



THE
FUTURE
OF THE LAW IN
HONG KONG

Editor

RAYMOND WACKS

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Preface

LAWYERS tend to look backward. The doctrine of precedent, hallmark of the common law, dictates that what has gone before is what now should be. And this affords a measure of security and certainty in a precarious world.

Why then should a group of lawyers wish to abandon so congenial a philosophy to venture into the unfamiliar terrain of the 'future'? Why such folly?

The short answer is that, the title of this book notwithstanding, our purpose is not to foretell what lies ahead. While we acknowledge the need to reflect upon the prognosis of the common law in one of Britain's last colonies, we profess no special power of prophecy. There is much in Hazlitt's observation that if the world were good for nothing else, it is a fine subject for speculation. But we leave that for others.

Nevertheless, though eschewing any suggestion that we are legal soothsayers, we accept that there is a special responsibility cast on those who share a concern about the future to reflect upon how what is deficient in our law might be improved and what is good, preserved.

Hong Kong stands at an uncertain stage in its history. The future of this extraordinary society defies simple prediction; several imponderables hang like so many question-marks above the territory, not the least important of which is the future of the People's Republic of China itself. But the temptation to draw facile conclusions from present developments in China must similarly be resisted. Apart from the obvious perils of generalizing from what is still a volatile state of affairs, there is every reason to suppose that significant political changes await both Hong Kong and China in the years before and after 1997.

Though the essays in this collection attempt to look into the future, the audacity of such an enterprise would be even further compounded were it not based on a consideration of the present law and, where appropriate, its history. The subjects considered in some chapters have called for a more detailed discussion of this kind than others. It is hoped that even readers familiar with the current law might find this analysis useful.

The contributions cover several branches of the law. It therefore seemed sensible to ensure that each chapter should be capable of being read in isolation. Cross-references are made in the appropriate places, but this has been limited to instances where it was thought helpful. In the latter case, important articles of the Draft Basic Law, for example, have been reproduced in more than one chapter. Life is probably too short (and certainly in Hong Kong, too frenetic) to expect readers to hunt the pages for the reference in question.

I am most grateful to the contributors, all but one of whom are colleagues in the Faculty of Law at the University of Hong Kong. And the one who is not escaped only recently. Meeting deadlines is the scourge of most writers; to ensure that fourteen colleagues do so is an invitation to discord. Yet there was none. All managed to endure my editorial badgering with apparent equanimity. At the time of writing, they still speak to me.

I wish also to record my gratitude to the secretarial staff of the faculty who processed so many of the words in this volume. I am particularly indebted to Mrs Monnie Lee, Secretary of the Department of Law, who, with her usual patience, charm, and efficiency saved me from certain insanity.

According to publishers' protocol, it is, once again, *verboten* for me to name Oxford University Press's editor whose eagle eye has remained undimmed even in the face of the questionable literacy of lawyers. She knows how much I (and the contributors) value her assistance.

The fate of Hong Kong is a matter of concern to many beyond the borders of the territory. Yet it is the people of Hong Kong whose future depends, in large part, upon whether the historic promise of the Joint Declaration is kept. And it is to them that this book is dedicated.

RAYMOND WACKS
May 1989

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Introduction

RAYMOND WACKS

At midnight on 30 June 1997 the British flag will be lowered in the colony of Hong Kong. It will become a Special Administrative Region (SAR) under the direct authority of the Central People's Government (CPG) of the People's Republic of China with the promise of a 'high degree of autonomy'.¹

The Hong Kong SAR will be vested with executive, legislative, and judicial powers including that of 'final adjudication'. The National People's Congress (NPC) of the People's Republic of China will enact a Basic Law for the Hong Kong SAR pursuant to Article 31 of the Constitution of the People's Republic of China.

The second draft of the Basic Law (referred to hereafter as BL) was published in February 1989. It is, in effect, a 'mini-constitution' for the future Hong Kong SAR and seeks to provide a constitutional framework for the maintenance of Hong Kong's present legal and economic system after 1997. Article 5 declares:

The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region and the previous capitalist system and way of life shall remain unchanged for 50 years.

Article 8 provides:

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for those that are inconsistent with this Law or have been amended by the legislature of the Hong Kong Special Administrative Region.

1. The Joint Declaration of the Government of the People's Republic of China and the United Kingdom of Great Britain and Northern Ireland on the Question of Hong Kong, 26 September 1984, 23 ILM (1984), Annex I, Section II.

The interpretation of the Basic Law will be in the ultimate hands of the Standing Committee of the NPC which also has the power to amend it.²

The philosophy of 'one country, two systems', first adumbrated by Deng Xiaoping in 1982, has encountered a fair degree of predictable cynicism in Hong Kong which is not easily dislodged by the formal undertakings contained in the Sino-British Joint Declaration of 1984 or the present draft of the Basic Law. Yet in the face of both the vicissitudes of politics and the fragility of the promises of politicians, constitutions afford the most palpable (or, at any rate, the least precarious) expression of hope in the future arrangement of power. And if it is replied that, in the absence of genuine political will, such documents are not worth the paper they are written on, one is bound to ask what realistic alternatives exist.

The prognosis for Hong Kong's future turns on numerous factors. Developments both locally and in China, even before the transfer of sovereignty, suggest an increasing volatility that renders predictions decidedly risky. Adaptations to the new order are already evident in Hong Kong. In particular, the prospects of Chinese rule have generated a growing political consciousness that has been singularly absent since the territory's acquisition by Britain in 1841. Far more significant rumblings are audible in the mainland. The huge task of 'modernization' undertaken by China's present leaders is likely to bring unavoidable political turbulence in its wake.

Given only these more obvious factors it would be folly to attempt to prophesy Hong Kong's future. Nor is that the task of this book. We have sought merely to examine possible directions the law might take in each of several areas selected for analysis. In Part I certain fundamental features of the legal systems of Hong Kong and China are described. It is hoped that the essays in this section of the book will provide a helpful backdrop against which to evaluate the specific aspects of the law which are discussed in Part II.

The subjects chosen for analysis are, needless to say, a function of the interests and expertise of the contributors to this collection; the selection is intended to be neither comprehensive nor exhaustive. To set objectives of that kind would have been pointless, and impossible to realize. Instead, the authors have followed a simple brief: to

2. See, in particular, Articles 17 and 18 of the Draft Basic Law, referred to hereafter as BL 17, BL 18.

examine the most significant features of the present law and to consider how the law might change either as a consequence of the transfer of sovereignty in 1997 or entirely independently of it.

But any simplicity is deceptive, not only because of the perils of prediction already mentioned, but because of the unparalleled anguish and insecurity that will precede and accompany Hong Kong's transition from a tiny capitalist enclave to an uneasily schizophrenic existence as a region of the world's largest socialist state. This process is a complex phenomenon. The forces of progress and conservatism are present in all social groups. But in Hong Kong today, the inherent tension between them often assumes a somewhat enigmatic nature. Pressures for the preservation by legislation of Hong Kong's present legal system emanate both from local entrepreneurs (who fear meddling by China after 1997) and from the Chinese government (which is anxious to inherit the successful city-state in as pristine a form as possible). Against this 'unholy alliance' the voices of those in Hong Kong who clamour for the introduction of democratic government are all but drowned out. It is, in this extraordinary environment, far from safe to place bets on the destiny of Hong Kong's law.

Nor does the complexity end there. Hong Kong receives, and for 50 years after 1997 will continue to receive, the common law. BL 159 states, *inter alia*:

Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be inconsistent with this Law. If any laws are later discovered to be inconsistent with this Law they shall be revised or cease to have force in accordance with the procedure as prescribed by this Law.

Apart from the constitutional difficulties associated with this provision³ and the theoretical problems of validity, continuity, and legitimacy to which it gives rise, developments in England and, to a lesser extent, other common law jurisdictions will influence the law and the legal system in Hong Kong both before and after 1997. Thus, to take only one example, which is examined in Chapter 8, Hong

3. See Peter Wesley-Smith, 'The Legal System and Constitutional Issues' in Peter Wesley-Smith and Albert H.Y. Chen, (eds.) *The Basic Law and Hong Kong's Future* (Hong Kong, Butterworths, 1988), pp. 174-6.