

HONG KONG'S NEW CONSTITUTIONAL ORDER

**The Resumption of Chinese Sovereignty
and the Basic Law**

Second Edition

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The Acquisition of British Sovereignty Over Hong Kong

INTRODUCTION

In few colonial situations has the mode of the acquisition of British sovereignty scarred British relations with the 'colonized' as deeply as in Hong Kong. In other instances there was no continuing questioning of the right of British sovereignty, even if there was pride in the initial resistance to colonial rule. Claims of the colonized to independence were not based on the illegality of British occupation but on its illegitimacy as well as nationalism, self-determination, democracy and human rights. By contrast, for most of the period of the colonial occupation of Hong Kong, China rejected British claims of sovereignty, but did little, even when it had the means, to bring it to an end. The rejection of the claims of British sovereignty had legal and constitutional consequences which became clear only when sovereignty was about to be restored to China. But more important has been a continuing sense of moral outrage by the Chinese authorities (and a large part of its populace) at the colonization of a part of China. China was particularly weak and vulnerable when foreigners established their hegemony through superior armed force, imposed trade, extra-territoriality and other assertions of jurisdiction. For a nation and civilization as grand, ancient and proud as China, these experiences were a source of great humiliation and inflicted a deep wound in the national psyche — with Hong Kong occupying a symbolic place in its history as the first loss to the superior might of the West.

For the British, a large and hardened colonial power, there was nothing extraordinary in its acquisition of Hong Kong. The convenience of having it alone justified its annexation. Nor was the method of acquiring sovereignty, through the use of force as well as the threat of further force,

unusual; indeed the precise modality was not deemed of great consequence. Such was the world view of Western imperialists. Hong Kong fitted in easily and conveniently into the imperial legal framework for the acquisition and the running of overseas possessions, developed through Acts of Parliament and Orders in Council, building on the wide powers of British monarchy under the common law, often exercised through executive action only.

Much is made of the blessings of the rule of law brought by the British to Hong Kong, but it was acquired by the force of arms in the pursuit of one of the most disreputable commercial enterprises known to the world — the trade in opium forced on a regime which sought to protect its citizens from its deleterious effects. At that time the rule of law was merely the 'rule by might', fully reflected in the norms and practices of international law concerning the relations between the West and Asia and Africa.¹ As international law was then conceived, all non-European nations and peoples were mere objects of international law with no legal status or voice (Anand 1987; Gong 1984). International law was reserved for 'civilized states' (which excluded both China and India); other peoples could be treated according to 'discretion', and they had no redress against depredations and injuries committed against them by the European powers. That great liberal, John Stuart Mill wrote in 1867 that to 'characterize any conduct whatever towards a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject' (as quoted in Anand 1987: 24). It was conceived to be the divinely ordained right of the West to force open the frontiers of other lands to trade or settlement and to carry their own laws there. If there was resistance to these intrusions, the use of armed force or other forms of coercion as 'punitive expedition' was entirely justified (Anand 1987: 26). 'Treaties' were forced upon these people, primarily to safeguard the position of one colonial power against expansionist ambitions of another.

Times and mores have changed. Chinese recovery of Hong Kong comes at a time of and reflects its growing economic and political strength. There is therefore a special joy and pride in the restoration of sovereignty, the exorcism of the ghost of the terrible past. Hong Kong is no longer a small fishing community, 'a barren rock', but a thriving and prosperous metropolis with over six million people. More civilized norms of international conduct have replaced the opportunistic rules of the last century. Colonialism is illegal; people have, at least in theory, the right to

¹ In 1898 Keswick of the leading firm of Jardines, urged Britain to claim all the maritime provinces of China as a British sphere, saying 'we had the might, therefore we had the right' (quoted in Welsh 1993:319).

self-determination, no longer object of transfer from one sovereignty to another as if chattels, and individuals have fundamental rights that secure their autonomy, no longer mere subjects. The terms for the transfer of sovereignty have undoubtedly been influenced by these ideas but whether they are consistent with the new regime of international law may be questioned (the position is briefly examined later). China does not think that the analogy of decolonization applies, and thus sought to disapply the principal norms of self-determination.

THE BASIS OF BRITISH JURISDICTION IN HONG KONG

British jurisdiction was acquired through three treaties with China between 1842 and 1898 (for an excellent account, see Dicks 1983). The background to the conclusion of these treaties lies in the policy of the British to force the liberalization of trade with China and to secure territorial concessions from which to conduct the trade. At various periods in Chinese history, there was open trade with the outside world, but by the eighteenth century, there were serious restrictions. Trade with China could be conducted only in Canton, where foreign traders were able to establish 'factories' or warehouses. The trade developed steadily from towards the close of the eighteenth century, and consisted largely of the purchase of Chinese tea. Foreigners could only trade through a guild of Chinese traders (co-hongs) and could only communicate with Chinese officials through them. There were restrictions on the movement of foreign traders, confined for the most part to the factory areas. These and other difficulties (for a summary, see Endacott 1964: 7–9) were compounded when the British introduced the sale of opium, in part to provide revenue for the purchase of tea. The consumption of opium increased rapidly (resulting in widescale addiction and the loss of valuable resources as payment). Attempts to curb it having failed, in 1800 the Chinese banned outright its import and local production. However, trade continued (in increasing quantities) illegally, with the connivance of foreign trading houses. After the Chinese authorities tried without avail to invoke Chinese law and international law, as well as the norms of morality to suppress the opium trade, they began to enforce the ban strictly in 1839 when all known stocks of opium in warehouses were confiscated and destroyed.²

² Cohen and Chiu (1974: 5–7) cite attempts by China to use international law as understood by the West to stop the opium trade. The Imperial Commissioner Lin Tse-hsu arranged for the translation of relevant parts of Vattel's *Le Droit des Gens*, which stated that it was

Under pressure from British traders, the British government, having occupied Chusan Island and blockaded the coast, demanded compensation for the opium so destroyed (even though the product was banned), as well as other concessions, including the opening of other ports to trade and a commercial treaty to safeguard British trade interests. An agreement (the Convention of Chuenpi) was reached in 1841 ceding Hong Kong to the British whereupon Britain occupied the island. However, the agreement was repudiated by both sides — meanwhile the opium trade had resumed, and this time British forces, under the command of Pottinger who replaced the more conciliatory Elliot, and using greater violence, occupied the chief ports on the coast, sailed up the Yangtze River, blockaded the Grand Canal and threatened Nanking. The Chinese suffered heavy casualties: the vulnerability of the Chinese empire to the superior sea power and weaponry of the West was driven home. The Chinese capitulation was the Treaty of Nanking, signed (on the British warship *Cornwallis*) in 1842 and ratified the following year.

In addition to Canton, China was forced to open Amoy, Foochow, Ningpo and Shanghai to Britons for mercantile purposes and to allow communications between British traders and the Chinese government through British officials. China was to pay a compensation of \$21 million (which included 12 million for the costs of the British expedition and 6 million for the destruction of the opium). Most importantly (in retrospect) China ceded in perpetuity the island of Hong Kong, it 'being obviously necessary and desirable that British subjects should have some port whereat they may careen and refit their ships when required, and keep stores for that purpose'. Hong Kong was 'to be governed by such laws and regulations' as were directed by Britain (art. III).

The second treaty, the Convention of Peking 1860, conceded the Kowloon peninsula (the exact area having already been determined by British and Chinese officials in what amounted to a private treaty) to Britain 'to have and hold as a dependency of the colony of Hong Kong' (art. VI). Hong Kong was only a few hundred yards from Kowloon, at the southern tip of the Chinese mainland, and with improvements in the range of gun power, it was vulnerable to attacks from there. Security

the right of every state to stop foreign nationals from importing noxious products into its territory, by declaring them as contraband and confiscating them. He even followed Vattel's prescription that before a state took such action against offending foreigners, it must first notify their sovereign and request that she restrain her subject. Unfortunately Queen Victoria never replied to his letter. In his letter he had said, 'Suppose there were people from another country who carried opium for sale to England and seduced your people into buying and smoking it; certainly your honourable ruler would deeply hate it and be bitterly aroused' (quoted in Neoh 1992: 315–316; see also Wang 1990).

considerations were important to the acquisition of Kowloon, although the British mercantile community in Hong Kong also saw its commercial potential. The private initiative of a British official, Harry Parkes, had already secured a lease in his own name for the peninsula, including Stonecutters Island, thus adding 3.5 square miles to Hong Kong's 29 square miles. The convention cancelled the lease and ceded Kowloon to Britain.

The convention was part of a wider peace settlement between Britain (and other Western powers) and China following serious conflicts regarding the full operationalization of the Treaty of Nanking and the forcing of China to allow the permanent diplomatic representation of Western states in Beijing. The Chinese capitulation was again brought about by massive use of Western armed might, numerous Chinese casualties, and the destruction of the Summer Palace outside Beijing (for a detailed account, see Welsh 1993: 199–210; 223–228). The complementary Treaty of Tientsin 1858 was a watershed in China's relations with the West; and a turning point in its history. Foreigners were now allowed 'to travel anywhere in China, to preach Christianity, to establish an embassy in Peking, and to trade up to the Yangtze to Hankow, which was, with nine others, designated as a treaty port' (Welsh 1993: 210).

The third treaty, the Convention of Peking 1898, provided for a 99-year lease of the immediate hinterland of Kowloon. As with Kowloon, the reasons for Britain wanting this area were a mixture of military — further improvement in weaponry rendered the peninsula insufficiently protected — and commercial. The British request for it was made in the context of the carving up of China by foreign powers (now joined by Japan) with further decline in the ability of the Chinese government to resist external demands. Britain's wish was for outright cession, but that option was problematic since other European powers were content with leases (the longest of which was 99 years). Britain itself had acquired a lease in Weihaiwei — primarily to counter Russian influence in the north (for an account of the general situation and the negotiations see Welsh 1993: 313–330). The new leased area was indicated on a map accompanying the treaty; the exact boundaries were to be determined later. In fact only the northern boundary was delimited by both sides, but it was only partially demarcated on the ground and British officials determined the rest (Wesley-Smith 1994b: 29)³. The New Territories included several

³ Wesley-Smith writes that the delimitation and demarcation of the western and eastern boundaries were carried out by the British alone, who unilaterally revised the southern sea boundary and amended other boundaries as well. 'It is unclear whether, as appears to be claimed in theory (though not always in practice) by British officials, islands

large islands, including Lantau. The total area was 365 square miles, larger territory than China had intended to provide and certainly well in excess of the needs which had provided the justification for its acquisition. There is little doubt that the treaty was forced upon the Chinese (although not under threat of military force).

The Convention of Peking 1898 was different from the previous treaties not only in its duration, but also in its provisions for ancillary matters. Dicks (1983: 443–444) suggests that this reflects a greater degree of Chinese sophistication due to new familiarity with international law acquired through translations of some standard European texts, but it must also reflect bitter Chinese experience with earlier treaties. There was no delineation of the nature of the authority that Britain would exercise over the leased territory (other than that Britain would have 'sole jurisdiction'). China kept the Walled City of Kowloon within its jurisdiction where its officials would continue to reside — 'except so far as may be inconsistent with the military requirements for the defence of Hong Kong'. The Walled City had a particular symbolic significance for the Chinese, for it was built as a reaction to the forced cession of Hong Kong and its retention signified Chinese sovereignty despite the lease (Dicks 1983: 449–450). China also reserved the landing-place near Kowloon city for its men-of-war, merchant and passenger vessels as well as the movement of the officials and people within the city and retained the right to use the waters of Mirs Bay and Deep Bay. Extradition of criminals was to be dealt with in accordance with the then existing treaties between China and Britain. Three other provisions were made for the benefit of the Chinese inhabitants of the territory (who numbered a great deal more than those in Hong Kong and the peninsula when they were ceded). They could use the road from Kowloon to Hsinan; they could not be expelled from the territory; and their land could not be appropriated except when required for a public purpose and in return for a fair price (see Wesley-Smith 1980 for an account of the negotiations for the treaty and the problems in its implementation). China got nothing in return for the lease.

within the New Territories have a belt of territorial sea. The convention map is seriously inadequate and provides no guidance on these matters. China has not been consulted, so far as is known, on any matters relating to boundary revisions. Thus no one can say with certainty what the boundaries of Hong Kong are' (1994b:29).

As I point out below, the matter of boundaries is left in some confusion by the NPC Decision (4 April 1990) to establish the HKSAR. The Decision states that a map of the administrative boundaries is to be provided by the State Council. The State Council issued an order on 1 July 1997 specifying the land and sea boundaries of the HKSAR (reprinted in S.S. No. 5 to Gazette No. 6/1997 of the Gazette).

These treaties were regarded by the British as giving them full sovereignty over Hong Kong, Kowloon and the New Territories, albeit for a limited period in relation to the last. Although the 1898 treaty had at best given the right of administration of the New Territories to Britain, reserving various matters to China, Britain proceeded to rule the New Territories (with the reservation about the Walled City) as if its jurisdiction over them were as plenary as over Hong Kong and Kowloon. The British promulgated the New Territories Order in Council in 1898 which stated that the New Territories 'shall be and are hereby declared to be part and parcel of Her Majesty's Colony of Hong Kong and Kowloon in like manner and for all intents and purposes as if they had originally formed part of the said Colony' (art. 1). The powers of the Governor and the Legislative Council were extended to them as were the laws of Hong Kong (arts. 2 and 3 respectively). Furthermore, six months after the treaty was signed, Britain unilaterally abrogated the provision for Chinese jurisdiction over the Walled City by occupying it and expelling the sub-magistrate, allegedly for defence reasons. An Order in Council (December 1898) revoked article 4 of the previous Order concerning the reservation and provided for the total integration of the city in the colony (art. 1) (see Wesley-Smith 1980: chap. 7, for an account of these events). Land in the New Territories was vested in the Crown, and leasehold interests given to the original occupiers on the approval by a land court of presentation of claims by them (New Territories (Land Court) Ordinance, 1900), in what would seem a violation of land guarantees in the treaty.

Such usurpations of jurisdiction as might be implied in these orders were condoned by Hong Kong courts. In *Re Wong Hon* [1959] HKLR 601, the Full Court held that the question of the jurisdiction of the British government was to be determined by the government itself, not regulated by a treaty even if the assumed jurisdiction was contrary to the assertions of the government. Assertions of jurisdiction (i.e., authority over a territory) were acts of state and therefore binding on the courts.⁴ Thus the government may evade its solemn undertakings in an international treaty by its own unilateral act. The court said, 'Whence else than from the Crown, with or without the aid of Parliament, is jurisdiction outside the United Kingdom to be derived; and how else except by the Crown is such

⁴ The decision was given under the rule then prevailing that the exercise of the royal prerogative could not be questioned by courts. In 1985 the House of Lords held that prerogative powers were as reviewable as other sources of power, but that the courts might refuse to review particular exercises of the prerogative due to reasons of public policy (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). Given the close connections between the assertion of jurisdiction overseas and foreign policy, it is likely that the courts would defer to the executive on this point.

jurisdiction to be defined or circumscribed? In these matters the Crown speaks with one voice, and alone determines the sphere in which, and the extent to which, its various organs of government, legislative, executive and judicial, shall properly function.'

In another case, which went all the way to the Privy Council, the provision of the 1898 treaty precluding the appropriation of land except for public purposes and on the payment of fair price was invoked to invalidate local legislation. The court enforced the local legislation which had breached the terms of the treaty on the ground that, according to the common law, breaches of treaties were not justiciable in municipal courts (*Winfat Enterprise (HK) Co. Ltd. v Attorney-General* [1985] 2 WLR 786).

The judicial support of administrative and legislative acts of the colony in contravention of the treaty merely compounded the British view of its rights and jurisdiction under the treaties. Dicks (1983: 444–446) has argued that the Chinese understanding of what they had granted Britain varied significantly from the British view, the divergence of views being due to problems of translation as well as legal concepts. As regards the 1842 and 1860 treaties, Dicks says that words 'cede' and 'cession' were terms of art which had long been understood by Western lawyers to mean the transfer of territory, together with all the legal rights appertaining to it, from one sovereign state to another, while in the Chinese view of imperial supremacy there was no room for the idea that the Emperor might transfer territory to an equal in this way. Dicks notes that there was no equivalent to the term 'cede' in early nineteenth-century China, and the standard expressions which began to be used at the end of the century, *gerang* and *rangyu*, had the distinct connotation of yielding or making a concession. The expressions in the two treaties are much less precise, and reminiscent of an imperial grant that the Emperor might make to an inferior ruler or tributary, with no notion of permanence. Dicks concludes that it is 'doubtful whether even the most dispassionate Chinese reader who examined' these treaties in the Chinese version 'would have understood it in the sense intended by the draftsman of the English text'. Wesley-Smith makes similarly critical comments on the British interpretation of the 1898 convention, when Britain effectively equated the lease to cession. He calls this a decision based on 'expediency, not law' and says that Britain could not legitimately claim that 'the concept of a "cession for a term of years" necessarily flows from the general words of the leasehold treaty', especially as defence, not commercial development, was its *raison d'être* as British legal advisers themselves realized' (1980: 178). A study of British colonial treaty practice reveals that the Hong Kong experience was not unusual. Britain imposed treaties on indigenous authorities when it suited them and broke them with impunity, protected

by British and colonial courts. When there were divergent understandings of their terms (especially sovereignty, a peculiar artefact of Western statecraft, and in relation to land rights) — whether due to linguistic, legal or cultural reasons — it was the British interpretations which were followed.⁵ Certainly the early Chinese experiences with British versions of ‘legality’ can hardly have inclined them to value either international law or ‘constitutionalism’.

Unequal Treaties

Not surprisingly, successive Chinese governments have been resentful of these treaties, and other treaties that China was forced to sign in the nineteenth century and the early part of the twentieth century, which undermined many of its sovereign rights. However, it was not until the 1920s that their validity began to be challenged under the doctrine of unequal treaties (see Chiu: 1972, on which the following account is substantially based; Wesley-Smith 1980: 184–187; Wang 1990). Although some classical scholars of international law like Grotius had distinguished between equal and unequal treaties, and defined unequal treaties as lacking reciprocity and imposing permanent or temporary burdens on one of the states, they did not say that unequal treaties were invalid, merely urging that so far as possible treaties should be equal. In the nineteenth century, with the expansion of European empires, the doctrine was inconvenient and there was little mention of unequal treaties, but after the Bolshevik revolution in Russia in 1917, the new regime abrogated a number of treaties which previous Russian governments had forced upon China, Persia and Turkey on the grounds that they were coercive and predatory. The term unequal treaty was used when the Kuomintang government demanded the abrogation of treaties forced upon China. The Chinese Communist Party adopted a similar position, which remained the official policy when the communists came to power.

⁵ In relation to the treaty practice in Kenya, see Ghai and McAuslan (1970: 18–25), where in a particular instance the Privy Council sanctioned repeated violations of solemn undertakings by the British, at first forcing people off their traditional land, and later confiscating the land on which they had made their new habitation. We concluded, ‘The use of the defence of Act of State in these circumstances provides an example of arbitrary government which it is hard to parallel’ (at p. 23).

Another example comes from the attitude of the British and subsequently New Zealand governments to the Treaty of Waitangi that Britain made with the Maori, the original inhabitants of Aotearoa, as New Zealand was known to them. In recent years the attitudes of the New Zealand courts and therefore of the government has changed towards a proper regard for the undertakings of the treaty. See Orange 1987.

While the doctrine of unequal treaties has been argued by China for over 70 years, the precise contents of the doctrine are unclear. The theoretical basis is that treaties are 'based on mutual benefit and equality of states'. Therefore a treaty under which only one state incurs obligations and only the other state acquires rights would be unequal. In 1924 the Kuomintang authorities listed various provisions that rendered treaties unequal:

- (a) foreign leased territories;
- (b) consular jurisdiction (extraterritoriality);
- (c) administration of customs by foreigners; and
- (d) political rights that infringe upon the sovereignty of China.

Other items were added later, but they did not include cession (Chiu 1972: 250–252). The Kuomintang appeared not to have argued that unequal treaties were void or could be abrogated at will, favouring their revision or abrogation through diplomatic negotiations. Nevertheless, when negotiations with the US, the UK and France on the termination of extraterritorial advantages failed, the government terminated them unilaterally, relying on the principle of *rebus sic stantibus* and article 19 of the Covenant of the League of Nations regarding the reconsideration of treaties that have become inapplicable. The implementation of the law was delayed due to the Japanese invasion of China, and in 1942 the US and the UK agreed to the abolition of extraterritoriality and the remaining ones were terminated after the Second World War.

The Chinese communists relate the doctrine of unequal treaties to the violation of sovereignty, which demanded the equality of rights and treatment. Whether a treaty was equal depended not on its formal terms, but 'upon the state character, economic strength, and the substance of correlation of the contracting parties' (Chiu quoting a Chinese scholar, Wang Yao-t'ien 1972: 259). This might mean that no treaty between states which have unequal economic and political strength can be valid; but China cannot mean that since it has signed treaties with its neighbours, like Burma, which are infinitely inferior in these respects to China. Presumably some element of coercion is necessary, although its absence does not necessarily validate a treaty as is obvious from the analysis of some modern treaties offered by mainland scholars.⁶ A modern formulation

⁶ Hungdah Chiu gives as an example the Chinese condemnation as unequal of the 1956 US-Swiss treaty on cooperation on nuclear uses of atomic energy. The US supplied the fissionable material as well as some technology and information. It reserved the right to inspect or supervise the use of the material, and the right to acquire or use any Swiss inventions based on the information supplied to it. Chiu accuses the PRC of an opportunistic and unprincipled use of the doctrine, as many of its own treaties fall foul of their own criteria (1972: 260–266).

(in *Concise Law Science Dictionary* published in 1991 by Jilin People's Publishing Corporation) defines unequal treaties as those 'concluded by the coercion of one party through unjust methods with the aim of imposing unequal obligations on the other party'. It goes on to say that they are mostly 'concluded by small and weak states under the coercion of imperialist powers that seek to oppress and plunder the weak and small states' (p. 175).

The communist regime regards all treaties imposed on China in the nineteenth and twentieth centuries as unequal. Unequal treaties are invalid in law (and therefore void *ab initio*), although for practical reasons they may be temporarily tolerated. Thus while there are clear formal differences on this point from the position taken by the Kuomintang, in some respects the views of the communist government do not differ from those of the Kuomintang, especially as regards treaties dealing with boundaries and cession (Chiu quotes Zhou Enlai as saying that 'on the question of boundary lines, demands made on the basis of formal treaties should be respected according to the general international practice' and if necessary differences should be settled by friendly means, 1972: 266). The PRC has (in the absence of an alternative) followed in practice the Hong Kong treaties with Britain, despite its views of their illegality, waiting for when 'the time is ripe' for a diplomatic settlement of their differences with the British (the removal of Hong Kong from the list of colonies that the UN supervised in 1972 being a manifestation of the Chinese view of the treaties and setting the stage for the eventual return of Hong Kong to China). In some respects, such as the applicability of Chinese and British nationality laws in Hong Kong, it has however treated the treaties as invalid (see Chapter 3). The Sino-British Joint Declaration providing for the return of sovereignty effectively brings the treaties to an end, and provides, at least in Chinese view, the only basis for British authority in the transitional period (this point is discussed later in this chapter).

There is a widespread view that the Chinese position on unequal treaties is not supported in traditional international law. Nor is it supported under the 1969 Vienna Convention on Treaties in so far as it might be deemed to cover unequal treaty situations as it does not apply retrospectively (Wesley-Smith 1980: 187, and 1994a; Chiu 1972: 267; Dicks 1983: 434–435). Delegates to the Vienna meeting were agreed that treaties secured through the use or the threat of force would be void, but differed in their view as to what constituted 'force'. Some, especially those representing third world countries, wanted a broad definition to include economic and political coercion while Western states wanted to restrict it to military force. The compromise was to adopt a broad non-

binding declaration ('deploring the fact that in the past states have sometimes been forced to conclude treaties under pressure exerted in various forms by other states' and 'desiring to ensure that in the future no such pressure will be exerted in any form by any State in connection with the conclusion of a treaty') and a narrower binding article in the Vienna Convention (stating that a 'treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations', art. 52).⁷ Under the Vienna Convention a treaty is also void if at the time of its conclusion, it conflicts with a peremptory norm of international law (art. 53). Although under one or both of these provisions the Hong Kong treaties would be void, the convention applies only to treaties concluded after the adoption of the convention (art. 4). The Chinese position of course does not depend on the provisions of the Vienna Convention but on general principles of international law which were binding even in the nineteenth century.

These controversies are of limited relevance to the Hong Kong situation since the Sino-British Joint Declaration which provides for the transfer of sovereignty to China. However, the impulses behind the original claims of invalidity are still important. The legal doctrine of unequal treaties reflects profound resentment of an unequal world, where under the hegemony of Western imperialism many parts of the world have been subjugated and plundered in total disregard of norms of equity, fairness, and civilized conduct. China feels particularly humiliated at its treatment by European powers (particularly Britain) in the nineteenth and twentieth centuries. The resentment has been nursed over decades, intensified by the realization that for long periods China was unable to redress the inequities of the treaties. This bitterness is all too evident today; and has complicated the problems of transition and may affect the full implementation of the autonomy of Hong Kong under the Basic Law, premised as it is in part on the internationalization of Hong Kong. Formalistic analysis of the legal soundness of the doctrine of unequal treaties obscures its underlying historical and psychological bases.

⁷ The International Court of Justice has interpreted the article to restrict the term 'force' to military force, *Fisheries Jurisdiction (UK v Iceland)* ICJ Reports (1974) 3. See also Sinclair (1973).

THE ASSUMPTION AND EXERCISE OF BRITISH AUTHORITY

It is not my purpose to provide a detailed account of the manner of the assumption and exercise of British authority over Hong Kong. I propose to describe the constitutional, legal, economic and social systems that had been established by the time the negotiations between China and Britain for the transfer of sovereignty began, since the negotiations were conducted against the background of these systems and it was the intention of both states to substantially preserve these systems. (For this reason the use of the past tense to describe the bench mark does not mean that the system has necessarily changed since the early 1980s; I hope the situation will be clear from the context.) I will pay particular attention to factors which are often ascribed to the nature of British policies and administration in Hong Kong, such as the rule of law, a regime of rights and freedoms, and a successful economy, to assess how far they were the inevitable consequences of British policy and to separate myth from reality. It is significant that many of the problems that Hong Kong faced at the transfer of sovereignty to China had their roots in British policies and laws.

British authority in Hong Kong was exercised on the basis of British law, not the Sino-British treaties of the nineteenth century. The treaties were relevant to the extent that they provided the basis for the operation of rules governing the administration of British colonies. There are two types of colonies under British law, the first being colony by settlement, through occupation and establishment by British subjects, and the other the colony by conquest or cession. The basis for the application of English law and the extent of British authority differ for the two types of colonies, the British government having more authority in the latter (Roberts-Wray 1966). There was little doubt among British officials that the Treaty of Nanking and the first Convention of Peking ceded Hong Kong and Kowloon to Britain and that they were therefore a colony (a position on which the Orders in Council were based). The position was less clear cut about the New Territories since there was little precedent for the status of a territory which was leased. Since British sovereignty was limited, logically it was closer to a 'protectorate'. However, as has been shown above, it suited Britain to disregard these niceties and through an Order in Council, the New Territories were assimilated to the status of Hong Kong and administered as an integral part of the colony (this approach may be contrasted with the British lease over Weihaiwei over which Britain claimed no such extensive rights). In practice, the integration was not achieved until the early 1980s as the New Territories, due to their rural nature and dispersed population, were originally administered through a separate system based on district administrative officers who liaised with the central

government and exercised a wide range of functions, with the assistance of traditional authorities, almost as a form of indirect rule.

British authority in Hong Kong (broadly defined) rested on a mixture of prerogative and statute. I do not intend to provide a detailed account of the basis and system of British authority in or the administration of Hong Kong (see Wesley-Smith 1994b for an authoritative account). Briefly the legal situation, as clarified in the Colonial Laws Validity Act 1865, provided for the plenary powers of the British Parliament to make laws for Hong Kong. The British government had extensive powers of law making as well, deriving from prerogative as well as legislation and exercised principally through Orders in Council. It could authorize institutions in Hong Kong to make laws and to establish courts, but no law locally enacted could contravene a provision of an act of parliament which applied of its own force in Hong Kong.

Compared with many other colonies where there was fierce resistance from the local people, the establishment of British authority was relatively unproblematic once China had been brought to heel. There were some protests in the New Territories to start with (which provided the pretext for the takeover of the Walled City) but on the whole the population existing then and particularly the subsequent migrants seemed to have welcomed British authority. Unlike other places, Britain did not establish plantations, extract minerals, compel people into labour or take over their land, activities which normally required coercion. It was thus possible to establish a reasonably benign administration, although not without a panoply of harsh legislative measures nor as fairly as the colonial authorities would have us believe.

The Constitution and the System of Government

Relying upon general British law, no specific legislative measure was needed to enable the British authorities to exercise jurisdiction in Hong Kong (the Kowloon and New Territories Orders in Council were necessary only to clarify their legal status). To start with, British authority was exercised by virtue of general powers vested in Pottinger as Plenipotentiary and Superintendent of Trade, in which capacity his responsibilities extended beyond Hong Kong. These powers did not provide sufficient basis for orderly administration and so, in accordance with normal colonial practice, a Charter in the form of Letters Patent was issued in 1843 by the Crown (i.e., the government) to provide for government in Hong Kong. The Charter, which established the office of the Governor and the Legislative Council, was accompanied by Instructions to the Governor on the exercise

of certain of his powers (the Charter is reprinted in Tsang 1995:19). The Charter was subsequently replaced by other Letters Patent, which with periodic amendments, formed the basis of government together with the Royal Instructions.⁸

The constitution of Hong Kong, as of other British colonies, was based on what that great scholar of colonial administration, Martin Wight, has called the double principle of subordination: the subordination of the colonial executive to the metropolitan executive, and the subordination of the colonial legislature to the colonial executive (Wight 1952: 17). The precise form that this principle took has varied from colony to colony, and in the same colony over time. In Hong Kong the basic form of the colonial constitution remained remarkably unchanged from 1840 until the 1980s. The essence of it was the wide executive and legislative powers of the Governor under the supervening authority of the Colonial Office. Britain retained the power to legislate for Hong Kong either by an act of parliament or by prerogative, i.e., by the executive. It also retained control over the legislative process in Hong Kong by its powers of disallowance and the reservation of certain types of legislation for its approval. It gave the Governor the authority to legislate with the advice of the Legislative Council. It appointed and dismissed the Governor and other senior officials in the territory, and had the power to give directions to the Governor on the discharge of his functions. An executive council was appointed to advise the Governor on policy and administration, as well as a legislative council to help him in law making.

At first both the councils consisted of coteries of officials appointed by him on instructions from or approval by London. Attempts by the officials to hew a path independently of the Governor were scotched in the early days⁹ and these bodies functioned effectively therefore as

⁸ While the Letters Patent were legally binding, it has been held that the Royal Instructions were merely a matter between the sovereign and the Governor. This decision was made in a case when the Crown Lands Resumption Ordinance 1900 was challenged for incompatibility with the 'no expropriation' clause of the New Territories lease. The Royal Instructions required the Governor to reserve bills which had provisions inconsistent with British treaty obligations for approval by the Crown. The failure to do so was held not to affect the validity of the Ordinance (*Pong Wai-ting v Attorney-General* (1925) 20 HKLR 22). After an interesting review of the controversy, Wesley-Smith concludes that in 'the final analysis, it is perhaps of no great consequence whether the Royal Instructions are termed "law" or not, and they are at least as important to the constitutional scheme of things as conventions' (1994b: 43–45).

⁹ Endacott (1964: 42) provides an early but rare example of a successful opposition to the Governor by the Legislative Council in 1846 (when the Council consisted only of officials) over the Governor's tax proposal. Gladstone, then Secretary for Colonies, upheld the objection of the Legislative Council.

extensions of his office and authority. In due course unofficial members were nominated to these bodies, and various interest groups were coopted or integrated within the administration; subsequently such members acquired majorities in both the councils. There were also the beginnings of functional representation as early as 1850 when Bonham, the Governor, asked the unofficial Justices of the Peace to propose to him two of their number to sit in the Legislative Council, who were joined by a nominee of the Chamber of Commerce in 1884 (Endacott 1964: 45) (functional representation was of course not to flower into full bloom until the reforms of the 1980s, when it became at first the only form of representation). In fact the JPs always nominated men of substance and commerce, and it is fitting that the first nominee of the JPs was the head of Jardine Matheson and the first nominee of the Chamber of Commerce was the manager of the Hong Kong and Shanghai Banking Corporation. It established a pattern which was to persist for most of Hong Kong's colonial history.

An examination of the formal constitutional arrangements is of course not necessarily a guide to political, or indeed constitutional, development. Numerous British colonies, destined in the fullness or the rush of time for independence, have carried similar formal arrangements well into their period of self-government, if not actually right to the very eve of independence. These arrangements are moderated by that quintessentially British technique of transforming power, the constitutional convention. Conventions have been employed essentially to guide and register progress towards self-government and independence; so that at a certain stage the Governor begins to take a back seat (while retaining all his legal powers), the centre of the stage being occupied by an indigenous chief minister, who owes his or her position to electoral success. The Governor also retreats from the legislative assembly, where the chief minister leads government business and an independent speaker presides over its deliberations. The balance between the official and unofficial members in both the legislative and executive councils moderate or reinforce conventions, depending on the stage of decolonization. The conventions do not affect the relationship between Britain and the colony (although Hong Kong may well have been a partial exception); in fact the metropolitan role increases as key decisions on decolonization and evolving constitutional forms and settlements have to be taken by the Secretary of State (not unlike the increasing role of the UK towards the end of its rule in Hong Kong, the evolving relationship with the PRC being the analogue of independence).

However, it is possible to exaggerate the significance of conventions in a colonial context; except perhaps in the white dominions, conventions have not led to the surrender of power. As far as the metropolitan government is concerned, it remains responsible to Parliament and British

public opinion for the administration of the colony, which is scarcely compatible with the surrender of power. The Governor on his part retains responsibility for law and order until the dying days of colonial rule, and most matters can be made to hang on law and order.

Given that Hong Kong did not progress to representative institutions and was not destined for independence, conventions, contrary to some opinion (Miners 1991: 61–63), have not played a significant role. Not all the examples Miners cites of the divergence between the legal provisions and practice are really instances of conventions properly understood, that is, treated as binding (as is evidenced from increased Whitehall intervention in policy and administration in Hong Kong in the last few years before the transfer of sovereignty). Such as they were, they operated within an overarching framework in which the Governor's position remained dominant and membership of key institutions was through his nomination. In any event, conventions may register shifts of power within the colony, but they do not alter the nature of the powers themselves. Changes in Hong Kong's constitution came about less through conventions or formal amendments, than through legislative measures within the framework of the Letters Patent, principally through the provision for local advisory bodies (Scott 1989: 140–46). It is of course true that several provisions of the Letters Patent did not work in the way originally envisaged, but this was due less to a shift in power than to modern technology (a royal veto was important when communications were slow, and precluded advance discussions in many cases). Nevertheless it must be acknowledged that there was a marked decrease in the detail with which Britain exercised its control and supervision over Hong Kong after the Second World War (as Hong Kong's economy began to industrialize and its financial position improved). Increasingly, economic and social (but not political) policies and decisions were being made locally (although they bore the stamp of the Governor of the day rather than of the populace of the territory).

From the beginning, British concern with designing the constitution for Hong Kong had been to maintain a wide measure of flexibility. Hong Kong was an unusual kind of colony; less important for itself than for its role in the British trade with China. The settlement was small and most British residents were itinerant or transient traders. The dominant concern being the management of relations with China and the exercise of British extra-territorial jurisdiction in the treaty ports, local issues were subordinated to imperial interests. That scheme of things suggested a free hand for the Governor under the tutelage of the British government, particularly the Foreign Office.

In the course of time, as the settlement in Hong Kong increased and its economy developed and as imperial policy began to be managed directly

from London, local issues became more pressing. An open-ended constitution operating under gubernatorial hegemony was still considered necessary because of the way the economy had developed: a laissez-faire market dominated by expatriate business houses. The greater formalization and specification of institutional arrangements that excluded the dominance of the business houses would be seen to undermine the market basis of the economy, while their formal incorporation would be regarded as the abdication of imperial responsibilities and the placing of the Chinese population at the mercy of a handful of transient expatriate businessmen. An open-ended constitution was better able to maintain the privileged status of the market and the influence of the business houses through informal arrangements or through cooption by the administration. The powers of the Governor to nominate private citizens to governmental bodies, particularly the legislative and executive councils, were invaluable for this purpose. A close alliance was established between the administration and expatriate business community (typified in many ways by the privatization of significant public power to the Royal Hong Kong Jockey Club, which, thanks to its monopolies, disposed of large sums of money to charity projects of its choice). The increase in the Chinese settlement and the rise to eminence of various Chinese professionals and businessmen could equally be accommodated through the system of nomination. The accommodation was facilitated by the absence of ethnic conflict: the market provided a much stronger basis of identification for the important members of both communities.

Social and economic developments after the 1950s led to the growth of a labour class and other groups which could not so easily be accommodated within the close and cosy world of nominated members without upsetting the structure of power and authority. The social disturbances of the 1960s stimulated the search for other forms of cooption and participation. This led to reforms at the local and district level, with an emphasis on better communication of government policies and intentions and more effective channels for feedback of public opinion into policy making and administration. Numerous committees and consultative organizations were set up. At the same time the government undertook measures for the social amelioration of the working and other less well off communities, including extensive labour legislation. Helped by a buoyant economy, these measures took the heat out of social discontent, and led to the establishment of a system in which there was considerable public participation in administration, what the Hong Kong government has called government by consensus and consultation and others have called the 'administrative absorption of politics' (King 1975). This form of government was carried on within an essentially nineteenth century

colonial constitution, buttressed by a close alliance between the administration and various business and professional elites. Except for the last few years before the transfer of sovereignty there was a broad acceptance of this framework. Discontent has been triggered not only by the impending return of sovereignty to China, but also by the failure of the constitutional order to accommodate the new social and economic forces outside the traditional elites.

The continuity of these formal constitutional arrangements was possible due to their flexibility. Resting in part upon the extensive patronage powers of the Governor and the provisions for the accommodation of non-official interests and groups into the establishment, they enabled the government to progressively coopt fresh groups into a partnership. As we have seen, the system coped with the emergent forces at different stages of Hong Kong's history, although not always with the same degree of success. These accommodations were, however, made within a system that demonstrated a very clear bias towards the business community.

The constitution and the market

The continuity of the constitutional arrangements was facilitated by a remarkable degree of social consensus centring on a belief in the superiority and efficacy of the laissez-faire market. The doctrine and pre-requisites of the free market shaped powerfully the ways in which the framework of the constitution was utilized. One implication of the influence of the market was that it led to a sharp distinction between the public and the private (something unusual in a colonial context, for a colonial administration cannot usually achieve its purposes without a total domination of civil society, fragmented though it is, see Balandier 1970). The sharp distinction in itself was premised on a minimal role for the government, although the minimal role itself was not politically neutral. Because the role of the state was narrow and did not enter many controversial areas of social policy, it did not itself become an object of controversy and competition (Lau 1982).

The second implication is that in order to provide a privileged position for the business community in this scheme, notions of electoral representation had to be abandoned. The business community was small, and in any electoral system, it would find itself in a small minority. It would have been possible to secure a dominant position for it through rigid property qualifications for the franchise, as indeed was done in settler dominated colonies in Africa; but to give a small expatriate business community control, formally, over the vast majority of indigenous Chinese would probably have been unacceptable in the UK as well as China. It

was politically easier to provide a privileged position for the business community through nomination to the two major councils (and of course through its control of the economy). The one group at that time which could have mounted a campaign to reform the constitution thus had little incentive to do so; indeed had much to preserve it.

The system of nomination may also have helped to dampen the mobilization of social demands on the government (thus facilitating the *laissez-faire* system) as well as political mobilization. Individuals were picked to represent specific interests; they did not have to seek re-election and appeal to the public. There was consequently no scope for political parties and little mobilization of the people occurred (although it should be remembered that in many former colonies political parties developed precisely in opposition to the system of representation through nomination in a search for more democratic institutions, and so their absence in Hong Kong may represent broad satisfaction with the system). Leaders who emerged as spokespersons for the community under this system had an uncertain social basis of support. The government claimed nevertheless that it was able to represent and interpret public opinion. There were of course other factors reinforcing this system, which have been well analysed: the apathy of the local Chinese community, dominated by considerations of economic gain and the unease with which China would have viewed political and constitutional progress towards some form of self-government (as well as the fear that the electoral system of Hong Kong would provide a proxy battle ground for the rivalries on the mainland between the Kuomintang and the Communists, with unsettling effects on the market). It has frequently been alleged that a fundamental obstacle to reform was the attitude of the Chinese government which did not favour the democratization of Hong Kong, either because it might signal a separate future for Hong Kong or might make its return to China problematic. There is no conclusive evidence for this view, and it is interesting that the major attempt, until the 1980s, to introduce political reform after the Second World War foundered not on Chinese opposition, but the lack of enthusiasm in Whitehall and resistance of the colonial officers and Europeans in Hong Kong who were fearful that with the increasing number of Chinese migrants, there would be a severe demographic balance against them (Welsh 1993: 433–440; Tsang 1988).

The colonial constitution provided the broadest of frameworks for the exercise of power. It was lacking in any normative rules and was weak on procedure. It was not the instrument through which one could raise profound questions of community morality and public interest or of the permissible use of state power. The broad framework established by the constitutional arrangements, and within it the dominance of the

executive, meant that it became the instrument of demand management (instrumental in generating, as well as facilitated by, the low level of political consciousness and mobilization). It bred a powerful and paternalistic bureaucracy, and a weak legislature, and little accountability. It negated the separation of powers. Policy making was a prerogative of the government, and the Governor exercised important powers over the composition of the legislature and the judiciary. And, obviously, the constitution was not the product of local bargaining.

Such an instrument, it might be thought, would command little legitimacy. There is certainly little evidence that people of Hong Kong have looked to the constitution as a safeguard of their freedoms. Such legitimacy as the system enjoyed came from the way in which that instrument was used, in a relatively benign manner, ensuring to a large extent fundamental liberties (if not political rights) and the operation of, for long periods, a largely free market. Given the early nature of capitalism in Hong Kong, the first was perhaps a necessary pre-condition for the second. It is widely agreed that these two factors were the key elements of the legitimacy of the administration. Neither is a natural or inevitable consequence of the colonial constitution. But the capitalism that it engendered produced great economic growth and prosperity, for a community which had suffered from poverty and great social turmoil. It was that situation which has raised pragmatism to high dogma, and made it a powerful ideological force. But there was a price, if that is the right term, to pay for it. The state became the captive of the market. The demands of the market dictated, to a significant extent, how powers under the constitution would be exercised. The power of the market was particularly strong when it was based on activities that could readily be relocated elsewhere. With the growth of manufacturing the situation changed somewhat, but Hong Kong remains vulnerable to the mobility of capital, technology and skills, in a region hungry for them. The state's ability to raise revenue and provide services depends on the performance of the economy. Consequently the constitution must yield to the market. So much did the ideology of the market dominate that of constitutionalism that constitutionalism (especially the democratic aspect of it) came to be seen as a major threat to the market and the prosperity of Hong Kong.

The market was not the only basis of legitimacy; other factors which promote it were connected with it. As we have seen, colonial rule fostered and coopted interests which had a stake in the system (they were or became the spokespersons for their communities). The top administrators were not rapacious or, for the most part, corrupt. The civil service allowed some mobility, although not to the highest echelons. More fundamentally, the residents of Hong Kong had come there through choice, migrants

from political oppression or harsh economic circumstances, who found the system of government as well as the potential in the economy altogether more congenial. Generally people were allowed to get on with their lives and occupations, an approach that was favoured by many.

The Legal System

In almost all colonies, one of the first acts of Britain was the establishment of a system of law.¹⁰ A system of law was particularly urgent in Hong Kong as it was acquired to be a centre of commerce. Under the imperial legal doctrine of cession whereby Britain exercised jurisdiction over Hong Kong, the pre-existing laws continue in force unless they are expressly modified or disappplied (*Campbell v Hall* (1774) 1 Cowp 204; for a more detailed discussion of the establishment of the legal system, see Wesley-Smith 1994c as well as Chapters 8 and 9 of this book). On 26 January 1841, after occupying Hong Kong under the Treaty of Chuenpi which preceded the Treaty of Nanking (and was not ratified), Elliot, the officer in charge of British trade in China, issued a proclamation on the laws to be applied there. A distinction was made between Chinese and others. Chinese were to be governed according to the 'laws and customs of China (every description of torture excepted)'. Another proclamation a few days later reinforced this rule by promising them the free exercise of their religious rites, ceremonies, and social customs, to be applied by village elders under the control a British magistrate. Non-Chinese were to be governed by the British law which had been applied to the British in Canton in exercise of British rights of extra-territoriality, as well as, more generally, 'the principles and practice of "British law"'. These arrangements were formalized by one of the first ordinances (The Supreme Court Ordinance 1844) passed by the Legislative Council set up under the Charter of 1843. It provided for the application of the Law of England, 'except where the same shall be inapplicable to the local circumstances of the said Colony, or of its inhabitants'. When English law was not suitable, Chinese law and customs would apply. The formula was amended various times and later provided for English law to be applied in a modified form if necessary (see Chapter 8), but no clearer basis for the application of

¹⁰ Wight (1952:19) has remarked the 'Dependent Empire illustrates how in constitutional development the stage of judicial power precedes the stage of legislative power. Early or undeveloped constitutions are concerned with organising jurisdiction rather than establishing legislative and executive organs. The Foreign Jurisdiction Act itself was concerned with the establishment and regulation of courts.'

Chinese law was provided (except in relation to land in the New Territories). Chinese law was administered in formal English style courts, which had considerable discretion in applying it.

The Chinese authorities were not happy with these arrangements for the application of Chinese law (see Endacott 1964: 26–38 for Chinese demands and early discussions on the application of Chinese law). Indeed at first Britain intended to place its Chinese subjects under their own law administered by Chinese officials. This was consistent not only with the dual system of law that applied to trading communities in Canton, but also with the principle of extra-territoriality that the European powers had successfully claimed in China. China already had a magistrate in Macau for dealing with Chinese residents in the Portuguese enclave. During the negotiations over the Treaty of Nanking, China demanded and Britain agreed, that Chinese in Hong Kong should remain subject to Chinese law and Chinese imperial officials. However, with the British position on the matter shifting (and with the Foreign and Colonial Offices not of the same mind), agreement on details was hard to achieve. Various arrangements were canvassed, such as that Chinese accused of serious crimes should be sent to China for the trial, that Chinese magistrates should be stationed in Hong Kong or Kowloon, that a distinction be made between Chinese who were permanently settled in Hong Kong who would be subject to colonial law and institutions and sojourners who would be subject to Chinese law to be administered in Hong Kong or China. In the end none of these proposals was accepted, the British anxious that these might provide the Chinese with an argument that they exercised some sovereignty in Hong Kong and the Governor worried by the deteriorating law and order situation, which he considered required to be dealt with through the colonial law. Over Chinese protests that Britain had reneged on earlier written assurances, the Legislative Council enacted the ordinance providing for the limited application of Chinese law and no role for Chinese officials in its administration. The Treaty of the Bogue (October 1843), supplementary to that of Nanking, provided merely for the mutual extradition of offenders.

Chinese law was applied to the Chinese in civil matters and remained important for regulating their personal, family and property matters until the reforms of the 1970s when most of Chinese customary or imperial law (by this time applicable formally neither in the PRC or Taiwan) was replaced by English principles in recognition of the massive changes in the life-style of the Chinese. The reforms had the support of most of the Hong Kong people, and reflected a general tendency in law reform to adopt new legislative initiatives in Britain. However, the principles of English law that applied in Hong Kong had been adapted to local conditions. It was

recognized in the 1844 Ordinance that English law could be modified or disappplied by local legislation. A very considerable body of local laws has been enacted, and although some British legislation still applied in Hong Kong in the 1980s, it can be said that Hong Kong had a truly autonomous legal system. However, its inspiration and fundamental principles were derived from English law, particularly the common law on which decisions of the House of Lords and other British courts are based.

The autonomy of the legal system was also manifest in the institutions of the law (although the Privy Council in London remained the final court of appeal). Law making had become largely a local enterprise, and the British veto over it, provided for in the Letters Patent, had not been exercised for decades (although undoubtedly in controversial matters a prior clearance from London would have been obtained). A complex system of courts and tribunals, based largely on English principles and practice, had been established to administer the law (Wesley-Smith 1994b: chap. 6). Judges had substantial independence, for although their appointments were made by the Governor under the Letters Patent, he was advised by a statutory Judicial Service Commission on appointments. Senior judiciary enjoyed security of tenure and could only be dismissed for inability to discharge their duty or for misbehaviour, after an enquiry by the Privy Council following a preliminary enquiry held locally. There was a large, well established and independent legal profession, which provided legal advice and other services to the public, including defence in criminal cases. The government had a large legal service, partly to ensure that government departments observed the law. Legal training was available locally at the University of Hong Kong, but lawyers trained in some overseas jurisdictions could also practise. There was a well established tradition of legal research.

Thus, although not perfectly, the Hong Kong legal system was based on the essential principles of the common law. There was equality before the law. Individuals and groups aggrieved by a decision of a government official or public agency could go to courts for redress. Courts could also review the legality of legislation and government policies. The common law rules of interpretation lean in favour of rights and freedoms when there are ambiguities. It is often claimed that rights and freedoms as well as the economic success of Hong Kong are based on this legal system, which provides predictability and rationality through the impartial administration of justice. It defines and protects property rights and enforces contracts that parties have freely made. Combined with the general rule of the equality of all parties before the law, these principles provide a necessary framework for the operation of the market (for a number of statements by various individuals and groups, including those cited here,

on the virtues of Hong Kong's legal system as developed during the colonial period see Ghai 1993: 353–356).

As early as 1914 Wu Tingfang (the first Chinese barrister and member of the Legislative Council in Hong Kong and subsequently a senior official in the Chinese government) wrote that Britain's distinctive contribution was 'a working model of a Western system of government which, notwithstanding many difficulties, has succeeded in transforming a barren island into a prosperous town . . . The impartial administration of justice . . . cannot but excite admiration and gain the confidence of the natives' (as quoted by Wesley-Smith 1988:3). Former Chief Justice Sir Ti Liang Yang often extolled the value of an independent legal profession as the bulwark of a free society and as providing the security and the competence that the international business community needed — 'to decide the complexities of commercial dispute on familiar principles' (Yang 1992). The Law Society, referring to uncertainties about the future, said that 'a reliable, predictable legal system can provide much needed stability at society's core in time of transition. It goes without saying that the rule of law will guide us and steady us'.

The rule of law became a powerful means to legitimize colonial rule, particularly as the ideology of a democratic and accountable government could not be pressed into service. The rule of law so selectively conceived was especially congenial to business, the *raison d'être* of Hong Kong. These rosy images of the law come, not surprisingly, from administrators or the high priests of the law. How far it had resonances for all the people of Hong Kong is hard to tell; such limited research or opinions as exist do not tell a consistent story: a mixture of admiration, ignorance and misunderstanding (Ghai 1993:343, 354; Lau and Kuan 1991; Hsu 1992; Ti Liang Yang 1992). It is clear that for many decades after the establishment of British authority, the Hong Kong Chinese had little truck with the formal legal system except as accused in criminal cases. They effectively set up their own mechanisms for dispute resolution (Sinn 1989; Chan, WK 1991) and relied minimally on the formal system even for their commercial transactions (Tricker 1990; Wong 1991). Even now it is not clear how much resort is had to the formal legal system by the Chinese business community (although there is no doubt that more use is being made than before and Hong Kong has an unusually high rate of litigation (Ghai 1993: 356)), and the existence of rules which protected property rights facilitated Chinese economic enterprise. Nor is it clear that even the top European firms needed the law to pursue their enterprise, for undoubtedly much business was transacted in the elite Jockey and Hong Kong Clubs between them and the administration, and between the leading firms themselves, both European versions of *guanxi* (Chan, WK 1991:

25–32). On the other hand, the legal rules and system undoubtedly played an important role in the internationalization of Hong Kong's economy.

The common law that was applied in colonies was generally a truncated version of the genuine article, often stripped of its ameliorative qualities (Seidman 1969). The common law cheerfully accommodated enormous discriminations against the Chinese, which began to be dismantled only after the end of the Second World War (Wesley-Smith 1994d). Nor did the common law or Letters Patent provide any barrier to a fair amount of repressive legislation, including extensive emergency regulations, that the administration wanted to arm itself with during occasional periods of crisis (for numerous restrictions on rights and freedoms before the enactment of the Bill of Rights Ordinance in 1991, see two volumes edited by Wacks 1988 and 1992). As we have seen in relation to the judicial attitudes towards treaties, the common law was often a slender reed, qualified as it was in its application in colonies by layers of the prerogative. The rule of law was itself a doctrine of procedure rather than substantive principles (especially given the lack of normative principles in the Letters Patent). The ideology and principles of the common law can be used to strengthen the regime of rights and the legal accountability of the government, as is demonstrated by recent decisions of courts, particularly in New Zealand and Australia where there are few fundamental or entrenched provisions for the protection of individual rights (e.g., *Tracy; ex parte Regan* (1989) 166 CLR 518; *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Lim v Minister for Immigration* (1992) 176 CLR 1; *L v M* [1979] 2 NZLR 519; *Brader v MOT* [1981] 1 NZLR 73; *Keenan v AG* [1986] 1NZLR 241; but compare Winterton 1994). But that this is not inherent in the common law is evidenced by the fact that judicial activism associated with the common law is a development of very recent years.

There is no questioning the considerable strengths and virtues of the common law and the legal systems founded on it. It provided a view of the law and the relationship between the government and the courts which was new to Hong Kong's Chinese residents, even the very opposite of what they had experienced in China. However narrow the scope of legal challenge under the common law in Hong Kong, it did present to the people the notion that the government was not above the law and could be challenged in the courts. It did protect the lives and property of its residents, which played a crucial role in the legitimization of the colonial regime. Above all its ideology of the rule of law contributed to the raising of public consciousness of rights and the value of fair administration, which flowered as China sought to assert its sovereignty over Hong Kong, and provided a bench mark for an acceptable legal system.

The Economic System

From the very beginning Hong Kong was conceived in the womb of commerce as a free port (although, ironically, it was delivered with the armed might of the government). The implications of the decision were set out clearly in the instructions of the British Foreign Secretary Lord Aberdeen to Governor Pottinger in a dispatch of 4 January 1843 (the relevant parts of the dispatch are reproduced in Tsang 1995: 17). To encourage its development as a free port it was necessary to keep harbour dues low, and income from import or export duties would not be available to finance the administration. The principal source of government revenue would be land, and its allocation. It was therefore necessary to increase the value of land, which would be done by 'tempting' British subjects and foreigners to establish themselves on the island. It was considered best not to alienate land but to allocate it on short term leases, so as to retain for the government the benefits of increase in land values. The auction of land was recommended to tap the best prices. A free port could not exist without a free market. The essential characteristics of the Hong Kong so delineated became firmly established. The early, swashbuckling pioneers would not have tolerated government intervention in their affairs, and so Hong Kong was allowed to become a particularly free, laissez-faire, market. The popular image of Hong Kong as the world's most free economy has persisted, in the face of considerable evidence to the contrary. But there is no doubt that Hong Kong is a celebration of the capitalist market which has strong ideological attraction there and abroad.

There were no restrictions on convertibility of the Hong Kong dollar (an independent currency backed by considerable reserves of foreign exchange); and in 1983 the Hong Kong dollar was pegged to the US dollar at a rate of 7.8 local dollars to the US (to avert the collapse of the Hong Kong dollar following uncertainties of Sino-British negotiations on the transfer of sovereignty). There was no central bank; a local bank, the HongkongBank, acted as government's banker. Currency notes were issued by private banks on licence from the government. Hong Kong maintained an open door policy in other ways as well. Movement in and out of Hong Kong was relatively easy, although immigration controls were introduced after the Second World War. Foreign businesses competed on the same terms as local or British residents (and enjoyed such political rights as were available to others). Relatively few business decisions required government approval. The framework for the conduct of business and financial transactions (and the internal affairs of companies) was loose, even relaxed. There were no price controls except on a few items (and these were not for commercial reasons). Personal and corporation taxes

were low; there was no sales tax. Except in some special cases, the government did not enter directly into commerce or establish business corporations. The distinction between the private and the public was clear. For long periods government expenditures were a smaller proportion of the GDP than in most countries. Big commercial interests were able to organize themselves into powerful chambers or organizations and to negotiate with the government for concessions. A consequence of these policies was that laws to protect labour were weak and their enforcement even laxer. Labour had no political clout — major strikes or even riots were the medium of their influence. Social welfare did not figure high on the official or corporate agenda.

Various features qualified the *laissez-faire* orientation of the market. As the ultimate landowner, the government had considerable control over land, such as bringing new land on the market, determining rents and premiums that leaseholders must pay for change of land use, which were additional to statutory powers under planning laws — a key instrument of control when usable land is as scarce as in Hong Kong. The government was also a major player in the housing market. Since 1953 (with alarming increases in squatter settlements) the government had assumed the responsibility to provide subsidized housing for lower income groups (and to manage a systematic distribution of population to new industrial areas). It set up the Hong Kong Housing Authority (and a subsidized private group, the Hong Kong Housing Society) for this purpose. Public housing accounted for over 40% of total housing. However, the private housing market thrived as well, even though its domination by a few large firms meant that it was not fully competitive. The third major area of government intervention was transport. Railway transport systems were owned by government-owned corporations and other forms of transport (including harbour facilities) were owned and run by private companies, although subject to regulation through licencing and fare control (Clark and McCoy 1995: chap. 11).

Within this broad framework, the economy developed rapidly after the Second World War with the influx of entrepreneurs from Shanghai after the communist takeover. Since then Hong Kong had experienced a steady increase in standards of living so that in the 1980s it was the most prosperous part of Asia next to Japan. Its prosperity was based on several factors. The oldest and most important was entrepot trade, particularly its mediation of China's international trade accounting for most of its imports and exports. Regular migration from China before and after the establishment of the PRC provided a constant supply of cheap labour. A good educational system provided people with skills. Its domestic industry was based on simple manufacturing, especially textiles and plastic goods, destined for markets in Europe and North America. Its

burgeoning financial markets made Hong Kong an important regional financial centre, with the second largest stock market in Asia. These developments gave a considerable boost to the property market which constituted one of the leading sectors of the economy.

As a major trading centre, Hong Kong became increasingly integrated into the world economy. As its industry became more sophisticated, foreign investment, particularly from the US and Japan, came in. It became necessary for Hong Kong to manage its own international economic relations, e.g., to maintain its customs regime and to promote its textiles under international agreements. Britain authorized Hong Kong to become a separate member of several international economic organizations (such as the GATT and the International Monetary Fund) and to enter into treaty relations, for trade and investments.

The opening up of China to the outside world for economic development in the late 1970s and early 1980s had a major impact on Hong Kong. Its role as the main gateway to China, not only for exports and imports, but also investments, increased greatly. Rising labour and land costs prompted many industrialists to shift their factories to the newly established free economic zone in Shenzhen just to the north of Hong Kong, leaving Hong Kong to concentrate on more advanced industrial products, like electronics, but especially on financial services and tourism. China itself began to invest in Hong Kong. This was to have major consequences for social structures, labour relations, the emergence of a middle class, government economic policies, and politico-economic relations with China (which are discussed briefly in the following section). However, these developments had not advanced significantly when Sino-British negotiations on the transfer of sovereignty started.

The Social and Civic Structure

The *laissez-faire* economic policy resulted in relatively restricted involvement of the government in social matters. The early pattern of development resulted in Europeans and Chinese living in separate communities, and effective exclusion of the Chinese from the apparatus of government drove them to establish their own organizations which became *de facto* sites of governance of their social, economic, and to some extent, legal affairs. The development of private organizations was prompted also by the lack of government provision for social welfare. There was a proliferation of welfare agencies after 1946, funded by external donors, covering health, education, and the care of old people among other activities. From 1967 the government began to take over more responsibility for their funding,

so that by the time of the negotiations on the transfer of sovereignty, a considerable portion of government money was devoted to this purpose. So while welfare agencies continued to play an important role in the provision of services, they came increasingly under official influence if not control, almost an extension of the administration (Pearson 1992; Chow 1990; Morris 1992). Nevertheless the number of voluntary organizations in these and other areas (like sports and religion) involved a large number of people in social activities and provided an important base for lobbying and participation in policy making. They laid the foundations of civil society.

The emergence of civil society was facilitated by other factors as well. One was the development of a significant local commercial community. The rise of Chinese business enterprise in Hong Kong goes back to the early years of colonialism, but for a long time it played a secondary role to European firms (to which it was linked in many ways). The waves of entrepreneurs and skilled workers from Shanghai in the 40s and 50s are often held responsible for the transformation of Chinese small scale and simple enterprises to sophisticated, industrialized firms which provided the basis for further expansion of local capital, so that by the 70s Chinese businesses were able to mount a major challenge to the old hongts. Economic power was steadily, sometimes dramatically, but surely passing over to local firms.

Increasing prosperity, rising population (based largely on immigration from China), housing settlements, and greater educational opportunities exposed Hong Kong residents to the modern world and fostered a sense of Hong Kong community. Growing literacy encouraged the development of newspapers and journals, a lively and diverse press with nearly 60 newspapers and a wide readership (Chan and Lee 1991). Arts and culture also flourished with the new prosperity, and the freedom to experiment that was denied to Chinese on the mainland.

The dominant factor in the social and economic development of Hong Kong, as has already been pointed out, was the market. The market defined people's expectations of and accommodation to the colonial regime. It provided the basis for the interactions between the Europeans and the Chinese. It influenced class and gender relations. For a society lacking a pre-established social structure or aristocracy, the market determined hierarchy and status, overcoming in time the racial and occupational hierarchies of colonialism. It provide the most effective ideology for Hong Kong's special social and political system.

Hong Kong is not and has not been an egalitarian society. There are vast differences in incomes and wealth, perhaps bigger than in any other industrialized society. However, the belief that Hong Kong offers social

mobility and equal opportunity is sedulously nurtured (and is believed even by those whose daily experience demonstrates its invalidity, Wong, T and Lui, T 1994). This was undoubtedly true in the past where the strength of the market system may have been the absence of class distinctions within both the European and Chinese communities (though not as between them). But class differentiation started early (the Hong Kong Club, that bastion of privilege and male dominance, was established in 1842), and on the Chinese side too the establishment of communal organizations facilitated the consolidation of social hierarchy (Chan, WK 1991). The transience of the population and an expanding economy facilitated both opportunity and mobility. Now the evidence no longer supports the belief of equal opportunity. Social origins and class backgrounds have become important determinants of one's life chances and wealth and power are being consolidated in families and groups (Tsang, WK 1994).

The picture of industrial relations was generally unsatisfactory. Trade unionism was astonishingly low (being under 20% of all employees), due to a variety of factors: the small size of firms (very few employed more than 50 employees), tendency for employers to hire persons from kinship or clan networks, discouragement from employers, the ignorance or caution of workers (mostly migrants), and the politicization of unions (many unions being fronts for either the Chinese Communists or Nationalists). The last factor also muted class differences and conflicts. There was little use of collective agreements, only 4% of workers being covered by them in the late 1970s. The level of industrial safety was low. Labour law was reasonably progressive (based substantially on British legislation), although it was designed to prevent political organization of workers — which shows that economic and political realities were more influential than the law.

Within families, there was little gender equality and it was the extra burden imposed on women that has helped families in Hong Kong to cope with the stresses of industrialization (Ng 1994). Gender inequality was institutionalized in Chinese customary law (incorporating traditional Chinese patriarchy) which continued to apply until the 1970s and remnants of which lingered in the land law and practices in the New Territories (Jones 1994). Gender inequality was replicated in employment practices. The government was always reluctant to legislate for equality in the public and private sectors, due to explicit or perceived opposition from traditionalists or the business community.

CONCLUSION

The Joint Declaration promises to preserve 'the current social and economic systems in Hong Kong' as well as its 'life-style'(art. 3(5)). Life-style is an elusive concept, but it becomes necessary to define it or at least develop an understanding of it. From the preceding account, it is possible to draw a picture. The distinctiveness of Hong Kong's 'systems' is reasonably clear, although it denies the premise of change which has been itself a defining feature of the territory. The reference to 'systems' in the plural seeks to separate off parts which are of a whole. The notion of 'life-style' through the concept of identity may provide a framework which shows the unity of systems. But the question was often asked, is there a Hong Kong identity? It is generally argued that for a long period Hong Kong did not have an identity; its population, whether Chinese or foreign, was too transient, and bound to its culture of origin. After the Second World War this seemed to change, at least as far as the Chinese were concerned.

There continued to be steady migration from China, but settlement in Hong Kong became more permanent. In the 1980s about 60% of the population was Hong Kong born. Hong Kong also became more industrialized and modernized; and from early days it was urbanized. Western education and the international position of Hong Kong (with the Hong Kong diaspora overseas) gradually defined a culture and outlook different from their antecedents on the mainland. Their Confucianism was moderated by Western forms of economy (in which commerce occupied a lofty place) and government. The new morality was market oriented, with little place for compassion, virtue or equality, business entrepreneurs being venerated instead of the scholar-bureaucrat. On the other hand, the relative freedoms in Hong Kong encouraged self-expression, in traditional as well as Western cultural forms, and other forms of creativity too. Hong Kong identity was sharpened by the impending transfer of sovereignty, making its residents aware of their own distinctiveness.¹¹

Lau and Kuan state that the Hong Kong identity, 'though not implying rejection of China or the Chinese people, necessarily takes China or the Chinese people as the reference group and marks out the Hong Kong Chinese as a distinctive group of Chinese. This group is perceived as one with a separate subculture which is more "advanced" than the dominant culture in contemporary China or the often touted traditional Chinese culture. This Hong Kong identity does not entail much political overtones

¹¹ Lau and Kuan report that in their survey a year after the signing of the Joint Declaration that 'an astonishingly' large number of respondents (59.5%) identified themselves as 'Hongkongese' rather than 'Chinese' (1988: 2).

in terms of Hong Kong nationalism or the desire for political independence . . .' (1988: 2). It is an identity of ambiguity, traditional and yet modern, which, for example, has been nourished on the freedoms of Western liberalism but does not fully accommodate it within its mind set, or is suspicious of communist China yet hurries to make peace with (even to placate) it — perhaps because it is founded on the morality of commerce.

There were latent forces which might in due course have resolved the ambiguity. While Britain ruled Hong Kong through an authoritarian system, it also laid the foundations for democracy. It secured the rule of law and the notion of the legal accountability of the government. It established a responsive public service (if only for the exigencies of governing). It protected private property and the security of transactions, and developed (in practice if not always in law) a generous regime of rights and freedoms. It generated a lively civil community. It consulted the people (though somewhat manipulatively) on policy and administration. It introduced Western education and ideology, in which democratic values were celebrated. Migration and the market led to some atomization of society and the autonomy of the individual. Prosperity and a high degree of literacy would have facilitated the transition to democracy.

However, whether due to constraints forced on the colonial enterprise stemming from China's ultimate claim to Hong Kong or other reasons, Britain left the democratic part of the agenda unfulfilled. What Britain left behind was manipulative politics, a privileged political position for business and professional elites, and access to influence through patronage and cooptation. It made the Heng Seng Index the barometer of well being and fostered the notion that democracy was somehow antithetical to economic prosperity. The Joint Declaration, in wanting to preserve 'current systems', also wished to stunt the growth of democracy. In this as in other respects, rapid changes were inherent in the logic of the organization of economy and society in Hong Kong which the Joint Declaration and more particularly the Basic Law insufficiently recognize or provide for.

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Indexing Note:

The arrangement of entries is word-by-word. Subheadings are arranged alphabetically.

The following abbreviations are used in subheadings:

BL	Basic Law
HK	Hong Kong
CPG	Central People's Government
CPPCC	Chinese People's Political Consultative Conference
HKSAR	Hong Kong Special Administrative Region
JD	Joint Declaration
NPC	National People's Congress
UN	United Nations

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