SOCIAL MOVEMENTS AND THE LAW IN POST-COLONIAL HONG KONG

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I *Introduction*

Social movements are an important social and political phenomenon in the contemporary world. Many sociologists, political scientists and historians have contributed to the study of social movements. As regards the relationship between social movements and the law, an American scholar has pointed out in his discussion of a number of social movements that "legal norms, discourses, and practices in each case were an important constitutive element of evolving movement understandings, aspirations, and strategic action." (McCann, 1998a: 84) In the post-colonial era, the law has become an increasingly prominent arena of social movement activities in Hong Kong. It is the purpose of this chapter to undertake a preliminary exploration of social movements and the law in Hong Kong.

Our inquiry will proceed in the following stages. The remainder of this part I considers briefly the definition of "social movements" and the history of social movements in Hong Kong. Part II of the chapter will provide some general comments on the relationship between social movements and the law. It is intended to provide the general theoretical foundation for the work in the remainder of the chapter. Part III

will comment on the development of Hong Kong's legal system in the post-colonial era and on its relevance to social movements. It will also provide some case studies of law and social movements in post-colonial Hong Kong. Finally, part IV will contain some concluding reflections.

Social movements and Hong Kong

Accordingly to Charles Tilly (2004), social movements were a new political phenomenon that first emerged in Western Europe and North America in the late 18th and early 19th centuries. Tilly points out that a social movement consists of a distinctive combination of three elements: (a) campaign, (b) repertoire, and (c) WUNC displays ("WUNC" being the abbreviation of worthiness, unity, numbers and commitment). The campaign is "a sustained, organized public effort making collective claims on target authorities" (Tilly, 2004: 3). The repertoire of a social movement refers to the "employment of combinations from among the following forms of political action: creation of special-purpose associations and coalitions, public meetings, solemn processions, vigils, rallies, demonstrations, petition drives, statements to and in public media, and pamphleteering" (Tilly, 2004: 3). Finally, the WUNC displays are public representations by the participants in the social movement of WUNC on the part of themselves and/or their constituencies (Tilly, 2004: 4).

A better understanding of social movements can perhaps be arrived at by

combining Tilly's definition with that offered by Della Porta and Diani (1999), according to whom social movements are informal networks of interaction among people based on shared beliefs, solidarity and a common sense of collective identity, which mobilise about conflictual issues for the purpose of collective action to promote social change, and make frequent use of various forms of protest and public means of confrontation. This definition explains that a social movement need not be tightly organised,[1] and the existence of an informal network suffices. It also supplements Tilly's definition by pointing to the importance for a social movement of a belief system and a sense of collective identity among its participants (Melucci, 1988; 1989).

The 1970's have been described as the "Golden Age" for social movements in Hong Kong (Butenhoff, 1999: 25). According to Benjamin Leung (1996: 148-9), the government's expanded role in the provision of social service since the mid-1970's resulted in an increasing frequency of social conflict and protest actions in areas such as housing, transport, environment and education. The most significant social movements in the 1970's were the student movement (Leung, 1992; Leung, 1996: 155-8), the housing movement (movement of residents of public housing estates to improve their housing conditions) (Lui and Kung, 1985; Ho, 2000), and the public

[1] It has been pointed out that "social movements do not have members, but participants" (Della Porta and Diani, 1999: 17); there is no need for participants to be loyal to any particular organisation.

sector labour movement (Leung and Chiu, 1991; Levin and Chiu, 2000). In a leading work on social movements in Hong Kong, Lui Tai-lok and Stephen Chiu (2000: 3, 5) summarise their findings as follows:

> "[W]hile observers of Hong Kong politics are busy with the construction of explanations of political stability, waves after waves of collective actions – from student activism to urban protests and organized actions of civil service unions – have been witnessed in this so-called politically quiescent society since the 1970s. ... In our review of the development of social movements in contemporary Hong Kong, we suggest that the emergence of collective actions in the 1960s and 1970s was largely an outcome of social and political changes within Hong Kong society. Subsequent development in the 1980s and 1990s, especially changes brought about by the process of decolonization, has significantly politicized popular mobilization and collective actions."

The signing of the Sino-British Joint Declaration in 1984 and the colonial government's policy in the 1980's to develop representative government in Hong Kong by opening up the political system to electoral politics resulted in a changed structure of political opportunities (in the language of political processes theory as discussed above) for social movements in Hong Kong, "new rules of the game" (Lui, 1994: 75) and a new agenda for participants in Hong Kong politics. Most social

movement organizations "switched to the political participation mode" (Lui, 1994: 76) in the sense of participating in electoral politics and trying to pursue their agendas through institutional channels such as District Boards and the Legislative Council. Social movement activists became elected politicians instead (Lui and Chiu, 2000: 12). Generally speaking, there was a "decline of grass roots protest groups" and "a 'hollowing out' of political organization at the grass roots level" (Lui and Chiu, 2000: 12).

In 1989, the student movement in Beijing and its suppression on 4th June provoked a series of massive demonstrations of an unprecedented scale in Hong Kong's history. However, this pro-Chinese democracy movement was not able to sustain itself in the 1990's despite the well-attended annual vigils in memory of the victims of 4th June (Lui and Chiu, 2000: 12-3; Wong, 2000). On the other hand, the constitutional reforms and the drafting of the Basic Law in the 1980's had stimulated the development of a pro-democracy movement in Hong Kong (Butenhoff, 1999). However, the pro-democracy movement of Hong Kong was also unable to sustain itself in the 1990's (Lui and Chiu, 2000: 13; Sing, 2000) despite Governor Christopher Patten's ambitious programme for electoral reform which met stiff resistance from the Chinese side. The 1980's and 1990's also saw the decline of the student movement (Leung, 2000), although in these decades the environmental

movement (Lui and Chiu, 2000: 13; Lai, 2000) and feminist movement (Lui and Chiu, 2000: 13; Lee, 2000) began to assert themselves in Hong Kong.

After 1997, the economic downturn and the growing dissatisfaction with the Tung Chee-hwa administration gave rise to an increasing number of demonstrations and other forms of social protest (Lui and Chiu, 2000: 14-6; So, 2002), culminating in the march of half a million people on 1 July 2003 against the proposed national security law and in the subsequent assemblies and marches demanding the introduction of universal suffrage for the election of the Chief Executive and all members of the Legislative Council.

Despite the "explosion of social protests" (So, 2002: 407) in the post-1997 era, it is arguable whether, overall speaking, social movements have gained in strength after Hong Kong became a Special Administrative Region. Indeed, unless we define social movements loosely as collective activities involving public protest and demonstrations, it seems that there are few social movements in Hong Kong, for many social protest actions in Hong Kong do not satisfy the more elaborate definitions of social movements discussed above. In the discussion below of social movements and the law in post-colonial Hong Kong, I follow the conventional usage of scholars of social movements in Hong Kong and use a low threshold for the purpose of recognising social movements. Activities that are usually referred to as

social movements in the existing literature on social movements in Hong Kong are deemed to be social movements in the following discussion.

II *Social Movements and the Law*

Is it possible to develop a general theoretical framework for understanding the relationship between social movements and the law? In this part, we will first look at how the general theories of social movements may be relevant to this understanding, and then examine the work of one scholar who specialises in studying law and social movements.

The "classical model" of social movements (Doug McAdam, 1982/1999) was premised on theories of collective behaviour and "mass society" that emphasize the structural strains in society and the social psychology of its inhabitants. Such theories throw light on the rise of Nazism and Fascism in Europe before the Second World War. With the Civil Rights Movements in the U.S.A. in the 1960's, the student activism in Europe and America in 1968 and the "new social movements" such as feminist, environmental and peace movements, social movements began to be perceived in a positive light. New perspectives were developed by European scholars who study how social movements respond to the crises of postmodern or post-industrial society in advanced Western nations (Touraine, 1981). In America, the paradigms for the study of social movements became shaped by resource mobilisation theory and political

processes theory. It is these two latter approaches that seem to be most relevant to the study of law and social movements.

The insight contributed by resource mobilisation theory is that whereas structural strains and grievances exist in almost every society, they do not necessary lead to social movements. The formation and development of any social movement depends on effective organisation and mobilisation of resources. Given the existence of a particular sociopolitical environment and certain resources at their disposal, the leaders and participants of a social movement must act rationally and strategically in order to maximise their influence and to achieve their goals.

There are at least four ways in which resource mobilisation theory can throw light on the relationship between law and social movements. First, depending on whether the legal system is repressive or respectful of civil liberties, the legal system may either constrain or facilitate mobilisation for a social movement. "[P]olitical freedoms, and the extent of repression by agents of social control ... may affect the costs for any individual or organization allocating resources to the SMS [social movement sector], serve as constraints on or facilitators of the use of resources for social movement purposes." (McCarthy and Zald, 1987: 26) Secondly, litigation may be used as one of the strategies of a social movement, as in the initial phase of the American civil rights movement (Locher, 2002: 273-9; Eyerman and Jamison, 1991:

122, 125). Thirdly, insofar resource mobilisation theory points out that the use of the media by a social movement is a significant factor (McCarthy and Zald, 1987: 15, 31), litigation or other law-related strategies may generate media attention and thus attention by members of the public to the issues raised by the social movement. Finally, resource mobilisation theory recognises that resources include "legitimacy, money, facilities, and labor" (McCarthy and Zald, 1987: 22), and both "material and symbolic resources" (Della Porta and Diani, 1999: 8); the expression of the demands of a social movement in legal discourse (particularly the discourse of rights) or victories in court battles may be quite effective in conferring legitimacy on the movement and constitute an important symbolic resource of the movement.

Political processes theory stresses that social movements are essentially political phenomena, and may therefore be studied in ways similar to those applicable to other political phenomena such as "institutionalized political processes" (McAdam, 1999: 36). What needs to be studied therefore includes the interaction and alignment of different political actors within the system and their response to the social movement. The importance of the internal dynamics of development of a social movement is recognised by this theory, but it also pays particular attention to the external political environment in which a social movement finds itself, or what it calls the "structure of political opportunities". Changes in this structure may have significant impact on a

social movement and may sometimes be able to account for its rise and fall. For example, such changes may result in a sudden opening up of the political system which may either be intentional or unintentional (Garner, 1996: 50), undermine its stability or otherwise improve the bargaining position or political leverage of the constituents of a social movement (McAdam, 1999: 42-3).

Like resource mobilisation theory, political processes theory demonstrates that a legal system – as part of the structure of political opportunities for a social movement – that is repressive will increase the "risks associated with movement participation" (McAdam, 1999: 43) and thus constrain the development of a social movement. Apart from this point, political processes theory also contributes at least two other insights into the relationship between law and social movements. First, according to political processes theory, the law-related aspects of the structure of political opportunities to be studied include not only "the state's capacity for and tendency toward repression" (Locher, 2002: 267), but also "the relative weight and independence of judicial, legislative, and executive branches in governments" (Garner, 1996: 52). Thus the constitutional role of the courts in a particular legal system, and, in particular, whether the judiciary is independent, activist and willing to develop new legal doctrines to meet the demands of particular social movements, may become highly relevant to the development of a social movement. In countries such as the

U.S.A. where the judiciary is indeed powerful and activist, social movements are more likely to resort to litigation as a means for social reform.

Secondly, political processes theory points out that an important factor in the formation of a social movement is "cognitive liberation" (McAdam, 1999: 48) or "the subjective transformation of consciousness" into an "insurgent consciousness" (McAdam, 1999: 38, 40). When this insight is combined with discourse theory, which demonstrates that the language and discourse which people use shape their interpretation of their life experience and their perception of the meaning of events and construct the social reality in which they live (Garner, 1996: 15-16), it is possible to understand how legal discourse matters for social movements. This point has been further elaborated by Michael McCann's work on law and social movements to which we now turn.

Drawing upon various studies by scholars of law and social movements and his own empirical research on the movement for gender-based wage equity in the U.S., McCann (1998a; 1998b; 2004) has developed a fairly comprehensive theory of the relationship between law and social movements. The theory is largely based on American experience but can serve as a useful starting point for our inquiry later in this chapter into law and social movements in Hong Kong. McCann's theory should be viewed against the background of the prevailing "leftist" or "progressive" view of

law and social movements which has been largely shaped by Marxism and critical legal studies. According to this view, law legitimizes hegemonic social hierarchies and relations of domination, and is thus a negative force in relation to social movements that try to promote social change and justice. Doubt is cast on the use of litigation as a means of social reform, because litigation depends on elites such as lawyers and judges whereas true reform should and will only come from mass mobilisation. The structure of the law and legal institutions itself restricts the opportunities for challenge of the existing system and its radical transformation, and eventual defeat in court battles will also be a severe blow to a social movement. It is also said that litigation diverts precious resources and attention from alternative tactics involving mass participation in the social movements themselves.

While not disputing the validity of these critical ideas, McCann points out that the law can be a double-edged sword for social movements. The law is itself a medium and arena of social struggles, and it need not be assumed that forces opposing change and progress will always win in this arena.[2] In particular, both legal discourse and litigation may be turned into a positive resource by a social movement that is

[2] The law entails a "mix of potentially transformative and hegemony-affirming implications over time" (McCann, 1998a: 98). "Legal mobilization does not inherently disempower or empower citizens." (McCann, 2004: 519) This is because "legal conventions are a volatile, ambiguous force in social life. As Stuart Scheingold has put it, 'rights, like the law itself, do cut both ways – serving at some times and under some circumstances to reinforce privilege and at other times to provide the cutting edge of change.'" (McCann, 1998a: 100) Legal norms may be able to "play a role in shaping and expressing the terms of resistance, aspiration, and tactical struggle for institutional transformation. We must, in Michel de Certeau's words, analyze law's 'manipulation by users who are not its makers'" (McCann, 1998a: 82).

striving to change the status quo. Thus litigation may be used by social movements as a strategy that supplements the use of non-institutional channels of mass protests such as marches and demonstrations. Legal norms and rights discourse may be used by social movements as positive resources in mobilising support and making gains in social struggles against the existing system.

McCann (1998a: 83) points out, for example, that the law may have a lot to do with the formation of a social movement, particularly in shaping a legal consciousness and a politics of rights which help mobilise support. Legal discourse may be drawn on "to name and to challenge existing social wrongs or injustices", or to forge a "sense of collective aspiration and identity" among movement participants (McCann, 1998a: 83). It is pointed out that legal norms contributed significantly in framing movement demands or shaping movement identity in the civil rights movement in America, the early American labour movement, the women's movement, the welfare rights movement, the animal rights movement, and the gay and lesbian rights movements (McCann, 1998a: 84).

The insight contributed by Marxism and critical legal studies to our understanding of law is that law is largely an instrument of the ruling elite for the purpose of maintaining its domination, and legal thinking and discourse – which reflect the interests and worldview of the dominant class – performs an ideological

function in shaping the consciousness and beliefs of the oppressed and persuading them to accept the existing system as natural and legitimate. McCann however points out that legal concepts, norms and discourse may at least in some circumstances be effectively exploited by social movements in order to challenge the existing system. This is because law is "a quite malleable medium" (McCann, 2004: 508).[3]

McCann also analyses the multifold functions of litigation as a possible strategy of social movements, particularly as "a source of institutional and symbolic leverage against opponents" (McCann, 2004: 513). First, the publicity associated with litigation will enable the issues which the social movement is concerned about to "get on the public agenda" (McCann, 1998a: 92), or will even to serve to mobilise public opinion in support of the movement. It is noted that "the mass media tend to be particularly responsive to rights claims and litigation campaigns for social justice, although this evidence is primarily limited to the US experience" (McCann, 2004: 511).[4]

Secondly, as in the case of litigation in other contexts, the threat or initiation of court proceedings may already be able to extract concessions or a compromise from

[3] Social movements can make use of the law "by exploiting the conflict between already settled rights claims and practices violating those rights; by identifying implicit contradictions within settled discursive logics of rights; or by developing logical extensions or new practical applications of settled rights claims." (McCann, 1998a: 84)

[4] In this regard, another writer has made the interesting point that "As entrepreneurs of the news, publishing, advertising, and entertainment industries have long known, at least the more reassuring, titillating, or lurid aspects of law can in the name of 'human interest' and 'information' be presented to capture and hold the public's attention." (Turk, 1976: 281-2) McCann (2004: 514) himself concludes that "media propensities to publicize legal rights claims, especially when taken to official tribunes and linked to dramatic information disclosure, often magnify the public power of legal mobilization pressure tactics in many settings."

the other side. The party sued will have to weigh the costs and benefits of contesting the plaintiff's claim, the risk of losing the court battle, and the adverse publicity if the plaintiff's claim is perceived by the general public as legitimate or ultimately upheld in court (McCann, 1998a: 91).

Thirdly, if the social movement is able to win some court battles, this will serve to strengthen the movement by further publicising and conferring legitimacy on its claims, rallying further public support, and demonstrating that the existing system which the movement seeks to change is indeed vulnerable and changeable. Litigation can thus contribute to shape – in the terminology of the political processes theory of social movements – "the overall 'opportunity structure' within which [social] movements develop" (McCann, 1998a: 84). It is interesting that McCann points out that it is not necessary that the judicial victory be "conclusive" and "far-reaching" (McCann, 1998a: 86), but even "small advances" (McCann, 1998a: 93) in litigation might be sufficient to enable the social movement to reap gains.[5]

Given these strategic advantages which a social movement may be able to gain from litigation, it is not surprising that it has not only become a popular tool of social movements in the U.S.A., but there has been "a rise of legal leveraging as a key tactic

[5] "[W]inning court cases – even when they achieve only limited advances in legal doctrine – is usually beneficial to movements. ... [M]ovements in many circumstances can gain tremendous advantages from winning only small doctrinal advances for a cause far short of a full remedy, from initiating actions that never get to court, and even sometimes from losing altogether in court." (McCann, 1998a: 100)

of social movement politics around the globe" (McCann, 2004: 515). In the U.S. itself, litigation associated with several social movements has resulted in substantial and far-reaching changes in the doctrines of American constitutional law (Eskridge, 2002). However, McCann also points out that the use of litigation as a strategy might entail considerable risks for a social movement. "[L]egal gambits are hardly costless guarantees of success for social reformers ... Initiating legal action ... may commit movement supporters to long, costly, high-risk legal proceedings that they can afford far less than can their institutional foes. Even more important, eventual defeat in official forums can sap movement morale, undercut movement bargaining power, and exhaust movement resources." (McCann, 2004: 514) McCann (1998a: 93) refers to several "examples where legal tactics either failed to generate, or even impeded, progressive change".

III *Social Movements and the Law in Hong Kong*

In the colonial era, the British legal model and the English common law were transplanted to Hong Kong. The British tradition of the Rule of Law and of the independence of the judiciary provided a strong foundation for Hong Kong's legal system (Tsang, 2001). However, for most of the time during Hong Kong's history as a colony, the people of Hong Kong did not enjoy the full extent of civil liberties enjoyed by the British people themselves (Wacks, 1988). As in other ceded colonies

forming part of the British Empire, the nature of colonial rule was authoritarian (Miners, 1986), with a high degree of concentration of power in the hands of the Governor appointed by London (Wesley-Smith, 1995). Laws on sedition, assemblies and associations were draconian, although they were not always strictly enforced (Chen, 1989a; 1990a). Furthermore, the operation of the legislative and judicial systems in the English language made local inhabitants feel that the legal system was alien and imposed on them (Chen, 1989b).

The 1980's however saw a fundamental change in Hong Kong's legal culture, particularly in public attitudes towards issues relating to the Rule of Law. The signing of the Sino-British Joint Declaration in 1984 and the prospects of reunification with China alerted the people of Hong Kong to the fact that the level of the Rule of Law and the protection of individuals' rights in mainland China was much lower than in Hong Kong, and there was a real danger that the human rights situation in Hong Kong would deteriorate upon Hong Kong's return to China. The people of Hong Kong therefore began to treasure the legal system which they had inherited from the British colonizers, and to make efforts to safeguard and strengthen it in preparation for the challenges of 1997. There was a legal awakening in Hong Kong, a rise in rights consciousness. Law-related current affairs attracted increasing media and public attention (Chen and Chan, 1987; Chen, 1990b). A number of legal controversies in the

1980's testified to the increasing vigilance of members of the public with regard to human rights and fundamental freedoms (Chen, 1988b; Chan, 1990).

In 1989, the 4th June suppression of the student movement in Beijing brought about an unprecedented crisis of confidence in Hong Kong. One of the measures taken by the British colonial government to alleviate the difficult situation was the enactment of the Hong Kong Bill of Rights Ordinance in 1991, which incorporated into the domestic law of Hong Kong the human rights guarantees in the International Covenant on Civil and Political Rights. Under this new legal regime of the constitutional protection of human rights, the courts of Hong Kong acquired and began to exercise for the first time the power to review the validity of local legislation on the ground of its inconsistency with international standards of human rights (Chen, 2000: 418-20). As in other jurisdictions, the opportunity of constitutional review rendered the courts of Hong Kong more assertive and activist in ensuring that the law should strike the proper balance between rights and liberties of individuals on the one hand and the collective interest of society on the other hand. A body of jurisprudence and principles of constitutional interpretation were gradually built up through the accumulation of case law (Ghai, 1997a; Chan, 1998; Byrnes, 2000). At the same time, the government conducted a thorough review of existing legislation as regards its compliance with the Bill of Rights and introduced relevant amendments to liberalize

the law. In retrospect, the most significant amendments were those made to the Societies Ordinance and the Public Order Ordinance, which the Chinese side found to be objectionable with the result that the amendments were partially reversed at the time of the handover in 1997 (Chen, 2002: 216).

The Basic Law -- the constitutional instrument of the Hong Kong Special Administrative Region -- restricts the right of individual members of the Legislative Council to introduce private members' bills relating to government policy.[6] In the last weeks before the Basic Law came into effect in July 1997, the Legislative Council that had been elected in 1995 in a fairly democratic manner pursuant to the political reforms introduced by Governor Chris Patten rushed through a number of private members' bills which turned out to be significant in the post-1997 era. An example was the amendment of the Housing Ordinance for the purpose of ensuring that the rent payable by tenants of public housing estates in Hong Kong was affordable to them. Another example was the enactment of the Protection of the Harbour Ordinance which declares the Victoria Harbour to be "special public asset and a natural heritage of Hong Kong people" and discourages land reclamation within the Harbour. Laws like these, when enforced before the courts, enable the courts to play a major role in shaping social policies in Hong Kong in the post-1997 era. This reinforces the already

[6] See article 74 of the Basic Law. For a comparison with the pre-1997 position, see Chen, 1989c: 118.

enhanced role of the courts resulting from constitutional review of laws on human rights grounds as mentioned above and from the protection given by the Basic Law to various interests and its entrenchment of various policies.[7] Generally speaking, therefore, Hong Kong courts in the post-1997 era have addressed difficult issues of public policy more than ever before. Opportunities for social movements to challenge the existing order or existing policies by means of litigation have also become greater than ever before.

We consider below several episodes in the post-1997 legal history of Hong Kong which illustrate the interaction between social movements and the law. The incidents concerned are classified into the following categories: (1) law as a means to control social movements; (2) law as a weapon of social movements; (3) law as the contextual environment of social movements.

Law as a means to control social movements

As discussed above, law may constrain the space for social movements by limiting the freedoms of speech, press, assembly, procession and association without which social movements can hardly mobilize mass support. In post-colonial Hong Kong, one prominent domain of legal struggles that is relevant to the space for social movements is that constituted by the Public Order Ordinance and the Societies

[7] See, e.g., articles 40, 99-103, chapters 5 and 6 of the Basic Law.

Ordinance, which regulate the freedoms of assembly, procession and association. As mentioned above, the colonial laws in these areas were originally strict but were liberalised in the 1990's as part of the exercise to ensure that all existing Hong Kong laws were consistent with the newly enacted Bill of Rights. However, on the eve of Hong Kong's reunification with China, the National People's Congress (NPC) Standing Committee, exercising its power under the Basic Law of Hong Kong to determine which existing Hong Kong laws could not survive the handover (Ghai, 1997b; Ghai, 1999: 379-86), decided not to adopt the major amendments made to the Societies Ordinance and the Public Order Ordinance in July 1992 and July 1995 respectively.[8] The NPC Standing Committee's action met stern protests from civil society in Hong Kong.

Although the NPC Standing Committee nullified the amendments introduced in the 1990's to the Societies Ordinance and Public Order Ordinance, it did not actually mandate the restoration of these laws to their pre-amendment version. A new version of societies and public order legislation for the SAR was enacted by the Provisional Legislative Council (PLC) on 14 June 1997 in the form of the Societies (Amendment) Ordinance 1997 and the Public Order (Amendment) Ordinance 1997. The new version to a considerable extent preserved the improvements and liberalisations made in the

[8] For an English translation of the text of this decision, see (1997) 27 *Hong Kong Law Journal* 419-24.

1992 and 1995 amendments.[9]

The requirement in the revised law of a "notice of no objection" in the case of public processions proved to be controversial. In the years following 1997, some demonstrators tried to test the law by deliberately not applying for a notice of no objection before the demonstration. Some omitted to do so through neglect or due to the urgency of the demonstration. It has been pointed out that 126 protests were organised in 1998 and 183 protests in 1999 without applying for any notice of no objection (So, 2002: 405). However, the government did not prosecute any of the organisers. Other organisers of demonstrations complied with the legal requirements, and 1388 protests were approved in 1998 and 1283 in 1999 (So, 2002: 405). It has also been pointed out that "According to official figures in the period between July 1997 and March 2002, about one in seven public rallies were in fact held without notifying the police in advance." (Cheung and Chen, 2004: 79)

[9] The most significant changes introduced by the PLC to the existing law related to two areas. First, under the latest version of the law, the government has the power to prohibit a public meeting or procession or the operation of a society on the additional ground of "national security" (in addition to the pre-existing grounds of "public safety" and "public order"). Secondly, it is now provided that political bodies in Hong Kong may not have any connection with foreign or Taiwan political bodies (otherwise the former's existence may be prohibited). This provision reflects the requirements in article 23 of the Basic Law. The other features in the new vesion of the law are largely technical changes to the existing law and do not take away any significant substantive rights which were enjoyed under the existing law. These features include the change from the system of "notification" to the authorities after the formation of societies to a system of "registration" of societies (but s. 5A(6) of the new version of the Societies Ordinance provides that societies may still be formed and hold activities pending notification of the result of their application for registration), and the requirement of a "notice of no objection" in the case of public processions (but s. 14(4) of the new version of the Public Order Ordinance provides that if the police do not expressly object to a proposed procession, they will be deemed by law to have issued the notice of no objection).

The only cases in which the government attempted to enforce or actually enforced the requirements of the Public Order Ordinance with regard to applications to hold demonstrations occurred in 2000 and 2002. The events in 2000 illustrate the interaction between the law and the student movement in Hong Kong. On 20 April 2000, about 60 university students demonstrated against a proposal to charge differential tuition fees for students in different academic disciplines. On 26 June 2000 – the anniversary of the NPC Standing Committee's ruling which overturned the Court of Final Appeal's decision in the "right of abode" case (discussed below), about 1200 seekers of the right of abode, their supporters and students from the Hong Kong Federation of Students staged a demonstration to protest against the Standing Committee's decision. In both cases, the organisers of the protest did not comply with the procedural requirements of the Public Order Ordinance. Student leaders in both demonstrations were subsequently arrested by the police – five arrested in August 2000 in connection with the June demonstration, and another five arrested in September 2000 in connection with the April demonstration. The arrests and apparently impending prosecution of the students prompted a strong reaction from civil society, with a number of demonstrations and petitions organised in support of the students, some of the protests being again in defiance of the procedural requirements of the Public Order Ordinance. The government finally succumbed to the pressure of public opinion and decided on 5 October and 25

October respectively not to prosecute the two groups of students (So, 2002; Cheung and Chen, 2004).

The campaign against prosecution of the students soon turned into a campaign for the reform of the Public Order Ordinance itself. However, on this front the government refused to give way. It decided to table a motion before the Legislative Council requesting legislators to express support for retaining the Ordinance in its existing form. On 21 December 2000, after a 8-hour debate lasting for two days, the Legislative Council passed the motion by majority vote, and the public debate on the reform of this area of the law came to an end at least for the time being (So, 2002: 414-5; Cheung and Chen, 2004: 80).

The patience of the SAR Government in not prosecuting demonstrators who flouted the law came to an end in 2002. In May 2002, Leung Kowk-hung of the April 5th Action Group, Fung Ka-keung, council chairman of the Hong Kong Federation of Students, and another student activist were arrested by the police and charged with organising an unauthorised procession in February 2002 (Cheung and Chen, 2004: 80). They were convicted by a magistrate in November 2002; the defendants were required to be bound over for 3 months on a recognizance for $500.[10] The defence lawyers' challenge to the

[10] i.e. to undertake that they would be of good behaviour and not violate the law during this period, the breach of the undertaking would result in a fine of $500.

constitutionality of the Public Order Ordinance (i.e. its alleged violation of the freedom of assembly and procession) was unsuccessful. The defendants appealed to the Court of Appeal. In November 2004, the Court of Appeal dismissed the appeal by a majority ruling of 2 to 1.[11] The case was further appealed to the Court of Final Appeal (CFA).

On 8 July 2005, the CFA by a majority of 4 to 1 dismissed the appeal.[12] The court upheld the requirement in the Ordinance that organisers of public processions involving more than 30 persons should notify the police in advance. The court also upheld that the power of the police to restrict or prohibit processions on the ground of "public order" in the "law and order" sense of maintenance of public order and prevention of public disorder is constitutional, while striking down the broader concept of "*ordre public*" as used in the Ordinance since the concept is too broad and imprecise to satisfy the test of legal certainty. The court also stressed that in exercising the discretionary power to regulate processions, the police must comply with the "proportionality" test, otherwise their decisions could be overturned by the court. This means they "must consider whether a potential restriction is rationally connected with one or more of the statutory legitimate purposes [public order as narrowly defined above, national security, public safety, etc] and whether the potential restriction is no more than is necessary to

[11] *HKSAR v. Leung Kwok Hung* [2004] 3 HKLRD (*Hong Kong Law Reports and Digest*) 729 (HCMA 16/2003). The court judgments in the cases discussed in this chapter are all available at the website of the Hong Kong Judiciary, http://legalref.judiciary.gov.hk.
[12] *Leung Kwok Hung v. HKSAR* [2005] 3 HKLRD 164 (FACC 1/2005).

accomplish the legitimate purpose in question." (paragraph 96 of the judgment) The dissenting judge agreed that it is legitimate to impose a prior notification requirement on processions but disagreed with the view that this requirement can be enforced by the sanctions of criminal law. He also believed that the police power of prior restraint of demonstrations is unconstitutional.

We now turn to another high-profile episode of litigation regarding the right of assembly and demonstration. This is the case of the prosecution of Falun Gong demonstrators in 2002, which reveals that apart from the Public Order Ordinance, the law of obstruction of public places[13] (which traditionally was mainly used against illegal hawkers in the streets) may also be used to control assemblies and demonstrations. The case concerns a small-scale demonstration staged by 16 Falun Gong activists outside the entrance to the Liaison Office of the Central People's Government in Hong Kong on 14 March 2002. Since the number of demonstrators was small, there was no need under the Public Order Ordinance to notify the police in advance or to comply with procedural requirements which are only applicable to assemblies involving more than 50 persons or processions involving more than 30 persons. After the protesters refused to leave despite repeated police warnings, the police arrested them. There was some physical violence during and after the arrest. The protesters were charged with obstruction of a public

[13] See the Summary Offences Ordinance, sections 4(28) and 4A.

place, and obstructing or assaulting police officers in the execution of their duty. After a 27-day trial, the protesters were in August 2002 convicted by a magistrate who imposed fines ranging between $1300 and $3800 on them. They appealed to the Court of Appeal, which gave judgment in November 2004.[14] The appeal against conviction for obstruction of a public place was successful, although the appeal against conviction on the other charges failed. In an unanimous decision, the Court of Appeal held that due regard to the protection of the right of assembly should be given in applying the law of obstruction of public places. It overturned the conviction for obstruction on the ground that the magistrate failed to address sufficiently whether the manner in which the protesters exercised their right of assembly was so unreasonable so as to constitute an unlawful obstruction. The defendants appealed further to the Court of Final Appeal.

The appeal was successful. On 5 May 2005, the CFA[15] unanimously held that the arrest of the defendants had been unlawful, since the police officers who carried out the arrest were not able to satisfy the court that they had reasonable grounds for suspecting that the defendants had committed the offence of obstruction of a public place. The court stressed that the offence is not constituted by mere obstruction; the use of the public place or highway must be unreasonable, otherwise there could be a lawful excuse for the obstruction. In determining what is unreasonable use or lawful excuse, the defendants'

[14] *HKSAR v. Yeung May Wan* [2004] 3 HKLRD 797 (HCMA 949/2002).
[15] *Yeung May Wan v. HKSAR* [2005] 2 HKLRD 212 (FACC 19/2004).

right to peaceful assembly and demonstration should be given due weight. The court further held that the defendants in the present case could not be convicted for obstructing or assaulting police officers in the execution of their duty even though physical resistance was involved. Since the arrest was unlawful, the police officers were not actually acting in the due execution of their duty when they encountered resistance from the defendants. It was also pointed out that citizens have a right to use reasonable force to resist an unlawful arrest and detention.

In both decisions mentioned above, the CFA stressed the importance of the constitutional right to freedom of peaceful assembly and demonstration which is guaranteed by the Basic Law, the Hong Kong Bill of Rights and the ICCPR. The CFA's decisions in the two cases may be deemed a consolidation of the freedom of demonstration in the Hong Kong SAR, and the reinforcement of the protection for the physical space for social movements to operate in Hong Kong.

Law as a weapon of social movements

As discussed above, under some circumstances litigation may be an effective strategy used by social movements, particularly when accompanied by other social movement tactics such as demonstrations and other forms of expression of popular support for the cause of the movement. In other words, the law of the state may be turned into a weapon in a battle against the state and its status quo. In post-colonial

Hong Kong, such battles have included those for the right of abode of mainland-born children of Hong Kong residents, against the reduction of civil service pay, against reclamation of the Victoria Harbour, for the lowering of public housing rent, and against the privatisation of the assets of the Housing Authority. The legal weapons used in these battles included the Basic Law, the Protection of the Harbour Ordinance and the Housing Ordinance. We shall discuss the right of abode saga in greater detail, and then mention the other episodes more briefly.

The right of abode litigation was initiated immediately after the handover and reached its climax in the Court of Final Appeal's (CFA) decisions in *Ng Ka Ling* and *Chan Kam Nga* in January 1999[16] on the appeals to the CFA from lower courts by seekers of the right of abode in Hong Kong. The applicants were children of Hong Kong permanent residents, but they were born on the mainland. Some were born before their parents became Hong Kong permanent residents; some were born after at least one of their parents became such residents (e.g. the children were born on the mainland to women whose husbands were Hong Kong permanent residents living in Hong Kong); some were illegitimate children. The children claimed the right of abode in Hong Kong under the Basic Law,[17] and argued that the immigration legislation

[16] *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315 (FACV 14/1998); *Chan Kam Nga v. Director of Immigration* [1999] 1 HKLRD 304 (FACV 13/1998).
[17] Basic Law, article 24(2)(3).

(passed by the Provisional Legislative Council)[18] that restricted such right was invalid because it contravened the Basic Law. The task of the CFA, therefore, was to give a final and authoritative interpretation of the relevant Basic Law provisions.

The CFA's decisions in *Ng Ka Ling* and *Chan Kam Nga* in favour of the applicants for the right of abode had huge impact at the practical level in terms of the migrant population pressure generated by the decisions.[19] After the decisions were announced, the Hong Kong Government conducted sample surveys and statistical studies for the purpose of estimating the number of people eligible to migrate to Hong Kong as a result of the decisions. It announced on 28 April 1999 that 1.67 million people (consisting of two generations) would be so eligible in the coming decade if the CFA's decisions were to be implemented. It was then pointed that that the CFA's interpretation of the relevant provisions in the Basic Law was probably inconsistent with the original intent behind the Basic Law, of which the National Peoples Congress Standing Committee (NPCSC) would be the most appropriate interpreter. Under the

[18] The Immigration (Amendment)(No. 2) Ordinance 1997 and the Immigration (Amendment)(No. 3) Ordinance 1997.

[19] The immigration legislation that the decisions invalidated (on the ground that it was inconsistent with the Basic Law) had attempted to restrict the migration of mainland-born children of Hong Kong permanent residents by requiring them to apply for the exit permit issued by the mainland exit control authority (for which they would have to queue up and wait for years). The CFA in *Ng Ka Ling* held (on the basis of its interpretation of article 22(4) of the Basic Law) that the Hong Kong immigration authorities could not legitimately require the migrant children to hold such an exit permit before they were allowed entry to Hong Kong. The immigration legislation had also defined the category of children eligible for the right of abode in such a way as to exclude children born on the mainland at a time when neither of their parents had acquired Hong Kong permanent resident status. The CFA in *Chan Kam Nga* held that this definition was inconsistent with article 24(2)(3) of the Basic Law, which, according to the CFA's interpretation, conferred the right of abode on mainland-born children of Hong Kong permanent residents irrespective of whether the parents had already acquired permanent resident status at the time of the children's birth.

Chinese Constitution[20] and article 158 of the Basic Law, the NPCSC has the power to interpret the Basic Law. On 21 May 1999, the SAR Government requested the State Council to refer the relevant Basic Law provisions to the NPCSC for interpretation.

The Government encountered vehement opposition to its proposal to refer the matter to the NPCSC (Chan, Fu and Ghai, 2000) not only from the right of abode seekers and their supporters who had since 1997 organised many demonstrations in support of their cause, but also from the legal community of Hong Kong, particularly the Bar Association and most leaders of opinion in the legal community, as well as from a significant section of the political elite in Hong Kong, particularly the Democratic Party and its allies in the legislature, which comprised most of the directly elected members of the Legislative Council. The incident was extremely controversial because there is nothing in the Basic Law which suggests that the executive branch of the SAR Government can request the NPCSC to interpret the Basic Law. Furthermore, the reference to the NPCSC was criticized as a self-inflicted blow to Hong Kong's autonomy, judicial authority, Rule of Law and system for protecting individuals' rights. Nevertheless, on 26 June 1999, the NPCSC issued an interpretation which in effect negated the CFA's interpretation of the relevant Basic Law provisions and upheld the restrictions on the right of abode imposed by the

[20] The 1982 Constitution, article 67(4).

relevant immigration legislation.[21] Thus the fruit of the court victory was completely taken away from the social movement for the right of abode.

The interpretation was followed by a series of demonstrations by right of abode seekers and their supporters in civil society, including student, religious and human rights groups. On 30 June 1999, 600 lawyers also marched in silence wearing black (Fung, 2004: 109). As mentioned above, even as long as one year after the NPCSC's interpretation, a demonstration of 1200 people took place to mark the anniversary of the interpretation, and the event almost resulted in several students being prosecuted. However, there was on the whole in Hong Kong little public support for the right of abode movement. The movement suffered a further setback after the arson attack by some abode seekers at the office of the Immigration Department on 2 August 2000, which further turned public opinion against the movement for the right of abode (So, 2002: 409).

As in the case of the right of abode seekers, civil servants also used the Basic Law to litigate their claims against the government. Before the handover, annual revisions of civil service salaries almost always resulted in pay rises, and there had never been any pay cut. To cope with the severe budget deficits and to align public sector salaries with those in the private sector, the Government in 2002 decided to

[21] For the text of the interpretation, see *The Government of the Hong Kong Special Administrative Region Gazette Extraordinary, Legal Supplement No. 2*, 28 June 1999, p. 1577 (L.N. 167 of 1999).

introduce a pay cut (ranging from 1.58% to 4.42%) for Hong Kong's 180,000 civil servants. In order to implement the pay cut, the legislature enacted the Public Officers Pay Adjustment Ordinance 2002. A further pay adjustment ordinance was passed in 2003 providing that civil service pay would be further reduced by 3% on 1 January 2004 and by another 3% on 1 January 2005. These reductions[22] do not however reduce civil servants' salaries below their salary levels at 30 June 1997. When the last reduction came into effect on 1 January 2005, civil service salaries (for existing civil servants) were reduced to the relevant levels of 30 June 1997. The pay cut law was challenged by several civil servants with the support of their unions as being an infringement of the Basic Law provision that after the handover the pay and conditions of service of civil servants would be "no less favourable than before".[23] It was argued that even if the actual salary of a civil servant was not reduced below its 1997 level, the mere introduction of legislation to reduce pay and thus to vary unilaterally the terms of the existing contract of employment would be a violation of the Basic Law. The argument failed before the Court of First Instance,[24] but

[22] They are provided for in the Public Officers Pay Adjustment Ordinance (Cap 574) and the Public Officers Pay Adjustments (2004/2005) Ordinance (Cap 580). The former provides for a reduction which took effect on 1 October 2002. The latter provides for 2 reductions taking effect on 1 January 2004 and 1 January 2005 respectively.

[23] See article 100 of the Basic Law. Several other articles of the Basic Law (e.g. article 103) were also relied on by the civil servants in the litigation. Article 103 provides for the maintenance of the pre-1997 system of recruitment, employment, assessment, discipline, training and management for the public service.

[24] *Lau Kwok Fai Bernard v. Secretary for Justice* (HCAL 177/2002; Court of First Instance, 10 June 2003) [2003] HKEC 711 (Westlaw); *Michael Reid Scott v Government of the HKSAR* (HCAL 188/2002; Court of First Instance, 7 Nov 2003) [2003] 1235 HKCU 1 (Lexis). See also *Michael Reid Scott v. Secretary for Justice* (HCAL 38/2004; Court of First Instance, 4 Feb 2005) [2005] 174 HKCU 1.

succeeded before the Court of Appeal,[25] which in November 2004 decided by a majority of 2 to 1 that a key provision of the pay cut law was invalid. The case then went on appeal to the CFA. On 13 July 2005, the CFA[26] unanimously upheld the pay cut law, and decided that it violates neither article 100 nor article 103 of the Basic Law.

The first two of the next three cases to be considered involved the use of ordinances introduced in the form of private members' bills (bills proposed by individual members of the Legislative Council rather than by the Government) and enacted at the last minute before the handover after which extensive restrictions in the Basic Law on the introduction of private members' bills came into force. The Protection of the Harbour Ordinance was such an ordinance. It was initiated by a legislator on behalf of the Society for the Protection of the Harbour ("the Society"), an NGO which opposes excessive reclamation in the Victoria Harbour. The Ordinance declares that "The harbour is to be protected and preserved as a special public asset and a natural heritage of Hong Kong people, and for that purpose there shall be a presumption against reclamation in the harbour." In July 2003 the Society by relying on the Ordinance successfully challenged a reclamation project in Wanchai before the Court of First Instance.[27] That Court's decision was affirmed on appeal to the Court

[25] *Lau Kwok Fai Bernard v. Secretary for Justice* [2004] 3 HKLRD 570 (CACV 199/2003).
[26] *Secretary for Justice v. Lau Kwok Fai Bernard* [2005] 3 HKLRD 88 (FACV 15/2004).
[27] *Society for Protection of the Harbour Limited v. Town Planning Board* [2003] 2 HKLRD 787

of Final Appeal in January 2004.[28] Although a similar challenge brought by the Society against another reclamation project in Central was unsuccessful,[29] the series of litigation succeeded in attracting public attention to the issue of the protection of the harbour against reclamation and in mobilizing public support for this cause, which was manifested in a number of assemblies and marches organised by the Society.

Like the Protection of the Harbour Ordinance, a law to ensure that the rent charged by the Housing Authority to tenants of public housing estates in Hong Kong would be low and affordable to the tenants was introduced shortly before the handover in the form of a private member's bill on an amendment to the Housing Ordinance. The express provisions of the law were designed to prevent frequent rent increases at a time of inflation and to ensure that upon any increase the "median rent to income ratio" (MRIR) for public housing tenants would not exceed 10%. After 1997, Hong Kong experienced deflation. The Housing Authority did not lower public housing rent with the result that the MRIR came to exceed 10%. Several public housing tenants supported by social movement organisations in the housing movement obtained legal aid and brought an action against the Housing Authority, claiming that the Authority had the legal obligation to review the rent and to lower it

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(HCAL 19/2003).

[28] *Town Planning Board v. Society for the Protection of the Harbour Limited* (FACV 14/2003; CFA, 9 Jan 2004).

[29] *Society for Protection of the Harbour Ltd v. Chief Executive in Council* (HCAL 102/2003; Court of First Instance, 9 March 2004).

so as to bring the MRIR down to 10%. The action succeeded before the Court of First Instance,[30] whose decision was however overturned by an unanimous decision of the Court of Appeal in November 2004.[31] The Court of Appeal's decision was affirmed by the Court of Final Appeal in * 2005/06.

In the celebrated or infamous (depending on one's perspective) Link Case, two elderly tenants of public housing estates who lived on public assistance income, with the support of a few politicians and a social movement organisation in the housing movement, brought an action in December 2004 to challenge the privatisation of the commercial areas (for retail shops) and car parks of public housing estates owned by the Housing Authority. The priviatisation was for the purpose of raising capital to solve the problem of the Authority's budget deficit. The plan was to set up a unit trust (the Link Real Estate Investment Trust) to take control of the privatised assets and to list the unit trust on the stock exchange in Hong Kong and abroad. The action to challenge the privatisation programme was initiated only a few days before the listing was to materialise. Although the challenge failed before the Court of First Instance[32] and the Court of Appeal,[33] the legal uncertainty created by the possibility of an appeal to the Court of Final Appeal ultimately resulted in the privatisation and listing project

[30] *Ho Choi Wan v. Hong Kong Housing Authority* [2003] 2 HKLRD 819 (HCAL 174/2002).
[31] *Lam Kin Sum v. Hong Kong Housing Authority* (CACV 250/2003; Court of Appeal, 22 Nov 2004).
[32] *Lo Siu Lan v. Hong Kong Housing Authority* (HCAL 154/2004; Court of First Instance, 15 Dec 2004).
[33] *Lo Siu Lan v. Hong Kong Housing Authority* (CACV 378/2004; Court of Appeal, 17 Dec 2004).

being aborted. This was a victory for the movement against privatisation of public housing assets, but mainstream public opinion in Hong Kong considered the litigation an abuse of the legal system by self-interested politicians using the two public housing tenants as puppets. One of the two tenants dropped out of the litigation after the first instance decision, while the other appealed all the way to the CFA. In an unanimous judgment delivered on 20 July 2005,[34] the CFA dismissed the appeal and affirmed the legality of the privatization project. The CFA held that, as a matter of interpretation of the Housing Ordinance, that the proposed sale of the retail and carpark facilities concerned to the Link Trust is within the powers of the Housing Authority The sale did not mean that the Housing Authority would no longer be able to "secure the provision of" (in the words of the Ordinance) the facilities concerned to the tenants because the facilities would still be available for use by the tenants after the sale.

Law as the contextual environment of social movements

Finally, we turn to two famous episodes in Hong Kong's post-colonial history in which legal controversies led to massive demonstrations – the movement against the national security bill to implement article 23 of the Basic Law, and the movement for universal suffrage in 2007-08. In these two episodes, the law provided the contextual

[34] *Lo Siu Lan v. Hong Kong Housing Authority* (FACA 10/2005; CFA, 20 July 2005).

environment of the social movements. Indeed, the movements would not have occurred but for the existence of certain legal provisions in the Basic Law of Hong Kong.

Article 23 (BL 23) of the Basic Law requires the SAR to "enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government". It also addresses state secrets and the activities of foreign political organizations in Hong Kong. It does not directly prohibit treason, sedition, subversion and related actions, nor does it define the precise meaning of these words. Instead, it empowers and mandates the SAR -- in practice its legislature -- to enact laws to define and penalize such actions. Many of the issues raised by BL 23 are considered politically sensitive. Ever since the Basic Law was enacted in 1990 and brought into effect in July 1997, there have been anxieties over the implementation of BL 23.

The publication on 24 September 2002 of the Government's Consultation Document on *Proposals to Implement Article 23 of the Basic Law* opened a 3-month consultation exercise on the legislative proposal. The results of the consultation were announced on 28 January 2003 together with 9 sets of clarifications or modifications of the original legislative proposal. This was followed by the publication of the National Security (Legislative Provisions) Bill on 13 February 2003 and its first

reading in the Legislative Council on 26 February 2003. During the Bills Committee's deliberations on the Bill, the Government agreed to some amendments. However, critics said that the amendments were insufficient (Fu, Petersen and Young, 2005), and in any event the Government's timetable of passing the Bill in the Legislative Council's week-long meeting beginning on 9 July did not allow sufficient time for deliberation.

On 1 July 2003, a hot summer day which was also a public holiday marking the 6th anniversary of Hong Kong's return to China and the last day of the new Premier Wen Jiabao's visit to Hong Kong, half a million Hong Kong residents took to the streets to demonstrate against the article 23 legislative exercise and to express other grievances against the Tung Chee-hwa administration. Surprised themselves by the large turnout, opponents of the Bill demanded that the Bill be shelved, and planned to organize a rally of tens of thousands surrounding the Legislative Council on 9 July if proceedings on the Bill were to go ahead on that day. The SAR Government decided to postpone the Bill – the decision came 3 hours after the Liberal Party on the evening of 6 July withdrew from the "governing coalition" of political parties in protest against the Tung administration's original decision on 5 July to adhere to the 9 July deadline for the passage of the Bill while giving three major "concessions" on the content of the Bill (Chen, 2003a; 2003b). On 17 July 2003, Chief Executive Tung

Chee-hwa announced that the Government would re-open public consultation on the Bill to ensure that its content would receive broad public support before it was passed into law. However, in an about-turn on 5 September 2003, Mr Tung announced that the Bill was to be withdrawn. Since then, the implementation of article 23 of the Basic Law has been shelved indefinitely.

After the demonstration on 1 July 2003, the political climate of Hong Kong changed dramatically. There was a rising tide of demands for further democratisation of Hong Kong's political system (Chan, 2004), as reflected in the pro-democracy demonstrations on 9 and 13 July 2003 and on 1 January 2004 – each attended by tens of thousands of people -- and in the landslide victory of pro-democracy candidates (as opposed to pro-China candidates) in the District Councils election on 23 November 2003. Pro-democracy forces called for the introduction of universal suffrage in the election of the Chief Executive in 2007 and in the election of all the members of the Legislative Council in 2008.[35] They also urged the HKSAR Government to initiate a comprehensive review of Hong Kong's political system (together with a full-scale public consultation exercise on the matter) as soon as possible so as to ensure that new electoral laws could be put in place in time for the elections in 2007 and 2008.

In early 2004, it was widely anticipated that Mr Tung Chee-hwa, Chief Executive

[35] The Basic Law only provides expressly for the modes of election of the Chief Executive and the Legislative Council before 2007, and contemplates the possibility of change in the modes of election after 2007. See Annexes I and II to the Basic Law.

of the HKSAR, would announce the arrangements for the review of the political system when he gave his annual policy address to the Legislative Council on 7 January 2004. Many people in Hong Kong were disappointed when the policy address was delivered. Instead of announcing the arrangements for constitutional review and consultation or committing the Government to such a review, Tung announced the establishment of a Constitutional Development Task Force to study the relevant issues relating to the Basic Law and to consult relevant departments of the Central Government.

Then came the crucial month of April 2004, in which the fate of Hong Kong's political development was sealed. On 6 April 2004, the NPC Standing Committee exercised the power of interpretation of the Basic Law for the first time since its first-ever interpretation on the right of abode,[36] bringing the constitutional debate on "one country, two systems" in Hong Kong to a new climax. The interpretation was followed by a decision of the NPCSC on 26 April on the issues arising from the interpretation. These interventions on the part of the NPCSC amounted to a rejection of the democrats' demands with respect to 2007 and 2008. The democracy movement was halted, although it has by no means disappeared immediately. On 1 July 2004, the anniversary of the march against article 23 of the Basic Law, an estimated 200,000

[36] For the text of this Interpretation and the subsequent decision of 26 April 2004, see the *Gazette of the HKSAR Government, Legal Supplement No. 2*, 8 April 2004, p. B431 (L.N. 54 of 2004); *Gazette Extraordinary*, 28 April 2004, *Special Supplement No. 5*, p. E5.

people participated once again in a pro-democracy march.[37] On 1 July 2005, by which time Tung had resigned and been replaced by Mr Donald Tsang, the number dropped to less than 20,000.

IV *Concluding Reflections*

By Western and international standards, social movements in Hong Kong are relatively few, weak, of small scale and of limited durations. However, Hong Kong does provide an interesting case study of the relationship between law and social movements. It may be seen from this chapter that theories of law and social movements developed by scholars on the basis of Western experience are by no means irrelevant to Hong Kong. The Hong Kong experience vividly demonstrates how the law can both constrain and support social movements, and how the law can become a stage on which the mass media and members of the public focus their attention as the rights claims of social movement actors and organizations are fought out.

The story of the legislative changes and debates on the Public Order Ordinance and the *Leung Kwok Hung* and *Falun Gong* cases provide a classic illustration of how the law can be used to define and limit the physical space which social movements utilize for protests and demonstrations, and how an independent and activist judiciary

[37] The organisers estimated that 530,000 people had participated in the demonstration, but the figures given by the police, the Hong Kong Human Rights Monitor, and independent scholars ranged between 120,000 and 260,000.

can contribute to protecting such space by relying on a constitutional proclamation of the right to freedom of assembly. Whereas these two cases involve the prosecution of social movement activists defending themselves in court, in the next four cases discussed in this chapter, individuals with the support of social movement organizations (as well as legal aid provided by the Government in four of the five cases)[38] took the initiative to challenge government actions before the courts. In all these cases, the text of the law was ambiguous enough to sustain the interpretations advanced by the litigants. Legal discourse was employed to bolster the legitimacy of their claims before society as a whole. Indeed, in the right of abode and civil servant pay cases, the legitimacy of the right of abode seekers' and the civil servants' demands was primarily derived from the law – the language of the Basic Law – instead of from other sources.

In all these five cases, litigation was used as an instrument or strategy by "social movements" as loosely defined. There were assemblies and marches in the streets to advance the litigants' claims in each case, the size of these activities being lager in the case of the right of abode seekers, civil servants and harbour protection activists, and smaller in the case of the housing movement activists who organized the litigation in the public housing rental case and the Link case. Whereas in the West, litigation is

[38] The right of abode cases, the civil service pay cut case, the Housing Ordinance case and the Link case were all litigated with the support of legal aid. So was the defence in the Leung Kwok Hung case and the Falun Gong mentioned above.

often used only as a supplementary strategy by social movements whose principal strengths and activities lie in mass mobilization and public protest, in these five Hong Kong cases (with the possible exception of the harbour protection case) litigation was relied on as the principal means for advancing the claims of the movements which had only very limited support in society. Thus when the litigation failed (in the civil servants' case, the housing rental case and the Link case) or when the NPC Standing Committee settled the legal issue authoritatively (in the right of abode case), the social movement itself subsided. This testifies to the weakness of the relevant social movements in Hong Kong.

The social movement against the enactment of the national security law to implement article 23 of the Basic Law provides a remarkable example of law and social movements. Many social movements, such as the classic Civil Rights Movement in the U.S.A., campaigned for the reform of the law. In the case of the movement against the national security bill, the objective was to preserve the status quo, particularly the liberties of civil society and the very space for future social movements. This is therefore a movement about the law and about the legal conditions and possibilities for social movements themselves. The democratization movement that followed provides a classic illustration of how legal discourse can be mobilized to strengthen a social movement claim. The claim in this case is for

democratization, and the legal argument was based on the provisions on the Basic Law that allow fundamental changes to the electoral system in 2007 and 2008. However, insofar as this claim – as the right of abode claim – was dependant on the language and interpretation of the Basic Law, it was ultimately defeated by a legal maneuver – again the NPC Standing Committee's act as the most legally authoritative interpreter of the Basic Law.

To conclude, it may be noted that the transition in 1997 to Chinese sovereignty has not weakened the vitality of the law in Hong Kong. On the contrary, the life of the law has apparently been strengthened by the coming into force of the Basic Law and the increasingly activist role of the Hong Kong judiciary in handling important issues of public policy. Social movements in Hong Kong have begun to exploit the law and the legal system for the purpose of challenging government policies or at least making their claims highly visible before members of the public in Hong Kong. There is also evidence in Hong Kong's experience for the proposition that law may matter as a symbolic and legitimating resource for social movements. Furthermore, the story of Hong Kong law as recounted above demonstrates how the legal boundary of the free space for social movements has been contested here, and how law has inspired or provoked social movements in the post-colonial era. And the story of Hong Kong law and the story of Hong Kong social movements are likely to continue to be intertwined

in the foreseeable future.

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