



CAMBRIDGE STUDIES IN LAW AND SOCIETY

Legal Mobilization under Authoritarianism

The Case of Post-Colonial Hong Kong

WAIKEUNG TAM

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LEGAL MOBILIZATION UNDER AUTHORITARIANISM

Legal mobilization is the process by which individuals invoke their legal rights and use litigation to defend or develop these rights against the government. In recent years, increasing attention has been paid to this phenomenon as it occurs under authoritarian regimes. It is often suggested that, in such situations, legal mobilization is caused by the strategic interests of the ruling elites. Using the case study of post-colonial Hong Kong, where legal mobilization has by no means unfolded as political authorities would wish, Waikung Tam casts doubt on this contention. To do so, he examines in depth why and how legal mobilization arises under authoritarianism. Tam analyzes quantitative data of changes in the Hong Kong judiciary agendas over the last three decades, and uses detailed interviews with activists, politicians, cause lawyers, judges, and government officials to reveal the complex underlying socio-political forces at play.

WAIKUNG TAM is Assistant Professor in the Department of Political Science at Lingnan University, Hong Kong.

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Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong
Waikeung Tam

To my Lord Jesus Christ

and

To my parents, Tam Yuk-bo and Yeung Sau-yung,

and

my wife, Wing Chee

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PART I

INTRODUCTION: EXPLAINING THE RISE OF LEGAL MOBILIZATION IN POST-COLONIAL HONG KONG

THE PUZZLE: RISE OF LEGAL MOBILIZATION IN POST-COLONIAL HONG KONG

The range of areas covered by judicial review proceedings has broadened considerably in recent years ... It is important for the public to understand the court's proper role. On judicial review, the courts do not assume the role of the maker of the challenged decision. The courts are concerned and only concerned with the legality of the decision in question ... The courts could not possibly provide an answer to, let alone a panacea for, any of the various political, social and economic problems which confront society in modern times. Within the parameters of legality, the appropriate solution to any political, social or economic problem can only be properly explored through the political process ... The responsibility for the proper functioning of the political process ... rests with the administration and the legislature.¹

Some litigation that carried political objectives has caused great concern to the court. People are more ready to bring politically unresolved issues to the court ... but the court is not legislature, judges are not legislators and cannot make policy decisions.²

¹ Speech delivered by the first Chief Justice of the Hong Kong Special Administrative Region (HKSAR), Andrew Li Kwok-nang, at the Ceremonial Opening of the Legal Year 2006, January 9, 2006. Andrew Li Kwok-nang became the first Chief Justice of the HKSAR in July 1997 and retired in September 2010. Justice Geoffrey Ma Tao-li succeeded Li and became the second Chief Justice of the HKSAR.

² Speech delivered by Patrick Chan, Permanent Judge of the Court of Final Appeal of the HKSAR. *Apple Daily*, September 4, 2005, p. A4 (in Chinese).

The foregoing excerpts of speeches by two judges of Hong Kong's highest court reflect an important political phenomenon in post-colonial Hong Kong, and more broadly around the globe, namely the rise of legal mobilization under authoritarianism. In this book, legal mobilization refers to the process by which individuals invoke their legal rights and use litigation to defend or develop these rights against the government (Zemans 1983, pp. 690–94; McCann 2008, pp. 527, 532). Using post-colonial Hong Kong as a case study, this book studies why and how legal mobilization arises in authoritarian regimes. Chan (2009) contends that democratic deficit is a primary factor behind the rise of legal mobilization in post-colonial Hong Kong. Legal mobilization, however, has not occurred in every political system with democratic deficit. For example, legal mobilization has failed to take place in Singapore, Myanmar, and Saudi Arabia. More importantly, the case of authoritarian Taiwan demonstrates that authoritarianism does not necessarily bring about legal mobilization. Indeed, authoritarianism wrought electoral mobilization in Taiwan during the 1970s–80s, as many liberal lawyers turned to oppositional politics (i.e., establishing an opposition political party) to pursue political liberalization and democratization (Winn and Yeh 1995, p. 565; Ginsburg 2007, p. 57).

Why did legal mobilization develop in Hong Kong during the process of the sovereignty transition from Britain to China and intensify after Beijing resumed its sovereignty over the city in July 1997?³ My answer to this puzzle combines elements of “structure” and “agency.” The key structural elements are the long-term institutionalization of the legal complex in Hong Kong, and the intervention of a critical juncture in the form of Beijing's military crackdown on the 1989 Tiananmen democratic movement and the process of the sovereignty transition. The key agentic elements are the growing strategic use of litigation in pursuit of human rights and more progressive public policies by Hong Kong's rights support structure (consisting of cause lawyers and rights advocacy organizations). In the next section, I discuss each of these factors in turn. Then I highlight the core contributions of my study to the literature on comparative courts and rights mobilization. Most importantly, the Hong Kong case suggests a path to judicial activism/rights-based legal mobilization under

³ In July 1997, Britain ended its colonial rule over Hong Kong and transferred its sovereignty over the city to China.