thus (e) to strengthen rule of law institutions such as constitutional, administrative and regular courts. But markets can also divert lawyers from 'political' activity (cf. France, Hong Kong). And the mere existence of an advanced economy with superb commercial courts does not guarantee full civil rights (cf. Singapore). It is thus a fallacy to imagine that economic development necessarily leads to the institutionalization of basic legal freedoms and political liberalism as a whole. Indeed, the contrary may be so.

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