

**THE FIGHT FOR FIRST GENERATION RIGHTS:  
A COMPARATIVE ESSAY ON THE MOBILIZATION  
OF THE LEGAL COMPLEX FOR BASIC LEGAL FREEDOMS <sup>1</sup>**

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<sup>1</sup> 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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Rights discourse is now global discourse (Hajjar 2004). International organizations such as the United Nations propagate universal human rights (Boyle 2002; Merry 2003; 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, 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 17<sup>th</sup> and 18<sup>th</sup> 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 18<sup>th</sup> to 19<sup>th</sup> centuries to

countries in Latin America, the Middle East, Asia and Europe in the 20<sup>th</sup> 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.

## **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.

## Political Liberalism

What is political liberalism? For methodological reasons we formulated a concept that would be meaningful across centuries and across the world.<sup>3</sup> 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

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<sup>3</sup> While the details have varied from situation to situation, historians and historical sociologists have found the definition we adopt meaningful in 17<sup>th</sup> and 18<sup>th</sup> century England and France, 19<sup>th</sup> and early 20<sup>th</sup> century Germany, and 20<sup>th</sup> 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).

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 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, nor civil rights without civil society.

Evidence from the last decade indicates that a shift towards liberalism on any of these criteria remains fraught with difficulty. In the Asian developmental states, gradual movement towards a moderate state, a more robust civil society and secure civil rights can be observed in Taiwan and Korea (Ginsburg 2004; 2002). But insurgencies, radicalized religious groups and a repressive military remain a threat in Indonesia and Sri Lanka, Hindu fundamentalism threatens India's secular politics, fundamental rights of speech and association have been under attack in Malaysia, Hong Kong, and Singapore (Harding and Hatchard 1993; Lev 1998), and political and economic corruption pervade many countries on the Asian continent. With some notable exceptions, such as India and Hong Kong, and now Korea and Taiwan, few judiciaries in Asia have sufficient autonomy or power to bridle arbitrary executive action despite public protestations about the "rule of law" (Miyasawa 1994; Harding 1996; Harding and Carter 2003).

In Africa, only a handful of countries have institutionalized any of the three elements of liberalism (Widner 1999a; 1999b; 1994). In those parts of the former Soviet bloc closest to Western Europe, liberal polities appear to be emerging with some durability in numbers of countries—the Baltic states, Poland, Hungary, the Czech Republic (Kurczewski 1993; Scheppele 2003). But farther east, and particularly in the new Central Asian republics, one kind of illiberal regime has been more often than not replaced with another.

Many nations, particularly in Latin America, have experienced a roller-coaster encounter with liberalism where cycles of liberal and illiberal regimes have succeeded each other over decades (Couso 2002; 2004; Hilbink 1999; 2003; Perez-Perdomo 2003). In these countries, the rule of law has been marginal to the definition of politics. Second and third generation rights take priority over the procedural rights of classic first generation rights.

Indeed, recent scholarship in comparative politics is beginning to argue that Latin America's uncertain experience with liberal politics may have occurred precisely because the fundamentals of core civil rights, protected by strong, independent courts, were never effectively institutionalized (O'Donnell 1999; 2001).

### **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 18<sup>th</sup> and 19<sup>th</sup> century Britain (Pue 1998), 19<sup>th</sup> century Germany (Rueschemeyer 1997), 17<sup>th</sup> and 18<sup>th</sup> century France (Bell 1997; Karpik 1998a), and 19<sup>th</sup> and 20<sup>th</sup> 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 18<sup>th</sup> century France or 20<sup>th</sup> 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.<sup>4</sup> These will include (a) private lawyers, (b) public lawyers, who serve in ministries of justice or regulatory agencies of

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<sup>4</sup> 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.

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 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.

### 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).

#### **Obtaining Freedom**

Countries in North East Asia, the Middle East, Africa and Southern Europe offer a kaleidoscope of progressions towards political liberalism.

*China*           Least advanced is China. In the decade following the revolution, the Chinese Community Party quickly took control of the legal system, then effectively destroyed it during the Cultural Revolution. Extensive rebuilding has occurred since the late 1970s (Lubman 1999; Peerenboom 2002), not least an immense expansion of commercial law, but



the Party tolerates no threat to its control over courts and judges, despite statements that sound more benign to western ears {State Council Information Office, 2005 #57). The Party-state does seek to build a rule of law state, narrowly defined, but it exists in the contradictory situation of wanting the neutrality, predictability and certainty of law while still being able to intervene arbitrarily when judges or courts threaten political or personal interests.

A nascent civil society exists, but “non-government” organizations must be registered with government ministries and are ultimately controlled by them. A substantial grey zone of unregulated civil society is permitted, including groups of many sorts, often connected by internet, so long as they stay off incendiary topics and show no signs of mobilizing in any manner thought to be a security threat. The media is entirely controlled by the Party and local governments, though again variation occurs in its willingness to break away from the official positions mandated by the Xinhua News Agency (Fen Lin 2006), deviations often spurred by economic competition.

The constitution and Criminal Procedure Law purportedly institutionalize many of the universal human rights embodied in UN declarations or in rule of law societies. In practice, most basic legal freedoms are honored in the breach and in very few respects are core rights of citizenship respected in practice. As a telling indicator of law’s fragility, provisions in the Criminal Law 1997 and Criminal Procedure Law 1996, together with interpretations and opinions issued by official agencies of the legal complex, threaten fundamentally the capacity of lawyers to defend effectively criminal suspects, and many lawyers have been jailed or their careers ruined by the most modest advocacy that falls awry of judges, prosecutors, police or Party officials (Halliday & Liu 2006).

Nevertheless research on internet forums among lawyers reveals that there are signs of an insurgent professionalism that strongly advocates basic legal freedoms (Halliday and Liu 2007). The All China Lawyers’ Association hosts an internet forum in which large numbers of lawyers across China engage each other on a huge number of topics. They do so with almost complete freedom to state expressly what they think.<sup>5</sup> From these exchanges is emerging a nascent professional community that is knit together by a converging ideology of rights. This ideology grapples with the moderate state, civil rights and civil society—the core elements of political liberalism.

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<sup>5</sup> For details on the degree of censorship and self-censorship see Liu and Halliday (2007).

Lawyers argue for a redistribution of power in which courts and judges can counter-balance the long-dominant influence of police and prosecutors. They seek the attenuation of the “rule of man,” of arbitrary interventions into court processes by “powerful people” or “local authorities,” in favor of something more rule-governed. Paramount are calls for their own protection so they may defend suspects. A preponderance of opinion supports the forging of their unity: we should “unite together in consciousness and respect . . . we should support, aid and cry for each other.” Only by “uniting together and dominating our own destiny by ourselves,” will a rule of law society be established in China. By so doing they stake a claim to leadership of a prospective civil society. That society, they say, will be protected by due process of law, citizens will be tried fairly, torture will be sanctioned, the right of innocence will be presumed. In this procedural approach to liberalism, progressive lawyers receive significant support from the most vocal legal academics who variously draft new laws of criminal procedure, make public pronouncements, and seek to lead public opinion (Halliday & Liu 2006).

*Korea and Taiwan* Much more advanced in the path towards political liberalism has been the drive of the legal complex in Korea and Taiwan (Ginsburg 2007). Indeed, for Ginsburg the changing distributions of power within the legal complex not only presage but constitute the emergence of a liberal political system. The North East Asian legal complex for much of the last century had a remarkably stable set of relationships. A powerful administrative apparatus of the developmental state, imperfectly regulated by administrative law, guided remarkable economic expansion in Korea and Taiwan. Courts, while competent and fairly autonomous, were fenced into narrow jurisdictions. Highly competent, successfully monopolistic, but tiny legal professions seldom strayed from technical matters. Prosecutors executed authoritarian policies. This equilibrium provided few lawyers willing to litigate for social change, few judges ready to encourage private litigation, and weak administrative laws to constrain bureaucratic discretion. The North East Asian legal complex “cabined law to a narrow zone,” argues Ginsburg, where it “was relatively unimportant as a means of social ordering, particularly in interactions with the state.”<sup>6</sup>

In the 1980s Ginsburg demonstrates that both social and legal pressures built up against the military dictatorship. Two courts created new arenas for the pursuit of rights. A

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<sup>6</sup> Ginsburg 2006:6.

new Constitutional Court permitted litigation on administrative law, criminal defense and human rights. A new Administrative Court provided another point of leverage for aggrieved litigants. In 1987, a small group of lawyers who had boldly defended victims of political repression converted an underground network into a formal alternative bar association for activist lawyers, *Minbyeon*. The official bar association itself admitted larger numbers of lawyers, many of whom found rights-related litigation more inspiring than conventional commercial law. In the legal arena, lawyers and judges found a synergy over rights litigation that paralleled growing protests from civil society. Prosecutors began pressing corruption cases against politicians. Legal academics injected new ideas and offered legitimacy for the liberalizing moves. Together, therefore, the legal complex and civil society, “had a profound impact on Korea’s liberal transformation” (Ginsburg, 2007:10).

From a broadly similar starting-point, Taiwan’s path, while distinctive, nevertheless evidenced similarities. Here the lawyer insurgency arose from Taiwanese

“ethnic lawyers who were excluded from the Kuomintang’s one-party rule. In 1970 they formed a society with judges and academics to advance liberal ideas, including freedom of speech and assembly. Some of their leaders obtained notoriety by defending arrested activists and opposition figures against treason charges, relying on doctrines of human rights. Compared to Korea, however, the Taiwanese lawyer-activists pursued not a litigation campaign but channeled their efforts into political parties. A constitutional court, the Council of Grand Justices, began flexing its hitherto flaccid muscles in a series of increasingly bolder administrative rulings, thereby signaling that law might limit administrative discretion, even of a state unaccustomed to checks on its bureaucratic powers. A rapidly expanding legal profession provided manpower for a mobilization of law. Yet success—the integration of Taiwanese lawyers into Taiwanese politics, the transition to political liberalism, and the establishment of multi-party democracy—channeled lawyers as much into party politics as towards a distinctively lawyerly politics that operates on a plane of legalism and constitutionalism. In either case, like their Korean counterparts, the transformation of the Taiwanese legal complex both facilitated and constituted the institutional accomplishment of political liberalism over a period of three decades.”<sup>7</sup>

*Japan* As a progenitor of the Korean and Taiwanese models of development, the Japanese legal complex began its modern emergence following the Meiji Restoration in 1868 (Feeley, 2007). In a defensive move by the Japanese government, a series of reforms sought to persuade the West that Japan had chosen the path to modernity by adopting some bulwarks

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<sup>7</sup> Halliday, Karpik and Feeley, 2007, “The Legal Complex . . . ,” pp 14-15.

of legal liberalism—adoption of a constitution (1884/1889), a civil code (1890) and the legal institutions of courts, prosecutors and a bar. This forceful push towards modernization combined an enormously powerful state administration with a specialized but not independent judiciary and a tiny bar, supported by private law schools. For the first time public law modestly constrained bureaucratic arbitrariness and heavy-handedness and the foundations were laid of a legal complex upon which might be erected effective institutions of political liberalism. Despite its limited size, the bar adopted “an anti-government spirit” from which came periodic resistance to infringements on basic legal freedoms. Lawyers began to resist state persecution in the 1880s and 1890s by defending labor and party leaders from criminal prosecutions.

Japanese lawyers partially constituted the beginnings of a hitherto absent civil society in the first two decades of the twentieth century, aided by a fledgling free press and the founding of voluntary associations. In 1921 activist lawyers, engaged in defending striking shipbuilders, formed themselves into a voluntary association, the Japanese Lawyers Association for Freedom; a Japan Civil Liberties Union was established in 1946 to defend freedom of speech and other basic rights; a Japan Young Lawyers Association arose in 1954 to support the new constitution; and in 1961 a group of lawyers formed the Japan Democratic Lawyers’ Association, again from an activist impetus. This capacity for organization and mobilization propelled the bar into the leading ranks of a developing civil society in the later 1990s, precipitated by the Hanshin-Awaji earthquake in 1995. When government failed adequately to cope with the crisis, NGOs moved swiftly into the vacuum to provide relief to victims, not least the Japan Civil Liberties Union to deal with rights issues. Out of this demonstration of an enabling civil society developed a movement for a liberalization of laws governing the founding of civil society groups, ultimately realized in the NPO Law (1998), which by 2004 had led to 16,000 new groups, many of which are watchdogs of government agencies, often led by lawyers (Feeley and Miyazawa 2007).

From the 1880s, Japanese history is punctuated by occasional episodes of interventions by groups of lawyers on behalf of basic legal freedoms: defense of labor and party leaders; challenges to illegal land seizures; human rights protection; establishment of a jury trial system; and environmental defense. A stronger project can be found in its efforts to buttress not only the autonomy but the strength of the judiciary vis-à-vis the state

administrative apparatus. From the beginning, the bar supported a professionalized judiciary, but its long-time deference to the state has been much more difficult to change. A highly-qualified but essentially passive judiciary has been reluctant to use its powers of judicial review, slow to allow litigation by citizens against state agencies, and all too ready to bow to government interests (Feeley & Miyasawa 2006). Lawyers have fought for a larger, more responsive judiciary, to citizens and needs of the market, while judges have resisted reform proposals of all sorts, including an expansion of the judiciary. Japan, in short, has not moved nearly so decisively as its former colonies, Korea and Taiwan, in the judicial moderation of executive power. In general both Korea and Taiwan have moved towards a re-equilibration of power in their legal complex that remains still to be achieved by Japan.

*Egypt* In sharply contrasting circumstances, the cases of Egypt and Spain both confirm and expand our understanding of the dynamics of the legal complex in fighting for freedom. From the late 19<sup>th</sup> century until Nasser's military coup in 1952, the prestigious legal profession had been a bastion of liberal values. A combination of circumstances severely eroded its leadership: the military dictatorship abolished legal institutions; the nationalization of most major industries destroyed a lucrative market for legal services and reduced its attraction for the best and brightest; a vast infusion of law students into the profession lowered its appeal and prestige; and the Islamicization of the bar subverted its liberal ideals. An Islamic faction captured the Lawyers' Syndicate in 1992 conveniently giving Mubarak's regime the excuse it needed to sequester the Syndicate under government control (Moustafa 2007).

This loss of autonomy by a once prestigious and liberalized bar shifted the locus of activism in the legal complex elsewhere. Moustafa (2007) argues that under pressure to attract foreign investment, the Egyptian government set up a Supreme Constitutional Court in 1979 to protect property rights. The Court was given the power of judicial review of legislation, to rule on the correct interpretation of statutes, and to resolve conflicts among judicial bodies. Progressive rights' lawyers discovered the Constitutional Court offered precisely the platform they needed to advance liberal causes. In the later 1980s, in cooperation with activist civil society groups, they brought a stream of cases that empowered the court to permit opposition political parties, rule laws unconstitutional and restrain administrative discretion. The rulings enabled some relaxing of controls over the media,

increased protections for dissidents, expanded capacities for lawyers to defend detainees, limits on arbitrary and extended detentions, and more protections against torture.

Much of this activism was enabled by a growing civil society that lawyers often led. Defense of the media gave activist lawyers' groups a significant ally. If the Supreme Constitutional Court enabled political life, it did so because of a synergy forged between the Court, which accepted test cases, and the civil society it protected. NGOs, lawyers, the media and other civil society groups in turn legitimized and protected the Court. The most dramatic effort of this coalition to undergird civil society can be seen in a proposed law (153/1999) that would sharply limit the number and independence of civil society groups. Into this fray stepped a national NGO coalition of more than one hundred organizations that led demonstrations, hunger strikes, and litigation, leading to the eventual decision of the Supreme Constitutional Court to strike down the legislation.

However, this activist legal complex of bold lawyers, a few human rights groups, some activist judges, and an assertive court also met its match by a regime that eventually struck back forcefully and, ultimately, effectively to narrow the liberal opening. In so doing, the Egyptian case further specifies the conditionality of mobilization by the legal complex. First, there is 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. It relied significantly on money and other resources from international NGOs, such as Human Rights Watch, Amnesty International, and Lawyers' Committee for Human Rights, as well as the U.S. State Department. On the other hand, when the government tired of its defeats by local NGOs in the SCC, it found it relatively easy to cut them down to size by painting groups receiving outside money as unpatriotic or even treasonous. In this way it was able to cut overseas funding to a trickle and cut the heart out of the NGO and HRs leadership of civil society. Second, the Supreme Constitutional Court had its impact effectively by striking a Faustian bargain with the state. It displayed an "insulated liberalism," says Moustafa, by making major concessions to the government—ruling Emergency State Security Courts constitutional, delaying a ruling on transfer of cases from civilian to emergency courts, limiting appeal from special and military courts to regular courts. It bought its limited independence by permitting a parallel legal system and legitimating much of the government's authoritarianism via legality. Third, by authorizing opposition political parties,

and aligning civil society groups with those parties, the legal complex blurred the line between the politics of legality and the legality of politics.

*Spain* Spain's transition from the fascist rule of General Franco to democracy also implicated fragments of the legal complex. Hilbink (2007) changes key by focusing less on the bar per se and more on a progressive group of judges, *Justicia Democrática* (JD), who helped catalyze a shift towards political liberalism that mobilized diverse elements of the legal complex. In the mid-1960s small numbers of dissident judges began to meet informally and in secret to debate issues of justice and democracy. With the 1971 founding of an illegal association in Barcelona which extended to a nation-wide network by 1974, the judges sought to restrain executive abuses of power while re-conceiving the role of a judiciary in a liberal political society. They found allies in a clandestine bar association, *Circulo de Estudios Juridicos*, among liberal Roman Catholic clergy and intellectuals, and even with some prosecutors. Through numbers of clandestine documents, JD advanced an alternative concept of courts in a moderate state. JD mounted a critique of the judiciary's complicity with the regime and called not only for judicial independence from the regime, but for full jurisdiction to be restored to courts, for the restriction or abolition of military and special courts, and for wide-ranging reforms in the recruitment of judges and the organization of the judiciary. JD dared to criticize directly those many judges who were "complicit in the regime's arbitrariness."<sup>8</sup>

JD accompanied this championing of an effective judiciary with "sharp criticism of infringements on rights and the articulation of a just rights regime. JD declaimed the lack of procedural protections in the penal and military justice codes, assaults on free speech and repressive activities in universities, and the criminalization of political associations. In their place, it advocated a state whose guiding principle would be "respect for the dignity, integrity and liberty of the human person," and that would guarantee citizens "rights to liberty of expression, correspondence, abode, assembly and association, security, habeus corpus, due

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<sup>8</sup> Hilbink, Lisa. 2007. "Politicising Law to Liberalise Politics: Anti-Francoist Judges and Prosecutors in Spain's Democratic Transition." Pp. 403-436 in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing., p.10; Halliday, Karpik and Feeley, op.cit., p. 15.

process nationality, and petition.””<sup>9</sup> Again, part of the legal complex offered a justification for civil society as it itself help constitute that space.

The implication of lawyers, judges and prosecutors in the Spanish transition from fascism to political liberalism and democracy shows some commonalities with resistance and advocacy in quite different situations but also has several distinctive features. First, Hilbink (2006) shows that the legal complex itself was unusually diverse, including not simply activist lawyers and judges but also prosecutors from the earliest days of JD. In this sense the legal complex consisted of a progressive slice off the proportionately larger segments of the legal occupations. Second, while the members of this complex were drawn from a heterogeneous scattering of backgrounds (Communist, socialist, Catalan nationalists, liberal democrats), they found common ideological ground on concepts of “mission,” “duty,” and “social responsibility.” In short, they found a basis of commonality that offered a *professional* solidarity that transcended partisan politics. Third, the liberalization momentum benefited from Franco’s decision to open up the Spanish economy to Europe. This led to the infusion of ideas and support for dissident groups from outside Spain. It also led to a call by technocratic economists, who themselves might be socially conservative, for a modernized legal system that enabled a thriving market. Fourth, whereas in Egypt the infusion of conservative Islamic lawyers into the profession gave the government the excuse to crack down on extremism, in Spain elements of the Roman Catholic church itself became critical to the reform movement. Fifth, alliances crossed the legal frontier to embrace also political parties, domestic and foreign media, and even the Council of Europe.

*Hong Kong* According to Jones (Jones 2007), the political society of Hong Kong in the last years of British colonial rule and the continuity of that society into the first decade as a Special Administrative Region within the Republic of China, show all the hallmarks of political liberalism but not the familiar standards of democracy. Residents of Hong Kong were convinced by the British, in a counter-hegemonic project in contradistinction to Cold War Communist China, that they were governed through a rule of law society, complete with a judiciary independent of administrative control, the defense of basic legal freedoms, and an autonomous bar which championed the fundamental rights of English common law. Yet undisputedly Hong Kong is no democracy. It cannot boast universal suffrage or a

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<sup>9</sup> Id.



representative legislature. Its most senior government figure is appointed by higher authorities, once colonial, now in Beijing, rather than elected directly or indirectly. Political parties are stunted. Power does not alternate between bearers of contesting conceptions of the public good. In other words, Hong Kong breaks the mold of societies that combine capitalism, political liberalism, and political democracy.

But the affirmation of the rule of law as a principle of governance does not come until the 1970s when Hong Kong faced a dual threat—the looming presence of Communist China on the mainland and rising civil disorder on the island. Jones proposes that Hong Kong, under pressure from its colonial overlords, the British Government, responded by reconceiving governance and forging a new identity for Hong Kong residents. The Hong Kong administration embarked on a course of securing consent for its undemocratic rule by pursuing a double strategy. On the one side, it established a new “social agenda” that built community, offered extensive welfare services, provided law and order, cleaned up government administration, and forged a Hong Kong cultural identity. On the other side, Hong Kong’s public administration intensified efforts to build a rule of law society that would contrast sharply with the lawlessness and mayhem of China’s Cultural Revolution. Where “social legislation reined in some of the worst excesses of unrestrained capitalism,” a “rule of law ideology . . . now became state policy.” But a rhetorical sleight of hand would not suffice. A rule of law society needed to deliver in practice legal accountability, legal redress, legal transparency, and in place of political rights, legal rights. Says Jones, the authorization of power in Hong Kong came to flow “from the state’s delivery of two promises: rising prosperity for all and a fair society.”<sup>10</sup>

The legal complex made its mark on this legitimation project, but from an unexpected direction. The defenders of basic legal freedoms were found less in the private bar and more in the civil service. Legally-trained civil servants had much experience of seeking to protect public administration from powerful business interests. The state’s legal advisors now turned to help erect a rule of law regime, and having established it, set out to defend it. While most Hong Kong lawyers occupied themselves with the commercial business of Hong Kong, government officials found allies in an

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<sup>10</sup> Jones (2007), pp. 116-146.

increasingly activist bar, most notably indigenous Hong Kong Chinese lawyers who found some influential expatriate fellow travelers. The state sponsored a profusion of new tribunals to resolve disputes over labor, land, and small claims. Courts were strengthened and substantially independent. And just as the British were about to leave they endowed Hong Kong with a Bill of Rights they had never quite managed to enact while they were in power.

But the legal complex itself was cross-cut with cracks that weakened its collective force. While a strong group of barristers, supported by indigenous academics, and an often sympathetic bench and legal civil service sought to protect the rule of law regime, they were diminished by a solicitors' profession much more interested in market activity, by a bar and bench too disproportionately comprised of expatriates, and a by gap between bar leaders and the mass public. After the handover of the colony to China in 1997, a pro-Beijing faction of the legal complex formed, further threatening the rule of law order erected in the preceding thirty years. Indeed, having accomplished this peculiar form of political liberalism without democracy in three decades, the progressive wing of the legal complex now fights to defend it against a central state bent on disabling it.

*Kenya* One of the heroic struggles for basic legal freedoms was waged by Kenyan lawyers from the mid-1980s to the present. After independence in 1963, the two-party system was eventually dissolved in favor of a one-party and increasingly authoritarian regime led by the founding father of post-colonial Kenya, Jomo Kenyatta. After his death in 1978, his successor, President Moi, tightened his authoritarian grip on the country, instituting a personalistic politics that intensified repression. Oddly enough, however, Moi sought to undergird his legitimacy with repeated expressions of commitment to law, an independent judiciary and free legal profession. After an abortive military coup in 1982, Moi tightened his grip further, seeking to cow defense lawyers from defending political prisoners, to coopt and tame the judiciary, and to fracture relations between the bar and the few remaining civil society groups.

He did not succeed. With increasing boldness through the 1980s, individual lawyers insisted on mounting defenses for political detainees, even when they too risked arrest and torture. Lawyers protested constitutional amendments that contracted political rights and removed security of tenure for judges. Attorney Nowrojee, for instance,

defended cases on “the right of assembly . . . charges of sedition; charges against unlawful assembly, illegal meetings and press censorship.”<sup>11</sup> Since Moi pronounced his commitment to the rule of law, lawyers used courtrooms as public stages to exert maximum impact on the nation. They knew they could not win, but they dragged out trials for longer impact, staged walkouts when judges ruled unfairly, filed court papers that could be published by censored newspapers, and packed courtrooms with lawyer supporters and foreign observers on the most notable trials.

Professional mobilization took a new turn in 1991 when an activist lawyer, Paul Muite, became chair of the Kenya Law Society and mobilized the KLS in court filings and appeals, in press releases, and support for mass marches, often in alliance with church leaders. Muite became a political hero. In one notable trial, “Kenyans saw him as the bastion of resistance to tyranny. Hundreds of people appeared outside the court to listen to the submissions and they would carry Muite shoulder-high as he left the courts.”<sup>12</sup> The Law Society became a national leader for multi-party elections and constitutional reforms. When the Moi regime tried in 2002 to block public debate of the new constitution, “Most of Kenya’s 3,000 lawyers held prayers, demonstrated in the streets, and shunned the courts for one day to protest attempts by the judiciary to block the work of the constitution review team.”<sup>13</sup> Of all civil society groups, perhaps only church leaders exerted as much influence on Moi’s restoration of civil liberties, revision of the constitution, moderation of executive power, enlivening of civil society, and a return to pluralistic politics.

### **Maintaining Freedom**

Preservation of political liberalism requires a vigilance that never ends (Halliday & Karpik 1997). Freedom is being maintained, not when it confronts any challenges, nor when it undergoes restructuring, but when it stays above a threshold that allows forces inside and outside the state effectively to resist its incursions against most basic legal freedoms for all citizens and residents in a sovereign territory. When systematic or arbitrary deviations occur

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<sup>11</sup> Robert Press, p122

<sup>12</sup> Id., 158ff.

<sup>13</sup> Ibid., p.215.

from the standards of political liberalism as we have defined them, and when sections of the population have no effective redress, then freedom is no longer being maintained but is lost.

Protecting basic legal freedoms within the matrix of political liberalism requires two different kinds of efforts that ultimately converge, though not necessarily to reinforce each other. Maintenance may take the form of readjusting asymmetries among the elements of political liberalism, when, for instance, a nation may combine a strong moderate state that defends basic legal freedoms but without a robust civil society or a lively public discourse around these issues. Or asymmetries may be observed within the elements of political liberalism: when civil society permits mass publics to overwhelm protections of vulnerable populations; when an independent court remains powerless or insulated from the effective exercise of power; when procedural protections are extended to citizens, but not pre-political freedoms, such as freedom of speech or religion.

Maintenance also occurs in face of challenges—from domestic and international threats to security, from threats to territorial integrity, from the growth of administrative states, from yawning gaps between constitutional aspirations for freedoms and their protection and enabling in practice.

These two efforts at maintenance may be reinforcing or subverting. A threat can lead to a consolidation or expansion of state moderation or the mobilization of civil society or a re-assertion and, indeed, invention of new defenses against challenges to core civil rights. Alternatively, threats can shatter the supposed protections institutionalized in independent courts, or can turn a dense civil society into mass hysteria, or can crush protections that were erected precisely to define limits when fear abounds.

The theoretical problem, therefore, must be to identify the conditions under which threats or adjustments to asymmetries within the liberal political society lead to its strengthening rather than its demise. Does the legal complex mediate these processes to produce one set of outcomes rather than another?

*Brazil and Argentina* Challenges to political liberalism frequently arise when disjunctions between manifest between a country's constitutional ideals and its everyday practices. Indeed, narrowing the gap constitutes the never-ending task for legal and civil society observers that monitor what in fact is political hypocrisy. Brinks (2006) demonstrates that precisely such a breach of basic legal freedoms marks the incomplete transition of Brazil

and Argentina from the military dictatorships that preceded their present-day democracies. In Brazil, where a robust political liberalism is taking root, a slow drama unfolded, not at the heights of judicial power but in the first instance criminal courts. In Sao Paulo, the largest city in democratic Brazil, in 1992 the police killed nearly 1500 people, 30 people a week. This amounts to about one-quarter of the homicides in the city. In Buenos Aires the rate was about the same. Yet government prosecutors have been exceedingly reluctant to bring cases against the police, and judges have been equally reluctant to convict. Concerned lawyers have mobilized unconventionally. In several Latin American countries there exists the possibility of private prosecutions—individuals, victims, involved in a crime, can bring a prosecution if they are not satisfied with the state prosecutor. From a careful empirical analysis of hundreds of case files, Brinks shows that “the presence of a private prosecutor,” especially in combination with some public support and NGO allies, “dramatically improves the likelihood of a successful prosecution,” sometimes by 300 to 400 percent.<sup>14</sup> “In short, lawyers can compel the justice system to live up to its ideals by limited arbitrary police actions if they can patch together the right combination of allies.”<sup>15</sup>

The detachment of parts of the legal complex in Brazil and Argentina from instances of systematic deprivations of human rights might be viewed as one manifestation of threats to internal security. Brinks also shows that publics in both countries are fearful. “The papers editorialize about the *‘ola de inseguridad’* or wave of insecurity; parents complain that their children are not safe in the street; reports of kidnappings and violent crimes make headlines.” In Buenos Aires, close to 50 percent of citizens agreed that there was a need “to put bullets into criminals.”<sup>16</sup> Frightened publics become careless about protection of rights, especially if they seem to hamper police.

*Italy* Internal threats also arise from domestic terrorism and organized crime. Italy in the 1970s experienced attacks by the extreme right and extreme left on officials and politicians, culminating in the killing of former Prime Minister, Aldo Moro. Judges and prosecutors, working closely together, led the anti-terrorism campaign, even directing investigations by police, with strong support of the public and political parties {Guarnieri, 2007 #671}. Yet, for reasons not fully explained, the concentration of investigative,

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<sup>14</sup> Brinks 2007:9.

<sup>15</sup> Halliday, Karpik and Feeley, op. cit., p. 26.

<sup>16</sup> Brinks 2007: 294.

prosecutorial and judicial functions, that would seem to diminish moderation of the state, nevertheless did not lead to widespread or notable abuses against basic legal freedoms. Guarnieri makes a similar claim about organized crime in the 1980s where the methods from the prior threat to domestic security were adapted to the new threat. But when the magistracy and prosecutors take advantage of the 1989 reforms in criminal procedure to pursue political corruption, a different kind of internal threat to political liberalism, then the legal complex clearly is redefining the relative powers of the institutions of justice vis-à-vis the electoral system and its legislative outcomes.

*United States* External threats become internalized through international terrorism, as Abel (Abel 2007) describes for the US after the attacks on the Twin Towers in 2001. In the US the moderate state came under immediate threat. “The President claimed executive powers to detain hundreds of domestic suspects indefinitely without access to counsel or courts, to inter prisoners from outside the U.S. in sites that are not subject to the jurisdiction of U.S. courts, and to abrogate international standards of human rights, such as the Geneva Conventions. The executive further claimed the right to try suspected Al Qaeda members or supporters by military commissions, using that well-trod path of repressive governments to remove so-called security cases to special courts where protections were minimal or absent.”<sup>17</sup> Elements of the legal complex, in alliance with parts of civil society, mobilized in defense of political liberalism. Abel documents numerous public statements by the American Bar Association to Congress in which it champions the presumption of innocence, reasonable standards of evidentiary proof, and judicial review. A report issued by the Association of the Bar of the City of New York<sup>18</sup> boldly stated:

“The holding of persons incommunicado in this country without charges, indefinitely, based solely on the executive’s decision, has nothing in common with due process as we know it. ...these detentions are alien to America’s respect for the rule of law. Until now, no court has ever sustained the assertion of such unilateral detention powers by a President....”<sup>19</sup>

Many human rights groups joined the organized bar to file amicus briefs in federal courts.

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<sup>17</sup> Halliday, Feeley, & Karpik, op.cit., 2007, pp. 22.

<sup>18</sup> Committee on Federal Courts, ABCNY, ‘The Indefinite Detention of “Enemy Combatants”: Balancing Due Process and National Security in the Context of the War on Terror’ (6.2.04, revised 18.3.04).

<sup>19</sup> Torture Papers, n 1, at 1132; also available at <http://www.abanet.org/media/docs/torturereport10b.pdf>.

Informal groups of lawyers and law professors added their voices to the organized bar. Several hundred lawyers (including 12 former ABA presidents, 11 ex-judges, seven former law school deans, four ex-Representatives, an ex-Senator and an ex-Governor) wrote an open letter to Bush, Cheney, Rumsfeld, Ashcroft, and Congress, charging that the “most senior lawyers in the Department of Justice, White House, the Department of Defense and the Vice President’s office have sought to justify actions that violate the most basic rights of all human beings.”<sup>20</sup>

The legal complex added a surprising element—some lawyers from within the military. On the treatment of prisoners staff judge advocates expressed concerns about Guantánamo interrogation practices, other SJAs sought counsel from human rights committees of leading bar associations, and two former senior officers of the Judge Advocate stated publicly that the practices ‘blacken[ed the names] and ‘stain[ed] the honor’ of the military.’<sup>21</sup> Many law professors also mobilized against the repressive actions of the administration as did some retired judges. But the federal judiciary itself moved very slowly indeed and inconsistently, says Abel, on suits concerning habeus corpus, denial of due process, denial of legal representation, not to mention cases on the scope of executive powers. Courts not only were slow, but divided, mostly, but not always, on grounds of political ideology. Yet, while Abel finds evidence that some judges rose above political ideology to champion the ideals of political liberalism, four years after 9.11 “the courts had yet to release a single detainee.” Concludes Abel, “faced with the determined executive and legislature of the world’s only superpower, the rest of the legal complex—lawyers, legal academics, professional associations, and judges—can do little to protect political liberalism.”[47]<sup>22</sup>

When confronted with terror, domestic or international, the contrast between Italy and the US, is striking. In Italy, leadership in the legal complex since the 1970s has resided not in the bar, but in the tight cooperation of judges and prosecutors, not to mention police. Although the recent history of the magistracy and prosecutors in Italy has subject to almost continual renegotiation, in favor of an adversarial rather than

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<sup>20</sup> ‘Group Criticizes Rules on Prisoner Treatment,’ *NYT* A17 (5.8.04); available at <http://www.afj.org>.

<sup>21</sup> NA Lewis & E Schmitt, ‘Lawyers Decided Bans on Torture Didn’t Bind Bush,’ *NYT* A1 (8.6.04); JG Meek, ‘At War With Gitmo Grilling,’ *New York Daily News* 20 (13.2.05); B Herbert, ‘We Can’t Remain Silent,’ *NYT* A25 (1.4.05).

<sup>22</sup> Abel, 2007, 47.

inquisitorial trial system, this fracturing of justice has periodically retrenched when confronted by shocks to the body politic. Yet it remains unclear how it is possible for a profession that is not only severely balkanized among its segments, but is also riven within segments by partisan politics, can confront adequately major shocks to liberalism. Perhaps the response of the Italian legal profession to fascism provides the answer. In the U.S., by contrast, many segments of the bar have mobilized in a variety of ways against the repressive actions of the Bush administration. Arguably the bar has led what opposition has arisen from the legal complex, although it itself is not entirely unified. These oppositional elements have received overwhelming support from that part of the legal academy that has taken a public position. While it has received little support from the highest reaches of the administration closest to the President, lawyers within the executive, and remarkably, even within the military, have broken ranks in support of rule of law. The judiciary, while divided, often along political lines, however, has not as a whole offered the bulwark of protection of individual liberties that the doctrine of a moderate state would have predicted.

### **Losing Freedom**

Freedom can be lost decisively across all dimensions of political liberalism. Assaults upon freedom come from military takeovers and civil war (Brazil, Argentina, Chile, China, Spain), or a regressive slide into authoritarianism or totalitarianism by an elected government (Italy, Venezuela, Japan), or by the consolidation of a one-party regime by a dominant leader (Kenya), among others. Ultimately, in all cases, the legal complex is compelled to surrender most or all of its defensive powers. We are compelled to ask, however, could it have been different? How do the attributes of the legal complex come to capitulation, with a fight or without?

The 1920s and 1930s witnessed a fascist and militaristic turn in several countries that later joined the Axis powers of World War II. Guarnieri (2007) notes that fascism in Italy grew on fertile soil. From Italy's late unification as a state (1861), "intermediary groups were distrusted: nothing had to disturb the direct relationship between the citizen and the State."<sup>[5]</sup> In counterpoint to this absence of civil society stood a unified judiciary and prosecution (the magistracy), and between the citizen and the unified corps stood lawyers. Yet lawyers were



drawn principally from a middle class that overwhelmingly supported Mussolini. “From 1926 to 1933 the regime sought to “corporatize” the bar by curtailing what autonomy it had, forbidding elections for positions of leadership in local bar councils, and eventually expelling as much as ten percent of the 25,000 lawyers in practice who resisted the authoritarian regime. Fascism advanced neither with an active bar nor a judiciary in effective opposition. As Guarnieri (2006) observes, authoritarian regimes seldom displace judiciaries but marginalize or co-opt them while transferring more politically sensitive cases to special courts that are politically vetted for correctness and conformity, as Mussolini did with special courts in Italy. While fascism might have penetrated the judiciary very little, as Guarnieri maintains, that may have been substantially because in self-protection the judiciary maintained a low profile that was not threatening to the regime.”<sup>23</sup> Instead “without openly opposing the regime, [they] tried to insert the Fascist ‘revolution’ into the tradition of the Italian state.”[6]<sup>24</sup>

The drift of Japan into a military government in the mid-1930s also appears not to have been arrested by the legal complex. The bar protested very little as the government eroded what civil liberties existed. It quickly legitimated Japan’s invasion of China and its creation of a puppet state by forming a Japanese-Manchurian bar association. By 1940 the government quashed all bar independence, forcing lawyers to become part of a corporatist body, the National Federation of Attorneys for the New System. Japan’s tiny civil society offered little hope for joint mobilization, even if lawyers had emerged to lead it. After Japan entered World War II, the executive “virtually eliminated the ‘rule of law,’ and further weakened the already feeble institutions of civil society, including the organized bar.”<sup>25</sup> No support for rights emerged from the judiciary. With rare exceptions, the entire legal complex stayed silent throughout the war.

In contemporary Venezuela, Perez Perdomo (Perdomo 2007) asserts that a quickening momentum may already have taken that country across the line into political illiberalism. He points to the high-profile drama surrounding three of Venezuela’s leading jurists, all of whom are now facing trial. “Cecilia Sosa was the first female President of the Supreme Court of Justice and former director of the Center for Legal Studies at the Catholic

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<sup>23</sup> Halliday, Feeley and Karpik, 2007, pp. 28-9.

<sup>24</sup> Guarnieri, 2007, p. 441-2.

<sup>25</sup> Feeley and Miyasawa, 2007, pp.163-5.

University Andres Bello. Brewer Carias is probably the internationally best known Venezuelan jurist and former director of the Public Law Institute at the Central University of Venezuela. Ayala Corao has been president of the InterAmerican Commission of Human Rights and is professor at the Metropolitan University. All three are well known as legal scholars. They have been accused of conspiracy in the attempted coup d'etat that ousted, for a short period of time, President Hugo Chávez, and that for a few hours dissolved the National Assembly and the Supreme Tribunal of Justice.” They can be neutralized by making a criminal case against them, most likely by forcing them into exile.<sup>26</sup>

These cases point to a wider phenomenon. “The Supreme Tribunal has been packed with Chavez supporters and, with its supervisory powers, has purged approximately one-third of the country’s (c.500) judges. Judges now know they rule against the government at their peril. For all that some judges heroically are speaking out in the hope of galvanizing public opinion through the media. The legal profession, while more vigorous and populous than at any time in Venezuela’s history, has had minimal collective impact. Instead individual lawyers have pressed cases to nullify acts of government or protect rights in the hope of using the court as a stage from which to constrain the government. When these have failed they have turned to international forums, such as the Inter-American Commission on Human Rights, but their effects are limited within Venezuela. Judges and lawyers have been joined by some vocal eminent jurists who again have sought to mobilize civil society through speeches carried in the media. Thus a rearguard action is being fought by a loosely aligned number of lawyers, judges and academics, albeit not through their formal associations and not by any coordinated mechanism. Critical for all these efforts has been a civil society that has been responsive to leadership by figures in the legal complex through newspapers, radio and television.”<sup>27</sup>

By contrast to Italy’s, Japan’s and Venezuela’s slow drift into authoritarianism and military government, “Chilean democracy was abruptly foreclosed by General Pinochet’s military overthrow of the elected Allende government on September 11, 1973. In Pinochet’s State of Siege, according to an observer at the time, individual liberties were suspended, the Constitutional Court was dissolved, political opponents could be

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<sup>26</sup> Perdomo, 2007, p. 344.

<sup>27</sup> Halliday, Karpik, Feeley, 2007, pp. 16.

deprived of citizenship, and thousands were seized, tortured and summarily executed without due process, all this in a long-time democracy. Did the legal complex resist? Couso(Couso 2007)) demonstrates just the contrary. Apart from some individual heroic lawyers who defended human rights, the organized bar as a whole remained moribund, a stance that was possible through the dominance of its politics by political supporters of Pinochet. The legal academy fared even worse, with right-wing academic supporters of Pinochet actively exposing and then expelling their left-wing colleagues. And from the outset of the military government the judiciary not only capitulated by aided and abetted the regime. In the first celebratory religious ceremony for the Junta, the Supreme Court attended en masse. While it proclaimed to Chileans and the world that “in Chile human rights were being respected,”<sup>28</sup> its “complacent attitude towards the abuses of power” was reflected in its resistance to granting large numbers of *habeus corpus* writs filed by families of political prisoners and its blind eye to the government’s parallel tribunals. The few judges who dared raise their voices in protest were disciplined and marginalized.”<sup>29</sup>

## **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.

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Table 2 About Here

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<sup>28</sup> Ftnt 67, Couso 2007.

<sup>29</sup> Couso, 2007, pp.332-8; Halliday, Karpik & Feeley, op.cit., 2007, pp. 29-30.

### **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.

### **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.

### **Persistent Segmentalism**

The collective force of alliances across the legal complex are 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.

### **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.

### **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.

### **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.

### **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.

### **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 coopted 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 Queda 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 cowering or coopting 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.

### **MOBILIZATION AND ELEMENTS OF POLITICAL LIBERALISM**

To this point I have not confronted a further question posed at the outset—is there a relationship between type of mobilization and which element of political liberalism is fought for by the legal complex? Some initial results can be discerned.

First, core civil rights—invariably negative rights, often core political rights, but seldom property rights—are always being contested in those patterns of mobilization where the legal complex successfully contributes to the development of political liberalism. They are a frequent battleground among elements of the legal complex in several countries and an arena for contestation in the maintaining of political liberalism. Retreats from political liberalism are associated with a self-imposed passivism or state-constrained activism by most of the legal complex on behalf of core civil rights.

Second, expressions of independence of the courts, always in alliance with lawyers, can be observed in those forms of progressive and parallel mobilization that lead to the establishment of political liberalism. In the other cases of mobilization a restricted independence of courts—whether from self-restraint by courts, or court-packing by authoritarian rulers, or party control—is always associated with struggles to defend an established political liberalism. When the courts are reduced or domesticated by illiberal



leaders or publics, then the central axis within the legal complex, that of lawyers and judges, is splintered and their collective capacity to defend political liberalism is reduced.

Third, insofar as lawyers' autonomy itself is an element of civil society, then it is integral to advocacy and defense of political liberalism. But the involvement of other parts of civil society is much more equivocal and complex. Often lawyers lead and mobilize civil society (e.g., Korea, Egypt, Brazil, Argentina), sometimes even against other parts of the legal complex (e.g., judges, public prosecutors and police in Latin America vie with private prosecutors for allies of publics or civil society groups). Seldom do we see instances of a vibrant civil society that does not also include a vocal bar and bench.

In sum, it appears that action on behalf of basic legal freedoms cannot be easily separated from the elements of political liberalism. They commonly cluster together. If one is being advocated, so are the others in play. If another is being defended, it is unlikely that the others will be irrelevant. In other words, the heart of political liberalism is a bundle of conditions that for the most part rise and fall together.

### **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).

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Table 3 About Here

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First, there are occasions when lawyers mobilize without support of judges and, indeed, even in the face of judicial opposition. Lawyers' mobilization itself varies. In China the online forums suggest that a wide scattering of defense lawyers across the country share common views about the protection of rights but relatively infrequently are these translated into collective action by the organized profession (which is controlled by the Ministry of Justice) at the provincial or national levels. There may be some growing sympathy for lawyers' insistence on the protection of due process in criminal defense among the leading

edges of the judiciary, but for the most part judges defer to the police, prosecutors, the local Party and local politicians and officials. In Japan the bar itself appear substantially united on many rights issues and perhaps even strengthened by lawyers' groups that were specialized in rights but with limited support from judges. In Kenya, from the mid-1980s until 2002, initially a rump group of rights lawyers and later the entire bar mobilized in the face of judges loyal to Moi.

Second, in several instances lawyers and judges who normally protect basic legal freedoms fail to act. In Brazil and Argentina, Brinks shows that most lawyers, prosecutors and judges essentially are complicit in police killings because they refuse to prosecute or convict police officers. Only private prosecutions, handled by small numbers of activist lawyers on behalf of victims, ensure any rights protection. Israel's normally vigorous bar and judiciary, argues Barzilai, remains steadfastly silent on detentions, torture, and targeted killings of Palestinians. Abel, too, indicates that only the most progressive sections of the U.S. bar mobilized in order to defend rights after 9/11 and judges were very slow to offer any protections.

Third, while selective mobilization has not yet led to the rampant dismantling of rights in any of our cases, the fail to mobilize altogether—when neither lawyers nor judges in any numbers act—is highly correlated with the onset of military dictatorships or right-wing authoritarian regimes. In the case of Chile, in classic Machievellian style, action by Pinochet was quick and brutal but it also got immediate support from the judiciary. In the cases of Italy, Japan and Germany, capitulation to growing militarism and authoritarianism was slow, despite rare outbursts of resistance, and ultimately complete.

How can we explain the willingness and ability for the legal complex to mobilize on behalf of basic legal freedoms?

### **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.

### **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.<sup>30</sup> Ironically, some of the most complicit courts were

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<sup>30</sup> 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.

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 jurisdiction 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-19<sup>th</sup> 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 19<sup>th</sup> 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.

Some hints of that explanation occurs in several places as scholars trace the historical institutionalization of their respective legal complexes. In one development sequence, both Chile and Venezuela exemplify cases in which historically separate fragments of the legal complex, founded at different historical moments and following distinctive historical trajectories, have begun to cohere in the last several decades. In a second developmental sequence, a contrary dynamic may be in motion—historically fused fractions of the legal complex in China (judges, prosecutors, lawyers) are beginning to differentiate. In a third developmental sequence, there has been a moving equilibrium in the North East Asian legal complex in which a small, independent bar and independent but constrained judiciary, both under the shadow of a powerful state administration, are transformed over two decades into larger, more activist legal professions which find receptive and bolder courts ready to hold state bureaucracies accountable. In a fourth developmental sequence, the U.S. legal complex has grown up together, with lawyers, judges and legal academics merging and mixing for the past century. This presents many opportunities for parts of each fragment to combine with others for and against basic legal freedoms. Other patterns will also emerge as research depends. We can hypothesize that the more historically entrenched are patterns of differentiation and integration, the more fraught will be transitions towards mutually supportive mobilization on behalf of political liberalism.

The probability of coordinated mobilization will also turn on the education of legally-trained professions, their mobility among different branches of practice, and the inclusiveness of their professional associations.

National developmental sequences, of course, are affected by the international milieu of national legal complexes. A quickening of activism and changing relations between the courts, administrative state and profession occurred in Korea and Taiwan in part because their security relationship with the United States brought large numbers of lawyers and judges into contact with their U.S. counterparts who variously valorized separation of powers, use of litigation for social change, and rights consciousness. Spanish judges and lawyers in the frontline of reforms under Franco drew intellectual and moral support from their counterparts in Europe once the borders were opened for the freer flow of people and ideas.

### **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.

The importance of NGOs relates to the phase of political liberalism. Where they are banned or rigidly controlled, as in authoritarian countries, then loose informal networks or underground groups function in their stead (cf. China). As authoritarianism begins to break down, civil associations usually accompany the political spring and quicken the thaw. A consolidated politically liberal regime opens the terrain for an increasing density of associational life, although, as Japan demonstrates, strictures on the formation of NGOs can retard their growth even in a supposedly mature democracy. When a slide begins away from political freedom, an indicator of its danger can be found in the volume of sound generated from outside the state. In 1930s Japan, 1970s Chile, and 1990s Venezuela, the quietude from organized groups outside the state indicates the limited brakes on regressive momentum. In Hong Kong since 1997, however, the success of civil society groups, often led by lawyers, to bring hundreds of thousands of citizens into the streets, signals to the Hong Kong government, and even more to Beijing, that the retraction of rights will be a very public, very contested, and very vocal enterprise, with hefty political cost.

Karpik (1995) showed that the political force of the 18<sup>th</sup> century French bar relied upon its ability to convince the crown that it spoke on behalf of a public, at that time more fictive than real. In 20<sup>th</sup> and 21<sup>st</sup> century struggles for freedom, the public, as a diffuse force outside the state, appears in numbers of our cases. But its currents flow in contradictory tides. From one vantage point the public is a latent ally that can be mobilized by organized civil

society and the legal complex. In Uruguay it demands that police function within constitutional limits; in Brazil and Argentina sections of the public can pressure prosecutors and judges to check police homicides; in Hong Kong its vast numbers forced Beijing to back down; in Italy it supported the magistracy's bold steps to strike aggressively against organized crime and to root out political corruption. From another vantage point the public is a fickle force easily manipulated by demagogic leaders or aroused to hysteria by fear and threat. Police killings of suspects occur with impunity in Brazil and Argentina because the public at large permits its fears to be intensified by law-and-order politicians. Confession by torture and attacks on criminal defense lawyers continue unchecked in China because the masses fear disorder more than they fear apparently mild abrogations of unfamiliar rights. Brinks is surely correct, however, that the rule of law, institutionalized in a moderate state and defended by an active bar cannot be sustained without a broad-based public belief that arbitrary and excessive state action must be checked by procedural and substantive rights. Political liberalism cannot be institutionalized on the basis of leadership by the legal complex alone.

The media broadcast points of view, calls to arms, and public responses between the legal complex, civil society and publics. We observe it aiding the push to obtain freedom in Spain, where Madrid's nationally circulated *El Pais* publicized *Judicia Democratica's* reports, and in Egypt, where NGOs and lawyers gained much publicity over the fight to keep the Supreme Constitutional Court's powers of judicial review, not to mention public demonstrations, hunger strikes and the like. Even in the heavily censored Chinese media, some papers and some journalists take risks in the "gray zone" of journalism (Fen Lin 2006) to publicize egregious abuses of lawyers and suspects by the police and procuracy. In the struggles over the loss of liberalism in Venezuela, those fragments of the legal complex that have taken a stand have leveraged their impact through public statements to media outlets, op ed articles, press conferences, and invitations of journalists to notable trials.

Yet the media are a potentially compromised ally. When the state controls the media, the selective permission to publicize certain events amounts to systematic bias of news by regulators. When the media must survive in the market, they are subject to manipulation by large corporate advertisers, by vocal reader groups, or by the consumption habits of readers. Moreover the media themselves are often associated with a particular political party,

religious group, or similar source of systematic bias. While a powerful potential channel for the legal complex to reach its public constituencies, therefore, the media is a vulnerable and scarcely neutral conduit into the public arena.

*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.

It follows that an added protection that the legal complex can offer political liberalism, particularly that part located in civil society (lawyers, legal academy), depends upon lawyers’ capacity to find a commonality that transcends political partisanship. That commonality rests upon an ideology of legality or constitutionalism that cannot readily be attacked on grounds of its partisanship or reducibility to party politics. Procedural justice offers one such option. Lawyers who might otherwise be divided on matters of substantive justice can often find common ground on procedural protections. This stance elevates lawyers above the arena of interest politics in which the rest of society may be configured. Thereby it provides an ideological basis on which organizational resistance can be mobilized to the programs of any political party when it attains power.

A difficult case is presented by Turkey where Arlsan shows that the secularized legal complex has steadfastly opposed the authorization of religious political parties or Kurdish political parties on grounds that the former would threaten Turkey’s commitment to secularism and the latter would potentially foster separatism and ultimately secession. Here fundamental values of political liberalism clash: freedom of speech, association, and religion. Arlsan finds the legal complex on the wrong (illiberal) side: a legal order resists both civil society and the legislative will.

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. Moustafa goes further to argue that lawyers' relationship to the market significantly affects the numbers, quality and ultimate influence of practitioners drawn into the profession who may subsequently exercise leadership against a repressive government. The Egyptian legal complex was most effective in expanding its liberal project when the free market provided an economic base for an independent legal



profession, placed some pressure on the regime “to respect judicial institutions charged with protecting property rights,” [and where] free market economies diffuse power such that “the regime generally has fewer levers of control, and groups are more likely to mobilize to protect their economic interests if judicial institutions are threatened.” In similar vein, Hilbink suggests that government technocrats, although politically conservative, believed that a legal regime protective of property rights and committed to the rule of law was a necessary condition for Spain’s economic development, a belief that was translated into the building or renovation of legal institutions and the march of administrative law as a protection for business. Brinks recognizes that the capacity of private prosecutors to compel the state to live up to its constitutional commitments depended upon the ability of lawyers to make a living while engaging this kind of law. 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 are 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.

### **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 Guantonomo Bay, Pinochet and the “disappeared.”). A higher profile option that depends on a riskier legitimization 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.

### **CONCLUSION: SUCCESS AND FAILURE**

There are many instances where lawyers and the legal complex mobilize on behalf on 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.

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

<b>Moments of Transition</b>	<b>Country</b>	<b>Episode</b>	<b>Action of Legal Complex</b>	<b>Basic Legal Freedoms</b>
<b>Obtaining Basic Legal Freedoms</b>	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 state administration	Defense of labor and party leaders; challenges 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.
	<b>Maintaining Basic Legal Freedoms</b>	U.S.	2000-2006	Against executive assaults on international conventions, basic legal freedoms
Brazil		1990s-2000s	Against police	Legal rights: lawyer representation;

			killings	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
<b>Losing Basic Legal Freedoms</b>	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:

**Table 2 Mobilization Profiles of the Legal Complex**

<b>Profiles</b>	<b>Moment of Freedom</b>		
	<b>Obtaining</b>	<b>Maintaining</b>	<b>Losing</b>
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



**Table 3 Limits to Mobilization of Legal Complex**

<b>Lawyers Mobilize without Judges</b>			
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
<b>Lawyers and Judges Mobilize Selectively</b>			
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
<b>Neither Lawyers nor Judges Mobilize</b>			
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

## References

- Abel, Richard L. 2007. "Contesting Legality in the United States after September 11." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- 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.
- Boyle, EH. 2002. *Female Genital Cutting: Cultural Conflict in the Global Community*. Baltimore: The Johns Hopkins University Press.
- Couso, Javier A. 2007. "The Role of Chile's Legal Complex in the Configuration of a Moderate State." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- Feeley, Malcolm M., and Setsuo Miyazawa. 2007. "The State, Civil Society, and the Legal Complex in Modern Japan: Continuity and Change." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- Ginsburg, Tom. 2007. "Law and the Liberal Transformation of the Northeast Asian Legal Complex in Korea and Taiwan." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- Ginsburg, Thomas. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.
- Hagan, John, Wenona Rymond-Richmond, and Patricia Parker. 2005. "The Criminology of Genocide: The Death and Rape of Darfur." *Criminology* In Press.
- Hagan, J. 2003. *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*. Chicago: The University of Chicago Press.
- . 2005. "Crimes of War and the Force of Law." *Social Forces* In Press.
- Hajjar, Lisa. 2004. "Human Rights." Pp. 589-604 in *The Blackwell Companion to Law and Society*, edited by Austin Sarat. Malden, MA: Blackwell Publishing.
- Halliday, Terence C. 1987. *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment*. Chicago: University of Chicago Press.
- . 1999. "The Politics of Lawyers: An Emerging Agenda." *Law and Social Inquiry* 24:1007-1011.
- Halliday, Terence , and Sida Liu. 2007. "Birth of a Liberal Moment? Looking through a One-Way Mirror at Lawyers' Defense of Criminal Defendants in China.T." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- Halliday, T., and L. Karpik. 1997a. *Lawyers and Rise of Western Political Liberalism: Europe and North America from Eighteenth to Twentieth Centuries*. Oxford: Oxford University Press.
- . 1997b. "Politics Matter: A Comparative Theory of Lawyers in the Making of Political Liberalism." Pp. 15-64 in *Lawyers and the Rise of Western Political Liberalism: Europe and North American from the Eighteenth to Twentieth*

- Centuries*, edited by Terence C. Halliday and Lucien Karpik. Oxford: Clarendon Press.
- . 2001. "Political Lawyering." Pp. 11673-11678 in *International Encyclopedia of Social and Behavioral Sciences*, edited by Neil J. Smelser and Paul B. Baltes. Oxford: Elsevier.
- . 1998b. "Postscript: Lawyers and the Globalization of Liberal Politics." Pp. 349-70 in *Lawyers and the Rise of Western Political Liberalism: Legal Professions and the Constitution of Modern Politics*, edited by Terence C. Halliday and Lucien Karpik. Oxford; New York: Oxford University Press.
- 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.
- Halliday, Terence C., Lucien Karpik, and Malcolm M. Feeley. 2007b. "The Legal Complex and Struggles for Political Liberalism." in *Fighting for Political Freedom: Comparative Studies of the Legal Complex for Political Change* edited by Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley. Oxford Hart Publishing.
- Hilbink, Lisa. 2007. "Politicising Law to Liberalise Politics: Anti-Francoist Judges and Prosecutors in Spain's Democratic Transition." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- Jones, Carol. 2007. "'Dissolving the People': Capitalism, Law and Democracy in Hong Kong." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- La Porta, Rafael, Florencio Lopez-de-Silanes, Andre Schleifer, and Robert W. Vishny. 1997. "Legal Determinants of External Finance." *Journal of Finance* 52:1131-50.
- Ledford, Kenneth F. 1996. *From General Estate to Special Interest: German Lawyers 1878-1933*. Cambridge: Cambridge University Press.
- . 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.
- Karpik, Lucien. 1988. "Lawyers and Politics in France, 1814-1950: the State, the Market, and the Public." *Law and Social Inquiry*.
- . 1998. *French Lawyers: A Study in Collective Action, 1274 to 1994*. Oxford: Oxford University Press.
- . 1998a. "Builders of Liberal Society: French Lawyers and Politics." Pp. 101-23 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.
- Lubman, Stanley. 1999. *Bird in a Cage: Legal Reform in China After Mao*. Stanford: Stanford University Press.
- Merry, S. 2003. "Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence." *Human Rights Quarterly* 25:343-81.

- Merry, Sally Engle. 2005. *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago Press.
- Moustafa, Tamir. 2007. "Mobilising the Law in an Authoritarian State: The Legal Complex in Contemporary Egypt." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- Peerenboom, Cf. Randall. 2002. *China's Long March toward Rule of Law*. New York: Cambridge University Press.
- Perdomo, Rogelio Perez 2007. "Lawyers and Political Liberalism in Venezuela." Pp. in *The Legal Complex and Struggles for Political Liberalism*, edited by Lucien Karpik Terence C. Halliday, and Malcolm M. Feeley. Oxford: Hart Publishing.
- 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.
- . 1998. "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.
- Scheingold, Stuart, and Austin Sarat. 2004. *Something to Believe In: Politics, Professionals and Cause-Lawying*. Stanford: Stanford University Press.