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# Mobilizing Law for Justice in Asia: A Comparative Approach

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# MOBILIZING LAW FOR JUSTICE IN ASIA:

## A COMPARATIVE APPROACH

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### I. INTRODUCTION

Throughout Asia and the developing world, the pursuit of social justice through law has become increasingly visible as legal professions

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and legal institutions undergo dramatic changes.<sup>1</sup> Understanding why and how lawyers and other advocates mobilize law for social justice has occupied scholars for the past half century,<sup>2</sup> and with the development of this field of research, attention has increasingly focused on the relationship between legal practices of lawyers in economically developed democracies, especially the United States, and lawyers pursuing social justice in societies of the Global South.<sup>3</sup> In a period characterized by more intense global contact among societies than ever before,<sup>4</sup> some scholars have focused on the global influence of powerful governments, international agencies, and private actors committed to political and economic liberalism imposed from above.<sup>5</sup> Other scholars have emphasized the emerging role of lawyers in international campaigns waged against the inequities of neoliberal development from

<sup>1</sup> In addition to country-specific sources for Asia referred to subsequently in this introduction and the contributions of other authors to this symposium, acknowledgement of global visibility is documented in representative recent scholarship. See generally RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA (William P. Alford ed., 2007); COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008); PUBLIC INTEREST LITIGATION IN ASIA (Po Jen Yap & Holning Lau eds., 2011); and THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE (Frank S Bloch ed., 2012).

<sup>2</sup> Early investigations include: Frances Kahn Zemans, *Framework for Analysis of Legal Mobilization: A Decision-Making Model*, 7 AM. B. FOUND. RES. J. 989 (1982); Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, in 3 ACCESS TO JUSTICE: EMERGING ISSUES & PERSPECTIVES 513 (Mauro Cappelletti & Bryant Garth eds., 1979). For recent analysis, see Austin Sarat & Stuart Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 3 (Austin Sarat & Stuart Scheingold eds., 2001); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107 (1985); CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998). See also *infra* Part II.

<sup>3</sup> Scott L. Cummings & Louise Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 1 (2008); see also ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001). For critique, see Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in THE ROLE OF THE JUDICIARY IN PLURAL SOCIETIES 33 (Neelam Tiruchelvan & Radhika Coomaraswamy eds., 1987). The term "Global South" is generally understood to refer to so-called developing societies located primarily, but by no means exclusively, in the Southern Hemisphere.

<sup>4</sup> See SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* 8 (2005) (noting the growing density of international governance and influential international networks among public and private organizations, businesses, advocates, and other groups); see also ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* (1996) (arguing that media and migration have greatly intensified contemporary globalization).

<sup>5</sup> See, e.g., *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* (Terence C. Halliday, et al. eds., 2007).

below.<sup>6</sup> The perspective we put forward in this article acknowledges the contributions of these scholars, but adopts a different point of departure. In contrast to those who maintain that legal development reflects increasing global attention to law and lawyers, we argue that law's evolving place, especially in the developing societies of the Global South, arises from the political and social struggles within each society. Law is defined through political struggles over the role of government, accountability of the powerful, inequitable effects of social and economic development, the distribution of status and power, and the everyday claims for justice of ordinary people, in which lawyers (among others) have increasingly sought to mobilize law. Law's role, and the role of lawyers, varies with domestic political development as well as global influence. Global economies, politics, and resources play an important part in the emergence of law, but, as we argue in this article, their influence is mediated by important factors that distinguish societies and their legal development from each other.

A new generation of scholars studying human rights, social justice, and rule of law in comparative perspective is making law's *mobilization* central to their inquiry by examining how law is perceived, translated, and deployed in these new global contexts.<sup>7</sup> Practices making rights and law active in new contexts do not construct themselves, but as Jeremy Perelman and Lucie White observe, reflecting on path breaking collaborative research undertaken with African human rights lawyers, they are practices "enacted by lawyers and others on the ground."<sup>8</sup> Examining the mobilization of law for social change draws attention not only to the creative strategies of advocates, but also to the contexts in

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<sup>6</sup> See, e.g., LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura De Sousa Santos & César A. Rodríguez-Garavito eds., 2005) [hereinafter LAW AND GLOBALIZATION FROM BELOW].

<sup>7</sup> We use the expression "mobilization of law" to refer to ways that law, as a "system of cultural and symbolic meanings," influences social action. Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117, 127 (Keith O. Boyum & Lynn Mather eds., 1983). A rich literature on mobilization of law describes actions that sometimes involve government officers (such as legislators, court officials or administrative officers) but often involve only "the initiative of citizens engaged in everyday struggles..." Michael McCann, *Legal Mobilization and Social Reform Movements: Notes on Theory and its Application*, in LAW AND SOCIAL MOVEMENTS 2, 7 (Michael McCann ed., 2006). We embrace this literature's emphasis on law's potential autonomy from state authority and its dependence, as a symbolic resource, on the context in which it is mobilized. See *id.*

<sup>8</sup> Jeremy Perelman & Lucie E. White, *Introduction* to STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 1, 2 (Lucie E. White & Jeremy Perelman eds., 2011).

which their strategies for action and mobilization of law have meaning and take shape.

Studying the mobilization of law *for justice* generates a new perspective on legal development and the globalization of law. Lawyers for social justice are rare in any society, but they are important. If it is ultimately the power of law we seek to understand, the experiences of legal practitioners whose clients are at the margins of society may tell us as much as the experiences of lawyers for clients with power and influence. Lawyers for social justice typically lack the resources of lawyers for “haves.”<sup>9</sup> For them, the mobilization of law may be more difficult and perilous. Nonetheless, they and their clients, for lack of political alternatives, may be more reliant on the independent force of law to secure basic protections or opportunities than those of greater means and social position. For this reason, the comparative study of what these lawyers do has much to contribute to a better understanding of the place of law and its development in contemporary societies.

In previous work, two of the authors explored the transfer of ideas about public interest law practice from the United States to the Global South, accompanying the spreading influence of capitalism and free markets.<sup>10</sup> They observed that the rule of law movement, embedded within policies associated with the so-called Washington Consensus,<sup>11</sup> has globalized support for economic transformation while also becoming a resource for groups affected by those same economic and political transformations—urban workers, rural communities, environmental stakeholders, and others experiencing the collateral damage of growing inequality, displacement, and loss of security. While these two sides of globalization are different, and often in conflict, they are necessarily linked by the role that rights play in the globalization of markets and political support for them.

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<sup>9</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

<sup>10</sup> Symposium, *The Globalization of Public Interest Law*, 13 UCLA J. INT’L L. & FOREIGN AFF. 295 (2008). See Cummings & Trubek, *supra* note 3, at 10–12.

<sup>11</sup> The Washington Consensus refers to neoliberal economic development policies emanating from U.S. foreign policy and pursued by the IMF and World Bank, key elements of which include fiscal discipline, redirection of public expenditures from direct investment to market infrastructure, deregulation and tax reform, privatization and security for property rights, and promotion of trade liberalization and foreign direct investment. See WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 337 (2009). As explained in Part III.B, below, these policies have evolved to include strengthening the rule of law, building civil society capacity, and, as an element of the latter, protections for human rights.

We now move that earlier analysis forward in two ways. First, we have chosen an important region for our comparative analysis of social justice advocacy. Although the growing importance of Asia's rapid social and economic development has been widely recognized, relatively few comparative studies examine recent legal development<sup>12</sup> or the rise of the legal profession.<sup>13</sup> With the exception of India and China, until recently Asian countries have been conspicuously absent from comparative studies examining the mobilization of law for social justice.<sup>14</sup> Because powerful Western governments and international agencies perceive legal modernization to be a key factor in economic development, Asia's growing economic importance alone is a compelling reason for further study of the evolution of its legal institutions.<sup>15</sup> Well-publicized controversies over the unequal impact of economic development, authoritarian governance, religious differences, and ethnic inequality suggest a few of the reasons why law may be emerging in struggles for justice.<sup>16</sup> Yet we know little about when and why mobilization of law for justice occurs in most Asian societies.<sup>17</sup> Both similarities and differences among the countries in the region create opportunities for comparison of important factors such as colonial history, authoritarian governance, ethnic and religious diversity, and state-managed development on mobilization of law.<sup>18</sup>

Second, we use this regional focus to develop a framework for comparative analysis. The importance of comparative analysis follows

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<sup>12</sup> Important exceptions include: FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987); SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE* (2006); RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008); ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES (Tom Ginsburg & Albert H.Y. Chen eds., 2009); REGULATION IN ASIA: PUSHING BACK ON GLOBALIZATION (John Gillespie & Randall Peerenboom eds., 2009).

<sup>13</sup> See RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA, *supra* note 1. See also LAWYERS IN THE THIRD WORLD: COMPARATIVE AND DEVELOPMENTAL PERSPECTIVES (C.J. Dias et al. eds., 1981).

<sup>14</sup> Of the dozens of case studies included in the four volumes edited by Austin Sarat & Stuart Scheingold which have come to define the term "cause lawyer" only two concern lawyers in Asia.

<sup>15</sup> David Trubek and Alvaro Santos provide a powerful argument for renewed attention to legal development, especially in the rapidly developing BRIC (Brazil, Russia, India, China) countries. DAVID TRUBEK & ALVARO SANTOS, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (2006).

<sup>16</sup> See William P. Alford, *Introduction* to RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA, *supra* note 1, at 4.

<sup>17</sup> Po Jen Yap & Holning Lau, *Public Interest Litigation in Asia: An Overview*, in PUBLIC INTEREST LITIGATION IN ASIA *supra* note 1, at 1.

<sup>18</sup> See *infra* Parts II and III.

from the great diversity among Asian nations and recognition of the influence of institutional, political, and global factors on the mobilization of law. Lawyers mobilizing law for social justice encounter different opportunities and limits on the power of law in every society. We have found that a critical difference among societies is the space each allows for mobilizing support for legal claims. Particular political and institutional features of a society shape this space. For example, political openness is one factor influencing the space for mobilizing law. Where opportunities for political dissent are relatively broad and unobstructed, mobilizing support for law takes many different forms. Where political openness is most limited, the mobilization of legal claims often leads back to the state itself, where lawyers can become creative strategists within the domain of state power but may also have to negotiate limits on their social change goals. In this article, we sketch a framework for comparing the influence of key factors affecting opportunities and resources for mobilizing law for social justice. We then suggest some ways in which these domestic factors may also shape the influence of global support. Our observation is that that the flow of global support for the rule of law—far from being universally available or uniform in its purpose or effects—is shaped by the politics of both the sending and receiving societies, sometimes through limitations imposed by governments and international agencies, but also by strategic choices and self-restraint by donors and potential collaborators.<sup>19</sup>

Our plan from the outset has been to understand the institutional and political space for mobilizing law for social justice through exchanges between practitioners and scholars focused on eleven Asian countries: Bangladesh, China, India, Indonesia, Malaysia, Mongolia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. The articles in this issue include a combination of those by scholars of the region, which provide overviews of important trends and dynamics, and those written by Asian lawyers themselves, which provide first-hand descriptions of career origins, critical opportunities and choices, and what the lawyers' actions were intended to achieve. Both sets of articles address complex, indirect and subtle influence of culture, politics, and globalization on the path of legal development—influences more readily discerned after discussion and reflection among lawyers with deep knowledge gained through practice in a particular society and scholars with broader comparative and historical knowledge.

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<sup>19</sup> See *infra* Part IV.

The exchanges we encouraged between practitioners and scholars raise additional questions about the relationship between the perspectives of these two groups of contributors to this issue. Scholars' use of first hand narratives as "data" creates a well-recognized risk of misunderstanding or distorting a narrator's meaning to fit interpretations conceived in a different institutional context or culture.<sup>20</sup> Here, we again take our lead from White and Perelman's insightful collaborative study of social justice lawyers in Africa,<sup>21</sup> which suggests that our concern need not be whether practitioner narratives created in response to our ongoing discussions are "authentic"—for practitioners themselves will acknowledge continuing evolution of their views over the length of a career, generating many authentic versions with or without discussions with academics or other members of a global community. Our concern, like White and Perelman's, and indeed that of the practitioners themselves, is to better understand the possibilities for law in different societies and institutional contexts—possibilities about which both the practitioners and scholars are learning.<sup>22</sup> We believe that practitioner narratives create a unique opportunity to consider the ongoing reconstruction of spaces within which social justice lawyering occurs and we make that possibility a central focus of our analysis.<sup>23</sup>

Part II of this article situates our collaborative project in the context of research on social justice lawyers. Part III then examines two challenging issues underlying our comparison of advocacy in Asia: describing the practices we are comparing and explaining why these practices are similar or different in each country. For reasons we explain in detail, we decline to use the familiar concepts "cause lawyer" and

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<sup>20</sup> See, e.g., Daniel Bonilla, *Legal Clinics in the Global North and South: Between Equality and Subordination*, 16 YALE HUM. RIGHTS & DEV. LJ 165 (2013)

<sup>21</sup> STONES OF HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY, *supra*

note 8.

<sup>22</sup> Cummings & Trubek consider whether the local practitioners can accurately assess their ability to initiate effective social change and whether their power actually owed much more than they were aware, or could estimate, to globalization. Cummings & Trubek, *supra* note 3, at 41–42.

<sup>23</sup> Our last point raises a final concern. The inherent tendency of academic disciplines to encourage complexity and contradiction may in some ways be fundamentally at odds with human rights advocacy, perhaps altering their commitment to a particular objective or strategy. Annelise Riles, *The Virtual Sociality of Rights: The Case of "Women's Rights as Human Rights"*, in TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES 420 (Michael Likosky & A.V. Lowe eds., 2001). Although the effects of exchanges between rights advocates and academics have been a subject of contentious debate, a great deal of the globalization of law literature accepts the importance of such perspective-developing exchanges about the rule of law, without, we think paying adequate attention to this issue.



“public interest law” to describe the practices we are comparing and instead we focus concretely on how law is being mobilized. Because the practices typically involve advocacy on behalf of the weak against the powerful, the success of such practices, whether mobilizing law or pursuing a different strategy altogether, depends on institutional and political opportunities and support, both domestic and global. Our point of entry for comparing how law is mobilized starts with this context. In Part IV, we suggest that one way to understand variation in the type and scope of legal mobilization across Asian countries is in relation to two important domestic factors: political openness and autonomy of law. By charting the interaction between these two factors, we provide a comparative framework that maps the domestic space for legal mobilization. We then suggest some ways that these domestic factors may interact with global factors influencing the availability of funding for social justice practitioners. In presenting this comparative framework, we draw on the contributions to this issue to illustrate its usefulness and to develop a more nuanced picture based on lessons learned from those mobilizing law for justice in Asia.

## II. LAWYERS FOR SOCIAL JUSTICE

The increasing visibility of lawyers who deploy law for social justice might be viewed as a natural outgrowth of the geometric rise in the number of lawyers throughout the economically developing world over the past thirty years, especially in Asia.<sup>24</sup> With the emergence of the Washington Consensus<sup>25</sup> in the 1980s, developing countries have been pressured to embrace private property, limited government, and free markets. Lawyers are experts in the rules of this economy. In the last thirty-five years, even governments that formerly restricted the training and role of lawyers have begun to encourage development of a legal profession, and the promise of a career in law in this new international environment draws aspiring members of an emerging middle class. Yet lawyers working for social justice are rare in any society, but especially in developing societies where they face unfavorable odds and, in some societies, take significant personal risks. Their emergence and career paths under widely varying conditions across Asia require further explanation.

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<sup>24</sup> RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA, *supra* note 1.

<sup>25</sup> See *supra* text accompanying note 11.

Global influence on legal development in Asia predates the late twentieth century. Colonial governments in Asia imported European legal institutions—and with them lawyers—adapted to the colonizers' needs. Other pathways of influence also existed. In the late nineteenth century, non-colonial Thailand's interaction with European powers persuaded its monarchs to adopt European-style governmental administration in order to survive and prosper as a modern nation. Revolutionary governments in China, Vietnam, and Burma likewise adapted European models to their purposes to establish socialist dictatorships. In each of these countries, following the colonial era, imported institutions have persisted and evolved along paths reflecting subsequent political history and further international engagement. In the latter part of the twentieth century, market development—through World Trade Organization membership, bilateral trade agreements, and the growth of global finance—has been an important driver of legal evolution.<sup>26</sup>

Global economic development has influenced the evolution of law in each country in other less direct, but important ways. Free markets and capitalism have greatly increased economic inequality, spawned contention over natural resources, and created other sources of dislocation, conflict, and resistance for millions of disadvantaged members of developing societies in Asia and around the world. Since the end of the Cold War, these sweeping transformations have had a powerful influence on the understanding of law in the Global South, where many believe that law can play a role in promoting, managing, or resisting the effects of political change and economic development. Although it has appealed to colonizers and political elites, the rule of law is also an ideal that has crossed borders for people in the new states of Asia seeking greater accountability from public or private power holders or wider opportunities for themselves. In this way, the globalization of law—including public interest law and human rights—has been promoted by an influential transnational community of governments, international organizations, and private agencies with diverse, and sometimes conflicting, purposes.

Some scholars have argued that the apparent symbiosis between liberal legality and economic development in Western societies points to convergence between law in the developing societies of the Global South

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<sup>26</sup> Nevertheless, the paths of legal and administrative evolution can be quite different. See REGULATION IN ASIA: PUSHING BACK ON GLOBALIZATION, *supra* note 12, at 16.

and law in economically dominant societies of the Global North— notwithstanding their great political and cultural differences.<sup>27</sup> One implication of this view is that the legal profession will inevitably play a similar role in defense of individual rights and the rule of law in any society. Yet, the results of efforts to support the rule of law by international organizations such as the World Bank or the United Nations, individual global powers such as the United States, and private foundations, nongovernmental organizations (NGOs), and networks of activists have been too varied, and often too disappointing, to constitute an adequate explanation of legal evolution. Much less can these international efforts entirely explain the roles played by social justice lawyers, many of whom have little international contact or support for their work on behalf of indigenous causes.

We think that the evidence suggests a different starting point for our comparative analysis. In adopting this starting point, we draw on insights from prior scholarship about lawyers who advocate for social justice. Research on these lawyers has grown from early studies of “public interest law” and “cause lawyers” in the United States, and now extends to exploring the role of law in social struggle in the Global South. In the United States, public interest law was initially framed as an effort to provide fuller representation to groups and interests excluded from traditional politics and the legal system. It was a project in which lawyers sought to recalibrate the “scales of justice” by leveraging the law’s symbolic power on behalf politically weak and socially marginal groups.<sup>28</sup> Carrying the concept of public interest law and practices developed in the United States abroad has been fraught with complexity, encountering challenges based on its inappropriate assumptions about the institutional and political context of other societies and on resistance to the imperialism of Global North ideas. In the 1980s, prominent Indian intellectual Upendra Baxi famously argued against India adopting “public interest law” as a label for legal rights advocacy, preferring instead to term it “social action litigation.”<sup>29</sup> Baxi noted that “while labels

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<sup>27</sup> See, e.g., William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People’s Republic of China*, in *RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA*, *supra* note 1, 287–310 (contending that by extrapolating European and American experiences, most American and other foreign observers have seriously misjudged the role lawyers are likely to play in China’s legal change).

<sup>28</sup> EPP, *supra* note 2, at 2–3; Louise G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417 (2011).

<sup>29</sup> Baxi, *supra* note 2, at 108.

can be borrowed, history cannot be. [Public interest litigation] represents for America a distinctive phase of socio-legal development for which there is no counterpart in India; and the salient characteristics of its birth, growth, and possibly, decay are also distinctive to American history."<sup>30</sup>

As Baxi's critique underscores, the term public interest law can be both a political resource and liability to advocates in other countries. In the 1970s and 1980s, public interest law carried many positive global connotations because it was associated with important political struggles for disadvantaged groups in the United States. The use of law in these struggles informed advocacy in other countries, such as South Africa.<sup>31</sup> However, advocates and commentators also expressed a countervailing impulse to name the distinct cultural meaning of their own legal advocacy, as reflected in Baxi's commentary. This effort to both embrace and avoid the U.S. model suggests what Richard Abel called the "anxiety of influence."<sup>32</sup> Stephen Ellmann, writing about "Third World" cause lawyering in the early 1990s, makes an equally telling point about "influence," which is that the focus on U.S. transmission may obscure the contributions that lawyers in other countries have made to each other and to the American public interest law movement.<sup>33</sup>

Ellmann's framing of a "Third World" (a relic of the Cold War) has now largely been supplanted by talk of the "Global South," a term generally used to describe poor countries, mostly in the Southern Hemisphere, working toward different levels of economic development. Concern over the imperialistic "exportation" of U.S.-style legal institutions in the postwar era gave rise to the first critiques of law as a tool for development.<sup>34</sup> The current era of development policy, powered as much by a search for economic as political influence, has reproduced concerns about the one-sided nature of the relationship between "donor" and "donee" countries. Colombian legal scholar Daniel Bonilla focuses on the costs of this relationship in the development of legal clinics. He argues that many of the North-South exchanges between clinicians are

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<sup>30</sup> *Id.*

<sup>31</sup> RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID 1980-1994* (1995).

<sup>32</sup> Richard L. Abel, *The Globalization of Public Interest Law*, 13 *UCLA J. INT'L L. & FOREIGN AFF.* 295, 296-98 (2008).

<sup>33</sup> Stephen Ellmann, *Cause Lawyering in the Third World*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 349, 358-360 (Austin Sarat & Stuart Scheingold eds., 1998).

<sup>34</sup> See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062 (1974).

premised on a set of norms that foster subordination rather than cooperation.<sup>35</sup>

In part because of the baggage associated with the term public interest law, scholars Austin Sarat and Stuart Scheingold<sup>36</sup> coined the term “cause lawyer” to describe lawyers who practice “with a vision of the good society.”<sup>37</sup> Their characterization of practitioners who deploy law in the service of a cause has resonated powerfully not only among those familiar with the American experience—where lawyers have been iconic figures in the civil rights and other social movements—but also those who study and engage in struggles for social justice around the world. For lawyers and activists outside economically developed democracies, the link between law and accountability for the powerful or greater opportunity for the excluded has often made sense as a potential strategy for advancing human rights and greater distributive justice. For Sarat and Scheingold, and for many scholars who have followed their lead, research has focused primarily on lawyers’ commitment to causes compatible with pluralism, democracy, and a liberal legal vision of justice—causes that are unfamiliar to much of the world.<sup>38</sup> Their more recent work has placed less emphasis on democratic values and drawn

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<sup>35</sup> Bonilla, *supra* note 20. These norms include the “Production Well,” in which “legal academics from the North is seen as creating original academic products, [while] legal academia from the South is considered solely as a weak reproduction of knowledge generated in the North;” the norm of “Protected Geographical Indication,” which states that “all knowledge produced in the North is worthy of respect and recognition per se given the context from which it emerges”; and the norm of the “Effective Operator,” which “indicates that academics from the North are much better trained to make effective and legitimate use of legal knowledge than academics from the South.”

<sup>36</sup> Sarat & Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 3, *supra* note 2.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> In places they have stated this thesis quite broadly: “Generally speaking, there is a natural affinity between cause lawyering and democratization.” *Id.* at 14. They qualify this bold assertion with the observation that cause lawyering may be “one of the few avenues open to those who are subjected to repression.” *Id.* This second phrasing concerns accountability rather than an ideological embrace of liberal democracy. Scheingold’s concluding chapter in the same volume reaffirms a belief that “democratic aspiration of cause lawyering are manifest and pervasive,” and at the same time admits variation in the vision of democracy held by cause lawyers in different societies to the extent that some may embrace redistributive goals that are not characteristic of liberal democracy. Stuart Scheingold, *Cause Lawyering and Democracy in Transnational Perspective: A Postscript*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 2, at 383.

more attention to legal mobilization in illiberal contexts.<sup>39</sup> The important contribution of Sarat and Scheingold's redirection of the field of study has been to place at the center of the analysis careful examination of what lawyers do to mobilize the authority of law and to remind us of the context-dependence of practice sites, strategies, and cause.

The lawyers on whom we focus in our comparison are distinctive because their causes and clients are politically weak, unpopular, or socially marginal. Because they and their clients lack power of their own, law can be an especially important resource for them. Although they use many different strategies to advance social justice, lawyers are uniquely positioned to deploy law to attract support from power holders. As a symbolic resource, law has power only where it is supported by other power holders.<sup>40</sup> Support for law can be derived from powerful government entities, individuals, private corporations, influential groups, or a mobilized public. Although lawyers may be motivated by commitment to a cause, support is needed from power holders, which "invest" in law to serve purposes of their own.<sup>41</sup> In the economically developed societies of Europe and America, the symbolic power of law is backed, most importantly, by a powerful profession and powerful courts, whose mutual support evolved to manage the political fractures and disputes in a plural society where power is divided among rival sovereign entities and between public and private institutions.<sup>42</sup> In the United States, where lawyers have become especially influential, the profession embraces public interest law practice as evidence that it is not only powerful, but worthy of public trust.<sup>43</sup> Public interest lawyers are supported and often honored by the profession as well as by members of the public.

In many countries of the Global South, the conditions under which lawyers mobilize law for social justice are often fundamentally different. The symbolic power of law is often not secure. As we describe

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<sup>39</sup> Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 1 (Austin Sarat & Stuart Scheingold eds., 2006) [hereinafter Sarat & Scheingold 2006].

<sup>40</sup> See generally ARTHUR L. STINCHCOMBE, *CONSTRUCTING SOCIAL THEORIES* (1968).

<sup>41</sup> YVES DEZALAY & BRYANT G. GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE* (2010).

<sup>42</sup> See Richard L. Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 33, at 69.

<sup>43</sup> See generally STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* (2004).

further, courts may be dominated by the executive branch of government and lawyers as an organized profession may be weak or have little commitment to public service.<sup>44</sup> Lawyers who practice for social justice, and especially lawyers who confront the powerful, may encounter political and personal risk. Where law itself is weak, constructing the authority of law and secure sites from which to mobilize law may be the lawyer's paramount cause.<sup>45</sup> For lawyers whose clients are politically weak or socially marginal, the symbolic power of law, where it exists, may be especially useful.<sup>46</sup> We emphasize the contingency of law's power, depending on the context of its deployment, especially the institutional support for law within the state and the possibilities for leveraging the power of allies within civil society.

Our task is to understand how the paths of internal legal development and transnational influence in different societies have created distinct contexts for mobilization of law for social justice. Exchanges with our Asian collaborators have shown us that decisions by individuals also play an important role. The path to becoming a lawyer who will use law for social justice is guided not only by social conditions, political institutions, and resources (including global resources) that enable such a career, but also by experience, reflection, courage, and choice. Notwithstanding the variety of motivations and purposes or the odds against success, these extraordinary careers may be essential first steps toward new possibilities for law.

### III. THE CHALLENGE OF COMPARISON IN ASIA

At the heart of Andrew Harding's thought provoking discussion of legal transplants in South East Asia is the question of whether and how similar legal practices can become established in societies so

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<sup>44</sup> Symposium, *A Comparative Perspective on Social Justice Lawyering in Asia: Conditions, Practices, and Possibilities*, 31 WIS. INT'L L.J. xxx (2013); see, e.g., Nick Cheesman & Kyaw Min San, *Not Just Defending: Advocating for Law in Myanmar*, 31 WIS. INT'L L.J. 702 (2013); Jothie Rajah & Arun Thiruvengadam, *Of Masks, Absences and Exceptions: Cause Lawyering in Singapore*, 30 WIS. INT'L L.J. 646 (2013).

<sup>45</sup> See Cheesman & Kyaw Min San, *supra* note 44; see also Sarat & Scheingold, *supra* note 2, at 14.

<sup>46</sup> For a similar valorization of law utilized by political outsiders (in response to law's rejection by the U.S. based Critical Legal Studies movement), see Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988); see also Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

strikingly different from the European states where the ideas originated—and so different from each other. Harding's helpful first step toward comparison draws on his knowledge of regional history and culture to identify shared characteristics that may explain some of the strikingly similar adaptations despite deep political differences. In other areas, especially development of political and economic institutions, the societies remain far from Western practice and each other. Harding's comparison is exemplary because of his knowledge of the region, but also because he is cautious about generalizations and uses examples of deeply embedded and locally adapted practices to illustrate how ideas and practices, regardless of origin, take on meaning as law in a new setting.

Like Harding, we seek to understand why some practices and strategies for mobilizing the law are shared across Asia while others are not. Lawyers for the politically weak are particularly dependent on support from others for social change strategies and for legal mobilization in particular, and we begin by identifying similarities and differences among these societies, which we think will be closely associated with the sources of support for law. Similarities include those described by Harding, and we discuss their relevance for mobilizing law. We then consider other factors that recent comparative research has suggested are central to the mobilization of law for social justice and which distinguish these societies from each other.

Harding identifies several important historical and cultural commonalities that have influenced the role of law—including roots in early transplantation of ideas about law from Hindu, Buddhist, Confucian, and Taoist thought—which share an emphasis on the “wider family as the natural unit of society, and their placement of community above the individual: all of which have profound implications for law.”<sup>47</sup> Ethnic diversity and minority inclusiveness are important sources of conflict in virtually all Asian societies and affect the emergence of law as a resource for social justice. Harding also suggests that the very syncretic nature of legal adaptations, at different times from different non-European and European jurisprudence, in which systems of thought have combined or adapted to distinct conditions rather than superseding previous concepts of law, might also be a regional characteristic. While

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<sup>47</sup> Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia*, in ADAPTING LEGAL CULTURES 199, 213–15 (David Nelken & Johannes Feest eds., 2001).



there are similar conceptions of rights in some areas, syncretic adaptation has preserved unique and eclectic characteristics of legal development.

More directly related to our interest in the process by which law may be mobilized, colonization and adaptation to politically and economically powerful nations in the twentieth century has resulted in other shared experiences, including rapid economic growth. Many Asian countries have also struggled to integrate an eclectic mix of institutional forms derived from indigenous, European, and American models. Harding notes, notwithstanding different paths for political development, an apparent preference for semi-authoritarian forms of governance throughout the region.

The conditions under which the modern governments of Asian states were formed set them apart from Europe, whether or not they originated from colonization.<sup>48</sup> An important consequence of elite or colonial imposition of modern government has been that legal systems have been shaped to serve rulers' needs rather than serving a political accommodation between rulers and subjects.<sup>49</sup> A profoundly important effect of top-down legal development in many modern Asian states has been the formation of a "statist" or executive branch judiciary, which lacks the institutional independence familiar to lawyers in democracies in Europe or North America.<sup>50</sup> Indeed, one purpose of statist governments

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<sup>48</sup> Relatively late development of colonized and non-colonized states alike within a system dominated by European powers meant that new states had far less freedom to create new institutional forms adapted to indigenous political needs or demands. Instead, a powerful international community required formation of governments patterned on models that evolved historically in Europe which were then established in Asia either by colonizers or by indigenous elites seeking recognition and support from the powerful community of nations. CHARLES TILLY, *COERCION, CAPITAL AND EUROPEAN STATES, AD 990-1992* (1992). The establishment of socialist governments following revolutions has likewise been influenced by the European experience.

<sup>49</sup> Modern Asian states typically developed from the top down. Lev contrasts European legal development where rule of law was a political bargain struck by governments with new contenders for political power, especially an emerging commercial class with economic capital needed by the state. DANIEL S. LEV, *Introduction, in LEGAL EVOLUTION AND POLITICAL AUTHORITY IN INDONESIA: SELECTED ESSAYS 3* (2000). Abstract principles for rule of law institutions have rationalized and legitimated these political bargains. Frank Upham has argued that an idealized form of this theory, derived from European and North American experience, has become the rule of law "orthodoxy" prescribed by the Washington Consensus as a necessary precondition for economic development. Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 75* (Thomas Carothers ed., 2006).

<sup>50</sup> Kanishka Jayasuriya, *Corporatism and Judicial Independence Within Statist Legal Institutions in East Asia, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS 147* (Kanishka Jayasuriya ed., 1999) [hereinafter *Corporatism and Judicial Independence*].

has been to manage development of a relatively undeveloped private sector.<sup>51</sup> Further, as Daniel Lev has observed, the absence in Asian legal thought of any equivalent to the natural law tradition in European and American jurisprudence provides little foundation for a rule of law which limits the state's political will.<sup>52</sup> Statist courts and statist jurisprudence, as well as a tendency toward semi-authoritarian government, have meant that lawyers pursuing social justice in most Asian societies have sometimes developed strategies which require little support from the judiciary and at other times have used litigation strategically to draw support for other strategies or even to press for increased judicial autonomy.

Further, South East Asian countries have recognized themselves as a community through a regional accord, the Association of South East Asian Nations (ASEAN),<sup>53</sup> and especially relevant to our inquiry, have adopted ASEAN's common front on human rights.<sup>54</sup> The emergence of stable semi-authoritarian regimes has given rise to contentious debate about the universality of human rights norms promulgated by international agencies and supported by states and NGOs of the Global North. These differences in perspective on the meaning of rights have acquired added importance because of the economic success of their state-managed economies. The "new developmental states"<sup>55</sup> of Asia and

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<sup>51</sup> Jayasuriya explains that the judiciary is not viewed as a separate branch of government. Instead, the judiciary is a part of the executive, guided by the same mission rather than the mission of maintaining the public-private divide to keep an overreaching executive in check and to facilitate orderly private interactions. *Id.* at 177–81.

<sup>52</sup> LEV, *supra* note 49, at 6.

<sup>53</sup> *Charter of the Association of Southeast Asian Nations*, ASEAN (Nov. 20, 2007), <http://www.asean.org/asean/asean-charter/asean-charter>.

<sup>54</sup> *ASEAN Human Rights Declaration*, ASEAN (Feb. 28, 2013), <http://www.asean.org/resources/publications/asean-publications/item/asean-human-rights-declaration-ahrd3>.

<sup>55</sup> In 2001, Harding concluded that "[i]n Asia . . . the notion of the 'Asian developmental (or regulatory) state,' characterized by social stability, authoritarian governmental structures . . . and long-term economic planning, is now seen by many as crucial to the understanding of law-and-development in Asia." Harding, *supra* note 47, at 202. David Trubek's description of the legal policies of Asian developmental states makes clear that "innovation" in industrial policy is the key to their economic success. An important implication is these states, on economic as well as political and cultural grounds, may be hostile to the concept of entitlements that are commonplace in welfare states and to a lesser degree in neo-liberal conceptions of the state. Trubek maintains that, on the contrary, the states pursuing the new political economy of development [NPED] see social protection programs of poverty and inequality reduction to their benefit. David M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* (Univ. of Wisconsin Legal Studies Research Paper Series, Paper No. 1075, Paper No. 1075, 2008), available at <http://ssrn.com/abstract=1349163>.

Latin America are resisting neoliberal prescriptions, giving additional credibility to statist institutions and state-managed development. The dominating economic success of China and “Asian Tigers” not only considerably alters the conventional wisdom about the value of western, neoliberal rule of law “orthodoxy” and convergence, but may be legitimating an alternative paradigm for successful development in which law plays a different role.<sup>56</sup> How the emergence of a “third moment”<sup>57</sup> in the relationship between law and development shapes legal mobilization for social justice, and the role of lawyers, is a compelling question for comparative study. The varied reception of liberal legalism and neoliberal economic prescriptions favored by the United States and its global partners, the International Monetary Fund, World Bank, and leading foundations raises still broader questions about the impact of other forms of global connection that are even more clearly related to advocacy for social justice—including the role of international venues, such as the United Nations or the International Bar Association Human Rights Institute, or the influence of networks, NGOs, and an array of potential global partners.

Because of broadly similar cultural and political influences, advocates for justice across many countries in the region may encounter similar conflicts arising from such issues as ethnic or religious difference and exclusion, arbitrary exercise of power under authoritarian governments, or resistance to post-colonial development and global economic hegemony. At times, advocates may find it useful to employ a regional or international discourse about human rights, law, and injustice. However, the practices associated with establishing sites and developing strategies for mobilizing the law take shape under profoundly different conditions. Domestic politics and global influence have propelled each country’s institutional development along different paths. Colonial era “investment” in law by a society’s elites has been a particularly important part of this story in many Asian states.<sup>58</sup> The paths of subsequent legal development, even among societies colonized by the same European country, have been radically different. New constituencies are becoming active, making political claims and

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<sup>56</sup> *Id.*

<sup>57</sup> David Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 15, at 1, 4.

<sup>58</sup> DEZALAY & GARTH, *supra* note 41.

demanding accountability, and transnational influence is penetrating domestic political space in new and significant ways.

Studies of the evolution of law in Asia emphasize the fundamental importance of the relationship between political authority and legal development.<sup>59</sup> Four recent comparative studies refine this general observation by making lawyers and the conditions under which they mobilize the law their point of entry. We conclude that each study provides only a partial view of the influence of context on the mobilization of law. Drawing on all four, together with the contributors to this issue, we identify two domestic factors associated with important differences and similarities in patterns of legal mobilization for justice. The next part of the article develops a framework combining the two factors and examines its implications.

Yves Dezalay and Bryant Garth's comparative study of seven former Asian colonies emphasizes the importance of elite "investment" in the autonomy of law from the colonial era to the present time, especially investment by lawyers possessing social, economic, or cultural "capital" to support their elite standing.<sup>60</sup> Where early investment was substantial and sustained over time (as in India or the Philippines), law and the legal profession have remained relatively autonomous. Where domestic elites failed to make such an investment, the autonomy of law has been greatly reduced (as in Malaysia, Hong Kong, and Singapore), and thus of limited use for opposing an authoritarian government—unless lawyers receive support from elite global sponsors (as in Indonesia). Dezalay and Garth's research provides valuable descriptions of the actions of elites in former colonies, but their general argument applies to non-colonial states as well. Limited early investment in law's autonomy from political rulers in countries such as Thailand and China has had a profound effect on the subsequent development of law and its relative autonomy (or lack of autonomy) from the central political authority of the state.<sup>61</sup> In the late 1980s, investment by indigenous elites in institutional reform in Mongolia and Bangladesh changed the path of

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<sup>59</sup> Harding, *supra* note 47; RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008); *see also* LEV, *supra* note 49.

<sup>60</sup> DEZALAY & GARTH, *supra* note 41. Their study includes Hong Kong, India, Indonesia, Philippines, Malaysia, Singapore, and South Korea.

<sup>61</sup> RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); DAVID M. ENGEL, LAW AND KINGSHIP IN THAILAND DURING THE REIGN OF KING CHULALONGKORN (1975); TAMARA LOOS, SUBJECT SIAM: FAMILY, LAW AND COLONIAL MODERNITY IN THAILAND (2006).

legal development, supporting both a sharp turn toward democracy and a potential for greater autonomy of law.<sup>62</sup>

Boaventura de Sousa Santos and Cesar Rodriguez-Garavito show, in contrast to Dezalay and Garth, how social justice lawyering in the Global South has arisen “from below,” supported by a “subaltern cosmopolitan legal consciousness” and through the efforts of progressive networks that extend both across borders and from civil society into government.<sup>63</sup> Case studies by Santos, Rodriguez-Garavito, and other scholars illustrate the growing importance of transnational collaborations to pressure multinational corporations and domestic regimes to respond to the concerns of less powerful groups and comply with international human rights norms.<sup>64</sup> Studies in this collection also suggest rich possibilities for effective action “from below” to defend rights or change policies by nonelite lawyers who find collaborators in civil society and within the government itself—even in the most authoritarian states.<sup>65</sup> The perspective of Santos and Rodriguez-Garavito resonates with the literature on social movements and “history from below” emphasizing the importance of political opportunities and resources available for collective action against the state.<sup>66</sup>

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<sup>62</sup> See *infra* notes 100–101, 130–131 and accompanying text.

<sup>63</sup> LAW AND GLOBALIZATION FROM BELOW, *supra* note 6. “Subaltern cosmopolitan legality” is an approach to the study of law which “aims to empirically document experiences of resistance, assess their potential to subvert hegemonic institutions and ideologies, and learn from their capacity to offer alternatives to the latter.” *Id.* at 14–15.

<sup>64</sup> Additional examples of transborder movements leveraging NAFTA’s framework can be found in the symposium organized and edited by Scott Cummings & Louise Trubek. See Cummings & Trubek, *supra* note 3. The potential influence of Transnational Activists Networks (TANS) is described in classic studies by Kathryn Sikkink and her colleagues. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al. eds., 1999).

<sup>65</sup> Examples include Duean Wongsa, *TRAFCORD and Its Participation in the Promotion of Human Rights to Counter Human Trafficking in Thailand*, 31 WIS. INT’L L. J. 501 (2013) (describing network collaboration between an NGO and government); John Gillespie, *The Juridification of Cause Advocacy in Socialist Asia: Vietnam as a Case Study*, 31 WIS. INT’L L.J. 672 (2013) (advocacy for a community deploying symbolic capital gained as former government official) [hereinafter *The Juridification of Cause Advocacy in Socialist Asia*]; Cynthia Farid, *new Paths to Justice: A Tale of Social Justice Lawyering in Bangladesh*, 31 WIS. INT’L L.J. 421 (2013) (illustrating the important role of bar association leaders and law school faculty); Arvind Narrain & Arun Thiruvengadam, *Social Justice Lawyering and the Meaning of Indian Constitutionalism: A Case Study of the Alternative Law Forum*, 31 WIS. INT’L L. J. 525 (2013) (emphasizing the importance of collaboration with social movements).

<sup>66</sup> See Sidney Tarrow, *States and Opportunities: The Political Structuring of Social Movements*, in *COMPARATIVE PERSPECTIVE ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES AND CULTURAL FRAMINGS* 41 (Doug McAdam et al. eds., 1996).

Terence Halliday, Lucien Karpik, and Malcolm Feeley compare the evolution of political and legal liberalism in former British colonies (including Malaysia, India, and Singapore).<sup>67</sup> They and their collaborators focus on the capacity of courts and the organized bar to remain autonomous following the end of British colonization and establishment of authoritarian governments. Key political transitions in each country have restructured the relationship between the political regime and legal institutions. Taking differences in the courts and bar as a starting point, their case studies describe variations in direct state control of the judiciary, doctrinal barriers that limit access to the courts, and restrictions on the independence of the legal profession.<sup>68</sup> Tracing the “fate” of liberal institutions, the authors do not consider processes of legal mobilization as such, or the growing influence of international movements for rights and the rule of law. Yet their case studies underscore the importance of the bar and courts, and the role of social movements that influence the mobilization of law and the strategic choices lawyers must make.<sup>69</sup>

Sarat and Scheingold’s influential work on cause lawyering contributes a fourth important comparative perspective.<sup>70</sup> Conceptualization of “cause lawyers” as practitioners who further “a

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<sup>67</sup> See Terence C. Halliday & Lucien Karpik, *Political Liberalism in the British Post-Colony: A Theme with Three Variations*, in *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX 3* (Terence Halliday et al. eds., 2012) [hereinafter *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY*]. Asian countries in this study include India, Malaysia, Singapore, and Pakistan.

<sup>68</sup> Thus, while Dezalay and Garth emphasize the sociological process by which a significant group of elites invests lesser or greater amounts of social, economic and political capital in the autonomy of legal institutions (and describe subsequent political events which affect the value of this capital), Halliday, Karpik and Feeley take the outcome of this process as their starting point, examining the evolution of liberal ideals under political arrangements vastly different from Britain’s. Santos and Rodriguez-Garavito, like Dezalay and Garth, describe opportunities and strategic choices that led to legal cases, made careers, and, collectively, established the character of legal institution. Halliday, Karpik and Feeley’s more conventional political history focuses on the effects of authoritarianism which have undermined liberal ideals and defined points of conflict.

<sup>69</sup> In a different context, the globalization of financial reforms, Halliday has persuasively shown that the outcome of legal transplantation depends on the stakes of institutional players at the receiving end who transform new laws and legal practices to reinforce existing roles and relationships. See Terence Halliday, *Architects of the State: International Organizations and the Reconstruction of States in East Asia*, 37 *LAW & SOC. INQUIRY* 265 (2012).

<sup>70</sup> *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES*, *supra* note 33; *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA*, *supra* note 2; *THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE* (Austin Sarat & Stuart Scheingold eds., 2005); see also Sarat & Scheingold 2006, *supra* note 39.

vision of the good society”<sup>71</sup> has encouraged detailed case studies of their advocacy. These studies have explored the specific conditions under which lawyers’ careers take shape, law is deployed as a political resource, sites of practice are constructed, and possibilities for change emerge.<sup>72</sup> Among the most important conditions for cause lawyering identified by Sarat and Scheingold are the political limitations and openings created by the state. Surveying the research, they conclude that “the strategy, tactics, recruitment, reproduction, and organization of cause lawyers—as well as relationships between cause lawyers and mainstream professionals” must constantly adjust to “the changing configurations of state power.”<sup>73</sup> Globalization of law is a second important factor influencing cause lawyering. Notwithstanding the influence of the rule of law as an element of neoliberal economic development promoted “from above,” they conclude that the rule of law “from below” also creates new openings for lawyers challenging the state. This is because law necessarily “decenters national legal orders, bringing them into stark juxtapositions, bringing new forces to bear in contestation over legal rules and practices, bringing new patterns of power as legal life gets rearranged.”<sup>74</sup>

Because these comparative projects were undertaken with different goals in mind, they emphasize different contextual factors that influence how law can be mobilized and with what success. Dezalay and Garth, like Halliday and his collaborators, describe the role of lawyers in relation to specific types of institutions. These two studies are focused primarily on the relation between the evolving influence of the state and the capacity to mobilize law, but differ in the attention they give to specific institutions and actors in that process—elite lawyers, bar associations, courts, social movements, or global power holders. In contrast, Santos and Garavito (like Sarat and Scheingold) are more interested in the mobilization of law as a process than in the evolving state context. Because they focus on mobilization, they pay more attention to the support for mobilizing law in the advocates’ immediate context, including social movements, recruitment of lower level officials, NGOs, transnational activist networks, and other forms of global

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<sup>71</sup> See Sarat & Scheingold, *supra* note 36 and accompanying text.

<sup>72</sup> Sarat & Scheingold 2006, *supra* note 39, at 10.

<sup>73</sup> *Id.* at 12.

<sup>74</sup> *Id.* at 14.

support.<sup>75</sup> Their projects view the global movement for rule of law as complex and multilayered, rather than an elite-driven process, and discuss the influence it has had in ways not envisioned by some of its most powerful global sponsors.<sup>76</sup>

Together, these studies provide starting points for development of a descriptive and analytical framework for comparing mobilization of law in different countries. By seeking to explain when and how law can be mobilized strategically as a political resource, each study illuminates important aspects of the role of institutions, opportunities, and resources in supporting or limiting the law's role. We draw three conclusions from these studies that are developed further in the next section. First, the capacity to mobilize law as a political resource is closely connected to the independence of legal institutions and the bar. Second, the relationship between legal mobilization and the capacity for political dissent is critical. These two domestic factors interact in ways that produce variation across time and space. They also are shaped by global forces. Santos and Rodriguez emphasize that social movements, and especially global movements, provide alternatives to domestic political support for legal mobilization. Similarly, Sarat and Scheingold argue that interaction between a state's legal institutions, globalization, and social movements may create new openings for cause lawyering. As this research highlights, a third important factor shaping legal mobilization is the role of global connections. The influence of globalization has been particularly complex, in part because global actors have different motives and offer different resources, and in part because global support is influenced by the domestic space for legal mobilization. The next section provides an initial mapping of these complex relationships.

#### IV. A COMPARATIVE FRAMEWORK

In this part, we draw from the contributions to this issue and the broader comparative literature to suggest a framework for understanding differences and similarities in the mobilization of law across Asian states. This framework is an effort to facilitate analysis of the domestic and global factors shaping different avenues for and types of legal mobilization for justice. It seeks to do two things. First, we identify two

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<sup>75</sup> Boaventura de Sousa Santos & Cesar Rodriguez-Garavito, *Law, politics, and the subaltern in counter-hegemonic globalization*, in LAW AND GLOBALIZATION FROM BELOW, *supra* note 6.

<sup>76</sup> *Id.*



broad domestic factors—autonomy of law and political openness—which we suggest may help to illuminate why and how lawyers mobilize law for social justice in different ways in different contexts. Next, we use these factors to explore the opportunities and limitations that shape legal mobilization across the region and how they may influence particular sites and strategies in each country. We then consider how these domestic factors may interact with global ones to influence the availability and type of funding for social justice work. At each stage of our analysis, we emphasize that the framework we propose is intended to be a starting point for deeper examination and refinement of our understanding of mobilization of law across the region and that our conclusions are preliminary and tentative.

## A. MAPPING DOMESTIC SPACE FOR MOBILIZING LAW

### 1. *Autonomy of Law and Political Openness*

Building on contributions to this issue and the larger body of comparative scholarship, we begin by suggesting two factors that influence the domestic space for mobilizing law. The first may be termed the autonomy of law,<sup>77</sup> by which we mean the degree to which law can be mobilized through agencies of the state, for example courts, to challenge those with political power.<sup>78</sup> Dezalay and Garth suggest that the greatest threat to legal autonomy is the power of authoritarian governments over courts and the legal profession. Similarly, Halliday, Karpik, and Feeley's examination of former British colonies shows that the principal threats to

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<sup>77</sup> The importance of autonomy more generally may be a complex issue. Autonomy of law has special importance for claimants of rights who lack financial resources and access to political leaders, but statist judiciaries, described earlier, may perform some judicial functions *more* effectively in a "developmental state" precisely because they lack a degree of autonomy. See also John Gillespie, *Rethinking the Role of Judicial Independence in Socialist-Transforming East Asia*, 56 INT'L & COMP. L.Q. 837 (2007).

<sup>78</sup> It may be asked why we have not begun by considering whether the legislative and executive branches respect the autonomy of law, which is the liberal democratic ideal. But while this may seem a self-evident starting point, we are especially interested in how lawyers mobilize law to support the aspirations of clients, political or otherwise. Lawyers do this in distinctive ways, through their special knowledge of legal process and legal ideology. As we discover when we combine our two factors, below, the most favorable conditions under which courts and bar are independent and political space is open to mobilizing dissent occur in democracies. We have chosen to emphasize conditions permitting mobilization rather than the institutions that these conditions reinforce. While democracies may be relatively easy to identify and characterize, the regimes in Groups II through IV below are less easily labeled and the factors on which we focus are a more useful guide to the prospects for social justice lawyers.

legal liberalism are limitations imposed on (and by means of) the courts and organized profession that entrench dominant political interests. Both studies remind us that the factors influencing legal autonomy are complex and context-specific. Legal autonomy is influenced by the relationship among different types of courts, the organized bar, and law schools. It is also shaped by the degree to which law is structurally protected and widely implemented. Thus, one would suspect that law is less autonomous in contexts in which it is easy to change constitutional and statutory provisions or where lower level government officials have broad discretion over policy implementation. On the other hand, local discretion may also provide opportunities for lawyers to influence local decision makers—and may place those decision makers in a position of exercising power to support social justice causes. Illustrating this point, Santos and Garavito-Rodriguez emphasize the possibilities for exploiting the decentralization of state power to advance movements, while some case studies assembled by Sarat and Scheingold describe what might be termed “cause bureaucrats” as well as “cause lawyers.”<sup>79</sup>

Studies on the autonomy of law have placed greatest emphasis on the accessibility and responsiveness of the courts. Courts dominated by the political interests of the executive and legislative branches have been more hostile to attempts to mobilize law for social justice than courts that are relatively autonomous from political domination. We have already described the generally statist orientation of the bureaucratized judiciaries in many Asian countries. More authoritarian political leaders have relied on a variety of direct and indirect means of influence over judges. For example, control of bureaucratic appointments and advancement has created judiciaries with less autonomy in Indonesia and Malaysia.<sup>80</sup> In these and other states, executive power has been reinforced through legislative interventions to limit judicial review of executive power, by constitutional amendment, or (in the most extreme cases) through direct political pressure on judges.<sup>81</sup> In some Asian legal

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<sup>79</sup> See Neta Ziv, *Cause Lawyers, Clients, and the State: Congress as a Forum for Cause Lawyering during the Enactment of the Americans with Disabilities Act*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL SOCIETY*, *supra* note 2, at 211.

<sup>80</sup> In some countries, bias introduced through bureaucratic appointment has been augmented by ethnic preferences. DEZALAY & GARTH, *supra* note 41, at 96; Shanmuga Kanesalingham, *Monkey in a Wig: LoyalBurok, UndiMsia!, Public Interest Litigation and Beyond*, 31 *Wis. Int'l. L.J.* 586 (2013).

<sup>81</sup> *Corporatism and Judicial Independence*, *supra* note 50 (describing judicial appointments in Singapore); Cheesman & Kyaw Min San, *supra* note 44 (describing direct influence on judges in pre-reform Myanmar).

systems, an important consequence of judicial subservience to the interests of the executive branch has been the development of jurisprudence restricting access to courts.<sup>82</sup>

Members of the legal profession are licensed by the state, and subject to state supervision, but they are also private actors with a degree of independence from the state. Notwithstanding the limited autonomy of the courts in many countries, the legal profession has preserved a degree of independence in some Asian states through its elite social status, superior education, relation to an international community of wealthy clients, and training (often abroad) in a rule of law legal ideology.<sup>83</sup> Each of these factors helps to explain the readiness of the legal profession in some countries with statist judiciaries and an authoritarian government to embrace litigation and alternatives to litigation for mobilizing law to promote social justice when there are opportunities.<sup>84</sup>

The second broad factor that we suggest influences the domestic space for mobilizing law may be termed political openness, by which we generally refer to opportunities to mobilize dissent outside of legal institutions. Such opportunities relate to a complex web of factors, which include the existence and strength of domestic civil society actors, and the degree and severity of governmental repression. As other scholars have long noted, the power of organizations, movements, and individuals to oppose the government through politics has a direct relationship to their capacity to mobilize law for social change.<sup>85</sup> A strong environment of openness may both provide more resources for, but make less necessary, legal mobilization. In these contexts, law may be used to complement political strategies to strengthen their overall impact. On the other hand, a weak environment may channel political grievances into courts, but still imperil the lawyers who advance them if they overstep political bounds. Here, law may be used in more subtle ways to push the limits of authoritarianism by exposing inconsistencies between legality and practice, or to negotiate solutions to local problems.

<sup>82</sup> Malcolm Feeley, *Judge and Company: Court, Constitutionalism, and the Legal Complex*, in *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY*, *supra* note 67, at 493.

<sup>83</sup> No assumption is made about the nature of the rule of law ideology embraced by social justice lawyers. Rule of law is an ideal constructed by practice, and as experience has shown, takes many different forms, promoting many different kinds of fundamental values and institutions. See *Mythmaking in the Rule-of-Law Orthodoxy*, *supra* note 49; see also Frank Munger, *The Cause Lawyer's Cause*, 28 *LAW IN CONTEXT* 95 (2010) (Austl.).

<sup>84</sup> See Part IV.A.ii; Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 *UCLA L. REV.* 506 (2012).

<sup>85</sup> See *id.* (reviewing the U.S. literature).

The case studies assembled by Sarat and Scheingold, and by Santos and Rodriquez-Garavito provide many illustrations of law mobilized for political goals with the support of NGOs, domestic political groups, social movements, transnational activist networks, and social and public media. In general, where civil society is strong, support for mobilizing law for social justice can come from many different sources, and will be shaped by both the opportunities created by local politics and institutions, and by direct and indirect government interventions to limit dissent.<sup>86</sup> Direct limitations can include regulation of private organizations (including registration, taxation, and monitoring requirements as well as control of domestic and international sources of funding),<sup>87</sup> licensing and monitoring of public media, and control of assemblies, demonstrations, and other uses of public space.<sup>88</sup> Indirect or informal controls include arbitrary use of bureaucratic and police authority as well as harassment or intimidation that can take any number of forms.<sup>89</sup> Under the most repressive regimes, a government may resort to arrest, prosecution, or imprisonment of lawyers who have challenged its authority.<sup>90</sup>

In our framework, interaction between autonomy of law and political openness creates a space in which social justice advocates encounter distinctive constraints and opportunities. The point we make here is that these constraints and opportunities may have distinctive patterns that allow us to better compare social justice practice across Asian states. We emphasize that each factor is itself in reality a shorthand for a complex set of ideas and institutions—and also influence one another. Because of this, we also emphasize that each factor should

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<sup>86</sup> Sarat & Scheingold, *supra* note 2. Sarat and Scheingold's observation is supported by a well-developed body of social movement research. See COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS, *supra* note 66.

<sup>87</sup> Authoritarian governments especially exercise discretion unchecked by law associated with state funding as well as licensing or registration requirements. See, e.g., Gillian Koh & Ooi Giok Ling, *Relationship between State and Civil Society in Singapore: Clarifying the Concepts, Assessing the Ground*, in CIVIL SOCIETY IN SOUTHEAST ASIA 184 (Lee Hock Guan ed., 2004); see also MARK SIDEL, LAW AND SOCIETY IN VIETNAM: THE TRANSITION FROM SOCIALISM IN COMPARATIVE PERSPECTIVE, 141–165 (2008).

<sup>88</sup> See, e.g., Kanesalingham, *supra* note 80.

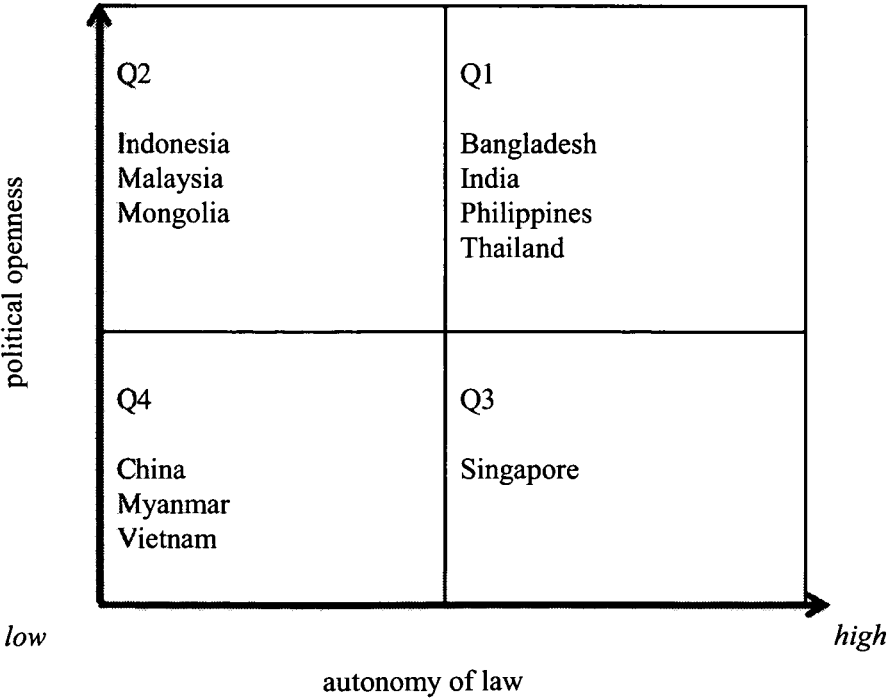
<sup>89</sup> See, e.g., MEREDITH L. WEISS, PROTEST AND POSSIBILITIES: CIVIL SOCIETY AND COALITIONS FOR POLITICAL CHANGE IN MALAYSIA 124 (2006); see *infra* notes 159–161 and accompanying text.

<sup>90</sup> Cheesman & Kyaw Min San, *supra* note 44; See also *China Human Rights Briefings: Chinese Authorities Resort to Violence Against Human Rights Defenders*, CHINESE HUMAN RIGHTS DEFENDERS (May 14, 2013, 4:23 PM), <http://chrndnet.com/2013/05/7768/>.

be understood as a continuum with many intermediate stages between the extremes that contribute to significant variations in practice. Our modest claim here is that, although each factor simplifies a complex reality, taken together they nonetheless help orient comparative analysis of the broad structural features of domestic politics that powerfully influence legal mobilization. We use it as a starting point to guide deeper investigation of the similarities and differences we observe in legal mobilization in the eleven countries examined in this issue.

Figure 1 charts the relationship between autonomy of law and political openness, and tentatively assigns countries in this issue to relevant quadrants. Because each dimension is complex, the placement of each country is only intended to suggest a starting point from which to examine distinctions within each quadrant and differences from countries in others. We emphasize at the outset that, although the countries in each quadrant have important similarities, there are also differences that matter for lawyers' advocacy strategies. Figure 1 is thus meant to provide a way of thinking about differentiating conditions for lawyers in order to help guide further examination, comparison, and refinement.

Figure 1: Autonomy of Law and Political Openness



## 2. Contexts for Mobilization of Law: A Tentative Comparison

This section explains our initial placement of countries within specific quadrants, together with our qualifications and reservations, and suggests implications of each location for legal mobilization. Our analysis draws on both detailed country studies and comparative research undertaken by other scholars bearing on political openness and autonomy of law.<sup>91</sup> The goal of this exercise is not to overstate similarities or reify differences, but rather to offer a starting point that will lead to deeper understanding of factors influencing legal mobilization.

Quadrant 1 is comprised of countries that have had some success building both autonomy of law and political openness—India, the Philippines, Bangladesh, and Thailand—although there are important differences.<sup>92</sup> India and the Philippines are relatively secure democracies

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<sup>91</sup> Several other scholars have described a roughly defined, and similar, continuum of divergent political and legal development in Asian states from those where political freedom and use of law to challenge political authority is most confined (Myanmar, Singapore, Vietnam, China), to an intermediate transitional group of authoritarian states with active civil societies (such as Indonesia and Malaysia), to governments closest to being fully democratic (India, Philippines, and perhaps Thailand). See Harding, *supra* note 47; Randolph S. David, *Political Space: Lessons from Southeast Asia*, in *BREAKING THROUGH: POLITICAL SPACE FOR ADVOCACY IN SOUTHEAST ASIA* 13 (Joel Paredes et al. eds., 2007). Mongolia and Bangladesh are not discussed by any of the comparative studies we have reviewed. Yves Dezalay and Bryant Garth reach similar conclusions by a different route, describing India and the Philippines as states where the autonomy of law has become established and Malaysia, Singapore, and Hong Kong as states where the autonomy of law has failed. We agree as to Singapore, but we follow Harding and Whiting in taking a different view of Malaysia because of its vibrant civil society and activist bar. Andrew Harding & Amanda Whiting, "Custodians of Civil Liberties and Justice in Malaysia": *The Malaysian Bar and the Moderate State*, in *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY*, *supra* note 67, at 247. A third group of states has been described by Harding and by Dezalay and Garth as transitional (Indonesia, South Korea, and we add Malaysia and Mongolia). See Harding, *supra* note 47, at 214; DEZALAY & GARTH, *supra* note 41, at 258–60. Dezalay and Garth's classification of these states is based on the role of sponsorship for social justice lawyers by global law firms. DEZALAY & GARTH, *supra* note 41, at 258–60. Ours is grounded in a large literature on the rising tide of activism in countries like Indonesia and Malaysia which supports legal activism independent of a global elite. We argue that our categories capture the valuable insights from the comparative studies and incorporate them into a broader analysis of differences and potential developments through legal activism.

<sup>92</sup> Dezalay and Garth conclude that lawyers India and the Philippines have the capacity to confront authoritarian governments because of a history of investment in the autonomy of law. DEZALAY & GARTH, *supra* note 41. Halliday, Karpik and Feeley concur in characterizing India as the most "liberal" of the former British colonies. Halliday et al., *supra* note 67; Feeley, *supra* note 82. Andrew Harding likewise characterizes India and the Philippines as "democratic" and tentatively adds Thailand to his list. Harding, *supra* note 47.

with relatively strong protections for political dissent. They also both have strong traditions of bench and bar independence. The high courts of India and the Philippines have long demonstrated their autonomy by rendering important constitutional rulings against governmental abuse of rights.<sup>93</sup> In both places, there is a support structure of lawyers litigating rights and employing other strategies to advance social justice practice in law firms, NGOs, or networks of legal services offices.<sup>94</sup> Some elite law schools teach and train new lawyers to serve the interests of the broader public through legal clinics.<sup>95</sup> None of these attributes guarantees problem-free mobilization of law or easy victory, but lawyers are able at a minimum to mobilize the law through courts for their causes.

We add Bangladesh and Thailand to this list, but they are different from India and the Philippines in important respects. Democracy in both Thailand and Bangladesh is fragile, and recent governments, authoritarian and otherwise, have placed some limits on political activity.<sup>96</sup> In Bangladesh, legal autonomy factors are present,

<sup>93</sup> See EPP, *supra* note 2; Rohit De, *Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India: 1942–1944*, in *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY*, *supra* note 67, at 59. See also Harry L. Roque, *The Call of The Times: Strategic Public Interest Lawyering During The Arroyo Regime In The Philippines (2001–2010)*, 31 *WIS. INT'L L.J.* 462 (2013).

<sup>94</sup> See Narrain & Thiruvengadam, *supra* note 65 (giving a brief history of the rise and fall of PIL in India); see also Roque, *supra* note 93 (describing successful constitutional litigation over a period of years in the Philippines).

<sup>95</sup> Aubrey McCutcheon, *University Legal Aid Clinics: A Growing International Presence with Manifold Benefits*, in *MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD* 267, 277 (Mary McClymont & Stephen Golub eds., 2000), available at <http://equalbeforethelaw.org/sites/default/files/library/2000%20Many%20Roads%20to%20Justice.pdf>.

<sup>96</sup> Further, the risk of violence directed against human rights activists or political opponents of the current regime is far larger in these two countries. Odhikar, *Human Rights Monitoring Report*, ODHIKAR.ORG (June 1, 2012), [http://www.odhikar.org/documents/2013/HRR\\_2013/human-rights-monitoring-monthly-report-may-2013-eng.pdf](http://www.odhikar.org/documents/2013/HRR_2013/human-rights-monitoring-monthly-report-may-2013-eng.pdf). Odhikar is a Bangladesh human rights organization which publishes an annual summary of the status of human rights in Bangladesh. See *About Odhikar*, ODHIKAR.ORG, <http://odhikar.org/about-us/about-odhikar/> (last visited Jan. 16, 2014); *Archive: Annual Human Rights Report*, <http://odhikar.org/category/reports/annual/> (last visited Jan. 16, 2014). On political violence in Thailand, see *World Report: Thailand 2012*, HUMAN RIGHTS WATCH, <http://www.hrw.org/world-report-2012/world-report-2012-thailand> (last visited Feb. 14, 2014). On political space for dissent in Bangladesh, see, e.g., Saleem Samad, *Political Squall Stalls Bangladesh Development Projects*, GLOBAL POLICY FORUM <http://www.globalpolicy.org/component/content/article/176/32020.html> (last visited Jan. 15, 2014). Thailand's *lèse majesté* and computer crimes laws have been used to limit access to the media for political dissent through criminal prosecutions of some activists. On recent restrictions on political space in Thailand see generally DAVID STRECKFUSS, *TRUTH ON TRIAL IN THAILAND: DEFAMATION, TREASON, AND LÈSE-MAJESTÉ* (2011); SAWATREE SUKSETH ET AL.,

though weaker than in India or the Philippines. The Supreme Court of Bangladesh has enforced constitutional mandates to check government abuse of rights. Since the late 1980s, the Bar Association and the Supreme Court have formed a strong, mutually supportive bloc independent from political domination by authoritarian rulers.<sup>97</sup> Older members of the legal profession, many with elite training in England or Russia, have maintained political independence, becoming law professors and leaders of the NGO movement. With respect to political openness, Bangladesh has had relatively free elections and a two party system for several decades, and a working democracy. A large and active NGO community, supported primarily by foreign funding, provides infrastructure for a civil society and contributes information and expertise needed for public participation in politics.<sup>98</sup>

Thailand also has significant limits on legal autonomy. Judicial independence in Thailand is in its early stages. Throughout its history, a tradition of conservative, statist jurisprudence limited use of the courts for social justice advocacy and reinforced the political marginality of the legal profession.<sup>99</sup> The establishment of administrative courts in Thailand in 2000 has changed this picture.<sup>100</sup> A small but increasing number of public interest litigators have won significant constitutional and statutory victories on behalf of social causes.<sup>101</sup> While lawyers mobilizing law for social justice have formed networks to provide mentoring and support, they remain a distinctive minority.<sup>102</sup> The profession as a whole lacks power and does not embrace mobilizing law for public interest causes.

COMPUTER CRIME? IMPACT OF THE COMPUTER-RELATED CRIME ACT OF 2007 AND STATE POLICIES ON THE RIGHT TO FREEDOM OF EXPRESSION (2012) available at [http://www.boell-southeastasia.org/sites/default/files/computercrime\\_publication\\_thai.pdf](http://www.boell-southeastasia.org/sites/default/files/computercrime_publication_thai.pdf).

<sup>97</sup> Cynthia Farid, *New Paths to Justice: A Tale of Social Justice Lawyering in Bangladesh*, 31 WIS. INT'L L.J. 421 (2013).

<sup>98</sup> *Overview of NGOs and Civil Society: Bangladesh* (Aug. 2008), ASIAN DEVELOPMENT BANK, <http://www.adb.org/sites/default/files/pub/2008/CSB-BAN.pdf> (last visited July 31, 2013). Farhat Tasnim, *Civil Society in Bangladesh: Vibrant but not Vigilant* (2007) (unpublished Ph.D. dissertation, University of Taskuba), available at <http://www.tulips.tsukuba.ac.jp/limedia/dlam/B27/B2782934/1.pdf>.

<sup>99</sup> See Wongsu, *supra* note 65.

<sup>100</sup> Peter Leyland, *The Emergence of Administrative Justice in Thailand Under the 1997 Constitution*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES, *supra* note 12, at 230.

<sup>101</sup> See, e.g., Bangkok Pundit, *Thai Court Uphold Suspension of Industrial Projects*, ASIAN CORRESPONDENT (Dec. 3, 2009, 7:30 AM), <http://asiancorrespondent.com/25821/thai-court-upholds-suspension-of-industrial-projects-part-1/>.

<sup>102</sup> Frank Munger, *Globalization, Investing in Law, and the Careers of Lawyers for Social Causes: Taking on Rights in Thailand*, 53 N.Y.L. SCH. L. REV. 745 (2008–2009).



With regard to political openness, legal restrictions limiting some forms of expression in Thailand, occasional limits on mobilization, and violence directed against some activists in both Bangladesh and Thailand have not deterred emergence of community and NGO-based collective action for both local causes and causes linked to global networks of support.<sup>103</sup>

Quadrant 2 includes countries with relatively limited legal autonomy but increasingly vibrant civil societies reflecting greater political openness: Indonesia, Malaysia,<sup>104</sup> and Mongolia.<sup>105</sup> Authoritarian governments and a preference for state management of key resources and services are characteristics shared with the “new developmental state.”<sup>106</sup> Each of these states is in political transition and thus lawyers pursuing social justice seem to have increasing resources and space for their work.

Indonesia’s complex blend of traditional and European legal institutions were quickly subordinated to the control of the authoritarian governments that followed independence after World War II.<sup>107</sup> With Suharto’s resignation in 1998, following the collapse of the Indonesian economy during the Asian fiscal crisis, the repressive institutions under his rule were dismantled, but even under *Reformasi*, subsequent leaders have struggled to establish democratic governance and more responsive courts.<sup>108</sup> Lack of judicial training, corruption, and political influence continue to constrain the independence of the judicial system.<sup>109</sup> Limiting

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<sup>103</sup> Michael Connors, *Ambivalent About Human Rights: Thai Democracy*, in HUMAN RIGHTS IN ASIA 103 (Thomas Davis & Brian Galligan eds., 2011); Stephen Golub, *From the Village to the University: Legal Activism in Bangladesh*, in MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD, *supra* note 95, at 127.

<sup>104</sup> See Harding & Whiting, *supra* note 91; see also WEISS, *supra* note 89.

<sup>105</sup> Tom Ginsburg, *Nationalism, Elites, and Mongolia's Rapid Transformation*, in MONGOLIA IN THE TWENTIETH CENTURY: LANDLOCKED COSMOPOLITAN 247 (Stephen Kotkin & Bruce A. Ellemen eds., 1999); Jargalsaikhan Mendee, *Civil Society in a Non-Western Setting: Civil Society in Mongolia* (July, 2012) (unpublished M.A. thesis, University of British Columbia), available at [https://circle.ubc.ca/bitstream/handle/2429/42779/ubc\\_2012\\_fall\\_jargalsaikhan\\_mendee.pdf?sequence=1](https://circle.ubc.ca/bitstream/handle/2429/42779/ubc_2012_fall_jargalsaikhan_mendee.pdf?sequence=1).

<sup>106</sup> See Trubek, *supra* note 55. Other states in Trubek’s category include China and perhaps Vietnam, but neither of these countries has permitted political openness to the same degree as these three.

<sup>107</sup> Daniel Lev, *Judicial Institutions and Legal Culture in Indonesia*, in CULTURE AND POLITICS IN INDONESIA 246 (Claire Holt ed., 2d prtg. 1977).

<sup>108</sup> See DEZALAY & GARTH, *supra* note 41, at 119–125.

<sup>109</sup> See *Tackling Corruption in Indonesia*, WORLD BANK NEWS AND BROADCAST (Apr. 8, 2004), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190200-menuPK:34457-pagePK:34370-piPK:34424-theSitePK:4607,00.html>.

the progress of reforms is an influential establishment empowered under Suharto's New Order and entrenched as leaders of government bureaucracies, the military, and the corporate economy.<sup>110</sup> A small group of elite lawyers founded the Legal Aid Institute in 1971, which provided legal support for opponents of the authoritarian regime and became a leading advocate for the rule of law. Since its founding, the Institute has provided crucial mentorship to subsequent generations of Indonesian activist organizers and lawyers.<sup>111</sup> Its importance has grown, as a source of leadership and of new leaders, as Indonesian civil society organizations have begun to flourish.<sup>112</sup>

Malaysia's judiciary, although better trained than Indonesia's, has long been under executive and legislative control.<sup>113</sup> The British constitutional settlement of Malaysia left the government in the control of a Malay minority, which has exercised its power by means of a single, dominant party since independence.<sup>114</sup> A large Chinese minority, prominent in the business community, has been all but excluded from politics. The government has kept tight control of the media, and state of emergency orders issued in 1957, during an uprising long since crushed, gave the government broad powers to suppress its opponents and any public dissent.<sup>115</sup> Only the Internet has remained free from regulation

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<sup>110</sup> Edward Aspinall, *Indonesia: Transformation of Civil Society and Democratic Breakthrough*, in *CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA: EXPANDING AND CONTRACTING DEMOCRATIC SPACE* 61 (Muthiah Alagappa ed., 2004). Further limiting progress toward observing basic human rights, the United States considered Indonesia an important second theater in the war on terror, encouraging an increase in government capacity to monitor and control the activities of suspected terrorists and reducing concern about violating human rights. Michele Ford, *International Networks and Human Rights in Indonesia*, in *HUMAN RIGHTS IN ASIA*, *supra* note 103, at 38.

<sup>111</sup> As Sukarno's dictatorship fell in the mid-1960s, a small group of elite anti-authoritarian lawyers founded PERADIN, the Indonesia Advocates Association, which kept alive the ideals of independent courts and legal profession. PERADIN eventually sponsored the Legal Aid Institute, which in turn has become a key to preservation and replication of social justice lawyering in Indonesia. Daniel Lev, *A Tale of Two Legal Professions: Lawyers and the State in Malaysia and Indonesia*, in *RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA*, *supra* note 1, at 383.

<sup>112</sup> In the early 1990s, as Suharto's political grip began to give way in response to massive demonstrations against brutal government suppression of protests, and increasing after his fall in 1998, Indonesian civil society emerged as an active social force, able to bring pressure for change. There have been an increasing number of organizations linked to the labor movement, women's rights NGOs, human rights of ethnic minorities and other social causes, many linked to international networks and donors. See Ford, *supra* note 110.

<sup>113</sup> See Lev, *supra* note 111.

<sup>114</sup> See DEZALAY & GARTH, *supra* note 41, at 93–94.

<sup>115</sup> For examples, see WEISS, *supra* note 89, at 124. See also Kanessalingham, *supra* note 80.

and, as a result, Malaysia's NGOs and social movement organizations have used it to create an audience, disseminate their activities, and to mobilize support. A major political victory for opposition parties in 2008, which limited the Malay party's control of Parliament, has been widely attributed to increasingly effective mobilization of political opposition by use of the Internet.<sup>116</sup> In 2011, a coalition of human rights and other organizations succeeded in pressuring the government to withdraw its emergency orders, a movement that included high profile (via the Internet) litigation brought by social justice lawyers on behalf of detainees.<sup>117</sup>

The Malaysian legal profession illustrates an important point about the status of lawyers—subject to state authority and simultaneously capable of becoming independent political actors. The bar, made up of elite, foreign-trained lawyers serving corporate clients, most ethnically Indian, has remained independent and a strong advocate for the rule of law, even though the courts offer limited access for political challenges and the profession itself has lacked political influence.<sup>118</sup> The legal profession has played an important role in supporting NGOs, exploiting access to the Internet to raise legal issues which challenge the government's authority and—as the courts have become more open since 2000—employing litigation in support of broader political campaigns.

Mongolia's abandonment in 1990 of its long history of communist and authoritarian government to become a parliamentary democracy has also created a terrain of rapid legal and political change. While Mongolia's transition to democracy is widely viewed as successful, based in part on its ability to conduct "free and fair elections,"<sup>119</sup> the rapid transformation is the result of elite consensus rather than restructuring in response to demands from below.<sup>120</sup> As a

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<sup>116</sup> Kanesalingham, *supra* note 80.

<sup>117</sup> *Id.*; Tsun Hang Tey, *Public Interest Litigation In Malaysia: Executive Control and Careful Negotiation of the Frontiers Of Judicial Review*, in PUBLIC INTEREST LITIGATION IN ASIA, *supra* note 1, at 80, 90–93.

<sup>118</sup> Today, the bar is much more diverse, but remains independent and unified in its support for the rule of law. The Malaysian Bar currently has more than 14,000 attorneys (or about a 1/2000 attorneys/population ratio, compared with 1/350 in the US). *Statistics—No. of Lawyers and Law Firms*, MALAYSIAN BAR, [http://www.malaysianbar.org.my/statistics\\_no\\_of\\_lawyers\\_and\\_law\\_firms.html](http://www.malaysianbar.org.my/statistics_no_of_lawyers_and_law_firms.html) (last visited Jan. 16, 2014).

<sup>119</sup> SUSAN V. LAWRENCE, CONG. RESEARCH SERV., R41867, MONGOLIA: ISSUES FOR CONGRESS, (2011), available at <http://www.fas.org/crs/row/R41867.pdf>.

<sup>120</sup> See Ginsburg, *supra* note 105.

consequence, the government remains highly centralized. Mongolia's politics have been influenced by corruption with the rise of global interest in its natural resources.<sup>121</sup> Parties in power have used their position to invoke the law for reprisal against opponents, and civil society organizations challenging policies of the government are thus at risk. Nonetheless, Mongolia is relatively more open than the strongly authoritarian countries discussed below. NGOs participating in politics or asserting rights against the government typically seek political sponsorship from one of the major political parties.<sup>122</sup>

Mongolia's institutional support for autonomy of law, however, is relatively weak. The judiciary, lacking training or experience in independence, and with few incentives to explore greater autonomy, has been increasingly controlled by the executive.<sup>123</sup> Mongolia's legal profession, like its judiciary, has little experience of independence or training in a rule of law tradition on which to build its role.<sup>124</sup>

Our placement of Singapore as the only country Quadrant 3 may be controversial. Singapore's government has severely limited political space for dissent or even nonconformity.<sup>125</sup> Yet its record with respect to autonomy of law is quite complex. Although its judiciary and legal profession have been described by some commentators as lacking autonomy, Singapore consistently ranks among the leaders in judicial professionalism and rule of law.<sup>126</sup> Jayasuriya refers to these contrasting qualities as "dual legality," meaning adherence to the rule of law for most civil and criminal matters, but—by contrast—adherence to the government's restrictive interpretations of political or civil rights, which limit activities that run counter to the policies of the dominant one-party

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<sup>121</sup> See Mendee, *supra* note 105, at 7, 14. Mongolia's Global Transparency score has fallen precipitously as has its World Bank rule of law score.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The number of lawyers is very small, about 1250 lawyers in a population of 2.7 million (or about one lawyer for every 2200 persons, compared with 1/350 for the US). More significantly, the bar association is a private non-profit organization, but it is the same organization which existed under previously authoritarian governments and membership is apparently compulsory. See *Information Sheet-Mongolia*, JAPAN FED'N OF BAR ASS'NS (Nov 10, 2011), [http://www.nichibenren.or.jp/library/ja/bar\\_association/word/data/Mongolia.pdf](http://www.nichibenren.or.jp/library/ja/bar_association/word/data/Mongolia.pdf) (last visited Jan. 16, 2014).

<sup>125</sup> *Corporatism and Judicial Independence*, *supra* note 50; see also Jothie Rajah, *Lawyers, Politics, and Publics: State Management of Lawyers and Legitimacy in Singapore*, in *FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY*, *supra* note 67, at 149.

<sup>126</sup> See, for example, the World Bank's Rule of Law index which places Singapore at the highest level. *Singapore*, WORLD JUSTICE PROJECT, <http://worldjusticeproject.org/country/singapore> (last visited Jan. 16, 2014).

state or threaten domestic political stability.<sup>127</sup> Jayasuriya also distinguishes Singapore's judiciary from other statist judiciaries because of its professionalism and the absence of overt manipulation of its decisions by the government.<sup>128</sup> Instead, conformity with the government's repressive political control is maintained, he argues, through a high degree of political self-regulation.<sup>129</sup> Internalization of a jurisprudence which conforms to the political expectations of Singapore's ruling party has been encouraged by selective appointment of bureaucrats to judicial positions, short-term rotations between bureaucratic and judicial positions, and occasional removal of judges from the bench after a disapproved decision.<sup>130</sup> More surprising, perhaps, is the absence of overt resistance to authoritarian government by members of the bar, who are equally self-regulating, though not universally so.<sup>131</sup> Lawyers who assist NGOs and other groups interested in policy or political change seldom play a public role,<sup>132</sup> while lawyers who have directly challenged the government have been rare, and in the past, such incidents have drawn swift repression and reprisal.<sup>133</sup>

Thus, in many ways Singapore's situation resembles societies in Quadrant 4. Yet there are reasons to think that change may occur along a different path from other highly authoritarian societies.<sup>134</sup> Some area specialists view the high regard in which the judiciary of Singapore is held by the international community in economic matters and its simultaneous failure to embrace substantive political ideals associated with rule of law as an inherently unstable situation, which places the Singaporean judiciary in a unique position of vulnerability to symbolic resistance in the name of rule of law ideals.<sup>135</sup> As discussed below, the

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<sup>127</sup> Kanishka Jayasuriya, *Introduction: A Framework for the Analysis of Legal Institutions in East Asia*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS, *supra* note 50, at 1.

<sup>128</sup> *Corporatism and Judicial Independence*, *supra* note 50.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Rajah & Thiruvengadam, *supra* note 44.

<sup>132</sup> See Lynette Chua, *Pragmatic Resistance, Law and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore*, 46 LAW & SOC'Y. REV. 713 (2012).

<sup>133</sup> JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE* (2012).

<sup>134</sup> Others have viewed the space for mobilizing political dissent in Singapore as an area of active negotiation and change in which the state has gradually adopted a somewhat more liberal policy. See Koh & Ling, *supra* note 87, at 186–188.

<sup>135</sup> See Garry Rodan, *Political accountability and human rights in Singapore*, in HUMAN RIGHTS IN ASIA, *supra* note 103, at 70.

reputation of Singapore for adherence to the rule of law has created space for some dissident lawyering and may create other openings for change that do not exist, for example, in more closed societies.<sup>136</sup>

China, Vietnam,<sup>137</sup> and Myanmar<sup>138</sup> occupy Quadrant 4: countries having nominally socialist legal ideologies (but with great variation in practice) and authoritarian governments correlated with weak legal autonomy and closed political space. These states differ significantly from those in Quadrant 1—but differ from each other as well. As a matter of ideology, socialist legality reinforces the subservience of the judiciary to the executive,<sup>139</sup> in ways that have important implications for legal development and social justice lawyers. China and Vietnam have been termed “socialist market states,”<sup>140</sup> which are now confronting challenges arising from setting narrow boundaries for political openness while creating ever widening economic and technological links to an international community. Although socialism creates common ground, China and Vietnam’s rapid emergence as market societies may soon place them closer to Singapore by creating tensions between their need for a modern judiciary and desire to maintain control of opposition to state policies and state authority.<sup>141</sup> Until 2010, Myanmar was ruled by a military junta with limited capacity for effective governance and which employed direct political manipulation of the judiciary and reprisals against dissidents and their lawyers<sup>142</sup> to suppress almost all political or social cause mobilization.<sup>143</sup> Because Myanmar has never been governed by a principled or effective socialist government, neither its legal system under dictators and the junta nor its recent progress toward reform has involved the carefully controlled introduction of reforms to support an increasingly market-oriented economy that is apparent in China and

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<sup>136</sup> See Rajah & Thiruvengadam, *supra* note 44. Thus, because Singapore is highly regarded as a commercial center and is strongly motivated to maintain its “first world” status, Singapore may have created conditions under which the contradictions of dual legality maximize the potential for liberal change.

<sup>137</sup> See *The Juridification of Cause Advocacy in Socialist Asia*, *supra* note 65; see also SIDEL, *supra* note 87.

<sup>138</sup> Cheesman & Kyaw Min San, *supra* note 44.

<sup>139</sup> See *Corporatism and Judicial Independence*, *supra* note 50.

<sup>140</sup> See David, *supra* note 91.

<sup>141</sup> See RACHEL E. STERN, *ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE* (2013).

<sup>142</sup> See Cheesman & Kyaw Min San, *supra* note 44.

<sup>143</sup> See VINCENT BOUDREAU, *RESISTING DICTATORSHIP: REPRESSION AND PROTEST IN SOUTHEAST ASIA* (2004); Andrew McGregor, *Human Rights Coalitions in Myanmar*, in *HUMAN RIGHTS IN ASIA*, *supra* note 103, at 144.

Vietnam. Although Myanmar has recently moved toward greater openness, it is far behind and has a long legacy of ineffective governance and destructive political repression to overcome.

Although “socialist legality” subordinates formal law to socialist ideology and to party interpretations or policy,<sup>144</sup> there are also many practical limitations on judicial independence in China. Although China’s court system is complex, having many levels and territorial jurisdictions covering a vast geographic expanse, it is a system designed to maximize interaction between policy making branches, the courts, and political supervision, ultimately under party control.<sup>145</sup> The subtlety of this system of control allows political leaders to use the courts for purposes of indirect control, punishing rule of law violations by subordinate officials accused of corruption or rights violations while creating an instrument of political control capable of keeping conflicts from reaching higher levels of government.<sup>146</sup> Courts have become an avenue for social justice advocacy in rare cases, but far more often provide no remedy against policies of the central government.<sup>147</sup> The very complexity of the system has meant that at the margin, social justice lawyers may occasionally win in administrative courts,<sup>148</sup> or general courts,<sup>149</sup> but victories require special conditions where other resources are brought into play.<sup>150</sup> The practice of law as a private profession was reintroduced in both China and Vietnam in the 1980s in response to

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<sup>144</sup> The contradiction of judicial autonomy under socialist legality has been described as similar to serving two masters. The courts are subservient to the law and also to the socialist principles underlying the law. Even in cases where the written law is relatively clear, party implementation commands supreme respect as the peoples’ interpretation of socialist principles underlying the law. SIDEL, *supra* note 87.

<sup>145</sup> *Corporatism and Judicial Independence*, *supra* note 50, at 193–197.

<sup>146</sup> Ben Liebman, *Lawyers, Legal Aid, and Legitimacy in China*, in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA, *supra* note 1, at 311–356.

<sup>147</sup> Mary Gallagher, ‘Use the Law as Your Weapon!’: *Institutional Change and Legal Mobilization in China*, in ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 54 (Neil J. Diamant et al. eds., 2005).

<sup>148</sup> John W. Givens, *Sleeping With Dragons? Politically Embedded Lawyers Suing the Chinese State*, 31 2013 WIS. INT’L L. J. 734 (2013).

<sup>149</sup> Gallagher, *supra* note 147.

<sup>150</sup> In China, important recent scholarship has suggested that social change may be advanced on issues such as environmental reform through implementation by local officials attempting to synchronize reform with other important political objectives, like economic growth and social stability. See Alex Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARV. ENVTL. L. REV. 365 (2013).

growing engagement with the global economy.<sup>151</sup> In neither country are professional associations independent of the government.<sup>152</sup> Lawyers who challenge the state's ideology or politics in either China or Vietnam have been subject to severe reprisal as are organizations considered to be troublesome or a threat.<sup>153</sup> Unregistered organizations may be subjected to harassment through frequent inspections, tax audits, and other forms of bureaucratic pressure or policing.<sup>154</sup> Sites of social justice practice which are directly controlled by the state, such as law school clinics or state controlled mass organizations, may be the most secure places for lawyers challenging state policies.<sup>155</sup>

Political space in both China and Vietnam is closely controlled through state ownership of the media, and the Internet is also closely controlled. Use of public space is subject to state control as well. While unions, legal aid, and other organizations serve some public legal needs, and for this reason their lawyers might be characterized as lawyers pursuing social justice, many such organizations are state controlled and their mission limited.<sup>156</sup> Some NGOs are supported by the state, addressing social issues in a way that is compatible with that support.<sup>157</sup> Other NGOs, which have external support, have been required to register and their external sources of support must likewise be registered.<sup>158</sup>

In 1962, Myanmar's government was taken over by military leaders with a professed socialist ideology. With the exception of a brief period of liberalization in 1988, a repressive military junta has carefully controlled the courts and political participation.<sup>159</sup> In 2009, the junta signaled significant progress toward a "discipline democracy," which

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<sup>151</sup> SIDEL, *supra* note 87; Givens, *supra* note 148. The number of lawyers in China exceeds 190,000 (about 1/7900 citizens). THOMAS LUM, CONG. RESEARCH SERV., RS22663, U.S. ASSISTANCE PROGRAMS IN CHINA (2013), available at <http://www.fas.org/sgp/crs/row/RS22663.pdf>. In 2008, Sidel reported that Vietnam had about 8500 lawyers (about 1/10,000 citizens). SIDEL, *supra* note 87.

<sup>152</sup> *The Juridification of Cause Advocacy in Socialist Asia*, *supra* note 65.

<sup>153</sup> *Id.*; LUM, *supra* note 148.

<sup>154</sup> *China Pledges to Allow Nonprofits to Play a Greater Role*, PHILANTHROPY NEWS DIGEST (Mar. 15, 2013), <http://www.philanthropynewsdigest.org/news/china-pledges-to-allow-nonprofits-to-play-greater-role>.

<sup>155</sup> Titi Liu, *Transmission of Public Interest Law: A Chinese Case Study*, 13 UCLA J. INT'L L. & FOREIGN AFF. 263, 278–83 (2008).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See Gillian Wong, *China Says it Will Give Nonprofits a Greater Role*, ASSOCIATED PRESS (Mar. 13, 2013, 6:43 AM), <http://bigstory.ap.org/article/china-says-it-will-give-nonprofits-greater-role>. See also *infra* Part V.

<sup>159</sup> BOUDREAU, *supra* note 143.



established Parliamentary rule under military leadership and in 2011 the ruling military council dissolved itself, turning governance over to a nominally civilian government.<sup>160</sup> Since 2009, civil society has begun to reemerge and relationships with other nations have begun to be restored,<sup>161</sup> but while extreme and arbitrary authoritarian rule may be ending, many of the junta's institutions and practices have left their imprint on political participation and the legal system. Civil society has been greatly weakened by decades of effective suppression of political dissent,<sup>162</sup> but the recent change of direction by the ruling junta has restored party politics and relaxed formal limitations on political space. NGOs have begun to emerge as conduits for new ways of thinking and acting politically.<sup>163</sup>

Under the junta, decisions of the court system in cases the government deemed important were corrupted by direct political manipulation.<sup>164</sup> The domestically trained judiciary had few ideological resources and little incentive to resist political pressure. Trials were frequently closed to the public and state controlled media do not report them. Private law practice was never banned, but lawyers who represented those charged with crimes against the state often faced reprisal, served jail terms, and had their licenses revoked.<sup>165</sup> Myanmar's legal institutions remain formally the same, but with the political opening since 2010 it remains to be seen how mobilization of law will change now that practitioners no longer fear being jailed, public media has been allowed to report what courts do, and there is more democratic participation in government.

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<sup>160</sup> MICHAEL F. MARTIN, CONG. RESEARCH SERV., R42939, U.S. SANCTIONS ON BURMA: ISSUES FOR THE 113TH CONGRESS (2013), available at <http://www.fas.org/sgp/crs/row/R42939.pdf>.

<sup>161</sup> Bart Gaens, *Political Change in Myanmar: Filtering the Murky Waters of "Disciplined Democracy"* 13, 21–22 (Finnish Inst. Int'l Affairs, Working Paper No. 78, 2013), available at <http://www.fiia.fi/en/publication/313/>.

<sup>162</sup> Boudreau describes student groups and other activists trying to organize and coordinate the mass uprising in 1988 but so lacking in experience as protesters that a great amount of time was lost relearning lessons known to earlier generations of activists about mobilizing public support and effective coordination. See BOUDREAU, *supra* note 143.

<sup>163</sup> Aung Hla Tun, *Myanmar Junta Makes Way for Civilian Government*, REUTERS (Mar. 30, 2011, 9:11 AM), <http://www.reuters.com/article/2011/03/30/us-myanmar-politics-idUSTRE72T2O720110330>.

<sup>164</sup> Cheesman & Kyaw Min San, *supra* note 44.

<sup>165</sup> *Id.*

### 3. *Preliminary Evidence: Patterns of Legal Mobilization in Asia*

In this section we examine the usefulness of the framework we have constructed to capture patterns of interaction between legal autonomy and political openness. We have thus far described some of the differences among the countries represented in this issue and situated them in a comparative mapping. Here we draw on evidence from the articles in this issue to ask whether our preliminary mapping illuminates patterns of legal mobilization across the countries represented. Our approach is to consider what the framework suggests about the patterns of legal mobilization across countries and then to compare the evidence we have from our collaborators' articles. We emphasize that legal autonomy and political space are not static concepts, but instead are constantly in motion and interactive. In reality, they constitute one another, and in part through their interaction, each is subject to political contest and reinterpretation. We attempt to refine our understanding of this interaction through our collaborators' descriptions of mobilizing politics to achieve greater autonomy of law and mobilizing law to achieve greater political openness. We are also deeply interested in the variety and creativity of the contributors' individual responses to the opportunities or constraints they have encountered within each country.

Where legal autonomy and political openness are both high—Quadrant 1—we expect to see multifaceted social justice strategies, where law is not prioritized, but used as leverage to advance causes in connection with other forms of political pressure. That is, legal mobilization under conditions of autonomy and openness would look beyond litigation in court—but not leave it behind. Similarly, because institutional development is already strong, the goals of legal mobilization would move beyond building the rule of law (though this would remain important and constantly be at stake) to ultimately focus on using law to more directly redress specific social problems. Here timing may matter: political openness may occur first, creating space for building law's autonomy—or vice versa. Once both are built up, then they come to be viewed as different tools of politics, with neither privileged. In each country, there are efforts to move law to this point of minimal autonomy—so there is a project of building judicial independence that may precede or at least occur simultaneously with the

move to legal empowerment, alternative law, and multifaceted strategies. That is one hypothesis.

What do the contributors to this issue tell us about this hypothesis? We see at least some evidence in support. The first part of the story that Cynthia Farid tells about Bangladesh is one of how the judiciary comes to play a larger role in politics.<sup>166</sup> Elite lawyers initially exert power through politics, a new constitution is passed that creates resources for judicial independence, and then litigation works to promote more formal power in the judiciary. With that project advanced, legal mobilization then moves beyond courts. More disputes are legalized, but this does not of course translate automatically into greater equality, which has to be enforced through courts, but ultimately won through other political means. This then leads into what Farid describes as second-wave lawyering: a move toward more organized forms of legal activism and the rise of NGOs that promote legal empowerment and provide legal aid around social issues. In this model, advocacy occurs inside and outside the court.

The Philippines case, detailed by Harry Roque, traces a somewhat similar trajectory, though in a different context.<sup>167</sup> CentreLaw's litigation campaign is focused on asserting greater independence for courts to check the executive: it litigates to expand standing, challenge martial law, and protect freedom of expression. Then with the role of the court in the state on firmer ground, there is a shift to other issues: reparations for mass rape and broader social justice causes, including reproductive health.

The Alternative Law Forum (ALF) in India also adopts an approach that goes beyond rights claiming, operating in the space of strong democratic and legal institutions—with many problems of course, but their existence is established. Thus, we see lawyers in ALF explicitly embracing a multifaceted, beyond-the-court strategy of mobilizing law, research, community organizing, and public policy advocacy around critical social problems related to class inequality, religious freedom, and sexuality. As the authors suggests, ALF is motivated by skepticism of judicial-led social change movements, and instead seeks to use courts for

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<sup>166</sup> Cynthia Farid, *New Paths to Justice: A Tale of Social Justice Lawyering in Bangladesh*, 31 2013 WIS. INT'L L.J. 421 (2013).

<sup>167</sup> Harry L. Roque, *The Call of the Times: Strategic Public Interest Lawyering During the Arroyo Regime in the Philippines, 2001-2010*, 31 2013 WIS. INT'L L.J. 462 (2013)

its radiating effects. Within this space the move is from law *or* politics, to law *and* politics.

When politics are relatively more open than law—Quadrant 2—we expect to see robust legal and political mobilization in favor of a greater role for the judiciary in the political sphere—what is already achieved in Quadrant 1. Because political space may permit activism with less risk of reprisal, and there may be some protections for speech and opposition politics, we might expect to see centers for resistance develop in the civil society space and then attempt to build law's autonomy. We might also expect that because law is weak, legal mobilization would be subsidiary to political action, or at least focus more narrowly on building the rule of law. Again, it is extremely hard to generalize because each country is different and political openness is such a relative concept, since we may be talking of quite marginal openings in politics relative to law. But there are some basic patterns consistent with this model of building legal autonomy.

If we look to Mongolia, the story that Jigmeddash and Rasmussen tell is one of nascent democratic institutions and a burgeoning civil society, with law groups such as the Center for Human Rights and Development formed to mobilize law in courts on behalf of marginalized groups.<sup>168</sup> But they do so in an environment in which law's autonomy is constrained for several reasons: restrictive standing, no class actions, civil law, and limited constitutional review. The profession is also weak. So the turn to law is tentative, and designed to *both* advance specific causes *and* to build the court's position within the state—thus overcoming some of the challenges to public interest litigation. Cases proceed through the administrative courts, where the issue is compliance with basic regulations, and there are some early successes, notably the 2005 case challenging the imposition of city fees on new residents, which severely hindered movement of the nomadic people. The authors tell of an important challenge to mining rights, which is both locally driven but also supported by external funding and technical support. This work is not just about litigation, but is undertaken alongside a coordinated protest and public relations campaign to put pressure on government, which works, but then ultimately folds under the weight of multinational corporate and government backlash.

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<sup>168</sup> Bayarra Jigmiddash & Jennifer Rasmussen, *Protecting Community Rights: Prospects for Public Interest Lawyering in Mongolia*, 31 2013 WIS. INT'L L.J. 566 (2013).

In Malaysia, we see a similarly tentative step into courts to build power and advance the rule of law, but also deep investment in other forms of politics.<sup>169</sup> There, law's role is constrained, primarily because of the subservience of court to parliament. Kanesalingam tells of the launch of the Centre for Constitutionalism and Human Rights not primarily as a strategic litigation group, but one that turns to court as a last resort and in connection with other strategies. It seeks to empower the citizenry through information disseminated via its blog, research, and information exchange. It seeks to build law's power incrementally—with the Muslim child custody case he describes suggesting a small movement in favor of civil over religious courts—but still emphasizes community education to influence politics and promote the empowerment of marginalized communities.

When, in Quadrant 3, law is relatively more open than politics, then one would imagine that law would be deployed to try to check government overreach and build space for greater dissent. Here is where the case of Singapore may or may not fit easily within this category alone. On the one hand, it seems right to suggest confined political space with single-party politics, repression of opposition, and detention without trial. But on the other, it may be a stretch to suggest judicial autonomy, or even its potential, in light of the limitations on judicial support of civil and political rights. As Rajah and Thiruvengadam suggest, there may be contradictions within the concept of dual state legality that can be exploited, but one aspect of legal autonomy that is not present is the autonomy of lawyers, who have to be able to mobilize law for justice without fear of reprisal—and that is certainly not the case, though there may be some slight openings.<sup>170</sup> Without that, despite some judicial independence, most lawyers are legitimately concerned about the backlash against any activism, leading to—with dissident lawyer Ravi as the exception—associational politics with NGOs rather than lawyers entering court or engaging in public advocacy against the state.

This aspect of Singapore then begins to look more like Quadrant 4, where *neither* law is strong *nor* politics is open. In this environment, it seems plausible to expect caution and incrementalism on the part of lawyers (who are after all relative social elites dependent on the state for their status), coupled with insider strategies where they are available to resolve disputes. There are always exceptions, with lawyers at times

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<sup>169</sup> Kanesalingam, *supra* note 80.

<sup>170</sup> Rajah & Thiruvengadam, *supra* note 44.

bringing more direct ideological challenges, though these carry grave risks. And here the contributions draw distinctions between locally rooted lawyers who adopt inside and incremental strategies focused on basic administrative enforcement or negotiated settlement, and a smaller number of lawyers more willing to walk up to or cross the line, some of whom either start out as or become globally connected. Both insist on formal legality, though take different paths to do so tied to the degree to which they might minimize risk to personal and professional livelihood.

In Vietnam, John Gillespie focuses on lawyers' brokering role.<sup>171</sup> There, the move is not to reform the state through law, but to make the state work in accord with minimal state regulations, through brokering and negotiating strategies to address disputes like the land confiscation claim in his case study. In addition to these lawyer-brokers, there are, as Gillespie shows, a small cadre of reform-oriented lawyers connected to international networks, who look to law as a basis for checking state power; these lawyers in the NGO sphere are connected to global funders and networks, and take big risks, with many ultimately disbarred or imprisoned.

In Myanmar, Nick Cheesman and Kyaw Min San's case study of resistance to land confiscation focuses on the effort to enforce procedural compliance with regulatory licensing.<sup>172</sup> That campaign succeeds by moving the case from the local to the national—and gaining some international attention—in ways that impose enough costs on the government and its private company partner to back down, though this just means that they move operations to another location, not that community members become endowed with rights they are able to assert in the future. Also, it is important to underscore the cost: the lawyer who handles the case loses his license. At the time of the study, although Myanmar was not politically open and law was not autonomous from state control, advocates were able to exploit the limited opportunities for political and legal mobilization to win concessions, but at a great price to the lawyer and with little impact on the political or legal systems.

In China, John Givens again focuses on the role of lawyers channeling dissent through acceptable routinized processes, at times gaining wider access through publicity.<sup>173</sup> We note again that many of the administrative cases Givens studies center on land disputes, which

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<sup>171</sup> *The Juridification of Cause Advocacy in Socialist Asia*, *supra* note 65.

<sup>172</sup> Cheesman & Kyaw Min San, *supra* note 44.

<sup>173</sup> Givens, *supra* note 148.

emerge as a common problem in socialist states where property rights are subservient to party development priorities, although these are intertwined with private interests. The “politically embedded” lawyers Givens’ profiles are walking a delicate line, using their local connections and familiarity with administrative process to promote official legal compliance through lawsuits ostensibly targeted to correct administrative process defects. When they cross the line from contesting legal procedure to challenging legal substance, they risk repression. Although some administrative lawyers invite reprisal by asserting more explicit challenges to state authority, most are acutely aware of how far they can go in raising broader challenges and stay well within the bounds of acceptable “corrective” litigation.

#### *4. Comparative Themes*

In addition to formulating predictions about how autonomy of law and political openness may shape the scope and type of legal mobilization in different countries, our comparative framework may help to generate broader insights about legal mobilization in Asia. In this section, we step back from a country-by-country approach to identify several themes that emerge from comparative analysis.

First, judicial autonomy has an obvious relation to litigation. Public interest litigation has been of more than marginal importance to social justice practitioners only in the Quadrant 1 countries, and primarily, though not exclusively, in India and the Philippines. For countries outside of this group, courts have discouraged public interest litigation in a variety of ways: ranging from refusal to take jurisdiction; to “principled” rejection of claims in countries with conservative, bureaucratic judiciaries; to ruling against the client in closed court; to reprisals against the lawyer as well as the client. Public interest litigation is not altogether absent outside of Quadrant 1 countries, but it is undertaken for different purposes. In particular, we see lawyers in countries without strong legal autonomy turning to courts precisely in order to build basic rule of law principles to broaden the scope of judicial review and legal access. For example, in Mongolia, public interest litigation has been focused on access to the courts, ancillary to addressing the merits of social justice issues. In more authoritarian states, litigation may need to conform more closely to government interests. In

China, what could be called public interest litigation is sometimes approved when it coincides with the interests of powerful government officials. Outside of these cases, litigation has often been a strategy to gain wider public recognition for a cause without much hope of success in court and which may place the lawyer at risk.<sup>174</sup>

Second, social justice practice often depends on the existence of a vibrant professional community, which is possible only where the bar has some degree of freedom to form independent organizations to publicize and oppose the state's violation of rights or failure to follow the rule of law. In this sense, the professional autonomy of the bar may be supported by political openness. Though there are other reasons why a legal profession may be stronger in some countries than others, greater political openness may help explain the strength of lawyer organizations, including bar associations, in the countries of Quadrant 2, which otherwise measure low on legal autonomy. In countries in which the bar has more independence, lawyers may press for more power, which, in some cases, may be linked to the expansion of judicial independence. Thus, in Bangladesh, efforts to suppress the national Bar Council provoked protest and legal mobilization to bring a constitutional challenge. The successful fight over judicial independence laid the groundwork for further litigation, including a challenge to the long-standing use of martial law by the government.

Professional communities have other important functions as well, including recruiting new generations of reform-minded lawyers, mentoring them, and, if possible, creating protected niches for employment in firms, NGOs, or private practices. Countries such as Thailand and Malaysia, but also elsewhere among countries in Quadrants 1 and 2, have created networks of support among lawyers who recruit, mentor, and place young lawyers—many without credentialing abroad or work experience—in elite firms. In contrast, more authoritarian countries constrain professional independence. For example, Vietnam has kept much tighter control over lawyers by forbidding “organizations with the potential to mobilize resistance against the state” or “which function independently from the party and the state.”<sup>175</sup>

Third, the ability to communicate with the larger public is a central feature of successful legal mobilization for justice. Thus, where communication is carefully controlled and public dissent suppressed by

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<sup>174</sup> Gallagher, *supra* note 147.

<sup>175</sup> *The Juridification of Cause Advocacy in Socialist Asia*, *supra* note 65.



the state, effective mobilization of law becomes difficult—often nearly impossible. Quadrant 2 countries have relatively unresponsive judiciaries, but openings for political discourse and action, which can strengthen legal mobilization despite weak courts. For example, the Malaysian state's reluctance to limit access to the Internet has had enormously positive effects on civil society, leading to the development of additional opportunities for mobilization of law. NGOs, including lawyer-NGO alliances, have benefited in particular because they have the resources to conduct media campaigns, but political openness provides a critical resource—an audience—and in return, support for the mobilization of law.

Fourth, political openness may also be related to the type of practice sites that develop for activist lawyering in different countries, such as NGOs, law school clinics, legal aid offices, social movement organizations, and small private firms.<sup>176</sup> These practice sites relate to the domestic political context in different ways. They are not evenly distributed across the eleven countries in this issue because the state may have a different view of each type of practice site. In addition, lawyers in these sites have different access to resources and may face political pressures that discourage them from adopting controversial forms of practice. For instance, countries that are relatively closed (as in Quadrant 4) may be more likely to tolerate, and even encourage, law school clinics, and state-funded organizations because they are under state control. Even though China and Vietnam have been resistant to direct political challenges to the central state, their governments have encouraged development of legal clinics within law schools. NGOs require more political space, and they are especially important to activist lawyers because they have the capacity to attract external funding and are often linked to networks, communities, or media supporting issues with which the NGOs are concerned.<sup>177</sup> NGOs are especially important in countries with weak legal autonomy, where civil society presents opportunities for social justice advocacy, but other professional paths, such as employment by the government or self-sustaining private law practices may be difficult for reform-oriented lawyers to enter and maintain. Because they do not typically depend on the state—and thus

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<sup>176</sup> See *infra* Part III.

<sup>177</sup> See, e.g., Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT'L L. 348 (2006) (arguing that NGOs have unique capacities and an important role in the development of international law).

are less subject to its control—NGOs and private law firms are more likely to be targeted for regulation and control, ranging from legal limitations to bureaucratic harassment and police sanctions. Countries in Quadrants 3 and 4 have placed more restrictions on these potential sites of practice and, consequently, there are far fewer NGO-supported roles for lawyers to attempt to mobilize law for social justice.

Finally, and closely related, lawyers in Quadrant 4 countries, where judicial autonomy and political openness are severely limited, have depended to a much greater extent on relationships with the state, including practicing at state-sponsored sites and establishing mutually supportive relationships with officials. Opportunities for collaboration with state officials are likely to grow with the increasing diversity of political and social views among officials in local components of complex government institutions.<sup>178</sup> As mentioned already, state sponsored projects have included law school based clinics and public legal aid. In China, some law faculty members who established legal clinics have employed them to bring controversial litigation over rights; indeed their location and elite status have undoubtedly provided a degree of protection from reprisals.<sup>179</sup> Other state sponsored or approved projects include some types of NGOs. Even the most repressive states have tolerated some foreign-funded NGOs, which provide services the state itself is unable to provide on its own.<sup>180</sup> Because the availability of resources for social justice practice from international sources has been an important element of so many of the stories of our collaborators we turn next to a discussion of global support.

## B. THE POLITICS OF GLOBAL SUPPORT

The contributions to this issue suggest another feature of legal mobilization: that *global* support for social justice practice is influenced by the *domestic* context within which such practice occurs. Further, global support depends on the political goals of the donors. Observers who have made similar points often focus on the latter—donor intent—when expressing concerns that powerful Global North governments and

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<sup>178</sup> See PERELMAN & WHITE, *supra* note 8.

<sup>179</sup> Liu, *supra* note 155.

<sup>180</sup> See generally *infra* Part IV.B.

NGOs attempt to advance their own interests through efforts to transplant legal liberalism. While that concern is valid, it obscures the influence of domestic politics on the availability of global support; who provides it, and what it is ultimately used for—a point made quite powerfully in Dezalay and Garth's demonstration that domestic elites build their own capital by creating connections to global sponsors. Our observations in this part extend Dezalay and Garth's insight to suggest how domestic factors interact with global funding to produce uneven distribution of resources and uneven, sometimes quite unpredictable, outcomes. Our goal in this section is to illuminate some of these interactions—suggesting that the scope and type of external support is mediated by the relationship between the intentions of global donors and the domestic space for mobilizing law that we have described in previous sections of this article.

### 1. *Global Intentions*

We begin by examining the sources of support by international donors and other advocates for the rule of law. Following World War II, nations emerged from the conflict in Europe and Asia with a new world order taking shape under the leadership of the United States and its allies, including the establishment of the United Nations, international financial institutions, and nation-to-nation support for development. A framework for human rights created by a small group of countries has grown and thrived since that time, becoming a truly global movement notwithstanding the hegemony of the United States' economic and political agenda in international relations.<sup>181</sup>

In the initial phases of the Cold War, the United States poured enormous amounts of aid into particular developing countries, supplemented by grants from large foundations led by members of the

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<sup>181</sup> Hope Lewis, "New" Human Rights: U.S. Ambivalence Toward International Economic and Social Rights Framework, in *BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 100, 103 (Cynthia Soohoo et al. eds., 2009). The United States' top priority has not been human rights but promotion of economic and political development according to its own vision—a vision that has evolved with the shifting patterns of elite politics in the U.S.

same policy elite.<sup>182</sup> Both forms of aid were intended to stimulate a version of state-led development distinct from communism.<sup>183</sup> As the Cold War wound down, American policy shifted to emphasize the expansion of free markets, deregulation, and institutions of democratic governance needed to support these goals. In the 1970s and 1980s, policy elites trained in neoliberal economics promoted free markets, private development, and deregulation while tolerating authoritarian governments, which suppressed political and social resistance that might impede these policies.<sup>184</sup>

The approach promoted by neoliberal policy advisors ignored the unequal distributive effects of free markets and deregulation, and put the development policies of the United States, and its representatives at the World Bank and the International Monetary Fund, squarely at odds with emerging criticism in the Third World and with a rising global consciousness of human rights.<sup>185</sup> Major U.S. foundations, which had acted in concert with the U.S. government through the earlier law and development phase, changed direction abruptly when the older policy elites, already disenchanted with "law and development" and losing influence at the highest levels of foreign policy, became critics of U.S. support for dictators in Latin America implementing neoliberal economic policies while disregarding human rights.<sup>186</sup> However, until the end of the 1970s, Cold War priorities continued to unite American elites on some objectives. While foundation support for human rights advocacy flowed

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<sup>182</sup> Rockefeller's long-standing relationship with medical schools in China was abruptly ended when the communist movement won power in 1947. See Fengshi Wu, *Double-Mobilization: Transnational Advocacy Networks for China's Environment and Public Health* (Aug. 5, 2005) (unpublished Ph.D. dissertation, University of Maryland) (on file with Digital Repository of University of Maryland), available at <http://drum.lib.umd.edu/bitstream/1903/2970/1/umi-umd-2764.pdf>. See also STERN, *supra* note 141, at 179–211. The major cold war recipients of aid in Asia were countries in *Quadrant I*. For example, enormous USAID and foundation investments in Thailand were linked to its role as a demonstration project for capitalist development and a buffer against communism's spread from China and Vietnam. ROBERT J. MUSCAT, *THAILAND AND THE UNITED STATES: DEVELOPMENT, SECURITY, AND FOREIGN AID* (1990).

<sup>183</sup> Gary Hess, *Waging the Cold War in the Third World: The Foundations and the Challenges of Development*, in CHARITY, PHILANTHROPY AND CIVILITY IN AMERICAN HISTORY 319 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003).

<sup>184</sup> See Cummings & Trubek, *supra* note 3, at 10–12.

<sup>185</sup> Cummings and Trubek note the irony of the role of these policies in launching an international human rights movement both in the US and in Europe. *Id.* at 12.

<sup>186</sup> See also Yves Dezalay & Bryant G. Garth, *Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, *supra* note 2, at 354 (describing the role of the Ford Foundation as the a major source of support for human rights advocacy under authoritarian rulers in Latin America and elsewhere) [hereinafter *Constructing Law out of Power*].

to Latin America, no similar support was offered for human rights in Asia, a region where the U.S. military was engaged and the threat from communism seemed real and imminent.<sup>187</sup>

When the Cold War ended, the United States and international development agencies were compelled to change course to address market failures, massive social dislocations, rising inequality, and unrelieved deep poverty.<sup>188</sup> Their new approach embraced “good governance,” requiring greater emphasis on institutional development,<sup>189</sup> especially democratic institutions of accountability and the rule of law, which blended protection for private property with guarantees for civil, political, and basic human rights viewed as necessary for citizen empowerment and participation.

The rule of law has remained the cornerstone of United States and international development policy for the past two decades, drawing with it the major international agencies, private foundations, NGOs, and advocacy groups seeking to reinforce the message of the new Washington Consensus or modify it to serve purposes of their own. While rule of law advocates embrace different, sometimes conflicting, goals for political and economic development,<sup>190</sup> among those who have benefited directly—both discursively and financially—are advocates contesting international environmental, labor, and human rights abuses.<sup>191</sup> These groups have sought to advance the rule of law movement by leveraging the legal and moral power of domestic, regional, and international agreements and institutions, and mobilizing the

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<sup>187</sup> Hess, *supra* note 183.

<sup>188</sup> See Cummings & Trubek, *supra* note 3.

<sup>189</sup> *Id.* at 17–18. The World Bank’s embrace of the rule of law is explored by *Mythmaking in the Rule-of-Law Orthodoxy*, *supra* note 49.

<sup>190</sup> On the variety of objectives embraced by international and domestic “rule of law” advocates see Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31 (Thomas Carothers ed., 2006).

<sup>191</sup> See Cummings & Trubek, *supra* note 3, at 19. The change in policy in the 1990s brought to the fore funders interested in building the rule of law movement, such as Ford, OSI, USAID, the International Monetary Fund and major agencies and philanthropies from Canada, Europe and Australia as well. This ideologically diverse core group has been in agreement about support for “free market economies, an empowered judiciary to protect private property and individual liberty, and access to justice for all social classes to insure political legitimacy.” Scott Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 964 (2007). While this convergence has supported judicial independence and enforcement of law it does not mean complete agreement on other goals which, for some, encompass a broader meaning of human rights and willingness to become involved more deeply in the politics of accountability and reform.

extraterritorial jurisdiction of tribunals in the United States and elsewhere.<sup>192</sup>

The rule of law movement has also had a less direct, but no less important influence on social justice advocates. The rule of law resonates with resistance to authoritarian rule, inequality, abuse of power, and with aspirations for a fairer distribution of resources and opportunities in developing societies. While the rule of law is not a new concept in the developing world, the rule of law movement has linked law to the aspiration for political democracy and resistance to economic inequality. Thus, the rule of law movement has not only driven development of international governance, but it has also encouraged domestic advocates for social justice to focus on law. Commenting on this trend, Cummings and Trubek concluded that an important effect of the movement has been to encourage “lawyers to invest in constructing and monitoring state institutions from the inside” and to “retool as public interest lawyers.”<sup>193</sup>

The point we suggest here is that neither of these effects of the rule of law movement—the direct effect of support linked to international development goals and the indirect effect of encouraging domestic rule of law advocacy—has been evenly distributed or had equal influence in all countries. Scholars have examined the origins of donor policies and their shifts over time in relation to Global North governments,<sup>194</sup> international organizations,<sup>195</sup> major foundations,<sup>196</sup> and a variety of NGOs both domestic<sup>197</sup> and international.<sup>198</sup> Far less attention

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<sup>192</sup> Cummings & Trubek, *supra* note 3, at 19–27. The authors note that while social justice advocates may benefit at times from the broader movement for rule of law, they are also often in sharp conflict other advocates for the rule of law, especially governments and international investors seeking stronger legal institutions that support property rights, economic investment, and law enforcement to insure a relatively tranquil civil society.

<sup>193</sup> *Id.* at 19.

<sup>194</sup> See YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICA* (2002) [hereinafter *THE INTERNATIONALIZATION OF PALACE WARS*].

<sup>195</sup> See, e.g., Antje Vetterlein, *Economic Growth, Poverty Reduction and the Role of Social Policies: The Evolution of the World Bank's Social Development Approach*, 13 *Global Governance* 513 (2007). See also Cummings & Trubek, *supra* note 3, at 20–21.

<sup>196</sup> See, e.g., KECK & SIKKINK, *supra* note 64 (discussing the funding of the Ford Foundation); STERN, *supra* note 141 (discussing the evolution of “soft support” policies of major foundations, NGOs, public and private institutions for development in China).

<sup>197</sup> Analysis of the role played by the hundreds, even thousands, of NGOs with transborder interests has been less systematic, embedded in case studies of particular movements and transborder activities. For general consideration of these sources of influence see *THE NEW TRANSNATIONAL ACTIVISM*, *supra* note 4.

<sup>198</sup> We have in mind international nongovernmental organizations [INGOs] such as Amnesty International, International Organization of Migrants, the International Bar Association Human

has been paid to the ways in which the domestic space for legal mobilization at the receiving end of rule of law initiatives has influenced access to and uses of global resources. It is to that issue that we now turn.

## 2. Domestic Reception

In this section, we suggest how differences in the domestic space for legal mobilization in receiving countries may influence the distribution of global support for social justice causes. Specifically, we explore how global funding relates to the timing of domestic political openings, the identity of domestic recipients, and the nature of domestic sites of practice. Examining each of these dimensions of support—timing, recipients, and sites—reveals an important dynamic, namely that global support is related in critical ways to both autonomy of law and political openness within each country.

Our analysis finds that where political openness is limited, global investment in the rule of law tends to focus on expanding the autonomy of legal institutions in ways that will achieve the donor's specific political or economic goals. Governments and major foundations are often major players in this phase of global support, seeking areas of mutual agreement with domestic political leaders for the development of the rule of law, such as supporting international trade, economic development, and private investment, but rarely political liberalization. Advocates whose goals are incompatible with those of domestic political leaders must resort to forums for advocacy outside the country. In contrast, where politics are relatively open, global rule of law support shifts toward legal advocacy for specific social or political causes, whether or not political leaders fully approve. At this stage, global support for domestic advocacy may be channeled through a far more diverse community of advocacy organizations and on behalf of more politically contentious goals. Our overview of global funding reinforces an important theme in the globalization literature: that the rule of law movement is not a unidirectional process of legal transplant, but a dynamic exchange—and often a contest—between rule of law sponsors

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Rights Institute, and the International Council of Jurists, or the International Union for Conservation of Nature. For a discussion of the role of U.S. based human rights INGOs see *Constructing Law out of Power*, *supra* note 186.

and political actors, including social change advocates, in the Global South.<sup>199</sup>

### i. Timing

Opportunities for global intervention—whether by governments in the Global North, international agencies, private foundations, NGOs, or movement organizations—are necessarily influenced by domestic political conditions. Since the beginning of the law and development movement at the end of World War II,<sup>200</sup> global support for legal modernization generally, and social justice advocacy in particular, has responded to domestic political conditions, which have affected the type of aid countries have received—or indeed whether they have received any aid at all. Most obviously, domestic political closure or the rise of power holders antagonistic to donor interests can sever ties. In 1947, the Rockefeller Foundation ended a long-standing relationship with Peking University Medical School when the Chinese Communist Party ascended to power and the United States severed diplomatic ties.<sup>201</sup> USAID and other U.S. government agencies withdrew direct support from China for nearly fifty years.<sup>202</sup> Similarly, the U.S. government terminated most aid to Myanmar in 1962 after the takeover by a dictatorship professing socialist ideology and to Vietnam in 1976 after the withdrawal of U.S. troops from Vietnam.<sup>203</sup>

In contrast, the flow of aid has often increased in response to greater openness. Reflecting—and attempting to promote—changed conditions, Congress has recently restored authorization for some forms

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<sup>199</sup> In Part IV we return to the narratives of practitioners to make this point, for their stories are often about indigenous movements for change that opportunistically find global, and often transient, sponsors that may or may not have had an important influence on their goals, strategies or the viability of their work.

<sup>200</sup> TRUBEK & SANTOS, *supra* note 15.

<sup>201</sup> See Wu, *supra* note 182.

<sup>202</sup> See *Development Experience Clearinghouse, China, Projects 1946–1996*, U.S. AGENCY FOR INT'L DEV. [hereinafter USAID], <https://dec.usaid.gov/dec/search/SearchResults.aspx?q=Q2hpbmE%3d> (last visited Aug. 12, 2013) (listing only 16 USAID projects for the fifty-year period).

<sup>203</sup> See *Burma: History*, USAID (Aug. 2005), <http://www.usaid.gov/burma/history>; *Vietnam*, USAID (Aug. 2013), <http://www.usaid.gov/where-we-work/asia/vietnam>.



of direct U.S. government aid to China, Vietnam, and Myanmar.<sup>204</sup> Even when direct aid has not been politically possible, funds from Global North donors have sometimes flowed to NGOs within recipient countries when their governments have indicated a willingness to accept them. Major foundations, especially those in the United States, have sometimes taken the lead or played the role of intermediary when direct governmental aid was not politically feasible. The Ford Foundation resumed contacts with China in 1979 and, with the Chinese government's support, quickly established connections between major U.S. law schools and elite Chinese universities—with important implications for social justice advocacy.<sup>205</sup> Some Chinese law faculty members who were participants in this collaboration subsequently founded legal clinics at elite Chinese law schools.<sup>206</sup> Similarly, Ford began supporting human rights awareness soon after the fall of Ferdinand Marcos in the Philippines and by 1985 had funded a network of Alt-Law NGOs to litigate human rights.<sup>207</sup> Likewise, when Bangladesh's lawyers and judiciary asserted independence in 1989 to limit authoritarian control of government institutions, Ford and other foundations soon offered funding to fledgling legal clinics and advocates for the poor, women, and the environment. Following Mongolia's abrupt democratic turn in 1991, the Asia Foundation and other private intermediaries (with USAID funding) began supporting rights-oriented NGOs "to serve as a potential firewall against governmental encroachments on civil liberties and political freedom" as the new democracy took shape.<sup>208</sup>

Infrastructure assistance, intended to modernize and rebuild state institutions, has often been one of the first types of aid to be offered after

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<sup>204</sup> U.S. support for China revived in 1997 with an agreement under Clinton's administration, although funding does not seem to have started until 2000 with funding for promoting democracy and normalizing trade relations, and for cultural NGOs. See U.S.-China Trade Relations Act of 2000, 114 Stat. 880; Consolidated Appropriations Act of 2000, 113 Stat. 1502.

<sup>205</sup> Liu, *supra* note 155. Aubrey McCutcheon, *Contributing to Legal Reform in China*, in MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD, *supra* note 95, at 159.

<sup>206</sup> Liu, *supra* note 155.

<sup>207</sup> Stephen Golub, *Participatory Justice in the Philippines*, in MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD, *supra* note 95, at 197.

<sup>208</sup> *Development Experience Clearinghouse, Mongolia Democratic Initiatives, Projects 1946-1996*, USAID (Sept. 1998), <https://dec.usaid.gov/dec/content/Detail.aspx?q=TW9uZ29saWEgRGVtb2NyYXRpYyBJbml0aWF0aXZlcw==&ctID=YjViNTk2YmQtZjJlZi00NWFlWjJhODEtNmI3ODNjZjhmMDU3&rID=OTAxMg==&qcf=&ph=VHJlZQ==&bckToL=VHJlZQ==&>.

political or economic transitions, which appear to create opportunities to establish institutions embodying values and practices supported by Global North donors.<sup>209</sup> Such aid typically flows directly to government agencies whose own priorities shape how that aid is used.<sup>210</sup> To donors, infrastructure assistance implicitly supports political as well as economic purposes, including promoting liberal values among educated government officials and professionals, encouraging free market development, and protecting foreign economic investments.<sup>211</sup> Infrastructure aid was a central part of U.S. support to Thailand in the 1960s to create a foundation for a modern market society. This included funding rural health facilities and schools, but also foundation-sponsored training for university faculty and government bureaucrats.<sup>212</sup> Infrastructure programs were not only among the first forms of global support for China's economic liberalization in 1979, but also for post-Suharto Indonesian liberalization after 1999.<sup>213</sup> Infrastructure aid to help modernize Vietnam's system of public administration has been the core of donor funding since the early 1990s,<sup>214</sup> contributing to its economic growth in the twenty-first century.<sup>215</sup> This type of assistance often includes support for legal reforms such as judicial training, court management training, establishment of basic legal services programs, and revision of statutory law.<sup>216</sup> Following the Asian fiscal crisis in 1997-1998, the World Bank and the International Monetary Fund promoted

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<sup>209</sup> *Foreign Assistance: Rule of Law Funding for Fiscal Years 1993-1998*, U.S. GEN. ACCOUNTING OFFICE (1999), <http://www.gao.gov/assets/230/227749.pdf>; *THE ASIAN FINANCIAL CRISIS AND THE ARCHITECTURE OF GLOBAL FINANCE* (Gregory W. Noble & John Ravenhill eds., 2000).

<sup>210</sup> Sidel observes that donor support for country wide legal services in Vietnam was captured by a few large organizations close to the Vietnamese government and never reached small, underserved communities. Sidel, *supra* note 87, at 169.

<sup>211</sup> Scholars have cast serious doubt on the effectiveness of these programs for transmitting values or long term commitment to liberal market reforms. Infrastructure and "soft support" were considered a failure in both Latin America and Asia. See Trubek & Galanter, *supra* note 34; Hess, *supra* note 183; *THE INTERNATIONALIZATION OF PALACE WARS*, *supra* note 194. Additional reasons for skepticism about infrastructure aid are explored in Molly Land, *Human Rights Frames in IP Contests*, in *BALANCING WEALTH AND HEALTH: GLOBAL ADMINISTRATIVE LAW AND THE BATTLE OVER INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES IN LATIN AMERICA* (Rochelle Dreyfuss & César Rodríguez-Garavito eds., forthcoming Mar. 2014).

<sup>212</sup> In addition to "soft support" for China described in note 173, see Sidel, *supra* note 87, at 195.

<sup>213</sup> See *Indonesia Control of Corruption Project: Final Report*, USAID (Nov. 2009), [http://pdf.usaid.gov/pdf\\_docs/PDACP906.pdf](http://pdf.usaid.gov/pdf_docs/PDACP906.pdf); *Indonesia, Local Governance Support Program: Final Report*, USAID (Dec. 2009), [http://pdf.usaid.gov/pdf\\_docs/PDACP359.pdf](http://pdf.usaid.gov/pdf_docs/PDACP359.pdf).

<sup>214</sup> See generally *Vietnam: History*, USAID (Aug. 2013), <http://www.usaid.gov/vietnam/history>.

<sup>215</sup> *Id.*; see also Sidel, *supra* note 87, at 141-166.

<sup>216</sup> See U.S. GEN. ACCOUNTING OFFICE, *supra* note 209; see also Sidel, *supra* 87; Liu, *supra* note 155; *Constructing Law out of Power*, *supra* note 186.

law reform, including the establishment of bankruptcy courts and other protections for investors.<sup>217</sup>

## ii. Recipients

Donor self-interest is the most important factor channeling support to aid recipients. Donors want to achieve specific goals and choose recipients that will serve their purposes. Donors also want continuing “engagement” or “development,” and thus pick recipients they believe will succeed or survive even if it means compromising goals. Donor goals vary, and while many provide direct or indirect support for social justice lawyers by funding law school clinics, rights-oriented NGOs, legal aid outreach, empowerment projects to teach citizens about rights, and litigation projects, such support is not uniformly distributed. This section explores some of the factors that shape funding distribution, focusing particularly on global and local dynamics that influence the status of recipients within the field of domestic politics.

Political shifts within the United States make a difference, as we have already seen. During the “law and development” phase of U.S. foreign policy, funding by major foundations focused on training an elite group of leaders to promote acceptance of modern administration and American democratic values. During the contemporary rule of law phase, the same foundations have continued “structural support” to train government officials in key positions, but have also extended training and material support for “capacity building” and “empowerment” of marginalized social classes and outsider groups, consistent with efforts to build a pluralistic democratic society. These changes have affected the type of recipients to whom aid is targeted.

Greater political openness may change the targets of global funders by increasing opportunities to strengthen domestic political constituencies. This had been evident in some countries where greater political openness has reduced the need for donors to resort to external pressure for human rights enforcement and increased the same donors’ interest in building connections and political capacity within a country to advance domestic causes. As a result, some funders have shifted away

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<sup>217</sup> THE ASIAN FINANCIAL CRISIS AND THE ARCHITECTURE OF GLOBAL FINANCE, *supra* note 209.

from international human rights projects toward greater support to projects emphasizing specific local concerns or cross-cutting transnational issues. Ford's shift from funding human rights litigation projects in the 1970s (Chile) and 1980s (Philippines) to projects for litigating social causes in the 1990s (Bangladesh) tracks this larger trend.<sup>218</sup> In Indonesia, for example, over the past fifteen years funders have shifted their priorities from human rights to environmental causes, women's rights, or the problems of ethnic minorities and other marginalized groups.<sup>219</sup> With respect to transnational issues, beginning in the 1990s, Global North governments and United Nations agencies began targeting funding to support environmental enforcement in Asia and elsewhere by promoting statutory reforms,<sup>220</sup> offering training for enforcement officials, and subsidizing establishment of special courts or panels of judges trained in environmental law. Similarly, concerns about criminal trafficking in weapons, illegal goods, and human labor resulted in UN adoption of aggressive programs pressuring societies in Asia and elsewhere to enact laws and pursue enforcement in accordance with Global North standards.<sup>221</sup> Some NGOs, like TRAFCORD in Thailand, while rooted in a long-standing domestic movement, have sought to tap into such transnational funding streams.<sup>222</sup>

When domestic political space closes, some donors' targets change because it becomes more difficult to channel funds to dissident causes without jeopardizing ongoing donor access—and sometimes the safety of domestic recipients. Closure is often maintained by private organization registration and reporting requirements as well as formal and informal political reprisal directed against recipients<sup>223</sup> and their funders.<sup>224</sup> Sensitivity to the political jeopardy of recipients prompts

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<sup>218</sup> *Id.*

<sup>219</sup> Ford, *supra* note 110. A similar trend has been observed in Malaysia. See Tey, *supra* note 117.

<sup>220</sup> The famous United Nations "Earth Summit" held in Rio De Janeiro in 1992, attended by more than 170 countries, resulted in an increase in global awareness and action on the environment, encouraging many countries to enact environmental protection laws patterned after those in developed countries. See *Earth Summit: UN Conference on Environment and Development* (1992), UNITED NATIONS (May 1997), <http://www.un.org/geninfo/bp/enviro.html>.

<sup>221</sup> Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655 (2010).

<sup>222</sup> Wongsu, *supra* note 65. On the difference between Global North and Global South policies, see generally, Ratna Kapur, *Cross-border Movements and the Law: Renegotiating the Boundaries of Difference*, in *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS* 25 (Kamala Kempadoo et al. eds., 2012).

<sup>223</sup> See Wong, *supra* note 158; see also *Human Rights Monitoring Report*, *supra* note 96.

<sup>224</sup> See LUM, *supra* note 151 and personal communication with the author.

some donor self-regulation.<sup>225</sup> In these contexts, donors may become more inclined to work within the narrow parameters set by authoritarian regimes to maintain a toehold of support. As a result, groups closest to the state are often in a position to benefit most from foreign support, while those mobilizing law for the least powerful may do so with the fewest resources.<sup>226</sup>

China is one example of this dynamic. After going to great lengths to bar contacts with the West, China began to gradually open after the collapse of its economy in the late 1970s. Since then, China has carefully selected some aid recipients, acting as intermediary for connections between government officials (which include law school faculty) and Western contacts.<sup>227</sup> Legal aid funded by Ford was initially co-sponsored by the Chinese government. As China has promoted more legal modernization, it has also tolerated some donor support for some nongovernmental clinics mobilizing law for rights.<sup>228</sup> Other relatively closed societies have limited donor access in part by acting as intermediary or by requiring a memorandum of understanding (MOU) specifying a funder's goals and proposed recipients.<sup>229</sup> Even more open countries have sometimes required donors to enter into MOUs, and some countries have imposed restrictions to express displeasure with the behavior of the funded organizations.<sup>230</sup>

<sup>225</sup> For example, the State Department Bureau of Democracy, Human Rights, and Labor recently removed the list of recipients of direct aid from its China webpages, presumably to protect them from local reprisals. Email communication from Thomas Lum, Congressional Research Service (Mar. 12, 2013) (on file with author) [hereinafter Thomas Lum E-mail].

<sup>226</sup> Other scholars reach similar conclusions for particular countries. See Liu, *supra* note 155; see also SIDEL, *supra* note 87, at 168–69.

<sup>227</sup> Liu, *supra* note 155.

<sup>228</sup> McCutcheon, *supra* note 95, at 196; similarly, Singaporean statutory law permits foreign donations only to “non-political” organizations. See Koh & Ling, *supra* note 87.

<sup>229</sup> For example, the Thailand International Development Cooperation Agency [TICA] and its predecessor agencies have long required international donors to enter into such agreements. Interview with Apinan Patharathiyon, Director, TICA (July 11, 2011). Other authoritarian countries are also believed to limit access by international partners who are expected to limit their contact and support for civil society organization. Personal communication from Thomas Lum E-mail, *supra* note 225.

<sup>230</sup> In 2011, the PM of Bangladesh temporarily froze funding for NGOs to express displeasure with their political opposition to his own political party. See Mohosinul Karim, *PM asks DCs to regulate activities of NGOs*, DHAKA TRIBUNE (July 24, 2013), <http://www.dhakatribune.com/bangladesh/2013/jul/24/hasina-asks-dcs-hunt-down-ngos-involved-militant-financing>. In 2012, the government of Bangladesh banned Medecins Sans Frontieres for allegedly helping Rohingya refugees fleeing Myanmar. See *Bangladesh: Immediately Lift Ban on Medecins Sans Frontieres, Action Against Hunger and Muslim Aid UK*,

Nationalism has also sometimes restricted the inflow of global funds. For example, in non-socialist societies like Malaysia and Singapore, nationalism has spurred governmental and popular resistance to human rights,<sup>231</sup> resulting in some restriction on global funding. More diffuse nationalism and anti-colonialism have motivated popular resistance to some Western funders.<sup>232</sup>

### iii. Practice Sites

As our discussion so far has already made clear, a key point of contact between global donor interests and domestic politics is at the level of the practice site. Different sites of practice have very different positions in the field of domestic politics of receiving countries. The position of a site is related to its perceived political independence, and in turn to the deployment of particular legal strategies. In general, we would expect that more open societies with stronger legal cultures will have a more diverse range of practice forms (with greater external support) that use more regime-challenging strategies; more closed societies will attempt to minimize regime challenges by attempting to keep legal practice more closely under state control—and thus limit external funding of NGOs.

Rule of law programs have been widely credited with encouraging development of important new sites of social justice practice, such as law school clinics, NGOs, legal aid programs, pro bono

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NETH. AID (Aug. 2012), <http://www.nl-aid.org/domain/ngo/bangladesh-immediately-lift-ban-on-medecins-sans-frontieres-msf-action-against-hunger-acf-and-muslim-aid-uk/>.

<sup>231</sup> Mahathir Mohamad, Malaysia's authoritarian prime minister, who held office from 1981 to 2003, defended his authoritarian rule and restricted observance of human rights based on his interpretation of "Asian values," a view which still resonates throughout the region influencing the separate course the Asian regional body, ASEAN, has chosen and especially the ASEAN Human Rights Declaration. Thio Li-ann, *Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go before I Sleep*, 2 YALE HUM. RTS. & DEV. L.J. 1 (1999). On Singapore, see Garry Rodan, *supra*, note 135. USAID made relatively few grants to Malaysia during this period, none supporting rule of law, human rights, or governance projects. The Ford Foundation funded two projects while Mahathir was in office, one notably related to the rule of law, a 1988-1992 project on "The Implementation of the Syariah Criminal Law and its Impact on Women," Ford Foundation grant #0085082. E-mail from Lucas Buresch, Assistant Archivist, Rockefeller Archive Ctr., (Feb. 7, 2013) (on file with Frank Munger, author). This exception to the pattern may reflect Mahathir's concerns about the growing political influence of the Islamic courts and community rivaling his one-party rule. Lai Suat Yan, *Participation of the Women's Movement in Malaysia: The 1999 General Election*, in CIVIL SOCIETY IN SOUTHEAST ASIA 122, 137 (Lee Hock Guan ed., 2004).

<sup>232</sup> For example, it is widely known that many potential Asian donee groups have refused Open Society Institute funding because of George Soros' role in the Asian financial crisis.

practice by mainstream law firms, private law firms committed to public interest practice, and bar associations.<sup>233</sup> Many of the contributors to this issue have been situated at one time or another in sites that received foreign support, often leading to other opportunities to advance their careers as social justice lawyers. Yet the distribution of these opportunities varies by country. For example, while clinics providing legal services for a variety of ordinary legal matters are externally funded in almost all of the countries represented in this issue, funding for NGOs engaged in public interest litigation is limited to those countries that are the most politically open and have the strongest culture of legal autonomy.<sup>234</sup> Funding for legally activist NGOs has been highly restricted in the most closed societies,<sup>235</sup> or carefully tailored to promote regime preferences.<sup>236</sup>

In less politically open societies where law has relatively little autonomy from domination by political leaders, practice sites associated with social justice lawyering, if any, are most closely connected to the state. Clinics (both in law schools and state-funded NGOs) are a point of convergence between donors interested in promoting the rule of law and authoritarian governments that recognize the need for increased legal services for ordinary citizens confronting a complex modern state—but one resistant to rights mobilization. Thus, legal clinics providing basic advice to individuals about bureaucratic procedures or technical legal compliance with basic rights (like minimum employment standards) may receive some internal and external financial support (monitored by the state), while NGOs advancing rights that challenge government authority will not.<sup>237</sup> NGOs independent of the state are less likely to be tolerated

<sup>233</sup> McCutcheon, *supra* note 95.

<sup>234</sup> For example, the Ford Foundation litigation projects have been welcomed in *Quadrant I* countries such as the Philippines, India, and Bangladesh, while its aid to countries in other *Quadrants* has been more limited in scope and typically in collaboration with the government. See MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD, *supra* note 95; Liu, *supra* note 155, at 278, 283.

<sup>235</sup> Liu, *supra* note 155.

<sup>236</sup> See *supra* notes 227–230 and accompanying text.

<sup>237</sup> See, for example, *The Juridification of Cause Advocacy in Socialist Asia*, *supra* note 65, who describes the contrasting the Vietnamese government's response to the work of two social justice lawyers in Vietnam. In China, Guo Jianmei is the internationally acclaimed founder of Peiking University's Centre for Women's Law and Legal Services who receives support and recognition from the Chinese government. However, many Chinese lawyers for social causes have faced serious reprisals for advocacy about sensitive political issues, especially since a shift in central Chinese policy in 2003 which has limited the political space for rights advocacy. Hualing Fu & Richard Cullen, *The development of public interest litigation in China*, in PUBLIC INTEREST LITIGATION IN ASIA, *supra* note 1, at 9, 28. More generally, the U.S. based Committee to

unless they are providing welfare services that supplement the state's capacity, for example, by providing critical health services and poverty relief.<sup>238</sup> Despite general restrictions on rights mobilization in less politically open societies, it may nonetheless be permitted when it serves state interests.<sup>239</sup> For instance, individual litigation may be allowed by the central government as a vehicle to control corrupt local officials without expending political or financial resources required for direct intervention.<sup>240</sup>

Some examples from countries represented in this issue illustrate these dynamics. In Vietnam, limited clinical programs have developed alongside a small number of state and internationally supported NGOs. Since the mid-1990s, global donors have partnered with the Vietnamese government and Communist Party to develop the capacity of legal institutions to implement new laws appropriate for a modern market society, but the government has successfully resisted attempts to expand access to justice for poor and politically excluded interests outside of government-controlled entities.<sup>241</sup> Vietnam began to incorporate clinical legal education into its national plans in the early 2000s,<sup>242</sup> yet most of the increasing international aid for legal development has gone to agencies and NGOs closest to the state to support state-approved economic and structural law reform projects.<sup>243</sup> Law reforms to meet rising legal needs of workers, poor individuals, minorities, or other groups increasingly disadvantaged by development have received far less international support. However, some law reform efforts for these groups have been advanced by a few activist lawyers, a growing state legal aid system, and smaller, more progressive NGOs without the help of global donors<sup>244</sup>—illustrating that sometimes initial domestic support for legal clinics might create pressure for expanded rights advocacy. In contrast to

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Support Chinese Lawyers has regularly reported human rights violations experienced by lawyers during recent government crackdowns on rights advocacy. See *About Us*, COMM. TO SUPPORT CHINESE LAWYERS, <http://www.csclawyers.org/about/> (last visited Aug. 7, 2013).

<sup>238</sup> Between 1962 and 2010, under the junta, Myanmar received little funding from Global North government sources or foundations. Exceptions were humanitarian aid, typically, but not exclusively provided through charities with a religious affiliation and a long-standing reputation for non-alignment.

<sup>239</sup> See *supra* note 226 and accompanying text.

<sup>240</sup> Liebman, *supra* note 146.

<sup>241</sup> SIDEL, *supra* note 87.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 168–69.



both Vietnam and China, which have promoted carefully controlled development of rule of law capacity, Myanmar's political and economic closure left little space for collaboration with donors or the state, and social justice practice was carried on by a few private practitioners at great personal risk.<sup>245</sup>

There are other ways that authoritarian states may be losing control over even those sites for mobilization of law closest to state power. With the spreading influence of the Internet and mobile phone technology, legal proceedings that violate the rule of law are increasingly likely to receive publicity beyond the control of the state. For example, the prestige of such organizations such as the International Commission of Jurists and the International Bar Association Human Rights Institute makes it difficult for even the most authoritarian states to deny them observer status at politically sensitive trials. These organizations have gained access to trials in all but the most authoritarian countries.<sup>246</sup> But even in China, as John Givens reports in this issue, decisions in some court cases are more likely to be reported in the press and known to the public than equivalent decisions made by bureaucrats, and thus there are reasons for lawyers to bring cases in court that they have no hope of winning.<sup>247</sup>

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<sup>245</sup> Nick Cheesman, *How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence*, 45 LAW & SOC'Y. REV. 801 (2011).

<sup>246</sup> See generally *An Introduction to Trial Monitoring*, IFEX, [http://www.ifex.org/campaigns/tools\\_resources\\_trial\\_monitoring/](http://www.ifex.org/campaigns/tools_resources_trial_monitoring/) (last visited on June 9, 2013) (with examples from *Quadrant I* countries) [hereinafter IFEX]; *Quadrant IV: China: see Special report: China's new leaders advance Internet control*, IFEX (July, 25 2013), <http://www.ifex.org/china/>; Vietnam: see, e.g., *IBAHRI trial observers denied access to trial of Vietnamese activists for subversion*, INT'L BAR ASS'N (Jan. 2010), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=5b7bc8eb-aadd-4ea4-bcc4-f837a973fafc>; see generally *Appeal for immediate release of Vietnamese blogger Dieu Cay on hunger strike*, IFEX (July 24, 2013), <http://www.ifex.org/vietnam/>. *Quadrant II: International trial observers have been present at trials in Malaysia since 2000*. Tey, *supra* note 117. *Quadrant III: Singapore: see, e.g., Singapore: International Trial Observer to Attend Court of Appeal as Former Opposition Leader JB Jeyaretnam Faces Possible Expulsion from Parliament*, AMNESTY INT'L (July 20, 2001), [http://www.amnesty.org.uk/news\\_details.asp?NewsID=13875](http://www.amnesty.org.uk/news_details.asp?NewsID=13875) (last visited June 9, 2013).

<sup>247</sup> Gallagher, *supra* note 10. For example, Chen Guangchen, the Chinese dissident, who escaped house arrest in 2012 and sought refuge in the U.S. embassy, made this choice when he sued the Chinese government over its "one-child" policy, triggering a repressive response. Chen's story is rare. Courts have also served a number of useful functions in strategies for mobilizing law for social justice in China and elsewhere short of provoking personal reprisal. See Michael Dowdle, *On The Regulatory Dynamic of Judicialization: The Promise and Perils of Exploring 'Judicialization' in East and Southeast Asia*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES, *supra* note 12, at 23.

As this suggests, the mix of practice sites in China, their relation to different legal strategies for social justice, and their connection to global funding is complex. In China, as we have already seen, the development of law school clinics was among the first results of the Ford Foundation's path-breaking assistance in the 1980s.<sup>248</sup> Ford's support also assisted in the establishment of government legal aid clinics and, as China moved toward greater acceptance of the rule of law in the 1990s, the first nongovernmental legal aid center.<sup>249</sup> Thus, China has chosen to support state-financed legal aid clinics—but has been far more cautious about permitting funding for legal mobilization outside of government institutions. Rachel Stern documents the role of the Chinese state in directing—and limiting—the support of international donors for NGO activities. While China permits some global funding for environmental advocacy, it is typically channeled to support seminars and policy development but not litigation, which, many American funders in Beijing agree, “falls beyond their comfort zone.”<sup>250</sup> State harassment and the risk of being shut down, or worse, is an ever-present reality for the few legal organizations that exist.<sup>251</sup> The result is that NGOs that address the legal needs of those without access to political power and most in need of law reform are least likely to receive international support.

Elsewhere, we see that even when international funding exists for public interest litigation, weak domestic legal institutions can blunt its impact. The limited successes of public interest litigation in Mongolia suggests the force of the elite consensus behind preventing the courts from interfering with projects that are profitable to businesses supporting its economy in spite of financial support flowing from Mongolia's chief international patron, the United States.<sup>252</sup> In other places, global funders simply do not reach lawyers who lack access to global networks. Many social justice lawyers, like those who pursue mundane but important cases in administrative courts, or those in small firms, have less opportunity for contact with the global community or to receive global assistance. This stratification becomes more pronounced as countries become more closed, but is observable everywhere as a function of

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<sup>248</sup> Liu, *supra* note 155; McCutcheon, *supra* note 95, at 182–4.

<sup>249</sup> McCutcheon, *supra* note 95, at 183–84.

<sup>250</sup> STERN, *supra* note 141, at 189.

<sup>251</sup> *Id.* at 188–89.

<sup>252</sup> Bayartsetseg Jigmeddash & Jennifer Rasmussen, *Protecting Community Rights: Prospects for Public Interest Lawyering in Mongolia*, 31 WIS. INT'L L.J. 566 (2013); See also LAWRENCE, *supra* note 119.

global sponsors' focused interests and limited knowledge of the diversity of legal mobilization across Asia.

## **V. CONCLUSION: LEARNING ABOUT—AND FROM—LEGAL MOBILIZATION IN ASIA**

The articles in this issue provide an innovative comparative look at Asian lawyers who mobilize law for justice. The insights it offers build upon unique contributions by practicing lawyers on the front lines of social change across Asia as well as academic area specialists. This article has offered a wider perspective on their contributions, framing the work of empirical researchers and practitioners who have provided detailed descriptions and careful analyses of efforts to mobilize law for justice in particular countries. The great variety of careers, strategies and outcomes described in the articles written by these contributors led us to propose a new perspective on legal development. As we argue, the mobilization of law for justice has been ubiquitous in the region, driven in part by international opportunity and influence but also by popular expectations and politics from within. While other scholars have placed great emphasis on global influence and exchange in legal development, we have been influenced by the perspective that arises from the narratives and analyses of lawyers struggling for justice for particular causes within each country. Their experiences draw attention to the importance of the political context for their work that both generates conflict and influences the resources that may be mobilized for social change. We sought to create a framework for comparing of the interaction of local political context and global resources, and to examine its implications for mobilization of law for social justice across the eleven Asian countries examined in this issue.

From the point of view of lawyers for the politically weak, law is an important resource because of its capacity to draw support from those committed to the law—though perhaps not to the underlying social justice cause. In turn, law's capacity to support advocacy for the politically weak is closely related both to the autonomy of law—measured in terms of factors such as judicial independence, the strength of the bar, and the stability of social justice oriented practice sites—and to the degree of political openness—measured in terms of the ability of

dissidents to mobilize politically against a regime in power. These two qualities are closely connected but also vary independently. Our comparative framework employs these two factors as a starting point for examining the specific features of the legal and political systems in each country that influence legal mobilization for justice. As we have emphasized, our analysis is intended to generate new insights, provoke further discussion, and invite improvements.

To develop our country-specific analyses, we have drawn heavily on the contributions of the authors in this issue. Their detailed accounts have greatly enriched our analysis in an especially important way by reminding us that legal and political context is not static, but rather a picture in motion. Lawyers adapt political objectives, strategic choices, and legal methods over time in an evolving political landscape to pursue distinct paths of legal mobilization. Their work in this regard can have an iterative effect on both the autonomy of law and political openness. As the stories of these contributors reveal, lawyers often mobilize law's power to create openings for political change, and then leverage that political change to build greater autonomy of law. Of course, our framework is intended not only to show how comparison can illuminate the contextual reasons for differences in practice, but to invite further comparative research and deeper analysis of the role of law in development in Asia. We also think that comparison reveals a broader lesson: that lawyers who mobilize law for social justice, though marginal in numbers and status, often help to open new paths for change.

In the twenty-first century, law is widely viewed as an important element in development. Some have suggested that legal institutions in emerging societies will inevitably converge with institutions and practices established in developed Western democracies. Yet, in spite of wide differences in legal development, Asia has emerged as a region of dynamic economic growth capable of having a powerful influence on global change. The path of legal development in these societies seems anything but uniform and predictable. Just as economic development within the region has had few precedents, so the path of legal development, and the part played by lawyers for social causes, has responded to unique opportunities and limitations created by political and social change accompanying development in each country. Although influenced by the appeal of global rule of law ideals and the resources offered by international donors, lawyers who mobilize law for social justice in Asia are breaking new ground in societies unlike those of

Europe or America by inventing new and creative roles for law that may be especially meaningful in the new contexts created by a global world.