

## CHAPTER ONE

### THE HISTORICAL BACKGROUND

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#### Hong Kong Today

1.1 In 1997, Hong Kong is in a unique position. It is to be decolonised by having its sovereignty handed, not to itself, but to another power. This is to be achieved by way of an agreement between two great powers, the United Kingdom and the People's Republic of China, without formal reference to the people of the territory itself.<sup>1</sup> It is unique also in that it is the 'voluntary' return of an open, liberal, highly developed society with an evolving democracy to a country with closed, anti-democratic, political structures and economic and legal systems in a state of flux.

1.2 What is being handed back to China is a very different place from the barren, mountainous island ceded in 1842. Then, it had only three and a half thousand people scattered in 20 villages and a further 2,000 fishermen living on boats in the harbour. It offered few prospects, having little fertile land. However, it had an excellent harbour.<sup>2</sup> It has always played the role of a gateway to China and a first point of exit from China in times of troubles.

1.3 Hong Kong today is a remarkable place. Its skyline is distinctive and dramatic, marked by burgeoning high rise offices and apartments, set closely into its granite base. The mountainous interior and surrounding islands provide a physically beautiful backdrop to the spectacular man-made city. It is a busy and energetic place with its population of 6.3 million people living in the small geographic area of just over a thousand square kilometres. Its people are well educated, skilled, enterprising and hard working.

1.4 It is an international city of significant economic importance: a major financial and trading centre not only for the region but for the world. In 1995 it was the eighth largest trading economy in the world, with the world's busiest container terminal. It is fifth in the world for foreign exchange transactions. Throughout the nineties Hong Kong has had a high growth rate in GDP of between 4.6 and 5.4 per cent per annum; GDP per capita rose to US\$23,200 in 1995. Taxes are simple and low - company tax of 16.6 per cent, personal income tax up to 15 per cent maximum. There is no capital gains tax, no payroll tax and no

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1 Jayawickrama, Submission, p. S323; and Dowd, Transcript, 20 January 1997, p. 126. The Sino-British Joint Declaration on the Question of Hong Kong, 1984, is a formal treaty lodged with the UN. It will be covered in Chapter 2 of the report. No plebiscite or referendum of the popular view was held prior to that agreement or since. However, a survey conducted in Hong Kong in 1982 found that 85 per cent wished to continue with British administration and only 4 per cent wanted a return to China. Quoted from Welsh, F, *A History of Hong Kong*, Harper Collins, 1993, p. 507. However, it is notable that, after the Joint Declaration was signed and irrevocable, a poll found that 79 per cent of respondents 'agreed that sovereignty over Hong Kong should be returned to China'. Exhibit No. 8(c), Michael De Golyer, *Self Internationalisation the Hong Kong Way*, November 1996, p. 2.

2 The Committee notes that concern was expressed to it during its visit about the extent of reclamation in the harbour.

tax on offshore assets. Unemployment is 2.4 per cent.<sup>3</sup> It has foreign reserves of US\$60 billion and projected budget surpluses in the next two financial years.

1.5 Hong Kong is also a flexible and pragmatic place. As its wages, skills and rents have risen, it has moved its manufacturing into neighbouring Guangdong Province where there are 5 million people employed by Hong Kong businesses. Hong Kong fuels China's development and is in turn fuelled by China's growth. Hong Kong has moved its economy into high tech manufacturing, design and services. Services constitute 83 per cent of its economy. Business dominates the culture and style of Hong Kong. A number of locals who spoke to the parliamentary delegation which visited in January 1997 conveyed a brusque, single-minded impatience with anything abstract or esoteric. The Committee also met a large number of highly educated people who spoke lucidly and passionately about their democratic ideals and social commitments.

1.6 Even after a hundred and fifty years of British rule Hong Kong is a Chinese city with British characteristics. No doubt it is this blend of characteristics, *guanxi* under a rule of law, which has been a potent force in driving Hong Kong's attractiveness as a place to do business.

## Hong Kong as a British Territory

1.7 The island of Hong Kong was ceded in perpetuity to Britain in 1842 under the Treaty of Nanking (Nanjing) at the end of the First Opium War (1839-1842). Further territory on the Kowloon Peninsula was ceded in perpetuity in 1860 at the end of the Second Opium War (1856-1860) under the Conventions of Peking (Beijing). Britain gained the leased territory on 9 June 1898 under a convention signed in Beijing following China's defeat by the Japanese in the Sino-Japanese War of 1894-95 which was followed by a scramble for territory by the foreign powers in China. The lease was for 99 years and covered the New Territories - the area north of Kowloon to the Shenzhen River and 235 islands. The British argued that this was necessary to provide security for the island of Hong Kong. Only the leased territories of the 1898 concession were required under the treaty agreements to be returned to China in 1997; however these territories, the source of Hong Kong's power and water supplies, had become essential to Hong Kong's viability. Therefore, the decision was made to return the whole territory, Hong Kong island, Kowloon and the New Territories, to China on 1 July 1997.

1.8 Hong Kong was ceded to Britain in what China regarded as unequal treaties. China has interpreted its nineteenth century history as a period of humiliation when foreign powers carved spheres of influence out of Chinese territory at will. The view that the treaties were unequal has been a significant one in the presentation of current policy by the PRC.<sup>4</sup>

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3 The economy of Hong Kong will be dealt with in Chapter 5 of this report.

4 It is a view not universally shared by historians who have argued that the treaties, particularly the earlier ones, were fairer than many others negotiated at the time and incorporated a number of concessions to the Chinese side negotiated by shrewd Chinese negotiators. 'These were all valid transfers of territory according to the law, practice and values of that time'. Jayawickrama, Submission, p. S322. Throughout the 19th century, there was on the part of the Ch'ing emperors a detachment from reality, a lack of understanding of the nature and strength of the people they were dealing with and an adherence to a traditional role of superiority in dealing with foreigners as vassal states with whom no negotiations or compromises were necessary. This left them, having refused to negotiate, vulnerable to superior force and defeat and an outcome much less favourable to their own position than it might have been.

The reclamation of territory and the redressing of these humiliations has been a strong motivation in Chinese policy throughout the twentieth century, especially for the Communist government which was able to achieve national unification in all areas of Chinese life except Hong Kong, Macau and Taiwan.

1.9 For the British the territory of Hong Kong was at first seen as a temporary acquisition (despite its in-perpetuity treaty status), a possible future bargaining chip to open further trade on the mainland.<sup>5</sup> It appeared to have little immediate value. It was to be a temporary, military position. Lord Aberdeen saw the primary objective of British foreign policy as trade, not the acquisition of expensive colonies.<sup>6</sup> However, on the ground, once ceded, the island soon began to develop as both a strategic base and a trading and commercial centre. Its permanence as a British colony was quickly determined.

1.10 Some of its enduring characteristics were established from the beginning. It was described in the local press in 1841 as 'a free and inexpensive asylum with ample protection for persons and property'. The British Government's proclamation on Hong Kong in 1841 stated:

There were to be two codes of law, English and Chinese;<sup>7</sup> Chinese law and customs were to be interfered with as little as possible, except that 'all forms of torture' were banned; all were to be protected 'against all enemies whatsoever and they are further secured in the free exercise of their religious rites, ceremonies and social customs and the enjoyment of their lawful property and interests'. ... Hong Kong was to be a free port with 'no charges ... payable to the British Government'.<sup>8</sup>

1.11 The political structure established soon after acquisition was similar to other colonial governments set up by Britain in the nineteenth century. In theory, in Hong Kong, it remained largely unchanged for over 140 years. Albert Chen in his paper on the constitutional development of Hong Kong described the colonial political administration in the following terms:

It is a system based on the rule of law and not on arbitrary government. The distribution and exercise of political power in relation to the colony are carefully regulated by refined and elaborate rules and principles of law. Such a system is not, however, accompanied by parliamentary democracy or responsible government in the Westminster sense. The relationship between the colonial

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5 The Treaty of Nanking opened five ports to foreign trade - Amoy, Foochow, Ningpo, Shanghai and Canton; it allowed for the appointment of consuls in those cities to regulate the trade and protect foreign citizens; it stipulated that all future correspondence should be as between equal powers, and it demanded a compensation payment. The treaty contained a most favoured nation clause; Lord Aberdeen, the Foreign Secretary, claimed that a secure and well ordered trade was all that the British desired, no exclusive advantages. Welsh, op. cit., pp. 120-123.

6 *ibid.*, p. 124.

7 This pledge was not fulfilled. Only one legal system, the British, was introduced.

8 *ibid.*, p. 138.

government and London is characterised by overwhelming powers of control by London.<sup>9</sup>

1.12 In particular, the 'constitution' of colonial Hong Kong defined by the Letters Patent consisted of:

- a local legislature consisting of the Governor acting by and with the advice and consent of the Legislative Council (Legco);
- a capacity of a British Act of Parliament to override any colonial law repugnant to the Act;
- a capacity of the Crown to instruct the Governor to refuse royal assent to any bill passed by the Legislative Council, or to disallow a law enacted by the colonial legislature;
- a colonial Governor selected, appointed and dismissed by the Crown;
- an Executive Council (Exco) appointed by the Governor to advise him;
- a Legislative Council appointed by the Governor on instructions from the Crown;
- a judiciary appointed by the Governor; and
- a court of final appeal resting in the Privy Council.<sup>10</sup>

1.13 It was a system that changed little in form over the next 140 years and one which appeared to suit the Chinese Government which negotiated the Joint Declaration of 1984.<sup>11</sup> In terms of the powers of the central government over Hong Kong, there is considerable resemblance between the letter of the colonial system and the structures China appears to wish to reimpose on Hong Kong in the argument it has had with Governor Patten since 1992.

1.14 However, it should be noted that, while the letter of this system in Hong Kong did not change substantially between 1843 and 1980, the spirit and actual workings of it evolved into a process that was much more open and representative than the documents would suggest. From the 1880s pressure began, largely from the merchants, for members of the Legco to be elected, on the argument that there should be no taxation without representation. This was not acceded to until the 1970s.

1.15 Progress towards liberalisation was slow in Hong Kong, usually granted in relation to some upheaval in the colony and these were rare: particularly, in 1925-26 - the workers' strike; in 1956 - Kuomintang/Communist riots; and in 1966 and 1967 protests over fare increases on the Star Ferry followed by serious demands for an end to colonial rule. This last uprising coincided with the beginnings of the Cultural Revolution in China and was to produce the most concerted effort towards reform. There were further riots in 1984 and huge

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9 Chen, Albert H Y, 'From Colony to Special Administrative Region: Hong Kong's Constitutional Journey', from *The Future of the Law in Hong Kong*, ed. Wacks, R, Oxford University Press, 1989, p. 77.

10 *ibid.*, p. 79.

11 Indeed the Basic Law is more liberal in respect to: (i) the selection of the Chief Executive, (ii) the powers of the Central Government to disallow legislation, and (iii) the Court of Final Appeal being within the territory.

demonstrations in 1989 in response to the massacre in Tiananmen Square. The changes that occurred as a result of these pressures were limited.

1.16 The reasons for the reluctance to grant greater democracy to Hong Kong in the period after the Second World War were complex. They reflected the narrow interests of the business elite and the political passivity<sup>12</sup> of the Chinese population in Hong Kong; the fear on the part of the colonial administration of what decisions a fully elected Legco might come to in a colony which had deep divides between Communist and Kuomintang supporters and where the influx of refugees from China was considerable and their votes unpredictable; and most importantly, where the government of the PRC had made it clear that greater democratisation would be seen as an unfriendly act. If the British were uncertain of the political sympathies of the locals, the Chinese feared a demand for independence. It was a conjunction of interests between the British and the Chinese which made inaction the easiest option.

1.17 Nevertheless, if the formal changes were few, the conventions of consultation and local autonomy were significant. They determined Hong Kong's reputation as a city with an open, liberal and predictable system; a place in which the rule of law prevailed. It has been suggested that the presence of fully democratic processes in London created some imperative for liberality and a safeguard against 'irresponsible' rule in Hong Kong.<sup>13</sup>

1.18 A H Y Chen lists a number of significant changes in the way things were actually done in Hong Kong over the last hundred years. It appears that Britain applied its own liberal traditions and bureaucratic systems in an informal way despite the lack of interest in or pressure not to liberalise the constitutional arrangements in Hong Kong:

- From 1850 onwards there was a continuous enlargement of both the Exco and the Legco and an increasing number of their members were unofficial rather than official.
- As early as 1858, Legco proceedings were made open to the public and their records published.
- In 1858 government spending proposals were submitted to the Legco.
- In 1884, the first permanent Chinese member of Legco was appointed and the first unofficial members (2) of Legco were elected by the Hong Kong Chamber of Commerce.
- In 1896, the first unofficial members of the Exco were appointed.
- In 1926, the first Chinese member of Exco was appointed, following the general strike and boycott by Hong Kong workers in 1925-26.

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12 Chinese political traditions are hierarchical with an expectation of 'submission to political authority and a lack of rights consciousness'. Chen, op. cit., p. 97.

13 The Frontier, Submission, p. S208. This fact is very important in current discussions about the 'free and open' traditions in Hong Kong and it is central to the concerns expressed by many in Hong Kong today about what China as the central power might do to Hong Kong.

- From 1913 onwards, despite the unchanged constitutional arrangements, there was no attempt to use London's powers to disallow local ordinances.
- From 1958, Hong Kong's annual budget has not been referred to London.
- In the late 1960s, after civil disturbances, political reform at the municipal level was introduced, allowing for community involvement through city district offices (CDO).
- Consultation improved through the development of large numbers of advisory committees. In particular, changes occurred in the consultative arrangements for and priorities given to questions of labour relations and social welfare and public housing.
- There has also been a longstanding practice of the government not to push a proposal against the unanimous opposition of the unofficials on the Legislative Council.<sup>14</sup>

1.19 The system of government in Hong Kong has been broadly consultative rather than democratic. Under British colonial rule Hong Kong became an efficient, orderly and prosperous entrepot port, but apolitical both by design and inclination. After the communist victory on the mainland in 1949 and particularly up to 1967, Hong Kong found itself caught in the middle of the Cold War rhetoric between the United States and China over the status of Taiwan. Britain sought to remain aloof from the arguments, to keep the status of Hong Kong out of the equation, and consequently refrained from allowing any overt political expression in the colony which might have reproduced the Communist/Kuomintang factions in the territory. Two million refugees had poured into Hong Kong after the communist victory. The British minister responsible for Hong Kong, Mrs Judith Hart, told the House of Commons in 1967:

Hong Kong is in a completely different position from any other of our colonies. For international reasons alone, there are problems in planning for the usual orderly progress towards self-government. Because of Hong Kong's particular relationship with China, it would not be possible to think of the normal self-government and not possible, therefore, to consider an elected Legislative Council.<sup>15</sup>

1.20 Hong Kong did not figure highly in the British consciousness; questions or statements in the House of Commons were rare<sup>16</sup> and it was a matter dealt with by junior ministers. After the Korean War and the independence of Malaya, its strategic importance to Britain declined. In 1958, the naval dockyard in Hong Kong was closed. In 1962 the *Commonwealth Immigrants Act* and in 1981 the *British Nationality Act* restricted right of abode in Britain, closing off the ability of colonial subjects to gain citizenship in Britain on

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14 Chen, op. cit., pp. 80-81.

15 Welsh, op. cit., p. 465.

16 A question on the fire in the Tung Tau squatter camp in 1952, a statement by Profumo on employment conditions in 1958; a grudgingly agreed to debate limited to an hour and a half on the future of Hong Kong in 1963; a question on the extension of democracy in 1965; and a half hour adjournment debate in 1967. Welsh, op. cit., pp. 453-465.

the basis of their colonial status. Few Hong Kong citizens qualified under the new rules. Withdrawal combined with benign neglect.

1.21 China's proximity and China's history loomed large in Hong Kong; periods of upheaval between 1950 and 1976 had an impact on the territory. At times the disturbances in China<sup>17</sup> spilt over into Hong Kong but they also had the effect of distracting China from any concern with the status of Hong Kong. Rapprochement with China after President Nixon's visit in 1972 and the emergence of Deng Xiaoping after the death of Mao in 1976, which heralded both greater stability after the Cultural Revolution and the beginnings of economic reform, brought Hong Kong's position to the fore. The Chinese representative on the United Nations Committee on Decolonisation told the Committee in 1972:

The question of Hong Kong and Macao belong to the category of questions resulting from the series of unequal treaties which the imperialists imposed on China. Hong Kong and Macao are part of Chinese territory occupied by British and Portuguese authorities. The settlement of the questions of Hong Kong and Macao is entirely within China's sovereign right and does not at all fall under the ordinary category of 'Colonial Territories' covered by the declaration on the granting of independence to colonial countries and people ... the Chinese government has consistently held that they should be settled in an appropriate way when conditions are ripe.<sup>18</sup>

1.22 Chinese arguments were not countered by Britain and Hong Kong was subsequently removed from the list of colonial territories whose decolonisation could be monitored by the United Nations. It would appear that this acquiescence and the further decision on the part of Britain to return Hong Kong to China were part of a broader agreement between China and Britain to establish full diplomatic relations in March 1972.

1.23 The 1970s, under the governorship of Sir Murray Maclehoose, was a period of reform in Hong Kong, bringing the colony to a more suitable condition for any handover that was to take place. The Governor addressed the poor quality of housing through an extensive public housing program and developed the transport infrastructure. Reforms occurred in health and education. Most importantly for the certainty of the business climate in Hong Kong, Sir Murray tackled the pervasive and endemic corruption in the colony. In 1974, he established the Independent Commission against Corruption (ICAC) which proved to be highly effective in uncovering corruption in the police force in its initial period of operation. On the basis of the statistics, since its establishment, it would appear to have reduced the level of corruption and thereby enhanced Hong Kong's reputation as a place governed by the rule of law and thus a reliable place for business operations.

1.24 It was business concerns about the shortening leases in the New Territories that forced the question of the future of Hong Kong into open negotiation. In 1978 the Governor visited Beijing where Chinese leaders quietly made it clear they intended to resume sovereignty over the New Territories in 1997. Britain decided it was not viable to return the

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17 The Hundred Flowers Blooming Campaign in 1956, the Great Leap Forward in 1958 and the Cultural Revolution from 1966 until 1976 were all in their way destructive, causing outflows of refugees and disturbances in Hong Kong.

18 Quoted in Welsh, op. cit., p. 471.

leased New Territories alone as this area contained much of the basic infrastructure for Hong Kong, particularly its water supply. Formal negotiations began with the visit of the British Prime Minister, Mrs Margaret Thatcher, to China in September 1982.

1.25 At the same time as negotiations began with the Chinese, the British Government began a flurry of activity to consider the constitutional position of Hong Kong. The usual decolonisation practice of democratising the political structures<sup>19</sup> began only in 1984 with the Green Paper on constitutional change for Hong Kong. The Green Paper was to be the basis of consultation with the people of Hong Kong on the issue. It proposed reforms which would bring Hong Kong to a form of representative and responsible government over a period of seven years.

1.26 The decision to proceed on this path, although very late, was not unreasonable, even given the negotiations about the handover of sovereignty. Firstly, it was normal decolonisation practice. Secondly, it was within a framework where, even with the transfer of sovereignty, Hong Kong was to have the highest degree of autonomy, 'one country, two systems', so that the way in which it was governed should accord with its own wishes. Thirdly, the political reforms, aimed at preserving Hong Kong's autonomy, were entirely within the spirit of the Joint Declaration.<sup>20</sup>

1.27 The British took the view that the political structure of the territory was theirs to determine, in consultation with the people of Hong Kong, so long as they were the legitimate administrators of Hong Kong, up to 1997. The Chinese viewed the changes with suspicion - that the British were preempting the nature of the political shape of Hong Kong without regard for China's interests. In the mid 1980s Britain was persuaded by China to defer changes until after the drafting of the Basic Law and to agree that any changes should 'converge' with the Basic Law. In the course of this agreement, Britain appears to have modified its plans and its timetable for constitutional reform, delaying the fully elected Legco until an unspecified time after 1990.<sup>21</sup>

1.28 Britain's failure to create representative and responsible government in Hong Kong and to create a democratic ethos, including respect for human rights, well before any negotiations on the handover of the territory to the People's Republic of China, has left Hong Kong vulnerable. It was too late to make the changes necessary to ensure fully autonomous government in Hong Kong at a time when China and Britain were negotiating the handover and, therefore, the shape of Hong Kong. China rightly could claim an interest in the outcome of any political changes made at that time. More importantly, Hong Kong has been left with no experience of political democracy, little familiarity with its processes and conventions and has developed few structures or organisations which can operate effectively in the interests of their own preservation or development. Finally, China can point to the letter, if not the spirit, of the colonial arrangements and structures in Hong Kong, which have been largely

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19 British processes of decolonisation in other colonies followed a typical pattern of converting the legislature to a fully elected body, of making the executive responsible to the legislature and the executive led by a Prime Minister, the leader with the confidence of the legislature, appointed by a Governor whose powers are limited.

20 Annex 1, Section 1 of the Joint Declaration states: The Legislature of the Hong Kong Special Administrative Region shall be constituted by elections. The executive authorities shall abide by the law and shall be accountable to the legislature. See Appendix 6.

21 The details of the various Green and White Papers which were produced in 1984 and 1987 are set out in Chen, *op. cit.*, pp. 99-111.



unchanged up to 1984<sup>22</sup> and claim to be offering in the Basic Law a more democratic system than the British had offered.<sup>23</sup>

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22 See paragraph 1.11.

23 This is a claim that has little validity since the Chinese have instituted the Provisional Legislature.

