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Part I Human Rights: The Role of the Judge*

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 form 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 in 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 decision 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 decision 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 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 of 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 may faults, has the strength of upholding and defending certain basic civil rights.

The role 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 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 role 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 tradition that the courts will accord parliament's laws respect. If, 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 and otherwise absurd result" so that the "letter of the statute is not to prevail".[34]

In New Zealand, the notion of such "basic rights" 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 role 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 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 has 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 object 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 whole 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 in 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 adhere 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 role 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 regime 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 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 role 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 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 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 interpretation. 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 regime 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 role 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 role 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 millenia 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 People's 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 be 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. 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 rights 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 accepted 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 state 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] 72% favoured the continuance of individual and legal rights. Almost 60% favoured government by the rule of law. 77% supported the adversary system with a role for the private legal profession. 73% 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 treasure-house 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 role 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 regime 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 role.

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

* Paper presented at The International Conference on the Bill of Rights, Hong Kong, 20-22 June 1991

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 Kong 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 BFC Hsu and PW 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 MS Moore, The Semantics of Judging 54 *S Calif L Rev* 151, 161ff (1981)

27 See O Dixon *Jesting Pilate,* 1965 cited in DF Partlett, Book Review, The Common Law as Cricket, 43 *Vanderbilt L Rev* 1401, 1406 (1990). See also AF 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 Hsu 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]2NZLR 519; *Brader v Ministry of Transport* [1981] 1NZLR 73; *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1NZLR 374, 390 and *Fraser v State Services Commission* [1984] 1NZLR 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 385, 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 ALRJ 400 (HCA)

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

43 *Yuill,* 403

44 BFC Hsu and PW 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, 447; *Koowarta v Bjelke-Peterson & Ors* (1983) 153 CLR 168, 224f

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

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 s24 *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 SR 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 RL 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 TL Tsim and BHK 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 People's 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 TL Tsim and BHK 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, 326ff. 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 NJ Miners in Tsim (above), 3

78 Tsim (above), 3

79 Miners, in Tsim (above, 3

80 Tsim xxvii. See also Hsu and Baker, 324

81 Hsu and Baker, 350

82 Reported in E Law, 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

PART II BRITISH RULE IN HONG KONG - FROM IGNOMINY TO IGNOMINY*

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 promise, 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 cession 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".1

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).[2] In a belated effort to protect the future of the people of Hong Kong who remain there after 1997, the British negotiations 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 of 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).[3] 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 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 regime 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.[4] 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.[5] 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[6] is extended to litigants. The growth of public and administrative law, which has been such a feature of the common law in recent decade, 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 treasure-house 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 plaint 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 of 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 Hong Kong 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 role 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.[7]

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.[8] 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 law 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.[9] 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 regime.[10] 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".[11] 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 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 role 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[12] 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 as 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 20-22 June 1991. That paper, by the author is titled "Summing Up: Hong Kong - A Cause for Optimism or Pessimism?" [Occasional Address: Parliament House Sydney, 5 September 1991]

1 This account of the British acquisition of Hong Kong is conveniently told in W Rodzinski, *The Walled Kingdom - A History of China from 2000BC to the Present,* Fontana, 1984, 180ff

2 See R Wacks (editor), *The Future of 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 Role 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 NJ Miners in TL Tsim and BHK Luc, *The Other Hong Kong Report,* Chinese Uni Press, 1990, 3

9 See n 3, *loc cit*

10 *Ibid*

11 See n 4 above, *loc cit*

12 Reported *Hong Kong Standard,* 7 June 1991, 1