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LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION

EDITED BY YVES DEZALAY AND BRYANT G. GARTH

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Yves Dezalay and Bryant G. Garth

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Lawyers and the Rule of Law in an Era of Globalization

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

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Chapter 1

Introduction

Lawyers, law, and society

Yves Dezalay and Bryant G. Garth

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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