

## 5 Freedom of Association and Assembly

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S.K. LAU, perhaps the most perceptive academic observer of the Hong Kong social scene, has contended in his influential book<sup>1</sup> that the dominant cultural code in the territory is 'utilitarianistic familism'. This manifests itself in a normative and behavioural tendency of local Chinese to place their familial interests above the interests of other individuals, groups, and society as a whole, and to structure their relationships with other parties in a manner consistent with the ultimate objective of maximizing familial welfare. The utilitarianistic dimension of familism is rooted, according to Lau, in the strong inclination exhibited by family members to accord far greater importance to material interests than to non-material ones.

Utilitarianistic familism is said to generate attitudes such as 'aloofness towards society' ('[t]he Hong Kong Chinese in general neither identify with Hong Kong nor are committed to it but rather tend to treat it as an instrument. Consequently, society is conceived as a setting wherein one exploits . . . the opportunities available . . . to advance the interests of oneself and one's familial group');<sup>2</sup> 'avoidance of involvement with outsiders' ('[s]uspicious attitudes towards outsiders and distrust of them have long been a recognized cultural feature of Chinese people, which have their roots in a peasant society where relatively self-contained life confined to small geographical areas was the rule. Given the Chinese abhorrence of conflict and aggression, we find the coexistence of intense emotional attachment among people in small groups, and cold impersonal postures towards those who are outsiders . . . In Hong Kong this avoidance attitude towards others has produced a relatively "cold" society in which concern with the well-being of others is low');<sup>3</sup> 'low social participation' ('an aloof attitude towards society and the distrust of outsiders, together with the emphasis on familial groups, are followed by a low rate of participation in voluntary associations');<sup>4</sup> 'limited demands on government' ('[t]he primary role of government in society is largely conceived to be that of maintaining social stabil-

ity, and it is understandable as Hong Kong has been haven [*sic*] for Chinese immigrants who fled from war and hunger in the mainland in the past one and a half centuries . . . As long as the government can maintain social stability it will be accepted, and the level of political frustration among Chinese will be held within controllable limits . . . service delivery is [increasingly] emphasized by the younger generations. Even in this aspect, however, the expectation is still rather low, and is far from the types of "aspiration explosions" plaguing other parts of the world);<sup>5</sup> 'political powerlessness' ('[u]nder the general rubric of diffuse tolerance of the existing form of government, it is also possible to locate a pervasive sense of political powerlessness among the Hong Kong Chinese');<sup>6</sup> 'deference towards government officials' ('[t]he attitudes of the Hong Kong Chinese towards . . . government officials are ones of envy, fear, respect, abhorrence, avoidance and aversion');<sup>7</sup> and 'low political participation' ('political participation is usually shied away from by . . . ordinary people, and the middle-income residents are not much better in this respect').<sup>8</sup>

The web of socio-political attitudes underpinned by utilitarianistic familism is hardly likely to result in the active expression of collective opinion and its articulation in the form of public protest. For this reason, the twin issues of freedom of association and assembly historically have not loomed large on the local political agenda. The cultural influences which have prevented them from gaining greater prominence have been reinforced by the government's policy of emphasizing stability rather than participation, as well as the rapid economic growth enjoyed by the territory in the 1960s and 1970s. The latter factor has helped to foster satisfaction with the system and has encouraged the diversion of energy towards material pursuits.

In recent years, however, Hong Kong people have displayed an increasing willingness to vent their grievances in public, and lend support to community-wide objectives. The question of the future of Hong Kong after 1997 and the decision to build a nuclear power-plant at Daya Bay<sup>9</sup> have served as principal catalysts in this respect, as has the growing sense of political efficacy in the face of the perceptible decline in government power. Confronted with the choice between exercising the option of 'voice' or disengaging by availing themselves of the opportunity to 'exit'<sup>10</sup> most of the territory's residents would perhaps prefer to 'vote with

their feet', but there appears to be a widespread realization that certain strategic questions call for political mobilization and that the pre-1997 period offers considerable scope for seeking political influence through organized means. This is a consequence of the weakening position of the colonial authorities and China's desire to be seen as benevolent in order to win local confidence during the transition years. Slower economic growth is also likely to intensify collective action by inducing social stress and heightening the sense of relative deprivation.

In the light of these developments, it is reasonable to assume that the issues of freedom of association and assembly will attract greater attention in the future. Indeed, one of the aims of the present chapter is to speculate about likely government responses to the changing socio-political circumstances and to suggest possible legislative reforms. One cannot, however, proceed to deal with future contingencies without a discussion of past and present trends — particularly in Hong Kong where policy tends to evolve incrementally over a long period of time. Therefore observations about the future are preceded by a brief historical survey and a detailed analysis of the existing law.

## A. HISTORICAL BACKGROUND

The history of legislation concerning the freedom of individuals in the territory to form and join associations is essentially one of continuing restraint. The first substantial encroachment on the freedom of association in Hong Kong after the Second World War came into effect in 1949 in the form of the Societies Ordinance which imposed a duty of registration with the Registrar of Societies (the Commissioner of Police) on any association of people 'whatever its nature or object',<sup>11</sup> and provided for extensive governmental supervision. Subsequent amendments of the principal ordinance alternated between seeking a 'greater measure of control'<sup>12</sup> and 'stricter control'<sup>13</sup> over the activities of societies and their office-bearers by means of an expanded scope of application, extension of the Registrar's approval and regulatory powers, an increase in the range and stiffness of penalties, and a more effective system of law enforcement (achieved through the granting of protection to informers and through flexible rules of evidence).

The desire to maximize control over group activities has been fuelled by strong and legitimate concerns about the threat posed by pervasive triad influences in the territory.<sup>14</sup> The preoccupation with the triad problem, however, has led local law-makers to overlook the many distinctions between different associations. Specifically, they have not addressed themselves over the years to the needs of groups not involved in crime and subversion. Such groups have thus continued to be constrained in their pursuit of objectives consistent with mainstream community values.

Perhaps the most significant turning-point in the history of legislation pertaining to the freedom of assembly in Hong Kong was the year 1967, in which there was an attempt to 'consolidate and amend the law relating to the maintenance of public order, the control of organizations, meetings, places, vessels and aircraft, unlawful assemblies and riots and matters incidental thereto or connected therewith'.<sup>15</sup> The same year was also marked by the worst civil unrest that Hong Kong has experienced and, consequently, the Public Order Bill 1967 encountered little opposition, passing swiftly and with only a few minor amendments. It is particularly noteworthy that no fundamental objections were raised in view of the strong emphasis placed by the Bill's presenters on 'prevention and control of disorder' while avoiding any reference to the right of members of the public to dissent or express their opinions by means of peaceful assembly. The Bill was projected as a measure erring on the side of safety and justified as a necessary response to the turmoil experienced in the preceding months.<sup>16</sup>

In an effort to deflect potential criticisms, the government signalled that if the 'balance between citizen and state' changed or the implementation of the Bill disclosed 'gaps or provisions which proved unfair or oppressive', it would be 'ready and willing to consider suitable amendment'.<sup>17</sup> Such an opportunity presented itself in 1970 with the enactment of the Public Order (Amendment) Ordinance, following the 'recognition that some of the provisions of the Ordinance confer unnecessarily wide powers in ordinary times and that, in a few instances, there may be a risk that innocent persons may become involved in offences'.<sup>18</sup> The 'need for [further] review of the provisions of the Public Order Ordinance [specifically]<sup>19</sup> relating to public meetings and processions in the light of [new] circumstances' was acknowledged again nine years later.<sup>20</sup>

As indicated, the main purpose of the architects of the 1967 Ordinance was that of 'strengthening the law dealing with public order'. To this end, they conferred wide powers on the relevant executive organs. Thus, the Commissioner of Police was granted the authority to prohibit the holding or continuance of any public gathering in any particular area or premises or on any particular day if he considers it necessary or expedient in the interests of public order to do so (section 15); the Governor in Council was provided with the power to ban all public gatherings for up to three months if he considers it necessary to do so in order to prevent serious public disorder (section 16); a police officer of or above the rank of inspector was authorized to prevent the holding of, stop or disperse, or vary the place or route of any public meeting, public procession, or public gathering other than meetings exclusively for religious purposes (section 3); authority was also extended to such an officer to enter and search premises without warrant, search persons found in premises and stop and search vessels and vehicles in which such an officer knows or has reason to suspect that there is evidence of an offence under the ordinance (section 49); all police officers of any rank were given the power to prevent the holding of, and to stop or disperse an unlicensed public meeting or public procession (section 11); and their coercive ability was further buttressed by an array of ancillary powers such as the authority to issue orders and use necessary force (section 11); finally, section 50(1) accorded members of the Hong Kong Auxiliary Police Force on duty greater powers and immunities than they had previously held, placing them on a par with police officers of equivalent ranks.

Nor was it just a matter of enhancing the control potential of law enforcement officers. The Public Order Ordinance 1967 also substantially expanded the scope of relevant offences to replace what had been regarded as the 'technical and ill adapted' and generally 'inadequate' common law on the subject of unlawful assembly and riot.<sup>21</sup> To be more explicit, according to the Ordinance (section 18), if three or more persons assembled together conducted themselves in a manner intended or likely to cause anybody reasonably to fear a breach of the peace, regardless of whether they shared a 'common purpose', they would constitute an 'unlawful assembly'. The latter, in turn, would amount to a riot as soon as any party present committed a breach of the peace (section 19). Furthermore, an unlawful assembly might be

deemed an 'intimidating' one under the new provisions (sections 27-30) which introduced into the permanent law the substance of the Emergency (Prevention of Intimidation) Regulations 1967.

As the impact of the 1967 disturbances started to dissipate, criticism intensified against powers granted to the police that were deemed to be 'unnecessary' or 'unjustifiable', and the likelihood of 'morally innocent persons'<sup>22</sup> falling within the broad terms in which some sections in the Public Order Ordinance were expressed. While admitting no actual abuse of the powers conferred by the Ordinance or the unreasonable prosecution or wrong conviction of persons, the government proceeded to 'clarify some provisions about which doubt has been expressed and to relax others in order to give better protection to the public against any misuse of powers or against the possible conviction of persons innocently involved in circumstances which constitute offences under the Ordinance'.<sup>23</sup>

Specifically, the term 'meeting' was redefined to include any meetings in which a degree of organization is exhibited, whether before or during the meeting, thus excluding a casual gathering of persons in a public place, hitherto regarded as a meeting subject to the requirement of a licence. Also excluded were meetings for any statutory purpose such as creditors' meetings or sittings of courts. Exempted additionally<sup>24</sup> from the need to obtain a licence were meetings held for social or business purposes in licensed restaurants and funeral meetings. Amendments were introduced not only to narrow the ambit of the Ordinance's application but also to restrict the exercise by police officers of the power to prevent the holding, stopping, and dispersing of public meetings (section 11), as well as the powers to prohibit the public display of flags and banners (section 3) to occasions where these could be believed to be reasonably necessary (rather than on the basis of the officer's opinion). Similarly curtailed were the wide powers of search and entry granted to police officers under the 1967 Ordinance (section 49); they retained merely the qualified authority to require a person to identify himself if this was considered necessary for the purpose of preventing or detecting a crime.

Perhaps even more significant was the attempt to circumscribe the liabilities and offences under the Ordinance. In such a vein, the strict obligation imposed on the licensee to be present from the first assembly of the meeting to its final dispersal was

amended to enable him the defence of absence by reason of illness or other unavoidable cause. By the same token, a person responsible for the organization, promotion, direction, or management of a meeting which was prohibited by the Commissioner of Police under section 15 would, under the new provisions, be guilty of an offence only *after* the issue of the prohibition order. The defence of 'lawful authority or reasonable excuse' was also guaranteed by the 1970 amendment to 'participants' (as distinct from organizers) charged with taking part in an unlicensed assembly (section 12) who could demonstrate that they had been innocent bystanders and had become involved unintentionally. The plea of lawful authority or reasonable excuse was extended in like manner to persons charged with having an offensive weapon in their possession at a public meeting or procession (section 14), in the light of the wide definition of 'offensive weapon' which includes articles that are in common use (such as choppers or knives). Of particular importance were the amendments of the offences of unlawful assembly (section 18) and riot (section 19), requiring a disorderly, intimidating, insulting, or provocative element in the conduct of an assembly before it became unlawful. As a result of these amendments, the offence of 'intimidating assembly' became superfluous since a person taking part in an intimidating assembly could be prosecuted for taking part in an unlawful one.

The 1970 attempt to strike a better balance between the values of public authority and individual liberty notwithstanding, the implementation of the provisions in the Public Order Ordinance imposing constraints on freedom of assembly continued to provoke criticism, the most grave of which entailed allegations of the arbitrary exercise of police power and selective enforcement of the law.<sup>25</sup> A series of events in 1979<sup>26</sup> and particularly an important Supreme Court judgment<sup>27</sup> served to highlight the anomalies in the existing legislation and apparently prompted the government to convene a working party (in May 1979) with a view to recommending possible improvements in the law relating to the licensing and control of public meetings and processions.<sup>28</sup> The working party's efforts culminated in the Public Order (Amendment) Ordinance 1980 which sought primarily to replace the established licensing procedures pertaining to public meetings with a simplified system of police notification in the context of

substantially redefined 'meetings' and 'processions', thus arguably paving the way for a variety of public meetings to be held without official permission.

The shift towards a less sweeping form of monitoring public meetings was justified by the government on the ground that there was a 'sufficiently stable' Hong Kong with a 'sufficiently responsible' population.<sup>29</sup> Be that as it may, the further liberalization of the law undertaken in 1980 was still heavily influenced by considerations of public order and security. The then Attorney General shed light on the cautious attitude displayed by the authorities more than a decade after the eruption of the 1967 disturbances by portraying the territory as a potentially volatile place. As he put it,

although Hong Kong today is stable, and its population, with very few exceptions, responsible it was not always so, and — who knows — in the future issues unforeseen by us today may arise which could lead to the expression of strongly opposing views supported perhaps by different groups or different factions in society. And it is to be remembered too that in all societies and in all places it happens sometimes that those who hold strong and controversial views may, through misguided enthusiasm or indeed sometimes perhaps through malice, attempt to insist upon the expression of their views in places and at times when to do so may risk or even be actually designed to cause unrest.<sup>30</sup>

Given the lingering fear that the communication of opinions in the public domain poses the danger of escalating into political conflict and destabilizing the precarious social order, the importance of the 'right to demonstrate' as an integral part of the freedom of expression was — again — not accorded full recognition by local law-makers in 1980. In this respect, the latter have not departed from the British tradition which denies a positive legal principle supporting the right to demonstrate and gives greater weight to the imperatives of political order.<sup>31</sup> However, even in jurisdictions in which no such denial prevails, some form of regulation of public meetings and processions is considered legitimate. The specific regulatory measures adopted by the Hong Kong government are therefore of interest, despite the intellectual rejection of the right to demonstrate in principle. These measures, as well as those pertaining to the formation of and membership in associations and the law which incorporates them are described and evaluated in the following section.



## B. SURVEY OF EXISTING LEGAL PROVISIONS

The local authorities have opted to regulate the freedom of association and assembly in the territory by a variety of means ranging from 'prior restraint', through 'subsequent punishment' to 'dispersal powers'. The first type of measure includes registration as a form of 'pre-association' control and three 'pre-assembly' methods of vetting made available under the Public Order Ordinance, namely licensing, notification, and banning orders.<sup>32</sup>

### *1. Regulation by Prior Restraint*

#### a. Registration

As pointed out earlier, any organized group is required under the Societies Ordinance to apply to the Registrar of Societies for registration. Exemption from registration may be granted by the Registrar to societies established solely for religious, charitable, social, or recreational purposes, but all groups formed for other purposes must be approved and registered by him.<sup>33</sup> Indeed, approval and registration may be denied for a variety of reasons, including the mere fact that the 'society is a branch or affiliated or connected with any organization or groups of a political nature established outside the Colony' or the arguably vague suspicion that it is 'likely to be used for any purpose prejudicial to and incompatible with peace, welfare or good order in the Colony' (section 6). The Registrar's decision may none the less be reversed, or modified, should the parties affected succeed in their appeal to the Governor in Council in accordance with section 12 of the Ordinance. In the absence of registration or exemption, a local society is deemed to be an unlawful entity (section 18) and its office-bearers, any person managing it or assisting in its management, and any member who attends its meetings are subject to severe penalties (section 19).

#### b. Licensing

The licensing procedure is detailed in section 13 of the Public Order Ordinance which stipulates that public processions consisting of more than 20 people and taking place on public highways, public thoroughfares, or public parks must be authorized by a licence issued in writing by the Commissioner of Police. The licence — once given — is subject to conditions relating to the

forming, conduct, route, times of passing, and dispersal of the procession as the Commissioner of Police may impose, as well as a general condition that the licensee be 'present at the public procession from the first assembly thereof to the final dispersal thereof' in order to ensure the 'due performance and compliance with the conditions of the licence and the maintenance of public order throughout the period of assembly, conduct, and dispersal of the public procession' (section 15). Furthermore, the Commissioner of Police enjoys wide discretionary power to grant or withhold the necessary permit and is guided merely by the elastic formula that he be 'satisfied that the public procession is not likely to prejudice the maintenance of public order or to be used for any unlawful purpose'. The Commissioner may thus refuse a licence to hold a public procession, unless for the sole purpose of a funeral, and is constrained in this respect only to the extent that:

The applicant or any person or society associated directly or indirectly with the application or likely in the opinion of the Commissioner of Police to be concerned with the organizing, convening, forming or conduct of the public procession has, in relation to any public gathering, at any time contravened the provisions of [the Public Order Ordinance] or any other law or any other condition of a licence, issued under [the] Ordinance or any other law; or that 'the public procession has been advertised or otherwise publicized prior to the determination of the application' (section 13 (6)).

A right of appeal to the Governor is none the less granted (under section 16) to an aggrieved person whose application for a licence is rejected or whose licence is cancelled or amended. On the other hand, a procession to which the licensing requirement applies, and which is held without a licence or in breach of its terms, is deemed to be an 'unauthorized assembly' and the organizers and participants alike are guilty of an offence (section 17A).

### c. Notification

The notification requirement applies under the present system to public meetings which involve — or are expected to involve — more than 30 people in a public place or more than 200 people in private premises, excluding, however, meetings held in schools or accredited educational establishments with the consent of the management (section 7). Failure to give such notification renders the meeting 'unauthorized' and carries with it criminal liability

and a heavy penalty (section 17A). By contrast, meetings preceded by a notification in accordance with the prescribed procedure — that is, seven working days in advance and providing the Commissioner of Police with full details — may take place, although subject to strict conditions (section 11). The freedom to hold public meetings is further circumscribed by the extensive powers granted to the Commissioner of Police to prohibit intended meetings notice of which has been given (section 9), though section 16 provides for a right of appeal to the Governor to rescind the prohibition order.

#### d. Banning Orders

The Hong Kong authorities have at their disposal banning powers both of a general and a specific nature. Thus, a general ban on all, or a class, of public gatherings in the territory for a period not exceeding three months may be imposed by the Governor in Council 'if he is satisfied that by reason of particular circumstances existing in Hong Kong or in any part thereof, it is necessary for the prevention of serious public disorder' (section 17E). In addition, the Commissioner of Police is empowered to place a specific ban on public gatherings 'if it appears to him to be necessary or expedient in the interests of public order so to do' and regardless of whether the gathering is disorderly or violent (section 17D).

## 2. *Subsequent Punishment*

Tight control over associations and public assemblies may also be exercised in the territory through provisions regulating the conduct of members and participants. A local society (registered or exempted) which is regarded as being 'used for purposes prejudicial to or incompatible with peace, welfare or good order in the Colony' may thus be dissolved by the Governor in Council (section 30, Societies Ordinance). The Public Order Ordinance also contains restrictive provisions which impinge on the freedom of people in Hong Kong to organize themselves for the purpose of collectively expressing their views. Specifically, it authorizes police officers of or above the rank of inspector to prohibit the display of flags, banners or other emblems at public gatherings, private premises or on various transport vehicles (and use the necessary coercive means to enforce these prohibitions) on the basis of their reasonable belief that such display is likely to cause

or lead to a breach of the peace (section 3). Similar prohibitions are extended to the wearing of uniforms signifying one's affiliation with any political organization or the promotion of political objects (unless permitted by the Commissioner of Police) (section 4). Finally, section 5 makes it an offence to organize, train or equip the members of an association whose purpose is to usurp force in promoting any political object.

With respect to public assemblies, the principal legal tool of controlling conduct is section 18 of the Public Order Ordinance which defines the offence of 'unlawful assembly' as the assembly together of three or more persons who conduct themselves in a 'disorderly, insulting or provocative manner intended or likely to cause any person reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such conduct provoke other persons to commit a breach of the peace'. More disruptive forms of assembly are dealt with by invoking the offence of 'riot' (section 19) which may be described as an unlawful assembly turned violent. Also subject to prosecution under the Ordinance (section 26) is a person who 'without lawful authority, at any public gathering makes any statement or behaves in a manner which is intended or which he knows or ought to know is likely to incite or induce any person' to engage in acts of violence. More specific restrictions are imposed in the Public Order (Public Meetings) (General Conditions) Order 1981 with regard to the duty to maintain good order at a public meeting; the requirement to notify the date, location, and duration of the meeting; the use of amplification devices; the display of banners; advertising arrangements; the burning of national emblems; the collection of money; stage performance; the removal of litter at the conclusion of meetings; and the dispersal of crowds.

Another cluster of offences which reinforces the punishment system directed at restraining public gatherings concerns picketing. Thus, while it is 'lawful for one or more persons, acting on their behalf or on behalf of a registered trade union or of an individual employer or firm, in contemplation or furtherance of a trade dispute, to attend at or near a place where a person works or carries on business, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working', it is an offence to 'so attend in such numbers,

or otherwise in such manner, as to be calculated to intimidate any person in that place or to obstruct the approach thereto or egress therefrom or to lead to a breach of the peace' (section 46, Trade Unions Ordinance).<sup>34</sup> Indeed, such a gathering would under the same ordinance be tantamount to 'watching and besetting' of that place, conduct which constitutes the offence of 'intimidation and annoyance' (section 47).

The array of punitive measures that may be employed by the Hong Kong authorities to enjoin public assemblies is further buttressed by statutes proscribing public nuisances,<sup>35</sup> obstruction of public places,<sup>36</sup> incitement to disaffection,<sup>37</sup> criminal damage to property,<sup>38</sup> or obstruction of police officers in the execution of their duty,<sup>39</sup> and supplemented by common law offences<sup>40</sup> and statutory instruments.<sup>41</sup>

### 3. *Dispersal Powers*

Considerable dispersal powers have been conferred upon police officers (in the case of both lawful and unlawful gatherings) if they reasonably believe that such activities are 'likely to cause or lead to a breach of the peace' (section 17, Public Order Ordinance). In addition, to facilitate the enforcement of dispersal orders, police officers may use such force 'as may reasonably be necessary', to enter any premises in which persons are gathered or close specific places to the public (section 17). Failure to comply with dispersal orders is a criminal offence which is severely penalized (section 17A).

## C. EVALUATION

There is a dearth of judicial pronouncements on the subject of freedom of association and assembly in Hong Kong. Thus an assessment of the extent to which this freedom is preserved must inevitably focus primarily on statutory provisions and government policy reflected in them. The criteria of evaluation, however, mirror international norms and legal practice in other jurisdictions. Equipped with such external yardsticks, but not without regard to local conditions, one may endeavour to ascertain the appropriateness and justiciability of the limits imposed on the exercise of the freedom of association and assembly in the terri-

tory, and particularly whether it exists only in so far as the regulating authorities allow it to exist.

At the outset, reference should be made to international guarantees of the freedom of association and assembly which are applicable in Hong Kong. Of special relevance here are Article 20 of the 1948 Universal Declaration of Human Rights,<sup>42</sup> stating that '[e]veryone has the right to freedom of peaceful assembly and association', and Articles 21 and 22 of the 1966 International Covenant on Civil and Political Rights,<sup>43</sup> which stipulate (respectively) that '[t]he right of peaceful assembly shall be recognized' and that '[e]veryone shall have the right to freedom of association with others'. These rights, however, are not absolute and it is acknowledged that restrictions may be imposed which are 'necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others'.<sup>44</sup> The key issue, therefore, is the proper balance between competing rights, interests, and values, or, more specifically, to reconcile the inherent conflict<sup>45</sup> between the freedom of individuals to organize themselves in groups, attend public meetings, or participate in public processions on the one hand, and societal needs for peace and order, on the other.

Achieving such a balance often eludes governmental decision-makers for they tend to gravitate towards the public security and public order end of the value spectrum, thereby stifling individual freedom. Indeed, as the preceding survey of the law in the territory suggests, the Hong Kong bureaucracy has displayed a disquieting proclivity to seek to minimize environmental disturbances at the possible cost of impeding individual expression. While the authorities pay lip service to the ideal of striking a 'fair balance' between these competing rights, the right to a stable environment<sup>46</sup> invariably carries greater weight.

Whether a fair balance is struck depends in the first instance on the mechanism adopted for the regulation of associations and public gatherings. It is possible to argue, for example, that prior restraint of any kind dilutes to a certain extent the freedom of association and assembly. On the other hand, some form of prior restraint may be necessary to hold organized crime at bay, ensure proper control of traffic and allow optimal deployment of traffic control resources. Early notice may also be necessary whenever complex decisions concerning priorities between competing pub-

lic uses are faced.<sup>47</sup> The key issue, therefore, is not the justifiability of prior restraint as such but the appropriateness of the specific method employed for this purpose.

As outlined previously, the procedures devised by the Hong Kong government encompass a wide range of prior restraint measures, some aspects of which appear acceptable, or even essential, but which tend on the whole to restrict excessively freedom of association and assembly in the territory. To begin with, the requirement that all associations, irrespective of their nature and objectives, be registered, is neither reasonable nor necessary. Clearly, the burden is on government to identify the type of associations which should meet this requirement as a matter of public interest without unduly circumscribing the legitimate rights of other groups. What renders the requirement of registration particularly objectionable is the branding as an 'unlawful society' of any association which does not comply with it, including ones whose intentions are not malicious and whose activities cause no social harm. The consequent penalties, when directed against groups which pose no threat to the social order, violate principles of retributive justice given the lack of proportionality between harm caused and punishment inflicted.

Perhaps an even more conspicuous restraining technique applied locally is the licensing of public processions. While possibly facilitating more efficient traffic planning, and reassuring 'risk averters' who may prefer to have prior knowledge of the areas within which they can operate without exposing themselves to the risk of committing traffic or similar offences, the licensing system inhibits the freedom of expression and discourages those who may be seeking public channels to exercise their voice option and are willing to risk the consequences.

Generally, the 'costs' associated with mandatory licensing schemes of the type relied upon in Hong Kong are thought to outweigh the benefits. Thus, from a theoretical standpoint, subjecting the right to peaceful assembly to the requirement of a licence substantially devalues that right and reduces it to a limited privilege granted at the discretion of the authorities. More tangible costs are those identified by Baker in his recent study.<sup>48</sup> They include a cost in the form of what amounts to a proscription of valuable means of expressive conduct such as 'spontaneous' demonstrations.<sup>49</sup> Another concrete cost imposed by licensing systems manifests itself in the notion of being 'licensed to demon-

strate' which implies state paternalism or what Baker refers to as 'compelled symbolic affirmation of allegiance'. Strong exception is taken particularly to the fact that 'government requires the permit in order to do what one already has a right to do'<sup>50</sup> and that licensing 'forces . . . dissidents to acknowledge, by requiring them to act out, the authority and dominance of the very government against which they protest'.<sup>51</sup> An even more significant cost attributed to licensing procedures is their vulnerability to arbitrary or biased decision-making on the part of the officials involved. According to one writer, 'common experience is sufficient to show that [licensors'] attitudes, drives, emotions and impulses all tend to carry them to excesses'.<sup>52</sup> Baker adds that licensing methods are often used to harass and suppress dissidents and other advocates of minority opinions unacceptable to the authorities or the mainstream community.<sup>53</sup> The institutional dynamics in which licensing is embedded also tend to encourage officials to circumscribe the rights of unpopular groups. ('Saying "yes" creates more trouble, more work, potential problems, and accompanying criticisms.'<sup>54</sup>)

It could be argued that the record of the police shows a propensity towards granting approval to applications for licences.<sup>55</sup> Be that as it may, the relatively small number of applications may in itself be indicative of the repressive nature of licensing, and the existing scheme remains open to potential abuses. Such abuses cannot be ruled out since the present system lacks built-in safeguards against violations of civil liberties.<sup>56</sup>

The lack of safeguards is not the only questionable feature of the licensing procedures. Equally problematic is the provision under which a procession held without a licence or in breach of its terms is deemed an 'unauthorized assembly' rendering any participant guilty of an offence. Given that the law requires those who desire to hold, organize, and convene a procession to apply for a permit, fairness dictates that the sanction for non-compliance be directed against such people alone.

Similar objections may be raised in relation to another form of 'prior restraint' currently applied in Hong Kong with respect to public meetings, namely notification. Like licensing, it also has the undesirable effect of placing the onus on the person wishing to exercise his right to assemble and does not allow for the possibility of semi-organized or spontaneous protest. In addition, the far-reaching decision to make a failure to notify the Com-



missioner of Police of the intention to hold a public meeting a criminal offence subject to a heavy penalty is hardly compatible with liberal notions of freedom of assembly and association; nor is there any tangible evidence to suggest that it is conducive to the promotion of the objectives normally served by criminal law. As Fisse and Jones have contended, 'demonstrations of highly radical persuasion are unlikely to be influenced, and may even favour the creation of new targets of disobedience'.<sup>57</sup>

Furthermore, while an argument could possibly be put forward in support of some form of notification, under specific conditions, with regard to 'moving assemblies' or processions,<sup>58</sup> no such argument may legitimately be offered where the problem of allocating scarce resources to competing uses does not arise and the mass movement of people does not take place (that is, where no police supervision is required). The instrumental value of notification is also dubious, for the police tend to learn about most public gatherings through informal channels such as their own intelligence network and prior publicity, which calls into question the practical need for imposing a statutory objection to notify the authorities unless the purpose is to cause 'embarrassment to law abiding citizens'.<sup>59</sup>

Equally questionable are banning orders whose statutory rationale is not grounded in actual disorderly or violent behaviour, but in the subjective belief of the Commissioner of Police that it is 'necessary or expedient in the interests of public order'. Although broadly similar banning orders exist in other jurisdictions — for example, some European countries have adopted banning procedures in conjunction with a notification requirement for the purpose of restraining unruly processions — they generally do not apply to gatherings other than processions, are reserved for circumstances involving serious public disorder which the authorities are ill-equipped to contain, and are drafted with a view to minimizing abuses.<sup>60</sup> Even the banning powers granted under British legislation, which have attracted considerable criticism, are confined to processions and are contingent on the inability of the police to prevent serious public disorder by means of control mechanisms that enable the attachment of specific conditions as to time, area, and route.<sup>61</sup>

While the British system is marginally superior to the local one in so far as banning is concerned, it constitutes an inadequate model in that its 'blanket' nature has apparently inspired Hong

Kong law-makers to confer upon the Governor in Council the authority to impose general bans on public gatherings in the territory. The lack of discrimination between peaceful and violent assemblies is particularly disturbing in this respect because the powers at issue extend to public gatherings of any type, strengthen unduly the capacity of the Governor in Council to exercise political control, and leave limited scope for judicial review.

In addition to the problems stemming from reliance on mechanisms such as registration, licensing, notification, and banning orders, the local system for regulating associations and public gatherings exhibits deficiencies that may be attributed to the fact that the standards which feature in the relevant provisions are very elastic and place too much discretion in the hands of the decision-making body. As indicated, incompatibility with the 'peace, welfare or good order in the Colony' is deemed to be a legitimate ground for the denial of registration by the Registrar of Societies. Similarly, the 'maintenance' of public order or the 'interests of public order' may justify refusal by the Commissioner of Police to permit the holding of public meetings or to grant a licence for a procession and can provide him with sufficient grounds to prohibit any public gathering. No attempt is made to delineate or carefully define the conditions under which such restrictions on the freedom of assembly and association may be imposed. In consequence, the standards in question are open to abuse and arbitrary application, and clearly fail to meet the criteria built, for instance, into the 'overbreadth' doctrine embraced by American courts.<sup>62</sup>

Another problematic factor which enters into local regulatory decisions concerning freedom of association and assembly pertains to the past behaviour of potential organizers. Thus, the Registrar of Societies may refuse to register a society if any of its office-bearers has been convicted of an offence under any other ordinance which in the Registrar's opinion renders him unfit to hold office in that society (section 6, Societies Ordinance). Similarly, a conviction of a person or a collective body associated with the organization of a public meeting for an offence under the Public Order Ordinance allows the Commissioner of Police to proscribe the holding of such a meeting. An even greater power is given to the Commissioner in the exercise of his discretion in the context of public processions, authorizing him to deny a licence to applicants who at any time violated provisions of any

law or permit relating to public gatherings. The unfairness inherent in depriving persons of the freedom to assemble and voice their views publicly in an organized manner on account of the prior conviction of the leaders of the planned society or event has been emphasized by several writers.<sup>63</sup> Their criticism is rooted in the assumption that the past conduct of organizers is merely one of several variables which impinge on the outcome, peaceful or otherwise, of group activity and that it is not a particularly reliable predictor in this respect. They also express misgivings about the denial of civil liberties to persons who have already suffered punishment for their unlawful conduct.

The employment of ill-defined and dubious standards is not confined to 'pre-association' and 'pre-gathering' measures alone, but also extends to the regulation of existing societies and gatherings 'in progress'. Considerable ambiguity, for instance, characterizes the standard of 'peace, welfare or good order in the Colony' and yet activities inconsistent with it may prompt a dissolution of an existing society by the Governor in Council. Equally unsatisfactory is the 'breach of the peace' criterion which guides decisions regarding the public display of objects such as flags in gatherings, police powers to stop and disperse, and the offences of disorder in a public place, unlawful assembly, and riot. No definition of the concept of 'breach of the peace' is provided in any ordinances, nor is it in fact possible to find a 'modern and authoritative definition' in English and Commonwealth jurisprudence.<sup>64</sup> Moreover, '[t]he quest for an all-embracing definition might, perhaps, be an illusory one.' For 'what amounts to a breach of the peace sufficient to justify or require a policeman's prophylactic intervention in one context (rowdiness on the streets after a party) might be of a different order from the threats to the peace that can be tolerated in the course of a picket or demonstration.'<sup>65</sup> The multi-dimensional nature of the concept of 'breach of the peace' has been highlighted by Bevan,<sup>66</sup> who has attributed to it at least five different shades of meaning, each with different ramifications in so far as the freedom of association and assembly is concerned. To illustrate, if the notion of 'breach of the peace' is interpreted to encompass any public disturbance, police officers in Hong Kong may be permitted to prevent public gatherings merely on the ground that would-be speakers might express views likely to offend some listeners or that their noisy behaviour could disrupt the tranquillity of the neighbourhood. In

contrast, limiting the term to an 'actual outburst of violence' may be regarded as too restrictive in the face of a serious and imminent threat of violence.

Indeed, the absence of an unequivocal definition of 'breach of the peace' leaves unregulated a most crucial facet of the freedom of assembly, namely the question of a 'hostile' audience or, more specifically, whether one's liberty should be restricted because of the intolerance and unlawful behaviour of one's audience. The Public Order Ordinance in its present form offers no distinctions with respect to the source of disturbance, particularly such as between the persons assembled and other parties reacting to their conduct. As a corollary, it fails to give recognition to the fundamental democratic principle that under normal circumstances<sup>67</sup> the right to assemble freely should never be revoked or controlled because of threatened violence by unreceptive spectators.<sup>68</sup>

It is also undesirable to make criminal liability for offences such as unlawful assembly and riot largely dependent on an ambiguous concept like 'breach of the peace' and the mere likelihood that some people might be stirred into hostile reaction. As Bevan contended, the key element in ascribing criminal liability in the context of freedom of expression must be intention on the part of the speaker to incite violence or recklessness. The law should 'only punish the speaker who intentionally or recklessly sets out to provoke violence whilst acquitting the speaker whose opponents are the real source of disorder'.<sup>69</sup> At the same time, the use of 'fighting words' which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace'<sup>70</sup> may engage the speaker in criminal activity subject to punishment. The existing legal provisions in the territory with regard to disorder in public places and unlawful assembly, although incorporating some reference to intention, omit the critical elements of imminence and seriousness of the anticipated violence, placing excessive discretionary power in the hands of the police and injecting ambiguity into a domain which is in need of certainty.

The problem is compounded by the fact that the objects of regulation themselves, namely societies, meetings, and processions, are not carefully defined. Consequently, borderline cases may proliferate, further detracting from the value of the law as a mechanism for reducing uncertainty. It is not clear, for instance, whether an informal group whose members share the sole common objective of enjoying a game of bridge or *mahjong* consti-

tutes a society for the purpose of the Societies Ordinance.<sup>71</sup> By the same token, one is at a loss to decide which issues qualify as 'matters of interest or concern to the general public or a section thereof' in relation to public meetings.<sup>72</sup> Finally, the loose expression 'common purpose' which furnishes the basis for the definition of procession<sup>73</sup> can hardly be said to promote clarity.

The deficiencies of the present legislation do not manifest themselves in the prevalence of ambiguous phrases alone. Another factor is the appropriateness of the vesting of public officials with such an extensive authority to make crucial decisions concerning the freedom of association and assembly. As Lord Scarman noted, '[a]t the end of the day standards of police conduct and the proper use by the police of their powers mean more to society than the theoretical state of the law'.<sup>74</sup> In his view, the answer lies in better organization, accountability, training, and supervision of the police,<sup>75</sup> but the question still remains as to whether police officers should exercise such wide-ranging controls over the freedom of association and assembly in Hong Kong. It is, for instance, legitimate to query whether police officers whose principal function is the maintenance of peace and order are likely to be sufficiently sensitive to the importance of citizens' rights to peaceful association and assembly. Furthermore, there is a danger that the Commissioner of Police, given his prominent position within the executive branch of government, may be subject to improper political influences in discharging his responsibilities as the official controlling societies and public gatherings.

The great latitude enjoyed by police officers with respect to these two forms of group activity is of particular concern to civil libertarians in the territory in view of the fact that no neutral, non-political, independent reviewing body is assigned to check police discretion. The Hong Kong legislation does provide for appeals against rejections of applications for registration as a society, against refusals to allow public meetings, and against denials of licences to hold public processions. None the less, the appeals are to another administrative authority which, although theoretically capable of a more strategic grasp of social problems, is not free from executive bias. As in the United Kingdom, the legislation does not provide for appeal to the courts and a test case brought before the European Commission on Human Rights lends support to the conclusion that no such remedy is

available.<sup>76</sup> Yet, as Brownlie observed,<sup>77</sup> there is no reason why courts could not review the exercise of the powers at issue on the basis of the 'ordinary principles of administrative law'. Be that as it may, in the absence of clearly and narrowly defined criteria, and given the subjectively phrased legislation, an effective challenge to the wide discretionary powers granted to the relevant authorities is not a realistic prospect.

#### D. SUGGESTIONS FOR REFORM AND FUTURE PROSPECTS

Whether the freedom of association and assembly in the territory is actually abused by the law enforcers because of legislative loopholes cannot be established with certainty,<sup>78</sup> yet reliance on the good faith and self-restraint of officials hardly provides a solid foundation for the protection of civil liberties. There are also grounds for the concern that — since societies, public meetings, and proceedings are at most 'lawful' within the existing legal framework — the freedom to associate and assemble may be entirely abrogated if brought into conflict with a competing right or obligation. It is desirable, therefore, to 'carve out [for such a freedom] a protected status'<sup>79</sup> or at least elevate it above 'the interstices of the substantive law'<sup>80</sup> which it occupies in the Hong Kong legal system. This would allow it to play a greater and more definite role in legislative, executive, and judicial decision-making.<sup>81</sup>

The importance of the right of association and assembly cannot be overemphasized. Indeed, as Macfarlane noted in his treatise on *The Theory and Practice of Human Rights*:

[t]here is a tight correlation between the existence of an effective right of association and assembly, exercising the associated right of freedom of expression and the general recognition and protection of other fundamental human rights. This is not surprising, since without effective and operative rights of association, assembly and expression . . . there is no possibility of taking action to draw attention to and secure redress for the invasion of other rights.<sup>82</sup>

Moreover, the exercise of these rights is thought, according to another writer, to be conducive to social stability in the light of the 'escape valve' theory.<sup>83</sup> Thus 'citizens who are politically

active, who spend their energies on social protest, meeting, parading, picketing and petitioning are releasing the pressures of modern society before the revolutionary elements can reach critical mass.<sup>84</sup> As this writer concludes: 'It is surely better to have the discontented campaigning and litigating, perhaps achieving legal and social reform, than to sow the seeds of a terrorist underground.'<sup>85</sup> Distinguished members of the judiciary have also recognized the 'undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances'.<sup>86</sup>

The notion that such a right should find formal legislative expression has none the less been disputed by some legal authorities. Lord Scarman, for instance, considered it 'unnecessary' to enact a 'positive right to demonstrate' since in his opinion the right already exists, 'subject only to limits required by the need for good order and the passage of traffic',<sup>87</sup> and his position was supported by the Select Committee charged with the Review of the Public Order Act and Related Legislation.<sup>88</sup> The extent to which the right of association and assembly may be said to exist in the above sense has, however, been questioned by Wallington, who regards it as tantamount to a mere perception of lawfulness in specific circumstances.<sup>89</sup>

The need for and the value of codification in the context of public processions and meetings have been stated with particular conviction by Bevan. He maintains that 'a right of procession would afford the protester clear legal protection',<sup>90</sup> 'provide a means of regulating municipal controls',<sup>91</sup> and 'bring the liberty which underlies protest into sharper relief and hinder the possibilities of its gradual, and sometimes, hidden erosion'.<sup>92</sup> Similarly, 'a statutory right of assembly would force the law to recognize assembly as a legitimate usage of many public places'<sup>93</sup> and allow restrictive local by-laws to be tested judicially.<sup>94</sup> American courts have acknowledged such advantages,<sup>95</sup> and the 'right to expressive usage of public places' is firmly established in American legal practice.<sup>96</sup>

It is hoped that the code of rights to be incorporated in the Basic Law would accord the freedom of association and assembly a 'preferred status' within the system of laws. Pending such constitutional initiative, however, consideration should be given in the light of the above analysis to raising the status of this freedom to that of a 'softer'<sup>97</sup> legal principle which, although not

having the effect of overriding primary legislation, would shift the emphasis currently placed on public order objectives to the protection of civil liberties.

A shift in a less authoritarian direction is also urged as a reaffirmation of democratic values in a period characterized by the tentative emergence of a participative culture and a quest for more effective communication between the grass roots periphery and the bureaucratic centre.<sup>98</sup> As Baker contends:

When conditions and events so strongly offend people's political and ethical consciousness that they are moved to take non-violent, disruptive steps, the situation has usually become one in which it is more important for the community to have its normal routines broken and people's everyday activities disrupted in order to awake the government and the community to the deep dissatisfaction, than it is for the community to avoid the inconveniences of the disruption.<sup>99</sup>

Baker's view seems to apply with even greater force to contemporary Hong Kong society, the relative stability and homogeneous nature of which militate against large-scale social disruption.

Closely related to the demand for a shift in emphasis from authoritarian to libertarian values, and contingent upon a greater recognition of the importance of the freedom of association and assembly within the legal system, is a possible reform in the allocation of the burden of action between those seeking to exercise this right and officials entrusted with the power to regulate it. Specifically, rather than compelling the former to challenge restrictions imposed on the freedom of association and assembly, the law should require the latter to demonstrate that such restrictions are warranted. A reform along these lines would, one hopes, also result in the removal of registration, licensing, bans, and similar prior-control mechanisms.<sup>100</sup>

Abolition of prior controls need not, however, entail the jettisoning of other means of regulation. For instance, regulation of time, place, and manner of a public gathering would not amount to an abridgement of the freedom of association and assembly provided it did not prevent the exercise of this highly valued liberty, particularly where a range of equivalent channels or opportunities exists. Indeed, the government ought to assume the formal responsibility for ensuring that adequate facilities for public expression are available.<sup>101</sup>

Needless to say, apart from restrictions pertaining to conduct



and manner, the ordinary criminal law could also be relied upon in appropriate circumstances, and use could be made of specific offences in respect of members of societies or participants in public gatherings who are personally involved in violations of the law while taking part in the activities of such societies or gatherings. However, the ambit of the relevant offences must be narrowly defined and strictly interpreted and adequate defences ought to be built into the prohibitions thought necessary.<sup>102</sup> Furthermore, as a general rule the government's view should be informed by the 'least restrictive alternative' approach,<sup>103</sup> and the authorities should be permitted to impose restrictions on the freedom of association and assembly only when other alternatives have been exhausted or proved ineffective and such a step is unavoidable in the face of serious public disorder, personal injury, and significant damage to or destruction of property.

Protection of the citizen's right to associate and assemble freely would none the less remain inadequate as long as the factors which justify the circumscription of this right are not meticulously defined.<sup>104</sup> Moreover, law enforcement officials or judges should, in weighing such factors, follow a stringent test along the lines of the 'reasonableness'<sup>105</sup> or 'clear and present danger' criteria.<sup>106</sup> The adoption of criteria of this type would arguably result in the exclusion of prohibitions on the freedom of association and assembly which are susceptible to arbitrary and discriminatory application and help limit restriction to cases in which evidence is available with respect to the seriousness and imminence of a social disturbance.

Equipped with such tools the courts ought to assume a greater role in the protection of the freedom of association and assembly using their existing authority to interpret the relevant statutes while giving more careful consideration to libertarian values than can be expected of executive authorities.<sup>107</sup> The scope for judicial involvement should be extended through provisions allowing both the Commissioner of Police and the organizer of an assembly or procession to approach the courts for a determination as to whether such gatherings may take place.<sup>108</sup> The provision of a firm basis for substantive judicial review of executive acts that impose restraints on the freedom of association and assembly would also reinforce the courts' position as the forum in which the individual can obtain redress from the excesses of government or government-sanctioned authority.

It must be conceded, however, that the likelihood that reforms of the kind suggested here will be implemented is not high. The preoccupation of both the authorities and the economic establishment with the twin objectives of 'prosperity' and 'stability' militates against any radical departures from the status quo in this particular domain during the transition period before 1997. Although there is a general recognition of the need to close legislative loopholes in so far as civil liberties are concerned well in advance of that critical date, there is perhaps an even greater reluctance in official and unofficial quarters to encourage individual and group activities which are construed as posing a challenge to the bureaucracy and detracting from its ability to govern efficiently. The freedom of association and assembly, therefore, is less likely to loom large on the legislative agenda than some of the other civil liberties discussed in this book.

The problem is compounded by the fact that this freedom does not have a 'natural' constituency which is dedicated to promoting it as a 'terminal'<sup>109</sup> or an 'instrumental'<sup>110</sup> value. Thus, for instance, the struggle to uphold the freedom of the press is spearheaded by the information industry which has a vested interest in liberal press laws and has been reasonably successful<sup>111</sup> in projecting the freedom of the press as something which is intrinsically valuable in a civilized society and essential for the smooth functioning of a sophisticated service centre (the argument is that a service economy depends on a free flow of information). By contrast, there are at present no groups, with the possible exception of the legal profession, which perceive a linkage between the freedom of association and assembly and their particularistic interests. For this reason, the government may have no incentive to address this issue in earnest. The prospects of reform will to all appearances be even poorer after 1997. For, while China seems favourably disposed towards the notion of capitalist Hong Kong, it will in all probability endeavour to place the territory's market economy within a more, rather than less, authoritarian political framework. Given the experience of Singapore, South Korea, and Taiwan,<sup>112</sup> the Chinese may not be inclined to acknowledge the existence of a strong positive correlation between political freedom and economic performance in the Asian context; in fact, there is evidence to suggest that they believe that the relationship between these variables tends to be negative.<sup>113</sup> As a corollary, it would be unrealistic to expect them

to lend support, before as well as after 1997, to attempts to liberalize the laws concerning the freedom of association and assembly.

Nor it is just a matter of the effect of political freedom on economic performance. The Chinese leadership apparently subscribes to 'unitary' theories of the public interest (where the whole may be conceived as a single set of ends which pertain equally to all members of society) rather than 'individualistic' ones (where the ends of the plurality as a whole are simply the aggregate of ends entertained by individuals).<sup>114</sup> It may consequently experience genuine difficulties in reconciling itself to the idea of a political community in which individuals and groups are free to form societies and assemble in pursuit of objectives other than those of the social 'organism' of which they are a part. In other words, the freedom of association and assembly may suffer erosion because they hinge on philosophical assumptions which do not dovetail with the conception of the public good prevailing in the mainland.

Low probability should not, of course, be equated with certainty. It would doubtless be inappropriate to leave the reader with the impression that the freedom of association and assembly will inevitably be curtailed rather than extended. The purpose of the note of caution sounded at the end of this chapter is not to suppress liberal hopes but to dispel unrealistic expectations. The objective of more enlightened laws with respect to the right to form societies and assemble is achievable. Yet such laws are likely to be introduced, if at all, only following an intense dialogue within Hong Kong and between the territory and China. The freedom of association and assembly will have to be won. It will not be granted willingly by those who exercise control over the rights of others.

## NOTES

1. S.K. Lau, *Society and Politics in Hong Kong* (Hong Kong, Chinese University Press, 1982).

2. Lau (1982), p. 87, note 1 above.

3. Lau (1982), pp. 89-90, note 1 above.

4. Lau (1982), pp. 92-3, note 1 above.

5. Lau (1982), p. 103, note 1 above.

6. Lau (1982), p. 105, note 1 above.

7. Lau (1982), p. 111, note 1 above.

8. Lau (1982), p. 113, note 1 above.

9. China and Hong Kong interests decided to construct a nuclear power-plant in the Daya Bay area which is situated about 55 kilometres from the territory.

10. Terms used by A.O. Hirschman in *Exit, Voice and Loyalty* (Cambridge, Mass., Harvard University Press, 1970).

11. Ordinance No 28 of 1949, cap 151.

12. *Amendment Ordinance No 36 of 1961, cap 151.*

13. *Amendment Ordinance No 36 of 1982, cap 151.*

14. See, for example, *Legislative Council Proceedings* 1982 (19 May 1982) 820, 822 (cited hereafter as *Leg. Co. Proc.*).

15. *Public Order Ordinance No 64 of 1967, cap 245.* Prior to its consolidation the law dealing with public order was to be found in the Public Order Ordinance, the Peace Preservation Ordinance, the Summary Offences Ordinance, and in the common law.

16. *Leg. Co. Proc.* 1967 (1 November 1967) 442.

17. *Leg. Co. Proc.* 1967 (15 November 1967) 476.

18. *Leg. Co. Proc.* 1970 (11 February 1970) 334.

19. Note that minor amendments not directly pertaining to the question of freedom of assembly and association were introduced in the intervening years. See Ordinances 29 of 1969, 98 of 1970, 5 of 1971, 24 of 1972, 75 of 1972, 45 of 1973, 20 of 1975, 40 of 1977, and 27 of 1978.

20. *Leg. Co. Proc.* 1979 (9 May 1979) 831; leading to the legislation of the Public Order (Amendment) Ordinance No 67 of 1980.

21. *Leg. Co. Proc.* 1967(1 November 1967) 440, 444 respectively.

22. See references in *Leg. Co. Proc.* 1970 (11 February 1970) 333-4.

23. *Leg. Co. Proc.* 1970 (11 February 1970) 338.

24. Exemptions had been previously accorded to religious meetings and meetings for entertainment or in theatres, cinemas, and similar places.

25. See, for example, S.H. Chan and others, *Putting Justice and Human Rights in Focus*. A Report submitted to the United Nations Human Rights Committee, August 1980. For a 'milder' form of criticism, see the letter addressed to the Attorney General by Justice (Hong Kong Branch) dated 11 July 1979.

26. See accounts of the 'Yaumati Boat People Case', January 1971; the 'Trotskyite Case', April 1979; and the 'Lok Chuen Case, May 1979 in Chan and others (1980), pp. 4-19, note 25 above.

27. *Chow Shui and Others v The Queen* [1979] HKLR 275. The conclusion of Cons J. that the appellants' activities, in the form of boarding two motor coaches at a public place in Kowloon and being conveyed thereon through the cross-harbour tunnel to Hong Kong Island, constituted an 'unlawful assembly' enraged members of the legal profession. See, for example, B. Downey, 'Public Gatherings' (editorial) (1979) *Hong Kong Law Journal* 114-15. Critics regarded as equally objectionable the narrow construction imposed by the judge on the defence of 'reasonable excuse' as excluding purposes such as the presentation of a petition to the Governor in support of a campaign for the rehousing of boat people. See Downey (1979) above.

28. See Report of the Working Group on Review of Provisions of the Public Order Ordinance Relating to Meetings and Processions, 2 February 1980.

29. *Leg. Co. Proc.* 1980 (23 July 1980) 1065.

30. *Leg. Co. Proc.* 1980 (23 July 1980) 1064-5.

31. See discussion in M. Supperstone (ed.), *Brownlie's Law of Public Order and National Security* (London, Butterworths, 2nd edition, 1981), pp. 42-50.

32. Note that the prior restraint measures of 'binding over' and 'injunction' can also be exercised by the Hong Kong courts but no authorities may be adduced

to support a contention that these powers have been utilized to curtail public expressive activities.

33. It should be noted that the Ordinance does not extend to certain organizations which are covered by specific ordinances (such as societies registered under the Companies Ordinance; trade unions registered under the Trade Unions Ordinance; co-operative societies registered under the Co-operative Societies Ordinance).

34. Cap 332, LHK 1971 ed.

35. Summary Offences Ordinance, cap 228, LHK 1977 ed, s 4.

36. Summary Offences Ordinance, cap 228, LHK 1977 ed, s 4A.

37. Crimes Ordinance, cap 200, LHK 1984 ed, s 7.

38. Crimes Ordinance, cap 200, LHK 1984 ed, s 7.

39. Offences Against the Person Ordinance, cap 212, LHK 1981 ed, s 36.

40. For example, public nuisance, public mischief, incitement, conspiracy, criminal libel, and blasphemy.

41. Such as the Country Parks and Special Area Regulations, cap 208, LHK 1978 ed.

42. For the argument that the Declaration may be enforceable in Hong Kong by virtue of its incorporation into the common law see W.S. Clarke, 'Messrs. Wong and Ng and the Universal Declaration of Human Rights' (1985) 15 *Hong Kong Law Journal* 137.

43. The Covenant has been extended to Hong Kong by United Kingdom ratification on 20 May 1976. See J. Wilson, ed., *Multilateral Treaties Applicable to Hong Kong* (Hong Kong, Attorney General's Chambers, 7th edition, 1984).

44. Covenant, Art 21.

45. 'Demonstrations, rallies and pickets which are entirely peaceful may nonetheless disrupt traffic, shopping, and other community activities and may be expressive to the police . . . Novel forms of protest, such as occupation or sit-ins of university buildings, factories or foreign embassies, may be and usually are entirely peaceful, but they challenge property rights.' P. Hewitt, *The Abuse of Power* (Oxford, Martin Robertson, 1982), p. 108.

46. *Leg. Co. Proc.* 1980 (23 July 1980) 1064.

47. See V. Blasi, 'Prior Restraints on Demonstrations' (1970) 68 *Michigan Law Review* 1481, 1485.

48. C.E. Baker, 'Unreasonable Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations' (1984) 78 *Northwestern University Law Review* 937, 1013ff.

49. Clearly, 'a society committed to popular expression and involvement in public life must highly value the opportunity to engage in this type of immediate expression'. Baker (1984) 1014, note 48 above.

50. Baker (1984), 1017, note 48 above.

51. Baker (1984), 1017-18, note 48 above.

52. T.I. Emerson, 'The Doctrine of Prior Restraint' (1955) 20 *Law and Contemporary Problems* 648, 658.

53. Baker (1984), 1018, note 48 above.

54. Baker (1984), 1019, note 48 above.

55. See the relevant figures in R. Mushkat, 'Balancing Freedom of Expression and Public Order in Hong Kong' (1981) 11 *Hong Kong Law Journal* 62, 65-6.

56. See the discussion below concerning the applicable standards and reviewing facilities.

57. W.B. Fisse and J.B. Jones, 'Demonstrations: Some Proposals for Law Reform' (1971) 45 *Australian Law Journal* 591, 596.

58. See the brief submitted by local civil libertarian organizations in South Australia, referred to in Fisse and Jones (1971), 594-6, note 57 above.

59. Report of the Inquiry by Lord Scarman into the Red Lion Square Disorder of June 15, 1974 (1975) Cmnd. 5919 (hereafter cited as the Scarman Report) para 129.

60. See references to practices by Austria, Germany, and the Netherlands in D. Kretzmer, 'Demonstrations and the Law' (1984) 19 *Israel Law Review* 47, 80-1.

61. See Public Order Act 1936, s 3.

62. See Note, 'The First Amendment Overbreadth Doctrine' (1970) 83 *Harvard Law Review* 844. According to this doctrine the court may strike down a statute which does not narrowly and clearly draw the limits of authority or which curtails a constitutional right.

63. See Blasi (1970), 1515ff, note 47 above; Fisse and Jones (1971) 599, note 57 above; and Mushkat (1981), 67-8, note 55 above.

64. See V.T. Bevan, 'Protest and Public Order' (1979) *Public Law* 163, 181.

65. A.T.H. Smith, 'Breaching the Peace and Disturbing the Public Quiet' (1982) *Public Law* 212, 213.

66. Bevan (1979), 181-2, note 64 above.

67. 'Only if imminent spectator violence cannot be satisfactorily prevented or curbed by means of crowd control techniques and if the speech itself is the apparent cause of the impending disorder may otherwise constitutionally protected speech be suppressed.' L.G. Tribe, *American Constitutional Law* (1978) cited in *Brownlie's Law of Public Order* (1981), p. 92, note 31 above.

68. Such a principle was expressed as early as 1882 in the case of *Beatty v Gillbanks* [1882] 9 QBD 308. Generally, on the problem of hostile audience see D.G. Barnu, 'Freedom of Assembly and the Hostile Audience in Anglo-American Law' (1981) 29 *American Journal of Comparative Law* 59-96.

69. Bevan (1979), 186, note 64 above.

70. *Chaplinski v New Hampshire*, 315 US 568, 62 SCt 766 (1942) 769.

71. See dicta by Mr Justice McMullin in *Yim Wai-tsang v Lee Yuk-har* [1973] *HKLR* 31, 34.

A 'society' is defined as 'any club, company, partnership or association of persons, whatever the nature or objects, to which the provisions of [the Societies Ordinance] apply'.

72. Under section 2 of the Public Order Ordinance "'meetings" means any gathering or assembly of persons convened or organized for the purpose of the discussion of issues or matters of interest or concern to the general public or a section thereof, or for the purpose of the expression of views on such issues or matters ...'

73. 'Procession' is defined in section 2 of the Public Order Ordinance as 'a procession organized as such for a common purpose'.

74. Lord Scarman, 'The Conflict in Society: Public Order and Individual Liberty' in *Papers of the 7th Commonwealth Law Conference* (Hong Kong, 7th Commonwealth Law Conference Ltd., 1983), pp. 201, 203.

75. A similar approach is taken by A.D. Grunis, 'Police Control of Demonstrations' (1978) *The Canadian Bar Review* 393-439.

76. See *CARAF v UK* (Application 8440/78) (1978) 21: Decisions and Reports of European Commission of Human Rights, 138. The case is summarized and discussed in Kretzmer (1984), 82-3, note 60 above.

77. See *Brownlie's Law of Public Order* (1981), p. 57, note 31 above.

78. According to a communication received from the Royal Hong Kong Police in response to a request for information, '[e]ach notification of a public meeting and each application for a licence for a public procession is dealt with on its individual merits and once dealt with is, as it were, a dead issue'. Hence 'it is

not possible to say how many of these were refused or approved subject to conditions'. Letter of 30 October 1986 addressed to the writer by K. Ratcliffe (for Commissioner of Police).

79. See Hewitt (1982), p. 149, note 45 above.

80. This expression is used by P. Wallington to describe the place of the liberty of the subject under the English law: 'Injunctions and the right to Demonstration' (1976) 35 *Cambridge Law Journal* 82, 94.

81. Such an approach is applied, for example, in Israel. See Kretzmer (1984) 64-7, note 60 above.

82. L.J. Macfarlane, *The Theory and Practice of Human Rights* (New York, St. Martin's Press, 1985), pp. 91-2.

83. See B. Hodge, 'Civil Liberties in New Zealand: Defending Our Enemies' (1980) 4 *Otago Law Review* 457.

84. Hodge (1980), 458, note 83 above.

85. Hodge (1980), 458, note 83 above.

86. Lord Denning in *Hubbar v Pitt* [1975] 3 WLR 201, 212-13; see also the statement by Forbes J at first instance that there is 'a democratic right to public assembly' [1975] 2 WLR 254, 266.

87. The Scarman Report, para 134, note 59 above.

88. See Green Paper, Cmnd. 7891, cited in I.N. Stevens and D.C.M. Yardley, *The Protection of Liberty* (Oxford, Basil Blackwell, 1982), p. 50.

89. Wallington (1976), 94, note 80 above.

90. Bevan (1979), 174, note 64 above.

91. Bevan (1979), 175, note 64 above.

92. Bevan (1979), 175, note 64 above.

93. Bevan (1979), 176, note 64 above.

94. Bevan (1979), 185, note 64 above.

95. See particularly *Fred Shuttlesworth v City of Birmingham* 394 US 147, 89 SCt 935 (1969).

96. See discussion in *Brownlie's Law of Public Order* (1981), pp. 101-2, note 31 above. See also D.G. Barnum, 'The Constitution Status of Public Protest Activity in Britain and the United States' (1977) *Public Law* 310, 314-18, 324-33.

97. For an elaboration of the concept of 'soft' legal principles see Kretzmer (1984), 64-5, note 60 above, and references therein.

98. See J.Y.S. Cheng, 'Preliminary Suggestions on the Political System of the Hong Kong Special Administrative Region' in J.Y.S. Cheng, ed., *Hong Kong in Transition* (Hong Kong, Oxford University Press, 1986), pp. 52-66.

99. Baker (1984), 980-1, note 48 above.

100. If some form of notification is to be retained — possibly with respect to processions — it should be carefully circumscribed. In particular, failure to notify should not be made a criminal offence but providing a notice would confer on participants an immunity from traffic control offences. For further discussion of proposed reform in the notification system see R. Mushkat (1981), 71-2, note 55 above.

101. On the advantages of such a duty see Bevan (1979), 185, note 64 above. For support of such reform see H. Street, *Freedom, the Individual and the Law* (Harmondsworth, Penguin Books, 5th ed. 1982), p. 56; Lord Scarman also accepted that there was a case 'for the specific provision of public meeting places' and that '[p]ublic meeting places whether they be a speaker's corner in the centre of a great city or a village green are essential to civilized life . . .'. The Scarman Report, para, 123, note 59 above. Note that certain public areas have been designated as such by the Governor under the Public Order Ordinance (Desig-

nated Public Areas) (Consolidation) Order of 8 May 1981, cap 245, 1982 ed, although the general laws with respect to public meetings and processions are applicable therein as well.

102. A reform in this area could benefit from the work of the Law Commission in the United Kingdom, especially its Report No 123, *Criminal Law Offences Relating to Public Order*, HC 85 of 1983; summarized at (1983) 127 *Solicitor's Journal* 725; the Commission's recommendations were incorporated in the White Paper published in May 1985 by the Home Office and Scottish Office on the Review of Public Order Law — see 'Summary of Proposals' (1985) 129 *Solicitor's Journal* 397. Particularly interesting in this connection are the definitions of newly created statutory offences of 'violent disorder' and 'conduct intended or likely to cause fear or provoke violence'; these replace the problematic concept of 'breach of the peace' with the easier to operationalize concept of 'violence' and incorporate the essence of the principle of *Beatty v Gillbanks* (hostile audience), namely that criminal liability should only ensue when the speaker intentionally or recklessly sets out 'to cause another person to fear immediate unlawful violence, or to provoke the immediate use of unlawful violence by others'. Draft Criminal Disorder Bill, cited in D.G.T. Williams, 'Public Order and Common Law' (1984) *Public Law* 12, 15. The attention of law reformers in Hong Kong should none the less be drawn to certain difficulties and ambiguities contained in the White Paper which are aptly pointed out by A.T.H. Smith, 'Public Order Law: The Government Proposals' (1985) *Public Law* 533-42.

103. See F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge, Cambridge University Press, 1982), pp. 205-6; See also Note, 'Less Drastic Means and the First Amendment' (1969) 78 *Yale Law Journal* 464; and E. Barendt, *Freedom of Speech* (Oxford, Clarendon Press, 1985), pp. 192-213.

104. In the absence of case law, recognized limitations under the various human rights instruments — which are expressed in a very general manner — offer little guidance.

105. The test considers whether prohibitions imposed on fundamental freedoms can be administered capriciously or discriminatorily. The *locus classicus* in this area is the American case of *Hague v CIO*, 307 US 496 (1939). See, however, criticism of this test in Hewitt (1982), p. 150, note 45 above.

106. This test was first formulated by Holmes J in *Schenck v United States* 249 US 47 (1919); for a discussion of its applicability in the context of the freedom of peaceful assembly, see E. Vogt, 'Dupond Reconsidered: or the "Search for the Constitution and the Truth of Things Generally"' (1982) *University of British Columbia Law Review Charter Edition* 141, 160-1.

107. One is reminded in this connection of Lord Atkin's dictum in *Liversidge v Anderson* [1942] AC 206, 244 expressing his apprehension that when facing claims involving the liberty of the subject, judges show themselves to be 'more executive-minded than the executive'.

108. The courts must be under a mandate to decide the application with the greatest expedition possible so as to ensure that the application is not frustrated by reason of the decision of the court being delayed until after the date on which the gathering is proposed to be held. See for example, the Public Assemblies Act 1979 (NSW) ss 6-8.

109. 'Terminal' values pertain to ends. See D.T. McAllister, *Evaluation in Environmental Planning* (Cambridge, Mass., The MIT Press, 1980).

110. 'Instrumental' values pertain to means. See McAllister (1980), note 109 above.

111. At least until the enactment in March 1987 of the Public Order (Amendment) Ordinance.

112. See in this connection C.A. Johnson, *MITI and the Japanese Miracle*



(Stanford, Stanford University Press, 1982); and C.A. Johnson, 'Political Institutions and Economic Performance' in R.A. Scalapino, S. Sato, and J. Wanandi (eds.), *Asian Economic Development — Present and Future* (Berkeley, Institute of East Asian Studies, University of California, 1985), pp. 63–89.

113. See B.B. de Mesquita, D. Newman, and A. Rabushka, *Forecasting Political Events* (New Haven, Yale University Press, 1985).

114. See, in this connection, M. Meyerson and E.C. Banfield, *Politics, Planning and the Public Interest* (Glencoe, Free Press, 1955); and V. Held, *The Public Interest and Individual Interests* (New York, Basic Books, 1955). See also A.J. Nathan, *Chinese Democracy* (New York, Knopf, 1985).