

BRITISH RULE IN HONG KONG -  
FROM IGNOMINY TO IGNOMINY  
MACQUARIE UNIVERSITY CENTRE FOR  
CHINESE POLITICAL ECONOMY  
PARLIAMENT HOUSE, SYDNEY 5 SEPTEMBER 1991

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The Hon Justice Michael Kirby AC CMG\*\*

IN THE BEGINNING

The acquisition by the British Crown of sovereignty over the colony of Hong Kong was one of the least noble chapters of the history of the British Empire. Little wonder that the sesqui centenary passed recently with hardly any notice. And now that sovereignty is about to be surrendered in a chapter equally shameful. Indeed Mrs Thatcher, in Tokyo earlier this week, confessed that she felt "guilty" for failing to include democratic reform for Hong Kong in the 1984 Sino-British Joint Declaration. Well may she feel that way.

Visitors to the glittering metropolis of Hong Kong are dazzled by the steel and glass, the expensive shops, busy people and the manifest wealth at every turn. Few visitors trouble to acquaint themselves with the circumstances by which the British Crown acquired this colony. That acquisition was eventually secured by the Treaty of Nanking, 1842. The treaty was enforced at the end of the first opium war. It is worth remembering how it came about.

Britain led the efforts of western nations to open China to the international trade in which Britain, early to the industrial revolution, was the foremost exponent. From the 1830s, Britain increased its efforts to persuade China to alter the conditions upon which trade could be had with this vast country and huge potential market. A peaceful mission to this end, led by Lord Napier in 1834 was not permitted to proceed beyond Canton. It ended in failure. This failure stimulated the demands of the collected British merchants in Canton for the use of Imperial force to achieve the mercantile objectives.

Coinciding with these demands the Ch'ing government in Peking turned its attention to the best means of tackling the problem of the growing use of opium within the Chinese Empire. After a debate, reminiscent of some which we have had more lately in Australia, a decision was made in 1838 to suppress trafficking in opium and to punish its usage. The campaign to this end was led by Lin Tse-Hsü. He was appointed Imperial Commissioner. His orders were to proceed to Canton immediately to liquidate opium trafficking. He arrived in Canton in March 1839.

It was soon confirmed for Lin that the primary source of opium was the foreign merchants (most of them British). They imported most of the opium from the British possessions in India. When the demand for the surrender of the huge stocks of opium held by the foreign merchants was ignored, the foreign factories in Canton were blockaded and the Chinese employees recalled. This move ultimately produced the surrender of the opium and a pledge by the merchants never again to engage in its commerce. Over 20,000 chests of

opium were destroyed in public under the orders of Imperial Commissioner Lin, a man known for his probity and humanity. Having destroyed the opium and secured the promises, Lin lifted the restrictions on the merchants.

However, the British Superintendent of Trade (Charles Elliot) determined that the enforced surrender of the opium was a cause for war. The Government of Westminster was persuaded to agree. A number of British naval and land forces arrived off Canton in November 1839. They attacked a fleet of Chinese war junks in the Pearl River estuary. Thus began the first opium war. Its outbreak in England led to denunciations of the government's efforts. Gladstone declared:

*"A war more unjust in its origin, a war more calculated to cover this country with permanent disgrace, I do not know and have not read of. The British flag is hoisted to protect an infamous traffic."*

Canton was blockaded in June 1840. Demands were presented to the Ch'ing government. These included compensation for the confiscated opium, an indemnity to cover the cost of the war, the removal of barriers on future trade with China, the establishment of relations on an "equal footing" and, significantly, the grant of an island base.

Talks began in September 1840. Lin was replaced. Because negotiations in Canton with his rapacious successor dragged on, the British launched an attack on Chinese positions near the city. This forced the new Imperial negotiator to sign the Ch'uan-pi Convention on 20 January 1841. It provided for the cession of Hong Kong to the British Crown, the payment of an indemnity of 6 million

silver dollars the recognition of "equality" in Sino-British negotiations and a full resumption of trade. When news of this treaty reached Peking, it was repudiated. The Emperor ordered an offensive against the British. This produced various further military efforts during 1841 and 1842. Despite the courage of the Chinese garrisons, the superior technology of British arms carried the campaign before them. The British fleet and military continued the slow ascent of the Yangtse River. On 10 August 1842, they reached Nanking. The threat to that city extinguished Peking's resistance. The Treaty of Nanking was signed. It required the payment of a war indemnity by China which included \$6 million compensation for the confiscated opium. It obliged the opening of five ports to British trade and residents. It confirmed the session of Hong Kong to the British Crown. Subsequent plaintive Chinese requests to Britain that it should limit the production and export of opium were dismissed. Hong Kong became the main base for the opium trade which "flourished splendidly in the decades following the Nanking Treaty".<sup>1</sup>

By that treaty, the island ceded to the British Crown provided a base for British trade. With the British flag eventually came civil and military officials, the judiciary, merchants, churchmen and citizens. What began as a sleepy domain of fishermen was to become a thriving port and metropolis. Eventually a "lease" for the "New Territories" was negotiated. The lease was, by its terms, to endure for ninety-nine years until 30 June 1997. But the acquisition of the island and coastal area of Hong Kong was not by lease. The Crown Colony itself was acquired by the Ch'uan-pi

Convention confirmed by the Treaty of Nanking. The Convention and the Treaty were always denounced by successive Chinese governments, of every variety, as unequal and unjust derogations from Chinese sovereignty. Those governments never accepted the surrender of Chinese sovereignty over Hong Kong - both the ceded and the leased parts. However, many parts of the British empire were acquired by treaties no less unequal. Despite that, where territory was acquired by the Crown, its people came under the protection of the Crown and the Parliament and judiciary at Westminster. Those people who lived in the Old dominions (and who were basically of British, or at least European ethnicity) acquired a high measure of independence in the 19th century or in the early decades of the 20th century. The inter-War moves towards responsible government in India were accelerated following the conclusion of the Second World War which so drained British treasure and resolve. The establishment of the United Nations Organisation in 1945 was effected on the basis of the United Nations Charter. That Charter, the *Universal Declaration of Human Rights* and the *International Human Rights Covenants* which followed, committed the post-War era to (amongst other things) respect of the rights of peoples to self-determination. The United Kingdom, to its honour, has insisted elsewhere throughout its large empire upon the right of self-determination as the cornerstone to the process of decolonisation by which the peoples of the British Empire were brought to independence and self-government.

A most dishonourable exception to this story is Hong Kong. The people of Hong Kong were not prepared for self-government. Political movements were at first

suppressed and later discouraged. To this day - and to the British withdrawal - a fully elected legislature is not achieved. No act of self-determination was ever conducted to provide for the passing of power over those people on 30 June 1997 to the People's Republic of China. At midnight on that day, the British flag will be lowered on the colony of Hong Kong. Hong Kong will become a Special Administrative Region (SAR) under the direct authority of the Central People's Government of the People's Republic of China (PRC).<sup>2</sup> In a belated effort to protect the future of the people of Hong Kong who remain there after 1997, the British negotiators secured a Joint Declaration with the PRC. This included a number of promises by the PRC to respect the basic rights, system of government and capitalist economy of Hong Kong for fifty years after 30 June 1997. Even more belatedly, steps have been taken to provide Hong Kong with a justiciable Bill of Rights Ordinance and to amend the Letters Patent of the Governor to incorporate into local law most of the provisions of the International Covenant on Civil and Political Rights (but not those relevant to the basal entitlement to exercise the right to self-determination).<sup>3</sup> These changes of status rest upon no decision of the people of Hong Kong but upon a treaty negotiated over the heads of those people, by a spent Imperial power with a modern Imperial power (PRC) who share in common an ultimate indifference to the wishes of the people of Hong Kong about their own future.

This is an ignoble end to the British involvement in Hong Kong. The question upon most lips at a recent conference in Hong Kong was whether, after June 1997 the

Citizens of the Hong Kong SAR will be able to come before an independent judge who will determine rights and duties according to law.

That some features of the present régime in Hong Kong will endure for a time seems beyond question. At first, the world's gaze will be upon the transition of power. Nothing is likely to happen in the first few years. But the promise is for at least fifty years. The busy world will soon lose interest in the transition of Hong Kong. After the transition of government power is accomplished, and seemingly set upon a fair course, the world will turn to other problems. That will be the moment of truth for Hong Kong. Will the rights reflected in the common law of England applied in Hong Kong, collected in the Bill of Rights Ordinance and promised in the Basic Law endure beyond that time? Coldly we must balance the points for optimism and caution. We must weigh them in the crucible of history, seen from this vantage point of 1991. In my scales, there are ten points for optimism and ten for caution. I will state them now.

#### POINTS OF OPTIMISM

The first point for hope lies in the history of the common law itself. It is a history of a resilient legal system which survives revolutions, bitter hatreds, freedom struggles, emergence from colonial rule, the change of the language of the courts and different systems of justice. It is a system difficult to eradicate. Because its basic jurisprudence is written in the English language and daily renewed in courts around the world, it is a living plant, once taken root that is hard to extirpate. One anonymous



local lawyer has said that it is the one thing of the British "worth keeping" in Hong Kong.<sup>4</sup> Why should what has happened in other colonies - the survival of the common law - not happen also here in Hong Kong?;

Secondly, where there are doubts about judicial courage and integrity after 1997, it is possible to point to many instances in British and Commonwealth history, in the United States, Ireland and elsewhere where judges have remained true to the promises given on their appointment. Even in difficult times they have remembered Thomas Fuller's famous words "*Be you ever so high, the law is above you*". It was a humble judge in a Federal trial court whose insistence on the rule of law brought down the President of the United States, arguably the most powerful man in the world. Judicial officers who are here now will accompany Hong Kong through the transition. Continuity of personnel and of systems will lay down the example of a rights respecting society which will ever be before the local successors to the expatriate judges when the last of them has departed;

Thirdly, there is hope from the terms in which China accepted, before the whole world, the basis of resuming *de facto* sovereignty over Hong Kong. In the Joint Declaration of 1984 it promised for fifty years an "independent judicial power" and respect for a collection of basic rights and freedoms: the right to free speech, to assembly, to religion, to choice of occupation, to holding private property and so on. In the Basic Law of 1990, the National People's Congress (NPC) accepted amongst the general principles for the government of Hong Kong an independent judicial power, the safeguard of the rights and freedoms of

residence, the use of English as an official language of the courts and the persistence of the laws previously in force. In Chapter 3 of the Basic Law, China promised that the fundamental rights would remain in force. The whole world knows China's promise. In Hong Kong, a great metropolis and economic centre, with 150 years of contact with a wider world - and with people scattered around that world having links with their families here - it is scarcely likely that departures from China's promises could be kept secret;

Fourthly, the United Kingdom is obliged to report to the United Nations Human Rights Committee in Geneva on compliance in Hong Kong with the International Covenant on Civil and Political Rights. China is not a party to that Covenant and does not report. During the conference it was suggested that China would succeed to the United Kingdom's obligations of reportage.<sup>5</sup> It would be obliged to do so by reason of the international treaty with the United Kingdom which is deposited with the United Nations. A refusal to report, despite the clear promise of the Joint Declaration and the terms of the Basic Law, would attract world-wide condemnation. The obligation to report provides a window for those in the wider world who are anxious about the continuance of basic human rights and the rule of law in Hong Kong;

Fifthly, there is the point that excessive confidence should not be placed in the Joint Declaration, Basic Law or Bill of Rights Ordinance as such, whether alone or in combination. Basic rights are not confined to constitutional documents such as these. They are found in the nooks and crannies of the common law itself. In the daily work of

courts the justice of the common law <sup>6</sup> is extended to litigants. The growth of public and administrative law, which has been such a feature of the common law in recent decades, has protected individuals and minorities and brought the great power of the Executive Government under control. It has rendered that power answerable to the courts. Now there are new weapons which courts can use - including by reference to international human rights law - in fashioning common law principles and construing ambiguous statutes. It is not necessary to put all the eggs of the future into the basket of the Bill of Rights Ordinance in Hong Kong. For notions of rights and of the rule of law permeate the whole system of the common law. For practical day to day problem-solving, that law, for default of others, will continue to apply in the courts of Hong Kong;

Sixthly, the judges of Hong Kong of the future, and the magistrates, will not be isolated. They will remain part of the company of the judicial officers of the common law. They will have links, professional and personal, with judges throughout the Commonwealth of Nations and beyond. They will never be alone in their Chambers. With them will be the spirits of the great judges of our tradition - from Coke and Mansfield, from Marshall and Holmes - to Atkin, Dixon, Laskin, Reid and Wilberforce. Their words, captured on the pages of lawbooks, will always be there to give support, encouragement, strength and courage. In the field of human rights jurisprudence there is now an international treasurehouse available for use. Giving meaning to the Ordinance and to basic rights beyond the Ordinance is not a job where the judge need feel beleaguered and lonely. He or

she will have constant access to a body of legal principle to which appeal for legal authority can always be made;

Seventhly, it is not as if the judicial officers of Hong Kong stand alone. The law schools of Hong Kong produce many lawyers who, as this conference has shown, accept and uphold the fundamental principles of basic rights, respect for minorities and adherence to the rule of law determined by an independent judiciary. The right of access to a judge is meaningless if the judge does not have the support of an independent legal profession. The whole history of the common law has been one of the assertion of the independence of the legal profession, including on the part of the judiciary itself. It is unlikely that, after 1997, the robust individuals who make up that profession in Hong Kong will fade away or become pliant instruments of the state;

Eighthly, the economic interests of Hong Kong depend significantly upon international confidence in the independence and ability of its courts. Shatter that confidence and the financial and economic stability of the Territory could be wounded, even mortally so. This the PRC knows. It is in the interests of the PRC, which is developing its own economic regions in the vicinity of Hong Kong, to keep this international port strong, adventurous and prosperous. Any rational examination of the underpinnings of Hong Kong would produce the realization the importance of continuing confidence in Hong Kong's judicial system. It may go too far to say that economic self-interest is the chief or only fundamental assurance for the continuance of basic rights and judicial independence in Hong Kong after 1997. But it is certainly an important feature of the real

guarantees to Hong Kong. Economic development of the mainland, in the vicinity of Hong Kong will itself be enhanced if the prosperity of Hong Kong and its outreach to established markets throughout the world are maintained well beyond 1997. In this sense it is in the interests of the PRC to preserve and enhance the economic power of Hong Kong as one of the world's great financial centres. That will only be secured if there is international confidence in the courts of Hong Kong to resolve with courage and neutrality disputes that will inevitably arise between individuals, corporations and with the state. That confidence exists now. It is essential that it should survive 1997;

Ninthly, it is inevitable that some changes will occur after 1997 as Hong Kong becomes part of the "one country". There may have been some who thought the 50 year promise would leave Hong Kong's legal system wholly untouched for that period. But most must have seen the period as a time cushion or bridge to a more natural association of the Territory with the mainland behind it. Some changes in notions of individual rights and community duties are inevitable as Hong Kong is associated with a country having quite different conceptions of human rights and scepticism about the rule of law. But this may say no more than that, in its return to its Chinese environment, the law will adapt, as every other feature of society must adapt. So much is inevitable and is natural. It need not be intolerable; and

Tenthly, China itself is changing. The world is changing. China has invited delegations from Australia, France and Italy to inspect and report upon its human rights record. The Australian delegation in July 1991 will visit

major Chinese cities and also Tibet. This is itself something of a change in China's hitherto insistence that human rights and legal questions are strictly "internal" to China. China's sensitivity to world opinion on human rights following the Tiananmen Square incident, its realisation of the economic clout of human rights activists (not least in the United States Congress) promotes a respect for Hong Kong's basic rights derived from China's changing society. The lesson of Central and Eastern Europe and of the Soviet Union appears to be that the future belongs to freedom, not autocracy. Advance the education of the people and enlarge their contact with the outside world and they will refuse forever to accept the dictatorial whim of an individual, a Party or a group lacking the legitimacy of democratic acceptance. Thus China may itself change. The history of China must be seen as one of alternative waves of liberalisation and autocracy. At least the backlash of June 1989 - though cruel and punitive - did not even begin to approach that of earlier acts of suppression in China. In the Cultural Revolution millions died.

The very integration of the world economy, of its transport and telecommunication systems render vulnerable any country seeking economic advancement at the price of political oppression. It may be the mission of Hong Kong, at an important moment in the history of the world and of China, to take ideas of individual rights and the rule of law into China. With the entrepreneurs of Kong Hong opened up to China, knowing the measure of freedom they have enjoyed, they may take in their knapsacks the common law concepts of individual rights and the rule of law and spread those ideas

together with their capital and merchandise.

The negotiation of a special relationship between Hong Kong and the PRC might even serve as a model for a new kind of federalism, responsive to the desire of peoples with a different culture or history to have a degree of autonomy within another state. The growing assertion of the rights of peoples from the Kurds to the Baltic, the Balkans and along the whole gigantic border of the Soviet Union and into Asia demonstrates the urgent need for political arrangements of a new character. It may be the rôle of Hong Kong to offer an experiment, in its relation to the PRC, which will have implications far beyond China and even beyond Asia. There is no doubt that the assertion of group rights and the rights of peoples is one of the most important developments of our time.

#### POINTS OF CAUTION

What of the other side? First, it must be conceded that there is some truth in the statement of the past Chief Justice of Australia (Sir Harry Gibbs) that if a community is rational and tolerant, a written Bill of Rights is not needed. If it is not, no Bill of Rights will protect it. Until now, the basic rights of residents of Hong Kong have been guaranteed, ultimately, by courts sitting in London and by the fact that the government of Hong Kong is answerable to a democratically elected Parliament sitting at Westminster. Take away these anchors from the legal system and it may be cast adrift. The rights collected in the Basic Law and those spelt out in the Bill of Rights Ordinance are bequeathed belatedly. Have they taken root amongst the people of Hong Kong? Will people who have lived under one form of

autocracy, without responsibility for their self-government, be sufficiently right-asserting to uphold these basic rights when they are passed to the control of another autocratic form of government?

Secondly, ideas of basic rights (whether in a Bill of Rights or derived from common law principle) depend ultimately on a shared notion of society. In recent times at least, this has been of a democratic society respectful of individual rights and minority freedoms. This is the reference point for courts in giving meaning to a Bill of Rights and in controlling oppressive acts of individuals or the state, by reference to the justice of the common law. But to the very end of its colonial phase, Hong Kong has no democratic legislature, wholly elected by direct vote. This may itself offend the fundamental notions of human rights law, including as expressed in the International Covenants. Thus, as the Territory enters the PRC, there is no notion of society, with the legitimacy of democratic acceptance, to which judges of the future can refer in protecting basic rights. They can, for a time, do so by reference to principles in the case books resting upon features of British or Commonwealth societies. But as Hong Kong's association with the PRC becomes more intimate, those presumptions may have declining relevance.

Thirdly, it is essential to recognise that the rule of law as we know it depends upon a convention of obedience. Courts have no armies to enforce their orders against an obdurate state. They are rendered impotent if an opinionated Executive Government declines to obey a court order. The presence in Hong Kong after 1997 of the People's Liberation



Army, to garrison Special Administrative Region provides a potential for a flashpoint between the power of the authorities of the PRC (unused to judicial control) and the courts of Hong Kong.

Fourthly, there is the Confucian approach to law to consider. China repeatedly denounces Western notions of human rights and the rule of law. In doing so, it draws not simply upon Party ideas on these subjects but upon the deep wells of Chinese philosophical writing dating back to the Hundred Philosophers and particularly to Confucius. Neatly encapsulated, the Confucian philosophy of law is about communities not individuals; about obligations, not rights; and about the rule of virtue determined by powerful men, not the rule of law.<sup>7</sup>

It is said that Hong Kong is no longer a purely Confucian society. That it has been imbued with 150 years of a different philosophical tradition. Certainly, opinion polls amongst ordinary people of Hong Kong suggest the acceptance of many of the basic premises upon which the colonial administration has governed the Territory.<sup>8</sup> It may therefore be an error to assume that, with the departure of that administration, Confucian values will again predominate, unaffected by the colonial experience. Nevertheless, it would seem inevitable that Hong Kong's re-entry into China will tend to accentuate Confucian values, some of which may be less enthusiastic for basic rights and the rule of law than the lip service paid to them at international meetings would otherwise suggest.

Fifthly, there is the simple fact that the laws of Hong Kong are subject to the laws of the PRC. The Basic Law

itself is made by the NPC. What is made can be unmade. Article 5 of the Constitution of the PRC provides that no law may contravene the Constitution. Thus no law, even the Basic Law on Hong Kong, may entrench a system of law or government in Hong Kong which is beyond the reach of the constitutional organs of the PRC. This is simply basic constitutional law which any beginning student of that discipline would understand. It demonstrates the fact that the ultimate guarantee of "two systems", and respect of basic rights and the independent judiciary in Hong Kong rests not upon the Basic Law or even upon the NPC of China. It rests upon the will of the brokers of power in China and their willingness to tolerate a separate and different system of law and government in Hong Kong. That willingness will endure only so long as such separateness is thought to advantage the PRC or where its dismantlement would be thought to cause an outcry in the world community with disproportionate damage to the PRC. The events of June 1989 demonstrate that, when their basic needs of survival are thought to be challenged, those with power in Beijing will move to preserve it and shore it up without undue concern about international responses.

Sixthly, there is the absence of a tradition of judicial independence in China. Under the Constitution of the PRC, the separation of powers and the function of the courts as the arbiter of power, is not guaranteed. It is the Standing Committee of the NPC which resolves disputes about where power lies under the Constitution of the PRC, not the Supreme People's Court. This means that neutral determinations of power, by an independent court with a

different agenda and mission, is not an idea that is accepted or even respected in China. On the contrary, it is frequently denounced as a Western bourgeois idea. The proposed Final Court of Appeal for Hong Kong, being established pursuant to the Basic Law under the Constitution of the PRC, must ultimately be subject to the Standing Committee of the NPC upon any controversy relevant to the meaning of the Basic Law or the impact on Hong Kong laws of the laws and Constitution of the PRC. For this reason the Final Court of Appeal should more properly be described as the "Almost Final" Court of Appeal for Hong Kong. And the difficulty specially presented is that it is a court subject not to another court sharing a similar ethos but to a political committee of Party members more likely to be responsive to those in power in Peking than to enduring notions of fundamental human rights, the independence of the judiciary or the rule of law.

Seventhly, the delay in establishing even such a Final Court of Appeal of incontestably respected and indigenous lawyers must be a source for growing concern. The Sino-British Joint Liaison Group failed in April 1991 to agree on a date for the setting up of the Final Court of Appeal which it is intended should take over from the Privy Council after 1997. A Joint Liaison Group subcommittee has been discussing the question of such a Final Court for more than two years. Discussions in the full group began in August 1990. The representatives of the United Kingdom are reportedly keen to establish the Final Court of Appeal by 1992, so that it will be fully operational in advance of 1997. It has been reported that the representatives of the

PRC appear concerned that a strong and fully functional Final Court of Appeal might encourage a greater atmosphere of independence from China in the fledgling Special Administrative Region than is desired.<sup>9</sup> The calibre, reputation for integrity and courage, as well as the learning and experience of the judges appointed, will be subject to critical scrutiny and evaluation in Hong Kong. Their appointments will set the tone for confidence on the judicial system within Hong Kong and beyond. The appointments have, therefore, both a practical and symbolic importance.

Eighthly, there are concerns about renewal of the judiciary in Hong Kong and retention of a large, active and independent legal profession. The Chief Justice is reported as expressing concerns about the many retirements in prospect and the difficulty of getting suitable appointees. Apologists have explained the difficulty by citing lack of interest because of unattractive salaries and benefits and concerns about the future of a person holding a commission from the outgoing régime.<sup>10</sup> Local lawyers suggest that it is rather a want of enthusiasm for localising the judiciary and the desire to promote expatriate judicial officers which has slowed the filling of vacancies. At this stage in the history of Hong Kong, it would appear to be desperately urgent to localise the judiciary as far as possible, as an assurance for the survival of the common law in Hong Kong. A legal system seen to be foreign will be much more vulnerable. Localisation of the judiciary would also permit, in the lower courts, the use of the Cantonese language. The conduct of the great bulk of legal proceedings in the language of the local people is essential to its

demonstrated fairness. Only in this way will an abiding determination to support the legal system be laid down in the hearts of the people of Hong Kong.

As worrying as the localisation of the judiciary, and connected with it, is the threat of the departure of trained lawyers from Hong Kong. The common law system cannot work successfully without a vigilant, independent Bar. Yet only 33% of lawyers are committed to staying in Hong Kong after 1997. This represents a fall of 5% since the events of June 1989. It is this erosion of the personnel of talent and integrity, equipped to keep the system of law and its values intact after 1997, that has caused lawyers to voice concern that the legal system is "crumbling around them".<sup>12</sup>. It is a process which must be arrested as quickly as possible.

Ninthly, there is the failure, already referred to, both of the departing Imperial power, and of the its successor, to accord the people of Hong Kong the most fundamental of human rights - that of self-determination. In its third periodic report to the Human Rights Committee in Geneva, the United Kingdom Government stated that:

*"Successive British Governments have since 1945 consistently promoted self-determination and independence in the dependant territories of the United Kingdom in accordance with the wishes of the inhabitants and the provisions of the United Nations Charter. The United Kingdom's policy towards dependant territories for which the United Kingdom is still responsible continues to be founded on respect for the inalienable rights of peoples to determine their own future. The vast majority of the dependant territories for which the United Kingdom was previously responsible have chosen, and now enjoy, independence."*

This asserted right of self-determination was upheld by the

United Kingdom in the case of Gibraltar where the United Kingdom provided a Constitution whose preamble affirmed that:

*"Her Majesty's Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another State against their freely and democratically expressed wishes."*

Similarly, the Constitution of the Falkland Islands, enacted after the war initiated by Argentina, recognises the rights of the people of that colony to self-determination. As I have said, the same right has not been accorded to the people of Hong Kong. Instead, without proper and effective consultation with the people, nearly 6 million of them, citizens of the Commonwealth of Nations and present subjects of the Queen, are transferred into the control of the PRC without an act of self-determination by them. The Joint Declaration and the Basic Law exclude, and are a substitute for, an act of self-determination. The Bill of Rights Ordinance, notably, excludes from the re-enactment for Hong Kong those provisions of the International Covenant on Civil and Political Rights which guarantee the right to self-determination.

This represented an intolerably paternalistic abdication of a fundamental obligation imposed on the United Kingdom by international human rights law. It is the subject of a mission by the International Commission of Jurists. It may be expected that the mission's report will be available to the Governments of the United Kingdom, the PRC and Hong Kong before too long. Even at this stage, it may not be too late to ensure that the government of Hong Kong is provided with the legitimacy of a complete democracy. Unless this is

done, judges and others looking at the laws of Hong Kong will inevitably view those laws for what they are - not the expression of the will of the democratically elected representatives of the people of Hong Kong but of other persons, not all of whom enjoy the authenticity of democratic election.

Tenthly, and in answer to the economic arguments, it is suggested that to China, Hong Kong (which looms so large for its citizens and for us) is of relatively small concern. In judging issues of democracy and self-determination, the Government in Beijing would necessarily have its eyes fixed on Tibet and the other minority peoples living within the present borders of China. In evaluating respect for human rights in Hong Kong, the PRC will consider the implications of the spread of such notions across the length and breadth of a continental country. In evaluating the rôle of an independent judiciary as a brake on Executive Government in a small special region, the perceived needs of the revolution would have to be judged before this idea was allowed to flourish. The expression of dissenting viewpoints will be tolerated by the PRC only so far as they present no real challenge to the Party. It is in these contexts that resistance to the Final Court of Appeal, a demand to vet its appointments, an assertion that all laws made before 1997 will be reviewed after that date and that the Bill of Rights Ordinance specifically would be reviewed<sup>13</sup> cast a dark pall over the future of Hong Kong and the observance there of the rule of law.

#### THE REAL POLITIK OF HONG KONG TODAY

The *Realpolitik* of Hong Kong today can be seen by

any visitor there. On one day during a recent visit for a conference, the front page story in the local press was of a bone marrow operation and of the skill of the hospital staff in Hong Kong who achieved success. The point of the story was not the high professionalism and the standard of medical skills in Hong Kong: unrivalled in the region. Its point was that the demonstrated skills ensured for those involved their ticket of exit - joining the drain of treasure and talent from Hong Kong before 1997.

And on the second day of the conference, the overseas delegates descending in their bus from the University, perched on the mountain, to the international hotel where the conference was held, saw a telling sight. A queue wound its way down the mountain. On and on it went: well dressed quiet people standing with umbrellas in the gentle rain. That is a long bus queue, we observed. Unusual in a Territory otherwise well served with public transport. But then the end of the queue was finally reached. It terminated at the gates of the American Mission. This was a queue of Hong Kong people seeking visas to emigrate to the United States of America. There are similar queues at the Missions of Canada and Australia and doubtless elsewhere.

Those people were demonstrating their real concern about the future. That concern has at its heart an anxiety about the future of the rule of the law and respect for individual rights. The level of that anxiety was most clearly demonstrated in the vivid enlarged photograph which stood at the front of the conference on its final day. It was a photograph of more than a million citizens of Hong Kong. They had emptied from their houses and offices and



gathered, spontaneously, at Happy Valley in June 1989 to express their thoughts about the new democracy movement in nearby China. Their thoughts - and ours - turned to the brave people - their true compatriots - who paid a great price when they stood out for values which the law in Hong Kong now seeks to enshrine.

Should one be optimistic or pessimistic about the future of the judiciary, human rights and the rule of law in Hong Kong? The evidence points both ways. The jury is out. Only time will tell.

However, I believe that it is possible to adapt Gladstone's remarks at the opening of the Imperial adventure in Hong Kong. They may be applied, with appropriate modification, to the departure of the British from that place. I suggest that if there were a Gladstone in England today - as sadly there is not - that leader would say::

*"A departure more unjust in its origin, a departure more calculated to cover Britain with permanent disgrace, I do not know and have not read of. The British flag is hauled down to protect an infamous agreement with an autocratic power over the heads of people who are subjects of the Queen, citizens of the Commonwealth and human beings who are entitled to (but denied) the security of basic rights - including the precious right to self-determination.*

What began in ignominy finishes in ignominy. It is appalling that the response to this tragedy in Australia is one of almost complete silence and yawning indifference.

## ENDNOTES

\* This paper is adapted from a paper prepared following an international conference on the

Bill of Rights organised by the University of Hong Kong in Hong Kong 20-22 June 1991. That paper, by the author is titled "Summing Up: Hong Kong - A Cause for Optimism or Pessimism?"

\*\* President of the Court of Appeal of New South Wales, Australia. Member of the Executive Committee of the International Commission of Jurists, Geneva. Personal views.

1. This account of the British acquisition of Hong Kong is conveniently told in W Rodzinski, *The Walled Kingdom - A History of China from 2000 BC to the Present*, Fontana, 1984, 180ff.
2. See R Wacks (editor), *The Future of the Law in Hong Kong*, Oxford University Press, Hong Kong, 1989, Introduction, 1.
3. The Joint Declaration of the Government of the People's Republic of China and the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong (28 September 1984) is found in 23 ILM (1984) annex 1. See also The Basic Law for the Hong Kong Special Administrative Region made pursuant to Article 31 of the Constitution of the People's Republic of China and the *Bill of Rights Ordinance* 1991 (HK).
4. *Far Eastern Economic Review*, 9 May 1991 ("Hong Kong: Law in Disorder"), 13.
5. This was a view expressed from the floor by Mr A Lester QC, during discussion of the paper by Professor T Opsahl, a former member of the United Nations Human Rights Committee. It gained qualified support from Professor Opsahl.
6. See Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 184; 143 ER 414, 420. See also

*Salemi v MacKellar* [No 2] (1977) 137 CLR 396, 451;  
*MacRae & Ors v Attorney General for New South Wales*  
(1987) 9 NSWLR 268, 273 (CA).

7. See discussion R Little and W Reed, *The Confucian Renaissance*, Federation Press, Sydney, 1989 and discussion in the author's paper for the conference "Human Rights: The Rôle of the Judge". The issue was referred to by Mr M Lee QC in one of his interventions from the floor. See also R Wacks, above n 1, 7f.
8. N J Miners in T L Tsim and B H K Luc, *The Other Hong Kong Report*, Chinese Uni Press, 1990, 3.
9. See n 4, *loc cit*.
10. *Ibid*.
11. 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, 324.
12. See n 4 above, *loc cit*.
13. Reported *Hong Kong Standard*, 7 June 1991, 1.