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978-1-107-01278-3 - Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex

Edited by Terence C. Halliday, Lucien Karpik and Malcolm M. Feeley

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Introduction

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Political Liberalism in the British Post-Colony

A Theme with Three Variations

Terence C. Halliday and Lucien Karpik

In 1939, as Britain struggled to survive the German onslaught, India's colonial government enacted emergency legislation to secure "the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war," a measure that had led to preventive detention of more than 60,000 people by December 1942, and the effective suspension of habeas corpus.¹ Fifteen years later, at its moment of independence from Britain, Malaysia adopted emergency powers in the face of the Communist insurgency, powers reinforced with subsequent proclamations in 1964, 1966, 1969, and 1977. These repressive powers to repel Communists, and later to handle racial conflicts and conflicts between states and the federal government, placed Malaysia "in an almost perpetual state of emergency since *merdeka* [independence]."² Yet another fifteen years on, Frederick Chiluba, president of the former British colony Zambia, declared in 1993 a state of emergency, albeit short-lived, supposedly to forestall a plot by a rival political party to overthrow his regime.³ And as the world watched in November 2007, a frustrated President Musharraf of Pakistan imposed emergency rule on the country to suspend civil rights and force out some sixty uncompromising judges from the courts, including its contentious chief justice.⁴

These instances of emergency in Britain's former colonies highlight a fundamental threat always posed to political liberalism – that rulers will exploit domestic and international circumstances to justify the dismantling or forestall the emergence of liberal political institutions. A state of emergency expresses itself most dramatically as a retreat from liberal politics; it also symbolizes more widespread and more common, if less draconian, states of exception that deny the prospect of

¹ Ronit De, this volume, "The Wartime State: 1939–1945."

² Harding and Whiting, this volume, "The State, Politics, and the 'Rule of Law.'"

³ Gould, this volume, "Judicial Harassment."

⁴ Munir, this volume, "The Lawyers' Movement in Pakistan 2007–2009" and Ghais, this volume.

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liberal politics. While reliance on states of exception is a ubiquitous temptation of all ruling elites, the use of those powers is all the more paradoxical when it is undertaken by Great Britain, a leading generative state for political liberalism in Western Europe.

The British colonial project, we argue, was bedeviled by an internal contradiction that went beyond the use of emergency as a pretext for escaping the constraints of the rule of law: whereas, on the one hand, the colonizers purported to be implanting a common-law, British rule of law, on the other hand, the colonial overlord reserved for itself two exceptions: one based on the threat to social order, the other premised on racial and ethnic, religious and linguistic differences between the colonizing and subaltern populations. Both the contours of colonial politics and the politics of the post-colony reflect a struggle to resolve the contradiction or to affirm one of its sides against the other.

This volume takes a further step in our wide-ranging inter-disciplinary investigation of the legal complex and its variable engagement in the rise and fall of political liberalism (Halliday and Karpik 1997a; Halliday, Karpik, and Feeley 2007a). We have stipulated political liberalism to be an amalgam of three elements: a *moderate state* whereby the power of the state is fragmented, commonly by a counter-balancing of the executive and legislature, or both of these by the judiciary; *civil society*, in which thrive autonomous voluntary associations outside the control of the state and capable of both restraining the state and contributing to constructive governance and publics that engage each other and the state in constructive dialog; and *basic legal freedoms*, which include first-generation civil rights that protect individuals against state tyranny; basic political freedoms, such as those of speech, association, belief, and movement; and property rights (Halliday and Karpik 1997b; Halliday et al. 2007b; Karpik 1998).

In these earlier rounds of historical and comparative inquiry we demonstrated that commonalities of politically liberal regimes can arise from widely divergent histories and regions. The states we examined were sometimes long-established metropolitan states, at other times former colonies, and in other places new states without any significant colonial past. In contrast to political convergences that arose out of an eclectic assortment of states, in this volume we examine how divergent political regimes can arise from putatively common histories and, more precisely, out of former colonies. We advance the theory of the legal complex and political liberalism by examining whether a progenitor of liberal politics, Great Britain, was able to pass on its liberal-legal heritage to its post-colonies, and whether the inherent contradictions of colonialism could be transcended by newly independent states once the imperial power retreated or attenuated its control.

This essay proceeds through three steps. First, we lay the theoretical and methodological foundation for current inquiry by rehearsing the cumulative findings of

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our collective project, where we have been, and what we have discovered. Second, we present three configurations of post-colonial politics, in each case providing both an overview of each configuration and sets of specific explanations for each configuration. Third, we move toward a comparative theory of political liberalism by creating a typology of relationships among the principal dimensions of our analysis and then drawing hypotheses from our findings with respect to the conditions under which the legal complex, civil society, and the state influence a post-colonial trajectory of liberalism.

THEORY IN THE MAKING

Colonialism and post-colonialism offer windows onto manifestations of political liberalism, not only in the Global South, but also in long-established liberal political regimes where the occurrences of “emergency,” rules of exception, and even difference are far from extinct. We therefore proceed on the premise that the post-colony is “a crucial site for theory construction” (Comaroff and Comaroff 2006b, p. 42). It must be emphasized, however, that our investigations into political liberalism’s fortunes in post-colonies are deliberately limited. We treat basic rights of legal-liberalism, the so-called negative rights and core political rights, not second- and third-generation rights. We exclude social, economic, and wider political rights such as suffrage for two reasons. On the one hand, our earlier historical and comparative studies repeatedly find that there is a strong affinity between the legal complex and first-generation rights that does not exist for other sets of rights. On the other hand, as important as social, economic, and political rights are for their own sake, there is both methodological and theoretical merit in unbundling clusters of rights that have quite different implications for politics and theory building.⁵ We emphasize those rights that are less visible and less dramatic but arguably foundational to enduring institutionalization of the other rights.

Further, we do *not* seek to explain the rise and fall of democracy. Political liberalism in our definition is analytically distinct from democracy and raises its own key questions.⁶ Political liberalism has an affinity with the politics of lawyers and the

⁵ One of the great difficulties of developing a comparative theory in post-colonial scholarship is the bundling together of different sorts of rights – civil, economic, political – that emanate from and produce very different sorts of politics. In his very provocative and impressive volume, for instance, Matthew Lange (2009) undertakes both quantitative and qualitative measures of post-colonial “success” where the definition of “success” mixes together quite incommensurate concepts and indicators. It cannot be assumed that political “success,” for instance, will have the same explanatory provenance as economic “success,” as Singapore and China well exemplify.

⁶ See a thoughtful discussion of differences between democracy and political liberalism in Epp, this volume.

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legal complex in ways that democracy does not. And, again, it can be argued that democracy itself cannot prevail or consolidate without the foundation of political liberalism. It follows that we do not investigate suffrage or study political parties, although both arise from time to time in our essays.

Acquired Knowledge

Earlier historical research on collective action by legal professions in Europe and the United States (Halliday and Karpik 1997a) demonstrated that lawyers over the *longue durée*, in states at the forefront of liberal politics, frequently engaged in collective action that went well beyond market control or status mobility (Halliday 1987; Karpik 1988, 1990, 1998). Lawyers historically and comparatively have fought, albeit unevenly, for basic legal freedoms, an autonomous civil society, and a moderate state. Five principal sets of findings emerged from studies of political liberalism in Europe and the United States (Halliday and Karpik 1997a).

1. A strong association can be observed between lawyers and the building of political liberalism through two different means, one substantive and the other procedural (Halliday and Karpik 1997c).
2. For lawyers, political liberalism is always a liberalism limited in its scope and substantive reach. It includes first-generation rights, including core civil, legal, and foundational political rights, but it does not embrace social and economic rights (Halliday and Karpik 1997b).
3. Lawyers have adopted double strategies of mobilization for political liberalism, working both within courts and outside them.
4. The capacity for bar activism requires both some collective autonomy of the bar itself and a degree of autonomy for the system of justice from executive control.
5. Influence of the bar derives significantly from its capacity to act as a spokesperson for publics (Karpik 1997, 1998).

In a second wave of international collaboration (Halliday et al. 2007a) we tested the proposition that the drive for liberal politics by legal professions was not a phenomenon confined to the regimes of Europe and North America. We investigated occurrences of struggle for political liberalism in Latin America, North East Asia, and the Middle East across an assortment of regimes.

At the same time, we introduced a new concept, the *legal complex*, to broaden the basis of inquiry, since the first round of research showed that the liberal politics of lawyers very often were inextricably bound up with other legally trained and law-practicing occupations (Karpik and Halliday 2011). The concept of the legal

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complex acknowledges that collective action of private lawyers cannot be segregated artificially from the fraternity of legal professionals who actively practice law at other sites – in law schools or courts, in government agencies or prosecution services, in corporations and non-profits. Transitions to or from political liberalism must be explained in part by the structure and dynamics of the legal complex.⁷

We emerged from this collaboration with four principal findings (Halliday et al. 2007b).

1. With one exception, the association of the legal complex with political liberalism is found everywhere in one form or another. The strength of that association varies, but it can be found even in totalitarian countries.
2. In circumstances where there is a weak association between political liberalism and the legal complex, specific conditions, such as expressions of nationalism, explain why (cf. the Israel/Palestine conflict).
3. Exceptions to the association between the legal complex and political liberalism indicate that in certain countries and during certain periods lawyers have become illiberal (Chile, Nazi Germany), most especially in circumstances where lawyers perceive society is socially and culturally chaotic, and these conditions threaten the very basis of lawyers' existence.
4. The notion of the legal complex requires empirical inquiry to distinguish among conditions when lawyers were the only or the main actor on behalf of political liberalism from the conditions under which an alliance was forged between judges and lawyers, and with other parts of the legal complex.

In sum, a distinctive lawyers' politics, often allied to other actors in the legal complex, is not simply a Western or European phenomenon. Nor is it confined to countries with advanced economies. It is a universal phenomenon. Yet, the diverse politics of an activist bar and legal complex for political liberalism is neither inevitable nor unvarying. Frequently lawyers retreat into complicity with authoritarian regimes (Couso 2007), or they remain silent when basic liberties are infringed (Barzilai 2007), or they are crushed through expulsion from the bar or attacks on their associations (Guarnieri 2007; Moustafa 2007), or they are too few to make a difference (Feeley and Miyazawa 2007; Perdomo 2007), or they are distracted by money and markets, or they are preoccupied by the basic need to earn a living.

⁷ The legal complex comprises all those law-practicing occupations that mobilize, whether cooperatively or not, on a given issue at a given moment (Karpik and Halliday 2011; Halliday 2009; Halliday, Karpik, and Feeley 2007b). Here we distinguish between (a) every person with a legal training, which in some countries embraces a very large and diverse group of professionals, business persons, and politicians, and (b) those in a legal complex who are acting as lawyers, whether within the state or private market, within for-profit or non-profit corporations, or within civil society.

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Fighting for Political Freedom (2007a) showed that there is no teleology or inevitability about political liberalism. We identified configurations of action and proceeded some distance toward explanations of disparate actions. We could demonstrate some of the explanatory leverage to be gained by thinking about the politics of a legal complex in the ubiquitous arena of law as a domain of political struggle. We provided evidence for continuities and similarities across enormously diverse histories and locations.

Nevertheless, major puzzles remained. While continuities and similarities could be discovered across an enormously diverse array of countries, diversity appeared to flower from states that shared similar legacies. After all, it is plausible to expect quite different configurations of politics in countries whose statehood emerged from the competing empires of Spain or Germany, Britain or the Netherlands. It was plausible that countries obtaining statehood in the early nineteenth century might take a different path from those obtaining that goal in the late twentieth century. But there is also a surface plausibility that some commonality or convergence or singularity might be apparent among those countries that shared the same colonial heritage, a heritage, moreover, that supposedly celebrated the common ideals of a country at the leading edge of Europe's wave of historical drives toward liberal politics.⁸ And it is all the more puzzling when startling diversity should accompany states that obtained independence in approximately the same moment in history and therefore shared somewhat similar geopolitical and economic contexts. Our cross-disciplinary, cross-national collaboration thus required a different turn.

We therefore pivot in this volume to new questions and methodologies. In contrast to our previous design, where we discover commonality among great diversity, this project seeks to explain diversity in countries that shared colonial commonality. We selected ex-colonies in three regions of the former British Empire – South Asia, Africa, and South East Asia. These colonies obtained independence from Britain mostly in the ten to twenty years following World War II. Moreover, in some cases (India and Pakistan, Malaysia and Singapore) they are countries that, for a period after independence, were unified politically before subsequent partition.

Yet the question of commonality itself is fraught with difficulty. From one point of view, there would appear a face validity to the expectation that all Britain's colonies, from the seventeenth to twentieth centuries, were pervaded by Britain's common-law legal heritage. This endowment was instituted by force, sustained by Britain's

⁸ This after all is the implicit hypothesis with which major scholars of comparative colonialism, such as Steinmetz (2007) begin their enterprises. Is there a commonality to be discovered across German colonies?, asks Steinmetz, or is the diversity so marked that common colonial origins amount to little?

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army and navy, administered through its colonial civil service, and underwritten by more or less explicit doctrines of constitutionalism that purported to subsume power to the rule of law. The circulation of local elites, especially in law, between the colony and Britain in the late nineteenth and twentieth centuries would seem to reinforce a legality with a distinctively British hue, a common law that seemed expansive in its universality.

From another point of view, however, discontinuities and uncommonalities abounded across the Empire in its geographical reach and across time in the evolution of the colonial apparatus itself. A colonialism that is centuries long in India contrasts with a mixed colonial heritage in the Sudan. A colonialism foreclosed by revolt contrasts with those where self-government is thrust upon unprepared or unwitting indigenous leaders. A colonialism with a dearth of leaders in its indigenous bar and bench contrasts with those where “native” judges and lawyers are extensively integrated into all levels of the legal system by the eve of independence. A colonialism shallow in its extension of direct rule contrasts with a colonialism that relies on indirect rule. These variations in the colonial experience should affect post-colonial trajectories. Moreover, post-colonial contexts, such as degrees of integration into the world economy, geopolitical vulnerability or strategic location, resource wealth, and labor power should also influence countries differently after independence as events unfold that make one or another nation more or less salient to great global struggles over wealth, power, ideologies, and religion. For all these reasons, post-colonial variations abound (Lange 2009).⁹

Nevertheless, a general theory of post-colonial development, whether within or between empires, has yet to emerge. Scholarship from the humanities and social sciences does provide numerous pointers that might inform a theory of the legal complex and political liberalism. Said (Said 1978, 1994) spurred vast scholarship on the premise that colonialism not only involved the exercise of military, political, and economic power, but was also a discursive project of justification, not least to construct a colonial “other.” Scholars insisted that colonialism had its points and counter-points, its elites and subaltern groups, its disjointed and sometimes competing bases of identity and organization (Guha 1997). Hybridity within colonies, let alone across empires, was ubiquitous in one form or another.

Moreover, colonialism’s exceedingly uneven footprint complicates accounts of colonial residues (Childs and Williams 1997). Here debate juxtaposes those who have argued that the structure of the colonial state, “the civil service, the political administration, the judicial system, including the codes of civil and criminal law, and the armed forces,” continued “virtually unaltered” (Chatterjee 1993, p. 204) and

⁹ While our focus is on the British Empire, political scientists and political sociologists are also demonstrating pre- and post-colonial variations in other empires (Steinmetz 2007; Mahoney 2003).

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those who observe how independence struggles themselves and subsequent shocks – wars, economic crises, revolutionary situations – can produce major dislocations in post-colonial trajectories (Lange and Rueschemeyer 2005c).

Law also matters, in the colony and post-colony. Law's forms and meanings are integral to the construction of colonial power, both to resistance and to colonial legacies (Darian-Smith and Fitzpatrick 1999; Fitzpatrick 1992; Merry 2003). Histories of colonial constitutionalism (Benton 2006) and the legal ordering of colonial states (Benton 2002) are now on the agenda of world history. A comparative study of colonial legal professions, elite and indigenous, that investigates their organization and identities reveals the implication of legal occupations, formal and customary, in colonial state building, independence movements, and constructions of newly independent states (Likhovski 2006; McQueen and Pue 1999; Sharafi 2007). The "lawfare" of imperialism, state Comaroff and Comaroff, re-appears in different guise in the post-colonies (Comaroff and Comaroff 2006a; Comaroff 2001).

The manifestations of law in colonial and post-colonial regimes find their way into a recent comparative politics and political sociology of states and development.¹⁰ While the problems it engages are both narrower and broader than ours,¹¹ there is tantalizing evidence that the legal forms of colonial rule have far-reaching consequences for post-colonial states and politics. A theoretically pessimistic variant of colonial state building is expressed by Steinmetz's assertion that there is "no generally accepted definition of the colonial state" and its conceptualization is relatively impoverished when juxtaposed with states in general (Steinmetz 2007, p. 27). Moreover, his findings from a comparison of three German colonies – Southwest Africa, Samoa, Qingtao – not only shows the enormous variability in the ways these three colonies were managed, but leads him provisionally to reject the notion that there are any "nationally specific styles of colonization" (Steinmetz 2007, pp. 45, 69).

More optimistic in its theoretical aspirations is a body of research on the endowments of colonial states on post-colonial development. Not only does the colonial state matter for long-term development, maintains Lange (2009), but a particular type of colonial state can be shown to have strong association with "successful" post-colonies. Lange assembles a body of comparative data on all British colonies to

¹⁰ There is a large literature on colonies, legal families, and markets or economic development that we do not treat here, much of it stimulated by Acemoglu et al. (2001) and work on legal transplants (Acemoglu, Johnson, and Robinson, 2001, "The Colonial Origins of Comparative Development," *American Economic Review* 91: 1369–1401; Berkowitz, Daniel, Katharina Pistor, and Jean-Francois Richard, 2003, "Economic Development, Legality, and the Transplant Effect," *European Economic Review* 47: 165–95; Pistor 2002; "The Standardization of Law and Its Effect on Developing Economies," *American Journal of Comparative Law* 50: 97–130).

¹¹ Lange (2009), for instance, subsumes under "development" a plethora of economic, political, governance, health, education, and other variables.