

**Keynote Speech at 2017 Annual Conference of the Asian Law and Society Association (ALSA)**

## *Legal Freedoms: Struggle in the Theory of Legal Change in Asia*

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### 1. INTRODUCTION

President Chang, Dean Liu, and Professor Lin, I am delighted to be here in Taiwan and to enjoy the fine hospitality of the National Chiao Tung University. President Miyazawa and fellow scholars, it is an honour for me to be invited to address you at the opening of this exciting event.

I am asked to reflect on legal transformations in Asia from the viewpoint of my own scholarship on Asia in the context of the wider socio-legal community. I shall do so by posing a fundamental question for all scholars engaging in socio-legal research, whether in Asia or across the world: how can socio-legal scholars explain legal change in global contexts?

Here, I include legal change of every kind: in legal consciousness and legal professions; in the judiciary and dispute settlement; in human rights, social rights, and social justice; in commercial, economic, financial, and trade law; in international and domestic law; in criminal and public law—indeed, in every major theme addressed in the sessions of this conference.

I shall answer this question by drawing on research and theoretical formulations I have shared with my academic collaborators. All of these have been shaped by my research in Asia. All have been influenced by Asia specialists in broader collaborative networks. All, I believe, have continuing relevance for legal change in Asia, just as Asia is a critical empirical site to include the developing theory of legal change in global contexts. My remarks today, therefore, are intended to deepen and widen the conversations between scholarship in Asia and the broader socio-legal community to the mutual benefit of all.

To set an autobiographical context, my own research in Asia has been eclectic. Although I grew up in New Zealand, and so was acutely aware of developments in Asia my entire life, my scholarly interests were awakened by the Asian Financial Crisis. The financial collapse confronted by several Asian Tigers in the late 1990s drew states, international financial

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institutions, international private banking, and a wide array of regional and global governance institutions into intensive negotiations with several South-East and East Asian countries over far-reaching legal change. My work with Bruce Carruthers sought to discover the systematic dynamics of this legal change.<sup>1</sup>

In the late 1990s, I was invited by the World Bank, in collaboration with China's State Council Office on Restructuring the Economic System, to meet with economic law-makers who were working on Premier Zhu Rongji's five-year plan for China's economy. One part of his plan was to reconstruct the regulation of professions that presided over China's booming economy—again, the challenge of legal change in global contexts.

Beginning in the early 1990s, I joined with French sociologist and public intellectual, Professor Lucien Karpik, and later with Professor Malcolm Feeley, University of California, Berkeley, to explore comparatively and historically when lawyers will mobilize on behalf of certain freedoms. Over the past 25 years, we worked with country specialists to develop a comparative theory of legal and political change across the world.<sup>2</sup> We invited historians and legal scholars, sociologists, and political scientists to weigh the impact of lawyers in the struggle over freedoms, including those in India, Sri Lanka, Pakistan, Malaysia, Singapore, Japan, South Korea, Taiwan, Hong Kong, and China.<sup>3</sup>

These strands of work led to my current research with Professor Sida Liu, University of Toronto, on the politics of lawyers at work in China. For more than ten years, we have been studying how criminal defence lawyers, ordinary lawyers and notable lawyers, urban lawyers and rural lawyers gave meaning to their work. Is it only work? Is it purely an economic activity? Or did legal work have meaning as political action, as a contribution to building a particular kind of political society—a polity in which freedoms are in sharp focus?<sup>4</sup>

Through all these scholarly encounters in Asia, the same fundamental question is repeated: how can socio-legal scholars explain legal change in global contexts? Arguably, this question underlies all the research of any of us in this auditorium this morning and for members of the Asian Law and Society Association (ALSA). I propose to you elements of theory that may apply to Asia, the Americas, and the world more broadly.

I shall illustrate that formulation by focusing on one specific kind of legal change integral to my research: the *fight for basic legal freedoms*. I propose to you that to understand the fight for basic legal freedoms in Asia—and legal change more generally—will include three theoretical elements: (1) the recursivity of law; (2) the legal complex; and (3) transnational legal orders.

## 2. FREEDOMS

I begin by clarifying what it is I seek to explain—what social sciences frequently call the dependent variable. I focus on one fundamental arena for legal change in any country at any time—the expansion or contraction of basic legal freedoms. What are those freedoms? I shall concentrate on freedoms where there is the highest probability that lawyers will find common ground despite the great diversity of attributes and ideals among lawyers themselves.

1. Halliday & Carruthers (2009).

2. Halliday & Karpik (1997a); Halliday, Karpik, & Feeley (2007); Halliday, Karpik, & Feeley (2012).

3. Aziz (2012); De (2012); Ghias (2012); Harding & Whiting (2012); Mate (2012); Munir (2012); Udagama (2012); Rajah (2012); Feeley & Miyazawa (2007); Ginsburg (2007); Halliday & Liu (2007); Jones (2007).

4. Liu & Halliday (2016).

Comparative and historical research reveals that, in Africa and Asia, in the Americas and Europe, over the last 400 years, lawyers have been most likely to set aside their differences and mobilize collectively for legal change in a small subset of all the potential freedoms we could name. This small bundle of freedoms is foundational for a particular type of political-legal society.

I will divide those freedoms along the familiar lines of *freedoms from* and *freedoms to*.

## 2.1 *Freedom From*

Great struggles for legal change across the world have for several hundred years taken place on the terrain of arbitrary exercise of power by the state. In history, on every continent, research reveals lawyers uniting around: freedoms from arbitrary arrest; freedom from indefinite detention without trial; freedom from extra-legal killings; and freedom from torture of detainees. Lawyers will insist that these “freedoms from” can only be meaningful when detainees have access to lawyers, when the accused receive a fair trial, when defendants are protected by procedural rights, when detainees know the charges against them and can see and test the evidence brought by the state.

Our research on China’s criminal procedure reforms reflected what scholars had found elsewhere—lawyers mobilizing to fight against confession by torture, to fight against extended detention and sentencing before trial, to fight against the assumption of guilt, or limits on access by detainees to legal counsel or difficulty in collecting and testing evidence, among others. We describe repeated efforts over decades by lawyer-reformers to institutionalize core civil rights in the Criminal Procedure Law and to implement them in practice.<sup>5</sup>

These “freedoms from” extend well outside the police station, prison, or courtroom. They reach to personal property of persons in the society. Criminal lawyers and commercial lawyers, the rich and poor, can find common ground on resistance to arbitrary seizure of property by the state or by those the state authorizes or allows. In our China research, we observe the deep-seated grievances of tens and hundreds of millions of Chinese over property takings. These fuel social unrest, which leads to arrests on criminal charges and draws defence lawyers into property struggles.

These rights are often referred to as core civil rights or first-generation rights.

## 2.2 *Freedom To*

Lawyers in Asia and elsewhere very often lead for “freedoms to” express core political rights. They have fought for the ability to speak openly on any topic—freedom of speech. They struggle for the right to associate openly with others who share common interests—freedom of association. In many countries, they are leaders in voluntary associations. Lawyers, like others, seek the freedom to move from one part of a country to another, temporarily or permanently, viz. freedom of movement. Lawyers from eighteenth-century France to twenty-first-century China can be found in the fight for all citizens to worship openly, viz. freedom of religion.

These freedoms find their expression in a vibrant civil society, where hundreds and thousands of loose networks and even formal associations populate the social landscape. Any individual can belong to as few or as many as she or he wants. These freedoms are observed in lively and noisy public squares. Media of all kinds carry views of every kind.

5. Liu & Halliday (2009), pp. 911–50.

Platforms, squares, and streets become stages on which these freedoms are expressed, whether by lawyers in Malaysia or citizens in the streets of Seoul or Hong Kong.

In fact, lawyers' *associations* themselves are one of the pillars of a civil society populated by voluntary associations. In South Korea, in the mid-1980s, it was a small, initially secret network, and later an association of lawyers who were among the early drivers of legal and political change.<sup>6</sup> In 2008 and 2009, many activist lawyers in Beijing sought some autonomy from the tight control of the Bureau of Justice. They pushed for an open election for leaders of the Beijing Bar Association—a daring move that was crushed by the state.<sup>7</sup>

Not least, “freedom from” and “freedom to” cannot exist without a *moderate state* where law “tempers power,” as Australian legal philosopher, Martin Krygier, eloquently states.<sup>8</sup> The concentration of power takes many forms: military rule in South Korea or Chile; emergency powers in India or Pakistan; one-party rule in Chiang Kai Shek's Taiwan or Lee-Kuan Yew's Singapore or Xi Jinping's China.

In the 1600s and 2100s, in the Americas or Africa, in constitutional struggles everywhere, the ability of legal or political institutions to restrain all-powerful rulers is a common ground of struggle as lawyers and publics fight for basic legal freedoms. Ideals inscribed now in the universal norms of the UN emphasize the need for a balance of power in the state or the independence of the judiciary. Scholars write of the ideal of the moderate state. Liu and I report on a deep institutional struggle in China over the capacity and willingness of judges to confront the police, procuracy, and party.

Of course, you would be right to say that often lawyers have not mobilized for these values. You would be correct to observe that there are limits on all these freedoms. You would also point out that “freedom from” and “freedom to” are not independent of each other. A condition of “freedom from” is the capacity of “freedom to.” Moreover, when we observe “freedom to” associate and speak, we are also likely to find demands for freedom from a repressive state.

How can we explain shifts towards or away from basic legal freedoms in any country? An essential place to begin is the *legal complex*.

### 3. THE LEGAL COMPLEX

Research in Europe, the Americas, Africa, and Asia repeatedly shows that the most proximate actors to legal change are lawyers. And, of course, this makes sense. Lawyers are practitioners in the language of the state, and that language is law. However, lawyers themselves usually are divided by all the economic and political as well as racial and ideological cleavages in society. How, then, is it possible for them to act collectively?

Our research shows that lawyers can find common ground, despite their differences, in two respects. First, almost all lawyers can agree that basic legal freedoms need protection, that lawyers themselves should be able to speak collectively, and that a justice system should respect right over might. Lawyers can find solidarity on a narrow but common ground. Second, lawyers are not the only legal actors to drive legal change. Lawyers involved in the struggle for or against basic legal freedoms almost always are involved with other legal occupations.

6. Ginsburg, *supra* note 4.

7. Liu & Halliday, *supra* note 4, pp. 107–12.

8. Krygier (2017), pp. 34–59.

In fact, when we looked back on our earlier interdisciplinary collaborations on European countries, to France or Germany, or on the US, we saw we had missed the obvious—that private legal professions and judges and prosecutors and legal scholars very frequently are acting in relation to each other. This interaction among legal occupations is brought even more clearly into focus by the writings of Professors Miyazawa, Malcolm Feeley, Tom Ginsburg, and Carol Jones on North-East Asia, by Professors Andrew Harding, Amanda Whiting and Jothie Rajah on Southeast Asia, and by many studies of South Asia. Sida Liu and I observe these dynamics at present in China.

We may acknowledge these interrelationships in particular cases but how do we turn them into explanatory components of theories of legal change? Lucien Karpik created the concept of the *legal complex* as a new collective actor in the fight for basic legal freedoms and legal change more generally: “[T]he legal complex denotes legal occupations that mobilize on a given issue at a given historical moment, usually through collective action that is enabled through discernible structures of ties.”<sup>9</sup>

The concept has been elaborated on and applied in many settings, including China, Taiwan, South Korea, Japan, Singapore, and Malaysia.<sup>10</sup> What are the properties of this collective legal actor?

First, it comprises *legal occupations* that create, elaborate, transmit, or apply the law. It includes private lawyers, judges, prosecutors, legal academics, military lawyers, and grassroots lawyers.

Second, the legal complex is *action-oriented*. It does not refer to anyone with a legal education. The occupations in a legal complex are doing legal work—drafting, advising, representing, suing, prosecuting, teaching, and writing the law. Moreover, they are doing so individually and collectively through organizations, such as law firms, bar associations, courts, judicial networks, scholarly societies, and military hierarchies.

Third, the legal complex changes in its composition and relationship as issues of legal change differ. The actors and actions of the legal complex relate *not* to all issues at any moment, *but* a specific issue at a given moment. Today, the legal change we seek to explain concerns basic legal freedoms. However, different configurations of a legal complex could spring up around environmental problems or the problems of the elderly or the revision of Constitutions or shifts in gender relationships.

Fourth, the legal complex involves *structural relationships* among its members. They may be relations of co-operation or competition, consensus, or conflict. Tom Ginsburg writes that prosecutors and rights lawyers were starkly oppositional during the turbulence of South Korea in the 1970s. In China, Sida Liu and I, together with Kwai Ng and Xin He in their most insightful new book, *Embedded Courts*,<sup>11</sup> find a deep divide between prosecutors and judges who align with the police and defence lawyers who align with clients. With legal academics often taking the side of lawyers, these structural relationships within the legal complex have influenced every round of China’s Criminal Procedure Law reforms in 1979, 1996, and 2012.<sup>12</sup>

9. Karpik & Halliday (2011), p. 221.

10. Liu & Halliday, *supra* notes 4 and 5.

11. Ng & He (2017).

12. Liu & Halliday, *supra* note 4.

Fifth, the legal complex acts on particular issues at a particular moment in time. It is not static, but dynamic. For instance, Ginsburg shows that, whereas South Korean prosecutors and activist lawyers were locked in conflict in the early and mid-1980s, by the mid-1990s, prosecutors effectively became allies, particularly in bringing corruption cases against entrenched elites as they sought to redeem their earlier association with a repressive state.<sup>13</sup>

In sum, to explain the rise and fall, the advances and retreats of basic legal freedoms, the structure and dynamics of the legal complex are vital explanatory factors of the direction, speed, and magnitude of legal change.

#### 4. THE RECURSIVITY OF LAW

As we construct the elements of a theory of legal change, we have articulated something to explain—the rise and fall of basic legal freedoms—and one set of factors to explain that fall—the properties of the legal complex. However, the explanation remains incomplete. Too often in the history and sociology of law and legal change, scholars extract a small slice of action at a single moment in time and hone in on that moment as if it stands outside time, outside history, outside the constraints and opportunities endowed by institutions, and outside culture. A momentary snapshot can yield real value. For it to be encapsulated in a robust theory of legal change, however, it must be situated in a more extended temporal context that stretches back to formative moments and extends forward to prospective moments.

By following legal reforms in Indonesia, South Korea, and China, Carruthers and I developed a framework to inform accounts of legal change in any other part of the world, on other issues, at other times. We call this theoretical framework the recursivity of law.<sup>14</sup>

Significant efforts at legal change, we propose, unfold in *episodes*. An episode of change has a *beginning*. It occurs when a relatively stable state of affairs of law in action or law on the books is disturbed by a combination of facilitating circumstances (e.g. rising debt, rigid law, and pressure on weak institutions) and precipitating events (e.g. collapse of major banks, the central bank runs out of money, creditors demand their money back, and a wave of business failures threatens the domestic economy).

An episode of change also has an *ending*. Of course, it is not a discrete or crisp ending, such as the passing of a new law. It is an *ending* where a new state of affairs in law and practice settles down. Business people, workers, lawyers and accountants, consumers, and bankers all act in new and relatively predictable ways. We call this *settling*.

In a global and transnational world, in fact, in a world seen through socio-legal eyes, legal change is always occurring in at least three levels of action. It occurs locally, far from the national capital, out in the provinces and towns and villages, where ordinary people, firms, and organizations go about their lives, sometimes with the advice of lawyers and other professionals. It occurs nationally, in parliaments and courts, regulatory agencies and presidential palaces, policing institutions, and civil society organizations. It occurs transnationally, in the relationships among neighbouring states, in multilateral bodies like ASEAN or the Asian Development Bank (ADB) or the Asian International Investment Bank (AIIB), or the UN, in multi-national corporations, through international civil society.

13. Ginsburg, *supra* note 4.

14. Halliday & Carruthers (2007), pp. 1135–202.

These exogenous entities may create norms, bring states together as signatories on international treaties, monitor behaviour, and infuse an international public sphere.

We further discovered what any good historian might have shown—between the beginning of a reform episode and its settling, there are many *cycles* in the reform episode, some driven by a local problem, others by an international body. Moreover, of course, practice does not always conform to law on the books. Institutions do not work as intended. Resistance and adaptation change the intent of law-makers. As such, a new cycle of global law-making, national law-making, and local norm-making and practice begins again.

When Professor Liu and I turned to study the fight for basic legal freedoms in China, we found that recursivity theory gave us a *systematic framework* with which to conceptualize our problem.<sup>15</sup> We were pressed to look back into China's recent and distant histories of criminal law and practice to understand the deep currents that lay underneath current reforms. We observed the immediate circumstances that impelled the law reforms of 1979, 1996, and 2012. Each reform episode had its *beginnings*, on one side, in crises or failures, or limitations in domestic practices and policy, and on another side, in international influences ranging from UN standards to ideas imported and adapted by China's brightest legal academics. Each reform episode initiated changes in practice, but each reform failed in part—and, indeed, the demands and expectations for legal change differed sharply between grassroots and notable activists, on the one side, and leaders of the party-state and its security apparatus, on the other side.

Recursivity theory gave us immediate starting points for our fieldwork. We knew fieldwork could not be seized in one static moment and had to follow a change. We knew we needed to be aware of norms, actors, and interests at all three levels of action—international, national, and local. We also knew we needed to identify what are the *mechanisms* or *processes* that produce fewer or more cycles of change until they settle.

Recursivity theory offers hypotheses about the *mechanisms* that drove China's waves of legal reform.

One mechanism involves *diagnostic struggles*. We were able to show how the police and procuracy and defence lawyers saw underlying problems in very different ways. Where the party-state saw dangers to social stability, practitioners saw grievances of vulnerable clients.

Another mechanism that drives cycles of reform involves *actor mismatch*, which occurs when the actors who are responsible for implementing legal change are not all included in deliberations about statutory law reform. As a result, law-makers often get it wrong, or law implementers cannot or will not act as law-makers expect.

Legal change frequently is driven by *contradictions*—another mechanism. In China's procedural law reforms, we observed contradictions between different laws—for example, powers are given to defence lawyers in the 1996 Criminal Procedure Law but taken away in the 1997 Criminal Law. Contradictions could also be found in the conflicting interpretations of the 1996 law issued by the Ministry of Public Security, the Supreme People's Procuracy, the Supreme People's Court, and the Ministry of Justice.

Another mechanism that drives change, the *ambiguity* of the law, also occurred in criminal practice. The vague wording of statutes as well as the broad bounds for discretion and interpretation of the law in very different ways led to confusion and struggle over the extent that legal freedoms would genuinely be protected in criminal defence.

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15. Liu & Halliday, *supra* note 4.

Our research on criminal defence revealed the *legal complex* in action. We discovered five types of defence lawyers who split sharply in their relative emphasis on protecting basic legal freedoms versus sustaining the “strike hard” power of the state. We saw the powerful alliance between the prosecutors and judges but, even then, observed tensions between judges who thought they were too weak in the criminal process and prosecutors who believed they were not strong enough. We observed some legal academics who aligned themselves firmly with reformers in favour of higher legal protections from the state, but most others were indifferent or silent, or favoured the security apparatus.

Our China research further convinces me that recursivity theory offers increments of explanatory power to criminal as well as commercial law, to China as well as North-East and Southeast Asia. Research on many other areas—forestry, nuclear proliferation, and international humanitarian law, to name a few—demonstrates that there are varieties of recursivity in legal change and policy-making. Put another way, this framework, originating from Asian research on commercial and criminal law, amplifies understanding of legal changes occurring, both across a wide variety of issue areas and in jurisdictions across the world.

## 5. TRANSNATIONAL LEGAL ORDERS

Explaining legal change in today’s world requires theories that situate domestic legal change in transnational and global contexts.

We may think of two overly stylized ways of thinking about contexts beyond the borders of a state. First, we may look from the *inside out*, within a national or local context, and observe which other states, international organizations (IOs), and/or non-state actors feature in domestic reforms. This approach is common and in fact is what Liu and I did in our China criminal defence research. Second, we may look from the *outside in* and observe how the transnational and global itself is constituted to influence legal change in Asia and elsewhere. That is, the orientation of the scholar is transnational or global. She starts with the outside and moves to the inside.

An emerging paradigm of the second course, which I am now convinced is imperative for theories of legal change, is to situate each piece of research within the framework of *transnational legal orders* (TLOs).<sup>16</sup> This theoretical approach conceives of a world constituted by orders—political orders, economic orders, and religious orders, among others. A transnational *legal order* arises when norm entrepreneurs construe some sort of social behaviour as a *problem* and seek to design a transnational order that will solve that problem through law.

These norm entrepreneurs can be individuals, such as influential law professors, or professionals, such as leading practitioners, or law firms, which devote resources to create legal orders, or international organizations, such as international bar associations or speciality professional or industry organizations. Each of them finds international venues, such as the UN or private soft-law-making bodies, in which to formulate norms for all countries. Shaffer and I define a transnational legal order as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”<sup>17</sup>

16. Halliday & Shaffer (2015b).

17. *Ibid.*, p. 5.



Recent research demonstrates there are many TLOs of varying scales at various degrees of institutionalization: corporate bankruptcy, taxation, trade and finance, food, climate change, health and pharmaceuticals, human trafficking, accountability for human rights violations, worker protection, and labour standards. In fact, it seems that TLOs of one form or another increasingly saturate the world.

These TLOs rise and fall, expand and contract, compete or divide.<sup>18</sup> They differ in how well they are institutionalized and how well the norms in the TLO have settled. A fully institutionalized TLO has concordance among norms at the transnational, national, and local levels. At the transnational or global level, norm entrepreneurs seek to bring states and localities into conformity with the norms. At the local level, activists and others may appeal to transnational and global norms. TLOs are dynamic, and they follow a recursive logic. Norms develop through repeated waves between international and national, national and local, and local and transnational levels of action.

We discovered early in our research that some segments of the legal complex in China and the activists who advocated for change appealed to norms outside of China. Some referred amorphously to rule of law versus rule of man. Rule of man, they said, was exemplified by Mao's China. Rule of law was a universal norm that China should follow, they claimed. Criminal law professors drafted model laws explicitly drawing upon those of other countries, particularly in the US and Europe. Many lawyers insisted that China's statutes should adhere to the UN International Covenant on Civil and Political Rights, which China has signed but not ratified. Norms from outside China crept inside indirectly through increasing numbers of young lawyers who had overseas education or judges involved in foreign workshops and tours.

All these appeals from the inside to the broader world implied that there might be a TLO for basic legal freedoms and, for an open civil society and moderate state, could be identified from the bottom up. However, from a transnational or global perspective, was there a TLO or several TLOs that provided the normative context, constraint, and influence on China's Criminal Procedure Law? From the outside, can we observe bundles of states and non-state organizations that articulate relatively settled legal norms and ideals that influence the advance towards or retreat from basic legal freedoms in China or elsewhere?

We are currently engaged in a research project that aims to answer this question. We seek to identify actors who generate or monitor norms, such as the UN Commissioner for Human Rights. We are identifying the form and substance of their legal norms. We are studying the modes of normative expression or the global scripts that are standards for appeal.

Lying behind this relatively well-publicized struggle, however, is what appears to be a robust set of global norms that constitute a loosely articulated TLO. China's strong responses to international criticism reinforce the point that change in China's criminal practice is not merely a domestic struggle. It must be partly explained by the qualities of a TLO in which it is uncomfortably embedded. In conclusion, I now turn to this discomfort and its alternatives.

## 6. RECAPITULATION

Let me recapitulate my argument to this point. As socio-legal scholars, we all confront a key question—how do we explain legal change in whatever area in global contexts? I have

18. Halliday & Shaffer (2015a), pp. 473–528.

focused my answer to the generic question on a fundamental social-legal issue in history and across regions—the expansion or contraction of basic legal freedoms. I have proposed to you that *three* sets of theoretical elements advance the theory of the rise or fall of basic legal freedoms in any society, in any issue that stimulates legal change.

First, legal change is driven by actors. The most proximate actors are drawn together in a legal complex—the coalitions or networks of practising legal occupations where co-operation or conflict drive states towards or away from the protection of basic legal freedoms.

Second, legal change is a dynamic process that proceeds through recursive rounds or cycles or waves that unfold through entire episodes of norm-making at three levels of action—local, national, and international.

Third, legal change in the twenty-first century always occurs inside a broader drama—the rise and fall of TLOs. Local and state actors preside over a push for change or resistance to change. They support or resist change within contexts being shaped by regional, transnational, and global norm entrepreneurs who seek to establish TLOs across the world. These TLOs will be clustered around transnational norms. They will be driven by IOs, by an international legal complex, by individual states and multilateral governance institutions. Sometimes they arise from above—from a UN or ADB. Sometimes they emerge from below—by a state that seeks to magnify its national norms by making them transnational.

Here, then, are four components towards a theory of legal change in global contexts. There is a phenomenon to be explained. There are discernible factors (structures, processes, actors, institutions) that explain whether and when and how change will occur.

## 7. FREEDOMS IN A SECOND COLD WAR?

We may be tempted to conclude that this is all highly abstract, far removed from the headlines of our newspapers, from tweets that go viral, or social media we continuously scan on our smartphones. In fact, our focus today on basic legal freedoms points us towards a necessary socio-legal engagement with a great struggle of our time.

### 7.1 *The First Cold War*

For 40 years, from the close of World War II to 1989, we experienced a Cold War. That Cold War was not only about the fear and threat of nuclear war. It was not only about geopolitics and the alignment of the entire world for or against or between two super-powers. The Cold War was a battle over ideas and ideals, over the very meaning of “freedom” itself. Indeed, meanings of “freedom” became an ideological battleground.

One side championed ideals of freedom of association, freedom to worship freely, and freedom from fear. The other side championed ideals of freedom from want, from hunger, from medical neglect or lack of shelter, or from lack of education.

The UN Charter had built all these freedoms into the UN mandate. However, a struggle over which freedoms should be prioritized continued for half a century. In a meaningful sense, basic legal freedoms, and their supporting pillars of an open civil society and moderate state, were an ideological battleground for the last half of the twentieth century.

With the fall of the Berlin Wall, some hubristic writers declared “the end of history” and a victory for the West, democracy, rule of law, constitutionalism, and capitalism. However, the twenty-first century has shown this premature claim to be short-lived, even false.

## 7.2 *A Second Cold War?*

In the past 10–15 years, we have seen increasing fragments of evidence that a Second Cold War might emerge. This is *not* so far a Second Cold War where missiles and tanks prevail. It is an incipient Cold War in which ideology, law, and legal institutions form a decisive field of battle. It is a Cold War in the making, in which we, as socio-legal scholars concerned about law and behaviour, find ourselves drawn into the heart of the conflict.

On the one side, there is a long-standing mega-TLO, arguably the dominant TLO since the mid-twentieth century, which we might call a liberal-legal order. It is institutionally anchored in the UN, in international courts, and in a dense fabric of international hard and soft law. It is championed by international non-governmental organizations (NGOs), such as the International Commission of Jurists, by the International Bar Association Human Rights Institute, and by international religious coalitions, among many others. The norms of this TLO are inscribed in the Constitutions of states across the world.

Attempts to capture the essence of this mega-TLO are reflected in broad concepts such as rule of law, constitutionalism, political liberalism, human rights, and basic legal freedoms. The historical roots of this TLO are inscribed in the master norms of many states.

An exciting scholarship has arisen in international law that examines the content and provisions of constitutions in all countries from the late 1700s to the present empirically. Professor David Law, of the University of Hong Kong and Washington University, presents an evocative analysis in his chapter in a forthcoming book on *Constitution-Making and Transnational Legal Orders*.<sup>19</sup> Professor Law identifies what he calls “constitutional dialects.”<sup>20</sup> While there are variations on the theme, by the last half of the twentieth century, at the core of these constitutions were institutions such as parliaments and judiciaries and values such as civil rights and negative freedoms. These constitutions have strong family resemblances to “basic legal freedoms” and a moderate state. These constitutions enable conditions for an open civil society that, in turn, sustains a liberal-legal order. We observe these norms as guides to practice and behaviour in North and South America, in Europe and Australasia, in South Asia, and in North-East Asia, notably in Taiwan, South Korea, and Japan.

However, within this wide-ranging legal order, we now observe deep strains. The countries that were once the leaders of the TLO associated with liberal, democratic, and constitutional polities now confront their internal political-legal crises. The US, for instance, has shown itself to be careless in fortifying fundamental institutions that protect the rights of the weak, the poor, the vulnerable, and the marginalized, and many of these populations have risen in shocking, even extremist, ways. Similar shocks are seen in the UK and Continental countries, long fortresses of a liberal-legal TLO.

Against a dominant TLO of the First Cold War, insurgent alternative norms are arising in many parts of the world. In a very provocative piece, Professor Kim Scheppele of Princeton University identifies what may be an insurgent TLO rising in Hungary, Poland, Russia,

19. Law (forthcoming).

20. Shaffer, Ginsburg, & Halliday (forthcoming).

Venezuela, Ecuador, and Turkey.<sup>21</sup> She observes efforts by rulers to adopt, borrow, and build clusters of what she calls “worst constitutional practices.” Those clusters, she says:

deny the most important elements of constitutionalism: limitation of public power by law, the exercise of public power in a transparent and accountable manner, the importance of checks and balances in the design of the state, the unconditional and non-discriminatory protection of rights.<sup>22</sup>

This possible counter-TLO is driven by charismatic, even messianic, rulers. It observes constitutional provisions in the letter of the law but cynically manipulates the systemic defects in the constitutions. Its central ideological premises are to concentrate power, to stifle civil society, and to perpetuate the rule of a single leader or party.

We see another counter-point in the book that won the 2017 Distinguished Book Award by the ALSA. In his searching, profoundly ethnographic research into Myanmar’s courts, Professor Nick Cheesman<sup>23</sup> discovers a legal order whose goals are not free and noisy speech, not activist bold legal actors, not courts protective of weak citizens, not the prospects of collective action for emancipatory ends. Instead, he finds political leaders erecting a legal order marked by quietude, acquiescence, silence, stillness, passivity. This legal order privileges the power of the state and military. We see further evidence of the party-state imposing an alternative order in Matthew Erie’s notable book on Islam and law in north-west China.<sup>24</sup>

Most dramatically, if Professor Scheppele had turned her eyes to the Far East, she would have discovered a rising geopolitical power in Asia already engaged in the “worst practices” she finds in Europe and Latin America. She would find a power that is a practitioner of harsh repression against defenders of basic legal freedoms. She would have observed a power where parliaments or judiciaries have little or no say in the institutional structure of society or the paths of legal change.

Like the Soviet Union during the First Cold War, China’s efforts to project soft power explicitly aim to project alternative concepts of the state, politics, and law. China emphasizes values where there are strict limits on procedural justice, where substantive justice prevails over procedural justice, where “strike hard” campaigns or defence of the “state” place pre-eminent value on loyalty and fear of the subversion of state power, where there is a concentration of power at the apex of the party in a “core” leader, where a balance of power within the state is dismissed as “Western” ideology, and where an open civil society is seen as a threat to the party’s hold on power.

This ideology places a higher value on “social stability” than the protection of basic legal freedoms. Religion is tolerated so long as its believers are quiet or its doctrines and teachings incorporate the ideals of the party.

The formation of an alternative TLO that clusters together these counter-points to the liberal-legal TLO has not yet come together in a coherent way, except perhaps in shared opposition to fundamentals of the liberal-legal TLO. It does not yet have a clear global leader. Moreover, it is not sufficiently coherent or bold enough to express itself under a common banner or label.

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21. Scheppele (2016).

22. *Ibid.*, p. 5.

23. Cheesman (2015).

24. Erie (2016).

Nevertheless, the study of basic legal freedoms by socio-legal scholars is a research enterprise where the most fundamental of legal and political values are currently an epicentre of struggle. Tectonic shifts may be underway as the world sorts itself into oppositional clusters of legal norms. This is not a struggle of West versus East—a myth that is perpetuated by propaganda departments and carelessly adopted even by some scholars. This struggle manifests itself on every continent, in long-established and recently established liberal-legal orders, within and across Asia. Moreover, one of its fields of conflict is law.

We socio-legal scholars, we specialists in legal change, have particular agendas, methodologies, and viewpoints to discern the dynamics of these contests among legal orders. We have competencies to distinguish between propaganda and facts, fake news and real news, law as liberating and law as oppressive. At this historical moment and in this geographical region, our calling and our everyday research and writing on Asia may be the acutest they have ever been in the decades-long study of law and society.

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