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Lawyers, Their Transgressive Cases and Social Movements

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This article opens up by very briefly pinpointing the gaps in the sociology of professions and the research on social movements that prevent a shared research agenda for exploring the interactions between professions and civil society[1]. It outlines the contours of such an agenda to then move on to present examples of situations in which lawyers and social movements collided over the issues or strategies (US) or lawyers initiated or kept up the issues that social movements did not rally around (Hong Kong, Japan). While the US examples rely on the available literature, the Hong Kong and Japanese material builds also on 10 interviews with lawyers conducted in Hong Kong and 22 interviews with lawyers conducted in Japan in 2017. The hospitality of the Department of Sociology at the Hong Kong Baptist University and a grant of the Japan Society for the Promotion of Science (JSPS) made these interviews possible.

Basic Assumptions in the Sociology of Professions and in Research on Social Movements

§1 Two classic approaches define professions as “neutral” or “claiming neutrality”, but – and this is why the sociology of professions hardly pays any attention to social movements – neither of these approaches conceptualizes civil society or acknowledges social movements. Professions are chiefly positioned in relationship to the market and the state.

§2 In the long-dominating *Parsonian sociology of professions* (structural-functionalism), professions are defined as the “altruistic” guardians of societal values and bearers of “expert” knowledge[2]. Their neutrality and autonomy are seen as functional prerequisites necessary to sustain their expert knowledge and with it their ability to safeguard societal values — even against the pressures applied by the market or state actors. They are defined in terms of their distinctive characteristic — their societal function and responsibility to keep the entire societal system and its main constitutive parts stable.

§3 In contrast, the *power approach within the sociology of professions* (interest/power /conflict approach)[3] proposes instead that when “egoistic” occupations successfully define, monopolize, and come to certify and guard what they define as “expert” knowledge, they achieve the status of professions – often but not always with the backing of the state. They claim “neutrality” and say they safeguard specific aspects of the public good, such as, for example, justice, national health, national defense, etc. But this approach sees these claims merely as self-legitimizing discourses, helping professions to achieve autonomy from both the state and the market, not to mention public respect, and thus to accumulate wealth, status and power.

§4 Whereas the sociologists of professions still today pursue their original question of (i) which occupational groups (ii) by what means (iii) manage to reach the status of a (semi-)profession, since the 1980s they also focus on the question of how the state or the market impinge on the autonomy and expertise of the professions.

§5 As these brief summaries of the two contrasting approaches to professions show, they posit of professions as occupations with distinctive characteristics and set them in relationship to the state and the market. But they do not include civil society or social movements in their purview.

§6 In its turn, sociological social movement research (here I have in mind the dominant US-European nexus exemplified by the journal *Mobilization*) is self-centric, so in this research professions appear at best as the opportunity structures, as when, for example, discussing (i) courts as a possible arena in which

to contest specific government policies or business actions or (ii) specific professions as the resource upon which a movement can draw, as when mentioning that movements consult lawyers about their programs or specific courses of action[4]. But professions and professionals are not interesting as such. The focus is still on the preconditions of mobilization: resources, (present or absent, yet mobilizing) political opportunity structures, identity forming, issue framing, emotional underpinnings, etc.

§7 Taking lawyers as an example, the question of under what circumstances some representatives of this profession may be willing to offer (*pro bono*) advice to a social movement or co-shape a social movement as experts is of no interest. Neither is there interest in such forms of extracurricular professional engagement as initiating intra-professional mobilization or organizing public educational campaigns, demonstrations, citizens initiatives, etc. Nor is the question posed under what conditions professionals set up their own (trans)national associations or become involved in institution-building creating new legal contestation opportunities, *e.g.* the International Criminal Court in the Hague[5].

§8 It is not among sociologists, but mainly among political scientists and legal scholars, peppered with a few sociologists and historians, that there is some interest in such questions. They focus their research on professional or, more specifically, on lawyers' mobilization for liberal democracy and on "transgressive" lawyers willing to transgress professional and even legal rules to contribute to a "cause"[6].

§9 The only other areas of study that come to mind in which civic or political engagement of lawyers and social movement or NGO mobilization are studied together are those about struggles against environmental destruction or discrimination on the grounds of class, "race", gender, sexual orientation, handicap, migration or refugee status. But they do not form a cohesive body of research and I cannot name more than two offhand[7].

§10 Of particular relevance in the following text is the question which some, mainly American, political scientists already investigated as to whether mobilized lawyers help or frustrate the struggles of social movements / NGOs[8]. The case studies presented towards the end will focus on how lawyer initiatives may run contrary to those of social movements (US), but also take up situations in which lawyers act – as it were – in lieu of or with faint support of social movements (Hong Kong, Japan)[9].

On Embedded Professions

§11 In a recent article[10], I suggested that the sociology of professions has to move away from a conceptual triangle consisting of professions, the market and the state, wherein each is posited as a source of distinct values and a central societal force, to include civil society in its conceptual scheme. I argued that it also should forsake the assumption that professions are necessarily neutral or claiming neutrality, citing many examples, such as neo-liberal vs. welfare economists, Physicians for Social Responsibility or Engineers without Borders. Drawing on the extant literature, I showed that the interlacing of professional with civic engagement and political positioning or even political activism can be studied best by doing research on professional organizing in voluntary associations, foundations, research centers, think-tanks, councils, consortia, etc. which express them. The professional organizations are part and parcel of civil society.

§12 Civil society is defined as the societal realm populated by individuals and their voluntary associations, such as households, friendly and professional societies, religious and lay institutions, non-government organizations, citizen initiatives, charities, foundations, social movements, counseling centers, non-government political parties, independent community media, etc.[11].

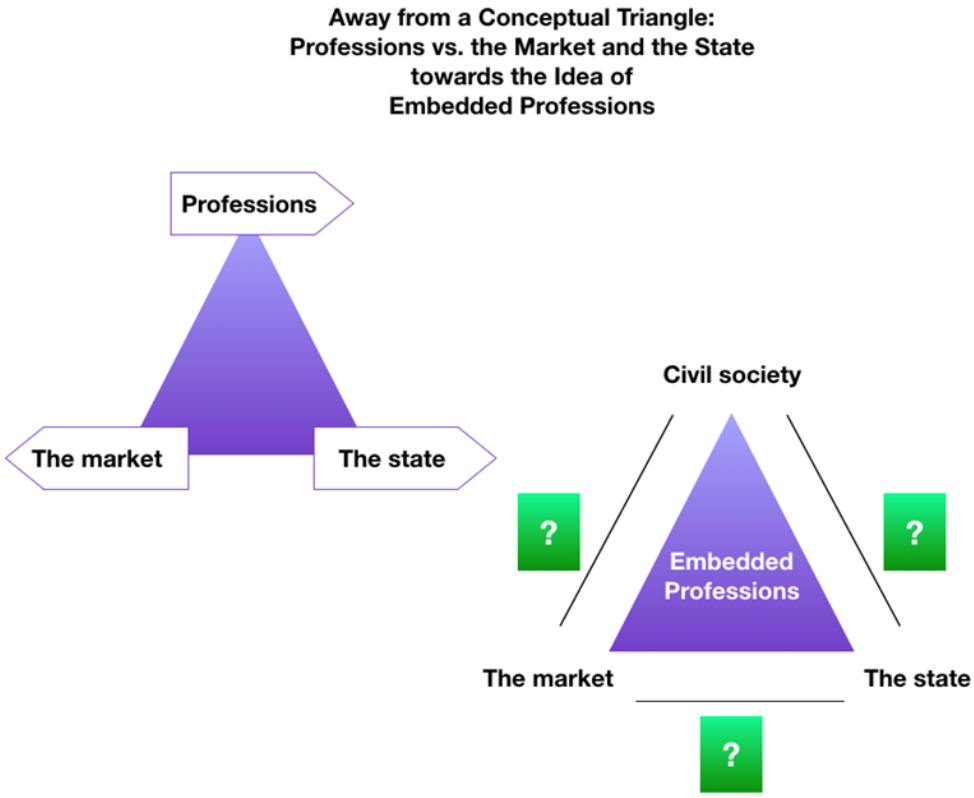
§13 Rather than being idealized, civil society should be seen for what it is: a generator of tolerance just as of intolerance, of chauvinism/racism and sexism just as of universalistic human rights. It produces both social order and insurrection; peace and violence; virtuous ethics and truth as well as authoritarian morals, propaganda and – to speak in today's language – fake news[12]. Professional bodies, associations, think-tanks and consortia are part of this multivalent, ambivalent civil society. They at the same time interact with its other parts, the state and the market.

§14 The same multivalence and ambivalence is characteristic of professions and their organizational off-shoots. One cherished assumption in the (Parsonian) sociology of professions has been that professions have superior values and are capable of enlightening/improving the state and the market[13]. Even the opposing approach did not quite manage to shake off this idea – it posited professions as bearers of superior values (such as, for example, honesty, systematic effort, striving for excellence), although it reduced these to the instruments of self-legitimation. Foucault's research did much to disabuse at least some social scientists of such idealistic notions when it pinpointed that professions have contributed much to the disciplining and punishing governance regimes[14]. Erving Goffman – an American sociologist – trumpeted a similar message in his work on mental asylums in 1961[15]. In sum, not just professions, but also their professional organizations are very heterogeneous, even internally divided on issues, and they

change their values, discourses and strategies over time. It follows that one can find disciplining and punishing as well as pastoral or preventive or curative-supportive professions, professional segments and professional organizations. It also follows that one can find among one and the same profession both ultraconservatives and transgressives on nearly every controversial issue.

§15 The idea of *embedded professions* is to convey that professions and their organizations in their capacity as bearers and guardians of their expert knowledge are not the only source of values, discourses and strategies for handling specific issues allegedly stemming from this expert knowledge. Professions are embedded in the magnetic field constituted by the polar forces of the state, the market and civil society, and each of these may inspire, co-generate, support or constrain professional (expert) knowledge, values, discourses, strategies as well as professional institutions and organizations[16].

§16 The idea of *embedded professions* which is here proposed opens up the possibility of doing research on civil society as a source of some professional values, discourses, strategies, etc. It allows to raise the question why some representatives of professions are not “neutral”, but instead “partial”, working for the benefit of “private interest” or specific groups or “causes” or, finally, for what they or the public define as the “common good” beneficial to most members of a society. Many other interesting research questions and hypotheses emerge which, however, the space does not permit to treat here.



Source: Own Diagram

Turning to Lawyers and Social Movements

§17 Having theoretically made a case for that professionals mobilize not just as individuals, but also by forming and becoming members of their own professional groups, associations, councils, think-tanks, consortia, foundations, projects, etc. and that they sometimes create, but at any rate interact with other members of the civil society, such as for example, NGOs or social movements, I now want to focus on lawyers and their mobilization for what they consider to be higher values. My interest is in judicial case reviews which throw light upon the relationship between social movements and lawyers.

§18 The literature on lawyers and social movements which I listed above focuses mostly on lawyers' own mobilization for liberal democracy and on "transgressive" lawyers, willing to navigate and even transgress professional, societal and even legal rules in pursuit of public good on controversial issues pitting them against powerful business and government agencies. It pays much attention to lawyers' contributions to creating and upholding the rule of law, democracy, and mobilizing for "good" causes, including supporting or starting likeminded mobilization initiatives.

§19 Let me briefly discuss the meaning attached by Scheingold and Bloom15 to the term "transgressive" lawyers before I take up the US, Hong Kong and Japanese examples. These two authors explain what they mean by successive steps of exclusion. Focusing on the US they point out that most lawyers at some point in their careers contribute to common good, but this does not qualify them as (left-liberal, radical-critical) "transgressive" lawyers. So, for example, most lawyers do *pro bono* work, even in corporations, for the sake of good public image this brings. Further, as a result of the specificity of the US, where civil liberties are part of the national creed, many corporate law firms take on and even gain prestige and money on cases concerned with civil liberties[17]. To consider is that if a lawyer is an employee of a large firm or a trade union or an association, such as, for example, the American Civil Liberties Union, his or her salary remains unaffected and social standing will not suffer, but, given a vast liberal public, even improve, when the court case focuses on controversial civil rights or public policy issues. Only when lawyers work on their own account, engage in high risk, controversial, low pay cases, and are willing to transgress the professional and even legal boundaries to achieve common good, can they be defined as full-blown (left-liberal, radical-critical) "transgressive" lawyers according to the criteria proposed by Scheingold and Bloom. This is to say that not just taking on a court case on a controversial issue, but also the willingness to take personal risk and to do so relying on unconventional means (not just lobbying or advising a citizen initiative, but also, for example, organizing a citizen initiative oneself) define a fully "transgressive" lawyer. To sum up: when economic and political interests, and possibly even the public, turn against specific legal changes while the legal *status quo* allows for

exploiting a social group or for violating its civil or human rights (or for violating nature), a lawyer fighting against this can be called a “transgressive” lawyer, according to Scheingold and Bloom’s definition. This implies that one has to pay attention to the structure of economic and public interests, public controversies and the wider cultural context, such as, for example, the importance of civil rights in the US, to be able to decide whether or not a lawyer engages in “transgressive” professional activities. All this is not meant to deny that there are lawyers serving greedy and corrupt corporations or politicians, akin to the presidential lawyers engaged in the Watergate affair or to the lawyers defending the US president Donald Trump and his violations of human and constitutional rights. They are as much part of the profession as progressive or “transgressive” lawyers who probably constitute minorities anyhow. But the point is that these minorities deserve research in their own right.

§20 An alternative to studying “transgressive” lawyers would be a study of “transgressive” cases. Scheingold and Bloom’s approach is lawyer- rather than case-focused. But it is not necessarily the lawyers who are conservative, progressive or “transgressive” (or good or bad), but rather the cases they (are told to) take on. Scheingold and Bloom’s discussion of their own empirical examples does not take the specific legal-institutional settings and the rules guiding the taking-over of the cases sufficiently into consideration. As they themselves state in many large law firms it is not even a matter of individual choice but a question of which cases one becomes assigned. And, for example, the American Civil Liberties Union takes up the cases that by its definition are “transgressive”. But not all interested lawyers can get jobs with organizations that specialize in and hunt for “transgressive” cases, so “transgressive” lawyers working for regular law firms are probably grateful for an occasional chance given them by their firms to pursue a “transgressive” case. On the other hand, in a single-person firm even a “transgressive” lawyer has to balance the accounts and so is under much pressure to pursue a mix of cases to survive. In sum it is important to distinguish lawyers and their orientations from the case(s) they (have to) take on, and also to recognize that there are few purely “transgressive” lawyers or law firms. If we leave the US, the necessity of studying the legal-institutional settings and the rules for taking on specific cases becomes even more apparent to understand why (voluntarily or not) specific lawyers or law firms take on “transgressive” cases. The examples provided further down will lend further support to this assertion.

§21 For now let me just note that it is possible to go for a judicial case review on civil liberties, civil rights or public policy in the US, Hong Kong and Japan, and each such case has a potential to be “transgressive”, even if lawyers pushing the case are not[18]. It also should be noted that, on the other hand, the current trend is that in many states elected governments are authoritarian and repressive, ignoring the rule of law or changing laws to achieve their personal or some sectoral interests, so that advancing or defending civil liberties, civil rights and public

policy for common good has become “transgressive”, attached to controversy and highly risky. In this context even some otherwise fairly conservative lawyers may easily become mobilized in defense of the rule of law and civil liberties and rights.

§22 As it was pointed out above, the yet modest literature tends to take up cases of mutual support or close cooperation between social movements and lawyers. However, what raises my interest and what the remainder of this article focuses on is scant research on how “transgressive” lawyers and social movements may come into conflict with each other. These conflicts may be about what are the key issues and how they should be framed or what strategies should be followed. Section entitled “Lawyers *Contra* Social Movements – the US Examples” (§24-§26) will illustrate this by providing two examples.

§23 Also interesting are cases when lawyers rather than social movements mobilize on specific issues and thus, as it were, “hold issues in abeyance”[19]. Here the scenario comes from social movement research, where social movements are seen as the key bearers of issues, mobilizing to raise them and put them on the agenda, and staying mobilized until they achieve halfway satisfactory outcomes. In times of apathy or repression and war which make overt mobilizing risky, parts of a movement may hold issues in abeyance waiting for the broader social movement mobilization to return. I would like to suggest that when another group — in this case members of a profession: lawyers — acts as the initiator and bearer of issues before a social movement emerges or when a movement subsides, we could also speak of this group as “holding issues in abeyance”. In this scenario a profession takes up issues when a social movement does not or cannot shoulder the task. A profession might be waiting until a social movement starts mobilizing or returns to mobilizing. However, such a view on the role of professions (lawyers in this case) implies a movement-centric perspective according to which social movements are the main innovator and bearer of issues. De-centering social movements would mean admitting the possibility that the state, civic society members, such as professions, or market actors may initiate an issue or carry on with an issue that social movements (at the moment or ever) do not consider important or suitable for mobilization. De-centering social movements means making explicit that they are far from having a monopoly on initiating social change or raising issues with legal implications. There is no reason to assume that they outstrip the legal professions in judicial mobilization. De-centering social movements opens up research on (i) why and how some members of a profession mobilize to form and act in professional associations, and (ii) also on why and how professions they work to mobilize around controversial issues. Both the movement-centered and profession-centered scenarios allow investigating whether it comes to successful cooperation or conflicts between social movements and professions on specific issues. Here of interest is a situation in which members of a legal profession introduce or keep issues in the courts and thus likely on the national agenda even in the absence of social movement mobilization. To illustrate this point, I will bring

in examples from Hong Kong and Japan (see §30-§37).

Lawyers Contra Social Movements – the US Examples

§24 The two examples picked from the literature on the US will illustrate that lawyers may mobilize and pursue an issue with little regard to social movements or community organizations – criticizing their strategies as the first example shows or ignoring their needs and demands as the second example shows.

§25 The first example takes up "race segregation" as an issue: early in the 1950s the elite lawyers in the National Association for the Advancement of the Colored People Legal Defense and Education Fund, Inc. (NAACP LDF) had launched a legal offensive against racism and achieved some legislation de-legalizing segregation and promoting equality by the end of the 1960s. The first path-breaking legal ruling came with a "transgressive" Supreme Court school de-segregation decision (see *Brown v. Board of Education of Topeka*, 347 U.S. 483) in 1954. "Transgressive" in this case was that the Supreme Court unanimously asserted the principle of unequivocal "equality" and thereby overturned the "separate but equal" segregation-condoning legal principle held onto by (mostly, but not only) the south-eastern states[20]. "Transgressive" was also that the Supreme Court justified its decision by evoking the 14th Amendment to the Constitution from 1868 which stated that "no state shall… deny to any person within its jurisdiction the equal protection of the laws"[21]. The Supreme Court thus de-legalized segregation of schools according to racial ascription and at the same time denied the states the possibility of self-government in the area of education. It ruled that US state laws establishing in public schools were unconstitutional, since separate educational facilities – even if equal in quality – were inherently unequal and thus in violation of the Equal Protection Clause of the 14th Amendment. For better understanding of the path-breaking character of the recourse to the 14th Amendment it is necessary to mention that only the 14th Amendment comes closest to calling for and protecting the principle of equality in the US Constitution, although the American creed loudly trumpets it and the American Declaration of Independence from 1776 asserts that "all men are created equal" and have been endowed with "unalienable Rights" to "Life, Liberty and the pursuit of Happiness".

§26 In the US one speaks of *landmark decisions* – these establish a significant new legal principle or concept. Or they change the interpretation of existing law. Both meanings of the term apply to the Supreme Court decision of 1954. A new legal principle, that of "unequivocal equality" was introduced in 1954, and the existing "separate but equal" law was re-interpreted as violating the 14th Amendment of the Constitution. The result was that while segregation was legal before 1954, it became illegal after the Court's decision. While the legal principle of "separate but equal" prevailed earlier, the principle of "unqualified equality" was asserted in

numerous court cases henceforth. In addition, a policy area became subject to federal monitoring and jurisdiction at a time when specific US states opposed this jurisdiction, even relying on the use of force. Until today, despite some path-breaking laws against discrimination and for affirmative action, apart from its 14th Amendment, the US Constitution remains silent on the principle of equality, making passing “transgressive” Amendments (see the Equal Rights Amendment) extremely difficult. At any rate, this is to say that the Supreme Court decision was “transgressive” in the full landmark-sense of the word – because it established a new legal principle, while re-interpreting, overturning and even de-legalizing the old legal principle. Further, in the actual practice it put a new authority in charge of its implementation.

§27 “Transgressive” was not just the Supreme Court decision, but also the NAACP LDF’s initiative to take on such a controversial, extremely politicized issue as school segregation, since it implied considerable reputational and economic risks. Numerous lawyers it recruited to take on specific cases for legal contestation were similarly “transgressive” in this sense of the word. However, in terms of strategy the NAACP LDF was not “transgressive”. The NAACP LDF saw law, courts and the legal pursuit of rights as the only or main means of achieving social change[22]. It vehemently rejected direct action, seeing it as an illegitimate attack on the rule of law and as detrimental to the legal campaign the NAACP was waging against segregation and equality. In contrast, the Civic Rights Movement and the lawyer who led Student Nonviolent Coordinating Committee (SNCC), after watching for several years how old and new legal rights were being disregarded and violated in the South, had no more patience for the reliance on the legal procedure[23]. SNCC’s action repertoire included acts of peaceful civil disobedience, such as sit-ins, boycotts, demonstrations, etc. When at the height of the Civil Rights Movement the NAACP condemned direct action, this caused much tension with the activists and other legal advocacy organizations participating in the Civil Rights Movement.

§28 The second very brief example takes up “same-sex marriage” as an issue: in court after court the Lambda Legal Defense and Education Fund and the American Civil Liberties Union pursued same-sex marriage as a nation-wide issue following the Hawaii Supreme Court decision of 1993 (the US Supreme Court decision legalizing same-sex marriage in the US came in 2015)[24], thus ignoring numerous gay and lesbian critics of the marriage institution. These vanguard, elite lawyer organizations, equipped with great resources and clout, have been criticized also for their top-down decision-making by civil law organizations and citizen initiatives which they never consulted. The critics argued that poverty and discrimination in access to work and housing are the pressing issues, not the issue of same-sex marriage[25].

§29 As signaled earlier in this text, the examples to be presented next are meant to illustrate situations in which lawyers pursue controversial issues, even at a great

cost to themselves, acting the part of “transgressive” lawyers, even when they as persons see themselves as conservative and even when there is no social movement or public mobilization on the issue.

Lawyers Keeping an Issue in Abeyance – Hong Kong

§30 In the 1980s, prior to the preparations for the "handover" of Hong Kong (HK) to China scheduled for 1997, Human Rights were high on the British, UN and international agenda. Early in the 1980s, China's leader, Deng Xiaoping, was widely interpreted to have promised regional autonomy to HK and Macau when he formulated "one country, two systems" as a constitutional principle (also known as "two systems, one China") for re-united China. Such situational factors, as business exiting HK *en masse*, Beijing's "embarrassment about the Tiananmen Square", the ongoing lawyer demonstrations and (after Tiananmen Square: massive) resident protests for democracy in HK resulted in the International Convent on Civil and Political Rights being virtually copied into *The Bill of Rights Ordinance of 1991* and later into the *Basic Law* (1997) – both with China's overt support. Also, a chance to pursue judicial case reviews was written in – this is extraordinarily important since the "legislators", that is members of parliament, can approve or reject government plans but cannot initiate own legislation in HK.

§31 Judicial case reviews have been fought and won "for" refugees, for migrants' mainland children's rights, for non-discriminatory residence and work rights for domestic workers, trans-gender people, etc. The number of judicial case reviews increased greatly since the 1980s[26]. The highest court of appeals, that is, the final appellant court in HK SAR, is called the Court of Final Appeal (CFA).

§32 Turning now to the same-sex partner's rights issue, a legal case which was called "QT" moved to the CFA by 2017 (IP8, IP9). It involved a lesbian woman challenging the Department of Immigration and its refusal of a visa for the same-sex civil marriage partner. The claimant wished to have the same residential, work and health insurance rights as the partner already residing in HK. The laws, the plaintiff argued, are discriminatory and, that is the key argument, deprive corporations of best (wo)manpower and thus of the competitive edge.

§33 In HK there was no social movement or public mobilization for the issue. A solicitor firm was involved in preparing the case – in part *pro bono* and in part using legal aid provisions (IP8, IP9). The HK Gay and Lesbian Lawyers Association (HKGALA, set up in 2013/2014) knew about and supported the legal efforts. But it did not offer any financial support. However, its members persuaded some leading corporate actors, such as banks, to express their support in public. This fit into the overall image-boosting efforts of the corporations which copy their headquarters in the US or the UK by adopting and broadly advertising their diversity policies. This, by the way, suggests that social movement research by focusing on "movements from below" misses others which are top-top or top-down, even when they started "from below".

Lawyers holding an Issue in Abeyance – Japan

§34 According to its conservative critics, Japan has an “American” Constitution, imposed by an occupying force. The Abe government has the ambition to annul it, in the meantime changing some key Constitutional laws. This information is insofar relevant that it implies that the Constitution establishes the Judicial branch of Government as an autonomous power, in principle capable of checking on the Executive and the Legislative powers. It also makes judicial case reviews – even of government policies – possible. Critics argue that these constitutional opportunities are rarely used or rarely successful when put into practice. Others argue that although court cases are frequently lost, they often achieve changes in government and business policies.

§35 As a result of the 1950s horrifying industrial and urban pollution, Japan became world pollution leader[27]. Much local and then in the 1960s also national mobilization against this pollution developed, but the industry and government for long denied that there was any causal connection between industrial production and industrial and urban pollution. First in 1968 the Ministry of Health and Welfare recognized the Minamata and Itai Itai conditions as pollution diseases. Suits against Big Four industrial polluters began in 1969 . In 1970, a historical session of the Diet, nicknamed the Pollution Diet, passed and amended fourteen laws, creating a strict environmental regulation regime. It deleted the pro-industry “harmony” Article 1 from a law passed in 1967, marking its departure from a hitherto unequivocal support for the polluting industry. In 1971, the Environmental Agency of Japan was established to round off anti-pollution measures. Between 1971 and 1973 courts delivered unprecedented verdicts – recognizing industrial pollution generated by the Big Four as a cause of the horrific diseases.

§36 Still in 1973 anti-pollution mobilization was at its peak – this year witnessed no less than three thousand participant strong local mobilizations[28]. In 1973 the Diet passed the law creating the world’s first governmental compensation scheme for pollution victims. This law made it easier for victims to seek compensation through out-of-court negotiations with polluters, but by the same token diffused and reduced mobilization, keeping contention out of courts, and, consequently, lowered the chances of having a judge decide that a polluting factory deserved an injunction.

§37 After 1973, the poisoning of human beings and environment by the corporations with state backing was exhausted and closed as an issue. What has been called the “ice-age” of civil society which ended first in the 1990s set in[29]. Even though movement mobilization subsided, and media attention moved away from the issue, in 1975–1978 the victims of the Minamata disease and their families launched – along with their lawyers – another court case (or set of cases),

and then, in 1984 a third court case (IP15). The cases focused on patients with milder symptoms and on areas not addressed by the earlier Big Four court cases. The 1970s trials involved industrial firms which were closing down to avoid the consequences of the new environmental and compensation laws. Virtually in every instance it had to be proved anew that industrial (sea and flood) pollution caused the terrible Minamata disease which distorted and disabled both the body and the mind. In the fourth court case, the plaintiffs took not an industrial firm, but the government to court. The case went up all the way to the Supreme Court and the government lost the case on formal grounds – it had unduly delayed decision-making about prohibiting the conditions producing the Minamata disease. In this particular case, the Judicial made use of its power to control and counterbalance the Executive. This is to say that, although the social movement mobilization and media interest waned, victims' lawyers kept industrial polluters and the government in a state of alert and thus the issue itself alive, even if it was no longer a prime issue on the national agenda. At the same time, they created further precedents based on which the victims' lawyers of the future could build, the future cases refer to, and future social movements rally around.

Why do Lawyers raise “transgressive” Issues?

§38 An interesting question which this material inspires concerns conditions under which some lawyers raise or hold “transgressive” issues in abeyance – in the absence of social movements, media attention or public interest. This question requires in-depth comparative studies. Here just a couple of ideas can be offered. As suggested while discussing “transgressive” lawyers and cases, it is important to pay attention to the legal-institutional settings as well as the rules for taking on cases, not forgetting to set the issue in its economic and political structural context and political culture. More concretely, not just the possibility of submitting a case to a judicial review but also lawyers’ cooperation forms and networks play an important role. Not to be forgotten are international trend-setting institutions, conventions and legal trends. Some illustrations will help to buttress these statements.

§39 As to the institutions, Hong Kong’s legal system still has many remnants of the “British” system: no lawyer can turn down the case if it is in his/her area of expertise and solicitors prepare cases but have to relinquish them in higher courts to barristers who play the role of advocates (IP11, IP9). The first rule means that a very conservative lawyer who happens to be an expert on human rights may end up representing a lesbian couple or a transgender person in court and thus working on a “transgressive” case. The second rule compels cooperation and developing long lasting amicable relations or networks between solicitors and barristers. It is enough if 30–40 lawyers start working on transgressive causes to achieve change. In Hong Kong a group of such lawyers has been working with each other over a long period of time (IP5, IP6, IP9, IP11). Not just these lawyers, but also millions of Hongkongers are concerned that the chances of winning such “transgressive” cases will diminish over time since Beijing is keen on and in fact already appointed some China-loyal judges. For it also takes a judge willing to accept a case to start a juridical case review.

§40 In Japan, the first Article of the Conduct Code states that lawyers should act for HR/public good (IP1, IP2,). Moreover, the main professional association is very rich and powerful as a result of its (intended) policy of collecting very high individual member fees (IP1, IP2, IP15, IP20). It is autonomous and its topical committees are free to investigate a plethora of burning issues, following up, where consensus can be found, with lobbying and public statements. Equally important, in Japan there has been a widespread practice of decade-long lawyers’ cooperation on specific issue-related court cases — individual lawyers step in to replace those stepping out, but an issue-focused lawyer group keeps at it, court case after court case (IP8, IP13, IP15). Their main professional association facilitates getting to know each other and identifying lawyers who are likely to agree to cooperation. Moreover, some activist lawyers set up or join issue-related NGOs, while others initiate or join issue-related voluntary associations (IP5, IP18).

This way they keep themselves informed, can contribute to discussions about goals and strategies, and, not to be forgotten, recruit clients. Yet others become union, communist or NGO lawyers, working often on “transgressive” cases (IP5, IP10, IP11).

§41 International institutions, such as the UN or the EU, the UN conferences, international conventions or agreements, such as, for example, the International Convent on Civil and Political Rights (ICCPR) or the environmental protocols (EP), as well international social movements also convince some lawyers to try to push national laws past their established limits, even if they can expect much opposition in their state.

§42 To mention some examples: in Hong Kong lawyers, including those who worked on “transgressive” cases, often referred to the ICCPR, while some Japanese lawyers had shaped the environmental conferences and protocols, and then used them in their own legal practices as a point of reference. Some Hong Kong lawyers working on improving the refugee treatment in Hong Kong have been keenly aware of the bad treatment of the “boat people” in Australia and the counter-mobilization it caused, and also of the UNHCR Resettlement Programs failure to secure fair practices in Hong Kong[30]. They initiated or joined legal efforts to establish a fair refugee review and selection process in Hong Kong. These legal changes have been judged by foreign lawyers as extremely successful.

Conclusion

§43 In this text, it was argued that the sociology of professions and research on social movements should open up to study professional mobilization on controversial issues, its origins and forms and ask how it interacts with social movements. It proposed that the sociology of professions has to acknowledge civil and political engagements of professionals, expressed in professional collective organizing and involvement in civil society. Similarly, research on social movements has to de-center them in order to acknowledge the contribution of professions to inspiring and pressing on controversial issues even when social movements do not do so.

§44 Although it was acknowledged that professionals and professional organizations often support social movements in a number of different ways, the text focused on the contestations of laws and daily practices during which professional organizations upset social movements by their choice of issues or strategies (the US). It then moved on to consider the contestations of laws involving “transgressive” court cases in Hong Kong and Japan to show that lawyers worked on such cases even in the absence of social movements or wide public interest.

§45 In the body of the article a case was made for that it is not necessarily lawyers or their firms that are « transgressive », but instead the cases they work on. And that the institutional rules for taking on cases, formal cooperation or informal networking between lawyers can make for the seemingly unlikely situations in which a deeply conservative lawyer takes on a « transgressive » case and a number of lawyers become involved in advancing a « transgressive » position on a controversial issue.

§46 The text also suggested that when lawyers act as the initiators or bearers of issues before a social movement emerges or when it subsides, it could be said that these lawyers “hold issues in abeyance” like a core of social movement does for a broader movement and for the sake of partial or common good in time of de-mobilization. In this scenario a profession takes up issues when a social movement cannot or would not shoulder the task, waiting, as it were, until a new movement starts mobilizing or an old movement returns to mobilizing. As I suggested, however, such a scenario builds on a movement-centric perspective in which social movements are the main innovators and bearers of issues. De-centering social movements would mean admitting the possibility that also professions (or any other civil society, state or market actor) initiate and sustain important, controversial issues with a potential to contribute to common good. This admission would open up research on professions to allow questions as to why and how professions (or other actors) take on controversial issues and whether and how they mobilize their colleagues, their fellow citizens or try to compel the already

existing social movements to adopt and mobilize on the issues they find important[31].

§47 In the final section, a few suggestions were made about what factors have to be considered to explain the willingness of some lawyers to work on such "transgressive" cases, offering path-breaking legal solutions to controversial issues. Among them were legal-institutional settings and legal institutional obligations, also such specifying case-taking rules, specific cooperation patterns among lawyers, and international institutions, agreements and trends. A comparative research program would focus on these and at the same time identify in each case powerful economic and political interests, the relevant elements of the national political culture, societal problems, political party positioning towards these problems, and the extant (conducive or constricting) opportunities to make an issue out of them in an attempt to explain why (i) lawyers and social movements or (ii) social movements but not lawyers or (iii) lawyers but not social movements (have) mobilize(d) on specific issues. When they both (have) mobilize(d), research could focus on the similarities and differences in their mobilizations in terms of their numbers, issue framing, goals, and self-presentation, recruitment, lobbying and contestation strategies. Of special interest would be their lines of cooperation and conflict. In reverse, one could start with a key controversial issue on which either lawyers or social movements or both already mobilized in some but not all investigated countries in order to explain their respective (non-)mobilizations, and, where these exist, their lines of conflict and cooperation. In this manner one could approach an image projected by a sociology-inspired law theorist and philosopher Roger Cotterell[32], who envisions a *Jurist* capable of rising to the occasion and offering wise answers to questions of co-existence arising in liberal, pluralistic societies and, we might add, conflict-ridden globalized world. Equipped with the empirical comparative material derived from a here proposed comparative study, one could perhaps answer the question under which circumstances a *Jurist* worthy of this name can emerge.

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16. And vice versa: professions and professional organizations generate their own expert knowledge, values (e.g. meritocracy, transparency, justice, rule of law, law and order) and discourses in support of their expert knowledge and values. They develop strategies of spreading them as a way of handling various problem(s). They may inspire, support or constrain knowledge, values, discourses and strategies not just of the state or the market but also of the other civil society members. Ultimately, it is an empirical question whether and how they do so. ↩

17. S. Scheingold, A. Bloom, *op. cit.* ↩

18. Judicial review is a form of court proceeding in which the judge reviews the lawfulness of a decision or action, or a failure to act, by a public body exercising a public function. Judicial review is concerned with whether the law has been correctly applied, and the right procedures have been followed. A court having judicial review power, such as the United States Supreme Court, may choose to quash or invalidate statutes, laws, and decisions that conflict with a higher authority. The court's decision must be followed, and one judicial review case can make a difference to many other people. Judicial review is a part of the checks and balances system. ↩

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