

# The New Legal Order in Hong Kong

*Edited by Raymond Wacks*



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# Contributors

**Douglas Arner** is Sir John Lubbock Research Fellow in International Capital Markets at the University of London's Centre for Commercial Law Studies and is an honorary lecturer in the Faculty of Law of the University of Hong Kong. He has published several articles in the field of international financial law, and is a legal consultant to the European Bank for Reconstruction and Development.

**Janice Brabyn** is a Lecturer in the Department of Law at the University of Hong Kong. She has published a number of articles in the fields of criminal law and evidence and has a special interest in the subject of extradition.

**Anne Carver** is a Senior Lecturer in the Department of Professional Legal Education at the University of Hong Kong. Her principal areas of expertise are commercial and company law. Her book *Hong Kong Business Law* is now in its third edition.

**Felix Wai-hon Chan** is an Assistant Professor in the Department of Professional Legal Education at the University of Hong Kong. He was formerly in practice with a major Hong Kong firm of solicitors and specialises in commercial and shipping litigation.

**Albert Hung-yea Chen** is a Reader in Law and Dean of the Faculty of Law of the University of Hong Kong. He has published widely in the field of public

law. His most recent books include *An Introduction to the Legal System of the People's Republic of China*, (1998) and *The Rule of Law, Enlightenment and the Spirit of Modern Law* (1998). He is co-editor of *General Principles of Hong Kong Law* (1999) and of the Hong Kong Law Journal.

**Anne Shann-yue Cheung** is an Assistant Professor in the Department of Law at the University of Hong Kong. Her research deploys cultural and sociological perspectives in exploring legal issues and has published in the fields of language rights and cultural questions. She is currently pursuing a doctorate at Stanford University on the subject of press freedom and self-censorship.

**Wilson Wai-shun Chow** is an Assistant Professor in the Department of Professional Legal Education at the University of Hong Kong. He practised briefly as a solicitor. His research interests include trade union and labour law and he is editor of *Hong Kong Management and Labour: Continuity and Change* (1999).

**Richard Cullen** is Professor and Head of the Department of Business Law and Taxation at Monash University in Melbourne. In 1998 he was a Visiting Fellow at City University of Hong Kong Law School. He has published widely in the areas of tax law, public law and media law.

**Fu Hualing** is an Assistant Professor in the Department of Law at the University of Hong Kong where his principal teaching and research interests are criminal justice and law and administration. He is co-author of *Media Law in the PRC* (1996).

**Li Yahong** is a Research Fellow in the Department of Law at the University of Hong Kong. She has published a number of articles on various aspects of Hong Kong, Chinese and American law.

**Katherine Lynch** is an Associate Professor in the Department of Law at the University of Hong Kong where she specialises in corporate law and dispute resolution. She previously practised in the area of commercial and civil litigation in Canada. She has published in the field of property law, company law, international arbitration and dispute resolution. She is co-author of *Hong Kong Company Law: Cases, Materials and Comments* (1997).

**Roda Mushkat** is a Reader in Law in the Department of Law at the University of Hong Kong where she specialises in public international law and has published widely in the areas of refugee law, international environmental law, and human rights, including *One Country, Two International Legal Personalities: The Case of Hong Kong* (1997).

**Stephen Nathanson** is an Associate Professor in the Department of Professional Legal Education at the University of Hong Kong. He has designed several professional legal education programmes in Canada and England, and is a Professor at the College of Law in London where he assisted in the design of the first Bar Vocational Course. He has published widely on the subject of curriculum reform, including *What Lawyers Do: A Problem-solving Approach to Legal Practice* (1997).

**Joseph Norton** is Sir John Lubbock Professor of Banking Law at the University of London's Centre for Commercial Law Studies, and James L Walsh Distinguished Faculty Fellow and Professor of Law at the SMU School of Law in Texas. He is currently a Vice-Chancellor's Distinguished Faculty Professor at the University of Hong Kong. He has published more than 30 books and 100 articles in the field of banking, finance and business law.

**Carole Petersen** is an Associate Professor in the Department of Law at the University of Hong Kong. She has published articles in the field of human rights law, women and the law, and anti-discrimination law. She is a member of the editorial committee of the Hong Kong Law Journal.

**Bart Rwezaura** is a Senior Lecturer in the Department of Law at the University of Hong Kong. He has published widely in the field of family law and change, on children's rights and culture, and is a member of the editorial committee of the Hong Kong Law Journal.

**Shen Jianming** is Visiting Professor of Law at St. John's University School of Law and an Assistant Professor of International Law at Peking University. He was formerly a Research Fellow in the Faculty of Law at the University of Hong Kong. His principal research interests lie in the field of public international law.

**Judith Sihombing** is a Senior Lecturer in the Department of Law at the University of Hong Kong. She has published widely on land law, conveyancing and commercial law, including *Goods: Sales and Securities*, now in its third edition, and is co-author of *Hong Kong Conveyancing: Law and Practice* (1993).

**Benny Yiu-ting Tai** is an Assistant Professor in the Department of Law at the University of Hong Kong where he specialises in constitutional law.

**Anna Yick-man Tam** is an Assistant Professor in the Department of Law at the University of Hong Kong. She specialises in the field of company law. Prior to joining the University she was a solicitor with a major Hong Kong law firm. She is co-author of *Hong Kong Company Law: Cases, Materials and Comments* (1999).



**Raymond Wacks** is Professor of Law and Legal Theory at the University of Hong Kong. He has published widely in the fields of privacy and legal theory. He is a former Head of the Department of Law and Editor of the Hong Kong Law Journal. His recent books include *Privacy and Press Freedom* (1995). The fifth edition of his book *Jurisprudence* is imminent.

**Peter Wesley-Smith** was, until recently, Professor of Constitutional Law at the University of Hong Kong and Editor in Chief of the Hong Kong Law Journal. His books include a popular primer on the Hong Kong legal system, a text on the territory's pre-1997 constitutional and administrative law, and *The Sources of Hong Kong Law* (1994). He retired early and now lives in Australia.

**John Whitman** is a Lecturer in Accounting at the School of Business at the University of Hong Kong where his principal research interest is the regulation of stock markets. He is a Fellow of the Hong Kong Society of Accountants.

**Zhang Xianchu** is an Assistant Professor in the Department of Law at the University of Hong Kong where he specialises in Chinese domestic and foreign economic laws. His research interests include company law and the regulation of financial markets. He is an editor of and contributor to *Introduction to Chinese Law* (1997).

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# Introduction

*Raymond Wacks*

In 1989, to mark the twentieth anniversary of the University of Hong Kong's Faculty of Law, a volume of essays was published.<sup>1</sup> The book was an attempt, if not to prophesy, at least to contemplate, the likely development of our legal system in the decade that was about to unfold. Those ten years have now passed. The constitutional personality of Hong Kong has, of course, been transformed from British colony to Special Administrative Region (SAR) of the People's Republic of China (PRC). And, perhaps less portentously, the Faculty of Law now commemorates its thirtieth birthday with this attempt to reflect on the consequences of our new status. What are its effects on our law and legal system? Can the improbable doctrine of 'one country, two systems' be made to work? What is the prognosis for the common law in this uncertain environment? Are signs of change already evident in specific branches of the law? These, and many other, questions are the stuff of the pages that follow.

The legal controversy currently enveloping Hong Kong (concerning the right of abode and the referral of the matter for interpretation to the Standing Committee of the National People's Congress) will have faded by the time these words are published. Indeed, it is not unlikely that it will have been

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<sup>1</sup> Raymond Wacks (ed), *The Future of Law in Hong Kong* (Hong Kong: Oxford University Press, 1989). For a contemporaneous glance backward at the previous decade, see Raymond Wacks (ed), *The Law in Hong Kong: 1969-1989* (Hong Kong: Oxford University Press, 1989).

overshadowed by new calamities that arise as the fledgling SAR learns to fly. The issue nevertheless raises certain fundamental questions about the future of the rule of law in Hong Kong, and is discussed in some of the chapters in this book. In the earlier volume, I asserted that in the face of the vicissitudes of politics and the fragility of politicians' commitments, constitutional guarantees represent the most palpable, or at any rate the least precarious, expression of hope in the arrangement of power. But, I would now wish to stress the obvious need for a judiciary that strenuously resists political pressure and defends both of the rights enshrined in the Basic Law and the autonomy it vouchsafes to the SAR.

Understandable cynicism greeted the Basic Law's promise to Hong Kong of a 'high degree of autonomy'. Yet the acrimony that characterised the last phase of British rule has been replaced by an increasingly cordial relationship with China, facilitated no doubt by the sympathetic (some might say, quiescent) posture adopted by Chris Patten's successor, Tung Chee Hwa, towards the PRC administration. But doubts remain.

The facility with which our political system has been disengaged from its colonial yoke is not reproduced in the case of the legal order. Part 1 of this book considers a number of pressing problems that lie at the heart of the Basic Law's promise of legal continuity. The unequivocal declaration, in Article 8, that the 'laws previously in force . . . shall be maintained' attracts a host of questions about the scope, content, and consequences of post-1997 law. Does the Basic Law, for example, freeze the common law as it stood at midnight on 30 June 1997? Peter Wesley-Smith argues in Chapter 1 that such an interpretation would be 'disastrous' for our system. It would stultify the development of the law, by emasculating the judicial function. Yet this appears to be the 'excruciating dilemma' facing our judges: if the common law is to be confined to its pre-handover incarnation it will in time grow out of date. It will become a 'parcel of petrified precepts'.

Tracing the history of constitutionalism from the dawn of British colonial rule to the present, Benny Tai concludes in Chapter 2 that the people of Hong Kong have been deprived of the opportunity to decide their own fate. Since political freedom and autonomy are fundamental components of constitutionalism, the dependent status of the territory has stunted the growth of democracy. But, liberty, he argues, must be fought for, and this struggle is likely to continue within the framework of 'one country, two systems'.

One country, two systems, but not necessarily, as H L Fu demonstrates in Chapter 3, one country, two hostile systems. Nothing in our new constitutional dispensation implies an antagonistic relationship, especially since mutual legal assistance is vital to sustaining and promoting co-operation between the two 'equally autonomous legal regimes'.

This is a view echoed in the criminal context by Janice Brabyn in Chapter 4. She analyses the numerous difficulties besetting the path to the goal of international co-operation in respect of mutual legal assistance, extradition and

prisoner transfer to and from the SAR. She nevertheless concludes that the autonomy Hong Kong enjoys in this field provides grounds for optimism that these problems will be resolved.

Though it may be subject to the influence of Chinese law, our system needs space to breathe. Maximum autonomy is imperative. Hence in Chapter 5 Li Yahong suggests that the current distribution of legislative authority between the Central People's Government and the SAR, contains a number of grey areas that appear to vest excessive control in the centre. She proposes a move toward a federal structure that would facilitate greater law-making powers for Hong Kong.

Xian Chu Zhang considers the question of the mutual recognition and enforcement of intra-China arbitral awards in Chapter 6. After reviewing the features of the system of arbitration in both Hong Kong and the Mainland and their application, he stresses the need for urgent reform if a crisis is to be averted. Establishing a new mechanism for mutual enforcement presents not only legal, but also political challenges. But questions concerning the precise model for co-operation, the structure of the arrangement to be made, and the permissible extent of the application of certain judicial doctrines, cannot justify procrastination.

Less clear is the relationship between our law and increasingly significant customary international law. Shen Jianming, after examining in Chapter 7 the status of these norms in both United Kingdom and Chinese law, finds a disturbing ambiguity in the law of Hong Kong. He suggests that we have little to 'inherit' from the pre-1997 common law or the Chinese system, and urges instead that a fresh approach be adopted locally, one that recognises the prevalence of international law over conflicting municipal law.

Part 2 of the book examines various aspects of Hong Kong's bedrock — the economic system. The stock market is a central feature of the territory's financial anatomy, perhaps its heart. The continued integrity of the Hong Kong Stock Exchange, the world's seventh largest, requires a sophisticated regulatory framework that is able to ensure not only its credibility but, as Katherine Lynch demonstrates in Chapter 8, its very future. The recent economic turbulence in Asia has intensified the need for controls over a whole range of corrosive practices, including market manipulation, cronyism and corruption. She examines the pervasive problem of insider dealing in Hong Kong, surveying the law and policy that seek to check this complex, intractable phenomenon, proposing the comprehensive reform of both.

Similarly, it is critical that banking and capital markets be properly regulated if Hong Kong is to maintain its economic achievements. Joseph Norton and Douglas Arner demonstrate in Chapter 9 how domestic and international law in this field have developed dramatically over the past decade, and its consequences for legal education.

In Chapter 10 Anne Carver and John Whitman seek to show how government intervention in the stock market in August 1998 undermined the foundations of

the Basic Law. The authorities' argument that Hong Kong law did not apply to this activity has damaged the doctrine of legality and requires a reconstruction of the broad policy objectives of our constitution so that they might conform to social and economic realities.

There is, Anna Tam argues in Chapter 11, an urgent need for the reform of Hong Kong's company law. It is no longer appropriate to look to English legislation: its powerful sway is now inappropriate. The recommendations of the recent Companies Ordinance Review Report ought to be adopted. The Report exhorts the legislature to enact a comprehensive streamlining of the unwieldy, and sometimes anachronistic aspects of company law and practice. She acknowledges, however, that in Hong Kong's present economic climate, the business community may not be well disposed to expending energy on embracing a new corporations regime.

The Basic Law provides, to the relief of taxpayers, that Hong Kong's present revenue policy (low and simple) shall continue. Yet in Chapter 12 Richard Cullen argues that a plethora of forces appear poised to impose significant changes on this regime. In particular, economic factors, demography and economic turbulence — in Hong Kong, on the Mainland, and in Asia generally — are likely to result in new patterns of government spending and, hence, taxation. He shows how any reform of the tax system will have political consequences: more fiscal accountability leads inexorably to greater democracy.

The maintenance of Hong Kong as a free port is an equally crucial characteristic of its economic vitality. Rapidly expanding international trade with mainland China and Hong Kong has generated important changes to maritime and admiralty law in both jurisdictions. Moreover, as Felix Chan shows in Chapter 13, China's booming shipping industry is a catalyst in this process, drawing the two legal systems into closer interaction. He provides a comprehensive analysis of the principal features of this development which, like many branches of the Hong Kong law, has both shaped and been shaped by the extraordinary pace of economic growth.

The law of contract, backbone of commercial practice, has not been immune to this expansion. In Chapter 14, surveying the last three decades of this branch of the law, Judith Sihombing discerns two words that capture the 'retreat from rationality': unconscionability and uncertainty. The former has extended a helping hand to plaintiffs, while the latter is the consequence of the numerous developments she describes that have displaced much of orthodox contract theory and practice.

Nor has that specialist branch of the law of contract — labour law — failed to respond to the growing pains of Hong Kong's economic and political maturing process. These responses are considered by Wilson Chow and Anne Carver in Chapter 15. After describing employment and trade union law and the major changes in the legislative framework and their political repercussions, they wonder whether the architects of the new rules may be creating a 'legal dysfunctionality' between the expectations of the community and the legitimate

permitted end result'. They conclude that the Hong Kong model of the social contract for employment and trade union law affords a firm foundation for the future.

The shifts in Hong Kong and mainland China's social values are traced in the essays that form Part 3 of this volume. For Albert Chen, who in Chapter 16, chronicles the long evolution of Confucian legal culture, the Neo-Confucianism that informs many contemporary mainland debates contains the seeds of liberal democracy, the rule of law and the recognition of human rights. The enactment of social and economic reforms, he believes, is likely to engender significant moves toward greater constitutional transparency and legitimacy.

Perhaps the branch of the law that reflects most exquisitely the metamorphosis in culture and mores is family law: the normative mirror of private life. In Chapter 17 Anne Cheung considers the extent to which judicial attitudes have approached the settling of private family affairs in the public arena. Based on a study of two cases decided just before Hong Kong's return to China, she explores the 'narratives' adopted by the judges. Family harmony and social identity, she remarks, were achieved largely because the trials were conducted in Chinese by Chinese judges, and a 'discourse playing out the entire complex materials and sentiments of culture and tradition' was activated.

Yet, as Bart Rwezaura claims in Chapter 18, there are other agents transforming the family. Despite more than a century of dependence on English law and experience, there has in the last decade been a shift in official policy in tandem with the end of colonial rule. In particular, the enactment of the Bill of Rights Ordinance in 1991, and the extension to Hong Kong of two major treaties: the Convention on the Rights of the Child (in 1994) and the Convention on the Elimination of All Forms of Discrimination Against Women (in 1996), have had a profound impact on the law of marriage, parent and child, children's rights, and the law of divorce. He concludes that Hong Kong family law is likely to be dominated by concerns for gender equality and human rights within the family.

The elusive quest for equality continues, but, as Carole Peterson acknowledges, Hong Kong has pursued it with remarkable vigour. In Chapter 19 she recounts the recent legislative action that now prohibits discrimination on grounds of gender, pregnancy, marital status, family responsibility, and disability. In addition, sexual harassment and harassment on the grounds of disability have been outlawed. The establishment of the Equal Opportunities Commission to assist in enforcing the legislation is a key institutional feature of this regime which, while it stands in need of enlargement (to include the prohibition of discrimination based on race, age, and sexual preference), she regards as a significant achievement.

A less satisfactory picture emerges from Roda Mushkat's assessment in Chapter 20 of the government's compliance with another set of international norms — those that seek to protect the environment. After reviewing these standards and their application to Hong Kong, she argues that, while there is

the political will to halt the destruction of our environment, economic forces still appear to impede the adoption of a properly co-ordinated policy.

The preservation of Hong Kong's legal system is an indispensable requirement of almost all the reforms postulated in this book. The inculcation in our future lawyers and judges of the values embodied in the common law is a *sine qua non* of this process. Moreover, as Stephen Nathanson contends in Chapter 21, its achievement depends on the competence of our legal practitioners. Challenging orthodox models of legal education, he maintains that the solution lies in improving the quality of our teaching and curriculum.

How secure is our new legal order? The essays in this book, though they cover a large terrain and proceed from a variety of standpoints, do suggest that there are few grounds for pessimism. The common law is a hardy plant, difficult to uproot. The culture and traditions of our system, whatever its imperfections, seem destined to endure for the next ten years, and well beyond.

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