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Introduction—The Legal Complex in Struggles for Political Liberalism

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FIGHTS FOR POLITICAL liberalism are not dead. Nations that have never sought or accomplished a liberal political society are constrained or inspired to do so by international financial and governance institutions, international NGOs, and geopolitically influential states (Elster, Offe and Preuss, 1998). Nations that have advanced towards and then retreated from political liberalism are pressed to regain lost ground (Miller, 2003; Schmitter, 1995). Nations that have recently shifted from authoritarian to liberal political systems are encouraged to lock in the transition through institutions and constitutions (Ackerman, 1999; Ahdieh, 1997; Ahn, 1998; Gross, 2004). And nations that seemed to be mature democracies are being encouraged to recover diminished freedoms in the face of terrorism and domestic conflict.

Across the world political liberalism is being fought for, consolidated and defended. In reaction to formerly one-party or developmental states (eg, Indonesia, Taiwan, South Korea), 'Big Man' authoritarian regimes (eg, Kenya), former and current communist regimes in central and eastern Europe and Asia (eg, China), and former military dictatorships in Latin America (eg, Brazil, Chile and Argentina), internal and external sponsors of change are vigorously advocating a liberal model of politics. Everywhere, it seems, the fate of political liberalism is at stake.

It is well known that the foundations of these politics were laid down in the eighteenth and nineteenth centuries by European states and in North America. It is less well known that lawyers frequently marched at the vanguard of these movements towards political liberalism. Historical and sociological studies demonstrate that legal professions often were active builders of the institutions of liberal politics. In a variety of ways, legal professions sought the moderation of state power via judicial independence, the creation and mobilisation of a politically engaged civil society, and the vesting of rights in subjects as citizens who would be protected by judiciaries (Bell, 1994; Bell, 1997; Halliday and Karpik, 1997b; Karpik,

1998b) However, it is also clear that lawyers were both very particular kinds of liberals, for they defined their causes narrowly, and conditional liberals, because on notable occasions they failed altogether to pursue the liberal agenda (Ledford, 1996; Ledford, 1997).

Historical research on lawyers and political liberalism stimulates a wider question of major theoretical and pragmatic importance. Is the fate of political liberalism in the contemporary world also intertwined with the politics of lawyers? Put more directly, do legal professions influence the viability of political liberalism in circumstances significantly different from their historical precursors? These differences are of three kinds. First, times have changed. New conditions have emerged such as the interdependency of nation states, the growth of national and international media, and the expansion of civil society within and across countries. Second and third generation rights of political, social and economic citizenship now are institutionalised in global norms alongside the core first generation rights of civil citizenship. Secondly, legal occupations have changed. Expanding markets demand larger numbers of more sophisticated private lawyers; expanding rights attract more professional proponents; the judicialisation of politics pushes courts into the centre of the political stage; the legal academy has grown in size, stature and visibility. Law is expected to shoulder a heavy carrying capacity in the domestic politics at least of established liberal political regimes. Thirdly, the scope of lawyers' engagement with politics potentially reaches now to the full diversity of countries with markedly different histories, cultures, legal traditions and politics from their limited range of western precursors.

Moreover, it becomes increasingly clear that nation states cannot be assigned to qualitatively different categories of transitional or established democracies as if those political conditions exist in separate spheres. Countries on a path towards political liberalism, those well-established on that path, and those that have fallen off the path are confronted alike by old and new challenges of national security, by the power of executive agencies and administrative states, by threats to civil society and basic legal freedoms by overweening states or frightened publics. The global North and South, former metropolitan societies and their colonies, countries at the top and bottom of economic development scales face challenges to political liberalism that are more similar than their other differences might predict.

This book tests for the contemporary world the proposition that lawyers are active agents in the construction of liberal political regimes. It examines the efficacy of a framework that postulates that legal professions not only orient themselves to a market for their services but can frequently be seen in the forefront of actors seeking to institutionalise political liberalism. On the basis of some 16 case studies from across the world, we present four principal findings. First, a theoretical link between lawyers and political liberalism has wide-ranging application over radically diverse situations in

Asia and the Middle East, North and South America, and Europe. Secondly, it is not the politics of lawyers alone but the politics of a 'legal complex' of legally-trained occupations, centred on lawyers and judges, that drives advances or retreats from political liberalism. Thirdly, political liberalism itself is everywhere in play, in countries with established democracies and those without liberal politics. Everywhere the problem manifests itself in one form or another. It is either being constructed or defended; it is rising or falling. Fourthly, it is clear that the legal arena is now a central field of struggle over the shape of political power. As a result the legal complex, centred on the nexus of the bar and bench, is a strategic actor in transitions towards or away from political liberalism. Our cases present mounting evidence that the theory of lawyers and politics has universal application.

I. LAWYERS, POLITICS AND THE LEGAL COMPLEX

After decades of neglect, scholarship on lawyers and politics has expanded exponentially in the past 15 years. Significant turns towards lawyers' political activism have occurred with two parallel lines of sociolegal scholarship that now overlap and creatively engage each other—cause lawyering (Scheingold and Sarat, 2004) and political lawyering (Halliday and Karpik, 2001). Cause lawyering treats lawyers' advocacy for rights of all kinds [Karpik].[1] We focus on political lawyering—the capacity and willingness of legal professions to mobilise on behalf of political liberalism itself.

(a) Political Lawyering[2]

Beginning in the early 1990s, our political lawyering project confronted a central problematic: what is the relationship between political liberalism itself and first generation rights? In confronting this problem we studied collective action by the bar as a whole rather than dissident fractions within it; we focused on the institutional structures of liberalism (the moderate state, civil society) rather than on one or another civil, social or economic right. We took a comparative-historical approach to the foundations of liberalism in four western countries only—England, France, Germany and the US (Halliday and Karpik, 1997).

Our findings may be summarised in five propositions (Halliday and Karpik, 2001), all of which amplify the central thesis that in Europe and North America legal professions, acting collectively, have been periodic but by no means consistent agents of political liberalism.

[1] References to chapters in this volume are signified by square brackets around the names of authors.

[2] This section draws heavily on TC Halliday and L Karpik, 'Political Lawyering' in NJ Smelser and PB Baltes (eds), *International Encyclopedia of Social and Behavioral Sciences* (Oxford, Elsevier, 2001) 11673.

(i) *The autonomy of the judiciary and the autonomy of the bar are the principal conditions for the fight of lawyers on behalf of a moderate state.*

The fight by lawyers for judicial autonomy, as an element of the moderate state, can be found in France during the eighteenth century (Bell, 1994; Karpik, 1988; Karpik, 1998a; Karpik, 1998b), in Germany during the nineteeth century (Rueschemeyer, 1997), and in the United States in the nineteenth and twentieth centuries (Halliday and Carruthers, 1997). Both as a condition of this fight and as a distinguishing feature of liberal political society, the autonomy of lawyers, and their ability to mobilise collectively on behalf of the judiciary, suggest a critical interdependence between the bar and bench for the rise of political liberalism in disparate historical contexts.

(ii) *Historically, lawyers' collective defence of civil rights does not extend to struggles in favour of economic and social rights.* With surprising continuity across history and nation, the collective action of the bar as a collectivity has been strongly defined by a 'pure' or core rights model where the 'negative rights' of freedoms of the person, speech, movement, property and association are defended against potentially oppressive states. As a collectivity, lawyers have not been champions of second and third generation rights (eg, education, welfare, voting), which is why cause lawyers who do advocate those rights more often than not are deviants on the periphery of the profession.

(iii) *The forms of lawyers' political action are principally reactive and rely on the authority of the public or civil society.* Compared to social movements, lawyers conventionally react *against* arbitrary or illegal actions by governments and repudiations of individual rights, often through trials that become *causes célèbres* (Pue, 1997).

(iv) *Courts can become the central locus of political battles around individual civil and political rights.*

(v) *Lawyers have specific resources to become* porte pârole *(spokesmen) on behalf of civil society and to act in favour of political liberalism.*

While this first wave of studies established instances of constructive relationships between legal professions and the emergence of political liberalism, it left many questions unasked, or at least, unanswered. Not least, while these findings demonstrate that the relationship between the bar and judiciary is often decisive, they neither elaborated the variability or contingency of those relationships, nor took account of burgeoning diversity of legal occupations in successive centuries.

(b) Courts as Political Actors

In earlier centuries, the alliance between the bar and bench frequently was decisive in the capacity to mobilise on behalf of political liberalism. In the twentieth century judiciaries themselves moved much closer to centre political stage and scholarly observers followed this shift from a variety of angles.

Since World War II, two developments have made the political dimension of the judiciary obvious and imposed great political responsibilities on the judiciary. The appeals of constitutional government and the limited state have taken off around the world. Although neither of these is uniquely a post-war idea,[3] nevertheless experience with fascism and communism generated immense enthusiasm for both. These ideas have in turn spawned adoptions of bills or charters of rights that provide explicit protections of individual rights, expressly limit governmental powers, and establish judicial review—the power of the courts to declare acts of the other branches unconstitutional.

In recent years countries of the European Union have adopted bills of rights. In Europe transnational courts, such as the European Court of Human Rights, have emerged as powerful policy makers that engender compliance (Zorn and Winkle, 2001). The European Court of Justice has become a significant architect in the development of a 'United Europe'. What is undisputed is that the new Europe is being constructed in part by courts (Stone Sweet, 2000; Weiler, 1991).

The idea of constitutionalism, and its incipient doctrine of a moderate state, has spread far beyond Europe and North America. Since the mid-twentieth century, it has exerted increasingly powerful appeal, in the new nations freeing themselves from colonialism, in Eastern Europe and the former Soviet Union after the fall of communism, and in the new democratisation in Latin America. Even authoritarian regimes and illiberal democracies as diverse as China and Egypt have felt unable to resist this powerful diffusion of an institutional model that on its face appears subversive to their own regimes (Ginsburg and Moustafa, forthcoming). Motives for adopting these provisions vary widely (Hirschl, 2004; O'Donnell, 1997; Epp 1998; Epstein, Knight, and Shvetsova, 2001; Moustafa, 2003), as does their strength (Ginsburg, 2003), but none dispute their importance.

The recognition of courts as political actors has stimulated multiple strains of scholarship that do not always intersect. The juridification of politics in Europe and around the world has been illuminated by research on 'political jurisprudence', a term coined by Martin Shapiro some 40 years ago, which designates studies that explore the political salience of the judicial process and the political dimensions of judicial behaviour (Tate

[3] In pre-war Europe some countries had adopted a version of judicial review advanced by Hans Kelsen, but after the War Germany, Austria, and France and other countries embraced it in even stronger form (Stone Sweet, 2000).

and Vallinder, 1997; Guarnieri and Pederzoli, 2002; Charles, 1998). More recently a new institutionalism is exploring the political role of judiciaries. Much of this work builds on the classic study of judicial independence by Landes and Posner (1975) which argues that judicial independence depends upon a political system with competitive political parties. While some argued that judiciaries are regularly captured and used by the dominant political regime (Dahl, 1957), other research demonstrates the significance of courts in contemporary state formation that emphasises constitutionalism, limited government and basic rights (Hilbink, 2007; Epstein, Knight and Shvetsova, 2001).

Inevitably these concerns lead to judicial review (Shapiro and Stone Sweet, 2002), a mechanism which deliberately thrusts courts into a political role. Contemporary studies of constitutionalism in Asia, Latin America, and Africa, the establishment of 'basic rights' in Israel, Canada, Australia, Europe and elsewhere, all acknowledge a political role for judiciaries (Barzilai, 2002; Ginsburg and Ganzorig, 1996; Scheppele, 2003). As a consequence students of comparative politics have finally come to discover the importance of courts (Ginsburg, 2002; Shapiro and Sweet, 2002; Stone Sweet, 2000) [Barzilai; Ginsburg; Perez Perdomo; Couso] and, more generally, the importance of law and legal institutions for political stability and political success (Van Caenegem, 1987; O'Donnell, 2001; North and Weingast, 1987; Lijhpart, 1977; Gerring et al, 2004; Wibbels, 2005).

Perhaps for the first time, therefore, in the past decade scholars of political jurisprudence, comparative politics and historical sociology have conjoined to take law, constitutionalism and judiciaries seriously. The principles of limited government, separation of powers and judicial review have transformed judiciaries, especially in the modern administrative state, into major players in many national—and international—political arenas.

Yet this burgeoning demonstration of ubiquitous constitutionalism, the juridification of politics and the integral significance of law for political stability and change have proceeded quite independently of historical and sociological research on the politics of lawyers and legal professions despite the confluence of their mobilisation to similar ends—a moderate state. In this volume we weave these strands together by positioning legal professions and courts as a putative collective actor on behalf of political liberalism.

(c) The Legal Complex

To capture the structure and dynamics of lawyers, judges and the diversity of legal occupations requires a new concept. We stipulate the system of

relations among legally-trained occupations which mobilise on a particular issue as the 'legal complex'. At the core of the legal complex are lawyers[4] and judges. However, the legal complex may extend to all legally-trained personnel in a society who undertake legal work, including prosecutors and civil servants involved in the administration of justice. The legal complex, through its conflicts and coalitions, we postulate, presents configurations of relations that can fight for political liberalism. What is at stake is to explain (1) how the legal complex mobilises, and (2) when it acts on behalf of political liberalism. More ambitiously, a theory should press towards explaining (3) how political liberalism and the legal complex over the *longue durée* mutually transform each other.

Defining the bounds of the legal complex is not easy because legally-trained professionals find many niches in a society. In several countries the vitality of human rights NGOs depends upon their leadership by lawyers and thus the boundary between lawyers within the legal complex and lawyers at the head of other civil society groups is blurred [Brinks; Moustafa]. Lawyers themselves may drift in and out of politics, claiming a legal mantle while working for clients but shedding that mantle when representing voters. In several countries there is substantial mobility within the legal complex across its various segments—from private practice to government positions, from the judiciary back into private practice, from academia to the judiciary. In some countries (eg Italy) legal academics often maintain concomitantly a private practice [Guarnieri]; in others the legal academy for decades was staffed by legal practitioners [Couso; Perez Perdomo].

Something of this complexity can be observed from the relationships between lawyers and judges. In an earlier phase of this research collaboration (Halliday and Karpik, 1997b) we observed several historical instances where a unified profession collectively supported and defended independence of judiciaries from state control, thereby enabling judiciaries better to emerge as autonomous institutions and thereby moderate state power, strengthen civil society and champion core citizenship rights. Where lawyers were divided, weak or distanced from the judiciary as an institution, or when their loyalties were devoted to other centres of power in a society, then judiciaries remained undeveloped as independent institutions or their independence more easily was eroded.

A careful examination of heterogeneous cases demonstrates considerable variation in this core relationship. At one extreme, relations may be *unengaged,* where lawyers and judges are indifferent to each other

[4] The definition of lawyers varies markedly across legal cultures: Abel and Lewis, 1989; 1988a; 1988b. Lawyers can variously embrace practising private lawyers, all lawyers who are licensed to practise law or appear in courts, or all persons with legal training. We consider private lawyers and particular advocates as the core of political lawyering.

and occupy separate worlds (cf Ledford, 1997 on the Weimar Republic, Germany). Relations may be *cooperative,* as Karpik (1998b) and Bell (1997) observe in their observations of mutual support between French *avocats* and *Parlements,* or Halliday (1987) notes more equivocally in the 'moral economy of judicial control' that existed between US lawyers and the judiciary. Relations can be *oppositional*, for this is the posture that an activist profession takes against a corrupt or captured or oppressive judiciary. Relations may be *detached* on juridical grounds, such as the posture taken by Chilean judges to maintain their non-engagement from 'politics' during Pinochet's military rule (Couso, 2005; Hilbink, 1999) [Couso]. Often relations will be more complex, whether *cross-cutting* (alliances of one faction of lawyers and judges align against another faction of lawyers and judges) or *multiplex* (they are cooperative on some issues and oppositional on others). We hypothesise that the more unified this nexus of the legal complex, the more cooperative or mutually supporting their orientations towards or against political liberalism, the more efficacy they will exhibit in moving politics to or from a liberal form.

Almost completely absent from earlier discussions of lawyers, judiciaries, and political liberalism has been the legal academy. In the twentieth century the legal academy emerged as a substantial institution on its own (Dezalay and Garth, 2002). From the late nineteenth century the modern law school attached to the university was born. Throughout the world, and particularly following World War II, universities expanded in size and scope and law became a core feature of the curriculum. Law schools, law libraries and law reviews all became features of modern legal education. Especially where law professors are full-time they have developed a strong professional identity linked to university life and not (or not only) the legal profession. This change of legal education into an academic discipline has been accompanied by the transformation of the law review which quickly emerged as a standard scholarly forum which allowed legal scholars to communicate with each other and reinforce scholarly identity.

Thus, in many places throughout the world, an independent legal professoriate emerged, dependent neither upon the bench nor the bar, but ensconced as part of higher education. But although, on one side, law professors are located in a university and committed to the culture of higher education, on the other side their educational and scholarly mission is tinged with professional training and continued association with the 'law' and the legal profession. The development of the legal training in the university further strengthened law's grounding in civil society; legal education enjoys the independence that is typically accorded to universities by the state. In this new configuration, law professors must certainly be counted as integral components of the modern legal complex. In the politics of the legal complex, therefore, we are alert to the question—does the

law professoriate view itself collectively as a trustee of autonomous law, political freedom and the moderate state? If so, does it act collectively to pursue these aims? And when is it a potential ally with lawyers and civil society? Evidence from several case studies [Venezuela, Hong Kong, China] finds that legal scholars are integral to battles over political liberalism and serve as prospective allies for other segments of the legal complex (Davis and Trebilcock, 2001; Garth, 2003; Trubek and Galanter, 1974).

Prosecutors sit uneasily within the legal complex. A state prosecution service is a potential weapon in the armoury of a repressive state. In one respect, some attenuation of relations between prosecutors and police is an indicator of state moderation, a process currently underway in China where prosecutors putatively are being made more accountable to judges (Halliday and Liu, 2007). Since prosecutors are often complicit in the abuse of rights, however, several countries in Latin America have instituted the possibility of private prosecutors—representatives of victims who may press forward cases that public prosecutors neglect or disdain, as Brinks (this volume) describes in Brazil and Argentina. Prosecutors are variably integrated into bar associations which in turn will be likely to affect their responsiveness to professional norms rather than state ideology.

The complex relations that can be found between lawyers and judges are also paralleled across the entire legal complex. It may exhibit deep cleavages among its segments: private lawyers and academics on one side of the divide and judges and prosecutors on another. Or it may exhibit cross-cutting alliances where a coalition of lawyers, judges and prosecutors may ally against political liberalism while another coalition mobilises collectively on its behalf. The theoretical challenge of our collective enterprise is to discover which patterns of alignments are conducive to the enhancement of a liberal polity.

It must be emphasised that the legal complex is not a static configuration of actors that is exhaustive of all legal occupations acting collectively on all issues. The legal complex constitutes the cluster of legally-trained occupations who act collectively on specific issues because that is the way actors define their own commitment. As a result, comparisons of different legal complexes are made according to (1) the different issues that organise them, and (2) the different ways in which they deal with the 'same' issue. It follows that the legal complex may be differently constituted across different issues at the same moment in time or on the same issue over time. As a result, a given country may be classified in one period as an example of lawyers-only mobilising for political liberalism, at another period as an instance of the legal complex mobilising as a whole, and at yet another as a situation in which lawyers and the legal complex failed to mobilise. The dynamism in the concept and its explanatory value lie precisely in this variability across issues, sites and time.

II. POLITICAL LIBERALISM

The concept of political liberalism is notoriously ambiguous and much contested (Voeglin, 1974). We employ a definition that has proved to be sufficiently flexible and open to withstand shifts in the meaning of the term in diverse countries over several centuries and yet is sufficiently precise for it to be meaningful in empirical inquiry (Halliday and Karpik, 1997a).[5]

First, and fundamentally, liberal political society offers and protects *basic legal freedoms*.[6] These reside in the core rights of citizenship although they often extend to residents and aliens who are not citizens. It must be underlined that we deliberately adopt a restrictive concept of citizenship rights that corresponds to those rights in the earlier European liberal polities that precede economic and social rights and those political rights concerned with suffrage. Basic legal freedoms rest upon the granting of legal personality to a citizen and the protection of all residents within a sovereign legal jurisdiction. These freedoms include the institutionalisation of juridical rights (eg, rights to due process in law, habeas corpus, legal representation and access to justice, freedom from arbitrary arrest, torture, death), which are sometimes construed as negative rights, and the protection of foundational political freedoms (eg, speech, faith, travel, association) excluding suffrage, and property rights, which are sometimes construed as positive rights.

Secondly, political liberalism encompasses a *moderate state*. The state embraces many elements, ranging from legislatures, executive agencies to courts and the military. A moderate state is distinguished by its internal and systematic fragmentation of power, such that there is ordered or constitutionally-structured contestation among elements of the state. Most importantly for our purposes, the moderate state depends upon some autonomy of the judiciary, at the very least to the degree that it can exert restraint over other elements of the state or advance claims to rights or justice.[7] State power may also be moderated by a balance of local and national political

[5] While the details have varied from situation to situation, historians and historical sociologists have found the definition we adopt meaningful in 17th and 18th century England and France, 19th and early 20th century Germany, and 20th century US: DA Bell, 'Barristers, Politics, and the Failure of Civil Society in Old Regime France', KF Ledford, 'Lawyers and the Limits of Liberalism: the German Bar in the Weimar Republic', WW Pue, 'Lawyers and Political Liberalism in Eighteenth- and Nineteenth-Century England', and D Rueschemeyer, 'State, Capitalism, and the Organization of Legal Counsel: Examining an Extreme Case-the Prussian Bar, 1700–1914' all in in TC Halliday and L Karpik (eds), *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (Oxford, Oxford University Press, 1997).

[6] We shall refer interchangeably to basic legal freedoms and core legal rights.

[7] Simpson (1989) helpfully elaborates the concept of judicial independence by distinguishing between negative elements of formal independence, such as freedoms of judges from dismissal and similar pressures, and positive elements whereby judiciaries restrain executive power and champion values of the rule of law and open justice. See also Brinks (2006).

authority (Taylor, 1990). It is critical to distinguish between moderation that may result from state self-restraint and moderation that results from a fracturing and counter-balancing of powers. We do not exclude the former but emphasise the latter.

Thirdly, a liberal polity requires *civil society*. Civil society may be constituted both as a web of associations that are dependent on the state for neither their formation nor functioning (Tocqueville [1848] 1969) and as a public sphere, a realm of discourse where reason is mobilised, citizens express opinions, and ideas encounter each other and inform political understandings (Habermas, 1989). Fundamental to civil society is the notion of an autonomous sphere that stands outside and prior to the state and may act collectively to hold it accountable.[8] Civil society fills the middle ground between the state and tribe or family, yet it is not unduly penetrated or domesticated by either. Among elements of civil society we include formal groups, such as the media, unions, religious groups, business associations, professions, intellectuals, and human rights groups, and networks of connection among members of civil society that might potentially be mobilised collectively. Yet, following Weber (1978), it is well to distinguish between civil society groups that constitute themselves independently of the state but which are far removed from prospects for mobilisation on behalf of political freedom (eg, chess clubs, model aeroplane clubs, music societies) and those that are more proximate to engagement with power and law because their organising *raisons d'être* overlap with issues of freedom and the state.

Historically, there is a contingent relationship between basic legal freedoms, on the one hand, and the moderate state and civil society, on the other. Basic legal freedoms arguably are achieved through moderation of state power and mobilisation of civil society as a realm of power. Yet even here we must exercise care because a civil society cannot emerge without freedoms of association and speech, just as juridical rights will not be meaningfully implemented if rights of legal representation are not effectively enabled by relatively autonomous courts.

It must be said emphatically that we offer a *legal* concept of political liberalism rather than a *suffrage*-based model of liberalism.[9,10] Our concept

[8] Yet it must also be said that civil society is often, perhaps always, partially constituted by the state: Weber, 1978.

[9] Historically, of course, almost all societies that institutionalise the three elements of political liberalism we have identified also eventually institute a universal suffrage and contested electoral politics.

[10] We distinguish between *political liberalism*, which we define narrowly in terms of legal institutions, the legal rights inherent in civil citizenship, and the engagement of lawyers in civil society, and *democracy,* with its emphasis on political rights of suffrage, the contest of political parties, and representation. While we would argue that the legal dimensions of political

of political liberalism does not include political suffrage or universal voting, for four reasons. First, the inclusion of suffrage tends to overwhelm the other basic freedoms which then get ignored. Secondly, the foundational freedoms of speech and association take us a long way towards suffrage and effectively prefigure it. Thirdly, suffrage itself is nearly universal and does not enable us to distinguish among totalitarian, authoritarian, illiberal and liberal democratic societies. Fourthly, in the past, as now, the state tends to treat individual core civil rights in a different way from universal suffrage. The latter it may readily permit, under various constraints, while sharply limiting the former. In fact, it is even conceivable that a society may display most characteristics of political liberalism, *without* universal suffrage or democracy, as Jones (this volume) finds in Hong Kong. In this respect, then, 'political liberalism' is 'political' both in the sense that it is not 'economic' liberalism nor reducible to it; and in the sense that it relates to the restraint, distribution and control of power in a society.

III. ORIENTATIONS TOWARDS BASIC LEGAL FREEDOMS

The case studies reveal that lawyers and the legal complex display four principal orientations towards basic legal freedoms. First, there are many occasions on which the legal complex as a whole presses to obtain, maintain or defend political liberalism. Secondly, there are occasions where lawyers mobilise on behalf of basic legal freedoms, but not judges or other members of the legal complex (eg, Japan during much of the twentieth century, China at present). Thirdly, there are moments where a normally liberal legal complex is inhibited or selectively constrained from mobilising to defend political liberalism (eg, Israel during the Intifadas, US after 9/11, Argentina and Brazil in the face of police killings). And, fourthly, there are instances where the overwhelming majority of lawyers, judges and the legal complex fail to mobilise, indeed, are openly hostile to basic legal freedoms (eg, Pinochet's Chile, Mussolini's Italy, Japan in the 1930s).

(a) The Legal Complex Mobilises to Fight for Basic Legal Freedoms

Our cases reveal many instances when the legal complex—lawyers and judges, sometimes with academics and prosecutors—has fought for basic legal freedoms. In some historical situations that fight led to apparently

liberalism are significant for contested democracies, studies of the latter often underplay the former: GA O'Donnell, 'Democracy, Law and Comparative Politics' (2001) 36 *Studies in Comparative International Development* 7; G Sartori, 'How Far Can Free Government Travel?' in L Diamond and MF Plattner (eds), *The Global Divergence of Democracies* (Baltimore; London, Johns Hopkins University Press, 2001).

robust regimes of political liberalism (eg, Korea, Taiwan, Spain). In other cases the victories may be short-lived or battles that will need to be fought over and again (Egypt, Hong Kong). At other moments and settings the legal complex appears to be fighting a losing battle, certainly in the short term (Venezuela, Hong Kong) or possibly in the longer term (Egypt). However, historical trajectories never proceed in a straight line. The robustness we observe in Korea, Taiwan and Spain may be vulnerable to shocks we do not yet imagine. In countries where the trajectory is trending downwards at present (eg, Venezuela, Egypt and Hong Kong) a change in domestic or international circumstances may reverse the slide away from political liberalism.

(i) Korea and Taiwan

Korea and Taiwan represent two dramatic instances of regime transformations. Movements against Korea's military dictatorship during the 1980s proceeded in parallel social and legal tracks that progressively intertwined. While students and unions led protests in the streets, the law also stirred, notably in the creation of a Constitutional Court that opened up a new high level forum for litigation around rights, criminal defence and administrative law. This was joined by a new administrative court. A rump group of human rights lawyers, who had cut their teeth in defence of prisoners of political repression, in 1985 formed a clandestine society that became formalised as the *Minbyeon* in 1987 as an alternative bar association for activist lawyers. The statist-oriented legal profession opened up to more entrants and to a growing private market for lawyers who found 'dissident' activities more appealing than commercial practice. Between the lawyers and the courts a synergy developed through legal strategies for change, based on litigation, that complemented political strategies by an energised civil society. Even the formerly conservative prosecutors sought to recast themselves in the liberal opening by successfully pressing corruption charges again officials and politicians. Legal academics injected their ideas into the widening opening of liberalism. In the face of corrupted political parties, media and legal system, this re-equilibrated legal complex, in tandem with a vibrant civil society, 'had a profound impact on Korea's liberal transformation' [Ginsburg].

In Taiwan Ginsburg shows that insurgency arose from Taiwanese ethnic lawyers who were excluded from the Kuomingtang's one-party rule. In 1970 they formed a society with judges and academics to advance liberal ideas, including freedom of speech and assembly. Some of their leaders obtained notoriety by defending arrested activists and opposition figures against treason charges, relying on doctrines of human rights. Compared to Korea, however, the Taiwanese lawyer-activists pursued not a litigation campaign but channelled their efforts into political parties. A constitutional court,

the Council of Grand Justices, began flexing its hitherto flaccid muscles in a series of increasingly stronger administrative rulings, thereby signalling that law might limit administrative discretion, even of a state unaccustomed to checks on its bureaucratic powers. A rapidly expanding legal profession provided manpower for a mobilisation of law. Yet success—the integration of Taiwanese lawyers into Taiwanese politics, the transition to political liberalism, and the establishment of multi-party democracy—channelled lawyers as much into party politics as towards a distinctively lawyerly politics that operates on a plane of legalism and constitutionalism. In either case, like their Korean counterparts, the Taiwanese legal complex both facilitated and constituted the institutional accomplishment of political liberalism over a period of three decades.

(ii) Egypt

From the late nineteenth century until Nasser's military coup in 1952, Moustafa argues that the prestigious Egyptian legal profession had been a bastion of liberal values. Although the regime weakened the influence of the bar and impaired the independence of the courts, it changed course in the 1970s in order to attract foreign investment with the establishment of a Supreme Constitutional Court in 1979 to protect property rights and to review and interpret legislation. This new arena for legal mobilisation provided just the forum required by a progressive number of rights lawyers who led or allied with burgeoning rights organisations in Egypt. From the late 1980s, activist lawyers and rights groups brought a succession of cases to the Supreme Constitutional Court which thereby authorised previously banned opposition political parties, ruled laws unconstitutional and restrained administrative discretion. In addition to enabling some modest expansion of pre-political freedoms, including striking down criminal law provisions that limited freedom of the press, the legal complex fought hard to strengthen due process rights , and to limit recurrent detention and torture. On these hardest of issues the legal complex lost more often than it won. Still, there were notable victories and the legal complex pressured the government relentlessly through a series of highly publicised legal actions. But eventually the regime, stung too many times, struck back against activist judges, an assertive court and their allies in civil society to narrow the liberal opening.

(iii) Hong Kong

In contrast to the preceding cases, Hong Kong neither follows the same trajectory nor is oriented to same end. A peculiar configuration of the legal complex became implicated in the construction of a rule of law regime by colonial administrators, but *without* political democracy. Jones (this

volume) shows that the emergence of Hong Kong as a rule of law society occurs not until the 1970s, when the British government, confronted with a double crisis of security—the threat of Communist China on its doorstep and internal disturbances from alienated residents—directed its Hong Kong administration to embark on a double strategy: establishing a new 'social agenda' of public services and building a rule of law society. Much of the legal complex became implicated in the legal side of this legitimation project. Uniquely, most of the construction and defence of this rule of law regime came not from the private bar but from the state's in-house legal advisors, its legally-trained civil servants who had become practised at defending basic rights from abrogation by exploitative business elites. Government officials found allies in an increasingly activist bar, most notably indigenous Hong Kong Chinese lawyers who found some influential expatriate fellow travellers. The court system was strengthened and its autonomy substantially assured. In the twilight of its colonial rule, the British even introduced a Bill of Rights.

(iv) Spain

In Franco's Spain, however, only fragments of the legal complex mobilised within a broader social movement led by Catholic intellectuals and clandestine party activists. Progressive, dissident judges formed an illegal association in 1971, *Justicia Democratica* (JD), to pursue a two-fold strategy: to limit government abuses of power in particular instances and to conceive of ways in which a judiciary might be constituted in a liberal-legal democracy. JD mounted a critique of the judiciary's complicity with the regime and called not only for judicial independence from the regime, but for full jurisdiction to be restored to courts, for the restriction or abolition of military and special courts, and for wide-ranging reforms in the recruitment of judges and the organisation of the judiciary. JD dared to criticise directly those many judges who were 'complicit in the regime's arbitrariness'. With parallel support from activist lawyers, JD sharply criticised infringements on rights and the articulation of a just rights regime. It declaimed the lack of procedural protections in the penal and military justice codes, assaults on free speech and repressive activities in universities, and the criminalisation of political associations. In their place, it advocated a state whose guiding principle would be 'respect for the dignity, integrity and liberty of the human person', and that would guarantee citizens 'rights to liberty of expression, correspondence, abode, assembly and association, security, habeas corpus, due process nationality, and petition', in a word, the basic legal freedoms [Hilbink].

In two cases fractions of the legal complex also mobilised against the erosion of basic legal freedoms. In Hong Kong the handover of the colony to China in 1997 embedded a rule of law regime inside an authoritar-

ian state. The Beijing-appointed Tung Chee-hwa administration sought repeatedly to strengthen the primacy of the National People's Congress in Beijing over Hong Kong courts, to change the Basic Law so as to limit freedom of speech (eg, Falun Gong), to ride rough-shod over property rights of the weak in preference for affluent developers, and to restrict public demonstrations. Jones shows that a rule-of-law oriented legal complex, led by vocal barristers, fought in the courts and for the courts, most importantly the Court of Final Appeal. To a substantial degree it has succeeded, compelling the administration to withdraw amendments to the Basic Law, and upholding practices of freedom of speech and association, not to mention property rights of the weak. When legal strategies failed, lawyers took to the streets.

(v) Venezuela

In certain respects, Venezuela has followed a similar trajectory. An increasing liberalism in political society over the later twentieth century was partially constituted by a large private bar, increasingly robust courts and a lively civil society. Since Chavez was elected in 1998, however, the legal complex has been in retreat, fighting an increasingly desperate battle to protect its earlier advances. The Supreme Tribunal has been packed with Chavez supporters and, with its supervisory powers, has purged approximately one-third of the country's (c 500) judges. Judges now know that they rule against the government at their peril. For all that some judges heroically are speaking out in the hope of galvanising public opinion through the media. The legal profession, while more vigorous and populous than at any time in Venezuela's history, has had minimal collective impact. Instead individual lawyers have pressed cases to nullify acts of government or protect rights in the hope of using the court as a stage from which to constrain the government. When these have failed they have turned to international forums, such as the Inter-American Commission on Human Rights, but their effects are limited within Venezuela. Judges and lawyers have been joined by some vocal eminent jurists, including law school deans, who again have sought to mobilise civil society through speeches carried in the media. Thus a rearguard action is being fought by a loosely aligned number of lawyers, judges and academics, albeit not through their formal associations and not by any coordinated mechanism. Critical for all these efforts has been a civil society that has been responsive to leadership by figures in the legal complex through newspapers, radio and television.

(vi) Modes of Mobilisation in the Legal Complex

The legal complex mobilised in diverse ways in each of these widely disparate situations. In each case a core of private lawyers and judges, seldom exhaustive of either profession, constituted the central axis of the legal complex alliance. But frequently other legal occupations joined

the alliance: in Korea lawyers and judges were joined by academics and, later, prosecutors; in Taiwan, lawyers and judges obtained support from outspoken academics; in Spain lawyers and judges were joined by prosecutors; in Egypt lawyers and judges got occasional support from academics; in Hong Kong barristers and lawyer civil servants allied with judges; and in Venezuela lawyers and judges were defended by eminent law deans.

Curiously, in no case was each segment of the legal complex internally unified in its fight for basic legal freedoms. We observe at least two patterns. In the best case, the bar or bench is led by an advance guard, or substantial proportion of activist lawyers, but its remaining members are either passive or minimally resistant. The spearhead of the legal complex serves as a more rights-oriented and activist faction in a generally liberalised legal complex. In the worst case, a fault line runs through the segments of the legal complex, pitting, for instance, pro-rule-of-law Hong Kong lawyers, legal academics and officials against pro-Beijing opponents, or pro-Chavez lawyers and judges against legal liberals in Venezuela. As that balance of power shifts it can be expected that the willingness and capacity of the legal complex to advocate basic rights will also shift.

The struggle for basic legal freedoms in all these cases is inseparable from capacities given to lawyers by courts. Frequently the opening for political liberalism is associated with a restructuring of the judiciary. In Korea, Taiwan, Egypt and Hong Kong, newly established courts—constitutional courts, administrative courts, courts of final appeal—or activated courts gave lawyers a stage on which to play, opening up the prospect of mutual alliances between courts that needed legitimation and lawyers who required a forum for the airing and correcting of grievances. Into these alternative centres of state power poured lawyers intent on establishing negative and positive legal rights, including freedoms of speech and association, as well as property rights.

As Spain exemplifies positively and Egypt negatively, the programme for a progressive legal complex also extends to the breadth of jurisdiction of courts, most notably, the abolition of special and military courts and the return of all cases to the general court system. The manifesto of *Judicia Democratica* likewise reflects a broader recognition by lawyer/judge reformers—that judges must be recruited and court systems organised in ways that affirm judicial competence, independence of the executive and ruling parties, and conditions of advancement that do not rely on 'loyalty' tests. As Moustafa argues for Egypt, and we also observe in fascist Italy, a liberal legal complex ultimately cannot tolerate an 'insulated liberalism' where courts strike Faustian bargains with the state by ruling Emergency State Security Courts constitutional and limiting appeals from special and military courts to regular courts. The struggle for political liberalism thereby directs itself to delegitimate a parallel legal system erected by authoritarian states (cf Italy, Spain, Egypt).

(vii) Civil Society

In every country in which the legal complex mobilised it gained impetus from the renaissance of civil society just as lawyers, in particular, stimulated the resurgence of civic groups, often through positions of leadership. In Egypt, defence of the media gave activist lawyers' groups a significant ally. If the Supreme Constitutional Court enabled political life, it did so because of a synergy forged between the Court, which accepted test cases, and the civil society it protected. NGOs, lawyers, the media and other civil society groups in turn legitimised and protected the Court. The most dramatic effort of this coalition to undergird civil society can be seen in a proposed law (153/1999) that would have sharply limited the number and independence of civil society groups. Into this fray stepped a national NGO coalition of more than 100 organisations that led demonstrations, hunger strikes and litigation, leading to the eventual decision of the Supreme Constitutional Court to strike down the legislation [Moustafa]. In Spain, in the early days of insurgent organisation by *Justicia Democratica,* the Roman Catholic Church provided meeting places and clandestine facilities for printing publications. Liberal Catholic clergy and intellectuals joined hands with prospective reformers. In Korea unions provided the springboard for many lawyers who later widened their activism with support from labour. In Hong Kong bar leaders could often be found at the front of public demonstrations which got sympathetic coverage from the media. Lawyers articulated for the public its grievances and aspirations. In Venezuela, too, the anti-Chavez media amplified protests by legal actors against attacks on judges and the erosion of rights.

International civil society fortified internal alliances between the legal complex and domestic civil society. The vibrance of the human rights and NGO sector within Egypt depended heavily on the resources from international NGOs. European governments and NGOs provided most of the funding for Egyptian rights organisations, and well-known transnational NGOs, such as Human Rights Watch, Amnesty International and Lawyers' Committee for Human Rights, publicised human rights violations and litigation campaigns in the international media. In Spain, domestic alliances crossed the frontier to the rest of Europe, embracing foreign media and even the Council of Europe. In Hong Kong, legal liberalism obtained international protection by keeping the PRC and NPC at bay because Beijing feared being labelled as a foe of the rule of law in a business community that demanded it. Condemnations from the international media made them a potent ally for Hong Kong groups against the PRC.

Nevertheless, civil society or publics are not inevitable allies of activist lawyers. In the US the infringements on rights by the Bush Administration did not stir most of the public to protest. In Venezuela, presumably, a majority of the public supports Chavez' encroachments on core legal rights.

But in most of the cases where a cross-legal complex coalition mobilised for basic legal freedoms it appears that it received support from vocal civil rights groups and, at least, acquiescence from publics.

International influence took a geopolitical form for Korea and Taiwan. Both sheltered under a US security umbrella. Their leading scholars, lawyers and judges increasingly turned to the US for advanced education and sometimes employment. A US presence both fostered a culture of rights, especially after the Cold War, and US connections multiplied as both countries opened up their civil societies and markets to US counterparts. Geopolitics might also account for the degree of governmental support by the US for reformist movements in Egypt and Hong Kong, and certainly tacit support for resistance to Chavez' dismantling of liberal legal institutions in Venezuela.

(viii) Politics and the Market

Relationships between the legal complex and politics are more equivocal. Many movements spearheaded by the legal complex pressed for the expansion of prepolitical freedoms (eg, Egypt, Korea, Taiwan, Hong Kong, Spain) such as freedom of speech and association. In several cases essentially legal action by the legal complex crossed over to political activism through the founding or leadership of political parties (eg, Taiwan, Korea, Hong Kong) or political movements. In Hong Kong, for instance, several of the leading barristers in the vanguard of rule of law activism became leaders of a new political party, the Civic Party, in 2005. In the US Abel argues that the federal judiciary responded to legal actions and amicus briefs substantially along party lines. Yet the Spanish case indicates that while the members of the legal complex were drawn from a heterogeneous scattering of backgrounds (Communist, socialist, Catalun nationalists, liberal democrats), they found common ideological ground on concepts of 'mission', 'duty', and 'social responsibility'. In short, they found a basis of commonality that offered a *professional* solidarity that transcended partisan politics. In Korea corruption cases against politicians brought by prosecutors brought the support of the legal complex for a purification of politics through law.

We can also observe that market conditions substantially influence the ability and willingness of the legal complex to mobilise. On the one side, political leaders solicitous of foreign investment, increased trade and economic expansion may believe that a regime that secures property rights and facilitates orderly commerce must be institutionalised. Hilbink maintains that the liberalisation momentum in Spain benefited from Franco's decision to open up the Spanish economy to Europe. This led to the infusion of ideas and support for dissident groups from outside Spain. It also led to a call by technocratic economists, who themselves might be socially conservative, for a modernised legal system that enabled a thriving market.

Similarly, after Nasser's death a liberal economic turn in Egypt premised economic expansion on the need for more secure property rights, good law and courts to enforce it. Bar leaders in Hong Kong knew that alarms would go off among the business and political elites if Hong Kong's legal system was impugned as a predictable place to do business. On the other hand, Moustafa (Egypt) and Perez-Perdomo (Venezuela) maintain that an expanding market can support a prestigious and growing private bar which concomitantly is less dependent on the state for its livelihood and has more resources to commit to mobilisation. But care is necessary lest this case be overstated. In some countries a substantial proportion of commercial lawyers do not actively support a mobilised legal complex, although they may acquiesce in its activities. They are either too busy making money or nervous about political disturbances which may threaten their current economic benefits.

(b) Lawyers Mobilise for Basic Legal Freedoms

In several cases (China 2002–6; US 2002–5, Japan 1886–1920s, Japan 1980s–2005) lawyers mobilise without judges. That is, the core alliance of the legal complex is broken. Lawyers may from lack of support by judges to assistance from legal academics and civil society.

In China, the Communist Party (CCP) tightly controls political power and fiercely resists any threats to its one-party state, despite its protestations to the contrary (State Council White Paper, 2005). The judiciary is treated as an administrative arm of the Party-state, although the government finds itself in the contradictory situation of wanting the legal certainty and governance advantages of an effective system of commercial and criminal law (Peerenboom, 2002), while simultaneously ensuring that it does not lose its capacity for arbitrary interventions in particular cases or general interventions if a far-off autonomy should threaten Party rule. The legal profession confronts an 'iron triangle' of police, prosecutors and judges whose tight collusion to 'strike hard' at crime has been contemptuous of lawyers for most of the Communist era.

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

Yet there are subterranean stirrings by many lawyers. Under cover of official control, lawyers across China engaged in criminal defence are beginning to see themselves as a nascent professional community with a potential for collective action. Enabled by an electronic infrastructure, the ACLA internet forum, lawyers are wrestling with the core of an ideology that involves all three components of political liberalism. Almost universally they seek a re-equilibration of power among the agencies of justice so that courts can check the power of prosecutors and police. They are insistent on the rights of lawyers effectively to defend detainees, to meet suspects privately, to collect evidence, and to be exempt from prosecution themselves. They demand the abolition of extended detention without trial, widespread confession by torture, and sentencing before trial. Not least many advocate the autonomy of lawyers' groups themselves. So far they have had limited support from judges. In this procedural approach to liberalism, progressive lawyers receive significant support from the most vocal legal academics who variously draft new laws of criminal procedure, make public pronouncements, and seek to lead public opinion [Halliday and Liu].

In Japan, too, over a much longer period, Feeley and Miyazawa show that from the 1880s, lawyers mobilised on behalf of basic legal freedoms: defence of labour and party leaders; challenges to illegal land seizures; human rights protection; establishment of a jury trial system; and environmental defence. A stronger project can be found in lawyers' efforts to buttress not only the autonomy but also the strength of the judiciary vis-à-vis the state administrative apparatus. From the beginning, the bar supported a professionalised judiciary, but its long-time deference to the state has been much more difficult to change. A highly-qualified but essentially passive judiciary has been reluctant to use its powers of judicial review, slow to allow litigation by citizens against state agencies, and all too ready to bow to government interests [Feeley and Miyazawa]. Lawyers have fought for a larger judiciary, more responsive to citizens and needs of the market, while judges have resisted reform proposals of all sorts, including an expansion of the judiciary.

(i) Modes of Mobilisation

How is this segmented mobilisation by the legal complex to be explained? On the one side, private lawyers have been infused with liberal values. Feeley and Miyazawa state that the origins of legal modernisation following the Meiji Restoration in 1868 institutionalised the path to modernity by adopting some bulwarks of legal liberalism—adoption of a constitution (1884/1889), a civil code (1890) and the legal institutions of courts, prosecutors and a bar. This forceful push towards modernisation combined an enormously powerful state administration with a specialised but not

independent judiciary and a tiny bar, supported by private law schools. For the first time public law modestly constrained bureaucratic arbitrariness and heavy-handedness and the foundations were laid of a legal complex upon which might be erected effective institutions of political liberalism. Despite its limited size, the bar adopted 'an anti-government spirit' from which came periodic resistance to infringements on basic legal freedoms. In China's long history an independent legal profession never existed except for a brief honeymoon in major cities during the Republican period (1911–49) and slight opening in the mid-1950s. It is only since the late 1970s that a private bar has emerged, and only in the last decade that it has exploded in size. In recent years large numbers of lawyers have seized upon an ideology of the rule of law. Their increased exposure to international law, UN covenants and foreign media, and their disgruntlement with obvious injustices in contemporary China, together with their capacity now to join forces via the internet, combine to produce a China-wide network of practitioners who advocate basic legal freedoms.

On the other side, the lawyers face either unresponsive or resistant judiciaries. Japan's very conservative judiciary maintained a loyalty and deference to the state apparatus. Close alliances between the bar and bench never developed as lawyers were anchored in the market and governed by their autonomous associations and judges were bound to the state. Each occupied separate social and legal spheres. China's judiciary shows signs of emerging from its historic role of being an arm of state administration. Increasingly the judiciary is professionalising. A greater proportion of judges have legal training and the proportion of judges who are former military officers is declining. The Criminal Procedure Law of 1996 sought to weaken the power of police and prosecutors over judges in criminal cases. And there is some attenuation of direct Party interventions in particular cases. But the judiciary remains subject to generalised and occasionally quite interventionist Party and official influence. There are few signs yet, although it is one plausible scenario, of a professionalised judiciary differentiated from political control or market influence that is sufficiently aligned with the rule of law ideals of lawyers that it is a potential partner in a mobilised legal complex.

In the aftermath of 9/11, US lawyers also mobilised but in the face of obduracy from the bench, argues Abel. The President claimed executive powers to detain hundreds of domestic suspects indefinitely without access to counsel or co urts, to inter prisoners from outside the US in sites that are not subject to the jurisdiction of US courts, and to abrogate international standards of human rights, such as the Geneva Conventions. The executive further claimed the right to try suspected Al Qaeda members or supporters by military commissions, using that well-trodden path of repressive governments to remove so-called security cases to special courts where protections were minimal or absent.

Lawyers and law professors, in alliance with parts of civil society, took up the cause fairly quickly. In one of many public pronouncements, the American Bar Association urged Congress in 2002 to ensure that suspects were presumed innocent, that courts would require proof beyond a reasonable doubt, and that judicial review be permitted. In spring 2004 the New York City Bar Association (ABCNY) declared that 'the holding of persons incommunicado in this country … has nothing in common with due process as we know it. … these detentions are alien to America's respect for the rule of law'. Bar associations and human rights groups filed many amicus briefs before federal courts. Formal bar groups were joined by ad hoc groups of lawyers and legal academics. Nearly 300 lawyers wrote an open letter to Bush, Cheney, Rumsfeld, Ashcroft and Congress, charging that the 'most senior lawyers in the Department of Justice, White House, the Department of Defense and the Vice President's office have sought to justify actions that violate the most basic rights of all human beings'. Even some lawyers from within the military joined the resistance. Many law professors also mobilised against the repressive actions of the administration, as did some retired judges.

But the federal judiciary proceeded slowly, inconsistently and inconsequentially on actions concerning habeas corpus, denial of due process and denial of legal representation, not to mention cases on the scope of executive powers. Abel concludes that 'legality has fared poorly' since 9/11 [Abel]. Individual judges have written opinions in favour of legal rights but courts as a whole have not offered protections to citizens or residents or detainees. Four years after 9.11 'the courts had yet to release a single detainee'. Concludes Abel, 'faced with the determined executive and legislature of the world's only superpower, the rest of the legal complex—lawyers, legal academics, professional associations, and judges—can do little to protect political liberalism' [Abel: 47].

(ii) Civil Society

In part lawyers in Japan have been able to mobilise, and lawyers in China are beginning to envisage collective action, because there is support from outside the bar. Japanese lawyers partially constituted the beginnings of a hitherto absent civil society in the first two decades of the twentieth century, aided by a fledgling free press and the founding of voluntary associations. In 1921 activist lawyers, engaged in defending striking shipbuilders, formed themselves into a voluntary association, the Japanese Lawyers' Association for Freedom; a Japan Civil Liberties Union was established in 1946 to defend freedom of speech and other basic rights; a Japan Young Lawyers' Association arose in 1954 to support the new constitution; and in 1961 a group of lawyers formed the Japan Democratic Lawyers' Association, again from an activist impetus. This capacity for organisation and mobilisation

propelled the bar into the leading ranks of a developing civil society in the later 1990s, precipitated by the Hanshin-Awaji earthquake in 1995. When government failed adequately to cope with the crisis, NGOs moved swiftly into the vacuum to provide relief to victims, not least the efforts of the Japan Civil Liberties Union to deal with rights issues. Out of this demonstration of an enabling civil society developed a movement for a liberalisation of laws governing the founding of civil society groups, ultimately realised in the NPO Law (1998), which by 2004 had led to 16,000 new groups, many of which are watchdogs of government agencies, often led by lawyers [Feeley and Miyasawa].

The situation is more complex in China. Civil society is carefully controlled so far as that is possible. Many official social organisations exist but they must be registered with the government and are thereby more readily subject to its control. Yet until recently a substantial grey zone of unregulated civil society has been permitted, including groups of many sorts, often connected by the internet, so long as they have stayed off incendiary topics and showed no signs of mobilising in any manner thought to be a security threat (Thirk, 2007). But lawyers can often count on support from publics, especially peasants, workers and others, who are highly disgruntled with local corruption, abuse by officials and police, and aggrieved by expropriation of what they perceive to be their property rights. Lawyers can act as spokesmen for these publics, presenting one possible outlet for grievances with a glimmer of hope for redress. Lawyers are staking a claim to leadership of a prospective civil society. That society, they say, will be protected by due process of law, citizens will be tried fairly, torture will be abolished, and the right of innocence will be presumed. Often the media, too, offer support for lawyers. Although all forms of media are controlled by the Propaganda Ministry, substantial grey zones of discretion open up in which burgeoning media can build circulation as it airs the grievances of citizens and lawyers who find common cause. In this way the market indirectly assists. Crime and corruption sells papers and advertising. So, too, do social disturbances and official misconduct. Lawyers can appear as heroes even if a deep-seated belief continues to exist among the Chinese that detainees must be guilty and lawyer representation merely excuses the rich and powerful.

In the US, lawyers found some allies in civil society. Eclectic religious and civil rights groups, Unitarians and Quakers, Churches of Christ and Reform Judaism, and the ACLU, submitted amicus briefs in court cases. The International Committee of the Red Cross sought to find 'America's disappeared', secretly interned detainees. In all this, however, the media took their cues from public sentiment for the administration rather than offering lawyers effective support in the struggle to protect rights.

(c) Lawyers Mobilise Selectively

Mobilisation on behalf of basic legal freedoms cannot be assumed, either across time or across freedoms or across attacks on freedoms. We observe several cases where lawyers and judges, with a history of commitment to political liberalism, a robust bar, a moderate state, an active legal complex and a dynamic civil society, nevertheless are inhibited from protecting basic legal freedoms in particular instances. These instances are of two kinds: either a singular moment punctuates an otherwise liberal record; or an enduring threat inhibits a legal complex from extending its habitual liberalism to every issue. In all cases these inhibitions or reservations stem from threats to security—external threats, as in the cases of Israel and the United States, and internal threats, as in the cases of Argentina and Brazil.

(i) Israel, Argentina and Brazil

On many counts, argues Barzilai, Israel can boast a liberal legal complex. Over the last 20 years there have been emerging protections of rights, an expansion of civil society, the growth of NGOs, and some fracturing and balancing of the state's internal elements. Lawyers have championed rights, led fights against corruption, become political entrepreneurs. Yet for Barzilai this is a constrained liberalism. Lawyers, he proposes, influence public discourse and politics not only by what they say when they mobilise, but what they don't say when they choose to remain silent. This silence, while ambiguous in its meaning, amounts to tacit support or acquiescence in the most illiberal policies of the Israeli State and even Supreme Court. Silence can be observed on three issues: the legitimacy of a state as a Jewish republic, the role of Arab-Palestinians in such a state, and national security issues. It is the last of these that is salient to our inquiry. By remaining silent about torture or targeted killings, the wall of separation, the military occupation, discrimination against Arab Israeli citizens, lawyers have hindered the socio-political emergence of liberalism. There are exceptions. Some anti-Zionist Jewish lawyers and some Arab-Palestinian lawyers have chosen to break the silence. But even they operate within the rules of the political game, constrained by legal institutions and strategies, neither reaching to 'political fundamentals' nor 'restructuring state power'. Thus the legal complex talks within a framework of dominant ideologies. It is silent on the hegemony of the Jewish state and national security. And in so doing it is complicit in the retardation of political liberalism in Israel.

Threats to security may also come from within. In Argentina and Brazil, the legal complex confronts fearful publics demanding protection from rampant criminality. Public security agencies have responded with deadly force—an explosion of police homicides. In Sao Paulo, the largest city in democratic Brazil, in 1992 the police killed nearly 1,500 people, 30 people a week. This amounts to about one-quarter of the homicides in the city.

In Buenos Aires the rate was about the same. Yet government prosecutors have been exceedingly reluctant to bring cases against the police, and judges have been equally reluctant to convict.

While the bulk of the legal complex implicitly condones police killings, only a small number of private lawyers mobilise unconventionally on behalf of basic legal freedoms. In several Latin American countries there exists the possibility of private prosecutions—individuals, victims, involved in a crime, can bring a prosecution if they are not satisfied with the state prosecutor. From a careful empirical analysis of hundreds of case files, Brinks shows that when lawyers mobilise on behalf of victims, often in alliance with or through NGOs, and with public support, 'the presence of a private prosecutor dramatically improves the likelihood of a successful prosecution', sometimes by 300 to 400 per cent [Brinks]. In short, lawyers can compel the justice system to live up to its ideals by limited arbitrary police actions if they can patch together the right combination of allies. But in the face of fear of crime those allies are seldom available.

(ii) Explaining Selective Mobilisation

How can we explain these inhibitions or selective disengagement of a normally liberal legal profession or legal complex? Common to them all is a deep-seated threat that precipitates fear—fear of destruction of the state (Israel) or public hysteria over internal or external threats to life and social stability (Argentina, Brazil). But this explanation is scarcely sufficient for there are instances of threat when governments refuse to abrogate their own liberal values. Can part of the explanation be found in the legal complex? Each of these countries has well developed and conventionally liberal bar associations, judiciaries and prosecutorial professions. Yet on these issues they divided or avoided engagement. Two explanations emerge from the case studies. On the one hand, public criticism itself can instil fear in lawyers, prosecutors and judges, or at least sway their readiness to act. Judges are not immune from mass demands for repressive behaviour. Legal actors may be loath to stand apart from a national consensus that gives short shrift to legal protections when confronted with national crises. On the other hand, judiciaries may be insufficiently insulated from the executive, a case that Brinks makes also for prosecutors. When confronted with mass opinion that demands social protection that law seems unable to deliver, they respond by either refusing to protect potential perpetrators and others of their class, race or religion, or acting in conformity with executive and public preferences. Moreover political appointees to the bench are more likely to align themselves with the political authorities that appointed them rather than defend ideals that transcend factional politics. Where promotion within the judiciary is based less on merit and more on conformity to the orientations of senior judges, there too is a powerful disincentive to dissent.

Broader mechanisms are at play in these cases. Argentina and Brazil have variously experienced a 'punctuated liberalism'. Moments of exceptionalism are not unknown. In Argentina and Brazil internal threats of Communism have led to military dictatorships that summarily suspended legal freedoms. What is different in the case of police killings is their coexistence with otherwise liberal orientations by the legal complex. In this sense localised emergencies inhibit mobilisation by legal protectors of basic rights. A similar kind of selective orientation to rights, less temporally punctuated than continual, is found in Israel, argues Barzilai. While the state of Israel grew through the ministrations of lawyers, they colluded from the beginning in its 'massive national endeavours' of confiscation of Palestinian lands after 1948, the creation of a *Jewish* state, and the erection of the state's 'apparatuses of collective violence and national ideology'. The kind of society that resulted, says Barzilai, has maintained illiberal elements: the intrusiveness of religion in a state that seeks simultaneously to be Jewish and Democratic; the intrusion of the state deeply into civil society; the centrality of the military as Israel's most fundamental institution; and the overwhelming of basic rights (eg, freedom of expression, movement, property rights) by national security concerns. In one respect or another, therefore, each of these states has historical precedent for contemporary limits on the scope of legal liberalism.

(iii) Civil Society, Politics and Markets

Lawyers' inhibitions, and those of judges and prosecutors, also are intertwined with civil society and publics. While each of these countries has a robust civil society, primordial social/political/racial/religious fears of Communism, anarchy, war, personal safety or existence of the nation state can temporarily or selectively silence voices that would normally be heard. Brinks shows that publics in Latin America, especially in cities such as Sao Paolo, Salvador and Buenos Aires, register high levels of fear. 'The papers editorialise about the "*ola de inseguridad*" or wave of insecurity; parents complain that their children are not safe in the street; reports of kidnappings and violent crimes make headlines' [Brinks]. In Buenos Aires, close to 50 per cent of citizens agreed that there was a need 'to put bullets into criminals' [Brinks]. These fears are translated into public resistance to protection of rights that would seem to handcuff law enforcement. Civil society becomes a vengeful public. When leaders of civil society, such as lawyers, themselves are silent, that signal is powerful, even more if reinforced by a powerful religious institution. In each case a few civil society groups do refuse to yield to hysteria or fear, but they are usually too few to sway the nation as a whole. Rather, their exceptionalism merely underlines the failure of a conventionally liberal set of legal protections to operate in these particular circumstances.

The danger of political subversion of the legal complex recurs as a threat, ironically, to political liberalism. Political partisanship offers an alternative to a trans-political ideology of legal liberalism. Both Abel and Brinks find for the US, Argentina and Brazil either an ideological affinity between judges and those who appointed them or judges and the current occupants of executive office. Whereas the growth of a substantial market for legal services often stimulates the expansion of a private bar, which in turn multiplies centres of power outside the state, each of the countries with an inhibited liberalism had a strong private bar that served a robust market. This suggests that development of a market may provide a threshold for a minimal critical mass of lawyers able to mobilise against state incursions on rights but even a market-based private profession is no guarantee against national emergencies precipitated by threats to security.

(d) Hostility by the Legal Complex to Basic Legal Freedoms

Lawyers are not only limited liberals, insofar as they seldom cohere around second or third generation rights; they capitulate in notable instances to the waves of illiberalism. In Italy (1920s–30s), Japan (1920s–30s) and Chile (under Pinochet), neither lawyers nor judges fought for basic legal freedoms, even when it was evident they were under dire threat. These are the limiting cases for our theory. Yet it must be observed that in each of these cases, and particularly those of Japan and Chile, on other issues and in earlier and later historical contexts, the legal complex did support political liberalism. The three episodes in our case studies therefore underline the point that mobilisation by the legal complex is to be analysed by particular issues at particular times. Part of the theoretical explanation then becomes to link mobilisation opportunities across time in order to explain why it is that in some circumstances the legal complex may sponsor or at least accede to political liberalism, where at others it will tolerate even abet authoritarianism.

(i) Italy, Japan, Chile

The approaches to World War II offer two instances of fascism and militarism that eclipsed potentially moderating forces. In Italy (Guarnieri, this volume), between 1926 and 1933 Mussolini's regime sought to 'corporatise' the bar by curtailing what autonomy it had, forbidding elections for positions of leadership in local bar councils, and eventually expelling as much as 10 per cent of the 25,000 lawyers in practice who resisted the authoritarian regime. Fascism advanced with neither an active bar nor a judiciary in effective opposition. As Guarnieri observes, authoritarian regimes seldom displace judiciaries but marginalise or co-opt them while transferring more politically sensitive cases to special courts that are politically vetted for

correctness and conformity, as Mussolini did with special courts in Italy. Fascism might have penetrated the judiciary very little, but the price was that the judiciary, in self-protection, maintained a low profile that was not threatening to the regime. Instead 'without openly opposing the regime, [they] tried to insert the Fascist "revolution" into the tradition of the Italian state' [Guarnieri].

Neither did judges nor lawyers effectively impede the drift of Japan into a military government in the mid-1930s.While the bar could boast instances of assertiveness in the 1920s, its protests over the declining respect of government for civil rights and liberties during the 1930s could not halt its eventual cooptation by the state in the later 1930s. Feeley and Miyasawa (this volume) indicate that as early as 1932 the Tokyo Bar Association legitimated its government's foreign adventurism in Manchuria by establishing a Japan–Manchuria Lawyers' Association. And on the brink of war, in 1940 the government pressured lawyers to form a National Federation of Attorneys for the New System as part of its campaign to domesticate civil society and forestall any outbreak of opposition. Indeed with war, the strength of the military in government bypassed the Diet, weakened civil control over the bureaucracy 'virtually eliminated the "rule of law," and further weakened the already feeble institutions of civil society, including the organised bar' [Feeley and Miyasawa]. Neither did resistance spring from a compliant judiciary. Apart from occasional exceptional lawyers who raised their voices in defence of clients during the war, the legal complex was silenced as an advocate of state moderation or defender of core civil rights.

By contrast to Italy's, Japan's and Venezuela's slow drift into authoritarianism and military government, Chile's longstanding democracy was abruptly foreclosed by General Pinochet's military overthrow of the elected Allende government on 11 September 1973. In Pinochet's State of Siege, according to an observer at the time, individual liberties were suspended, the Constitutional Court was dissolved, political opponents could be deprived of citizenship, and thousands were seized, tortured and summarily executed without due process, all this in a long-time democracy. Did the legal complex resist? Couso (this volume) demonstrates just the contrary. Apart from some individual heroic lawyers who defended human rights, the organised bar as a whole remained moribund. The legal academy fared even worse, with right-wing academic supporters of Pinochet actively exposing and then expelling their left-wing colleagues. And from the outset of the military government the judiciary not only capitulated nut aided and abetted the regime. In the first celebratory religious ceremony for the Junta, the Supreme Court attended en masse. While it proclaimed to Chileans and the world that 'in Chile human rights were being respected', its 'complacent attitude towards the abuses of power' was reflected in its resistance to granting large numbers of *habeas corpus* writs filed by families of political

prisoners and its blind eye to the government's parallel tribunals [Couso]. The few judges who dared raise their voices in protest were disciplined and marginalised.

In all these national cases, the thread in common is the imminence of a threat to the integrity of the nation or the security of the state. These threats provide a pretext for military or authoritarian leaders to quash what legal or civil rights exist, to contain, coopt or crush lawyers and judges, and to supercede an ideology of legal protections with countervailing ideologies of nationalism, fascism or imperialism.

(ii) Mobilisation by the Legal Complex

To what extent do dynamics within the legal complex itself contribute to this inability or refusal to mobilise? It must be said that in every case the gradual or sudden slide into political illiberalism did not silence all lawyers, though it heavily muted their voices. Small numbers continued to face, for a time, the threats of the regime, even to their personal safety. We cannot yet explain what distinguished these courageous lawyers from the majority who failed to take a stand or did so ineffectually. But in all cases the collectivities of the bar were quiescent. In all cases (Italy, Japan, Chile) the judiciary offered no moderation of executive power. Ironically, in each country the courts could boast some independence from executive authority but their jurisdictions were severely bounded and in no case had they a tradition of judicial review. In Chile, autonomous courts stayed away from big questions of substantive justice and deferred to positive law, notably Pinochet's edicts and pretence of legality. The imperative structure of the courts, with their dominance by conservative High Court judges, led to a general culture of deference to executive authority by failing to protect fundamental liberties and supporting egregious national security laws. The Chilean courts under Pinochet are one of several cases in which independent courts aided and abetted attacks on political liberalism rather than came to its defence. Courts in several countries showed themselves vulnerable to two kinds of assault: on the one hand, they might be left intact so long as they did not intervene in parallel courts to enforce security laws or overturn statutes or limit administrative discretion; on the other hand, they could be transformed internally through dismissals of dissenting judges, court packing, or even dismantling of troublesome tribunals. In any event, a court suffused with a positivist jurisprudence would not be inclined to hold a government substantively accountable so long as that government could offer some patina of legitimacy for its authoritative pronouncements.

In all cases prosecutors appear to be fused indissolubly with reactionary courts. The involvement of legal academics is more complicated. There was no developed, independent, vocal legal academy in Chile. Legal education

predominantly was a part time enterprise for practitioners. In any case, the left within the university was bitterly divided from the right, which moved to drive its rivals out. Defenders of political liberalism looked in vain for partners in law schools purged of defenders of liberal ideals. In Italy the highly prestigious professoriate adopted legal positivism, which understood law to be neutral and value-free. Such a doctrine, as Couso argues for Chile and Hilbink maintains for Chile and Spain, insulates professors from questions about the substantive merits of statutes and rules from authorised legislative bodies and administrative agencies. Thus professors, like most judges, were able to ride out the fascist period without either adopting fascist ideology or subjecting it to bracing critique. Japanese legal academics scarcely contested the abrogation of rights or intensifying immoderation of the Japanese state in the 1930s.

Since both courts and prosecutors aligned with executive power there was no basis for an alliance across the legal complex between lawyers and their state-employed legal counterparts. But this sharp differentiation within the legal complex mattered little since lawyers as a whole were not inclined or able to resist assaults on the core rights of citizenship.

Deeper historical and sociological roots also help explain these failures to mobilise. In Japan and Italy state-building and modernisation of political regimes were only decades old before the onset of deepening authoritarianism and militarism. In both countries with recent histories of a strong, centralised state, other potential centres of power were customarily deferential to executive authority, a deference that only intensified as threats to security were perceived or manufactured by political leaders. In none of these countries was an institutionalised regime of political liberalism already in place. Chile looks like an exception since Couso shows that presidential power, the national legislature and courts evolved somewhat independently of each other. But their ensuring relations were not governed by a doctrine of the separation of powers. Courts had neither constitutional authority nor inclination to abrogate positive law on the basis of higher order norms of justice.

(iii) Civil Society, Politics, Markets

Moreover, in these countries civil society was either non-existent, underdeveloped or assimilated to politics. From Italy's late unification as a state (1861), 'intermediary groups were distrusted: nothing had to disturb the direct relationship between the citizen and the State' [Guarnieri]. Japan's civil society was deeply distrusted and stunted, despite lawyers' efforts to defend the emergence of political parties, unions and independent groups. And in the case of Chile, one of the strongest institutions in civil society, the Roman Catholic Church, supported the executive rather than defend rights. In all cases, therefore, not only could a civil society not speak for

itself, but it offered no potential ally for a potentially activist bar as existed in Japan.

Paradoxically, politics also had a corrosive effect. In Chile, as in numbers of other Latin countries, lawyers' groups were riven by party politics. Put another way, their lack of autonomy from partisanship in the political system co-existed with a failure to develop a quintessentially professional ideology that transcended party politics. Thus they had no capacity for a unified resistance on the basis of a common legal ideology in defence of basic legal rights. In Italy, and perhaps elsewhere, this impediment also coincided with class politics. Guernieri points out that Italian lawyers were drawn principally from a middle class that overwhelmingly supported Mussolini.

Finally, the market may also have exerted an indirect effect, most notably in Japan. Historically Japanese lawyers have steadfastly resisted the expansion of the legal services market, principally for economic reasons. As a result their bar, while unified and oriented towards the expansion and defence of rights, remained tiny. With little force in itself and limited allies in civil society, it could only resist ineffectually when confronted with the full force of the state.

(e) Summary

Can we conclude that there is a systematic relationship between the legal complex and fights for political liberalism? Table 1.1 shows schematically the preponderant relationships of four orientations by lawyers and the legal complex towards political liberalism across the many episodes analysed in this book.

The findings on mobilisation for a moderate state indicate that except for cases of manifest hostility in extreme circumstances (eg, war, civil war), lawyers and the legal complex generally mobilise for an independent judiciary, often in alliance with the judiciary itself. The legal complex and lawyers similarly mobilise widely for limits on executive power, but with exceptions: in several countries whose professions are normally liberal in orientation, the legal complex or lawyers are reluctant to restrain the executive when faced with internal or external threats to security.

Furthermore, across regions, history, political circumstances and legal culture, we observe repeated instances of the legal complex and lawyers mobilising against breaches of basic legal freedoms of all sorts—against arbitrary arrests, torture, indefinite detention without trial, right to legal representation, state-sponsored killings, arbitrary seizure of private property. But in parallel to the moderate state exceptions occur when an otherwise liberal legal complex tacitly or explicitly supports executive use of torture, indefinite detention, state seizure of family property, and killings in response to widespread public fears about internal disorder or threats to

Table 1.1 Orientations towards Political Liberalism

	Legal Complex Mobilises	Lawyers Mobilise	Selective Mobilisation by Legal Complex	Hostility of Legal Complex
Country Episodes	Korea, 1980s–1990s Taiwan, 1970s–1980s Spain, 1960s–1970s Egypt, 1990s–2000s HK, 1997–2000s HK, 1983–1997 Venezuela, 1998–2006 Uruguay, 1990s	China, 2002–2006 Japan, 1886–1920s Japan, 1980s–2000s U.S., 2002–2005	Israel, 2000 Brazil, 1990s Argentina, 1990s	Japan, 1930s–1945 Italy, 1920s–1945 Chile, 1973–1990
Moderate State				
Independence of judiciary	+	+	+	–
Limits on executive power	+	+	–	–
Basic Legal Freedoms	+	+	–	–
Civil Society				
For autonomy of lawyers & legal complex	+	+	+	–
Freedoms of speech, association	+	+	+	–

This table indicates the associations between the majority of cases in a category of orientation (eg, Lawyers Mobilise) towards a particular goal for which they are fighting.
+ = the mobilisation of actors towards an element of political liberalism
– = the failure to mobilise (ie, a passive stance) or opposition towards an element of political liberalism

domestic security. The extreme cases occur in war and civil war as power is concentrated or seized by political or military leaders who are prepared to jettison all civil rights, at least for a period, on grounds of national defence or national emergency.

Finally, we find a great variety of instances where lawyers and the legal complex push for their own autonomy from executive control. Characteristically, they accompany these claims with campaigns on behalf of basic political and religious rights—freedoms of speech, association and movement. In so doing they lay the foundations of active political life which can be expressed in political opposition movements and ultimately political parties.

Yet the final column of Table 1.1 also shows there are limits to the politics of lawyers and the legal complex. We previously showed that the legal complex seldom mobilises explicitly for social, economic and political rights of suffrage. The empirical evidence of this volume demonstrates moments where lawyers and the rest of the legal complex fail to mobilise against pervasive state repression either because they are coopted or because their dissent is crushed.

IV. THE LEGAL ARENA AS A DOMAIN OF STRUGGLE

Across the world in the last half century the prospect of political liberalism is everywhere in play. For countries that are variously totalitarian or authoritarian, Big Man Regimes or military dictatorships, their leaders must grapple with domestic constituencies that agitate for basic legal freedoms in a global context of advocacy for political liberalism by well-established democracies and international organisations. For countries whose liberalism seems well-entrenched, political leaders confront domestic challenges from the administrative state and international threats to national security. In all cases it is the fundaments of political liberalism—the moderate state, civil society and ultimately basic legal freedoms—that are at stake.

This volume demonstrates that a theory of political liberalism that is linked to the activism of lawyers was not simply a passing, even if foundational, phase in the emergence of western politics. In China and the US, Brazil and Argentina, Hong Kong and Venezuela, Egypt and Israel current fights are underway that reprise those of earlier decades in Korea and Taiwan, Spain and Chile, Japan and Italy. Repeatedly we discover that the fortunes of political liberalism are linked to the activism of lawyers. Often they are in the vanguard, driving for a political opening; frequently they fight a rearguard defence when established rights are threatened. On notable occasions the loss of political liberalism is also accompanied by a failure or inability to mobilise by the bar.

Yet we have shown that the theoretical link between lawyers and political liberalism is incomplete without drawing the legal complex into the explanation. Time and again—and in our cases more often than not—lawyers derive their force not from their collective action alone but from the strength of their mobilisation together with other legal occupations, most notably judges and legal academics. The legal complex has been a critical agent of political transformation, while also constituting it, at key moments in the recent histories of Korea, Taiwan, Spain, Egypt, Italy, Hong Kong, Venezuela and Uruguay. We begin to understand that dynamics within this complex and the various ways it can be structured for political action also factor into explanations of the conditions under which political liberalism will be advanced or retarded.

In sum, the fight for basic legal freedoms involves a collective political actor that hitherto has been observed without being acknowledged. The concept of the 'legal complex' gives expression to this actor. Repeatedly we have seen that the legal arena recurs again and again as a domain of struggle. It is not surprising that legally trained occupations—the various segments of the legal complex—often choose to mobilise for or against basic legal freedoms on grounds that are most proximate to their vocation and with weapons that they have acquired in training and practice. It may be more surprising, however, to discover that states, too, in the last 30 to 40 years also wage political struggles in the legal arena. And when those states resist the construction of political liberalism or seek to undermine and dismantle it, they must engage in the pretence of legality even as they undermine it. In short, even if they lose, illiberal states have no option but to fight on this terrain as well as others.

We do not elaborate here why repressive or would-be repressive states must now paint over repression with a patina of law and legality. We can suppose that the diffusion of global norms from the United Nations and other world organisations has erected a symbolic standard for comportment that all nations find difficult to ignore altogether, if they view themselves, and want to be acknowledged, as legitimate members of the international community (Meyer et al, 1997). Sometimes formal adherence to norms of legality, human rights, citizenship and rule of law may be a deliberate ideological strategy of nation states to satisfy potential allies, protectors or trading partners who insist that defence or trade must proceed hand in hand with greater respect for law and legally-constrained political freedoms. On occasions the movement by state leaders to institutionalise basic legal freedoms can be mandated by international organisations or foreign aid organisations, such as the IMF's and donor refusals to extend further aid to Kenya until it proceeded to multi-party elections. For all these reasons and others, nevertheless, it is plain that political elites in widely dispersed countries in different regions and with different profiles of politics, have in

common a perceived need to resist basic legal freedoms through legality and on legal terrain so far as they can.

This implies for the legal complex that even if it loses battles for the moderate state, the defence of civil society or the defence of basic legal freedoms, it may live to fight again on this same terrain, as the cases of Japanese, Italian and Chilean lawyers well exemplify. By the same token, it offers always to would-be champions of political liberalism the prospect that a politics of liberalism can be fought with a wide variety of legal weapons alongside those other politics of mass mobilisation, suffrage or protest. The leadership of the legal complex sometimes comes from judges, sometimes from private lawyers, sometimes even from prosecutors and government lawyers. Seldom, we have seen, do all the segments of the legal complex unify completely around a coherent position. But occasionally and in diverse circumstances they do.

Yet if struggles for freedom widely recur on legal terrain, even here there are limits. They are set not only by the capacities of the legal complex, but by the intensity of repression a regime is prepared to muster. Some repression simply extinguishes the legal terrain: the brute force of the Cultural Revolution or the repression following Tiananmen Square, Pinochet's first months in the State of Siege or, in attenuated form, the effective abolition of *habeas corpus* by the US following the attacks on the Twin Towers. In these cases there may be no legal recourse at all. Indeed the legal complex itself may be a target.

Nevertheless it must be observed that the overwhelming majority of repressive states cannot themselves tolerate the abandonment of law for very long. In China and Chile, Egypt and Hong Kong, one-party and colonial leaderships sought to build legitimacy by squaring at least some of their repressive actions with law and normalising other actions by legal means.

Most commonly, therefore, the legal complex has at least some degrees of freedom to mobilise in repressive states because political elites are impelled to legitimise domestically or internationally their regimes on legal grounds. They increasingly need some kind of legal system to support expansion of the market economy. Here repressive rulers play a complicated and potentially dangerous game. While they may roll out all the soft strategies of repression, through law and alongside law, various segments of the legal complex, alone or together, may mobilise subversively through law. Moreover, law, while profoundly domestic, never is entirely domestic. It retains juridical concepts that span frontiers and it draws upon claims to universality that are embodied in jurisprudential traditions and global institutions. To legitimate their repression on legal grounds, therefore, political elites risk exposing themselves to the erosion of their repression also on legal grounds. A similar logic applies in apparently established liberal regimes that invoke emergency powers in times of crisis. To escape from the

constraints of legality for a short time nevertheless confirms the centrality of legality in normal times. The deviation from basic legal freedoms is measured against a set of normative criteria well institutionalised in law and politics. In this case, too, therefore, fragments of the legal complex have an opening to close the gap between a lapsed government's practices and the core foundations of political liberalism.

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