HUMAN RIGHTS: THE ROLE OF THE JUDGE

ERNATIONAL CONFERENCE ON THE BILL OF RIGHTS

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The Hon Justice Michael Kirby AC CMG*
Australia

THE COMMON LAW: FLOWER OF EMPIRE

How resilient is the common law of England! Spread by English navigators, adventurers and colonial administrators to the four corners of the world, it flourishes. It outlives the rule of the English Crown. It survives revolutions, as the courts of the former American colonies and settlements demonstrated after 1776. It survives the departure, on the last ship or train home, of the bemedalled, bewigged and befeathered colonial judges and officials who administered it. So much is shown by the daily working of courts from Antigua to Zimbabwe. It survives even the replacement of the English language as the medium of curial communication. It remains, even where there was bitter hatred of the English rulers who imposed their system of law. The fidelity to the common law of the courts of Ireland and of other resistant peoples show as much. It elbows its aggressive way into the courtroom practices of countries which preserve other,

competing legal traditions. This can be seen in the courtrooms of Sri Lanka and South Africa, where the Roman-Dutch substance does battle with the common law technique; and in the courtrooms of Quebec. In the baggage of Anglophonic troops from North America, it spread to lands where the Union Jack never flew. Even in the lifetime of most of us, features of its system (particularly in public law) have been introduced into the legal procedures of the vanquished Axis powers. They may there yet prove a potent relic of victory in a mighty conflict when much else has passed into history. Save for the English language, aspects of international commerce and (possibly) the institutions of the international legal order, the common law will probably be the most enduring relic of that period of human history which the English speaking people have dominated.

Why is this so? The answers are complex. But they include:

1. The highly practical nature of the system, devoted as it is to the solution of immediate conflicts and disputes by an authoritative decision reached by a trained and generally respected person by reference to a discoverable principle of law;
2. The acceptance of the legitimacy, integrity and authority of the decision delivered by a judicial officer independent of, yet appointed by, the State for reasons which are published and which are sometimes based upon factual findings of a jury of fellow citizens; and

3. The ability of contemporary practitioners to develop common law "principles" from a body of reasoned decision-making provided by highly intelligent judges solving practical problems in the past. Within the nooks and crannies of their decisions lie the articulated exposition of a vision of the nature of a society which the law seeks to preserve and to protect. In that society, the individual has a high measure of protection from arbitrary power. The individual enjoys a high level of respect for the exercise, unhindered, of certain basic civil and political rights.

These features of the common law did not develop overnight. It is a system eight centuries in the making. The legal systems of the countries of the Commonwealth are, to a large measure, the gift of the common law,[1] just as for Herodotus, Egypt was the gift of the Nile. It is a system with many blemishes, both fundamental and practical. Fundamentalists criticise its lack of conceptualism and its embarrassment with anything akin to a grand theory. If a "concept" or "principle" ever emerges, it is only after a multitude of cases have edged the judges, struggling, to perceive that behind their practical decisions lie large general rules of wide application. The specific defects are too numerous to mention. Relevantly, they include a suggested bias in favour of the Crown, business interests, property holders and a prejudice against minorities or even indigenous majorities when the "bottom line" of legal decisions comes to be written.

THE JOINT DECLARATION & THE BASIC LAW FOR HONG KONG

It is important to remind ourselves of these characteristics of the common law tradition in the context of the subject matter of this conference. Hong Kong, as a colony, is also in a sense a child of the common law. Its lawyers are Commonwealth lawyers. Its judges wear the same robes, take the same oath and perform the same basic functions as do Commonwealth judges throughout the world. The resilience of the common law in the post-imperial and post-colonial age is itself a source of optimism for the future of Hong Kong and its people when, in July 1997, the colony becomes a Special Administrative Region of the Peoples' Republic of China (PRC). The Sino-British Declaration of 1984 promised that:

> *"The Hong Kong Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."*[2]

The declaration also agreed:

> *"The current social and economic systems in Hong Kong will remain unchanged, and so will the lifestyle. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate rights of inheritance and foreign ownership will be protected by law."*

It was stipulated that the foregoing "Basic Policies" of the PRC would, amongst others, be contained in a *Basic Law* to be adopted by the National Peoples' Congress (NPC) of the PRC and that:

> *"they will remain unchanged for fifty years."*[3]

The *Basic Law* was duly adopted by the Seventh NPC at its third session on 4 April 1990. It has been published. In the English language version, there are a number of provisions relevant to the issue in hand. For example, among the general principles are the commitment to an "independent judicial power", including that of "final adjudication in accordance with the provisions of this law";[4] an obligation on the Hong Kong Special Administrative Region to "safeguard the rights and freedoms of the residents ... in accordance with law";[5] a promise of the protection of the right of private ownership of property in accordance with law;[6] the permission to use the English language as an official language, including by the judiciary;[7] and the establishment of a system for "safeguarding the fundamental rights and freedoms of its residents ... and judicial systems".[8] There is a commitment that the socialist system, which obtains in the PRC, shall not be practised in Hong Kong and that the "previous capitalist system and way of life shall remain unchanged for fifty years".[9] A commitment to the common law is found in article 8:

> *"The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."*

Chapter III contains "fundamental rights and duties of the residents". These include familiar provisions such as equality before the law,[10] freedom of speech of the press, publication, association, assembly procession, demonstration and to strike.[11] Freedom of the person is inviolable.[12] So is freedom from arbitrary or unlawful arrest, detention or imprisonment.[13] The inviolability of homes;[14] the privacy of communications;[15] freedom of immigration and of travel;[16] freedom of conscience and religious belief and practice;[17] freedom to choose an occupation and to engage in academic, artistic and cultural activities;[18] freedom to secure confidential legal advice, the choice of a lawyer, of representation and "to judicial remedies".[19] All of these basic freedoms are promised in the *Basic Law*. Perhaps the most important commitment is that contained in article 39:

> *"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.*
>
> *The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."*

The PRC has signed and ratified the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination Against Women; the Convention on the Prevention and Punishment of the Crime of Genocide and the

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[20] However, it has not signed, still less ratified, the International Covenant on Civil and Political Rights or its companion, the International Covenant on Economic, Social and Cultural Rights. It is a commitment to respecting the two international covenants referred to in article 39 of the Basic Law which has become, naturally enough, the focus of attempts to establish, before the end of British rule on 30 June 1997, a framework for judicially enforceable human rights applicable in Hong Kong thereafter.[21] Until that date the United Kingdom is obliged to report upon its compliance in Hong Kong with the covenants which it has signed.[22] After that date, it may be doubted that the PRC would agree to so report. More likely is it that the PRC would contend that conformity within Hong Kong with the covenants - to the extent that they are incorporated in the law of Hong Kong - is a matter of the "internal affairs" of China.[23] This argument might have particular force by reason of the fact that China is not itself a party to the covenants and looks unlikely, in the foreseeable future, to becoming so.

These reasons explain why the Bill of Rights Ordinance 1991, which came into force in June 1991, takes on a special significance for Hong Kong. It provides a potential framework for the justiciable enforcement of basic rights by an independent judiciary. This is now a well established function of the judiciary in many countries, including countries sharing the same legal tradition as Hong Kong presently enjoys. There is therefore a well established

jurisprudence in those countries upon which judges of Hong Kong, before and after 1997, could draw in discharging the function of enforcing a bill of rights. That jurisprudence has been enhanced, in a way relevant to Hong Kong, by the judiciary of Canada following the adoption of the Canadian Charter of Rights and Freedoms nearly a decade earlier, on 17 April 1982. As a common law country which moved from being charterless to one governed by the Charter, the experience of the Canadian judiciary, in particular, has obvious lessons for a Hong Kong judiciary called upon to enforce basic rights. But so has the experience of the judiciary in new Commonwealth countries which achieved their independence with constitutions providing for guaranteed basic rights. I shall return to these lessons. But first, I wish to say something about the traditional and a modern role of the judiciary of the common law in protecting basic rights, even without an entrenched effective constitutional bill of rights.

THE JUDICIARY AS GUARDIANS OF BASIC RIGHTS

At a recent meeting of Chief Justices from many countries held in Washington, a question was posed for the participants as to what right was the most fundamental; so that if all else were lost, that right should be insisted upon as essential to a just legal order.

Various options were offered. Unsurprisingly perhaps, the United States judge ventured the right guaranteed in the First Amendment to that country's constitution: freedom of speech and freedom of the press. Ideas, powerfully and independently communicated will ultimately (if properly upheld and protected by courts) defend other basic rights and ensure that they are eventually observed.

The Canadian Chief Justice (Antonio Lamer) suggested that the right of access to a judicial officer, independent of the other branches of government, and to an independent legal profession was the most important right to be guaranteed.[24] His was an assertion which reflected the traditional attitude of the common law. The symbiosis between the appointed and unelected judiciary (on the one hand) and the powerful lawmaking branches of government (on the other) is one of the brilliant features of the system of government developed by the English over the centuries. It provides an interaction between:

(i) a judiciary aspiring to learning, intellectual rigour, the pursuit of logic, fidelity to conscience and respect for minorities and for the individual (on the one hand); and

(ii) the other lawmakers in the legislature and executive, reflecting popular will, the changing sometimes passionate aspirations of the majority, an impatience with minorities and individuals whose demands can sometimes hold back great revolutions, including economic revolutions which are thought to benefit the mass of individuals making up the community.[25]

The judiciary provides an occasional break on the resolute action of the other branches of government. The agenda of the judiciary tends to be longer term. Although not entirely impervious to popular opinions, aspirations and moods (for judges are members of the community also) the judiciary is often deflected from passion by the instruction of forebears,

who remind current office-holders of the need to protect the individual, defend minorities and uphold proper procedures even where doing so may frustrate the achievement of the democratic will.

In the tradition of the common law judge, this defence of basic "rights", as defined by the common law is not a charter for a judicial veto on the determined activities of the legislature or the executive. This truism was pointed out by the United States Supreme Court, emphasising the real, but limited, function of judges in our tradition:

> *"Our system of government is ... a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. ... Here we are urged to view the Endangered Species Act 'reasonably' and hence shape a remedy 'that accords with some modicum of common sense in the public weal'. ... But is that our function? ... Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. ... [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by a judiciary decreeing what accords with 'commonsense and the public weal'. Our Constitution vests such responsibilities in the political branches."*[26]

Notwithstanding this recognised subordination of the judicial branch of government to the political branches, there remains a great deal for judges of the common law to do in the defence of basic rights. If the judges of Hong Kong have independence of the political branches of government after 1997, there will be much for them to do in defending basic rights, simply because this is inherent in the day by day activity of judging. It will be so whether or not the

Bill of Rights Ordinance survives the transition of sovereignty power in Hong Kong in 1997 from the United Kingdom to the PRC. It will be so whether the Bill of Rights Ordinance is "entrenched". It will be so whether or not the United Nations Covenants are accepted as part of the domestic law of Hong Kong and remain in that law, unaltered, after 1997. It will be so, simply because the decision-makers are judges operating within a legal tradition which, for many faults, has the strength of upholding and defending certain basic civil rights.

The rôle of the courts in the common law tradition in upholding these rights has not been the subject of deep analysis. In large measure, it is a function which is taken for granted. In part, it is a function which derives from the necessity (which is an aspect of the daily chores of the judges) to give meaning to language. That language may be the language of common law judgments. More frequently, nowadays, it is the language of legislation. The Chinese languages may be different, although I doubt it. Certainly, the English language is irretrievably ambiguous. In part, this is because the English language represents the marriage of two important European linguistic schools: the Germanic and the Latin. The Anglo-Saxon Celtic tongues of the original inhabitants of the British Isles have been moderated by the "official" language of the Norman conquerors. Thus for virtually any idea - particularly in the official context of law and government - there are usually two words or phrases: the one Germanic and the other Latin. Take "last will" (Germanic) and "testament" (Latin) as an illustration. The feature of the English language, which makes it so rich

in literature, presents ambiguities to judges. They are ambiguities both in the text of legislation and in the principles of the common law as expounded in the words of earlier judicial decisions. Out of such ambiguities are presented choices which simply will not go away. It is doubtless so in the legal systems of every linguistic tradition. But it is magnified in any system of law operating, even in part, through the medium of the English language.

There is a growing recognition amongst judges that they have such choices. The old notion of absolute and complete legalism[27] is increasingly giving way to the recognition of the necessity and obligation of judicial choice. That obligation is enhanced when it is the function of the judge to give meaning to the necessarily sparse language of a Bill of Rights, constitutional or otherwise. Such language, necessarily expressed in terms of great generality, will impose particular obligations to which I will shortly come.

For present purposes my point is that the obligation of choice necessitates criteria for choice. It does so whether the criteria are expressly stated in the instrument or not. It does so whether they are recognised by the decision-maker or not.

Australia is a federal country. Its constitution, originally enacted as an imperial statute, but based upon a referendum of the people in the Australian colonies, contains a number of guaranteed rights.[28] Although it is often said that there is no bill of rights in the Australian constitution, and this has only a superficial accuracy, the Australian courts have increasingly spelt out of the general

language of the constitution (and the assumptions which that language enshrines) guarantees of basic rights which almost certainly were not in the minds of the Founders when the words were originally written.[29]

It is now a century since the first draft of the Australian constitution was adopted. A recent centenary conference on the constitution - to prepare a decade of discussion about its reform - resolved that priority should be given to the incorporation in it of a bill of rights.[30] An attempt in 1988 to incorporate a number of additional basic rights failed at referendum, receiving the support of little more than 30% of the people. Various attempts to draft a non-constitutional bill of rights in Australia have ultimately foundered upon the opposition of politicians and of people deeply imbued with an inherited English suspicion about bills of rights.[31] Perhaps it is the very fact that the notion is a *conceptual* and not a *practical* one is why it offends many Australian people. Perhaps it is their suspicion of governments and of change of the constitution and of the risk of remitting power over large social issues from elected and accountable parliamentarians to unelected judges. But most probably the resistance stems from a general satisfaction with the state of basic rights in the current institutional framework of Australian law, a belief that those rights are adequately safeguarded in the laws made by Parliament and interpreted and enforced by the judiciary.

Upon one view there could be similar attitudes to the entrenchment of a bill of rights in Hong Kong, if ever the people of Hong Kong had been properly consulted about it. Already opposition to some aspects of the Bill of Rights

Ordinance has been reported, based upon traditional Chinese laws and customs, eg on matters such as sexual equality.[32]

These realities may provide reasons why, for the practical enforcement of basic legal rights in Hong Kong after 1997, the rôle of the judge will prove to be of the greatest importance. If the judge is faithful to basic principles of the common law, he or she will have legitimate and readily available legal means to protect and uphold basic rights, to defend the individual and to safeguard minorities.

JUDICIAL TECHNIQUES FOR SAFEGUARDING BASIC RIGHTS

Two common law techniques at least compete for acceptance in Commonwealth countries to provide the common law judge today with potent means to defend basic rights simply by performing judicial functions.

The first is the notion that there are some common law rights which lie so deep that even a legislature of full powers has no authority to change them. This is a notion, within the common law tradition, which has an ancient lineage. It is grounded in ideas of natural law. Its supporters remind opponents that even the respect for the law made by parliament is ultimately grounded in a common law principle that the courts will accord parliament's laws respect. If, then, the basic rule is that of the common law, the common law can add a qualification: that no legislator may validly make a law which is so fundamentally shocking that it must be declared to be not the law at all. It is not necessary to go back to Chief Justice Sir Edward Coke to find support for this notion.[33] More recent support for it can be found in authority in the United States where, in "rare and exceptional circumstances", a judicial "safety valve" is

provided against the enforcement of a rule which leads to an "unjust, unfair or otherwise absurd result" so that the "letter of the statute is not to prevail".[34]

In New Zealand, the notion of such "basic rights" exist has been crafted by the Court of Appeal and asserted in a system of law which is in some ways similar to that of Hong Kong: common law, non-federal and subject to appeals to the Privy Council. The cases are subject to a great deal of judicial and academic discussion and controversy.[35]

The other basis which authorises judges to defend fundamental rights is more modest in its assertion but (perhaps for that reason) more potent in its daily effectiveness. It achieves its goals by the simple device of statutory interpretation and common law exposition. Because the bulk of law is nowadays made by legislatures in the form of statutes, an important feature of the life of the modern judge of the common law is giving effect to the "intention" or "purpose" of the lawmaker. This is done by giving meaning, and then force, to the words of the law so interpreted. That law may have had such meaning and force before it is judicially expounded. But there is no doubt that the judicial exposition adds, if not legitimacy, at least effectiveness to that law in a society such as ours.

It is in this function of statutory interpretation (but equally in the exposition of the common law and in its development) that the modern judge of the common law has a vital rôle to play in protecting, and even advancing, fundamental rights. The issue arises all the time in the practical work of courts. Because of the ambiguity of language to which I have referred, courts are presented with

choices. Take one choice, and a basic right may be lost. Take another and the basic right will be safeguarded. Generally speaking, modern judges of the common law have asserted their function to protect fundamental rights by preferring the second choice, if it is open on the language of the law under consideration.

There is little exposition of how this function came about or how it came to be accepted by the other branches of government. Sometimes that acceptance is grudging and reluctant. But there is a kind of compact between the courts and the "political" branches of government that the courts will declare the meaning and effect of laws made by the other branches and the others will accept that declaration. In doing so, the courts will presume that those other branches did not (unless they made their intention absolutely clear) intend to derogate from "basic rights", as the courts in turn declare them.

In a recent case I attempted to explain the fundamental principle upon which this basic political compact rests:

> *"Thus ... the danger of legislative oversight [should be] mentioned. Equally dangerous is the loss of attention to basic rights which may accompany the very growth in the quantity and complexity of legislation which is such a feature of our time. Legislatures, both Federal and State, have recognised this problem by the appointment of Parliamentary committees, with terms of reference designed to call to notice such problems whenever they occur. However, it is inevitable that some such problems will escape notice. This is where the assertion by the courts of the role of construction ... has such a great social utility. It may delay, on occasion, the achievement of the intention which Parliament had. It may temporarily interrupt the attainment of an important legislative purpose. It may even sometimes give rise to a feeling of frustration amongst legislators and those who advise them. But the delay, interruption and frustration are strictly*

temporary. And they have a beneficial purpose. It is to permit Parliament, which has the last say, an opportunity to clarify its purpose where the Court is not satisfied that the purpose is sufficiently clear. And that opportunity is reserved to those cases where important interests are at stake, which might have been overlooked and which deserve specific attention.

Considering its importance, there has been insufficient discussion in the casebooks or elsewhere of the functions served by this technique of statutory construction ... But looked at in this light, the asserted role of the courts is not an undemocratic usurpation of Parliament's role. Still less is it the deliberate frustration of the achievement of the purpose of Parliament, as found in the words of an enactment. Instead, it is the performance by the courts, by way of the techniques of statutory construction, of a role auxiliary to Parliament and defensive of basic rights. In the end (constitutional considerations apart) Parliament's will must be done. But before basic rights are repealed, that will should be spelt out in clear terms. Parliaments both in this country and in other countries of the common law accept this beneficial relationship with the courts. It reflects the shared assumptions of all the lawmakers in our society. On not a few occasions, it has prevented the unintended operation of words of generality in a statute to diminish basic rights as Parliament would never have enacted, had the point been properly considered."[36]

In the foregoing decision, the question was raised whether legislation, designed to provide for a special investigation into a company's affairs, should be construed to take away the common law right to legal professional privilege. The importance of that common law right had been emphasised in a number of decisions of the High Court of Australia.[37] Similar questions had arisen in New Zealand[38] and in Canada.[39] Analogous questions had arisen in respect of the common law privilege against self-incrimination.[40] More recently, like questions had arisen concerning the powers of a local Independent Commission Against Corruption where its statutory charter appeared to infringe fundamental common law rights.[41]

I mention these cases because they suggest that the judge of the common law today often does not need an entrenched and justiciable bill of rights to safeguard at least some basic rights. Those "basic rights" will be found clearly enough in the principles of the common law. Those principles will be upheld at least by techniques of statutory construction and common law exposition to the extent that the new law on any subject is unclear. Of course, sometimes an oppressive law, or one which derogates from "basic rights" will be only too clear. It is then ordinarily the duty of the judge to give effect to that law.[42] If the judge cannot in conscience do that, he or she must resign. A judge has no legitimacy to deny effect to the law, if it is plain. Some of the reasoning which supports the "compact" to which I have referred between parliament and the judiciary, rests upon assumptions about the democratic nature of parliament and presumptions that the people's representatives in parliament would not deprive the people of basic rights without a clear indication that this was parliament's intent.[43] In Hong Kong, there is not at the present, nor will there be in the foreseeable future, a legislature which is wholly democratic - in the conventional understanding of that term. To this extent the "democratic assumption" which lies behind the authority of the common law technique of legal exposition will be missing. But another basic premise may exist which authorises the continuance of the judicial technique to which I have referred.

APPLYING INTERNATIONAL HUMAN RIGHTS NORMS

An additional technique is one which has been given

close attention in recent years. I refer to the function of the judge in the common law system in giving effect to international human rights law in the course of performing everyday judicial duties, by the use of wholly orthodox techniques of common law exposition and development.

Both China and the United Kingdom have followed the "incorporation" principle for international law. Unlike some other legal jurisdictions, where international law is taken to be part of domestic law, China, like the United Kingdom, insists upon the dichotomy. Unless international law is specifically incorporated by a valid local law, it is not part of domestic law.[44] In the United Kingdom, this principle has recently been reasserted by the highest court. In *Reg v Secretary of State for the Home Department; Ex parte, Brind*[45], the House of Lords held that the European Convention for the Protection of Human Rights and Fundamental Freedoms is not part of English domestic law. Although the presumption that Parliament intended to legislate in conformity with the Convention might be resorted to in order to resolve ambiguity or uncertainty in a statutory provision, if such provision were clear, the statute must be given effect to. This is so notwithstanding that the law does not then comply with the Convention. There is much in the speeches in *Brind* which repays careful reading. But there is nothing in them which conflicts with an important new idea now being promoted within the Commonwealth of Nations. This is an idea designed to give new relevance to developing international human rights law. It is an idea with high relevance to Hong Kong.

The new idea is expressed in *"The Bangalore Principles"* which were contained in a concluding statement by Justice P N Bhagwati, the former Chief Justice of India, at the close of a Judicial Colloquium on International Human Rights Laws held at Bangalore, India in February 1988.[46] The judges collected from Commonwealth countries and from the United States, drew attention to the development of human rights jurisprudence around the international statements of human rights contained in human rights instruments. They pointed out that some of these rights had passed into international customary law. In many Commonwealth countries, with established bills of rights, the commonality of the principles enshrined in international and national laws meant that judges could, in their own domestic decision-making, call upon judicial decisions and learned commentaries in other jurisdictions for the purpose of performing their daily tasks. The essence of the *Bangalore Principles* can, be found in the following statements:

> *"7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into basic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.*
>
> *8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases a court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country."*

The judges at Bangalore called attention to the need to promote the availability of international human rights jurisprudence. This is something which the Commonwealth Secretariat and other bodies have set about doing.

In Australia, we have followed the "incorporation" doctrine[47] observed in China and the United Kingdom, and thus also observed as part of the law of Hong Kong. Nevertheless, in an increasing number of decisions, both of Federal[48] and State[49] courts, reference has been made to international human rights norms as a source of law. It has been done generally for the purpose of resolving ambiguities in legislation. That resolution of the ambiguity will be preferred which avoids a conflict between domestic and international law.[50] However, it is not only in the construction of legislation that international human rights norms can be utilised. Common law principles are themselves often unclear. In clarifying them, an increasing number of judges are willing to refer (among other sources) to international human rights law. This is particularly so where the international rule is contained in a treaty which has been adopted by the country, even if yet "incorporated" in the sense of being followed by the enactment of domestic law. It is also true where the country has not yet ratified the international convention stating the norm, still less incorporated it in domestic legislation. In such a case, the international statement of a human rights obligation may, by virtual universality of respect and the passage of time, have become part of international customary law, in much the same way as the common law develops in municipal jurisdictions. In such a case, an appeal may properly be made to the norms

of international customary law. They are not part of domestic law. They may not be observed if they are in conflict with clear domestic law. But they can be used to help fill the gaps which repeatedly appear in a common law legal system.

This is an important new development which has a particular relevance to Hong Kong. That relevance derives from the terms of article 9 of the *Basic Law*. Although the government of the PRC has always asserted an exclusive right to provide for the future of Hong Kong and its peoples, the *Basic Law* is unarguably an international treaty between nation states asserting *de jure* and *de facto* powers over Hong Kong. It will be important, whatever is the fate of the Bill of Rights Ordinance and the incorporation of the norms of the international covenants into the law of Hong Kong, that the judges of Hong Kong, before and after 1997, should become familiar with the new move for the utilisation of international human rights law in domestic decision-making.

The *Bangalore Principles* have now been followed by the *Harare Declaration on Human Rights*.[51] This Declaration reasserts the validity of the Bangalore approach. It does so with the authority of virtually every Chief Justice of Commonwealth Africa. Later still, the *Bangalore Principles* have been reaffirmed by the *Banjul Affirmation*.[52] At a high level meeting of Commonwealth judges in Banjul, the Gambia, the participants accepted in their entirety the *Bangalore Principles* and the *Harare Declaration*. They acknowledged that fundamental human rights and freedoms are inherent in human kind. They

stressed the importance of complete judicial independence and the need to assure real and effective access to the courts for the determination of criminal charges and civil rights and obligations by due process of law. The *Bangalore Principles* have been considered by meetings elsewhere in the Commonwealth of Nations, notably in the Caribbean. A further meeting in the series is planned for December 1991 in Abuja, Nigeria now in the process of returning to democracy and constitutionalism.

There will be some lawyers who will look with reservation upon the developments which I have just sketched. Those brought up in the rigidities of the "incorporation" theory of international law may even reject the Bangalore idea. But we are at a special moment in human history. It is akin to the moment of Runnymede in the history of England. The barons are represented by the nation states. International law is in its infancy. Often it is impotent. But there is a sense of urgency about the need to secure respect and to implement international human rights law. The urgency derives from the vulnerability of our planet and the new human integration achieved largely by miracles of technology. It is important for lawyers to keep pace with the changing world. Human rights are, of their very nature, universal. They inhere in human beings as such. Each judge has many opportunities to contribute to the implementation of universal human rights law. But a judge of the common law - using the established techniques and methodology of the common law - has special, enhanced opportunities to do so.

IMPLEMENTING A GUARANTEED CHARTER OF RIGHTS

So far, I have dealt with the rôle of the judge who has no special weapons for defending basic rights other than those in the traditional armoury of the common law - enhanced lately by new instruments as suggested by the *Bangalore Declaration*. In Hong Kong, however, the departing colonial régime has belatedly provided the people with a bill of rights, based substantially upon the international covenants referred to in article 39 of the *Basic Law*. It is hoped that in some way, at least for fifty years, this basic charter of rights will remain inviolable; be justiciable in the courts; and be interpreted, declared and enforced by a judiciary independent of the "political" branches of government.

I set aside for a moment issues of *Realpolitik* to which I will eventually return. If such a Bill of Rights could be incorporated and entrenched in the law of Hong Kong, the judiciary performing its tasks in relation to it would not do so unaided. It would have available to it three centuries of judicial exposition of the United Kingdom Bill of Rights (1688); two centuries of the judicial exposition of the Bill of Rights which form the first ten amendments to the United States Constitution (1790) and the more recent and possibly more relevant experience of Canada and other Commonwealth jurisdictions which belatedly embraced the bill of rights idea.

There will be other participants with more relevant experience to examine the rôle of the judge in expounding and applying the Canadian Charter. Interpreting basic rights, at least stated in a document like the Charter, has required

common law judges to modify the narrow techniques which have, sometimes beneficially, marked the interpretation of ordinary legislation. A Charter requires judges to embrace a degree of judicial activism which even the boldest spirits of the common law would find unacceptable, without the authority provided by the Charter. Judges must be ready to invalidate legislation and executive acts in order to protect a vision of the rights and freedoms which then stand guaranteed. Because such guarantees become part of the overriding law, they must be respected not only by judges of the highest courts, but by magistrates, police, government officials and other citizens. The greater leeways for choice posed for judges must be more openly recognised. No longer can large policy decisions be hidden behind voluminous reference to court decisions. The judge comes face to face with fundamental choices, starkly posed by the tension between the suggested meaning of the general words of the charter and the activities of officials and others which are impugned.

The importance of approaching a statement of basic rights in a way different from ordinary legislation was recognised in the early decisions of the Supreme Court of Canada on the Canadian Charter:

> *"The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'."*[53]

It is this approach which has led in Canada to a broad purposive and generous interpretation of the basic rights and the avoidance of a narrow and technical interpretations. In

approaching the Charter in this way, the Canadian courts were able to call upon the emphatic instruction of earlier common law decisions. Thus, in 1929, Viscount Sankey in the Privy Council, referred to the *British North America Act* as:

> *"...a living tree capable of growth and expansion within its natural limits ... [which should not be] cut down ... by a narrow and technical construction, but rather [given] a large and liberal interpretation."*[54]

Similarly Lord Wilberforce in the Privy Council, talking of the Burmudan Constitution which incorporated a Bill of Rights said that it should be given:

> *"A generous interpretation, avoiding what has been called the 'austerity of tabulated legalism', suitable to give to individuals the full measure of fundamental rights and freedoms referred to."*[55]

In interpreting and then enforcing express basic rights in this way, future judges of Hong Kong would undoubtedly have much developed jurisprudence in other countries to draw upon. But if the law were to be a living and relevant instrument for Hong Kong society, it would be essential that the judges should have a vision of what that society is and how rules, expressed in language of generality, may operate for the benefit of such a society and its people.

In the United States of America the judges have a notion of the nature of United States society in which the unlimited statements of that country's bill of rights must operate. Such rights are expressed in absolute terms. Necessarily, they cannot operate in that way. They must be balanced against the collective needs of society. United

States courts have therefore, as a matter of definition of such rights, had to use judicial construction as the chief instrument for limiting and controlling the apparently absolute terms in which the rights are expressed in the Bill of Rights of that country.[56]

Canadian judges on the other hand, have section 1 of the Charter to provide the touchstone against which the widely expressed rights and freedoms must be limited:

> *"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

This is, by now, a common formula. Around it has developed a well worked jurisprudence. The Canadian courts have developed a "form and proportionality" test to determine whether suggested limits on the rights and freedoms guaranteed by the Charter may be upheld.[57]

Once a court has declared what the basic rights are and what they require, there must be a convention of obedience which follows. That convention exists in the United States, Canada and other countries.[58] In developing countries of the Commonwealth obedience on the part of authority is not always automatic. Thus, in Zimbabwe recently, tension was reported between the High Court and the Executive Government. The Court made declarations under the Basic Rights provisions of the Constitution relating to the treatment of three prisoners in conditions which members of the Court took the pains themselves to inspect.[59] At last report, the Executive Government had declined to follow the régime laid down by the High Court, designed to secure

conformity in their treatment with the constitutional guarantee against cruel and unusual punishment. Proceedings for contempt were reportedly planned.

But courts have no armies to enforce their orders. A few sheriffs and bailiffs are all they can call upon, in ordinary circumstances, to uphold their decrees. Compliance with their decrees must therefore depend upon a convention respected by the "political" branches of government and by ordinary citizens. To the extent that those decrees require the enforcement of laws which do not enjoy official support (and may even be opposed by many citizens) courts depend upon acceptance of the principle of the rule of law. It is this principle, amongst other things, that will be tested in the *Realpolitik* of Hong Kong after 1997.

REALPOLITIK: HONG KONG AFTER 1997

It is impossible to discuss the rôle of the judge in the enforcement of basic rights in the context of Hong Kong without alluding to matters of *Realpolitik*.

Some of the traditional opponents of guaranteed basic rights, including those in my own country, have stressed the adequacy of common law techniques to do the necessary work, so long as society remains liberal and tolerant. The former Chief Justice of Australia, Sir Harry Gibbs, told a Senate Standing Committee on Constitutional and Legal Affairs in Australia in 1985:

> *"If society is tolerant and rational, it does not need a bill of rights. If it is not, no bill of rights will preserve it."*[60]

Many would regard this aphorism, oft repeated by judges of the common law, as a serious understatement of the utility of an entrenched bill of rights - particularly for the protection of minorities against majoritarian democracy in the other branches of government. However, there would certainly be some who would apply Sir Harry Gibbs' words to Hong Kong with a note of pessimism. If, after 1997, the Government of the PRC did not respect "basic rights" as these have been understood in Hong Kong and elsewhere, it is certainly true that no Bill of Rights Ordinance, letters patent or "piece of paper" would stand guardian for those rights. No judge's decree, nor any learned judicial opinion would ultimately protect those basic rights. They would melt before the sun of a resolute Executive Government and the guns of its soldiers glittering and numerous. Even a courageous judge, determined to expound and uphold his or her vision of basic rights, would find that vision blunted by a determined and opinionated political government. A mountain of erudite jurisprudence or even the full weight of international human rights law would not prevent the "basic rights" from being overwhelmed. The judge would be like a modern Canute, bidding the waves of executive power to recede. Those not used to being bidden in this way - still less accustomed to obeying such curial bidding - might find an appeal to a "piece of paper" unpersuasive, even laughable. They might justify their action - possibly in all sincerity - by an appeal to collectivist notions and to the urgent necessities of "revolutionary justice" in Hong Kong, once it is part of the PRC.

THE RELEVANCE OF CONFUCIAN APPROACHES TO LAW

Concerns about these issues are not wholly political and philosophical. But they are that in part. A recent influential book in Australia has suggested that "China and the Four Dragons" (meaning Hong Kong, the Republic of Korea, the Republic of China (Taiwan) and Singapore) do not really share with western and other countries common assumptions about human rights and the rule of law. The book, *The Confucian Renaissance*[61] expounds the thesis that modern China (and countries of a similar ethic) are still deeply imbued with a vision of society, and the rôle of the individual in it, expounded by the itinerant Chinese scholar, philosopher and teacher Confucius nearly 2500 years ago in the Spring and Autumn Period of China's history. Followed by the Hundred Philosophers, Confucian teaching was seen (in something of the same light as equity in English legal history) as a relief from the tenets of strict legalism.[62] Confucius asserted a major weakness of the rule of law in the following key passage in the *Analects*:

> *"Lead the people by laws and regulate them by penalties and the people will try to keep out of jail but will have no sense of shame. Lead the people by virtue and restrain them by the rules of decorum, and the people will have a sense of shame and moreover, will become good."*[63]

This book asserts that the ethic of "North-Asia" lays emphasis not upon the individual but upon the community. Not upon individual rights, but upon obligations. Not upon the rule of law but upon government by Man or virtue. The growing economic ascendency of Confucian societies, including Japan, will therefore require international recognition and understanding of the different values which motivate such

societies. Whilst they will go along with (and sometimes pay lip service to) Western notions of human rights and the rule of law, and even adhere to the institutions and treaties which safeguard them, they do so without conviction, because the basic rules which they embrace have for more than two millennia been quite different.

Against this background, it comes as no surprise to read of denunciations in China of western notions of human rights and the rule of law. These denunciations are not new or peculiarly communist in character. They must rather be seen in the context of longstanding Chinese teachings on ethics and philosophy. In that context, the future relevance of western notions of basic human rights and of respect for the rule of law in Hong Kong after 1997 must be questioned. These are notions which are not only not observed throughout the PRC. They are notions which are in sharp conflict with traditional Chinese approaches to law, the individual and society which antedate the Communist Revolution by more than 2400 years.

But, it is said, for fifty years Hong Kong will be guaranteed the continuance of the legal system which is important to its commercial success as well as to its citizens' lifestyle. That success was seen as vital both for the commercial value of Hong Kong (with its high level of foreign investment earnings) and as a model for other "lost territories" - especially Taiwan.[64] Following the Tiananmen Square incident in June 1989, the suppression of the democracy movement, the trials and executions which followed, there is now less optimism about respect for the basic rights, judicial independence and the rule of law based

upon this ground. In the big picture of China, Hong Kong is of relatively small concern.[65] Yet it is perhaps a measure of the impact on its basic Confucian values of universal notions of human rights that in June 1989 a million residents of Hong Kong gathered together to protest the suppression of the new democracy movement in the PRC. Their resolution, reflected in other actions since, may demonstrate the universality of at least some basic human rights and the determination of the people of Hong Kong who remain after 1997 to assert and defend those rights.

SUBORDINATION TO THE LAW OF CHINA

Lawyers point to the fact that the *Basic Law* of Hong Kong is made, just as the Joint Declaration promised, "in accordance with the Constitution of the Peoples' Republic of China". What is done under that Constitution may readily be undone. All that stands in the way is not law but a promise. The breach of a treaty with the United Kingdom would be involved. But, should that happen, it is scarcely likely that a Kuwait-style operation would be mounted to enforce that aspect of international law against the PRC.

Article 5 of the Constitution of the PRC, 1982 provides that:

> *"No law or administrative rules and regulations shall contravene the Constitution".*

Nothing in the Constitution indicates that article 5 can be exempted or suspended. Thus, neither the *Basic Law* nor laws of Hong Kong can ultimately contravene the Chinese constitution.[66]

There is nothing unorthodox in this. An autonomous region of Australia, if it could be created by the Australian Parliament under the Australian constitution, would be ultimately subject to a repeal of the instrument creating it. Nothing the Australian Parliament could do under the constitution could prevent such repeal. It could promise not to do so for fifty years. But if it broke that promise, there would no legal obstacle to its doing so. The promise is a political commitment to the people of Hong Kong. It rests on the politics, personnel and institutions of the PRC. It does not rest on law, at least on any law which can be enforced under the constitution of the PRC. This reality must be clearly faced.

Condemnations in China of the notions of the rule of law derive in part from the different approach to the interpretation of legislation adopted by the constitution of that country. It was partly for reasons of history and partly by accident that the notion of judicial review developed in the common law tradition. The history is found in the early decisions of the Judicial Committee of the Privy Council by which, even before the American Revolution, laws of the colonies were sometimes struck down by judges as invalid when they were found to be incompatible with laws made in Westminster. It was this judicial empowerment which encouraged the early judges of the Supreme Court of the United States to assert a similar function of judicial interpretation and review in the famous decision in *Marbury v Madison*.[67]

Other countries, including Australia and countries of the Commonwealth of Nations with and without Bills of Rights have followed the American model. But China did not.

It is the Standing Committee of the NPC, not the judiciary in China, which has the constitutional authority to interpret the constitution and statutes of the PRC.[68] This therefore includes the interpretation of the *Basic Law* of Hong Kong made by the NPC. The NPC can alter and annul decisions of the Standing Committee. It is for this reason that, strictly as a matter of law and within the polity of the PRC, the Court of Final Appeal of Hong Kong envisaged by the *Basic Law* has powers which are subject to the NPC. It is for this reason that scholars are already pointing out that, established rules of private international law require that the socialist legal system of China will ultimately, in the event of conflict, prevail over the common law judicial system of Hong Kong, and this quite apart from the politics of China.[69]

Various suggestions have been made for resolving potential future disputes of this kind.[68] However, any judge giving meaning to a Hong Kong Bill of Rights Ordinance (or to the International Covenants extended to Hong Kong by the *Basic Law* or otherwise) would do so in the sure knowledge that judicial orders made by the judge would be subject to the overriding supervision of the NPC. Such knowledge might, for some judicial officers, provide a "chilling effect". It could after 1997 restrain robust orders against the agencies of government, such as have lately attracted attention to the independence of the Hong Kong superior courts.[70] Time will tell.

If Hong Kong were to remain exclusively a microcosm of government officials, trained in and used to British ways, the possibility of conflict might be minimised. However, the insistence of the PRC that, as a symbol of sovereignty, the Chinese Peoples' Liberation Army (PLA) will be stationed in Hong Kong after 1997 presents a potential flashpoint for the future. Relief might be sought by a citizen in the courts against the conduct of the PLA. Orders of the courts directed to the PLA could present that organisation with an utterly different source of discipline to that to which it has been accustomed. Then, the court may indeed appear an alien authority. It might be represented to be such to the NPC or to other organs of power in Beijing. It takes a mighty leap of faith to believe that the flash at this point can be avoided for fifty years. It is perhaps in recognition of this source of tension that the PRC has announced that, in the case of Taiwan, the PLA would not be stationed there after its return "to the Motherland".[71] But Hong Kong is different.

THE BASIC GOAL - A SHARED POLITY?

A further problem is presented by the status of the basic rights and by their content. The Bill of Rights Ordinance is, after all, simply an enactment of the local legislature. With perfect legality, under the Constitution of the PRC, it could be repealed, modified or qualified.[72] No *Colonial Laws Validity Act* 1865 (Imp) will avail to entrench its provisions in the law of Hong Kong. The "entrenchment" of those provisions depends solely on the political will of the PRC. No amendment of his letters patent will have effect beyond the ceremonial departure of

the Governor in 1997. The PRC's will is presently exhibited principally in Part 3 of the *Basic Law*. The most important provision of that Part is article 39. But it must be noted[73] that article 39 does not include Part 1 of the International Covenants in which appear article 1 promising that:

> *"All peoples have the right of self-determination."*[78]

Whether, following 150 years of separate history, the people of Hong Kong are a "peoples" for this purpose of international law is the subject of a mission by the International Commission of Jurists.[74] In the context of the great world movement of peoples, which is such a feature of international society today, much research has been done on the definition of "peoples" for this purpose.[75] The claims of stateless peoples, such as the Kurds and Palestinians, or peoples within an existing State, such as the Croats, Estonians and Punjabis is a subject of much international debate amongst scholars.[76] It is a debate which, at least in respect of Tibet and Hong Kong reaches the peoples of China itself.

The importance of this debate for present purposes is that all Bills of Rights must operate in a constitutional framework which contemplates that the several rights will contribute, in a coherent way, to a generally accepted form of society. Whether by express provision (as in the Canadian case) or by implication of the constitution (as in the United States) courts construe the detailed and precise provisions so that they will operate to sustain the polity itself. Generally too, by revolution, referendum or other process,

the rights themselves derive their legitimacy from the people making up that polity. And they may be so altered by those people. None of these considerations will be true in the case of Hong Kong's basic rights. The Joint Declaration is a statement of sovereign nations. The *Basic Law* is made exclusively by the NPC of China. Even the Bill of Rights Ordinance is not made by a legislature elected by direct suffrage held amongst all of the people of Hong Kong.[77]

To the extent that Hong Kong and its people have enjoyed rights typical of a western democracy it has been because its lawmakers have been ultimately beholden to the democratically elected Parliament at Westminster, its Governor appointed by the elected Government of the United Kingdom and its courts subject to the judges in the Privy Council, most of them Englishmen. When these vital underpinnings are removed, it is not self-evident (either in law or in practical politics) that the notions of fundamental rights which have accompanied the people of Hong Kong will long survive their passing. It was once said that self-interest, and the example given to the greater prize of Taiwan, would indeed sustain the post-colonial aberration for the 50 years promised to Hong Kong. However, the events in China in June 1989 have cast a shadow over this hope.[78] Judges do not ride the tiger of politics. But they cannot be wholly indifferent to the environment and the society in which they work. That is why the provision of a reference point, related to the nature of that society excepted as the goal, is an essential ingredient in an effective workable law of basic rights.

For all the many good things which the United Kingdom has done in Hong Kong, it will long stand as a reproach to Britain that it did not provide a democratic form of government before its departure. According to recent polls taken of the people of Hong Kong, at least 68% of those with definite opinions were in favour of the immediate introduction of direct elections.[79] The want of direct elections (and the inhibition which now exists under the *Basic Law* in conducting them) provides a basic obstacle to the achievement of a judicially enforced bill of rights having real legitimacy for Hong Kong. For the judges, like the citizens, will constantly face the quandary presented by the attempt to reconcile the irreconcilable. The basic rights contained in the International Covenants (wholly at peace in a representative democracy) sit uncomfortably in a society which, despite certain other virtues, is autocratic and not democratic.[80] The events of June 1989 in China have presented these simple truths in sharp relief.

There remains one other practical consideration which should be mentioned. Institutions may look fine on paper. But they need sensitive, knowledgeable and talented people to work them. A recent survey of Chinese members of the legal profession in Hong Kong indicated that only 37% of the sample stated positively that they would stay in the colony after 30 June 1997.[81] A survey taken after 4 June 1989 revealed that this figure had actually dropped to 33%. As has been stated, this is "not a very promising figure in view of the present shortage of lawyers in Hong Kong". With the inevitable departure of expatriate members of the legal profession and judiciary, there will be a vacuum. It is

doubtful, in the words of the Chief Justice of Hong Kong, whether "suitable ethnic Chinese candidates can be found to fill these [judicial] positions by 1997".[82] Various expedients have been suggested. Doubtless the vacuum will be filled somehow. But whether it will be filled by the judges of courage, integrity and skill required remains to be seen. The challenge will be enormous.

RAYS OF HOPE: THE NEED FOR JUDGES OF WISDOM & COURAGE

Is it possible to end on a note of hope? According to research conducted in 1988, a clear majority of Hong Kong's Chinese population accepted common law values.[83] Seventy-two percent favoured the continuance of individual and legal rights. Almost 60% favoured government by the rule of law. Seventy-seven percent supported the adversary system with a rôle for the private legal profession. Seventy-three percent favoured the jury system. Surprising perhaps was the fact that only 53% favoured the presumption of innocence. Only 32% believed in the fact of judicial independence. There may be considerations relevant to local conditions in the lower judiciary which explain this last statistic.[84] These are important soundings of values amongst the people of Hong Kong. If they are accurate and representative they provide the most instructive foundation for the post-1997 preservation in Hong Kong of basic rights of the kind found in the *Basic Law* and in the international covenants.

The end of Privy Council appeals will sever the link of the Hong Kong legal system to the centrepoint of one of the world's great legal traditions. But other countries of the common law have survived this severance. There is always a risk of a retreat to parochialism. But if we work at it in

the community of the common law, we can draw upon each other's jurisprudence. In this sense, severance of the link to London may actually ensure access to the treasurehouse of jurisprudence in other common law centres. We in the Pacific area should become more aware of each other's jurisprudence, for this is the area of the greatest economic potential in the 21st century. Hong Kong judges and lawyers may forge closer links with colleagues in the region. Those colleagues should work to ensure that this can be done. Whether it exists in an appellate court or simply in participation in the exchange of law reports and journals remains for the future. But in the common law world, and working on a Bill of Rights, a judge is never alone. The judge always has the great intellectual support of those who have gone before and who labour away on similar problems in other lands. It is the very system of precedent and the development of principles by analogous reasoning which is the strength of our legal tradition. That tradition gives courage and conviction to the judge, working in lonely chambers, endeavouring with integrity to solve the problem in hand according to law.

It is true that many spectres can be seen in the future of basic rights in Hong Kong after 1997. Some arise from the deficiencies of the political system bequeathed by the colonial power. Others derive from the perceived threats of absorption in a highly centralised autocracy. Candour dictates that the events of Tiananmen Square should be mentioned again. They have led many to be cynical about the prospects of the rule of law, human rights and the independence of the judiciary in Hong Kong after 1997.

But it is not impossible that China will recognise the great utility to it, and to the world, of a prosperous and confident Hong Kong. Prosperity and confidence will more likely survive if the promise of the *Basic Law* is fulfilled. I do not think that many observers, least of all in Hong Kong, ever saw the fifty years interregnum as a total postponement of the change of systems. The fifty years was clearly contemplated as a time-cushion. Within that period it may be hoped that the autocratic features of China itself will change, just as change has lately been achieved with remarkable speed in central and eastern Europe and elsewhere. Similarly, it may be expected that Hong Kong's legal system will change. It will adapt to its new environment. In this way, it might be expected that two systems of law, at first so different, might come more closely to resemble each other.

We should not be too pessimistic about the future of the common law in Hong Kong. As I have demonstrated, it is a flower which, once planted, proves difficult to eradicate. It takes on the features and attributes of the societies it serves. It may even provide lessons and an example for China which will prove beneficial to that great land. And in the end, Hong Kong, though a cosmopolitan and partly Eurasian community, is overwhelmingly Chinese. The natural return of that community to harmony with its geographical, cultural and linguistic environment is probably inevitable and may in the long term prove beneficial both for Hong Kong and for China.

The problem in hand is essentially the time of transition. It will doubtless be painful. It will require temperate restraint on the part of the people and officials

of Hong Kong and the people and officials of China. And that is why the rôle of the judge in Hong Kong will become one of the greatest importance. It will be even more important than it is under the present régime with its other checks and balances and its accountability to a democratic legislature at Westminster.

An independent judge of courage, sustained by the mighty intellectual treasury of the common law is an essential component in the peaceful and just transition of Hong Kong from its present status to its new rôle.

For the sake of universal human rights and for the rights of the people of Hong Kong, it is my hope that judges in this great tradition will be found, in the words of Socrates, *"to hear courteously, to answer wisely, to consider soberly and to decide impartially"*. If the spirit of basic rights is left in the people of Hong Kong and if judges emerge who can interpret that spirit and enforce it with the support of the people, those rights may yet survive after 1997.

ENDNOTES

* President of the Court of Appeal, Supreme Court of New South Wales, Australia. Commissioner, Member of the Executive Committee and Chairman Elect of the International Commission of Jurists.

1. Gaudron J in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 263 ("Our legal heritage is the gift of the common law of England and

our legal system necessarily has much in common with that of England.")

2. Signed 28 September 1984; (1985) *United Kingdom Treaty Series* No 26, Cmnd 9543. See R Wacks, *Civil Liberties in Hong Kong*, Oxford. Hong Kong, 1988, 11.

3. *Ibid*, para 3(12). See Wacks, 13.

4. China, the Consultative Committee for the Basic Law of the Hong Hong Special Administrative Region of the People's Republic of China, April 1990 *(Basic Law)*, Article 2.

5. *Ibid*, Art 4.

6. *Ibid*, Art 6.

7. *Ibid*, Art 9.

8. *Ibid*, Art 11.

9. *Ibid*, Art 5.

10. *Ibid*, Art 28.

11. *Ibid*, Art 27.

12. *Ibid*, Art 28.

13. *Loc Cit.*

14. *Ibid*, Art 29.

15. *Ibid*, Art 30.

16. *Ibid*, Art 31.

17. *Ibid*, Art 32.

18. *Ibid*, Art 34.

19. *Ibid*, Art 35.

20. United Nations Centre for Human Rights, *Human Rights: A Compilation of International Instruments*, 1988.

21. See B F C Hsu and P W Baker, The Spirit of Common Law in Hong Kong: The Transition to 1997 (1990) 24 *UBC Law Rev* 307, 341.

22. *Ibid*, 310.

23. *Ibid 311.* During the discussion of another paper in this conference, the opinion was advanced that the PRC, although not itself a party to the International Covenants, would have an obligation, in succession to the United Kingdom, to report to the Human Rights Committee of the United Nations on the compliance of the Hong Kong Special Administration Region with the covenant. Having regard to the fact that reporting obligations fall only upon States party to the Covenant, and that the PRC is not such, this interpretation appears strained. In any case, if the PRC declined to report there is little by way of sanction that could be done (save for a possible resolution censuring the PRC) when the PRC would doubtless rely on the legal arguments suggested above.

24. A Lamer, Address to the Provincial and Territory Court Judges of Canada, Quebec City, Canada, September 1990. Noted (1991) 65 *Aust LJ* 3 at 4.

25. Y Ghai, Bills of Rights: Comparative Perspectives in R Wacks (ed) *Hong Kong's Bill of Rights: Problems and Prospects*, Uni of HK, 1990, 7, 18.

26. See *Tennessee Valley Authority v Hill* 437 US 153, 194-5 (1975) per Powell J. See discussion M S Moore, The Semantics of Judging 54 *S Calif L Rev* 151, 161ff (1981).

27. See O Dixon *Jesting Pilate*, 1965 cited in D F Partlett, Book Review, The Common Law as Cricket, 43 *Vanderbilt L Rev* 1401, 1406 (1990). See also A F Mason, The Role of a Constitutional Court in a

Federation: A Comparison of Australian and United States Experience (1986) 16 *Fed L Rev* 1, 4.

28. See B Gaze and M Jones *Law, Liberty and Australian Democracy*, Law Book Co, 1990 60 ff.

29. See eg Deane J in *Street v Queensland Bar Association* (1989) 63 ALJR 715, 737. Cf Murphy J in *Attorney General for the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 74; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670.

30. See discussion Gaze and Jones, above, n 28, 63ff.

31. *Ibid*, 49.

32. See Hsui and Baker, above, 341.

33. See *Dr Bonham's Case* (1609) 8 Co Rep 107a at 118a; 77 ER 638, 652. See generally *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations and Anor* (1986) 7 NSWLR 372, 402ff. Cf Partlett, above, 1415.

34. *Church of the Holy Trinity v United States* 143 US 457, 459 (1892). See also *Crooks, Collector of Internal Revenue v Harrelson* 282 US 55, 60 (1930). Cf discussion Moore (above) 280 ff.

35. see *L v M* [1979] 2 NZLR 519; *Brader v Ministry of Transport* [1981] 1 NZLR 73; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374, 390 and *Fraser v State Services Commission* [1984] 1 NZLR 116, 121. See discussion J Caldwell, Judicial Sovereignty - A New View [1984] NZLJ 357 and *BLF Case*, above, 404.

36. *Yuill & Others v Corporate Affairs Commission of New South Wales* (1990) 20 NSWLR 386, 403-4 (NSWCA).

37. See eg *O'Reilly v The Commissioners of the State Bank of Victoria* (1983) 153 CLR 1; *Baker v Campbell* (1983) 153 CLR 52.

38. *R v Uljee* [1982] 1 NZLR 561.

39. *Descoteaux v Mierzwinski and Attorney General of Quebec* (1982) 141 DLR (3d) 590; *Re Director of Investigation and Research and Shell Canada Limited* (1975) 55 DLR (3d) 713 (FCA). See *Yuill*, 397ff.

40. See *Oades v Hamilton* (1987) 11 NSWLR 138; *Hamilton v Oades* (1989) 166 CLR 486.

41. See *Balog v Independent Commission Against Corruption* (1990) 64 ALJR 400 (HCA).

42. See P W Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 *Osgoode Hall LJ* 87, 93.

43. *Yuill*, 403.

44. BFC Hsu and P W Baker above n 21 at 310.

45. [1991] 2 WLR 588 (HL).

46. Reported (1988) 62 ALJ 531-2.

47. *Chow Hung Ching & Anor v The King* (1948) 77 CLR 449, 477; *Koowarta v Bjelke-Peterson & Ors* (1983) 153 CLR 168, 224f.

48. See *New South Wales v the Commonwealth* (1975) 135 CLR 337, 445; see discussion in M D Kirby, The Bangalore Principles of Human Rights Law (1989) *S Af LJ* 484, 490 ff.

49. See eg *Daemar v Industrial Commission of New South Wales & Ors* (1988) 12 NSWLR 45 (NSWCA); *S & M*

Motor Repairs Pty Limited & Ors v Caltex Oil (Australia) Pty Limited & Another (1988) 12 NSWLR 358, 360f (NSWCA); *Jago v District Court of New South Wales & Ors* (1988) 12 NSWLR 558, 568, 580; *Gradidge v Grace Brothers Pty Limited* (1988) 93 FLR 414, 422 (NSWCA).

50. *Loc cit.*

51. Reported in Commonwealth Secretariat, Legal Division, *Developing Human Rights Jurisprudence*, vol 2, London, 1989, 9.

52. Reported (1990) 5.3 *Interights Bulletin* 39.

53. *Hunter v Southam Inc* (1984) 2 SCR 145; 11 DLR (4th) 641, 649 (Dickson CJ).

54. In Re s 24 *British North America Act* (1930) 1 DLR 98 (PC), at 106-107.

55. *Minister for Home Affairs v Fisher* [1980] AC 319 (PC) at 328. See also discussion S R Peck,An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms (1987) 25 *Osgoode Hall LJ* 1, 6.

56. Cf McDonald J in *Re Soenen and Thomas* (1983) 3 DLR (4th) 658; [1984] 1 WWR 71 (Alta QB) at 502.

57. See eg *R v Oakes* (1986) 1 SCR 103; 26 DLR (4th) 200.

58. C Barr and E Barr, Diagnostic Adjudication in Appellate Courts: The Supreme Court of Canada and the Charter of Rights (1989) 27 *Osgoode Hall LJ* 1.

59. Reported in *Sunday Times* (SAf) 27 March 1991, 15.

60. Sir Harry Gibbs cited in Gaze and Jones (above) 60.

61. R Little and W Reed, *The Confucian Renaissance*,

Federation Press, Sydney, 1989. See also R L Caldwell, "Chinese Administration of Criminal Justice. Return to the Jural Mode? [1987] *Lawasia* 57, 81.

62. Little and Reed, *Ibid*, 4.

63. Cited *ibid* 5.

64. T L Tsim and B H K Luk, *The Other Hong Kong Report.*

65. *Ibid* p xxvii and Chapter 3, The Implementation of the Sino-British Joint Declaration, *ibid* p 48.

66. Article 62 (11), *Constitution of the People's Republic of China*, 1982. See Hsu and Baker, above, 313.

67. 5 US (1 Cranch 137) 368 (1803). See Partlett, (above) 1415.

68. The Standing Committee is also an administrative and legislative body. See *Constitution of the Peoples' Republic of China*, Art 67. See also Hsu and Baker, 313.

69. *Ibid*, 314.

70. The reference is to the order of Sears J concerning Vietnamese refugees. See (1990) 25 *Australian Law News*, 14.

71. T L Tsim and B H K Luk, *The Other Hong Kong Report*, Chinese Uni Press, 1990, xxvi.

72. See Nihal Jayawickrama, "The Content of the Bill of Rights" and Peter Wesley-Smith "Entrenchment of the Bill of Rights", 66 in R Wacks (ed) *Hong Kong's Bill of Rights: Problems & Prospects*, Faculty of Law, University of Hong Kong.

73. P Wesley-Smith, Letter from Hong Kong [1990] *Public L Rev* 14, 117.

74. See Hsu and Baker, 326 ff. The International Commission of Jurists (Geneva) has established a mission to report on various matters. The mission's visit to Hong Kong coincides with this conference.

75. See eg J Crawford, (ed) *The Rights of Peoples*, Clarendon Press, Oxford, 1988.

76. UNESCO, *International Meeting on Experts on Further Study of the Concept of the Rights of Peoples*, Paris, 27-30 November 1989, *mimeo*, SHS-89/Conf 602/7.

77. N J Miners in Tsim (above), 3.

78. Tsim (above) xxvii.

79. Miners, in Tsim (above), 3.

80. Tsim xxvii. See also Hsu and Baker, 324.

81. Hsu and Baker, 350.

82. Reported in E Lau, Disorder in the Courts: The Judiciary Faces Major Task in 1997 Run-up, *Far Eastern Economic Review*, 21 (20 April 1989).

83. Hsu and Baker, 308.

84. *Loc cit.* See also *The Economist*, Hong Kong's Liberties, 15 June 1991, 18f.