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LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION

EDITED BY YVES DEZALAY AND BRYANT G. GARTH

Lawyers and the Rule of Law in an Era of Globalization

Lawyers and the Rule of Law in an Era of Globalization focuses on the national and transnational processes transforming both the rule of law and the role of lawyers. The book draws on a framework that emphasizes the relationship between the national and the international, the strategies of lawyers at various political levels, and the circulation of ideas and people. As such, it considers the 'rule of law', not as a normative ideal that has to be accomplished and realized, but rather as a field of action and discourse that emerges through complex relationships among experts, national elites and global institutions. Through detailed empirical work, the contributors all examine the relationship between law, politics, and the state; focusing on lawyers and the social capital they possess and deploy, in order to understand the efficacy of the rule of law in different polities. *Lawyers and the Rule of Law in an Era of Globalization* will be invaluable for socio-legal scholars, students of the legal profession, as well as those with interests in law and development studies.

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Chapter 1

Introduction

Lawyers, law, and society

Yves Dezalay and Bryant G. Garth

The current enthusiasm for the rule of law must be understood in the context of the globalization of the market economy. One reason for the great interest in exporting and importing the rule of law is a belief that global capitalism can be facilitated by the adoption of a global language. On one side, those who are already fluent in the legal language of globalization—for example, large corporate law firms, investment banks, and business consultants—are anxious to expand the domain in which they can operate with their own tools and approaches—in other words, to extend their hegemony. On the other side, those who long operated outside that language and the rules of the game that it contemplates, for example South Korean and Japanese conglomerates—the chaebols and the keiretsu—may seek access to the same language and tools in order to compete effectively in the terrain of global capitalism. The process of legalizing business competition in this manner tends to focus on the development of corporate and commercial law, but there is also a widespread belief among rule-of-law proponents that reform in one arena—in particular, corporate law—will spill over into others—in particular, state governance. Even if pushed to a great extent by the transnational commercial side, the rule of law will come to the state and the domestic economy.

This volume focuses on processes central to building the position of law in the state and in the economy. Our focus, however, is on aspects of the process typically neglected in the rule-of-law literature. We highlight the role of lawyers as brokers who constantly renegotiate the interchange between social relations and what is considered to be law. Their central role in the negotiation process is also a profitable one. Like financial brokers or bankers, they are not just neutral translators. They use the various forms of capital (social, legal, political, economic) that they have already accumulated to build their credibility (and power) as brokers. This profitable role serves further to expand their own portfolio of capital—for instance, helping a client or serving a governmental leader can add to professional notoriety and expand relational capital (or even financial capital, e.g., Silicon Valley lawyers accumulating wealth as did railroad lawyers in earlier times (Kostal 1994)).

Our focus on processes behind the law is not new in the field of law and society (Moore 1978; Comaroff and Roberts 1986). Indeed, if there is one well-established

finding from a long body of research in this tradition, it is that law and society are deeply intertwined. Law is embedded in social relations, and social relations mobilize and contribute to the construction of legal and quasi-legal processes and structures (Moore 1978). The boundary between law and social relations, as this literature shows, is fluid and constantly changing.

The literature promoting the rule of law, however, for the most part reifies the boundary between law and social relations. An extreme version of this approach in the literature is the growing movement to rank countries according to how they measure on a rule-of-law index. The World Justice Project of the American Bar Association is one high-profile example of a new initiative seeking to rank countries objectively on an index measuring the rule of law (www.worldjustice project.org/sites/default/files/The%20Rule%20of%20Law%20Index%20Version %202.0.pdf). The ABA project, typical of such ventures, focuses on such factors as the independence and impartiality of the judiciary. Progress in building the rule of law is assessed by looking strictly at the law side of the supposed boundary between law and society.

The descriptive and prescriptive literature on the "judicialization of politics" (e.g., Hirschl 2006) takes essentially the same one-sided approach. It tends to equate progress on the rule of law with an expanded role of courts, especially Supreme Courts and their equivalents. The idea informing this approach is that if more of politics is taken over by courts, the law as a body of neutral principles will gain a more important role in a particular society. The "legalization" of politics is defined as a larger role for courts. Yet this literature typically ignores the way that courts may be used. For example, the instrumental political use of the courts by dominant political actors in countries such as Malaysia (where Prime Minister Mahathir used the courts to imprison his political rival Anwar), Singapore (where Lee Kwan Yew used litigation and the courts to eliminate one after another of potential opposition politicians) (Dezalay and Garth 2010), or Argentina (where political parties have long used the courts to punish their enemies) (Dezalay and Garth 2002), does not equate to the progress of law. There are also more subtle ways that politicians who happen to be lawyers use the law and legal procedures tactically, exemplified in the construction of the European Union (Cohen 2010) and indeed throughout the history of Italy (Malatesta, this volume). The use of courts and legal procedures does not necessarily indicate progress in achieving the rule of law. The focus only on the so-called role of the courts, as the legal process literature pointed out more than three decades ago, misses the social context in which they operate.

More importantly, from our perspective, the focus on the courts misses two key elements: lawyers invest in politics in order to build their capital of social relations and their credibility/legitimacy. They also do it in order to represent the political interests of the privileged social groups from which they or their clients are recruited.

On the other side, however, many proponents of rule-of-law reform tend to emphasize only the social context and in particular the need to strengthen

non-governmental organizations (NGOs) and more generally civil society (Golub 2006). According to the first United Nations report on rule-of-law activities, for example (United Nations 2009), "The point of departure for effective efforts is assisting national stakeholders with the development of national strategies and plans on the rule of law." The idea here is that empowered local and international stakeholders will automatically translate their activity into the strengthening of law and legal processes. What is missing from this equation is the process of translation—including, for example, the role of lawyers as activists and moral entrepreneurs combining access to media resources and the law as part of a political strategy, or the role of international corporate lawyers serving as brokers between multinational corporations and domestic state or private companies.

The chapters in this volume highlight the relatively neglected role of lawyers as brokers—converting social, political and economic resources into legal processes and, vice versa, thus accumulating these various forms of legal capital that they can mobilize in social and economic interactions. Lawyers profit politically and economically by constantly renegotiating that interchange. Typically missing in the studies of and recipes for the promotion of the rule of law—even when focused on "stakeholders" and "civil society" instead of simply "the courts" or the "rule of law"—is an empirical examination of the actual people and processes rather than the abstract categories of judge, court, civil society, stakeholder, and the like. More generally, what law is in any given society depends on the social capital embedded in the law. The best way to see that relationship is to focus on the specific processes that relate to the active role of the lawyer as broker.

It is commonly recognized that lawyers act as brokers between different interests. The interests are typically understood, however, as more or less given economic, political, or social interests. It is easy to see, for example, that lawyers translate the economic interests of a particular business or the political claims of a particular group into legal arguments—or that lawyers mediate between two different groups seeking to resolve a dispute.

Our description of the role of the lawyer as broker is more complex because it takes into account the various phases of the processes through which lawyers themselves first invest their own social capital (or more precisely the social and economic capital inherited from their families) in order to acquire expertise in legal knowledge; then use this mix of legal capital and social capital (family name and friendships cultivated in law faculties) in a diversified practice of law serving to expand their relational capital (through government practice or new clients or preferably both) at the same time as their specific legal expertise (as litigators, deal makers or learned practitioners).

It is precisely because lawyers have this diversified portfolio of capital (including legal, political, relational, academic) that they can constantly renegotiate the changing and porous boundary between social relations and legitimate legal processes. This constant readjustment is essential to adapt the legal corpus to new political, social or economic contexts, and thus avoid the risk of obsolescence or competition from other technologies of power, regulation and governance.

There are also great incentives to take part in this constant redefinition and expansion of the new frontiers of the law because legal entrepreneurs-innovators take advantage of the constant micro-shifts to valorize their position, add to their own portfolio, and move up in social and professional hierarchies.

Lawyers take advantage of the changing and uncertain boundary that the rule-of-law literature tends to ignore. What is inside, represented as "the law," and what is outside, which can be designated as "society," are not fixed. Only a process of deconstructing and examining both sides allow one to understand what the law represents. Society is embedded in law, and law is embedded in society, and the relationships are ever changing. Lawyers in this process do not build regimes based on the rule of law as distinct from regimes based on personal relations. The power of law depends on what is embedded in the law, including personal relations. Using Pierre Bourdieu's categories, it depends more generally on the value of the social, economic, and political capital accumulated by lawyers and embedded in the law (1987, 1991).

Lawyers take advantage of opportunities for capital conversion that are presented at certain times and in certain places. The available opportunities change in relation to national and transnational developments, including, for example, the Cold War and the post-Cold War era of globalization. Stable patterns and institutions are also disrupted by crises which, as Naomi Klein notes in the "Shock Doctrine," provide opportunities to promote new arrangements (2007). Crises and changes over time affect the value of the different forms of capital, creating opportunities to reconfigure the mix. Lawyers profit from their possession of relatively valuable capital, which may be a set of relationships, or social capital, but it may also be symbolic capital in the sense of a valued legal pedigree, a highly sought expertise, or an ideology on the upswing. The playing field tilts in favor of those possessing the valued forms of capital. Shifts in the rate of exchange offer opportunities and challenges to lawyer brokers.

One difficulty in studying these processes is that the fluidity of the conversion process between different forms of capital embedded in the law makes it almost impossible to analyze the respective importance and role of each of these forms. The passage of time serves to hide the capital that is embedded in the law and the source of the strength of the law. The situation becomes taken for granted, which may make it seem as if the power of the law comes from the law itself. Legal capital without social capital, however, is relatively weak (Dezalay and Garth 2010). The study of geneses and historical patterns is necessary to uncover what is embedded within the law over time.

The chapters in this volume illustrate how a focus on lawyers as brokers helps to explain relative successes in exporting the rule of law or, more precisely, successes in building a stronger role for lawyers and the law in the global south. In particular, we can see the continuing growth in Latin America in the position and role of lawyers after the initial rebuilding of that role in the 1980s and 1990s (Dezalay and Garth 2002). We can also explain the more puzzling phenomenon of dramatic change in Asia, including in countries long thought to be resistant to

Western recipes for the rule of law (Dezalay and Garth 2010). We have recently studied these issues for a variety of Asian countries, but our research did not focus on China or Japan. Drawing mainly on the chapters in this book on China, Japan, and South Korea, we seek here to make more sense of the largest Asian economies. In Japan, for example, even if the introduction of U.S.-style law schools is deemed only a half-reform by local observers (Chan, this volume; Miyazawa, Chan, and Lee 2008; Saegusa 2009), the potential may still be far-reaching over time. Change in South Korea, on the other hand, is already quite dramatic.

The key to understanding these and comparable developments is to see that lawyers in these countries serve as double brokers. Within their national spaces, they convert social processes into legal processes and vice versa; and they also import from the north—in particular, in recent years, converting U.S. legal innovations into local legal practices. This double brokerage can be interpreted as "decoupling" or as the movement of "texts without contexts" (Bourdieu 2002), but the process is more complex since the division of roles is often blurred and fluid. In particular, we see examples—discussed further below—where importers in the south retool and become exporters based in the north (Vecchioli, this volume; Palacios Muñoz, this volume). There are also competing or conflicting agendas both in the north and the south because of the divide between corporate hired guns and moral civic entrepreneurs. As noted in our recent book (Dezalay and Garth 2010), the multiple roles may lead to paradoxical alliances, such as U.S. philanthropists, seeking to promote reform on behalf of the disadvantaged, investing in corporate lawyers, since the corporate lawyers build their local credibility by promoting their own NGOs.

The book is divided into three parts. Part I focuses on opposite yet similar situations in Venezuela and China, showing how lawyers manage to combine social and political brokerage with different strategies that have contributed to (and continue to contribute to) the process of building a relative autonomy, exemplified by Italy in the third chapter of that part. Part II focuses on the more familiar terrain of the import and export of legal expertise, but also reveals the complexity and reversibility of the processes. Then Part III focuses on the Asian challenge to the rule-of-law orthodoxy (Upham 2002), raising the question of why the situation in China and Japan is so different from that of South Korea. We describe each part in more detail below.

Part I provides a kind of grand tour of law, embedded social capital, and the conversion of legal and political capital. We begin with the chapter by Manuel Gómez. He examines the processes of exchange between politics, judges and lawyers in Venezuela. The history that he recounts illustrates the impact of key shocks in the 1970s that disrupted the traditional legal elite dominance of the courts, the public law faculties, and the state. The oil profits raised the economic stakes and the profits to business lawyers who increasingly specialized and practiced in larger corporate law firms; and the simultaneous expansion of legal education created a large non-elite group that began to dominate the judiciary.

Elite lawyers could no longer count on judges to protect the legitimacy of the elite legal world.

It was not enough, however, for the elite to denounce the corruption of the courts and insist on the need to avoid them. They continued to need to use the courts at certain times. The key to the successful navigation of the courts was the emergence of the so-called "judicial tribes"—networks of personal relationships led by lawyers connected to courts and to politics. Elite lawyers could then "problem-solve" through a combination of their own stature and set of connections in politics and the economy on one side, and through strategic uses of the judicial tribes to achieve ends in courts on the other side.

Gómez further shows that the government of Hugo Chavez has sought to discredit the elite bar for what by then appeared as a cozy relationship with traditional forms of patronage, including with the judiciary. Chavez's Bolivarian revolution has meant that the regime has essentially gained control over the judiciary as well—eliminating the judicial tribes connected to the traditional political parties. But now, as Gómez notes, the tribes have returned with a somewhat different composition, and they play the same role of brokering between the courts, politics, and social networks in order to facilitate problem-solving. The attractiveness and remaining strength of "the law" in Venezuela then comes largely through the availability of a new group of occupants of the well-paid broker role represented by the judicial tribes.

Gómez shows how lawyers import from their society in order to strengthen what they have to offer as the law and as legal problem-solving. In particular, in the case of Venezuela they import largely from the political sphere. When the political system was operated through a kind of peace treaty and power sharing arrangement among the political parties, judicial tribes mirrored that construction. In the Chavez era, the tribes mirror the dominant single party. What does not change is the fact that high profits, as we have noted, go to those who can translate valued political capital obtained through their careers and contacts into judicial decisions and processes.

The Gómez chapter, more generally, provides an example of the problem with theoretical formulations that purport to describe a converging global trend toward the judicialization of politics—seen as the spread and strengthening of the rule of law. Such a trend may mean the weakness of the formal law as well as its strength. In Venezuela (and in other countries with such judicial tribes, including Bolivia and Colombia), lawyers have made it possible to translate the political system quite directly into the legal system. Similarly, in Argentina, as we have shown elsewhere (Dezalay and Garth 2002), the judiciary has historically been part of a winner-takes-all political process. Whichever party wins the government takes over the courts and uses the legal system to punish its enemies and secure impunity for its friends. From our recent research on Asia we can point to other examples (Dezalay and Garth 2010). Lee Kwan Yew ensured that the Singapore courts would help him pursue a strategy of suing for libel and bankrupting any individual who sought to build an opposition to the People's

Action Party, and Malaysia's Prime Minister Mahathir Mohamad used the courts instrumentally to imprison his major political rival, Anwar Ibrahim, through a conviction of corruption and sodomy. Stephanie Mudge and Antoine Vauchez have recently argued that Europe provides another case of weak legal autonomy coupled with a kind of "legalization" (2010).

These examples suggest that when the courts are being used to fight political fights, it may mean that political capital as such determines the value of legal capital. Those with access to the requisite political capital become the winning advocates. It makes much more sense, in other words, to characterize the process in these instances as the politicization of law rather than the legalization of politics. But however it is described, lawyers profit by serving as brokers who successfully negotiate the changing terrain and put the courts into play. If the formal law does not have much value, in short, there is an opportunity to import something from the society that does. On the other hand, if the formal law inside the courts is highly valued, lawyer brokers may be better able to market "rights consciousness" into the political process. Politicization or legalization is a fluid process with ever-changing boundaries—negotiated by lawyer brokers.

The chapter by Ethan Michelson presents the situation of a relatively new legal profession clearly subordinate to the Communist Party and the Chinese state—subject to harassment and lack of cooperation when trying to present, for example, a criminal defense. At least until the era of Chavez, elite lawyers in Venezuela historically operated from a position largely "above the law" through their family capital, social networks, and links to economic and political power. That pattern, common in Latin America, will also be seen in Chapter 3 on the Italian legal profession. But in China, lawyers—and the state seeking to encourage the emerging legal profession—have faced a challenge of how best to augment the minimal value of legal capital. Law is subordinated to the party and state hierarchies. Michelson traces individual and law firm career paths to make clear that those who brought contacts and credibility from the Chinese state were and continue to be those best able to succeed and profit in the law. Those not fortified with this state capital seek desperately to build contacts with judges and prosecutors or resort to payments in order to gain something for their clients. As he notes, "If lawyers have trouble getting in through the front door, they try the back door." Access is key, whether "by hook or by crook." Those who have the best opinion of the legal system, in fact, are those who have the capital to operate better within it. Their relative success, compared to those lacking their capital, does not, Michelson notes, mean that the rule of law is on the march in China. The study of this broker role of lawyers reveals, in his terms, "at least as much about institutional marginalization, patronage, formal institutional support, and administrative rules of access in the socialist state bureaucracy as they do about incipient capitalist and rule of law institutions." Those who are most successful in law in China take what is available to them of value outside and package it with the law (see also Liu 2010). In a symbolic market, reflecting unequal allocations of assets, the successful traders are those most endowed

with social relations; knowledge, both imported and Chinese; and institutional connections.

In both these cases, the state has historically been quite strong. In contrast to China, however, in Venezuela prior to Chavez, there was a long process of capital accumulation—transforming social capital into legal capital—that helped to create spaces for the bosses of the judicial families. A similar process, which we explored in previous work (Dezalay and Garth 2002), brought so-called camarillas based in the faculty of law of the huge state university in Mexico City, to a position of political dominance in Mexico, especially in the long era dominated by the PRI—the Institutional Revolutionary Party (see also Lomnitz and Salazar 2002).

Malatesta's examination of the history of the Italian legal profession shows the situation where a very long process of capital accumulation allows lawyers both to play major roles in politics and for the law to serve as the arbiter of political battles. As documented in works on the origin of the legal profession in Medieval Italy (Brundage 2008; Martines 1968), the universities beginning with the University of Bologna facilitated the conversion of social capital into legal capital, the legitimation of law and legal institutions, and then conversions of legal capital back into political capital. What was embedded in the law and its authority in Italy was much less visible than what we saw in Venezuela or China—or indeed the global south generally. The distant origins of the legal profession in Medieval and Renaissance Italy, tied from its inception to leading families and the emerging City states, camouflaged the capital that went into the law. What we see in Italy is the general model, which is usually invisible, of the forms of capital that have become embedded in the law over a long period of time—including especially family capital, a purportedly universal learning, and close links to business and the state.

In contrast, as we have shown in other work (Dezalay and Garth 2010), the colonial transplantation of lawyers and law to the south was relatively recent, separated by oceans from the leading institutions producing legal knowledge and legitimacy, and dominated by elites favored by the colonizers, making it more difficult to embed the capital into law such that it would appear naturalized and separate from particular interests. One result, not developed in this volume but apparent to most observers, is that there are more exchanges in the form of payments, or corruption, to bring together the various interests involved in the state and the economy in the south.

There are instances, however, where countries in the south enjoy periods where the capital embedded in the law gives the appearance of a smooth functioning and relatively autonomous legal system. India in the period after independence provides one example (Dezalay and Garth 2010). The British-educated legal elite, disproportionately from groups such as the Brahmin caste and the Parsi, occupied the key positions in the state and the economy. The long period of investment in legal institutions and lawyers by the British meant both that considerable capital was embedded in the law and that Indians generally respected

the authority of the law and colonially established legal institutions. Crises leading up to the proclamation of a state of emergency by Indira Gandhi in 1975, and then also the professionalization of politics, reduced the role of lawyers in the state and disrupted the stable set of relationships that had made the Indian high courts appear to function with relative autonomy and freedom from corruption. The new era after the emergency—a revamping of the law to make it appear more open and progressive—helped bring elite lawyers back to more prominence as arbiters of the political game. India remains a relatively unique example in the south of strong social capital embedded in the law.

The relative value of law, as the example of India shows, fluctuates even where well established. Crises and shocks in Italy at various times led also to a decline in the role and prestige of lawyers, as Malatesta shows. The professionalization of politics in the post-World War II period, as in India, disrupted the stability and reduced the control of the old legal elite. It led to the corruption so famously revealed in the Mani Pulite investigations. From a short-term perspective, in addition, the process of exposing and dealing with the scandals made it appear as if Italy was a textbook example of the judicialization of politics. The courts boldly took on the corruption scandals. From a longer-term perspective, however, Italy confirms the difficulty with such a general characterization. It better illustrates the resiliency of law fortified with long-accumulated social capital.

As in India, corruption scandals opened up spaces for the legal elite to come back, now providing valuable legal legitimacy to rulers such as Berlusconi. Notable criminal lawyers, in particular, became key members of the Berlusconi group. The set of assets that they embodied—family capital, learned capital, connections to business—in other words, regained value in the state. Their role was in part, however, to help Berlusconi roll back the power of the courts—restoring in some sense the classic model of lawyers as arbiters of politics and the political rules of the game.

Part II focuses on the import and export of the rule of law. We therefore focus on the transnational aspect of lawyers as brokers. Historically, of course, lawyers outside of Europe, where the legal profession initially developed, were inevitably negotiators of a transnational relationship. Local elites bolstered their own position by investing in the connections, know-how, and credibility associated with the colonizers (Dezalay and Garth 2010). And at the same time, the colonizers looked to the co-optation of local elites as a means to bring legitimacy to the empire and to govern more efficiently. Put simply, imported know-how mixed with local know-who. The success of building up legal capital in India, discussed above, exemplifies this process.

International capital played a major role in the comebacks of law in Latin America, the subject of the first two chapters in Part II. In Latin America, as in many parts of the world, the value of legal capital declined in the period after World War II (Dezalay and Garth 2002). For a number of reasons, the credibility embedded in the law beginning with Spanish and Portuguese colonialism eroded during the Cold War period. One reason was the separation of the

traditional legal elite from new social movements opposed to the conservative oligarchies associated with the legal elites. Another of particular importance in Latin America was the rise of economics as a challenger to the law as the most legitimate state governing expertise. The rise of economics was connected to developments in the old and the new imperial powers. Within Europe, the law and lawyers had also declined in relation to the welfare states, reducing the value of the connections and credentials that Latin American lawyers had long used to give credibility to their local political power. As we argued elsewhere, elites in the south used northern contacts, expertise, and credibility to strengthen their position in local palace wars (Dezalay and Garth 2002). In addition, the new dominant imperial power, the United States, turned in favor of military and authoritarian states as part of a tougher Cold War strategy that took shape over the 1960s and 1970s. The brief period focusing on "law and development" in the 1960s and 1970s in Latin America, for example, came to an end. As happens periodically, therefore, much of the value of the transnational, learned, and even familial capital embedded in legal capital depreciated. The role of law correspondingly declined in Latin America.

The chapters in this part trace the role of lawyers brokering a comeback by taking advantage of shifts both in their own countries and in the U.S. Cold War position. The common theme, as noted above, involves the management of relationships between imported know-how and local know-who.

Virginia Vecchioli's chapter on the emergence of the human rights movement in Argentina shows how politically oriented labor lawyers in Argentina, persecuted and exiled during the military dictatorship of the 1970s, took advantage of divisions in the north to help build the field of human rights and retool as human rights lawyers. They built their positions through a reorientation toward the emerging human rights expertise produced in the United States. They shifted their local habeas corpus petitions on behalf of their political friends into transnationally focused human rights actions. The link to the human rights movement and its supporters, including major philanthropic foundations, brought strength to a group of Argentine lawyers and indeed fortified what had been a declining legal capital. As Vecchioli points out, unlike the situation in China, for example, some fraction of the brokers was able to combine the new and valuable transnational capital with strong family and social capital. They could connect their capital of personal relationships with international know-how. The chapter also shows that the process of import and export is more complex than usually acknowledged. The Argentine lawyers did not simply import. Many of them went abroad and helped put together what was exported to the south. They helped to build the human rights field that they could both export and import.

The Palacios Muñoz chapter on judicial reform in Chile focuses on a different subject and country, but it illustrates the same theme of lawyer brokers acting to mobilize international expertise into local politics. Chile was extremely divided politically after Pinochet. The importation of new approaches to criminal procedure helped bridge the divide by bringing together the public security agenda of the

right and the human rights agenda of the left. The resultant semi-neutral space of a newly configured law helped rebuild the social credibility of lawyers identified with the left and right, again strengthening the place of law and lawyers in Chile—especially those able to take a lead role in the brokering relationship. And, again, as in the previous chapter, the importers also became exporters, especially throughout the region of Latin America.

The Hammerslev chapter, focusing on imported judicial reform in Bulgaria, highlights another variable in the theme of brokering legal imports as a means to add credibility to the law and lawyers. In Bulgaria it was not only about importing the dominant expertise, but also about a competition between European and U.S. approaches and even competing ideologies that go with the approaches. Those best able to play the two sides of the hegemonic competition in local palace wars were Bulgarian lawyers equipped with cosmopolitan capital. They could draw on the European state-centered approach or the U.S. approach emphasizing reform activity outside of the state. In either case, the position of the local brokers here (and in the other examples) was such that the role of law did not change dramatically within Bulgaria even if the discourse of law did. The chapter also illustrates the other side—lawyers from the exporting side using brokering activities on behalf of the rule-of-law activity to strengthen their positions at home within the elite legal world of corporate law, the American Bar Association leadership, the Supreme Court, and the elite legal academy.

The Rodríguez chapter, focusing mainly on Colombia, involves lawyers as brokers working with the issues between the north and the south on judicial reform—including the same focus on the Americanization of criminal procedure seen in Chile. Rodríguez's own research perspective asks a complementary set of questions from those that stem from our approach. He uses his material to see whether globalization in the form of judicial reform is "hegemonic" or "counter-hegemonic," meaning imposed by the "Washington Consensus" on one side or part of a more politically progressive resistance to Washington's recipes on the other. His research, from our perspective, also reveals the subtle blending of the two sides—each of which uses the importation of northern ideologies and networks, albeit from competing sides, to push aside more traditionally oriented elites—linked to Keynesianism in economics, in particular, and to Europe among the lawyers. The broker role of the rivals in local palace wars shows that the lines are not so clear between north and south, hegemony and counter-hegemony, as lawyers and economists on both sides draw on and respond to changing forces—especially in the north—to strengthen their positions. Again, there is another layer of complexity in the process of importing and exporting—the ability to play on the divisions in the north.

Part III further tests our approach and hypotheses about the relationship between social capital, lawyers, and the rule of law in the setting that raises the strongest intellectual and practical challenge to the idea that globalization is building the rule of law in the countries that participate in global trade and

exchange. Two broad theoretical perspectives can be used to sustain the argument that Asia is different and unlikely to change. We will address each one.

One well-respected theory, which was used to organize the Abel and Lewis volumes comparing legal professions in the late 1980s, focuses on the legal profession as a monopoly not willing to share profits (Abel and Lewis 1988–89). The profession accordingly was able to maintain a very limited supply of lawyers in much of Asia with high prestige and a limited but highly profitable market—with Japan, South Korea, and Singapore as prime examples consistent with what this theory posits. Lawyers from this perspective did not serve in the brokering role moderating the state that Western theories tend to posit. They moderated their own mission to protect their profits in the small niches in which they operated.

A second theoretical perspective depends on culture or some variant, such as a distinctively Asian model of state, law, and capitalism. The theory may depend on notions of personal relations or guanxi as the key to Asian capitalism—here often identified with China (e.g., Jones 1994). Or it may depend on the close relationships seen between states and business conglomerates cemented by the so-called "descent from heaven" (amakudari in Japan) that brings leading state bureaucrats into positions of leadership in the conglomerates of Japan and South Korea in particular.

Neither of these theories sees a strong place for law in the reshaping of Asian states, and indeed the chapter in this book by Ethan Michelson has already established the weak role of law today. Since the state has a monopoly on violence, and the state is not likely to invest in sustainable law unless law and legal processes generally sustain the power of the dominant groups represented in the state, we suggest that successful development of a stronger position for law and lawyers will depend on lawyers finding a place where they are both moderating and serving dominant economic interests in Asian countries (analogous to Kantorowicz's theory (1997) on lawyers and the king).

Looking at the three largest East Asian economies, China, Japan, and South Korea, all three had a colonial or quasi-colonial history where law entered largely in order to resist colonial domination. It was imported but at the same time resisted in the late nineteenth century in Japan and China. Western law came to China at a time when the colonial powers insisted on using their own rules for their merchant activities in China and the foreign enclaves in which they operated. Within China early in the twentieth century, law schools mainly producing foreign-oriented private lawyers, exemplified by the Soochow Law School (Connor 1994), built on the activities in the foreign enclaves, while larger faculties of law produced lawyers mainly serving the Chinese bureaucracy. Japan imported from European legal models to keep the foreign pressure off, but in fact only one part of the German model was imported into Japan—the legal training of elites to govern the state (Feeley and Miyazawa 2008). The role of the law school in Germany and elsewhere in Europe as a producer of an evolving legal doctrine was not developed. This more or less shared history of resistance to Western law

is behind the restricted and self-moderated position of law and lawyers in these Asian powers.

The papers on Japan by Chan and China by Peerenboom provide rich empirical material that shows where to look to understand current developments. It is not so much a matter of market control or uniquely Asian cultures as such. Peerenboom shows that the corporate bar is thriving in China, in contrast to the local practitioners—especially in criminal law—depicted by Michelson (see also Liu 2010). It is interesting to look at the reasons for the corporate law success in order to see if there is likely to be any spillover effects into state governance. The corporate bar's success and survival relates to its position as largely outside of politics and the state. The corporate lawyers serve almost exclusively as brokers between foreign and domestic economic interests and state power in China. In this sense, therefore, they replicate the foreign enclaves and the dual system of law that they inhabited. There is a dual legal field (corporate vs. criminal) where the party leaders in effect replicate the dual colonial model. As in the colonial era, this approach serves as a counter strategy of fighting fire with fire, allowing the Chinese to deal and compete with hegemonic societies but keep control over their own society. The corporate bar reaps huge profits from the services provided to the growing foreign trade, but it is hampered in gaining autonomy both politically and socially by its lack of legitimacy.

In Japan, the configuration of a strong state alliance with big business was somewhat similar to what we see in China, at least until the relative weakening of the MITI-Keiretsu alliance. It may also be that corporate leaders have in fact sought to launch another episode of the Meiji strategy of the late nineteenth century—borrowing government technologies from hegemonic countries in order both to compete more effectively and also to secure their own positions. Yet the difficulty of this strategy in Japan is, again, the relative weakness and low level of legitimacy of the corporate bar as well as the political marginalization of the established Japanese bar.

Japan's recent set of reforms purportedly to expand the profession and focus on importing graduate education may be a half-reform akin to the importation of part of the German approach to faculties of law in the nineteenth century. As noted above, the educational reform has been contained for the most part by the traditional Japanese legal elite (Saegusa 2009), but there is some potential for developments in Japan to follow what is already happening in South Korea. Reformed law schools, as we suggest in the conclusion to this book, could create a new balance of forces both within the legal field and in relation to state politics.

Because of the demise of the military state in South Korea, as the chapter by Kim shows in some detail, new avenues for building the political capital of lawyers and enhancing their legitimacy developed. There was an opportunity to combine the multiple financial and social resources of corporate lawyers with the legitimacy of human rights and more generally political lawyers. Like Japan, Korea has also adopted a more U.S. style of legal education recently, but it came to a great extent from outside the corporate legal sector—although

the corporate sector has a similar desire to expand the bar (Miyazawa, Chan, and Lee 2008). The key actors relied on imported legal capital and close connections that had developed between lawyers and the state in the 1990s after the demise of the authoritarian military regime. This group of Korean lawyers took advantage of the global delegitimation of authoritarian states at the end of the Cold War to present themselves as resisters to authoritarian policies. The political transformation then put them in a position to use their prestige—and their independence from the military—to convert their strictly legal knowledge and capital into a much stronger position. They used public opinion in Korea and international connections to give much more substance to the reform agenda than in Japan. The initiative did not come only from corporate lawyers who could have been perceived as a narrowly self-interested group as in Japan, but rather from national legal champions who had accumulated social and political capital domestically and internationally after the end of the Cold War.

The new law schools in Korea, unlike the undergraduate faculties of law that they will largely replace, may also serve to accelerate the process of converting social capital into legal capital. Admission is no longer only on the basis of a narrow test, as was the case for the faculties of law that they will largely replace, but rather depends on such factors as career experience, linguistic abilities, social activism, and the like. The new criteria will bring in individuals who can in turn expand the markets for law, even in politics and the state.

These developments in South Korea to a great extent repeat what happened at the end of the nineteenth century in New York City. The elite corporate bar in New York City invested in politics to enhance the credibility of their practice serving the so-called robber barons, and they also formed a close alliance and indeed symbiotic relationship with the elite law schools, led by Harvard Law School, which moved toward more meritocratic standards and the case method. We discuss these Asian examples and the essential role of the market in legal education reform in more detail in the concluding chapter to this book. We revisit the issues of the spillover from corporate and commercial law into human rights and governance, and we examine the issue in the particular context of the Asian countries that present the greatest challenge to the so-called "rule-of-law revival" (Carothers 1998).

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Part I

Law embedded in social capital and converted into legal and political capital

The three chapters in Part I focus on different examples of the role of lawyers first embedding law in social capital and then using that social capital for the construction of legal and political capital. We begin with the chapter by Manuel Gómez on the processes of exchange between politics, judges and lawyers in Venezuela. The history of Venezuela from the colonial period until recently linked the descendants of colonial elites, wealthy landowners, and the law. The faculties of law, both within Venezuela and abroad, provided an education that provided credibility for a familial elite that turned into a legal elite governing under the authority of a mostly imported law. The social capital embedded in the law legitimated this legal/political elite, which competed for power but kept together the system that favored their collective interests. Gómez shows how the oil shocks in the 1970s disrupted the traditional legal elite dominance of the courts, the public law faculties, and the state. The oil profits raised the economic stakes and the profits to business lawyers who increasingly specialized and practiced in larger corporate law firms; and the simultaneous expansion of legal education created a large non-elite group that began to dominate the judiciary. Elite lawyers could no longer count on judges to protect the legitimacy of the elite legal world. Focusing on the specific role of lawyers as brokers, Gómez shows how certain of them managed to work through "judicial tribes"—networks of personal relationships led by lawyers connected to courts and to politics—to pursue the interests of themselves and their clients. The challenge of the Chavez regime has been even greater to law and the legal elite, but at least some lawyers have again found a way to place themselves as brokers for newly reconstituted judicial tribes with a new political/legal configuration.

Lawyers in China, as Ethan Michelson shows, lacked the long history linking family capital to legal capital and embodying the law with some social power. The position of law was weak before communism and the top-down reconstruction of the legal profession did not imbue the law and legal degrees with the same prestige as government service or engineering. Lawyers accordingly seek to broker whatever connections they have to leading families and political actors to bring some authority to their efforts to attract and represent clients. Michelson traces individual and law firm career paths to make clear that those who were

able to bring contacts and credibility from the Chinese state in particular were and continue to be those best able to succeed and profit in the law. Those not fortified with this state capital seek desperately to build contacts with judges and prosecutors—or resort to payments—in order to gain something for their clients. Michelson shows the challenge that those who seek to build a stronger role for law and lawyers face in China.

Maria Malatesta in Chapter 4 provides a picture of the legal profession as it has evolved in Italy from its establishment in the medieval period through the combination of increasing trade, the development of city states, the strength of the Roman Catholic Church, the rediscovery of Roman law, and the establishment of the University of Bologna. The University of Bologna and its imitators facilitated the conversion of social capital—for example, from aristocratic and feudal familial ties, authority within the hierarchies of the church, or wealth accumulated through trade—into legal capital, the legitimation of law and legal institutions, and then conversions of legal capital back into political capital. What was embedded in the law and its authority in Italy became over time much less visible than what the chapters on Venezuela or China—or indeed the global south generally—show. The distant origins of the legal profession provide some camouflage for the capital that went into the law. Italy, in short, provides the general model, which is usually invisible, of the forms of capital lawyer/brokers have succeeded in embedding in the law over a long period of time. It provides a notable contrast to Venezuela and China.

Chapter 2

Greasing the squeaky wheel of justice

Networks of Venezuelan lawyers from the pacted democracy to the Bolivarian Revolution

Manuel A. Gómez

Latin American lawyers have been commonly portrayed as members of a privileged social group with important influence in many areas. Lawyers have been seen as power brokers, social entrepreneurs, and nation builders. Over time, they have been able to form a permanent and steady elite, which has shaped the ways in which the public and private sectors operate. As described in previous work (Gómez 2003, 2008), Venezuelan lawyers are not the exception. The social and political conditions under which the country developed allowed networks of lawyers to attain significant power, thus enabling them to manipulate the ways in which different parts of the political system functioned, including the courts.

This chapter describes how the operation of the Venezuelan judiciary has been traditionally controlled by networks of lawyers, judges and other political actors who have attained significant power and influence, and how members of the business sector have greatly benefited from this. It also explains how social and political changes occurred in that country during the late 1990s which modified the power balance, thus shifting the position of its different actors, but enabling the same social network structures to remain in place.

The rest of this chapter is organized as follows: Section I describes how Venezuelan lawyers have formed a select group that has played key roles during different historical periods, from their contribution to the consolidation of the country's political and intellectual leadership during the nineteenth century, to their rise as power brokers bridging the public and private sectors during the economic and social expansions that took place throughout most of the twentieth century. Section II explains how the political transition from dictatorship to democracy also shaped the role of lawyers in society, particularly in light of the numerous opportunities created by the oil boom of the 1970s, which strengthened the business sector and gave rise to the powerful elite that I call "business lawyers." This section also shows how, during the same time period, the presence of strong political parties and of powerful clientele networks facilitated the rise of clan-like groups (judicial tribes) whose main goal was to manipulate the courts and exert influence on public officials for the benefit of certain influential groups. Finally, Section III explains how, in spite of the radical political transition that took place in the late 1990s, which led to the disappearance of the traditional

elites, the new regime created the conditions for the emergence of new networks similar to those that existed in the past, revealing that personal connections are still very important and remain vital in making the justice system work.

Venezuelan lawyers: from nation builders to power brokers

The proximity of lawyers to the country's political elites can be traced back to the process that, during the 1800s, led to the independence of Venezuela from Spanish domination, and the subsequent nation-building period that continued through most of the nineteenth century (Pérez-Perdomo 2004). A brief look at the history of Venezuelan political institutions shows that lawyers held a prominent place in the formation of the state, and that—in addition to the military—they were the only group that contributed to the consolidation of the political and intellectual leadership of the country (Pérez-Perdomo 1981). Venezuelan lawyers were traditionally considered primary participants in shaping the political landscape; indeed, for many years, the few existing law schools perceived themselves as institutions in charge of forming future government bureaucrats, and not necessarily members of a liberal profession (Pérez-Perdomo 2005).

Conversely, the common aspiration of those who had the opportunity to enroll in law school was to become involved in politics, either by serving directly in government positions or as political advisers to those in public office. Given the precarious economic and social conditions and the high illiteracy rates that prevailed in Venezuela until the early twentieth century, legal education was a privilege enjoyed by few; only those who were relatively affluent and lived in urban areas could aspire to become lawyers (Pérez-Perdomo 2005: 210). This, naturally, helped maintain the legal profession's elite status.

During that time, almost no one viewed the practice of law as a permanent source of income, and even less as a way to attain material wealth. In social and political terms, being a lawyer meant something higher and more meaningful than just a way of making money (Pérez-Perdomo 1981). For example, lawyers' fees were traditionally—and are still in many places—called *honoraria*, signifying that clients remunerated their lawyers in an entirely voluntary manner, and not as payment for the provision of professional services. This was consistent with the view that regarded monetary compensation as secondary in the lawyer–client relationship. Accordingly, lawyers had little or no incentive to organize themselves as members of a profession, and even though the Colegios de Abogados (bar associations) existed, their role was very different from that of present-day professional associations.

Although going through law school did not lead directly to the attainment of material wealth, it certainly provided a different kind of power. Law schools offered the ideal environment for strengthening one's social network with other influential members of society (Dezalay and Garth 2002; Pérez-Perdomo 2005) and facilitated access to those who controlled economic and political resources (Boissevan 1974: 147).

Wealth, population growth, democracy and the transformation of the Venezuelan legal profession in the twentieth century

The economic expansion that followed the discovery and subsequent exploitation of hydrocarbons, in addition to significant demographic growth and the transition from military dictatorships to democracy—all of which occurred during the first half of the twentieth century—had a major impact on the traditional structure of the legal profession.

Regarding the first of these conditions, as multinational oil companies began operating in the country their business required the use of lawyers on a permanent basis (Pérez-Perdomo 2001). At the same time, the state apparatus grew immensely and so the need to regulate the economy, which also required the intervention of legal professionals. On the other hand, the domestic private sector also experienced a significant expansion as business opportunities arising from the massive oil-driven wealth unfolded. Local businesspeople found incentives to diversify and expand their investments, for which they often required political connections, and elite lawyers were instrumental in this process. A number of well-known lawyers became legal advisers of foreign and national companies, and turned out to be essential in the organization of the fast-growing legal departments and in-house counsel divisions (Gómez 2003).

The typical successful lawyer of the time was a member of the local social elite who had the opportunity to attend private Catholic schools throughout his education, and had then pursued a law degree at the (public) Universidad Central de Venezuela in Caracas, the oldest and most important institution in the country at the time. Upon graduation, these lawyers would often enroll in prestigious European universities (in Italy or France) in order to pursue postgraduate degrees in law, and return to Venezuela one or two years later. Depending on their personal connections, young lawyers would either take a government position or go into professional (solo) practice.

Law firms and other forms of professional partnerships were very rare, as the legal market was relatively small and dominated by a handful of prominent lawyers, who often worked out of their residences. The few law firms in existence until the mid-twentieth century were basically small operations with no more than three partners, often connected through family or strong social ties. The oldest Venezuelan law firm was Escritorio Bance, founded in 1896 by Juan Bautista Bance, a prominent lawyer of his time, whose main clients were foreign oil companies that dealt with the Venezuelan government. It was not until 1945 that the firm's three partners expanded their operations and changed the firm's name to Mendoza, Palacios, Borjas, Páez Pumar & Cía, which still exists to this day.[1]

Another early firm was the Escritorio Tinoco, founded in 1914 by Pedro Tinoco Smith, an important lawyer who served as Minister of the Interior from 1931 to 1935. Years later, his son Pedro, Jr. took control of the firm and, along with his partners, transformed it into a powerful player in the Venezuelan legal market.[2] For almost three decades (1973–93), Pedro Tinoco, Jr. was one of the

most influential power brokers in Venezuela. During the 1970s, he gained notoriety as one of the "twelve apostles" (Duno 1975), a group of influential businessmen who, due to their close relationship with the President, multiplied their fortunes through government contracts and other formidable business opportunities (Ball 1994).

In addition to his successful professional practice, Tinoco had a brief stint as a university professor and an intermittent political career, first as a congressman, later presidential candidate, and eventually as Minister of Finance and Chairman of the Venezuelan Central Bank during the early 1990s.[3] He also served as President of the Banking Association, and was also one of the main shareholders and, for several years, the CEO of Banco Latino, one of the largest commercial banks in the country, in which the government maintained a significant proportion of its reserves, until the collapse of the Venezuelan financial sector in 1994. During his lifetime, Tinoco was also tied to several influential politicians as well as important families of the Venezuelan business sector, most notably the Cisneros family, whose Cisneros Group became one of the wealthiest conglomerates in Latin America.

The career of Pedro Tinoco, Jr. exemplifies the trajectory of Venezuelan elite business lawyers who, in addition to their main professional activities, were often connected to academic life by teaching law courses, and on occasion, writing treatises or manuals for law students. An academic position was a sign of social and intellectual superiority and was well regarded among colleagues and clients alike. In practical terms, by maintaining proximity to the universities, elite lawyers also maintained control over these institutions, kept an eye on future generations, and—when the legal market grew—used it as an opportunity to recruit young associates for their own firms or for other key positions within the public or private sector, thus expanding the range of their own social networks.

Serving in government positions was never a permanent career choice for the Venezuelan elite lawyers of the twentieth century. Those who took public jobs at the beginning of their careers often did so—with the acquiescence of their mentors—in order to gain experience and build government connections. In most cases, these jobs were taken as a sort of apprenticeship, not in order to gain a particular set of skills, but mainly to learn how the bureaucracy operated and how to navigate the complicated web of political connections. After a couple of years, these lawyers would usually join the private sector where they spent most of their lives. Lawyers were not only valued by their clients because of their expertise in understanding the intricate legal system, but more importantly, due to their ability to navigate throughout the even more complex web of social and political connections. As a result, legal professionals became important and well-respected members of the business community and key players in connecting businesspeople with other businesspeople and government officials.

Some elite lawyers would briefly go back to the public sector late in their careers, either as ambassadors, ministers, Supreme Court justices or advisers to the President; this obviously helped them expand the range of their networks,

and enabled them to effectively influence policy and rulemaking for the benefit of their own groups.

As a result of the economic expansion, by the mid-twentieth century, the population of Venezuela began growing at a fast pace. This occurred through several waves of internal migration from rural areas to the capital, and also through large numbers of European immigrants who fled to South America looking for better opportunities in the aftermath of World War II. Venezuela was a particularly attractive destination in light of its sustained economic growth and upward social mobility. An increase in the population led to a rise in the demand for educational opportunities at all levels, which in turn spurred the establishment of several (private) universities and within them new law schools. Legal education was no longer restricted to members of the privileged social and economic circles, but open to virtually anyone. Law students now came from different parts of the country which obviously meant that they also had very diverse social, economic and cultural backgrounds.

With massification also came stratification. The students who belonged to the traditional elites maintained their cliques and kept to themselves in social circles relatively inaccessible to outsiders. Within certain law schools, other groups formed according to geographical origin, or political ideology, but these were of more heterogeneous composition than the elite ones.

By the mid-1950s, the Universidad Central de Venezuela law school, which for decades had monopolized the country's legal education and where the traditional political elite was produced, began facing some serious competition from the newly formed private law schools. Particularly the one created by the Catholic Jesuit order (Universidad Católica Andrés Bello) became the breeding ground for the upcoming generations of elite business lawyers. Even though its curriculum was very traditional and almost identical to the ones followed by the other schools, the Universidad Católica attracted most of its students from well-to-do families of the country's capital, and to a minor extent, from the provinces. It was fairly common for these law students to have also attended the same private Catholic schools, thus making their law school years look like an extension of high school, as they often had the same classmates since their teenage years and, on occasion, took classes with some of the same professors who had taught in their high schools.[4]

But the connection among these law students went beyond their high school friendships. Very often, these future lawyers were also related by family ties, belonged to the same social clubs, attended the same churches or their relatives had business ties among themselves. These *multiplex* relationships became stronger over time, and upon graduation from law school, their contacts became one of their most important assets as the majority of them remained in the private sector as members of the business community (Gómez 2003).

None of the emerging private law schools offered their students a specific set of skills in business law, nor did they have a special curriculum intended to attract those aspiring to become corporate lawyers. What these institutions really

offered was a favorable environment for individuals who belonged to the same social circles to strengthen their bonds and perpetuate their privileged status. And these circles often happened to be the same close-knit networks that dominated the country's business and political environment during the Pacto de Punto Fijo era (1958–98).

Lawyers in a "pacted democracy"

The Punto Fijo Pact and the emergence of partydocracy

During the second half of the twentieth century, Venezuela was often praised for being one of the most solid, effective and long-standing democracies of Latin America (Levine 1973: 3). At least until the 1980s, when most of the countries in the region were facing harsh military dictatorships or other forms of totalitarian regimes, Venezuela was perceived as a role model. It was a country where general elections were held in a periodic and peaceful manner, political parties seemed to enjoy a solid position in society, state institutions had the appearance of being relatively organized and independent from each other, citizens' rights were formally protected, and the rule of law seemed to have gained a prominent place in society (Coronil 1997; Wiarda and Wiarda 2002).

Below the surface, however, the Venezuelan democracy was far from perfect. Presidential and congressional elections were indeed held every five years, and all three branches of government were formally organized according to the principle of separation of powers. However, electoral results were often subject to negotiations between the main political parties, while the integration of the legislative and judiciary branches always depended on bargains and compromises between strong party leaders, and were not always a result of a transparent democratic process.

On October 31, 1958, barely nine months after Venezuela had made a transition from dictatorship to democracy, the leaders of the three major political forces at the moment reached an agreement known as the Pacto de Punto Fijo,[5] by which they vowed to set the bases for future democratic stability (Navarro 1988). The document contained a general declaration of principles according to which the main parties reassured their willingness to guarantee the respect for basic democratic principles, defend the constitution and to form a government of national unity that effectively represented the key sectors of society (Karl 1997).[6]

In real terms, this *pacto* meant the allocation of political power among the leading parties through the permanent distribution of key government positions, congressional seats, judicial appointments, and public contracts. Even though the general elections determined which party would enjoy the dominant position during a given period, those bound by the pact were guaranteed at least a minimum share in the overall benefits, regardless of the electoral results (Karl 1997: 99). Once established, the system reassured the political survival of its promoters, legitimized manipulation and influence, and created a breeding

ground for powerful clientele networks that would govern the most important sectors of the country during the ensuing four decades.

While promoting stability, the *pacto* system discouraged the idea of a transparent democracy and hindered the formation of a professional bureaucracy. Loyalty to the political establishment was far more valued than competence or professionalism. For years, Acción Democrática and COPEI, the two dominant parties, amassed considerable power, and divided the country into different political territories subject to their influence. Party leaders also shared indirect but significant control over the state's resources—most notably, the massive revenue of petrodollars. As political parties—and not their constituencies—were the main beneficiaries of the political system, some preferred to say that Venezuela did not have a real democracy but a "Partydocracy" (Calero 1982).

To members of the private sector, the only way to succeed and participate in the distribution of the oil rent was through political mobilization and by strengthening their networks (Jatar 1999; Gómez 2007). Businesspeople understood that having the proper connections would guarantee them access to government contracts, joint ventures, concessions, subsidies, low-interest loans, and other forms of preferential treatment, including the possibility of exerting influence over judicial and administrative decisions in which their interests were at stake. As one can imagine, lawyers were essential in the operation of this system.

The rise of business lawyers in the era of "Saudi Venezuela"

During the 1970s, the perception of political and social stability in Venezuela was enhanced by the idea of economic prosperity, which resulted from the unprecedented benefits obtained almost exclusively from oil exports, and to a lesser extent from other natural resources (natural gas, bauxite, and iron, among others). The sustained increase in oil revenues, and the country's emerging role as a key player in the world's energy sector (IEA 2006), put Venezuela in a most enviable position marked by the placement of its per capita income as the highest on the continent (Karl 1997: 234).

Petroleum allowed Venezuela to enter the world market as an influential force. It also helped the country shift its status from that of a rural and poor society, reliant on a small-scale, agricultural-based economy (Izard et al. 1976), to that of an urban, wealthy and modernized one. This economic boom also accelerated the migratory wave from rural areas to the cities and helped create the conditions for the emergence of a new bourgeois class (Karl 1997: 82). Another important effect was the rise of political and economic elites whose power depended almost exclusively on the influx of petrodollars. The new reality allowed people from lower socio-economic strata—but with the right political connections—to rapidly climb the social and economic ladder. However, money and political power did not guarantee immediate acceptance into the top social circles, and those aspiring to join local "high society" had to work their way up slowly.

In domestic terms, a fiscal bonanza generated by volatile oil prices and the subsequent nationalization of the hydrocarbons industry in 1975 enabled the Venezuelan government to become the sole ruler of its own wealth (Makhija 1993) as well as the most important local investor and benefactor (Neuhoser 1992). Not surprisingly, oil "shaped institutions that in turn structured the preferences and behavior of state authorities and private citizens" (Karl 1997: 90). The colossal windfall of petrodollars and the ostentatious lifestyle of the emerging economic elites during that period earned the country the nickname of "Saudi Venezuela" (Tinker Salas 2005).

With a need to invest and diversify its income, the state created a myriad of opportunities for the private sector while simultaneously becoming involved in every imaginable economic activity (Brewer Carias 1981), ranging from the exploration, exploitation and commercialization of natural resources, to the sponsorship of other activities like product manufacturing, transportation, services, utilities and mass communications. The economic expansion was accompanied by a broad range of protectionist and interventionist measures, such as import substitution policies, price controls, fixed interest rates, and extensive regulations, all geared to deter foreign threats and hinder local rivalry (Jatar 1999).

In light of this state of affairs, in order to be able to successfully navigate the intricate web of regulations and red tape, and to take advantage of the opportunities created by the economic bonanza, local businesspeople had to rely on their personal networks of contacts with government officials, politicians and other players who served as power brokers (Gómez 2008).

During that time, litigation also proliferated as did the number of courts and judges, while the demand to study law also notably increased (Pérez-Perdomo 2004). Traditional business lawyers who in the past had predominantly worked as solo practitioners or in small professional partnerships, were now forced to specialize in different areas in order to serve their clients better (Gómez 2003); this also meant a transformation in the organization of legal practice with the emergence of larger, U.S.-style firms.

In the aftermath of the nationalization of the oil industry, the lawyers who had formerly advised foreign oil companies in their dealings with the local government remained active in different areas of the business sector. Some of these lawyers became partners of the fast-growing local law firms, while simultaneously serving on the boards of financial institutions or as advisers to politicians and high-ranking government officials as I explained *supra*.

To their advantage, these legal professionals not only spoke and wrote in fluent English, and were familiar with the administrative structure of foreign companies, but also belonged to the local social elite, which granted them access to key connections within the Venezuelan private and public sectors.

In spite of its rapid growth, the Venezuelan legal market remained very local. For many years, foreign law firms did not have any presence in the country.[7] The exception was Baker & McKenzie, which opened its doors in Caracas in 1955, making it the firm's first international office.[8] The emerging local law

firms, however, generally adopted the organizational structure of their U.S. counterparts, at least in relation to their billing systems, client management strategies, and corporate image. Notwithstanding, the "large" Venezuelan firms barely had more than ten lawyers, and their members often belonged to the same family or shared strong social ties that could be traced back several generations, in clear contrast with the anti-nepotism rule prevalent in U.S. firms.

Aside from providing legal services to their clients, law firms also served as lobbying agencies, as their most prominent members were closely connected to politicians and public officials. Elite business lawyers, however, did not have direct control over the operation of the courts, as the judiciary was an area reserved to the influence of political parties through the so-called "judicial tribes" that I now turn to describe.

Political control over the Venezuelan courts and the emergence of judicial tribes[9]

An average business disputant in Venezuela always knew that the first step before filing a lawsuit was to identify a well-connected lawyer, a friendly court, a familiar judge, and of course, be opened to gratify court employees for "being diligent." Judges regarded as friendly to the business community have been usually labeled by business lawyers as "decent" and "competent," even if their diligence is clearly tilted in favor of one side.[10]

Also, as I have already pointed out, business lawyers have been traditionally regarded not only for "what they know" (their particular legal skills) but more importantly, for "who they know" (their social connections) and how they use these connections to their own advantage. Legal professionals have become brokers in the real sense (Burt 2005). The stereotypical image of a Venezuelan legal network is that of a group of lawyers with political power and influence who, together with some judges and other public officials, form a close-knit and strong chain known as a "judicial tribe" ("tribu judicial").[11] These networks, which became popular during the first years of the democratic period, portray an extreme form of judicial clientelism and have influenced greatly the way in which the courts operate in Venezuela.

The end justifies the means: political manipulation of the courts and the rise of the tribes

In spite of the favorable economic outlook, the 1960s was a decade of political and social turmoil in Venezuela (Roberts 2003: 41). The consolidation of Fidel Castro's insurgence in Cuba had become a source of inspiration to rebel groups throughout the region. Particularly in Venezuela, the government faced the rise of an urban guerrilla movement that posed a serious threat to the country's nascent democracy (Pérez-Perdomo 2007). Between 1962 and 1963, the insurgents sacked businesses and robbed banks, burned public transportation units,

sabotaged operations at different oil refineries, and bombed public buildings, leaving large numbers of casualties in their wake (Weitz 1986: 401). In addition, the rebels tried to boycott the 1963 national elections, which prompted the government to act in a speedy manner before things got out of control.

As a result of successive military operations, many insurgents were captured and tried. In order to ensure exemplary convictions and protect the fragile regime, the executive determined that the suspects should be tried in military courts, over which the establishment had strong political influence, and the accused had fewer procedural safeguards. However, as some cases had to be tried in ordinary criminal courts, the executive felt an urge to expand its sphere of influence and make sure that the judges presiding over these cases would effectively convict the rebels, thus sending a signal about the government's determination to end the warfare at all costs.

Prominent political leaders who were also lawyers, and therefore familiar with the operation of the court system, were entrusted with the task of assuring the government's control over the judiciary, and given ample powers to devise a mechanism to appoint "friendly" judges (Pérez-Perdomo 2007).

Even though the purpose of the government in manipulating the judiciary was apparently limited to assuring institutional stability and preventing the leftist movements from spreading all over the country, savvy politicians and power brokers rapidly saw it as a window of opportunity to expand their control and use this to their own benefit, and the main political parties became increasingly involved in exerting influence on how judges were appointed and how the judiciary worked. The strategy served its original purpose, but it also planted the seed for a network-driven judiciary, where political connections and manipulation were essential. Before many people even realized it, the two leading political parties literally divided the country into areas of influence, thus each retaining control over a certain number of jurisdictions or courts.

The control over the judiciary became an extension of the Punto Fijo Pact, and to a certain extent was "institutionalized" with the creation of the Judicial Council in 1969. Early on, the Council became, to no surprise, controlled by members of the political party who had the majority of seats in Congress and in the Administrative Chamber of the Supreme Court, which obviously gave it significant leverage. For years to come, the judiciary was populated by judges who were chosen more because of their political allegiance than their legal competence or merits (Pérez-Perdomo 2007).

The process of appointing judges was one of intense negotiations among political actors. It was an unwritten rule that those who wanted to enter into the judicature needed a political sponsor ("padrino"), which obviously produced a relationship of subordination between the candidate and his or her supporter in the case the first got appointed. As a result, the judicial career became a sort of social network in itself, reserved to those bound by common political affiliations, and the need for a sponsor became an entry barrier as typically occurs in close-knit networks (Raub and Weesie 1990). Among the usual backers were

influential politicians, some of whom happened to be connected with lawyers who in turn were key members of corruption networks known as "judicial tribes."

Judicial tribes

The tribes were clan-like structures led by well-connected lawyers who were involved in politics or close to the government in diverse capacities; some tribes were actually led by retired judges who after leaving the bench decided to go back to private practice and kept their influence upon some courts (Pérez-Perdomo 2007). Some of these groups had spheres of influence in particular areas (e.g. criminal courts) or levels (e.g. trial courts, Superior Courts, or the Supreme Court itself) while others were known for having control over a certain jurisdiction. Active judges, public defenders, and prosecutors were also part of the tribes.

The main purpose of these networks was to manipulate the courts in order to get favorable decisions for their clients, speed the handling of judicial processes, or simply counteract the negative influence of another clan favoring the other side. Furthermore, the influence of these networks was often used to coerce or intimidate people through false criminal charges, "official" investigations or other forms of threat, a practice that later became known as "judicial terrorism."

Each of these tribes would have a law firm as a facade. The firm would offer its clients the guarantee of a speedy trial, with favorable decisions, and would often assure results on possible appeals and, if necessary, even at the Supreme Court level. The lawyers of the firm would usually set their fees very high since they had to include the "work" of others.

The firm served also as a hub for all members of the network, and a small group of lawyers (brokers) centralized communication with judges, clerks and other public officials. Some active judges were permanently tied to particular tribes, while others were known to work on a "freelance" basis, collaborating with several groups on a case-by-case basis.

During more than three decades, several networks became known for their significant power and frequent involvement in high-profile cases, but perhaps the most notorious of all was the "Tribu de David" (Tribe of David) (Coronil 1997; Pérez-Perdomo 2007). This group acquired its name from David Morales Bello, a lawyer and leader of the Acción Democrática party who had been entrusted by the President to direct the extradition of the former dictator Marcos Pérez Jiménez in the late 1950s, and who, later on, became one of the masterminds in charge of crafting the system for appointing judges who were loyal to the government.

Morales was by no means an elite lawyer. Originally from the province, he became a political activist and then a law student at the Universidad Central de Venezuela. Upon graduation, Morales dedicated his life to a political career, as congressman, then presidential pre-candidate and later head of the Senate, while maintaining a legal practice on the side. Even though he became a prominent public figure, most of Morales's achievements occurred backstage, earning him a

reputation as an effective power broker and a fearful political manipulator. Unlike traditional lawyers, Morales did not pursue an academic life, but he did publish at least a couple of legal books on criminal law topics. Even though Morales was often involved in high-profile—mostly criminal—cases, his name rarely appeared in court records. He kept an office, but his real organization was an invisible network of lawyers, judges, and high-ranking officials including heads of the police force and ministries, with powerful tentacles throughout the entire system.

Eventually, other tribes with similar structure emerged in the judicial environment but no one reached the prominence of the Tribe of David. Among these other groups, one can mention the Borsalino Clan, which took its name after the picturesque hat worn by one of its key leaders, Joel Melendez, a lawyer who graduated from the Universidad Santa María, a less prestigious private law school established in 1953—the same year that the Universidad Católica was founded—where many judges, mid-ranking government bureaucrats and police officers had obtained their legal education. Melendez's tribe was in a way a rival of Morales's as its members had political connections within the more conservative COPEI party, and often associated with some prominent appellate judges and Supreme Court justices linked to that political organization.[12]

While business lawyers generally graduated from the same elite private law school, judges and mid-rank government bureaucrats usually came from the public ones and, more recently, from other non-elite private schools as well. In these institutions, the student population was more diverse in socio-economic and geographic terms.

Unlike the close-knit networks among graduates from the Universidad Católica, at public and non-elite private universities, the ties among students were initially weaker as they usually came from very different backgrounds. However, many of them developed solid bonds over time and after graduation formed their own strong social networks that eventually attained notable power in the operation of the justice system. In fact, the key members of the judicial tribes and other networks that controlled the Venezuelan judiciary for more than thirty years came from these schools and not from the elite one.

The school from which a lawyer graduated not only determined his or her professional prestige and occupation, but also the particular social network to which they belonged, and their position within the group. Lawyers of similar status were connected to their peers by *horizontal ties*, as their relationship was based on friendships or similar bonds that did not imply subordination (Lomnitz and Salazar 2002).

Elite business lawyers were not considered part of the tribes but they definitely used the influence of these corruption rings to their advantage. Some of them were permanently connected to Morales's and Melendez's associates, and often served as brokers between the tribes and the rest of the business community, but the relationships between people of the two groups were generally discrete. From a social standpoint, it was seen as undesirable for upper-class lawyers and

business executives to be seen interacting with low-class court officials or controversial politicians so the former tended to act in a covert manner or through other non-elite lawyers who positioned themselves between the different groups, thus serving as intermediaries. Similar to the invisible hierarchies reported by Lomnitz in the case of Chilean bureaucrats (Lomnitz 1971), some kind of subordination was implied in the relationship between the Venezuelan elite business lawyers and the less honorable tribe members, who often took bribes or other forms of gratification in exchange for their "diligent" services to the clients of the former.

Paradoxically, the reputation of some business lawyers as effective problem-solvers largely depended on their relatively close proximity to the heart of the networks, that is, how close they were to the Moraleses and the Melendezes, and how far they were able to navigate through the visibly stratified legal profession. Lawyers did not only use the networks to process cases in courts, but also to obtain help in bypassing regulatory processes, dealing with government authorities and negotiating disputes outside the formal system.

Entrepreneurial judges

The mid-1990s witnessed a crisis among the traditional political parties, which lost legitimacy and therefore their long-established power and influence within the political arena. After the two failed coups d'etat of 1992, the Venezuelan political elite became increasingly fragile, which also affected their levels of influence on the judiciary.

About the same time, high-profile corruption cases involving judicial networks were denounced by the media (Pérez-Perdomo 2007), thus exposing the existence, structure, and members of the different networks. The increasing rivalry between the different tribes and their intense competition for power, in addition to the continued pressure that prominent politicians exerted on them in order to obtain protection against the waves of indictments in corruption-related cases, made the traditional tribes weaker and eventually led to their demise. The pacts according to which the leading political parties had shared their control over the courts slowly eroded, so the remaining clan members were left on their own. In spite of the tribes' notorious influence and power, which they maintained for almost three decades, most of its members were tied only through uniplex or single-stranded relationships (e.g. political affiliation, but not common social background, school or family ties), and once these ties were compromised or one of the most salient members—notably the leader—was disabled, it had a negative impact on the entire network.

Notwithstanding, a number of retired judges who had amassed power during the previous years as members of the tribes became leaders of their own small-scale corruption rings, thus rising as judicial entrepreneurs of a sort, in a similar fashion to the Japanese *amakudari* (Granovetter 2005). These judges were only capable of cutting deals involving cases being tried in their own former courts or

others with which they still had connections, so their power was minuscule when compared with the one held by the tribes in their heyday. Clearly, the network-based system became less efficient due to the fact that participants were only tied by one-dimensional, single-stranded and relatively weak relationships, and the solid political platform that once protected the tribes did not exist anymore.

Unlike what occurred during the climax of the era of judicial tribes, the facade of these new groups was not a law firm but the individual judge or another former official. This new structure left group members vulnerable and their contacts exposed to the growing witch hunt led by the media. The situation became more complicated for business disputants and their lawyers who were now forced to establish new connections and open new channels on a case-by-case basis.

The impeachment of President Carlos Andres Pérez in 1993 brought into evidence the diminished role of the once-powerful political parties and the profound gravity of the country's political crisis. In less than a year, Venezuela had two interim presidents,[13] which created a high level of instability, thus contributing to debilitate the already weakened judicial networks.

In 1994, Rafael Caldera, a prominent lawyer, university professor and seasoned politician—one of the founders of the COPEI party and the driving force behind the Punto Fijo Pact—was elected President for a second term.[14] Even though he had been one of the most emblematic representatives of the pacted democratic system, Caldera's comeback was not the result of his party's electoral machinery, but instead of the support from his newly formed group CONVERGENCIA along with a coalition of several small political organizations, which in colloquial Venezuelan jargon became known as "el chiripero" (the small cockroaches). During his administration, Caldera faced the worst financial crisis of Venezuela's recent history with the intervention of a dozen commercial banks, an out-of-control inflationary spiral, and widespread bankruptcies throughout the country.

The business sector took a direct hit, as many bankers and their lawyers were indicted and prosecuted for their involvement in a number of financial schemes that hurt thousands of bank customers. Even those who in the past had enjoyed immunity from political retaliation and had exerted control over powerful business networks, felt forced to hide or leave the country when confronted with the possibility of being jailed for years. The government, however, could successfully seize properties and art collections, and freeze bank accounts of numerous members of the business community. Paradoxically, the group that became the main target was that of Pedro Tinoco, and his bank (Banco Latino) was the first one subject to intervention.

In order to process the hundreds of claims filed in the wake of the financial crisis, the government created a special banking jurisdiction and appointed trusted judges to oversee the cases against the bankers, in a similar fashion to the strategies devised during the 1960s to face the urban guerrilla problem. However, as a few small networks of judges were still operative, some bankers were able to rely on them to successfully negotiate their indictments and were left

relatively unharmed. However, this proved to be a very difficult endeavor as the members of the traditional political and business elites had almost lost their leverage.

The financial crisis also had an impact on the configuration of the Venezuelan business community. As the indictments involving high-profile executives became widespread, many members of the traditional business elite left the country and relocated elsewhere, thus leaving behind many opportunities for newcomers to take advantage of. The banks, insurance companies and other financial institutions that had been subjected to intervention or seized by the government were later acquired by new economic groups, the majority of which were not connected to the traditional elites.

Unlike most of their predecessors, members of the emerging business community did not come from wealthy families, elite private schools or the same social country clubs. Their previous relationships, if any, were not multiplex or close-knit but single stranded and brief. They just happened to climb to the same positions at the same time and take equal advantage of the opportunities that the government had given them. These new groups later evolved to form what in Venezuela is currently known as the "Bolivarian bourgeoisie" or "Boliburguesía" (*New York Times*, August 20, 2006; *Washington Post*, December 3, 2006), which is none other than a new business elite led by people who have amassed significant wealth under the current political regime and who are closely connected to the government.

Lawyers and their networks in the age of the Bolivarian Revolution

Sweeping the house clean: Chávez's judicial revolution[15]

With the advent of the "Bolivarian Revolution" that started in 1998, the existing political structures suffered an important change. The new President Hugo Chávez, a former leader of the first 1992 coup attempt, vowed to undertake a complete overhaul of state institutions plus a deep legal reform process, including the drafting of a new Constitution. As part of this process, a Judicial Emergency decree was issued in 1999 with the general purpose of cleaning up the judicial system.[16] This emergency legislation vested Congress with ample powers to restructure the judiciary, including the removal and appointment of judges, decisions on the judicial budget, the creation of a Commission for Judicial Reform, and in general, control over all matters related to the functioning of the court system (Pérez-Perdomo 2007).

This government initiative had a positive public reception because in the previous years the media had given ample coverage to numerous corruption scandals. Also, the way in which the previous administration handled the financial crisis exacerbated the perception that state institutions required an overhaul, and the judiciary seemed to be the right place to start.

One of the first actions taken by the Emergency Commission was the dismissal or suspension of a large number of judges under charges of corruption or unjustified delay in deciding the cases brought before them. During the remaining months of the same year, 340 judges—representing one-third of the total number nationwide—were summarily dismissed. This move proved to be the final nail in the coffin of the Punto Fijo regime, but it also marked the birth of a new, overtly politicized judiciary.

At the outset, it was not hard to realize that these actions were mainly motivated by political retaliation against the old establishment and not by altruistic interest on the government's part in getting rid of corrupt judges and honestly improving the system (Pérez-Perdomo 2007). Within the first year of the Emergency decree, several government representatives admitted that one of the driving forces behind the massive dismissal of judges was their resistance to embrace the President's political project, thus causing some discontent among early supporters of the measure.

Many of the dismissed judges were replaced by militants of President Chávez's political party regardless of their professional qualifications or previous experience in similar positions. To the general dismay, some of the new judges had shady pasts and even criminal records, but the government was willing to overlook these details as long as the candidates offered their unconditional support to the Bolivarian Revolution. In order to guarantee that the newly hired judges would remain unreservedly loyal to the regime, their appointments were made temporary so they could be easily dismissed without cause when deemed necessary.

By the year 2001, these provisionary judges accounted for more than 80% of the total number nationwide (Pérez-Perdomo 2007). Traditional judicial cartels were in fact long gone, but the irony is that the new structure created a breeding ground for an even more politicized judiciary in which not only a fraction but all judges were expected to pay unconditional loyalty to the President's political agenda and were forced to be aligned with the official party or face summary dismissal and even prosecution.

Under the new system, the Judicial Council was eliminated and replaced, first by the Judicial Emergency Commission, and later on, by the Executive Direction for the Judicature (*Dirección Ejecutiva de la Magistratura*). The main idea was to centralize the governance of the courts under the Supreme Tribunal's authority in order to promote judicial independence. The reform also intended to eliminate the direct influence that Congress and the President had traditionally exerted upon the Judicial Council and the court system in general, a source of political trade-offs and constant negotiations.

Even though, in theory, this seemed like a perfectly benevolent solution, in reality, the new system gave unlimited powers to a handful of Supreme Court justices who, in addition to enjoying the supremacy within the organizational hierarchy, also attained control over the appointment of judges and made budgetary decisions of all sorts. These justices were obviously trusted men of the President who, as a result, became more powerful than any of his predecessors.

The heavy ideological component of the *Chavista* revolution has made it difficult for the few remaining members of the traditional business elite to continue exerting heavy influence on the public sector. Unlike during the times of the pacted democracy and the old judicial tribes, the new system is governed by the unilateral decision of a few who exert their power through a vertical chain of command, and the unconditional allegiance to the "revolution" trumps any other consideration.

There is no need for trade-offs or negotiations with competing groups because the official ruling party seems to be the only influential player. The system is, in a way, more straightforward than in the past, and it is definitely less inconspicuous. Appointments and dismissals of important judges and the outcome of high-profile cases are usually announced by the President in his weekly televised appearances even before they formally occur. Judges who preside over controversial cases are also directed to decide in a certain way, under the threat of being labeled as traitors.

Notwithstanding the openness of the way in which undue influence is now exerted, the rise of different economic groups with competing interests has motivated the formation of new cartels and corruption networks, which are now resurfacing within the new Venezuelan judiciary. Even though the country's social, economic and political reality is so distant from the times of the Punto Fijo Pact, the new judicial networks have replicated the same structure of the old tribes.

Perhaps the most notorious group is the one known as "la banda de los enanos" (the band of dwarves), which according to media reports is formed by at least fifteen judges in Caracas and a total of 400 nationwide.[17] The *enanos* also include a number of public prosecutors and a group of private lawyers. This network is said to be led by high-ranking public officials, including a former vice-President and a handful of Supreme Court justices. Members of this network have been connected to a number of high-profile cases and are most noted for extorting and pressing business leaders to negotiate several indictments for their involvement in a failed attempt to overthrow President Chávez in April of 2002. As the old business elites did during the heyday of the tribes, the members of the emerging *Boliburguesía* also use judicial mafias to manipulate court decisions and obtain political favors. The overall structure is very similar to the one adopted during the era of Punto Fijo. The big difference, however, is that only those who have connections within the ruling political party can take advantage of the influential cartels that have permeated the courts, and there is no counterbalance. The system is more loyalty-driven than in the past, but business disputants and their lawyers are still able to find their way around.

Notes

1 See www.menpa.com/esp/el_escritorio/index.php.
2 The firm still exists under the name *Tinoco, Travieso, Planchart & Nuñez*.
3 See www.bcv.org.ve/BLANKSITE/c3/galeria5.asp.

4 This is particularly true for students who had attended Colegio San Ignacio de Loyola, a Jesuit private school in Caracas, as some of the faculty were also affiliated with the Universidad Católica Andrés Bello.
5 See www.analitica.com/bitblioteca/venezuela/punto_fijo.asp.
6 The idea of a "pacted democracy" (Karl 1997: 93) was not an original creation of Venezuelan politicians. A similar arrangement known as "Turno Pacífico" was implemented in Spain by Antonio Canovas del Castillo between 1876 and 1923, during the reestablishment of the Bourbon monarchy.
7 It was not until the mid-1990s that other foreign law firms opened offices in Venezuela. To this day, there are at least five foreign firms operating in the country, and several others have entered into strategic alliances with local lawyers.
8 See www.bakernet.com/NR/rdonlyres/0E68C07F-32BE-49C5–9C4C-F652A9244E78/0/CaracasHistoryJuly2005.pdf.
9 This section is largely based on Gómez 2008.
10 Granovetter has called "neutralization" the phenomenon by which an individual "acknowledges the causal connection between a payment and a service, or that items have been appropriated as the result of a position held, but implies that *given the particular circumstances*, no moral violation has occurred."
11 *El Universal*, "La Tribu de Carmen" (March 12, 2006) (http://buscador.eluniversal.com/2006/03/12/pol_apo_12190F.shtml); *El Universal*, "Respuestas a Acusaciones y Otros Detalles de Sus Planes" (February 24, 2005) (http://buscador.eluniversal.com/2005/02/24/pol_apo_24106B.shtml).
12 The presence of a leader shows that these *tribes* are slightly different from most social networks in the traditional sense. Networks don't usually have a *head* or a hierarchically superior authority; and the decision-making process within them occurs as a result of consensus among the participants in the absence of a centralized entity. However, the Venezuelan judicial tribes have a clear leader who is considered the central figure and who is also regarded as hierarchically superior in relationship with the other members, and as such is the one in charge of coordinating the activities of the network.
13 Octavio Lepage Barreto, the then-President of Congress, served from May 21, 2003 to June 5, 2003. Ramón José Velazquez served from June 5, 2003 to February 4, 2004.
14 Caldera's first presidential term was from 1969 to 1974.
15 Very often, representatives from the government refer to the restructuring of the court system as the "judicial revolution" just to be consistent with the label that President Chávez uses for his regime, which he usually refers to as the Bolivarian Revolution ("la revolución Bolivariana").
16 *Official Gazzette of the Republic of Venezuela* 36(772), August 25, 1999.
17 See *El Universal*, "Fiscal General: Queremos ahondar en las denuncias sobre la Banda de los Enanos" (June 29, 2006) (http://buscador.eluniversal.com/2006/06/29/pol_ava_29A735095.shtml).

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Chapter 3

Lawyers, political embeddedness, and institutional continuity in China's transition from socialism*

Ethan Michelson

Legal practice for many Chinese lawyers is fraught with difficulties and dangers. The challenges they routinely face include various forms of obstruction, harassment, intimidation, and even physical abuse, often at the hands of public security administration (the police system) personnel, the procuracy (the public prosecutor's office), and courts—lumped together in common parlance as the *gongjianfa*. Surviving and even thriving in this hostile institutional environment demands formal and informal ties to the state bureaucracy.

The story of Chinese lawyers is the story of barriers and bridges. Since the revival of the legal profession in 1979, Chinese lawyers have tried to surmount the meso- and macro-level institutional barriers stymieing their work by building micro-level bridges to the public actors who control the resources on which they depend. They have mobilized personal, particularistic relations, or *guanxi*, in their efforts to find refuge from the troubles that plague their work, and to gain access to public actors inside the judiciary and elsewhere in the state bureaucracy who can expedite, facilitate, and simplify their work. Guanxi comes in many forms. Public actors oblige overtures from needy lawyers owing to their preexisting affective relations, often to help out an old friend or colleague. They also oblige lawyers in exchange for rents, as part of their instrumental money-influence exchange relations with lawyers. But valuable ties to the state come in forms besides individual political connections. Lawyers affiliated with organizations embedded in the state bureaucracy, too, enjoy shelter from the predatory behavior of state actors while enjoying privileged access and support from them. In short, the guanxi on which lawyers rely in their everyday work includes a diverse portfolio of direct and indirect, individual and organizational ties to the state that must be conceptualized more generally as *political embeddedness*.

In a little over a decade (prior to 1999), the Chinese bar completed an about-face from a fully public profession to an almost fully private profession. In the process of "unhooking and privatizing," as they lost their formal state-sector membership, lawyers' individual-level guanxi helped fill the void left in the wake of retreating organizational-level support. As they unhooked from the state at a macro level, lawyers found ways to stay hooked and to rehook by mobilizing micro-level political connections. Insofar as legal reform is commonly theorized

as eroding the value of ties to political officeholders, lawyers' mobilizations of political connections function as a theoretically important, albeit ironic, strategy for navigating their hostile institutional terrain.

Theoretical issues and debates: decline or persistence of guanxi?

Formal laws and regulations are at the center of the new institutional economics (see Carruthers [2006] for a review). In this theoretical framework which has also been labeled "rational choice institutionalism" (Campbell 2004), legal protections and legal constraints shape the micro-level incentives structuring social life. Grounded in this tradition, *market transition theory* predicts a decline in the relative value of political capital in the post-socialist context as markets with legally defined and legally protected property rights supply incentives stimulating investments in human capital and entrepreneurship. In short, know-how comes to eclipse know-who as regulatory institutions supporting and protecting know-how develop and mature in post-socialist market transitions (Nee 1989, 1991, 1992, 1996; Nee and Mathews 1996; Nee and Cao 1999; Cao and Nee 2000). Similarly, a theory of the *declining significance of guanxi* posits the diminishing importance of guanxi as a means of getting things done in the state bureaucracy. According to this complementary theory, over the course of institutional reform in China, universalistic and contractual relations have come to trump the mobilization of particularistic relations (Guthrie 1998, 1999, 2002; for a similar position, see Kennedy [2005]). Guthrie (1999:186) asserts that the development of a rational-legal system is obviating the need to pull strings to get things done: "the major force in the diminishing importance of *guanxi practice* is the rational-legal system that is being constructed at the state level" (emphasis in original; for similar statements, see Guthrie [1999:20, 177, 178, 185, 196]; Guthrie [2002:52]).

In this chapter I expand the analytical scope of guanxi beyond affective, emotive relations of reciprocal obligation (Guthrie 1998) to include a wider array of concrete strategies and resources individual and organizational actors develop and mobilize in response to contextually specific constraints and challenges posed by contextually specific institutions. Ties to the state include both *individual guanxi* and *organizational guanxi*. Individual guanxi includes friendships and other direct and indirect personal connections that may belong to the category of *emotive guanxi* of the narrow, cultural type or to the category of *instrumental guanxi* that includes money-influence exchange. Organizational guanxi includes *administrative guanxi* and other forms of formal institutional support. Not only are these multiple forms of guanxi overlapping and difficult to disentangle empirically (Walder 1986:179; Shi 1997:69; Gold et al. 2002; also see Karklins 2002), but one form of guanxi can be expressed idiomatically to obscure another form of guanxi (Wank 1999). At a more general level, the advantages that accrue from being embedded in social networks that bridge institutional outsiders (such as lawyers) to institutional insiders (such as members of the gongjianfa) can be conceptualized

as the benefits of *political embeddedness*. Political embeddedness here differs from earlier conceptualizations. Whereas in earlier research political embeddedness refers in general to the *political* forces and in particular to the *legal* constraints that shape economic institutions (Fligstein 1990; Zukin and DiMaggio 1990), in this chapter it refers to ongoing structural relations to the state and its actors—relations that are both formal and informal, and that are bureaucratic, instrumental, and affective.

A comparative look elsewhere in time and place shows that lawyers mobilize direct and indirect connections to judicial insiders not only in China (Cheng and Rosett 1991; Jones 1994; Winn 1994; Dezalay and Garth 1997; Appelbaum 1998; Wank 1999:115; Alford 2002:184; Potter 2002; Schramm and Taube 2003), but also in a diverse array of other contexts, including the United States (Galanter 1974:99; Black 1976:45; Black 1989:16–17; Sarat and Felstiner 1995:101–2; Kritzer 1998:16, 196; Parikh and Garth 2005:297), Mexico (Lomnitz and Salazar 2002), and India (Gandhi 1982). While it is the general case that lawyers everywhere depend to an important measure on social connections, this chapter attempts to identify contextually specific institutions and institutional logics giving value to contextually specific forms of capital (Bourdieu 1986; Friedland and Alford 1991), including guanxi.

Power-dependence (Emerson 1962; Blau 1964) is one concrete condition giving rise to the guanxi imperative. In the process of collecting evidence, Chinese lawyers depend on access to information and documents controlled by government agencies and other public organizations. Any lawyer who does any amount of trial work depends on resources controlled by the courts. Any lawyer with any volume of criminal defense work depends not only on the criminal courts, but also on cooperation from public security organs (which gather evidence and detain criminal suspects) and the procuracy (which prosecutes criminal suspects). Chinese lawyers who despair of the difficulties of working with the gongjianfa and exit criminal defense practice cannot avoid state agencies without exiting the system altogether and abandoning the practice of law. As we would expect anywhere in the world, the specter of state administration is inescapable in the practice of law in China. There is no viable substitute for the gongjianfa and other parts of the state bureaucracy. If lawyers have trouble getting in through the front door, they try the back door. But they must gain access somehow, "by hook or by crook."

In the Chinese context, two additional properties of lawyers' institutional environment continue to valorize political connections above and beyond the general case. First, the judiciary remains fused to the state, embedded in and subordinated to the rest of the government bureaucracy (i.e., there is no meaningful separation of powers or judicial autonomy) (Cohen 1997; Lubman 1999; Potter 1999; Woo 1999; Cho 2003; Zhang 2003; Liu 2006). Second, as we will see in greater detail below, lawyers face enduring institutional discrimination that relegates them to the marginal status of outsiders or interlopers.

A consequence of institutional barriers to institutional outsiders such as lawyers is the development of micro-level bridging strategies that give enduring

value to political capital. They embed themselves deeply in clientelist networks bridging public and private spheres, connecting themselves directly and indirectly to government officials as a coping strategy, a means of gaining informal access and support. In what Solinger (1992) calls the "merger of state and society," public and private spheres have become symbiotically linked through micro-level behavior (Wank 1999). Lawyers find patrons in the state to protect their interests. In return, these patron-guardians expect and receive financial rewards. This mutually beneficial coping strategy that has developed in a contextually specific institutional environment has been labeled *symbiotic clientelism* (Wank 1999).

In addition to conceptualizing guanxi as a means of engaging in corrupt practices, of circumventing, bending, and breaking legal rules and procedures (Guthrie 1999:177), guanxi must also be understood as a means of fending off corrupt practices. To be sure, lawyers survive and thrive by developing relationships, often through bribes and kickbacks, with personnel in the gongjianfa and elsewhere in the state bureaucracy. But lawyers endowed with political connections are also better equipped than those without such social resources to avoid various forms of unlawful rent-seeking. Political connections improve the success of lawyers not only by enhancing their ability to secure preferential access to essential bureaucratically controlled resources, and not only by helping them sway and circumvent official procedures, but also by sheltering them from predatory state agents.[1]

In order to set the stage for the empirical analysis that follows, I will first provide some historical background on the meso- and macro-level institutions that shape the micro-level responses of lawyers. In the next two sections I draw on documentary sources as well as interviews I and my research assistants conducted almost entirely between 1999 and 2001.[2]

Lawyers' difficulties

Chinese lawyers' woes have been more thoroughly documented in the press than in scholarly literature (but see Yu 2002, Sheng 2003, 2004, and Cai and Yang 2005). For their reports published in *The New York Times* on "ragged justice" in China, in which lawyers' abrasive relationship with the state is prominently featured, journalists Joseph Kahn and Jim Yardley won the 2006 Pulitzer Prize (Kahn 2005a, 2005b, 2005c, 2005d; Yardley 2005a, 2005b, 2005c, 2005d). This particular series, however, is merely an extension of an established genre of English-language media reports on the challenges Chinese lawyers face in their day-to-day practice (e.g. Becker 2000; Rosenthal 2000; Eckholm 2001, 2002; Pomfret 2002a, 2002b; also see *Human Rights Watch* [2006]).

Chinese lawyers report a wide array of difficulties in their work. The so-called "three difficulties" include: (1) the difficulty of collecting evidence, (2) the difficulty of meeting with clients, and (3) the difficulty of reading and photocopying documents. Beyond these, their difficulties also include police evidence tampering,

police intimidation of witnesses, and outright police harassment and abuse, including beating, kidnapping, and illegal detention. Of all 79 cases regarding lawyers' rights investigated by the All-China Lawyers Association (ACLA) between 1999 and 2001, 21 were related to the unlawful imprisonment, detention, or prosecution of lawyers or to the taking of lawyers as hostages, the kidnapping of lawyers, and the beating of lawyers, while 31 were related to the obstruction of lawyers' work. These cases represent only the relatively few cases reported to and investigated by the ACLA, and thus exclude an undoubtedly far greater volume of similar cases brought to local bar associations or not reported to or investigated by any organizational entity (Wang 2004).

Although similar difficulties in securing the assistance and cooperation of state actors afflict lawyers in business fields of practice (Li 2002), lawyers in the field of criminal defense are at particular risk (but see Fu [2006]). As one lawyer said to me, "When you go to the public security and ask to see the criminal suspect, it would be easier to climb up to the heavens. … We simply can't get access to our clients" (E11). Criminal defense lawyers also face the threat of being criminally prosecuted themselves on (often trumped-up) charges of fabricating or concealing evidence (Michelson 2003:99–111). Not surprisingly, lawyers have expressed reluctance to perform criminal defense work (I4, I13, E11, and E33).

The difficulties faced by Chinese lawyers in general and Chinese criminal defense lawyers in particular reflect the marginal status of lawyers in the broader socialist context. "Socialist legality"—legal institutions governed by the principle that law is a political tool fundamentally serving the interests of the state (Markovitz 1996:2295; Petrova 1996:543; Potter 1999)—reduces lawyers to the status of outside annoyance, a thorn in the side of the gongjianfa. As a lawyer in Beijing put it, "In actuality, the gongjianfa are in opposition to lawyers" (I12). Another lawyer referred to the "antagonistic character of the relationship between lawyers and the gongjianfa" (I21).

In addition to the troubles the gongjianfa inflict on lawyers, officials in the judiciary have also developed an assortment of techniques for extracting rents from lawyers (Alford 1995:33; Ma 2001), rents on which the operation of gongjianfa are increasingly dependent. Pretenses or euphemisms for rents include "file retrieval fees" and "service fees" (Wang and Gao 2000:8). Rents are also exacted in the form of kickbacks from lawyer fees for referrals from judges (Wang and Gao 2000:7), sometimes called "cash cases" or "friendship cases" (Cai 2006). Lawyers tire of the heavy "extra-legal" investments demanded by trial work (E33). At the same time, however, ordinary people with legal needs often hire lawyers according to their stock of guanxi with judges and other important members of the gongjianfa (Xie 1994). As a consequence, lawyers interviewed in Wuhan "universally acknowledged the importance of connecting and cultivating guanxi with judges" (Wang and Gao 2000:10). Indeed, lawyers even used to advertise their special insider connections. In short, lawyers' guanxi imperative stems not only from the gongjianfa, but also from competitive market pressures and pressure from their clients and prospective clients.

Political embeddedness as a source of protection

Deng Xiaoping, China's paramount leader from the late 1970s until the early 1990s, proclaimed in 1980 that "the ranks of lawyers must expand, to fail to create this legal system is unacceptable" (Li 1997:467, 722). Given the precarious history of lawyers, however, few people were brave enough or desperate enough to enter the bar. The socialist history of lawyers did not inspire confidence among those who were called upon to staff the newly revived bar.

After the system of lawyers that prevailed during the Republican period (1911–49) was formally abolished in September 1949, Republican lawyers were labeled "black lawyers" and purged in 1949–50 (Cui et al. 1999:219; Guo 2000:99). In 1954 a new system of lawyers modeled after the Soviet system was developed on an experimental basis in several cities including Beijing, Tianjin, Chongqing, and Shenyang. The new system was formally established in 1955, the same year in which the Beijing Bureau of Justice was established. Following the 1956 Hundred Flowers Campaign in which many lawyers participated alongside intellectuals who harshly criticized the new government, lawyers who sympathized with the campaign were branded "Rightists" and purged in 1957 (Lubman 1999:77–78; Guo 2000:99–100). In 1957, 30% of lawyers in Beijing were classified as "Rightists" (Cui et al. 1999:223).

In light of this history, the people who were called upon to serve as lawyers in the late 1970s and early 1980s were understandably skittish. Part of the official strategy to attract and retain lawyers included giving them civil service slots in the state personnel system. This was an official status bestowed upon lawyers expressly to offset their socialist marginalization, to provide a real measure of protection against official harassment, and to assuage fears of political persecution (Guo 2000:101). For the first decade following their revival in 1979, lawyers remained "hooked" to the state; they remained embedded in and an inextricable part of the state bureaucracy. Without such an institutionalized safeguard against persecution, lawyering was widely perceived as little less than suicidal:

> At the time a lot of people were scared by all the earlier political campaigns. As a result, in 1979 and 1980 no one dared work as a lawyer. They were under the pressure of political fear because they had to sing opposing melodies with the courts, sing opposing melodies with the government, and defend people arrested by the government. So various measures were adopted. The Organization Department of the Party Central Committee issued a directive in 1979 stating that lawyers must be respected as civil servants, that they were government officials.
>
> (E28)

Guo (2000:101) reaffirms the institutional logic behind lawyers' official status:

> To enable lawyers to perform their work without the threat of being accused as "accomplices" of the suspects, it was necessary to make them

> State legal workers, which was at a similar level to judges and public prosecutors. At a certain moment, the Supreme People's Court even issued circulars to criticize certain judges for their critical attitude towards lawyers. In order to make lawyers look like part of the government establishment, China went so far as to create a police-style uniform clothing for lawyers.

From the time of their revival in 1979 until the end of 1986, lawyers were treated as "administrative cadres" and assigned administrative ranks according to the complex *nomenklatura* system of civil service grades (Luo 1998:2). The first sentence of the 1980 Provisional Regulations on Lawyers defined lawyers as "state legal workers" (Article 1). Like other state cadres, lawyers "ate imperial grain" (Dai and Zhu 1994). A lawyer I interviewed said that lawyers at the time "were allocated slots as state civil servants, as state employees" (E16).

The political embeddedness of specially appointed lawyers

An additional measure adopted to satisfy the needs of the expanding legal system and to enhance lawyers' safety in the process of carrying out their work was the active recruitment of lawyers from organizations that were the very sources of the profession's plight: "Lawyers came primarily from personnel in government agencies and public organizations, especially from cadres carefully selected from central and regional party and government organs; some were selected from the ranks of decommissioned military officers" (Li 1997:471). Such politically connected lawyers who had already retired from their former posts were given a new official label in 1984: "specially appointed lawyer" (*teyao lüshi*). In response to a local government request for guidance, the Supreme People's Court, in its 1984 Written Reply Regarding Permission to Take in as Specially Appointed Lawyers Retired Personnel Who Meet the Standards of Lawyers, stated that retired personnel from judicial and other government organs were qualified to work as specially appointed lawyers if they were in good health and met conditions stipulated by the Provisional Regulations on Lawyers and other requirements set by Ministry of Justice documents (BBJ 2001:103–4).

Specially appointed lawyers were described as " … expert legal personnel who, after retiring from judicial agencies, legal teaching, or scientific or other units, bring into play their post-retirement energies by becoming lawyers" (Zhu 1988:E28). Together with other lawyers who had prior careers, they were sometimes called lawyers who "become monks in mid-life," an expression that refers to people who switch careers in their 40s or 50s. Specially appointed lawyers were "old cadres" (BBJ 2001:101), likened to "old doctors" for the wealth of experience and comfort they brought to people who relied on their expertise (Zhu 1988). They were "old comrades who have been retired for at least two years after working as judges in the People's Court, as procurators in the People's Procuracy, as preadjudication personnel in a public security organ, or

after performing some other kind of judicial work for at least 10 years" (BBJ 2001:105).

Entry from the gongjianfa did not require formal educational certification or passing the bar examination.[3] Eligibility for admission to the bar was extended to anyone with at least a junior college degree in law and at least two years of law-related work experience such as law school teaching experience; anyone with legal training and work experience in the courts or procuracy; or anyone with a university degree in any subject who underwent legal training and was able to demonstrate legal ability (Article 8 of the Provisional Regulations on Lawyers). Only with the enactment of the 1996 Law on Lawyers did passing the national lawyers examination become a licensing requirement (Article 6).[4]

Specially appointed lawyers' special insider connections to their old friends in the gongjianfa—their political embeddedness—shielded them from the kinds of problems routinely suffered by lawyers at the hands of gongjianfa personnel. To be sure, it is the general case that political officeholders and other government employees everywhere, including the United States, often put their accumulated connections to good use in private practice. But the special case of institutionalized discrimination against lawyers and the institutional fusion of the legal system to the state bureaucracy gives particular value to political connections above and beyond the general case. In the words of one lawyer I interviewed, "Lawyers who used to work in the gongjianfa have an absolute advantage. There's no comparison. That they use their prior guanxi in their current practice is a one hundred percent certainty" (E13). Because of their insider advantages, specially appointed lawyers—who might also be labeled "specially advantaged lawyers"—were particularly well suited to lawyers' hostile institutional environment: " … they had personally weathered the storms of China's many political struggles" (Zhu 1988).

Although in Beijing the last "specially appointed law firms" were established in 1986, and although in 1988 they were forced to drop "specially appointed" from the names of their firms (BBJ 2001:103–4; Luo 2004:35), the ranks of specially appointed lawyers continued to grow. At their peak, in 1996, there were over 15,000 specially appointed lawyers nationwide (18% of all lawyers). In Beijing their peak came in 1997 at about 1,300 (12% of all lawyers, although in 1989 and 1990, at about half their 1997 population, they represented 23% of all lawyers in Beijing). Only a few years later this official category suddenly disappeared. In accordance with the 1999 Ministry of Justice Notice Regarding the Issue of Registering Specially Appointed Lawyers, starting in 2001, specially appointed lawyers were required either to pass the bar examination or to abandon practice (E8). Those who had acquired their lawyers' licenses prior to the 1997 passage of the Law on Lawyers were simply to be relabeled "full-time lawyers" (*zhuanzhi lüshi*). In 2000, after this directive was issued, the *China Law Yearbook* (ZFN) suddenly stopped reporting specially appointed lawyers. Likewise, in 2000 the *Beijing Statistical Yearbook* stopped reporting specially appointed lawyers.

The political embeddedness of part-time lawyers

In addition to specially appointed lawyers, the position of part-time lawyers (*jianzhi lüshi*) was also developed to help meet the growing demand for lawyers. Part-time lawyers are formally based at other work organizations (excluding the gongjianfa) and, from an official standpoint, only moonlight as lawyers. After 1989, only teaching and research personnel of law schools and other legal research units could work as part-time lawyers (E28). The formal institutional affiliation of a part-time lawyer is her or his law school or research unit, not a law firm. Beijing's first "part-time law firm" was established in 1984 by the China University of Political Science and Law (BBJ 2001:101). Part-time lawyers are thus, in most instances, teachers at educational institutions. Their firms are typically operated by their universities. For example, the Kehua Law Firm was established by the Chinese Academy of Social Sciences and the Dishi Law Firm was established by Renmin University of China. Because they are already members of prominent public organizations, part-time lawyers' state political embeddedness is self-evident. Moreover, as members of often prestigious institutions of higher learning, and in contrast to the status of "full-time lawyers," the high and unambiguously official status of part-time lawyers shields them from many of the difficulties that plague lawyers without this official status.

Three patterns emerge from an analysis of the changing population and composition of lawyers in China. First, until recently, specially appointed and part-time lawyers accounted for a substantial portion of all lawyers: "China's system of lawyers possessing special Chinese characteristics has been formed with full-time lawyers as the backbone and with specially appointed and part-time lawyers as the two wings" (Zhu 1988). Second, full-time lawyers have always accounted for a smaller proportion of the lawyer population in Beijing than in China as a whole, undoubtedly because Beijing has the greatest concentration of universities and research institutes and the greatest concentration of government officials in China. Third, by 2004 the official category of full-time lawyers had come to account for almost all lawyers.

The political embeddedness of state-owned law firms

Much of the protection enjoyed by specially appointed lawyers and part-time lawyers against the predatory behavior of people in the gongjianfa and elsewhere in the state derived from their personal connections to friends in high places, resulting from their personal career backgrounds. However, they also derived protection from their law firms. That is, it is important conceptually and analytically to separate *individual political embeddedness* from *organizational political embeddedness*. The advantages of state-sector membership in the bar are no different from the advantages of "wearing a red hat" in private business: registering as a state-owned business in order to minimize the uncertainty and vulnerability associated with private-sector membership (Solinger 1992:126–28; Wank 1999). A lawyer's

organizational affiliation is of enormous consequence to her ability to avoid problems in legal practice. For this reason, when the names of legal advisory offices were changed to law firms, lawyers voiced intense opposition for fear it would erode what limited support they had from public officials. When the bar was first revived, lawyers worked in "legal advisory offices" (*falü guwen chu*) modeled after Soviet law offices (see Feinerman 1987:120; Zheng 1988:490; Gelatt 1990–91:761; Zhang 1999:63). By 1984 the name "legal advisory office" had already been changed to "law firm" (*lüshi shiwusuo*), although in reality the name "law firm" had already been adopted in parts of China by 1983 (Zhang 1999:63; BBJ 2001:91, 94). In a 1983 meeting in Wuhan on legal reform,

> The majority of comrades were opposed to the idea of changing the names of legal advisory offices to "law firms" for the following reasons: (1) "Advisory office" implies "official," whereas "law firm" smells like "private" [*min ban*]. Changing the name would lower the status of lawyers' work in the eyes of people. (2) Changing their name so soon after their establishment might mislead some people into believing the state's policy and attitude toward lawyers have changed.
>
> (Li 1997:459)

For the very same reasons, meeting participants were equally opposed to changing the official status of lawyers from "state legal workers" and to making the budgetary transition to a system of "assuming sole responsibility for profits and loses" (Li 1997:459–60). Such opinions notwithstanding, this is precisely the direction in which law firm reform unfolded.

> In the past the Chinese government gave money to law firms according to the number of slots they had in the state personnel allocation system. If there were thirty people in the firm, then the government allocated a budget according to thirty personnel. The money lawyers billed was first given to the government. The firm's income had to be given to the government to guarantee the salaries of the firm's personnel. Later it was realized that this was too bureaucratic and an obstacle to the development of the system of lawyers.
>
> (E28)

The process of "unhooking and privatizing" law firms began in the late 1980s. In 1988 the first private law firm was unveiled under the label "cooperative" (*hezuo*) law firm. In contrast to state-owned firms, cooperative firms were self-accounting and could hire and fire lawyers freely; they were not part of the state personnel allocation system. But in name their assets remained owned by the state. Insofar as the state relinquished control of the day-to-day management of operations but retained formal ownership, cooperative firms were analogous to "collective enterprises": for most practical purposes they were private, but they

possessed "socialist characteristics" in terms of property rights. The unhooking and expansion of the bar accelerated in 1992 following Deng Xiaoping's call in his Southern Tour speeches for greater economic reform, accelerated privatization, greater openness to the outside world, and the deepening of the legal reforms (Dai and Zhu 1994; Zhang 1999:64; BBJ 2001:95). In the spirit of Deng's exhortations for greater and faster reform, in 1993 the Ministry of Justice circulated a directive (Plan Regarding Deepening the Reform of Lawyers' Work) ratified by the State Council in the same year that effectively stripped the bar of its former civil service character. The politically embedded status of law firms and lawyers as state personnel with administrative ranks was formally abolished (Zhang 1999:72). Even most state-owned law firms were on the road to operational and fiscal autonomy. The 1993 directive also formally sanctioned partnership law firms. In contrast to cooperative firms, which ultimately remain state property and whose liabilities are limited to its assets, partners of partnership firms bear unlimited liability jointly and severally (Zhang 1999:62–93; Law on Lawyers, Articles 17 and 18). After 1993, from both fiscal and organizational standpoints, state-owned law firms became virtually indistinguishable from their private-sector counterparts.

By 1993 the significance of membership in the state sector had become less about property ownership by and fiscal dependence on the state, and more about less tangible forms of support from and access to other state organizations that reduce the likelihood of encountering trouble in the course of legal practice. Members of state-owned firms remained "inside the system" (*tizhi nei*), part of the state bureaucracy, whereas their private-sector counterparts were situated "outside the system" (*tizhi wai*). Bureaucratic rules of access to other state organizations in general privilege people within the state bureaucracy and in particular people in more highly ranked state organizations. According to the prevailing institutional norms and rules of China's socialist bureaucracy, gaining access to a given state organization typically required making contact through a higher-level overseeing unit that considered requests only from units of the same rank (Lieberthal and Oksenberg 1988:143). Thus, in the words of a research informant, "In the 1980s a lot of importance was attached to rank and level [of law firms], which unit was of a higher rank than other units" (E8). The following is an extreme case of political embeddedness: before it merged with the Jiawei Law Firm in 2001, the Landun ("Blue Shield") Law Firm, which had been established and operated by the China People's Public Security University, itself under the authority of the Ministry of Public Security, would have offered to its lawyers unparalleled access to and protection against the police and other criminal justice personnel.

No different from the population of lawyers, the population of law firms experienced rapid growth beginning only in 1992. In 2000 a major drive to unhook and privatize all remaining state-owned law firms was mandated by the State Council and carried out by the Ministry of Justice and local bureaus of justice. Whereas in China as a whole 15% of law firms remained state-owned in 2004, in Beijing the process of unhooking was already complete in 2001.

Data and methods

Data from two surveys of lawyers I carried out in the summer of 2000 in Beijing (N = 462) and 24 small and mid-sized cities in 16 provinces outside Beijing (N = 518) confirm the general patterns described in the foregoing. I cannot overstate the fortuitousness of my timing. As we saw, between 1999 and 2002 almost all state-owned firms shut down or privatized and specially appointed lawyers, as an official registration status, entirely disappeared. Had I conducted the surveys any later I would have missed most if not all state-owned firms and specially appointed lawyers. In Beijing I collected data from lawyers in 131 identifiable firms, representing 38% of all law firms in the city in 2000. The proportion of all firms accounted for by the 185 identifiable firms in my multi-city sample is impossible to estimate given the absence of a comprehensive national law firm directory. However, in the 10 cities with available local law firm directories, I surveyed an average of 34% of all firms.

Because cities were not randomly sampled, and because we cannot be certain about the quality of the sampling either of firms or of lawyers within firms, we must treat the findings I present in this chapter as more suggestive than conclusive. This caveat notwithstanding, I hasten to add that, at the time of this chapter's publication, no comprehensive sampling frame of Chinese lawyers can be constructed from publicly available information.

The next section contains findings from my analysis of lawyers' answers to questions about the nature and extent of—and the means by which they alleviate—their difficulties. I construct my dependent variables from information about: the marginal status of lawyers, support and cooperation from government agencies, obstructionism and other difficulties in criminal defense work, and the importance of guanxi in legal practice. In my effort to explain variation in the severity of the plight of lawyers, I focus my analysis on the effects of exposure to hotbeds of trouble (criminal defense specialization) as well as individual-level and organizational-level measures of political embeddedness: career history information (prior work in the gongjianfa), lawyer registration status (specially appointed, part-time, or full-time), and law firm ownership (state-owned).

Findings

Political embeddedness became a dominant theme early in the course of my field research. One of the first lawyers I interviewed explained that many lawyers first pay their dues for a few years to a government bureau for the sole purpose of accumulating the social capital necessary for subsequent legal practice. He specialized in tax work after working in the Ministry of Taxation (E24). My survey data showed this to be a widespread pattern. Lawyers in my survey samples who formerly worked in banks reported a dramatically greater percentage of billings from "finance and banking" than did lawyers without this background. Former government officials were dramatically more likely than lawyers without this

background to cite "administrative law" and "government counsel" as their specializations. Almost half of all lawyers who reported real estate as their primary specialty also reported emerging from government bureaus including the State Land Management Bureau, the Construction Commission, and the Environmental Resources Bureau. To be sure, it is the general case that people everywhere choose their vocations, and specific fields of practice within their vocations, in no small part according to the social resources upon which they can draw for support. However, the fusion of China's legal system to the rest of the state bureaucracy and the marginal status of Chinese lawyers valorize political connections above and beyond the general case.

The distribution of lawyers among firms of different types of ownership reflects the unequal distribution of links to the state. While the overall distribution of all lawyers reported by all respondents was 70% full-time, 24% part-time, and 6% specially appointed, in state-owned firms the distribution was 56% full-time, 33% part-time, and 11% specially appointed. Although 27% of all lawyers and 22% of all full-time lawyers belonged to state-owned firms, a disproportionately high 39% and 51% of all part-time lawyers and specially appointed lawyers, respectively, belonged to state-owned firms. Among respondents, specially appointed lawyers were over 60% more likely than average to belong to state-owned law firms (0.47 vs. 0.29) and two-thirds as likely to belong to partnerships (0.43 vs. 0.66). Although they were disproportionately represented in state-owned firms, specially appointed lawyers and part-time lawyers were also recruited into partnership firms, undoubtedly for the advantages they brought to firms lacking formal institutionalized support. At the same time, specially appointed and part-time lawyers remained in state-owned firms that privatized and registered as partnerships.

Specially appointed and part-time lawyers were embedded in the state bureaucracy not only by virtue of their membership in state-owned law firms, but also by virtue of their personal backgrounds: the proportion of specially appointed lawyers who were CCP members (0.81) is more than double the overall average (0.39), and part-time lawyers were over 50% more likely than full-time lawyers to be CCP members (0.56 vs. 0.36). Almost 90% of specially appointed lawyers were either CCP members or Communist Youth League members. Career background data also reveal the political embeddedness of specially appointed and part-time lawyers. Specially appointed lawyers were far more likely than lawyers in the other two registration categories to have worked either in the courts or in the procuracy. However, specially appointed lawyers were not significantly more likely than average (0.07 vs. 0.05, respectively) to have emerged from the public security administration (the "gong" in the gongjianfa). Compared with only 29% of all lawyers, 72% of specially appointed lawyers reported prior careers in the government, gongjianfa, or military. Also consistent with expectations, part-time lawyers, compared with the average lawyer, were almost four times more likely to report prior work as teaching faculty in institutions of higher learning (0.50 vs. 0.14, respectively) and less than

half as likely to spend more than 40 hours per week working as a lawyer (0.18 vs. 0.45, respectively). One informant underscored the enduring importance in the private bar of former public-sector membership:

> Behind some successful law firm partners are their "bosses," the ones who in actuality take the firm's profits. They aren't even lawyers, but people who wield guanxi resources. But on their business cards they print "high-level lawyer" because no one ever bothers to verify. … What is this thing called "high-level lawyer"? Sometimes they are former bureau chiefs from the Bureau of Justice, or former deputy bureau chiefs, and after they retire they give themselves the "high-level lawyer" title.
>
> (E22)

Because of their prior careers in the courts and the procuracy, specially appointed lawyers were far more likely than average to specialize in criminal defense work. Another indication of membership in and ties to the state is housing benefits, the socialist privilege of obtaining a state housing allocation. The proportion of specially appointed lawyers with state housing (0.56) was almost double the overall average (0.31), and part-time lawyers were almost 30% more likely than full-time lawyers to have state housing (0.37 vs. 0.29).

Because most specially appointed lawyers were retired officials from the gongjianfa, specially appointed lawyers were almost 20 years older than average (54 years vs. 35 years old, respectively). Whereas only 14% of all lawyers in the samples were over 45 years of age, 72% of all specially appointed lawyers were in this age category. Even more striking, whereas only 3% of all lawyers in the samples were 60 years of age or older, half of all specially appointed lawyers were in this age category. Because lawyering is not their first career, their average tenure as lawyers is only 1.5 years longer than the overall average and they have been licensed as lawyers for only about a year longer than average.

Lawyers' responses to seven statements on the survey questionnaire reflect their overwhelmingly negative assessments of their status, the level of support (or the lack thereof) extended to them by government agencies, their troubles in criminal defense, and the importance of guanxi in legal practice. Only 6% of respondents indicated any degree of agreement with a statement that lawyers' rights were sufficiently strong ("Currently the laws concerning the rights of lawyers are sufficient to guarantee that lawyers' functions are brought into full play."). Respondents supplied similarly negative assessments of the amount of support they received in the process of gathering evidence. With respect to the second and third statements provided on the survey questionnaire, lawyers complained more intensely about weak support from government agencies than they did about weak support from civil organizations (*jituan*) and individuals. Whereas 32% said it was "rare" to receive the full cooperation of civil organizations and individuals ("In general, in the process of gathering evidence, lawyers get the full cooperation of the related individuals and civil organizations."), 42%

said it was "rare" to receive the full cooperation of government offices ("In general, in the process of gathering evidence, lawyers get the full cooperation of the related government offices."). As much as the surveyed lawyers complained about the foregoing problems, they complained even more vehemently about their criminal defense woes; in response to the fourth statement of the survey, 66% of the respondents indicated that it was "prevalent" and only 8% that it was "rare" for police to obstruct lawyers' criminal defense investigations ("In criminal cases, public security organs always find ways to obstruct lawyers' investigation work."). At the same time, in response to the fifth statement, exactly half of the respondents said it was "prevalent" and 14% that it was "rare" for lawyers to face discrimination vis-à-vis procurators ("In criminal cases, the prosecution has an advantage over the defense; there is no equality to speak of between the prosecution and the defense.").

Survey respondents also reported the remarkable prevalence and disheartening consequences of guanxi in the legal system. In response to the sixth statement, exactly half indicated observing that it was "prevalent," and only 11% said it was "rare" for lawyers to build relationships with judges ("Lawyers I know about spend a lot of time fostering personal relationships [*gao hao geren guanxi*] with judges."). At the same time, in response to the seventh statement, 44% said it was "prevalent" and only 17% said it was "rare" for the quality of a lawyer's relations with a judge to affect case dispositions ("The quality of a relationship [*geren guanxi*] between a lawyer and a judge will not influence how a court case is tried.").

I combine these seven items in three ways both to render more parsimonious the analyses that follow and to ensure the robustness of the empirical patterns that emerge. First, I analyze the average score of all seven items. In order to make the responses comparable across items worded in both positive and negative directions, I calculated the mean score after reversing the order of the response categories of negatively worded questions. Thus, higher mean scores reflect more positive assessments of lawyers' institutional environment, and lower scores reflect greater despair of their woes. Cronbach's alpha for all seven items is 0.65, meaning they can be meaningfully combined into an aggregate scale of vexation with their institutional environment. This measure ranges from 0 to 5. Second, I analyze counts of negative responses and counts of positive responses. Third, I analyze the proportion of respondents who, in response to the seven questions, chose any positive response and the proportion of those who chose any negative response. These measures range from 0 to 1.

If lawyers' opinions about their institutional environment were equally distributed, the average score of all seven items would be 2.5, the midpoint on the 0–5 scale of responses. In fact the average score is almost a full point lower. After reversing the response categories of negatively worded items, the mean and median scores are 1.712 and 1.714, respectively, and the mode is 1.286. While not a single respondent chose the most positive response category for all seven items, eight respondents chose the most negative response category for all seven

items. Likewise, whereas only one respondent chose one of the two most positive response categories for all seven items, 48 respondents (or 5%) chose one of the two most negative response categories for all seven items. The average number of negative responses was over four times greater than the average number of positive responses (3.4 vs. 0.8). Whereas 48% of respondents supplied at least one positive response, 92% of respondents supplied at least one negative response. Finally, whereas only 8% of respondents supplied at least three positive responses, 66% of respondents supplied at least three negative responses. Differences between the Beijing and multi-city samples are not statistically significant.

Not only were lawyers on the whole remarkably acerbic, but the extent of their acerbity varied according both to their exposure to risk and to the strength of their political ties to the state. Lawyers specializing in criminal defense took greater umbrage at their institutional environment than did their non-specialist counterparts. Lawyers who reported prior careers in the court system expressed more positive assessments of their institutional environment. Because of the advantages they derived from their special backgrounds in the gongjianfa, specially appointed lawyers, compared with their full-time counterparts, were far more sanguine and far less cynical about their institutional environment. Specially appointed lawyers were almost 75% more likely than full-time lawyers to supply at least one positive response (0.78 vs. 0.45).

The effects of firm ownership are similarly strong. Compared with their counterparts in partnership firms, lawyers in state-owned firms averaged more positive responses and fewer negative responses. At the same time, lawyers in state-owned firms were 30% more likely than their counterparts in partnership firms to supply at least one positive response (0.58 vs. 0.44, respectively). Compared with their full-time counterparts, part-time lawyers, who as teaching and research faculty of universities and research institutes enjoyed formal membership in the state bureaucracy, were far more sanguine and supplied far fewer negative responses about their institutional environment.

The foregoing relationships are robust to controls in multivariate regression analysis (details not presented). In short, saturated regression models confirm that, whereas politically unembedded lawyers were far more negative than they were positive, politically embedded lawyers were about as positive as they were negative.

Conclusions and implications

It has become a banal truism in law and society scholarship that the law on the books tells us little about the law in action. The formal appearance of the law often reveals little about its substance. Yet the new institutional economics tends to treat law as a transparently and predictably enforceable set of rules to which all parties are equally constrained. Through empirical scrutiny of on-the-ground legal processes, this chapter builds on Suchman and Edelman's (1996) critique of such "naive Legal Formalism." It supports an alternative scholarly tradition in

which institutional form and institutional substance are loosely coupled or altogether decoupled, and in which ritualistic and ceremonial conformity to standardized models belies and obscures enormous local variation in on-the-ground behaviors and meanings within organizations (Meyer and Rowan 1977; DiMaggio and Powell 1983).

In this chapter we have seen the enduring salience of the institutional legacy of socialist legality, the remarkable resilience of an institutional logic antithetical to the interests of lawyers. In response to the wide array of troubles they report, including obstruction, harassment, threats, violence, and rent-seeking, lawyers have learned to cope by relying on formal and informal bridges to state bureaucracy. Formal bridges include organizational ties through membership in law firms politically embedded in the state and through affiliations with public-sector universities and research institutes. Informal bridges include personal connections to old friends from prior careers in the judiciary.

My findings reflect both a general case and a special case of the value of political embeddedness. It is the general case that, *ipso facto*, direct and indirect connections to government bureaucrats facilitate access to government bureaucracy. But the special case of China's institutionally undifferentiated character of law, the legal system's fusion to the state and to the CCP's political apparatus, enhances their gatekeeping capacity and gives special advantages to bureaucratic insiders above and beyond the general case. While it is undoubtedly true that the institutionalization of judicial autonomy and the separation of powers would erode some of the political advantages I have documented in this chapter, there is no necessary reason to believe China is on a track of teleological institutional convergence with liberal democratic settings. Indeed, my findings are consistent with existing research concluding that actors more deeply embedded in the state bureaucracy have less need to resort to guanxi practices (and thus report less of it) because they already enjoy routinized, institutionalized access (Guthrie 1999:191; Guthrie 2002:53–54). Chinese lawyers appear to tell us at least as much about the institutional logics of socialism and their continuity as they do about the incipient institutional logics of capitalism and the rule of law. Lawyers reveal at least as much about institutional marginalization, patronage, formal institutional support, and administrative rules of access in the socialist state bureaucracy as they do about incipient capitalist and rule of law institutions.

But the story of Chinese lawyers is not only a story of institutional continuity. The unhooking of lawyers from the state reflects fundamental changes in institutional form consistent with neoinstitutionalist expectations of global isomorphic convergence. Specially appointed lawyers, who best exemplify individual political embeddedness, have been purged from the bar, at least in name. To be sure, some former specially appointed lawyers, by passing the judicial examination[5] and obtaining lawyer licenses, remain in the bar under a different name. However, many have been forced out. Indeed, some specially appointed lawyers have sued the Beijing Bureau of Justice (unsuccessfully) for the right to renew their licenses to practice as lawyers (Sun 2003; Yang 2003). Following the Ministry of

Justice's circulation in 2003 of official directives on "cleaning up and consolidating" (*qingli zhengdun*) the bar, the population of part-time lawyers has been roughly halved, accelerating a more gradual decline in their numbers which had been underway for a decade. Finally, amendments made in 2001 to both the Law on Judges and the Law on Procurators include two provisions limiting the kinds of relational practices I have documented in this chapter: a provision banning former judges and procurators from doing civil litigation or criminal defense work as a lawyer until two years after resigning or retiring and a provision prohibiting judges and procurators from handling cases represented by their spouses and children.[6]

However, these formal institutional changes obscure the deeper continuity of socialist institutional logics and the enduring importance of informal micro-level bridges to the state bureaucracy. Even following lawyers' unhooking from the state, the public-private divide remains of fundamental salience. So long as the official status of lawyers, and of the private sector more generally, remains poorly defined and weakly protected, access to the state will remain a highly prized and unequally distributed resource. The disappearance of specially appointed lawyers and the decline of part-time lawyers as *formal categories* does not imply the diminishing significance of the *functions* of these defunct and soon-to-be-defunct formal categories. Likewise, the premium attached to informal ties to the legal system has not diminished simply because it is now forbidden to advertise them.

Political connections are not diminishing in significance as much as they are becoming more opaque. Political connections in the Chinese bar are now obscured by the labels "full-time lawyer" and "partnership firm" that make it easier "to see lawyers in the PRC as, in effect junior colleagues—cut from the same cloth as their American brethren" (Alford 2002:189). The methodological implications of this conclusion include the need to develop more sensitive and creative measures of political embeddedness. We must consider not only a lawyer's *current* position but also *former* positions. We must consider not only the *current* ownership form of a law firm but also its *former* ownership form. It is likely that former state-owned law firms, even after they privatize, will continue to enjoy preferential access to and support from important public actors.

At the same time, instead of purging politically embedded lawyers from the practice of law, recent reforms may have done more to push them into the realm of unauthorized legal practice. As they "clean up" the official, primary market for legal services, recent reforms may also be fueling the secondary, shadow market for legal services containing "black lawyers" (*hei lüshi*), "fake lawyers" (*jia lüshi*), and "underground lawyers" (*dixia lüshi*) (Liu and Michelson 2004). By serving to expand the ranks of their unauthorized, unregulated competition, lawyers' unhooking from the state may be more of a shot in the foot than a shot in the arm with respect to efforts to advance their professional rights and status. Other post-socialist contexts in which official enforcement institutions are weak and unresponsive to people with legal needs and to the practitioners who staff them

have witnessed the rise of private, unauthorized enforcement institutions containing and utilizing collusive ties to the state bureaucracy (e.g. Varese 2001).

In sum, although China's legal reforms are entirely consistent with neoinstitutionalist expectations of global convergence—the isomorphic adoption of the formal trappings of standardized global legal models (Boyle and Meyer 1998; Frank and McEneaney 1999; Boyle 2003), this is merely one of many—often contradictory—institutional logics at play. To use superficial changes in institutional appearance as evidence of the rise of American-style adversarial legalism, including institutionalized limits on state authority (Kelemen and Sibbitt 2004; Gilley 2004:76), or of the rise of a "rational-legal system at the state level" (Guthrie 1999:183), is to succumb to what Alford (1995) calls the "tasseled loafers" syndrome: "the tendency of some observers to mistake appearances for substance" (Alford 2002:200n31). Just as a dragon sporting a three-piece suit may still feel and act like—and be perceived locally as—a dragon, a Leninist state sporting a legal system may still behave like and be understood locally as a Leninist state. Over four decades ago it was observed, "Law can be—and in recent decades frequently has been—made by political commanders neither trained in nor concerned with law as a disciplined science or ideology. Political dictators, social revolutionaries, technocrats, all these may make the laws by political fiat" (Friedmann 1963/64:181).

There is no theoretical reason why formal adherence to the global institutional logic of "rule of law" must necessarily supplant contradictory institutional logics including the logic of authoritarian control and the logic of guanxi as a means of bridging and reconciling the needs of the market with the needs of political control. In this chapter I have made no such assumptions of teleological convergence. Insofar as "rule of law" institutions are only loosely coupled with contradictory institutional logics and practices, they can buttress and reproduce as well as erode existing power structures. The power of law includes the power to obscure the persistence of contradictory institutional logics (e.g. Bourdieu 1987; Nader 1990; Santos 2000; Dezalay and Garth 2002). As we will see, Chinese lawyers tell us at least as much about the enduring legacy of socialist institutions as they do about the incipient institutions of capitalism.

It is perversely paradoxical that adherence to neoliberal models of privatization and standardized global rule of law models may have done as much to dash as to advance lawyers' political and professional aspirations for political reform. The lawyers with the fewest troubles and the greatest capacity to navigate their hostile institutional terrain are precisely the lawyers most folded into the state and the party. Insofar as they benefit from their privileged ties to bureaucratic insiders, the lawyers most adept at avoiding the sorts of troubles I have documented in this chapter are precisely the ones with the greatest vested interest in the institutional status quo. Moreover, the Chinese pattern of career mobility from the state into the bar, while not historically and comparatively unprecedented, runs counter to the more commonly observed pattern to the contrary in other contexts (Miller 1995). The case of Chinese lawyers thus contributes to scholarly efforts to remedy earlier approaches to the study of lawyers that ignore

the centrality of politics and the state (see Halliday and Karpik [1997] and Halliday [1998] for reviews). But whereas research in the "political lawyering" tradition (Halliday and Karpik 2001) highlights lawyers' efforts to *advance* political change (Abel 1995; Sarat and Scheingold 1998, 2001; Scheingold and Sarat 2004), the case of China identifies conditions under which lawyers also, wittingly or unwittingly, *stymie* political change (Dezalay and Garth 1996, 2002). While under many circumstances they are a politically liberal force, under other circumstances they are a politically conservative force. Although their political subordination is exacerbated by socialist legality, it is by no means limited to the socialist context. In the civil law world more generally, lawyers in private practice are distinguished from and have lower levels of status and prestige than legal practitioners employed by the state (Abel 1988).

By recognizing institutional change at the level of form and structure and institutional continuity at the level of norms, meaning, and practices, we can recognize the concrete conditions under which legal institutions that, at one level appear to conform to standardized global models, function at another level as "anti-politics machines" (Ferguson 1994; Jones 1999) by reproducing local institutional logics incongruous with the institutional logic of political liberalism.

Notes

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1 Of course China enjoys a monopoly neither on aggrieved lawyers nor on lawyers' mobilization of political connections as shelter from their grievances and as a source of professional advantage. Power-dependence characterizes lawyers' relationship with the state and the judiciary in many other contexts, including the United States (Carlin 1962; Blumberg 1973; Nardulli 1986) and Indonesia (Lev 2000; Kadafi 2002).

2 Basic descriptive information about interviews cited in this chapter is presented in the Appendix.

3 From a comparative standpoint, the formal privileging of practical experience over education and examinations was not unprecedented, but was also the case, for example, in Japan (Rabinowitz 1956:80; Sun 1988) and in the Republican bar (Conner 1994:219), which had been modeled after the Japanese bar.

4 The informal path of mobility from the judiciary into private practice also replicates a Republican-era pattern: "Not a few lawyers left judgeships or other official positions to enter practice, citing their past experience as a valuable qualification" (Conner 1994:234).

5 In 2002 the three-in-one judicial examination (*sifa kaoshi*) for lawyers, judges, and procurators replaced the national lawyers examination established in 1986.

6 These amendments (Article 17 in the 2001 revised Law on Judges and Article 20 in the 2001 revised Law on Procurators) replicate a pattern from the Republican period. The common path of mobility from the bench to the bar "was obviously open to abuse, and this avenue was cut off or delayed for many when the Ministry of Justice issued an order barring judges or other court officials (including procurators and court clerks) from entering law practice in their former jurisdiction for three years after their resignation or retirement" (Conner 1994:234–35).

Table 3.1 Appendix. Sources of qualitative interview data

Interview code	*Interview dates*	*Age*	*Position at time of interview*	*Prior work experience*
E08	July 31, 2001	35–39	Bureau of Justice official	
E11	August 7, 2001	35–39	Lawyer in partnership firm with 11 lawyers	
E13	September 16, 1996	60–64	Lawyer in partnership firm with 17 lawyers	
E16	August 28, 2001	65–69	Law school professor, part-time lawyer	
E22	July 27, 2001	30–34	Journalist	
E24	November 8, 1999	40–44	Partner of firm with 13 lawyers, Ph.D. in law	
E28	September 1, 2001	40–44	Former ACLA leader	
E33	November 5, 1999	40–44	Director of state-owned firm with 17 lawyers	
I04	August 5, 2001		Lawyer in partnership firm with 50 lawyers	
I12	August 2, 2001	30–34	Lawyer in partnership firm with 50 lawyers	Engineer
I13	August 2 and 7, 2001	30–34	Lawyer in partnership firm with 50 lawyers	Factory manager
I21	July 24 and August 13, 2001	25–29	Intern at BD Law Firm	Military; government agency

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Chapter 4

Italian legal elites

The classical model and its transformation

Maria Malatesta

The Italian pattern

Unlike their counterparts in other European countries, Italian lawyers today still comprise a substantial component of the national political elite, even though their huge numerical growth over the past thirty years has objectively weakened this position. We may speak of Italy as a case of exceptional resistance raised by the classic pattern of legal elites, which have neither lost all their traditional power nor withdrawn from politics to confine themselves to professional practice alone. This resistance of the traditional model has nevertheless not prevented the Italian legal profession from being characterized by a markedly precocious propensity to be "contaminated" by the economic sphere. Italy's early openness to the corporate economy laid the groundwork for the formation of a new legal elite, a part of which has recently acted as the channel by which new models of professional organization originating in Anglo-American countries have entered Italy.

The classic model of the Italian legal elite has been characterized by the following features: political participation; a frequent combination of the exercise of the profession and university teaching; social closure and strong rootedness at the local level; a marked propensity to negotiate with political powers; and a notable ability to grasp change and adapt to it. Since the 1990s, the main challenges to this classic model of the Italian legal elite have come from globalization and the advent of new transnational professional cultures. This chapter investigates the extent to which the Italian legal elite has changed under the impact of professional models originating from other countries; whether it has preserved its traditional features, or whether it is now entirely patterned on Anglo-American professional models; and the role of certain endogenous factors in regard to this process of change.

The decline of the public sphere: an absolute model?

One of the main changes that has affected the Western world is the weakening role of law as the ruler of societies. Scholars identify numerous consequences of this demise of the law's power: the yielding of the legal order to the economic

sphere; the traditional national legal elites' loss of power (Dezalay 1997); and their surrender to new transnational legal elites (Dezalay and Garth 1996). One result of this process is lawyers' flight from the political sphere and civil society, along with their assumption of a new identity modeled on that of their clients, who are no longer single individuals but rather firms (Kronman 1993). However, focusing only on these internal aspects of the legal profession is reductive, and it does not aid a general understanding of the phenomenon. The withdrawal by lawyers from politics has not been due solely to the impact of the corporate economy and globalization. It has been the result also of changes which have taken place since the second half of the 1900s in the process by which the political class is formed, and which have relegated the legal professions to a secondary position while assigning the dominant role previously enjoyed by lawyers to other social groups (Cotta, Mastropaolo and Verzichelli 2000:232, 251). This tendency has varied in its timeframe and form according to national context; it is thus misleading to assume simply that there is a general decline in the political role of lawyers.

In Italy, the participation by lawyers in national politics has outlasted political participation by lawyers in other Western countries. Comparisons with France are particularly interesting because the legal professions of the two countries have followed similar paths in the past. French lawyers historically played a leading role in the national political arena; at the end of the nineteenth century, they represented more than 40% of the political class, while today they account for only about 5% of it. The decrease in the number of Italian lawyers with seats in Parliament has been smaller and slower than in France and other European countries. Moreover, the tendency was reversed during the 1990s, when the Italian political system underwent radical change.

The predominance of the Italian legal profession in the country's public sphere for more than a hundred years was not restricted to politics but encompassed economic activity as well. The Italian legal system performed a threefold function of regulation, mediation, and participation in the political and economic spheres; and the protagonists of the political process were lawyers. Italian lawyers maintained such a dominant presence in national and local representative bodies that they became identified with the ruling class and the very institution of political representation.

This longstanding presence of lawyers in national politics resulted from the interweaving of various factors: first, the legacy of Italian history; second, the country's political instability, which in the past one hundred and fifty years has generated three political regimes entailing profound constitutional interruptions and the passage from a monarchy to a republic; and third, the system of higher education. In regards to the latter point, there has been no Italian university institute which has performed a function comparable to that of the Faculty of Law in the formation of the ruling class; nor are there schools or academies on a par with Oxford and Cambridge or the French Grandes Écoles instituted to train the country's elites. The monopoly over the formation of the political elites

held by Italian law faculties has long exerted profound influence on the relationships between jurists and politics. Comparison with France is illuminating in this regard. In France, lawyers no longer constitute the principal pool for ruling class recruitment, because since the Second World War the law faculties have been outclassed by other centers for the formation of political elites, such as the ENA or Sciences Politiques (Malatesta 2011: 11).

The legacy of the past

The tradition of Italian lawyers' participation in the political sphere has distant beginnings. The period prior to Unification saw the rise of a bourgeois ruling class consisting of lawyers—many of whom were also university teachers—who managed the transition to the new kingdom. This close linkage between politics, the legal profession, and universities extends its roots even earlier into the early modern period. The Italian peninsula at that time was divided into numerous states, each of which had a university patterned according to a model of geographical distribution similar to that of Germany. The absence of a national state and a center able to coalesce the country's political and cultural life fostered the growth of strong localism which still today is one of Italy's distinctive characteristics. But this localist model, which had the deleterious effect of fragmenting the elites and dispersing them across the national territory, was one of the reasons for the political rootedness of the Italian legal profession and its long duration.

In the Middle Ages, Italian universities consisted of three primary faculties: Theology, Law, and Medicine (in addition to some smaller arts faculties), which awarded degrees as well as qualifications to exercise a profession and teach at university. The period between 1400 and 1600 saw the rise of professional colleges instituted by universities; access to these colleges was restricted and conditional on the student's birth city. In some cases, these institutions were granted the ability to award degrees. Their purpose was to restrict social mobility and control the formation of urban elites. This applied above all to jurisconsults, who possessed a specialist qualification deemed necessary for numerous positions in the justice system and its administration. Select families of jurisconsults were incorporated into city governments alongside the patriciate in order to counterbalance the latter's power. This inaugurated the tradition of government entrusted to legal professionals (Brambilla 2002:59–75).

The lawyer-politician and the process of nation building

Lawyers took part in the nation-building process as patriots during the Risorgimento: the historical process whereby, from the 1820s onward, national unification was prepared and accomplished. Lawyers performed a role of prime importance in developing a new legal culture based on the principles of liberalism: in Tuscany they assembled in the Gabinetto Viessieux; in Naples, lawyers of a liberal

persuasion taught law to pupils in their law offices, which thus became places of legal apprenticeship and training grounds for the new political ideas of liberalism (Mazzacane 2002). After the revolts of 1830 and 1848–49, lawyers joined the revolutionary governments which arose in the various states after their reactionary governments had been overthrown; in both cases, many of them paid for their political action with exile and imprisonment. Italian lawyers' participation in the formation of the unitary state again acquired great significance when the time came to define how they should take part in the political life of modern Italy. During the Risorgimento they had committed themselves to the victory of the national cause without fear of the dangers that they incurred, while also preparing themselves to join the ruling class. This dualism of power and political engagement characterized participation by Italian lawyers in politics from the first half of the 1800s until the 1970s.[1]

After national unification, lawyers became important members of the national ruling class. They strengthened their position by performing a threefold function as political representatives, constructors of the national legal order, and defenders of society. They acted as the ruling class at both national and local levels. They worked for decades on constructing the new legal system by drawing up the new civil, criminal, and commercial codes, while enacting laws intended to give shape to the unitary state and delineate the features of the new Italian society. Engaged in this task were celebrated law professors like Pasquale Stanislao Mancini of Naples, one of the authors of the Civil Code, and equally well-known lawyers like Giuseppe Zanardelli, president of the Brescia order of lawyers, compiler of the new Criminal Code, and head of the government which initiated the reformist period that lasted until the early 1900s and the outbreak of the First World War (Tacchi 2002).

The composition of Parliament during the liberal period (1861–1922) reflected the importance acquired by the legal profession in the building of the nation-state, but it also showed that the profession had provided an increasing number of lawyers with an entryway into politics. In the legislatures immediately subsequent to unification, lawyers in the Chamber of Deputies accounted for between 28% and 32% of its members. And from the seventeenth legislature (1890–92) onward, the proportion rose from 18% to 43% in 1919 (Cammarano and Piretti 1996:552–55, 584). The majority of these lawyers belonged to the establishment and was aligned with governmental parties. There were also some lawyers who sided with the opposition. Socialist lawyers, for example, fought for civil rights by defending anarchists and striking peasants. But even these "non-conformist" lawyers replicated the traditional model. Enrico Ferri, for example, was simultaneously a celebrated lawyer, a defender of workers, an academic, a well-known legal theorist belonging to the positivist school, and a socialist deputy.

Throughout the liberal period, lawyer-politicians formed the core of a system which functioned by virtue of extensive clientelism (Musella 1994). Clientelism has always been one of the pernicious aspects of Italian localism, but while it was one of the channels by which lawyers gained entry to politics, it also enabled

them to perform an often unique mediating function between citizens and the state in a political system that was still oligarchic.

The Fascist regime: consensus and resistance

Italian lawyers managed to survive during the Fascist regime and maintain some of their power, contrary to the fate of their German counterparts under Nazism. Despite the concentration of power in the hands of the Fascist party and the functionaries who pursued their careers within it, the Fascist regime did not greatly affect the position of Italian lawyers. They still held 31.25% of the seats in the Chamber of Deputies in 1929, although the proportion had decreased to 24.25% by 1934 (Cammarano and Piretti 1996:556–59). This striking continuity is an obvious sign of lawyers' collaboration with Fascism. Besides the adherence to Fascist ideology of many lawyers, a situation that convinced others to support the Fascist regime was the restructuring of the profession by laws enacted in 1926 and 1933. These laws were accepted because they guaranteed closer control over the market through state examinations, compulsory enrollment in the professional register, and career progression from attorney to advocate. Hence, the acceptance of Fascist legal policy by the majority of lawyers was mainly the result of a political exchange between professionalization and political consensus.

The legal community's acceptance was facilitated by the fact that the reorganization of the legal profession was undertaken by celebrated jurists and academics who contributed to rebuilding the legal order by working for two decades on the new legal codes. Some of them occupied political roles of prime importance. Most prominent among them was Alfredo Rocco, the "legal brain" of Fascism. Rocco came to Fascism after having subscribed before the First World War to nationalism, the political movement which acted as a breeding ground for the future Fascist elites. In his role as minister of justice, Rocco was the principal artificer of the transition from the liberal legal order to the authoritarian and corporatist one of Fascism (Ungari 1974). The enactment of the new criminal code in 1933 was the first result of this complex operation of building the new legal order without entirely dismantling the previous one, and which concluded in 1942 with the promulgation of the new civil code. A similar, though less prominent, role was performed by Alfredo De Marsico, a lawyer and university professor, who was elected deputy in 1924 and appointed minister of justice a few months before the fall of Fascism—to which he contributed by voting for Mussolini's arrest during the session of the Gran Consiglio Fascista of 25 July 1943 (Meniconi 2006:332–34).

Other illustrious exponents of the legal elite, in their capacity as legal "technicians," helped build the new legal order. In some cases, conflicts arose between the profession and political doctrine, and these were overcome in the name of legal science. Piero Calamandrei, the great Florentine jurist, was one of the signatories of the "Manifesto of the Anti-Fascist Intellectuals" written by Benedetto Croce, and he never enrolled in the Fascist national party. Yet his opposition to the

regime did not prevent him, as the foremost Italian expert on civil procedure, from being one of the editors of the Code of Civil Procedure published in 1942 (Cipriani 2007).

Few Italian lawyers initially joined the corporatist professional associations created by the regime in the 1920s. Moreover, contrary to events in Germany, where the nazification of the professions was accomplished only a few months after Hitler came to power, the Fascist regime was much slower in regimenting the liberal professions, and lawyers in particular, into the new corporative system. During the liberal period, the legal profession had been represented by the "orders": institutions founded in 1874 and to which the state had delegated control over possession of the legal requirements for enrollment on the professional register as well as disciplinary powers. The orders were abolished in 1933—eleven years after Mussolini's ascent to power—and replaced by legal syndicates: associations devoid of autonomy and closely controlled by the regime. The slowness with which the Fascist regime dismantled the system created during the liberal period was indicative of its desire not to provoke conflict with this important component of Italian society and to fascisticize it only gradually. However, once the profession had indeed been fascistized, this state of affairs was accepted by the majority of lawyers (Tacchi 2002:406–84).

Lawyers who dissented against the Fascist regime did so for two main reasons. The first was corporatist in nature, involving their disapproval of the profession's loss of autonomy, and this dissent was manifest from the mid-1920s until 1933. Many Italian lawyers sought to defend their professional order, whose autonomy was the best representation of their esprit de corps, and they resisted the professional law of 1933 because it entailed tight political control over the profession. The second main reason for dissent was political. Antifascist advocates were in the minority, but they formed the core of lawyers who joined the Resistance against Nazi-Fascism between 1943 and 1945 and also participated in the armed struggle. Their law offices often became the focal points of local resistance (Meniconi 2006:32–34). Among the most prominent of these lawyers were Piero Calamandrei and Tancredi Duccio Galimberti, both of whom in 1942 were among the founders of the Partito d'Azione, a secular and progressive political party which attracted many antifascist intellectuals who also rejected communism. Calamandrei was appointed rector of the University of Florence on July 26, 1943. A warrant was issued for his arrest when the Armistice was signed with the Allied forces on September 8, 1943. He resumed his post in September 1944, after Florence had been liberated from German occupation.

Duccio Galimberti, a criminal lawyer from the city of Cuneo in Piedmont, was the son of a former minister in the liberal governments, who then became a fascist senator. Galimberti was the commander of the Piedmontese partisan groups associated with the Partito d'Azione. Following a tip-off, he was arrested in 1944, tortured, and then shot. Galimberti represented the ideal combination between the political engagement of lawyers opposed to Nazi-Fascism and the patriotic lawyers who fought during the Risorgimento to free Italy from foreign domination

and build a new state (Galante Garrone 1987). It was Piero Calamandrei who paid greatest homage to this lawyer-hero of the resistance by dedicating a poem to him upon the release of Albert Kesserling—the former commander of the German troops in Italy who was responsible for ferocious onslaughts against the civilian population—from prison in 1952 after his life sentence had been commuted. Calamandrei's poem is a famous text of partisan literature.

Lawyers and the republic: the politics of power

The post-war Constituent Assembly provided the second occasion after unification for lawyers to participate in the process of nation building. The Constituent Assembly met in 1946 to draft a constitution and lay the bases for the state that would arise from the ashes of Fascism. Lawyers represented 32.45% of the Constituent Assembly, and their presence was not significant in quantitative terms alone. Indeed, jurists played a leading role in the drafting of the constitutional text. Among them were such well-known jurists as Costantino Mortati and Piero Calamandrei. Elected to the Constituent Assembly as a representative of the Partito d'Azione, Calamandrei became a deputy in 1948 for the Partito Socialdemocratico after his former party had disbanded. Subsequently appointed a lifetime senator, he still represents an unparalleled example of the classic legal model's loftiest goal: that of jurists' engagement in the politics and the academic and legal professions, all with the same commitment and moral stature. Besides his political activity, Calamandrei endeavored to spread a secular and democratic culture, especially through the creation of the journal Il Ponte. All this did not prevent him from continuing to practice law and contributing to the rebirth of his profession's representation. In 1946 he became President of the Consiglio Nazionale Forense, the recently founded national governance body for lawyers, and he retained this office until 1956, the year of his death.

At the end of the 1950s, the presence of lawyers in Italian local and national politics diminished, as it did in other European countries, although not at the same rate or to the same extent. The main reason for the decrease in the number of lawyer-politicians during the new republican regime was the birth of the party political system and the advent of party bureaucracies within the new electoral system of proportional representation, which reduced the number of lawyer-politicians and made obsolete the function of trustees mediating between society and the state that they had hitherto performed. In the Parliament elected in 1948, the presence of lawyer-deputies had diminished to 26.8%, and the decrease continued in the following years. By 1958 the number of lawyer-deputies had fallen to 21.19%, and the average stood at 21% until the mid-1970s. The collapse began in 1976 (18.1%) and culminated in 1987, when the percentage of lawyer-deputies was a mere 11.5%. The declining influence of lawyers on the political stage of republican Italy was counter-balanced by their greater concern with the problems afflicting the legal profession, from its redefinition in a context characterized by fierce political and social conflicts and the belated application

of the principles of the Constitution, to a search for new forms of representation through which the profession could better express its democratic aspirations (Tacchi 2008).

By contrast, for those lawyers who opted for political careers, the first decades of republican Italy gave them opportunities to increase their power within the political system. The majority of them chose to join the parties in the government coalition, and especially the Democrazia Cristiana party, where some of them forged brilliant careers, becoming ministers, prime ministers, and presidents of the republic. This path was exemplified by Giovanni Leone, a Neapolitan criminal lawyer and criminal law professor who was president of the republic from 1971 to 1978. Leone represented to the utmost degree the classic model of the Italian bar within the power system of those years. Steeped in the clientelistic culture that enabled the Democrazia Cristiana to remain in power for fifty years, Leone concluded his presidency under serious accusations of corruption.

Lawyers seem to have regained their influence since "Tangentopoli" and in the latest center-right governments. In the early 1990s, Italy was shaken by the "Tangentopoli" (Bribesville) scandal, which began quietly but eventually overturned the entire political system. Thanks to the commitment of a group of Milanese judges, the truth about how the national political system had worked in the last decade emerged: it had relied on widespread corruption through which the majority political parties had been financed. Industrialists and managers of public and private enterprises paid bribes to the political parties in exchange for contracts and favors. The striking results of the "Tangentopoli" scandal and the "Mani pulite" (Clean Hands) investigations were the collapse of the old political system, the disappearance of the parties at the center of the scandal—the Democrazia Cristiana and the Partito Socialista Italiano—and the birth of new parties which came to dominate the national political scene in subsequent years.

The year 1994 saw the introduction of a majoritarian electoral system and the formation of the first government headed by Silvio Berlusconi, the businessman who founded the Forza Italia party. This year was also marked by the "return of the notables" to politics. The collapse of the traditional parties had swept away the professional politicians and revived the model of the parliamentarian recruited from civil society. In the eleventh legislature, professional politicians represented 13.4% of all deputies; in the twelfth (1994–96), the proportion had diminished to 5.4% (Martinelli and Zucchini 2001:829). Those who profited most from the return of the notables were professionals, and lawyers in particular. Their proportion in Parliament increased from the 13% recorded in the 1994 Chamber of Deputies to 15.8% in 2001 during the second Berlusconi government, with three-quarters of them belonging to the center-right parties. The years of the Berlusconi governments, especially, saw a revival of the political role of criminal lawyers, who formed the parliamentary legal lobby which enacted a series of laws to protect the prime minister against legal proceedings. In 2006, with the return of a center-left government, the presence of lawyers in Parliament again diminished, and settled at 12.3%.[2]

The irresistible attraction of politics

For Italian lawyers exercising their profession in a poor country with highly restricted legal markets, gaining political capital became a strategy that allowed for market control and professional reproduction. A political career acted as compensation for a situation of economic backwardness and low professional incomes, and it became a source of both social recognition and increased earnings through the extension of the lawyer's network of clients. The result was the development of a collective mentality which viewed a career in politics as a source of social esteem superior to that provided by the legal profession. Politics served as the channel to guarantee entry into the national elite. This archetype first arose in the nineteenth century, but it still affects the culture and mentality of some Italian lawyers, even though the conditions of the exercise of their profession have greatly changed.

Some of the lawyers who joined Silvio Berlusconi's Cabinet in 1996 and in 2001 were wealthy, professionally celebrated, and highly esteemed (Statera 2004:11). Giorgio Bernini, the Italian business lawyer best known internationally, who had always called himself "apolitical," was unable to resist Silvio Berlusconi's summons, and in 1994, at the age of 66, he was elected deputy in the ranks of Forza Italia and then appointed minister of foreign trade. When the first Berlusconi government fell in 1996, Bernini concluded his brief career in politics, handing it on to his daughter Anna Maria, also a lawyer, who in 2008 was elected as deputy in the center-right coalition of the third Berlusconi government. Gaetano Pecorella, a well-known criminal lawyer with a large law office in Milan, and a university lecturer, who in the past was affiliated with the radical left, was chairman of the Justice Committee of the Chamber of Deputies during the second Berlusconi government. Nicolò Ghedini, a successful young criminal lawyer, is another member of the group of lawyers which has entered Parliament in Berlusconi's retinue. These lawyers have contributed to the devising of laws ad personam which have facilitated Berlusconi's position in the many trials in which he has been the defendant. In these cases, entry into politics has not been motivated by the desire to join an elite, improve one's social position, or crown a prestigious career. Rather, the intention has been to join a political and juridical project with a primary aim of retrenching the power of the judiciary.

The birth of the business lawyer

Though neglected by scholars, the structuring of the Italian legal field in relation to the economy has been one of the most important aspects of Italian legal and social history. In the late nineteenth and early twentieth centuries, the private legal sector saw the rise of the figure of the lawyer-consultant and courtroom advocate for banks and companies. The advent of the business lawyer coincided with the onset of industrialization and the enactment of the new Code of Commerce (1882), arising in a context where the role of public mediation was crucial.

As in Germany, industrialization in Italy was driven by the actions of the banks and the state. It is for this reason that the best-known lawyers of the period worked for the banks which financed industrial companies and regulated the legal space in which the interests of the banks, the steel industry and the state met and merged. Although Italy only began to industrialize in the late nineteenth and early twentieth centuries, the ways in which this process came about eventually fostered the emergence of a type of lawyer operating in the field of business and finance.

The rise of this type of lawyer is not explained by economic factors alone; it was also due to cultural ones. Political economy and financial science instruction in law faculties gave lawyers a positive attitude towards the world of business. Additionally, the relationship between lawyers and business was not demonized by the legal profession. The Italian legal profession was at the time divided between two figures, the prosecutor and the advocate[3]—the former being propaedeutic to the latter, given that a practitioner became an advocate after being a prosecutor for a number of years. This substantial unity of the legal profession prevented the creation of internal hierarchies and impeded the spread of a culture hostile to the development of legal activities connected with the world of business and finance. The situation was quite the reverse, in fact: advocates who handled litigation by the large banks, and the companies associated with them, formed a new elite which enjoyed high esteem both within the legal world and in society, as demonstrated by the fact that some of them were honored by appointment to seats in the Senate during the liberal period and under the Fascist regime. In an industrialized country like France, by contrast, the legal elite concentrated in the capital was, for a long time, hostile to the mingling of the legal profession with business, and it created an internal hierarchy in relation to the world of business which lasted for many years (Boigeol and Dezalay 1997), a situation which was facilitated by the fragmentation of the French legal profession.

As shown by Alessandra Cantagalli's seminal study (2010), between the beginning of the twentieth century and the 1930s, an elite of legal consultants and courtroom advocates for big business (banks, steel and engineering companies, insurance companies) made a decisive contribution to Italy's industrial and financial development. Some of them had special relationships with particular clients, but generally they did not work for a single company. Their embeddedness in the national economy was increased by their presence on the boards of banks and companies for which they were also the legal representatives and in which they were sometimes shareholders. The great transformation of the Italian legal profession began between the two world wars. Intervention by lawyers in the economy expanded during the 1930s in concomitance with the birth of state-controlled corporations. Not only did the ranks of elite business lawyers increase in size and influence but also significant changes occurred in business management. During those same years, in fact, the private entrepreneur, traditionally educated in engineering, was replaced by the state manager with legal training.

The rise of the elite expert in commercial law was due to the structural interweaving of politics and the economy, the public and the private spheres. It

was for this reason that business lawyers established relations with the political system, doing so in two different ways. In some cases, like that of Camillo Giussani, who was the lawyer for the Banca Commerciale, the relationship with politics was indirect and concerned questions of national scope. Giussani pursued his entire career within the financial sector. Other lawyers at the Banca Commerciale were deputies and senators, and their function was to represent the bank's interests in the political sphere. Then there were individuals like Vittorio Rolandi Ricci, a lawyer for the steelmakers' trust, the Banca d'Italia, and the Banca Commerciale, a senator and interlocutor with all the heads of government. Ricci joined the Fascist party and throughout his life engaged in politics, representing the interests of his clients, but above all representing his own interests.

Lawyers and big business

Thanks to the first generation of lawyers working with the great Italian banks, a model and a professional mentality which prepared the ground for the rise of the corporate economic expert lawyer spread during the second half of the twentieth century. As we have seen, the classic model of the Italian legal elite was a lawyer who often held political appointments at the local and national levels, and in the best-known cases also held a university chair. The new model that arose in the first decades of the 1900s was that of the "merchant of law"—to use Yves Dezalay's (1992:84) expression—who represented one or more companies, shared in corporate profits, and did not usually hold an academic post. Although he might sometimes engage in politics, he operated in the national arena alone.

This model also applied in republican Italy, where there was the formation of a new elite of lawyers working for the largest Italian companies in contract procurement and litigation. The most marked continuity with the past consisted of the fact that lawyers often joined the firms for which they worked, sitting on the board of directors (Italian lawyers are not allowed to be managing directors). In Turin, a network of legal firms formed around FIAT, the largest Italian company, and produced high-profile lawyers who forged exclusive relationships with the holding company and the Agnelli family. Vittorio Caissotti di Chiusano, a criminal lawyer, and the civil lawyer Franz Grande Stevens, exemplify a recently operating legal elite which has shared the power and ideology of old family-run capitalism.

Count Vittorio Caissotti di Chiusano (1928–2003), a member of an ancient noble family of Piedmont, in 1954 joined the Turin law firm of Michele Barosio, the lawyer for the La Stampa newspaper owned by the Agnelli family. Upon Barosio's death in 1960, Chiusano inherited his firm, and, through La Stampa, came into contact with the Agnelli family and became its trusted criminal lawyer. His work as FIAT's lawyer began in 1981, when the company's management was brought to trial for trade fraud. But it was Tangentopoli which subjected Chiusano to the greatest media exposure when he defended FIAT executives, including managing director Cesare Romiti, against accusations of involvement

in the bribery scandal (Garuzzo 2006). The relationship between Chiusano and FIAT was not exclusive, however, because he developed a highly diversified criminal law practice—indeed, in the 1970s he was involved in trials for kidnapping and terrorism—but his bond with the Agnelli family remained very strong until his death. Chiusano's activity in the FIAT holding company concentrated on two sectors: the media (he was vice-president of La Stampa) and soccer. In 1960 he joined the board of directors of Juventus, the soccer club owned by the Agnelli family; he became its president in 1990, holding that position until 2003, the year of his death, and placing his legal skills at the club's service.

The lawyers I interviewed in Turin depict Chiusano as a precursor of the changes that affected the legal profession in the following years. Alberto Mittone, who worked with him on numerous trials, called him "the first business criminal lawyer," in the sense that his clients were corporate groups, not individuals.[4] According to Luigi Chiappero, who worked in his law office, Chiusano was the first to introduce a factual defense into the criminal trial, thereby anticipating the reform made to criminal procedure in 1989.[5] Chiusano's daughter Anna, who has taken over his law office, recalls that he pioneered the formula of the law firm, albeit of small size, operating in the criminal law sector, and that he introduced the idea of "branding" large law firms as early as the 1970s.[6]

Franzo Grande Stevens, born in Naples in 1928, is the son of an English colonel who read the Italian news bulletins on Radio Londra during the Second World War. In 1953 he moved to Turin to join prestigious law firms in which antifascist and partisan lawyers had worked—Manlio Brosio,[7] Livio Bianco, and Alessandro Galante Garrone—and which subsequently became the Grande Stevens Law Firm (Trabucco 2003). In 1983 he joined FIAT's board of directors, and in the following years became vice-president of the Toro insurance company (*Il Corriere della Sera*, June 3, 1983, p. 22), and member of the board of IFI, the Agnelli family's financial company (*Il Corriere della Sera*, January 9, 1994, p. 17). In 2002, a year of severe crisis for FIAT, he acted as the company's chairman for some months and then remained with FIAT as vice-chairman. On Chiusano's death in 2003, he was appointed chairman of Juventus and in 2004 he was appointed chairman of the Compagnia di San Paolo, the Turinese foundation controlled by the Banca San Paolo IMI, one of the largest Italian banking groups (*La Repubblica*, January 29, 2004, p. 40). Having resigned from the order of lawyers, Grande Stevens continues to act as consultant to the Agnelli family and defender of its interests. The photograph taken during Gianni Agnelli's funeral, which shows him embracing John Elkan, the grandson designated by Gianni Agnelli as his successor, eloquently testifies to the close bond tying the lawyer to the Turin business dynasty (*La Repubblica*, January 26, 2003, p. 4).

Vittorio Chiusano and Franzo Grande Stevens have been two legal professionals with complex features as both "merchant" jurists and lawyers with strong civic commitment. They have devoted themselves not only to politics—although

Chiusano was for some years a Turin municipal councilor representing the liberal party—but also to professional organization. Franzo Grande Stevens was the first chairman of the council of the Turin order of lawyers, and then for ten years president of the National Law Council, an office in which he dedicated particular attention to the profession's code of ethics (Grande Stevens 2000). Vittorio Chiusano devoted his energies to criminal lawyer associations. He was president of the Criminal Law Chamber of Eastern Piedmont, and from 1990 to 1994 of the Union of Criminal Law Offices, the national association of criminal lawyers. In 2002, one year before his death, Chiusano re-submitted his candidacy for presidency of the Union in open conflict with the judicial policies of the Berlusconi government in office at the time. He was defeated by Ettore Randazzo, the candidate who expressed Italian criminal lawyers' endorsement of Berlusconi's policies (Torisi 2002).

Whereas Grande Stevens and Chiusano have been the lawyers of old family capitalism, Aldo Bonomo (1929–2005) was the legal representative of the new media entrepreneurship. He first met Silvio Berlusconi in 1978, the year in which the latter founded his Fininvest holding company. Thereafter Bonomo used legal weapons to fight the "war of the airwaves" alongside the man who in the space of a few years had become the owner of the three largest private television networks in Italy. He was the advocate of free television broadcasting in the legal battle against the government's monopoly over radio and television. The 1990 Mammì Law which enacted a mixed public/private television system put an end to the "war of the airwaves," and Bonomo, by now one of the foremost Italian experts on broadcasting law, stayed on as legal consultant to Fininvest. When the latter was restructured following Berlusconi's entry into politics, Bonomo was given prestigious appointments: a directorship of Mediaset, the company which runs Berlusconi's television stations, a directorship of Publitalia, the advertising agency for Mediaset networks, and finally, in 1996, chairmanship of Fininvest (Verlicchi 2005).

Business law firms appeared in Italy at the end of the 1980s. The first of them was Gianni, Origoni and Grippo, which grew out of a firm founded in 1988 by Francesco Gianni. The American model of the law firm specialized in mergers and acquisitions spread through the North of Italy as the result of numerous mergers between Italian and Anglo-American firms. The 1993 law authorizing the creation of firms by professionals laid the normative bases for the reorganization of the Italian legal profession in response to transnational competition. Globalization has galvanized what was a peripheral legal market by introducing competitive dynamics which have brought new clients and new cultural influences. Nevertheless, it has not been these two macro-factors alone that have changed the Italian legal profession in the past twenty years. According to Natalino Irti, a university professor, expert jurist, and the owner of an important law firm in Rome, the privatization which began at the end of the twentieth century has had a major impact, enabling the few business lawyers operating at the beginning of the 1990s to become a large group of highly sought-after

professionals.[8] However, it would be reductive to analyze this phenomenon solely in terms of its national features, without considering it from a broader perspective, because Italian privatization has been part of the market-liberalizing process promoted by the European Union. The recent transformation of the Italian legal profession that has generated a new elite of lawyers who are experts in company law and specialize in corporate mergers and takeovers, investment funds, and contract law, is the result of a transnational process and the effects of that process within the national arena. The elite currently operating in the business world consists of lawyers between the ages of thirty and seventy. Its novel features are the sectors in which these lawyers specialize, changes in the organization of their work, and their public visibility. The media have performed a leading role in defining this elite, which in turn uses the media as a means of promotion and indirect advertising.

Italian business lawyers in the twenty-first century reflect a new pattern in which characteristics of the past mix with new ones. It is an elite which enjoys high incomes, so much so, indeed, that it is depicted by the media as one of the categories of the "new rich" (Dino 2003:79). In 2006, the top 100 law firms, which employed 5,300 lawyers (of the approximately 137,000 currently exercising the profession), accounted for 14% of the entire national legal business. The average turnovers of the top four firms were less than those of their British and American counterparts, but the profits of the Italian equity partnerships were among the highest in Europe. According to a survey conducted in 2007 by the *Top Legal* journal (5, May 2007, 31), the profits earned by the partners in the three largest Italian law firms (Bonelli Erede Pappalardo, Chiomenti, and Gianni Origoni Grippo) stand at around 1.6 million euros, compared with the average of one million euros earned by the top German and Spanish business lawyers and the 800,000 euros averaged by English business lawyers.

The new Italian legal elite shares many features with the Anglo-American business lawyers criticized by Anthony Kronman, and they are features which have long characterized the history of the Italian bar. Also in Italy, the business lawyer is identified with corporate clients which require not only technical expertise but also "total support, unscrupulousness, no misgivings which may alienate the client, audacity in his or her public attitude, a capacity to clash with the adversary" (Gianaria and Mittone 2007:90). As in the past, the most visible members of this elite sit on the boards of the large companies which they represent as lawyers. Sergio Erede has been the preferred lawyer of Carlo De Benedetti, the former owner of Olivetti. He worked alongside financiers, like Roberto Colaninno, who came to prominence during the 1990s; and he has sat on the board of Parmalat. Franco Bonelli worked closely with IRI, the huge former state-controlled enterprise, now defunct, acting as president of one of its subsidiaries. He has been legal consultant to ENI (the state-controlled energy company) and also secretary of its board of directors. Natalino Irti has been president of the Credito Italiano bank, while Giuseppe Lombardi, name partner of Lombardi and Molinari,[9] sat on the board of the Banca di Lodi, from which

he resigned in 2002 before the bank was overwhelmed by financial scandal (Tamburini 2005:7). However, the embrace of big business can prove very dangerous, as the lawyer Gian Paolo Zini knows full well: he ended up in jail for assisting Callisto Tanzi, the owner of Parmalat in the operations which led to the company's collapse (*Top Legal*, 10, November 2007, 16).

The new elite exhibits a marked business mentality; indeed, Franco Bonelli[10] has called for the stock-market flotation of the Italian law firms (*Top Legal*, 5, May 2007, 40). It does not occupy political positions, nor does it engage in professional organizational activity. University posts seem to have been of secondary importance in the construction of this new elite, even if they are still widespread among the members of the older generation. Nevertheless, an academic title no longer functions as it did in the past, when the most difficult lawsuits were entrusted to university-affiliated lawyers. Today, for jurists with expertise in corporate and commercial law, like Franco Galgano, Giorgio Bernini, Franco Bonelli, Natalino Irti, Vittorio Uckmar, or Renzo Costi, being or having been a member of the professorate counts for them on the market only to the extent that they can furnish high-level consultancy services.

The principal differences with respect to the previous generation of lawyers with expertise in business law consist in training and international professional experience. Until the 1980s, few Italian lawyers had received international training, practiced abroad, and been members of international institutions. An exception is Giorgio Bernini, one of the first Italian lawyers to have contributed to the formation of a transnational legal space. Born in Bologna in 1928, after graduating in law from that city's university in 1950, Bernini moved to the United States to complete a PhD at the University of Michigan. Upon his return to Italy, he began an academic career as a lecturer in commercial law and set up as a lawyer. The head of a medium-sized Bologna law firm (recently taken over by Baker and Mackenzie), Bernini has worked almost exclusively with international clients in the field of contracts and arbitration. It is for this latter activity that he has received the greatest honors, culminating in the presidency of the International Council for Commercial Arbitration, of which he is today honorary president (www.arbitration.icca.org). In 2001 Bernini, the Italian delegate to the UN commission on international trade law, and a member of the Italian antitrust authority, was appointed president of the Italian State Railways. Although Bernini's exceptional career is unequalled in Italy, other lawyers—Aurelio Pappalardo, for instance—have been members of European Union commissions.

Another pattern in the internationalization of the Italian legal elite is represented by the Italian lawyers who have gained professional experience abroad and then returned to Italy. It is these practitioners who have facilitated the transfer of Anglo-American legal culture to Italy and mediated between the two professional models. Francesco Gianni spent eleven years in the United States before returning to Italy to found his own law firm in 1988. Luigi Macchi di Cellere and Bruno Gangemi are further examples of this transnational pattern.

Macchi di Cellere, a Roman nobleman and the son of an ambassador, was born in Tokyo in 1938. He worked for many years in the New York offices of the Milan-based Visconti law firm. Upon his return to Italy in the 1980s, he started a law firm in Rome with Bruno Gangemi, a leading expert in international law who had previously worked at Ford as a business lawyer.[11] The Pavia Ansaldo firm opened in the 1960s as a branch of Fink and Pavia, the law firm founded by Enrico Pavia, who had fled to the United States in 1938 after the enactment of the racial laws in Italy. The aim of Enrico Pavia and Giuseppe Ansaldo was to deploy the expertise which they had acquired in the United States in the Italian legal market, and create an international clientele. To this end, the firm trained its own lawyers for many years, sending them to the United States to gain practical experience (Damiani 2007:15).

This pattern is evident in the younger generation as well, with variations induced by globalization. Charles Adams, aged thirty-eight, the son of a British father in the diplomatic service and an Italian mother, was educated at an English school in Rome. He attended Oxford—Queen's College—and then joined Clifford Chance, which had begun operations in Italy in 1993. In 1994 he was sent to Rome to complete his pupilage. Adams subsequently decided to stay in Italy and work in the Grimaldi firm, of which he became a partner six years later. In 2000 Grimaldi and Clifford Chance merged. Adams thus found himself again working for his first firm, and there he stayed after the two legal firms' de-merger in 2002. After five years, Adams and Giuseppe De Palma, his contemporary and former partner at Grimaldi, became the pivot of Clifford Chance's new strategy, which consisted in returning "Italy to the Italians" after the crisis that had erupted when management of its Italian offices was entrusted to Nicholas Wrigley. Adams and De Palma have mastered both Italian and British management methods, and they have created a mixed model designed to remedy the opposition between Italian law firms and international ones by separating management of the Milanese branch of Clifford Chance from the Roman branch (Di Molfetta 2007a:12–13).

Cultural transfers, adaptations, resistances

At the end of the twentieth century, the organization of the Italian legal profession underwent profound changes. The dominant model of the legal firm with a single proprietor and deep local roots was challenged by a set of national and international factors. Firstly, the introduction of the "association" as the only corporate form allowed in Italy for professional firms, and whereby profits are shared among the partners on the basis of pre-established quotas, fostered the enlargement of legal firms. Secondly, the installation of Anglo-American law firms at the end of the 1990s in the industrial and financial cities of Northern Italy (Milan and Turin) as well as in Rome further increased the competition among legal firms already aggravated by the exponential growth in the number of lawyers.

For one hundred years the number of Italian lawyers remained constant in ratio to the population. From 1881 to 1981 the ratio was about 7.50 lawyers for every 10,000 inhabitants (Cammelli 1996:57). Thereafter, the growth of lawyers was due both to an enormous increase in students enrolled in law faculties, and the 1997 law reforming the profession, which unified the careers of prosecutor and advocate. It is now possible to take the state examination for lawyers after a three-year pupilage, whereas qualification as an advocate previously required three years of pupilage, passage of the state examination, and practice of the profession for six years as prosecutor. In 1989, 53,000 law graduates were enrolled in the professional register, and 40,000 of them were in professional practice; in 2007, there were more than 180,000 enrolled, and 136,818 of them exercised the legal profession (Colloca 2008:1), with a ratio of 23 lawyers per 10,000 inhabitants. This overcrowding was the main reason for the "proletarization" of Italian lawyers in both social and economic terms. Between 1971 and 2005 the incomes of lawyers diminished in absolute terms, and the gap between the legal elites, whose average income in 2005 was 261,000 euros a year, and the rest of the profession, with an average income of 47,383 euros, widened dramatically (Zazza 2008:60–61). Competition has also been exacerbated by the deterioration of Italy's economy. Because of the slowdown in privatization, among other things, the Italian legal market is currently less appealing to foreign law firms, which are instead attracted to emerging legal markets in Asian countries. According to numerous lawyers, the solution to the current crisis of the Italian bar lies in restricting the number of practitioners and modernizing legal studies.

Among the critics is Domenico Borghesi, whose career is emblematic of the cultural changes that have taken place within the Italian legal elite under the impact of competition. After graduating from the University of Bologna, in the early 1970s Domenico Borghesi began his academic career as a teaching assistant to Tito Carnacini, a professor of civil procedure and the rector of Bologna University; Borghesi subsequently became a full professor of civil procedure himself. He began his work in the legal profession in Bologna as legal consultant to the Confederazione Nazionale del Lavoro, a leftist trade union. At the end of the 1970s, Marco Biagi, the labor law expert murdered in 2002 by the reconstituted Red Brigades, introduced Borghesi to Giorgio Bernini, in whose firm Borghesi worked for approximately ten years, working almost exclusively on international arbitrations and contracts. In 1990 Borghesi left Bernini's firm and set up his own law firm, structured along traditional lines and with a national clientele. His decision to change, Borghesi reports,[12] came when he realized that small law firms, even if well rooted in the local community, could not withstand competition and create large clienteles. Attempts to form partnership with other firms did not bear fruit (Costa 2003:6), with the consequence that Borghesi decided to merge his firm with Macchi di Cellere Gangemi, thereby losing the original name of his firm. Today, Macchi di Cellere Gangemi has six offices in Italy and one in Paris, and it employs more than one hundred lawyers.

Specializing in corporate and commercial law, it works mostly with foreign law firms handling cases in the Italian financial and energy sectors. Domenico Borghesi thus finds himself once again dealing with international clients; and the circle has been completed by his resumption of academic work, which in recent years he has partly undertaken in the United States, where he teaches courses at a number of law schools.

However, the outcomes of mergers have not always been positive and enduring. The greatest difficulties have arisen in those between Italian and foreign law firms. When the Anglo-American firms moved into Italy during the 1990s, they courted the most important firms or the most prestigious partners in order to acquire the best clients and put down operational roots in the country. But this takeover of the most qualified professionals did not yield the hoped-for results, and it generated a conflict that did not involve economic interests alone but was also cultural. Many important Italian lawyers rejected the principles of the more democratic Anglo-American partnership and continued to act on their own account, cornering the best clients and claiming the relative profits (Musy 2006:14). This is what happened when the American White and Case law firm, on first setting up in Italy, formed alliances with well-known lawyers like Alessandro Varrenti and Alberto Morano (Di Molfetta 2007b:18). In another example, the 2000 merger between Clifford Chance and the prestigious firm headed by Vittorio Grimaldi lasted only three years because the Grimaldi group demanded an agreement on the distribution of profits which did not take into account the "lockstep" compensation to which all the Clifford Chance lawyers were subject (Di Palma 2007:14). The result has been numerous spin-offs and de-mergers which, in some cases, have hampered the growth of the Italian branches of Anglo-American law firms.

The latter have reacted by seeking other allies, as Allen and Overy has done since the retirement of Guido Brosio, its senior partner, and the spin-offs of other lawyers. White and Case, which was severely damaged by the de-merger with Grimaldi, has decided not to have equity Italian partners for the time being. Clifford Chance, as we have seen, has recently adopted the reverse strategy of recruiting young Italian lawyers with Anglo-American training. These examples show that the strategy adopted by the Anglo-American law firms to penetrate the Italian market via mergers with the great national firms has been thwarted by the individualist culture still largely embraced by prestigious lawyers belonging to the older generation, and for whom it is almost impossible to abdicate their role as "monarchs" of their firms. In the face of these difficulties, some law firms have preferred to adopt more flexible strategic alliances (Di Palma 2007:34), allowing the reinterpretation and hybridization of Anglo-American and Italian models. The story of the "alliance" between the New York firm of Dewey Ballantine and the Galgano boutique in Bologna shows how a cultural transplant adapts to the new national context. As Dewey Ballantine sought to expand in Italy, the American firm found it more practical to establish a form of collaboration, rather than a merger, with the civil lawyer Francesco Galgano, a

leading jurist who enjoyed great scientific, academic, and professional prestige in the country (*Top Legal*, 5, May 2007, 22).

Legal families

Until the Second World War, Italian lawyers formed a semi-open elite affected by scant social mobility and an inclination toward professional endogamy. A study on the city of Bologna between 1874 and 1945 has shown that the amount of lawyers who were the sons of lawyers averaged about 59% (Malatesta 2003). Elitism with social closure was a twofold strategy of professional reproduction and control of the professional market, and it was one of the reasons for the strong identification of lawyers with the ruling class in a country affected until the Second World War by high levels of illiteracy. The expansion of higher education in the second half of the 1990s generated unprecedented upward social mobility in Italian society which also affected the intellectual professions. The bar was partly unaffected by this process of social opening, and until the 1980s it maintained a notable propensity for professional endogamy. Two surveys conducted in 1989 (CENSIS 1990) and 1991 (Petrone and Filos 1992) showed that the percentage of lawyers whose fathers were also lawyers stood at around 22%.

The Berti family of Bologna provides an example of the transmission of the profession to successive generations of male family members across two centuries. The Bertis were landowners who had lived in the Bolognese uplands since the sixteenth century. In 1802, Pietro Berti opened a law office in Bologna behind the law courts, in which the Berti Arnoaldi Veli lawyers still work today. Pietro's grandson, Gaetano Berti, participated in the Risorgimento struggle for Italy's independence in 1848–49. He was a provincial councilor and president of the disciplinary council of Bologna lawyers, thereby inaugurating a family tradition of civil and professional commitment which still continues today. The firm, handed down by direct and indirect lineage, closed in 1931 after the death of Nino Berti Arnoaldi Veli (the name of the family had changed in the meantime for hereditary reasons) at the age of forty-one owing to wounds received at the front during the First World War.[13] His son Francesco reopened the firm in 1949. A former partisan and a leading figure in the city's political and cultural life, Francesco Berti Arnoaldi Veli has continued the family tradition of the actively committed lawyer. A long-standing member of the Bologna order of lawyers, from 1978 to 1980 he was president of the national social security fund for lawyers. Although a civil law practitioner, he has occasionally acted as a criminal lawyer in trials of great civil importance, such as that held for the neo-fascist bomb attack at the Bologna train station on August 2, 1980. In 1981 Francesco's eldest son, Giuliano, joined the firm, and in 1993 his brother Giovanni followed him. Both are active in professional associations: Giuliano has been councilor and president of the Bologna order of lawyers, and Giovanni is currently its secretary.

The recent increase in the number of lawyers has accelerated mobility within the profession and has reduced its tendencies to social closure. According to a survey conducted by CENSIS in 2007 on behalf of the AIGA (Associazione Italiana Giovani Avvocati), the association for Italian lawyers under the age of 45, in a sample of 874 interviewees, among those under the age of 45 only 11.6% were the sons and daughters of lawyers, while the percentage rose to 12.4% when the interviewees over the age of 45 were included (CENSIS 2007). In the past, hereditary transmission was facilitated by the large number of single-proprietor law firms. During an interview, Giuliano Berti Arnoaldi Veli said that his family's reproduction strategy had worked because "the firm has deliberately maintained the small size typical of family-run law firms and corresponding to the medium-small structure typical of Italian entrepreneurship."[14] Today, amid the changes which have taken place in the organization of the legal profession, endogamy still seems to be a reproduction strategy in the case of small firms. This is especially true in provinces, where memories of fathers and grandfathers as lawyers and city notables are more closely cherished, and the younger generation continues to feel pride at belonging to a family of lawyers. For the Piedmontese lawyer, Luca Scagliotti, activity within the AIGA represents completion of a professional identity in which belonging to a family of lawyers plays an important role.[15]

Large law firms with a transnational structure and high internal mobility constitute a model antagonistic to the endogamous reproduction strategies of "legal families" closely embedded in the local community. However, there are also firms of considerable size which have preserved their family structure. The Pedersoli law firm is an example of the failure of the alliance strategy and the resumption of family-based legal activity. In 1959, Alessandro Pedersoli opened a law office which was then joined by his sons, Carlo, Antonio, and Giovanni. In order to resist competition by the Anglo-American law firms, in 1999 Pedersoli allied with Grande Stevens and in 2001 with Lombardi. With 15 equity partners and 64 lawyers in 2003 alone, Pedersoli is today a highly dynamic firm operating in the banking and financial sector (Di Molfetta 2007b:26–28). Still today, therefore, the family is able to operate not only as the channel for the reproduction of new elites but also as a device for adjusting to the market. A considerable number of well-known business lawyers originate from families of lawyers. As examples, the firm headed by Natalino Irti has come down to the family's fifth generation, and today Irti's son Nicola also works for the firm; Francesco Gianni is the grandson of a famous lawyer; exponents of the old generation have bequeathed their law offices to their sons (as in the cases of Aldo Bonomo and Giuseppe Sala) and daughters (as in the cases of Vittorio Chiusano and Giorgio Bernini). Also, as regards the tendency to social closure, the old and new legal elites do not form a rigidly dualistic system. The classic and business lawyer models have been "contaminated" and today constitute a pattern which has changed over time without losing all of its original features.

Notes

1 For a discussion of the political commitment of Italian lawyers during "the long '68," see Malatesta (2010).
2 I wish to thank Maria Serena Piretti for providing me with the figures on the presence of lawyers in Parliament from 1958 to 2006.
3 The single figure of the advocate was created in 1997.
4 Interview with Alberto Mittone, lawyer, Turin, March 21, 2007.
5 Interview with Luigi Chiappero, lawyer, Turin, March 22, 2007. Chiappero still works as a lawyer at Chiusano's firm; he took over from Chiusano as lawyer to Juventus and president of the Criminal Law Chamber of Eastern Piedmont.
6 Interview with Anna Vittoria Chiusano, lawyer, Turin, March 22, 2007.
7 Minister in Italian post-war governments, after 1947 the Turinese lawyer Manlio Brosio was ambassador to Moscow, London, Washington and Paris; he was NATO secretary general from 1964 to 1971.
8 Irti's comments are taken from Tamburini 2005: 7.
9 The firm arose in 2003 from the break-up of Pedersoli Lombardi and partners, which had been created in 2001 when the Pedersoli group separated from the firm formed in 1999 by the merger with the Grande Stevens firm (*Top Legal*, 2, February 2005, 40).
10 Frank Bonelli is name partner of Bonelli Erede Pappalardo, the firm which arose in 1999 from the merger among Bonelli and partners, Erede partners (founded in 1969), and Pappalardo and partners (set up in 1992 after Pappalardo left the firm where Vittorio Uckmar also worked) (*Top Legal*, 2, February 2005, 34).
11 Interview with Domenico Borghesi, lawyer, Bologna, April 2, 2008.
12 Interview with Domenico Borghesi, lawyer, Bologna, April 2, 2008.
13 Berti family archive housed at the Berti Arnoaldi Veli firm, Bologna.
14 Interview with Giuliano Berti Arnoaldi Veli, lawyer, Bologna, March 10, 2008.
15 Interview with Luca Scagliotti, lawyer, Casale Monferrato, May 5, 2008.

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Part II

Imported know-how and local know-who

Part II focuses on the more familiar terrain of the import and export of legal expertise. It focuses on the transnational aspect of lawyers as brokers. There was a transnational aspect to the legal profession from the beginning where, for example, those able to afford the extremely expensive and time-consuming legal education at the University of Bologna took their expertise to other parts of Europe offering themselves and their knowledge to political and economic elites. In the era of colonialism that shaped the boundaries of the current world, furthermore, lawyers outside of Europe were inevitably negotiators of a transnational relationship. Local elites bolstered their own position by investing in the connections, know-how, and credibility associated with the colonizers. At the same time, the colonizers looked to the co-optation of local elites as a means to bring legitimacy to the empire and to govern more efficiently. Put simply, there has been a very long history of the combination of imported know-how and local know-who—brokered by lawyers on both sides.

Virginia Vecchioli's chapter, Chapter 5, shows how politically oriented labor lawyers in Argentina, persecuted and exiled during the military dictatorship of the 1970s, took advantage of divisions in the north to help build the field of human rights and retool as human rights lawyers. They built their positions, strengthened the role of law and lawyers in the state, and helped to import the emerging human rights expertise produced in the United States. This connection to the human rights movement and its supporters, which included major philanthropic foundations in the United States and Europe, brought strength to a group of Argentine lawyers. As Vecchioli points out, unlike the situation in China, for example, some fraction of the brokers were able to combine the new and valuable transnational capital with relatively strong family and social capital. They could connect their capital of local personal relationships with international know-how. In addition, the chapter shows that lawyer brokers are not limited to the role of importer or exporter. Many of the Argentine lawyers went abroad and helped put together what was exported to the south.

Chapter 6, by Daniel Palacios Muñoz, illustrates the same theme of lawyer brokers acting to mobilize international expertise into local politics. Here the example concerns the reform of the courts and in particular criminal procedure.

A group of lawyer activists used their local connections, the process of democratization (and the uncertain and divided politics associated with it), and the credibility of U.S. approaches to crime—both from a human rights and crime control perspective—to rebuild some of the credibility of law. They also strengthened their own position both within Chile and in the field of criminal justice reform in Latin America more generally. The imported ideas, which, as Palacios points out, were consistent with the strategies and career paths of the importers, gave the agents promoting the reform a legal capital different from that of the traditional legal world, to which they did not fully belong. The greater technical legitimacy that they brought, the imported know-how, helped to place them among the "who's who" of local and transnational legal and political fields.

Ole Hammerslev's chapter, Chapter 7, focuses on imported judicial reform in Bulgaria, and it highlights another variable in the theme of brokering legal imports as a means to add credibility to the law and lawyers. In Bulgaria it was not only about importing the dominant expertise, but also about a competition between European and U.S. approaches and even competing ideologies that go with the approaches. Those best able to play the two sides of the hegemonic competition in local palace wars were Bulgarian lawyers equipped with cosmopolitan capital. They could draw on the European state-centered approach or the U.S. approach emphasizing reform activity outside of the state. In either case, the position of the local brokers here (and in the other examples) was such that the role of law did not change dramatically within Bulgaria even if the discourse of law did. The chapter also illustrates the other side—lawyers from the exporting side using brokering activities on behalf of the rule of law activity to strengthen their positions at home within the elite legal world of corporate law, the American Bar Association leadership, the Supreme Court, and the elite legal academy.

The same national/transnational focus is evident in Chapter 8, by Cesar Rodriguez-Garavito, focusing mainly on Colombia, but it shows the additional feature of lawyers in the south playing on the divisions among the exporters of legitimate northern expertise. Here, as in Chile, the lawyers work on issues of judicial reform—including the same focus on the Americanization of criminal procedure seen in Chile. Contending political sides in Colombia use the importation of northern ideologies and networks—on one side, the so-called pure Washington Consensus, and on the other side, what Rodriguez calls the global neoconstitutional project. As each side strengthens its local position through connections to competing hegemonies coming mainly from the United States, they also serve to push aside more traditionally oriented elites—linked to Keynesianism in economics, in particular, and to Europe among the lawyers. The new imported expertise strengthens the position of the importers—helping to imbed, again, the imported know-how into the local know-who. As noted above, the analysis shows another layer of complexity in the process of importing and exporting—the ability of lawyer/brokers to play on the divisions in the north.

Chapter 5

Human rights and the rule of law in Argentina

Transnational advocacy networks and the transformation of the national legal field

Virginia Vecchioli

The aim of this chapter is to understand the processes by which the rule of law and human rights protections entered the Argentine public agenda after the end of the last military dictatorship (1976–83). I will suggest that the importation of this type of legal expertise is part of a broader process that began with the involvement of a group of legal professionals, who were also victims or relatives of the victims of state terrorism, in the transnational space of legal activism from the mid-seventies through the introduction of neo-liberal state and economic models during the nineties. These same agents, legitimized by their role as "experts," actively participated in the nineties in the struggle to reconstruct the state.

The importation of this orthodoxy produced profound local transformations in both the political and legal sectors: from the development of specific reparation policies geared toward victims of state repression and their relatives, and the creation of institutions specializing in the management of human rights, to broader reforms in the administration of justice, like the creation of the Consejo de la Magistratura ("Council of Judges") and the institution of competitive processes for judicial positions. The 1994 national constitution fulfilled these reformist ambitions by granting constitutional status to international treaties for the protection of human rights.

The local impact of these transnational movements can be identified in the emergence of a new local legal elite in charge of advising, designing, and implementing these reforms and committed to broader programs to reform the state and justice system. This process is also accompanied by the appearance of new legitimating criteria, new spaces for professional practices, and the like.

In this chapter, I will trace an itinerary that follows the professionalization of a group of Argentinean lawyers committed to the cause of human rights through to this group's involvement in state reform programs inspired by the rule of law. Those who initially defined themselves as labor lawyers and "defenders of political prisoners" in the mid-seventies began to see themselves and to be recognized as "human rights lawyers" and thus as "experts" legitimized not only by moral capital deriving from their resistance to military dictatorship, but also by the capital of knowledge and technical skill accumulated in the course of bringing

forth and litigating these cases in both national and transnational spaces. Within the framework of state reform programs introduced simultaneously with the importation of neo-liberal models, human rights activism became a significant tool for political activists to gain access to the state under banners of truth, memory, and justice for the victims of the dictatorship. Upon entering state agencies, these agents became active importers of management models inspired by the rule of law and the protection of human rights.

Bryant Garth and Yves Dezalay have emphasized the importance of identifying the concurrence between the political conjuncture in the United States and Europe, and that of Latin American countries, in understanding the extraordinary growth of this international movement. My analysis offers data and evidence to show how these lawyers' internationalization strategies were developed in close relationship to strategies of professionalization of transnational legal activism. Joint efforts undertaken by native and foreign legal professionals (or nationally and internationally oriented legal professionals) resulted in a sort of game of double recognition: the participation of local legal professionals, including victims or relatives of the victims of state terrorism, contributed to the legitimization of international legal associations and, inversely, these associations contributed to the institutionalization of local networks and associations and to the professionalization of their members. When neo-liberal economic policies were widely introduced in Argentina during the nineties, under the guidance of the World Bank and the IMF, these state reform programs gained legitimation thanks to the strong drive to reinforce the rule of law and human rights protections. Legal professionals widely recognized as human rights defenders actively participated in the process of political and constitutional reform as well as in the management and implementation of these policies in their roles including service as congressmen, public advisers, state officials, jurists, leaders of civil and professional associations.

In order to understand these various exchanges and crossroads in time and space, I will focus on reconstructing the political and professional trajectories of these Argentine lawyers, calling attention to the ways in which they have been molded by various conjunctures over those forty years.[1] When focusing on their trajectories, it is possible to recognize the confluence of different generations and recruitment principles highlighting three main routes of entrance into this form of "expert-activism": (a) lawyers who entered the profession as labor lawyers during the sixties and who began to engage in this form of activism in exile, mainly in Europe and the U.S.; (b) lawyers who entered this form of activism based on their experience as relatives of victims of state terrorism and who actively created and led civil associations in defense of human rights; and, finally, (c) a third group of legal professionals who began this type of activism after the end of the military dictatorship. Among the latter group of lawyers, we found that moral capital was replaced by academic diplomas and qualifications obtained primarily in U.S. universities and internship and special training programs run by interstate organizations like the Inter-American Commission on Human Rights (IACHR).

Beginnings in the profession and the emergence of the activist's vocation

The political activism and professional careers of lawyers committed to the defense of human rights before the end of the last military dictatorship, who were themselves direct victims of state terrorism, can be viewed as a succession of conversions. Most of these lawyers of this generation entered the profession as labor lawyers.

They were young professionals, recent university graduates who, as a result of the activities of dictatorial governments in the late sixties and early seventies, converted their professional profile when taking on the legal cases of union leaders and armed leftist activists persecuted by the state. Coinciding with the proscription of partisan political activity and the extreme outsider status of these lawyers within the legal field, the defense of these cases provided them, early on, with enormous notoriety when they were between 25 and 35 years old.

This group was primarily comprised of professionals just entering the legal field without the capital of inherited family connections in the field.[2] In most cases, their parents belonged neither to the world of law nor to the professional world at all (e.g. fathers who owned small businesses and mothers who were teachers or school directors, many of whom were widowed at an early age). A high percentage came from the countryside and were educated mainly in public schools, although some of them grew up in families belonging to the intellectual elite. In these cases, they went to public schools traditionally recognized as typical breeding grounds for political leaders, as was the case for Rodolfo Mattarollo, Eduardo Luis Duhalde and Rodolfo Ortega Peña, who studied at the Colegio Nacional de Buenos Aires. Within this framework, many of these students exemplified cases of social ascent. This process coincided with a strong increase in university matriculation and broader changes in the constitution of the ruling elites as they began to recruit members from middle class groups.[3]

In this context, the pursuit of a law degree was described as a prudent course of action inasmuch as it meant obtaining a diploma that qualified its recipient for immediate job opportunities. Even though they made continuous references to other professional interests, like sociology or political science, these fields were not seen as options available to those who needed to guarantee their economic sustainability. For these young professionals, who had not yet made a name for themselves and lacked any significant family connections within the world of law, their involvement with the unions as legal advisers constituted an important source of income and also allowed them to pursue a professional practice that was consistent with their early "sensibility" to social and the political issues.

Within this profile, there are some lawyers who had differing social origins than the majority of the interviewees. Among this group, there are lawyers whose families belong to the world of law and politics, as is the case for, among others, Hipólito Solari Yrigoyen, great-grandson of the sister of the Unión Cívica Radical Party founder, Leandro N. Alem, and grandnephew of the twice

president of Argentina Hipólito Yrigoyen (1916–22 and 1928–30), and Gustavo Roca, son of a lawyer from a traditional family of Córdoba. This was also the case for Martin Federico, Rodolfo Ortega Peña and Mario Landaburo, a member of a family of important landowners, lawyers and politicians affiliated with conservative parties and whose members included lawyers, senators and national ministers during governments born of coups d'etat.

The pursuit of a law degree was also described as an option directly related to the expectation of becoming a professional politician, mainly by those who had participated in student activism during secondary school. For them, entering law school allowed them to continue their earlier interests: " … At last, I did what most politicians do: *to be a politician*, you have *to be a lawyer*. … "[4] In the words of another interviewee, " … in my day, in order to engage in politics, you had to be in law school […]. When I entered law school, I entered the world of political activism."[5] As we can see, entering law school meant gaining professional qualifications as well as the opportunity of making connections that would allow them to fulfill their own political ambitions, whether these ambitions were those of living by and for politics or following the path of socialist revolution.[6]

The beginnings of their professional life in the legal representation of the workers also constituted a way to reconcile their professional qualifications with their political and social sensibility, particularly in a context of political proscription. One of these lawyers defined himself in these terms: "I was a simple member of the Unión Cívica Radical party during the coup d'etat of 1966 […]. My fundamental *political activity*, however, had to do with the unions […]. I *was a lawyer* for the Confederación General del Trabajo de los Argentinos, the Federación Gráfica Bonaerense … " (Gabbeta 1983: 222; my emphasis). In this sense, their professional skills became a critical tool for political participation.

The political use of this expertise involved everything from assuming the legal case of a dismissed worker in their private office to advising and taking part in workers' everyday lives to the point of, in certain circumstances, entrenching themselves next to union leaders during factory occupations. For these professionals who had degrees and belonged to the middle class, associating themselves with symbols and spaces associated with the working class allowed them to reduce the social distance between them and their defendants; they located themselves, symbolically, in a space of dislocation vis-à-vis their own socioeconomic class. When engaging in these actions, their professional sensibilities became better aligned with their own social and political sensibilities. This allowed them to maintain "consistency between the profession and activism" (Imaz 1964).[7]

Having entered law school in order to engage in politics, the commitment to the judicial and public defense of workers was a way to engage their earlier interests through employing expertise and professional skill, within a context not only of proscription of any political activity, but also of deep transformations in the membership of leadership groups. In agreement with Imaz, beginning with the rise of Peronism, the mere possession of a law degree no longer guaranteed access to politics. New credentials arose at that time, including that of prior

union activism. It is possible that the practice of labor law also responded to expectations of entrance into politics in a context of transformations in the forms of recruitment of political leadership.[8]

Commitment to the defense of political prisoners

Student activism and advocacy in unions and trades constituted two of the main spaces for the recruitment of political prisoner defendants, in a context in which leftist and Peronist groups adopted insurgent strategies. Starting in the late sixties, these professionals began to take on the legal defense of these political activists who, officially, were not accepted by progressive lawyers, members of professional associations such as the Asociación de Abogados de Buenos Aires or members of legal services of non-governmental organizations (NGOs) such as the Liga Argentina por los Derechos del Hombre.

The assumption of these controversial cases involved changes in the way they conceived and acted out their legal activism and in the position they occupied within their own peer group and within the sphere of partisan activism. Through their incorporation into this universe of militancy and, thence, through their legal practice linked to the defiance of dictatorship, the possession of a set of extra-professional qualities and dispositions such as commitment to the cause, a willingness to sacrifice for the cause, and the courage to assume these cases, were conditions that allowed them to distinguish themselves from their peers at the same time that it allowed them to find a legitimate position within the field of partisan activism. In this way, these lawyers joined a sort of "aristocracy of risk" that emphasized the disposition to danger, risk, adventure, etc. As one lawyer points out: " … *one entered a world*, on the one hand, of danger and decisions that, one quickly understood, had an *irrevocable character*. … "[9]

Within these lawyers' universe of representations as they faced political proscription, values that were emphasized included rage, full commitment, sacrifice, and disinterestedness. It was through this representation that they came to exist as a group. It can be suggested that their outsider position, along with the lack of electoral alternatives, is what makes their adoption of a heroic profile[10] understandable.

The risk involved in taking on these cases was brought into dramatic relief for the first time with the December 1970 disappearance of Néstor Martins, the labor lawyer, defender of political prisoners, and member of the legal arm of the Confederación General del Trabajo de los Argentinos, the Villero Movement, the Liga Argentina por los Derechos del Hombre, and the Buenos Aires Bar Association. Increasingly, these lawyers began to be identified with the armed organizations to which their defendants belonged. They also began to be themselves objects of persecution, kidnapping, murder and disappearance. Against this background, we can understand the appearance of a new professional association, "la Gremial" [the union], a product of the split between members of the Buenos Aires Bar Association. As one of its members pointed out: "[In 1969], we

were a handful of lawyers who took on the defense of political prisoners […]. Then, as a consequence of the brutal escalation of repression and the disappearance of Martins, the number of lawyers that took part in these kinds of cases was ever greater to the point that it gave rise to the emergence of the Asociación Gremial de Abogados, [created] *in defense of the exercise of the profession*."[11]

All these processes came with transformations in their professional profile and resulted in the creation of a series of new associations, such as the above-mentioned "Gremial" as well as the Asociación Gremial de Abogados de Mar del Plata, Bahía Blanca, the Agrupación de Abogados de Córdoba, the Mesa Nacional de Abogados, the Movimiento Nacional contra la Represión y la Tortura, the Foro de Buenos Aires por la Vigencia de los Derechos Humanos and the Organización de Solidaridad con los Presos Políticos, Estudiantiles y Gremiales; which all together included three hundred professionals throughout the country. Abroad, these associations corresponded to others like the *Comité de Défense des Prisonniers Politiques Argentins*, created in France by a group of lawyers and intellectuals.

When appealing to public opinion through their work, along with a rhetoric that made reference to grand ideological schemes (like Marxism and anti-imperialism), the protection of human rights and the defense of the rule of law were privileged forms of denunciation, serving as key elements in the lawyers' representations of their own roles as lawyers and constituting them as a group. In Héctor Sandler's terms, "If lawyers and politicians have some *mission*, it is to make people aware of the necessity *to implement the rule of law*, because in this way, freedom, life and human dignity form the basis of society."[12] When diagnosing the political situation in 1973, the defenders of political prisoners declared that, even under democracy: "In the Argentinean Republic, not even the remains of the so-called '*rule of law*' exist. *Human rights* are violated and ignored by legislation, jurisprudence and repressive practices."[13]

Before the courts, international conventions for the protection of prisoners of war and elements of U.S. jurisprudence were invoked by these defenders of political prisoners. The international public sphere began to play an increasingly important role as a space in which to amplify denunciations of the local situation. The activist lawyers appealed to prestigious politicians and institutions, like the Red Cross, the ILO, the Russell Court, the International Commission of Jurists (ICJ) and even the Inter-American Commission of Human Rights (OAS). These denunciations resulted in the creation of the first mission of international experts enlisted by the ICJ in 1974 to examine professional conditions of defenders of political prisoners.

This type of mission was essential to the integration of Argentinean legal professionals into these international legal associations. Trips to Cuba, Bolivia and China were progressively replaced by exile in Europe, the U.S. and Mexico and trips to Geneva, London, New York and Washington.[14] Political organizations created or translated into exile that still used leftist revolutionary rhetoric began to be considered too politicized and were abandoned. Gradually, human rights rhetoric won out. This functioned as a new conversion in their professional profile.

Commitment to the cause of human rights

From the declaration of the state of siege in 1974, defenders of political prisoners came to be privileged victims of state repression, and many of them went into exile. Bonds previously established with international experts who visited Argentina on humanitarian missions, as well as bonds created abroad in exile, allowed the incorporation of defenders of political prisoners into transnational networks of jurists. They became part of these associations as both lawyers and direct victims of repression.

These transnational associations were a significant path of entry into this type of legal activism, promoting the cause of Argentinean lawyers and allowing them to denounce the human rights situation in Argentina before the IACHR as well as the UN Commission on Human Rights and Sub-Commission on the Promotion and Protection of Human Rights. Despite differences between the Federación Internacional de Derechos del Hombre (FIDH), the International Association of Democratic Jurists (IADJ), the ICJ, Amnesty International (AI) and the Bar Association of the City of New York, they all promoted activities to support the Argentinean cause. All shared the ambition of incorporating human rights into international law (Madsen 2004).

In this new context, the social existence of Argentinean defenders of political prisoners required involvement in human rights associations and the adoption of this model of public action and intervention. The use of technical and politically neutral language was accompanied by a shift in focus: from the narration of heroic actions taken by revolutionary activists to the detailed description of the "victims" of repression and the responsibility of the state in the "systematic violation of human rights." This was possible due to the use of a repertoire of new categories provided by international law.

Defenders of political prisoners were internationally recognized as "exiled Argentine lawyers"—lawyers and direct victims of state terrorism. In exile, they adhered to the anti-dictatorial cause through an endless number of activities and areas of participation. Participation in these international forums highlights the value that this sphere had assumed for these defenders. In Paris, for example, two associations composed mainly of legal professionals were formed: the Groupe d'Avocats Argentins Exilés en France (GAAEF) and the French branch of the Commission Argentinean des Droits de l'Homme (CADHU). The GAAEF was created by French lawyer Nuri Albalá, a member of the Association Internationale des Juristes Démocrates (AIJD) who, only two months after the coup d'etat, traveled to Buenos Aires to participate in a humanitarian mission.

Exile as "a great political training period"

The trajectories of defenders of political prisoners were progressively assimilated to those of the international experts, among other reasons because their conversion

to human rights defenders was one of the professional options available to these lawyers.

For the group of exiled lawyers living in European countries, the options of practicing law, entering the judiciary, and competing for electoral positions were not available because they lacked citizenship and/or the credentials required for those positions. Under these circumstances, some survived by teaching Spanish or working for NGOs, but for others, the experience of exile fully positioned them in the center of the international political scene. This was the case for Rodolfo Mattarollo. The shift between his position during his initial years in France and just before his return to Argentina shows the way in which the commitment to denouncing state terrorism created new professional opportunities that contributed to the status of this group as experts. When discussing the beginnings of his life in France, Mattarollo explains, "The first job I had was distributing brochures to mailboxes."[15] His circumstances changed dramatically in the following years, to the point that, at the end of his exile, Mattarollo was in charge of a section of the Office of Refugees in France.

When Mattarollo returned to Argentina after the dictatorship ended, having left the country as a defender of political prisoners, he returned as a professional who was well known for his human rights expertise. He had accumulated experience in the public sector, experience with the UN, and a specialization in international law at the Sorbonne. Mattarollo describes his entry into the transnational sphere as a key moment in his professional career: " … I took part in the first actions before the United Nations in Geneva. In August of 1976, I spoke before the Sub-Commission and in March of 1977, before the Commission on Human Rights. … "[16]

As part of a learning process that included acquiring the codes required to speak in spaces like that of the UN and the discovery of the international system of protection of human rights, defenders of political prisoners began to distance themselves from the political organizations to which they had previously belonged. According to one of the interviewees, guerrilla organizations and legal professionals in exile began to take separate paths, since there was no longer agreement regarding the purpose of their activities.[17] According to Mattarollo, " … I left the CADHU because I thought that it had run its course, that it represented a political group that was very radicalized; and that at that moment it was necessary to act in wider circles."[18] In this split, we can identify the power of contact with transnational legal activism. Upon joining transnational legal networks, human rights rhetoric was reinforced, becoming exclusive and excluding.

The Center for Legal and Social Studies (CELS)

Other lawyers became human rights activists as a result of their roles as relatives of victims of state terrorism. Among them, we can find Emilio Mignone (1922–98), one of the lawyer founders of the Centro de Estudios Legales y

Sociales (CELS), whose daughter never has been found. A glance at his trajectory allows us to understand the weight that bonds with the international community of jurists had in the professionalization of human rights activism in Argentina.

Participation in these networks is one of the conditions that gave rise to the founding of CELS, whose name is similar to that of the Center for Law and Social Policy, a public interest law firm created by Leonard Meeker in Washington. Mignone became acquainted with Meeker when Meeker was a legal adviser to the State Department. This international association affected CELS's self-definition, direction and structure. In agreement with Nicholas Guilhot, " … nothing attests to this phenomenon of the professionalization of human rights activism better than the efforts of civil associations from central countries to create equivalent associations abroad" (Guilhot 2001).

In the context of existing human rights associations in Argentina, CELS distinguished itself as an association formed when " … participation in the human rights movement was pro bono and even desperate […]. The four lawyers [founders of CELS] brought *professionalism*, *efficiency* and *technical skill* to this activism in order to bring the fight to the courts, compile systematic documentation, and go forward with the denunciation of cases of disappearances in international forums" (Bruschtein 2002).

From Meeker, CELS took not only its name but also its initial source of financing and a type of expertise specifically centered on the litigation of public interest causes according to the "leading cases" model.[19] According to one of its members, CELS's founding meant: " … the possibility of developing legal action […]. In CELS, we began to work on crucial cases and follow them through […]. We, the lawyers, began to see that the important thing was to focus on legal denunciation and not just public denunciation … " (Interview of María Salazar (pseudonym) by Laura Saldiva. Private Archive 2003).

This definition reproduces the goals followed by international legal associations emphasizing the necessity of exploring fully "the legal path" in the denunciation of human rights violations, a strategy that differentiates CELS lawyers from those belonging to other civil associations like, notoriously, the Asamblea Permanente por los Derechos Humanos (1975). The Asamblea had undertaken various collective actions before the courts that were, from a legal perspective, fictions. Since the founding of CELS, proper legal intervention has become privileged, implying the creation of a hierarchical structure within this space of activism which privileges professional competence over qualities bound to notoriety or dispositions that include rage and heroism in facing the military dictatorship. Legal professionals thus have come to be defined as those best able to deal with the situation.

According to Mignone, in 1979 he contacted a delegation from the Association of the Bar of the City of New York when the group came to Argentina as part of the nascent Lawyers Committee for Human Rights. Their mission was to verify the veracity of denunciations of human rights violations in Argentina.

> "It was a group of distinguished lawyers from the New York Bar, some of them members of prominent law firms and tied to multinational companies […]. It was my task to *attend to and orient* […] the members of *the mission*. Throughout these conversations, *one began developing the idea of what our institution would be* […]. Shortly afterward, the American lawyer Leonard Meeker arrived in Buenos Aires. The retired director of the legal consultant's office of the State Department and ex-ambassador to Rumania, he concentrated his activity on the Center for Law and Social Policy located in Washington DC […]. *It served us as inspiration* for our name and projected work, and this institution had some financial resources to develop projects in the Third World […]. Finally, CELS's creation is intimately bound to the IACHR of the OAS […]; its executive secretary was an old friend of mine, the Chilean diplomat and university professor Edmundo Vargas Carreño."
>
> (Mignone 1991: 109, 111; my emphases)[20]

The term "centro de estudios," which was used to designate this human rights defense association, constituted something new, linked to the intention to include political activism in the category of "expert knowledge" or "academic activity." As Guilhot suggests regarding other similar cases in the U.S., the "centro de estudios" designation confers a title of nobility on an organization whose operational logic lies outside the realm of science (Guilhot 2001).

The creation of an association like CELS supposes an attempt to impose expert status on a field relatively removed from the academic world by appealing to the support of well-known and recognized scientific disciplines: it functions as a center dedicated to legal studies rather than an extremely politicized cause, as the human rights cause had been.[21]

This investment in academic credibility also comprised one of the strategies of several defenders of political prisoners who, as already we saw in the analysis of their trajectories while in exile, pursued postgraduate studies in international law. This strategy appears to be a way to compensate for the highly political origin of their legal activities.

The international relations capital that Mignone had accumulated during his academic, professional and political trajectory constituted an opportunity for an association like CELS. Mignone was a figure who, prior to the coup d'etat of 1976, maintained ties with high-level military, ecclesiastic, political and academic circles, both at the national and international levels. Although he belonged to an earlier generation than the group of lawyers and persecuted political activists, like them, he did not belong to the group of families and law firms traditionally tied to the legal system. He was also a newcomer who had just arrived from the interior of the province of Buenos Aires, and his initiation into the profession was bound with his affiliation with the Peronist Party and his involvement in the labor courts.

An important element of his formation was his extended Catholic activism, which began during his youth years in Luján, his hometown. As a student at a

Marist school, he participated actively as a leader of the Juventud de Acción Católica [Youth Catholic Action], where he established strong bonds with those who later would occupy key positions of the Catholic hierarchy in 1976.[22] He maintained these bonds throughout his professional trajectory; in fact, at the time of the 1976 coup d'etat, he was attending a meeting held by the Latin American Episcopal Council as the Director of the University of Luján.

Mignone's work in the public sector was another central element of his trajectory. Just a short time after finishing law school at the University of Buenos Aires, he became Education Director of Buenos Aires Province (1948–52). Soon he also became part of the Revolución Argentina government headed by General Onganía, between 1969 and 1971 acting as the National Sub-Secretary of Education. This experience in the public sector allowed him to accumulate a very important capital of relationships and public work knowledge, including close ties to high-level officials of the restored military government of 1976.

The third decisive element of his trajectory that helps to understand the possibilities made available by an association like CELS was his professional entry into the international sphere. From 1962 to 1967, he was the head of the Projects Division of the Department of Technical Cooperation of the OAS, with headquarters in Washington, within the framework of the Alliance for Progress, a program that sought to fight Communism by introducing measures that would lead to economic development in Latin American countries. Living in Washington allowed him to establish bonds with civil employees of the U.S. administration as well as legal professionals who soon became part of the IACHR. When he returned to the country, these bonds were reinforced when he became a board member of the Latin American Scholarship Program (LASPAU) and, once the coup d'etat occurred, he became investigator and director of the FLACSO headquarters in Buenos Aires.[23]

The creation of an organization like CELS must be understood as the result of the extraordinary conjunction of social properties joined by the trajectories of their founders, mainly Mignone. His trajectory combines management experience, involvement in the academic world, political activism, and strong Catholic and anti-Communist convictions. Experience in the international realm, added to the fact of being equipped with legal, political and linguistic competence, all constituted capital that Mignone was able to accumulate throughout his life. In the official documents that the embassy sent to the Department of State, Mignone was recognized as a "very qualified academic who worked for the OAS in Washington from 1962 to 1967."

The experience of working in an international program allowed Mignone to recognize the importance of this dimension for the advancement of legal activism in the defense of human rights. From his bonds with U.S. State employees, he had several meetings with Patricia Derian, Assistant Secretary of State for Human Rights, and Cyrus Vance, the Secretary of State. From the beginning of the dictatorship, Mignone maintained strong contacts with the members of the embassy of that country. The U.S. ambassador put him in contact with Leonard

Meeker, director of the Center for Law and Social Policy. This strong international relationship spurred CELS's affiliation with the ICJ and the International League for Human Rights of New York, as well as various financial resources that CELS continues to receive.

This conjunction of properties made it possible to combine the strategies of internationalization of local legal professionals with those of professionalization of the international legal organizations that began precisely in the seventies. As indicated by Dezalay and Garth, the international human rights movement is the direct product of the relationship between legal professionals with a profile similar to Mignone and another group of legal professionals who were new arrivals to the field of international activism, who saw professional competence as a source of legitimation within this field and initially committed to Third World development and the fight against Communism (Dezalay and Garth 1998:59).[24]

The visit of the IACHR (1979) to Argentina was the clearest result of the crystallization of these relationship networks, recruitment principles and moral values around this new form of activism. This proximity was possible for an institution like CELS as a result of the opportunities opened by Emilio Mignone, with close ties to public employees and legal professionals in the U.S. As Mignone said, "the executive secretary of the IACHR was an *old friend* of mine, the diplomat and university professor Edmundo Vargas Carreño from Chile" (Mignone 1991: 109 and 111, my emphases). The friendship with several diplomats who lived in Washington while he was in the OAS made it possible for Mignone to meet with members of the IACHR in Washington six months before their visit to collaborate in the preparation for the Argentina mission.

The professionalization of activism

The growth of the international field of human rights led to the creation of new organizations dedicated to human rights litigation and to the conversion of defenders of political prisoners into human rights lawyers. The links to transnational legal organizations were critical in leading to the professionalization of this activism. These relationships made it possible, among other things, to finance the activities of the local human rights organizations, such as CELS, and they brought new professional opportunities for legal professionals in exile. With the return of democracy, the expertise obtained internationally was also converted into positions within the state. The defenders of human rights, fortified with moral capital accumulated in the fight against the dictatorship and legitimated internationally through the accumulation of degrees, experience, and notable relationships, went on to positions in the state dedicated to the expert formulation of political policies related to human rights. In this manner militant lawyers were able to convert their expertise and experience into multiple arenas at the same time. The professionalization of their political commitment translated into elevated positions in the government, in local or transnational NGOs, in academia, and in international organizations.[25]

International financial support allowed CELS, for example, to retain a group of professionals dedicated to legal advocacy,[26] which differentiated CELS from other groups that had to rely on volunteers. The lawyers who were hired were for the most part from the same generation as those who had defended political prisoners. Many had in fact participated in the defense of political prisoners. A number of these lawyers had lost their positions in the judiciary or the university, and this work at CELS allowed them to continue their social and political commitment. Today all are recognized as human rights lawyers.

The professional trajectory from the 1960s to the present can be seen in the career of Rodolfo Mattarollo, who began his career as a lawyer for the state, then took up the defense of political prisoners and the cause of human rights through his relationship with international legal organizations. At the time of the writing of this chapter, he serves as Subsecretary to the Argentinean Secretary of Human Rights. He is well-known as an international legal expert in human rights. Among other activities, he is a member of the French section of the Liga Internacional de los Derechos y la Liberación de los Pueblos, created in 1976. For thirty years, furthermore, he has been a regular contributor to *Le Monde Diplomatique* on international human rights issues. He served also in the Office of Refugees of the French Minister of Foreign Affairs, and in the 1990s he brought his human rights expertise to the United Nations. His career then involved a succession of international activities serving the UN and others in places including El Salvador, Ethiopia, Haiti, and Sierra Leone before coming to use his expertise as the number two person in Argentina in human rights.[27]

The relationship between the national and transnational spaces is also well illustrated in the trajectory of Leandro Despouy, who stated that human rights served him as "a cause, a reason for being, a motive for [his] life, and a career" (Despouy 1999). A former defender of political prisoners, he was in exile in France, he belongs to the Asamblea Permanente por los Derechos Humanos (APDH) and he returned to participate in the prosecution of members of the military junta by the government of Raul Alfonsin, himself a former leader of the APDH. Despouy was in charge of contacts with international experts invited to participate. Among others, he contacted Patricia Derian, President Carter's director of human rights, Louis Joinet, a French judge acting for the UN Commission on Human Rights, and the Dutch expert Theo van Boven. He served Alfonsin in other capacities, including as the Ambassador to France, and after Alfonsin's term (1989) ended, he also became an expert for the UN Subcommission of Human Rights (1990), chairing that body in 2001. He then returned to serve the government in Argentina and then went back to work once again for the UN as a special reporter on the independence of lawyers and judges.

Solari Yrigoyen provides another example. A descendent of the family of a well-known Argentine president, his career included a stint in the Argentine Senate, service to the UN, and a number of human rights missions for Amnesty International and others. Currently he is vice president of the Committee on

Human Rights of the UN and president of the executive committee of an NGO named Nuevos Derechos del Hombre.

These examples illustrate how the accumulation of prestigious moral capital combined with a valued technical expertise led to careers inside and out of the Argentinean state and in a wide variety of both governmental and non-governmental transnational organizations. These individuals participate politically now not as militant activists but as legal experts.

The transformation is also evident in the evolution of CELS. Since the return of democracy, CELS has succeeded not only in maintaining its level of activism but also in increasing it exponentially. It is recognized today as one of the most prestigious civil organizations in Argentina. Its leaders and staff members are actively recruited by other NGOs, and its budget continues to grow.[28] The professional profile of CELS has further been augmented by a meritocratic recruitment process. Those who reach leadership positions in CELS now tend also to gain places abroad to augment their experience. Martín Abregú, for example, came from a family victimized by state terror, obtained a post-graduate law degree from American University, worked with the Commission on Human Rights, and became an adjunct professor of human rights at the University of Buenos Aires. At a very young age, he was selected to be regional Program Director for the Human Rights Program of the Ford Foundation. His career combining academic and international capital illustrates the trajectory characteristic of this second generation of human rights activists.

At the same time, the new profile of CELS contemplates a much greater range of issues than during the period of the military junta. As Mignone stated in 1983, the new profile includes the independence of the judiciary, corruption, education, personal safety, and social rights. The new focus has meant much more work with the state rather than simply against it. It also has meant working specifically to turn the field of human rights from a political cause into a matter of legal business. The creation of a legal clinic with the University of Buenos Aires is one sign of the commitment to build the legal field of human rights rather than simply to use human rights for political activism.

Legal expertise in state reform programs

The legal action against the leaders of the military government, termed the "Proceso de Reorganización Nacional" (1985), symbolized the commitment to rebuild the rule of law in Argentina. Technical and professional competency played a critical role in these proceedings. Lawyers for political prisoners and others participated and gained public stature and notoriety through that participation. One well-known example was the lawyer Luis Moreno Ocampo, who served as a prosecutor at the age of 32.

Moreno Ocampo created an NGO in 1989, Poder Ciudadano, which was affiliated with Transparency International and focused accordingly on issues of transparency and anti-corruption. The organization was strongly influenced by

the model of CELS (and shared the same location). Moreno Ocampo served also as a law professor in various schools abroad including Stanford and Harvard. In 2003, he was designated the Chief Prosecutor of the International Criminal Court. His law office in Argentina specializes in cases before international tribunals and in the recovery of laundered assets. His career shows how the institutionalization of the international law of human rights has created new opportunities for international careers.

Additionally, during the presidency of Carlos Menem (1989–99), a number of the former lawyers for political prisoners served as public officials overseeing the public administration and in the judicial system. They also served as public officials overseeing reforms in public administration and in the judicial system. An example of this profile is Alicia Pierini, a well-recognized human rights lawyer.

Pierini graduated from the University of Buenos Aires in the 1970s, became a defender of political prisoners and a political activist, had a family member disappear through state violence, and worked as a lawyer for the Movimiento Ecuménico por los Derechos Humanos during the period of the last military dictatorship. She was also involved with CELS and the APDH. She is now a consultant for the OAS in human rights issues and is the author of a number of books related to human rights. She served as Subsecretary of Human Rights from 1990 to 1997. One of her accomplishments in that position was to build up the technical law related to disappearances. Her work toward the creation of specific legal categories and procedures helped further to regularize the field of human rights.

Concluding observations

Networks of lawyers connected with international associations that they encountered in Argentina or in exile were an essential part of the process of the creation of the position of "human rights lawyer." The process implicated lawyers involved with local and foreign law (and oriented nationally and internationally) in a game of double recognition. The inclusion of the claims of Argentine activists on the agenda of international organizations allowed the organizations to speak legitimately for the legal rights of the oppressed and persecuted, strengthening their position and that of the emerging field of human rights. The Argentine professionals were also themselves often victims or family members of victims, which further contributed moral and expert capital that helped strengthen the international field.

At the same time, this transnational activism promoted the recruitment of Argentine lawyers into these networks and the exportation of a type of expert activism. This shared participation provided a common language, inclusion in a transnational community, a repertoire of actions and strategies, and new possibilities for professional careers. This insertion of the Argentine activists within this transnational space was vital in institutionalizing and professionalizing their activism.

International capital—contacts, academic degrees, academic titles, legitimacy, and expertise—was utilized to construct careers as experts in human rights that also translated increasingly into important positions within the state. Human rights began in Argentina as a strategy to fight the military regime, but with the return to democracy, it became a privileged expertise for service in a state now committed to the universals of human rights and the rule of law. The professional expertise of human rights also evolved into new organizations linked to transnational agendas for the rule of law and the reform of the state, such as Poder Ciudadano, which was already mentioned, and the more recent Asociación por los Derechos Civiles.

The professional trajectories of these lawyers make clear that a combination of social capital, the condition of victim or family member of a victim of state terror, and expertise in the local context made possible the incorporation of these lawyers into the emerging transnational space that facilitated their conversion into human rights professionals. The same combination allowed them to assume positions in the Argentine government, in the legislature, and in NGOs specializing in human rights, where they could use their stature and expertise in fights over the definition of the state. These individuals became active importers of models of the rule of law, and they helped to make law a legitimate arena for debates over the reform of the state.

Notes

1 The reconstruction of these trajectories is based on extensive field work research developed between 2002–2005 that includes documentary data collected from private and public archives and 45 extensive interviews made by me in Argentina and abroad (35), by Laura Saldívia (6), by Emilio Crenzel (1) and by Vera Carnovale for Memoria Abierta's Archive (3).

2 The importance of these relations is notable, for example, when analyzing the conditions of entry into judicial positions, which derives almost entirely from the possession of family connections in the legal field, though the 1994 constitutional reform introduced public tender. For an analysis of these processes centered on the case of the Supreme Court of Justice, see Pellet Lastra 2001. Agreeing with the profile of the lawyers described here, only labor courts constituted an exception to this rule (see Imaz).

3 For details on these changes, see Imaz. It is noteworthy that, although Imaz indicates that the incorporation of middle class groups into politics through their participation in political parties was characteristic of the forties and the sixties, this path of social and political ascent was only temporarily available after 1955 due to successive interruptions of democratic governments. Because of their extreme youth, many of these lawyers only gained electoral positions or access to State agencies after the elections of 1973.

4 Account of Jorge Podetti (pseudonym). My interview. My emphasis.

5 Account of Silvia Dvovich (pseudonym). My interview. My emphasis.

6 These options that, a priori, seem antithetical, were not in fact mutually exclusive, since it became evident from Cámpora's assumption of the presidency in 1973, that, while pursuing the dream of the socialist revolution, many of them gained positions within the parliament or as highly ranked public officials. They occupied spaces from which they had been previously excluded. Mario Kestelboim, a well-known defender of political prisoners, was named Dean of the Law School at the University of Buenos Aires. Among others, former members of "La Gremial," H. Sandler, H.

Solari Yrigoyen and R. Ortega Peña, entered the National Parliament. E. Righi became Secretary of Interior. Thus, in the brief period between the electoral triumph of Peronism in 1973 and the declaration of the state of siege by the end of 1974, they occupied a small part of the central scene in which crucial political questions were discussed in Argentina.

7 My interview with Patricia Sifredi (pseudonym).

8 According to Imaz, in 1961 only 52% of the elite leadership groups had a law degree. It is worth comparing this percentage to the effective one for 1941, when 92% of elite leaders held a law degree. According to Imaz, leaders tied to the working and unions were typical staff members of Peronist governments between 1945 and 1955.

9 Interview with Juan Carlos Rossi (pseudonym) by Laura Saldívia. Private Archive. The expression "aristocracy of risk" comes from the work of Siméant on the link between humanitarian vocation and medical professionals who are members of Doctors without Borders (Siméant 2001).

10 This suggestion is inspired by the work of Norbert Elias who, in *The Germans*, skillfully exposes the relation between the position of a marginal sector of youth, the feelings of proscription and betrayal, and the necessity to restore sense to a world that does not live up to expectations through the accomplishment of a task "superior" to one's own degraded existence.

11 Interview with lawyers Rafael Lombardi and Caesar Calcagno, in *Nuevo Hombre* 1:12 (1971). My emphasis.

12 *Nuevo Hombre* 1:3 (1971). My emphasis.

13 Closing statement of the Encuentro Nacional de Abogados "Néstor Martins," Newspaper *Peronism and Socialism* 1 (1973). My emphasis.

14 Whereas some members of "the Gremial" had described the IACHR (OAS) as "an assembly of lackeys" or as an institution "created to strengthen the U.S. imperialism," after the coup d'etat of 1976, those same lawyers would become some of the main agents participating in this transnational space.

15 Interview with Mattarollo. *Revista Humor*, April, 1984.

16 Ibid.

17 Interview with Malena Bordenave (pseudonym).

18 Interview with Mattarollo by Vera Carnovale for Memoria Abierta.

19 This very phenomenon is identified by Rojas Hurtado in the creation of legal services in Chile, Peru, Colombia and Ecuador.

20 The commitment of these U.S. lawyers must be understood in relation to the legitimation of the legal field in the United States. As explained by Dezalay and Garth, "A business lawyer in the United States, for example, who hopes to pursue an elite career is expected to invest in the promotion of legal services for disadvantaged persons" (Dezalay and Garth 2002:51). Meeker indeed fits this profile as a lawyer in an important legal firm and active in legal, academic and political spheres. When he came into contact with Mignone, Meeker was a legal adviser for the State Department.

21 It is worth remembering that in the sixties and early seventies, international human rights defense associations were still considered extremely political by the public. Thus, while the ICJ saw the AIJD as pro-Soviet, the latter saw the ICJ as tied to United States imperialism. It is within this context that we must understand the rise of Amnesty International and other similar associations that appealed to "technical" and "non-political" defense (Dezalay and Garth 2002).

22 Among them Moseñor Tortolo, president of the Consejo Episcopal Argentino and friend and personal adviser of two members of the first military government, General Videla and Brigadier Agosti. His friendship with Tortolo started in the forties when " … both of us were militants in the Juventud de Acción Católica in Luján … " (Mignone 1991).

23 These conditions correspond to the discussion of Dezalay and Garth regarding individuals in Latin America who, lacking social and family capital that traditionally would have allowed them to move in the traditional power circles, were the ones who could potentially best take advantage of these new career opportunities (Dezalay and Garth 1998:29).
24 It is worth emphasizing that associations like the Center for Law and Social Policy or the Lawyers Committee of Human Rights, that arranged the Argentinean mission of the Association of the Bar of the City of New York City, differed from the ICJ and other associations created immediately after World War II, because they did not include "remarkable" people of the right (Dezalay and Garth 2002). This suggests that the support of individuals such as Mignone was inscribed that within the fights that developed between the existing establishment of these associations and the newcomers.
25 It is worth noting that international programs for the protection of human rights became a flourishing industry, with recent estimates suggesting expenditures of some $700 million annually. T. Carothers 2000, cited in Nicolas Guilhot 2001.
26 According to Guest, Meeker initially contributed U.S. $40.000 (Guest 1990:213). After the Reagan election, CELS received support from the Ford Foundation and the National Endowment for Democracy.
27 Interview with Rodolfo Mattarollo by Vera Carnovale for Memoria Abierta.
28 The growing success of CELS in the international market for philanthropic resources is evident in the list of institutions that now finance it. See the website at www.cels.org.ar.

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Chapter 6

Criminal procedure reform in Chile

New agents and the restructuring of a field

Daniel Palacios Muñoz

Since the mid-1980s, Latin America has undergone a series of judicial reform initiatives as part of a wider process of democratization that has aimed to strengthen legal and political institutions throughout the region (Cafferata 1999:1; De la Barra 1999:140). These initiatives have generally been analyzed by the same local and international agents that have promoted them, and also by those seeking to contribute to the discussion regarding the direction of these processes. The analysis has focused mainly on the direction that judicial reform policies should follow in this region, thus contributing to the reproduction of this field in Latin America. However, very few studies have offered a critical analysis from a social science perspective regarding the conditions of possibility of these efforts at judicial and institutional reform (Binder and Obando 2004:40; Pásara and Faundez 2007:1). This chapter intends to complement the efforts[1] toward filling the void in this area by specifically analyzing the Chilean Criminal Procedure Reform[2] from the perspective of sociology of the legal field.[3]

The analysis of this chapter explores relationships between the particular strategies of the agents promoting this reform and the structural variables that frame the entire process, as well as the interaction between the local and international levels. This approach aims to distance itself, on the one hand, from the perspectives that accentuate only the internal or external factors explaining these reforms and, on the other hand, those that present these reforms *ex-post* as the product of the philanthropic volunteerism of those promoting them.[4]

This chapter begins by tracing the initial path of the agents promoting this criminal procedure reform, describing their position within the structure of the Chilean legal field and the political context characterized by the end of the dictatorship and the transition to democracy. Next, this chapter focuses on how this path allowed these agents to conquer institutional spaces from which they were able to mobilize a series of political and academic resources to promote this reform process. This promotion consisted of a strategy which—taking into account the structure of the legal field at that time and its relationship with the political context—focused on building a consensus regarding the need for reforms to Chilean criminal procedure. As this chapter demonstrates, these proposals were

the result of ideas imported from other countries and efforts to modernize public and judicial policy.

This chapter also explores how the agents promoting reform created an expertise that was the result of their local-international interaction, in a two-way process of building state knowledge which became a type of capital enabling them to improve their position within the legal and political field. This allowed these agents to compete with the judicial reform agenda set by the Chilean government and U.S. cooperation, in an attempt to promote their own reform agenda. This chapter examines how this reform was able to replace an agenda which was part of the strategy of reproduction of the country's state power at the time.

In the final section, this chapter will demonstrate how the agents promoting criminal procedure reform ended up becoming recognized both nationally and internationally as experts in judicial reform, mobilizing both the capital and expertise created during the process of these nationwide reforms.

The legal field in the democratic transition and the promoters of criminal procedure reform

In order to understand the process of Chilean Criminal Procedure Reform from the perspective of the sociology of the legal field, it is useful to analyze the individual stories of its main promoters in light of their position within the legal field and the political context—the late 1980s and early 1990s, with the end of the dictatorship and the beginning of the democratic transition.

This chapter describes how the Chilean reform process was promoted by agents who initially occupied a marginal position within the national legal field but who later became significant legal agents in the Chilean democratic transition. And as they began to gain influence, these agents obtained legal capital that allowed them to promote criminal procedure reform.

The two agents that played a central role in the promotion of the reform were Juan Enrique Vargas and Cristián Riego, two young lawyers who graduated from the University of Chile Law School toward the end of Pinochet's dictatorship.[5] Their decision to study law was motivated by a broad interest in Social Sciences and Humanities and a generalized perception that, at the time, law was the "Social Sciences and Humanities discipline" that offered the best opportunities for professional success.[6] In that sense, both men's career choices cannot be understood within a strategy of social reproduction, as is generally the case among the country's legal elite (Dezalay and Garth 2002:55).[7]

When they were both studying law in the mid-1980s, their university professors were mostly traditional jurists that were the epitome of legal orthodoxy, members of the judicial system or jurists with close ties to it. But there was also a legal community, excluded by traditional universities during the dictatorship, which criticized this traditional group and considered their academic activity to be limited and overly influenced by a desire to "maintain their status," reproducing

conservative practices and therefore excluding all critical thought (Dezalay and Garth 1998:81–82). Also, the majority of these jurists, especially those who were judges, were identified as collaborating with—or at least remaining passive in the face of—Chile's dictatorial regime (Dezalay and Garth 2002:347).

The lack of opportunity and dissatisfaction with the dominant and traditional legal world at the university forced Riego and Vargas to seek out other options. Consequently, midway through the 1980s, while still pursuing their studies, Riego and Vargas, along with a group of fellow students,[8] began to attend a series of classes being offered at the Academia de Humanismo Cristiano ("Christian Humanist Academy," or AHC). At that time, this institution had ties to the world of non-governmental organizations (NGOs), which harbored many intellectuals who had no place in the more traditional universities. These institutions were generating academic and political criticism of the dictatorship which began to pave the way for the democratic transition led by the Concertación de Partidos por la Democracia (or "Coalition of Political Parties for Democracy").[9]

In the case of Riego, his participation at the AHC gave him the opportunity to establish direct contact with Jorge Mera, a criminal law professor who had been expelled from the University of Chile and was working in this institution's Human Rights Program. Riego began working with this professor on the issue of criminal justice. At the same time, Riego was participating in a student group[10] at the University of Chile. The group was directed by one of the professors who, unlike the dominant criminal law world,[11] maintained an active academic and intellectual trajectory. In addition to this activity, Riego was pursuing a post-graduate degree in Social Sciences with the AHC Labor Studies Program.

In the case of Vargas, he was invited by José Miguel Vivanco to work as an assistant to the same Jorge Mera with the AHC Human Rights Program. The goal of this program was to analyze the different possible outcomes of the human rights issue in the future process of democratic transition. Vargas established relationships and later joined the jurists working at the human rights institutions created during the transition to democracy. There, he met José Zalaquett,[12] who would play an essential role in designing the Truth and Justice Commission (known as the Comisión Rettig).[13] Through this work, Vargas gained experience and knowledge that would prove very valuable during the first government of the Concertación, allowing him to become an advisor to then-Minister of Justice Francisco Cumplido.[14]

And so, very early on, Vargas and Riego were able to enter the world of jurists with ties to the "Concertación," which gave them access to previously unavailable academic and political resources.

At this point in both lawyers' careers, it is important to consider the figure of Jorge Correa Sutil, who played a significant role in creating the initiatives to modernize the Chilean justice system. In the late 1970s, he was secretary of the Grupo de los 24 ("Constitutional Studies Group"). This group included democratic politicians and respected jurists who were debating the dictatorship's plans to establish a new constitution while reflecting on the modernization of the

justice system in opposition to the dictatorship, feeding the judicial reform agenda of the Concertación's first government.[15] The main objectives of this agenda were to intervene in the structure of the judicial system and give it some degree of independence, modernize the management of the courts, and improve access to the justice system.[16]

Upon returning from a post-graduate degree at Yale in 1982, Correa Sutil became dean of the Law School at Diego Portales University (UDP), which was originally designed for lawyers entering the business world. Once again taking up the agenda of the Grupo de los 24,[17] Correa Sutil opened up the institution to issues of human rights, activities of public interest, and issues related to the study and analysis of judicial modernization. For this reason, the UDP hired the professors who had been excluded or were upset with the traditional universities, as well as a group of judges who were critical of the judicial system's status quo. The UDP established a dialogue between judges and critical jurists. At the same time, these professors also brought their assistants with them, mostly young jurists who began to participate actively in the activities at the UDP. As one of Mera's assistants, Riego was among these young jurists.

Simultaneously, between 1990 and 1991, the aforementioned Rettig Commission was created. Correa Sutil was named executive secretary of this commission, in charge of selecting and leading the teams of lawyers who would work on it. Because it was trying to build a political consensus regarding the conclusions of this commission,[18] Correa Sutil was forced to select lawyers who had never defended human rights cases. This is why he relied mainly on the UDP jurists to build his teams, inviting Riego (who then recommended Vargas). This is how both jurists began working in the devices of transitional justice created by the Concertación.[19]

In 1991, Correa Sutil urged the UDP to create the Department of Judicial Research, which would later become the Centro de Investigaciones Jurídicas ("Center for Judicial Research" or CIJ). At that point, Riego—who by then was a professor at the UDP—joined the CIJ and began to study how the criminal justice system worked.[20]

Parallel to this, USAID began offering funding to critical jurists and judges of the Institute of Judicial Studies[21] who were using the UDP and the Corporación de Promoción Universitaria ("Corporation for University Development" or CPU)[22] as a meeting and discussion center. This funding was intended to promote research on judicial reform and training. Finally, USAID directed this funding toward the CPU, developing a project that included the areas of judicial training, court management and legal assistance. This project also promoted the interests of the "Grupo de los 24," which also coincided with the judicial reform agenda promoted by USAID, which sought to strengthen Chilean institutions in support of the democratization process.

As a result of this first experience with the CPU, USAID decided to offer a second period of funding, from 1991 to 1995, in order to broaden the experience and knowledge necessary to promote reforms in the judicial sector. To execute

this project, the Center for Legal and Judicial Studies was created at the CPU, and Correa Sutil, who was the head of the legal assistance department, proposed that Vargas be placed in charge of the training department. The work and contacts developed by Vargas at the CPU would prove essential to launching his career as an international consultant.[23] For example, he was invited to participate in the First Conference on Justice, organized by the Inter-American Development Bank (IDB) in San José, Costa Rica, where he was in charge of the judicial training area. Thus, having established ties abroad, Vargas began participating at the Latin American level as a consultant for the IDB and the World Bank, and performing assessments of judicial reform processes in other countries.[24] In addition, during the late 1980s these jurists had created a small independent law firm[25] parallel to their academic activities, but they later abandoned this effort.

Thus, while attempting to establish their position within the legal field, Riego and Vargas began a parallel process which led them to participate in the judicial reform initiatives that arose during the democratic transition. This enabled them to establish relationships with jurists who were importing and creating the legal devices for human rights and judicial system transformations during the Concertación's first government. In this sense, their career paths were made possible by the specific context of the Chilean legal and political field.

Finally, after tracing this initial path, we can observe how Vargas and Riego joined institutions from which, as we shall see in the next section, they were able to develop a strategy for promoting criminal procedure reform during the early 1990s, mobilizing a series of resources which had been previously unavailable to them.

Technical and political legitimacy of the reform: building consensus and new expertise

This section examines how, considering the structure of the legal and political field, Vargas and Riego created a strategy for building a consensus and producing the technical and political legitimacy necessary for the legal reforms they promoted. Second, this section demonstrates how this strategy enabled them to build a legal capital different from that present in the traditional legal field, by importing ideas from abroad and including ideas from disciplines other than law. That is, we shall observe the creation of a specific expertise.

In the early 1990s, Riego and Vargas, along with two other professors of criminal law, Jorge Mera and Juan Bustos,[26] created a meeting place called the Asociación de Política Criminal ("Criminal Policy Association"). To give it further legitimacy, these jurists used the UDP's institutional framework. The association began proposing the first ideas regarding changes in the criminal justice system and invited other jurists who were interested in the subject to participate in the association as a discussion group. The presence of prestigious figures such as Juan Bustos gave them the opportunity to have their voice heard within the legal community.

Although this group was very short-lived, it allowed them to start building a set of ideas and discourse regarding criminal procedure reform. These ideas were laid out in a "manifesto" published by this association, which described the basic principles of modern criminal procedure, in line with a democratic society, which must guarantee the rights of individuals while also being able to efficiently pursue its objective (Asociación de Política Criminal 1991:7–12; Valdivieso and Vargas 2003:204).

By this time, around 1991, Riego and Vargas stopped exercising as independent professionals and centered their activities on their academic work at the CPU and UDP, respectively. From these institutions, both agents began a strategy of organizing studies and seminars,[27] which in the case of the CIJ were mostly funded by the Ford Foundation. These seminars presented critical studies on how the criminal justice system was operating. This enabled them to advance in creating awareness within the legal community about the need for criminal procedure reform, while at the same time allowing them to establish the networks they would later use to carry out the reforms. This strategy was also important since, at the time, criminal procedure was a field that was subordinate to civil procedure, and there wasn't much academic interest in the operation of the criminal justice system. Also, the jurists promoting and participating in the creation of the Concertación's reform agenda were not interested in the operation of the criminal justice system.[28]

This meant that all the seminars and studies that Riego and Vargas organized gradually positioned them as experts in this area within the legal field.

As part of this strategy of seminars, in 1992 the UDP and CPU joined forces with the Catholic University of Valparaíso to hold a seminar on the impact of orality on judicial reforms in Latin America.[29] This seminar was considered a key turning point in the creation of a consensus surrounding the need for reforms to the system of criminal justice (Urzúa 2000:141–45; Valdivieso and Vargas 2003:204; Duce 2004:204). Also participating in this seminar were Julio Maier and Alberto Binder, who were among the first to promote criminal procedure reforms throughout the region. They proposed a criminal procedure system based on a criminal procedure model for Ibero-America[30] that would include important aspects of the post-war European justice systems (especially the German and Italian systems), which Maier had helped create.

Maier and Binder played an important role in the processes of criminal procedure reform in Córdoba (Argentina) and also in Guatemala and Costa Rica. These Argentine jurists—along with local jurists who had a great deal of respect for them—negotiated with USAID to include criminal procedure reform in the judicial reform agenda which this agency wanted to promote in both countries as part of the second wave of "Rule of Law" reforms in Latin America (Langer 2007:646–51).

With this experience, and urged on by the Argentine jurists, in August 1993 Riego and Vargas used the CPU to create what was called the "Forum for Orality in Processes." It was a discussion group that included representatives of diverse interests within the legal field and the main political sectors, to reflect and create a consensus regarding the need for possible reforms to the Chilean criminal justice

system (Urzúa 2000:145–46). At the same time, Vargas negotiated with USAID to include a criminal justice area in the CPU project this agency was funding. USAID accepted and extended its funding for the CPU until 1996 (this is a significant aspect whose conditions of possibility shall be analyzed in the next section).

At this point, Vargas and Riego established ties with the Fundación Paz Ciudadana ("Citizen's Peace Foundation," or FPC). This institution was working on issues of security and had ties to the country's right-wing sectors; however, some members of the Board were also part of the Concertación.[31] One important aspect of the FPC's work was that it had a significant media presence, which enabled it to exercise a great deal of influence and position the issue of citizen security within the public agenda.

In this way, a working alliance was established between the CPU and FPC in 1994. This alliance appeared to be strategic since it earned them a certain degree of representation of different political positions among those promoting reforms, as the inclusion of the FPC ensured the participation of Chile's right-wing political sectors (Urzúa 2000:148).

In this scenario, in 1994 the agents involved in the reform process created a new space within the "Forum for Orality in Processes," designed to make concrete proposals for reforming the Chilean criminal procedure system, called the "Criminal Procedure Reform Forum"[32] (Urzúa 2000:148).

The multiplicity of actors within the Forum meant that it included representatives ranging from this new generation of jurists to older members of the Supreme Court, which from the point of view of the more traditional sectors brought "wisdom and experience" to a process which was strongly influenced by a generational change-over (Vargas 1998:102).

The creation of this Forum, as a strategy to create consensus surrounding this specific proposal, was the result of the lessons learned from the difficulties faced by the reform projects promoted during the Concertación's first government (under President Patricio Aylwin, 1990–94). They believed that if these projects had failed to achieve the desired results,[33] it was mainly due to right-wing opposition and the corporate resistance of the members of the judicial system. This resistance was understood as a consequence of the exclusion of the main judicial agents and the type of arguments supporting these reforms. These arguments clearly belonged to a context of understanding the human rights violations committed during the dictatorship and a criticism of the judicial system for its lack of commitment in clarifying these situations (Urzúa 2000:133). Just as had occurred with other reform efforts throughout the region, these reforms encountered corporate and political resistance.[34]

The Forum created several teams, including a steering committee and a technical committee. The steering committee was led by Vargas, Riego and the executive manager of the FPC, María Pía Guzmán.[35] The technical committee included Riego, Mauricio Duce, his assistant, and two young jurists: Jorge Bofill,[36] a jurist with a PhD in criminal procedure from Germany (University of Freiburg) and María Inés Horvitz,[37] with a PhD in criminal law from Spain (University of

Pompeu Fabra) and criminal law studies completed in Germany. This technical committee, which also included the assistance of the Argentine jurist Alberto Binder, was in charge of creating the technical proposals that were submitted for discussion within the Forum (Vargas 1998:103–4).

In short, the agents promoting criminal procedure reform created a strategy to include representatives from the entire judicial and political spectrum, taking into account the structure of the legal field and its ties to the political world. Following the analysis of Vauchez and Willemez (2004), the Forum became a relatively heterogeneous discussion group from which "a common sense for reforms emerged,"[38] and in which all particular interests were neutralized, given its condition as a "neutral place"[39] where different groups converged to create a hybrid notion of the reform. In this sense, this was a new generation of jurists calling for changes in the Chilean legal field, and their main characteristic was their ability to build alliances with institutions and persons who were close to both the right-wing and the Concertación (Dezalay and Garth 1998:83, 86), in order to promote transformations in the justice system, creating new spaces and proposals with technical and political legitimacy.

At the same time, as these jurists engaged in the process of building their own reform proposals, they were mobilizing an expertise or capital that was very different from that of the traditional Chilean criminal procedure, based on an inquisitorial, written culture. These agents were now in a position to import knowledge from post-World War II European law (especially German law), contained in the Model Code for Ibero-America proposed by Maier and Binder, as well as the experience of Bofill and Horvitz. Also, Vargas and Riego contributed a perspective that sought to modernize public policies, given the institutions they worked for and their own professional formation.

The next section explores how these reform agents implemented this strategy of technical and political legitimacy, enabling them to compete with the dominant reform agenda at the time for the inclusion of criminal procedure reform.

Criminal procedure reform and the initial judicial reform agenda under democracy

As noted above, at the same time that Riego and Vargas began working on criminal procedure reform, the dominant judicial reform agenda under the first government of the Concertación and the CPU project funded by USAID did not include criminal procedure reform. Meanwhile, in the case of USAID, the strategy of judicial reform had been a part of the U.S. State Department's foreign policy supporting democratic transitions ever since the mid-1980s. This had to do with modernization, institutional strengthening and court training (second wave of "Rule of Law" programs), but did not always lead to satisfactory results (Dezalay and Garth 2002:373; Pásara and Faundez 2007:3).

The support base or opposition that these reforms encountered at the local level determined its possibilities of success, as well as the direction taken by the

judicial reform agenda promoted by this agency (Pásara and Faundez 2007:9). For example, in cases in which local agents were interested in judicial reform processes, the content of these processes was the result of a dialogue between the agency and the local agents.[40]

As previously stated, in the case of Chile, USAID supported a CPU project whose agenda was in line with the interest of the Grupo de los 24, who at the same time agreed with the judicial reform agenda promoted by USAID, which aimed to strengthen institutions in support of the process of democratization. Meanwhile, this agenda was also in line with the reform agenda of the first government of the Concertación.

The reform projects of Aylwin's administration were not obtaining the expected results (Urzúa 2000:133), due to the aforementioned political opposition of the right-wing and corporate opposition of the judicial system. At the same time, USAID commissioned the CPU to carry out a project assessment, and this led to an internal discussion at the CPU regarding the impact of the project, which had not been as profound as desired. Meanwhile, USAID had appointed a new director who gave the CPU agents greater room to maneuver in this area.[41] This, along with the consensus that began to arise surrounding the idea of criminal procedure reform, allowed Vargas to promote the idea of including an area of criminal justice reform in the CPU project and successfully negotiate the inclusion of this new area within USAID in 1993.

On the other hand, at the governmental level, the participation of different groups and the technical consensus surrounding the proposals coming from the Forum were some of the factors that enabled criminal procedure reform to be included in the program of the Concertación's second government. Furthermore, members of the CPU and FPC participated in the political team that created Eduardo Frei Ruiz-Tagle's government program (Urzúa 2000:150).

Frei's program cited general aspects of the need for changes within the criminal justice system, but his government's main preoccupation in the area of justice was to finish approving the reforms that had been left unfinished by Patricio Aylwin's administration. Besides, the government elite of traditional jurists, economists and social scientists did not possess a genuine interest in changing the role of the courts within the state (Dezalay and Garth 2002:349), only in the political objectives of the democratic transition.

Nevertheless, in theory at least, criminal procedure reform proposed to solve two problems that appeared to be important for criminal justice in countries undergoing democratic transitions. On the one hand, the reforms ensured respect for basic rights, while on the other hand, this reform aimed to increase the efficiency of the justice system regarding the security problems that began to occupy the public agenda (Vargas 1997:9; Riego 2005:373–81) and which the right-wing had been using politically against the coalition government. This project also included a modernizing perspective[42] in line with the goal of state transformations present in the Chilean democratic transition, which contributed to diminishing the political differences surrounding this type of project by limiting the debate to the

logic of efficiency of the justice system.[43] This helped create acceptance for these reforms among those who were in charge of building the new state institutions (Dezalay and Garth 1998:91). These elements made it easier for the Forum steering committee to approach the Ministry of Justice in order to convince the Minister to adopt the reform as its own.

Another aspect that facilitated the relationship between the promoters of this reform and the Ministry of Justice was the role of one of the advisors to Soledad Alvear, Minister of Justice and member of the Christian Democratic Party. This advisor was Carlos Peña—a UDP professor, CIJ researcher, former dean of the UDP Law School and current UDP president—who shared the same academic background as Riego and urged Alvear to include this initiative in her ministerial agenda, outweighing the role of other advisors who weren't convinced about the reform.[44] This was a major turning point in the Concertación's judicial reform agenda.

Correa Sutil participated in the discussion regarding the agenda as one of the advisors to the Minister of Justice. Though he was one of the jurists who promoted the first judicial reform agenda, Correa Sutil claims not to have perceived the momentum being gained by criminal procedure reform because supposedly the issue was only of interest to "criminalists." Suddenly, however, it burst onto the scene with answers to some of the democratic transition's main problems (regarding basic citizens' rights and security), as well as a "highly qualified technical level."[45]

In 1994, a working agreement was made to adopt criminal procedure reform as a government initiative. This agreement included the joint participation of the Ministry of Justice, the CPU and FPC. Later, in 1995, Minister of Justice Soledad Alvear presented the project to the national legal community and in June of that same year President Frei presented it to Congress for approval (Valdivieso and Vargas 2003:205; Duce 2004:197).

At this moment, there was both an element of continuity and a break with the agenda adopted by the Concertación's first administration and its allies in USAID. This could be explained by the more "intermediate" position of the jurists who were promoting the criminal procedure reform. These agents joined a group of jurists who were previously discussing a judicial reform process that followed an agenda written by respected members of the legal community (a group to which Vargas and Riego did not belong). These jurists became new competitors in the space of judicial reform, mobilizing a knowledge and an object of interest that would compete with the dominant agenda promoted by jurists who were in a better position in terms of state power, corresponding to what Bourdieu (1986) identifies as the supporters of change within the legal field.[46]

The parliamentary discussion: mobilizing political capital and a second wave of imported ideas

First of all, this section analyzes how political aspects became a factor during the stage of parliamentary discussion of the criminal procedure reform, which forced

the promoters of the reform to mobilize political capital in favor of their reform. Second, this section analyzes a second wave of ideas imported during this stage, including elements from the Anglo-American criminal justice system, due to a strategy of "internationalization" of the team advising the government.

Although the first stage of the reform project created a relative consensus, as it went to Congress for discussion some resistance resurfaced within the legal community (Duce 2004:225–26). There was also opposition regarding certain issues that were sensitive for politicians, such as the autonomy of the Public Prosecutor's Office (Vargas 1997:11).

In this context, the Minister of Justice Soledad Alvear played an active role, personally participating in the congressional debates (Valdivieso and Vargas 2003:206). Also, the participation of the FPC guaranteed the crucial media support required for this type of reform, and the members of the Forum's technical committee (who later participated as advisors during the parliamentary discussions) gave the proposal further technical legitimacy.[47] Thus, these reformers used their networks within the political field to obtain support for the reforms.

The proposal presented to Congress reflected the expertise of the jurists who were promoting it. On the one hand, the reform proposal sent to Congress was influenced by the Criminal Procedure Code for Ibero-America and elements from post-war European law. This proposal, made by Horvitz and Bofill, was mainly based on post-war German law. Later contributions were made by Raúl Tavolari,[48] who joined the team that drew up the final criminal procedure code after signing a working agreement with the Ministry of Justice. On the other hand, this proposal also aimed to modernize the administration of the justice system. This approach was in line with the profiles of the reform's promoters[49] and the institutions they worked for, which were stressing the modernization of public policies based on analyses of how the justice system was operating—this is the case of the CPU, CIJ, and also the FPC[50] (Urzúa 2000:124–28, 159–60).

However, once the parliamentary discussion was underway, the initial project went through some changes, and elements from the Anglo-American model were added.[51]

First of all, this was due to the fact that the presentation of the proposal was a new experience for those who drew it up, since it was the first time any of them had participated in writing a reform bill, and the proposal was basically a general outline of what the reform should look like.[52] In this sense, it is important to consider that each of the jurists on the team helped perfect the code; in other words, they began to round out their ideas as the congressional discussion and analysis of the proposal advanced.

Second, the changes occurred because the team of jurists working with Riego and Vargas was also able to work alongside the Ministry of Justice during the legislative process. These contributions came during the same period that part of the team began studying in the United States and incorporating elements from the Anglo-American model of criminal justice in their consultancies during the parliamentary discussion. Basically, these contributions were made by Mauricio Duce[53] and Andrés Baytelman.[54]

In 1997, Baytelman and Duce participated in a course on courtroom litigation organized by the National Institute of Trial Advocacy (NITA). This was made possible by contacts established by Baytelman during his internship sponsored by Georgetown University at a Bronx prosecuting office. Both jurists imported and translated this methodology, holding seminars and workshops at the UDP. After this, the team led by Vargas and Riego included a closing statement during the trial process which is very similar to the U.S. system. The inclusion of these elements was also facilitated by the Master of Laws (LL.M.) degrees obtained by Baytelman at Columbia University, Cristián Riego at the University of Wisconsin and Mauricio Duce at Stanford University, which gave them a better understanding of the U.S. judicial system.

In the end, the Chilean Criminal Procedure Code combined elements from Latin America, such as those from the "Criminal Procedure Code for Ibero-America," European law (particularly the German model), as well as the Anglo-American system. Thus, the code is a translation[55] of ideas that were imported and adapted to Chile's reality using a perspective that placed an emphasis on modernizing judicial public policies. This inclusion of ideas and investment in the regional and international scenarios facilitated the changes. In this sense, importing ideas was a tool that legitimized the agents promoting the reforms, allowing them to gain a better position in the legal and political fields and promote a specific state expertise[56] regarding criminal procedure reform.

Another aspect that was essential to this process was the internal strategy for building the consensus and political support necessary for carrying out this reform within the field's power structure. In particular, the alliance established with the FPC allowed the reformers to earn the support of the right-wing. Also very significant was the role of the Minister of Justice at the time, Soledad Alvear, who strongly supported this reform (eventually strengthening her own position within her political party and the government coalition). Finally, this reform is considered one of the important achievements of the Concertación governments in the area of justice, and became a great source of political capital. In this sense, it is important to consider that this reform process is also part of the process of the reproduction of state power in Chile.[57]

The promoters of reform: symbolic entrepreneurs in the Chilean legal field and the Latin American discussion on judicial reforms

This section explores how the criminal procedure reform allowed the jurists who participated in these changes to gain a position of respect in the national and international forum, especially the network of Latin American jurists discussing judicial policy and reforms in the region.[58] These jurists used the capital and expertise acquired during this process to maintain the position which resulted from criminal procedure reform. The jurists involved in criminal procedure reform became what Dezalay and Garth (2002:32–33) would identify as "entrepreneurs"

who specialize in the market of promotion of institutional reforms, a hybrid category of academics-turned-symbolic entrepreneurs and consultants. They carried out this activity both nationally and internationally.

At the international level, in an initiative by the U.S. government, including some members of USAID and the State Department (Langer 2007:654), the Justice Studies Center for the Americas (JSCA) was founded under the guidance of the OAS (Organization of American States). JSCA's headquarters were set up in Santiago, Chile, since the Chilean reform experience was seen in a positive light by the United States, and also thanks to the efforts of Soledad Alvear in this sense.

Vargas was named Executive Director of the newly created JSCA in 2000, thanks to USAID's crucial support of his bid.[59] Vargas then recruited Riego[60] and Duce[61] to form the center's main leadership team. The task of these jurists at JSCA was to support the reform process of other countries throughout the region, offer consultancies for governments, and organize seminars and publications regarding the operation of judicial systems and reforms implemented in the region. JSCA became the platform for Riego, Vargas and Duce to join the regional discussion of ideas on reform processes and judicial systems.[62] Within this regional discussion of ideas, these agents used the Chilean experience to promote their expertise in the implementation of reforms.

After the reform process was completed, the UDP Law School became the leading law school among Chilean private universities, promoting a series of courses and trainings regarding the reform process, as well as becoming a strong alternative to the traditionally dominant schools. Meanwhile, Riego and Duce used this space as a platform toward the national legal community.

With the inclusion of international ideas and expertise arising from the modernizing approach to public policies, these agents have built an expertise emphasizing a more pragmatic, flexible, non-dogmatic criminal justice system. This expertise is currently used to position the agents within the technical-political discussion regarding the justice system and the academic discussion regarding legal interpretation and lawmaking in Chile. We see this use of expertise in the debates currently underway in Chile regarding the promises originally made during this reform process, in terms of the respect of basic rights and especially the efficiency of criminal prosecution under the new system. In this debate, this pragmatic and technical position can be observed in the proposals that represent approaches combining efficiency in system management with legal elements. This expertise is also present in positions that are critical of the more dogmatic points of view regarding the internal guarantees of the process, either from the academy or the system operators themselves (mainly judges and defense attorneys). From their institutions, these agents promote a technical knowledge that supports the continuity of the modernization process.

Today, this expertise is not without competition. On the one hand, there is the natural opposition from the traditional groups who opposed the reform from the beginning, while on the other hand there is the competing position of some jurists who participated in the process but who represent a different sort of legal

expertise or capital. Belonging to the latter group, Tavolari, Horvitz and Bofill represent an approach closer to European criminal procedure, especially Horvitz and Bofill. For them, the discussion regarding guarantees and efficiency within the criminal justice system must not modify the institutions ensuring the rights of individuals. They recognize their more dogmatic position regarding legal protections[63] and legal interpretation, believing that "the law must be analyzed from the perspective of the law."

This difference is also evident in the institutional spaces in which these jurists work. Tavolari, Horvitz and Bofill are dedicated to their professional law practice and their academic work at the University of Chile, which is a traditional legal institution but maintains its status as Chile's most important law school. In the case of Horvitz, this difference is expressed in her intellectual production, with publications adopting approaches that differ from those of Riego, Vargas and Duce.[64] Meanwhile, these differences are also present within the reproduction of the operators of the judicial system, since many of the agents criticized by Riego, Vargas and Duce are judges who have participated in diploma courses offered by Horvitz at the University of Chile.

In spite of this, Vargas, Riego and Duce have currently maintained an important position through the UDP and JSCA as state advisors on issues of criminal justice. JSCA appears to be important in terms of its internal positioning, since it allows these agents to present themselves as international experts. Being part of JSCA has become an advantage in the careers of these jurists, strengthening their role as consultants and "symbolic entrepreneurs." This space enables them to consolidate their internationalization, which is widely recognized as an important source of legitimacy. JSCA maintains different discussion forums within the legal community, but always as a space under their control and which is an important part of their professional careers, and this is perceived by other jurists who participate in the national academic discussion.

At JSCA, Vargas, Riego and Duce have established their legitimacy based on the experience of the criminal procedure reform, which has become a capital that enables them to participate in the regional Latin American discussions regarding judicial reforms, exporting their experience, which—although local—was based on a combination and translation of ideas acquired at the international level.

Conclusion

The goal of this chapter was to contribute to an analysis of the reform process in Latin America, beyond the perspectives that simplify these processes as external impositions or the result of the natural evolution of modern judicial systems.

Our analysis begins by considering the relationship between the general, structural processes, and the specific career paths of the jurists who promoted the Criminal Procedure Reform in Chile. In this sense, the initial path of these jurists may be understood in the framework of the existing legal field and the position they occupied within it, in a political context where the Chilean

dictatorship was coming to an end and the democratic transition was just beginning. This initial path of these agents was influenced by the world of jurists working toward the Chilean democratic transition, which made it possible for them to gain access to the institutions from which they would create their strategy for the promotion of the Criminal Procedure Reform.

The initial strategy of this reform consisted of building a consensus, considering that the structure of the legal and political fields had blocked the judicial reform projects of the Concertación's first administration. This strategy was used to give this justice system reform the technical and political legitimacy it required.

The analysis of this strategy describes the power structure in the legal field at the time, but also reveals how ideas were brought to Chile from abroad and were key to building the legitimacy of the reform proposal. These "imported" ideas, as well as the inclusion of a modernizing approach to judicial public policies (which were the result of their strategies and career paths), gave the agents promoting the reform a legal capital different from that of the traditional legal world, which they did not belong to. This capital gave their reform a greater technical legitimacy, which allowed them to obtain a better position in the legal and political fields and ensure support for the criminal procedure reform.

Next, we presented the Criminal Procedure Reform as an element of continuity and at the same time a break with the agenda promoted by the Concertación's first administration and USAID.[65] This previous agenda was created within a specific period when the strategies of North and South converged to promote democracy, good government and the "Rule of Law" as part of U.S. foreign policy and the internal strategies of local Chilean agents in their competition for state power, but which had been unsuccessful up until the time when the Criminal Procedure Reform was proposed.

This continuity and breaking point was made possible because, although the agents promoting criminal procedure reform initially entered the group of jurists who designed the Concertación's first judicial reform agenda, they were then able to trace a path through which they designed their own agenda in opposition to the dominant strategy at that time.

These jurists became a generational change-over that displaced the jurists who had originally designed the judicial agenda of the democratic transition. In light of the limited scope of the Concertación's first reform agenda and the technical and political legitimacy surrounding the proposal for Criminal Procedure Reform, they were able to position their reform as the main initiative of the Concertación's second government and negotiate the inclusion of this reform in USAID's international cooperation agenda in Chile.

Finally, this chapter showed how, beginning with a specific path and in relation to the legal field and a specific political context, the agents promoting criminal procedure reform obtained an expertise and legitimacy that was the result of national and international interaction, in a back-and-forth movement that was part of their reform strategy at the local level. This expertise and legitimacy allowed them to participate in the discussion on justice system reform at the

regional level, as they themselves had contributed to transformations in the Chilean judicial structure.

Chronology

Chronology of major events in Chilean Criminal Procedure Reform

1982	Diego Portales University (UDP) founded.
October 1988	Plebiscite puts an end to Pinochet's dictatorship.
April 1989	Creation of the "Judicial Training, Management and Policy" project at the Corporation for University Development (CPU) with funding from USAID.
1990–1994	First government of the Concertación de Partidos por la Democracia, after General Pinochet's dictatorship.
1991	Creation of the Department of Judicial Research at UDP, which later became the Center for Judicial Research (CIJ).
1991	New funding is obtained from USAID for the "Judicial Training, Management and Policy" project at CPU.
1992	Creation of Fundación Paz Ciudadana (FPC, or Citizen's Peace Foundation).
December 1992	Seminar "Criminal Procedure Reforms in Latin America and the Impact of Orality on Judicial Reform Processes," organized by CPU, the UDP Law School and the University of Valparaíso Law School. This activity was key to the strategy of the Chilean Criminal Procedure Reform.
August 1993	First session of the "Forum for Orality in Processes," the first technical-political space to examine criminal justice reform proposals. This forum is the direct predecessor of the work groups that made the concrete reform proposals.
1993	After the experience of this forum, USAID extended CPU's funding.
January 1994	A joint collaboration agreement is signed between CPU and FPC to implement a strategy to promote Criminal Procedure Reform.
March 1994	Transformation of the "Forum for Orality of Processes" into the "Forum for Criminal Procedure Reform," with a steering committee and a technical committee. This forum helped design the criminal procedure reform that was later adopted by the government.
1994–2000	Second government of the "Concertación," with President Eduardo Frei.

September 1994	A protocol of agreement is signed between CPU, FPC and the Ministry of Justice to execute criminal procedure reform together.
June 1995	President Frei presents Congress with the new bill containing the "New Criminal Procedure."
1999	Creation of the Justice Studies Center for the Americas (JSCA).
2000	Juan Enrique Vargas is named as the first executive director of JSCA.
December 16, 2000	Gradual implementation of the Criminal Procedure Reform, beginning with two of Chile's thirteen regions at the time.
June 16, 2005	With the inclusion of the Metropolitan Region, encompassing the capital city of Santiago, criminal procedure reform completed.

Notes

1 These efforts also include the works published by Dezalay and Garth (2002), Engelmann (2006), and Langer (2007).
2 Like other similar processes throughout Latin America, the Chilean criminal justice system reform consisted of a transformation from an inquisitorial system to a more adversarial, oral system. This implied profound changes for criminal procedure and at the organic, institutional level. Chile began implementing this judicial reform in stages in 2000, and the process was completed in 2005.
3 In regards to the sociology of the legal field, see Bourdieu 1986; Dezalay and Garth 2002; Madsen and Dezalay 2002.
4 In this sense, I wish to avoid what Bourdieu (1994:83) identified as the "biographical illusion."
5 Pinochet's coup d'état took place on September 11, 1973. The dictatorship ended with the 1988 plebiscite that set the stage for free elections in 1989, after which Pinochet finally passed on the presidency to Patricio Aylwin in March 1990.
6 Interviews conducted in November 2007. During the dictatorship, the alternatives for studying Social Sciences were very limited, given the level of widespread government intervention within higher learning institutions. This even led to certain disciplines being cancelled at some universities (such is the case for sociology, for example).
7 As in the reproduction strategy of the elites in the world of business law firms, which was a strategy of family or state elite reproduction—a path that often meant studying at the University of Chile Law School.
8 This group of University of Chile students included Juan Enrique Vargas, Cristián Riego, María Inés Horvitz, José Miguel Vivanco, and Felipe González. The first three participated directly in criminal procedure reform. Vivanco and González, on the other hand, went on to participate in the field of international human rights.
9 Political coalition that was formed to oppose the regime of General Pinochet in the 1988 plebiscite. This coalition has won all four presidential elections since the end of the dictatorship in Chile (in 1989 with Patricio Aylwin, in 1993 with Eduardo Frei Ruiz-Tagle, in 1999 (second-round in 2000) with Ricardo Lagos, and in 2005 with Michelle Bachelet). This coalition includes moderate left-wing parties and the Christian-Democrat Party. From now on, the "Concertación."

10 Students such as Cristián Riego, María Inés Horvitz, José Miguel Vivanco and others participated in this group. They are all currently well-respected academics at the University of Chile in the field of criminal law and criminal procedure.
11 It is interesting to observe how the traditional legal world present within the universities—and which is the object of much criticism—tends to focus on legal procedure, and how criminal law has been characterized by a lively intellectual tradition. Meanwhile, legal procedure has traditionally played a dominant role in the legal field, unlike criminal law.
12 José Zalaquett is what Dezalay and Garth (2002:234) would call an "outstanding legal cosmopolitan," and he is one of the main agents to import ideas from abroad regarding transitional justice (Cuadros 2006:210).
13 The Rettig Commission was created during Patricio Aylwin's administration to develop a policy of national reconciliation after the dictatorship of Augusto Pinochet. This commission was entrusted with drafting an official story regarding the political crimes committed by the dictatorship between September 11, 1973 and March 10, 1990, including a description of the most serious crimes, through which some type of reparation for the victims could be defined (Cuadros 2003:167; 2006:209).
14 Specifically, Vargas performed an analysis for the Vicary of Solidarity regarding the situation of political prisoners during the dictatorship, an issue that was later taken up by the Concertación's first government and for which Cumplido hired Vargas to be his advisor.
15 In regards to the role of the "Grupo de los 24" during the dictatorship and the democratic transition, see Puryear 1994.
16 These goals would lead to: the creation of a superior council of judges; changes in the composition and operation of the Supreme Court; the creation of a judicial academy; increased transparency and objectivity in the judicial career; the creation of a public defender's office; the creation of a legal assistance service; the creation of proxy courts; a broader use of arbiters; and the restoration of the Public Prosecutor's Office.
17 Interview conducted in November 2007.
18 Interview conducted in November 2007. This commission was composed of supporters of the military regime, experts, and especially lawyers who belonged to or had a certain affinity with the Christian Democratic Party and who played a mainly technical (and not militant) role within the world of human rights (Cuadros 2006: 215).
19 For a critical analysis of these institutions, see Cuadros 2003; 2006.
20 As we shall see, these studies were used to create a consensus surrounding the need for reforms to the criminal justice system.
21 An academic space for judges belonging to the National Association of Magistrates.
22 This corporation is one of the oldest Chilean NGOs, founded in the late 1960s, which traditionally worked in the fields of education, social development and international cooperation, executing diverse programs with both national and international funds (Urzúa 2000:124). This NGO has ties to the Christian Democratic Party.
23 This activity was created through the contacts of the director of CPU with Luciano Tomassini, who knew IDB president Enrique Iglesias.
24 Interview conducted in January 2007.
25 This study was conducted by Cristián Riego, Juan Enrique Vargas and Felipe González.
26 A well-known criminal lawyer who had returned from exile. This jurist had significant academic prestige because of his PhD in Germany and having been a professor at the University of Pompeu Fabra in Barcelona.
27 The best of these studies were those performed by Cristián Riego and María Angélica Jiménez for the CIJ.
28 In this sense, it is important to point out that criminal justice has been subordinate to the traditional legal world, as it was considered a sub-area of legal procedure in university study programs. Also, as observed by Dezalay and Garth (1998:72), during the

democratic transition the Chilean elites were interested mainly in legal imports related to business law or human rights law.

29 The content of this seminar was published by Maier and Tavolari 1993.

30 This model code was an initiative of the Ibero-American Institute of Legal Procedure, which was created in the late 1950s in Uruguay and convenes jurists from all over Latin America. Since 1978, this institute has worked on a project for a new civil and criminal procedure code, in order to guide the reforms of countries within the region, looking towards a future regional integration. After several congresses, this model code underwent modifications and the definitive version was drafted in 1988 (Urzúa 2000:142).

31 Fundación Paz Ciudadana was created by Agustín Edwards, owner of the El Mercurio editorial group, after his son was kidnapped by a Chilean extreme left-wing group. Ever since its creation in 1992, this foundation has worked on the issues of security and administration of the justice system.

32 From now on, the "Forum."

33 In fact, these projects were only partially approved during the second government of the Concertación under the administration of Eduardo Frei Ruiz-Tagle, 1994–2000.

34 In terms of the obstacles faced by the process of changes to the justice system, for example, see Pásara, "Justicia y ciudadanía realmente existentes."

35 Lawyer and Member of Parliament for the right-wing political party Renovación Nacional for two consecutive terms (1998–2002 and 2002–6).

36 This young jurist came from a small province. After an article he wrote, he was invited by Riego to participate on the technical committee. As Bofill himself says, at that time there were very few PhDs interested in criminal procedure.

37 This jurist was a classmate of Vargas and Riego. She was part of the group of students that participated in the AUH courses and studied criminal procedure. She also participated in the Criminal Policy Association, after an invitation by Juan Bustos, who had been her PhD advisor.

38 This refers to the same notion as Topalov (1999:44) and which Vauchez and Willemez (2004:15) used to analyze the justice reforms in France: "reform common sense," understood here as a shared "sense" or "language," a common definition of problems and a horizon for solutions. However, this shared sense does not imply a consensus on the specific modes of action or the ultimate goals.

39 In their analysis of the French justice system reforms, Vauchez and Willemez (2004:246) used Bourdieu's concept of "neutral place" and Topalov's idea of "reform common sense."

40 Such is the case of procedural reform in Guatemala, which can be referred to in regards to the role of Binder and Maier in Central America.

41 Interview conducted in November 2007.

42 For example, see Vargas 1997.

43 For an analysis of the role played by technical aspects in the adoption of reform projects, see Virgour 2006.

44 Interviews conducted in January and November 2007.

45 Interview conducted in November 2007.

46 " … the supporters of change are on the side of science and a contextualized, historical analysis (…), and of paying attention to jurisprudence, that is, the new legal problems and forms that may be created (business law, labor law, criminal law)" (Bourdieu 1986:18; my translation).

47 As the process of reforms advanced, new government working groups were created and the agents promoting reform up to that point became their advisors.

48 This jurist came from the traditional legal procedure world and was a well-known university law professor who belonged to a distinguished family of provincial jurists.

But he was also one of the few of his generation to establish ties abroad, especially with the legal community at the Ibero-American Institute of Legal Procedure, an institution which proposed the model code written by Binder and Maier.

49 In this sense, it is important to remember Riego's specific training at the Programa de Economía del Trabajo, while Juan Enrique Vargas was simultaneously pursuing a master's degree in Public Policy in the Department of Industrial Engineering at the University of Chile (which he finally obtained in 1997).

50 FPC also contributed its point of view regarding sentencing criteria and cost calculation within the new system of criminal prosecution.

51 Interviews conducted between January and November 2007.

52 Interviews conducted in November 2007 with all the members of the technical committee who wrote the project.

53 Participated in the initial stages of the reform as Cristián Riego's assistant, and later became a key actor as executive secretary of the Technical Committee of the Forum for Criminal Procedure Reform, participating with the team that advised the government and Congress during the congressional debate; all this besides his academic work promoting the reform through numerous publications.

54 This agent would later become Prosecutor of a research unit in charge of crime in downtown Santiago (Chile's capital city), using what were considered innovative strategies and earning him a great deal of media interest. Finally, in 2007 this agent was named chief executive of FPC.

55 Regarding the concept of translation, see Langer 2004.

56 In Latin America, the processes of symbolic importation have been a permanent tool in the competition for state knowledge and the field of state power. On this subject, see Dezalay and Garth 2002.

57 See Dezalay and Garth 1998.

58 Regarding this regional discussion of ideas, see Langer 2007.

59 Interview conducted in January 2007.

60 As Academic Director of JSCA (he has recently been named Executive Director, succeeding Vargas in this position).

61 The current Director of Training at JSCA.

62 One example of this is the Judicial System Review, edited jointly by JSCA and the Institute of Compared Studies in Social and Legal Studies (INECIP) (with headquarters in Buenos Aires and three other centers in Latin America and the Caribbean). Its directors are Juan Enrique Vargas and Alberto Binder, and it has an editorial committee including experts in Latin American judicial policy. See www.JSCAmericas.org/

63 Interviews conducted during November 2007.

64 Thus, for example, for Horvitz the type of analysis made by Riego, Vargas and Duce adds elements that are not properly of the legal field, while for those agents the work of these jurists would appear to be overly dogmatic and "traditional."

65 It is important to point out that the criminal procedure reform has currently been included within the cooperation agenda of the United States. Such is the case of Colombia and Mexico, where the role of U.S. cooperation has been very active in the definition of the reform agenda and its contents.

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Chapter 7

The European Union and the United States in Eastern Europe

Two ways of exporting law, expertise and state power

Ole Hammerslev

With the fall of the communist regimes in Eastern Europe, the world experienced a boom in legal assistance projects. Governments, private foundations, international organisations, consultancies and law firms started to invest millions of dollars and euros in legal assistance projects. American lawyers were prompt to move into the international arena, using the rule of law to open up markets, restructuring power hierarchies, deconstructing state bureaucracies and setting up institutions necessary to develop and maintain new forms of state power and market economy.[1] Drawing on the prestige of law, they managed to invent and export law, legal institutions and specific universals of governance to Eastern Europe, and – maybe more importantly – to set up the rules of the game for individuals, institutions and governments that came into the field later. The European Union – which became the other major institutional player in the field – joined in only when the initial rules had already been established. In doing so, it counteracted the growing dominance of U.S. lawyers. In the EU, this reaction was produced within and legitimised through the state in contrast to the U.S., where the production was born out of private initiatives. The grand official history of the EU enlargement towards Eastern Europe hides a complex struggle between two super powers – the EU and the U.S. – over forms of state power, law and legal capacity building.

Focusing on the social genesis behind legal assistance programmes originating in the U.S. and EU, this chapter illustrates two different ways of exporting law, expertise and state power. It examines how the programmes in the U.S. and EU developed differently. In the U.S. the programmes were to a large extent based on private initiative and were promoted by private lawyers whereas the European assistance developed within the administrative field of the EU, namely in the EU Commission. The two different 'origins' of the programmes might explain the foci of the programmes. Law firms, think tanks, private organisations and other institutions outside the state promoted law that could legitimise the (minimal) state or programmes could be designed to promote law and changes within the state.[2] The chapter exemplifies how lawyers use law to export various models of the state, and it exemplifies moreover the competition between the two large powers taking place in Eastern Europe.

Yet, it was not only *laws* these reformatory programmes focused on, it was also – and more importantly – *ways of practising and mental horizons of the agents in Eastern Europe*, the principles of vision and division, which were in focus for change. In that sense the story illustrates how law became a legitimate way of transforming practices around the state and the market.

The first CEELI liaison (cf. below), Bill Meyer, noted in an interview conducted by the author of this chapter, that he taught Bulgarian judges how to file and organise cases. It was a matter of changing the practices around the law and perceptions of law.[3] The following anecdote from American lawyer and CEELI liaison Meyer, who was in Bulgaria shortly after the changes, illustrates the mental categories that had to be changed – which were attempted by westerners by means of education and training, study tours to the U.S., and by sending volunteers to the Eastern European countries who could relate to brokers in these countries:

> 'I went to a cocktail party where the president's economic adviser was. He was a Ph.D. in economics from the Karl Marx Higher Institute of Economics. He did really not know about how things worked. He and I were standing over a glass of wine and he was telling about the mafia and about how the mafia had infiltrated Bulgaria. And I said I hear about it a lot but I have personally not experienced the mafia. Oh, he said, I have just heard a story about a person, a young man who had borrowed one million leva from a bank, and who went down to Greece and bought oranges. He came back and sold the oranges for two million leva and paid the bank back the loan. And made a profit of 200.000 leva. Can you think of anything more mafiaish? And I just said in the U.S. we would have given him a reward as businessman of the year. And this was the economic advisor to the president!'
>
> (See also Meyer 1992)

Analytical levels of the article

Using the tools provided by Pierre Bourdieu, this chapter focuses on how certain agents, given their resources (in the broadest understanding of the term), managed to take up dominant positions offered by the surrounding space, and how other agents managed to obtain positions in the field.[4]

The chapter functions on multiple levels. On one level it focuses on how individual lawyers pursued their own careers in the invention and export of legal programmes and criteria in accordance with the rule of law agenda. On another level it seeks to get behind the commonly told story of these individual creators – or unique individuals – by stressing the environment in which they, in the words of Bourdieu, 'were created', moved, and had their being. Focusing on individual persons' and institutions' biographies, the chapter attempts to write a 'collective relational biography' of how dominating agents in national fields succeeded in establishing their dominant positions in a field of law production.

Examining law production from a field perspective means that the focus changes *from law to legal field* (Bourdieu 1987:814–53). The field perspective stresses that law and legal institutions are not pregiven and universal but things which emerge, develop and are used in relation to the development of a field. Moreover the field perspective underlines that it is not the single agents per se, who have implemented the legal changes (as 'unique creators', in Bourdieu's words (Bourdieu 1997)), but the changes have appeared in relation to specific struggles in the various fields, in which different forms of resources are used to implement changes. Such a focus creates a dynamic in the study, as it shows how different groups on the basis of different investments for the time being have won the game, whereas others have lost. It moreover indicates a focus on the legal agents, which very rarely is part of the legal discourse because the perspective focuses on how legal development is closely related especially to social and cultural capital.

The chapter also addresses an international level which was created and became functional as a field with the new 'rule of law' agenda providing the operating orthodoxy of the field.[5]

Besides pointing to the mechanisms behind the formation of an international field, the chapter also points to the construction of Europe and illustrates how it is possible to examine fields in which Europe plays a role. The EU does not consist of a coherent unit, but has to be analysed from a field perspective, that is, with focus on the EU–agents' different relations, their relative strength, and the connections they are involved with. The EU is used by national agents, and therefore the analysis of struggles within the EU is essential to uncover the hidden structures of Europe (Cohen 2007:20–33; Hammerslev 2007:4–15; Kauppi 2005).[6]

The chapter deals thus with the EU enlargement towards Eastern Europe by focusing on the generative mechanisms behind the legal criteria that the new member states had to meet in order to gain access to the EU. The underlying view of the chapter is that EU agents were not the only agents taking part in the enlargement process. American lawyers as well as philanthropic foundations and other institutions were participating in what later became known as the EU enlargement.[7]

Yet the international field of legal assistance did not develop without a recipient side, a side in which local agents used international strategies in order to fight their local battles. This reciprocal process involved in the transformation of the Eastern European countries forms another level of the story. In examining the import of legal programmes and transnational capital, the chapter puts specific emphasis on the development of the Bulgarian legal field. The Bulgarian case can be considered as a 'double test case' for the largest and most important American programme in Eastern Europe.[8] Bulgaria was the first country in which the American Bar Association's Central and East European Law Initiative (CEELI) put a 'man on the ground' on a long-term basis, a model later expanded to the rest of the Eastern European region. Moreover, Bulgaria played an

important role for the National Endowment for Democracy (NED) when they developed regional programmes, in which agents behind Bulgarian think tanks trained and funded by U.S. funds assisted other think tanks in the region.[9]

In order to *represent* the dynamic of the field, the chapter focuses on biographies of various ideal-typical individuals in the field. These are chosen because they represent either clearly dominating positions in the field with representative and clear trajectories or because they represent changes and differences in the field. They thus characterise the dynamic of the entire field by pointing at specific trajectories and forms of capital at certain points and places.

The (re)emergence of U.S. legal export: the creation of a dominant position

In the U.S. the fabrication of post-Cold War legal assistance in the area of rule of law and the judiciary was to a large extent the result of a private initiative taken by American commercial lawyers within the American Bar Association (ABA).[10] Using the ABA as a platform for their undertaking, Sandy D'Alemberte and Homer Moyer set up the organisation known as CEELI (Central and East European Law Initiative), which was to provide legal assistance in Eastern Europe. At the time the prestige of the ABA was falling with the relatively decreasing profit of the investments in pro bono work helping poor people. They drew on the experiences of the law and development movement and long engagement in Latin America. With the focus of the programmes on apparently universal claims of the rule of law, independent judiciaries, human rights, and the market economy in Eastern Europe, this new programme could unite the right and left wings within the ABA. And the invention was relatively cost free because of the possibility to utilise lawyers doing pro bono work and profiting symbolically from it. With their positions as president of the ABA and chair of the international section of the ABA, respectively, these two lawyers invested in what within 15 years would become one of the largest legal programmes in the world. It became one of the most prestigious departments within the ABA, and it has been characterised by Janet Reno, the former U.S. Attorney General (and a friend to one of the founders) as the 'worthiest pro bono project that American lawyers have ever undertaken' and praised by ABA President Bob Hirshon and former ABA presidents, together with the President of Croatia, in 2002 as 'the crown jewel of the ABA'. CEELI was established in 1990.

Moyer is a corporate lawyer working in the international department of the Washington law firm Miller & Chevalier, which specialises in tax, litigation and international disputes. The law firm took in Moyer from the U.S. Department of Commerce, where he had worked on international issues, in order to create an international department. A political appointee in both Democratic and Republican administrations, Moyer has served as General Counsel and counsellor to the Secretary of the U.S. Department of Commerce. Before government, he practised with Covington & Burling and served in the office of the

Judge Advocate General of the Navy, with collateral duty at the White House. As CEELI developed, the number of international cases coming to Miller & Chevalier grew steadily, and this in turn was reflected in the number of lawyers working in the international department. Moyer has taken part in one of the largest WTO trade disputes and faced the extraordinary challenges presented by NAFTA. He was a product of the Yale Law School.[11] After the invention of CEELI, Moyer was honoured several times by the ABA for his leadership of CEELI.

D'Alemberte is a lawyer with the firm of Hunton and Williams. He came from politics, where he was associated with a progressive group of prominent South Florida Democrats who wielded influence over state policy and politics from the late 1960s. The group included long-time friends such as Janet Reno, as well as the late Governor Lawton Chiles. D'Alemberte received his juris doctor with honours from the University of Florida where he was named to the Order of the Coif. He also studied at the London School of Economics and Political Science. He was dean at the College of Law at Florida State University and later president of Florida State University, with which he had long family connections.

Using their collective social and legal capital, they started CEELI. The first director, Mark Ellis, was a specialist in commercial law and one of D'Alemberte's former students. They set up a board consisting of 'some of the brightest legal minds in the country', as one insider noted, people who were known to Moyer or D'Alemberte – and to the wider public – and who bore a variety of titles. The board included Max M. Kampelman, Justice Sandra Day O'Connor, Lloyd Cutler, and Abner Mikva.

Max Kampelman was a lawyer with the New York/Washington law firm, Fried, Frank, Harris, Shriver & Jacobson LLP. Alongside his association with the law firm, he has worked in U.S. diplomacy and in related institutions such as Georgetown University's Institute for the Study of Diplomacy, the Woodrow Wilson International Center for Scholars, and the think tank Freedom House.

Justice Sandra Day O'Connor from Arizona was nominated by former President Ronald Reagan for a position at the U.S. Supreme Court. She received her degree from Stanford University. She was married to a prominent corporate lawyer in Arizona who also worked for Miller & Chevalier, Washington (Homer Moyer's law firm) when he moved to Washington, D.C. with his wife.

Lloyd Cutler was a corporate lawyer whom Clinton took in as legal adviser – albeit on unusual terms that allowed Cutler to remain as senior counsel at his law firm and to work for undisclosed private clients (Nader and Smith 1996). Cutler's eminence is reflected in the obituary published in the *National Law Journal* by Stuart Taylor Jr. on May 17, 2005. It states that 'there will never be another superlawyer on the scale of Lloyd Cutler, who died on May 8 at age 87. This is not to deny the possibility that someone, somewhere may replicate the dazzling array of talents that made Cutler the pre-eminent lawyer-statesman of his generation: intellectual brilliance, wisdom, public-spiritedness, eloquence, genius for grasping the interests of everyone around the table, and a passion for forging consensus solutions to hard problems'.[12]

Abner Mikva was Cutler's successor appointed by the Clinton government. He was a former federal judge and a congressman from Illinois.

It was thus agents with significant resources who constructed the programmes, which were legitimated as idealistic undertakings. The conditions of possibilities for the construction of the programmes exist in the American national field, in which it is legitimate for the agents to make career criss-crosses between private law firms and the Washington administration and between corporate law and idealistic projects.

Putting law on the agenda

Drawing on this kind of social capital, D'Alemberte and Moyer – with the acceptance and approval of, among others, Miller & Chevalier – set up the programme and managed to overcome resistance and get funding from the U.S. government. Drawing on their social and cultural capital, the persons behind CEELI convinced the people in the U.S. State Department dealing with aid to Eastern Europe that the project merited funding.

Until that time, the U.S. government had focused primarily on weakening the strong political bureaucracies in Eastern Europe in order to oust the former communists from the field of power and replace them with reform-friendly forces. Officials from the U.S. administration, government, judges, and think tanks were training the opposition to the communists and were trying to construct a form of civil society, which from a U.S. perspective was identified by the presence of regional non-governmental organizations (NGOs), think tanks, and non-state institutions. These institutions could produce and import discourses concerning necessary reforms and problems that had to be solved, and they could train other reform-friendly forces. The American perspective was, in other words, to train, support, and fund institutions and individuals who could fight their fights by strongly investing in making virtues of necessity. Moreover, the U.S. government focused on privatisation and building up open markets. One of the people brought in to create and administer governmental programmes for the U.S. State Department was the former U.S. ambassador to Bulgaria, Robert Barry. In 1992 he noted: 'We do not have government-to-government agreements … Our task is to promote the growth of the private sector rather than to encourage the growth of new bureaucracies' (quoted from Wedel 2001:53).[13] The focus of the U.S. government was not on legal programmes, and it did not have any real strategy for rule of law programmes.

Like the government, The National Endowment for Democracy (NED) and its agencies, all of which were key institutions in the task of training oppositional groups to take up the fight against the former communists, did not focus strongly on rule of law programmes, though it was 'one of the underpinnings of what we did … We worked on rules regarding democratic elections, representation etc. We tried to change the democratic rules', as someone previously associated with the regime of NED expressed it.

CEELI became part of a larger U.S. professional field consisting of U.S. policy idea brokers and its trajectory corresponds with the structures of the field.

NED was founded under former President Ronald Reagan in order to promote democracy globally. The persons behind NED and the policy establishment in Washington came out of anti-communist policy in the U.S. in the 1950s. It is a core institution behind the transformation of Cold War activism into a professional field of international practices based on democracy in which human rights and the rule of law were important components (Dezalay and Garth 2002). The long-time head of NED, Carl Gershman, provided the grant to CEELI. Before joining NED he was engaged in politics. Like the CEELI board member Max Kampelman, he was born in New York City, has been involved in the U.S. Social Democrats and Freedom House. Yet, it is not only behind the social structures, where a correspondence exists between NED and CEELI.

NED has invested in and tried to export a specific form of policy knowledge, and it has also participated in the actual production of such knowledge by supporting a wide range of professional idea brokers both nationally and abroad such as politicians, lawyers and so-called independent research centres. The latter work primarily in areas defined and funded by dominating agents and institutions. Such institutions work to promote ideas in the areas of public policy. The ideas are formulated in a scientific language in various scientific traditions – such as law, economics and political science – the policy behind the ideas is hidden. As Nicolas Guilhot (2005:87) notes on the basis of American research centres, the activities of funding, building institutions, and training professionals ensure that 'a significant control is exercised over the process by which policies are fabricated and circulated'. The scientific and 'independent' idea production emphasises the universal need for a U.S. policy industry. With this specific U.S. model of promoting ideas, cultures, management techniques, and ways of practices, funded by among others, NED, the Washington policy community can extend its reach. Emanating from dominating institutions and persons in Washington, this form of imperialism opens new foreign markets for policy prescriptions focusing on public institutions and the market.

Though being primarily funded by the U.S. government and closely related to the foreign policy establishment NED appears as an independent civil society organisation. As Guilhot (2005:86) notes: ' … the enhancement of professional standards and the promotion of research and reflection on democratization processes contributed to turn the U.S. model of policy research and advocacy as a universal model of political change. Itself a product of the strong resurgence of foundations, think tanks, policy research centres, institutionalized lobbies and advocacy networks which deeply transformed U.S. politics in the 1970s, the NED actively seeks to export and internationalize this model'.[14]

In Bulgaria the NED managed to relate to and train a group of younger lawyers, some of whom went on to become prime ministers and presidents of the country and would be the driving force within the political field for investment in law reforms. When CEELI moved into Bulgaria, the Bulgarian NED-trained

lawyers collaborated with the representatives of CEELI in Bulgaria in determining the priorities and focus areas behind the rule of law and independent courts. The Prime Minister of Bulgaria in the first non-socialist government, Philip Dimitrov, is an example of such an actor. Dimitrov took into his cabinet 'all good persons', among others Nelly Koutzkova, who became a key figure in the later development of the rule of law agenda and who was very closely related to CEELI. She became a mentor and an inspiration for younger reformist lawyers and judges. Another leader in the legal community trained by NED was former Minister of Justice, Svetoslav Louchnikov, who had been a professor in civil law before the communist take-over. He was removed during the communist regime for political reasons, but yet he found a position as *juris consult* during the years of communism (Meyer 1993:134ff.). The story of Alexander Djerov, who also was trained by NED, might exemplify the resources and impact of these legal key reformers. Alexander Djerov was born in 1929 in Sofia. He came from a famous law family; the grandfather had chaired the Supreme Court of Cassation and was Minister of Justice three times. His father was one of the first lawyers in Bulgaria working in the field of finance law and commercial law. After the communist takeover, his father was deported to a small village. During communism Djerov started as 'an enemy of the state' but by drawing on the prestige of his family and social network he managed to study at the university. In 1989 he joined the Radical Democratic Party again due to his social capital – with the addition of cultural capital. In 1992 he became a professor of civil law. Just after 1989 he was in the U.S. on a study programme. Djerov was one of the founders of the private New Bulgarian University, which was based on a U.S. model to counter the previous communist domain of St. Kliment Ohridski University in Sofia. The university was founded with the cooperation of the leading think tanks – led by persons who also were or had been related to the establishment and continuation of George Soros's Open Society Institute and were mainly funded by various foreign institutions, especially USAID. At the same time, they were also professors at the New Bulgarian University. Djerov also practised civil and property law in his and his son's law firm (Hammerslev 2005:91–104; Hammerslev 2006b:29:27–42).

CEELI managed to get funding from the American government via the NED. The rule of law was thus outsourced to the inventors of the programmes, namely CEELI. It turned out 'that CEELI was a cheap and very effective way of promoting legal reforms' due to the *pro bono* programmes of lawyers in the U.S. 'Our people working on the ground did not get any salaries … so it was good value for the money.' The grant 'provided U.S. with the chance to experiment with CEELI', as someone close to CEELI put it. 'It was clear that the approach we were taking was *pro bono* assistance, because we thought we could attract lawyers to participate, and they did – they came out in great numbers.'

Since the launch of the project, more than 5000 volunteers have participated. In the beginning CEELI had two employees, the director Mark Ellis and a secretary. Their annual budget was approximately $400,000. By 2003 the

annual budget had increased to approximately 20 million dollars. In 2006, CEELI had 30 offices in Eastern Europe and Central Asia and more than 35 liaison officers and long-term legal specialists working overseas. CEELI has assessed more than 465 draft laws and constitutions, and has some 40 employees in its Washington D.C. office.[15]

The resources and backgrounds possessed by the American lawyers coming into the field, however, are unequally distributed – an inequality that is projected to the international level. Initially, the lawyers working on the ground did not carry the same forms of and amounts of capital as their Washington-based colleagues who were the inventors and leaders of the programmes. They were all lawyers but with differences in their possession of cultural, social, and economic capital – and also legal capital. The American lawyers who worked in Eastern Europe were often first-generation academics (and lawyers) who had qualified and established their practice in the provinces of the U.S. Some had never worked internationally before, but the work in CEELI was a gateway to international work and positions in less prestigious NGOs.

They were often idealists who wanted to 'change the world' and 'do something good', as several CEELI liaisons stated in interviews and in personal conversations. Their Washington counterparts wanted to change the world too, but their aims were driven less by idealism and more by strategy than their counterparts on the ground. The first phase of the process after the fall of the Berlin Wall, which saw the formation of this specifically U.S. side to the international field of legal assistance, was characterised by a period of idealism. This idealism was taken into the field and used both in order to attract volunteers – who were drawn to the 'peace corps' – and to establish relations with reformers in Eastern Europe, who were themselves propelled forward by their euphoria. Eastern European lawyers, judges and a few jurists were, moreover, attracted to the American lawyers who came on a volunteer basis in order to help them develop in the direction of Western societies. A similar idealism was not to be found either in the corridors of the U.S. administration nor on the private market (Hammerslev 2005:91–104).

The most significant illustration of the discrepancy between possession of capital and idealistic intentions might be the biography and views of Bill Meyer, the first volunteer CEELI liaison officer to be sent to Bulgaria (and Eastern Europe). He grew up in a small city in Ohio, where his parents worked as farmers. He was educated in Colorado. He is a lawyer in a law firm in Boulder, Colorado, where he lives on a farm. He had taught black people in prison. When he contacted CEELI he was full of idealism. When he saw the fall of the Berlin Wall, he 'thought it was the time where I could actually make a difference' as he said in an interview. An exceptionally winning personality (as a Bulgarian key reformer said: 'Bill? Oh, I loved him.'), Meyer was not part of the big Washington and Wall Street law firms, and these attributes gave him additional opportunities to socialise with the Bulgarians in the transition processes. In contrast to the career diplomats from USAID and the Washington administration

of whom they worked independently from the beginning, the volunteers used 'friendship strategies' in order to build relationships with reformist lawyers in the country. In his own words, Meyer 'lived like a Bulgarian. In contrast to many other foreigners, my wife queued up for milk' (see also Meyer 1992). With 'friendship strategies' the liaison officer in Bulgaria was able to relate to the next generation of reform lawyers, which was quite unique in the field of legal assistance.

The difference between this profile and the individuals behind CEELI is also illustrated by an account about Kampelman and O'Connor's arrival in Eastern Europe: 'CEELI has a meeting every summer somewhere in the region. And very often when we arrive, the government in the country we visit, the delegation that comes to meet us only really wanted to greet O'Connor and Kampelman. And they would often have separate cars for them.'

CEELI focused on programmes in a number of legal areas such as the constitution, legal education, judicial reform, bar reform, commercial law reform, and criminal law reform. The rule of law focus was very closely related to commercial law reform and the development of market reform in order to assist these countries on their way towards global economic integration. The new legal agenda, which went hand in hand with business interests, was invented in the legal field as neutral universals, then extended and imposed globally onto the political fields and onto the social universe.[16] The law was once again on the political agenda in the U.S. and Europe; and various governments,[17] international institutions,[18] and philanthropic foundations[19] began to focus on the rule of law and associated legal areas such as human rights, strong and independent courts and commercial law. These legal categories became key assessment criteria when the democratic status of various countries around the world was evaluated by international organisations such as the World Bank, Open Society, and the EU. Moreover, CEELI managed to get into a position where some of the individuals behind CEELI were advising other international institutions such as the International War Crimes Tribunal.

When Mark Ellis moved from CEELI to the International Bar Association (IBA), he took the CEELI model to the IBA, which is using it in, among other places, Afghanistan. At the same time, some of the individuals associated with CEELI were also used as consultants for international institutions. Once again, this is illustrated very well by following the career of Mark Ellis. With his background in foreign investments he was used by the World Bank as a consultant in foreign investment issues relating to Eastern Europe and the former Soviet Union while simultaneously being the director of CEELI.

CEELI therefore became part of a larger field for the production of legal assistance by the U.S. As illustrated, the trajectory of the persons involved in the organisation as well as the trajectory of the organisation itself corresponds to the structures of the field of production and exportation of legal models. CEELI and the persons involved grew out of a specific U.S. field and their actions abroad were shaped by their national field. The particular U.S. model of state with its main focus on governance and civil society was exported to Eastern Europe

(and other places) via structural homologous agencies trained and supported by U.S. agents to fight their fights.

Government to government programmes: from demand to accession-driven approaches of the EU

The trajectory of the legal programmes in the EU is different from the trajectory of the U.S. programmes. As the following demonstrates, the EU's legal programmes were created in the bureaucratic field of the EU, that is, mainly in the executive branch and in particular in the Commission. Yet, not only were the backgrounds of the programmes different, they also functioned differently.

In the first years after the fall of the communist regimes, the Phare programme was established. It purported to provide assistance within five main areas: agricultural supplies and restructuring, access to markets, investment promotion, vocational training and environmental protection. As a high positioned civil servant in the Commission noted in an interview with the author of this chapter, 'The Phare project was in English, and it was in fact built by native English speakers'. The persons behind the Phare programmes were mainly economists from Britain and persons with backgrounds in development. Moreover, the Commission got the central role in the assistance work and in the coordination of the G-24 because Jacques Delors could mobilise his social network (Smith 2004). Yet the assistance was what is termed *demand and market* driven. Private consultancies from the west were earning their keep on the big projects that were established (Wedel 2001). As several persons working in the area noted, 'we had so much money, the only problem was how to spend it quickly enough'. But still the funding and projects were subordinated to the auditing and bureaucratic control of the Commission.

When it became clear that the Eastern European countries were moving for membership of the EU, a group of persons invested in a legal focus. In 1993 the Copenhagen European Council defined the criteria the Eastern European countries had to fulfil if they were to join the EU. The political criteria comprised stable institutions guaranteeing democracy, the rule of law, human rights and respect for minorities; the economic criterion was a functioning market economy; and finally the countries had to incorporate the Community *acquis* and had to adhere to the various political, economic and monetary aims of the EU. Despite the vague criteria, which did not give specific instructions of institutional organisation, they could be used by the EU as an instrument to put pressure on the Eastern European countries in relation to the various reform projects.

A legal turn: the shift of the EU programme from demand to accession driven

With the new legal criteria, the lawyers behind them got an instrument to transform the EU support via the Phare programmes from *demand driven* to

accession driven. That meant that rather than support what the Eastern European countries sought in aid and grants, the assistance programmes of the EU now mainly focused on projects concerning the ability of the countries to fulfil the accession criteria. The inventors of the new form of focus were working for and around one core person, François Lamoureux.

The trajectory of François Lamoureux is very illustrative in showing the difference behind the U.S. and EU production of legal programmes. Lamoureux was part of Delors's cabinet (or as they were called 'practitioners of Rottweiler politics', 'Napoleonists, becoming Bonapartists', 'a gang'/'commandors' (Ross 1995:51)). He was educated at the *Instituts d'études politiques* and taught at the University of Paris I and the University of Metz before moving into the legal service of the Commission in 1978. He had been involved in politics for the French Socialists and had served as assistant mayor of a suburban Parisian town. He had been a member of Delors's cabinet since 1985 and formed together with Pascal Lamy (now head of WTO) the closest advisors to Delors. Lamoureux had been 'a central player in hammering out the Single European Act' (Ross 1995:55). In 1996 he moved to the Directorate-General External Relations as Deputy Director-General and later became Director-General of DG Transport. He and others used various strategies to strengthen the position of the bureaucratic side of the EU. Using the EU to regain the former imperial strength of the French, they managed to mobilise a strong cabinet – including many persons educated at the *Instituts d'études politiques* and with strong social capital in the form of international social networks (Kauppi 2005).

Lamoureux and the persons around him managed to take the Phare programmes to the next phase. They used their strength in order to impose the rule of law agenda into the political field, and it became a core area of assistance to Eastern Europe. With the rule of law agenda settled, legal expertise was needed in the Commission. A group of persons started the programmes, and the area of justice and home affairs became one of the growth areas within the EU Commission. It was an area where the Commission could play a leading role both within the EU *vis-à-vis* the Parliament and also *vis-à-vis* other institutions.

Lamoureux was also a key person behind the Twinning programmes, which are programmes supporting specific collaborations between a public institution in the recipient country and a similar institution in one of the EU's member states. By inventing the new programmes, they changed the ways of using experts and, more importantly, were able to place a larger responsibility on the member states for European integration. As a civil servant from the Commission noted in an interview, 'We saw that the area of public administration was extremely expensive, and we needed to draw our expertise on the market. And they did not leave stable results. Once the experts had left, we did not get any local know-how to take on the reforms.'

This new legal turn in assistance to Eastern Europe did not only mean that new forms of assistance were invented. It also meant that the state and legal (and other) bureaucrats were related and became committed to the development

of the Eastern European countries. The Twinning programmes, which sent bureaucrats, judges, police officers – in other words, state officials – to the countries in order to share their expertise and assist in reform efforts *within the state*, were also an invention to 'create network and focus, not a private focus. And then it might be possible to put political pressure from the members of the EU on the institutions for which Twinning is', as one of the inventors of the programme said in an interview before continuing, 'by nature, the field of justice and home affairs is something the state is in charge of. It is not the market that changes the judiciary'.[20] Thus, in certain ways the Twinning programmes mimicked the CEELI pattern with dominated agents from the provinces (capitals) of Europe sent out to assist the countries in changing legal agents' practices and outlooks. Yet, a fundamental difference existed in the way they functioned. The U.S. focused on private lawyers and the EU focused on bureaucrats, including judges, police officers, etc.

Lamoureux, who had been one of the closest advisors to Delors and who knew the rules of the game, succeeded in ousting others who wanted to expand the programmes to softer areas such as civil society, unions and welfare states. Despite the resistance from especially the U.K. to the changes from market expertise to legal state expertise, Lamoureux won the battle.

Even though there were internal EU reforms with the internal market and later the euro, the enlargement became one of the key areas of European development, and the persons who invested in the enlargement and not least in the rule of law agenda were promoted internally in the EU Commission. The legal assessment criteria of the legal reform programmes were decided progressively, mainly by a group of lawyers in the DG Enlargement in Brussels with the assistance of the growing DG Justice and Home Affairs.

Naturally the Commission and other EU institutions are surrounded by a host of professional lobbyists trying to influence which issues the political institutions should put on the agenda, how they should treat them, and which positions they should take on political issues. One of the ways the major lobby institutions, such as the European Roundtable of Industrialists and the EU Committee of the American Chamber of Commerce, operate is to try to influence leading persons in the Commission (Cowles 1995; Cowles 1996). In Europe, therefore, state institutions – and especially the bureaucratic field – are core institutions of influence for political development and for the establishment of major legal programmes and legislative initiatives (Hammerslev 2008:145–62).

The legalisation of the EU programmes was also a way to counteract the predominance of U.S. lawyers. As one of the founders of the EU legal programmes noted:

> 'It was in 96–97 you can say that the EU promotion became legalised. And the accession partnership gave us the possibility to say, look do not take U.S. experts in that field. Here is the priority, it is this EU legislation. So it is for us to tell you what to do … And then we felt: now they have applied

> for membership, should we continue to programming in the same manner? Or should we reverse the situation? We know in principle what should be good for you, what assistance you should receive. If you want to become member, we could tell you what we think your priorities should be. So we invented the accession partnership, which was an instrument whereby we would draw the priorities. And therefore we changed the way that the Phare programs were driven: from demand driven to accession driven.'[21]

However, the U.S. was still dominant in the area. They had educated the persons the EU had to count on when it evaluated the Eastern European countries, just as CEELI had invented evaluation criteria and written country assessment reports on the various Eastern European countries, which the EU lawyers had to use. Thus, much of the criteria and evaluation priorities were set with the inspiration of the work of CEELI.

When Bulgaria is assessed, the EU makes its reports based on interviews with elite persons about the development of the rule of law. Many of these interviewed experts were also the experts related to the NGO sector or to some of the prominent lawyers. It included, in other words dominating agents in Eastern Europe (Hammerslev 2006b:27–42). Many experts used in the beginning were also CEELI-trained experts. Yet, in order to get more European NGOs into the picture, the EU started to be in dialogue with the newly started think tank the European Institute, which was set up by the chief negotiator of Bulgaria for the accession agreement, Stanislav Daskalov. Daskalov was an economist and was closely related to some of the first Bulgarian law firms set up after the fall of the Zhivkov regime. Initially he and a lawyer working with the Open Society Institute of George Soros got funding from the Open Society Institute to set up the institution, which became one link between the persons in the Commission and advisors for the Bulgarian government.

The lawyers in the EU Commission engaged also in the battle for judicial training in Bulgaria (Hammerslev 2006b:27–42). The U.S. focus had been to have institutions outside the state, which were able to train magistrates, but the EU wanted such training institutions to be state institutions. The story of the Magistrates Training Centre is illustrative of the two different foci of the U.S. and EU. Different groups of 'reformist judges' and the Minister of Justice from the Union of Democratic Forces, Vassil Gotzev, decided to establish a joint venture organisation. The Magistrates Training Centre (MTC), as the organisation was called, was established in 1999 on an NGO basis between different organisations and the Ministry of Justice with the purpose of setting up training programmes for magistrates. The reasons for establishing an NGO were, as one of the persons involved in the training centre since its beginning noted in an interview, first, 'that NGOs are not bound by strict rules of the state, but mainly by rules given by the founders and the board'; second, that it is 'much more flexible with such an institution'; and third, that it 'could be funded by mainly international foreign projects'. USAID and the Open Society Institute agreed

to fund the project. Leading reformist judges got the idea for such an institution after discussions with a former CEELI liaison back at the beginning of the 1990s. USAID chose to work – via another Soros-founded institution, the East-West Management Institute – with MTC. MTC started as a small training centre, as one observer noted, but now it has grown, which would not have been possible without the support of USAID. Initially the project met some resistance among persons from the previous Communist Party both in the local courts and among law professors at the University of Sofia. The judges thought that it would interfere with their independence, and the university professors saw NGO-based training programmes as attacks on their expertise. The 'reformist judges' profited, however, by taking part in the establishment of the various NGOs and were often used as experts in various forums – national as well as international (Hammerslev 2007:135–55). When the EU Commission began to prioritise judicial reforms, it also focused on judicial training in Bulgaria. In the Commission the opinion was, however, that such institutions should be state institutions. As a central player in the Commission noted about the MTC, 'Throughout the years, we saw that their capacity to train magistrates was limited and remained limited. They were not able to grow so we imposed the Bulgarian Ministry of Justice to take their responsibility and to transfer it to some full fledged institute as you have in France or other countries.'

Conclusion

This chapter has demonstrated two modes of production of legal assistance by focusing on the social genesis behind the American and European production and export of legal assistance. In the U.S. the programmes were mainly the product of private initiatives, funded by the U.S. government via NED. In contrast, in the EU the production was the result of mainly French lawyers and bureaucrats within the EU Commission who invested in legal programmes and managed to replace the dominant positions in the enlargement game, namely British economists and persons trained in development. It is, in other words, in the organisation of the national fields of power that the conditions of possibilities for the different programmes can be found. It was possible for highly resourceful agents in the U.S. by means of their specific legal and social capital to mobilise legal export programmes to Eastern Europe. In the EU, law came on the agenda when agents with bureaucratic capital moved onto the stage.

An international field of legal assistance developed when different agents and institutions invested in the area of legal assistance based on the rule of law, democracy, independent and strong judiciaries, and business law. The chapter exemplifies how law and legal programmes were not only a strategic instrument to pursue self-interests in the agents' own careers, in which legal investments paid a good rate of return, they were also instruments used to change other states, markets and legal systems in Eastern Europe. Both from the EU side of the field and the U.S. side, the field was structured with the dominating figures

from the main cities with significant social and cultural capital, whereas the dominated persons who were sent out on the ground in Eastern Europe were typically from the provinces. They did not possess the same amount of capital as their dominating counterparts. Yet, an important pole exists in the way the programmes function, namely their relation to the state. Whereas the U.S. lawyers worked in separate institutions outside the state and sought to build institutions mainly outside the state, the European bureaucrats assisted mainly in the state. This meant that American lawyers were operating with various groups of lawyers and others, many of whom were the main elite reformist lawyers and persons behind large think tanks, whereas the Europeans mainly were assisting dominated persons within the local authorities and ministries (persons with low salaries, low prestige and neither distinct social nor cultural capital).

Because of the focus of this chapter, it might seem as if the international players did not meet much resistance in Eastern Europe. Yet, huge resistance has existed since the fall of the communist regimes. Despite the efforts of the U.S. and EU – as well as many lawyers, philanthropic foundations, think tanks, transnational agencies etc. – the former practices in and around the law were not so easily transformed in the Eastern European countries. As one of the lawyers behind CEELI noted in an interview conducted by the author of this chapter, 'First of all, the whole concept of CEELI was going to be short term. The idea was that CEELI would exist four maybe five years, or even less than that because the conception was that the transition would go so quickly in Eastern Europe that there would not be a need for us. But of course we know now that that was not true.'

The quote expresses the initial understanding of the transformation process of the legal systems in Eastern Europe shared by many persons involved in legal assistance projects from the U.S. and EU as well as many of the Eastern Europeans involved in the processes on the other side. It was a common belief that the transformation of the political and legal systems only would take a few years. The reasons for this relative failure of legal reforms have to be found in the national fields of power. In Bulgaria, for instance, relatively autonomous fields like the legal field did not exist so law and legal institutions were (and are) to a large extent subordinated to the political field with its heritage of practices from the communist regimes. CEELI and other Western institutions allied especially with the liberals – opposing the former communists in Bulgaria by investing in legal reforms in order to counterbalance the emerging economic elite. High-ranking politicians within the Communist Party had reinvested their political capital into economic capital and laid the grounds for an independent economic field in which social networks and previous political capital were important factors. As Stephan Nikolov notes, 'Being in the best strategic positions when the communist regime collapsed, the *nomenklatura* members were able to compete successfully for top positions in the new regime. They had the most important assets in the form of money and personal connections with which to replace defunct organizational connections. This is why the majority of today's *nouveaux riches* in

Bulgaria come not from the ranks of the old economic elite but from the ranks of the *Komsomol* and secret police' (Kostova 1994:31–40; Nikolov 1998:222; Kostova 2000:199–207).

Moreover, the opposition with whom the Western institutions collaborated in their legal investments was not as unified as it appears. The trajectories of Vasil Gotsev and the aforementioned Alexander Djerov illustrate two ways of moving in the new Bulgarian environment. They also show how different the profiles were of members of this group of reformers, which in itself was a source of internal struggles in the group of reformers. Vasil Gotsev was born in 1929 in Sofia. In 1953 he became a lawyer and the legal advisor of the then Minister of Justice Yaroslav Radev – who was the 'gate keeper' to legal and state positions and who, as is often noted, was feared even by persons in the Communist Party. Later he also became an assistant professor at the St. Kliment Ohridski University in Sofia. When the opposition to the Communist Party developed, he reinvented himself publicly and joined the re-establishment of his former party, the Democratic Party. A shift in career, which his opponents characterised as 'pragmatic', made him deputy from the UDF to the National Assembly in the period from 1990 to 1997. In 1996 he became the deputy chairman of the group of the European People's Party in the Parliamentary Assembly of the Council of Europe, and he has been a member of the Venice Commission and one of the promoters of the protocols of the Council of Europe. In 1997 he became Minister of Justice and European Integration after which he became a judge in the Constitutional Court.

In such an environment, Western legal exporters had difficulties with their transplants. One way CEELI, Soros's Open Society Institute, and the EU, etc. have tried to find ways to get beyond this form of internal struggle was to join forces with lawyers from the younger generation, who did not (necessarily) have close family origins among the elite of the former Communist Party. Yet the heavy investments in longer educational programmes (and masters degrees) through scholarships to Western Europe and the U.S. take time before they can have great impacts on the national fields of power. Moreover, despite the relative success of the legal assistance programmes in implementing Western forms of legal acts, the practices in and around the law as well as the importance of social capital have been difficult to change by means of legal export programmes.

Notes

1 The present global expansion predominantly in U.S. rule of law programmes – an expansion stretching across the Middle East, Eurasia, South-East Asia, China, Latin America and Africa – has to a large extent developed out of the programmes designed to assist the Eastern European countries in their transition towards Western-style democracies and market economies. Yet many of the present U.S. rule of law programmes started in the mid-1980s in Latin America but were redesigned after the experiences in Eastern Europe. As Carothers (2003:5) notes, the current programmes are already older than their precursor was, namely the law and development movement of the 1960s and early 1970s.

2 Moreover, the distinction concerns a struggle between what is promoted as legal models, namely between civil law and common law. For a discussion about these classical legal regimes, see, for example, Weber (1978:vol. 2).
3 Another reflection, Meyer had, illustrates the same within the legal domain:

> 'It was interesting from my perspective because these people, these lawyers, were interested in reform, but did not really know what that meant. And they found it unnerving and sometimes even frightening to learn what reform of the legal profession meant. The Bulgarian bar in Sofia when I arrived was essentially housed in a building in downtown Sofia where virtually all the lawyers had their offices provided by the government. We would create a new bar reform created after the independent Western European or American style … But it meant that lawyers were on their own, they had to find clients, find their office space and act like western lawyers. And … many of … the older were eager on reform. Code of ethics – they did not know what it meant. They were amazed. They wanted reforms but they became nervous about the details.'

4 Examining how does *not* mean asking how the individuals came to be what they were by following the biographical illusion of a reconstructed coherence of individual life (Bourdieu 1986:69–72; Bourdieu 1996a:215; Bourdieu 1997:ch. 17).
5 Bourdieu uses the term *nomos* in relation to the fundamental law of the field, the principle of vision and division defining the field (see, for example, Bourdieu 1987: 814–53; Bourdieu 1996a: 223ff.; Bourdieu 1996b).
6 Cf. also the articles in *Law & Social Inquiry*. Volume 32, Issue 1, 109–35, Winter 2007 and in *Retfærd. Nordisk juridisk tidsskrift*. Special issue: Pierre Bourdieu: From law to legal field, no. 114/2006. Bourdieu's analysis of the state is thus brought into the study of EU and international fields (Wacquant 1993:1–17; Bourdieu 1996b; Bourdieu 1998:21–32; Bourdieu 2005a:29–54; Bourdieu 2005b).
7 A separate methodological point of the chapter is to illustrate how the Bourdieusian field perspective can be used without examining the entire field but only part of it. The chapter builds on around 130 in-depth interviews conducted with, among others, agents in Bulgaria, in the EU, and individuals involved in the American programmes. The interviews are supplemented with other data. Research conducted by others is used in order to show the transformation and overall structures of the different national and international processes. These structures are reflected in the interviews, and the interviews confirm the other research as well. In this sense the macro-story of the transformation is told on the basis of the agents' micro-stories. The chapter builds thus on a 'bottom-up' perspective from which the macro-story of the transformation will be told by focusing on the involved agents' structured micro-stories. By focusing on a single individual's trajectories *in relation to* other individuals' trajectories it is possible to write a 'relational collective biography' of the development. The biographical information indicates which strategies the agents have used, which possibilities they had, who their competitors were, as well as which kind of resources (forms of capital) they could mobilise. Moreover, biographical information about social background, career choices, career strategies, etc. illustrates the hidden hierarchical structures of the social world and its institutions. When examining such relations in relation to a field, it becomes possible to examine and decode the complex struggles in the field, and it becomes visible how and why individuals move and act in the fields of power as well as which resources and forms of expertise they can mobilise. Predefined identities are challenged because they are seen in the specific historical contexts and therefore related to the structures and possibilities of the field. The relational collective biography is also a strategy to get beyond ruling discourses and orthodoxies because the

struggles behind the definitions and practices behind the discourses become part of the story. This means that such information shows how different persons in various ways have profited from new principles and how legal institutions are products of different agents' strategic use, struggles, and resources.

8 See also Hammerslev (2006b:27–42), which focuses on the transformation of the Bulgarian judiciary and on how the law was used in Bulgaria to bring to account people formerly closely related to those behind the leadership of the Communist Party.

9 Internal NED-memo given to the author of this chapter during an interview, Washington DC, 10 February 2006.

10 Also the 'law and development movement' of the 1950s and 1960s, which was carried forward by idealistic and entrepreneurial U.S. lawyers, who tried to put law on the agenda, was advanced by leaders of the American Bar Association (ABA), leading U.S. law schools, the American judiciary, and the executive branch of the U.S. government. These promoters of law reforms were supported by private foundations and by the U.S. government's assistance programmes. Yet a decade later the law and development movement was on the retreat. With the relative failure of this legal assistance movement, the export of U.S. law and legal models by U.S. lawyers was significantly diminished in subsequent years.

11 Miller & Chevalier formed a close alliance with one of the big five accounting firms, PricewaterhouseCoopers, with which they offer coordinated advice in relation to tax services for U.S. and foreign corporate taxpayers doing business in the U.S. (Dezalay and Garth 2001:513–35). Before the merger of Price Waterhouse and Coopers & Lybrand, PricewaterhouseCoopers was (just as the other big four) also active in Eastern Europe winning contracts from, among others, USAID, the EU, the World Bank, the British Know How Fund (Wedel 2001).

12 www.theatlantic.com/doc/prem/200505u/nj_taylor_2005-05-17, 6 March 2006.

13 The policy of not having government-to-government agreements was in contrast to the official view of the EU. The EU programmes were designed to assist governments in their development.

14 About the history of NED and Gershman, see Guilhot (2005); see also Hammerslev (2006a:29–34). Former CIA agent Philip Agee has noted that the task of NED was to

> 'support democratic institutions throughout the world through private, non-governmental efforts but in actual fact, when they say the promotion of democracy, or civic education, or fortifying civil society, what they really mean is using those euphemisms to cover funding to certain political forces and not to others. In other words, to fortify the opposition of undesirable foreign governments as in the case of Venezuela, or to support a government that is favorable to U.S. interests and avoid of coming to power of forces that are not seen as favorable to U.S. interests.'
>
> (Bernstein 2005)

One of the drafters of the legislation establishing NED, Allen Weinstein, said in 1991: 'A lot of what we [NED] do today was done covertly 25 years ago by the CIA' (Blum 2001:180; see also Carothers 2004).

15 Source: www.abanet.org/ceeli/, 2 March 2006.

16 The orthodoxy of the new legal agenda and its relation to economics is illustrated in Jeffrey Sachs's famous speech at Yale Law School, in which he stressed the necessity of lawyers in international development: 'As I am sure you will readily agree, the international economy is far too important to be left to the economists.' Sachs spoke at Yale Law School 16 October 1998, www.law.yale.edu/outside/html/Publications/pub-sachs.htm, 23 March 2006.

17 For instance, the Dutch Matra programme has its origins in economics – and in the attempt to optimise the conditions for Dutch business in Eastern Europe. In the design of the programme, they 'took out the soft sectors' and started to focus on the rule of law in order to pursue economic goals, as one of the inventers of the programme noted in an interview with this author. 'We wanted to export – that was our purpose. And to develop business it was necessary to invest in the legal system.'
18 The World Bank, for instance, has its legal programmes, which the IMF is supporting. Cf. the story behind the rule of law programmes of the World Bank (Dezalay and Garth 2002:ch. 13).
19 George Soros's empire, which spent around 570 million dollars in 1999, consisting of Open Society Institutes and various other organisations such as the Institute for Constitutional and Legislative Policy, which monitored legal development and stimulated legal education, and the Roma Right Center, which focuses on issues around discrimination of gypsies (Kaufman 2002:256ff.). The legal programmes took off with the arrival of Aryeh Neier, a former director of the American Civil Liberties Union and one of the architects behind Human Rights Watch, which he served as executive director before moving to the Open Society Institute (see Neier 2003). On the board of the Open Society Justice Initiative is Anthony Lester, who not only carries significant cultural capital but who also has been one of the main figures behind international human rights on the British scene. In the last 17 years, George Soros has granted about 100 million dollars to Bulgaria to assist the country's civil society and the democratisation process (novinite.com news alert, 10 June 2007).
20 On governmental networks see Slaughter (2004).
21 Interview, Brussels, 23 February 2006.

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Chapter 8

Toward a sociology of the global rule of law field

Neoliberalism, neoconstitutionalism, and the contest over judicial reform in Latin America

César Rodríguez-Garavito

While writing this chapter, I received an email from the American Bar Association (ABA) asking me to participate as an "expert respondent in the development of the Rule of Law Index" by filling out a detailed questionnaire on my perceptions of access to justice in Colombia. Intrigued, I consult the ABA website and find out that the Index is but one component of the World Justice Project (WJP), an ambitious "multinational, multidisciplinary initiative to strengthen the rule of law worldwide." It is co-sponsored by an unlikely coalition including, among others, the U.S. Chamber of Commerce, Transparency International, the American Society of Civil Engineers, Human Rights Watch, the International Organization of Employers, the International Trade Union Confederation, and Human Rights First.[1]

Though I do not find the time to fill out the questionnaire, I learn that the Index was launched at the World Justice Forum in Vienna in July 2008. The Forum brought together an impressive array of "past and current heads of state, presidents of multilateral institutions, CEOs of multinational corporations, labor leaders, and directors of key nongovernmental organizations [NGOs] from 112 countries."[2] Among the nearly five hundred invitees were former Irish President Mary Robinson, economist and Nobel Prize winner James Heckman, U.S. Supreme Court Justices Stephen Breyer and Ruth Bader Ginsburg, and Peruvian neoliberal pundit Hernando de Soto. Having spent $1.1 million on the construction of the Index between 2007 and 2008, the WJP estimates that by 2011 it should offer profiles of 100 countries (*International Herald Tribune*, July 3, 2008), and will periodically convene global meetings to discuss them.

The ABA is not alone in its interest in promoting and measuring the rule of law (ROL) across the world. Competing ROL indexes are produced by Freedom House, the Council of Europe, and the Dutch-funded Hague Institute for the Internationalization of Law (HiiL 2007). The World Bank has been collecting global data on the ROL and related institutional variables to construct its "Worldwide Governance Indicator" and rank countries based on it (Kaufmann and Kraay 2002).

In the same vein, the United Nations established a ROL Coordination and Resource Group in 2006 to channel and step up UN activities on the matter.

Inter-governmental institutions (e.g., the International Development Law Organization) and global civil society and expert networks (e.g., the International Network for the Promotion of the ROL, led by the U.S. Institute of Peace) have multiplied apace over the last decade with this explicit aim. Funding these and other initiatives is a plural array of government aid agencies (e.g., the European Union and the United States Agency for International Development [USAID]), private foundations (e.g., the Open Society Institute and the Ford Foundation), and myriad transnational corporations and professional associations.

A new wave of studies on the relationship between law and development, particularly within economics, provides the intellectual ammunition to this veritable transnational policy field (which I call the *global rule of law field*).[3] As *The Economist* (2008:83) put it in a review of two decades of scholarship on the matter, "the rule of law has become the motherhood and apple pie of development economics."

How did the global ROL field emerge? After the failure of law and development programs in the 1960s (Trubek and Galanter 1974), why have governments and development agencies in the global north been pouring billions of dollars into institutional reform in the global south? How has the global move toward ROL promotion operated on the ground?

In this chapter, I tackle these questions by focusing on a region (Latin America) and a specific type of institutional transformation (judicial reform) that have been particularly salient in ROL programs over the last two decades. Indeed, it is with Latin American judicial reform projects that the global ROL field took off in the 1980s (Muller and Janse 2007:7).

A socio-legal analysis of judicial reform and ROL programs

In response to this explosion of ROL projects, a dynamic academic debate has arisen in Latin America and elsewhere. However, the existing studies have two important limitations. First, analyses by actors and academics alike are dominated by instrumental approaches focusing on the evaluation of program success or failure (Domingo and Sieder 2001; IDB 1998; Shihata 1995; Trebilcock and Daniels 2008). They are driven by such concerns as extracting best practices, assessing conditions for successful institutional transplants and, more recently, "empowering" relevant "stakeholders" to participate in reform processes (Dakolias 1996, 2008; Prillaman 2000).

While useful for policy-making purposes, this instrumentalist approach fails to capture the power struggles underlying processes of judicial reform. Absent from them is a sociological analysis of the role of, and tensions and links between, actors in the global ROL field, from transnational funding agencies and national governments to corporate lawyers and NGO activists. What is needed, therefore, is an examination of how actors in this field have struggled to define the theory and practice of the ROL and judicial reform (Dezalay and Garth 2002b).

The second shortcoming of the literature is its failure to capture the diversity of conceptions of the ROL and the agendas at play. Indeed, academic studies

and policy statements tend to fudge the issue of what exactly is meant by the ROL, thus turning the latter into a catch-all term encompassing such varied—and potentially contradictory—institutional features as judicial independence, political accountability, access to courts, a competent bureaucracy, legal certainty, and the protection of human rights. At an analytical level, this conceptual fuzziness obscures the existence of contrasting theories and conceptions of the ROL (see Tamanaha 2004). At a sociological level, it conceals the political and legal differences among contrasting ROL reform agendas, as well as the struggles among national and transnational actors advancing them (see Santos 1997).

As the most compelling analyses on the matter have shown, at least two types of ROL conceptions and agendas need to be distinguished (Muller and Janse 2007; Santos 1997; Tamanaha 2004). On the one hand, thin conceptions privilege the stabilizing function of the ROL. They focus on legal certainty, that is, on the Weberian role of law as a source of predictable rules of the game. This is the conception famously advanced by Friedrich Hayek, for whom the ROL "means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge" (Hayek 2007:112). Thin versions include both those indifferent to the content of the laws providing legal certainty (and thus compatible with non-democratic regimes), and those highlighting public order and economic freedom while embracing core civil and political rights as limits to state power.

Thick conceptions privilege the enabling aspect of the ROL. Centered on an expansive understanding of civil, political, and social rights, this view was famously articulated in the Declaration of Delhi drawn up by a collective of progressive legal professionals from around the world convened in 1959 by the International Commission of Jurists. According to the Declaration, "the ROL … should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized."

As we will see, the thick version has been influential in legal thinking and practice throughout the world, including the global south and European social democracies. The most salient exception to this trend is the United States, whose constitutional tradition has famously centered on the thin version. Indeed, the lack of incorporation of the "second bill of rights" (on social and economic guarantees) into the U.S. constitution and its concept of the ROL is one of the components of "American exceptionalism" in politics and institutions (Sunstein 2004, 2005).

Given the exceptional character of the thin version, the dominance of the latter in the global ROL field—and in socio-legal analysis of it (see Halliday et al. 2007)—raises an empirical puzzle: how did the U.S. variety of the ROL get exported around the world (Dezalay and Garth 2002b), thus becoming a "globalized localism" (Santos 1995)?

This chapter seeks to contribute to the sociology of the ROL by addressing such questions and blind spots in the literature. To that end, it conceptually and empirically unpacks the global ROL field as a site of struggle among lawyers, economists, international donors, national policy-makers, and myriad other elite and subaltern actors vying for the power to define the content, pace, procedure, and beneficiaries of ROL programs in general and judicial reform in particular.

Specifically, I argue that the origins and trajectory of the global ROL field have been crucially shaped by two transnational ideological and political projects that, while overlapping in time and sharing a central interest in the promotion of the ROL, advance contrasting conceptions of the latter. On the one hand, the *global neoliberal project* has entailed an unprecedented investment in judicial and ROL reform by some of the key actors promoting economic liberalization around the world, such as USAID, the World Bank, and (in Latin America) the Inter-American Development Bank (IDB). The neoliberal focus on market-enhancing institutions has translated into the embracing and diffusion of the thin version of the ROL across the world since the 1980s. Indeed, after the "institutional turn" taken by the Washington Consensus in the mid-1990s in response to the failure of neoliberal shock therapy in Latin America and Asia, the thin conception of the ROL has become a core component of the theory and practice of the project.

On the other hand, an equally ambitious transnational project has unfolded that adopts a combination of the thin and thick versions of the ROL and stands in tension with the neoliberal project. I call this the *global neoconstitutional project*. With historical roots in the human rights movement and embodied in the explosion of constitutions with generous bills of rights and judicial review mechanisms, global neoconstitutionalism and its concomitant "juristocracy" (Hirschl 2004) touched down in Latin America precisely during the same period as neoliberal reforms. National and transnational legal elites advancing these diverse reform projects have entered into complex, contradictory relations—at times cooperating and at other times openly clashing and competing for the dominant position in the field.

This account of inter-elite conflict over ideas and programs of legal reform contrasts with the prevailing view in the literature, which tends to couch neoliberalism and global constitutionalism as two elements of a relatively unified elite project. In an influential account of the proliferation of judicial activism in the global north, Hirschl (2004:12) has gone so far as to argue that this is a deliberate, unified strategy of elites "to bolster their own position in the polity," rather than a "reflection of a genuinely progressive revolution in a polity." Against this sweeping generalization, I seek to show that judicial reform programs have been riven with inter-elite conflicts over the definition of the design and role of courts in Latin American democracies.[4]

Before proceeding with the empirical discussion, a theoretical caveat is in order with regards to my usage of neoliberalism and neoconstitutionalism as "global projects." Following McMichael's (2000) work on globalization as a project, I understand contemporary neoliberalism and neoconstitutionalism as

embodying (loosely) organized transnational collective endeavors with identifiable dominant actors, strategies, cognitive frameworks, and network structures. Though internally plural, they each constitute self-aware transnational communities of funders, academics, government officials, and other elite and subaltern actors connected directly or indirectly through cross-border networks (see Slaughter 2004).

In positing the existence of these projects, I do not claim that one project's actors, strategies, frameworks, and networks are entirely distinct from the other's. Indeed, throughout the empirical analysis below, I highlight the way in which dominant actors in the neoliberal and neoconstitutional camps (e.g., economic reformers and constitutional court judges, respectively) enter into complex relations that entail both episodes of confrontation (e.g., on constitutional courts' activism in the enforcement of social rights) and collaboration (e.g., on reform projects enhancing court efficiency). I also emphasize the way in which actors in one project may simultaneously or sequentially participate in the other's networks.

As noted, however, I claim that shifts across projects in some individuals' careers and collaboration on specific reforms do not make the projects indistinguishable from each other, nor do they merge neoliberalism and neoconstitutionalism into a single, unified elite strategy for global hegemony. The global ROL field, just as any other social or legal field (Bourdieu 1987), is a site of competition among transnationalized actors seeking to turn their view of the world (in this case, their understanding of the ROL) into the global common sense on the matter.

Among the many projects at play in the global ROL field, in this chapter I single out the contest between the neoliberal and neoconstitutional ones. The empirical exploration below offers evidence of the existence of such a competition and of the profound consequences it has on the fate of individuals and institutions in Latin America and beyond.

To flesh out my argument, I have divided the remainder of this chapter into four parts. I begin by specifying the content of the neoliberal project and documenting the rise of judicial reform as one of its key components in the 1990s. I then turn to neoconstitutionalism and track its origins, trajectory, and ROL agenda in the region. In the third section, I switch from the regional to the national scale in order to empirically ground my argument by zooming in on the inter-elite struggles over the content and implementation of judicial reform. I thus present a case study of two decades of judicial reform programs in Colombia (1986–2008), the Latin American country that has received the most funds from such international institutions, particularly USAID. Lastly, in the fourth section I offer some conclusions.

Global neoliberalism and the rule of law

From the Washington Consensus to the institutional turn

Neoliberal policies have traditionally been identified with the so-called Washington Consensus. According to Williamson's (1990) classic formulation, the "structural

adjustment" programs promoted by the World Bank and the International Monetary Fund since the 1980s typically included ten key policy reforms: fiscal discipline, public expenditure reduction and reorientation, tax reform to broaden the tax base, financial liberalization, competitive exchange rates, tariff reduction, elimination of barriers to foreign direct investment, privatization of state-owned enterprises, promotion of market competition, and provision of secure property rights.

For the purposes of this chapter, what is striking about this list is the marginal role of institutions in the original consensus. Focused as it was on short-term "stabilization measures" aimed at attaining macroeconomic balance, it involved only a limited set of institutions, namely those directly responsible for implementing the reforms (e.g., departments of finance and newly founded independent central banks) or those that were to be transformed or eliminated (e.g., privatized, formerly state-owned firms).

Mounting evidence of the failure of structural adjustment, coupled with the rise of neoinstitutionalism in academic and policy circles, led neoliberal advocates (including Williamson himself) to call for a second wave of structural reforms centered on institutions (Naím 1994; Williamson 2003). This new view gradually became the mainstream, so that by 2004 a prominent development economist could confidently state that "we are all institutionalists now" (Roland 2004:110).

The global turning point was the Asian crisis of 1997, which proved right the critics who had warned against the perils of rapid and unconditional deregulation of the economies of the global south. In response, neoliberal ideologues and practitioners advocated the establishment of institutions capable of overseeing the operation of liberalized markets in order to avert further crises (Bhagwati 2004).

In the field of institutional and legal reform, these developments led to self-criticism of the original programs, as eloquently shown by a World Bank internal assessment:

> Subsequent practical experience suggested that reform efforts could not stop with policies designed to shrink the state and liberalize and privatize the economies […] The initial theoretical approach was understandably aimed mainly at showing the problems associated with state institutions, but practice showed that it was not simply a matter of dismantling the state in favor of deregulation and privatization. […] It turned out that a lack of attention to institutions generally, especially legal ones, placed substantial limits on the reforms as a means to promote economic development and poverty reduction.
> (World Bank 2002)

The result of this institutional turn has been a broader reform agenda. To the original ten-point list, a wide range of loosely connected and vaguely formulated reforms were added. Among them were the "flexibilization" of labor law, the establishment of financial regulations and standards, the strengthening of market oversight agencies, and the implementation of targeted social policies (Navia and

Velasco 2003). If the original consensus embodied the phase of "roll-back" neoliberalism, the institutional turn gave rise to a phase of "roll-out" neoliberalism, in which institutions that could protect unregulated markets from their own excesses were created or reconstructed (Peck and Tickell 2002).

Judicial reform under neoliberalism

Chief among such regulatory institutions were courts and law enforcement agencies. Thus, judicial reform and ROL programs rose to the top of the policy agenda across the global south. In taking the institutional turn, neoliberal reformers embraced and globally diffused the thin version of the ROL and, accordingly, a highly selective approach to judicial reform. This is evident, for instance, in a revealing programmatic statement made by Ibrahim Shihata, who, as vice-president of the World Bank in the mid-1990s, was a key actor in steering the bank toward greater involvement in the ROL field:

> In Latin America and the Caribbean, as in other regions, experience has clearly demonstrated the quintessential role of law in development and, especially, the need for the ROL and for well-functioning judicial institutions. This is particularly evident in the private sector, where the ROL is a precondition for sector development. It creates certainty and predictability; leads to lower transaction costs, and greater access to capital […]. In fact worldwide experience confirms the importance to rapid and sustainable development of the clarification and protection of property rights, the enforcement of contractual obligations, and the enactment and application of rigorous regulatory regimes.
>
> (Shihata 1995:12–13)

As this quote suggests, the neoliberal version privileges the market-enhancing roles of the judiciary and institutions at large. From this viewpoint, the key functions of courts are twofold. They must contribute to offering a stable investment climate by enforcing predictable rules of the game while securing the basic conditions of public order necessary for markets to operate.

In practice, these functions translate into a two-pronged judicial reform agenda articulated in influential works by neoliberal economists in Latin America and elsewhere (Kluger and Rosenthal 2000; Clavijo 2001; Alesina 2002). First, to maintain the predictability of the norms regulating the market, civil and commercial courts have to efficiently enforce contracts and abstain from redistributive judicial activism. Second, to guarantee peace and order, criminal courts and other social control agencies must be efficient in preventing and punishing crimes.

The global diffusion of this vision has resulted in a veritable explosion of programs funded by international agencies advancing the thin version of the ROL. For instance, in 2006 "almost half the [World Bank's] total lending of $24 billion […] had some rule-of-law component" (*The Economist* 2008:84).

The exportation and importation of judicial reform in Latin America

Latin America was no exception to this trend. Just as in the global north, legal institutions did not figure prominently in the first wave of economic liberalization. The pioneer and leading exemplar of this early phase was Pinochet's Chile, followed by the shorter, radical experiment with neoliberalism undertaken by the Argentinean dictatorship between 1976 and 1982. In such a context, neoliberal economists and pro-regime lawyers alike embraced the thinnest, non-democratic version of the ROL as a mere set of stable rules of the game. The thinnest version conveniently justified their active contribution to the dictatorships' economic and institutional transformations (Valdés 1995; Hilbink 2007).

The turn of national elites toward the democratic variant of the thin conception resulted from the twin processes of democratization of the polity and the second wave of neoliberal reforms in the 1980s and 1990s. As for the former, with the exception of a few countries that had remained democracies throughout the 1970s (e.g., Colombia and Costa Rica), Latin American countries established or reestablished democratic institutions, among them the separation of powers and varying degrees of judicial independence. As for the latter, gradually in the 1980s and decidedly in the 1990s, governments embraced the Washington Consensus out of a combination of external pressure and ideological conviction (Huber and Solt 2004).

The synthesis obtained in most of the region was "democracy within reason" (Centeno 1994): a combination of democratic rule limited by enduring repressive institutions (e.g., government interference in judicial affairs and frequent use of state-of-siege penal legislation) and the imperatives of the liberalized market (e.g., technocratic modes of decision-making and growing social exclusion). In light of the clear fit of "democracy within reason" and the thin version of the ROL being diffused globally, it comes as no surprise that the latter was enthusiastically imported by national political and economic elites throughout the region.

Just as on the global scale, the crises of the mid-1990s marked the turn of neoliberal reformers towards institutionalist thinking and policies. The first clear signs of neoliberal malaise surfaced in Mexico in 1994, where economic crisis overlapped with the rise of the iconic Zapatista movement, which symbolically marked the swing of the political pendulum toward the left and away from neoliberal hegemony (Rodríguez-Garavito 2008). The coup de grâce for the Washington Consensus would come with the unprecedented crisis of the Argentinean economy in 2001, which served as a painful reminder of the effects of the radical downsizing of the state's regulatory capacity (Rock 2002; Svampa 2005).

The mechanisms through which the Washington Consensus and the thin ROL consensus were exported and imported into Latin America have been profusely analyzed. On the import side, the key actors have been elite, US-trained Latin American economists and (to a lesser extent) lawyers who, as part of the global epistemic and political community underpinning such consensuses, rose to positions of power in public bureaucracies and transformed state institutions (Dezalay and Garth 2002a; Montecinos and Markoff 2001).

On the export side, the most active promoters and generous sponsors of the spread of the thin version have been the same institutions spearheading the neoliberal project across the region. The World Bank and IDB have actively promoted legal reform programs in these countries (IDB 1998; Rowat et al. 1995). USAID, another advocate of the opening of Latin American economies, has also been a key advocate of such reforms (Sarles 2001).

These agencies have invested significant resources on the two components of the neoliberal ROL project, thus transforming institutions responsible for protecting private property and contracts (e.g., the Bank's and IDB's projects on civil and commercial courts), and strengthening institutions in charge of penalizing crimes and guaranteeing public order (e.g., USAID's effort to transplant the U.S.-style adversarial criminal justice system to legal orders throughout the region).

In terms of the sums invested, the main backer has been U.S. international cooperation through USAID and the Department of Justice programs. A conservative estimate places their investment at over $500 million between 1994 and 2002, the last year for which publicly accessible data were available at the time of writing (Rodríguez-Garavito 2008). IDB and the World Bank have also invested heavily on the projects, with funding estimated at a minimum of $400 million and $150 million between 1992 and 2007, respectively (Rodríguez-Garavito 2008).

In sum, instead of declining after the failure of the law and development movement of the 1960s, the investment in legal reforms during the last two decades has reached unparalleled levels. While the total amount of resources dedicated to legal education reforms four decades ago was nearly five million dollars (Gardner 1980), the resources designated for the main programs of the current wave reached at least a billion dollars by 2007 (Rodríguez-Garavito 2008).

Elsewhere, I offer a detailed analysis of the content and cost of judicial reform programs in times of neoliberalism in Latin America (Rodríguez-Garavito 2006, 2008). Given the analytical purposes of this chapter, I do not pursue that line of analysis here. Instead, in the next section I briefly look into the origins and trajectory of the transnational project that has contested neoliberal hegemony in the global rule of law field: global neoconstitutionalism. I then empirically ground my view of the ROL field as a site of contestation through a case study of the struggle to define the judicial reform agenda in Colombia.

Global neoconstitutionalism and the rule of law

Constitutional bills of rights, judicial review, and judicial activism spread throughout the world beginning in the 1970s, just as neoliberalism was being globalized (Tate and Vallinder 1997). As Hirschl (2004:7–8) has argued, this global trend has proceeded along three distinct paths. First, some countries conformed to the "single transition scenario," whereby they incorporated judicial review into the new constitutions that marked the transition from semi-democratic or authoritarian regimes to democracy. This was the case of, among others, Spain (1978), Portugal (1976), and South Africa (1993). Second, former socialist

countries made the "double transition" to the Western model of market economy and democracy, incorporating constitutional rights and judicial review in the process. Prominent among them are Hungary (1989–90), Poland (1986), and Russia (1991). Finally, some states introduced these reforms piecemeal, without enacting new constitutions or radically transforming their polities and economies. This is, for instance, the case of Canada (1982) and New Zealand (1990).

The overlap in time between the neoconstitutional and neoliberal projects also took place in Latin America, as one country after another adopted new constitutions or major constitutional reforms introducing expanded bills of rights and judicial review. The 1988 Brazilian constitution inaugurated a regional wave joined, among others, by Colombia (1991), Peru (1993), Argentina (1988, 1994), Mexico (1994), Venezuela (1998), and, more recently, Ecuador (2008). While most of these countries followed the "single transition" path away from authoritarian regimes (e.g., Argentina) or limited democratic rule (e.g., Colombia), others (e.g., Mexico) followed a third path of piecemeal reforms without overall institutional transformation.

If the iconic new institution of the neoliberal project has been the independent central bank (Maxfield 1998), the institutional node of global neoconstitutionalism has been the activist constitutional court (or the activist supreme court entrusted with judicial review). In the global south, constitutional courts have been central to the consolidation of democratic guarantees and civil and political rights in the face of the legacy of authoritarianism (Gloppen et al. 2004). In countries as varied as Hungary, Chile, South Africa, India, Brazil, Colombia, Turkey, Tanzania and Egypt, they have been instrumental in restraining the executive's emergency powers (Uprimny 2004), enforcing citizens' equality before the law (Klug 2000), consolidating economic liberties in the transition to market economies (Scheppele 2004), and opening channels for legal challenges to resilient authoritarian regimes (Moustafa 2007). A key task of these courts, therefore, has been to establish or fortify citizens' liberties (or "negative rights") vis-à-vis the state. In so doing, they have challenged the narrower understanding of such rights that is prevalent in thin versions of the ROL, focused as they are on security and political stability.

At the same time, constitutional courts in Latin America and other regions of the global south have developed an activist stance towards the protection of social rights, that is, "positive rights" entailing state action to guarantee a minimum of material well-being in contexts of stark deprivation and inequality. Thus, a southern variety of constitutionalism has developed that expands the conception of the ROL to include judicial enforcement of these rights (Gargarella et al. 2006).

This thicker view of the ROL has inspired highly activist, controversial rulings and enforcement mechanisms. They include the progressive jurisprudence of the Indian Supreme Court addressing structural social issues such as hunger and illiteracy, coupled with the creation of judicial commissions of inquiry to follow up on the implementation of court rulings (Sathe 2002). Similarly, the Colombian Constitutional Court has sought to redress massive violations of human rights (e.g., the forceful displacement of millions of citizens by paramilitary, guerrilla,

and state armed forces) through macro-rulings ordering the government to embark on long-term social programs and through periodic hearings to follow up on government compliance (Rodríguez-Garavito and Rodríguez Franco 2010). Meanwhile, the South African Constitutional Court has become a crucial institutional site for the promotion of such rights as housing and health, and thus for forcing state action against the social and economic legacy of apartheid (Bilchitz 2007).

Like neoliberalism, the global neoconstitutional project is rooted in transnational epistemic, professional, and political networks. The organizational backbone of the project is the infrastructure of the human rights movement that dates back to the international solidarity with resistance to dictatorships in Latin America in the 1970s. With law-centered NGOs as core actors, and northern private foundations and governments as main sponsors, human rights networks in Latin America made rule of law and judicial reform a priority after the transition to democracy in the region (Dezalay and Garth 2002a).

They were joined by two new transnational professional networks that have been instrumental in mainstreaming the project into legal academia and the judiciary. First, formal and informal networks of elite legal scholars promoting a combination of thin and thick versions of the ROL proliferated since the mid-1990s. In a process mirroring the transformation of economics in Latin America since the 1980s, academic careers in law became professionalized (as opposed to part-time endeavors for legal practitioners) at elite universities since the mid-1990s. And, just like in the field of economics, a graduate degree from Harvard, Stanford, Chicago, Yale, or other top U.S. law schools, has come to hold the key to both a local scholarly career and elite transnational networks of like-minded academics. A clear instance of the latter is SELA, a Yale-sponsored network of its law graduates from Latin America whose annual meetings travel across the region and are hosted by prominent local participating universities, including Palermo and San Andrés (Argentina), São Paulo (Brazil), Los Andes (Colombia), and Diego Portales (Chile).

The second new network brings together constitutional court judges with their peers in Latin America and elsewhere. This self-aware "global community of courts" (Slaughter 2003) underlies the explosion of cross-citation among constitutional courts, the growth of comparative constitutional law, and the migration of ideas on constitutional interpretation and enforcement mechanisms across borders. In Latin America, German foundations have been the key promoters of these networks by funding periodic meetings and exchanges among constitutional court justices and clerks across the region (Azuero 2007).

The constitutional project in Latin America draws its intellectual and ideological underpinnings from a combination of sources. The tradition of "alternative use of law" and courts for social transformation inspires those NGOs in the network that work closely with social movements (Rodríguez-Garavito 2007). Constitutional traditions of European states with strong social rights in general, and of those with activist constitutional courts (e.g., Germany) in particular, have also been influential. Interestingly, in reading U.S. liberal legal theory in light of

local conditions, U.S.-trained legal scholars and constitutional judges have developed varieties of judicial activism (for instance, on social rights) that are alien to U.S. liberal legalism (López 2004). Today, this global process seems to be coming full circle, as U.S. scholars invoke Southern understandings of rights (e.g., those of the South African Constitutional Court) to support their case for the doctrinal development of a "second bill of rights" in the U.S. (Sunstein 2004).

How has the neoconstitutional project related to Latin American neoliberalism? Actors in each project have entered into complex, shifting relations. On the one hand, scholars, judges, technocrats and activists advancing a thick version of the ROL have repeatedly clashed with neoliberal reformers over redistributive social policy and judicial activism. This was evident, for instance, in the antagonism between economic reformers and human rights advocates in Argentina during the heyday of neoliberalism under Menem in the 1990s (CELS 2008). The two camps have also clashed over the extent of civil and political guarantees included in the thin version of the ROL, as illustrated by the longstanding confrontation in Colombia between government lawyers and human rights NGOs over the restriction of civil liberties under national security legislation in the context of civil war (Uprimny et al. 2006).

However, the two projects' actors, frameworks, and networks have also converged on specific reforms. Neoliberal and neoconstitutional reformers have worked together on myriad ROL reforms seeking to promote the tenets of liberal democracy, from enhanced separation of powers to government transparency. Indeed, given their overlapping strategies in favor of these guarantees—and against the authoritarian legacy of the thinnest version of the ROL—their joint support largely explains the regional diffusion of ROL programs and the explosion of investment in judicial reform. This collaboration is aided by the existence of a few prominent brokers between the two camps, that is, elite lawyers and technocrats who have made a career of bridging the language of rights and the language of efficiency to create consensus around ROL reform.

In sum, the global ROL field in general and the Latin American field in particular have been decisively shaped by the intersections between the two projects. These complex relations, I argue, go a long way in explaining the shifting luck, the persistence, and the unexpected outcomes of judicial reform attempts. In the next section, I empirically ground this argument through a case study of the most ambitious and sustained foreign-funded judicial reform initiative in Latin America under the second wave of law and development programs: U.S. investment in judicial reform in Colombia.

Implementing and contesting neoliberal reform on the ground: U.S. investment in judicial reform in Colombia (1986–2008)

USAID's and the U.S. Department of Justice's investment in the Colombian judicial system spans over two decades and has cost approximately 100 million dollars

(Rodríguez-Garavito 2008). For the purposes of this chapter, I zoom in on the project that has absorbed most of the resources and energies of these reformers: the overhaul of the Colombian criminal justice system to transform it in the image of the oral, adversarial U.S. model of criminal investigation and sentencing. In line with my argument, I highlight the way in which the twists and turns of this most expensive project were shaped by the intersections of the neoliberal and global neoconstitutional agendas. The project has gone through four distinct phases, which I analyze in turn.

The first phase: the launch of the project and the compromise of the 1991 constitution

For this first stage, from 1986 and 1991, USAID assigned a total of 3,264,000 dollars to be administered by FES, a Colombian foundation (Rondón 1998). Both USAID and FES conceived these exploratory efforts as the preface of an ambitious judicial reform program, which they called *Program for the Modernization of Justice*.

After funding a number of diagnoses of the judicial system, towards the end of the period, USAID began to work on the project that would later become its main activity in Colombia: the promotion of a U.S.-style criminal justice system based on the creation of the Attorney General's Office (*Fiscalía*). The occasion for the launch of this project was the Constitutional Assembly of 1991, where USAID openly and actively advocated the adoption of this institution (Arenas and Gómez 2000).

The Assembly was the result of a momentous transition in Colombian politics. The mobilization of college students and the demobilization of a prominent guerrilla group with roots in the urban middle class (M-19), together with popular and elite demands for stability after the worst years of drug-related political violence in the late 1980s, led to widespread support for the enactment of a new constitution. This translated into an overwhelming vote in favor of convening a Constitutional Assembly in a referendum that the César Gaviria government called for this purpose in 1990.

With neoliberalism spreading like wildfire across the region and human rights becoming the lingua franca of progressive politics around the globe, the Constitutional Assembly became the testing ground for these reformist projects. On the one hand, with neoliberal economists in power (President Gaviria himself was one of them), the institutional tenets of the Washington Consensus were incorporated into the government's proposal to the Assembly, including the strengthening of economic freedoms and the opening of most sectors of the economy to private investment. On the other hand, the unprecedented representation of leftist parties (including those established by demobilized guerrilla groups that received high numbers of votes in the Assembly elections), and the influence of constitutional lawyers within the government elite, gave rise to an equally influential current in the Assembly that advocated the inclusion of a generous bill of rights coupled with judicial review mechanisms to enforce it.

The two currents were indeed present inside the President's circle of closest advisors responsible for producing the draft constitution that turned out to be the basis for the final text approved by the Assembly. On one side, an influential group of U.S.-trained neoliberal economists who occupied key positions within the administration (e.g., the heads of the Treasury and the National Planning Office) were responsible for including provisions enabling the liberalization of trade and capital flows, privatization of state firms, central bank independence and other key components of the Washington Consensus. On the other side, an equally influential, U.S.-educated group of constitutional lawyers was entrusted by the President with the responsibility of drafting the bill of rights to be included in the constitution. This elite group of young lawyers (its two leaders were under 30 at the time) were also in charge of producing a draft version of the sections of the constitutions having to do with key institutional arrangements, from the composition of Congress and the appointment of judges to the system of checks and balances.

The evolution of the relations between these two reformist camps can be vividly illustrated by the professional trajectory of Manuel José Cepeda, who, as Presidential Advisor for Constitutional Reform, was the central figure in the lawyers' group and the key broker (along with President Gaviria himself) between neoliberal reformers and neoconstitutional lawyers. The son of a prominent figure of the Liberal Party, Cepeda received a law degree from the University of the Andes Law School, a private, elite school modeled after U.S. law schools. Fresh out of law school, Cepeda was one of the first Colombian lawyers to get a degree that would become the ticket to a promising intellectual and professional career in top local law schools: an LL.M. from Harvard (1987). At Harvard, Cepeda pursued an interest in U.S.-style judicial review that he had discovered as a student at The Andes. It was also at Harvard where he got first-hand knowledge of debates on (and developed an admiration for) the work of Ronald Dworkin and his liberal theory of activist constitutional adjudication.[5]

Upon returning to Colombia in 1988, Cepeda was appointed legal counsel to President Virgilio Barco, a member of the Liberal Party whose administration took the first steps towards the opening of the Colombian economy. In 1990, when another member of the Liberal Party (César Gaviria) was elected President on a campaign platform that promised to push forward the student movement initiative to convene a Constitutional Assembly, Cepeda became the President's choice for the post of Presidential Advisor for Constitutional Reform.

Cepeda became the key figure in the government's circle of advisors responsible for producing the draft constitution to be submitted to the Assembly. He thus joined a group of mostly U.S.-trained professionals who incarnated the first generation of Colombian "technopols" (Dominguez 1996), of which President Gaviria himself was the clearest example. They constituted a self-aware community of technocrats whose influence was built on a combination of technical expertise, academic credentials, local political capital, and international connections. The generational shift embodied by the ascent of this type of expert in

government circles became an object of commentary in media and public opinion circles, where the group became known as "Gaviria's kindergarten" due to its members' young age.

The modus operandi of the Presidential circle of advisors, as recounted by Cepeda, is illustrative of the relationships between neoliberal economists and neoconstitutional lawyers. To produce the draft constitution, President Gaviria established weekly sessions—the "Saturday meetings"—attended by Cepeda, another young constitutional advisor (Fernando Carrillo), the President himself, and three or four high-ranking government officials or advisors who would be invited to the session having to do with the topic of their expertise. The Saturday meetings would go on for hours because Gaviria insisted that relevant sections of foreign constitutions (notably those of Germany, Italy, the U.S., and Spain) be read aloud and discussed in detail to gauge their advantages and disadvantages in the Colombian context. It was through this time-intensive exercise in comparative constitutional law that key decisions were made regarding the bill of rights and other institutional arrangements.[6]

The potential clash between the economists' focus on market liberalization and public order, on the one hand, and the constitutionalists' emphasis on a generous bill of rights, on the other, was managed through two mechanisms. First, a consensus existed between the two groups around the need to constitutionally protect the core civil and political rights making up the thin version of the ROL. Second, the fact that they shared an upper class background and elite training in Colombian and U.S. schools provided the social and intellectual glue required for them to make trade-offs and reach agreements on contentious issues.

This was greatly facilitated by a sense of solidarity stemming from the fact that *both* neoliberal economists *and* neoconstitutional lawyers were outsiders trying to take over their respective professional fields. While the former were attempting to displace the older generation of Keynesian economists that had dominated economics and economic policy-making under the protectionist era, the latter were trying to take the dominance of the legal field away from practicing lawyers and judges imbued in the French academic and professional tradition.

In addition to producing a draft constitution, this process gave rise to a reconfiguration of the Colombian legal field. The government's constitutional advisors were part of a new generation of lawyers and, importantly, of law students who had led the citizen movement for a constitutional assembly. Together with a rejection of violence and traditional politics, they shared a distaste for the French-inspired tradition that had been hegemonic in the Colombian (and Latin American) legal field, including its formalist jurisprudence and its preference for judicial restraint. When this self-proclaimed "new constitutionalism" (Cepeda 2005) was joined by human rights activists who had advocated the expansion of constitutional rights for decades, it became a formidable transformative force within the legal field, to the point of becoming hegemonic both within the government advisory circle and the Constitutional Assembly.

The transnational connections of this legal movement with the global neoconstitutional project were patent since its foundational phase. Indeed, beyond resulting from the above-explained exercise in constitutional law, the new constitutional bill of rights was directly influenced by U.S. liberal, activist constitutionalism. Tellingly, once the government had a preliminary draft of the bill of rights, Cepeda discussed it in person with Ronald Dworkin at working sessions held in New York City before submitting it to the Constitutional Assembly. Dworkin made comments and suggestions that were incorporated into key sections of the government's proposal, including those on the right to equality and affirmative action.[7]

In sum, the process leading to the government submission to the Constitutional Assembly marked the rise of the neoliberal and neoconstitutional reformist camps as key actors in the state, economic, and legal fields. Although differences between the two camps were evident, agreement over the core civil and political rights included in the thin version of the ROL combined with social and professional affinities to avert an open confrontation over the constitutional text. As we will see, however, once the exceptional political circumstances surrounding the enactment of the 1991 Constitution shifted, the consensus was also shaken.

Given the influence of the government's proposal on the Assembly, as well as the latter's diverse membership, the neoliberal/neoconstitutional consensus became incorporated into the final text of the constitution. Faithful to its mission to reconcile a deeply divided and violent polity, the Assembly ended up adopting *both* norms enabling neoliberal reform (e.g., enhanced protection of property and prosecution of crimes) *and* norms enabling contestation of the former (e.g., enforceable social rights and strong procedural protections for criminal defendants).

Such hybridization can be seen at play if we now go back to the debate within the Assembly on the USAID-sponsored proposal to adopt an oral, adversarial criminal justice system. USAID and its Colombian consultants argued that having specialized prosecutors would lead to greater efficiency in the investigation of crimes and thus to the reduction of the high rate of impunity in the country. This argument was influential in governmental circles, to the point that the Presidential advisory group, which saw it as a suitable compromise between prosecutorial efficiency and procedural guarantees, adopted and incorporated the U.S. model into the draft constitution.

The fate of this proposal in the Assembly illustrates the stalemate between the neoliberal and neoconstitutionalist camps and its peculiar institutional outcomes. In the U.S. model proposed by USAID and the government, the role of prosecutors, who belong to the executive branch, is limited to the investigation of crimes and accusation before the judge. The judge, not the prosecutor, decides if the defendant must be released or jailed during the investigation. On the contrary, in the European system that prevailed in Colombia before 1991, the investigation was to be carried out by the judicial branch, since judges had to decide all aspects of the criminal process. They directed the investigation,

decided on the defendant's freedom during the investigation, and eventually condemned or absolved her.

The clash between the two models in the Constitutional Assembly gave rise to intense debates between security-oriented reformers and rights-focused lawyers and activists. The former insisted on the reform's potential to improve crime investigation, while the latter emphasized the threat it implied for judicial independence and the protection of citizens' rights (Uprimny 1994).

The result of the debate was a paradigmatic example of the type of eclectic solution through which the Assembly handled the stalemate between the two camps. Following the model preferred by USAID and the government, the 1991 Constitution introduced a new powerful institution, the Attorney General's Office, whose main function would be to investigate crimes. Nevertheless, the Assembly also heeded human rights defenders' criticism of the proposal to subordinate the office to the executive. As a result, it incorporated this agency into the judicial branch and gave prosecutors judicial functions, such as deciding on defendants' freedom.

Thus, the interaction between the two projects gave rise to a peculiar hybrid, a sort of prosecutor/judge that at first glance resembles more the judge of the traditional European system than the district attorney of the U.S. system. Rather than a satisfactory compromise for both camps, the hybrid embodied a "catastrophic tie" (Uprimny 1994), in that the result was an all-powerful Attorney General whose judicial functions (which do not exist in most other adversarial systems) would come to worry both neoliberal reformers (who would later see them as an obstacle to the district attorneys' focus on efficient investigations) and neoconstitutional lawyers (who would come to view them as a source of arbitrary power). This lose-lose compromise was eloquently captured by Fernando Carrillo, who worked with Cepeda as co-coordinator of the Presidential Advisory Unit for Constitutional Reform. "We've created a monster," was his reply when asked about his view on the new institution shortly after the enactment of the 1991 Constitution.[8]

The second phase: the take-off of the neoliberal and the neoconstitutional projects

The aftermath of the Constitutional Assembly coincided with USAID's launch of the second phase of the Program for the Modernization of Justice (Arenas and Gómez 2000; Santos 2001). During this phase, from 1992 to 1996, USAID's investment in judicial reform overlapped with the unfolding of both the neoliberal and the neoconstitutional projects, which continued to coexist by following parallel tracks.

The neoliberal project took off in earnest on both its deregulatory and repressive fronts. As for the former, the project entailed legislation developing the liberalizing provisions of the 1991 Constitution, from tariff reduction to the flexibilization of labor markets to privatization of state-owned firms (Edwards

and Steiner 2008). The key figures in this wide-ranging reform were the members of the economic wing of President Gaviria's circle of young advisors (Ahumada 2000). As for the latter, it entailed the hardening of prosecution and punishment of crimes, namely drug offenses. Given Colombia's ranking as the top drug exporter, this component of the neoliberal agenda was dominated by the interest of the George H.W. Bush administration in ratcheting up the so-called war against drugs, which would come to mark USAID's investment in judicial reform in the country.

The path toward this policy emphasis had been opened in February of 1990, when the governments of the United States and Colombia signed an agreement at the San Antonio Summit, whereby the former committed to providing 36 million dollars, to be administered by USAID, in order to improve the ability of Colombia's judicial system to investigate and punish crimes. This pact turned Colombia into the largest recipient of USAID funds in Latin America (García 1995).

Interestingly, just as USAID and the rising neoliberal technocracy within and outside the government were pushing forward their economic and security agenda, new constitutionalism was taking over the elite sectors of the judicial branch and legal academia. Indeed, it was during this phase that the Constitutional Court (where key figures of the neoconstitutional camp had been appointed justices or clerks) developed its most protective jurisprudence with regards to procedural guarantees for criminal defendants and issued its most activist rulings enforcing social rights. Tellingly, the Court did this while declaring constitutional the key neoliberal economic reforms, which allowed the two projects to unfold without clashing with each other.

Such peaceful coexistence would not endure. Signs of strain were evident toward the end of this phase, as disagreements about the course of the USAID-funded reform program illustrate. The programs of the second phase were met with criticisms by human rights NGOs and influential neoconstitutionalists. These lawyers were joined by the local administrator of the programs (FES) in criticizing what they all saw as the project's excessive emphasis on the criminal justice system in general and its efficiency in particular, to the detriment of other branches of the judiciary and citizen access to justice. Thus, FES sought to give more salience to access to justice initiatives, among them legal aid projects for the poor and the use of alternative dispute resolution mechanisms in marginalized communities.[9]

Despite such disagreements and in line with USAID's priorities, the allocation of resources between 1992 and 1995 privileged the improvement of crime investigation. Indeed, the Attorney General's Office received nearly 35 percent of the funds granted during this period, which became essential to the sustenance of the new institution (Rondón 1998).

The third phase: the clash between the neoliberal and the neoconstitutional projects

The confrontation deepened during the third phase of the program (1996–99). In this stage, the deterioration of the relationship between Colombia and the

United States, originating with accusations against Colombian President Ernesto Samper (1994–98) for having received campaign contributions from drug lords, led to increasing pressure from the U.S. government to obtain concrete results from the projects regarding the punishment of drug dealers and the reduction of criminal court backlogs. Since the statistics on impunity and performance of the courts and tribunals showed that the impact of the projects had been negligible, USAID demanded immediate changes. This short-term view clashed with FES's approach, which led to the latter abandoning the program in protest (Arenas and Gómez 2000).

The fault line within USAID's project illustrated a broader struggle in the Colombian legal and state fields around institutional reform. Indeed, the late 1990s and the early 2000s were marked by the erosion of the relatively harmonious relations between neoliberal and neoconstitutional elites that dated back to the inception of the 1991 Constitution. As the Colombian civil war intensified and activist courts continued to publicly shame the government for its failure to protect civil and social rights, a neoliberal backlash brewed within academia and political circles that called for the toughening of the criminal justice system and the curtailment of courts' activism with regards to redistributive social policy.

The paradigmatic instance of this countermovement was an ambitious project led by Harvard economist Alberto Alesina and hosted by Fedesarrollo, a prominent think tank and influential pro-market voice. With the participation of leading Colombian economists, in 2002 the project produced a comprehensive diagnosis and proposal for institutional reform (Alesina 2002). Central among the proposed changes were those having to do with the strengthening of the criminal justice system and the weakening of constitutional adjudication, which sought to roll back the influence of the Constitutional Court and the new constitutionalism movement at large. This project was accompanied by increasingly acrimonious critiques against neoconstitutionalism by neoliberal economists, technocrats, business associations, and think tanks (Clavijo 2001; Kalmanovitz 2001).

Neoconstitutional scholars, judges, and policy makers fired back. The Constitutional Court issued highly activist rulings that limited the Attorney General Office's and the government's coercive powers (for instance, by striking down state-of-siege legislation allowing district attorneys to conduct raids and detain citizens without judicial warrant) and rolled back economic policies that negatively affected the middle and working classes (for instance, by declaring unconstitutional an unpopular law enabling banks to charge high interest rates on mortgages).

Given that neoconstitutional lawyers had attained positions of power in state and academic circles (Manuel José Cepeda, for instance, had been appointed Dean of the University of The Andes Law School in 1997), the confrontation gave rise to a new stalemate that contributed to stopping judicial reform programs in their tracks. Among the aborted programs was the reform of the Attorney General's Office, despite the continued availability of USAID funds for this purpose and the general dissatisfaction with the performance of the peculiar hybrid that had arisen out of the Constitutional Assembly.[10]

This context and the fallout between FES and USAID led to the latter project's decline. And it would have probably meant its demise had it not been revived by the so-called Plan Colombia, through which the U.S. government considerably increased the funds and programs of military and institutional assistance to Colombia in 2000. Although Plan Colombia is essentially a military program—as shown by the fact that approximately 75 percent of its funds are channeled to military operations (CIP 2004)—it also includes funds for institutional strengthening that have been mainly invested in the continuation of USAID's judicial reform program. Thus, in 2001 the fourth phase of the program was launched with USAID funds administered by a U.S. private consulting firm (Checchi).

The fourth phase: chastened neoliberalism, the "war on terror," and the reform of the criminal justice system

Plan Colombia marked a critical turn within U.S. and local governmental elites towards a militaristic response to increasing political violence in the country. The turn was accentuated by the political and ideological sequels of the global "war on terror" launched by the U.S. after the attacks of September 11, 2001. Given the status of Colombia as the sole country in the region undergoing a civil war involving the state, guerrilla groups, and right-wing paramilitary groups (all in various combinations with drug-trafficking mafias), the "war on drugs" in the country quickly metamorphosed into the broader "war on terror" against illegal armed groups, namely left-wing guerrillas. With this global shift and the widely popular, right-wing Uribe government on their side,[11] neoliberal reformers successfully advocated the deepening of criminal justice reform in order to restore "law and order" as a precondition for the proper functioning of markets (Montenegro and Posada 2001).

Together with disaffection with the existing criminal justice system both in neoliberal and neoconstitutionalist circles, this context offered a propitious setting for the overhaul of the system inherited from the 1991 Constitution. And, as in the previous phases of USAID's program, reformers could count on the agency's funding to promote the adoption of the adversarial system. Indeed, USAID allocated nearly seven million dollars to this effort,[12] which contributed to the reform of the Constitution's rules on the functions of the Attorney General's Office in 2002 and to the issuing of a new Criminal Code in 2004 that eliminated most of the hybrid components of the extant system and incorporated further elements of the U.S. model. Although the Attorney General's Office continued to be part of the judicial branch, the new system stripped it of most of its judicial functions, had its focus on the investigation of crimes, and generalized the use of oral procedures. With the take-off of this new system in January of 2005, the institutional transplant that had been promoted by USAID for more than ten years finally took form.

USAID's financial and logistic support was crucial both during the preparation and the implementation of the reform, which entailed the retraining of thousands of district attorneys and judges in the culture of oral proceedings. On the

local front, the key actors were Corporación Excelencia para la Justicia (a judicial reform think tank funded by major Colombian corporations) and a group of elite criminal lawyers whose personal and professional connections to both the government and the courts allowed them to bridge security-oriented and rights-oriented reformers and thus to generate a consensus around the project (Villamizar 2008).

For the purposes of this chapter, beyond the success of USAID's longstanding project, what is relevant about this reform is the fact that it embodies a rapprochement between the neoliberal and the neoconstitutionalist projects. Indeed, I argue that the consensus around this reform illustrates a temporary, unstable equilibrium in the struggle for dominance of the global ROL field. Aptly characterized as "chastened neoliberalism" (Kennedy 2006a), it entails the reconfiguration of the still hegemonic neoliberal project through the mutual accommodation of the neoliberal emphasis on property and public order and the neoconstitutionalist focus on redistribution and guarantees of individual freedoms.

This is evident, for instance, in the additions that USAID has made to its judicial reform program in Colombia over the last few years. To partially offset the considerable power of the revamped Attorney General's Office, USAID allocated three million dollars to strengthening the legal aid system for the poor. In addition, USAID, together with the Ministry of Justice, devoted four million dollars to the promotion of alternative dispute resolution methods such as community mediation. Finally, it spent eight million dollars on the strengthening of access to justice programs in urban and rural areas.[13]

The chastened neoliberal program that arose out of this confrontation had its counterpoint in the visible chastening of neoconstitutionalism. On the civil rights front, the tangible results and public opinion success of the Uribe government's "iron fist" policies to combat illegal armed groups, as well as its explicit alignment with U.S. global anti-terrorism policy, dramatically shifted the political correlation of forces in favor of the national security agenda. Under these circumstances, neoconstitutional lawyers and activists went on the defensive and limited themselves to trying to stop further curtailments of individual freedoms.

The weakening of the constitutional agenda behind the new consensus is also evident in the partial retreat of courts from the redistributive activism that characterized the 1990s. In response to economists' criticisms and several governmental attempts at stripping the Constitutional Court of its powers, the Court has moderated its activist jurisprudence and shifted to a consensus-building approach to the enforcement of constitutional rights.

Cepeda's career, once again, vividly illustrates this trajectory. After being appointed Constitutional Court Justice in 2001, he led the Court's rapprochement with its critics. This included brokering meetings between prominent neoliberal economists and neoconstitutional lawyers to discuss contentious issues (e.g., judicial activism regarding economic policy). Held towards the beginning of his tenure and sponsored by the Colombian Treasury, these meetings sought to tone down the debate and explore compromises to solve it. The same approach is evident in Cepeda's rulings, which helped steer the Court towards a middle

ground as a way to fend off criticism from increasingly powerful foes in government and economic circles.

After two decades of USAID investment and 15 years of neoliberalism and neoconstitutionalism, what does the Colombian case study tell us about the dynamics of the ROL field? Interestingly, the path of Colombian institutional reform, and the intersections between the political and professional projects animating that reform, have come full circle. Like the foundational moment of the 1991 Constitutional Assembly, the convergence of the neoliberal and neoconstitutional projects (this time under the aegis of strengthened neoliberal hegemony) constitutes the consensus underlying rule of law reform, as illustrated by the transformation of the criminal justice system. However, if the brief history of Colombian neoconstitutionalism and its changing relations with the neoliberal project are any indication of the structure of the ROL field, chastened neoliberalism is not to be a permanent synthesis. For the transnational epistemic and policy networks behind each project, with their contrasting conceptions of the ROL, continue to make inroads into the legal, economic, and state fields that they have gradually taken over.

Conclusions

In this chapter, I have sought to make a case for a sociological approach to the study of one of the key political and legal processes underlying contemporary globalization: the export and import of ROL and judicial reform programs. I have argued that such an approach entails unpacking the reformist projects vying for dominance of the global ROL field and examining their actors, strategies, cognitive frameworks, and network structures. Based on evidence from Latin America in general and Colombia in particular, I have identified two transnational projects advancing different conceptions of the ROL—global neoliberalism and neoconstitutionalism—and argued that their intersections have decisively shaped the fate of judicial reform over the last two decades.

The analysis offered in this chapter contrasts with both mainstream and critical accounts that tend to view legal globalization as embodying a peaceful, elite consensus around the thin conception of the rule of law. My analysis shows that the global ROL field is a site of struggle in which neoliberalism, albeit hegemonic, has been challenged from inside and from outside. Internally, neoliberal judicial reform has undergone transformations as neoliberalism reinvented itself in the 1990s in order to accommodate the evidence of the risks of unconditional deregulation arising from such events as the Asian financial crisis and the Mexican and Argentinean economic meltdowns.

Externally, neoliberal reforms have been met with elite opposition from representatives of an equally global project aimed at promoting the constitutionalization of rights and U.S.-style judicial review. The result of this ongoing inter-elite struggle is a provisory reformist hybrid that tones down both the neoliberal and neoconstitutional projects and integrates them into an unstable amalgam of neoliberalism-cum-rights. This synthesis is not unique to Latin America. Indeed,

it seems to be a temporary global fix, as the rapprochement between rising neoliberalism and increasingly moderate judicial activism in the iconic Indian case suggests (Rajagopal 2007).

Whether this struggle will lead to the stable fusion of the two projects has yet to be determined. Thus far, an unsurprising result of the inter-elite convergence around chastened neoliberalism is that it has effectively reproduced elite privilege. For, as Adelman and Centeno conclude in their historical analysis of the ROL in Latin America, current reforms tend to reproduce the pattern whereby "the better-endowed classes use even the 'reformed' rules to reinforce unequal applications" of the law (Adelman and Centeno 2002:158). Given that the equal application of the law to the rulers and the ruled alike, and to the rich and the poor, is the very definition of the ROL that constitutes the alleged goal of the reforms, the latter will likely continue to produce modest results while fueling new rounds of elite confrontation and compromise within the legal field.

Notes

1 www.abanet.org/wjp/.
2 www.abanet.org/wjp/forum.html.
3 For a useful review of this copious literature, see Muller and Janse (2007), Trebilcock and Daniels (2008), and Kennedy (2006b).
4 Neoliberal law and judicial reform have also been contested from below by subaltern actors, from indigenous and Afro-Latin American communities resisting legal institutions and court rulings threatening their territories to labor movements contesting the weakening of labor courts. Elsewhere, I offer an account of the role of social movements and popular actors in contesting neoliberal legality from below in Latin America. Given the focus of this book, in this chapter I bracket this type of analysis in order to concentrate on the details of inter-elite conflict. See Rodríguez-Garavito and Arenas (2005).
5 Interview with Manuel José Cepeda (Bogotá, June 2008).
6 Interview with Manuel José Cepeda (Bogotá, June 2008).
7 Interview with Manuel José Cepeda (Bogotá, June 2008).
8 Interview with Rodrigo Uprimny (Bogotá, July 2008).
9 Interview with Eduardo Aldana (FES Director, Bogotá, December 1996).
10 Interview with Rodrigo Uprimny (Bogotá, July 2008).
11 President Alvaro Uribe took office in 2002 and quickly delivered on his promise to use an "iron fist" approach to combat the hugely unpopular left-wing guerrilla groups (notably FARC) that had turned against civilians through the use of terrorist methods. The citizenry threw their support behind Uribe's tough approach, to the point of reelecting him in 2006 after a constitutional amendment that Congress passed to this effect.
12 Interview with Checci officer (Bogotá, January 2005). See also Checchi 2003.
13 Interview with Checci officer (Bogotá, January 2005).

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Part III

Testing rule-of-law hypotheses in the context of the largest Asian economies

Part III tests our approach and hypotheses about the relationship between social capital, lawyers, and the rule of law in the setting that raises the strongest intellectual and practical challenge to the idea that globalization is building the rule of law. We examine the countries that have the three largest economies in Asia—Japan, China, and South Korea—and that, by many accounts, have not relied much on lawyers and the rule of law to build their economic strength. We conclude this part with a more theoretical assessment of what these chapters mean for the future construction of a stronger role for lawyers and law in Asia.

Chapter 9 by Kay-Wah Chan does not so much chronicle the activities of the lawyer brokers in Japan as provide a map to the history and recent transformations in the legal profession generally. He provides a rich picture of considerable reform energy and initiative that builds on a long history of a very limited profession in size and role in the state and economy. With the relative demise of the long and stable alliance among the elite Japanese bureaucracy, the business conglomerates or keiretsu, and the Liberal Democratic Party that ruled from the 1950s until last year, there are more brokers from within and outside the law of U.S. technologies of governance. Japan's history shows, in fact, that Japanese importers of foreign technologies, such as the civil codes and faculties of law modeled on Europe in the Meiji period, have used the imports to claim the banner of modernity while resisting colonial domination and more fundamental challenges to existing social structures. The chapter raises questions about how recent importations, including reforms in legal education, and a rapidly expanding corporate bar, presage a stronger future role for lawyers and law in Japan.

Chapter 10, by Kim Seong-Hyun, traces the history of the Korean legal profession from its origins through Japanese colonialism into the present. We see the activities of the lawyer-brokers who brought the U.S. model of corporate law in the late 1950s, mainly to service U.S. business interests in South Korea, the lawyers who braved the military regime to represent political prisoners, and later the lawyer-activists who set up non-governmental organizations (NGOs) modeled largely on those in the United States. The very close connection in the Cold War between South Korea and the United States—built through large programs of educational exchange—made U.S. expertise prominent in the vocabularies of

the South Korean academies and think tanks; and the democratization and concomitant discrediting of the military regime and its henchmen provided an opportunity for lawyer brokers to validate themselves, their imported know-how, and a much expanded role for lawyers in the state and the economy. As we develop further in Chapter 12, the U.S.-style legal educational reform brought in the wake of these transformations in South Korea offers to further build and legitimate this expanded role.

Randall Peerenboom in Chapter 11 provides a thorough analysis of the current state of law and the legal profession in China, making the case for some skepticism about the immediate prospects for a substantial change in the relatively weak current position of law and lawyers. Peerenboom shows that the corporate bar is thriving in China, in contrast to the local practitioners—especially in criminal law—depicted by Michelson in Chapter 3. The legal landscape that Peerenboom depicts does not offer many examples of potential lawyer-brokers with enough social capital to be in a position to build a stronger position for law. He particularly doubts that the prosecutors, however much they might complain about the courts, have the potential to play this role. On the other hand, the rapidly growing corporate bar has strong ties to foreign business interests, foreign legal degrees, and imported legal expertise. There has been no equivalent to the crisis and regime change in South Korea, which boosted the value of South Korean legal capital and the U.S. expertise that fortified it. Further, since the Chinese corporate lawyers serve almost exclusively as brokers between foreign and domestic economic interests and state power in China, they have not built capital by investing in politics and the state. In Chapter 12, therefore, we ask what the likelihood might be for spillover, aided by some reform of legal education, from an increasingly well-established corporate bar into a larger role for lawyers in the Chinese state and economy.

Chapter 9

The reform of the profession of lawyers in Japan and its impact on the role of law

Kay-Wah Chan

Japan has often been described as a developed country whose laws and legal system play a limited role in its society (see Miyazawa 2001:118). The scarcity of lawyers[1] is one of the factors contributing to this situation. Despite the small number of lawyers in Japan, the legal profession has played an active role in facilitating the development of a civil society in the country by attempting to act as "a watchdog of the state" (Feeley and Miyazawa 2007). Their efforts, however, have been only partially successful (Feeley and Miyazawa 2007:152, 185), in part because their extremely small number (Feeley and Miyazawa 2007:185) affects the accessibility of legal services to the public. This is particularly true in remote and rural regions. The paucity of lawyers has led to extremely uneven geographical distribution of the profession throughout the country.[2] The justice system reform movement which began in the late 1990s led to a governmental agenda of extensive reform to the legal system in Japan. This justice system reform (also known as the judicial reform) included a substantial increase in the number of legal professionals (lawyers, judges, and prosecutors), which prima facie should have facilitated a more even distribution of lawyers and, accordingly, greater accessibility to legal services.

This chapter will discuss how economic development has led to the justice system reform movement, how reform has supported or facilitated the growth in commercial legal practice, and how this growth has impacted the accessibility of legal services. The chapter will then conclude with analysis of future prospects for law and lawyers in Japan.

Economic development and justice system reform

The main initiator of the justice system reform movement was the business sector, spearheaded by *Keidanren* (the Japan Federation of Economic Organizations)[3] and *Keizai Dōyūkai* (the Japan Association of Corporate Executives) (Miyazawa 2001:100, 106; Sato 2002:75–77). These groups pushed for changes including an increase in the number of lawyers and a new legal professional education and training system, the latter namely in the form of professional law schools (Miyazawa 2001:100; Sato 2002:76–77). In the early 1990s, *Keidanren* had already pushed

for deregulation (Yoshimatsu 1998:330–44) to facilitate the transformation of the Japanese economic system from "a bureaucratic, centralized system" to "a private sector-led, decentralized system" (Yoshimatsu 1998:337–38). The business sector exerted powerful influence on the Liberal Democratic Party (LDP), the principal ruling party of post-War Japan (Miyazawa 2001:106; Sato 2002:77). *Keidanren* is said to be "powerful" (see, for example, Lewis 2005:43),[4] "influential" (Yoshimatsu 1998:329; Miyazawa 2001:89; Bouissou 2002:151), and a "politically active business lobby" (Lewis 2005:43) in Japan. Their demand for a justice system reform therefore could not be ignored. LDP had also established its own Special Research Committee on the Judicial System and published a report (Miyazawa 2001:99; Sato 2002:77). In Miyazawa's words (2001:101), "A comprehensive reform of the entire judicial system has suddenly become a top priority in national politics."

The driving force behind the business sector's sudden demand for justice system reform was the rise in the level of their legal needs, which in turn can be attributed to Japanese economic developments. Until recently, there was low demand for lawyers' services from the big corporations in Japan. Unlike their counterparts in the U.S. and many other advanced economies, big Japanese enterprises handled their legal matters mainly through their in-house legal departments (see, for example, Nagashima and Zaloom 2007:138 and Altschul 1984:7), which were rarely staffed by legal professionals. The low level of legal needs was attributable to the structure and manner of operation of the Japanese economic system at that time.

Japanese enterprises were grouped into *keiretsu* (corporate groupings).[5] There was a strong tie between each business enterprise and its main bank (see Argy and Stein 1997:113–15; Milhaupt 1996:22).[6] The *keiretsu* and main bank systems diminished the role of the law and legal processes in the business sector. Transactions were based on long-term relationships. Before entering into these relationships, there was a careful evaluation of the business partner. Furthermore, in a long-term relationship, there was a lower possibility of opportunism than in a once-off deal. All these had a risk-reduction effect. As a result, the possibility of disputes was comparatively low. In addition, the maintenance of a long-term relationship demands an ongoing harmony and non-antagonistic behavior. In this situation, there would be lesser use of formal legal rules and processes.[7] There was reluctance to engage in litigation since that would be an admission of the dispute and conflict. In this business environment, there was little need for detailed contractual provisions meant to cover all possibilities. If disputes arose, they were resolved through negotiation. In this way, an amicable solution could be reached and the relation could continue. Business relationships were, to a large extent, regulated by a relation-based rather than a law-based mechanism.

In addition, corporate governance was not organized through legalistic structures, but rather by the main bank system, cross-shareholding, and, sometimes, monitoring conducted by governmental authorities (Milhaupt 1996:21–22).

Crossholding of shares among corporations and financial institutions resulted in a high proportion (up to approximately two-thirds) of all corporate shares being held "long term by 'stable' shareholders" who were "friendly" towards management (Milhaupt 1996:25). Individual shareholders only held a small portion of shareholdings, which is still true today.[8] It has been reported that about 50% of the stock in large Japanese corporations was held by "banks and insurers, often in large blocks," while other corporations (often firms that had supplier-customer relations) owned about 25% (Gilson and Roe 1993:883). Hostile takeovers were difficult and therefore rare. The main bank monitored the management of the enterprise and provided managerial and/or financial assistance in the event of crisis (Milhaupt 1996:22; Argy and Stein 1997:114). In return for "the re-financing of old loans or the provision of new ones," the enterprise would allow the main bank to replace management with bank personnel for an interim period (Argy and Stein 1997:114).

In short, businesses operated on a relation-based system rather than a law-based system. The legal culture of the business sector made little use of legal means in regulating relationships and resolving disputes. Commercial lawyers and law firms did exist, but they were small in number. Referred to as "*shōgai*" (foreign-related), these lawyers and law firms handled international transactions. A newspaper article printed in the *Nihon Keizai Shimbun* on December 5, 1987 estimated the number of international business lawyers (*shōgai bengoshi*) to be around 500. However, there have been changes in the Japanese economic system, particularly after the burst of the bubble economy and as a result of the prolonged recession of the 1990s.

The burst of the bubble economy and the subsequent prolonged recession highlighted the weaknesses of the post-War economic model. This model fell out of line with the post-industrial economy in Japan and global economic developments (see Kojima 2006:1; Sawa 1999:173).[9] As a result of administrative reform and deregulation, the mechanism of the Japanese economic system has begun to move from governmental monitoring to regulation by market forces.

After the burst of the bubble economy, banks were heavily burdened with bad debts. They divested their shareholdings in other enterprises in order to increase capital-to-asset ratios, gain liquidity to cover the losses on bad loans (Japan Information Network 2001), and improve profitability (Drysdale et al. 1999:25). In addition, the main bank might refuse to support a failing company.[10] The traditional close relationship between banks and enterprises weakened. Liberalization of the financial market has made it easier for the enterprises to raise funds in the capital markets (see Argy and Stein 1997:114). As a result, there was less reliance on bank loans for capital than there had been in the past. Borrowing amounted to about 45% of all non-financial sector liabilities in 1997, as compared with approximately 58% in 1989 (Drysdale et al. 1999:24). There was a corresponding increase in the proportion of securities liabilities from 15% to 27% during the same period (Drysdale et al. 1999:24). The change in the means of capital-raising reduced the reliance on banks, thus weakening the main bank system.

There was also a decline in the *keiretsu* system. Deregulation, corporate failures, the disposal of cross-held shares, and the disposal of non-performing loans provided the opportunity for foreign interests to invest in the Japanese market. Their entry has brought about threats of takeovers and the intensification of competition. As a result, mergers and/or alliances between Japanese companies began to take place across the traditional *keiretsu* borders. Japanese enterprises also started to diversify their business operations as competition intensified. This in turn made it more difficult to maintain *keiretsu* bonds, accelerating the decline of the system. *Keiretsu* members started to compete among themselves. Intensified competition also made it imperative for Japanese enterprises to focus on immediate profitability. In the past, controlled competition allowed businesses to prioritize growth and expansion over immediate profitability. Due to changes in the business environment, however, dependence on inter-company shareholding in the choice of business partners was no longer feasible (see Japan Information Network 2001)[11] because competitiveness would have suffered. This decline of the *keiretsu* system was further aggravated by a decline of cross-shareholding within *keiretsu* groups. As reported in *Japan Times* (2007), the ratio of cross-shareholdings among listed companies continued to drop since 1990 until 2006, when it rose by 0.9%. The reduction in cross-shareholding contributed to a decrease in the incentive for exclusive intra-group business deals. Indeed, an article in the November 25, 2000 issue of *The Economist* (London) observed that the share of business that *keiretsu* companies did with each other was in decline.

The weakening of *keiretsu* bonds provided an environment more amenable to investments by outsiders (non-*keiretsu* members) such as foreign interests and local entrepreneurs. The *keiretsu* system, in both its horizontal and vertical forms, has long been considered an impediment to foreign investment (Drysdale et al. 1999:16–19). The loosening of *keiretsu* ties has provided "outsiders" this previously denied opportunity. As discussed above, the decline in those ties resulted in an increased willingness to move beyond established and closed circles to find new business partners. These changes have opened up the business environment. The behavior of business partners has become less predictable. There is higher opportunistic risk than before. The past practice of heavy reliance on norms and customs to regulate relationships is no longer feasible. In fact, there is no common set of norms and customs once business partners are sought outside the *keiretsu* boundaries or the closed circle of long-term partners. In such circumstances, the law plays a much more important role than before. Furthermore, when the priority of business relationships shifts from that of aiming to establish long-term relationships built on mutual trust, to that of increasing immediate profitability, there are fewer disincentives for using legal means to resolve disputes. To maintain competitiveness and profitability, ongoing harmony and long-term relationships may be sacrificed. In addition, the opening up of the once closed business environment makes it easier than before to change business partners.

With the fading of the post-War Japanese model, legalization is progressing rapidly in the business sector. Governmental ex ante regulation and interim

monitoring have given way to post-crisis liability seeking as the means of governance. Closed door negotiations are being replaced by the pursuit of legal recourse. At the same time, the economy is changing from a "bureaucracy-led" system (Yoshimatsu 1998:344) to one centered on the free market and the private sector (Sato 2002:77). In these circumstances, the role of the bureaucracy in monitoring the operation of the society is diminishing and being replaced by the law.

As discussed above, until recently big Japanese enterprises handled their legal matters primarily through their in-house legal departments, which were rarely staffed by legal professionals. A significant number of corporate legal department staff is not recruited specifically as such.[12] It is true that some are law department graduates in their ranks,[13] but legal studies in Japanese universities differ from the professional legal education offered by American law schools or the LL.B. education provided by English law schools. Japanese undergraduate law programs are not designed to train legal professionals. Instead of being "clinical" or practice-oriented, the coursework tends to be theoretical (see Ota 1997/1998:184; Foote 2006:216). In addition, a significant portion of the four years of study is commonly spent on general liberal arts education rather than legal specialization.[14] The corporate legal department staff may receive training, but it seems mainly to be based on the attendance of courses outside the companies and on-the-job training.[15] Some may have studied at local or foreign higher education institutions and/or have had internships at law firms, but these are comparatively less common.[16] This system of corporate legal departments was sufficient to cope with companies' legal needs in the past, but the recent increased reliance on the law to resolve possible disputes has made corporate legal matters increasingly diversified, rapidly changing, complicated and international. These changes have made it difficult for corporate legal departments to cope with the business sector's new set of legal needs. There is also a "tendency to rely on the 'insurance policy' of an outside opinion" due to the severity of risks of error (Nagashima and Zaloom 2007:142). This resulted in a rising need for outside legal services. However, there was a scarcity of lawyers in Japan. In addition, given the low number of legal professionals, an increased use of litigation to resolve disputes meant a delay in proceedings unless there was a substantial increase in legal professionals. In fact, delays have always been an element of the litigation mechanism in Japan.

The business sector began to push for legal system reform in order to satisfy its new legal needs, which required a strong judiciary (Mainichi Shimbun 1998; Sato 2002:77) and an adequate supply of competent legal service providers. Academics (particularly law professors), politicians from different political parties, writers, and professionals seized the opportunity to join in the debate. A private-sector study group, the Judicial Reform Forum, was formed, and was "composed of consumers, economists, scholars and the like" (Ishido 2001:139). A monthly journal, the *Journal of Judicial Reform in Japan*, was also founded. These combined factors generated strong momentum for justice system reform.

In July 1999, the Judicial Reform Council[17] (the Council) was established as an advisory panel to the Cabinet. As stated in Paragraph 1 in Article 2 of the *Law Concerning Establishment of the Judicial Reform Council*, the Council was established with the purpose of "clarifying the role to be played by the administration of justice in Japanese society in the 21st century. … " The Council was comprised of three law professors, three senior members of the legal profession (one judge, one lawyer, and one prosecutor), two members of the business sector (one from *Keidanren* and one from the Tokyo Chamber of Commerce), the President of the Federation of Private Universities, a female accounting professor, a female writer, a labor organization representative, and a consumer organization representative (Miyazawa 2001:107). In June 2001, the Council produced its final report, *Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century* (2001) (the Report), which recommended an extensive reform of the legal system. Japan has been implementing those reforms since then. The reform prescribed a substantial increase in the number of legal professionals (lawyers, judges and prosecutors), the deregulation of foreign lawyers' practice in Japan, and the introduction of a new system of professional legal education.

In order to greatly enlarge the population of legal professionals, the Council proposed a substantial rise in the number of passers of the highly competitive National Legal Examination (NLE). In Japan, aspiring legal professionals must pass the NLE and then successfully complete training at the Legal Training and Research Institute (LTRI) before they can become lawyers, assistant judges or prosecutors. In the past, only a very small number of candidates were allowed to pass the NLE, ranging from 400 or so to 500 or so passers per year for almost 30 years since 1962 (Rokumoto 2005:12). In 1991, the number rose to slightly over 600, subsequently further increasing to 700 or so in 1993 and around 1,000 since 1999 (Rokumoto 2005:12). In the Report (Part 3.2 (2) of Chapter I and Part 1.1 of Chapter III), the Council proposed a gradual increase in the number of NLE passers to reach the figure of 3,000 in 2010. According to the Council's prediction (Chapter III, Part 1.1 of the Report), this will result in a population of approximately 50,000 legal professionals by 2018, a substantial increase. In 1999, the year the Council was established, there were only 20,696 legal professionals (17,249 lawyers, 2,143 judges/assistant judges, and 1,304 prosecutors) in Japan (Asahi Shimbun 1999:238).[18] A figure of 50,000 would constitute a 141.6% increase.

In its Report (Chapter II, Part 3.4), the Council also recommended a relaxation of the regulations on registered foreign lawyers (*gaikokuhō-jimu-bengoshi*) in Japan. It recommended consideration of abolishing the prohibition on the employment of Japan-qualified lawyers by *gaikokuhō-jimu-bengoshi*. The Council also recommended a relaxation of the requirements for specified joint enterprises between *gaikokuhō-jimu-bengoshi* and Japan-qualified lawyers. A specific joint enterprise (*tokutei kyōdō jigyō*) was a kind of cooperation permitted between *gaikokuhō-jimu-bengoshi* and Japan-qualified lawyers after a change in the law in 1994 (effective from 1995). However, this type of enterprise did not constitute a genuine

partnership. The *gaikokuhō-jimu-bengoshi* and Japan-qualified lawyers involved in these partnerships had to operate as independent legal practices and maintain separate names. *Gaikokuhō-jimu-bengoshi* could not employ Japan-qualified lawyers. Foreign law firms had been lobbying for changes in the law to permit them to take on Japan-qualified lawyers as partners and to employ them. The Japanese business sector also supported this demand. For example, *Keidanren* lobbied for this type of deregulation (Jiji Press 1992; Sherwood and Stafford 2005:29), which was ultimately adopted as part of the justice system reform. As of April 1, 2005, *gaikokuhō-jimu-bengoshi* can employ and partner with Japan-qualified lawyers. As will be discussed below, this deregulation and the increase in the number of lawyers have facilitated the rapid and substantial growth of commercial legal practice in Japan.

The growth of commercial legal practice

Until recently, due to the low level of outside legal counsel required by big corporate clients, commercial lawyers constituted a tiny minority in the profession of lawyers in Japan. However, in recent years, the number of commercial lawyers[19] has been rapidly increasing.

To roughly estimate the extent of this increase, this chapter presents some of my research on the current number of Japan-qualified lawyers in the larger-sized commercial law firms (including those merged with or having joint enterprise arrangements with foreign law firms). The aggregate of this calculation is the minimum figure on the number of commercial lawyers in Japan because there are smaller-sized commercial law firms, a figure which is then compared with an estimate of the number of commercial lawyers at the time that the justice system reform debate was taking place. An article published in the newspaper *Nihon Keizai Shimbun* on February 12, 2000 reported a general estimate of only about 500 to 1,000 lawyers handling corporate legal matters. As of March 31, 2000, there were 17,126 lawyers in Japan (Japan Federation of Bar Associations 2007b: 72). To investigate the current number of commercial lawyers, a list of 31 law firms[20] was drawn. A search of the Japan Federation of Bar Associations (JFBA) online database was then made to find out the current number of Japan-qualified lawyers in these 31 law firms. They were found to have in aggregate about 2,500 Japan-qualified lawyers currently.[21] According to the information from the JFBA website (accessed February 5, 2008), the total number of lawyers in Japan (as of February 1, 2008) was 25,114. This represents an increase of 46.6% from the 2000 figure. Examining solely the number of lawyers in the 31 law firms mentioned above, there is an increase of 150% (even if the higher figure of 1,000 is taken instead of the lower figure of 500 as the number of commercial lawyers around 2000). The number of commercial lawyers has increased at a faster pace than the total number of lawyers.

The most obvious phenomenon in the recent development of commercial legal practice in Japan is the rapid expansion of the largest law firms. All of these law firms are focused on commercial legal practice. Figure 9.1 shows the

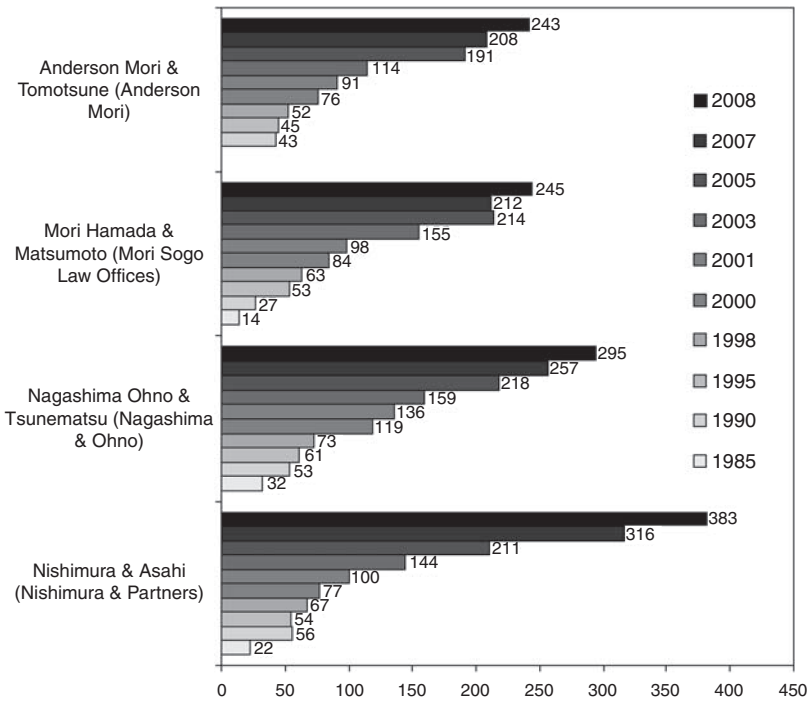

Figure 9.1 Number of lawyers in the four major law firms (1985–2008).

N.B. Firms' names are as of 2008 (former names are in parentheses).

Sources: Figures for 1985, 1990, 1995, 1998, 2000 and 2001 are from Nagashima and Zaloom (2007:143). Figures for 2003 are from the *Nikkei Financial Daily* (2003:1) (the figure for Nishimura & Partners is the aggregate for Nishimura & Partners and Tokiwa Sogo Law Offices). Figures for 2007 (as of July 2007) are from the JFBA (2007b:103). Figures for 2005 and 2008 were obtained by using the searchable lawyer-database system available on the web page of the JFBA www.nichibenren.or.jp on October 10, 2005/November 16, 2005 and January 22, 2008, respectively (entering each firm's name to obtain list of Japan-qualified lawyers in each firm).

expansion of the top four law firms (in terms of the number of Japan-qualified lawyers) in recent years. For example, Nagashima & Ohno had 73 Japan-qualified lawyers in 1998. In January 2000, it merged with Tsunematsu Yanase & Sekine to form Nagashima Ohno & Tsunematsu, which since then has further expanded in size. The firm's growth has been rapid and substantial. In 2003, it had 159 Japan-qualified lawyers, while in January 2008 (less than five years later), it had 295 Japan-qualified lawyers, an 85.5% increase. The firm showing the largest and most rapid expansion is Nishimura & Asahi, which is the product of two mergers in recent years. In January 2004, Nishimura & Partners merged with Tokiwa Sogo Law Offices. The merged firm maintained its English name,

Nishimura & Partners, though its Japanese name has changed to incorporate "Tokiwa." In July 2007, the firm merged with the international division of the once fifth largest Japanese law firm, Asahi Law Offices (formerly Asahi Koma Law Offices), to form Nishimura & Asahi, creating the first Japanese law firm in history with over 300 lawyers. While Nishimura & Partners had only 67 Japan-qualified lawyers in 1998, Nishimura & Asahi had 383 in January 2008. In other words, the firm has grown to 5.7 times its size in the ten years since the justice system reform movement began.

While the top four firms have substantially expanded in size, several other commercial law firms have also grown rapidly in recent years, as shown in Table 9.1. For example, TMI Associates only had 30 Japan-qualified lawyers in 1999. In ten years time, the firm has grown to 174 Japan-qualified lawyers. Another firm, Atsumi & Partners, has increased its number of Japan-qualified lawyers by 74.4% in just the three years between 2005 and 2008. In the same time period, City-Yuwa Partners had a 42.2% increase. Table 9.2 shows a substantial increase in the number of law firms with 21 to 50 lawyers in the last four to five years. There were 21 such firms in 2004, while three years later (in 2007), there were 42.

There are several factors contributing to the rapid growth of commercial law firms. One driving force has been changes in the economic system in Japan, as discussed above. Other factors include the recent expansion of foreign law firm

Table 9.1 Number of lawyers in some other commercial law firms (1999–2008)

	1999	*2005*	*2006*	*2007*	*2008*
TMI Associates	30	87	101	141	174
City-Yuwa Partners	24	64	72	85	91
Oh-Ebashi LPC & Partners	28	64	70	79	81
Atsumi & Partners	N/A	39	43	50	68
Ushijima	27	34	41	40	46

Sources: The 1999 information is based on end-of-year data from *Nihon Keizai Shimbun* (2005:1). The 2005 figures are end of July 2005 data from: Nikkei BP (2005:35). The 2006, 2007, and 2008 data were acquired by accessing the JFBA online lawyer database on May 17, 2006, July 13, 2007, and January 22, 2008. The Oh-Ebashi data are the sum of the number of lawyers in its Osaka and Tokyo offices.

Table 9.2 Number of larger law firms in Japan (2002–2007)

Firm size	*2002*	*2003*	*2004*	*2005*	*2006*	*2007*
101 or more lawyers	2	5	5	5	6	5
51–100 lawyers	6	3	4	3	3	3
31–50 lawyers	4	4	3	6	7	13
21–30 lawyers	12	12	18	23	24	29

Source: Figures are from the JFBA (2006:57; 2007b:103).

operations in Japan (Chan 2005:62–63). This expansion poses threats (of competition and takeover) to domestic firms. The economic development in Japan discussed above has led to a rapid growth in the commercial legal market.[22] Some foreign law firms in Tokyo decided to establish their capability to practice domestic law. In addition, the justice system reform brought along further deregulation permitting *gaikokuhō-jimu-bengoshi* to employ and form partnerships with Japan-qualified lawyers. This created a path for foreign law firms to handle legal matters involving Japanese law. In the past, they could only handle such legal matters through "specific joint enterprises" with Japan-qualified lawyers. Such an arrangement was, as mentioned earlier above, not a real partnership, and it had been an unpopular option. However, in recent years, there has been rapid development in foreign firm operations in Japan (Chan 2005:57–60). The number of specific joint enterprises has increased (Chan 2005:57–58), as has the number of Japanese lawyers in such joint enterprises (Chan 2005:58–59). After the deregulation became effective in April 2005, some foreign law firms amalgamated with the Japanese partner firms in their specific joint enterprises.[23] Changes in the law made it possible for foreign law firms in Japan, many of which are mega-sized global firms, to merge with or take over domestic firms, which are comparatively small and thus more susceptible to the threat of competition or takeover. For example, in 2005, the UK firm Linklaters hired a substantial number of lawyers (including two named partners) from the once sixth largest firm in Japan, causing the latter to split up and dissolve (see Chan 2005:60–61, 63). More recently, the American firm Bingham McCutchen LLP formed a joint enterprise with the local firm New Tokyo International Law Office in October 2007 (Market Wire 2007). Earlier in the year, another Japanese law firm, Sakai & Mimura, had already formed a joint enterprise with the American firm (Market Wire 2007). Each of these two local firms originally had about 20 to 22 Japan-qualified lawyers (Market Wire 2007). A search of the JFBA website on February 10, 2008 found that the firm had 52 Japan-qualified lawyers. Bingham McCutchen is not the only foreign law firm recently to have formed a joint enterprise with a domestic law firm. In January 2008, the Japanese firm Kubota Law & Patent Office merged with the British firm Lovells (The Lawyer 2007:10). The latter is also said to have plans for further expansion (The Lawyer 2007:10). In short, an increasing number of foreign firms show an interest in establishing or expanding their domestic capability.

Through mergers, takeovers, and/or active recruitment, some foreign law firms now have a significant number of Japan-qualified lawyers in their Tokyo offices. For example, as shown in Table 9.3, a search of the JFBA website on February 12, 2008 found that Baker & McKenzie[24] had 98 Japan-qualified lawyers, Sakai Mimura & Aizawa (in association with Bingham McCutchen) 52, Linklaters 44, Jones Day 41, Ito & Mitomi (in association with Morrison and Foerster) 36, White & Case 35, and Clifford Chance 32. In comparison, as of July 2007, there were only eight law firms in Japan with 51 or more Japan-qualified lawyers and 13 law firms with 31 to 50 Japan-qualified lawyers (JFBA 2007b:103).

Table 9.3 Number of Japan-qualified lawyers in some foreign firms (2005–2008)

	July 2005	*July 2007*	*February 2008*
Baker & McKenzie	62	79	98
Bingham McCutchen (Sakai Mimura & Aizawa)	5	–	52
Linklaters	28	–	44
Jones Day	25	37	41
Ito & Mitomi (Morrison & Foerster)	22	34	36
White & Case	25	29	35
Paul, Hastings, Janofsky & Walker (Taiyo Law Office)[1]	26	30	33
Clifford Chance	20	27	32

Note

1 Paul, Hastings, Janofsky & Walker merged with its joint enterprise partner (Taiyo Law Office) in September 2005.

Source: Data for 2007 and 2008 are from the website of JFBA, accessed July 1, 2007, and February 12, 2008. The 2005 data are from Nikkei BP (2005:35 and 79).

It should be noted that these 21 firms already included the foreign law firms that had merged with domestic firms, such as Baker & McKenzie. In addition, many of the foreign firms with a branch in Japan have a very strong presence in the Asian region. For example, Baker & McKenzie was reported in 2007 to have 868 lawyers in the region, Linklaters 372, Clifford Chance 288, Jones Day 209, and Paul Hastings 192 (Asian Legal Business 2007a:33). In other words, these foreign firms' Tokyo offices can rely on the support of their other branches in the region, not to say their global networks.

The threat of competition and takeover has contributed to major local law firms' continual growth in size. The recent merger between Nishimura & Partners and the international division of Asahi Law Offices demonstrates that there is still pressure on the major firms to expand. Furthermore, the expansion of the major law firms is also attributable to the increase in large-scale transactions such as mergers and acquisitions.[25] They need to amass a large number of lawyers to increase their capacity to handle these transactions. It is therefore to be expected that growth in commercial legal practice in Japan will continue, at least in the near future.

The major Japanese law firms achieved their rapid and substantial growth in recent years through mergers and large intakes of newly admitted lawyers (Chan 2005:63–66). As shown in Table 9.4, in recent years these firms have recruited a large number of new graduates from the LTRI to enhance their organic growth. For example, Nishimura & Asahi hired 30 September 2007 LTRI graduates and 42 January 2008 LTRI graduates, for a total of 72. In comparison, as of July 2007, only seven law firms (including Nishimura & Asahi) had more than 72 Japan-qualified lawyers (JFBA 2007b:103). The major law firms' large intake of newly admitted lawyers was supported by the increase in the number of NLE passers and the resulting increase in the number of newly admitted lawyers.

Table 9.4 Number of LTRI graduates hired by the major law firms (2003–2007/8)

Year (LTRI class)	*2003 (56th)*	*2004 (57th)*	*2005 (58th)*	*2006 (59th)*	*September 2007 and December 2007/ January 2008 (60th and new 60th)*
Number of LTRI graduates qualifying as lawyers	829	990	962	1268	
Nagashima Ohno & Tsunematsu	26	21	22	30	39
Mori Hamada & Matsumoto	18	21	17	20	36
Nishimura & Asahi (Nishimura & Partners)	14	25	27	29	72
Anderson Mori & Tsunematsu[1]	16	20	22	21	36
Asahi Koma Law Offices	18	12	11	10	N/A
TMI Associates	10	15	12	12	30
Percentage taken by the Big Five/Big Six	*12.3%*	*11.5%*	*11.5%*	*9.6%*	

Note

1 Figures for 2003 and 2004 are those for Anderson Mori (the firm merged with Tomotsune & Kimura on January 1, 2005). For Nishimura & Asahi, the figures for 2003–2006 are those for Nishimura & Partners.

Source: This table is constructed from data obtained from the firms' homepages (accessed October 15, 2004, November 24, 25 and 26, 2004, January 9 and 11, 2006, May 18, 2006, November 2, 2006, September 13, 2007, January 31, 2008, and February 13, 2008), and total number of LTRI graduates becoming lawyers as reported by the JFBA (2007b:80).

Such a large intake would not be possible if there were still about 500–600 NLE passers per year as in the past.

Commercial law practice has now become a popular career path for LTRI graduates (Sankei Shimbun 2005:29). This is a dramatic shift from the past, when commercial lawyers were a tiny minority in the profession and were even despised by their peers. In the past, traditional *bengoshi* considered those *bengoshi* that handled business matters to constitute a second tier within the profession's hierarchy (Kosugi 1992:102). This trend has since changed. Now, commercial law practice has become an elite and competitive career choice for newly admitted lawyers. Among LTRI graduates, to be offered a position with one of the large firms has become a status symbol (Murakami 2005:17). There are several reasons for this, including significantly higher starting salaries than those offered by other firms and the opportunity to be involved in handling large-sized transactions. *Toyo Keizai Weekly* (Shibukawa and Eguchi 2006) reported that the starting salary for associates at major law firms can reach an annual figure of 15 million yen while in litigation law firms that figure is about 6 million yen. An additional perk is the practice of large domestic firms sending their associates overseas to study and/or participate in internships (Murakami 2003:78–80; Smith 2003).[26] Global mega-firms also afford their employees the opportunity to

work in their offices in other cities around the world. A career in foreign law firms is also attractive since these firms typically pay higher salaries to attract brilliant candidates (Fackler and Fuyuno 2004: A15).

In the long term, there is a substantial income disparity between lawyers in commercial law practice and those in general litigation practice. A survey conducted in 2000 (JFBA 2002b:199) found that, by areas of specialization, those in international practice had the highest average income (35.43 million yen), followed by company law (30.3 million yen), economic law (29.71 million yen), and intellectual property law (26.08 million yen); meanwhile, those specializing in labor law had an average income of 18.63 million yen, succession law 15.47 million yen, and criminal law 11.4 million yen (JFBA 2002b:199). The *Nikkei Report* (2005) reported that partners in a large firm, who had about 10 years of experience, earned on average over 100 million yen a year. Meanwhile, a survey conducted by the JFBA in 2006 found that the average median income of lawyers was 16.3 million yen (JFBA 2006:130). These figures demonstrate the big income disparity within the profession. In the past, this disparity was probably due to the extremely small number of commercial lawyers. However, the disparity persists notwithstanding the increase in commercial lawyers. This phenomenon will likely continue. First, large-scale transactions such as mergers, acquisitions, and initial public offerings (IPOs) attract high legal fees. Second, as analyzed above, there are substantial commercial legal needs resulting from changes in the business sector.

The capability of commercial law to attract such a high number of qualified lawyers has the potential to impede alleviation of the problem of uneven geographical distribution of lawyers, since commercial law firms are located primarily in the metropolitan areas of Osaka, Nagoya, and particularly Tokyo. As of July 2007, all but one of the nine largest law firms (all of which were in commercial law) were Tokyo law firms. The one exception was the largest Osaka law firm (Oh-Ebashi LPC & Partners), which nonetheless has a branch office in Tokyo. According to a search of the JFBA website on February 11, 2008, the firm's Tokyo office had 22 Japan-qualified lawyers while the Osaka head office had 60. In addition to this firm, over ten Osaka law firms had branch offices in Tokyo as of March 31, 2007 (JFBA 2007b:107). On the other hand, only three Tokyo law firms, none of which ranked among the largest firms, had branch offices in Osaka (JFBA 2007b:107). This phenomenon indicates the attractiveness of the Tokyo commercial legal market, even in comparison to Osaka, Japan's second largest city.

Geographical distribution and its impact on accessibility

As noted above, lawyers are unevenly distributed in Japan. This is attributable to, among other factors, the scarcity of lawyers. In recent years, however, there has been a substantial increase in the number of lawyers. There were 23,119 lawyers in 2007, as compared with 11,441 lawyers in 1980 (JFBA 2007b:72).[27] This increase has primarily facilitated the rapid and substantial growth of

commercial law practice in Japan, and commercial law firms are located primarily in Tokyo and Osaka. The expansion of commercial law firms may jeopardize the intended increase in the supply of lawyers to remote or rural areas meant to alleviate the problem of lawyers' uneven geographic distribution. As shown in Table 9.4, the top six major firms[28] from 2003 to 2006 took on 9.6% to 12.3% of all the newly admitted lawyers coming directly from the LTRI annually. Such a large intake of newly admitted lawyers by the major law firms contributes to Tokyo's ability to absorb a large number of LTRI graduates. In addition to these major firms, there are also other commercial law firms which are also located predominantly in Tokyo. As of July 2007, all of the larger law firms (those with 21 or more Japan-qualified lawyers) are in Tokyo, Osaka, or Nagoya. Of the 50 law firms in this category, 41 are in Tokyo, eight are in Osaka and one is in Nagoya (JFBA 2007b:105).[29] Besides the largest firms, some of these other firms have also taken on newly admitted lawyers. For example, according to the information from the firms' respective websites (accessed February 14, 2008), Atsumi & Partners hired 11 newly admitted lawyers in 2007 (six in September and five in December), City-Yuwa Partners recruited four new LTRI graduates in September 2007 and six in January 2008, Baker & McKenzie GJBJ Tokyo Aoyama Aoki Koma Law Office (Gaikokuho Joint Enterprise) hired 14 newly admitted lawyers in 2007 (nine in September and five in December), and Kitahama Partners recruited three new LTRI graduates in September 2007 and six in January 2008. Statistical figures (see Table 9.5) show a continual increase in the number and proportion of lawyers in these firms, many of which practice commercial law. While the total number of lawyers has increased by 17.8% in the five years between 2003 and 2007, the number of lawyers in law firms with 21 or more lawyers has increased by 86.1%, showing a higher growth rate in larger law firms.

Table 9.5 Number and percentage of lawyers in larger law firms in Japan (2003–2007)

	2003	*2004*	*2005*	*2006*	*2007*
Total number of lawyers	19,621	20,383	21,195	22,021	23,110
Firm size					
101 or more lawyers	670	756	880	1088	1034
	3.41%	3.71%	4.15%	4.94%	4.47%
51–100 lawyers	184	256	211	189	220
	0.94%	1.26%	1.00%	0.86%	0.95%
31–50 lawyers	156	119	226	254	475
	0.80%	0.58%	1.07%	1.15%	2.06%
21–30 lawyers	288	434	557	592	686
	1.47%	2.13%	2.63%	2.69%	2.97%
Total					
21 or more lawyers	*1298*	*1565*	*1874*	*2123*	*2415*
	6.62%	*7.68%*	*8.84%*	*9.64%*	*10.45%*

Source: Data are from the JFBA (2007b: 104) and the percentage figures are obtained through calculations using that data.

Table 9.6 Proportion of new lawyer registration (by prefecture) 1996–2006

	1996	*1997*	*1998*	*1999*	*2000*	*2001*	*2002*	*2003*	*2004*	*2005*	*2006*
Tokyo	50.4%	49.1%	51.9%	53.3%	56.1%	56.3%	55.6%	56.9%	52.1%	55.5%	51.6%
Kanagawa	5.7	4.4	4.0	3.3	3.9	3.6	3.7	2.5	3.3	3.4	4.2
Saitama	3.2	1.7	1.6	2.0	1.4	1.5	1.7	1.5	2.0	2.2	1.6
Chiba	0.8	1.8	1.5	0.8	1.7	1.7	2.5	1.1	1.4	1.7	1.9
Osaka	15.0	16.0	13.2	15.0	13.9	15.1	14.0	12.6	12.1	10.8	11.3
Hyogo (Kobe)	1.5	1.8	1.9	2.3	2.6	1.8	2.0	2.4	1.9	2.1	2.0
Kyoto	0.9	2.3	2.2	1.4	1.8	1.9	2.7	1.2	1.3	1.6	1.2
Aichi (Nagoya)	4.7	3.7	3.9	4.4	3.3	3.9	3.9	5.2	4.3	4.0	4.3
Other prefectures	17.8	19.2	19.6	17.6	15.3	14.2	13.9	16.5	21.6	18.7	22.0

Source: The percentage figures derive from calculations made using statistical figures on registration of newly admitted lawyers obtained from the JFBA (2006:6, 2007b:75).

Statistical data confirm that an overwhelming majority of lawyers still prefer to work in metropolitan areas, particularly Tokyo. This is demonstrated by newly admitted lawyers' preference for starting their practice in urban cities over remote or rural areas. As shown in Table 9.6, every year an extremely high proportion of newly admitted lawyers registered in the three largest cities (Tokyo, Osaka and Nagoya) and adjacent prefectures. In the eleven years from 1996 to 2006, except for 2004 and 2006, over 80% of newly admitted lawyers registered with bar associations in these areas. Tokyo is overwhelmingly the most preferred choice, continuously garnering half of the newly admitted lawyers or more, while in some years it has registered as high as over 56%.

Table 9.6 shows newly admitted lawyers' preference for starting their practice in metropolitan areas, particularly Tokyo. However, it is possible for lawyers to move from metropolitan areas to remote or rural regions, and vice versa. There are such movements. For example, in 2006, 109 lawyers moved from Tokyo or Osaka to other areas, while 23 lawyers moved from other areas to Tokyo or Osaka (JFBA 2007b:81). In other words, such "other areas" gained 86 lawyers in 2006. This is the biggest net gain in recent years. In 2003, 59 lawyers moved from Tokyo or Osaka to other regions while 17 went in the opposite direction (JFBA 2007b:81). In other words, the "other regions" gained 42 lawyers that year. On first glance, these figures might suggest a growing preference for practicing in areas other than Tokyo or Osaka. However, as pointed out in the JFBA report (2007b:81), the large movement away from Tokyo or Osaka is attributable to, among other factors, the increase in the establishment of branch offices by Tokyo or Osaka law firms, and the dispatch of lawyers from Tokyo or Osaka to the *Himawari* law offices[30] or the regional offices of the Japan Legal Support Center.[31] Moreover, those moving out of Tokyo or Osaka may not all be going to remote or rural regions. Some may just be moving to the prefectures adjacent

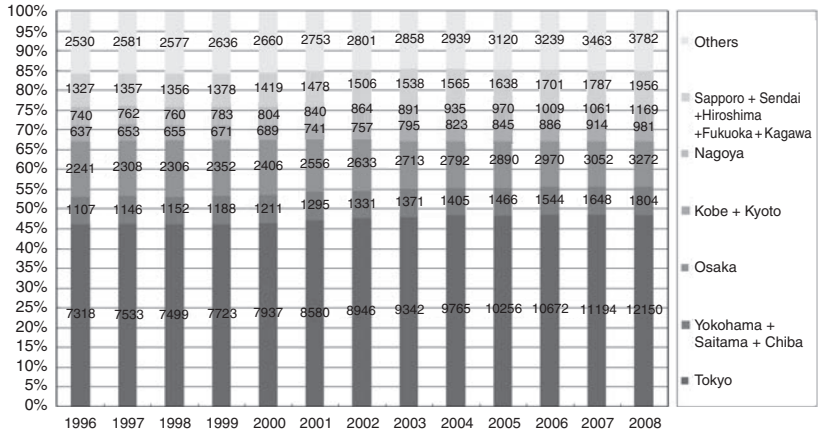

Figure 9.2 Distribution of lawyers (by area) 1996–2008.

Source: This graph was constructed using figures from: JFBA (2006:4) for 1996–97, data as of December 31, of the year; JFBA (2007b:74) for 1998–2007, data as of March 31, of the year; and JFBA (2008) for 2008, data as of February 1, 2008.

to Tokyo or Osaka. Furthermore, given the fact that there are 45 "other" prefectures, their net "gain" is in reality quite small. For example, the "gain" of 86 lawyers in 2006 would mean less than two lawyers per prefecture on average. In addition, the extent of lawyers' movement away from Tokyo and Osaka is minimal when measured against the severity of the unevenness of their distribution (see Figures 9.2 and 9.3) and the total number of lawyers in Tokyo and Osaka. For example, with a total number of 13,642 lawyers in Tokyo and Osaka in 2006 (JFBA 2007b:74), a loss of 86 lawyers (a mere 0.63% of the total number of these areas' lawyers) to other prefectures is insignificant. An overwhelming proportion of lawyers still prefer to work in metropolitan areas, a fact confirmed by statistical data on the current distribution of lawyers in different regions of Japan.

As shown in Figures 9.2 and 9.3, despite the increase in the number of lawyers and the JFBA's attempt to solve the problem of uneven geographic distribution by establishing the *Himawari* law offices, lawyers are still unevenly distributed. Figure 9.2 shows the trend of development in the number of lawyers in different regions of Japan from 1996 to 2008. With the increase in the national number of lawyers, all the regions depicted in Figure 9.2 show an increase in their overall number of lawyers. However, some regions show a higher increase than others. Tokyo ranks the highest (66%), followed by regions neighboring Tokyo (Yokohama/Kanagawa, Saitama and Chiba) (63%) and Nagoya (58%). Only these three categories show a rate of increase higher than the national rate (57.9%). Kobe/Hyogo and Kyoto, regions neighboring Osaka, have increased their population of lawyers by 54%. Besides Tokyo, Osaka, and Nagoya, there are five other District Court jurisdictional regions with a High Court: Sapporo, Sendai,

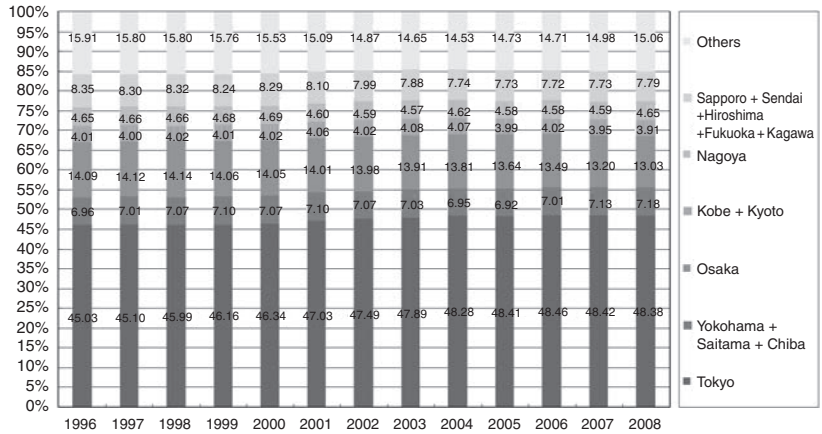

Figure 9.3 Proportions of lawyers (by area) 1996–2008.

Source: This graph was constructed using figures from: JFBA (2006:4) for 1996–97, data as of December 31 of the year; JFBA (2007b:74) for 1998–2007, data as of March 31 of the year; and JFBA (2008) for 2008, data as of February 1, 2008.

Hiroshima, Fukuoka, and Kagawa. They increased their number of lawyers by 47.4%. Osaka ranks the lowest in rate of increase of the number of lawyers (46%). Other regions, most comparatively remote or rural, increased by 49.5%.

Figure 9.3 shows the trend of development in the proportion of lawyers in the same categorized regions in the same period of time as Figure 9.2. As of February 1, 2008, there were 12,150 lawyers in Tokyo, out of the country's 25,114 lawyers (JFBA 2008). This is equivalent to 48.4% of the country's lawyers. It is even higher than the 1996 figure (46.0%). Figure 9.3 shows a drop in the proportional figure for Osaka, while the percentage figure for Nagoya (Aichi prefecture) has remained relatively stable. According to the JFBA (2008), as of February 2, 2008, these two prefectures had 3,272 and 1,169 lawyers, respectively (representing 13.03% and 4.65%, respectively, as compared with the 1996 figures of 14.09% and 4.65%). In any case, the proportion of lawyers in these three largest cities when counted together has increased slightly from 64.8% to 66%. This is principally due to the increase for Tokyo. When the situation in areas neighboring Tokyo (Yokohama, Saitama, and Chiba) and Osaka (Kobe and Kyoto) are also considered and combined with the figures for the three biggest cities, altogether these areas have a very high proportion of the country's lawyers. Furthermore, this proportion has increased slightly since 1999 (see Figures 9.2 and 9.3). The proportion of lawyers in Sapporo, Sendai, Hiroshima, Fukuoka, and Kagawa seems to be in a general decreasing trend from 2000 to 2007, with a slight rise in 2008. Nonetheless, the 2008 figure (7.79%) is lower than the 1996 figure (8.35%). The proportion of lawyers in the remaining areas displays a general decreasing trend from 1996 to 2004, with a slight rise

afterwards, though the 2008 figure (15.06%) is also still lower than the 1996 figure (15.91%). Despite an increase in the total number of lawyers (from 15,900 to 25,114), the current proportion of lawyers practicing in remote or rural areas is still lower than the proportion in 1996. In other words, the increase in the total number of lawyers has not led to significant alleviation of the problem of uneven distribution of the profession.

The uneven distribution cannot be justified by shifts in population, the extent of economic activities, or the volume of litigation. This can be demonstrated by a comparison of lawyer-to-population ratios, gross prefectural domestic products, and the volume of litigation for Tokyo and Osaka in comparison to that of some prefectures which have small numbers of lawyers. As shown in Table 9.7, there is a big difference in such ratios for metropolitan regions and comparatively remote or rural areas. There is clearly still a severe under-supply of lawyers in many remote or rural prefectures. At the same time, there is no sign of a decrease in the legal needs in those prefectures with a low number of lawyers. Figure 9.4 shows the extent of changes in the number of legal consultation cases in the late 1990s (based on the average number of cases for the years of 1998 and 1999) and in recent years (based on the average number of cases for the years of 2004 and 2005), which were handled by the different local bar associations. Many of the remote or rural regions also have an increase in the number of legal consultation cases, and several show a substantial increase. Examples include Fukushima, Shiga, Akita, Iwate, Gifu, and Shimane (with increases of

Table 9.7 Number of lawyers, lawyer-to-population ratios, gross prefectural domestic product, and civil litigation cases (2007)

	No. of lawyers	*Prefectural population per lawyer*	*Gross prefectural domestic product per lawyer (x 1 million Yen)*	*No. of newly received civil cases per lawyer*
Tokyo	11,194	1,131	8,001	13
Osaka	3,052	2,888	12,674	28
Mie	88	21,284	85,605	123
Fukushima	101	20,594	77,774	134
Aomori	51	27,902	84,321	209
Shiga	72	19,292	81,855	106
Iwate	66	20,833	69,704	134
Akita	55	20,618	67,321	151
Shimane	36	20,472	69,347	152
Tottori	37	16,324	55,329	144
Gifu	108	19,491	65,841	103
Yamaguchi	91	16,297	63,140	124
Toyama	61	18,197	76,594	92

Source: JFBA (2007b: 84–6); the number of lawyers as of March 31, 2007; prefectural population as of October 1, 2006; gross prefectural domestic product as of fiscal year 2004; and civil cases as of 2006.

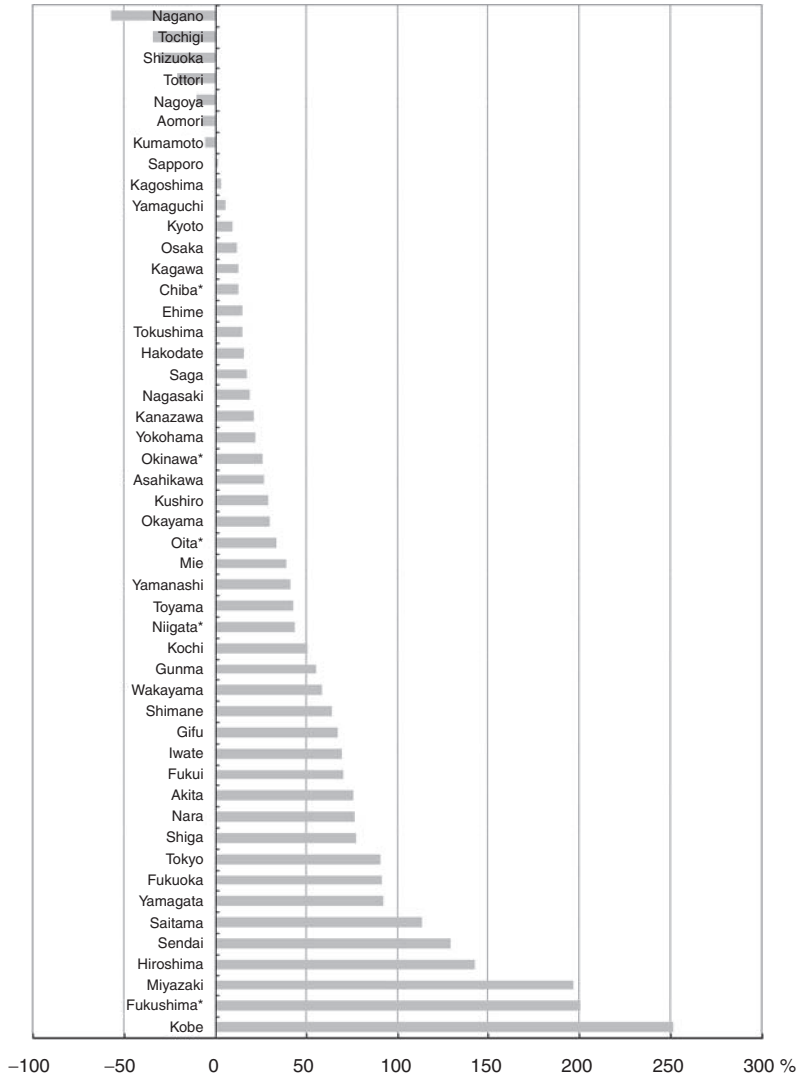

Figure 9.4 Change in number of legal consultations handled by bar associations (comparison of the 1998 and 1999 average with the 2004 and 2005 average).

* For these prefectures, the source does not contain data on the number of consultations in 1999. For these, instead of the average number of consultations in 1998 and 1999, the data of 1998 were used to calculate the percentage of change.

Source: This graph uses calculations based on JFBA data (2002a:108 and 2007b: 201).

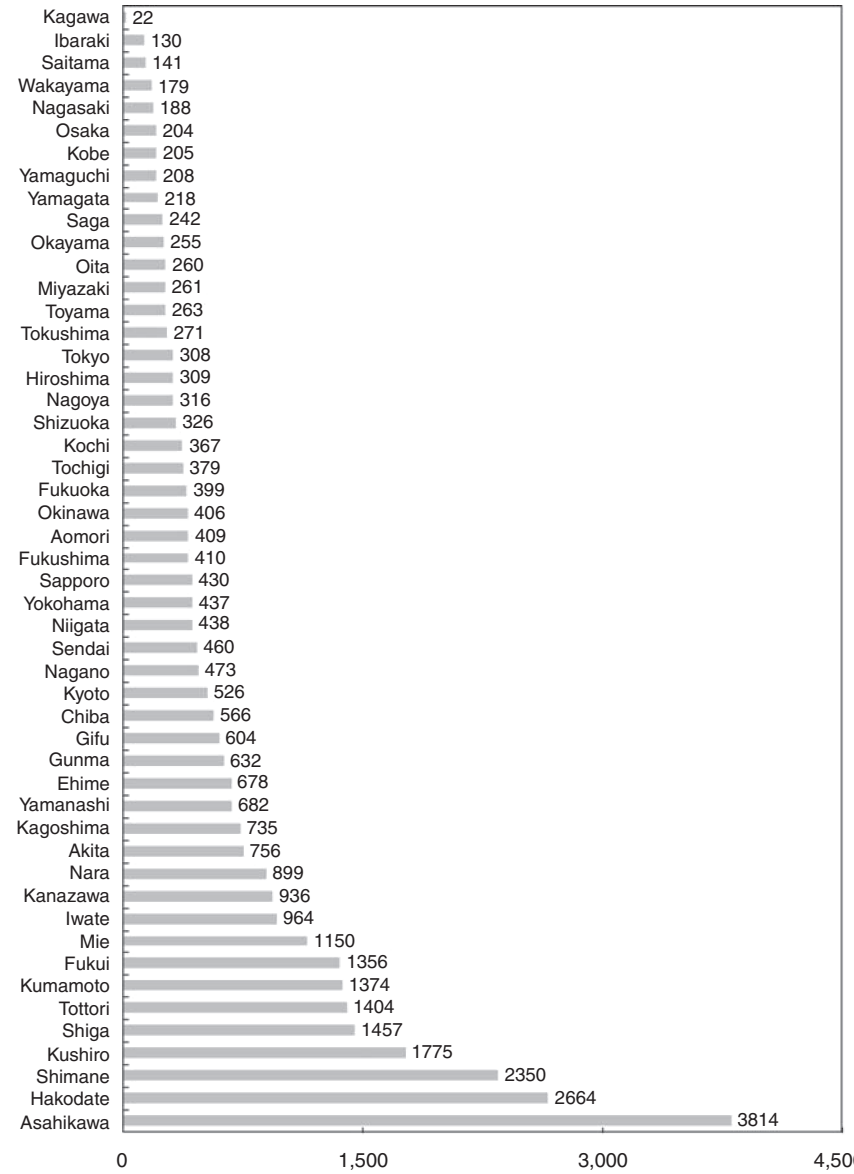

Figure 9.5 Percentage change in requests for *Toban Bengoshi* service between 1994 and 2004 (by local bar associations).

Source: This graph uses calculations based on data from JFBA (2005:18).

200.5%, 78%, 76.2%, 69.6%, 67.6%, and 64.7%, respectively). A rise in legal needs in these regions is also demonstrated by a comparison of the change between 1994 and 2004 in the number of requests made to the respective local bar associations for "duty lawyer" (*toban bengoshi*) service[32] (Figure 9.5). In these 10 years, all District Court regions show an increase in the number of such requests. All prefectures besides Kagawa show an increase of more than 100%. Some regions like Asahikawa, Hakodate, Shimane, and Kushiro increased by over 15 times. In many regions with low numbers of lawyers, there has been an increase in legal needs.

Future prospects

As discussed above, the increase in the number of lawyers in Japan so far has not contributed to a significant alleviation of the problem of uneven distribution of the profession. This is partly attributable to the sudden and substantial growth of commercial legal practice. There was a significant increase in the number of NLE passers, particularly between 2003 and 2004 (as shown in Figure 9.6). This increase has led to an increase in the number of lawyers. However, the commercial law sector of the profession has absorbed a substantial proportion of newly admitted lawyers.

The prospects nevertheless might seem optimistic. First, as shown in Figure 9.6, there was a steep increase in the number of NLE passers in 2007 (2,099) in comparison to the 2006 figure of 1,558. These passers are at the time of this writing still in the LTRI. When this cohort graduates from the LTRI, there should be a sharper increase in the profession's population than before. Second, the number of NLE passers will continue to greatly increase until, as proposed in the Report, it ultimately reaches the figure of 3,000 in 2010. A rough estimate of the approximate number of NLE passers from 2008 to 2010 is represented by the dotted line in Figure 9.6. The figure of 3,000 is in fact close to doubling the 2006 number. Such a steep increase should accelerate the increase in the overall number of lawyers, which in turn may result in a significant increase in lawyers practicing in remote or rural areas. However, on closer analysis, it does not seem as optimistic as it appears.

First, there is no sign of over-supply in the commercial legal market. As discussed above, there is still pressure on the major firms to expand and grow. In fact, this is also the case for medium-sized firms. The analysis above has shown the substantial expansion of some foreign law firms. There are signs of the foreign law firms' interest in further expanding their operation in Japan in the near future. Examples include the above-mentioned establishment of joint enterprises by two domestic firms with Bingham McCutchen LLP in 2007, the recent opening of a Tokyo office by Norton Rose (Asian Legal Business 2007b), the merger of the Japanese firm Kubota Law & Patent Office with Lovells's Tokyo office on January 1, 2008 (The Lawyer 2007; Lovells 2007),[33] and the complaints from the American Chamber of Commerce in Japan about the

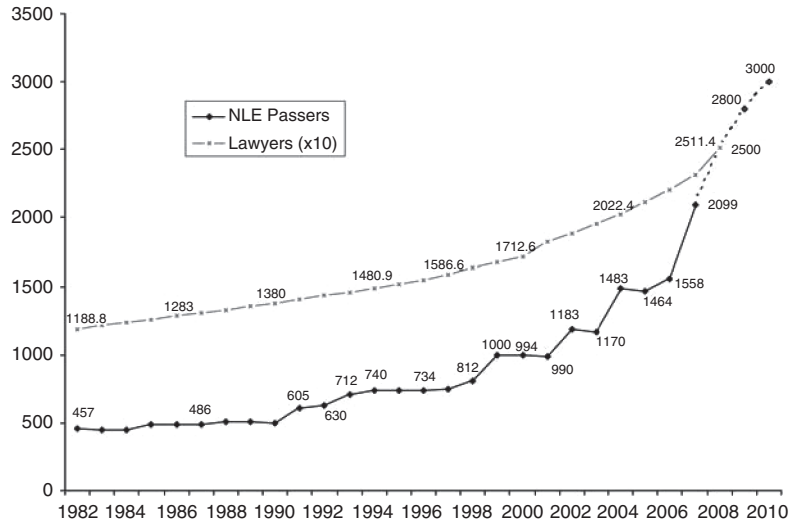

Figure 9.6 Number of lawyers and National Legal Examination passers.

N.B. The figures for NLE passers from 2008 to 2010 are approximate estimates only, based on the expected figures which have been announced: 2,100–2,500, 2,500–2,900 and 2,900–3,000 for new NLE 2008, 2009, and 2010, respectively; and about 200, 100 and less than 100 for old NLE 2008, 2009 and 2010, respectively (Nihon Keizai Shimbun 2007a).

Source: Data on the number of lawyers are from JFBA (2007b:72) (except for 2008: JFBA (2008)). Data on the number of NLE passers are from Rokumoto (2005:12), the Ministry of Justice (2006a; 2006b), and Nihon Keizai Shimbun (2007b).

prohibition curtailing foreign law firms' ability to open a second or further office(s) in Japan (Asian Legal Business 2007c). Foreign law firms are nonetheless actively expanding their Japanese capabilities. Some of them already recruit newly admitted Japan-qualified lawyers. Baker & McKenzie GJBJ Tokyo Aoyama Aoki Koma Law Office (Gaikokuho Joint Enterprise) has, as mentioned above, taken on 14 2007 LTRI graduates. According to the information from the firm's website (2006, 2007, 2008), Paul, Hastings, Janosky & Walker has recruited five, three and two fresh LTRI graduates from the 59th, 60th and new 60th classes of October 2006, September 2007, and January 2008, respectively. Even if foreign firms mainly recruit experienced lawyers from domestic firms, this can also impact the supply of lawyers to remote or rural areas since the domestic firms losing lawyers to foreign firms will need to recruit in order to fill those spaces. In the end, sourcing from the pool of newly admitted lawyers will be needed. Another sign of the absence of over-supply in the commercial legal market is the active recruitment campaigns of many commercial law firms. Visits to the websites of some of these law firms found that explanatory sessions are organized for NLE passers even before they have commenced their training at the LTRI.

Similarly, there were explanatory sessions for the law school graduates who had taken the new NLE even before the examination results were reported.

Second, there are signs of forces hindering the full implementation of the reform. The figure of 3,000 NLE passers per year is in fact a scaling down of the Council's recommendations. While the Council has suggested an increase in the number of NLE passers to 3,000 by 2010, the Report (Chapter III, Part 2.1 and 2) also recommended the introduction of a new postgraduate program (law schools) as part of the justice system reform. The creation of law schools as graduate programs follows the U.S. law school model, though the Japanese system has retained undergraduate law faculties that do not exist in the U.S. system. Under the new Japanese system, law schools were established to provide professional legal education with the aim of fostering future legal professionals. The law schools admit graduates from the undergraduate law faculties as well as those from other disciplines. Graduates from these Japanese law schools take a new NLE, for which the Council recommended a pass rate of 70–80% (see the Report: Chapter III, Part 2.2 (2) (d)). In 2004, 68 law schools opened their doors. Six more law schools have since opened for a current total of 74 law schools. In 2007, the 74 law schools enrolled a total of 5,713 new students (JFBA 2007b:39). If the Report recommendation of a 70–80% NLE pass rate is followed, there should be more than 3,000 NLE passers yearly, given law school enrollments.

A close look at the Report (Chapter III, Part 1.1) reveals that the Council made a point of stating that the figure of 3,000 passers per year should not be considered a maximum. However, in practice, that is precisely how the figure is being used; the number of passers is currently capped at 3,000 per year. This yields a pass rate much lower than 70–80%. When the law schools started their programs, the pass rate had not yet been determined. Newspapers subsequently reported a tentative proposal which would allow only 800 candidates to pass the new NLE. This proposal would have resulted in a pass rate of only about 34% (see Asahi Shimbun 2005b; Tokyo-Bengoshikai Hoyukai 2004:153). This led to strong opposition from law schools and their students. Although the ultimately determined pass rate was higher than the 34% initially reported for the proposal, it was still much lower than 70–80%. The first new NLE, taken by the first cohort of Japanese law school graduates, took place in 2006. Only 1,009 candidates (of the 2,091 test-takers) passed the exam (Ministry of Justice 2006a), representing a pass rate of 48%. The pass rate for the second new NLE, held in 2007, was even lower. Of the 4,607 candidates taking the examination, only 1,851 passed (40%) (Ministry of Justice 2007). In view of the number of new annual law school enrollment (about 5,700), unless around 4,000 candidates are allowed to pass, the pass rate will not reach the 70–80% rate recommended by the Council. The expected number of new NLE passers from 2008 to 2010, however, was projected at 2,100–2,500 for 2008, 2,500–2,900 for 2009, and 2,900–3,000 for 2010 (Nihon Keizai Shimbun 2007a). Although these figures project a gradual increase in the actual number of passers, the pass rate is unlikely to rise.

This is because those who have failed are allowed to take the examination two additional times, subject to the restriction that no one can try the examination more than three times in total in five years. Current law school graduates are therefore competing with candidates who have failed the examination before.

Recently, some have called for a review of the 3,000 passers figure recommended by the Report. The current Justice Minister recently suggested that 3,000 passers is an excessive number (Yomiuri Shimbun 2008a). Voices calling for a reduction in the number also included lawyers, particularly in the form of regional bar associations (Sankei Shimbun 2007a:30). For example, both the Chugoku Federation of Bar Associations[34] and the Chubu Federation of Bar Associations[35] have demanded a reduction or a review of the number (Sankei Shimbun 2007a:30). It is interesting that six of these 11 prefectures are among the 20 prefectures that have the lowest lawyer-to-population ratio in the country (see JFBA 2007b:84). In addition, it has been noted that rural areas with a paucity of lawyers have a substantially higher proportion of senior lawyers than in large cities (Rokumoto 2005:24). A visit to the website of the Tottori Bar Association on February 14, 2008 found a listing of 44 lawyers. Except for two lawyers, all the others have provided information on their respective years of birth, from which Table 9.8 is constructed. Of the 42 lawyers who provided their ages, eight are 70 years of age or older (representing 19% of the Tottori lawyers with disclosed ages). Given their age, they may not be very active in their practice. In fact, one of them is no longer in practice, according to the information on the Tottori Bar Association website. In other words, the number of active practitioners in the prefecture is lower than the number of lawyers registered with the bar association. Taking this into account, the actual extent of accessibility to lawyers is at an even lower level than that indicated by the statistical data on the population of lawyers.

In Japan, out of the 203 areas with a District Court branch, 24 still have one or no lawyer (Yomiuri Shimbun 2008b:3). This illustrates the persistent severity of the shortage of lawyers in remote or rural areas. There would not be such a severe shortage if there was an over-supply of lawyers in Japan or its metropolitan areas. If it existed, an over-supply in metropolitan areas would result in lawyers moving to or starting practice in remote or rural areas. In other words, the shortage of lawyers in remote or rural areas also proves that there is no over-supply in the metropolitan areas. In addition, despite the recently much-publicized

Table 9.8 Lawyers (by age groups) in Tottori (2008)

	Under 30	*30–39*	*40–49*	*50–59*	*60–69*	*70–75*	*76–79*	*80~*	*Total*
Number of lawyers	3	15	3	9	4	5	2	1	42
Percentage	7.1%	35.7%	7.1%	21.4%	9.5%	11.9%	4.8%	2.4%	100%

worry in the profession regarding over-supply, the reality is that, in terms of the competition for jobs, there was not much difference from the past for the cohort of September 2007 LTRI graduates (Sankei Shimbun 2007b:30).

Conclusion

The reforms recommended by the Council, including the proposal of a substantial increase in the number of legal professionals, which would improve accessibility to legal service, have constituted a big step towards strengthening the role of law in Japan. However, as the analysis above finds, the recent increase in the number of lawyers has facilitated the rapid and significant growth of commercial legal practice. The accessibility of legal services to the business sector has increased. As a result, the needs of the main initiator of the reform, the business sector, are being met. The role of law in the commercial sector has also been enhanced. However, it is still difficult for the general public to access lawyers and legal services in many parts of Japan.

Despite the reform agenda of increasing the number of lawyers, there is persistent uneven geographic distribution of the profession. This development may not have been expected by the reformers or the initiators of the reform. It will be difficult to resolve this uneven distribution problem while there are still unmet commercial legal needs. A substantial increase in the number of lawyers is still necessary. The Council's reform recommendations must be fully implemented. However, recent developments in Japan show signs of the emergence of groups that wish to scale down the reform. This will impede the resolution of the problems of uneven distribution and the accessibility of legal services. Lawyers contribute to the establishment, strengthening and maintenance of the role played by the law in society. If problems related to the accessibility of lawyers continue, the reform's goal of strengthening the role of law will be impaired. In view of the commercial legal sector's development in recent years, it is unlikely that this sector will be seriously affected by any scaling-down of the reform; rather, the public's access to legal services will suffer. It will become more difficult to resolve the problem of uneven distribution of lawyers. The role of law is being strengthened in the business sector, but not universally in society. If the justice system reform is scaled down, the development and enhancement of the role of law in Japan will be hampered.

Notes

1 Many literatures have mentioned the small number of lawyers in Japan (see, for example, Dean 2002:267; Rokumoto 2005:20; Miyazawa 2001:90).
2 The uneven distribution of lawyers in Japan has been noted by various scholars. See, for example, Dean 2002:268 and Rokumoto 2005:20.
3 In May 2002, the Japan Federation of Economic Organizations (*Keidanren*) merged with the Japan Federation of Employers' Associations (*Nikkeiren*) to form the Japan Business Federation (*Nippon Keidanren*) (see the Japan Business Federation n.d.).

4 There are numerous newspaper articles referring to *Keidanren* as "the most powerful business lobby" in Japan. Examples include *Nikkei Weekly* (2005); *Kyodo News* (2002); *Asia Pulse* (2001); *The Asian Wall Street Journal* (1996:22).
5 See Argy and Stein (1997:107–8) and Sato (1997:68–71) on the *keiretsu* system. *Keiretsu* refers to the unique horizontal and vertical affiliations among Japanese enterprises. Horizontal *keiretsu* occurs among large corporations in different industries, usually clustered around a leading bank (the main bank), other financial institutions, and "one or more trading companies." In order to avoid competition between members within the same *keiretsu*, each member company usually is highly sector-specific in its own business operation; diversification is uncommon. Whilst horizontal *keiretsu* occurs among big enterprises, vertical *keiretsu* links a big company with a number of small- and medium-sized firms. It invariably involves a big enterprise and a number of input manufacturers and/or distributors. Most of them do not involve shareholding interaction and their association is mainly based on long-term transactional relationship, the majority of which has lasted for decades.
6 See Argy and Stein (1997:113–15) and Milhaupt (1996:22) on the main bank system. The main bank is the largest single lender to the firm and, in the case of horizontal *keiretsu*, it is also one of its principal shareholders. Besides offering routine financial services, the main bank also organizes and manages a loan consortium.
7 See Milhaupt (1996:11, n. 33) on the infrequency of the use of the legal means in situations of long-term relations.
8 Only 25.2% of the stocks were owned by individuals in 1985 (23.1% in 1990 and 23.4% in 2004) (Asahi Shimbun 2005a:146).
9 Kojima (2006:1) has pointed out that the Japanese model could not "cope with the external and internal environments" and was not suited to the "new age." In addition, Sawa (1999:173) commented that "Japanese-style capitalism" was not suitable for a "post-industrial society."
10 For example, Tokai Bank "refused to lead a rescue" despite strong governmental pressure, and this brought about the collapse of Chiyoda Mutual Life Insurance in 2000 (Sprague 2000). This incident not only signaled a decline in the main bank system but also demonstrated the rupture of the close relationship between the bureaucracy and the private sector. The latter became less hesitant to act against the wishes of the bureaucracy.
11 For example, the president of Tokio Marine and Fire Insurance Co. was reported in the *Japan Times* (2000) to have said, "The era when (companies) in the same group bought each other's products is over."
12 A survey conducted in 2000 found that, among legal department personnel responding to the survey, only 26.7% had consistently worked in the legal department while 73.3% had worked in (an)other department(s), while a similar survey conducted five years earlier gave these figures as 33.7% and 66.3%, respectively (see the Association of Japanese Corporate Legal Departments 2001).
13 A 2000 survey found that only 65.9% of legal department personnel responding were law graduates while the ratio found in the 1995 survey was 62.3% (see the Association of Japanese Corporate Legal Departments 2001).
14 One to one and a half years of the four-year program are spent on general liberal arts education (Foote 2006:216).
15 A 2000 survey on the actual situation of corporate legal departments found that they had rates of 88.7% and 77.3%, respectively (multiple answers possible) (The Association of Japanese Corporate Legal Departments 2001).
16 The 2000 survey referred to in the preceding note found these rates to be: 5.4% local higher education institutions; 10.9% overseas higher education institutions; and 4.0% law offices (The Association of Japanese Corporate Legal Departments 2001).

17 It was also translated as the Justice System Reform Council.
18 The figures are all as of April of the year mentioned. The figures for judges do not include Summary Court judges. The figures for prosecutors do not include assistant prosecutors.
19 They are called *bijinesu bengoshi* (business lawyers) in Japan.
20 They include 29 firms from a list of top 30 law firms (all of which are commercial law firms), in terms of number of Japan-qualified and foreign lawyers in Japan as of July 2006, listed in the *Bijinesu Bengoshi Taizen 2007* (*A Total Guide to Business Lawyers 2007*) (Nikkei BP 2006:5). Instead of 30 firms, 29 firms were included in the list for this chapter's investigation due to the merger between Nishimura & Partners with the international division of Asahi Koma Law Offices, both of which were listed in the cited book. Added to the list of 29 law firms are two medium-sized firms formed as a result of recent mergers: Hayabusa Asuka Law Offices (formed from a merger between Hayabusa Kokusai Law Offices and Asuka Kyowa Law Firm in March 2007) and Sakai Mimura Aizawa (which was formed by two Japanese law firms, Sakai & Mimura and New Tokyo International Law Office in February 2007.) These two firms formed a joint enterprise with Bingham McCutchen in February and October 2007).
21 This number is based on the sum of Japan-qualified lawyers in these firms as listed in the JFBA's website (accessed January 22, 2008, or February 11 or 12, 2008).
22 There were reports in the *International Financial Law Review* and the *Nikkei Report* in 2004 estimating the Japanese corporate law market to have doubled to about 100 billion yen over the past five years.
23 Examples include mergers between Tokyo Aoyama Aoki Law Office and Baker & McKenzie; Paul, Hastings, Janofsky & Walker and Taiyo Law Office; and Jones Day and its joint enterprise partner Jones Day Horitsu Jimusho (formerly Showa Law Office).
24 The full name of its Tokyo office is Baker & McKenzie GJBJ Tokyo Aoyama Aoki Koma Law Office (Gaikokuho Joint Enterprise).
25 There has been a general trend of increase in the number of mergers and acquisitions cases since mid-1990s (with a slight drop in 2003), reaching its peak in 2006. There was a slight drop (2.8%) in 2007, but the number is still the third highest figure reported. See Recof Corporation 2007–8 and Mainichi Shimbun 2008.
26 There is, however, doubt about whether this practice can continue. See Chan 2005:75–77.
27 The figures are as of March 31 of the year.
28 Asahi Koma Law Offices changed its name as of April 1, 2007 due to the anticipated merger of part of its team with Nishimura & Partners and the departure of named partner Mr. Koma to Baker & McKenzie. On July 1, 2007, the international section of the firm merged with Nishimura & Partners.
29 The breakdown is as follows: of the five firms with over 100 lawyers, all are in Tokyo; of the three firms with 51 to 100 lawyers, two are in Tokyo and one is in Osaka; of the 13 firms with 31 to 50 lawyers, 10 are in Tokyo and three are in Osaka; and of the 29 firms with 21 to 30 lawyers, 24 are in Tokyo, four are in Osaka and one is in Nagoya.
30 As described by the JFBA (2007a: 9), *Himawari* were established under a JFBA program designed to alleviate regional shortage in lawyers. This program provided financial assistance to lawyers to offset the costs of opening and operating *Himawari* law offices operated by individual lawyers, and the conditions were that those lawyers must take up court-appointed cases and provide legal aid. As of October 1, 2007, there were 68 *Himawari* law offices (JFBA 2007b:81).
31 The Center was established in 2006 for setting up offices across the country to provide legal services to citizens (see JFBA 2007a:7–8).
32 This is a system whereby a suspect arrested or detained by the police can request consultation with a lawyer (the first visit by the lawyer being free).
33 From January 1, 2008, Lovells's Tokyo office is called Lovells Horitsu Jimusho Gaikokuho Kyodo Jigyo.

34 It is made up of the five prefectural bar associations in the Chugoku region: Hiroshima, Yamaguchi, Okayama, Tottori, and Shimane.
35 It is made up of the six prefectural bar associations in the Chubu region: Aichi, Mie, Gifu, Fukui, Kanazawa (Ishikawa) and Toyama.

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Chapter 10

The democratization and internationalization of the Korean legal field

Kim Seong-Hyun

Introduced by Japanese imperialism, Western modernity and the modern legal system in Korea have experienced repeated fluctuations. Although there were several precursors to a modern legal system, Western laws and legal professions were mainly introduced via Japan. Japanese domination distorted the transition toward a modern legal system which had begun before colonization. The colonial lawyers legitimated imperialist domination and repressed the aspiration of Koreans for independence. Koreans gained their independence before they liquidated the colonial legacies. The Korean War, political agitations, and military dictatorship maintained a powerful state and repressed the liberty and rights of social actors. Koreans considered the law an instrument of coercive state power. As a result, judges and prosecutors closely aligned with the state were looked upon with awe and the role of private attorneys was relatively marginal.

These attitudes toward the legal system have undergone rapid transformation since the Grand Democratic Movement in 1987. The most important and remarkable changes in the Korean legal field are its internationalization and democratization. The amendment of the constitution, defense of civil rights, expulsion of military elite from power, and reforms of various institutions weakened state power and influenced the modification of traditional legal positions and professions. Consequently, the new social movement's emphasis on lawyers' social responsibility has developed rapidly while promoting the rule of law, public interest law, and the defense of civil and human rights. On the other hand, the neoliberal economy, which was introduced by a small number of "technopols" in the 1980s,[1] has now become the mainstream, promoting deregulation policies and the internationalization of society in general. It has also promoted rapid internationalization of the legal field. These changes raised questions about the legitimacy of traditional legal professionalism and invited a global transformation of the field, including reform of the educational system and reevaluation of the material and symbolic capital possessed by the members in the field.

The modification of the Korean legal field can be considered not only a result of global and internal political changes, but also a result of the struggles of actors in the field. In particular, the importation of American legal professionalism as a global standard and strategic capital for the struggle gave new actors opportunities

to challenge the qualifications of traditional actors more closely aligned with state power and more embedded in the national space.

The development of the Korean legal field

Korea's modern legal system was imported by Japanese colonization. Western legal institutions and legal education introduced the modern institution of the lawyer in Korea. Although we do not know exactly when Western legal institutions were imported to Korea, traditional institutions had been challenged by debates about the introduction of international law before and after the 1876 Treaty of Ganghwa between Korea and Japan (Lee 1975:205–31; Bae 1980:7–16). Faced with the threat of Western invasion and internal demand for the destruction of the feudal system, the Chosun dynasty declared "fourteen reforms" in 1895 (洪範十四條), which quite possibly represented the first constitution in Korean history. However, this was not the voluntary legislation of the Chosun dynasty, but rather the result of reforms forced by the Japanese (Kim Hyo-Jeon, 2000:103–30). Korean legal institutions were renovated by the 1895 reforms and the Legal Training School (LTS), the first legal education institute in the country, was established in 1895. LTS gave its students the ability to become a judicial officer, such as judge or prosecutor, after six months of education. The school taught constitutional law, administrative law, international law, commercial law, foreign (French) law, mathematics, and literature. LTS professors of this school belonged to three categories. The first group was comprised of Koreans who had studied law in Japan, most of whom had graduated from Keyo University. The second group was recommended by Laurent Crémasy, legal consultant for the Chosun dynasty; professors in this group had studied French law individually. The last group was initially comprised of Japanese professors, but they were gradually replaced by Korean professors. LTS closed in 1909 after having produced 210 graduates. However, these graduates were not able to practice as legal officers within the state because they were of modest class backgrounds and their careers were blocked by the caste system of the Chosun society. The dominant Yangban class did not regard the law as important, and administrative bureaucrats continued to handle legal functions (Park Gil-Jun 1997:20).

In the meantime, a private educational body, Bosung College, was established in 1905. This college was composed of departments (law, economy, agriculture, commerce, industry). Autonomous private legal education in Korea is considered to have begun with the legal education of Bosung College. The college offered a two-year course of study. The first year focused on general studies and the second on specialized studies. Its professors were mainly people who had studied in Japan and those who had been recruited from LTS. Bosung College published legal manuals for the first time in Korean history and, unlike LTS, it was interested not only in legal practices but also in the development of jurisprudence (Park Gil-Jun 1997:21). With the effectuation of the "lawyer law" and enforcement regulation for the bar examinations, Koreans at last possessed modern legal

institutions. The bar examinations were modeled on those of Japan legislated in 1883,[2] and the first examinations were held on June 24, 1907. Twenty people applied and six candidates successfully graduated from Bosung College.

With the 1910 annexation treaty, Koreans were under Japanese rule for 36 years. The educational policies of imperialist Japan gave priority to the assimilation of Koreans to the Japanese nation, and they imposed technical courses for Koreans in order to cultivate lower-level officers and unskilled workers. The Japanese policies put pressure on the Korean educational bodies established before Japanese occupation. But even under colonial domination, legal educational institutions continued to develop. What had been the LTS became the KyongSeong Vocational School in 1911 and then KyongSeong Law College (KLC) following the educational reform in April 1916. KLC accepted Korean students but it placed its focus on inculcating obedience to national law and respect for the national constitution. Meanwhile, with its relative status diminished, Bosung College became Bosung Private Law and Commerce School (BPLCS). However, professional legal education was maintained and the commerce department of Yonhi College provided several legal courses.

A popular demonstration for national independence in 1919 induced the Japanese government to carry out more appeasing colonial policies. The Japanese elevated the Korean educational system to the same level as its own. The Korean aspiration for independence led to the movement to establish Chosun Private School with fund-raising campaigns starting in 1923. Yet, hindering this movement, the Japanese established a high-level university (Son 1987:657–63), KyongSeong Imperial University (KIU), the predecessor of present-day Seoul National University (SNU). Education at KIU was divided into two categories. There were preparatory courses for two years and then courses specific to the faculties of law and of medicine. Japanese professors staffed KIU. The graduates of this university became academicians as well as bureaucratic and legal elites following national independence. At the top of the first graduating class was Yoo Jin-Ho, who played a central role in drafting the constitution of the first republic. Bosung School recovered its status as a college in 1921. However, when Japan invaded China and Hawaii in the 1930s and 1940s, educational policies favored technically skilled human resources for the war. Many students were forced to enlist in the Japanese army, devastating Korean higher education.

The Japanese vice-regal enacted the "regulation for lawyers" on December 15, 1910, which established the recruitment of and conditions for being a lawyer. Among those qualified as lawyers were persons who: (1) had been qualified by Japanese law; (2) passed the Korean bar examinations; or (3) had been judges, prosecutors or lawyers in earlier courts (Chosun dynasty, the Residence-General) (Office of Court Administration 1995:103). Also, the list of lawyers had to be kept at regional courts, and individuals who wanted to register for the list were obliged to submit an application form along with the approval of the governor-general. The first bar examination was held in 1922, and until 1942, 181 of the 5267 examinees had passed it. Meanwhile, the lawyers' organizations were

divided into two associations: the first one was the Japanese Lawyers' Association (KyongSeong no.1) and the second was the Korean Lawyers' Association (KyongSeong no.2). There were several attempts to integrate them but they couldn't be realized due to conflicts. The Chino-Japanese war broke in 1938, and it had become difficult for Koreans to maintain their autonomous association. Eventually, both sides were integrated into the KyongSeong Bar Association, which had 230 lawyers as members. On February 15, 1944, as the Second World War was about to end, the Japanese declared a "wartime special ordinance for civil and criminal litigation in Chosun," applying their wartime special law to Korea. Because the Japanese governor-general controlled administrative, judicial, and legislative powers, the courts were virtually subordinated to the vice-regal. Judicial power lacked any independence.

From the time Koreans gained their sovereignty, the construction of a modern Korean state was led by an excessive bureaucratic system, distorted judicial institutions, and colonial elites who had collaborated with the Japanese. Moreover, the Cold War deprived Koreans of opportunities to liquidate their unfortunate past. Although Seoul National University was established from KIU, Korea University from Bosung College, and Yonsei University from Yonhi College, and almost all the other universities possessed faculties of law, they ran short of professors because the Japanese law professors returned to their country. The shortage of professionals was common in Korean society, which offered an opportunity for Japanese collaborators to restore their domination as new elites. The judiciary shortage was so grave that the American Military Government Office even qualified Americans and Koreans who had no experience in the legal profession (Korean Bar Association 2002:83–88). Permanent and exceptional bar exams were also held to compensate for the shortage. The Korean War broke out in 1950 and delayed further the birth of a modern nation state.

Until the 1950s, Korean jurisprudence imitated the Japanese. Almost all of the law professors had graduated from KIU or prestigious Japanese universities, and most of the legal manuals were translations of Japanese teaching materials. Some law professors were recruited as high-ranking bureaucrats, which greatly reduced the number of professors. Professors had to give lectures while traveling from university to university. Nonetheless, all over the country, new national and private universities were established and certain professors such as Yoo Gi-Cheon, Kim Zeung-Han, Lee Han-Ki, Kim Gi-Doo and Seo Jeong-Gak went to the United States at the State Department's invitation (Park Gil-Jun 1997:36–37). Starting in the 1960s, Korean law professors began to translate books on Western laws and comparative jurisprudence, providing momentum for the importation of American and German laws.

The Park Chung-Hee administration, which came to power by a military coup d'état, systematized the recruitment of bureaucrats and the legal profession. On March 1, 1962, the military regime amended the court organization law, the public prosecutor's office law, the Attorneys-at-law Act, and the national university establishment law. The latter established a graduate school of law at the

Seoul National University, set apart from the Faculty of Law. To qualify to become a lawyer, the person had to pass the bar exams and then complete two years of coursework at this school. State lawyers, such as judges and prosecutors, were selected from among the brightest students of this school. The government promulgated the ordinance for the bar examination on May 9, 1963. The purpose of the graduate law program, modeled on the German system, was to cultivate lawyers with both academic knowledge and practical ability. However, the school was closed in December 1970 because of the shortage of full-time professors qualified as lawyers, resistance from lawyers, and a lack of funds. The school was replaced by The Judicial Research and Training Institute, which was established to provide a unified practical legal education under the direction of the Supreme Court, a system which is still in place today (Song Sang-Hyun 2007:33). The rate of successful applicants on the bar examination has been about two percent. The fact that so few can become lawyers has been a serious problem that continues to await a solution.

In the 1980s, the new military regime modified the educational system, which standardized university education and reinforced its dependency on the state. In particular, the reform increased the number of students and faculty on a large scale. With this reform, the number of professors increased and the new professors made an effort to import American or German legal education (Park Gil-Jun 1997:38). In particular, American legal theories and professional models were enthusiastically introduced. In the recruitment of lawyers, the reforms increased the number of successful candidates from 141 in 1980 to 316 in 1981, but it was not yet enough to meet social demands.

Since the Democratic Movement in 1987, Koreans have experienced rapid social democratization. The civil government of Kim Young-Sam, established in 1994, insisted on eradicating the legacy of military rules, internationalizing the economy, and democratizing society. The "Globalization Committee,"[3] created in January 1995, promoted the reforms of legal institutions according to its "Plan for the Globalization of Legal Services and Education." The Committee initiated the global legal reforms, which affected everything from the education and recruitment of lawyers to the operation of institutions. The establishment of American-style law schools and increasing the number of lawyers were believed to be the most important educational reforms. Most legal professionals recognized the importance of the reform, but the introduction of the law school system was delayed until recently. The core of legal reforms in Korea has been the establishment of a legal system with international competitiveness in the era of globalization, the reinforcement of legal professionalization through law school, and the improvement of legal service by increasing the number of lawyers and enhancing their quality. The driving force for these transformations is the democratization and internationalization of Korean society. I will further explain the development of business lawyers and human rights lawyers as well as the reconstruction process of the Korean legal field that produced the diversification and specification of the legal profession.

Internationalization of the Korean legal field by law firms

The rapid promotion of business lawyers offers a salient example of the internationalization of the Korean legal field. The origin of Korean law firms can be traced to the 1958 establishment of the Lee Tae-Hyong and Kim Heung-Han Law Firm, which provided services to foreigners (Kim Jin-Won 1999:64–68). Kim Heung-Han established the first firm with an international legal practice modeled on American law firms. As a judge of the Seoul district court, he went to the United States in 1953 with the patronage of Cheong Il-Young, the chairman of the diplomatic commission of the Korean National Assembly. There he obtained MCL and LL.M. degrees at George Washington University. He hoped to be an American lawyer, but that was impossible for Koreans at the time. Returning to Korea in 1958, he along with Lee Tae-Hyong opened an American-style law firm, Lee & Kim. Lee was the first female lawyer in Korean history and Kim's mother-in-law. She was also Cheong Il-Young's wife. Thus the first law firm in Korea started its history as a family business.[4]

Kim Heung-Han, who was also introduced to the political world by Cheong Il-Young, worried that his business might suffer after the military coup d'état in 1961. However, the developmental state created after the coup did more good than harm to his law firm. The military regime invited some foreign investment in Korean markets. Lee & Kim became a unique law firm capable of dealing with foreign clients. Coca-Cola, Kraft Food, Ford, Lockheed Martin and others became Lee & Kim's clients. The firm changed its name to Kim, Chang & Lee (KCL) when Chang Dae-Young joined.

Since the 1960s, a number of law firms have been created as the Korean economy developed rapidly. Central International Law Firm (CILF), Kim & Chang, Hanmi, Sejong (Shin & Kim), TaePyongYang (Bae, Kim & Lee), GwangJang (Lee & Ko), ChungJeong (HwangMokPark), YulChon, Barun and others are some of the prominent firms.

Almost all the founders of the law firms were graduates of American universities and had careers as judges or prosecutors. But the lawyers obtained their juridical credentials in Korea. The first firms, such as KCL, JungAng, and Kim, Shin & Yu, were more a shared office of lawyers specializing in international affairs than a large commercial firm. The law firms recruited their members through family networks and school ties. Kim & Chang established an American-style law firm with respect to business methods and recruitment (Kim Jin-Won 1999:72–73). In 1972, Kim Young-Mu, a Harvard J.D., and Chang Soo-Gil, his friend from Seoul National University's Faculty of Law, developed legal services in the form of a commercial enterprise. They recruited young lawyers who had just completed their courses at the Judicial Research and Training Institute, and then taught them international practice. Kim & Chang also offered the new recruits overseas training in the United States. These methods were rapidly diffused to other firms, and recently more and more young lawyers without experience as judges and prosecutors have started their juridical careers in law firms. They are

Table 10.1 Korean law firms by number of lawyers

Rank	*Firm*	*Total number of lawyers*[1]	*Number of members*[2]	*Number of lawyers affiliated*
1	Kim & Chang	272	–	–
2	Whaw (YunYangKimShin &Yu)	140	51	89
3	GwangJang (Lee & Ko)	139	16	123
4	TaePyongYang (Bae, Kim & Lee)	139	52	87
5	Sejong (Shin & Kim)	125	43	82
6	YulChon	86	25	61
7	Barun	80	30	50
8	Kim, Chang & Lee (KCL)	57	20	37
9	ChungJeong (HwangMokPark)	55	24	31
10	Logos	52	25	27

Notes
1 The number of members signifies the number of lawyers who invest to the firm.
2 The number of American lawyers is excluded.
Source: JungAngIlBo, March 10, 2007.

sent to American law schools to obtain LL.M. degrees and learn American legal techniques.

With Korea's rapid economic development, the value of law firms has increased steadily. The number of law firms treating international business has always been insufficient, but now it constitutes one of the factors driving legal education reform. Fluctuations in law firm business reflect the fluctuations in the Korean economy. When President Park's developmental state pushed economic growth in the 1960s and constructed an oil refinery in Ulsan, Gulf Oil became a client of KCL, the first law firm in Korea. KCL's major clients were Westinghouse, Coca-Cola, IBM and others when the Korean government developed industrial infrastructure, vital consumer goods, and electronic products. With the penetration of foreign industries, foreign banks also invested in Korea. Chase Manhattan, Bank of America, FNBC, and BTC all became KCL's clients. The financial affairs of law firms flourished particularly when the Korean government spurred chemical and heavy industries to actively attract foreign loans. Law firms' principal business in this period concentrated more on finance rather than on foreign direct investment. The relationship between Kim & Chang and Citibank dates back to this period.

When the Korean economy had achieved a high degree of development, the fields of technological importation and intellectual property were added to the law firms' business areas. From the mid-1980s, law firm business took off (Kim Jin-Won 1999:87). Even when the economic situation was unfavorable, they enjoyed a favorable business climate thanks to new tasks such as legal management, restructuring, and business mergers and acquisitions. For example, the financial crisis of December 1997 drove many Korean enterprises into bankruptcy, and

foreigners vigorously took over Korean firms. Moreover, the structural adjustment imposed by the IMF gave Korean law firms new opportunities. The neoliberal deregulation policies allowed private enterprises to enter into government-monopolized affairs. On the one hand, by provoking vivid competition among firms, these policies made profits for law firms. On the other hand, the economic democratization and the relative separation from state power forced *chaebols* to depend on lawyers rather than to try to directly influence public authorities.

In this way, the internationalization of the Korean economy has offered favorable opportunities for Korean law firms. However, the continuing stimulus of the Korean legal market is sustained by the fact that the Free Trade Agreement between Korea and the United States (Korea-US Free Trade Agreement or KORUS FTA) predicts mergers and acquisitions among Korean law firms. The law firms will have to enlarge their size and specify their business areas in order to survive the competition with American firms. ChungJeong took over Seoul Law Group on February 2007, HanGyol merged with RaeIl, and BalGunMiRae with Evergreen. Recently, Kim & Chang seems to be concentrating more on criminal and administrative cases rather than on commercial ones. An affiliated lawyer explained the reason: "we have to reinforce civil, criminal, and administrative lawsuits to prepare for the lifting of the legal market" (*JungAngIlBo*, March 10, 2007). Because it is expected that American firms will advance in commercial affairs, Kim & Chang has tried to recover its expected losses with administrative and criminal cases.

The members of law firms

The members of Korean law firms are divided into groups of lawyers and "others." The latter category is divided again into a consultant group connecting political, administrative, and social groups to the law firms and a professional group including accountants, patent attorneys, etc. The educational background of law firms' lawyers shows us that most of them graduated from faculties of law at the most prestigious Korean universities and went to prestigious American universities, with the exception of "junior lawyers," whose careers are less than 5 years old.[5] They passed the bar examinations at relatively young ages and ranked highly in exam scores. Until the 1980s, when state power was enormously strong, the high-ranking successful candidates preferred to pursue public careers as judges and prosecutors. But since democratization, more and more brilliant lawyers start their careers in law firms. In 1999, there were seven top bar exam scorers and those of the Judicial Research and Training Institute in Kim & Chang, two in TaePyongYang, and one each in Sejong and KCL (Kim Jin-Won 1999:42).

Most lawyers recruited by law firms have no experience working as a judge or as a prosecutor whereas their founders often had these experiences. In Korea, former judges or prosecutors are favored for attracting clients when they opened a lawyer's bureau. "It has long been customary for former colleagues and clerks in the court or the prosecutor's office to refer cases to retired judges or prosecutors when they open their law offices, as a matter of professional courtesy".[6]

Therefore, former state lawyers typically prefer to open their own law office than to be recruited by law firms. But a more recent trend is for many state jurists to become law firm-affiliated lawyers after their retirement. For example, law firms directly recruited 19 of 47 judges who resigned their positions in March 1999. March and September are the personnel management seasons of the courts and prosecutor's office, and the end of the year is the Judicial Research and Training Institute's terminal season. During these seasons, there is often competition between law firms for recruitment. School ties and old provincial connections are important resources in this game (Kim Jin Won 1999:42).

Another category of law firm lawyers is the "foreign legal consultant." According to the Korean Ministry of Justice, the number of foreign lawyers was 55 between 1992 and 1993 but increased suddenly to 119 in 1999, two years after the Korean financial crisis. There were 101 Americans, six Canadians, and one of each of the following nationalities: British, Australian, French, and Israeli. The American lawyers were absolutely dominant. Moreover, the number of foreign legal consultants would increase considerably if we were to add Korean overseas lawyers who maintain Korean nationality. However, this number is not reported. Foreign lawyers also have organized bar associations such as the Legal Affairs Committee, the Korean American Bar Association, the Women's Foreign Consultants in Korea, etc. They are often affiliated with large law firms. In 1999, the number of foreign lawyers working in law firms was 96 and in commercial enterprises was 23. Kim & Chang had 27 foreign lawyers, Sejong 18, HanMi 16, and TaePyongYang 12 (Kim Jin-Won 1999:46–48).

A special case within the category of foreign legal consultants is that of Korean American lawyers. These are individuals who obtained their lawyer's qualification in the United States or graduated from American law schools without passing the Korean bar examinations, and then returned to Korea. Eighty percent of foreign lawyers in Korea are estimated to be Korean American lawyers. Though they are prohibited from litigating in Korea because the Korean legal market is not yet open, their numbers are rapidly increasing. In the 1960s and 1970s, the number of Korean students studying abroad was only 400–500 per year, but with liberalization of study abroad for adults in 1981 and for middle and high school students in 2000, the number has increased rapidly. In the 1980s and 1990s, when the Korean economy began to internationalize, American MBA degrees were very popular, but at present, the American LL.M. seems to be the replacement for the MBA. The American LL.M. will continue to be more popular because the FTA between Korea and the United States included an agreement on the opening of the legal market. Some return to Korea with an LL.M., but most Korean American lawyers described above completed J.D. degrees. Law firms prefer a J.D. degree.

Another category of Korean American lawyers is that of the children of diplomats. They have lived for a long time in foreign countries, learned foreign languages, obtained a J.D. or LL.M., and then returned to Korea. Some of them possess the experience necessary to work at international organizations, which

can be converted into precious capital for entering into the state. For example, Kim Hyun-Jong, the son of a former ambassador to Norway, obtained a J.D. degree from Columbia University Law School and became a professor at HongIk University in Korea. He was also a lawyer at Kim Shin & Yu, the legal consultant for the Ministry of Foreign Affairs and Trade (MOFAT), and then was appointed the WTO's legal consultant in 1999. He became the chief of the Economy and Trade Bureau of MOFAT in 2003 and initiated the FTA with the United States in 2007. Gong Seong-Do, son of a former Minister of MOFAT, obtained a J.D. from Boston University and joined Kim & Chang via the IMF. Kang Seong-Yong, son of a former ambassador to Great Britain and former Prime Minister, was a California state lawyer. He worked for six years in the World Bank and became a lawyer for Sejong law firm (Kim Jin-Won 1999:56–58).

Sometimes, Korean American lawyers are criticized for having avoided very difficult Korean bar examinations and returning to Korea as American lawyers. And some critical matters in which they were implicated make them appear as "compradors" promoting the opening of the Korean market.[7] The opening of the legal market will make them equivalent to Korean lawyers. Yet, international professionalism and careers give them certain legitimacy. The Korean American lawyers emphasize their very important role in reinforcing international competitiveness in their profession with knowledge about the American legal system.

The law firms and the state: the case of Kim & Chang

Five or ten law firms dominate the Korean legal market. The large firms say that they provide services based on their experiences and knowledge accumulated either by participating in the legislation and amendment of laws or by consulting for the public policies. That is to say, the legitimacy of their participation in the legislation and management of the state is based on their legal professionalism. But we can find big lobbying networks by observing the recruitment process of high bureaucrats and state lawyers in law firms. For example, the consultants of Kim & Chang occupying 40% of the Korean legal market are often former high-ranking officials of administration or financial sectors. The number of Kim & Chang's consultants was 44 on May 2006 (*Hangyore Shinmun*, August 15, 2006). The most remarkable figure is Lee Hyon-Jae who twice occupied the post of Minister of Economy and Finance. Additionally, 23 former bureaucrats of the National Tax Service found new jobs at Kim & Chang. Moreover, four officials of the Fair Trade Commission, six of the Ministry of Commerce, Industry and Energy, three of the Ministry of Labor, and three of the Blue House (Presidential Residence and Office) were recruited by Kim & Chang (Chang Hwa-Sik 2007:82–85). Though law firms argue that their consultant system is necessary for raising professionalism and offering "total services" to clients, there is some possibility of informal lobbying in a Korean society that is dominated by clientelism. There are top officials such as the former Minister of Economy and Finance, the Director of National Tax Service, the Ambassador to the United

Table 10.2 Number of former judges and prosecutors in law firms

Rank	*Law firm*	*Former judges and prosecutors (A)*	*Total number of lawyers (B)*	*Ratio (A/B)*
1	Kim & Chang	79	254	31.1%
2	Whaw	45	127	35.4%
3	TaePyongYang	34	141	24.1%
4	Barun	34	73	46.6%
5	GwangJang	30	178	16.9%
6	Logos	24	43	55.8%
7	Sejong	23	119	19.3%
8	YulChon	20	84	23.8%
9	KCL	17	50	34.0%
10	ChungJeong	13	51	25.5%
11	SeoJeong	11	48	22.9%
12	DaeRyuk	9	31	29.0%
13	JiPyong	3	41	7.3%
14	JiSeong	3	28	10.7%
15	HanGyol	2	29	6.9%
16	JeongPyong	–	20	–
Total		*347*	*1317*	*26.3%*

Source: People's Solidarity for Participatory Democracy.

States or to the OECD and the Minister of Justice at Kim & Chang. Some also become high-ranking officials after working for the firm.

Meanwhile, a recent study revealed that 347 former state lawyers—239 judges and 108 prosecutors—are affiliated with 16 law firms (People's Solidarity for Participatory Democracy 2006).

Additionally, law firms influence public policy decisions through diverse consulting. Specifically, many public authorities request law firm consulting services. From 2004 to 2006, 42 public organizations called on law firms for legal consulting ranging from accounting and auditing to personnel management. TaePyongYang was in charge of ten public consulting organizations, Whaw ten, Kim & Chang and DaeRyuk four each, and YulChon, Sechang, Sejong, Logos, Barun, KCL, and GwangJang three each (Goo Mi-Hwa 2006:338–41). The law firms assert that the services are not very profitable and are instead concerned with the public interest or honor, but there has been much criticism suggesting there may be other ways to represent a firm's interest in public policy or legislation. This criticism argues that law firms are involved in public affairs without a mandate from the Korean people and there is no institution that regulates them.

The influence of law firms is not simply restricted to the state's or public enterprises' affairs. Some leaders of the human rights movement were found among the lists of law firms' members. For example, Cho Young-Rae who initiated the public interest law movement worked at Kim & Chang for a short period. Having graduated from KyongGi high school, then the faculty of law of Seoul National University (SNU), and passed the bar examination, for eight years he lived

a life of social exile because of his involvement in the "SNU student rebellion," an affair falsified by the military dictatorship. With his rights restored after the assassination of the president Park, he worked for 18 months as a lawyer at Kim & Chang starting in 1982, but he left the firm in 1984 to devote himself to the human rights movement. Chon Jong-Bae, former Minister of Justice in the present government, was also a lawyer at Kim & Chang from 1981 to 1985. In 1985, he participated in Cho's Public Interest Law Consultation Bureau (Kim Jin-Won 1999:179–81).

As I observed above, Korean law firms developed rapidly as a result of the retreat of the State, democratization, neo-liberal reforms of Korean economy, and the internationalization of society. They redefined the rules of the legal field with the justification of American legal professionalism, reinforcing the private sector with regards to the public one, and promoting social mobility of legal elites. I will explain below the transformation of the Korean legal field promoted by the human rights movement.

The human rights movement and the reconstruction of the legal field

The human rights movement in Korea has changed over time due to the social structure and particular events. Social structural factors include labor specialization, the development of social class, dictatorial repression and its end, the activation of social sectors and the diffusion of international human rights norms. Events such as torture, assassinations, kidnappings and corruption charges were also important in provoking the mobilization and democratization of Korean society.

The Korean human rights movement began as an anti-governmental movement involved in the struggle against state repression. In the late 1970s and 1980s, when capitalist exploitation was excessive, social class conflicts became part of the movement, and material equality was considered essential for liberal democracy. Since the 1990s, the movement has been specialized and diversified into the social sector.

The formation of the human rights movement and its specialization

The history of the human rights movement in Korea can be divided into the following periods: the genesis of the movement in the 1970s, its specialization in 1990, and its maturation in 2000. The first human rights organization was the Korean League for Human Rights Advocates International (KLHRAI) established in 1953 by Kim Yon-Jun, chief director of Hanyang University, for the purpose of defending people's fundamental rights guaranteed by the Constitution, raising the ideas of human rights, and reforming human rights institutions. Starting off as the Korean Human Rights Advocates League, the group joined an international organization in April 1955, and changed its name while creating regional branches. Park Han-Sang, a lawyer and deputy, established the

Korean Association for the Defense of Human Rights, an organization similar to KLHRAI in 1961. In the 1960s, there were various organizations registered with the Ministry of Justice, including the Human Rights Consultation Office of Prosecution, the human rights branches of each Bar Association, the Women's Legal Information Bureau, the Federation of Korean Trade Unions, and the Human Rights Defense Office of the Ministry of Justice. Thus, the early stage of the human rights movement was initiated by legal organizations close to the state which placed the focus on legal consultation and aid regarding the violation of rights. After the Korean War and military dictatorship, political and economic turbulence made these organizations passive, as they remained in the shadow of state power.

In the 1970s, the US government began to express concerns about the Korean government's human rights violations and put pressure on the government. The most active organizations were the Korean office of Amnesty International (KAI) founded in 1972 and churches. KAI played an important role for the release of political prisoners but it was closed twice by governmental oppression. The human rights committee of the National Council of Churches in Korea (NCCK) was also an important organization for the democratization and defense of human rights in this period. Some people who contributed to the labor movement in the 1960s organized this committee in 1974. Its "Thursday Prayer Meeting" provided an assembly place for families of political prisoners and this event developed into the Prisoner's Family Council which was renamed the Family Council for the Democracy in the 1980s.

The human rights movement that established its constituency in the 1970s became more diversified and specialized in the 1980s. In this period, social organizations focused on the human rights movement were created with democratization. This was especially true for the legal movement Lawyers for Democratic Society (LDS), which was organized in 1988. LDS was composed of 51 lawyers who had defended human rights under the dictatorship. More young and vigorous members followed. Beyond the defense of human rights in the court, LDS diversified its activities, encompassing research, publication, movements for legal reforms, and international solidarity (*ShinDongA*, May 2003:424–34).

The founding of the Citizen's Coalition for Economic Justice (CCEJ) in 1989 and the People's Solidarity for Participatory Democracy (PSPD) in 1994 was very important in the history of social movements. While the Korean social movements were led in the 1970s by diverse groups gathered under the banner of anti-dictatorship, the movements in the 1980s were led by groups who combined Marxism with dependency theories. In 1980, General Chun's army massacred the citizens of KwangJu while US forces stationed in Korea remained indifferent. Moreover, the US government, which had put pressure on Park's dictatorship in the name of democracy and human rights, officially recognized Chun's new dictatorship. This provoked anti-Americanism and anti-imperialism in Korea. Anti-imperialism was theorized by Marxist Leninism and was considered by certain scholars and students as a tool for understanding "scientifically" the social conflicts in Korea. Beginning in the 1980s, the discourse about democracy

and human rights began to move toward liberalism and socialism (or social democracy). While the liberal democrats attached importance to the institutional defense of rights, the radicals attached importance to material equity. Opposition leaders were banned from political activities in the 1980s. Upon recovering their rights after the grand social movement in 1987, however, they organized their political parties to represent each region. The presidential election on December 1987 and the Assembly election in 1989 divided the Korean political map into regions, and these political parties absorbed many leaders of the social movement. Sometimes, democratization provoked debates about political participation within social groups. Moreover, the collapse of the socialist world obscured the prospect for social transition through revolution. While the radical groups considered the proletariat and farmers to be major actors in the process of social transformation, the liberals tried to include the middle class and, more ambiguously, "all the conscientious forces of society (citizens)" in their movement. The Grand Democracy Movement in 1987 was illuminated in the press as a victory for the middle class and its citizens.

Within this context, the CCEJ, modeled on the American civil rights movement, was founded by individuals who had been involved in the social movements of the 1970s and thus attracted media attention. The CCEJ was a group of professionals consisting of professors, lawyers, religious men, journalists, and managers of firms, and it suggested a more modest and professional "civil movement" rather than a radical one. The radical groups were weakened from the 1990s on, while Marxist movements were replaced one by one by newly imported "new social movements" that attracted many professionals who had hesitated to participate in the social movements of the past. However, the professional groups that continued to emphasize the legitimacy of radical movements organized the PSPD in 1994[8] to distinguish themselves from the relatively conservative CCEJ. The PSPD was created to combine radical social democratic values with a modest civil movement form. Yet, its ideological fervor began to fade as it pursued more and more the pragmatism of civil movement. In particular, many figures of the PSPD were recruited by Roh Moo-Hyun's administration, established in 2002, and its ideals for the movement ("watch on the social powers") became ambiguous. Thus, the fluctuation of political situations and the importation of new social movement models diversified the human rights movement and most of the civil movement organizations have been founded since the 1990s.

Democratization and lawyers

Since the establishment of the military government in 1961, some lawyers began to take charge of the defense of political prisoners.[9] They did not organize a movement but rather operated individually. In the 1980s, they organized the Lawyers Association for Justice (LAJ) with young lawyers who also were interested in the defense of human rights. In the young group, there were pioneers such as

Cho Young-Rae[10] and Park Won-Soon,[11] who were involved in the social movement through public interest law. President Roh Moo-Hyun himself was a member of this group. There was also a younger and more radical lawyers group than the LAJ: the Young Lawyers' Association (YLA). When they were at university, the members of this group experienced the rigid dictatorship of President Park, the coup d'état of the new military group, and the massacre in KwangJu. They studied Korean society "scientifically" (that is, with Marxist theory). By becoming lawyers, they had as their mission national independence (from imperialism), democratization, and national unification. In 1988, 51 LAJ and YLA lawyers organized the Lawyers for a Democratic Society (LDS: *Minbyun*). The group currently has 300 members.

The LDS devoted itself to the democratization of Korean society not only through the legal protection of the socially weak from the state and capitalist violence, but also through research, investigation, and an active movement for legal reforms. Democratization also promoted their participation in real politics. Today, there are many LDS members in the PSPD and in the administration. The political parties in which they participated were diverse, spanning the range from conservatives to radicals. Several members became high-ranking bureaucrats through the Uri party (the ruling party): Kang Gum-Sil, Chun Jeong-Bae (Minister of Justice), Ko Young-Goo (Chief Director of the National Intelligence Service, ex-Korean CIA), Moon Jae-In, Park Joo-Hyun, Lee Suk-Tae, Choi Eun-Soon (Blue House) and Park Won-Soon (Chairman of the Reform Commission of the National Tax Service).

Thus, democratization influenced the reconstruction of the legal field by opening new operational spaces for lawyers. First of all, it allowed the law, which had been applied arbitrarily by the dictatorship, to recover its essential functions. This influenced the legitimacy and position of lawyers. Under the dictatorship, the careers of prosecutors and judges closely allied with state power were considered more valuable than those of attorneys. But their professional legitimacy has largely diminished since democratization. Today, there are many critical discourses calling on them to repent for their past conduct and their conservative positions against social reforms. These criticisms are also strategic and symbolic resources for the social movements in order to disqualify the state lawyers in the judicial reform process. Secondly, the introduction of the civil society model in Korea opened a space for lawyers to be active as opinion leaders in Korean society. The roles of professionals as watchdogs for conglomerate capitals and political power are increasingly emphasized, and lawyers are considered professionally capable of guiding Korean society toward more moderate and reasonable ways. The number of lawyers participating in social movements rapidly increased and some of them became media stars. Finally, democratization allowed some lawyers to combine legal professionalism with morality, which offered them an opportunity to participate in the political field. Democratization created new political leaders in Korea and their past social movement careers as well as their progressive and moral images were revalued by the society. Certainly, the Korean

social movement has been developed as a struggle against a violent state, and many activists still hold themselves aloof from the material interest. Although many militants stubbornly oppose the partisan and administrative activities of their leaders, the establishment of a more progressive government and political parties legitimates this metamorphosis.

The reconstruction of the legal field: Korean "palace wars" expressed in legal reforms

The 2002 presidential election was monumental for Korean history. It demonstrated the rise of a new generation which had struggled against the dictatorship during its university years. President Roh Moo-Hyun has a very different social background from traditional Korean elites. Born to a poor, rural family, he was unable to attend university, but he passed the bar examination without any regular legal education. Although he was born in Young Nam Province, the constituency of the political elite since the military coup in 1961, he was elected as a Democratic Party candidate representing Cholla Province. Moreover, his electoral rival was Lee Hoe-Chang, renowned judge of the Supreme Court. The election was the biggest match between the "noblesse de robe" and a self-made human rights lawyer. Yet, the new government was defined as "neoliberal left" by the president himself after the election, and rapidly lost the base of its support.

Judicial reform is one of the major programs of the present government composed of progressive figures. It began in the 1990s but could not succeed. The new government created the Presidential Commission on Judicial Reform in August 2003. Its mission was to formulate a reform plan such as the reorganization of the Supreme Court, new legal education and lawyer recruitment, civil participation in the judicial process, and so on. The chairman of the commission was Han Seung-Won, a famous human rights lawyer. Before his nomination, he was a law professor and chairman of the Board of Audit and Inspection. He was also a lawyer for GwangJang, one of the major law firms. The conflicts surrounding judicial reform illustrate the strategies for the reconstruction of the legal field.

Legal education reform and the new recruitment system were based on the model of American style law school.[12] The Korean bar examination (which is called "SaBupGoSi") is open to the population, and there is no educational background requirement to apply to it. State lawyers (judges and prosecutors) are selected among successful candidates of the *Gosi* who have completed two-year courses at the Judicial Research and Training Institute (JRTI). This system has the advantage of assuring opportunities for the poor—of course, their success is extremely rare—but it also allows persons without professional knowledge and experience to become lawyers by memorizing the codes. Moreover, while the courses of the JRTI focus on the training of state lawyers, most of its graduates (70%) are not selected as state lawyers.

The number of successful candidates for the bar examination are always insufficient with respect to social demands. But lawyers have also restricted the

number because it may decrease their high profits and social status. At present, for every bar examination, the number of passers is decided by the Minister of Justice with recommendation from the Supreme Court and the Korean Bar Association excluding the opinion of social actors. The number has been thoroughly controlled: until 1978, it was less than 100, from 1981 to 1994 about 300, and since 1995 about 1000.

Another reason justifying the adoption of the law school model is globalization and, more precisely, the liberalization of the Korean legal market imposed by the WTO. Strategies for opening the Korean legal market include legal specializations in business and keeping up with international trends.

The introduction of the law school system is presumed to be the best solution for these problems, but there are many obstacles to overcome. The first one concerns the right to establish a law school and decisions regarding student quotas. According to the government's plan, an institution that wants to establish a law school has to be qualified by the Administration Office of the Court, the Minister of Justice, the president of the Korean Bar Association and the as-yet-unformed "law professor committee." Without any participation of social actors, the Korean legal establishment is likely to continue to control the number of lawyers. As a matter of fact, the government intends to permit a small number of universities to establish law schools and sophisticated administrative procedures. There are also critics who suggest that law school will deprive the poor of the opportunity to become lawyers.

The introduction of the law school system in Korea is expected to bring about the transformation of the Korean legal field. In this field, the distinction between academics and professional lawyers has been rigid. Regarding this distinction, one professor of law argues that:

> "Most law professors have the experience of getting frustrated by the failure of the bar examination. I think that they fail to overcome this experience of their youth. I believe that their academic work tends to, therefore, ignore the laws of the real world. So there is a latent 'balance of power' between legal practitioners and professors. It is a silent collusion that maintains the operational field. In such a case as the violation of this collusion, they press each other to assume responsibility for it."
>
> (Ahn Kyong-Hwan 1994:53)

It is likely that law school will destroy these divisions. Many universities have already recruited lawyers as professors. The Commission on Judicial Reform itself declared: "the professors of law school might be replaced by legal practitioners in the future" (*Yonhap News*, July 4, 2004). For this reason, the positions within the legal reform movement are divided among lawyers, scholars, and social movement militants although they agree on its necessity.

Another important reform is the "civil participation in the judicial process" which represents the democratization of Korean society. In November 2004, the

Commission on Judicial Reform decided to design an institution destined to assure civil participation in trials. The debates about this reform converged on the choice between the American jury system and the German *schöffengericht*. According to the commission's plan which oddly combined the two systems, civil participation will be restricted to the "serious criminal cases" (with suspect's agreement). Regarding the verdict process, the bench will be composed of three professional judges and five or nine civil representatives chosen at random. Civil representatives will express their verdict after deliberation under the guidance of a judge (jury system) and they will also be able to propose a penalty for the accused (*schöffengericht*), but the proposition has no binding force.

The critiques of this plan also diverged into two positions. Some conservative critics argue that it is not the time to introduce judicial participation of citizens because Korean society is dominated by various personal connections, which would make it difficult for juries to make objective judgments. Lack of legal professionalism and the increase of cost for the litigation would also hinder citizens from making correct judgment. Moreover, lawyers and legal scholars from social movements argue that the plan will restrain the real participation of citizens by so many provisos.

Thus, professionalism and morality are the most important weapons in the battle for the reconstruction of the new rule of the legal field. In the context of the retreat of the state caused by democratization and neoliberalism, the two types of civil lawyers—business lawyers and human rights lawyers—have driven state lawyers into a corner, demanding that they repent for their past actions as collaborators of state violence. Their incompetence in international affairs and social issues is another target. Given the contest surrounding the new rule of the field, knowledge of foreign laws, global trends, and the flexibility of civil society represent precious weapons for the new professionals to claim legitimacy.

Conclusion

Economic internationalization and political democratization are redefining essential factors of the legal field such as legal institutions, the positions and roles of lawyers, and the notion of the legal profession. The most important capital in this battle is internationally recognized expertise and morality untainted from the past. Concerning expertise, the American models influence not only the law firms who represent the interests of multinational corporations, but also the activities of human rights lawyers, their opponent professionals. As civil society actors, business lawyers and human rights lawyers together contribute to the retreat of the state, but their strategies and operations are carried out through the state. Traditional lawyers have formed closed communities independent from society and their operational fields are confined to the national terrain. For this reason, international expertise and moral capital offer new legal actors the weapons to disqualify the old legal order and legitimize their reforms. The profiles of new elite lawyers who became bureaucrats or assumed public affairs

through consultation show the efficacy of these strategies. Lawyers who oppose these transformations are discounted as conservatives and as guardians of vested rights. Certainly, these struggles have developed not only in the legal field but also throughout society. The recent movement to correct Korean history (e.g. making a list of Japanese collaborators, opening to the public cases concealed by the state in order to reexamine them) nurtures the battles in the legal field by heightening the dramatic effects in the media.

However, specific divisions existing in the Korean legal field limit the battle for reforms based on a foreign expertise. The first division is found within the professional groups, which means a rigid division between state lawyers and civil lawyers. Many candidates for legal professions still prefer public careers as judges or prosecutors. Even though these positions pay significantly less than corporate lawyer positions, the social prestige and authority of a state lawyer are very high. More importantly, judges and prosecutors can open their own legal bureaus whenever they want, while public careers are restricted for civil lawyers. But the enlargement of the private sector and relative marginalization of the public sector will obscure this division line and influence the preferences of the legal profession. It will also destroy the second division in the field: the one between scholars and practitioners. The liberalization of the Korean legal market, as agreement upon in the KORUS FTA, and the dogmatic discourse of globalization force all actors in the legal field to redefine the rules of the game. It will weed out the groups that oppose the transformation and favor lawyers who have pursued Americanization ahead of others. It will provoke new games promoting the strategy of alliances, struggles and the division of labor.

Notes

1 For a discussion of Korean bureaucrats as Korea's "technopols," see Kim Seong-Hyun 2003.

2 Japanese law initially was modeled on French law, but its structure was closer to German imperial law legislated in 1878 (Kim Hyo-Jeon 2000:10).

3 The profile of Park Se-Il, who led the committee, helps to understand the transitions of certain groups of Korean lawyers. He entered the Seoul National University Faculty of Law in 1966 and was interested in social and labor problems, much like the future leaders of the social movement including Cho Young-Rae and Chang Gi-Pyo, though the "social law group" was disbanded by the military dictatorship. He states that he was reflecting on "community life" by studying Marxism, Leninism, and Maoism. In addition to this experience of the radical student movement, he stated that he was also influenced by liberal thinkers such as Adam Smith, J. S. Mill, and F. Hayek (Interview with DongA Ilbo, March 18, 2003). His interest in labor issues continued and, abandoning preparation for the bar examination, he went to Tokyo University, where he studied labor economics and social policies. He attended Cornell University starting in 1980 and returned to Korea with a Ph.D. degree. Returning to Korea, he worked at the Korean Development Institute (KDI) which was both a think-tank for rapid economic development and a recruiting pool of professionals. Yet, he felt frustrated there by government's developmental policies. He thought that the law and institutions should be operated in a manner more focused on constructing an advanced Korea, and became interested once again in legal problems. In 1985, he

began teaching legal economics as a professor of the faculty of law at Seoul National University. He developed a new conception of "civil movement" and shared it with Seo Kyong-Seok, his old friend. They concluded that Koreans were in need of a new social movement that would suggest a practical alternative for social change. They established the "Citizens' Coalition for Economic Justice (CCEJ)" with opinion leaders and professionals such as religious men, scholars, lawyers, and journalists. Interested in globalization as a result of reading Robert Reich's works, Park organized a globalization study group with his fellow professors of SNU in 1993. He was appointed chief secretary of the president by Kim Young-Sam and initiated the Globalization Committee. His profile demonstrates the dynamic process that shifted from student movement to civil movement and again to administration or politics.

4 In 1993, this firm recruited Choi Kyong-Jun, son-in-law of Kim and it provoked conflicts among its members. Finally, sixteen lawyers left the firm and opened Chung Jeong Law Firm (Kim Jin-Won 1999:77).

5 Most large law firms offer their lawyers the opportunity to study abroad during the lawyers' fifth year with the firm.

6 This tradition is called "honorable treatment of predecessors" in Korea.

7 The case of the Korean Foreign Exchange Bank (KFEB) is typical. In 2003, the Korean government allowed Lone Star, a company founded on American speculative capital, to take over the bank. Korean law banned speculative capital takeovers of Korean financial institutions except for the faltering ones. The KFEB was considered a faltering enterprise and sold to Lone Star, but it was revealed that the bank might not have been appropriately categorized and thus should not have been subject to sale. Someone manipulated the affair. Lone Star is under indictment by the Korean Public Prosecution. Kim & Chang is involved in this case and became a target of attack.

8 The PSPD was founded in 1993 by former student movement militants, some professors who were involved in the civil movement as radical (they are often post-Marxists, Habermasians, and Gramscians) and progressive lawyers represented by Park Won-Soon. The PSPD defined itself as: a more radical civil movement as opposed to the conservative and middle class movements; a more practical civil movement suggesting alternatives to social problems; a civil movement based on the legal process; a government watchdog regarding political power and the human rights movement. The PSPD's involvement in public interest litigation and judicial oversight awoke the interest of the masses. The PSPD also became the personnel pool (along with the LDS) for the Roh Moo-Hyun government.

9 Lee Byong-Lin in the 1960s, Han Sung-Hun, Cho Jun-Hee, Hwang In-Cheol, and Hong Seong-Woo in the 1970s represented human rights lawyers in these periods.

10 Cho Young-Rae is known as one of the first to introduce the public interest law movement in Korea. In 1991, his friends gathered to commemorate his death and reflect on the past: "I think that Cho contributed to developing a new type of human rights defense like the environment, women, civil appeal, others. He called his firm a 'civil and public interest law firm.'" Beginning in the 1970s, American lawyers began to specialize their work in topics such as the environment, consumers, race, women, handicapped persons, etc. One scholar called it a "public interest law movement (…) I'm not sure that Cho himself knew this movement" (Yang Gun, Professor, Hayang University); another scholar explained, "I heard often of Ralph Nader from Cho. He might have been interested in the consumer movement a long time ago" (Son Hak-Gyu, Professor, SeoGang University); finally, another scholar confirmed, "I heard before his death that he met with Ralph Nader during his short stay in the US" (Yang Gun) (Hong et al. 1991:94–95).

11 Park Won-Soon is a representative human rights lawyer in Korea who defended many political prisoners in the 1980s and 1990s. He completed the diploma courses at

the London School of Economics in the early 1990s. Then he was a visiting researcher at Harvard Law School. In 1994, he founded the PSPD with activists of social movements, lawyers, and scholars. Leaving the PSPD in 2000, he also founded The Beautiful Fund, the first community foundation in Korea. He explained in a lecture the motivation for establishing the foundation: "In 1991, I was a researcher at Harvard University. I read a newsletter in which I found a novelist's column: 'The most beautiful words in the world are "check enclosed"' … The money enveloped carefully … It means the donation. Since, the word remained in my mind and bloomed in the form of a foundation. (…) I came to consider more concretely creating the fund when I visited the USA with the Eisenhower Fellowship. Then I understood: A foundation is like the magic by which a person can realize another person's hope." (*Wooridul Hospital Newsletter*, December 2005).

12 In order to distinguish law school from the faculty of law, Koreans call law school "law graduate school."

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Chapter 11

Searching for political liberalism in all the wrong places

The legal profession in China as the leading edge of political reform?

Randall Peerenboom

A central concern of scholarship on the legal profession and international donor agencies promoting the rule of law in China is the bar's role as a force for political reforms, and in particular the fostering of political liberalism, the promotion of democracy, and the protection of human rights (Alford 2003; Halliday and Liu 2007; Pils 2007; Fu and Cullen 2009).[1]

The first part of this chapter argues that there is general agreement in the legal profession, and among other actors in the legal complex and society more generally, in the value of rule of law broadly understood. However, the driving force for legal reforms is not political liberalism. The development of the legal profession and the legal system is very much a story of modernization and economic growth. But even given the general consensus regarding the value of rule of law, conflicts within the legal profession and between the legal profession and other legal-political system actors complicate the process of translating the broad principles and abstract ideals of rule of law into feasible reforms. These conflicts are intensifying as China enters into the critical middle-income stage, a stage where the reform process stagnates in many developing countries.

The second part points out that in addition to weak support for liberal democracy, a variety of other factors limit the ability of the legal profession to advance political liberalism. Most notably, China is following an East Asian model of development that greatly restricts opportunities for lawyers to engage in "political lawyering."

The third part suggests that, contrary to the cautious optimism of some commentators, the criminal defense bar is not likely to emerge as the leading edge of political reform in China for a host of reasons, the most important of which is a public intolerant of the rapidly escalating crime rates.

Finally, the fourth part argues that while there is somewhat more political space for "cause-lawyering" in socio-economic cases than for political-lawyering in civil and political rights cases, the efficacy of cause-lawyering is limited by various factors, most notably the lack of resources and weak institutions, as is typical in lower-middle income countries.

The chapter concludes that we ought not to expect the legal profession to be the leading edge of political liberalism, or even to play a significant role in the

short term, but we ought not to be too despondent either. Several East Asian countries have overcome or outgrown similar problems. They have established legal systems that are generally rule of law compliant and protect human rights reasonably well, even if several continue to be non-democratic or somewhat dysfunctional democracies, and even if they remain less liberal than their economically advanced Western counterparts. Moreover, small marginalized factions within the legal profession have managed to play a key role in political reforms in these countries, and in some cases have even managed to change the nature and political orientation of the legal profession and legal complex.

Rule of law and economic development

A wealth of data shows that the development of the legal profession and legal system as a whole has closely tracked economic growth patterns, and developed in ways consistent with modernization theories.

Development of the legal profession and the legal complex

The number of law schools and law students has risen rapidly since China embarked on economic reforms in 1978. Law schools have increased from a mere eight in 1976, to 62 in 1989, 183 in 1999, 389 in 2003, and 559 in 2005 (Zhu 2007: 41). The number of law students has also shot up, from 25,000 in 1991 to 450,000 in 2005, with the number of graduates increasing from 7,500 to 103,000 (Zhu 2007: 41). As a result, the number of lawyers has increased from a few thousand in the early 1980s to over 130,000 today.

Given the dearth of lawyers in the early years of economic reform, the qualifications for becoming a lawyer were initially quite lax. Over time, the bar has been steadily raised. In 1997, only 33% of lawyers had college or graduate degrees. By 2004, two-thirds had such degrees, including 11% graduate degrees, 44% LLBs and 12% undergraduate degrees in other subjects (Zhu 2007: 37). The percentage is sure to rise in the future as the Lawyers Law now requires lawyers to have college degrees, although exceptions are made for poor areas where lawyers are few and far between. Moreover, the percentage of lawyers with undergraduate or graduate degrees in law will continue to rise as increasing competition within the legal profession, particularly for the higher paying jobs available in law firms, is rewarding those with more specialized training.

The increase in the size and professionalism of the legal profession is also reflected in other areas. There has been an explosion in law making. Between 1797 and 2005, 805 laws, 4156 State Council administrative regulations, 58,797 ministry level rules, and 115,369 provincial people's congress regulations were passed (Zhu 2007: 2). Not surprisingly, the qualifications of members of the National People's Congress (NPC) have risen steadily. Some 90% now have at least junior college degrees, a two-fold increase over a 20-year period. Approximately 90% of NPC Standing Committee members now have college or graduate

degrees (Zhu 2007: 33). The number of NPC representatives and staff members with legal training has also risen dramatically.

By 2000, all judges had junior college degrees. The 2001 Judges Law then ratcheted up admission standards, requiring a college degree except in certain poor areas. By 2004, 52% of judges were college graduates, up from 7% in 1995 (Zhu 2007: 34). By 2004, 44% of prosecutors, and 51% of notaries, also had college or graduate degrees.

Strong correlation between economic development and development of the legal profession and legal system

Multiple-country empirical studies show that rule of law and good governance are highly correlated with wealth, and that institutional development and growth are also mutually reinforcing (Chang and Calderon 2000; Rigobon and Rodrik 2005; Kaufmann et al. 2007). The correlation between GDP and the World Bank indicators for rule of law is r = 0.82; government effectiveness r = 0.77; control of corruption r = 0.76; voice and accountability (i.e. civil and political rights) r = 0.62 (Peerenboom 2007).

Nevertheless, one of the problems confronting law and development scholars in sorting out the relationship between rule of law, good governance and economic growth is that it is difficult to compare development patterns across countries because of differences in political systems, cultural differences and other factors. China provides an enviable case study to test modernization theories in that there is remarkably wide regional diversity within a single country, allowing us to control in effect for the nature of the political system and cultural factors (although cultural differences between the dominant Han majority and minority groups may also be a factor in some areas). While Shanghai's GDP per capita is RMB 55,000, compared with 37,058 for Beijing, and 19,707 for Guangdong, the GDP per capita for Gansu is 5,970 and just 4,215 for Guizhou (Zhu 2007: 64–65). In short, while China overall is a lower middle income country, some of China's provinces are as rich as the wealthier middle income countries, others fall within the lower middle income range, and still others are as poor as low-income countries like India, Indonesia or Bangladesh.

Provincial level comparisons in China demonstrate the same general relationship between wealth and institutional development as shown globally. There is a strong correlation between provincial GDP per capita and lawyers per capita (0.98), legal education measured by the number of law graduates per capita (0.90), and litigation (0.92) (Zhu 2007: 60).

The general trend in the commercial area has been for an increase in litigation with an expansion of the range of justiciable disputes, while mediation has decreased and arbitration has remained relatively stable and limited (Zhu 2007: 21, 26). The number of first-instance economic cases increased from 44,080 in 1983 to 1,519,793 in 1996, while the number of first instance civil cases increased from 300,787 in 1978 to 3,519,244 in 1999. Between 1983 and 2001, economic

disputes increased an average of 18.3% a year, an increase twice the rate of civil disputes, and four times the rate of criminal cases (Clarke et al. 2006). Since then litigation rates have been relatively stable.

Contract disputes are the major cause of litigation (He 2007; Zhu 2007: 221). First-instance, purchase and sale contract cases increased from 23,482 in 1983 to 422,655 in 1996. Cases involving the contracting out of land in rural areas increased from 21,459 in 1983 to 87,503 in 1995. Money-lending cases increased from 1,264 in 1983 to 558,499 in 1996 (China Law Yearbooks).

There is a strong correlation between litigation per capita and lawyers per capita (Zhu 2007: 90). Most top law firms and most of China's lawyers are concentrated in a few large cities while in some areas there are no firms or even lawyers. The rate of litigation in Beijing, Shanghai and Tianjin per 100,000 people is 1,307, 994, 802 respectively, compared with between 177 and 230 in poorer provinces such as Hunan, Jiangxi, and Tibet. The number of lawyers per 100,000 people is 54.3 in Beijing, 32.3 in Shanghai, 17.1 in Tianjin, and 12.2 in Guangzhou, compared with just 6.4 in Hunan, 4.4 in Jiangxi, and 1.3 in Tibet (Zhu 2007: 51–52).

Looking at the legal system more broadly, there is also a clear relationship between the quality of the judiciary and wealth. The education level of judges in upper level courts in urban areas is often quite high. For instance, over one-third of High Court judges and nearly one-third of Intermediate Court judges in Shanghai have Masters or Doctorate degrees in law. Education levels also vary by division within the same courts. Among the 13 judges in Shanghai Intermediate Court No. 1 Civil Division No. 5, one has a Ph.D., another is completing a Ph.D., eight have Masters in law, and the others are studying for their Masters (Writing through Action). In contrast, basic level courts and even upper level courts in rural areas tend to have less highly qualified judges.

While enforcement of judicial decisions is often portrayed as difficult in China, overall enforcement has improved (Zhu 2007: 243–47; World Bank Doing Business Survey 2008). In keeping with the general development pattern, recent studies have found significant improvements in wealthier urban areas, with continued problems in poorer rural areas (He 2008). The main reasons for the improvement in enforcement are changes in the nature of the economy; general judicial reforms aimed at institution building and increasing the professionalism of the judiciary; and specific measures to strengthen enforcement. The economy in many urban areas is now more diversified, with the private sector playing a dominant role. The fate of a single company is less important to the local government, which has a broader interest in protecting its reputation as an attractive investment environment. As a result, the incentive for governments to engage in local protectionism has diminished (Peerenboom 2002; Gechlick 2005).

According to the World Bank's World Business Environment Survey, China has less legal corruption than countries at similar levels of per capita income (Clarke et al. 2006). This is consistent with general corruption data from

Transparency International and other surveys.[2] Nevertheless, corruption remains an issue in some cases.

The high correlation of wealth and corruption globally is also found *within* China. In rural areas where the courts lack adequate funding, there tends to be more systematic institutional corruption generated by the need to raise funds.

Public attitudes also reflect differences consistent with general growth patterns. While Chinese citizens overall express surprisingly high levels of trust in the judiciary, there are significant differences between rural and urban residents (Peerenboom and He 2008). Urban residents are much more likely to litigate (even though rural residents have a higher incidence of grievances), and more likely to be satisfied with their experience, than rural residents. Economic development in rural areas is likely to lead to fewer disputes, stronger institutions, and higher satisfaction levels, as it has in wealthier urban areas (Michelson 2008).

Obstacles to implementation of the rule of law: intensification of conflicts during middle-income stage

The rapid progress in improving China's legal and governance systems is reflected in empirical surveys. According to World Bank data, China performs better than the average country in its lower-middle income class on rule of law, and better or average on other good governance indicators (Kaufmann et al. 2007). Nevertheless, deeper reforms are required to address ongoing problems.

For China to be experiencing problems at this stage of development is not unusual. Middle-income countries (MICs) face daunting challenges in breaking into the top ranks of wealthy countries governed by rule of law whose citizens' rights are reasonably protected within a democratic framework. MICs must overcome a range of technically, politically and socially complex issues: achieving sustainable growth that provides productive employment and protects the environment, while reducing poverty and income inequality; creating social safety nets to protect those disadvantaged by economic reforms and globalization; reducing financial volatility and avoiding the crises that have frequently followed in the wake of financial liberalization; strengthening state institutions and governance structures; maintaining social and political stability in the face of rising expectations and demands on the state when the state's ability to respond adequately to such demand is hampered by limited resources and weak institutions (World Bank 2004, 2001; IEG 2007).

MICs also face new challenges arising from globalization and an international trade regime that have led to greater global inequality and limited the ability of MIC governments to set and pursue certain policies in their national interest—including some policies pursued by now-developed countries during their high growth periods.

A World Bank study (IEG 2007) found that while MICs have grown at an average rate of 3.7% since 1995, they have not been able to achieve sustainable high-quality growth. Income inequality rose in over half of the MICs, with

regional disparities particularly pronounced in some countries. Aggregate growth has also come at a cost of serious environmental degradation, including rising carbon dioxide emissions, deforestation, and severe air and water pollution. Moreover, while MICs have been relatively more successful in reducing poverty than low-income countries, poverty remains a serious problem in many countries. MICs also confront critical health challenges. HIV/AIDS remains a grave, and in many countries worsening, problem. Some 70% of MICS are failing to meet their Millennium Development Goal of reducing child mortality by two-thirds.

While some MICs have improved institutional capacity, institutions remain weak relative to developed countries. Three out of four MICs showed no improvement in combating corruption. Fifteen MICs are in the bottom quartile of the World Bank's corruption index, and two out of three are below the global average. Judicial corruption has undermined public trust in the courts and undermined efforts to implement rule of law (Global Corruption Report 2007). Programs to increase judicial independence have proven disappointing (IFES/USAID 2002; Santiso 2003; Couso 2005). Litigation is often expensive and time-consuming. Access to justice remains limited.

In short, in many middle-income countries, reforms have stalled; people are trapped in a cycle of dehumanizing poverty, growing income inequality, environmental degradation, weak and dysfunctional institutions, and government malfeasance; and the prescriptions for addressing these challenges so far have proven inadequate.

While there has been considerable attention to failed and transitional states and the obstacles they face, less is known about the particular issues facing MICs such as China or what they should do to increase their chances for success. The World Bank, for instance, has only recently begun to address MICs. That the bank has issued three strategy papers in just six years reflects the difficulty the Bank has had understanding, and designing effective reform strategies for, the complex issues confronting MICs (World Bank 2001, 2004).

This lack of knowledge and effective strategies is unfortunate, as 70 percent of the world's population, and one-third of the world's poor, live in 86 MICs (IEG 2007). In East Asia alone, 90% of people are expected to live in MICs by 2010.

Apart from the wide diversity within MICs, which range in per capita income from $850 to $10,000, one major problem is that a general consensus about an abstract notion such as rule of law does not easily translate into the kind of political consensus needed to carry out specific reforms. Generalizations about the need for a competent judiciary and legal profession do not provide useful guidance in countries such as China where there is tension between the desire to raise admission standards for judges and lawyers and the need to make concessions in poor counties just to ensure that there are some judges and lawyers available. Similarly, generalizations about the need for a clean and independent judiciary and legal profession do not provide much useful guidance in countries where corruption is a problem and supervision is needed to ensure accountability.

As in other middle-income countries, the task of designing and implementing specific reforms to realize rule of law in China is hampered by an intensification of conflicts. Chinese society is increasingly pluralistic. There are deep divisions over fundamental beliefs among the old left, new left, new right, neoliberals, classical liberals and Confucian revisionists (Leanord 2008). Rising inequality has intensified conflicts between urban and rural residents. State-owned economic reforms have led to increased unemployment, exacerbated tensions between laid-off urban workers and urban residents more broadly and migrant workers. These differences are reflected in competing normative visions for society that are then reflected in competing thick conceptions of rule of law (Peerenboom 2002). These competing conceptions hinder reforms, as different factions appeal to different versions of the rule of law in support of diametrically opposed legal reforms.

Reforms are also hindered by conflicts within the legal profession and the legal complex more broadly. The rapid rise in lawyers has led to an oversupply in some areas. As a result, lawyers have sought to limit competition from less qualified "law service providers," and unlicensed "barefoot lawyers." Law service providers are subject to lower admission standards, prohibited from handling criminal litigation, and required to charge lower fees than lawyers. The official policy toward them has varied. At first encouraged in response to the dearth of lawyers in rural areas, over time they have been subject to higher standards and more control. More recently, their numbers have decreased as the government has sought to recast them as non-profit providers of public interest legal services. Nevertheless, they continue to provide more legal advice and draft more legal documents than licensed lawyers (Zhu 2007: 388). Barefoot lawyers also handle a large percentage of civil litigation cases in some areas (Zhu 2007: 413).

Whether law service providers and barefoot lawyers really are a market threat to licensed lawyers is debatable. Few lawyers appear willing to relocate to rural areas or to accept the lower fees charged by the others. Although the government has increased legal aid and expanded access to justice by providing fee waivers or reductions for the poor, many people are still unable to afford the fees. While the general trend has been a rise in representation rates in civil cases, the rate is still extremely low: clients are represented by lawyers in only one out of four civil cases (Zhu 2007: 351). Moreover, barefoot lawyers often take on controversial cases involving land takings, environmental disputes, local corruption and government abuse of power. Many licensed lawyers are unwilling to take on these cases, as are legal service providers, who are often closely aligned with local justice offices and frequently depend on them for referrals.

At the other end of the practice spectrum, Chinese lawyers in major urban areas are competing with foreign law firms. In many cases, foreign lawyers and PRC lawyers will work together on a project. PRC lawyers also have a monopoly on litigation. With offices around the world, foreign law firms also have a natural advantage in large deals with transnational elements. Nevertheless, Chinese and foreign lawyers are increasingly competing in key areas such as general corporate work, mergers and acquisitions, financing and capital markets. As a result,

Chinese lawyers have sought to limit foreign competition. Foreign lawyers are not allowed to issue opinions on PRC law. Their ability to represent clients at arbitrations in China is also limited as they are not allowed to interpret PRC law.

Competing institutional interests and turf battles among other actors in the legal complex have also undermined efforts to implement reforms that would serve broader public goals. For instance, the procurates and members of people's congress have resisted the judiciary's call for more independence, pushing instead to expand their power of review over judicial decisions as a means of attacking judicial corruption, compensating for the low quality of judges in some areas, and ensuring greater accountability and justice. Judges meanwhile have called for changes in the appointment system and court financing to increase judicial independence. However, the central authorities are concerned about the financial implications of centralized funding. There is also little support from local government officials who would be less able to pressure local courts to decide in favor of local companies or to cover up abuses of government power.

The legal profession as a force for political liberalism and liberal democracy

Rule of law is generally a precondition for successful consolidation of democracy, though the two need not go hand in hand, as both the examples of Hong Kong and Singapore and broader empirical studies demonstrate (Peerenboom 2007). Moreover, the efforts to promote rule of law in China have required, and resulted in, legal restraints on the state; the development of an increasingly independent and autonomous legal profession and judiciary; an expansion of political participation in law-making, implementation and supervision; and a most robust civil society and media. All of these developments are consistent with political liberalism. As such, they have fostered hopes that China is on its way to becoming a liberal democracy, and that the legal profession will play an important role in the process, as it has in some other countries.

Yet caution is in order. We need first to distinguish between support for rule of law, for political liberalism in the sense of institutions and norms capable of providing protection for human rights interpreted reasonably if not liberally, for liberalism in the sense of a particular normative view that emphasizes individualism and autonomy, and democracy in the sense of competitive multi-party elections at all levels of government. There are many nonliberals in China who support rule of law, and would even agree that there is a need for stronger institutions to better protect citizen rights. But as in other East Asian countries (Peerenboom et al. 2006), they may not interpret rights in the same way as liberals. Nor may they put much stock in elections at this stage of China's development. Rather, they may very well believe, based on the experiences of other successful and unsuccessful East Asian countries, as well as the general dire results of the much-vaunted third wave of democratization, that democracy should be postponed

until a higher level of wealth is obtained and other factors that are likely to lead to successful consolidation are present (Peerenboom 2007).

It is also helpful for analytical purposes to draw a distinction between legal efforts to promote rule of law, "political lawyering" and "cause lawyering" (Scheingold and Sarat 2004; Halliday et al. 2007). Political lawyering emphasizes first generation, civil and political rights—the negative rights of freedom of speech, thought, religion, movement and association—and the political institutions of (primarily economically advanced Western) liberal democracies that protect these rights. Cause lawyering emphasizes social and economic rights: land rights, peasant movements, welfare claims, the rights of labor and women, and even the rights and welfare of animals. Of course, in practice activist lawyers may engage in both types of lawyering, as was the case in Taiwan and South Korea (Ginsburg 2007).

Activist lawyers, whether political or cause lawyers, also differ in their strategies and willingness to challenge the authorities, particularly in authoritarian states such as China. Fu Hualing and Richard Cullen (2009) have provided a useful threefold classification scheme for lawyers in China who are part of the so-called *weiquan* movement, a loose term that refers to activist lawyers who are engaged in efforts to protect citizens' rights and promote legal and political reforms. Activist lawyers can be moderate, critical and radical depending on the type of the cases they handle, their objectives, and their approach.

Moderate lawyers are not overtly political. They select cases such as consumer protection, labor rights, or discrimination cases that are not terribly politically sensitive. They operate within the limits of law, rely on legal arguments, and seek to promote rule of law.

Critical lawyers are often more critical of the political system, but they are also pragmatic in their acceptance of the lack of viable alternatives. They want to ensure that the system lives up to expressed ideals, often pushing for systemic reforms. They are willing to take on somewhat more politically sensitive cases involving free speech, religious freedom and freedom of association, but not cases that are politically prohibited such as Falungong or to represent dissidents calling for the overthrow of the CCP. They rely on both legal and political methods, including greater mobilization of the media, support from foreign non-governmental organizations (NGOs) and organizations, and the use of mass protests and sit-ins, though they are divided about mass protests and sit-ins. They "prefer gradual institutional transformation, hoping to end the endemic abuses of the authoritarian state through reforming it from within, avoiding any direct confrontation with the CCP/state" (Fu and Cullen 2009).

Radical lawyers take on highly sensitive political cases involving dissidents and Falungong. Their methods are more extreme, including organizing mass demonstrations and social movements, or even advocating violence. Their goals may include overthrow of the Party-state. Radical lawyers "mobilize against the law and against the grain of mainstream politics" (Sarat and Scheingold 2001). As a result, they tend to alienate the general public and their fellow lawyers, and

provide a pretext for the government to delegitimize and suppress the *weiquan* movement, as many less radical lawyers have pointed out (Pils 2007).

Moderate lawyers are tolerated and even supported by the government. Critical lawyers, while generally tolerated, are likely to face greater government opposition, often from local government officials, depending on the issue and the tactics employed. Radical lawyers are likely to be harassed by local authorities, detained and charged with various crimes from disturbing social order to endangering the state, or even beaten by police or thugs who may be affiliated with or acting on behalf of government officials.

In addition to government opposition, one of the challenges for lawyers engaged in political lawyering is the lack of support from other lawyers and the public. In some countries, the bar as a whole may support political lawyering, while cause lawyering tends to be more marginalized. In China, *weiquan* lawyers of all stripes are decidedly at the margins of the legal profession. If anything, there is more support for cause lawyering, which is politically safer, than for political lawyering.

As in other countries, the elite of the legal profession is found in China's top commercial law firms. The commercial bar is generally too busy to be politically active, although some may be members of the bar association, advise the government on commercial law matters or hold fund-raisers for charities. They tend to have a favorable view of the reform process overall to date, and be more optimistic about the direction of China. They also have a vested interest in stability, and gradual reforms. While some may sympathize with the long-term goals of political lawyering, they reject the methods of radical lawyers. As representatives of real estate developers and large businesses, their professional interests conflict with cause lawyering in land-taking cases, disputes between home owners and real estate management companies, environmental cases and labor rights cases.

Among other legal complex actors, law schools have provided some support for activist lawyers. As Fu and Cullen note (2009), academic lawyers have been crucial in promoting constitutionalism and the legal protection of rights. Their relative political autonomy and financial security as academics and their involvement in public policy development allow them to provide effective support to activist causes. Leading figures include He Weifang from Peking University, Xu Zhiyong from Post and Telecommunication University, Teng Biao from China University of Politics and Law, Zhou Wei from Sichuan University. All would be considered critical rather than radical.

However, one should not pin too many hopes on the academy. While universities provide a more expansive space for debate of sensitive topics than most public fora, universities must still answer to the political authorities. For instance, Teng Biao has encountered problems at his university on account of his activism, including being prohibited from traveling overseas (Fu and Cullen 2009). Moreover, legal academia is not united in support of liberalism, and many professors are not politically active. The legal academy has grown, and there are a number of highly respected and qualified scholars. However, many law professors,

while full-time in name, are in effect part-time given the considerable amounts of time spent on private money-making endeavors. Scholarly research tends toward positivist jurisprudence, with most works focusing on doctrinal issues. Relatively few works expressly address political issues. Given the heavy emphasis on the quantity of scholarly output, many books are nothing more than an article-by-article restatement of the law. Nor is the legal academy held in high esteem by judges and government officials. Legal reformers within government agencies and the judiciary often dismiss what theoretical work is done as not practical or useful given China's circumstances.

Given the correlation between education, wealth and political views, the legal academy may be somewhat more liberal than the general population in China. However, there is still a considerable diversity of political views among China's leading scholars. He Weifang, Cai Dingjian and a handful of others have become public intellectuals known for their liberal views. But others are known for opposing views. For instance, Gong Xiantian caused a delay in the passage of the Property Law when he waged a high-profile campaign against the law. While his complaints tapped into growing income inequality and concerns about social justice, and thus were part of a national debate between the new right and leftists who oppose neoliberalism, he invoked old-school socialist rhetoric that many believed had been buried long ago. Pan Wei, a political scientist, is well known for his attacks on democracy and the view that establishment of the rule of law must precede democratization.

Westerners searching for signs that China is on the road to liberal democracy naturally seek out liberals like He and Cai and activist lawyers such as Pu Zhifang and Gao Zhisheng. But in so doing they may be obtaining a false sense of where China is heading, or of the extent of the support for liberalism in China. More moderate and conservative academics and lawyers are more likely to have an influence on policy-making and the reform process than liberals and radical lawyers. Western academics, NGOs and congressional bodies may not like their views, and thus they may not be invited to international conferences, or to give testimony before the Congressional Executive Committee on China. But their voice should be heard.

The biggest obstacle, however, to political liberalism is that China is following a development path similar to other successful countries. The East Asian Model involves the sequencing of economic growth, legal reforms, democratization and constitutionalism, with different rights being taken seriously at different times in the process (Peerenboom 2007). This development path imposes severe restraints on the ability of the lawyers to advance political liberalism and engage in political lawyering. The emphasis is on economic development. There is a two-track approach to legal reforms, with rapid development of commercial law and tight limitations on civil and political rights when the exercise of such rights appears to threaten social-political stability, and hence economic growth. While there are many civil society organizations, civil society is heavily regulated, and organizations that become involved in political activities are closely monitored and

controlled. The velvet revolutions in former soviet republics have resulted in heightened vigilance, particularly of groups with connections to foreign governments, donors and NGOs. Similarly, while the media is increasingly diverse and aggressive in reporting of problems, there are limits, and reporters and editors who cross the lines will find themselves harassed, terminated, or arrested.

Institutionally, the lack of a constitutional court forces activist lawyers to rely on petitions and litigation in courts that are limited in their legal authority and political capacity to make social policy. But even were there a constitutional court, we should not expect too much from it. Constitutional courts in other East Asian countries were subject to tight control in politically sensitive cases, even if they were able to handle commercial and other non-political cases in a reasonably independent and competent manner (Ginsburg 2007; Peerenboom and He 2008). Constitutional courts in other authoritarian regimes such as Malaysia and Egypt have been neutered when they over-stepped the bounds and challenged the ruling regime too aggressively.

The criminal defense bar as harbingers of political liberalism

Observing that criminal defense lawyers played a leading role in advancing political liberalism in France and England, Terrence Halliday and Sida Liu have cautiously suggested that the criminal bar in China might do the same (Halliday and Liu 2007). They argue that effective representation requires a defense bar with a common identity, committed to limits on state power, the opening of civil society, and the institutionalization of core rights, all of which are features of political liberalism. They find support for the emergence of such a defense bar in the views expressed on the internet forum established by the All China Lawyers Association. By March 2005, the forum had over 34,000 registered users who had posted 271,925 messages on 25 discussion boards with divergent topics for each board.

Again, caution is in order. Halliday and Liu rightly emphasize that there is no systematic evidence for coherent views. In particular, it is not at all clear that China's defense lawyers are united in their support of liberalism, or any other political view. Most messages dealt with the many practical obstacles criminal lawyers face every day, including access to clients and files, problems collecting evidence and cross-examining witnesses, and the danger of prosecution on trumped up charges of falsifying testimony or obstructing justice. Not surprisingly, there seems to be a clear consensus in favor of more protection for defense lawyers, and significant support for taking the rights of criminals more seriously. As is true for the legal complex more broadly, defense lawyers also support rule of law reforms, including limits on state power; a reallocation of power among the courts, police and procuracy; and judicial reforms. But all of these reforms are consistent with a variety of thick conceptions of rule of law and diverse political views.

There are clearly divisions within the criminal defense community. Some lawyers place more trust in the state; others emphasize the need for defense lawyers to unite to protect themselves, though collective action has not yet occurred. While many criminal defense lawyers make little money and are among the more marginalized members of the legal profession, other criminal lawyers are more established figures who make a lot of money handling high-profile cases, or well-known academics or members of the national or local bar associations, or former judges or prosecutors. As such, they have better connections to the authorities, and a better idea of which cases are too hot to handle. They are also less likely to be harassed or subject to trumped-up charges than their less-connected defense bar colleagues. As Halliday and Liu note, views expressed in the Ministry of Justice's official magazine *China Lawyer* tended to be less radical, and to take a broader view of the legal reform process and the problems of defense lawyers.

But even were defense lawyers united in their political views and their strategies for reform, it is unlikely that they would become a dominant force for political liberalism. Relative to other legal complex actors such as prosecutors, police, judges and legislators, the legal profession, and the defense bar in particular, are the least powerful.

The social status of Chinese lawyers, and the defense bar in particular, is not particularly high. One of the key differences between the legal profession in China and other countries is in reproduction patterns. In many countries, lawyers are often from the educated upper class, with one generation of lawyers leading to the next (Dezalay and Garth 2002). However, China's legal profession has been rebuilt from the bottom up since 1978. The requirement that lawyers pass a national judicial exam further impedes reproduction. Moreover, the true elite—the princeling children of high-level government officials—do not go into law. They follow their parents into government, or establish businesses, taking advantage of their connections to obtain coveted approvals in restricted industries or valuable contracts to obtain land or supply materials to the government.

While there are no doubt liberals among the legal complex with whom the defense must interact, there can also be no doubt that the prosecutors and police in particular are less liberal, and more inclined toward law and order than defense lawyers. Judges and people's congress representatives are somewhere in the middle, though there is no reason to believe that they are significantly more liberal than average citizens of similar education. The majority appear to support the dominant popular view that a war on crime is justified.

Indeed, the biggest obstacle to the defense bar emerging as a leading force for political reforms is that crime is rising in China, and will continue to rise for the foreseeable future. Industrialization, urbanization, and a transition to a market economy generally lead to rising crime rates, particularly when combined, as they usually are, with increased social and economic inequality. As in other transition countries, there is very little public support for lawyers seeking to protect criminals in China (Peerenboom 2004; Bakken 2005). After the fall of the Soviet

Union, Eastern European countries rushed to enact constitutions and laws that provided the full panoply of liberal protections for criminals. However, they soon cut back on such protections in the face of rising crime and popular demands (Kurczewski and Sullivan 2002; Siegelbaum 2002). Similarly, close to 50 percent of citizens in Buenos Aires agreed that there was a need "to put bullets into criminals" (Brinks 2006: 18).

The media for its part plays both a positive and negative role. In several cases, the Chinese media has reported gross violations of due process or unjust results in criminal cases. For instance, in one case, a person was about to be executed for murder when the victim showed up alive and healthy. This led to public demands for reforms in death penalty cases.

But the media just as often has a negative effect on criminal justice. As elsewhere, the media portrays violent crime as much more prevalent than it actually is, leading to public calls to strike hard at crime (Pettit 2002; Beale 2003). In fact, China's crime rate remains relatively low compared with other countries (Bakken 2005). A good example of the negative effect of the media is the Liu Yong case, where a former NPC delegate depicted as a mafia boss was originally sentenced to death. On appeal, he produced a number of former police officers who testified that witnesses against him had been tortured. Liu then received a reduced sentence. The public uproar that ensued led to a retrial by the Supreme People's Court and Liu's swift execution.

None of this suggests that there is no hope for criminals or the defense bar. There have been positive developments, including reforms in death penalty cases. All appeals must now be heard in open court, and death sentences must be reviewed by the Supreme Court after it withdrew the right of review it had delegated to provincial courts earlier. These reforms appear to have reduced the number of executions. According to one report, death penalties decreased 10 percent within six months after the changes took effect.[3] Central review also revealed that different provinces were applying different thresholds for the death penalty for crimes such as drug trafficking. As a result, there are now efforts to unify the standards.

Other positive changes include a trend toward lighter punishments (Zhu 2007: 215); elimination of a form of administrative detention known as custody and repatriation, in which a petition by activist lawyers and academics played an important role (Hand 2007; Pils 2007); and proposed amendments to the criminal law, which may address some of the day-to-day problems of lawyers. There are also ongoing debates regarding the elimination or reform of the most heavily criticized form of administrative detention known as education through labor.

Such changes are the result of the foreign and domestic criticism of the many extreme failures of the criminal justice system, the increasing difficulty of finding lawyers willing to take on criminal cases (Zhu 2007: 354), and the general trend toward rule of law and professionalism of the legal complex, though defense lawyers and academics have surely played a role.

The challenges of cause lawyering in lower-middle income China

Socio-economic cases involving pension and other welfare claims, labor disputes, land takings and environmental issues present problems for developing countries because institutions are weak and the state lacks the financial resources to address what are in essence economic issues. Dispute resolution of socio-economic cases in China has been characterized by: (i) notably less effective resolution than in commercial cases; (ii) a trend toward dejudicialization, in contrast to the judicialization of commercial disputes: that is, the government has steered socio-economic disputes away from the courts toward other mechanisms such as administrative reconsideration, mediation, arbitration, public hearings and the political process more generally, when it became apparent that the courts lacked the resources, competence and stature to provide effective relief in such cases (Peerenboom 2008); (iii) a sharp rise in mass-plaintiff suits; (iv) a dramatic rise in letters, petitions, and social protests in response to the inability of the courts and other mechanisms to address adequately citizen demands and expectations; (v) a reallocation of resources toward the least well-off members of society as part of a government effort to contain social instability and create a harmonious society, combined with a simultaneous increase in targeted repression of potential sources of instability, including political dissidents, NGOs and activist lawyers.

Many socio-economic cases involve multiple plaintiffs. There were 538,941 multi-party suits in 2004, up by 9.5% from 2003 (Peerenboom and He 2008). Land takings, labor disputes and welfare claims are three of the major types of multi-party suits. In 2004 alone, Shanghai Intermediate Court No. 1 handled 21 multi-plaintiff cases, of which 17 involved land takings, relocations and real estate disputes. In 2006, there were 14,000 collective labor disputes, involving 350,000 workers, or just over half of the total number of workers involved in labor disputes.

Many of these disputes result in mass protests. The number of mass protests rose rapidly, from 58,000 in 2003 to over 74,000 in 2004. Such protests, many of them violent, are a threat to social stability, and thus to sustained economic growth. According to the state media, over 1,800 police were injured and 23 killed during protests in just the first nine months of 2005.

The courts have developed a number of techniques to reduce public pressure, including breaking the plaintiffs up into smaller groups, emphasizing conciliation, and providing a spokesperson to meet with, and to explain the legal aspects of the case to, the plaintiffs and the media in the hopes of encouraging settlement or even withdrawal of the suit. Some courts also try to pacify the protesters through legal means, for example by providing accelerated procedures to access government-sponsored funds. Basic-level courts also often work closely with higher-level courts and other government entities through the Social Stability Maintenance Offices.

In a related move, in 2006, the All China Lawyers Association issued guidelines that seek to reach a balance between social order and the protection of

citizens and their lawyers in exercising their rights.[4] The guidelines remind lawyers to act in accordance with their professional responsibilities. Lawyers should encourage parties and witnesses to tell the whole truth and not conceal or distort facts; they should avoid falsifying evidence; they should refuse manifestly unreasonable demands from parties; they should not encourage parties to interfere with the work of government organ agencies; they should accurately represent the facts in discussions with the media and refrain from paying journalists to cover their side of the story. And they should report to and accept the supervision of the bar association. On the other hand, bar associations shall promptly report instances of interference with lawyers lawfully carrying out their duties to the authorities, and press the authorities to take appropriate measures to uphold the rights of lawyers. Where necessary, local bar associations may enlist support from the national bar association.

More generally, the government has closed down or put pressure on some NGOs and law firms that have become too active in pressing for change. Some individual lawyers have been arrested, experienced intimidation, or had their licenses revoked in the process of representing criminal defendants or citizens challenging government decisions to requisition their land for development purposes and the amount of compensation provided (Fu 2006). Meanwhile citizens seeking to protect their property rights, uphold environmental regulations, or challenge government actions have been beaten by thugs and gangs, sometimes with links to the local government, or detained for their efforts (CECC 2004).

Conclusion

The development of the legal profession in China is largely a modernization story of economic development. The legal profession and the legal complex more broadly have become an important force for legal reforms aimed at implementing rule of law. However, lawyers have not been, and are not likely to emerge as, a significant force for political liberalism and liberal democracy. Lawyers, like citizens generally, are divided in their political beliefs. As elsewhere, many of them are politically conservative, have a vested interest in political stability and the current system, or are simply too busy making a living to worry about political issues. Furthermore, the ability of the legal profession to play a leading role in political reforms is limited by the newness of the legal profession and its relatively low status, and divergent interests within the profession itself and even within the much-smaller subset of the bar that focuses on activist lawyering. Other obstacles include the nature of, and political constraints imposed on, civil society and the media; popular attitudes that support the harsh treatment of criminals; the lack of a constitutional court; institutional weaknesses and resource constraints that hinder cause lawyering; an East Asian Model of development that limits opportunities for political lawyering; and the continued strength of the ruling regime and its ability to control any group that threatens socio-political stability.

Nevertheless, all is not lost. The legal profession is playing a role in moderating state power and protecting individual rights. A more rights-conscious civil society is emerging. There are pressures to increase the independence and authority of the judiciary, and to ratify the International Convention on Civil and Political Rights, which China has signed. The number of legally trained people working in state agencies is increasing. There are now high-ranking CCP members and government officials with a legal background.

Moreover, although liberalism is not the dominant view within the legal profession or society, the experiences of other countries show that it need not be for lawyers to play a positive role in promoting greater protection of human rights and other reforms that provide the foundation for a more liberal polity in the future (Halliday et al. 2007). The legal profession is rarely unified in its political orientation, much less in agreement over strategy and timing. Rather, activist lawyers join with others of like mind, be they judges, prosecutors, legislators, government officials or private citizens, on particular issues as opportunities arise.

Lawyers in China can also take some comfort from the experiences of other successful Asian countries. Hong Kong, Singapore, Japan, South Korea and Taiwan are all economically wealthy countries that have legal systems that rank well on rule of law indices and protect rights reasonably well. To be sure, not all are democracies, much less liberal democracies. In that sense, they do not fit the classical straight-line version of modernization theory where all states end up with Euro-American liberal democracy. While that may frustrate and disappoint liberals (Mann 2007), the range of normatively acceptable polities is broader than the Euro-American variants of liberal democracy. Moreover, the role of the legal system in promoting political liberalism has varied in these countries, with lawyers playing a more active role in political reforms in South Korea and Taiwan than in Hong Kong,[5] Singapore or Japan.

There are also other differences, some of which bode well for political reforms, others that do not. In Taiwan, an ethnic divide led to the formation of opposition parties, with a central role for lawyers, many of whom were local Taiwanese. Ethnic divisions will not play the same role in China, given the overwhelming majority of Hans and the diversity of minorities. In any event, the central leadership in China will not tolerate the rise of real opposition parties, whatever their nature.

Further, South Korea and Taiwan were dependent on international support, and the support of the U.S. China is not. If anything, China has become increasingly confident as its economy has grown. Witness, for instance, the State Council's 2005 White Paper on Democracy, which made it abundantly clear that China would democratize on its own terms and according to its own schedule. International pressure has influenced the course of China's reforms to some extent in many areas, but for the most part reforms have been driven by domestic factors. That said, the domestic demand for deeper legal and political reforms is growing.

In South Korea, Taiwan and Japan, the legal profession was severely constrained by a low pass rate for the national exam. As a consequence, lawyers were more privileged economically than they are in China, and not inclined to engage in political activism (Ginsburg 2007). The larger number of Chinese lawyers, many of whom are unable to find work in the more profitable commercial law sector, provides a large pool of potential activist lawyers. Courts in China are also handling a wide range of controversial cases, providing opportunities for cause lawyering, and a limited opening for political lawyering (Hand 2007; Peerenboom and He 2008). In addition, the administrative law system, for all of its faults, results in a significantly higher percentage of plaintiff victories than in Japan, South Korea or Taiwan (Peerenboom and He 2008). Given the many shortcomings in the legal system, there is much for the legal profession to do in promoting rule of law and ensuring social justice. Over time, its influence may grow in other areas as well.

Notes

1 In my view, Alford rightfully cautions against the assumption that the legal profession will emerge as a significant force for liberal democracy in China. However, the legal profession and the legal complex as a whole do appear to be more aligned in their support for some form of rule of law, even if not the thick liberal democratic version of rule of law that is dominant in advanced Western states and increasingly put forth by Western powers, international donor agencies, and the UN as a global model for all countries. In addition to the arguments herein, see Peerenboom (2002). The UN, International Bar Association and American Bar Association have all recently initiated major new initiatives to promote rule of law, political liberalism, human rights and democracy. See, for example, the 2005 Summit resolution of member states, GA/RES/60/1, para. 134 (b); the IBA's Global Campaign to Promote the Rule of Law, www.ibanet.org/humanrights/Rule_of_Law_Movement.cfm; the ABA's Global Rule of Law Movement, www.abanet.org/rol/ and the ABA's World Justice Project, www.abanet.org/wjp/. In distinguishing political liberalism from (liberal) democracy, Halliday and Liu emphasize fundamental freedoms, in particular civil and political rights and rights of person, rather than elections.
2 China ranked 71st out of 163 countries on the Corruption Perception Index. See Transparency International (2007: 327). See also Yang (2004).
3 Supreme People's Court Targets "Judicial Injustice", www.legalinfo.gov.cn/english/News/2007–07/INFO_20070707.htm.
4 Guidance Notice of the All-China Lawyers Association regarding Lawyers' Handling of Multi-party Cases, March 20, 2006.
5 In Hong Kong, a faction of the bar has been politically active, particularly from the time Hong Kong was to revert to PRC control. Constant pressure from various sources for democratization, including from a part of the legal profession, will play a role in Beijing's decision, though ultimately that decision will be made primarily based on domestic considerations.

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Chapter 12

Conclusion

How to convert social capital into legal capital and transfer legitimacy across the major practice divide

Yves Dezalay and Bryant G. Garth

The chapters in this book focus on the role of lawyers as symbolic brokers-entrepreneurs—investing and accumulating different forms of social, political and legal capital in order to be efficient merchants of social peace, and providing the full menu of multiple services as go-between but also as translators and mediators. Lawyers convert and invest various forms of capital—including social, economic, intellectual, political—into the law and legal institutions. That is the process that builds the role of lawyers and the rule of law. We ask in this concluding chapter what this kind of empirical approach can say about the emerging role of law in Asia, and in particular in the three largest East Asian economies—China, Japan, and South Korea. As we have noted, Asia, and China and Japan in particular, raise a powerful challenge to the idea that globalization is leading to the development of the rule of law throughout the countries integrated into the global economy.

The belief of many in the rule-of-law community is that law is a form of contagion that can spread from any of a number of bases. As Matthew Stephenson wrote, one way to see this is that reform in one area represents a "Trojan horse" for the legalization of the state and the economy more generally (2000). Many observers hope, for example, reform in the area of commercial law will spread to more recognition of individual civil rights. Reform in the method of legal instruction, or the development of clinics, will teach critical thinking that will lead to more leadership by law graduates in expanding the role of law and lawyers. Or the rise of corporate law firms will expand legal opportunities for individuals and build the autonomy of the courts. Stephenson is skeptical about the likelihood of the spillover effects of one development leading to a transformation in the role of law and lawyers in China.

The assumption of many who explicitly or implicitly adopt the Trojan horse approach is that the rule of law will gradually replace the power of personal relations—guanxi in China. A variation of that same dichotomy that is much the focus of recent literature on Asian law is that of administrative regulation versus the rule of law (Ginsburg 2007). This dichotomy can be seen, for example, in discussions of the role of the Korean or Japanese bureaucracy versus the law and the courts or the role of the Communist Party in China versus law or the courts.

The close relationships between the bureaucracy and business are seen as a hindrance to the development of transparency and regulation of business by law.

Consistent with the orientation of the chapters in this book, we will test our approach here by seeking to examine these dichotomies not in opposition to each other but rather as complementary. We examine the continuing renegotiation of the rate of exchange and division of role that takes place in these Asian countries and elsewhere. The renegotiation involves not only personal relations, the state, and the party, but also relationships between different governing knowledge and different ideologies. Our three chapters on Asia allow us to suggest some lines of inquiry to push the analysis further. The first concern is the extent to which social capital is becoming embedded in the law. The divided Chinese legal profession depicted by Michelson and Peerenboom suggests that the criminal bar remains relatively marginal and for the most part weak in valued capital such as relationships to the Communist Party and the government. The corporate bar has accumulated more status, even if it remains in a situation reminiscent of the colonial bar found in foreign enclaves. The traditional Japanese bar with its commitment to social justice issues and with the prestige that goes with its very small size and prosperity also appears to have built up credibility and valued social capital, but it too is disconnected from politics and the economy. The basic question is the one embedded in the spillover hope: under what circumstances does legitimacy for one part of legal practice transfer to another—in particular from more traditional practice to corporate law, and vice versa?

In South Korea, we see a faster transformation than in the other contexts because of the juxtaposition of a declining legitimacy for the military and authoritarian government and the investment of a relatively prestigious legal profession which included a number of individuals who had championed the victims of military repression. They could present themselves as organic intellectuals of the new social forces emerging with the transition to democracy. They were well positioned to obtain a favorable rate of exchange in the relationship between the representatives of the old regime—the chaebols, economists linked to the United States, and others—and the new groups. They had sufficient ties to the United States to draw on those links and the ideology of empowering civil society and law to promote a non-radical democratic politics with a strong role for lawyers who had been marginalized in the military regime. The circumstances of a political crisis changed the terms quickly and moved lawyers into much stronger positions in the field of state power.

Indonesia represents a similar case worthy of note. Because of its importance in the Cold War, Indonesia, like South Korea, was strongly embedded in the U.S. marketplace of ideas and intellectual exchange. Here, too, economists as technocrats provided an essential part of the original legitimacy of the military's authoritarian regime. Lawyers were mainly outside the government, but they built a role as corporate lawyers serving the investors from abroad who poured money into Indonesia when Suharto opened up the economy. The attraction of raw materials and the divided economy, owned in part by the government and

the military and in part by ethnic Chinese families, provided opportunities for elite lawyers to build a brokering and mediating role. Their elite status and foreign connections also allowed these lawyers to combine their profitable service as corporate lawyers with investment in legal aid and human rights, allowing them to rebuild some of the stature lost during the Cold War and the developmental state. What began in the 1970s and picked up in the 1980s can now emerge a generation later as a taken-for-granted role for lawyers in and especially around state power.

In Japan, in contrast, when the increasingly powerful military asserted itself in the period between World War I and II, the independent bar found a small but highly profitable niche as litigators fortified with legitimacy as moral champions of social justice (Feeley and Miyazawa 2008). Lawyers in Japan had considerable prestige, but the number of lawyers admitted to the bar was very small. The state had relatively little difficulty thwarting efforts to take on new terrain and play a role representing new social groups and interests. In addition, Japan experienced no crisis comparable to what occurred with the transitions to democracy in South Korea and Indonesia—especially in South Korea but also in Indonesia with major violations of human rights to be addressed. Finally, as part of the same limit on expansion, the Japanese corporate bar did not develop in the same way that it did in South Korea and Indonesia. We can surmise that the long pedigrees of the Japanese business interest—the keiretsu groups—linked them directly to the Japanese state bureaucracy and governing party. The existing establishment in Japan was much more cohesive, and that cohesiveness was maintained after World War II. Legitimacy was assured with the continuity of the Emperor on the one hand and electoral democracy on the other. There was no crisis of legitimacy—a discredited authoritarian state, overactive military, etc.—which internationally oriented lawyers could move into and use to build up their role in the field of state power.

In short, there was less of an opportunity for lawyers to make themselves useful as brokers between such interests, and between such interests and international investors—especially since the Japanese economy was relatively closed in much of the period after World War II. Similarly, unlike Indonesia and South Korea, the United States did not invest so much in U.S.-based ideas deemed essential to promote liberal economics and a transition to democracy. In South Korea in particular, there was more of a break in the constitution of the ruling elite. South Korea went from Japanese colonialism to independence and the Korean War, then to a relatively violent military regime. Another feature of South Korea was the number of Korean-Americans who returned both before and after democratization, with many working in the large corporate law firms. When guns and economists were not enough for international credibility, lawyers could speak the international language of democracy and human rights and build U.S.-like institutions to promote those views.

Contrasting the different opportunities presented in South Korea and Japan, therefore, suggests some important differences in what superficially seems to be

the same diffusion of the U.S. model in legal education. Lawyer-activists in Korea came up with the idea of moving the undergraduate system of legal education toward the graduate J.D. model found in the United States. The idea was picked up in Japan, and Japan was the first of the two to adopt this new approach (e.g., Foote 2006; Saito 2006; Saegusa 2009). Despite the creation of some 70 law schools, the system does not appear to have been changed dramatically to date. Bar passage is not as high as reformers had hoped. The reforms are consistent with a business demand for more lawyers and the emergence and rapid growth of the Japanese corporate bar in recent years, but the Japanese bar itself has sought to contain the reforms and maintain its relatively traditional niche. Commentators to date do not deem the reforms a success in changing the position and potential role of lawyers in Japan.

In contrast, when the Korean idea was re-imported back to South Korea after Japan picked it up, it built on a closer connection with the growing position of law and lawyers in the state. Part of the difference is time. We can see in retrospect that South Korean lawyers in the 1980s began to build their position in relation to changes in the state and its international credibility. The passage of time allows the change to get embedded and naturalized. It is not surprising that the cosmopolitan political role for lawyers now seems to be taken more for granted. The new law schools in South Korea are geared to admit and train students who are not just the traditional law students selected because they can do well on an exam that tests mainly memorizing. Such examinations tended to favor lower middle class students driven to succeed. The new schools will select not only on the basis of exams, but also travel, linguistic ability, service to non-governmental organizations (NGOs), and the like—potentially a recognition of the new elite role for lawyers.

Let us turn to the situation of China. As we noted before, the hope of many rule-of-law proponents has been that various reforms or innovations might serve as Trojan horses on behalf of individual rights and the rule of law. What happens in one area will spill over into others, in particular—at some point—the Chinese state. Administrative or party guidance will turn into a more neutral rule of law. Spillover applies directly to the issue of lawyers as brokers, taking advantage of opportunities, especially crisis moments, to make connections that strengthen their own position and provide a new version of state legitimacy. In China, also, there has been some investment in the reform of legal education, including modeling a J.M degree program after the U.S. J.D. degree (Erie 2009) and the introduction of clinical education—again modeled after the United States. It is also indicative—and reminiscent of the early days of the Soochow Law School and its foreign-trained faculty—that the effort, beginning in 2007, to build an American-style law school at Beijing University—seeking in effect to turn Chinese students into U.S. lawyers, has attracted considerable attention inside and outside of China. This effort, however, hardly touches the position of corporate lawyers as outside of the main world of Chinese politics and the state. As elsewhere in Asia, the market in legal education reveals much about the prospects for any kind of spillover from corporate law into state governance.

More generally, the question of the legitimacy of law and lawyers—and the likely spillover across sectors of the profession—is closely connected to the market of legal education. The various reform efforts are therefore of some potential importance for the future. Legal education is one of several important places for the production of the legitimacy of law. It is a place where social capital and political capital can be turned into legitimate legal capital. Corporate law firms provide another potential site for the conversion of capital, but there are problems associated with their social legitimacy.

As noted in Chapter 1, in the United States, the Wall Street law firms late in the nineteenth century and early in the twentieth century built an alliance with elite legal education and the Harvard case method—a way of sorting students for Wall Street practice—to build legitimacy around the role of the corporate lawyer as hired gun for big business. The problem of legitimating that role exists more generally, and it is exacerbated in the south and in particular in Asia.

One problem is that the source of the foreign legal knowledge that is the basic expertise and know-how for multinational corporate practice is far from Asia—centered in elite law schools and corporate law firms in the United States. Asian countries also, with a few exceptions such as India, do not have the benefit of a long period in which social capital converted and accumulated as legal capital. The resultant lack of legitimacy for a foreign-oriented corporate law practice suggests that in countries such as Japan and China, we should not expect much spillover from a burgeoning corporate practice into other sectors of the law—criminal law practice in China in particular, and the litigation practice of most private lawyers in Japan. The challenge is to find ways of building alliances across the basic divisions.

The market of legal education provides a potential forum to bring together the different sides. Potentially the children of top business executives can connect to the children of the clergy; old money can connect to new money and emerging social groups; moral entrepreneurs can link with profit maximizers; and local know-who can connect to imported know-how. In many countries of the world, accordingly, the faculty of law is a meeting place and melting pot to produce what Bourdieu termed the degree of the bourgeoisie (Bourdieu 1998). It is the place where, historically, the old elite represented by the aristocracy and feudalism could be converted into the advisers and conflict managers for emerging states and multinational enterprises. Those who brought social capital, as noted by Dahrendorf (1969) about Germany, may specialize in social skills such as drinking and dueling; while those lacking social endowments could over invest in learning and the production of law, making for a division of labor bringing legitimacy and stature to the profession.

In countries of the north and south, furthermore, law schools became breeding grounds for politics, with law then providing the neutral language for talking politics and a common habitus capable of harmonizing very different backgrounds and strengths. Examples of the impact of the faculties of law on the political

rules of the game include the role of fraternities in the Philippines (Dezalay and Garth 2010), the so-called camarillos in Mexico (Lomnitz and Salazar 2002), and the Inns of Court in London. And the latter example relates to the further bond that often cements relationships among elites in the south—meeting and learning a further common language and network through study abroad in world capitals such as Paris, at the Inns of Court, Oxford or Cambridge, or at an elite U.S. law school.

Short-term reforms in legal education are both shaped and limited by the particular histories of each country. The contrast between Japan and South Korea, for example, definitely stems from the different histories of the two countries, and in particular the opportunity that the transition to democracy provided for the corporate and traditional sides of the law in South Korea to join forces on behalf of a larger role for law and lawyers in the state and in the economy. In Japan, in contrast, the demand for legal education reform came mainly from business and business lawyers, with the traditional bar and its allies holding on to the role of a very small profession relatively marginal in the state but highly profitable and prestigious.

Spillover effects, however, may occur over a long period—even after a generation or more—or occur through crises that reshift the values of different forms of capital. The law schools over time may develop a distance from the divisions present at their formation and also develop some autonomy from the corporate lawyers and businesses behind the reforms. The reforms in Japan offer some possibility for this kind of development, with the resultant spillover across the boundaries of the traditional bar and the corporate bar. It is more difficult to imagine such a spillover effect in the foreseeable future in China.

The question we return to is the possibility of spillover—the conversion of social capital into legal capital and then the transfer of legitimacy from one sector of legal practice to another. The conversion process of social into legal capital has so far been relatively limited in China, as both Michelson and Peerenboom observe, especially when compared with South Korea, and in Japan the success of the bar has come from small numbers and a distance from politics and the economy. Lawyer brokers, in contrast, took particular advantage of the changing political situation in South Korea, and they built on the small and elite profession which was a legacy of Japanese colonialism. Indonesia, as we also noted above, provides a particularly good example of the kind of process that we saw in South Korea. The reverse of the process—the direct conversion of economic or financial capital into legal capital—does not proceed in the same manner. That process, even if successful, may take a generation. The reason for the delay and indirection of the process is that law is a symbolic good. As such, it must be legitimated before it can be exploited. Legitimation comes when there is a collective belief that legal authority will provide something of value to the holders of economic and political power. As noted above, that may take some time in places where law was not much connected to the state and economy—and not much involved in the relationship between the two.

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