Garth, Bryant G.; Dezalay, Yves

Article

The economy of legal practice as a symbolic market: Legal value as the product of social capital, universal knowlegde, and state authority

economic sociology_the european electronic newsletter

Provided in Cooperation with:
Max Planck Institute for the Study of Societies (MPIfG), Cologne

Suggested Citation: Garth, Bryant G.; Dezalay, Yves (2009) : The economy of legal practice as a symbolic market: Legal value as the product of social capital, universal knowlegde, and state authority, economic sociology_the european electronic newsletter, ISSN 1871-3351, Max Planck Institute for the Study of Societies (MPIfG), Cologne, Vol. 10, Iss. 3, pp. 8-13

The Economy of Legal Practice as a Symbolic Market: Legal Value as the Product of Social Capital, Universal Knowlegde, and State Authority

By Yves Dezalay and Bryant G. Garth

Centre National de la Recherche Scientifique, CNRS, Paris, and Southwestern Law School, Los Angeles, dezalay@msh-paris.fr ; bgarth@swlaw.edu

"… we must keep clearly in mind that the true object of a real economics of practices is nothing other, in the last analysis, than the economy of the conditions of production and reproduction of the agents and institutions of economic, cultural and social production and reproduction, i.e. the very object of sociology in its most complete and general definition." (Bourdieu 2005: 13)

In the second half of the 1980s, sociologists of law began to depart from the idealistic vision of the profession identified with the sociology of Talcott Parsons. They began to place their emphasis on the markets that the profession served and from which it profited. The legal market was portrayed in this literature according to a corporatist logic. The idea was that the quality of legal services – and the value assigned to the services – was determined by mechanisms for professional control over the recruitment and production of lawyers – the "producers of law." The legal market was thus characterized as a market of artificial scarcity due to the restricted supply. Rules and professional practices, according to this approach, were part of a strategy to defend and to legitimate the legal profession's monopoly on the provision of legal services and legal representation (Abel and Lewis 1988). The *numerus clauses* that operate in many countries served two functions according to this perspective. One was to guarantee quality among the providers of legal services. The other was to ensure that monopoly profits accrued to the limited supply of lawyers available to serve the public's demand. In exchange for this monopoly position, in addition, professional organizations assumed a collective responsibility to provide legal services to the disadvantaged, therefore contributing – despite the restricted supply – to the legitimating principle of equal justice for all.

Postulating this universal professional goal of market control helped to call into question the meaning and substance of professional ideals in a number of countries. It put pressure on legal professions to become more open and accessible. But this approach to the legal profession also has serious limitations. In the first place, it has trouble explaining the wide diversity of professional practices inscribed in specific national political histories. For present purposes, however, the most obvious weaknesses of this corporatist vision stem from dramatic events that transformed not only the education and reproduction of legal professionals, but also their mode of organization. Whatever plausibility the corporatist approach had was put into question by these transformations.

The first of these transformations is the result simply of a major increase in the number of law graduates. The opening began generally in the 1970s with the multiplication of the number of faculties of law and the expansion of access to legal careers to individuals from the middle classes. The legal profession therefore expanded its ranks beyond the relatively small minority descended from the legal elites who had characterized most legal professions. The corporatist idea of a homogeneous group of providers matched poorly with this development.

Then, beginning in the 1980s, the mode of production of legal expertise was transformed by a wave of corporate reorganizations, by the opening of new markets (like the Single Market for Europe), and especially by the internationalization and globalization of deregulated financial markets (the "Big Bang" of the City of London and its aftermath, shaking up financial markets everywhere). The growth in the demand for business law produced by these events went with a process of increasing concentration of corporate law in very large global law firms. The competition was accelerated by the multinational accounting firms, which sought for a time to compete with corporate law firms by offering a supermarket of professional services through so-called Multi-Disciplinary Partnerships, or MDPs (Dezalay 1992; Dezalay and Garth 2004).**1**

Corporatist logics were progressively distorted or dismantled in order to give free reign to competitive markets. Competition was exacerbated by the influx of new producers benefiting from the opening of borders – and thus of new markets – to challenge local professional preserves. The specificity of the mode of production of legal expertise increasingly lost out to profitable strategies drawn from management or marketing. The business logic of very large companies was extended to the professional services industry. Again, the corporatist model was hard to reconcile with this commercialization.

These major transformations began in the United States, where processes of concentration accelerated with the entry of numerous new lawyers into the legal labour force (Galanter and Palay 1991), and they extended to major cities around the globe. But the export of this model encountered strong resistance in a number of settings, in particular in Asia. Countries like Japan and Korea continued to impose very restrictive quotas on the number of new entrants into the legal profession and also enforced very restrictive rules limiting foreign competition, particularly that from the legal multinationals. They sought to protect their very small professions from the major forces of change.

Within the legal professional environment more generally, in addition, these upheavals brought forth a number of concerns and criticisms. The relentless pursuit of growth and profit called into question the professional ideal, which had long served to bolster the social credibility of the profession, of a collegial community of equals committed to serve the public interest. This context of a return to basic professional principles helped bring new approaches to the legal profession seeking to reintroduce the political dimension – whether by emphasizing the multiple forms of engagement by *cause lawyers* (Sarat and Scheingold 1998) or by insisting on the primacy of the political as the basis of the professional project. The emphasis on the political was a reaction to an economic approach considered too reductionist (Abel and Lewis 1988).2 Even if aspiring to a political theory of law, however, the authors of the new emphasis hold to a very restrictive view of the relationship between legal professionals and the field of political power. Political liberalism, they maintain, characterizes the essence of the history and structures of the bar (Halliday, Feeley and Karpik 2008). They recognize that this political project faces obstacles which slow down or prevent its realization. But they maintain that this project remains inscribed in the very nature of the legal professional model – built around the defense of the freedom of civil society vis-à-vis the encroachments of state authoritarianism. This approach echoes professional ideology, but it remains too narrow, even reductionist.

History shows that legal professionals more often than not put themselves and their expertise in the service of strong rulers (condotierri, caudillos, or political bosses, for example), or military regimes, authoritarian states, colonial powers, and the like. As Kantorowicz (1997) suggests, furthermore, one can suggest that the interventions of lawyers aiming to moderate the authoritarianism of power holders represent primarily a collective strategy of legitimation – for the power holders, and also for themselves – which leads to the role of double agent characteristic of lawyers as "guardians of collective hypocrisy" (Bourdieu 1987).

This idealized vision of the political liberalism of lawyers also errs by going to the opposite extreme of the market approach. It overlooks legal activity in the service of the economic interests of the ruling or possessing classes – from which lawyers are recruited. The lucrative service of particular groups is ignored. The sociological relationship among these elite groups, however, is essential to understand the articulation between the legal market and the politics of law.

Indeed, the role of state knowledge – and more precisely the role of the faculties and schools of law – in the reproduction of the dominant classes is essential to the complementarity between the two aspects of legal practice. The combination between inherited relational capital and specialized competence acquired in prestigious and cosmopolitan educational institutions allows the most successful business lawyers to combine political office with their activity as leaders of the large legal firms – statesmanship with profit.

Rather than to oppose the politics of law and legal markets, therefore, it is necessary to analyze what these two aspects of professional practice, at the same time distinct and complementary, contribute to the reproduction of the legal field. The investment in the institutions of the state is of double interest. First, the authority and violence of the state are essential to produce belief in the law – and thus the demand for legal competence. Second, the investment by lawyers in political activities enables them to accumulate capital that is at the same time institutional and relational. This capital then facilitates success marketing social peace

as counselors and mediators for individual and collective conflicts. To succeed in this double activity, professionals must play the double role of statespersons/guardians of the public interest and defenders (or agents) of the particular interests of groups or individuals.

This collective strategy of the double game is based on the social construction of a divide between law and politics. This divide is inscribed in learned representations and in the definitions of service in the institutions of the state. Far from preventing the accumulation of offices, this division allows activities that benefit from the complementarity between two arenas. Legal professionals can combine the two sides in career trajectories exemplified by the lawyer-politicians who dominated the various "Republics of Lawyers" in France, or even by those using Wall Street law firms or their equivalent to facilitate exchanges – and the mobility of individual lawyers – between the various sites of academic, political and financial power (Dezalay and Garth 2008).

In order to understand the success of this double game, however, it is essential to take into account the central role of learned investment. The accumulation of this capital of knowledge makes it possible for legal professionals to keep a certain distance from conflicts linked to the activities of the state. Depending on the setting, the distance could be from the various forms of "strong men" or other charismatic politicians that lawyers serve, or from the particular social interests that lawyers represent. Lawyers can draw on the higher legitimacy produced by knowledge that purports to be universal. The authorities of the state – as well as other players on the political scene – must respect that knowledge because it contributes substantially to their own legitimacy. That contribution serves them not only inside their own territory, but also on the international scene, where it is used as a guarantor of membership in the community of nation-states. Indeed, the international circulation of legal knowledge and the relational capital accumulated by lawyers predisposes them to serve as mediators in international relations – supported by a community of language and habitus.

In addition, this investment in learned capital plays a central part in the reproduction of legal professionals. This process, however, operates in an ambiguous and differentiated way. On one side, the need to acquire the requisite learning is used as a barrier to entry by facilitating the conversion of social (and financial) capital for the family lines of the noblesse de robe. Because of the high cost of the studies and the elite selection processes, legal degrees have traditionally been regarded as the equivalent of the "diploma of the bourgeoisie" (Bourdieu 1998). Further, the social stratification that comes from school selection has often been accentuated by apprenticeship requirements that tend even more to favour those possessing the most social capital.

In a paradoxical way, however, these barriers to entry function much better when the process remains relatively open to meritocratic talent. Serving as a filter, the selection process can restrict access to a relatively small group of social newcomers whose selective integration can contribute to a permanent and controlled renewal of the legal field. Thus, the recruitment of meritocratic students – who then are encouraged to overinvest in the production and diffusion of legal knowledge to compensate for their lack of relational capital – is one of the engines for the construction of law as a scientific discipline akin to those found elsewhere in the university. In addition, the social selection of the new recruits – often from the middle classes or immigrant populations in the process of upward social mobility**3** – helps open new markets and new customers for the law. In particular, it favours strategies combining politics and law by which lawyers work to gain recognition for the rights of social groups that have been dominated or marginalized in the field of state power.

These two aspects of recruitment make it possible for the legal field to be presented as a neutral space, legitimate to handle the mediation of social conflicts representing a diversity of social interests. Admittedly, this process of representation is tilted in favor of the holders of economic power – from whom most of the professional elites are recruited. But this uneven distribution is not completely rigid, and it may attenuate over time through political struggles or through the meritocratic logic inscribed in the scholarly world.

The interactions among three poles – merchant, scholarly and political – are therefore central to the reproduction of the professional field. The mobility of agents between these various sites is accompanied by a process of conversion among the specific forms of capital that prevail in each one of these subfields. This process can also be analyzed historically as the product of various phases that together constitute the cycle of reproduction of legal expertise. This process involves the conversion (according to fluctuating methods and rates) of social, relational and financial capital accumulated in family lines into a legiti-

mate form of competence, validated by a universal knowledge and linked to the institutions of the national state.

This conversion requires a substantial financial investment, but it increases and develops the relational capital of the most endowed agents. This combination of complementary resources can then be mobilized in strategies for the acquisition of professional notoriety. Those strategies do not exclude investments in the public scene – in fact the opposite is the case. Again, however, while the costs of entry are far from negligible, they are relatively easily and quickly converted into profit. The clout that comes from the entire capital of influence, relations and public notoriety, in fact, is much sought by large companies anxious to defend their interests, whether in the legal arena or in administrative and legislative settings.

These processes of exchange between family, learned, and political capital can be observed either at the individual level – in the career trajectories of the most successful legal elites**4** – or from a collective point of view – in the social authority and credibility accumulated by national legal fields at various times in their respective histories. Putting together individual trajectories over time in fact helps to explain the cyclical phenomena affecting the collective role of lawyers which we analyze in the global South in our forthcoming book (Dezalay and Garth forthcoming).

The initial phase is that of primitive accumulation. It is based on the transfer of an imported legal knowledge to a small group of local notables co-opted within the framework of colonial strategies. This investment is later consolidated by conversion into state capital when these colonial lawyers transform themselves into founding fathers in movements for independence. These elites use their constitutional and diplomatic expertise to make themselves the architects of the new nation-states.

In parallel, the rise of the legal market allows them to develop a double legal and political competence. They serve the dominant oligarchies from which they came and the interests associated with those oligarchies. The marketing of legal knowledge and authority to the exclusive profit of the dominant interests, however, creates risks for the social credibility of these people and institutions. The position of the legal elites is all the more fragile since they served essentially as colonial clerks prior to independence and were not well established on their own locally. In addition, they were highly implicated in local political struggles because of the very close link between lawyers and politics.

The phase of disqualification that results from these risks can also be accelerated and rendered worse if lawyer-politicians are marginalized by authoritarian regimes depending for their credibility, for example, on their position in the Cold War or on the strength of the military. The competition from technocrats associated with developmental states may further weaken legal credibility and further reinforce the decline of the legal path as the privileged channel for the reproduction of state elites. Thus, the loss of social credibility of the legal field is due to the decline in the value of its social capital, which goes hand in hand with the loss of legal authority in the state. At the same time, however, this obsolescence of legal capital offers new opportunities for investment in legal knowledge, taking advantage, for example, of hegemonic strategies associated with the export of the rule of law.

These cyclical processes in the South – initial colonial investment, increasing value through independence, and then decline in authoritarian or developmental states – are more pronounced because of the instrumentalization of the law in the service of colonial policies. The export of legal knowledge was after all at the centre of strategies of domination, seeking both to legitimate the power exercised by imperial companies in remote colonial possessions and to facilitate colonial management. That facility is seen both in the co-optation of local elites converted into lawyer-compradors and then in their enactment of the role of guarantors of a constitutionalized transition. Thus, the autonomy of these peripheral legal fields was limited by their double dependence – on the struggles that would take place in local and international political arenas, and on the colonial academic centres as the most legitimate places for the reproduction of legal knowledge and competence. Colonial metropolises had jealously kept the monopoly on the production of legal knowledge.

These two weaknesses were reinforced in a cumulative way. Legal excellence was reserved for a small minority of privileged people due to the costs and difficulties of access to the international sites where it was produced. The marginalization or loss of position by legal notables then would have the effect of dismantling the elitist networks through which the capital of learned legitimacy was renewed. As a result, it became even more difficult to resist political pressures.

The overlap and exchange among the various species of social capital, including family, learned, and political capital, explain how the force of the law is built, but also how

it can weaken and lose credibility. In certain countries of Southeast Asia, such as Indonesia, this process of decline was particularly dramatic. But one could find similar phenomena, even if less serious, in European countries after the Second World War. Lawyers in Europe did not hesitate to denounce the "decline of the law." Indeed, even if the system of positions at the core of the legal fields were more complex in Europe, in particular because of opportunities for social advancement for more meritocratic individuals, political struggles produced very similar results to what happened in the South. After having dominated political representation, as in the "Republics of Lawyers," political lawyers in Europe were relatively marginalized by the bureaucracies of the Welfare State. Indeed, that marginalization was done knowingly to weaken the influence of lawyers and the propertied classes whom they served. Thus, even in the European countries, the political marginalization of legal notable has effects on the credibility of legal knowledge. The relative downgrading of legal education, which no longer appears as the royal way of access to positions of public or private power, affects the process of the re-actualizing of the legal capital of learned authority. That authority increasingly has to compete with the rise and autonomization of new state knowledge such as found in economics, management, and political science. In Europe, therefore, as in the colonies that the Europeans founded in the South, legal authority declined notably in the period after the Second World War. The decline in Europe, in fact, also helps explain the relatively low resistance within Europe to the international expansion of the model of Wall Street law firms that accelerated in the context of the liberalization of markets in the 1980s.

Today the U.S. legal field is in a hegemonic position enabling U.S. lawyers to export prescriptions for the rule of law and to impose U.S. approaches as the best source for a renewal of the social authority of peripheral legal fields initially patterned on Europe. The basis for that hegemonic position is the complex structure of oppositions and complementarities in the United States among the various poles of legal power – scholarly, economic and political – which constitute a kind of built-in anti-cyclical device. Internal tensions and permanent competitive struggles in the U.S. legal field produce new legal opportunities and therefore renewal – as much in academic space as in the political world.

Still, this exceptional legal prosperity of the United States should not be seen as an immutable asset. The history of the legal field of the United States in the nineteenth century reveals some similarities to that of the colonized countries. After the "golden age" when lawyers serving colonial power reinvented themselves as fathers of independence and the American Constitution, the credibility of the law gradually eroded, in particular in the Jacksonian period. It was not until the end of the nineteenth century and the launching of law schools combining elitist social recruitment and strong academic competition – which included opportunities that the competition provided for meritocratic promotion – that the value of legal capital was restored. Elitist networks bringing together Wall Street finance and the corridors of political power then began to prosper. The reformers and cosmopolitans of the elite legal field were later termed the Foreign Policy Establishment. This group prospered and dominated the field of state power for most of the twentieth century – embodying the close link between politics and legal markets.

Yves Dezalay *is a director of research at the Centre National de la Recherche Scientifique (CNRS) in France. Renowned for his extensive research on the construction of the Single Market and its effects on legal practices in European countries, Dezalay authored* Les marchands de droit *(Fayard, 1992) and coauthored* Professional Competition and Professional Power, Lawyers, Accountants and the Social Construction of Markets *with D. Sugarman (Routledge, 1995). His research with Bryant Garth on the emergence of an international legal field and the restructuring of state and political elite, led to him coauthoring/co-editing* Dealing in virtue: International Commercial Arbitration and the Emergence of an International Legal Order *(University of Chicago Press, 1996);* The Internationalization of Palace Wars: Lawyers, Economists and the Contest for Latin American States *(University of Chicago Press, 2002) and* Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy *(University of Michigan Press, 2002).* ***Bryant G. Garth*** *is Dean and Professor of Law at the Southwestern Law School. In 1990, he was appointed as the Director of the American Bar Foundation (ABF), the independent nonprofit research centre established by the ABA for the empirical study of law, legal institutions and legal processes. Under his guidance over the next 14 years, the Foundation became a preeminent resource for lawyers, scholars, legal educators, and policy makers throughout the world. In addition to the books with Yves Dezalay, he coauthored/co-edited* Dispute resolution ethics: A comprehensive guide *(with P. Bernard; American Bar Association, 2002);* Looking back at law's century *(with A. Sarat and R. Kagan; Cornell University Press, 2002);* How does law matter? *(with A. Sarat; Northwestern University Press, 1998).*

Endnotes

1 Pierre Bourdieu insists on the need to reconstruct "the genesis of the economic dispositions of economic agents" (2005: 5). *Marchands de Droit* (Dezalay, 1992) sought to describe the international competition and internal fights that accelerated the difficult conversion of the heirs to a European *noblesse de robe*, who regarded themselves as "learned professionals," into merchants of law embedded in competitive markets and serving mainly large corporations.

2 This "rediscovery of the political" rests also on a current of professional literature that describes (prescribes?) a generalized phenomenon of a "return to law" in the political field. The authors of this literature document this phenomenon in very diverse ways: promotional campaigns for the rule of law by international and national institutions, militant engagements for public interest or cause lawyering, even the weakening of political agents because of judicial inquiries of the *mani pulite* type. Or they point to more structural causes such as a judicialization of international relations applied to Europe or more generally.

3 Particularly in the case of the United States.

4 One could give multiple examples starting from our own research, in particular on international commercial arbitration (Dezalay and Garth 1996). One of the most remarkable illustrations is that described by Lauro Martines (1968) examining the role of the notable lawyer-diplomats in Renaissance Italy. In a time of economic and political upheaval, legal investment was to some extent a way to protect family capital: to "cash in on one's connections and family prestige" (p. 76) by accumulating the positions of grand professor, ambassador, lawyer, judge or advisor to whichever of the authorities of State requires a "legal opinion" for important businesses. The book thus perfectly describes the process of investment in learned capital, then its valorization as diplomatic and relational capital, and finally its profitability on the market of legal mediation in various struggles for power. Initially, the noble families invested in legal knowledge by sending their children to Bologna; in return, those who came to possess this learned capital could use it to gain access not only to the most influential positions in the legal field but also in the field of state power. Indeed, Martines shows that not only were the grand professors well remunerated (with incomes equivalent to six months of the profits of the Florence branch of the Medici bank), but also that this position produced a marketable notoriety with respect to potential clients and the state. They served as ambassadors to negotiate important treaties or as mediators and arbitrators of commercial disputes or conflicts between official or religious powers.

References

Abel, Richard L./Phillip S.C. Lewis (eds.), 1988: *Lawyers in Society* (3 volumes). Berkeley: University of California Press.

Bourdieu, Pierre, 1987: The Force of Law: Toward a Sociology of the Juridical Field. In: *Hastings Law Journal* 38: 209-48.

Bourdieu, Pierre, 1998: *The State Nobility: Elite Schools in the Field of Power.* Stanford: Stanford University Press.

Bourdieu, Pierre, 2005: *The Social Structure of the Economy.* Cambridge: Polity.

Dezalay, Yves, 1992: *Marchands de droit: La restructuration de l'ordre juridique internationalpar les multinationales du droit.* Paris: Fayard.

Dezalay, Yves/Bryant G. Garth, 1996: *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order.* Chicago: University of Chicago Press.

Dezalay, Yves/Bryant G. Garth, 2004: The Confrontation between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility. In: *Law and Social Inquiry* 29: 615-38.

Dezalay, Yves/Bryant G. Garth, 2008: From the Foreign Policy Establishment to the Legalization of Foreign Policy. In: Michael Grossberg and Christopher Tomlins (eds.), *The Cambridge History of Law in America: The Twentieth Century and After.* Vol. 3. Cambridge: Cambridge University Press, 718-758.

Dezalay, Yves/Bryant G. Garth, forthcoming: *Asian Legal Revivals: Lawyer-Compradors and Colonial Strategies in the Reshaping of Asian States* (under review).

Galanter, Marc/Thomas Palay, 1991: *Tournament of Lawyers: The Transformation of the Big Law Firm.* Chicago: University of Chicago Press.

Kantorowicz, Ernst H., 1997: *The King's Two Bodies: A Study in Mediaeval Political Theology.* Princeton: Princeton University Press.

Halliday, Terence/Lucien Karpik/Malcolm Feeley (eds.), 2008: *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Change.* Portland/Oxford: Hart Publishing.

Martines, Lauro, 1968: *Lawyers and Statecraft in Renaissance Florence.* Princeton: Princeton University Press.

Sarat, Austin/Stuart Scheingold (eds.), 1998: *Cause Lawyering: Political Commitments and Professional Responsibilities.* New York: Oxford University Press.

.

In a steady-state economy with population growth n and labor-augmenting technological progress g, persistent increases in standards of living are possible because the: capital stock grows faster than does the labor force. According to the Solow model, persistently rising living standards can only be explained byÂ If the marginal product of capital net depreciation equals 8 percent, the rate of growth of population equals 2 percent, and the rate of labor-augmenting technical progress equals 2 percent, to reach the Golden Rule level of the capital stock, the ____ rate in this economy must be _____. saving; increased. Value-normative function of legal culture -this is the actual possibility of individuals to assess the legal sphere of their state. After all, laws and other normative acts are not always ideal. Therefore, each person should understand the benefits or, conversely, the uselessness of certain prescriptions. The value-normative function of legal culture, and, more precisely, the level of effectiveness of this direction indicates a high sense of justice of the population of the state. The rule of law regime depends on the levelrespect of citizens to the state. For this, the educational function of And are these effects of legal rules socially desirable? In answering these positive and normative questions, the approach employed in economic analysis of law is that used in economic analysis generally: the behavior of individuals and firms is described assuming that they are forward looking and rational, and the framework of welfare economics is adopted to assess the social desirability of outcomes.Â The macro-market regulation rules of the state-led economy that centered on the livingÂ China and the market economy under national macro control of the economy. To adhere to healthy economic development, China must uphold the market economy law under macro control.