Norwegian Lawyers and Political Mobilization: 1623-2015

Malcolm Langford[1]

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Abstract. Do Norwegian lawyers mobilize only to enhance their privileges and prestige? Or do they also engage in collective action for more noble ends? Contrary to materialist approaches, the theory of the 'legal complex' predicts that the legal profession will struggle as an entity for 'political liberalism' – a moderate state with basic civil rights and freedoms. This presents a paradox for the Nordic countries. Lawyers are not especially visible in the public sphere yet political liberalism is more deeply entrenched than elsewhere. If correct, this suggests either a case of Nordic exceptionalism or a problematic theory. This paper focuses on Norway. Beginning with the emergence of lawyers in the 1600s, it traces the legal profession's engagement with the development and defense of political liberalism. This is complemented by a quantitative content analysis of interventions by the *Advokatforeningen* (law society). The paper argues that the results should prompt us to rethink legal complex theory more generally. The legal profession will only mobilize broadly for political liberalism when: (1) committed individual lawyers are able to overcome collective action dilemmas in the profession and (2) lawyer-centric forms of mobilization are viewed as less costly or more appropriate than the alternatives.

[1] Associate Professor, Department of Public and International Law, University of Oslo (from 1 February 2016). This papers draws on work conducted at the Norwegian Centre on Human Rights and Pluricourts Centre of Excellence, University of Oslo. I am grateful for comments on an earlier version by Ragnhildur Helgadóttir, Mikael Madsen, Johan Karlsson Schaffer, Hans Petter Graver, Malcolm Feeley, Adam Hill and Terry Halliday. Frida Pareus also collated the *Advokatforeningen* documents. This paper is part of a broader multi-author project on the *Nordic Legal Complex and Political Liberalism*, coordinated by Prof. Feeley (University of California, Berkeley) and myself.

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1. Introduction

The theory of the legal complex posits that lawyers will not only mobilize as a collective for material ends but also the goal of political liberalism (Karpik and Halliday 2011). Constituted by a moderate state, core civil rights and civil society freedoms, political liberalism is presented as a *discrete* but professionally *valued* good to which all lawyers can led their support. The term 'political liberalism' is not easily translatable in the Scandinavian languages but it approximates the notion of of a *liberal rettstat* (Smith 2015: 13; Wessel-Aas 2011: 1; Emberland 2005: 69). This requires limits to state power, due process and equality before the law (*rettsikkerhet*), and certain civil rights such as freedom of expression and association, *habeus corpus,* and protection from torture (M. Smith, 2015: 14).[2]

Across a diverse range of jurisdictions, researchers have tested whether lawyers act in such a fashion (Halliday, Karpik, and Feeley 2008a; Halliday and Karpik 1998; Halliday, Karpik, and Feeley 2012; Massoud 2013; Rajah 2012; Gobe and Salaymeh 2015). [3] Drawing on historical observations of practicing lawyers — whether advocates, judges, prosecutors, civil servants, academics, military lawyers — they have sought to identify potential coalitions of professionals who may act in a self-appointed role as the stewards and guardians of political liberalism. The results suggest that that lawyers do mobilize in legal complexes and sometimes in spectacular fashion. However, lawyers do not always respond to threats to political liberalism or constitute its active vanguard; and in some cases represent its very opposition. The struggles are often reactive, rest on fragile organizational capacity, are vulnerable to silencing by political authority, particularly authoritarian regimes,[4] and are conditioned by the prevailing legal discourse.[5] However, the leading scholars claim that when one finds struggles against political repression, politics of the Legal

[2] However, the above authors differ on the selection of rights. For example, unlike legal complex theorists, Merete Smith does not name rights to property and freedom of religion but does name rights to family life and free choice of residence and work. See further discussion below.

[3] It is also taken up in individual chapters or discussions in other works (see Couso, Huneeus, and Sieder 2010; Kapiszewski, Silverstein, and Kagan 2013; Ghias 2015; Graver 2014a; Wesley Pue and Sugarman 2003; Cummings 2011).

[4] See particularly the analysis of effects in Halliday, Karpik and Feeley (Halliday, Karpik, and Feeley 2008b). These studies and others such as Graver (2014b) also detail the complicity of some judges and lawyers in illiberal regimes.

[5] Karpik (1998: 117) highlights the power of disinterested discourse as highly credible in the 19th Century which gave a particular ascendancy to the legal profession.

Complex are frequently part of that struggle, with powerful evidence that the nexus of bar and bench is a powerful core alliance in many transitions towards *or away* from political liberalism (Halliday, Karpik, and Feeley 2008b: 3).

One glaring omission in this research program is the Nordic region.[6] These states present perhaps the greatest challenge to the theory and particularly claims that it is of 'universal application' (Halliday, Karpik, and Feeley 2008a). Sitting atop most global indexes on core civil rights (not to speak of political and social rights), the Nordic states seem curiously devoid of visible legal complexes; representing seemingly the antithesis of turbocharged American legal adversarialism (Kagan 2001; Hirschl 2011). Hirschl (2011: 458) paints a typical picture: The Nordic constitutional tradition has been based on 'local and national democracy, popular sovereignty, parliamentary supremacy, and majority rule' together with 'overall good governance, political and judicial restraint, relative social cohesiveness, a traditional commitment to social democracy, a well-developed welfare state combined with a vibrant market economy.' Yet, this Northern 'paradise', says Hirschl, has been populated by a relatively small legal profession (Ibid. 468).

If such a Nordic phenomenon exists, it might undercut the empirical (and normative) thrust of the legal complex project. Not only is the legal profession absent in struggles for political liberalism but it appears relatively unimportant for its survival and sustenance. However, this is but one possible exceptionalist account. The Nordics may be simply a peculiar case: The Nordic experience might be the product of highly contextual factors that could not be easily replicated elsewhere.

Is Hirschl correct? Is the trajectory of political liberalism in the Nordic countries a story to be told without lawyers? It might certainly be in the case of Sweden up and until the 1970s (Schaffer 2015). However, a common error in accounts of Nordic

[6] This is not so uncommon outside the study of the social welfare state: "A related similarity is that Nordic political science has not paid much attention to comparative research. This seems surprising as the Nordic countries should be rewarding objects for comparison: on the one hand they are similar enough to encourage comparisons from a methodological point of view; on the other they are dissimilar to an extent which guarantees variation and thus provides the basis for meaningful comparisons. There are some truly comparative works, of course (e.g. Berglund and Lindstrom, 1978; Elvander, 1980), and comparative approaches to the study of Nordic politics have lately become more frequent in the research literature, but much of the work labelled comparative is in fact ethnocentric in the form of country-specific treatments of political phenomena. Comparisons between Nordic political systems and external political systems are rare." (Ancker 1987: 79).

exceptionalism is the presumption of regional homogeneity. From studies of social policy through to role of courts or lawyers, the idea that the Sweden or Denmark is representative of its stately siblings is not infrequent. While this assumption resonates in the field of early private law or later social welfare policy, it is particular problematic when applied to the most dynamic period of political liberalism in 19th Century.

The upstart Norwegian nation and proto-state followed the American and French revolutions in 1814 by adopting the most liberal constitution of its time, replete with core civil rights and the separation of powers. This constitutional moment ushered in both a long-standing practice of judicial review and an initially lawyer-dominated parliament and state apparatus, in which liberal politics found a generally warm reception. The result is that the pioneering study by Aubert (1960) provides a picture of 'lawyers' playing a prominent role in the construction of the rule of law, civil rights, and the conditions for liberal capitalism even if they were anxious to preserve as much as reform.[7] Many of the leading lawyers would pass the Feeley 'statue' test for the legal complex – many of their figurines sit proudly as statutes in central Oslo center or their home towns. To this picture, we might add the contemporary period, in which Norwegian lawyers are remarkably visible in domestic struggles and debates for human rights[8] - a phenomenon also apparent in other Nordic countries.

Yet it is equally possible to find a counter-narrative in the Norwegian literature. Espeli, Næss and Rinde (2008) paint a more materialist picture of the legal profession. Beginning in the 1600s, with a focus on *practicing* lawyers, the dominant narrative is one of a collective dominated by self-interest. Lawyers struggled for survival in the face of state and public skepticism, monopolized steadily new branches of commercial practice, defended tenaciously their professional privileges and were disproportionately represented amongst collaborators with the German occupiers in the period 1940 to 1945.[9] This account is certainly interpolated with sunnier accounts of lawyers struggling for political liberalism and other public goods. Nonetheless, their primary depiction is of profession dominated by self-interest – a point not lost in

[7] Aubuert (1960: 5). See also Slagstad's (2014: 16-17) rendering of Aubert as well as his broader history of national strategists and bureaucrats (Slagstad 1998: see particularly 26-54) .
[8] See further section 6.
[9] See also Graver in this volume.

the book's reception (e.g., Blandhol and Mahler 2015: 27).[10] Such a narrative of lawyers' potential not only undergirds the idea of Nordic exceptionalism but suggests a legal profession consumed by the concerns of profit and prestige rather than politics and public goods. This is precisely the materialist sociology of the legal profession of the 1970s and 1980s that legal complex researchers were seeking to debunk.

In my view, neither of the above two narratives gives a sufficiently nuanced sense of the role of Norwegian lawyers in the development and defense of political liberalism over the *longue durée*. Instead, this paper makes two primary arguments. The first is empirical. Norwegian lawyers have been a *regular* though not constant feature in the arc of political liberalism. With some notable exceptions, Norwegian lawyers have mobilized in smaller groups or wings - and in lightening rod struggles, the profession almost always finds itself on both sides of the barricades. The second is theoretical. The variance in the Norwegian experience suggests that legal complex theory needs rethinking. The paper argues that it needs to move beyond its origins in historical sociology and embrace contemporary thinking in political science, political sociology, and constitutional theory. It proposes an alternative legal complex theory that is constructed along two axes, which foreground the *individual agency* and motivations of lawyers and their relative *opportunity structures*. Moreover, it suggests that the idea of political liberalism needs to be viewed as a fluid social norm rather than an abstract transcendental idea.

The chapter is structured as follows. Section 2 begins by offering an alternative theory of the conditions under which legal complexes emerge. The following substantive sections address Norway and are divided into four broad historical periods: Mercantilism and monarchism 1622-1814; Liberal nationalism 1814-1884; Social liberalism and welfarism 1919-1980; and Globalsation and legalisation 1977-2015. A relatively early starting point was chosen because the role of Norwegian lawyers in the 19th Century can only be understood in historical perspective; and the period itself sheds interesting light on the question at hand. The primary focus across the paper is on lawyers in their capacity as *practicing advocates.* Judges, academics, civil servants

[10] The materialist depiction is even stronger in a chapter elsewhere summarizing the book|s finding (see Espeli and Rinde 2014).

and prosecutors are included in the broad historical sweep but their full and proper treatment requires a separate study.

Methodologically, the paper mostly follows a common approach in legal complex research. It sketches the *longue durée* of political liberalism and contemporaneous professional activity while also examining in-depth particular *événements* or episodes (Halliday and Kaprik, 2011: 226-7). The overview of historical periods is punctuated by case studies (ten in total), which mostly draw on secondary literature and interviews. These vignettes represent primarily flashpoints in political liberalism – a particular threat to the *liberal rettsstat*. Some cases were partly 'selected on the dependent variable' - it was known in advance that lawyers were central in those particular struggles. These include the *Litlasund* witch drowning case (1723), the *Fra Kristiania-Bohêmen* censorship case (1887), and the *Liste-saken* concerning publication of state security activities (1977). However, the remaining studies were chosen in a more detached fashion. In any event, selection on the dependent variable should not be lightly dismissed this method can provide deeper insight into causal processes. Indeed, these episodes strengthen the two central arguments of the chapter rather than offer a Panglossian view of a noble and united legal profession.

The paper seeks to expand the methodological remit by including a quantitative content analysis of lawyerly discourse (only initial results reported here) and interviews with some key actors. Discursive methods help avoid one particular risk in using high profile cases. Such moments may be so politicized that cross-professional mobilization is unrealistic – political loyalties or national security concerns trump professional sensibilities. A focus on flashpoints may paper over the possibility of less visible but broader legal complexes that operate on second-order or more technical questions of political liberalism. To check this phenomenon, the parliamentary submissions and press releases of the Norwegian Bar Association were analyzed. Interviews also provide a deeper exploration of explanatory hypotheses. Hopefully, in the future, the research agenda could also move towards using experimental studies (as is common in other collective action research).

2. Towards A Political Theory of the Legal Complex

The current research program on the legal complex has been strongly shaped by historical sociology. This sub-discipline can be described as a 'two centuries old attempt by economists, philosophers of history and nascent sociologists' (and many doctrinal lawyers) to 'provide a *historically sensitive, yet generally applicable,* account of the emergence of industrial capitalism, the rational bureaucratic state, novel forms of warfare and other core features of the modern world' (Hobson, Lawson, and Rosenberg 2010: 3357). The field is certainly diverse and always in flux (Deflem 2007: 13-14) but its traits are unmistakable. It is marked by a certain sociological sensibility that gives preeminence to social relationships and structures as research objects and a qualitative methodology that is inductive, historically attuned, and oriented to identifying necessary and sufficient conditions for social change.

However, legal complex research suffers from some of common problems within historical sociology. The first is that the role of individuals is often shrouded by the focus on the systematic relationships among legal actors and diverse historical and institutions. While 'biography' is the third pillar of historical sociology alongside 'social structure' and 'history' (Mills, 1959), it seems to be the proverbial 'third wheel', easily lost as historical sociology moves into its comparative and international modes.[11] In many leading historical sociological works on law and rights, individual experience and agency are simply absent (Nonet and Selznick 1978; Kennedy 2006; Teubner 1983; Kennedy 2013).

In the literature on the legal complex, it is striking that almost all of the attention is devoted to establishing the exogenous factors for lawyerly activism; with individual motivation relegated to a mysterious black box of the unknown. Lucien Karpik regularly raises the question of motivation. Yet, his answer, regularly repeated by others, is always in the singular: it is the theory of the public spokesperson. On account of their symbolic legitimacy, lawyers can easily lay claim to speaking on behalf of the amorphous public.[12] However, even this notion tells us very little about

[11] Hobson, Lawson and Rosneberg (2010) acknowledge for instance that 'biography' and 'agency' may be lost when historical sociology moves into the international realm.
[12] See, e.g., Karpik (1998) and Karpik and Halliday (2011: 226).

the individual motivation – it is primarily an account of self-representation. On the precise issue of inner motivations, Karpik (2008: 488-89) simply throws up his hands:

> How is it that lawyers doing their work, which sometimes means opposing arbitrary power, are ready to take risks and sometimes extreme risks? Why are they not more neutral? More cautious? Of course risk varies with countries, with periods, with individuals. Depending on the countries/periods/issues, they will be few or numerous, they will be isolated or be part of collective action. In every case, the question remains.

This neglect of individual motivation is puzzling. Social and natural scientists have struggled with the puzzle of explaining collective action for almost half a century (see, e.g., Ostrom 2000; Pinker 2002, 2015; Persson, Rothstein, and Teorell 2013).[13] Moreover, answering the question of motivation seems essential in validating the theory of legal complex for political liberalism. If we cannot explain why lawyers mobilize, any findings must remain highly contingent. Facts do not a theory make.

The second problem with legal complex theory is the slippage between the empirical findings and communicated theory. On one hand, the leading researchers are very careful in setting out the contingent nature of the findings. For instance, the relative silences of lawyers when faced with national security claims or highly repressive regimes are regularly articulated. On the other hand, the initial hypotheses are regularly re-stated as a grand theory without conditions. One constantly stumbles across grand statements that "lawyers more or less intensively fought in favor of civil and political rights" (Karpik and Halliday 2011: 219); "Since the eighteenth century, Western lawyers have been activist in the creation, defence and development of individual rights"(Karpik 2008: 463); or that "lawyers could often be found leading the charge towards a new kind of politics – political liberalism" (Halliday 2011: 52).

The dissonance is also marked by a grammatical sleight of hand. Collective legal mobilization is frequently referred to in the *singular* not plural. Despite the carefully-defined temporally and relationally contingent organizational networks of lawyers (suggesting a plurality - legal complex*es*), authors repeatedly refer to '*the'* legal

[13] I will leave for now my speculation as to why the research program has developed in this direction but it is mostly due to its reaction against market-based theories of lawyers (which were nascent rational choice in orientation) and its emergence at a time when historical sociology was largely allergic to general theorizing and cross-disciplinary impulses.

complex, conjuring up a stronger and stable image of political lawyering and organization.

This criticism is not to discredit the attempt to extrapolate and generalize nor the inductive method. The attempt to universalize is a welcome break from the resistance to general theorizing in historical sociology in the 1970s and 1980s (for an overview of this trend, see Kiser and Hechter 1991).[14] My sense is that the problem lies in the under-articulation of the theory, initially or in light of the findings. This theoretical lightness makes it difficult to provide a coherent restatement of the hypotheses in light of the identified exogenous factors. The end result may be a problem identified by others with comparative historical sociology:

> Instead of relying on necessary explanations, historians are willing to use sufficient ones, in which an event is taken to be a natural outcome of a sequence. The structure of the arguments, therefore, tends not to be implicative (involving deductive logic), but conjunctive (involving the use of coherent narrative).

While legal complex researchers have demonstrated a heightened awareness of this causal trap, it may represent an embedded risk in the methodology.

This paper suggests that legal complex theory needs reframing but without subjecting its basic concepts to violence. The reframing proceeds in three steps, by identifying (a) the nature of the public good; (b) the form of lawyerly demand; and (c) the structural supply choices.

2.1 The Public Good - Political Liberalism in Context

In my view, it is reasonable to *assume* that lawyers would be inclined to support, and even struggle for, a limited public good such as political liberalism. As the Norwegian case study reveals, this discursive consensus emerged amongst many lawyers in the 19th Century and is entrenched in the Bar Association objectives. More recently, the secretary-general of the association stated that the "social responsibility" of advocates is to "defend and develop" political liberalism (M. Smith: 2015: 13). However, the idea is too rigid in its expression. It is both over-stated and under-stated while also being unnecessarily static.

[14] Karpik (2008) engages explicitly with those who might claim the results are too fragile for such extrapolation.

First, Halliday, Karpik and Feeley (2008b) include within political liberalism certain civil rights which have been subject to fierce contestation. In Norway and elsewhere, it is easier to find lawyers wrestling over rights to property and religion rather than struggling for them. It seems odd to expect lawyers to view torture and property expropriation on the same plane, particularly when property rights have occupied the center of ideological contestation in the 19th and 20th centuries.

Second, there is a sharp distinction to be made between rights as articulated in moral theory (abstract and often unencumbered) and rights as materialized. Once we move beyond a thin conception, disagreement over the content of rights might be reasonably expected amongst lawyers. This is evident in legal expressions (in which rights are regularly qualified); coverage (which individuals and groups are to benefit); and institutional embedment (policy choices over the best way to protect rights). Indeed, one reason rights are constitutionalized in the abstract is that it widens support (as well as making them more adaptable to historical change). Thus, we might expect that lawyers may disagree more regularly on the substance of political liberalism when it moves beyond the defense of core civil rights. Conversely, we might surmise that many lawyers could be sensitive to the inner core of many social and political rights, for example freedom from hunger or blatant vote tampering. It is notable that English courts constructed a basic right to subsistence in the face of severe limitations to asylum seekers rights;[15] a pattern common in earlier implied rights jurisprudence in Germany, Switzerland, Colombia and India.[16]

Third, the abstract concept of political liberalism ignores the role of law in shaping social and professional norms. Statutes, constitutions, treaties, judgments may sociologically legitimize certain rights and, through omission or heavy qualification, delegitimize others (Tushnet 1995; Arbor 2008; Stoutenborough, Haider-Markel, and Allen 2006). Producing symbolic effects is often a key objective of legalized norm

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[15] *R v Secretary of State for the Home Department ex p Adam; R v Secretary or State for the Home Department ex p Limbuela; R v Secretary of State for the Home Department ex p Tesema* [2005] UKHL 66 (House of Lords, United Kingdom).

[16] See BVERFGE 1, 97 (104), 1 BvR 220/51 (1951) (Federal Constitutional Court of Germany); *Hartz IV*, 1 BVL 1/09, 1 BVL 3/09, 1 BVL 4/09 (2010) (Federal Constitutional Court of Germany); *V. v Einwohnergemeinde X. und Regierungsrat des Kantons Bern* BGE/ATF 121 I 367 (Federal Court of Switzerland); T-002/92 (Constitutional Court of Colombia); *Sunil Batra v Delhi Administration* 1978 SC 1675 (Supreme Court of India). For a comparative discussion of this jurisprudence see Langford (2008).

production. For example, it is not radical to suggest that the European Convention of Human Rights has expanded the notion of political liberalism amongst European lawyers. The adoption of the very liberal 1814 Norwegian constitution may also partly explain the greater mobilization of Norwegian lawyers in comparison to their Nordic counterparts. Equally, the repressive law codes enacted during fascist occupations and influence may have shrunk, for some lawyers, the legitimate sphere of political liberalism.

These caveats suggest that political liberalism might be thought of as a construct as much as an idea. It may be less generalizable and more contextual (at the individual and national level) than previously imagined. As we shall see, these shades of grey are also important in understanding the level of lawyerly demand for political liberalism.

2.2 Demand for Political Liberalism

We now turn to the nature of demand. The key question to ask is why lawyers would be willing to engage in collective action for a public good in situations to self-interest or would involve costs that would incentivize free riding.[17] A way to proceed is to re-express this puzzle as a simple cost inequality or trade-off: The degree/intensity of collective mobilization by lawyers is a function of: (1) their individual motivations or preferences for political liberalism; and (2) the costs of mobilization, particularly of a financial and reputational nature.

Motivations can be loosely grouped into three categories: utilitarian interests, normative preferences, and identity markers. In thinking about political liberalism, the most constant motivation is likely to be normative. So I will begin there and flesh out the account with the other two more contingent elements.

In experimental and other studies, normative concerns figure prominently in the decisions of individuals to contribute to the public good (Knoke 1988). In the case of lawyers, such norms may be grounded in their individual ideological preferences or socially instilled values (including through the legal profession). In the case of

[17] Strikingly, the first era of collective action theory would not even necessarily accept the realist depiction of lawyers since rational, self-interested individuals were only expected to mobilise to achieve their common interests under strict conditions.

practicing advocates, these values may be more deeply embedded if, through their work for clients, they encounter the darker and arbitrary side of state power.[18] However, the scholarship demonstrates that the *intensity* of such normative preferences varies dramatically amongst individuals. Thus, even if we believe that social instilled values are the prime normative determinant of individual behavior, the transmission of such values may vary considerably between families, social groupings, and legal communities in an individual lawyer finds herself or himself.

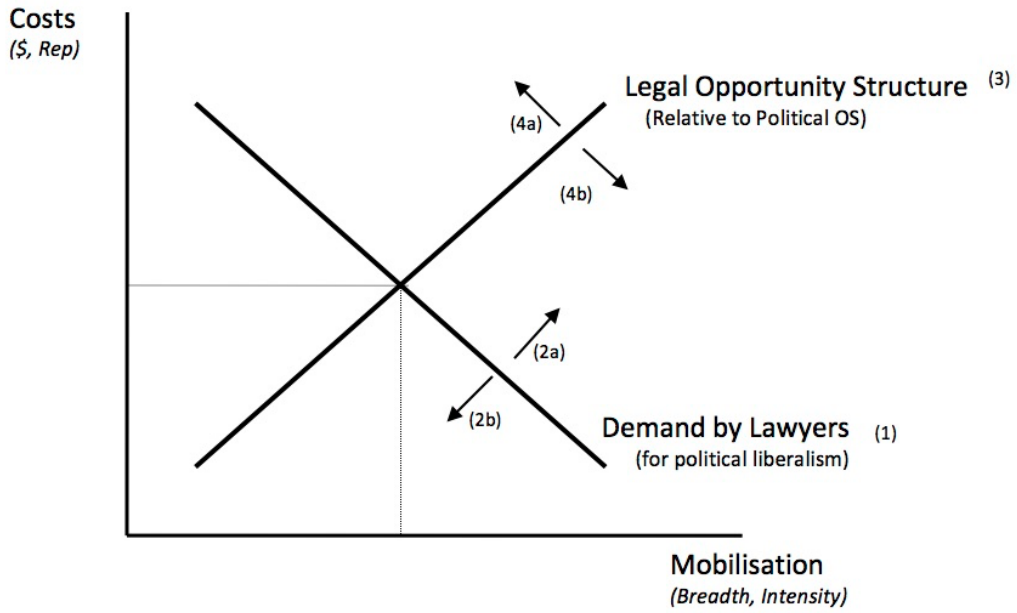
This variance in normative outlooks arguably affects the propensity of an individual lawyer to engage in action for political liberalism. We would expect lawyers with weaker preferences to abstain from mobilization when the costs are too high (or the issue too marginal). These costs might be financial and include loss of working time or dismissal from employment – a salient risk for judges and civil servants. The costs might be reputational. Negative perception among legal colleagues or family and social group members may dampen enthusiasm – and we know that status is a significant driver of human behavior (Weiss and Fershtman 1998; Rege 2008). The result is that the nature of *commitment* may vary considerable across the lawyerly spectrum.[19]

We can illustrate this commitment trade-off in a simple demand curve (1) in the following Figure 1. As the costs of mobilization increase (Y-axis), the degree and/or intensity of mobilization amongst lawyers falls (X-axis). This curve thus predicts many of the findings in the legal complex literature and in the following Norwegian study. It is very rare to find a fully united legal profession on political liberalism. With some important exceptions, legal complexes are either small or moderate and lawyers are often divided.

[18] This observation was made by Merete Smith, Interview of 6 January 2016. This idea is partly confirmed in Voeten's (2008) analysis on the role of professional background in influencing judicial behavior on the European Court of Human Rights.

[19] I think *committed* describes well the most active lawyers. Karpik (1998) also uses this term although to describe all lawyers who mobilize. The idea of a committed lawyer provides a nice distinction from cause lawyers who focus on particular issues for sustained periods. We would expect there to be more lawyers deeply committed to political liberalism than cause lawyers devoted to this issue.

Figure 1. Depicting A Political Theory of the Legal Complex



However, this demand curve may be sensitive to two other important motivations which may shift the curve outwards or inwards (2a and 2b in the diagram). First, *utilitarian* or rational choice approaches would point to strategic or personal advantages that lawyers might obtain by struggling for political liberalism. Cynically, we might think that championing political liberalism provides more space for remunerative legal work – particularly through greater civil society and market freedoms or the passages of new laws. However, this might also point in the opposite direction. Lawyers might worry that greater freedoms could permit other actors to encroach on their monopolies (in the market or in social stratification). Thus, this motivation might be highly contextual and historical contingent. Another cynical and utilitarian reason might be reputational. The public championing of political liberalism generates favorable publicity for the lawyers involved – and Karpik (1998) certainly hints in this direction. However, it may also generate negative publicity if lawyers are required to advocate for a highly unpopular cause without significant elite support. A final utilitarian interest might only work in a positive direction. Many lawyers may engage satisfaction in working for an altruistic cause and having a break

from their standard instrumentalized work routines.[20] A significant body of research demonstrate that sacrificial acts are often utility-enhancing (Pinker 2015: 73).[21]

Second, *identity-oriented* motivations - primarily based on group membership – may inflect the demand curve. This factor may be partly affective. Individuals are more likely to engage in collective action when "people experience fraternal, or group-based, deprivation" (Zomeren, Postmes, and Russell 2008: 505) or when they have established "affective bonding" through different activities (Knoke 1988: 316). Group action may also be partly strategic. Individuals engage in social competition in order to lift or maintain the status of the group (Zomeren, Postmes, and Russell 2008: 507). Thus, we might expect lawyers (as a whole) to be more committed to political liberalism struggles when members of their own profession or their elite grouping or class, or family/community are affected; and less engaged when other groups are the beneficiaries. The Norwegian case certainly provides some evidence. In moments of significant legal mobilization for political liberalism, the basic civil rights of Jews were overlooked or denied by the vast majority of lawyers. Moreover, the most-high profile and broad-based campaign by Norwegian lawyers in recent years involves contesting the low payments to lawyers working with free Legal Aid. The campaign is driven by notions of fairness and liberalism but raising salaries is also in the self-interest of lawyers and builds on group identity.

However, identity attributes are not static. *Engagement* in political action or *exposure* to concrete injustice may transform an individual's *personal* identity or connect them to the plight of the structural disadvantaged (Sturm, 2000; (Zomeren, Postmes, and Russell 2008). Some lawyers are particularly exposed to social realities and injustices, especially criminal defense lawyers and judges who have less control over their caseloads. The Marcus Thrane trial of 1855 in Norway reflects precisely such an individual transformation of a criminal defence lawyer.

[20] Merete Smith pointed this out to me in her interview.
[21] This is also a standard assumption in corporate social responsibility scholarship. Corporations that do not engage in responsible behavior or provide space for the employees to do so risk losing talented staff.

2.3 Supply of Opportunity Structures

Finally, lawyers must choose which strategies or repertories of action they will use to advance or defend 'political liberalism'. We can define legal strategies as lawyer-centric in which lawyers make use of their professional role or organize with other lawyers.[22] These would include:

- *Litigation* (case or trial is used by lawyers as a vehicle to advance political ends).
- *Direct action* (e.g., protests/marches, judicial/prosecutor resignations, strikes, work boycotts).
- *Lobbying* (e.g. petitions, submissions, opinion editorials).
- *Legitimation* (e.g. mediation, strategic presence of lawyers in action by others, third-party opinions, strategic use of legalistic discourse).
- *Awareness-raising* (e.g. education, materials, public speaking).

Yet, this choice of legal mobilization is conditional and relative. It is dependent on the openness of the alternative political opportunity structure (Hilson 2002). If the political opportunity structure is open and less costly, it is likely that lawyers will utilize these opportunities and forgo legal mobilization. Indeed, one explanation for any Nordic exceptionalism might be precisely that: a relatively open political space has obviated the need for lawyer-centric strategies. Figure 1 therefore plots a relative legal opportunity structure as a supply curve. If legal mobilization provides a relatively less 'costly' form of collective action, the curve will be further to the right and will be likely to envelop more lawyers (and vice-versa).

But what determines the choice of an opportunity structure? Three key elements can be named although it is unlikely that they are ever full objectively determined.[23] First, we would presume that lawyers would weigh the costs of any action: financial (including time) and reputational. Second, we can surmise that all actors would prefer to be *successful*. Costs will be weighted according to likely outcomes. Lawyers are

[22] This framework is partly drawn from political sociology of legal mobilization but is broader since it draws on the findings in the legal complex project and this study and seeks to incorporate all lawyers.
[23] It is thus preferable to speak of 'constructed opportunity structures' (Langford, Vibe and Kirkebø, 2016). The assessment of respective choices by lawyers may be swayed by the paucity of information, individual biases and the challenges of commensurability in weighing arguments (Blandhol 2011; Meyer 2004; Benford and Snow 2000; Lobel 2006: 17).

likely to be concerned with at least a narrow conception of success: e.g., a judicial victory versus new legislation. They may also take into account the likelihood of implementation and avoidance of backlash. Third, the level of *resources* (legal, financial, organizational, and human) and presence of *allies* may vary considerably between the legal/political spheres and across specific issues. Available resources and alliances are not only critical in determining costs and success, they may operate as condition precedent to any action: e.g. the existence of the right to judicial review or a relevant coordinating organization.

It is worth focusing briefly on this third aspect and the organizational resources of lawyer. Action through collective *structures* is a central concern of standard legal complex theory. A key question we should ask is whether organizational resources exist to mobilize lawyers, particularly reluctant lawyers (those further down the demand curve). Nobel Prize winner in Economics, Ellin Ostrom (2000), argues that this occurs when there are "conditional co-operators" who invest in accessing information and build inter-group trust. This 'activist' group needs support from "willing punishers", who are willing to invest time and reputation in to enforce the group consensus. If individuals of both psychological stripes are prominent or dominant in the legal profession, we would expect legal opportunity structure to be more open. Such intra-group solidarity is particularly critical when lawyers engage in high-risk actions such as strikes, resignations, petitions or when judges depart from strict legal positivism. Individual advocates, judges and civil servant lawyers can otherwise easily defect or dissent.

It is also at this juncture that the constructivist approach towards political liberalism is particularly salient. I may be overly pessimistic, but my general sense is that the influence of general legal training and professional ethics on the extent of a lawyer's pre-professional commitment to political liberalism is not particularly significant. However, the social norm of political liberalism may provide a very powerful force in mobilizing and demanding support amongst otherwise reluctant lawyers. If the social norm of political liberalism has been used to legitimate the legal profession or is part of the mandate of lawyer's association, this shaming process may be quite effective. Thus, invoking political liberalism may provide a way of embarrassing lawyers into action (or strengthening the underlying 'logic of appropriateness'(March and Olsen 1984)).

A final point to note is the choice between legal strategies. Bouwen and McCowen (2007: 429-30), in their study of choices of European companies between litigation and lobbying, found the counter-intuitive result that large companies and associations preferred lobbying while small companies preferred litigation. The cost-success ratio, however, made both choices rational. Similar results have been found in studying the choices of civil society organizations and trade unions in California.[24] Based on this finding, we would expect well-organized law associations of judges and advocates to leverage their power directly with the state through direct action and lobbying. Where this is not present, we would expect a greater degree of litigation, legitimation and awareness-raising activities that reflect a more diffuse and decentralized profession. However, where gains can not be made through lobbying, we would expect advocate associations to consider engaging in litigation.

2. Mercantilism and Monarchism 1623-1814

We now turn to the Norwegian case. The early development of the legal profession in Norway can be characterized as a peculiar dialectic between the demands and opportunities of emerging strong state mercantilism under the Danish crown.[25] In 1623 in the city of Stavanger, the legal profession was first formalized and defined by an order of the provincial court (Espeli, Næess, and Rinde 2008: 31-33). It was proclaimed that only a municipality could grant the title of |procurator| despite a royal letter in 1609 allowing any citizen to use the designation.

This local model was extended across the Kingdom in 1638 by a Danish Royal Decree and followed by a wave of regulation over the next two centuries. After 1666, a lawyer required royal assent to operate in major population centers and, from 1736, formal legal education. Regulation accelerated dramatically in the late 18th Century. In 1779, royal or assent or permission from provincial authorities was required for a lawyer to appear in a higher court, in 1784 only lawyers remunerated by the state could appear in higher courts, and from 1797, an additional assent was required to appeared in the highest two courts. By 1814, lawyers required appointment formally

[24] * Insert reference.
[25] This first part of this section draws heavily on Espeli, Næss and Rinde (2008: 18-61).

as a civil servant before they could practice and had to accept posting by the state to anywhere in the country, even if their practice was for private clients.

The initial objective of regulation was to control if not eliminate the rapid rise of lawyering. While formal rights to represent others in legal and other proceedings can be dated to the 1200s in Norway (as an *ombudsman*), the rise of a complex and hierarchical bureaucratic state together with a trading-based economy provided numerous opportunities for remunerative legal practice. The reforms of Christian IV in the 1500s were pivotal. They introduced a paper-based bureaucracy and a raft of new legislation, generating demands for specialized assistance from citizens. Opportunities for legal services also expanded rapidly in the commercial areas of debt recovery, delivery of goods and services, and shipping construction. And, courts began to proliferate (church, military, mining and eventually debt tribunals) with a shift to document-based proceedings, creating numerous opportunities for the development and deployment of legal expertise.

The initial reaction of both the authorities and public to the rise of lawyers was one of alarm. The many regulatory decrees and orders were often accompanied by a paternalistic reminder that self-representation was the most appropriate form of representation. The first reported paid lawyer, Matz Rytter, was accused in 1618 of pursuing needless litigation and inflicting on "innocent people" enormous "damage and destruction".[26] The uproar led to the King issuing a letter calling for his prosecution and imprisonment. A century later, Hans Villumsen Hoff was prosecuted for similar practices after a mass citizen protest. In 1723, he achieved the rare feat of appearing 123 times in court over 11 months for a few very simple cases. His strategy of perpetual requests for deferral of proceedings in order to enhance his fees was characterized by Norwegian historian Hilde Sandvik as the "rhetorical ballet" of many early procurators.[27] As with their English brethren at the time (Sugarman and Pue: 2003:2), Norwegian lawyers were the source of public consternation for their self-serving activity.

However, this regulation of lawyers had unintended consequences. It created a new and powerful monopoly of legal professionals. Economically, the procurators profited

[26] Sundt (1929: 438) cited in Espeli, Næss and Rinde (2008: 31).
[27] Cited in Espeli, Næess and Rinde (2008: 39).

deeply from their control of the market for legal services. By the end of the 1700s, the demand for genuine legal services far outstripped supply, particularly in the rural areas, allowing this new legal class to considerably expand its wealth. Politically, lawyers joined doctors and priests as a new powerful elite: the 'thousand academic families' (see generally Seip 1974; Neumann 2010; Myhre 2008). In the absence of an aristocracy in Norway, lawyers emerged as a core component of the bureaucratic, social and cultural elite. This was to have significant consequences in the breakthrough of full-bodied political liberalism in the 19th Century.

While the poor professional reputation of the early Norwegian lawyers was of Shakespearean proportions, some important observations should be made on their social role. Many procurators were not full-time advocates and some gained respect for their conscientious work. Moreover, the combination of the right to represent and the growing number of courts also provided a space to further develop the fledgling liberalism of Christian IV's reforms.

For example, in 1680, Tyri Litlasund was prosecuted for witchcraft with a demand that she face the drowning test.[28] The task of legal representation was given eventually to a historian, Tormod Torfæus, who approached the role like a modern criminal defense lawyer. Operating in accordance with legal process theory (Fuller 1978), Torfæus proceeded through step-wise rational arguments and submitted a range of concrete evidence. He argued that the charges were either based on vague testimonies and town gossip or given under the influence of alcohol (Titlestad 2001: 11). Torfæus demanded a full acquittal which, unusually for the time, was ordered by the provincial court (Espeli, Næess and Rinde, 2008: 37). As Næss (1982: 238-39) wrote on the trial: "At that moment, suspected witches obtained for the first time a professional defender who was capable of demonstrating inconsistencies and uncovering legal holes in prosecutorial evidence".[29]

Such a case study provides an early illustration of the potent structural power of courts to provide a space for liberal politics. Criminal trials provide a very particular space for a legal complex to emerge even if limited. Not only it one of the few

[28] As was the case elsewhere in Europe, if a bound and accused woman floated it was evidence of guilt and she would be later executed by sword.
[29] Cited in Titlestad (2001: 11).

opportunity structures for politics that often exist in authoritarian regimes, but it provides a legitimate space for lawyers and by its very nature raises questions of political liberalism such as due process and different freedoms.

However, it is not clear how widespread such actions were. Future research could examine the reactions of Norwegian lawyers to the bouts of Danish state illiberalism in the late 18th and early 19th Century in the wake of the brief liberal Struensee period. In 1771 the King's personal doctor, Johan Freidrich Struensee from Germany, assumed full royal powers as Prime Minister and issued a stunning 1800 decrees in sixteen months, many of them of a radically liberal character. Serfs were freed, torture and capital punishment abolished, and Denmark became "the first country to declare unlimited freedom of the press as official public policy" (Laursen, 2001: 191). The conservative backlash was swift and brutal. Struensee, compromised by his intimate relationship with the Queen, was executed and his reforms rapidly reversed.

When Frederik VI assumed power as regent in 1784 a gradual liberal reformism emerged but it soon gave way to new waves of illiberalism. Fears of the spread of the French Revolution reawakened the Danish censorship regime and critical voices were soon deported or punished (Alnæs 2013: 80). These cases could be closely scrutinized. Later in 1799, censorship rules were tightened, criminal penalties raised, and the monitoring of oppositional figures heightened – a pattern that only intensified during Napoleonic wars in the light of foreign policy sensitivities (Holmøyvik and Michalsen 2015: 153). Thus, despite the signs of change, "Denmark-Norway was an illiberal society" at the beginning of the 19th Century (Alnæs 2013: 81). Yet we might also expect lawyers joined in the critical respond to this authoritarianism. We know that many Norwegian jurists were taught in Copenhagen by the leading law professor and relatively liberal J.F.W. Schlegel (Mestad 2015) and the Danish turn to illiberalism strengthened the resolve of the Norwegian founding fathers in their constitutional convention to recognize civil rights and limited government (Alnæs 2013: 222).

3. Liberal Nationalism 1814-1884

3.1 The Constitutional Moment

It was in 1814, in a brief intermezzo of geopolitics, that Norway declared independence from Denmark, adopted a markedly liberal constitution, and created an elected parliament. While Sweden had gained Norway from Denmark under the January 1814 Treaty of Kiel, on account of Swedish participation in the anti-Napoleonic forces, an alliance of elite Norwegian civil servants, businessmen, free peasants, writers and the Crown Prince of Denmark sought to thwart the transfer in the spring of 1814. In the early summer, Swedish troops largely overpowered the undermanned Norwegian forces but a series of negotiations led to a compromise: Norway would maintain its constitution and parliament as part of a United Kingdom with Sweden and the latter would control defense and foreign policy.

This partial rebirth of the Norwegian state after four centuries under Danish rule was constitutional and proto-liberal. As Seip (1974: 70) states:

> [T]wo independent powers of state were juxtaposed: the parliament and the king. It was a basic principle that both powers would have to agree in order something to be decided. The arrangement was a split one. It was a state with two heads and two wills.[30]

The constitution thus created the structure for a *moderate state*. The King was physically separated from his cabinet, a parliament was introduced, the right to vote was partly expanded, and hermeneutic space was carved out for the recognition of judicial review. A partial form of bicameralism was introduced whereby a quarter of elected parliamentarians would sit as an upper house (*Lagting*) together with Supreme Court judges.[31] However, as Holmøyvik and Michalsen (Holmøyvik and Michalsen 2015: 225) point out, Montesquieu's theory of balanced powers bears only a partial imprint – notions of popular sovereignty were also deeply embedded in the structure.

The constitution was also replete with a set of *core civil rights* (partly inspired by the US Declaration: Mestad 2014; Michalsen 2015). Inspired by the American and

[30] Cited in (Neumann 2010: 241).
[31] This was effectively abolished in 1884 with the introduction of parliamentarism and formally abolished in 2009.

French declarations, the 1812 Spanish constitution, the writings of Kant, Rousseau, Voltaire and Adam Smith, and experiences with English liberalism, it included *habeas corpus*, protection against torture, freedom of expression and right to property. However, some of these rights were qualified. Incitement to illegal behavior, blasphemy, *lèse majesté*, and defamation was not constitutionally protected.

Lawyers were at the center of the constitutional convention, which met in Eidsvoll in April and May 1814. Of the 112 men elected from around the country, twenty-seven were advocates and judges (Alnæs, 2012: 212). Lawyers were also the dominant 'profession' amongst the powerful civil servant class (which totaled 57), with the rest of this group rounded out by priests, military officers and provincial governors. Finally, lawyers were the most prominent and influential force in shaping the constitutions. Advocate and judge Christian Magnus Falsen chaired the drafting committee, produced the first version of the constitution, and represented the dominant wing that wanted to appoint Danish Crown Prince as as an independent Norwegian King. The legally-trained Herman Wedel-Jarlsberg represented the 'Swedish wing' that pragmatically saw a peaceful union with the Swedish Union as the only realistic way to develop Norwegian freedom and sovereignty. Whether lawyers evinced more liberal tendencies that other groups is certainly difficult to say. On one hand, some of the most radical proposals emanated from lawyers. Seventy years before the principle of parliamentarism was instituted in Norway, Judge Wulfsberg from Moss was the only Eidsvoll delegate to propose and vote for the motion that the cabinet be elected by the parliament rather than a King (Bolin 2009). On the other hand, lawyers were amongst those who proposed to add a constitutional provision banning Jews from entering the Kingdom of Norway – flying in the face of European trends to recognize the civil rights of Jews. Some lawyers such as Wedel rallied against the proposal as "illiberal" (Fure and Mykland 1989: 51) but he was also joined by some equally indignant priests such as Ulrik Midelfart (Alnæs, 2013: 226). When it came to the general civil rights provisions, these all sailed through the convention with little dissent and peasants were vocal champions of some civil freedoms than lawyers.

Moreover, caution is needed in designating certain delegates a 'lawyer'. Some might be better labeled as politicians or polymath renaissance men. The 36-year old Wedel was legally trained but he also was one of the richest men and leading business

figures in the country; served as the private secretary to the Danish finance minister (1801-1805): was a provincial governor (1806-1813); led a militia in the war against Sweden (1808); co-founded the ambitious Norway's Welfare foundation to promote Norwegian economic and intellectual development (1809); and was a member of the Government Commission (1809). It is not the customary curriculum vitae of an advocate or judge.

Thus, overall, it is difficult to conclude that lawyers as a group at Eidsvoll were particularly more liberal than other representatives. However, the constitution does partly owe its character to a certain conjunction: the leading lawyerly figures and draftsmen could be counted amongst the most liberal delegates at Eidsvoll. It this conditional and historical intertwining of agency and structure (demand and supply) that allows the claim that a peculiar legal complex mobilized for political liberalism at Eidsvoll. It is this conjunction of biography and place that partly explains later moments in history when a Norwegian legal complex emerged *for* political liberalism.

3.2 The Lawyer's State

Lawyers were certainly dominant at the center of the wave of subsequent economic and political reforms gave life to these constitutional guarantees (Larsen 2013; Mestad 2008; Slagstad 1998). In a short period of time, Norway moved from a mercantilist economy dominated by royal privileges to a liberal market economy, although one partly guided by the state and one with a heavy emphasis on rule of law and other basic freedoms (Slagstad 1998). It was driven by the powerful elite of civil servants (*embetsmenn*): the 'thousand academic families' or the 'authorities' (*øvrigheten*). Often foreign-born and always university-educated, this elite dominated the running of government until the late 19th Century and parliaments until the mid-19th Century (even when they constituted a minority) (see generally Seip 1974; Neumann 2010; Myhre 2008).

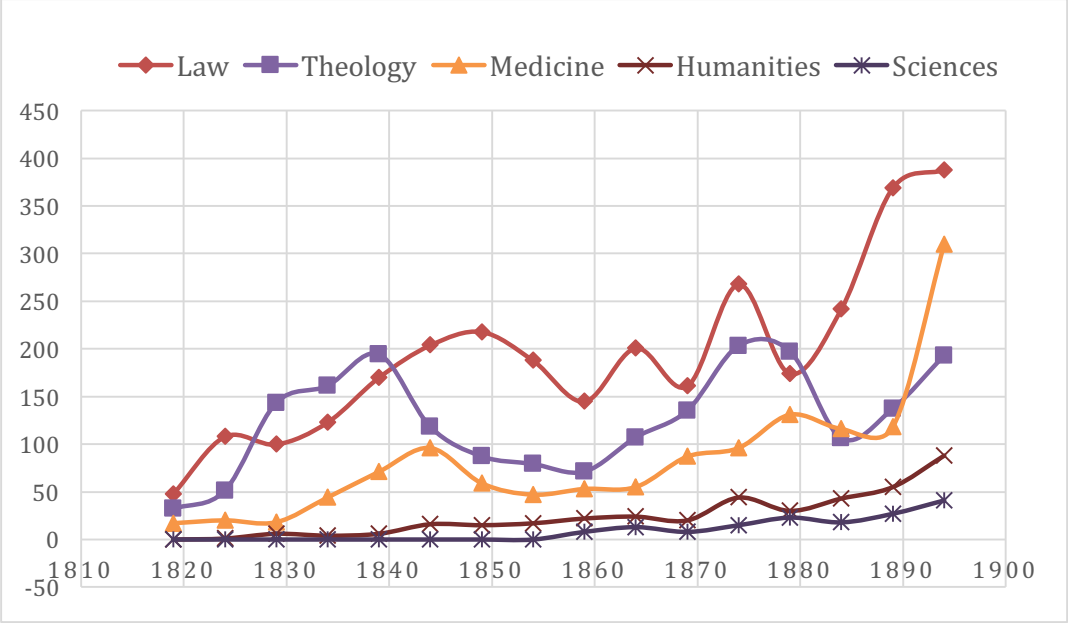
Three particular circumstances permitted this elite to exercise such extraordinary power: (1) the absence of an aristocracy in Norway (and its constitutional banning in 1821); (2) the collapse of the commercial sector in the wake of the Napoleonic wars; and (3) the vacuum of power created by the new constitutional arrangements. To this we might add the high level of literacy of the Norwegian population, particularly

amongst peasants, which permitted this University-educated elite to wield, initially, a significant degree of discursive power.

This caste was principally constituted by three professions - lawyer, priests and doctors – and to a certain extent military officers. Of these, the former was perhaps the most powerful: "The jurists dominated the government totally" (Myhre 2008: 27).

This dominance was partly a function of education. Figure 2 shows the annual number of graduates for different disciplines in the 19th Century and the overwhelming proportion of law graduates amongst academic disciplines.

Figure 2. Graduates – By Faculty: 1814-1895



Source: Raw data extracted from Aubert (1960: 15).

However, legal power was also a result of the exercise of political and social capital. Two examples are telling. First, throughout the mid-19th Century, civil engineers complained bitterly that transport was allocated to the Ministry of Justice (Slagstad, 1998: 39). To rub salt into the wound, lawyers dominated the entire planning and management of roads despite their evident lack of qualification. Second, at this moments lawyers also dominated parliament - both the pro-government and oppositional wings. In 1851, Johan Sverdrup, a practicing advocate and politician, went as far as to propose the establishment of an Advocates Party, which would unite

the many advocates in the parliamentary opposition and form a united front with the oppositional peasants in parliament (Libell 2008: 44). Like all attempts at party formation at the time (Seip 2002b: 74), the proposal faltered. Nonetheless, the idea of a political party composed only of advocates is possibly a historical first.

This dominance of lawyers in the civil service and in parliament was complemented by 'professor-politicians', often drawn from the University of Oslo law school. Of the four most powerful and influential political figures of the 19th Century, two were life-long law professors (Anton Martin Scheweigaard and Francis Hagerup) and a third was a professor and also advocate before entering politics full-time (Frederik Sverdrup). It was only the advocate Johan Sverdrup who did not deign the halls of Domus Akademika. Two of these academic figures functioned as a formidable political partnership: Scheweigaard (the dominant government-aligned figure in parliament from 1842 to 1869) and Stang (who served as First/Prime Minister from 1861 to 1880 but exerted considerable power from the moment he entered the civil service in 1846).

This elite was deeply committed to a project of political liberalism:

> [While] some of them participated in businesses, as partners, investors or experts, … Their major involvement in the economy in the 19th Century was of another kind. As the effective political rules in the early and middle decades of the century, they saw it as their task to prepare the ground for economic modernization. As economic liberalists, they did away with old economic privileges to encourage economic enterprise. (Myhre 2008: 28).

The elite commitment to political and economic liberalism was partly based in self-interest. It would constrain the power of the Swedish monarch and build legitimacy with the governed, which were even more seduced by ideas of romantic and popular nationalism. It was also driven by a European-shaped enlightenment perspective, partly idealistic but also deeply culturally embedded. Neumann (2010: 242, 53) highlights both these instrumental and norms based drivers. As the "civil servant state was a state of law" when "dissenting voices quickly surfaced they had to be met by discursive moves, not force". And, in discussing the later challenge of romantic and popular nationalism to the civil servant state, he notes:

> What the bearers of the statist representation feared above all was isolation – that Norway in its hankering after what specifically national should instead end up as a province cut off from the rest of European civilization.

Importantly, law had a double-edged role in this process of state-building as represented in the philosophy of Scheweigaard and Stang (Slagstad, 1998: 26-36). Law was partly viewed as an intrinsic good – the rule of law and associated rights served a constitutional function in sharing and limiting power.[32] Yet, law was also viewed instrumentally. Along with technical and educational competence, legal knowledge and techniques were to help modernize one of the poorest and underdeveloped states in Europe – foreshadowing a vision to later emerge in the social welfare state.

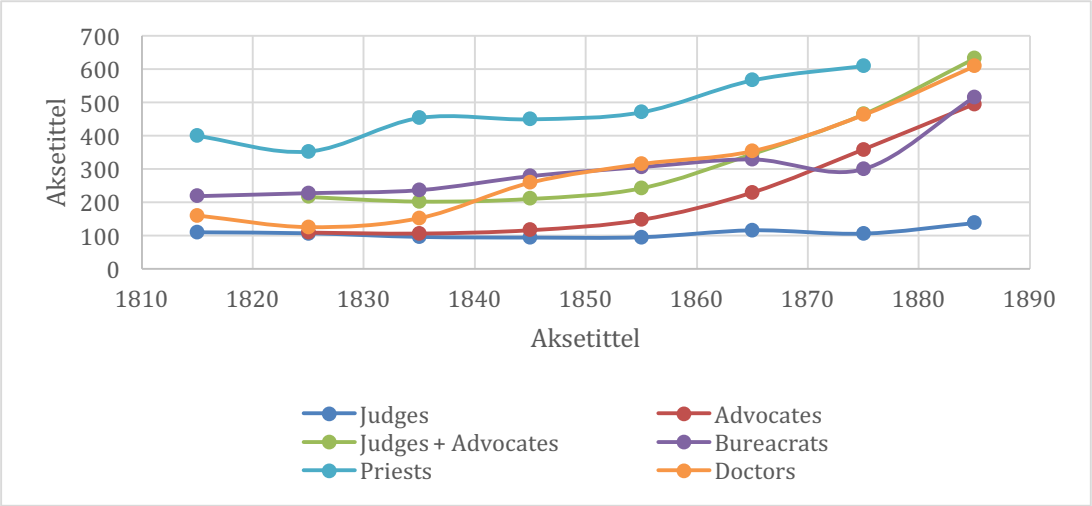
However, this lawyer-dominated state cannot really be described as a manifestation of a legal complex. While many lawyers did *practice* law they exercised their political power through *other positions*, as government ministers, parliamentarians, civil servants. In other words, elite lawyers used the political opportunity structure which was very favorably disposed towards their participation. There was no need to use legal opportunity structures when lawyers could simply advance their liberal politics directly. Norwegian lawyers formed, so to speak, *the* political complex.

3.3 The Judiciary and Advocates

Thus, a more theoretical coherent approach would be to examine the politics of judges and practicing advocates. As Figure 2 shows the number of permanent judges was relatively stable throughout the 19th Century – approximately a hundred at any one time. The number of advocates increased rapidly during the century for reasons to be discussed below – from a mere hundred in 1825 to five hundred by 1885. By the end of the century the bar and bench outnumbered priests and almost military officers (the latter is not shown).

[32] Both conceptions of law were underscored by an early legal positivism, particularly in the writings of Scheweigaard (Slagstad 1998). While Hagerup defended German idealism and natural law a half-century later (Blandhol and Michalsen 2007, especially 46-64), this modern approach to rights may explain some of the freedom and pragmatism in legal thinking in the 19th Century but also the reluctance to use the full range of judicial review powers.

Figure 2. Occupations: 1815-1885



Source: Raw data extracted from Aubert (1960: 16).

Judges

In the post-1814 period, the judiciary was comparatively active. Like its American cousin, the newly-minted Norwegian constitution was ambiguous on the powers of judicial review but this did not halt the Norwegian Supreme Court in assigning to itself the power to invalidate legislation contravening the constitution (Smith 2010: 1-2). A mere nineteen years after the 1803 judgment of *Marbury v. Madison*,[33] the Norwegian Supreme Court first exercised its power of judicial review. The cancellation with retroactive effect of the rights of certain civil servants in Trondheim to auction copper was found to violate constitutional rights on property expropriation and non-retroactivity (Hølmoyvik and Michalsen, 2015: 334-335). To avoid a formal conflict with parliament, the relevant constitutional provisions were read into the law.

This judgment and its successors were undoubtedly influenced by the American experience but they were equally a product of indigenous factors in Norwegian political and judicial development (for the background, see Slagstad 1995: 82-84).[34] Initially, the Norwegian court largely issued brief formal conclusions although these were the subject of public and legal debate (Slagstad 1995) and in 1866, in the *Wedel Jarlsberg* judgment, the Chief Justice formally articulated the grounds and method for

[33] *Marbury v. Madison,* 5 U.S. 137 (1803) (U.S. Supreme Court). However, state courts in the United States had exercised this power much earlier: see Friedman (2009).
[34] See also Hølmoyvik and Michalsen (2015: 339-346) and (Kierulf and Slagstad 2012).

exercising judicial review.[35] However, this willingness to exercise judicial review was not necessarily oriented to limiting state power. The Supreme Court increasingly aligned itself with parliamentary conservatives and, as the next section shows, they were not always unable to defend core civil rights in controversial cases. One might speculate that the court's motivation was dampened by their closeness and identification with the ruling elite.

Advocates

As the century drew on, advocates began to grow in number and influence. In the period 1814 and 1829, only fourteen per cent of law graduates worked as advocates – a proportion that rose to 35 per cent by the end of the century (Auber: 1960: 23). Their general influence is reflected in Aubert (1960) crediting of them with creating the conditions of trust between the new institutions and citizens and within commercial and social life.

As to political liberalism, it is possible to find again high profile criminal defense cases in which a concern for due process and civil rights trumped political consideration. The most notable illustration was the engagement of the high-profile, sharp-tongued, and deeply conservative lawyer, Bernhard Dunker. In 1845, he had written the provocative tract, *On the Norwegian Constitution*, calling for an increase in monarchial power and an absolute royal veto over all law in the absence of any express constitution exception (Lorenz 2009). Yet Dunker was also Norway's leading criminal defense lawyer, undertaking 800 cases before he was later appointed crown attorney. Most notably he defended the nascent labor movement, which was accused of treason.

Under Marcus Thrane's leadership, a local union of 160 rural and urban workers in 1848 grew rapidly into a national organization by 1950 with a critical and satirical magazine, *Arbeiderforeningernes Blad* (Seip 2002a: 183-206). In that year, the national union delivered a petition with 13,000 member signatures to the King and the parliament. It demanded universal voting, mandatory military service for all classes of society, equality before the law, better schools, reduction or elimination of custom

[35] Wedel Jarlsberg-case, *Ufl 1866 p. 165* (Supreme Court of Norway).
See further Smith (2009: 43, 311-12), Slagstad (1995: 96-98) and (Hølmoyvik and Michalsen, 2015: 334-335).

taxes on staple crops and cheap loans to poor farmers for land grants. The petition was dismissed and in the following year the union's national conference sought a revolution. While Thrane halted these insurrectionary plans, the authorities seized the opportunity to arrest him and 132 members.

Bernhard Dunker engaged himself deeply and publicly in the case, which eventually came before the Supreme Court in 1855. Dunker's final submission lasted nine days and amounted almost to a prosecution of the authorities themselves rather the reverse (Espeli, Næss and Rinde, 2008: 97). Despite the imprisonment of Thrane for another four years, the case captured the entire nation: 'The courtroom, court hallways and stairs were full of workers, their wives, children and relatives and in the *Christiania Daily*, Ludwig Kristensen Daa claimed that the whole nation followed every moment' Østvedt (1940: 50).

Dunker`s unrelenting legal defense of his political enemies not only strengthened the rule of law materially but contributed to a deeper public understanding of its meaning according to some authors. In his biography of Dunker, Østvedt (1940: 50) makes the following 'psychological' observation:

> In education, experience and sympathy, he stood on the side of the privileged, but his fanatical sense of justice was outraged by the arbitrary treatment meted out to the defenseless workers and their case.

This sense of justice was clearly part of Dunker's individual psyche but it is notable that he was also a student and fervent admirer of Stang (Østvedt 1940: 17, 27-29). Stang's modernization of legal theory may have found fertile ground. However, the case is also an illustration of the effect on lawyers of encountering concrete and state arbitrariness and their greater motivation to struggle for political liberalism. (Østvedt 1940: 50) notes that the arch-conservative Dunker moderated his political views moderated in the wake of the case.

This engagement of criminal defense lawyers in the 19th Century for political liberalism cannot be isolated to single case or lawyer. Legislation to establish child welfare boards (pass in 1900) was driven by two professional groups: teachers and lawyers. According to Aubert (1989: 73):

> Many criminal lawyers disliked the practice of putting wayward children in prison. They were troubled by the plight fo these children and were concerned

> about h ekind of influences they were exposed to in prison. They wanted children removed from prisons and responsibility for them transferred to other agencies.

This drive by lawyers to narrow the use of the criminal justice system to solve problems of juvenile delinquency is notably liberal. However, it is also colored by a broader sense of justice. As Aubert (1989: 72) reflects, it represented again the instrumentalization or positivization of law – where law was to be used for the 'optimal pursuit of goals with the most effective means'.

Nuancing the Account

This positive narrative of the bipartisan contribution of advocates to political liberalism in the 19th Century requires nuance and contingency. First, other political actors must be named. The liberal ruling elite was supported and superseded by a distinctive Nordic group, the free peasants. For reasons of pragmatism and principle, this group represented a peculiarly powerful force for political liberalism in Norway and other Nordic states. As Bo Strath (2004: 9) has argued:

> The figure of the peasant, constructed by intellectuals and clergy with a view to defusing the conflict between freedom and equality, was not just a romantic fiction with no relation to the real world, but an increasingly active participant in economic and political processes. In most other parts of Europe, the peasant was a more utopian figure, eliminated from political processes and revitalized on the level of rhetoric. In more specific terms, the Nordic peasant was too conservative to be radical but too radical to be conservative.

Steeped in Lutheran traditions and schooled in the democratic protestant politics of local parish meetings, the farmers "expressed specific educational ideals" and "individual-oriented Protestant notions like responsibility and ethics, rather than holistic collectivism" (Ibid). In the absence of an aristocracy in Norway, these attributes made peasants partners with the civil servant elite in struggling for political liberalism but eventually the key actors in an oppositional movement that would displace this ruling elite and drive political liberalism further in the second half of the 19th Century. Indeed, the literature is not unanimous on the extent of the initial power of the civil servant state. Some argue that power was shared with economic elites or that civil servants were absent from some spaces such as employer-employee, producer-consumers, farmer-crofter relations.

The second wrinkle is that in major battles for political liberalism, the legal profession was divided rather than united – as foreshadowed in the discussion of theory. Lawyers formed an important part of the emerging oppositional movement to the civil servant state as much as they constituted it. As Myhre (2008: 28, 34) notes in passing:

> [A]n open public sphere flourished from the 1830s on. Civil servants and other academics (University-educated) founded nearly all the contemporary newspapers and journals in the first few decades. Many of the founders were oppositional academics, who were sometimes joined by men from lower echelons of society, eager to point out how civil servants abused their position in society.

Many of these "oppositional townsmen" included "artisans" and "barristers" (ibid.). The former, mostly novelists, gained the most public attention but the latter provided editorial capacity and regional breadth. One remarkable feature of this oppositionalism was the role of lawyers in newspapers which blossomed from the 1850s. In the period 1850-1940, sixty newspaper editors were practicing advocates (Espeli, Næss and Rinde, 2008: 133-136). Considering that Norwegians were and remain voracious readers of newspapers, the influence wielded in this role cannot be discounted. Again, however, structural reasons seem important in explaining this peculiar role of lawyers in creating new spaces for political liberalism. In the civil servant state, lawyers were forcibly posted throughout the country. With their superior education and independent role, were intellectually and institutionally able to fulfill a demand for a free press.

This oppositionalism and the divided nature of the legal profession also expressed itself in some of the flashpoints in the second of the 19th Century. Sometimes the legal profession split down clearly political lines. In the Marcus Thrane case for example, the lawyer-dominated parliamentary opposition was frightened by the radical rhetoric of the worker's movement. While it might be true that Thrane had tactically erred in petitioning the government instead of building alliances with the opposition (with whom they shared some common causes) (Seip: 2002a: 201-205), the silence of many lawyers in the face of repressive state behavior is startling.

Across the mainstream political axes, this division amongst lawyers was also manifest. In Norway's second constitutional moment in 1884, the conservative civil

servant alliance suffered its most significant political setback, full parliamentarism. The parliamentary majority was to appoint the cabinet rather than the King and bicameralism was effectively abolished. Despite always possessing a minority of parliamentary positions, elite civil servants had dominated the cabinet and were aided in the 'upper house' by non-elected members.

In this constitutional dispute, lawyers were divided. The political parties that formed around the cleavage with the civil servants forming the now conservative *Høyre* (Right) and the oppositional liberal nationalists *Venstre* (Left), reflected the politics of the preceding few decades. This "left" alliance included not only teachers, farmers, small businessman but also oppositional lawyers and its main figure, as earlier discussed, was the advocate Johan Sverdrup. Its emergence was supported by social and economic forces. Teachers and peasants gained university education and political and social capital; commerce recovered and a new business elite reasserted its earlier power; and most lawyers could not secure civil servant positions.

Shortly, the new Venstre led government was able to finally implement reforms to to criminal justice system which had been demanded since the 1840s. The so called 'jury reform' of 1887 moved criminal proceedings from an inquisitorial mode of proceedings to an adversarial one, created a separate prosecutor's office, introduced a full jury system, and shifted the burden of proof. The reform was largely opposed by the lawyers in Høyre who defended the old system. While an inquisitorial system is not necessarily less liberal, the package of reforms was more liberal in its orientation as state power was diffused and the trial system partly democratized.

Likewise, these forces were split over the legal profession's monopoly, which had significant consequences for access to justice and by extension the rule of law. As early as 1815, proposals were made to the newly-instituted parliament to remove the mandatory requirements of royal assent and civil servant status. Instead it was argued that lawyers with the requisite training should be able to compete on the open market for legal services on the basis of their merit. The frustration with the monopoly was two-fold: Farmers and rural areas lacked access to lawyers, physically and financially, and the number of unemployed law graduates was steadily rising. Despite the ideological commitment of the civil servant elite to the dismantling of mercantilist entitlements, the removal of their own legal privileges was a bridge too far. After

oppositional forces gained a majority in the parliament in 1855, the civil servant-led cabinet was force to concede; although it took another twelve years before the right to appear before Supreme Court was opened. The law was groundbreaking with its new title of *sakfører,* superseded by *advokat* (advocate), and has been hardly amended in the last century and a half.

In other instances, the liberals and conservative wings of politics were strongly united in resisting political liberalism, particularly on civil rights. It was left to very small collectives of lawyers to defend radical positions against the establishment. A good illustration is the censorship of the 1885 novel of *Fra Kristiania-Bohêmen* of Hans Jæger. The leading character not only freely philosophizes but ends his days with prostitution and suicide. The book was banned immediately and Jæger was fined and imprisoned for sixty days imprisonment for infringing modesty and public morals and engaging in for blasphemy. Both the conservative and liberal parties condemned the book and the emerging advocates society made no public comment.

The oppositional voices in this instance were intellectuals (which emerged as the Bohemian movement) but also some lawyers. Ludwig Meyer, a lawyer and leading political figure in *Venstre*, was already an active participant in political debates (Terjesen 2009). He vigorously defended the case in the Supreme Court. Although the case was lost, the group of lawyers around Meyer were actively involved in the debate and went on to establish the Society for Free Legal Services a year later. Meyer also broke with *Venstre* and joined the social democratic movement, published a workers' magazine, and became the first Chairman of the Labor Party in 1897.

4. Social Liberalism and Welfarism 1884-1980

In the century from the introduction of parliamentarism, it is notable that the visibility of lawyers declines dramatically even if their numbers increase dramatically. Lawyers participation in parliament and cabinet dropped, their role as newspaper editors steadily declined, and the vast majority of lawyers were consumed by remunerative opportunities. Commercial lawyers profited from their leading role in debt recovery, real estate and bankruptcy and eventually administrative law while the emerging social welfare state provided employment for numerous law graduates even if it was

to be dominated by economists and engineers post Second World War (Espeli, Næess and Rinde, 2008).

On one hand this, might not be viewed as not problematic for the legal complex theory. Norway had entrenched political liberalism and could move in a Marshallian direction through to the advancement of expansive political and social rights. Such progression involves a widening cast of actors, which not struggle for the rights but partially displace each other in the process. Along such a trajectory, we might expect *lawyers as a collective* to gradually disappear from the narrative, only to emerge when political liberalism was under threat. To put it another way, the very success of lawyers in struggling for civil rights paved the way for their political demise as the expansion of the franchise (political rights) and then welfare state (social rights) required lawyers to partly relinquish power and influence and/or become servants of the newly configured state.

This underlying strength of political liberalism and the new role of lawyers may be evident in the approach of the Norwegian Supreme Court to the Nazi occupation and Quisling (see generally Graver 2015a). The Court would not bow on fascism in 1940 and many Supreme Court justices joined the resistance and its leadership, which was dominated by the Labour Party. The statement of one of the former justices, Berg, captures best this dialectical understanding on the role of law and lawyers in the Marshallian transition: "We shall build up again old rule-of-law state, but our times demand that the State does not only have the task of protecting life and property. The State shall and will be a welfare state that has its task to make life worth living for us all." And, while many advocates and judges collaborated with the Nazis, their respective associations resisted the ever-expanding Nazification of Norwegian law and legal institutions. The Bar Association was particularly active in its protests which led to the arrest of their leader and their eventually dissolved by the authorities in July 1941 along with many other associations (Graver 2015b). However, the association continued its activities underground, communicating with its members (with news, commentary, and urging of resistance) and cooperation with other underground resistance movements.

However, the risk of this view is that overlooks the many challenges and conflicts over the ongoing development and defense of political liberalism in the 20th Century.

The transition to social democracy meant that some dimensions of political liberalism would have to bend. The most notable and obvious was the right to property. Norwegian jurists were well aware of the American judiciary's attempt to hold back social reforms (Helgadóttir 2006). They were deeply divided over whether law should serve as an instrument of the emerging social state or a firewall. One view of the development of Scandinavian legal realism was that it was an attempt to rein in conservative lawyers and naturalistic and formalistic ideas of rights. Removing the metaphysical and rights dimensions would ensure that lawyers became implementers rather than interpreters of the law.

The rupture came to a head in a major case concerning expropriation of hydro operations after the expiry of a concession. The law was passed by a *Venstre*-led government but drafted by the Minister of Justice, Castberg, a prominent lawyer from a more left-leaning party. The law was particularly targeted at foreigners who were beginning to invest in Norwegian hydroelectric power. However, Castberg defended the law on a general basis: the right of all Norwegians to benefit. Indeed, it was opposed by the right-wing on principled grounds – as a threat to the market economy. Not only was *Høyre* deeply opposed but many lawyers across the country were particularly prominent in denouncing the law. The matter ended in the Supreme Court eight years later in Rt. 1918 s. 403, and a narrow majority (thanks to some branch-stacking by the social liberals) finding that the law did not amount to expropriation. While the general principle of judicial review retained, the case was representative of a number in which the Supreme Court moved to a distinctively deferential model of judicial review (Holmøvik and Michalsen, 2015: 348-359).

The faultline was raised again in 1952 when the Labor-led government moved to give itself full price and ration-setting powers (Espeli, Næss and Rinde, 2008: 347). *Høyre's* leadership raised the prospect of invoking constitutional rights before the Supreme Court while commercial-oriented lawyers strongly agitated against this move to "full powers". However, the matter was resolved after the Labor Party withdrew many of the controversial proposals. Of interest, the historian Francis Sejerstad has suggested that *academic lawyers* and a *judge* associated with the Labor party had worked behind the scenes to convince the party to scale back some of the absolute powers granted in the law.

Second, the idea that political liberalism was otherwise deeply rooted or did not require development is deeply problematic. Across the 20th Century, it is possible to find numerous instances of abuses of the rule of law and core civil rights. Travellers and Roma minorities and the Sami indigenous people were the target of a broad range of coercive assimilation social policies; children placed in foster care and orphanages were subject to systemic abuse; and social democratic party cadres and trade unions engaged in extensive illegal surveillance of citizens on the political left wing(Minde 2003a; Langford and Karlsson Schaffer 2014).

Even when these issues gained national attention, lawyers were slow or reluctant to mobilize. In 1950, the Labor government proposed a new security law that included detention for 3 months for suspicion of certain crimes, censorship during armed conflict, and speedy implementation of the death penalty when ordered by the special court for treason offences. The Bar Association confined itself to protesting only against a few provisions (with very procedural solutions) as did some academics. However, it was a public opinion backlash that helped motivate or support leading lawyers in the conservative *Høyre* party to work for a compromise in the parliament's justice committee. Once again, the spectre of rights interfering with national security concerns seem to dampen lawyer's enthusiasm for political liberalism and/or raise the reputational costs of struggle.

In the *Liste-saken*, the close connections between lawyers and the dominant parties on national security questions was even more evident Espeli, Næss and Rinde, 2008: 352-5). In July 1977, the Socialist Left's party newspaper disclosed details of secret Norwegian surveillance in the 1950s. This was followed by an announcement on 1 August 1977 that the newspaper would disclose the names of 600 Norwegian secret service agents and staff. On 9 August their offices were raided by police and one of the journalists, Teigene, who was later convicted, was interrogated extensively without a lawyer present. The elderly leader of the parliament justice committee, Unneberg, a lawyer and member of the centrists farmer's party, criticized the police for "fascist tendencies" – to which the Crown Prosecutor, Dorenfeldt, responded by asking a local prosecutor to charge Unneberg for defamation.

The legal fraternity rallied largely behind the police *not* Teigene. The leaks and threatened leaks were viewed by the vast majority of lawyers as unacceptable attack

on the general political consensus on security policy and membership of NATO. Only a small group of lawyers were willing to name the issues of liberalism and due process at stake. Teigene's defender called the arrest politically motivated – an attempt to destroy the emerging Socialist Left party. A meeting of 16 lawyers on 23 August 1977 resolved that the rule of law had been undermined and called in sharp language for the resignation of Dorenfeldt. Two days later they also created a rival law association: the Free Defenders Society.

On the 24 August, a competing meeting of 111 lawyers was called to draft a statement expressing full confidence in the actions of the prosecutors. Despite the requests of some present for a mention of the importance of due process, it was not included in the counter-statement. The Bar Association was paralyzed by this division but was captured by the conservative grouping. The association did not mobilize for the counter-statement, but its leader and secretary-general were amongst the remarkable 1100 lawyers who signed and there are questions over how the membership list was obtained. This vignette leaves us with perhaps the most visible indication of the absence of any clear or full legal complex in the period. Not only were lawyers deeply divided across various political faultiness, a petition was signed *en mass* by lawyers was dismissive of due process. The eventual judgment of the Supreme Court on the four journalists was very mild raising questions about the ferocity of support for the prosecutor authorities.

5. Globalization and Legalization 1977-2015

5.1 Structures and Legitimation

While the Norwegian legal profession was relatively divided and invisible in the social welfare period it has undergone a significant change in the last forty years. The background ideational and structural conditions resemble the 19th Century with the return of Europeanised frames and legal frameworks together with concerns over minority protection. Dense legalization within a complex global economy has led to a vast expansion of the commercial legal enterprise while the return of constitutionalism (including anew bill of rights in 2014) and the rise of international human rights law has provided a new superstructure for advancing and defending political liberalism – the boomerang effect of new state commitments (Christoffersen

and Madsen 2011). These changing conditions have simultaneously legitimated deeper and broader forms of political liberalism as a lawyerly goal and widened legal opportunity structures.

In 1976, the Supreme Court in the *Kløfta* case signaled by a narrow majority a return to a more robust form of judicial review, especially in cases concerning core civil rights.[36] The court moved slowly over the next few decades in enforcing this new approach but it has has made landmark decisions, such as on the rights of asylum seekers and retroactive application of the law. While there remains a divide in the Court over its appropriate role, there is a significant openness to questions of rights.

The Court was partly pushed in this direction by the European Court of Human Rights. In 1952, the first and rather solitary case from Norway, on military service objection, was dismissed by the Strasbourg Court on admissibility grounds - case was manifestly ungrounded. However, the European Court of Human Rights underwent a decisive shift in its jurisprudence in the mid-1970s and Norwegian lawyers gradually noticed. Between 1980 and 1992, they cited Strasbourg jurisprudence in 47 cases before the Norwegian Supreme Court and sent approximately 100 cases to European Commission on Human Rights (Espeli, Næess and Rinde, 2008: 349), even if both strategies initially had little impact. In 1992, Knut Rognlien became the first Norwegian lawyer to win a case in the European Court. This signaled the beginning of a rise of cases from Norway (with different law firms and sometimes NGOs specializing in different sorts of cases) and the more active application of the European Convention by the Norwegian Supreme Court.

5.2 Mobilizing lawyers

However, there is one crucial difference from earlier periods. It is that the lawyers most committed to political liberalism (the agents) have enhanced their mobilizing power in *non*-political spaces and institutions (structures). It is partly represented in the balance of power is new legal advocacy networks or 'civil society support structure' in the words of Epp (1998). These new approaches and relationships superseded the very *ad hoc* spaces by which lawyers previously mobilized – such as high profile criminal trials and serendipitous parliamentary processes debates and

[36] *Kløfta*-case, 41 Rt. 1976 s. 1 (Supreme Court of Norway).

media debates. By the early 1970s a new form of legal mobilization and consciousness was already emerging. The '1968 generation' drove the establishment of the first student legal center, *Juss Buss* (1971) at theUniversity of Oslo. Three years later came JURK (legal aid for women, 1974), the *Rettspolitisk forening* (Law & Politics Society, 1974) and a new journal *Kritisk Juss* (Critical Law). While the latter was partly in sync with the emergent American critical legal studies movement, many of its participants were much more open to the use of litigation – whether to advance political ends or reveal, even through failure, the flaws of democratic capitalism.

This University-centred wave of activity was followed by specialized law firms and individual lawyers taking up particular types of rights cases and engaging as public spokespersons on those issues, whether it be solitary confinement, freedom of expression or the rights of asylum seekers. The extent of this new underlying structure should not be overstated but it is now possible to identify a diverse group of organizations and individuals that directly mobilize broadly and quickly on issues of political liberalism and beyond.

The Alta Dam case of the late 1970s and early 1980s reflected this greater capacity for bipartisan lawyerly mobilization but also provided the seeds for future networking and advocacy(Semb 2001; Dalland 1994; Johansen 2000; Minde 2003b). A plan of a government directorate called for the construction of a dam and hydroelectric power plant that would create an artificial lake and deluge the Sami village of Máze in northern Norway. This initial plan was partly modified due to political resistance but it catalyzed a broad popular movement of Sami indigenous people and environmentalists against development of the Alta-Kautokeino waterway. As construction started in 1979, civil disobedience began with blocking of machines and hunger strikes outside the Norwegian parliament, which included two prominent criminology professors (Johansen 2014). When work re-commenced two years later, more than one thousand protesters chained themselves to the site and were were forcibly removed and charged by the police. The mass arrests by police (ten per cent of the Norwegian police force was re-stationed to the dam site) led to the first charges with violating laws against rioting. Lawyers mobilized in Oslo and Alta to represent protestors but also acted as mediators between the groups and parliament/police, moving continuously between the two locations.

5.3 The Advocates Society – A Legal Complex

The transformation of the Bar Association in recent times is perhaps the most dramatic manifestation of the emergence of new legal complexes for political liberalism. In 1952, the Association created twenty sub-committees in order to engage in political lobbying, particularly through submissions on public consultations on new law and policy proposals. Due to concerns of members over politicization it adopted a clear policy in 1972 that it should only make engage on issues concerning *rettssikkerhet* (the core of political liberalism) and technical aspects of law and regulation. However, the association was only partially active and its leadership was often close to the major political parties. Critique was infrequent. The passivity of the Association's President Christian Mellbye during the 1960s on was the subject of critique by the Lund Commission*'s* report in 1996 on illegal surveillance of citizens

The situation has changed quite dramatically. The shift was clear in the early 1990s when the Bar Association proposed that the government incorporate international human rights conventions domestically, a policy that was adopted a decade later in the Human Rights Act. By 2004, the Law Society had 31 sub-committees which made 76 submissions in that year (Espeli, Næess and Rinde, 2008: 350). By 2014, the number of submissions was 87 and has been accompanied by a growing stream of press releases on different topics.

A document content analysis of the submissions is currently being undertaken. A total of 272 submissions to government authorities have been collated for the period 2011-2016 and we are currently collecting press releases and other documents. In almost all submissions, the association indicates that it is acting as expert organ rather than speaking in its own self-interest. The Bar Association is clearly dedicated to the concept of *rettsikkerheten* – it is used 1046 times in the substantive sections of the 272 submissions. As to concrete civil rights, the freedom of expression is referenced, for example, in 40 submissions. A full analysis of the data is forthcoming.

Interestingly, the Bar Association is not confined by a narrow construction of political liberalism – commenting often for example on the right to privacy and also supporting social rights. When questioned, the Secretary-General of the Bar Association indicated that there had been no internal division in speaking out positively on social rights in the context of government policy or constitutional reform. The only tensions

that seemed to arise were statements that contained occasionally a strong policy content where there might be different policy choices (particularly on asylum questions). She also noted that the key conflicts tended to be with some lawyers elsewhere in the government where the question of judicial review remained a polarizing theme.

Moreover, the Bar Association has engaged in coordinated strategic litigation in the past five years. Their committee for migration law studied 1755 rejections of asylum applications and selected 74 cases for judicial review applications under administrative law (Humlen and Myhre 2015). The appeals were handled by various members of the associations, with great willingness, and 70 per cent of them were successful. The aim of the action was not only to rectify individual injustice but also to reveal the systematic problems in adjudication – with poor legal representation from some asylum seekers, questionable assessment of evidence, and problematic interpretations and applications of the law.[37] This strategic litigation was followed in a single and successful case concerning solitary confinement in 2015. Norway has been the subject of repeated critique by UN bodies and the European Committee on the Prevention of Torture for the overuse of solitary confinement and, notably, the Norwegian Advocate-General declined to appeal the case.[38]

How has the Bar Association emerged as such a unified and active actor with a broad conception of political liberalism? Three explanations might be offered. The first is that their Secretary-General possesses a clear commitment to political liberalism but appears also equipped with the leadership skills to facilitate and drive a common agenda and orient sufficient resources towards committees wishing to take action. The second is that the Free Defender's Society rejoined the Bar Association in June 2012, which provided a united front. The third is that the political opportunity structure on a range of questions (such as asylum processes, detention) has been closing as mainstream parties tilted rightwards or were deferential to other organized groups

[37] Interview with M;erete Smith, 6 January 2016.
[38] See http://www.aftenposten.no/nyheter/iriks/Staten-domt-for-ulovlig-bruk-av-glattcelle-7588564.html

such as the police trade unions. Strategic litigation on particular topics offered a much greater chance of success.[39]

6. Conclusion

This brief distillation of the engagement of Norwegian lawyers with political liberalism over four centuries presents a series of mixed results. Norwegian lawyers are clearly a social, intellectual and political elite (Olaussen 2015) and mobilize without doubt for their own material interests (Espeli and Rinde, 2014). However, legal complexes for political liberalism have also emerged, often intermittently and sometimes spectacularly. This essay has argued that the presence and absence of Norwegian legal complexes across time is not necessarily explained by a theory of Nordic exceptionalism. Rather, it has argued that previous studies on the role of lawyers have been over-stated and under-theorized. Taking a departure point in the choices of lawyers in context, it has argued that the motivations of individuals to suffer costs in the struggle for political liberalism varies greatly (a question of agency) and lawyers are often rational in choosing whether to engage on the legal or political terrain (a question of structure).

As to agency, the historical studies and contemporary interviews reveal that Norwegian advocates vary greatly in their individual willingness to struggle for political liberalism. The profession was often divided. With some exception, and certainly irony, predominantly left-leaning, sometimes communist, and certainly always 'oppositionalist', lawyers in Norway have represented liberal forces. After the 1850s, right-leaning lawyers were mostly only prominent in struggles over property rights. Lawyers connected with the premier 20th Century social democratic force, the Labour Party, were relatively active before the 1930s (or 1945) but more muted afterwards – tending towards more pro-state positions or concentrating, possibly, their struggles within the party apparatus. However, lawyerly motivations appear to have been boosted across the political spectrum by concrete experiences with injustice, the self-satisfaction of engaging in some altruistic behavior, and the legitimating effect of

[39] Interview with M;erete Smith, 6 January 2016.

two constitutional moments (1814 and the recent period of legalization), both of which have been partly driven by advocates and other lawyers.

At the same time, the openness of legal opportunity structures seems to help explain the nature of mobilization of lawyers. It is not surprising that distinct legalistic forms of mobilization were generally unnecessary in the 19th Century. Lawyers formed the political complex – in government and opposition. However, some advocates mobilized in other spaces (e.g. court trials) when the political complex turned distinctly repressive. Or they mobilized for law reform on distinct issues within distinct sub-groups (e.g. criminal lawyers for child welfare reform). In the social welfaristic period, the major challenge seems to be the inability of lawyers to find a unified form of collective mobilization, particularly in times of polarized politics and the Cold War national security climate. Moreover, lawyers were no longer the center of political and academic debates, their political power waned as other professions gained positions and legitimacy, and the bureaucratic social welfare state and hierarchical consolidation within political parties limited the space for more individualistic lawyers and their looser structural relations.

Yet, the Bar Association has also shown itself capable of mobilizing its organizational power for political liberalism, particularly during the German occupation and in the 21st Century. Advocates faced a closed political space and/or a more open legal space, the leadership of the Bar Association was distinctly political liberal in orientation, and internal divisions were overcome through adroit management. By creating new organizational forms and the capturing existing ones, political liberalism managed to find its wayward legal defenders.

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