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ASIAN LEGAL REVIVALS:

LAWYERS IN THE SHADOW OF EMPIRE



James R. Silkenat

James R. Silkenat is Vice President and Director of the World Justice Project and a Partner in the New York office of Sullivan & Worcester LLP. He has extensive experience in international M&A and joint venture transactions, particularly in the energy industry, and is a former Legal Counsel at the World Bank's International Finance Corporation. Mr. Silkenat has chaired the ABA Section of International Law and the ABA Section Officers Conference, as well as the ABA Latin American Legal Initiatives Council and the ABA China Committee. He served on the ABA Board of Governors from 1994 to 1997. He was elected to the ABA House of Delegates in 1990 and served as Chair of the New York Delegation in the House of Delegates from 2000 to 2009. He is a past Chair of The Fellows of the American Bar Foundation. Mr. Silkenat has authored more than 100 articles on law and business, and is the Editor of several books, including: *The Imperial Presidency and the Consequences of 9/11: Lawyers React to the Global War on Terrorism* (2007); *The Law of International Insolvencies and Debt Restructurings* (2006); and *The ABA Guide to International Business Negotiations* (1994, 2000 and 2009 editions). He is a member of the Council on Foreign Relations and of the American Law Institute, has served as a Fellow in the U.S. State Department Scholar/Diplomat Program, and was a Fellow of the National Endowment for the Humanities. He is a former Adjunct Professor of Law at Georgetown University Law Center.

Asian Legal Revivals: Lawyers in the Shadow of Empire

The ABF Fellows Research Seminar was held on February 6, 2010, in Orlando, Florida, during the American Bar Association Midyear Meeting. The session was moderated by James R. Silkenat, Vice President and Director of the World Justice Project, and partner in the New York office of Sullivan & Worcester LLP.

ABF Director Emeritus Bryant Garth (now Dean of Southwestern Law School) presented findings from his forthcoming book, co-authored with Yves Dezalay, *Asian Legal Revivals: Lawyers in the Shadow of Empire* (University of Chicago Press, 2010). Commentary was provided by Marc Galanter, John and Rylla Bosshard Professor Emeritus of Law and South Asian Studies at the University of Wisconsin, and Carole

Silver, Visiting Professor of Law and Executive Director of the Center for the Study of the Legal Profession at Georgetown University Law Center.

James Silkenat opened the session by noting how much the legal scene has changed in China in the last thirty years. Silkenat related how he first became interested in Asian legal affairs as a young lawyer in the mid-nineteen seventies, when, in his role as Chairman of the Council of

New York Law Associates he was invited to travel to China with the first ABA Delegation to visit that country. Lawyers were very small in numbers at that time in China; the change over the last thirty years, Silkenat stated, “has been truly amazing.” The role of law and lawyers has changed a great deal in other Asian countries as well, and Garth and Dezalay’s book addresses these changes in the context of an increasingly globalized world, Silkenat noted.

“You cannot understand law and the legal profession without making some investment in the history of colonization – the earlier forms of globalization.”

A STATE OF CONVERGENCE?

Bryant Garth then addressed the audience. The book, which is the fourth collaboration between Garth and French sociologist Yves Dezalay,

examines, “how globalization may enhance the rule of law and lawyers.” The book represents “our effort to... respond to the challenge of Asia,” Garth noted. It asks the question of whether, in the process of globalization, Asia and the rest of the world are converging toward a situation where “law is central to the economy and the state.” Such a convergence would require a significant change in thinking, as in the past the consensus has been that “there is a different economic model in Asia, where law is simply not that important.” Rather, in Asia *guanxi*, or personal relations, were seen as more vital to the economy than a robust system of law. “Now,” Garth stated, “it’s very different. We no longer think that Confucianism is necessarily the key to economic growth. China, Japan and South Korea are now not only expanding greatly their numbers of lawyers, but they are also even emulating U.S. law schools, making law much more increasingly a graduate degree.”

Garth explained that the approach of the book is historical and comparative, providing a background for understanding the present. Garth and Dezalay conducted close to 400 interviews which were designed to illuminate “the careers and the activities of lawyers and their competitors,” who are chiefly economists. The interviews were conducted in Hong Kong, India, Indonesia,



Bryant G. Garth

Bryant G. Garth is Dean and Professor of Law at Southwestern Law School. He began his tenure as Dean in the fall of 2005. Prior to that time, he served for fourteen years as Director of the American Bar Foundation and four years as Dean of Indiana University School of Law - Bloomington. His research focuses on the legal profession and on the globalization of law. His most recent books (with Yves Dezalay) are *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (University of Chicago Press, 2002) and *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (edited volume, University of Michigan Press, 2002). He and Yves Dezalay are currently finishing their forthcoming book entitled *Asian Legal Revivals: Lawyers in the Shadow of Empire* (University of Chicago Press, 2010). He currently chairs the advisory board of the Law School Survey of Student Engagement and serves on the executive coordinating committee of the “After the J.D.” study of lawyer careers. He is also co-editor of the *Journal of Legal Education*.

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Marc Galanter

Marc Galanter is the John and Rylla Bosshard Professor Emeritus of Law and South Asian Studies at the University of Wisconsin - Madison and LSE Centennial Professor at the London School of Economics and Political Science. He is the author of a number of highly regarded studies on litigation and legal culture, including: "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974); *Tournament of Lawyers* (with Thomas Palay, 1991); and his latest book, *Lowering the Bar: Lawyer Jokes and Legal Culture* (2005). Professor Galanter is a leading American student of the Indian legal system. He is an Honorary Professor of the National Law School of India, served as advisor to the Ford Foundation on legal services and human rights programs in India, and was retained as an expert by the government of India in the litigation arising from the Bhopal disaster. Professor Galanter has been editor of the *Law & Society Review*, President of the Law and Society Association, Chair of the International Commission on Folk Law and Legal Pluralism, a Guggenheim Fellow, and a Fellow of the Center for Advanced Study in the Behavioral Sciences. He is a member of the American Law Institute and a Fellow of the American Academy of Arts and Sciences. Professor Galanter is also the recipient of the 2010 Fellows of the American Bar Foundation Outstanding Scholar Award.

South Korea, Malaysia, the Philippines and Singapore.

THE SHADOW OF EMPIRE

Garth then turned to some of the book's findings. First, he emphasized the importance of the history of colonization in understanding the role of law in Asia. "You cannot understand law and the legal profession without making some investment in the history of colonization — the earlier forms of globalization, if you wish," Garth stated. Colonial powers invested in law differently in different colonies, a legacy which at least partly accounts for the current variations in the status of law and lawyers in Asian countries, Garth explained. The British in India and the U.S. in the Philippines, for example, invested heavily in local systems of law, while the Dutch in Indonesia and the Japanese in Korea invested comparatively weakly in law.

Garth and Dezalay identified a pattern in the countries they studied, where "the colonizing countries used law and legal education in part to co-opt local elites — the Brahmins, the landed elite in the Philippines, the Javanese aristocracy — by providing them with this special education, and then using them in part in imperial governance." Local elites, of course, allowed themselves to be co-opted in exchange for the benefits they reaped. Eventually colonial elites used their

knowledge of law and their legal and administrative contacts throughout the empire "to lead the charge to independence — an independence where, not surprisingly, they themselves would be in charge of the government," Garth explained. Finally, "legal revivals" occur when, after an eventual decline in the prestige of legal elites, often associated with their ties to authoritarian states, lawyers again rally to embrace the rule of law.

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LAWYERS AND SOCIAL CAPITAL

Garth and Dezalay's second major finding is that, referring again to the relationship between *guanxi* (personal relations) and rule of law, "it's not really a matter of the rule of law versus personal relations. Rather, the strength of lawyers depends, in large part, on their connections to local

elites, families, intellectuals, foreign centers of power, governing groups, businesses, land, et cetera.” The implications of this finding are twofold, Garth explained. First, “lawyers actually can coexist very well with authoritarian governments, especially when the profits are very high,” as has been the case, for example, in Singapore, Hong Kong, the Philippines, and South Korea. Second, “even strong and independent courts with top judges can fairly quickly be dismantled when the law is cut off from its other sources of power... You erect this bulwark court against authoritarianism, and when authoritarianism comes, it doesn’t have much trouble dismantling legal power.” Garth cited the Philippines, Malaysia and Indonesia as Asian states where such dismantling took place. However, Garth stated, “as their credibility gets undermined, when they have formed too close an alliance with an authoritarian state, or are too greedy in making money off an authoritarian state; when that happens there are almost always at least some lawyers who are going to take up the charge and try in some way to revamp the professional image and, in a sense, build some power through a different kind of legal credibility.”

LEGAL REVIVALS

Movements to reestablish legal credibility “through anti-authoritar-

ian strategies” notably took place in Malaysia, India and the Philippines. The movements in India and the Philippines were relatively successful “partly or largely because there was a strong investment in the empires by the colonizing countries; they had built really strong social capital into the law...powerful groups, families, connections to business. So the resistance that was the law was also tied to a resistance broadly connected to social forces in those particular countries,” Garth commented. In Malaysia, on the other hand, where lawyers were mostly Indian and Chinese rather than ethnic Malay, they “lacked any power to really gain any traction,” since they were cut off from the Malay-dominated state and business elite.

Ironically, Garth pointed out, “when you have the reemergence, the retooling, the bringing back of law through this resistance to authoritarianism, you also bring back the capital that is embedded in law.” “In the Philippines,” for example, “you had this virtuous set of lawyers coming back into power, reasserting the rule of law, rebuilding the courts, but in fact what you also brought back was the Philippine oligarchy that had been in place before Marcos and during Marcos,” Garth explained.

In the final section of his presentation Garth addressed some of the practical findings or consequences of the book for those who “want to



Carole Silver

Carole Silver is Visiting Professor of Law and Executive Director of the Center for the Study of the Legal Profession at Georgetown University Law Center. Her research analyzes the global strategies of large law firms, the role of United States legal education in the careers of international lawyers, and the relationship among globalization of legal services, regulation, legal education and law firm structure. She has taught courses on the legal profession and globalization, corporations, securities regulation, international securities regulation and comparative corporate governance, and conflicts of law. In addition to teaching in traditional U.S. law school programs, she also has taught in Korea in an executive LLM program.

Professor Silver is a member of the Commission on Ethics 20/20 of the ABA and is an advisor to the ABA Task Force on International Trade in Legal Services and to the Committee on International Issues of the ABA Section of Legal Education and Admissions to the Bar.

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go try and build the rule of law in particular places.” As Garth’s earlier points would indicate, rather than imposing a set of generic “best practices” reformers need to know “the local history of what the law has been.” One may have the goal of building an independent judiciary, but in order to do so successfully, one needs to understand “who the lawyers are, to whom they are connected, what their role is in the state, and in the economy?” In other words, powerful local legal allies are crucial to the success of reform efforts by NGOs and other outsiders, Garth noted. Similarly, the judiciary can maintain its independence best (or perhaps

the law have also been inseparable from what can be looked at as a more recent imperial phenomenon — the strong role of the United States during the Cold War and after. One key to understanding recent legal developments in Indonesia and South Korea, in particular, despite the lack of early colonial investment, is the very close connection between these countries and the United States during the Cold War.

Garth noted that Asian legal revivals are not inevitable; there can be reversals. Building up the rule of law takes sustained effort, “it requires continuing investment, continuing awareness and probably par-

play. “There are elements of convergence that are very easy to see,” Garth commented, “but...every country is path-dependent on what went before and the changes that take place are vectors that move and sometimes even reinforce those very same differences.” Again, Garth emphasized the formative role of each country’s distinct history in the trajectories of law and lawyers in Asia.

INDIA THROUGH THE WRONG END OF THE TELESCOPE

The next panelist, **Marc Galanter**, spoke about some of Garth and Dezalay’s findings especially in

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The British in India and the U.S. in the Philippines invested heavily in local systems of law, while the Dutch in Indonesia and the Japanese in Korea invested comparatively weakly in law.
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only) “when it is embedded in social, economic and political power.” By the same token, with respect to the economy, “even an independent central bank is one of those things that only makes sense if the central bank is embedded in the economy,” Garth observed.

Further, Garth noted, the revivals of the strong role of lawyers and

ticular activities attentive to building credibility and legitimacy within these countries.” Finally, Garth re-addressed the question with which he began his presentation: Are we converging to a point where around the world law is becoming central to the economy and to the state? Garth and Dezalay’s research indicates that both convergence and divergence are at

relation to South Asia, his area of scholarly expertise. Galanter praised the book for its extremely wide scope, which, for an area specialist, provides a novel way of looking at the familiar, like “seeing India through the wrong end of the telescope.” The very distance “enables some patterns to emerge that are not necessarily easy to see when you’re too close up,”

Galanter commented.

Such a wide approach poses drawbacks, however, Galanter noted. For example, the book underscores the shaping influence of the colonial past, and yet India and Pakistan, which were one colony under British rule, which were “administered together, had the same kind of legal development, the same educational systems, the same systems of governance” have, since Partition in 1947, diverged very widely. “At the very least,” Galanter commented, this suggests “that recent developments can involve major shifts and that if we know about the colonial past, we still don’t necessarily know a lot about the present.”

and so in some sense, secular, everyday law was reduced to a kind of subordinate status.” This led to “constant struggle about... just how much in practice Muslim law limits or controls or infuses the other law,” Galanter commented.

THE ROLE OF LITIGATION IN INDIAN SOCIETY

The immensity and diversity of Indian society make generalizations about it “dissolve when you look at it closely,” Galanter pointed out. Garth and Dezalay argue that the development of the legal system in India is closely related to the world of

somebody else; these were disputes about status, about government favor, about privilege, a license, a government franchise, social recognition and so forth.” There is a perception that Indians engage in a tremendous amount of litigation, but on a per capita basis, there’s actually rather little; the United States is actually twenty times more litigious than India, Galanter noted. Rather, it is the slowness of the litigation process in India — where tort cases average ten to twelve years — that creates a “congested, gridlocked legal apparatus which... translates into people saying that Indians are very litigious.”

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Indians had a very high level (similar to that of Americans) of confidence in their “legal efficacy,” that is, in the belief that they can secure a remedy for injustices they have suffered.

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The role of legal elites is complicated in Pakistan, because in that overwhelmingly Muslim majority country (unlike India where Muslims currently constitute about 15% of the population) “the expositors of Muslim law act as a competing elite” to secular lawyers. At Partition in 1947 Pakistan’s “raison d’être was to be a Muslim country...

business, but Galanter’s view is that, at least until very recently, “the legal profession in India was about litigation, it did very little transactional work.”

Litigation in India is about status and resources, not necessarily money, Galanter commented. “In fact, very rarely would a major lawsuit end with somebody writing a check to

INDIAN LEGAL ELITES?

Galanter expressed concern that Garth and Dezalay had interviewed only members of the legal elite for their research, a reasonable strategy, but one that comes with costs. The perspective of legal elites in the countries studied is key to understanding the system, but it does not tell



the whole story. Relying on the legal elite for an understanding of the legal system “would be like trying to form a picture of law in the United States by going and interviewing partners at Cravath and maybe some partners from Sidley and Austin and a few others, and maybe somebody from high up in the Justice Department or the Solicitor General’s Office, and then getting a picture of what the law is like in the United States,” Galanter commented.

The problem is especially evident in the “very rich and intricate civil society” that is India. “Law” permeates Indian society, ranging from constitutional law propounded by highly

which found that, compared to other nationalities, Indians had a very high level (similar to that of Americans) of confidence in their “legal efficacy,” that is, in the belief that they can secure a remedy for injustices they have suffered.

Finally, Galanter questioned Garth and Dezalay’s emphasis on the resilience of elites. In India the Brahmins, as the highest set of castes in the Hindu hierarchy were “carried to the top of the legal system established by the British,” Galanter explained. But, through an accident of geography and history, the Parsees, a small Persian minority group centered near Bombay, also became “amazingly

Galanter noted. These reservations aside, however, Galanter found the book “very provocative” and refreshing in its broad scope.

THE CASE OF SOUTH KOREA

Carole Silver commented on the book from her perspective as a student of the role of U.S. legal education in the careers of international lawyers. Her work relates to Garth and Dezalay’s in that she looks at international lawyers gaining U.S. legal credentials as a “strategy for gaining capital,” Silver noted. Though she focuses primarily on the LLM degree in this context, she has also studied

“Until very recently, the bar passage rate in South Korea has been extremely low — even less than 5% — so that studying law in South Korea in preparation for a legal career was an extremely risky path for young people to take.”

educated, articulate judges and lawyers, to litigation engaged in by thousands of everyday workhorse lawyers, to an informal system of extralegal “remedial options” exercised by many members of society. Galanter cited the World Values Survey — a survey gathering responses to similar questions in forty-some countries,

present in the legal system,” challenging the Brahmin dominance of the field. Currently, Brahmins in India are “shifting largely to commercial and scientific sectors and away from the more political sectors, where... as a tiny minority, and a much suspect minority in many quarters, they are much less likely to flourish,”

the role of the U.S. J.D. and legal practice experience with U.S. and other global law firms in the careers of these lawyers.

In recent years, Silver has examined the role of the LLM and U.S. legal education in general in the careers of South Korean-born lawyers. While for law graduates from certain

jurisdictions, such as Germany, the LLM serves as a kind of professional “icing on the cake,” for South Korean-born students it plays a more significant role, Silver noted. Until very recently, the bar passage rate in South Korea has been extremely low — even less than 5% — so that studying law in South Korea in preparation for a legal career was an extremely risky path for young people to take. Consequently, many young South Koreans have come to the United States for LLM or J.D. degrees and, while some return immediately to South Korea upon graduation and start working for South Korean firms as foreign lawyers, a significant portion stay in the United States for a few years, passing a state bar exam and gaining work experience with a U.S. law firm.

Indeed, many students with elite credentials work for American firms. “About a quarter of the lawyers working for the top five South Korean internationally focused firms graduated from a top U.S. law school, compared to over 50% of those working for the U.S. firms that have their Korean-related practices situated in Hong Kong,” Silver commented. While foreign law firms cannot establish offices in South Korea because of restrictive regulation there, some U.S. firms have gained a foothold of sorts by creating South Korean-oriented practices staffed with South Korean nationals

with J.D.s or LL.M.s from top U.S. law schools. These often are situated in Hong Kong, an easy airplane flight away from Seoul. A common career path for South Korean nationals who graduate from U.S. law schools is to work for several years in the U.S., and then move to the Hong Kong offices of their U.S. employers. From there, these lawyers — U.S.-educated and trained but culturally connected to South Korea — travel to South Korea to meet with clients and maintain important connections, and avoid the regulatory barriers.

CHANGES IN THE SOUTH KOREAN LEGAL MARKET

However, the South Korean government does plan to open up the legal market to foreign firms in the future, Silver noted. The government plans to require a special license — the Foreign Legal Consultant license — for foreign licensed lawyers who work for foreign law firms, even if they are South Korean nationals. The new license will require one year of practice experience earned outside South Korea, and a total of three years of experience altogether. However, South Korean U.S. educated and licensed lawyers who work with Korean law firms may be exempted from this requirement. Silver sees this exemption as a way for the South Korean government to provide some protection for Korean law

firms against U.S. and other foreign competition.

South Korean law firms have another advantage over U.S. law firms that will eventually set up shop there. Silver has found that, in at least three of the five South Korean firms she recently studied, “more than half of the South Korean-licensed lawyers first worked as prosecutors or judges in Korea,” while no U.S. firms employ lawyers with such a background. The connections that these lawyers have forged with former prosecutors and the judiciary are invaluable in building close relationships to the South Korean state.

As regulatory barriers fall, many changes are in store for the legal profession in South Korea, Silver noted. While historically lawyers have been in a somewhat marginal position in South Korea, due to the very low bar passage rate, “at the same time, the lawyers supported that control because it maintained their high status simply because they were so rare. And now, that’s being reversed; there will be many more lawyers, the South Korean government has moved to a graduate program of legal education and has promised to raise significantly the pass rate for the Bar to more than 50%, perhaps as high as 70%.” According to Silver, lawyers in South Korea are concerned about the projected increase in their numbers, fearing a dilution of the profession, “a loss of the values of being a lawyer,




and especially a loss of professionalism.” They are very concerned as well about the effects of globalization on their profession, “about especially U.S. and U.K. lawyers and law firms entering and kind of muddling around in what the role of a lawyer is and the relationship of the role of the lawyer to the state,” Silver commented. “The debate is certainly going to continue,” as the situation evolves, Silver concluded, as she again thanked the authors for the broad perspective their book has provided for students of the legal profession in an age of globalization.

CONCLUSION

As the formal part of the session ended, Garth thanked the commentators and responded to a few of their observations and critiques. He stated that, while studying the

entire legal profession in a country is indeed valuable, the focus of his and Dezalay’s research is, in fact, elite lawyers. “We’re studying — we’re not counting lawyers — we’re studying lawyers who count,” Garth stated, a focus that “gives a picture of the role of legal credibility in the state and in the economy.” He did grant that “to get a full picture, you do need to know much more about who are the lawyers... about the role of gender in the profession, for example... but it’s not the story that we really tell.”

Garth also commented on how the anticipated changes in South Korean legal education and admission to practice may increase the influence of South Korean elites in the profession. Up until very recently, lawyers tended to come from very ambitious, extremely studious members of “lower middle class communities,” Garth noted. The new law school admission

criteria will be more flexible, and will include linguistic ability and work experience, including experience abroad. These changes, along with the anticipated higher bar passage rate, will offer a relative advantage to the elites of South Korean society, who are able to “give advantages to their children,” such as the opportunity to study and work abroad, Garth concluded. 

IF YOU ARE INTERESTED IN SUPPORTING RESEARCH ON ASIAN LEGAL REVIVALS OR OTHER IMPORTANT ABF INITIATIVES, PLEASE CONTACT LUCINDA UNDERWOOD AT 312-988-6573.

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