

HAS SELF-DETERMINATION OCCURRED IN HONG KONG?

Although the handing over of the former British colony by the British government to the Republic of China is now a *fait accompli*, the issue of the right of self-determination of the people of Hong Kong should not be relegated to limbo and considered as closed. It is, however, possible to regard the handing over as part of the decolonisation process.

Hong Kong colony was an amalgam of territories acquired through cession and tenancy¹. However, over time it came to be regarded as territory leased from China by Britain, with 1898 being the critical year for this purpose. As a legal proposition therefore, when the lease agreement expired in July 1997, China was entitled to the reversion². The issue, however, is not so simple as it may appear. Hong Kong is not simply a landed property. It is peopled by a diverse breed of Chinese (some have fled the Peoples Republic of China for freedom in Hong Kong) and others who have over the past 100 years wrought an economic miracle on the island. The former colony is one of the world's most successful financial and industrial centers. It has entrenched democracy as its preferred political system,³ and the British Crown's writ ran throughout the territory thus ensuring the rule of law there.⁴

In these circumstances, it was not apparent how the British sovereign could simply "hand it over" to another sovereign and walk away as if it were a piece of property. The British government on its part has asserted that it was not simply walking away from people who were once its subjects owing allegiance

¹ Hong Kong Island was ceded to the British in 1842 as a consequence of the defeat of China in the Opium war. Kowloon and Stonecutter's Island were ceded to the British in 1860 under the *Convention of Peking*. The New Territories was obtained in 1898 by the British under a 99-year lease by virtue of the Second *Convention of Peking*. See Mushkat, R., "The International Legal Status of Hong Kong under Post-Transitional Rule," (1987) 10 *Houston Journal of International Law*, 6; Amberg, E M., "Self-Determination in Hong Kong: A New Challenge to an Old Doctrine," (1985) 22 *San Diego Law Review*, 839; also Cassese, 78-79 *supra*.

² Von Glahn, however, holds the view that lease treaties only confer jurisdictional right and none for alienation purposes: which is what British transfer of the territory to China will entail: *Law Among Nations*, 7th ed., Boston: Allyn & Bacon (1996) 483.

³ See Wesley-Smith, P., "Settlement of the Question of Hong Kong," (1987) 17 *California Western International Law Journal*, 117.

⁴ Shu, B. and Baker, P., "The Spirit of Common Law in Hong Kong: The Transition to 1997," (1990) 24 *University of British Columbia Law Review*, 307.

in return for protection, but that "suitable" arrangements had been concluded on behalf of the colony to guarantee its continued existence as a Special Zone of the People's Republic of China.

The British government had acted as a novice in international relations with no previous knowledge of China's record in the international arena, witness Tiennanmen and Tibet⁵. The "suitable" arrangements were of course, the notorious *Basic Law*,⁶ (the human rights provisions of which the Chinese government had already taken steps to write away), and the 1984 Sino-British Joint Declaration⁷.

Mainland China on the other hand continues to cling to an economy based on the now nearly defunct communist ideology, and has rejected the capitalist economic system of the West;⁸ it has spurned liberal and democratic ideals of government, its human rights record is horrendous; it continues to regard war as a respectable state policy, and still maintains an archaic and feudalistic legal system⁹. Hong Kong colony and China are simply worlds apart; despite the commonality of language and culture the two entities are simply not 'one people'.

The constitutional conundrum of the *Basic Law* is beyond the scope of this note. Here we are concerned mainly with the issue of self-determination. Are the

⁵ See H A Amankwah, 'Self-determination – Asia Pacific Style', (1998) 5 *JCU LR* 113 at 121-127.

⁶ By this Hong Kong was constituted into the Hong Kong Special Administrative Region (HKSAR, hereinafter, the Region) of China; subject to some limitations, the Region is vested with plenary legislative and executive powers; all laws previously in force in the colony including the English Common Law are preserved and will continue to apply in the Region; an independent judicial body will be established for the Region; the *UN International Covenant on Civil and Political Rights* (ICCPR) shall remain in force and shall be implemented by the Region's laws; however, freedom of speech, freedom of the press and freedom of religion may be restricted when necessary to maintain "national security, public order, public health and morals." (It must be noted, however, in passing that the Peoples Republic of China is not a signatory to the ICCPR); the Region shall continue to be a free port and shall preserve free trade policies; and the Peoples Republic of China shall not levy taxes on the Region or have recourse to the Region's taxes or other revenue.

See Han, A M., "Hong Kong's Basic Law: The Path to 1997, Paved with Pitfalls," (1993) 16 *Hastings International and Comparative Law Review*, 321.

See also Vause, W., "Tibet to Tiananmen: Chinese Human Rights and US Foreign Policy", (1989), 42 *Vanderbilt LR* 1575.

⁷ See Tso, K., "The Legal Implications of the Sino-British Treaties Regarding Hong Kong," (1996) 38 *Loyola International and Comparative Law Journal*, 115 and M. Kelly, "Sino-British Discord Over Hong Kong," (1994) 8 *New Zealand Law Journal* 18.

⁸ Clarke, D., "What's Law Got To Do With It? Legal Institutions and Economic Reform in China", (1991) 10 *UCLA Pacific Basin Law Journal* 1

⁹ See Hazard, J., *Communists and Their Laws*, Chicago: University of Chicago Press, (1969); H. Chelminsky and Pasquillani, S., *Prisoner of Mao*, New York: Double Day Publishers, (1976); also R. Munro, "Rough Justice in Beijing: Punishing the 'Black Hands' of Tiananmen Square" (1991) 10 *UCLA Pacific Basin Law Journal* 77

people of Hong Kong a "people", and if so, are they entitled to exercise their right of self-determination?

China's "One China" policy like opium has induced hallucination in many otherwise democratic nations. It would seem that many nations are pandering to the whim of China as a superpower. The policy of appeasement and containment of the Cold War era, it would seem, is still in vogue. This is the only plausible explanation for the feeble and muted response from the United States of America and its allies. Has the right of self-determination principle suddenly become Britain's "domestic matter" in relation to its handling of the Hong Kong issue?¹⁰ Why did the UN see fit to impose sanctions on Mr Ian Smith's Southern Rhodesia? As usual the international community looked on a potential threat to international peace and security cavalierly until a *fait accompli* eventuated.

The disintegration of the former Communist European nations is a pointer to the fact that the spirit of freedom is irrepressible.

There appears to be evident in Britain's handling of the Hong Kong issue a tragic twist of policy. Why did Britain go to war with Argentina over the Falkland Islands, one may ask? Does Hong Kong deserve less consideration? Only Britain could have made secure the wishes of the people of Hong Kong. Once the *fait accompli* of July 1997 came to pass, it would be futile to expect a reversal in the fortune of the people.

What options were available to the people of Hong Kong? *Independence? Emergence into a new state?* Both were foreclosed by Britain's hand-over of the colony to China.¹¹ *Integration* with China was a distinct possibility had the British government allowed the Hong Kong people to decide this for themselves. *Association* was also possible, but again this should have been the decision of the Hong Kong people themselves. Had *resistance* or *revolt* been resorted to, assuredly the Chinese military would have been deployed to crush any such move, even though international law recognises a regime of law which enables an oppressed people to fight for their liberation and independence¹². Did the

¹⁰ In the *Case Concerning East Timor (Portugal v Australia)* 1995 ICJ Rep 3, 102 the Court recognised "the rights of peoples to self-determination" as *erga omnes*.

¹¹ See Amankwah n 5 *supra* 119-121 on the modalities of the exercise of the right of self-determination.

¹² See McGee, R., "Hong Kong's Option to Secede," (1992) 32 *Harvard International Law Journal* 435. The "right" to oppose a repressive regime is said to derive from the "just war" doctrine. See T.M. Franck, *The Power of Legitimacy Among Nations*, New York: Oxford University Press (1990) 80-81, 86.

On secession generally see Nanda, V P., "Self-Determination in International Law: The Tragic tale of two Cities - Islamabad (West Pakistan) and Dacca (East Pakistan), (1972) 66 *AJIL* 321; Nixon, C R., "Self-Determination: The Nigeria/Biafra Case, (1972) 24 *World Politics*, 479; Kamanu, O S., "Secession and the Right of Self-Determination: An OAU Dilemma, (1974) 12 *The Journal of Modern African Studies*, 355; Nanda, V P., "Self-Determination under International Law: Validity of Claims to Secede," (1981) 13 *Case Western ReserveJIL*, 263; Islam, M R., "Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh," (1985) 22 *Journal of Peace Research*, 211; Heraclides, A., "Secessionist Minorities and External Involvement," (1990) 44

people of Hong Kong have the will and the appropriate leadership for this purpose? Or did pragmatism dictate to them the futility of their embarkation on such a course?

H A Amankwah

International Organisation, 341; Brilmayer, L., "Secession and Self-Determination: A Territorial Interpretation," (1991) 16 *Yale Journal of International Law*, 177; M. Eisner, "A Procedural Model for the Resolution of Secessionist Disputes," (1992) 33 *Harvard International Law Journal*, 415; McGee, R W., "The Theory of Secession and Emerging Democracies: A Constitutional Solution," (1992) 28 *Stanford Journal of International Law*, 451; Frankel, L M., "International Law of secession: New Rules for a New Era," (1992) 14 *Houston Journal of International Law*, 521; Franck, T M., "Postmodern Tribalism and the Right to Secession," in Brilmann et al (eds), n 3 *supra*; Higgins, R., "Postmodern Tribalism and the Right to Secession - Comments," *Id*; Murswiek, D., "The Issue of a Right to Secede Reconsidered," in Tomuschat, C., *Modern Law of Self-Determination*, n 21 *supra*; Aide, A., "In search of Constructive Alternatives to Secession," *Id*, 139.