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## Cross-Currents: East Asian History and Culture Review

### Title

Law as a Contested Terrain under Authoritarianism

### Permalink

<https://escholarship.org/uc/item/0wv7v112>

### Journal

Cross-Currents: East Asian History and Culture Review, 1(9)

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### Publication Date

2013-12-01

# CROSS-CURRENTS



## EAST ASIAN HISTORY AND CULTURE REVIEW

### REVIEW ESSAY

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#### **Law as a Contested Terrain under Authoritarianism**

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Waikeung Tam. *Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong*. Cambridge: Cambridge University Press, 2012. 234 pp. \$95 (cloth).

Rachel Stern. *Environmental Litigation in China: A Study in Political Ambivalence*. Cambridge: Cambridge University Press, 2013. 310 pp. \$99 (cloth).

Two recent publications, one by Waikeung Tam (Lingnan University) and the other by Rachel Stern (UC Berkeley School of Law), offer refreshing views on law and social change under Chinese authoritarianism, a topic that has been marginalized by both the law and society and China studies literatures. After all, rule of law and state authoritarianism seem like oxymorons, especially in the People's Republic of China, where the leadership of the Chinese Communist Party is enshrined in the Constitution, the country's highest law. Yet in recent years, a number of studies have spotlighted how ordinary Chinese citizens take the Chinese legal system more seriously than scholars, and these citizens' collective mobilization of the law has compelled us to rethink the relationship among law, society, and politics. The two newly published monographs discussed here, both of which grew out of doctoral dissertations written around the same time and addressing the same phenomenon—the rise of public interest litigation—reinforce the need for such a perspectival shift. Together they show that the law has become a contested terrain with varying potential for enabling rights activism under different types of state authoritarianism in a single country: in Tam's case, postcolonial Hong Kong, and in Stern's case, postsocialist China.

The puzzle in Tam's *Legal Mobilization under Authoritarianism* is: why was there a salient increase in citizens' use of litigation against the Hong Kong government to defend civil and human rights during and after the transition from British to Chinese sovereignty? On the agenda of the court of appeal in Hong Kong, for instance, the percentage of human rights litigation in the total number of cases involving the government as a litigating party rose from 2 percent in 1981 to 23 percent in 1994. Between 1998 and 2010, the court of appeal decided forty-eight human rights cases and eight public policy cases. The equivalent numbers throughout the 1980s were two and one, respectively. To understand the contemporary rise of legal mobilization, Tam traces its historical origin to the English rule of law complex that arrived with British colonialism in the mid-nineteenth century. But the independent judiciary in the colonial era did not produce legal mobilization mainly because the colonial constitution granted wide powers to the governor of Hong Kong. There was no law that could be used to restrain the executive. A critical juncture of reform presented itself in the aftermath of the Tiananmen crackdown in 1989 and in light of the imminent transition in 1997. New laws and new measures were deliberately put in place by the colonial government to strengthen Hong Kong's judicial independence. These included the promulgation of the Hong Kong Bill of Rights Ordinance (1991) and the Basic Law (1997), which explicitly defines Hong Kong citizens' social and political rights; the establishment of a final appellate court in Hong Kong to functionally replace the Privy Council in London, retaining the dominance of expatriate judges on the court of appeal; and securing the tenure of judges.

On top of these historical and institutional factors, legal mobilization has intensified in postcolonial Hong Kong because the political opportunity structure has decisively shifted, so much so that the legislature has been substantially blocked as a channel to advance civil rights and democracy. Beijing and the first Special Administrative Region administration under Tung Chee-hwa had reversed many of the last governor's democratization reform, successfully marginalizing prodemocracy politicians and their grassroots allies in civil society by reshuffling the rules of election and removing prodemocracy politicians from the cabinet. With the closure of the political opportunity structure, legal mobilization and social movements became the methods of choice for progressive social forces to influence government policy. To activate the potential of the rule of law complex, Tam argues that there is a need for agency, such as that found among local and foreign cause lawyers (many are democratic politicians) who offer pro

bono legal counsel to social movement organizations and activists trying to leverage the courts for social change. Yet under an authoritarian polity, these activists still face enormous economic and political pressures in pursuing legal mobilization. Corporate clients are reluctant to use the service of cause lawyers for fear of upsetting Chinese authorities, and the Hong Kong government has tightened its reins over the public legal aid system in an attempt to undermine resources for politically sensitive legal cases. All of these developments culminate in the confrontation between two countervailing forces circling around law and the constitution. On the one hand, Beijing and its Hong Kong allies have sought to erode the court's monopoly on the interpretation of the Basic Law; on the other hand, democratic politicians and social movements increasingly invoke judicial and constitutional rhetoric in public policy debates. In short, far from being a subordinate and perfunctory accessory of the authoritarian regime, the court and the law in Hong Kong have turned into the epicenter of political contestation.

If postcolonial authoritarianism in Hong Kong still leaves the judiciary a relatively autonomous space for civil and social rights mobilizations, Chinese Communist authoritarianism defines a more restrictive arena for social change through the law. Stern's concern in *Environmental Litigation in China* is environmental lawsuits. Stern argues that the Chinese state, despite displaying a rising level of political will to protect the environment and to include environmental criteria in cadre evaluation alongside indicators of economic growth, is ambivalent about how far it wants to avail society of a legal venue to protect the environment. The simultaneous existence of opposing state preferences—indicated by conflicting official statements, arbitrary handling of court cases, and uneven implementation of regulations—translate into ground-level uncertainty among citizens, lawyers, and judges. Stern strains to show that from this murky and messy legal field arise marginal experimentations by some daring pollution victims, cause lawyers, NGOs, and local officials to use the law to realize a better environment in China.

*Environmental Litigation in China* begins by depicting the stunningly rapid development in environmental lawmaking in China over the past three decades. From a trial enactment of its first Environmental Protection Law in 1979 through the end of the first decade of the twenty-first century, China has promulgated twenty-nine environmental laws and thirteen hundred environmental standards, allowing individuals, social organizations, and state agents to file criminal, civil, and public interest lawsuits against polluters. Yet the Chinese legal system

presents numerous hurdles for anyone trying to enforce these laws. From getting the case accepted by the court, to finding a competent and affordable lawyer, to securing the independence of the appraisal agency that assesses causation and harm, plaintiffs confront an arbitrary and arduous process. In a minority of cases, in response to extraordinary pollution and crisis, local governments have reacted by setting up environmental tribunals or filing government-led public interest lawsuits. But these efforts are often frustrated by the confusing and conflicting signals sent by the central government, which, for example, peppers leaders' speeches with environmental slogans but discourages collective lawsuits in the judiciary. The situation of the Chinese bar does not help either. In a country where judges' salaries and promotions depend on government assessment and approval, and where lawyers' licenses to practice are subject to regular government scrutiny, environmental lawyers remain a small minority in the profession (only 4 percent of Chinese lawyers reported having taken up an environmental lawsuit).

Under these circumstances, Stern shows that the most the judiciary can do is to innovate quietly at the margins, cautiously expanding the boundaries of environmental protection by, for example, supporting new claims against light pollution as pollution, awarding new categories of compensation such as emotional distress caused by noise, or using rights language in court decisions. Even resourceful international NGOs have difficulty exerting impacts in China other than giving "soft support"—encouragement, status, and international ties—to their Chinese allies. At pains to argue that change, no matter how modest and marginal, is possible through the law, Stern points to the emergence of an elite conversation over public interest law. Amendments to the Civil Procedure Law made in 2012 allow for lawful authorities and relevant organizations to initiate environmental public interest lawsuits. But public expectations are that only government-endorsed entities will qualify. In the end, the conclusion of the book is bleak: "Environmental lawsuits are unlikely to dramatically improve environmental quality, let alone spark a rights revolution in China" (211).

The common weakness of the two studies is that they shy away from pursuing a more encompassing sociological analysis of "legal mobilization" or "legal activism," the key concept grounding their empirical inquiry. While their focus on lawyers, judges, the judiciary, and the letter of the law is justified and indeed necessary, the intellectual purchase of the concept of "legal mobilization" suggests that there is more going on with the law than the actors and action

within the formal legal system. A classic work in this field, Michael McCann's *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, incisively links lawsuits with social movements, protests, and rights consciousness in the larger society. It is the intersections between law and other social, economic, and political arenas that make "law and society" a distinct and valuable field of knowledge. The two books reviewed here, pioneering and important in their own rights, fall short of taking society and social movements seriously. Instead of just analyzing court documents about four environmental lawsuits for the book, Stern could have explored the connection between the many "Not-in-My-Backyard" environmental demonstrations led by the middle class and citizens' legal consciousness. She could have looked at how the top leadership is pressured to respond—for instance, how the law enables and sparks protests, how protests may in turn be absorbed and pacified by the court, or how the court balances social pressures from below against political pressures from above. These issues are critical, because Stern starts her study with a claim to study political ambiguity, which she suggests is "the common experience of everyday Chinese politics" and a view of "the state from below" (4–5). The book offers little empirical illustration of the everyday experience of the state from below. Aside from interviews with lawyers, judges, and academics, Stern's data come from newspapers and court files that do not give her access to popular experience. Likewise, Tam subscribes to a narrow conception of social mobilization, referring only to the activities of two NGOs in Hong Kong that used the law to push for public policy reform. Yet mass protests invoking or criticizing the law have become a mainstay of Hong Kong politics, intimating a broader and more entrenched instance of legal mobilization. Given the openness of Hong Kong society, an ethnographic investigation into these mass legal mobilizations is eminently feasible and would deepen the analysis by probing the strength or weakness of law in transforming popular perception of state legitimacy, an assessment that is saliently missing in this study.

These two studies contribute to bringing the theoretical agenda of legal mobilization to the study of contemporary China. While they focus too much on formal institutions and elite actors, thereby missing the opportunity to explore the popular and social mechanisms through which law and society interact to bring about social change, they each make a strong statement about the contested nature of the law, even in authoritarian states. These two cases of authoritarianism in one country also alert us to the need for differentiated conceptualizations of

“authoritarian regime” using specific analyses of the institutional and social configurations that constitute different kinds of authoritarianism.

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### ***References***

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