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The Role of Non-judicial Mechanisms in Protecting Individual Rights: The China and Hong Kong Experiences*

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Abstract

This study intends to examine, from a socio-legal perspective, the different ways of individual rights protection in the Chinese Mainland and Hong Kong. The common misperception is that as Hong Kong Special Administrative Region is allowed to maintain its legal system inherited from the British colonial times, its residents enjoy more and wider individual freedoms than their Mainland compatriots. However, a comparison of relevant individual rights provisions of both Chinese Constitution and Hong Kong Basic Law finds that there is virtually no significant difference between them. The true differences of individual rights protection lie in various non-judicial mechanisms rooted in the different socio-economic-political environments. In the Chinese Mainland, those non-judicial mechanisms are usually related with social networks of the individuals. In Hong Kong, more likely they are found in various means of public pressure.

Keywords: *individual rights protection, non-judicial mechanism, social-network, China and Hong Kong.*

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Both China (the Mainland) and its recently recovered territory the Hong Kong Special Administrative Region (HKSAR) have pledged to implement the provisions of the two important international human rights documents: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In the Chinese Constitution and the Basic Law of HKSAR (the mini-constitution of this former British colony), the fundamental individual rights of Chinese citizens and Hong Kong residents have been written and the legal systems of these two Chinese societies have been enforced to protect these individual rights. While Hong Kong has been generally regarded as a rule of law society, the Chinese government has also been accelerating the pace of its build up as a rule of law state since the reform era began in the late 1970s, or at least it claims to be doing so. However, as in most the civilised societies, the legal systems in China and Hong Kong sometimes may not be able to cover all the areas where individual rights are concerned. Incidents of violations of individual freedom and other civil rights still exist in China and, to a less degree, Hong Kong. In many cases, people will either prefer to or be forced to resort some non-judicial means to seek redress for government injustices and individual wrongful actions.

This paper intends to examine the ways of implementing the constitutional provisions of individual rights in China and the HKSAR. The focus is on how non-judicial mechanisms work in the two Chinese societies. It argues that despite the relatively similar provisions of individual rights in both legal systems, and the fact that these provisions are not substantially different from most of the civilised societies in the contemporary world, people in the Chinese mainland and HKSAR often seek protections of their rights and freedoms outside the available judicial frameworks. In order to understand this phenomenon, this paper takes a socio-legal perspective and finds answers in the legal traditions, social strata, and cultural heritages of these two Chinese societies. It identifies and discusses the various non-judicial means practised in both the Mainland and HKSAR, and argues that due to their different socio-economic backgrounds and cultural histories, different non-judicial mechanisms are respectively emphasized. It finds that while in both legal systems the administrative authorities are important to provide protections of individual rights, the Chinese people often prefer to defend their rights through non-judicial means. Some of the non-judicial

mechanisms are found in many societies, but some are rather uniquely Chinese. In Hong Kong, it is mainly the civic society's "watch-dogs", such as the media, non-governmental organizations (NGOs), religious groups and public pressure that are the most significant forces to defend individual rights for its residents. In the Mainland, it is mainly the various social networks such as Chinese Communist Party (CCP) party apparatus, work units, neighborhood and communities, and kinship, etc. that take up this responsibility.

The next section gives a brief discussion on the socio-legal studies of the individual rights in the two legal systems. Then an analytical comparison of the constitutional provisions of individual rights in both Mainland China (hereafter 'China') and HKSAR is presented. This study then turns to examine the conditions that nurture those various non-judicial mechanisms and how these mechanisms work. With some typical case studies in the status of individual rights protection in China and HKSAR, it concludes that some socio-legal and socio-economic differences are main contributors to the rise and persistence of non-judicial mechanisms. The final section discusses some important characteristics of the various non-judicial mechanisms deployed in the two legal systems.

I. A Socio-legal Approach to the Study of Individual Rights

A legal system is the social-cultural construct of the society in which it is rooted. Legal systems usually reflect the social hierarchy of a given contemporary society. Specifically, laws reflect the will of the established and the "just" laws are those that protect the majority's interests and also provide the minority legal means to correct the wrongs done by members of the established majority. In a legal study of individual rights, one usually examines the constitutional and other legal provisions of the rights and put them in the context of how the judicial system implements these provisions and the strong and weak points of such a system. However, this approach mainly has two built-in defects. First, it often ignores the cognitive limits of the legal professionals like legislators, judges, lawyers, and legal scholars, who make, apply, interpret, rationalise, and implement laws. More importantly, it detaches the social environment in which those legal professionals live, and therefore often gets distorted pictures of the reality.

Unlike legal studies, a socio-legal approach of the individual rights looks at the social-legal environment in which individual rights are protected and whether such protections are adequate for all the people in the society. Although there is a lack of consensus on the definition of this approach, it is generally accepted that it involves the study of legal phenomena through an inter-disciplinary perspective. For example, Emile Durkheim's study on the sociology of law inspires many legal sociologists to explore this field and has yielded fruitful results.¹ Following the footsteps of the pioneers, recent publications have added more social sciences elements to the socio-legal approach. W. T. Murphy argues that "the traditional vision of the role of law is rooted in a complex set of hierarchical assumptions," in which the interests of the government and the governed are intertwined together.² Brian Tamanaha suggests a realistic socio-legal theory in which he attributes the concept of law to two major sources: the patterned behaviour of the society and the institutionalised norm enforcement.³ Some others claim that factors like religion, culture, economic and political statuses should be included in the socio-legal approach.⁴ In light of the various methodological and theoretical developments, the UK-based Socio-Legal Studies Association simply summarises that "[w]hat binds the socio-legal community is an approach to the study of legal phenomena which is multi or inter-disciplinary in its approach."⁵ However, it is generally understood that these elements are important for the composition of a social-legal environment. First, such an environment is guarded by its legal system. What kind of legal tradition does the society have? Is there a consensual legal culture? Are its residents familiar with the legal system? Secondly, the environment is based on the level of economic development. Is it an affluent society? How smoothly does the economic system operate? How is the social wealth distributed? To what extent it can satisfy its residents' basic needs? Thirdly, the environment is maintained by its political system. How effective are the governments at various levels of the society? In what way does the government rule the society? Finally, such an environment is supported by the members of the society. How knowledgeable are the people about the environment? How high is the general morale of the society?

It is quite obvious that the application of a socio-legal approach to the study of constitutionally guaranteed individual rights needs a thorough understanding of the legal system under study. The Chairman of Hong Kong

Bar Association has a neat comparison of the difference between the two legal systems in China and Hong Kong. “Hong Kong practises the common law, while PRC [People’s Republic of China] has basically a civil law system. During the colonial era, the British transplanted to Hong Kong the institution of the Rule of Law as it has been practised in the United Kingdom. PRC only came out of the Cultural Revolution in 1979 when law faculties were closed and lawyers were disbanded and has since had only 22 years to rebuild her legal system from scratch.”⁶ The return of Hong Kong from the United Kingdom to the “Central Kingdom” does not affect the existing legal system in the former British colony. Common law is still practised in Hong Kong, and the legal protection of its residents’ civil and political rights are nominally guaranteed in the Basic Law. Hong Kong residents live in a rule-of-law society, and the legal culture is inherited from Britain, combined with Chinese tradition. The judicial power remains independent from the executive and legislative branches of the HKSAR, except that the ultimate interpretive power of the Basic Law rests in the hands of the Standing Committee of the National People’s Congress of the PRC. When different opinions exist between Hong Kong’s highest judicial tribunal, -- the Court of Final Appeals, -- and the HKSAR government, the central government may step in to support the HKSAR government. The issue of judicial independence is at stake, as reflected in the “right of abode” cases.

China, on the other hand, has developed a quite different legal system. In the past two decades or so, China has been undertaking dramatic social, economic, and even political changes, which inevitably affect its legal setting. To bring this country that has no democratic experiences in its history from a rule of man to a rule of law requires tedious effort by the Chinese government. Caught between the need to retain the legitimacy of communist power and the desire to merge into the democratic trend of the international society, Chinese leaders have cautiously relaxed their tight control over the judiciary and allowed limited legal reforms in this area. In this transitional period, some legal scholars have been openly introducing western political and legal cultures. A lawyer system has been established and there have been active efforts to change people’s minds about going to court. In recent years, the Chinese people have become more aware of their constitutional rights and there are a few cases in which ordinary Chinese citizens sue government branches for the latter’s abuse of power. This gesture was almost unheard of

either in imperial China or during Mao's rule. As a result, a number of legal norms have been borrowed from outside and implanted in the Chinese legal system. However, China at present is still best described as having a legal system that is ruled by law rather than the rule of law. This is mainly due to the fact that the Communist Party is still in control of all the government branches including the judiciary, which cannot exert its independent role. In addition, most of the government legal professionals are members of the Party and many of them have little exposure to Western legal thought. Some of the judges do not even have formal legal training.

Not only do the two Chinese societies have different legal cultures and systems, they are also at different economic development stages and have different economic systems, though the line between the capitalist system of Hong Kong and the socialist economic system of China has been blurred in the recent years. As one of the four "little dragons" in East Asia, Hong Kong has a gross domestic product (GDP) per capita similar to that of advanced countries. The rapid economic growth in the 1970s through to the mid-1990s has made Hong Kong an envy of its mainland counterpart. As one of the world's freest economies and major trading partners, Hong Kong has been a dreamland for many Chinese. However, the rather narrowly structured Hong Kong economy also has its vulnerabilities, which have become more and more apparent since the 1997 Asian financial crisis. The booming property market bubble burst and remains even now in a pitiful situation. With a more open Chinese market, Hong Kong's role as a bridge between the mainland and outside world has been shrinking and its industrial infrastructure has been collapsing with factories moving to the mainland and elsewhere. Middle classes suffer from their investments and the size of underprivileged groups is growing. Social wealth has been concentrated on a few rich entrepreneurs and the gap between the rich and the poor has been widening to a dangerous level. This worsening economic environment intensifies social conflicts and endangers the individual rights of its residents.

China's economic development has been a miracle in the past two decades with an average of 7-8% annual GDP growth in the past two decades or so. The privatisation movement started from late 1970s has virtually paralysed its central planning system. Except for a few giant state-owned enterprises which are more likely to be burdens than assets to the government, the Chinese economic system is moving closer to a free economy like that in

Hong Kong. Armed with Deng Xiaoping's pragmatic economic policies, quite a few Chinese have reached the rank of a middle class; some have even joined the group of the world's richest people. However, the loopholes which exist in this mixture of "socialism with Chinese characteristics" allow some governmental officials and private entrepreneurs to get rich quick at the expense of ordinary citizens and underprivileged workers. Violations of the latter's constitutionally guaranteed rights, such as the right to work and the right to rest, have occurred more frequently. Social disorders and dissatisfactions become common phenomena and the legal protection of individual rights has been challenged from time to time. The government's crushing of a cult called "Falungong", many of whose members are retired and unemployed citizens, illustrates the seriousness of this social problem.

A civic society is a necessary condition to implement the constitutional rights of a nation's citizens. Neither of the political systems in these two Chinese societies has a democratic government in the generally accepted sense of democracy. In Hong Kong, the former British rulers did not encourage a wide participation of Hong Kong residents in politics. The appointed officials and the apolitical civil servants made the government a bureaucratic machine to carry out policies decided in accordance with the national interests of Britain. After the handover of sovereignty, Hong Kong has been administered by a small-circle selected Chief Executive. Its legislature, with only a handful of directly elected legislators and a limited legislative power, is not capable of providing a kind of check and balance system to the executive branch. The political participation of Hong Kong residents remain in a primitive level and apolitical attitudes are remarkable. The highly commercialised sub-political culture further alienates its citizens from making collective effort to defend their entitled constitutional rights. In the past few years, a series of what in most civilised nations would be considered fundamental issues of individual rights, such as freedom of demonstrations, freedom of criticising government policies, and the right of abode, only attracted a few political activists. Even the protests against the proposed Article 23 legislation on national security have been comparatively small-scale. The general apathy of the public to politics seals the fate of any political movement that runs against the will of the government.

For a long period of time in the history of the PRC, individual rights were regarded as "bourgeois" by the revolutionary leaders. Individualism

would be criticised and individual initiatives discouraged. The Chinese were taught to give up their own private desires, sometimes even dignity, to obey the orders from the central government and the authority. In the PRC's previous constitutions, individual rights were minimised and buried in the more prominent duties. The political culture in China was to stress Chinese citizens' collective social and economic rights. The concept of human rights was non-existent until the late 1970's. Even then, it was not interpreted in any positive way except when talking about the people's basic physical needs. During Mao's time, law for many Chinese meant to regulate the behaviour of the citizens, not of the government. In other words, laws were used by the government to punish the vicious and to protect the righteous. As for the government itself, whatever it did was on behalf of the people and should never be questioned. This sorrowful situation began to change during Deng's era. The Chinese leaders began to realise the importance of respecting individual rights and began to make constitutional arrangement to meet the international standards of civil rights protection. In the late 1990s, China joined the two important international covenants on civil, political, social and economic rights.

The current constitution, passed in 1982, includes almost all the clauses recognised internationally as "fundamental rights and duties of citizens." With the emergence of a sizeable middle class as a result of rapid economic privatisation in the late 1970's, the people's awareness of their own rights were increased. An accumulated dissatisfaction amongst students, workers and peasants with corruptive and inefficient government performances reached a climax in the spring of 1989. At one time even the government-controlled journalists were beginning to report events and make comments according to their own judgements. However, without a properly nurtured culture of rule of law, such a movement is doomed to be ephemeral. The Chinese leadership soon felt the threats to the stability of its regime and began to take actions. The tragic ending of the June 4 military crushing of the students' demonstrations was just an example of how difficult it was to safeguard individual rights in China.⁷

A careful examination of the socio-legal environments in China and Hong Kong reveals one fact: it is very difficult to protect Chinese people's individual rights merely through the constitutional means. Other mechanisms

have to be applied in order to effectively implement those constitutional guarantees the people are entitled to have.

II. The Constitutional Guarantees of China and Hong Kong: the Myth and the Reality

Very few people would deny that laws on paper and laws in practice are two different matters and more often than not the two do not match. If the current world fad is democracy, then one would expect that even the most authoritarian regimes would like to attach “democratic” to their nations’ names. Modern constitutional guarantees of civil rights and civil liberties have blossomed since the European and North American revolutionary years of the 18th century, become the prevailing trend after the dominance of western democracies. China, a communist country that gradually has abandoned its Marxist doctrines since the late 1970s, has adopted in its 1982 constitution most of the features of the western civil rights and civil liberties ideals. This change also affected the drafting process of the Basic Law (BL) of the HKSAR, which came into force from 1 July 1997.

1. What are the Citizens’ Promised Individual Rights?

Individual rights are changing concepts according to the development and the current consensus of the members of a given society. Some fundamental rights have been generally recognised by the international society, some only established in a few democracies. Since the end of the Second World War, the general trend is to include more and more individual rights in nations’ constitutions. The written provisions of constitutional protections in both China and Hong Kong do not have much difference. They all have the world’s most commonly promulgated individual rights clauses. Both the 1982 Constitution of the PRC and the Basic Law of the HKSAR guarantee their citizens,

- 1) The rights and freedoms of their residents/citizens. (PRC Cons. Ch. 2; BL Art. 4;)
- 2) The right of private ownership of property (PRC Cons. Art. 13; BL Art. 6)
- 3) Equal before the law (PRC Cons. Art. 33; BL Art. 25)

- 4) Freedom of speech, of the press and of publication; of association and of assembly, of procession and of demonstration; and Hong Kong residents also have the right and freedom to form and join trade unions and to strike. (PRC Cons. Art. 35; BL Art. 27)
- 5) Voting rights. (PRC Cons. Art. 34; BL Art. 26)
- 6) Freedom of religion. (PRC Cons. Art. 36; BL Art. 32)
- 7) The inviolability of the freedom of the person. (PRC Cons. Art. 37; BL Art. 28) and of the homes and other premises (PRC Cons. Art. 39; BL Art 29)
- 8) The freedom of private communications. (PRC Cons. Art. 40; BL Art. 30).

In addition, Hong Kong residents also enjoy the freedom of movement within the territory and of emigration to other countries and regions (Art. 31); the freedom of choice of occupations (Art. 33); and the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interest or for representation in the courts, and to judicial remedies. (Art. 35) In the Basic Law, a clause (Art. 39) is designated to allowing the provisions of the International Covenant on Civil and Political Rights to remain in force.

Needless to say, constitutional arrangements on paper do not always guarantee citizens' rights in practice. In China, the rule of law principle works primarily to ensure sustainable economic development and social stability. Therefore, when the nation's economic growth and especially when its domestic stability are at stake, the Chinese government would not hesitate to temporarily suspend or limit some individual rights even guaranteed by the constitution. The government would either amend the constitution (e.g., the abolishment of the right to post "big-character posters" criticising government) or to make implementing regulations that would make ordinary citizens very difficult to act their constitutional rights (e.g., the very restrictive and harsh terms on how to apply for demonstrations and assemblies). In general, the exercise of individual rights in China has been subject to a number of factors. First, it depends on the nature of the rights. Some rights likely to be implemented are those that are less sensitive to the stability of the regime and are generally in accordance with the trend of China's economic development, such as the protection of private property.

Some, like the freedom of speech and of assembly, are carried out with more restrictions. Secondly, it depends on the timing of the political atmosphere. When the government sees the practice of certain rights is likely to go out of control, it would intervene. Thirdly, the Chinese leadership's personal preferences are crucial to the success of carrying out individual rights protection policies. When they need public support to consolidate their power base or when they want to win international appreciation, they are likely to grant more flexibility on individual rights. The policies of both Deng Xiaoping and Jiang Zemin in their early years in power have illustrated this point. Finally, it depends on the geographical or ethnical division of the country. In general, ethnic minorities and officially sanctioned religious groups enjoy greater freedom and rights than those Han Chinese and less manifested religious groups. For example, in Tibet and Xinjiang, minorities are usually not subject to the family planning policies and are given greater freedom to practise their religious rituals.

As listed above, Hong Kong residents enjoy greater individual rights than mainland Chinese and their constitutional rights are less subject to political changes and/or leadership preferences. However, in the past few years the government's policies and regulations concerning certain civil rights issues have been under intensive public scrutiny and even evoked heated public debates. In these issues, a number of laws and government behaviour have been considered by many as encroachments on Hong Kong residents' individual rights. Notably are these discussions: the issue of Public Order Ordinance, which puts more restrictions on freedom of expression; the anti-cult legislation that may make Hong Kong less autonomous than is guaranteed by the "one country, two systems" principle; the issue of Chief Executive elections, which have been criticised as "non-democratic small-circle" elections; the denial of education to children on recognizance; and new security legislation as allowed under Article 23 of the Basic Law.⁸

2. Does Status Make Any Difference?

The "rule of law" mainly composes two fundamental principles: legality and equality. The former means that all the acts of government and social behavior of citizens must be in accordance of law. The latter means

that in front of the law, everyone should be treated equally, regardless of his/her personal background and social positions.

No existing legal system is perfect. Different systems have different weaknesses. No such a system can fulfill with a hundred percent confidence the functions it claims to have. With such an assumption, it is questionable whether individual rights can be protected by the common will of the communities. This common will, often in the form of law, can be easily manipulated by the established in society and become tools for their own profits. Depending on the nature of the individual rights, community power can be “coercive” in nature.⁹ In other words, legality may not necessarily achieve the fairness it is assumed to have. In a highly developed democratic society, the principle of legality has been repeatedly tested and modified so that its unfair nature may at least be restricted and neutralised. However, in a society where law-making process is less transparent, legality may become the accomplice to the unfair activities of some corrupt officials and social celebrities.

The principle of equality is even harder to achieve. The two most common obstacles that stand in the way of protecting individual rights equally by a given legal system are the abuse of power and the excessive weight of wealth. Both give advantages to a certain group/groups over another group/groups. In the two Chinese societies under study, the two obstacles are not equally obvious presented and often they cannot be easily convergent. In China, the main problem is the abuse of power by the Chinese officials. In HKSAR, the unequal protection of individual rights is mainly reflected in the unequal distribution of social wealth.

In China, the principle of “rule of law” has only been stressed in the last two decades. In the world’s most populous society, there is a general lack of legal professionals and particularly those who specialise in constitutional rights defense. For many ordinary Chinese, the logic is not about using the constitution to protect their rights and fulfill their obligations. Rather, they regard the constitution as a document that gives governments at various levels their legitimacy. And it is the responsibility of the governments to protect their individual rights and to explain those rights. This common misperception and ready dependency on officialdom have helped those government officials who tend to abuse their power for personal benefits.

Corruption of government officials has been a serious problem in China in recent years. It has been the main cause of several major public riots. The Chinese government has made obvious efforts to crush the corruption of its officials by bringing quite a few high-ranking officials, including national and provincial leaders, to justice. Yet it has reached a scale that to bring all the corrupt officials in China to justice is almost impossible. These officials abuse the power they have often at the expense of ordinary citizens' rights. Yet, they often can get away without punishment. Several factors have made it possible. First of all, these officials usually have a wide official network base that connects them with other officials. They may count on other officials' help to avoid punishment by law either through the latter's willing cooperation (e.g., because they are friends, relatives, etc.) or reluctant assistance (e.g., because the knowledge of the others' own dirty activities). Secondly, these officials usually have enormous power and other resources at their disposal. In a society where government operations are not transparent and where power means authority, it is relatively easy for them to hide what they have done wrong from the general public. Finally, these officials usually have better access to information, which can help them to divert public attention for their corrupt or even criminal behaviour.

The more than two decades of economic reform in China has given rise to an affluent class whose members too can have advantages in front of law. Although wealth itself does not necessarily give those people privileges like those officials, it can put money to "good" use such as bribing officials and silencing ordinary people's grievances when the latter's rights are violated by those wealthy people. However, in comparison with the power resource of those corrupt officials, money still has its limitations for the rich in China. In recent years, among those rich law-breakers, many committed the crime of bribery of government officials. The most shocking example is the *Yuan Hua* case. The main suspect, a Hong Kong merchant currently under custody in Canada, is on China's most wanted list for his crimes of smuggling and bribery that had already brought death sentences to more than a dozen high-ranking officials and important military, customs, and police individuals.¹⁰

In Hong Kong, the situation is quite different. Due to the government's policy to give high salaries to civil servants in order to prevent corruptive behaviour and the relatively independent nature and effective work of the Independent Commission against Corruption (ICAC), public officials are less

prone to corruption and other crimes. This is not to say, however, that they are always equal before the law as other residents. As their career developments are likely to be derived from a relatively narrow base (e.g., most of the civil servants are top graduates from the University of Hong Kong or the Chinese University, and many of them have at different times been colleagues to others due to the frequent shuffling of civil servants), they may also get special treatment. The real privileged people before the law, however, are those who are rich and famous. In the past few years, the HKSAR government's Justice Department has pardoned or given mercy to several famous public figures including the former boss of a local newspaper and the son of a judge. Each incident made the public furious and led them to question the equality principle of the law.

3. Socio-Cultural Environments

What are the main reasons for the Chinese people in both China and Hong Kong to use non-judicial mechanisms to defend their individual rights? The answers are primarily to be found in their socio-cultural environments. Through a search of the media and social scientists' interviews and surveys and a study of the socio-cultural environments of the two Chinese societies, three reasons stand out: the underprivileged socio-economic status, the traditional Chinese culture of obeying authority and respecting hierarchical structure, and the tradition of reluctance to go to court.

1) The unequal distribution of social wealth and the privileges of the "haves" vs. the underprivileged "have-nots"

Many socio-legal studies have pointed out that the rich or the higher classes in a hierarchical society are less subject to the restrictions of law than those middle or lower classes.¹¹ The previous discussion also demonstrates that such a situation is generally true in the two Chinese societies. By the same token, those who are in the lower part of the social strata and those who have limited financial and political resources are less likely to take legal actions to redress their grievances.

In the past two decades or so, China has been undertaking dramatic reforms and maintained an amazingly high pace of economic growth. One of

the direct consequences of these changes is the ever-growing gap between the rich and the poor. China has rapidly moved from the world's most populous egalitarian society to one of those countries which have the most unequal social wealth distributions. One direct consequence of this polarisation of social wealth in China is a growing population of the underprivileged class.

Hong Kong has long experienced an unequal distribution problem. Since the return of sovereignty to China in 1997, the gap between the poor and the rich has been on a widening trend. The SAR government, which has sometimes been criticised for its lack of sympathy to the underprivileged social groups, does not always provide strong leadership in safeguarding individual rights of its residents. Tension would occur between the government and the powerless people in a worse economic situation when the latter believed that their basic individual rights were threatened. Both in China and Hong Kong, those who rank low in the socio-economic strata are more likely to take non-judicial mechanisms to fight for their rights.

Why would the underprivileged be less likely to resort to legal means when their individual rights are at stake? Several factors can contribute to this tendency. First, it is the limited economic resources that prevent those people from taking legal actions. Law suits are costly in societies, and especially in Hong Kong. Many of them cannot afford to pay the legal fees. Even if they are lucky, as in the case of Hong Kong, to get assistance from the Legal Aid Department, they may still not be able to go through the time-consuming legal process. It is clear that there exists an unbalanced accessibility to justice between individuals of different social status. Researchers show that the underprivileged made only limited use of legal resources and law.¹² A second factor is that most of these underprivileged people do not have sufficient knowledge about litigation. Their educational background and their limited access to the necessary information gives them no option but to choose the more familiar non-judicial mechanisms to redress their right damages. Another factor is that they either predict or already know that there is little chance for them to win the case in court, they would like to seek non-judicial help. For example, in the "right of abode" case, when the applicants lost their case, then they turned to public help. In this situation, non-judicial mechanisms could be their last hope, even though they knew they may not be the effective means to get what they fought for. Some

non-judicial means, such as public opinion, may not always stand by the side of the underprivileged.

It should be pointed out that legal and constitutional rights in themselves do not change people's social attitudes towards the law. The rich have more resources at their disposal to tilt the law in their favour. In the longer run public attitudes toward those whose individual rights are allegedly violated are conditioned by economic pressures. That is to say, even those who may not belong to the "haves" class may give in to the economic pressure and support those "haves" against those "have-nots."¹³ This unfortunate situation would in turn force those "have-nots" to appeal directly to non-judicial means when their constitutionally entitled rights are at stake. The most illustrating case is the "right of abode" issue in Hong Kong. Most Hong Kong residents know that the Court of Final Appeal's ruling is based on the interpretation of the Basic Law. However, when the HKSAR government, dissatisfied with the court rulings, sought a re-interpretation from the Central Government and began to warn its residents that a flood of new immigrants would enter the territory if the Court's ruling stood, many Hong Kong residents began to change their attitudes. They feared that in a worse economic situation, these new immigrants would fight with them for the limited jobs.¹⁴

2) Chinese obedience of authority and hierarchical structure: the difference in sub-political cultures in the Mainland and Hong Kong

Ethnicity is one of the components of this social-legal construct. Chinese societies are deeply rooted in Confucian thought, which, among other things, stresses on the respect for authority and for hierarchical arrangements of society in accordance with people's social status. In most of the western societies, such individual rights as freedom of speech and freedom of migration are considered as sacred rights. Governments cannot do anything but to act in accordance with these social norms. In Chinese societies, on the contrary, those rights are not necessarily born with but rather given by "wise" governments or monarchs.

Needless to say, China is not a country with a constitutionalist tradition. Two major factors have hindered its people's general awareness of their fundamental rights: its historical heritage and its current political system. For thousands of years, the Chinese people's best hope to protect their lives and

property was not a trusty government with limited power but a wise emperor who understood the hardships of the people. The feudal principles, such as "when an emperor wants his subject to die, the latter should die unhesitatingly," were deeply rooted in the minds of ordinary Chinese people. To make the situation more complicated in contemporary China, it is also a socialist country. Different from most of the Western democracies, the fundamental decision-making principle in China is democratic centralism. Its decision-making mechanism allows only limited discussion and consultation at lower levels. The final decision power is reserved for the top leadership. Naturally, the Chinese people are expected to obey the authorities and worse, they are accustomed to this pattern of behaviour. So, when their individual rights are at stake, their first reaction would be to go to the authority to get justice back rather than to take a legal action. In other words, they would trust the administrative authority more than the legal system. This partially explains the fact that although there are very few lawyers in China, they have few cases to represent too.

3) It's shameful to appear in court

If Alexis de Tocqueville ever traveled to China, he would have made a totally different observation from his famous remarks on the legalistic orientation of North America. Instead of bringing up every dispute to court, the Chinese would rather settle down outside of the court whenever possible. This reflects a fundamental difference between the Chinese tradition and western traditions. On the one hand, the American society "bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement."¹⁵ On the other hand, the Chinese tradition considers it a shameful thing to be involved in any litigation.

This tradition is rooted in the legal thought that "one is assumed guilty till he can prove his innocence in court." This is an opposite logic from the western society's "presumed innocence" principle. That is to say, if one goes to the court in China, he will have to bear the pressure that in the eyes of the public he is already a guilty person. Worse, in many cases even if he can win

the case, the shadow of being suspected as guilty still follows him and it takes a long time to get rid of this.

Other than the tarred image of going to court, the reluctance to settle disputes in court is also attributed to the relatively low mobility of Chinese societies. Many of them live in the same hometown for generations and it would be “embarrassing” for them (and their families and relatives) to see each other if they have both appeared in court. It would be a face-saving thing to settle their disputes through non-judicial means.

III. Non-judicial Mechanisms

In most of the contemporary states, individual rights are protected by constitutions and various laws based on constitutional principals. However, in most of the nations, individual rights are not adequately protected by constitutional and other legal arrangements. Some of these inadequacies are caused by institutional defects, some simply because there are lack of legal professionals, such as the case of China. Between 1996 and 2000, the number of China’s law firms was raised from 8,265 to 9,541, and lawyers from 100,198 to 117,260. Of these lawyers, only 69,117 were full-time and others were either part-time or doing other legal-related works.¹⁶ That is to say, in a population of 1.3 billion, every lawyer, full-time or part-time, have to serve the needs of over 11,000 customers. In comparison, Hong Kong has 780 practising barristers and 4,871 solicitors.¹⁷ This means there is one full-time practising lawyer for every 1,200 Hong Kong residents. The ratio is almost ten times higher than that in China. This has not counted foreign lawyers and notary public in the HKSAR. This simple lack of qualified professionals in China, and for the other reasons discussed above, make the Chinese people seek other means to handle their legal problems.

There are other means of protection or other ways to deal with individual rights violations. These means are mostly by nature non-judicial. Non-judicial mechanism in this study is defined as a way to protect constitutionally guaranteed individual rights through administrative, communal, social, and other means that do not involve legal settlements. Some non-judicial mechanisms are available in most of the modern states, some in a few states, and some are particularly suitable for one or two legal systems or states. For example, to protect individual rights through

administrative means is available in most of the states, while to offer sanctions on individuals whose freedom and rights have been threatened by the government is a feature in those Christian states. To defend individual rights on the wronged individuals' behalf by the civilian networks and even quasi-official ones, such as the Neighborhood Committees and the Women's Associations in China, could be the unique means to deal with individual rights issues. The socio-legal approach recognises the need of those ordinary citizens to have ways to check the encroachment of their individual rights by those established. Non-judicial means are necessary supplements to those legal means, as the latter are usually working to the benefit of the established.

Although there are varieties of non-judicial mechanisms adopted and practised in China, they may be grouped in one broad concept: social network. Studies on social networks have been one major characteristic of sociology and political science. Most of the research focuses on how the social network is created and developed and its consequences to the society and political and economic systems.¹⁸ Social network, however, has rarely been attributed to the rise and maintenance of non-judicial mechanisms in defending individual rights and freedoms in a society.

Chinese societies have been known for their complicated social networks. The long and relatively uninterrupted civilisation and the key ethical principle of worshipping ancestors ensures that any Chinese person is surrounded by various networks. Kinship, for example, is one important component of such a network. Working unit or *Danwei* is another obvious example. However, in Hong Kong, the social network is less visible. Its non-judicial mechanisms usually have a general character of public pressure. This is mainly because of the different socio-legal settings and the legal culture its people inherited from the colonial times.

1. *Non-judicial mechanisms in China*

In China, when people feel their individual rights are violated and when legal solutions either are denied accessibility or are too costly, they are likely to find other non-judicial channels. Some non-judicial mechanisms are used in specific occasions, some have more general applicability.

1) Party solutions

In China, one of the most commonly used non-judicial mechanisms to punish those who have violated the individual rights of its citizens is through Communist Party disciplines. This is usually the case when ordinary citizens' individual rights and freedoms are violated by the government officials who usually also hold important Party positions. In many incidents, to give an "internal warning" to the involved Party member would be an indication of his/ her setback in the government career. A deprivation of Party membership is the severest punishment, and usually involved with those government officials who would have been sentenced later by the judicial tribunals for the crimes they have committed.

Because it is a widely accepted punishment for those Party member officials, the Chinese people would go to the local CCP committee to complain and to request it discipline the involved officials. In many cases, this would be a satisfactory result for both parties involved if the request has been considered and the disciplinary punishment has been made. For the ordinary individual, his or her grievances have been redressed. For the concerned official, he may have avoided legal consequences.

In recent years, this means has been less applied by the ordinary people, as the CCP members gradually lose their privileges and the membership cards are no longer considered as the only path to higher and economically more profitable positions.

2) Third Party Mediations

Mediations have been widely used in China. Usually the concerned parties are not very confrontational and no criminal cases are involved. Through mediations by a third party, both concerned individuals would have room to bargain and to compromise. For example, if an individual wants to take back a property such as an apartment, which has been occupied by another working unit (this often happened before the residential shelters in China became commercialised), the individual would very likely find a third party that has amicable relations with both involved parties. Through the help of this third party, a compromise is expected to be reached and the concerned parties would not necessarily leave on bad terms.

3) Working units involvement

Perhaps the most distinctive feature of non-judicial mechanisms in China concerning the protection of individual rights is the intervention of the concerned parties' working units. Prior to the reform era, almost all of the Chinese were employed in one or another working units, known as "*Danwei*" in Chinese. A *Danwei* is a miniature society itself, composing of its own "executive" hierarchies, its own "legislative" branches (such as the workers assembly that made regulations and rules for its own workers and managers), and its own "quasi-judicial" branches (such as the various disciplinary committees and the workers' pickets). In addition, a *Danwei* also has its own welfare departments and other logistic individuals.

The advantages to seek a working unit solution are obvious: usually the unit has experts in handling various kinds of disputes. It is convenient and resourceful. It also provides necessary authority and legitimacy when a solution is found. Moreover, it is the least costly way to protect individual rights from being encroached on by others.

4) Neighbourhood or community involvement

Another distinctive feature of Chinese social networks is the role of neighbourhood or community organisations. Contemporary China has a unique population control system called "*Hu Kou*" or "local residence registration" system. Every individual in the urban areas is required to register to the local police branches, which in turn provides the related information to the community or neighbourhood committees. These committees are not part of the government apparatus, yet their power over the local residence should not be underestimated. If anyone knows the details of one's privacy, he or she comes from these committees. Therefore, their intervention in solving some individual rights problems is granted.

5) Family and social connections

By and large, family ties remain one of the most important and accessible mechanisms for those who feel that their constitutional rights have been ignored or violated. This is especially true in rural areas. When an

individual feels that his/her rights have been violated by either government branches or officials, the first idea that comes to his/her mind is to search for a “powerful” relative who can help them. With various social networks and a low mobility, usually there are always some local officials who are related to the individuals and who are willing to intervene.

It must be pointed out that non-judicial mechanisms do not always work. Some of them lack authority and their solutions may not be recognised by the concerned parties. In a number of events, non-judicial mechanisms only provide a preliminary solution and the final solution still rests in the power of a legal tribunal.

2. *Non-judicial mechanisms in Hong Kong*

1) Media exposure

Deborah Rhode’s study reveals the formative role of the news media in shaping public and elite images regarding law.¹⁹ The Hong Kong media is a very competitive market. Newspapers and other media try very hard to bring about “explosive” news to the public in order to boost their sales. To report social injustice is obviously one of the most effective ways to attract an audience. Thus, journalists in Hong Kong often serve as “watch-dogs” of government policies. This role of journalism has enabled some Hong Kong residents to make use of it to appeal to the public for support when they feel their constitutionally-entitled rights have been ignored or violated. In a number of cases, those who feel wrongly treated by the authority would first report to the newspapers before any further actions are taken.

Media as a non-judicial mechanism has its limitations. In some cases, media exposure only complicates the case and makes it harder to reach a legal solution. In some other incidences, the media gets itself involved in legal actions and has to make proper compensation to the involved party.

2) NGO assistance

Unlike China, where NGOs have been under strict control, NGO activities in Hong Kong are both guaranteed by the Basic Law (Art. 149) and prosperous in local communities. Most important human rights NGOs have

their local chapters in Hong Kong. They pay close attention to any signs of human rights violations by the government.

One obvious example of NGOs safeguarding the individual rights of the underprivileged people is the association of the Philippine domestic helpers in Hong Kong. There are close to 180,000 Philippine domestic helpers (maids) in Hong Kong and some of them have been coerced or even abused by their employers. With limited financial resources and the risk of losing jobs, many of them would be reluctant to take legal actions. However, with the help of this NGO, things are different.

3) Community service

As an international metropolis, Hong Kong gives the impression that community ties are not obvious. However, in some areas (such as the original New Territory residents) and in some sectors (such as construction workers and domestic helpers) the sense of being in a community is strongly felt. Religion often serves as a bridge to connect local residents. In the recent cases concerning child abuse by a few Catholic priests, the community's role is obvious.

4) Public pressure

Though in general the Hong Kong public is not keen to be involved in political activities and particularly those sensitive radical activities, it would be wrong to assume that public pressure can be ignored. In many policy areas the government is required by law to consult the general public and if the public opposition to the policy is high, it is very likely the government would modify or even withdraw the proposed policies. In the field of protecting individual rights, public opinion against government intervention in academic freedom made the Vice chancellor of the Hong Kong University lose his job.

Other than those listed above, there are other non-judicial mechanisms practised in the two Chinese societies. The role of non-judicial mechanisms should not be ignored and cannot be ignored. It is significant in serving as supplementary means to judicial solutions and as stabilising elements in

society. Its social functions have yet to be fully explored and its significance to be discovered.

FOOTNOTES

¹ See Kenneth Thompson, ed., *Readings from Emile Durkheim*. NY: Routledge 1985. Also, Roger Cotterell, *Emile Durkheim: law in a moral domain*. Edinburgh: Edinburgh University Press, 1999.

² W. T. Murphy, *The Oldest Social Science?* Oxford: Clarendon Press, 1997, p. 6.

³ Brian Z. Tamanaha, *Realistic Socio-legal Theory*. Oxford: Clarendon Press, 1997, pp. 93-101.

⁴ See, for example, Pitman B. Potter, "The Chinese legal system: continuing commitment to the primacy of state power," *The China Quarterly*, no. 160, December 1999, pp. 673-683; Carroll Seron and Frank Munger, "Law and inequality: Race, gender ... and, of course, class," *Annual Review of Sociology*, vol. 22, 1996, pp. 187-212.

⁵ <http://www.ukc.ac.uk/slsa/index.htm>. For a critic of this approach, see, Richard Rosner, "The sociology of the sociology of law," *European Journal of Law and Economics*, vol. 2, no. 4, December 1995, pp. 265-284. Rosner claims that the socio-legal approach is somewhat narrowly focused, and theoretically and empirically limited in both scope and methods.

⁶ Alan Leong, "Role of lawyers and law associations in promoting human rights," speech at POLA 2001 meeting, 8 October 2001. <http://www.hkba.org/whatsnew/chairman-corner/speeches/2001/>.

⁷ For a discussion of the roots of the Tiananmen incident, see Andrew J. Nathan, *China's Crisis: Dilemmas of Reform and Prospects for Democracy* (New York: Columbia University Press, 1991). See also, Suzanne Ogden, Kathleen Hartford, L. Sullivan, and D. Zweig, eds., *China's Search for Democracy: The Student and the Mass Movement of 1989* (New York: M. E. Sharpe, 1992).

⁸ See, Alan Leong, "The Chairman's Annual Report 2001-2001," 15 January 2002. <http://www.hkba.org/>.

⁹ Tibor Machan, "Individual Rights, the common good and the environment," *International Journal of Social Economics*, vol. 20, no. 9, 1993.

¹⁰ For report of this case, see, *People's Daily* (Beijing), 24 February 2001. See also *The Straits Times*, (Singapore) 20 December 2000.

¹¹ See Donald J. Black, *The Behavior of Law*. New York: Academic Press, 1976. Edwin Sutherland, *White Collar Crime: The Uncut Version*. New Haven, CT: Yale Press, 1983. Karyl A. Kinsey, "Which 'haves' come out ahead and why?" *Law & Society Review*, vol. 33, no. 4, 1999.

¹² See L. Mayhew and A.J. Reiss, "The social organization of legal contacts," *American Sociological Review*, vol. 34, no. 3, 1969, pp. 309-318, quoted from Carroll Seron and Frank Munger, "Law and inequality: Race, gender...and, of course, class," *Annual Review of Sociology*, vol. 22, 1996, p. 189.

¹³ R. N. Ghosh, K. C. Roy, “The changing status of women in India: Impact of urbanization and development,” *International Journal of Social Economics*, vol. 24, no. 7-9, pp. 902-917.

¹⁴ For a HKSAR Court of Final Appeal’s 29 January 1999 ruling on the related case and SAR Government’s responses, see, <http://www.info.gov.hk/jud/> and <http://www.info.gov.hk/gia>.

¹⁵ Steven A. Fredley, “Casenote: Anastasoff v. United States: Nonprecedential precedent, judicial power, and due process,” *George Mason Law Review*, 10, 127, fall 2001, p. 151.

¹⁶ *Zhongguo Tongji Nianjian 2001 (China Statistical Yearbook 2001)*, ed. by National Statistics Bureau of the PRC. Quoted from <http://www.chinainfobank.com>.

¹⁷ <http://www.hklawsoc.org.hk/pub/about/>.

¹⁸ See, for example, John Scott, *Social Network Analysis*. Newbury Park, CA: Sage Publications, 1991; Stanley Wasserman and Katherine Faust, *Social Network Analysis*. Cambridge: Cambridge University Press, 1994; Barry Wellman and S. D. Berkowitz, *Social Structures: A Network Approach*. (updated edition) Greenwich, CT: JAI Press, 1997; Harrison White, S. Boorman, and R. Breiger, “Social structure from multiple networks,” *American Journal of Sociology*, vol. 81, 1976, pp.730-780.

¹⁹ See Patricia Ewick et al., eds., *Social Science, Social Policy, and Law*. NY: Russell Sage Foundation, 1999.