

REPORT

HONG KONG CONFERENCE ON HUMAN RIGHTS AFTER 1997

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On June 20-22, 1991, the Faculty of Law of the University of Hong Kong convened a high level conference in Hong Kong concerned with the prospects for human rights, an independent judiciary and the rule of law in Hong Kong after 30 June 1997. On that day control over the Territory of Hong Kong will pass from the United Kingdom to the People's Republic of China (PRC) pursuant to an agreement incorporated in a Joint Declaration of the two Governments signed in 1984. See *United Kingdom Treaty Series No 26*, Cmd 9543. This Declaration contains an undertaking that the Hong Kong Special Administrative Region (as it will be called) will be vested with "executive, legislative and independent judicial power, including that of final adjudication". The PRC agreed for fifty years to maintain the "current social and economic systems in Hong Kong" so that they would remain unchanged.

In April 1990 the Seventh National People's Congress of the PRC adopted a Basic Law for Hong Kong. This also contained a commitment to "an independent judicial power" in Hong Kong after 1997 including "final adjudication". It specifically guaranteed a number of basic rights and freedoms stating that "the previous capitalist system and way of life shall remain unchanged for fifty years". Article 39 of the Basic Law promised that the provisions of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights ... "shall remain in force and shall be implemented through the laws of

the Hong Kong Special Administrative Region".

In late 1990 the colonial administration in Hong Kong presented a draft Bill of Rights Ordinance for enactment by the local Legislative Council. This is a body partly appointed and partly elected which advises the Governor of Hong Kong on laws for the colony. The Ordinance was eventually enacted in June 1991. Its enactment led to protests from representatives of the PRC. They complained that the United Kingdom, in the closing stages of its colonial administration, was altering the position of human rights protection in Hong Kong. Notwithstanding the protests, the Hong Kong Letters Patent, providing the authority for lawmaking by the Governor of Hong Kong, were altered on 20 May 1991 by the addition of a new paragraph. This requires that the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong "shall be implemented through the laws of Hong Kong". It further provides that "no law of Hong Kong shall be made after the coming into operation of" the amendment to the Letters Patent, "that restricts the rights and freedoms enjoyed in Hong Kong in a manner which is inconsistent with that covenant as applied to Hong Kong".

It was in this context that the conference of judges, academics and others convened in Hong Kong. The conference was opened by the Vice Chancellor of the University of Hong Kong, Professor Wang Gungwu, an Australian citizen and long-time teacher at the Australian National University. Professor Wang made the telling point that

"Ultimately, the power to choose their governments and have a decisive say in their destiny is the only guarantee that any law to

protect human rights can work."

This was an important point, because the International Covenant on Civil and Political Rights, as extended to Hong Kong does not include the guarantee of self-determination contained in that Covenant. Although the United Kingdom has provided self-determination to other colonial peoples, this has not been allowed to the people of Hong Kong. The denial of that right, and its omission from the Bill of Rights Ordinance was criticised by a number of speakers at the conference including Dr Nihal Jayawickrama, a Senior Lecturer in Law at the University of Hong Kong and Chairman of Justice (the branch of the International Commission of Jurists) in Hong Kong.

A number of sessions were devoted to the practical tasks of educating judges and lawyers in Hong Kong upon the large body of human rights jurisprudence which has developed in the courts of countries with Bills or Rights and in international agencies, particularly since the Second World War. Professor Richard Lillich of the University of Virginia outlined the sources of human rights law. Professor Torkel Opsahl explained the operations of the United Nations Human Rights Committee in considering reports under the International Covenant. At present the United Kingdom reports upon compliance of laws and practices in Hong Kong with the International Covenant on Civil and Political Rights. It was during Professor Opsahl's paper that Mr Anthony Lester QC of the United Kingdom suggested that China would succeed to the United Kingdom's reporting obligations on Hong Kong after 1997. The PRC is not itself a party to the International Covenant. Differing views were

expressed concerning its obligation in international law to report to the Human Rights Committee on Hong Kong after 1997 when the Territory is absorbed by the PRC.

Important papers on techniques adopted in the interpretation of Bills of Rights, with useful illustrations, were given by Professor Manfred Nowak of the University of Vienna and Professor Yash Ghai of the University of Hong Kong. Mr Lester, with illustrations from his practice in the United Kingdom and before the European Court of Human Rights, outlined the practical ways in which a human rights brief should be prepared for consideration by a court.

There then followed a session on the machinery for human rights protection. Justice Michael Kirby, President of the New South Wales Court of Appeal outlined the central rôle of the judge in upholding guaranteed rights, such as those contained in the Bill of Rights Ordinance. Mr Peter Bailey, past Deputy Chairman of the Australian Human Rights Commission explained the functions of that Commission. There has been a debate in Hong Kong as to whether a Human Rights Commission should be established to provide more ready access by individuals to basic rights which they might not be prepared to enforce in courts of law. Professor Theo van Boven of the Netherlands explained the crucial rôle of non-governmental organisations in supporting individuals in the assertion of their basic rights. A number of participants from the floor questioned whether Hong Kong citizens, unused to a régime of rights, and brought up in the Confucian tradition of respect and in a colonial environment, would suddenly be converted to the assertion of rights on the eve of their absorption into China.

The former Attorney General of India, Mr Soli Sorabjee outlined the experience of India with the fundamental freedoms provided under that country's independence constitution. Dr Rajeev Dahvan also discussing the Indian Constitution, suggested that Hong Kong might provide a microcosm of new constitutional arrangements, suitable to be considered in the numerous societies in which the assertion of peoples' rights for separate treatment within a wider nation could be respected. The analogy of the Kurds was referred to as were developments in the Baltic and Balkans in Europe.

Dato' Param Cumaraswamy of Malaysia outlined the difficulties which had arisen in Malaysia in the judicial enforcement of basic rights when the Executive Government took steps to remove senior judges of that country. Justice Sarmiento of the Supreme Court of the Philippines explained the difficulties of human rights enforcement in the conditions prevailing in that country.

There followed sessions on substantive rights. Professor Kevin Boyle of the University of Essex outlined the importance of freedom of expression as a key to the enforcement of other rights. A number of Canadian speakers explained the experience with the Canadian Charter of Rights and Freedoms. This was highly relevant to Hong Kong as Canada, like Hong Kong, had endured for most of its modern history without a statement of legally enforceable fundamental rights. Madam Justice Bertha Wilson, a former judge of the Supreme Court of Canada outlined developments affecting women and the family under the constitutional protection of privacy in Canada. Justice Walter Tarnopolsky

of the Ontario Court of Appeal, explained developments affecting equal opportunity and discrimination in Canada.

The concluding remarks of Professor Raymond Wacks of the Hong Kong Law School declared the conference a success. But perhaps the most telling contribution was made by a participant who was absent from the conference. Professor Gong Xiang Rui of the Faculty of Law of Beijing University in the PRC prepared a paper on *The Constitutional Protection of Human Rights: the Chinese View*. It must be inferred that the paper did not state the official Chinese view as Professor Gong was not permitted to attend. Nevertheless his paper was read by the conference organiser, Mr Johannes Chan of the Hong Kong Law School. He also read a letter which accompanied the paper. At the close of his paper, Professor Gong declared:

"So long as there is free election based upon public opinions, it is always possible to compel the government not to overstep the boundaries of its powers, for there is a minority who would give attention to any abuse, and to persuade the electorate to oppose those abuses. And if the government is not responsive it may be turned out. There will be no democracy if minority opinions cannot be expressed, or if people cannot meet together to discuss their opinions and their actions, or if those who think alike on any subject cannot associate for mutual support and for the propagation of their common ideas. Yet these rights are vulnerable and they are most likely to be subject to attack. Therefore the most fundamental liberty is not only of free elections but also of limitations of government powers."

The eloquent plea for the rule of law by a distinguished Chinese legal scholar presented the conference in Hong Kong with a ray of hope. Nevertheless, Professor Gong's absence, and his empty chair provided a telling statement on the lack of acceptance of diverse opinions on such subjects in the

PRC.

Summing up the conference, Justice Kirby listed a number of points which gave rise for optimism and pessimism about the future of human rights, the judiciary and the rule of law in Hong Kong after 1997. Among the points for optimism were the resilience of the common law system, the public promises of the PRC recorded in the Basic Law, the inherent capacity of the common law, even unaided by a Bill of Rights, to protect fundamental freedoms and the economic interests of the PRC and Hong Kong which favoured a continuation of the latter's present legal system.

On the other hand, Justice Kirby referred, as reasons for concern, to the fundamental differences between traditional Confucian approaches to the law when contrasted to those of the common law. The former emphasise duties not rights; community not the individual; and the rule of virtue dispensed by powerful men, not the rule of law. The difficulty, belatedly, of building a rights-based society without the legitimacy of full democracy in its political arrangements was noted. So was the subordination of the Basic Law to the Constitution of the PRC and the absence of a tradition of judicial independence in China. The reported departure of trained lawyers and judges from Hong Kong before 1997 created a serious erosion of the prospects for a viable legal system after the transfer of sovereignty. The failure to afford the people of Hong Kong an opportunity to exercise self-determination tended to undermine the legitimacy of the last minute efforts to provide a paper framework for the protection of basic rights in the closing days of the colonial régime. Recent remarks by representatives of the

PRC concerning the need to review the Bill of Rights Ordinance in 1997 and delaying the establishment of the Final Court of Appeal for Hong Kong were also sources of concern.

The conference was attended by the four members of a mission of the International Commission of Jurists (ICJ) (Geneva) established to report on human rights and self-determination in Hong Kong. The members of the Mission are Sir William Goodhart (UK), Mr John Dowd QC (Australia), Professor Hans-Heiner Kühne (Germany) and Raja Aziz Addruse (Malaysia). Immediately following the conclusion of the conference the mission embarked upon a busy round of consultations in Hong Kong concerning the subject matters of its mandate. It is expected to report later in 1991 to the Executive Committee of the ICJ. It is likely that, as 30 June 1997 approaches, lawyers throughout the Commonwealth of Nations and beyond will become more closely involved in the events of Hong Kong and concerned in the provision of assistance to the judges and other lawyers who remain there determined to preserve human rights, an independent judiciary and respect for the rule of law after 1997. The hope was expressed by Justice Kirby that Hong Kong after 1997 might act as a bridgehead to take these universal ideas into China itself. If this seemed an uncertain prospect in 1991, the rapid changes in Central and Eastern Europe and in the Soviet Union in recent years gave some cause for hope.