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PART I

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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).

INTRODUCTION

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.

authoritarianism that is quite different from the path identified by Moustafa (2007) and Ginsburg and Moustafa (2008) (i.e., facilitated by the interests of the authoritarian rulers). Legal mobilization in Hong Kong has by no means unfolded as political authorities would wish.

ARGUMENTS

Structural elements: the legal complex and a critical juncture

This book adopts historical institutionalism, particularly two of its building blocks, the concepts of critical antecedent and critical juncture, as the analytical framework to examine the structural factors of the rise of legal mobilization in post-colonial Hong Kong. I argue that Beijing's military crackdown on the 1989 Tiananmen democratic movement and the more gradual process of the sovereignty transition created a critical juncture during which a new legal opportunity structure was created and the legislature was weakened. On the one hand, the implementation of the Hong Kong Bill of Rights Ordinance and the Basic Law, together with the establishment of a new final appellate court in Hong Kong, created new legal opportunities for individuals to use the law to advance their interests. On the other hand, Beijing and its appointed Tung Chee-hwa administration⁴ tightened the political opportunities available to pro-democracy politicians and civil society, by weakening the legislature and marginalizing their political influence in the legislature. These shifting political opportunities⁵ from the legislature to the judicial branch, combined with the historical legacies of a legal complex (consisting of an independent and competent judiciary, an autonomous and

⁴ Tung Chee-hwa, a pro-Beijing tycoon in Hong Kong, was selected as the first Chief Executive of the HKSAR.

⁵ I adopt the concept of political opportunities from Tarrow's work on social movements (1998) and modify it to study the rise of legal mobilization in post-colonial Hong Kong. In this book, political opportunities include three important dimensions: (1) the opening of access to political participation; (2) the presence of influential allies within the ruling elites; and (3) changing power relationships among political institutions. Legal mobilization in post-colonial Hong Kong (and elsewhere) can be regarded as a social movement tactic. That is, the pursuit of the objectives of a social movement through institutionalized channels, as opposed to outsider tactics like demonstrations and strikes (Burstein 1991). However, my book focuses on legal mobilization, rather than other social movement tactics.

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organized legal profession, and government-funded legal aid), constituted the structural factors behind the rise of legal mobilization in post-colonial Hong Kong. The following sections elaborate the logic through which the aforementioned processes and changes took place.

Historical institutionalism has two unifying themes.⁶ First, this scholarship is institutionalist because it studies how the institutional arrangement of the polity and economy affects political behavior, strategies, and outcomes. By defining the incentives and constraints faced by political actors and structuring power relations among them, institutions heavily mediate political struggles. According to historical institutionalists, institutions are the formal or informal organizations and rules, procedures, routines, norms, and conventions that structure behavior. Examples include the rules of electoral competition and the relations among various branches of government. As will be discussed later in this book, changes in the relations between the legislature and the judiciary (i.e., a shift in the political opportunities from the legislature to the judiciary) during the process of the sovereignty transition in Hong Kong shaped the political strategies of pro-democracy politicians and civil society and prompted them to increasingly use the law to pursue their goals.

Second, historical institutionalism is historical because it argues that political development should be understood as a process that unfolds over time (Pierson 1996, p. 126). Viewing institutions largely as the legacy of concrete historical processes, historical institutionalists also contend that history and/or historical events play a major role in influencing political choices and outcomes. Relatively small or relatively early decisions affecting institutional design have large and long-term consequences. Explanation of political outcomes, therefore, requires a close analysis of events over long periods of time. Critical antecedents and critical junctures are two distinctive stages of the historical processes, which interact and cause the political outcomes. As subsequent chapters will demonstrate, legal mobilization in post-1997 Hong Kong is not a sudden political change. Indeed, its historical origins can be traced back to the mid nineteenth century when the British colonial authorities introduced the apparatus of English law like the rule of law and an independent judiciary to the newly

⁶ The discussion on the analytical framework in this section is primarily based on Thelen and Steinmo (1992); Hall and Taylor (1996); Pierson (1996); Thelen (1999); Collier and Collier (1991); Slater and Simmons (2010).

acquired colony (see Chapter 3). Chapter 7 will examine how a group of transformative agents – cause lawyers⁷ – have actively taken up the new legal opportunities and promoted legal mobilization since the 1990s. However, it should be noted that these cause lawyers had opportunistically and subversively wormed their way into the system over a long period, as many of them were admitted to practice in Hong Kong between the mid 1960s and the 1980s (see Chapter 6).

Critical antecedent – the legal complex

According to Slater and Simmons (2010, p. 889), critical antecedents are “factors or conditions preceding a critical juncture that combine with causal forces during a critical juncture to produce the outcome of interest.” Unlike critical junctures which tend to unfold rapidly, critical antecedents are generally formed in slow-moving processes. More important, it takes considerable time and effort for a critical antecedent, like an independent and competent judiciary, to develop and mature. In their study of the role of the states in political and economic development, Skocpol (1985) and Rueschemeyer and Evans (1985) have argued convincingly that effective and capable state institutions like the civil service cannot be established overnight. The judiciary is no exception.

Institutions determine whether legal mobilization is feasible. Permissive and enabling institutions facilitate litigation and vice versa. Ginsburg and Hoetker (2006), for example, find that weaknesses of the Japanese legal system, like the relative scarcity of lawyers and judges per capita, have impeded the propensity of the Japanese to litigate. The incentive structures, like the payment system for legal representation (e.g., availability of legal aid) also influence whether aggrieved parties will take up the law to advance their claims (Kritzer 2001).

An autonomous and efficient legal complex⁸ – composed of an independent and competent judiciary, an autonomous legal

⁷ Cause lawyers are defined as lawyers who seek to use law-related means to achieve greater socio-political and economic justice both for individuals and for disadvantaged groups. Moral and/or political commitment is their defining attribute (Menkel-Meadow 1998, p. 37; Sarat and Scheingold 2005, p. 1).

⁸ I borrow the concept of the legal complex from Halliday, Karpik, and Feeley (2007b, pp. 6–7), who define a legal complex as the system of relations among legally trained occupations which mobilize on a particular issue. At the core of the legal complex are lawyers and judges. By this definition, government-funded legal

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profession⁹ trained in common law systems, and government-funded legal aid – are the critical antecedents for legal mobilization in Hong Kong (see Figure 1.1). The legal complex was established by the British authorities during the centuries-long colonial rule. Some components of the legal complex, such as an independent judiciary staffed by professional judges and the common law system, were introduced to Hong Kong in the mid nineteenth century. Others, like the government-funded legal aid, were set up in the late 1960s.

Legal mobilization requires the (pre)existence of a legal complex for two important reasons. First, it takes considerable time and effort for an independent and efficient legal complex to develop and mature. Second, Beijing and its appointed post-colonial authorities would have had little if any incentive to create an autonomous legal complex. The following chapters will demonstrate how Beijing has paid great efforts to bringing different political institutions and social classes under its rein during and after the processes of the sovereignty transition.¹⁰ In light of Beijing’s determination to control Hong Kong’s political development, it is hard to conceive why post-colonial authorities would have had the incentive to build up an autonomous judiciary and Bar Association that may challenge Beijing’s interest. When Beijing regained its sovereignty over Hong Kong in July 1997, it inherited an autonomous and well-established legal complex from the British colonial government, and lacked the political will to eliminate this historical legacy. In sum, as only the British would have ever wanted to build up an independent legal complex, the latter was the critical antecedent for legal mobilization in post-colonial Hong Kong. Chapter 3 will elaborate how the legal complex in colonial Hong Kong has provided the necessary preconditions for legal mobilization in the post-colonial period. Here I discuss the importance of the legal complex in general.

aid is not part of the legal complex. Instead, government-funded legal aid is part of the rights support structure as Epp (1998) theorized that concept. In this book, I place government-funded legal aid in the legal complex because it is more “structural” than “agentic.”

⁹ In this book, legal professions refer to practicing lawyers.
¹⁰ Xu Jiatun, a former director of the New China News Agency in Hong Kong (the *de facto* Chinese embassy in Hong Kong during the colonial period), discusses in his memoir how the Chinese government sought to bring various social classes in Hong Kong under its rein during the 1980s. See Xu (1993).

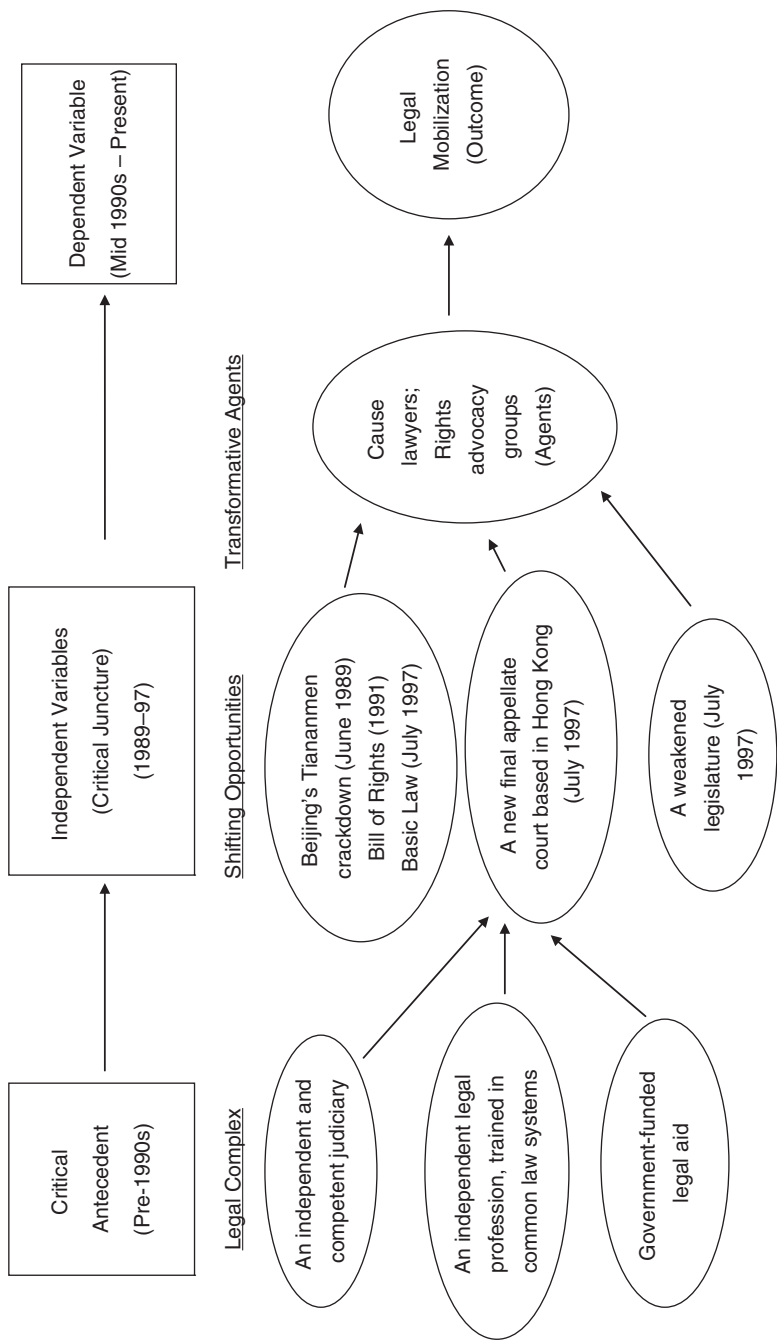


Figure 1.1: Flow of argument

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An independent and competent judiciary is crucial because it is the arena where most activities of legal mobilization take place. Citizens' perception of the judiciary significantly affects their propensity to pursue their claims through the judicial branch. Citizens are more likely to litigate when they perceive that, compared to other political institutions, the courts are insulated from political pressure and exercise their duties impartially (Javeline and Baird 2007, p. 872). Courts are also the major platforms where cause lawyers exercise their expertise to promote the causes of the disadvantaged. Their political significance is heavily dependent on an independent and functioning judiciary. A corrupt and oppressive judiciary not only hinders cause lawyering work, but also puts cause lawyers in political danger. For example, post-war Indonesian judges, who are infamous for their corruption, incompetence, and abuse of power, have sought to silence activist lawyers (Lev 2007, p. 404). Absence of meaningful judicial independence has impeded cause lawyering in China (Michelson 2007; Fu and Cullen 2008, p. 126) and in Argentina and Brazil as well (Meili 1998, pp. 494–97).

An autonomous, well-trained, and organized legal profession is another component of the critical antecedent for successful legal mobilization. To be independent of state control, a bar must be capable of governing itself and hold disciplinary powers over its members. Human rights and public policy litigation frequently pits civil society against the government and/or powerful groups. An autonomous and unified bar can better protect cause lawyers who take up politically charged cases from state harassment and crackdown. If the state severely restricts the autonomy of the lawyer community, liberal lawyers are likely to replace litigation with other strategies in their pursuit of progressive socio-political changes. This happened in Taiwan during the 1970s–80s, when the authoritarian Kuomintang regime seriously undermined the autonomy of the legal profession. Encountering tremendous problems in exercising their influence in the legal arena, many liberal lawyers turned to oppositional politics to pursue political liberalization and democratization (Winn and Yeh 1995, p. 565; Ginsburg 2007, p. 57).

Further, a unified and autonomous legal profession can play a crucial role in defending judicial independence. It can mobilize public support, such as demonstrations to oppose any attempts by the state to dominate the judiciary. By contrast, a divided and weak legal profession erodes an important pillar of judicial independence (Halliday, Karpik and Feeley 2007b, p. 7; Lev 2007, pp. 410–11).