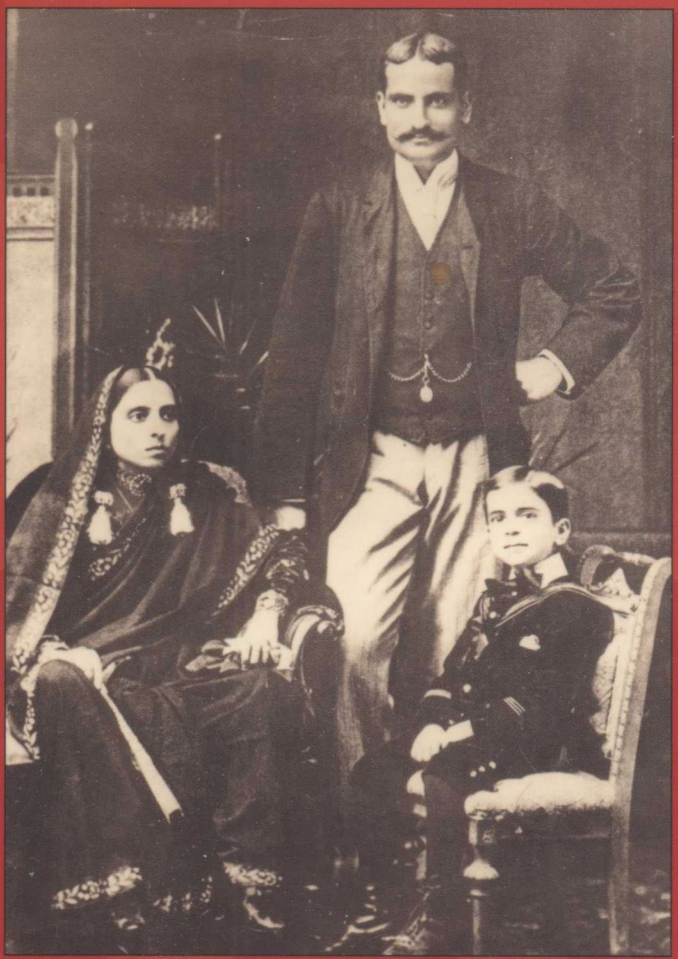
LAWYERS in the SHADOW of EMPIRE

Asian Legal REVIVALS



YVES DEZALAY and BRYANT G. GARTH

Asian Legal Revivals

Lawyers in the Shadow of Empire

YVES DEZALAY AND
BRYANT G. GARTH

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Contents

CHAPTER ONE

Introduction: Studying Law and Lawyers in Asia

The Role of Law in Asia

Discussions of the role of law and lawyers in Asia often start with some defensiveness (e.g., Ginsburg 2007; Ohnesorge 2003). The threshold question for many is whether the Asian state or the Asian economy does or does not have some cultural affinity with "Western" law, whether some version of the "rule of law" is necessary or inevitable in the region, or whether there is instead some competing "Asian model" of governance and regulation that may indeed triumph over what the West has produced. Scholars in the early 1990s made much of the idea that there was a Confucian model of development that was simply inconsistent with the Weberian model of law and state associated with Europe and the United States (e.g., Jones 1994). Prime ministers of rapidly growing Asian economies trumpeted Asian values in opposition to the individual rights consciousness of Western democracies. The World Bank at one point commissioned a study of the East Asian Economic Miracle to determine whether Asian economic development relied on a different economic model than that promoted by the World Bank's economists (World Bank 1993). The Asian Development Bank funded an extensive study to show that law really did matter in promoting economic development in Asia (Pistor and Wellons 1998).

We start with a competing set of issues. Law and lawyers are very present in the lives of the Asian states. One of the inventors of the idea of competing Asian values was Lee Kwan Yew, a British-trained barrister who learned Chinese only when he was well into his political career;

and the election in 2002 in the Confucian stronghold of South Korea involved on one side a human rights lawyer, Moo-Hyun Roh, and on the other a former Supreme Court justice, Lee Hoi-chang, who was the son of a public prosecutor. More generally, leaders of movements for independence in all the former Asian colonies were lawyers, and law has played a major part in the construction of these Asian states. Even the exceptions, notably China and Japan, came to law in part through a counterstrategy meant to modernize their nations while holding back the colonial powers, and one result was the implantation in Asia—including Korea as a Japanese colony—of a kind of Bismarckian model of lawyers in a strong state.

Furthermore, we see in all these countries a kind of legal revival, in two senses. One is a return to the old colonial roots, as in the revival of a theater production. The colonial imprint of law provides the core that defines the revival. The other sense of revival is the religious sense of a collective expression of belief, appropriately identified, for example, with a series of "great awakenings" in the United States. The rule of law is now deemed an article of faith for good governance in Asia and elsewhere (Ohnesorge 2007; Trubek and Santos 2006; for an historical reading that looks in a different way at Asian antecedents for the rule of law, see Ocko and Gilmartin 2009).

Our research begins with an examination of Asian colonial relationships—the geneses of law in Asia. We cover a good proportion of the ex-colonies in South and East Asia, including Hong Kong, India, Indonesia, Malaysia, the Philippines, Singapore, and South Korea. The countries we have selected include most of the Asian dragons celebrated for their rapid economic growth, and our selection includes the major colonies of the American, British, Dutch, and Japanese in the region. Drawing on these studies, we will also offer a few comparative observations about the role of law in other Asian countries, namely China and Japan. Certainly there is considerable activity in China and Japan that could be characterized as a renewed focus on law, and our findings based on the other countries may also suggest some issues and approaches useful in understanding China and Japan. Our principal aim, however, is to explore what can be learned about law in Asia from the seven case studies that we develop in some detail.

One of the reasons that scholars have trouble examining the role of law in Asia is that the usual categories of analysis are those that come from within the legal profession—for example, courts, bar associations,

law firms, and faculties of law. It has been difficult for scholars to find ways to link the study of those entities as such—separately or combined in some fashion (Halliday, Karpik, and Feeley 2008)—to the role of lawyers in the state and in the economy. It is relatively easy to see that lawyers invest in politics. The colonial origins of legal professions in Asia through the co-optation of elites already possessing political power ensure that law and politics will mix. Again, our approach to law and politics is different. We examine the role of law and lawyers in building legitimacy. In particular, we examine strategies to produce a belief in law and in the legitimacy it provides to a national state or a colonial relationship. As in our prior work, we draw on Pierre Bourdieu (e.g., 1998) and use the concept of strategy not to suggest a conscious or necessarily self-interested plan, but rather to refer to actions taken by individuals making sense of a field in which they operate. One task of empirical research is to relate individual "strategies" to the "rules of the game" which shape activity within a given social arena—or "field" in Bourdieu's terminology.

We also focus on the relationship between social and legal capital, examining processes through which different kinds of capital go into the law, including family capital. In order to understand the evolving role of law in Asia (as elsewhere), it is essential to explore the relationship between family and other social capital on one side and legal universals on the other. We see in Malaysia, for example, that legal capital not fortified with family and state capital is relatively weak by itself to assert the law against authoritarian state power. On the other hand, where legal capital and social capital are strongly intertwined, as in India and the Philippines, lawyers could mobilize much more strength when opposing an authoritarian state.

The key to the relationship between law and the legitimation of state power, according to Kantorowicz in his classic study of the notaries and the King (1997), is the double agency of the lawyers serving strong rulers at the same time as they moderate them. The double-agent strategy can be linked to the currently fashionable literature drawing from rational choice theories. In crude terms, lawyers must succeed in selling the idea that they can provide credible legitimacy to the dominant holders of economic and political power without threatening that dominant position. In Barry Weingast's well-known formulation (1997: 260), "The survival of democracy and the rule of law requires that political officials have incentives to honor a range of limits on their behavior." We do not need to see this relationship as the product of rational actors choosing

instrumentally to put law in this place. The concepts of strategy and field that we employ provide more subtle explanations of what leads actors to particular activities. But lawyers have long been specialists in brokering relationships where political and economic elites give up some portion of their power in exchange for credibility in the guise of the rule of law. Incentives for the exchange include the legitimacy that is provided for positions of power and the application of rules that help to secure that power.

Lawyers in Asia and elsewhere invest in state politics and then to a greater or lesser degree profit from that investment. They may become the experts in the rules and procedures that the state produces and also take up roles asserting and brokering political power. The connection between the two roles is apparent for all who look for it, but lawyers have an interest in affirming a basic difference between law and politics. Legally oriented scholarship tends to focus on the import and export of specific legal technologies and knowledge, exemplified by the civil codes from France or Germany or constitutional courts from the United States or Europe. The scholars look to see if the supreme courts are building a larger role or asserting more independence, for example. In fact, however, these imports and exports only make sense in relation to more general strategies used to build positions in the field of state power. An increased scholarly focus on courts, for example, does not necessarily lead to greater understanding of the position of law. As Martin Shapiro notes about a range of globalization scholarship that embraces law, "one is tempted to say that the word 'juridification' applies more aptly to the study of comparative politics than to the actual politics being studied" (Shapiro 2008: 329). The narrow focus on the institutions of the law as such supports professional ideology, but it makes it difficult to see the collective strategies through which lawyers seek to maintain and build their position in the field of state power.

The process that allows lawyers to gain state power is especially complicated in the histories of Asian colonies. Law came with colonialism, and therefore models established in Europe of the relationship between law and state were brought to Asia, and they were then transformed and further hybridized in relation to colonial politics. They were used by the colonizers in part to co-opt local elites into protégé statespersons in training for leadership of dependent states (Benton 2002). Colonial elites could justify their local positions in part by their possession of prestigious learned capital acquired abroad, for example, in the law fac-

ulties of Oxford and Cambridge and the Inns of Court in Britain, and in the equivalents in the other colonial powers. Accordingly, one strategy of lawyers in the colonizing countries was to call on the dominant state to put more law and legitimacy in the colonial systems of governance. This co-optation process had much in common with other colonial relationships, including those typical of Latin America, but the early lawyers in Asia were for the most part facilitators of trade and commerce, whereas in Latin America they were initially designed to be agents of the Crown (Perez-Perdomo 2006). The Asian colonial developments also occurred much later and for a shorter duration than those in Latin America. In both cases, of course, the process of co-optation has also allowed the local elites to transform the model as it serves them in a particular local context. The strategy of allying with colonial elites continues. John Bresnan, writing about his experience in the Ford Foundation in the 1950s and 1960s, notes that India received the most money outside the United States, and that many new ideas began there because, in his words, "Its sophisticated elite made it the most likely place for the Foundation to enter any field of activity for the first time" (2006: 26).

Northern Competition and the Production of Law in Asia

Any replication of European models of law and politics in Asia was further complicated by transformations within the colonial powers and in the competition among them. The Dutch and English empires competed in the region for centuries, and the United States entered the fray in the late nineteenth century with the Spanish-American War and the takeover of the Philippines. The competing European colonial powers lost some their power over the course of the twentieth century in relation to the growing global hegemony of the United States. There was also competition between the Soviet Union and the West that culminated in the Cold War. These competitive processes helped shape the role of law and lawyers and the construction of states more generally. Odd Arne Westad's recent book on the Cold War (2005), for example, details the relationship between third world countries, movements for independence, and the global activities of the Soviet Union—as well as those of the United States. The Soviet Union also had influence over the legal systems of Communist countries generally, including Communist China (Conner 2010). Because of the importance of law and lawyers to the

international strategies of the United States and the hegemonic power that the United States was able to assert in the region, we focus particular attention in this book on the role of the United States, especially in the period after World War II.

During the Cold War, as we shall see, the United States forged alliances with authoritarian states combining military, economic, and technocratic elements, and those alliances had definite impacts on the position of law and lawyers. The post–Cold War period then brought a renewed U.S. emphasis on the rule of law, both as a political strategy as a way to build trade and commerce according to a U.S. view of globalization. The latter part of the book concentrates on these U.S. influences and relationships. It remains true, however, that there are other countries competing for influence not only in Asia but also throughout the globe. What happens within the dominant powers as well as in the competition among them will continue to play a major role in determining what role law and lawyers play in Asian states (for a fascinating look at renewed Japanese interest in foreign investment in law in Asia, for example, see Taylor 2005).

The focus on the importance of global competition raises scholarly issues examined by Wallerstein and the "world system theory" he pioneered (Wallerstein 2000). Going beyond a traditional comparative sociology of national professional fields, a Wallerstein-inspired perspective leads to analyses of relationships between national and international competition. We therefore examine strategies whereby elites seek to redefine an international hierarchy of expertise while at the same time building the dominance of their own state and its approaches. This approach highlights a double competitive logic: one that involves competing expertises seeking universal credibility, such as law versus economics, and another that represents a competition between imperialisms.

The logic of the competition between imperialisms is seen in professional networks structured around the new hegemonic power—the United States—competing with those built by the old "imperial societies" of Europe (Charle 2001). The competition in the exportation of expertise that is evident in the politics of development assistance is therefore played out in a triangular dynamic, where the "imported states" (Badie 1992) from the periphery represent the stakes and a laboratory to try out new technologies of governance.

World system theory provides lines of inquiry to build on the sociology of professional fields—including studies of the internationaliza-

tion of the reproduction of the "state nobility" (Bourdieu 1998) and on the genesis of the international field of state power (Bourdieu 2002). The hypotheses and issues that derive from this sociology of globalization nicely extend Bourdieu's observations made about the "Esprits d'Etat" (1993) and the reproduction of the "Noblesses d'Etat" in the French national setting (1998). In this international competition over universals, the elites who dominate national professional fields mobilize resources of the national state—accumulated through more or less lengthy and more or less successful investments in the construction and perpetual reactualization of the state. The authority of these competing professional expertises, and thus their value on the international market of symbolic import and export, therefore quite depends on their success in shaping debates on state institutions at home.

The confrontations between different hegemonic powers seeking to diffuse their model of the state to other countries—as a basis for an emerging international field of state power—must be analyzed as elitist fights contributing toward the acceleration of the internationalization of the reproduction of national elites. This internationalization helps to compensate for the increased competition among national university graduates by helping revalorize the linguistic and cultural capital of the descendants of the old cosmopolitan elite (Dezalay 2004). As in our prior work (Dezalay and Garth 2002), therefore, we focus our attention on the "palace wars" involving elite actors whose activities have disproportionate weight in shaping the role of law in the state.

Accordingly, our study is not a study of the "legal profession" in the countries that we examined. Such a study would spend much more time on ordinary practitioners and courts, on the gender and ethnic make-up of the rank and file of the profession, and on diverse legal careers. The legal profession in all these countries has grown substantially, and there are important divisions within the legal professions. One increasingly common feature is the growing divide between the elite of the profession and the masses of lawyers educated at the law schools that have proliferated in Asia in recent years. Our focus is on the elites, many of whom, as we shall show, are descendants from the elites trained under colonialism. But the elites, as we shall also see, are not homogeneous or united by any particular approach to state governance.

Our approach also does not focus on transformations within Islamic Law or on the recent "revival of Islamic law" seen in Asia and elsewhere. Our general approach suggests that there are colonial linkages

and hegemonic competitions at the national and transnational level that merit detailed study as a basis to understand these transformations (see Hussin 2007). It will suffice for this study, however, to focus more generally on the role of lawyers historically and in brokering global (and especially U.S. influenced) legal imports. Many Islamic lawyers are of course part of our study, but their connections to economic and state power were not based specifically on their connections to Islamic law.

Consistent with our focus on the role of palace wars in the North and the South, our analysis of the global competition involving hegemonic and colonial states and types of expertise takes into account the internal divisions within individual states. Even if we can point to British imperial models or general U.S. approaches, for example, the crucial determinants of a colonial relationship may be which local groups shape colonial policy at a particular time and in a particular place. In particular, as the work of George Steinmetz illustrates, it is necessary to pay close attention not only to different groups in any colony but also to the different fractions within the colonizing powers (2007; 2008). Those differences shape developments at different times and in different sites (2007; 2008). As we shall see, the British approach in Hong Kong, India, and the Malay Peninsula shared some evolving concern with legal institutions and legitimacy, but local factors and different agendas among those in charge of colonial policy led to very different outcomes.

Lawyers and Asian States

Commentators and scholars see an increasing role for law and lawyers in the state as part of a more general global trend. The trend is described variously as a movement toward "juristocracy" (Hirschl 2004), the spread of a "rights revolution" (Epp 1998), or even just a "legalization" of international politics (Goldstein 2001). Much of the scholarship has a strong normative dimension. Recognizing this dimension, William Alford notes critically that "American scholars and policy-makers . . . share a deep faith in the value of China developing a legal profession that operates as we would like to think our own does" (2007: 287). Lawyers are assumed in this literature to be the natural architects and custodians of the national and transnational states—statespersons by definition. The role of lawyer statesperson has a long history in the United States (as we shall see in chap. 4), and it is not surprising that it reverberates in

scholarship and policy prescription finding favor on U.S. campuses. In the Philippines at the turn of the twentieth century, U.S. colonial administrators responded to their encounter with colonialism to seek to build a governing elite of lawyer statespersons, and similar efforts continue today in multiple Asian settings—again with the goal of building a larger role for law and lawyers.

Our research supports a broad narrative that is in many respects consistent with the normative goal of an increased role for law and lawyers in Asia. As we shall see, however, there are also many other elements that are inconsistent with that account and prognosis. According to this narrative, the story begins in the colonial era when colonial powers in varying ways saw the need to co-opt local elites. One prominent strategy was to train them in the law, make them lawyers, and use them as part of delegated governance. The local elites, in turn, bolstered their own power by serving as double agents serving themselves and their colonial masters (Benton 2002). Their local status was tied to the status of the expertise that they acquired in legal academies abroad. They in turn co-opted the colonizing powers to their own ends even as they served those powers and their law. Lawyers then became key leaders in movements for independence and the architects of the new states. In various ways, according to this narrative, they lost their power in the state to authoritarian governments or developmental states and only recently made a comeback to state power through a revaluation of their position. The revaluation is associated with globalization and a renewed emphasis on law in the governance of the economy and the state. It is also consistent with a U.S. approach to governance, as we have noted, and with the prescriptions of the World Bank, the International Monetary Fund, philanthropic foundations, and governmental programs supporting development. These globalization agents, in addition, including new generations of lawyers whose expertise now comes in part from study in the United States, have promoted market-led rather than state-led economic growth, which makes the legal comeback evident less in the state as such, and more in strengthened courts and imported entities such as corporate law firms and human rights NGOs—the "civil society" of much of the literature.

This narrative—and the rule-of-law literature behind it—suggests a pattern that will unwind in Asia and elsewhere. The first point, therefore, is to emphasize that Asian legal revivals are not inevitable. What happens in any given place is path dependent. When lawyers play roles