
History's marks on Hong Kong law: from British colony, to Chinese SAR

A Hong Kong's historically driven component culture

1 *The endowments of an international financial centre*

International financial centres, like internationally active trading ports, are outward looking. Their domestic prosperity depends on the ability to attract foreign capital, goods and the deals connected to them. Although the volume of solely domestic transactions may be dwarfed by that of transactions conducted with wholly foreign legs, it is the domestic institutional environment and available skills that draw in these funds, goods and deals. Since its creation in 2007, the Global Financial Centres Index has placed four cities with very different economic and political positions – London, New York, Hong Kong and Singapore – in the top four slots globally.¹ During this period, New York was also the domestic financial centre for the world's largest economy, while London served a like function for an economy with a ranking between sixth and eighth, and both Singapore and Hong Kong served domestic economies of negligible size whose GDP amounted to barely 10 per cent of the UK's. Thus, as international financial centres, both London and New York are divided: they are both national financial centres for their large domestic economies (of different sizes) and centres for activity that spans the globe without significant link to either the UK or the US domestic economy. Regardless of whether transactions in these cities are purely domestic, purely foreign or somewhere in between, they are drawn to the financial centre by an economic and institutional condition that reflects the institutional characteristics of the nation itself. In New York, it will be the American economy, institutions and laws, and in London, the corresponding support elements of the UK.² The same domestic institutions and laws facilitate

¹ Z/Yen Group, The Global Financial Centres Index, nos 1–13, 2007–13.

² London might be thought of as having four concentric circles in this respect, with the City of London serving first the UK domestic economy, second the EU internal market (whose

both domestic and purely foreign transactions. These respective sets of institutions and laws have developed within the larger context of the nation, received legitimacy from the power of that nation's state, and yet gained their support for international usage from and among persons based in other countries. While performing very similar functions, Hong Kong and Singapore present a dramatically different origin and composition. They inherited their legal systems from the British Empire, developed their international orientation as trade hubs of the same, and have achieved their status as leading financial centres significantly free of the (lacking) dimension of their domestic economies (which themselves are composed in good part of international financial services). Hong Kong, however, presents a geopolitical dimension not found in Singapore. Hong Kong was carved out of Chinese territory in 1841 and returned to it 156 years later, which means that Hong Kong – unlike Singapore – is hard pressed to present itself as the neutral 'Switzerland of Asia',³ but is very well placed to play the role of China's 'New York' – integrally tied both economically and politically to one of the largest economies in the world while separate from it and primarily outward looking.

Hong Kong serves the domestic economy of mainland China, yet its institutions did not spring from Chinese soil. This chapter will show how Hong Kong was built up as a colonial trading centre of the British empire, and Chapter 3 will show how, since the 1980s, it has reinvented its legal and regulatory framework to become the international financial centre of China employing mainly British tools. Moreover, the merely factual division between domestic and international found in New York and London becomes a real political boundary in Hong Kong under the 'one country, two systems' model.⁴ We are presented with the unique phenomenon of a foreign, offshore financial centre operating a British-origin legal system within the Chinese state. These characteristics endow Hong Kong with unique comparative advantages in serving as China's international financial centre. From its inception, Hong Kong was designed as a gateway between the local and the international and a component of a larger whole. It was built to be a gateway controlled by the British facilitating

financial institutions can legally operate in the UK), third Commonwealth member states (whose companies populate the UK stock markets), and finally the rest of the world.

³ Ben Steverman, 'Cashing in on the New Gold Rush', Bloomberg.com (12 November 2012).

⁴ This is enshrined in Article 5 of the Basic Law of the Special Administrative Region of the People's Republic of China ('Basic Law'): '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.'

trade in goods with China and after some modification now serves as a gate independent from (yet controlled by)⁵ Beijing facilitating both investment into China, and to a lesser extent outward-bound investment transactions. Although all international financial centres shape their laws and institutions to a certain extent as services to meet the needs of clients based outside the jurisdiction, Hong Kong has always known a government designed to be responsive to the needs of its international commercial activity.⁶ This characteristic is also shared by the fellow, former colony of Singapore, although Singapore's political, cultural and geographical circumstances present a very different picture than Hong Kong, which clearly serves the Chinese economy. In this regard, we can see that the analogy of Singapore as the 'Switzerland of Asia' does have some merit, whilst Hong Kong more closely resembles New York and London in legal stature and outlook. London is a financial centre first to Britain, then to Europe and finally to the world; New York serves first the United States and North America, then the rest of the world; Hong Kong is oriented first of all to China, then the remainder of Asia and finally to the global economy. Because it was built as a trade centre, has law originating from one of the world's most respected legal traditions, yet works within China as a Special Administrative Region, Hong Kong presents a package of structural and geopolitical factors that make it a more natural financial centre than any of its three peers. This is quite an endowment, but what has Hong Kong done with it? That is one of the questions this book has been written to answer.⁷ A good starting point in the project to understand whether Hong Kong has the measures necessary to successfully build on and address dangers from this inherited base is to understand the shape and content of the base: Hong Kong's socio-economic and legal structure in the context of the historical path by which its natural endowment was formed. That will be the function of this first chapter.

⁵ As will be discussed in following, 'control' arises first of all from the fact that China is Hong Kong's primary client for financial services, with the companies directly or indirectly controlled by the Chinese state constituting about 45 per cent of its market capitalization. Second, the Hong Kong constitution gives final power over its legislative enactments and judicial interpretation of its Basic Law to the Chinese 'National People's Congress' (see Articles 17 and 18 of the Basic Law). As such, Hong Kong is independent, but only up to a limit.

⁶ This characteristic would of course be shared by Singapore, although Singapore's current client base is more multilateral than that of Hong Kong.

⁷ As noted at the outset, this text is the outcome of a Public Policy Research Project funded by the Hong Kong Research Grants Council. The project, conducted from 2009 to 2012, was entitled 'Anatomy of a Financial Centre: A Systemic Analysis of Hong Kong's Legal and Regulatory Framework for its Securities Market'.

2 *Accidental haven with unintended consequences*

The Crown Colony and later Special Administrative Region of Hong Kong has, from inception, served as a component of a larger whole, providing a portal from one culture, economy and political system to another. Like other coveted, strategically important locations, the struggle for control over Hong Kong reflected the relative power of two nations – Great Britain and China – over time. Unlike most disputed territories, however, Hong Kong brought two dramatically different cultures into close contact, and eventually formed a deep bond of friendship between the two. While serving this function, the particular composition and governance structure of Hong Kong has amalgamated many aspects of British public administration and rule of law with Chinese culture, creating a unique form of civil society. Originally just another strategic port seized as the spoils of war, Hong Kong became a safe haven for millions of Chinese, who comprised nearly all of the British colony's population, and this occurred during some of China's darkest hours, times of occupation, revolution and restructuring. An imperial power of exploitation thus took on a relatively beneficent caretaker role for a large population of Chinese refugees who generally accepted – or, perhaps more accurately, did their best to ignore – British rule during the 150 years plus that it governed Hong Kong. It has been repeatedly observed that the non-democratic structure of the colonial management over the populous mirrored the various forms of paternalistic government found in China itself during the period.⁸ Yet although the Hong Kong Chinese found themselves in a government in which they had no say, they also experienced a form of authority that stressed law, individual rights and procedural mechanisms to protect those rights. The result was that the people of Hong Kong were presented with a general framework of government displaying extensive formal congruity with their authoritarian home in China, yet they were contemporaneously exposed to a very foreign ideology and social structure stressing rights and a proud exercise of the rule of law as standing above government authority.

Seen from the perspective of what economists and legal theorists call 'path dependence',⁹ the British chose an administrative caretaker structure, resembling the existing path in the Chinese Empire for a number of

⁸ See, e.g., Tsang (2004: 198–9). For further discussion of the scholarship on this question, see Goodstadt (2007: 218–22).

⁹ See North (1990: 93) for a discussion of the origins of this term.

reasons: it was a standard colonial format that they had employed at least since American independence, linguistic barriers made greater interaction with Chinese subjects extremely difficult, and the colonial managers consciously employed tools that could be translated quickly into the authority symbols of their subjects' native culture.¹⁰ For similar reasons, a judicial system with high independence and expectations of competence was introduced to administer a body of law introduced mainly through a targeted collection of ordinances that set out rules for public order and the protection of private property.¹¹ This was the English legal system adjusted for colonial administration and the only one the colonial power had at its disposal. It was introduced for this reason, not because Great Britain was preparing to school millions of Chinese in the Western legal tradition.¹² As discussed below, however, the unanticipated result has been the creation of a *Chinese* polity with a greatly English core in public matters and an economy that sets global standards for excellence according to a wide range of *Western* indicators.

In his text, *Capitalism with Chinese Characteristics: Entrepreneurship and the State*, MIT political economist Yasheng Huang has recently argued:

China's success has less to do with creating efficient institutions and more to do with permitting access to efficient institutions outside of China ... China is fortunate enough to have the most laissez-faire economic system at its doorstep. Hong Kong is a safe harbour for some of the talented Chinese entrepreneurs and an alternative to China's poorly functioning financial and legal systems. It is only a slight exaggeration to say that [the computer manufacturer] Lenovo benefited as much from the British legacy as from the grown opportunities within China itself. China is unique in that some of its capable entrepreneurs have the option of accessing one of the most efficient financial markets and legal institutions in the world.¹³

Leaving aside for the moment Huang's judgement that China's 'inefficient' institutions survive thanks to use of 'efficient' institutions just across the border, Huang does succinctly highlight Hong Kong's salient

¹⁰ For a discussion of these efforts, see Section C.3, below.

¹¹ These ordinances are discussed in Section C.1, below.

¹² This conception of the colonization was of course raised by some at the time as moral justification for British rule, but there is no evidence that it was ever taken seriously by the colonial administration or the Crown, particularly as the original, primary purpose of Hong Kong was to import opium into China and provide a base to allow the military to ensure that the Chinese government could not stop such imports. See the discussion in Munn (2001: 34–7).

¹³ Huang (2008: 6).

characteristics: safe harbour (it is 99 per cent peopled by 'immigrants' into Hong Kong and their offspring);¹⁴ on China's doorstep (it is linked economically and infrastructurally to Shenzhen, a Chinese city of some 11 million);¹⁵ laissez-faire (ranked the world's freest economy 20 years in a row);¹⁶ and efficient financial market (consistently ranked a 'global leader' among the world's financial centres).¹⁷ Yet Hong Kong also earns a prominent place in books with titles like *Asian Godfathers: Money and Power in Hong Kong and Southeast Asia*,¹⁸ because of the economic power and prominence of a small group of families, locally called 'the tycoons', as the following phrasing from Hong Kong's *South China Morning Post* exemplifies: 'Tycoons and their business empires pervade every corner of our city; their importance to the government in providing employment and tax revenue sometimes gives the impression that the playing field is tilted in their favour and that their actions and behaviour are governed by a different set of rules.'¹⁹ In addition, like many international financial centres, Hong Kong is seen as catering to the needs of multinational enterprises and foreign interests instead of the immediate needs of its own citizens.²⁰ Yet even today, many Chinese see emigration to Hong Kong as an alternative more attractive than remaining in China,²¹ where prosperity may indeed be arriving, but basic civil rights and their exercise are still uncertain. Thus Hong Kong is seen as orderly and efficient, a desirable haven for Chinese seeking a safer and more just society, yet accused by many of being unfairly twisted in favour of powerful interests.

There is also an important temporal axis to the shape of the Hong Kong economy: its function regionally and globally has changed in adaptation

¹⁴ As discussed below, Hong Kong Island was inhabited by about 2,000 fishers and farmers when the British arrived and now has a population of about seven million. Fittingly, its very name, 香港, means 'fragrant harbour'.

¹⁵ This is a figure for registered residents, as provided by the Shenzhen government on its website (<http://english.sz.gov.cn/gi> (accessed 15 March 2014)). As at 2013, unofficial estimates approached 16 million for all residences, registered and unregistered.

¹⁶ The Heritage Foundation (2014: 4). Hong Kong officially champions this laissez-faire position, although, as will be discussed in Section D.2, history shows that the Hong Kong government does intervene to guide the market and correct market failures, and has done so increasingly in recent years.

¹⁷ Z/Yen Group (2011, 2012, 2013). ¹⁸ Studwell (2007).

¹⁹ 'Richard Li Raid Sends out an Equality Signal', *South China Morning Post* (1 April 2010).

²⁰ See, e.g., Goodstadt (2007: 218–19).

²¹ Taking advantage of a judicial interpretation of the Basic Law that gave permanent residency to children born in Hong Kong, in 2011 approximately 40,000 mainland Chinese women took the extraordinary measure of travelling to Hong Kong to give birth, with effects so severe on the public health system that the practice was eventually banned. See

to the activities that China was able to perform, at times serving to replace the functions of a mainland China that was closed off to the world, and at other times supplementing a China that was less than efficient, much as Huang describes above. Following an initial period of slow growth,²² Hong Kong became the southern hub of British activity in China, connecting the treaty ports of the north with Malaysia and Singapore.²³ China was experiencing the decline of its Qing Empire, together with the many political and social woes that this brought,²⁴ and was a source of products for export and customers for imports, but not a serious competitor in international trade. Hong Kong grew into a thriving trading hub for import into and export from China. There was a chance that this could have changed during the short life of the Republic of China, but this period was also rocked by political unrest and finally collapsed into Japanese invasion.²⁵ During Japanese occupation, Hong Kong was once again under the same ruler as mainland China, but the city was stripped and looted, losing most of its population and economic activity.²⁶ Following the four years of post-War and Civil War in China, Hong Kong then entered into a 30-year period in which it came (along with Taiwan and Japan) to fill the void left in manufacturing and services as China retreated from the world.²⁷ When China reopened its doors for business in the 1980s, manufacturing then migrated out of Hong Kong into neighbouring Guangdong, and Hong Kong shifted its efforts towards logistics and finance. It appears that in 2013, the Port of Shenzhen overtook the Port of Hong Kong in volume processed,²⁸ and it remains to be seen just how much of this economic activity will permanently return to the mainland in the long term. Hong Kong's shift to finance, which is a central focus of this book, has led it to become one of the world's leading financial

Ella Lee, 'Public Hospitals May Act on Mainland Mothers', *South China Morning Post* (14 August 2012).

²² This period is discussed in detail in Section B.1, below.

²³ See, e.g., Tsang (2004: 57–8). ²⁴ See, e.g., Spence (1990: 167–91).

²⁵ See, e.g., Spence (1990: 267–83).

²⁶ See, e.g., Tsang (2004: 127–8), explaining that the population dropped from approximately 1.5 million to approximately 600,000 and that hundreds of corpses were collected weekly from the streets, having died of both starvation and violence at the hands of the occupation troops.

²⁷ Tsang (2004: 162–7); Goodstadt (2007: 97–103).

²⁸ Zhong Nan, 'Shenzhen Set to be World's 3rd-largest Container Port', *China Daily* (22 October 2013) ('Container flow through Shenzhen reached 17.28 million 20-foot equivalent units of containers in the first nine months, while Hong Kong handled 16.34 million TEU of containers, according to data released at the 2013 China (Shenzhen) International Logistics and Transportation Fair').

centres. One of the underlying questions posed in this book is whether Hong Kong is undertaking what it can to ensure that such financial activity does not eventually migrate back to Shanghai, the historically prominent financial centre of China.

During its various manifestations as *entrepôt*, manufacturing hub and financial centre, Hong Kong has received both high accolades for efficiency and criticism for inequality. What aspects of Hong Kong's character attract such strong praise and disconcerting criticism? The key appears to lie in the colonial 'caretaker structure' of Hong Kong's political and economic system and its simultaneous internalization of the British system of rights and procedural justice at the level of public discourse. The former arrangement fed directly into a *laissez-faire* economy in which governmental and economic leaders are free to give distant interests, whether they arise in London or in Beijing, a central place in policy making, potentially ignoring negative local impact. The latter, however, provides a fair system of public law and efficient avenues for the resolution of private disputes within this open-ended economy. Just as strategic and economic goals have been imported from afar through channels of power and finance, so too has law been brought in through statutory linkage and subsequent adjustment. Through the century and a half of the colony's link to the English legal system, principles of English law gradually merged into Hong Kong Chinese culture to synthesize a truly unique blend of rights-based and relationship-based dealing. Hong Kong's judicial system has continued to operate well after the SAR's return to China, and receives praise from disinterested observers for the quality of its adjudication.²⁹

Institutional quality, whether that of a colonial trading *entrepôt* or an international financial centre, is judged by meeting the needs of merchants on the one hand or the international financial community on the other, regardless of whether this function might override and neglect some needs of local citizens.³⁰ Nevertheless, the private lives of most Hong Kong citizens would have had little interaction with these characteristics

²⁹ For example, the World Justice Project (WJP) Rule of Law Index 2012–2013 ranked Hong Kong above France, Belgium and the United States for access to civil justice. WJP (2013: 27).

³⁰ At the level of policy making, prosperous trade or financial activity would theoretically bring with it jobs and increased tax revenue that help all residents. Problems can arise, however, when a zero-sum context occurs, such as the use of space to build offices for international financial firms, which in turn makes that available for housing scarce, driving up the cost of living for average residents.

of colonial government because they rarely came into direct contact with its institutions.³¹ They could live largely free of the colonial master while also being free of the various ills that affected life on the mainland. Public and private co-existed without significant demands between the two, thanks to the caretaker structure, and as will be discussed in more detail below, the ability of this caretaker structure to function throughout Hong Kong's history has greatly depended on a partnership between government and business, in which important governmental functions were either delegated directly to, or performed in close cooperation with, leading merchants, much as guilds functioned in medieval Europe and pre-communist China. Hong Kong's legal system both facilitated and reflected this basic structure, with a core of local ordinances producing the minimum order necessary for Hong Kong to function, and the courts importing law on demand through a colonial network of courts that generated a rich corpus of case law.³² Moreover, as will also be discussed in the following, when this British system was applied to the actions of the colony's local inhabitants, the system's caretakers attempted to adjust it to the new environment in skilful and interesting ways.

B Forming Hong Kong's 'caretaker' government model

1 *Cutting in the middlemen*

Aside from the obvious fact of British rule over a primarily Chinese population,³³ the development of Hong Kong's socio-economic and legal systems was greatly shaped by external events that channelled immigration into the colony and encouraged these immigrants to remain in Hong Kong. This has been summed up with the dark expression that 'trouble in China was a "god-send" for Hong Kong'.³⁴ This was particularly true because, given the language barriers and the ratio of a few British colonial

³¹ Law Wing Sang makes the interesting argument that the missionary schools in Hong Kong provided a cultural basis through which the Chinese were able to understand and accept the British institutions. Law (2009: 31–56).

³² The application of English Common Law in Hong Kong will be discussed in Section C.3.

³³ The European population of Hong Kong ranged from a couple of hundred in the early years to a couple of thousand in 1870. See Munn (2001: Figure 2.1).

³⁴ Munn (2001: 49). This characteristic is shared with another political area constituted by refugees: the United States. The United States received wave after wave of immigrants with different sorts of characteristics, depending on the country they were fleeing and the particular kind of trouble (religious, economic or political) that their country of origin was suffering from.

administrators to thousands of Chinese subjects, events forcing emigration from the mainland of a critical mass of influential Chinese who were able to understand the English language and the needs of colonial officials was a key to the colony's survival.³⁵ The type and extent of 'trouble in China' greatly determined the type and extent of emigration from China to Hong Kong, which then determined both the need for, and possibility of founding, an informal governing body of Chinese subjects in the colony. Further, the presence/absence and strength/weakness of the Chinese elite co-opted into government service had a significant influence on the development of Hong Kong's legal system as it progressed from a group of sparsely populated Guangdong fishing villages to a metropolitan area of about seven million.³⁶ As will be explained below, the development of Hong Kong's economy and legal system to this day generally follow the paths cut for them during Hong Kong's first half-century as an unruly entrepôt in which colonial administrators came to depend on a merchant elite to govern the safe haven on the edge of a decaying Chinese Empire.

The setting and circumstances of Hong Kong's founding and first decades were unusual in many ways. Hong Kong was a strategically unimportant piece of territory that Britain seized from a very large and proudly hostile Chinese Empire through military force in retaliation for Chinese officials confiscating 20,000 chests of illegal opium from British merchants in Guangzhou.³⁷ The initial, legal acquisition of Hong Kong in January 1841 was through an act of insubordination directly contravening Britain's official aim of acquiring trading access far to the north, near Shanghai, specifically one of the islands in the Zhoushan group.³⁸ The British Superintendent of Trade, Captain Charles Elliot, who negotiated the Chuenpi Convention (which was never ratified) providing for the acquisition of Hong Kong, was removed from office.³⁹ Because neither

³⁵ Goodstadt (2005: 98), Munn (2001: 372), Sinn (2003: 82), Tsang (2004: 68).

³⁶ The estimate of 2,000 original inhabitants is endorsed by Sinn (2003: 10), although Munn is more hesitant to specify an exact figure (2001: 69). The current population is provided on an up-to-date basis by the HKSAR Census and Statistics Department at www.gov.hk.

³⁷ Spence (1990: 154). In part to support its colony of India, and in part because China did not want to purchase British goods and this led to undesirable outflows of silver, the British East India Company brought opium into China, sold it locally and used the proceeds to purchase items such as tea, silk and porcelain, which it then exported to Europe. Given the effects of opium on Chinese society and on its balance of payments, China outlawed the opium trade in 1838. See Spence (1990: 151–66), Munn (2001: 24–31), Ferguson (2004: 139).

³⁸ Tsang (2004: 11).

³⁹ Lovell (2011: 168–78) provides a detailed history of this question, in which she cites both Queen Victoria and Prime Minister Lord Melbourne as seeing benefits in Elliot's

China nor Britain was satisfied with the Chuenpi Convention, they both repudiated it; hostilities resumed, during which Britain showed China that the balance of power in this clash of civilizations was very much in its own favour.⁴⁰ Britain inflicted high casualties on the Chinese while quickly seizing Zhoushan, Xiamen, Ningbo and Shanghai and then besieging Nanjing.⁴¹ The resulting Treaty of Nanjing, signed on 29 August 1842, gave Britain, among other things, five treaty cities: Guangzhou, Fuzhou, Xiamen, Ningbo and Shanghai.⁴² Hong Kong was also added to the list of acquisitions, but Munn argues that this was only because a significant maritime settlement sprang up in the short period between January 1841 and mid 1842 under artificial conditions, and this settlement could not be reasonably returned to China.⁴³ Hong Kong's situation was less than optimal:

Official encouragement [by Charles Elliot], the role of Hong Kong as a base of war operations in 1842, the air of permanence fostered by rapid immigration, land grants, extensive public works all encouraged merchants to invest heavily in the island in the belief that it was to be the main emporium for British trade in China. As the dust began to settle ... [there was] a mixed mood of tense anxiety and feverish optimism about the island's future role. Finally, sickness, recession and crime descended on Hong Kong during the latter part of this period, and the realization grew that, with the opening of five treaty ports, Hong Kong risked becoming superfluous to British interest provoked an equally extreme disillusion with the new colony ... The 'respectable and affluent Chinese merchants' returned to Canton. The great stone warehouses built by European firms suddenly emptied.⁴⁴

Munn argues that Hong Kong's unusual beginning as a disputed acquisition outside of British war aims in the shadow of more attractive northern treaty ports led to the colony lacking the kind of educated and permanent citizenry on which solid social orders usually depend, and influenced the choice to impose English law in Hong Kong. The early function of the colony was 'as a depot for two semi-monopolistic and still technically illegal enterprises: the importation of opium into China and the traffic in

moderate position towards China, and describes how *The Times* managed to whip up nationalist sentiment in favour of repudiation of the Convention and further war. Also see Spence (1990: 158), Tsang (2004: 12), Munn (2001: 25).

⁴⁰ 'In the engagements of January to March [1841], the *Chinese Repository* estimated, the Qing has lost more than 2,000 men; the British had suffered one dead of his wounds, and three killed by their own weapons.' Lovell (2011: 139).

⁴¹ Spence (1990: 159), Munn (2001: 26). ⁴² Spence (1990: 160–2).

⁴³ Munn (2001: 32). ⁴⁴ Munn (2001: 33).

labourers out of China'.⁴⁵ As for the growing Chinese population, Sinn observes that 'besides outright pirates and outlaws, it is safe to speculate that the early arrivals were mostly marginal to Chinese society'.⁴⁶ Law's historical investigation yields a similar opinion.⁴⁷ Colonial officials therefore faced an economic base that tended towards criminality, a disease-prone European community that remained very small⁴⁸ and a population of uneducated, migrant Chinese labourers with very few sophisticated members to whom the colonial government could communicate its intentions and policies.⁴⁹ As the immigration of Chinese labourers quickly eclipsed the small number of people inhabiting the fishing and farming villages pre-existing British rule, the colonial government came to look at the original state of Hong Kong as a 'barren island', mainly uninhabited, which helped justify a blanket application of English law. British colonial procedure at the time was that when an existing people were conquered, the colonial administration would try to accommodate their laws and customs, but when a barren territory was settled, the colony could be governed by English law because the settlers saw themselves as English subjects. This practice had evolved, likely under the pressure of practical necessity, from the formally correct position laid down by the Court of Common Pleas in 1608,⁵⁰ whereby the royal prerogative to impose English law was absolute over people conquered by that king, a practice still used today by many jurisdictions under war powers, but did not give the Crown power to 'alter the law governing the rights of free Englishmen'.⁵¹ To this situation was added the pressing political risk of the colony's proximity to a very proud Middle Kingdom, in which, as Sinn puts it, there was an 'almost universal reluctance among Chinese officials and civilians alike to accept the fact that Hong Kong was foreign territory'.⁵² Moreover, nearby Portuguese Macao, in which Chinese and Portuguese law found an untidy dual application, presented exactly the kind of example that the British wanted to avoid.⁵³ These factors fed directly into the fundamental character of the colony's legal system. Although Charles Elliot had declared in

⁴⁵ Munn (2001: 23). ⁴⁶ Sinn (2003: 10). ⁴⁷ Law (2009: 15–17).

⁴⁸ Munn (2001: 59–60). ⁴⁹ Tsang (2004: 50); Munn (2001: 71).

⁵⁰ See *Calvin's Case* (1608) 77 ER 1308.

⁵¹ McPherson (2007: 13–15, 15). This traditionally solid prerogative of the conqueror ran of course contrary to practical usage, in which accommodations to conquered people and use of English law for English settlers both fed stability. Thus in practice the distinction was blurred to an extent that resembled reversal. See McPherson (2007: 14–15, 36, 319) and also Munn (2001: 56, 163).

⁵² Sinn (2003: 5); Tsang (2004: 15). ⁵³ Munn (2001: 40, 168)

January 1841 that the local Chinese would be 'governed according to the laws and customs of China, every description of torture excepted',⁵⁴ after his removal and replacement, London instructed Governor Pottinger to demand "unqualified and complete" British jurisdiction' over Hong Kong and the Chinese residing within it.⁵⁵ Whilst, as explained above, this did comply with seventeenth-century case law because Hong Kong was 'conquered', the unusual policy for Britain in the meantime had become to apply indigenous law to a conquered population, and the reversal had much to do with Hong Kong's unusual circumstances.

Application of English law was not always something that Hong Kong could boast about. During the first decades of the colony, its government imposed this law in an often discriminatory and exaggeratedly harsh manner.⁵⁶ This had a number of causes. The Chinese inhabitants, who, as mentioned above, tended to spring from the margins of Chinese society, found little real connection with their colonial masters, yet retained what family and social ties they previously had within China. The lack of communication, negligible common understanding and an absence of all loyalty between most of the Chinese subjects and the British meant that reciprocal mistrust was high.⁵⁷ This situation led to an enduring fear of political unrest in the colony and a siege mentality among colonial officials.⁵⁸ As Governor MacDonnell expressed in an 1867 letter:

Here there is but a handful of Europeans on a small Island which contains an enormous amount of wealth, and inducement for plunder, surrounded by a dense Chinese fluctuating population in the proportion now of at least 60 Chinese to one European, and all placed within a few miles of the shore of a vast Empire between which and this Colony there cannot be a less interchange of population by arrivals and departures than 1,500 per day.⁵⁹

Colonial officials resorted to strong disciplinary and control methods, both out of a lack of better means and because they reasoned that such punishments were appropriate for the Chinese culture and character,⁶⁰ given that, at the time, punishment in China was often severe and

⁵⁴ Sinn (2003: 8); also see Tsang (2004: 46); Munn (2001: 163).

⁵⁵ Sinn (2003: 8); also see Munn (2001: 168). ⁵⁶ Tsang (2004: 47).

⁵⁷ See, e.g., Sinn (2003: 10–12). ⁵⁸ Munn (2001: 327–8); Goodstadt (2005: 33).

⁵⁹ Letter of Sir Richard Graves MacDonnell to Buckingham, dated 29 October 1867, cited in Munn (2001: 342).

⁶⁰ Sinn (2003: 11); Tsang (2004: 47–50); Munn (2001: 216–18, 364); Munn refers to MacDonnell's 'self-preservation' policies as 'little less than a campaign of terror against sections of the Chinese population' (2001: 330).

arbitrary. Thus English severity was arguably at least in part an educated attempt to adopt a form of government the Chinese would culturally accept. The Hong Kong solutions included floggings and beatings with bamboo rather than imprisonment or fine because, as historians of the period note, prison would have been a welcome comfort for many of the immigrants and most were too poor to fine.⁶¹ Pre-emptive monitoring was also used. First a curfew⁶² and then a registration system⁶³ were set up to control the movements of the Chinese and keep track of their numbers. Later a practice of branding and banishing Chinese criminals was also used.⁶⁴ The poverty of such draconian methods was well displayed in their ineffectiveness, and led directly to preferred use of a method that became the salient characteristic of the Hong Kong legal system: intermediation between the government and the bulk of the population through a network of Chinese elites.

This in effect led to an informal government of Chinese collaborators that provided many basic social services to the Chinese population and helped with settling all but the most intractable civil disputes, and dealt with those committing minor criminal acts and social disruption, greatly reducing necessary contact with the colonial government. A first attempt to introduce intermediaries was use of a somewhat adjusted traditional Chinese *tepo* (*dibao*, or neighbourhood watch) scheme,⁶⁵ and this showed significant success, but was abandoned when police commissioner Daniel Caldwell, one of the key figures in the framework, was charged with corruption and his informant network collapsed around 1860.⁶⁶ This system was replaced with a much more successful and enduring network of private Chinese community police under the direction of Chinese business and social leaders in 1866.⁶⁷ Munn gives Governor Hennessy credit for taking the concrete steps necessary to bind the Chinese merchant class to the colonial government in a partnership that would last for over 100 years.⁶⁸ Both the composition of the Chinese segment of the merchant elite, and the fortunes of the colony generally hung from the social, political and economic health of China. No sooner did the colony set up its administration and basic infrastructure, than China entered a century of

⁶¹ Sinn (2003: 11); Tsang (2004: 48). ⁶² Munn (2001: 131–2, 284–6).

⁶³ Munn (2001: 126–8, 286–8). See, in one of its later forms, Ordinance No. 6 of 1857, 'Registration and Regulation of the Chinese People'.

⁶⁴ Munn (2001: 125–6, 252–3).

⁶⁵ See the Chinese Peace Officers Regulation Ordinance No. 13 of 1844.

⁶⁶ Munn (2001: 123–5). ⁶⁷ Munn (2001: 369).

⁶⁸ Munn (2001: 367–9).

rebellions, invasions, civil war, mismanagement and ideological cleansing⁶⁹ that sent millions of Chinese to seek refuge abroad, including in the nearby Crown Colony. Fleeing Chinese business and social leaders filled the gap between the large population of relatively uneducated Chinese and the tiny expatriate community of colonial administrators. The Chinese leaders were articulate counterparts for the colonial government and respected figures for the Chinese population. The later phases of China's political travails brought to Hong Kong many of China's industrialists and financiers who were previously well established in Shanghai and other major cities,⁷⁰ topping off the immigrant society that had accumulated over 100 years of colonial rule, and preparing Hong Kong to play the kind of strategic role in China's development that Huang points out in the quotation in Section A.2. A key to establishing this relationship was for the merchant class to differentiate themselves from the mass of migratory Chinese that the colonial government feared and avoided. This took place through two closely related developments: the creation of institutions and the increasing wealth and education of the leading Chinese. The following subsections discuss each of these in turn.

2 Institutions of intermediation

Informal institutions outside of the colonial government first gave Chinese merchants and community leaders forums in which to discuss problems, coordinate activity and receive recognition. A formal Chinese institution, the guild, which had performed much quasi-governmental activity in China, was initially seen by the colonial government as a threat to market activities and was dampened and weakened with the same regulations applied in Britain against organized labour.⁷¹ The Chinese community's centre thus gravitated towards less threatening institutions. The Man Mo Temple, established on Hollywood Road in 1847, was the first such institution. Its construction was funded by people like Loo Aui and Tam Achoy, lower-class Chinese residents who had made their fortunes by collaborating with the British.⁷² The temple became a centre for Hong Kong Chinese to gather, and by the 1850s its leaders were serving as a de facto governing body for the Chinese community – they “acted

⁶⁹ See, e.g., Spence (1990), presenting events from regional dislocation, the Taiping Rebellion and the Nain Rebellion through Japanese occupation and the Civil War, to the Great Leap Forward and the Cultural Revolution.

⁷⁰ Goodstadt (2005: 195–200). ⁷¹ Sinn (2003: 14–15).

⁷² Sinn (2003: 15); Tsang (2004: 67).

as commercial arbitrators, arranged for the due reception of mandarins passing through the Colony ... and formed an unofficial link between the Chinese residents of Hong Kong and the Canton Authorities”⁷³ As Tsang puts it, ‘With the colonial government not keen to get too deeply involved in governing the local Chinese, the local leadership ... formed the basis for de facto self-government among the Chinese’.⁷⁴

As the colonial government provided infrastructure and services primarily with a view to the European community, health services for Chinese were bad, and when a shocking example of this came to the attention of the government, it worked with leading Chinese citizens to establish a hospital that would be managed and funded by Chinese, particularly successful Chinese merchants.⁷⁵ The result was the Tung Wah Hospital, which was established in 1872.⁷⁶ Munn gives credit to Governor John Pope Hennessy as the first official successfully to transcend the racial barrier. He sought advice from and cooperation with the Chinese ‘elite’, including those directing the hospital.⁷⁷ Sinn dedicates a book-length study to this institution, and the manner in which it both supplemented the colonial government and facilitated a parallel, Chinese social order operating in occasional contact with the colonial government.⁷⁸ Law points out that during Hennessy’s term, ‘the influence and the authority of the hospital reached new heights: the directorate of the hospital began to act as though it had inherited the magisterial function of the traditional petty Mandarins’.⁷⁹ It was notable that, as Sinn recounts, at one point the Chinese leaders threatened to pull out of the project unless a clear statement was given that the hospital would employ Chinese, not English, methods; although this meant Governor McDonnell reprimanding his own Registrar General who had decreed otherwise, McDonnell agreed, which was a significant display of early Chinese power.⁸⁰ Throughout its life, the hospital was known as a bastion of Chinese medicine and practices and refused European techniques (such as amputation).⁸¹ The directors forming the hospital’s committee became an informal governing mechanism for the Chinese community, assuming the functions previously performed by the Man Mo Temple, but at a higher level. Tung Wah Hospital’s directing committee had 125 members, led by a group of 12

⁷³ E.J. Eitel (1895), *Europe in China*, cited by Sinn (2003: 17) and Tsang (2004: 67–8).

⁷⁴ Tsang (2004: 68). ⁷⁵ Sinn (2003: 35–49).

⁷⁶ Tsang (2004: 68); Sinn (2003: 50).

⁷⁷ Munn (2001: 367–9). ⁷⁸ Sinn (2003). ⁷⁹ Law (2009: 23).

⁸⁰ Munn (2001: 40–2). ⁸¹ Sinn (2003: 60–5).

who were the most active and the largest donors to its funding, as Sinn describes them: 'They included the most powerful and wealthy Chinese business men of Hong Kong ... The Board not only represented wealth, dynamism, and astuteness, but also knowledge and experience in managing business and community affairs.'⁸² From the outset until the close of the nineteenth century, the board represented six major trade guilds, thus reintroducing the Chinese private ordering system that the British had tried to squash earlier on.⁸³ The Tung Wah's Board even held the title of 'gentry' (*shen*) as bestowed upon them by Chinese officials.⁸⁴ Because each wealthy merchant contributing over \$50 annually to the hospital was entitled to nominate one director, the functionally mercantile nature of this constituency ensured that representatives of the business community continued to dominate this important Chinese governing body in Hong Kong.⁸⁵

As Sinn observes, the dominance of this 'guild surrogate' shows how closely Hong Kong resembled a Chinese city, '[b]ut the influence of merchants was greater in Hong Kong than in China because, in the absence of a scholar-gentry class, they assumed the status and role of a local elite without competition'.⁸⁶ Thus Hong Kong allowed acceleration of a social change present in the West as well, as the aristocracy gave way to the bourgeoisie, but the selective nature of immigration flows accelerated this development in the colony. This demographic characteristic created an important substrate for Hong Kong's later famous philosophy of placing business first. However, the 'business' of this business community extended well beyond commerce. The Tung Wah Committee and Board managed the provision of social services to the Hong Kong Chinese and represented them in dealings both with the colonial administration and with the Chinese government. Social services included housing the poor, mentally unstable and sick, providing free burials, particularly after a major typhoon or fire, and repatriating destitute Chinese who had been kidnapped or tricked into a captive life in Hong Kong.⁸⁷ The Committee served also as a direct line of communication to convey complaints to the governor,⁸⁸ formulated and proposed legislation to respond to the needs of the Chinese business community,⁸⁹ heard and judged disputes among Chinese on a daily basis according to Chinese customary laws,

⁸² Sinn (2003: 47).

⁸³ Sinn (2003: 54).

⁸⁴ Sinn (2003: 87).

⁸⁵ Sinn (2003: 55).

⁸⁶ Sinn (2003: 55).

⁸⁷ Sinn (2003: 70–1).

⁸⁸ Sinn (2003: 91).

⁸⁹ Sinn (2003: 93).

such as those regarding the status and relations of family members,⁹⁰ and arbitrated commercial disputes.⁹¹

The Tung Wah Committee and Board lost significant power at the turn of the century following a dispute with the colonial government over handling an outbreak of the bubonic plague spreading from Guangdong,⁹² and came under criticism from the colonial government for its relief efforts helping, and close relations with, the Chinese government in Guangdong.⁹³ However, this was accompanied by a gradual assimilation of Chinese residents into the official power structures. Chinese were invited (at the request of the Tung Wah Board) to join the Legislative Council (LegCo) in 1880,⁹⁴ and increasingly played a role in official, colonial politics. Even as those Chinese who had obtained a certain knowledge of English law and culture were incorporated into the colonial government, the informal institution of the Tung Wah, which closely tracked that of a traditional Chinese guild structure, remained. Indeed, when Tsang writes, with respect to appointing members to Hong Kong's Basic Law Drafting Committee 100 years later, that 'The Communist Party preferred to give the business tycoons a stronger say. After all, it needed to secure their investments',⁹⁵ we see much the same trading of influence and money that moved McDonnell at the creation of the Tung Wah Hospital. Seen from another perspective, it is also possible that this model of representation by the merchant gentry allowed Hong Kong's governing of the Chinese population to approach the Confucian ideal of government.⁹⁶ As such, it should not be automatically condemned as unjust and elitist. A key difference between the Confucian and democratic models is that the Confucian trades accountability based on appointment rights for an accountability based on the ethical and fiduciary duties of the caretaker class.⁹⁷ If, as Rawls argues, procedure is a key to Western justice,⁹⁸ then civil behaviour as expressed in rites (禮) is a key to Confucian justice. As will be discussed in Section D.2 of this chapter, the problem with a Confucian system is ultimately the same that confronted the architects of the first democratic systems – placing exterior checks on abuse of the power-wielding fiduciary.

⁹⁰ Sinn (2003: 96). ⁹¹ Sinn (2003: 97).

⁹² Sinn (2003: 181); Tsang (2004: 71).

⁹³ Sinn (2003: 141–8). ⁹⁴ Tsang (2004: 70).

⁹⁵ Tsang (2004: 239). ⁹⁶ Tsang (2004: 198–9).

⁹⁷ Jacques offers an interesting discussion of democracy in a Confucian setting in Jacques (2009: 211–20).

⁹⁸ Rawls (1971: 75).

3 *Cultivating community leaders*

The Tung Wah Committee members were given gentry titles by Chinese officials, on the one side, and formally recognized by an ordinance of the colonial government⁹⁹ on the other. This status was directly connected to wealth. The merchants purchased titles from China, intervened to aid Chinese citizens and bore costs the colonial government could not (Governor McDonnell had hoped they would raise \$15,000 for establishing the Tung Wah, but the merchants quickly assembled a sum of \$47,000).¹⁰⁰ In the decade during which the Tung Wah was founded, Chinese merchants began to eclipse their European competitors, and by '1881 they were the largest owners of real estate, contributing over 90 percent of the colony's revenue and holding 90 percent of the note circulation'.¹⁰¹ With education from the UK or the United States and an incomparably better knowledge of and chance of successfully dealing with the mainland Chinese, the leaders of the Chinese community in Hong Kong increasingly outdistanced the European competition. A few examples of such community leaders are useful.

Ng Choy (in Mandarin, 'Wu Tingfang') was a Singapore-born co-founder of the Tung Wah Hospital. He studied at University College London, was the first Asian admitted to the Bar in England, was appointed as a Justice of the Peace in 1878 and then served as the first Chinese member of the Hong Kong legislative council in 1880.¹⁰² During the early years of the twentieth century, he served the Chinese Republic as a diplomat to the United States and the Americas and then was appointed to work with the ministry that drafted the first Chinese corporation law enacted in 1904.¹⁰³ Wu is seen as a strong advocate of using Western law to strengthen China, and was a visionary in legal policy. In his 1914 book (which appears to be a conscious homage to De Tocqueville's *Democracy in America*) expressing his observations on the United States' culture, government and legal system, he preceded the trend that would later take shape there, asking 'would it not be better for all the states to appoint an interstate committee to revise and codify their laws with a view to making them uniform?'¹⁰⁴ Wu was active and prominent in every role he played in the legal system, although as his career progressed he focused more

⁹⁹ Sinn (2003: 87).

¹⁰⁰ Sinn (2003: 87, purchase of titles; 43 on their contribution).

¹⁰¹ Sinn (2003: 84). ¹⁰² Sinn (2003: 56, 88). ¹⁰³ So and Lee (2011: 192–3).

¹⁰⁴ Wu (1914: Kindle location 359). This is exactly what the United States did during the course of the twentieth century in the shape of the Uniform Commercial Code and

on mainland China and less on the colony. Another prominent Hong Kong leader was Ho Amei (in Mandarin, 'He Xianchi'), who Sinn characterizes as 'exceptionally dynamic and aggressive'.¹⁰⁵ Ho was chairman of the Tung Wah Hospital in 1882.¹⁰⁶ He was educated in Hong Kong, worked for the colonial administration and Guangdong province and was a principal in Wa Hop Telegraph Co. and secretary of On Tai Insurance Co. Thus, as a corporate executive, Ho found himself active in two growing industries that would achieve central economic importance in the twentieth century: financial investment and communications. Ho also remained in close contact with Zhang Zidong, governor of Guangdong and Guangxi and an advocate of Chinese modernization, and proudly wrote of the honours that the Chinese government bestowed upon the Tung Wah for its relief efforts.¹⁰⁷ A third example of a prominent Hong Kong citizen was Ho Kai, who qualified in Britain both as a lawyer and a physician, and was the first Chinese member appointed to the Hong Kong Sanitation Board.¹⁰⁸ He promoted the use of Western legal tools to protect the Chinese in Hong Kong,¹⁰⁹ and thus exemplified the gradual adoption by the Hong Kong Chinese community of a British conception of how individual and state should interact.

Obviously with people at this level of qualification, the Chinese community leaders, once given a chance to operate in an organized system, displayed their capacity to excel. However, it should be noted that each of the persons referred to above was engaged with ideas and was a Chinese patriot. Indeed, Wu played important, leading roles in the early Chinese Republic. Wealthy citizens with more pragmatic visions and primary training in business might, absent a strong countervailing belief system, tend to adapt to those social circumstances that did not directly affect the results of their business activities. As Goodstadt observes, by the 1970s 'The age was past when the colonial administration could depend on the amateur endeavours of well-meaning individuals with personal wealth to finance welfare services'.¹¹⁰ Indeed, the 'new generation taking control of the economy was more sophisticated, and its fortunes were dependent on Western markets'.¹¹¹ This appeared to be

numerous model laws. 'Kindle locations' will hereinafter be referred to with the abbreviation 'loc' or 'locs'.

¹⁰⁵ Sinn (2003: 58, 137). ¹⁰⁶ Sinn (2003: 137).

¹⁰⁷ Sinn (2003: 137). ¹⁰⁸ Sinn (2003: 151).

¹⁰⁹ Sinn (2003: 153). ¹¹⁰ Goodstadt (2005: 105)

¹¹¹ Goodstadt (2005: 105).

the kind of motivation animating the business elite when they sought to accommodate the Japanese invaders of Hong Kong to preserve their prerogatives,¹¹² and when it appeared that once the return to China was inevitable, business leaders strongly supported the Chinese government after the Tiananmen crackdown, as 'the business elite no longer had the same compelling reasons of self-interest to support the colonial administration against the encroachments of the Mainland'.¹¹³ With respect to these occasions, it could be argued that at least some members of the business elite valued their personal, economic survival much more highly than a loyalty to Hong Kong society as something distinct from mainland China. An obvious moral hazard seems to be present in this 'market leads, government facilitates' aspect of Hong Kong government, which would be rationalized well with the *laissez-faire* assumption that what is good for the merchants will be good for Hong Kong. However, that only holds true if the influential merchants' holdings are focused in Hong Kong. Given the relative sizes of the Hong Kong and Chinese economies, substantial assets of groups owned by many wealthy Hong Kong businessmen now are found on the mainland.¹¹⁴ If China were to take a strong stance supporting the ascendancy of Shanghai or another city as China's leading financial centre, and measures could be taken to promote Hong Kong's competitiveness to the chagrin of the Beijing plan, would the business elite of Hong Kong use their influence in government to promote the good of Hong Kong or to serve the greater good as seen from Beijing (and their own return on assets)? It is likely, given the small size of Hong Kong, that any perceived bias and influence along these lines would at the very least provoke heated, public debate. Although formal safeguards against mainland bias among merchant leaders do not exist, ample information, consensual decision-making processes and the closely aligned interests of Hong Kong with the economic success of mainland China greatly reduce such risk. I now turn from the socio-political framework of Hong Kong to an initial, framework analysis of its legal system.¹¹⁵

¹¹² Goodstadt (2005: 101–2)

¹¹³ Goodstadt (2005: 107). Also see Loh (2006: 929).

¹¹⁴ The structure and holdings of Hong Kong's major economic groups will be discussed in Chapter 2. In particular, see the discussions of the property sector in Section B of that chapter.

¹¹⁵ A more thorough analysis, focusing on company and securities law, will be provided in Chapter 3.

C Building the Hong Kong legal system

1 *Laying the foundation*

During the early 2000s, a debate raged about the power of common law origin legal systems to stimulate the growth of capital markets and lead to more successful economies.¹¹⁶ The main argument marshalled in favour of common law was that case law flexibly protects property rights in a way not possible for the 'rigid codes' of the civil law. According to this legal origin position, Hong Kong's success would be largely owed to the 'fact' that its law sprang flexibly from the minds of savvy judges rather than from the dead letter of statutes. Mere statutes and other forms of written law not only are unable to adapt to innovation but also are sitting ducks for evasion, because they are fixed and unresponsive. The legal origin thesis has largely been discredited,¹¹⁷ primarily because of its failure to understand the actual composition and operation of legal systems – whether civil or common – but it has provoked a valuable debate. I will argue that while being a British colony had many advantages for Hong Kong's legal system, the fact that some of its legal rules sprung from the findings of courts in the dominions of the British Empire was not primary among them.

Acemoglu *et al.* have supplemented the focus on legal origin with an institutional analysis of how the structure of British colonialism led to better development than models used by competing nations.¹¹⁸ Because the British often set out to transplant their own people into a colony, they chose more inhabitable locations and built up stable institutions – rather than merely extractive facilities. As a result, 'British colonies are found to perform substantially better ... in large part because Britain colonized places where settlements were possible, and this made British colonies inherit better institutions'.¹¹⁹ Superior military power left Great Britain 'free to choose' its sites for colonialization. As Klerman *et al.* have reminded us, British colonies might well have prospered because the British were masters of the sea throughout much of the eighteenth and all of the nineteenth century, and thus had their pick of colonial locations with high comparative advantage.¹²⁰ These authors present evidence that

¹¹⁶ The debate is discussed with further citations in Roe and Siegel (2009) and Roe (2006).

¹¹⁷ See, e.g., Michaels (2009).

¹¹⁸ Acemoglu *et al.* (2001: 1388, also see 1374–6).

¹¹⁹ Acemoglu *et al.* (2001: 1388, also see 1374–6).

¹²⁰ Klerman *et al.* (2011: 8).

the development achieved by the British colonial administration was better than that of competitors regardless of legal origin (such as where the British took over a Dutch law colony).¹²¹ Certainly the loss of the North American colonies in 1781 put Great Britain on warning that it should take more care in managing its holdings,¹²² and by its entry into Hong Kong 60 years later, the British colonial administration was more experienced and much improved. With respect to the quality of law in the British Empire, one institution that stands out was the Judicial Committee of the Privy Council, a body serving effectively as a colonial court of appeal with judges seconded from the British House of Lords, which heard cases from imperial holdings throughout the world, recognized the demands of local conditions and shared solutions reached in one region with problems arising in another.¹²³ The Privy Council cannot be said to be essentially a 'common law' institution, because civil law jurisdictions have also had their own courts of appeal hearing colonial matters.¹²⁴ Rather, its activity as a colonial institution harmonized law on a global scale within the British Empire, while respecting regional heterogeneity for the sake of lowering political risk.¹²⁵ The Privy Council was essentially a multi-jurisdictional court of appeal, and anticipated twentieth-century multi-jurisdictional courts like the European Court of Justice. The function of this court will be discussed in greater detail in Subsection C.3.

Hong Kong, as a component of the British Empire, received the entire package of colonial solutions that Great Britain employed to manage its holdings globally. As discussed in the preceding section, a rather unusual decision was made to apply English law in Hong Kong with no provision to accommodate conflicting Chinese law,¹²⁶ although provision was made for Chinese customs that did not conflict with local ordinances.¹²⁷ This

¹²¹ Klerman *et al.* (2011: 14).

¹²² Ferguson calls the 1839 report prepared by George Lambton, the Earl of Durham (the 'Durham Report'), which advocated that Britain install a system of 'responsible government' in its colonies, 'the book that saved the Empire'. Ferguson (2004: 90).

¹²³ For a more detailed discussion, see the following subsection C.2.

¹²⁴ See Hollander (1961: 107–13).

¹²⁵ First of all, the Privy Council was not a court, although the creation of the Judicial Committee in 1833 brought it further in that direction. Second, it contained both foreign judges and judges who were expert in foreign systems of law. Third, when colonies were captured from other European nations, the Privy Council expressly assumed functions that had been performed earlier by such bodies as the French *Cour de Cassation*. See Howell (1979: 9, 22, 34–44); Hollander (1961: 20–5, 107–15).

¹²⁶ Sinn (2003: 8); also see Munn (2001: 168).

¹²⁷ Sinn (2003: 9); also see Munn (2001: 169).

decision was contrary to normal practice in the British Empire,¹²⁸ and was made for a number of reasons, particularly that Hong Kong's position was perilously close to the edge of a hostile state,¹²⁹ plus the mitigating effect of Charles Elliot's promise.¹³⁰ The decision was justified in good conscience with the theory that Hong Kong was essentially uninhabited and the Chinese who immigrated to Hong Kong did so with notice they would subject themselves to English law.¹³¹ As Tsang observes: 'Endowed with a Crown Colony system, Hong Kong was not founded as a democracy but as an autocracy to serve British interests.'¹³² Munn argues that when war and diplomatic crises were not on the horizon, the purpose of the legal system vis-à-vis the bulk of the Chinese population was not primarily to meet their needs, as it would have been in a settlement, but rather 'to make the most of the cheap labour that overflowed into the colony, while protecting the colony from the crime and other social problems that came with it'.¹³³ The foundation of law the colonial government laid can be seen in terms of four essential elements:

- (1) written ordinances issued in Hong Kong, which closely paralleled existing UK law and which reflected the accumulated centuries of British colonial know-how;
- (2) English law incorporated by statutory reference, particularly English Common Law;
- (3) legal institutions (primarily courts) for enforcement and administration; and
- (4) the culture of trust in the law that law needs to supplement its operation.¹³⁴

Introducing law itself was as simple as passing ordinances. The first Hong Kong ordinances will be discussed in the next subsection. Plugging Hong Kong into the international development of common law was somewhat more difficult and depended on both local and appellate courts. This will be the topic of the following subsection. Setting up bodies called 'courts' was also quite simple, although the trick was to staff them well and enable them to perform competently. Enforcement led to some behaviour by the colonial government that – although favourably compared to coeval

¹²⁸ McPherson (2007: 2–4). ¹²⁹ Munn (2001: 40, 168)

¹³⁰ Sinn (2003: 8); also see Tsang (2004: 46); Munn (2001: 163).

¹³¹ Munn (2001: 56, 163). ¹³² Tsang (2004: 26).

¹³³ Munn (2001: 333); also see Tsang (2004: 67).

¹³⁴ See, generally, Milhaupt and Pistor (2008); Berkowitz *et al.* (2003); North (1990).

Chinese criminal ‘justice’ – would today be considered serious violations of human rights.¹³⁵ As one might expect, the development of a culture promoting rights and justice was a much slower and more difficult process, and has ultimately led Hong Kong towards a significant pride in its institutions and to a large civil society movement. Given that the Hong Kong LegCo currently lacks the legitimacy universal suffrage could lend, this has created a state of political instability in Hong Kong, which will be discussed in Section D.2 of this chapter.

2 A ‘colonization kit’ of ordinances for the good order

A framework of laws was introduced very quickly into Hong Kong, in the form of local ordinances. This was not technically English law but it was unquestionably inspired by English law and culture. Britain, whose experience in creating colonial settlements stretches back to the American Jamestown Settlement founded in 1607, certainly knew how to apply to its last Asian colony the experience gained through nearly a quarter millennium of controlling less developed territories. In 1844, just months after the Treaty of Nanjing was ratified, a virtual ‘colonization kit’ of ordinances was unpacked in Hong Kong. These ordinances present a full institutional picture of what laws a port needs to operate smoothly. One cluster of ordinances provided rules for commercial activity, from merchant shipping and harbour regulation to weights and measures, the registration of wills and deeds, rules on slavery and a definition of usury.¹³⁶ Another group addressed the needs and discipline of sailors, such as licensing of public houses, the distillation of spirits, public gaming, rules on peace and quiet, and later, the desertion of seamen.¹³⁷ Some ordinances were specific to the kind of trade and people found in Hong Kong, particularly the licensing of opium trading and regulation of trade in China,¹³⁸ as well as

¹³⁵ See, e.g., Sinn (2003: 11); Tsang (2004: 47–50); Munn (2001: 216–18, 364) for descriptions of excessive floggings, long sentences of hard labour, branding and other harsh punishment inflicted disproportionately harder on the Chinese.

¹³⁶ See the Merchant Shipping Ordinance No. 4 of 1844, the Harbour Regulation Ordinance No. 18 of 1844, the Weights and Measures Ordinance No. 22 of 1844, the Registration of Deeds, Wills & c. Ordinance No. 3 of 1844, the Slavery Ordinance No. 1 of 1844, and the Usury Laws Ordinance No. 7 of 1844.

¹³⁷ See the Licensing Public Houses & c. Ordinance No. 11 of 1844, the Distillation of Spirits Ordinance No. 8 of 1844, the Public Gaming Ordinance No. 14 of 1844, the Good Order and Cleanliness Ordinance No. 5 of 1844, and the Desertion of Seamen Ordinance No. 4 of 1850.

¹³⁸ See the Salt, Opium Licensing & c. Ordinance No. 21 of 1844 and the Restraint of Trade in China Ordinance No. 9 of 1844.

the registration of inhabitants, the regulation of triads and secret societies, as well as the power to use the military to keep order, if necessary.¹³⁹ Others focused on the special social situation of Hong Kong. The Registry and Census Ordinance of 1844 created a system of registration targeting poor Chinese immigrants by providing exemptions for all other classes of people in Hong Kong, namely 'persons employed in the civil, military or naval services of Her Britannic Majesty, or the Honourable East India Company, members of the learned professions, merchants, shopkeepers, householders ... or persons possessing a means of livelihood amounting to the annual sum or value of not less than five hundred dollars a year'.¹⁴⁰ The 1845 Ordinance for the Suppression of the Triad and other Secret Societies made membership in such organizations a felony.¹⁴¹ A concrete case of damage suffered because of a failure to mind the gap between local custom and colonial rules is the story of Mr Too-hing. Too-hing collaborated with the British at the outset of the first Opium War and for that service received in 1841 a significant land grant in Hong Kong. He moved his family to the land and settled them in a residential and commercial complex that he built with an investment exceeding \$1,000.¹⁴² Following his death in 1848, his eldest son took over and began to manage the family holdings and build on them. However, he was contacted by the Register of Wills some two years later and informed that his father had failed to satisfy the applicable requirements of Hong Kong law on the registration of wills and codicils, which resulted in the estate being seized and the entire extended family being evicted.¹⁴³ The last information available on the son was that he had become a vagrant opium addict.¹⁴⁴ To the credit of the colonial administration, the relevant ordinance was later amended to avoid a repetition of this event.¹⁴⁵ The overall picture that emerges, however, is of a regulatory framework for a commercial centre with a clear slant in favour of free commerce and strict social order, introduced quickly, in part disregarding aspects of indigenous legal principles and in part specifically seeking to control the unknown elements of the local population.

This original bundle of ordinances introduced during the first years of Hong Kong as a Crown Colony subjected the people of Hong Kong to a

¹³⁹ See the Registration of Inhabitant Ordinance No. 16 of 1844, the Triad and Secret Societies Ordinance No. 12 of 1845 and the Martial Law Ordinance No. 20 of 1844.

¹⁴⁰ An Ordinance to Establish a Registry and Census of the Inhabitants of the Island of Hong Kong, 13th November 1844, s 2.

¹⁴¹ The Ordinance for the Suppression of the Triad and other Secret Societies, 8 January 1845, s 1.

¹⁴² Munn (2001: 74). ¹⁴³ Munn (2001: 74).

¹⁴⁴ Munn (2001: 74). ¹⁴⁵ See Ordinances Nos. 4 and 5 of 1856.

complete and systematic legal system just as quickly as if the French had moved in with their *Code Napoleon*. It is important to note the utility of such legislation in light of the ongoing debate regarding the amenities of common law, discussed above. The immediate introduction of this statute pack in Hong Kong presented significant advantages over waiting for a body of law to develop from common law decisions. They created legal clarity quickly without having to wait for disputes arising to be addressed by the courts; they were comprehensive and based on experience gained in other colonies; they could essentially be imported from the colonial administration or from other colonies and thus did not depend upon the presence of local talent to draft them; they were, in sum, an extremely cost-effective means of governance for a commercial centre with a sparse population of legal professionals. It should be further noted, moreover, that such statutes differ primarily institutionally, not essentially, from the activity of making common law: they collect solutions drawn from experience into a document that has the force of law for persons within the jurisdiction. No statute springs from a vacuum in philosophical isolation of real events and problems. Rather, as in the formulation of a judicial decision, solutions already in force, principles already accepted and the common sense at hand are applied to a problem or problems that are seen to exist. The one essential difference between statute and case law is that in the latter instance, a concrete problem actually does exist and the persons affected seek redress, where a statute can be either reactive or proactive. In both civil law and common law systems, case law grows within the cracks between broader, more abstract statutes, with the primary difference that case law is officially law in a common law jurisdiction, while in civil law jurisdictions it performs an ordering function more informally.

3 *Linking Hong Kong to the English Common Law*

As mentioned above, Hong Kong was brought into the system of English Common Law, and common law needs at least two things to unfold – courts and customary principles, the latter expressed in culture, written law and in prior judicial decisions.¹⁴⁶ These necessary components were provided through a single ordinance: the Supreme Court Ordinance No. 15 of 1844,¹⁴⁷ which both created the Supreme Court and ordered

¹⁴⁶ See, e.g., Eisenberg (1991).

¹⁴⁷ The Colonial Office disapproved of the formula for the reception of English law used in this Ordinance, and it was amended and reissued as the Supreme Court Ordinance

the retroactive reception of English law as from 5 April 1843.¹⁴⁸ Thus Hong Kong began very early a tradition in which its statutory law was locally controlled, yet borrowed in substance from abroad, and its case law was linked to a constantly developing mass of decisions originating in England and its other colonies. In fact, as will be argued at the close of this chapter, the common law applied in Hong Kong develops primarily abroad, and very little in the common milieu of Hong Kong. The colony's courts were plugged into England also because its highest appellate court was the Privy Council, and it was in England that common law had originated over half a millennium earlier and was still developing in a lively manner. The Privy Council heard appeals from every corner of the world, and brought them all under the English Common Law umbrella. In Hong Kong, the globalizing nature of this system was checked locally by the fact that there were high cultural and institutional barriers working against simple replication of the English legal system. Courts had to be manned, advocates trained and a culture that respected the judgement reached by these people established. The culture and socio-political environment in which English law had grown and prospered was not at all present in China, and certainly not familiar to the uneducated Chinese labourers who sought a better life in Hong Kong during its early years.

With respect to the cultural problems of transplanting English law into China, the colonial government showed skill that is rarely matched even today, while also making regrettable mistakes. Transplantation of law is a very delicate task that has been much discussed in the academic literature since the 1990s. Arguments range from a belief that the best rules will prevail regardless of geographic or social context to a position that the meaning of every legal provision is context-bound and can never be carried into another culture without significant modification.¹⁴⁹ In an early formulation, Denning LJ observed the general problem from a practical perspective with an appropriate metaphor:

[English Common Law] cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law: you cannot transplant it to the African continent and expect

No. 6 of 1845. Also key to the creation of the legal infrastructure were the Civil Actions Arbitration Ordinance No. 6 of 1844, the Justices of the Peace – Summary Jurisdiction Ordinance No. 10 of 1844, the Jurors Ordinance No. 7 of 1845, and the Criminal Proceedings Ordinance No. 8 of 1845.

¹⁴⁸ See McPherson (2007: 325); Sinn (2003: 9); Munn (2001: 169).

¹⁴⁹ See, e.g., Watson (1993) and Nelken and Feest (2001).

it to retain the tough character which it has in England. It will flourish, indeed; but it needs careful tending. So with the common law.¹⁵⁰

Both the difficulties of such transplanting and the diligence with which the British attempted to make it work are visible in Hong Kong. Certainly, the process was significantly facilitated by the fact that the actual application of the common law was in practice restricted to the European population and a relatively small segment of the Chinese population, with the remainder primarily using the informal Chinese institutions already mentioned and to be discussed below in Section D. However, as Berkowitz *et al.* have argued, ‘for law to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand’.¹⁵¹ Although the market was in fact limited to that segment of the population that came into contact with the English authorities, the quality of the intermediaries used to develop the law presented a considerable problem to increasing the demand for its use in early Hong Kong.

Historians have noted two problems, in particular: first, filling the posts of judges, justices of the peace and barristers with the kind of people capable of carrying forward the common law in Hong Kong, and second, enabling the courts to interact effectively with the local Chinese population. Munn closely examines the judiciary and the bar in early Hong Kong and finds them severely lacking, primarily because of the short supply of qualified personnel. When selecting its first Chief Justice, John Walter Hulme, the Colonial Office was forced to settle for ‘at least’ its ‘eighth choice’.¹⁵² Hulme had no judicial experience, and in addition to limited competence was suspended from the bench in 1848 for drunkenness.¹⁵³ Charles Molly Campbell, Hulme’s replacement during this suspension, was described as ‘an abortion of justice, both for honesty and capacity’.¹⁵⁴ The general problem was that the kind of educated Europeans willing to brave sickness and isolation in early Hong Kong were often adventurers. Munn describes the career of one, Percy Caulincourt McSwyney: he served as Deputy Registrar of the Supreme Court, but was dismissed for receiving money under false pretences, then worked as an attorney in the Supreme Court, where he was caught cheating and stealing from his Chinese clients, then he dealt in opium for a while, then served as Coroner, but was dismissed when a Coroner’s inquest produced incriminating

¹⁵⁰ *Nyali Ltd v. Attorney-General* [1956] 1 QB 1, 16.

¹⁵¹ Berkowitz *et al.* (2003: 168–9). ¹⁵² Munn (2001: 210).

¹⁵³ Munn (2001: 211). ¹⁵⁴ Munn (2001: 211).

evidence against a policeman; after spending some time in prison for having used his power on the court to groundlessly incarcerate a personal enemy, McSwiney became an agent in the small debts court, but was 'ejected for having taken out summonses without authorization'.¹⁵⁵ This example shows the importance of the high ethical standards common law countries expect and usually receive from their judges, and the decisive role such ethical comportment plays in the successful operation of a common law system. With respect to the bar, Munn explains that, '[b]y 1849, the colony had no barristers and, out of the six attorneys who had come to the colony, only two remained',¹⁵⁶ although this did improve with time as more professionals arrived from Britain. Jurors in the Supreme Court were all European until 1858, and the list of available jurors in the colony numbered just about 100 persons.¹⁵⁷ A particularly acute Hong Kong problem was the need for court interpreters, who, according to Supreme Court policy, had to be racially European, which greatly reduced the pool of candidates; due to his unique skills set, bilingual police superintendent Daniel Caldwell often served as interpreter in the very cases he was helping to prosecute, which cannot have given the court a great reputation of unbiased administration of justice.¹⁵⁸

Efforts to adapt English justice to Chinese culture display the good and bad sides of the colonial government, but in any case display a colonial administration that, on the basis of its 250 years of experience, took cultural differences very seriously. One small item that evidences the British approach is an attempt to adjust the oath administered to witnesses in court. The oath taken by a witness in an English court has a long history closely tied to the Christian religion. Indeed, early English courts would often apply the oath alone as a sole form of proof, by, for example, requiring a defendant to swear innocence with his hand on the relic of a Christian saint, and trusting in his fear of God to ensure a truthful statement.¹⁵⁹ Within the Hong Kong court system, uncertainty arose as to whether the best functional equivalent for administering an oath to a Chinese witness was to have him cut off a cock's head or burn a piece of ceremonial paper, so the court turned to its principal expert on things Chinese, police superintendent Caldwell, who, as Munn recounts it, advised

that cutting off a cock's head was the form of oath 'likely to elicit the greatest amount of truth from a Chinaman.' The problem with this form,

¹⁵⁵ Munn (2001: 211). ¹⁵⁶ Munn (2001: 212).

¹⁵⁷ Munn (2001: 213). ¹⁵⁸ Munn (2001: 213).

¹⁵⁹ Van Caenegem (1988: 66–7).

he warned, was that since it had to be taken before the witness's 'patron idol', which differed from one person to another, its effectiveness would be uneven. The Chinese did not consider 'lying in the abstract' to be a sin: if a prosecutor believed the defendant to be guilty he would 'swear to any false collateral facts necessary to prove the guilt, and would not scruple to cut off a cock's head for the purpose.' The Chinese anyway, he added, had no dread of punishment in the world to come and had only a superstitious fear of the consequences of breaking an oath in this world ... 'The fear of immediate punishment,' Caldwell concluded, 'would be a much greater deterrent than the fear of future misfortune or the reproaches of conscience, the consciences of Chinese being remarkably corrupt.'¹⁶⁰

Although laced with the kind of offensive racist assumptions widely held in the nineteenth century, we see in Caldwell's answer to the court an attempt to discern whether the causal link between perjury and hell-fire that made oaths so effective in Europe could be reconstituted in the Chinese cultural context. This type of analysis was by no means foreign to a Hong Kong government that would later have a number of expert Sinologists serving as governors. Its results may offer still another explanation why the Hong Kong administration preferred to keep some distance between itself and the bulk of the population. Caldwell's advice that the justice system should employ corporal punishment to create the necessary link with Chinese sensibility of the time, while perhaps accurate from an ethnological point of view, would lead to one of the darkest legacies of the Hong Kong justice system, as it imposed severe floggings, branding and imprisonment (usually transportation to another colony for hard labour) on the members of its Chinese population who were unfortunate enough to get caught in its wheels.¹⁶¹ Unlike in Europe, where the purpose of criminal justice had swung towards rehabilitation in the mid-nineteenth century, the colonial government decided it had to focus on deterrence, as given a great lack of knowledge regarding their individual backgrounds and characters, "any attempt to cultivate [the] higher faculties [of the Chinese] and to improve their moral condition seems hopeless"¹⁶² As Munn puts it, '[t]he legal institutions in the colony lacked the longevity, popular acceptance, and cultural consensus that their counterparts in England depended on'.¹⁶³ Although efforts were clearly being made, the evidence indicates that in early Hong Kong both the supply of

¹⁶⁰ Munn (2001: 232).

¹⁶¹ See, e.g., Sinn (2003: 11); Tsang (2004: 47–50); Munn (2001: 216–18, 364).

¹⁶² 1877 Report of the Gaol Committee, cited in Munn (2001: 216).

¹⁶³ Munn (2001: 201).

and the demand for an effective common law judiciary were lacking. This was compensated in part through the presence of a highly skilled court of appeal for the British colonies – the Judicial Committee of the Privy Council.

Until 1997, the ultimate court of appeal for Hong Kong was the Privy Council, a court-like body with mixed judicial, executive and legislative capacities.¹⁶⁴ The Privy Council is a direct descendent of the king's council, or *Curia Regis*, which was the decision-making council of William the Conqueror, and which retained its jurisdiction over the Crown's foreign holdings even after the creation of a system of courts for national matters.¹⁶⁵ With the expansion of the British Empire, the Privy Council heard appeals from colonies which under treaty retained Roman civil, Hindu and Islamic law legal systems.¹⁶⁶ After 1881, the Judicial Committee of the Privy Council was staffed with Law Lords and judges from the highest courts of certain foreign dominions (such as Bengal, Bombay, Canada, Australia and South Africa), and its caseload increased with the size and wealth of the British Empire.¹⁶⁷ Although the Privy Council was often backlogged, causing significant delays in appeals,¹⁶⁸ it is easy to conceive the benefit of bringing cases originating at various locations within the British Empire to a body of highly experienced judges who were familiar with problems arising and solutions applied on a global scale. Because the Judicial Committee of the Privy Council is neither a common law court nor fully judicial in nature, and because it has historically been staffed with experts on both equity and foreign systems of law, it presents a hybrid entity with multinational characteristics. As the Privy Council expressly took local conditions into account,¹⁶⁹ the colonies of Hong Kong, Singapore and Malaysia would have both shared judicial solutions with each other – as well as with places as diverse as England, India and Canada – while each following a path that took its own local culture and needs into account.

As from July 1997, Hong Kong's Court of Final Appeal replaced the Privy Council as the ultimate *judicial* arbiter of claims in Hong Kong,¹⁷⁰

¹⁶⁴ Charlotte Smith, 'An Introduction to the Judicial Committee of the Privy Council', available on the Council's website: www.privycouncilpapers.org (accessed 15 March 2014).

¹⁶⁵ Howell (1979: 3–5). ¹⁶⁶ Howell (1979: 9–10).

¹⁶⁷ Smith, 'An Introduction to the Judicial Committee of the Privy Council', *supra* note 164.

¹⁶⁸ Howell (1979: 226–7).

¹⁶⁹ See the discussion by Bokhary J, in *China Field Ltd v. Appeal Tribunal (Buildings) (No 2)* [2009] 5 HKLRD 662.

¹⁷⁰ Basic Law, Art. 82.

although the Hong Kong courts are ultimately bound by the opinion of the Standing Committee of the National People's Congress (NPC) of the People's Republic of China,¹⁷¹ and may still look to UK and Commonwealth decisions as persuasive authority. The Court of Final Appeal sits at the top of a well-articulated organization of trial and specialized courts, which have been guaranteed sole judicial power within the government under the Basic Law.¹⁷² A number of international reports on law and institutions have awarded a very high ranking to the quality of the Hong Kong judiciary.¹⁷³ The Basic Law expressly guarantees that the courts 'shall exercise judicial power independently, free from any interference'.¹⁷⁴ Judges are nominated by a committee (including judges, barristers and other professionals) specially constituted for this purpose, appointed by the chief executive,¹⁷⁵ and 'may only be removed for inability to discharge his or her duties, or for misbehaviour, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than three local judges'.¹⁷⁶ At the mandatory retirement age of 65, judges leave the court unless their tenure is extended for one or more fixed terms.¹⁷⁷ In 2012, a decision on this matter led to speculation on the strength of the independence guarantee because of the treatment of a Court of Final Appeal Justice who had publicly expressed his views regarding the reference of Hong Kong 'foreign affairs' questions to the NPC Standing Committee. In 2012, the chief executive decided not to extend the tenure of the highly respected Justice Kernal Bokhary – who in 2011 had dissented against the Court of Final Appeal referring a question on sovereign immunity theory to the NPC Standing Committee¹⁷⁸ – and Justice Bokhary has interpreted this as a political signal to himself and the courts.¹⁷⁹ Given the facts that the

¹⁷¹ See the analysis in Wang (2007). ¹⁷² Basic Law, Art. 80.

¹⁷³ See, e.g., the World Justice Project (2012), which ranked Hong Kong 9th for criminal justice and 17th for civil justice (the United States was ranked 26th and 27th in these two respective categories and the United Kingdom was ranked 11th for both) and Center for Financial Stability, which ranked Hong Kong 10th globally for rule of law (including its judiciary), while ranking the United States and the United Kingdom 33rd and 25th respectively.

¹⁷⁴ Basic Law, Art. 85. ¹⁷⁵ Basic Law, Art. 88. ¹⁷⁶ Basic Law, Art. 89.

¹⁷⁷ See Hong Kong Court of Final Appeal Ordinance, Cap 484, s 14(2) for justices of that Court and High Court Ordinance, Cap 4, s 11A(2) for justices of the High Court (consisting of the Court of First Instance and the Court of Appeal).

¹⁷⁸ See *Democratic Republic of the Congo v. FG Hemisphere Associates LLC (No 2) (2011)* 14 HKCFAR 395, dissent by Bokhary.

¹⁷⁹ Ng Kang-chung, 'Former Judge Bokhary: "I was ousted for being too liberal"', *South China Morning Post* (5 November 2012).

conceptual breadth of sovereign immunity is both a doctrine developed by common law and a principle used in international relations, there were reasons both for and against the reference to the Standing Committee.¹⁸⁰ As such, it is too early to decide whether the referral was a normal use or part of a trend towards political abuse of the Standing Committee's role in the Basic Law framework. The appointment and retirement of judges in every country has some political aspects, and it must remain to be seen whether Justice Bokhary's opinion on this matter will prove correct. It is, however, a question that any serious observer of law in Hong Kong must take seriously.

D Hong Kong as an exemplary jurisdiction in China

1 *A new role for an old port*

In June 2013, when the US National Security Agency whistleblower, Edward Snowden, had based himself in Hong Kong, declaring, 'I am not here to hide from justice; I am here to reveal criminality',¹⁸¹ the special nature and quality of the Hong Kong legal system within China had its moment of world fame.¹⁸² This special situation came into being when the society incubated for more than 150 years under British rule had for over a decade been reinserted into the Chinese state. On 30 June 1997, through a ceremony whose significant geopolitical visibility was largely eclipsed by the 'Asian Financial Crisis' triggered two days later through a short-selling attack on the Thai baht,¹⁸³ Hong Kong was returned to China's sovereign control. This occurred for a mix of legal and political reasons. Although Britain had acquired sovereignty in perpetuity over the Island of Hong Kong and the tip of the Kowloon Peninsula, it acquired only a 99-year lease over the remainder (and geographically larger) portions of land acquired in 1898 (the 'New Territories') that was joined to the colony of Hong Kong.¹⁸⁴ When, in the early 1980s, the lease

¹⁸⁰ For a discussion supporting Justice Bokhary's view of the matter, see Cheung (2011).

¹⁸¹ Keith Bradsher, 'N.S.A. Leaker Says He Will Fight Extradition in Hong Kong', *New York Times* (12 June 2013), citing an interview Snowden had given the *South China Morning Post*.

¹⁸² At the time, the Hong Kong legal system was discussed in varying detail by Julian Borger, 'Edward Snowden's Choice of Hong Kong as Haven is a High-stakes Gamble', *The Guardian* (9 June 2013); Jia Lynn Yang, 'In Hong Kong, Pressure Mounts on Government to Protect Snowden', *The Washington Post* (16 June 2013); Josh Noble and Kathrin Hille, 'Legal Experts Back Hong Kong Role in Snowden Case', *Financial Times* (24 June 2013).

¹⁸³ See Stiglitz (2002: 89–132). ¹⁸⁴ Tsang (2004: 39–41).

was revisited by the United Kingdom and the People's Republic of China (PRC), the roles played in 1840 were somewhat reversed. A much shrunk United Kingdom was struggling to free itself of an unsustainably large public sector and a morally questionable colonial past, while China was some four years into a process of reform that would put it on track to become the world's largest economy.¹⁸⁵ It was thus agreed that the entire colony of Hong Kong would be returned to China at the expiration of the lease on 1 July 1997, and that Hong Kong would become a 'Special Administrative Region' of the PRC, whose social, economic and political systems would enjoy a 50-year protected status under a 'basic law'.¹⁸⁶ The formula is known as 'one country, two systems', a policy originally formulated with a view towards reunification with Taiwan.¹⁸⁷ The 50-year period states a minimum term of protected status, not a fixed appointment with full merger into mainland China. As will be discussed below, there is no reason to believe that upon expiration of the 50-year term the PRC will decide to change or close down this special part of its national territory and lose the benefits it can gain from the HKSAR's special institutions and status.

The historical process sketched in the preceding sections was largely responsible for Hong Kong's government, economy and society taking its current shape, one in which a population that is nearly 100 per cent Chinese feels deeply at home with a legal system that is nearly 100 per cent British (colonial).¹⁸⁸ This is well symbolized by the fact that laws and most legal proceedings are used primarily in Chinese, but are in nearly all cases modelled on UK or Commonwealth counterparts.¹⁸⁹ The caretaker structure, which well served the distant British interests and mediated relations with the local population through a small body of elite merchants, after 1984 showed itself to be ambidextrous: what was done with a view westward towards London could also be done with a view northward towards Beijing. The business leaders who were a key to Hong Kong's utility as a trade and financial centre for the British Empire thus have also

¹⁸⁵ See Tsang (2004: 211–15, 229–30) for a discussion of the negotiations leading up to the 1984 Sino-British Joint Declaration.

¹⁸⁶ Tsang (2004: 238–44). ¹⁸⁷ Tsang (2004: 216–17, 236).

¹⁸⁸ As will be discussed later in this section, discomfort indeed exists where the system is more colonial and less British, particularly with respect to lacking legitimacy of government due to an incomplete system of suffrage.

¹⁸⁹ The laws of Hong Kong are available in the two official languages of the HKSAR, English and Chinese, at the Hong Kong Department of Justice's Bilingual Laws Information System, www.legislation.gov.hk (accessed 15 March 2014).

led Hong Kong's integration into the Chinese economy,¹⁹⁰ the Chinese 'empire' in arrival. Goodstadt notes that when the change in power was inevitable, these elites signalled their loyalty to Beijing by voicing strong criticism of British, democratic policies.¹⁹¹ During the decades since 1978, Hong Kong's business elite have in Beijing performed a mediating role that is comparable to that which their forebears once performed towards London.¹⁹² In preparation for and immediately after the handover from the UK to China, leading figures in business served on the Committee created to draft Hong Kong's Basic Law¹⁹³ and also on the Selection Committee charged with choosing Hong Kong's first chief executive.¹⁹⁴ As Loh notes, 'the Basic Law further strengthened the position of the elites through establishing the 400-member Selection Committee to choose the candidate for the first chief executive'.¹⁹⁵ Currently, the functional constituencies of business and professional leaders choose 35 of the 70 members of LegCo.¹⁹⁶

2 *From caretaker society to civil society?*

Hong Kong existed as a colony 'for diplomatic, commercial and military purposes',¹⁹⁷ and was operated autocratically to those ends, although the colony's charter provided for the Crown-appointed governor to be assisted by both executive and legislative councils.¹⁹⁸ Although the situation could be retrospectively glorified, history tells us that most people

¹⁹⁰ As McGregor puts it: 'The communists also once despised the pre-revolutionary comprador class of Chinese businessmen, but rushed without shame into an alliance with Hong Kong tycoons when taking back the British colony in 1997.' McGregor (2010: Kindle loc 107). At a certain point in discussing the PRC, I think it is necessary to abandon the Cold War rhetoric of referring to the country as 'red' or 'communist' even though it is officially controlled by the Chinese Communist Party. This is because basic communist tenets – downward redistribution of wealth to ordinary people through communal ownership – neither exist nor are advocated. The authoritarian state coupled with the massing of wealth in a largely unaccountable elite that is modern China presents a structure that long preceded communism, and can be seen currently both in the developing countries of South America and in other modern manifestations of ancient states, like Italy.

¹⁹¹ Goodstadt (2005: 107) ¹⁹² Goodstadt (2005: 110, 113–15).

¹⁹³ 'Indeed, some 70% of the membership of the Basic Law Drafting Committee was made up of business elites'. Loh (2009: Kindle locs 955–6).

¹⁹⁴ Loh (2009: loc 478). ¹⁹⁵ Loh (2009: locs 962–3).

¹⁹⁶ See Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China, at www.legco.gov.hk (accessed 15 March 2014).

¹⁹⁷ Tsang (2004: 20). ¹⁹⁸ McPherson (2007: 325); Tsang (2004: 18–19).

arriving in Hong Kong were forced out of their homeland by misfortunes and mistakes in China, and certainly the British relationship with them was based on economic and political calculus, not on some larger desire to create a multicultural settlement. The intermediation between government and the general population through business leaders initially occurred through organizations that were not designed for governing purposes, such as the Man Mo Temple,¹⁹⁹ and then later, and above all, the Tung Wah Hospital.²⁰⁰ A parallel development to the role of the Chinese merchant elite resulted from the regular petitions that British expatriate merchants (*Hongs*) made throughout the nineteenth century to the British Parliament to have a hand in governing the colony, which ultimately led to the appointment of a limited number of British and Chinese businessmen to the Executive Council (ExCo) and LegCo.²⁰¹ This gradual inclusion of merchants and their representatives in the ExCo and LegCo is the path from which the Hong Kong Basic Law's institution of 'functional constituencies' derives.²⁰² However, just as the colonial administration used the merchants as a shortcut for governing the colony, so the latter also tried to use the administration to protect their commercial operations. When the Japanese briefly took Hong Kong from the British, the business leaders who could, adjusted their behaviour to retain prerogatives under the new dominant class,²⁰³ and when after the crackdown in 1989, the British began to backpedal from their agreements with Beijing and seek more protection for civil rights and democracy, the Chinese business elite knew where their long-term interests lay, and duly took issue with the British position.²⁰⁴ On the other side of this relationship, as Tsang and Goodstadt observe, the only times the colonial government pushed significantly for social justice and democracy in Hong Kong were for diplomatic purposes – in reaction to abuses in China or to use British-led Hong Kong as a foil to emphasize errors in the Chinese political system.²⁰⁵ Seen in this way, the caretaker model loses much of its shine.

¹⁹⁹ Law explains that 'the place later functioned not only as a religious site but also as a social center from which the Chinese exercised a certain informal self-government'. Law (2009: 21).

²⁰⁰ Tsang (2004: 68); Sinn (2003).

²⁰¹ Loh (2009: locs 722–45). The role of Jardine and Matheson in Hong Kong is discussed in Chapter 2, Section C.1.

²⁰² See The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Annexes I and II.

²⁰³ Goodstadt (2005: 101). ²⁰⁴ Goodstadt (2005: 45, 106).

²⁰⁵ See Tsang (2004: 189–96, 249–53) and Goodstadt (2005: 145–6).

Moreover, the system of elite governance has not always been effective,²⁰⁶ and this became much more noticeable to the residents of Hong Kong as their level of information and education rose. As we have seen, Hong Kong experienced various waves of immigration from mainland China. Similarly to the persons driven to the United States by hunger, war and persecution in Europe over centuries, the type of person driven to emigrate from the Mainland also depended greatly on the type of scourge China was currently experiencing. Initially, a failing economy, rebellions and war drove the more vulnerable poorer people from their homes to seek better economic conditions and a more secure political environment.²⁰⁷ Hong Kong provided that. With the coming of the twentieth century and the rise of ideologically motivated change, leading citizens like Wu Tingfang and Sun Yat-sen came to Hong Kong society to look for Western solutions to Chinese problems. Later, civil war, revolution and political purging brought the bourgeoisie, liberal intellectuals and traditionalists to Hong Kong's safe haven.²⁰⁸ Recently, top secondary school students who decide to attend university in Hong Kong²⁰⁹ and mainland Chinese who invest in Hong Kong real estate are prominent among mainland immigrants.²¹⁰ Both are attracted in part by the Hong Kong legal system and the limited powers of government. The increasing sophistication of both immigrants and residents, their attraction to civil liberties and their discomfort with the remnants of a colonial system that has structural similarities with mainland China have all contributed to an increasing movement for universal suffrage²¹¹ – a clear step back from

²⁰⁶ As Loh puts it, 'The combination of laissez-faire economics and "consensus" government dominated by the elites led to out-of-touch policies that ended with crises in 1956 with Kuomintang fomented riots, and again in 1966 and 1967 as a result of poor social conditions in Hong Kong, as well as the overspill of the Cultural Revolution. The riots provided stark evidence that the elitist and narrow nature of the appointment system was unable to cope.' Loh (2009: locs 851–4).

²⁰⁷ See, e.g., Spence (1990: 167–91) for descriptions of triad revolts, the Taiping Uprising, the Nian Rebellion and the Muslim Revolts which left tens of millions of Chinese dead or homeless.

²⁰⁸ Goodstadt (2005: 195–200).

²⁰⁹ See, e.g., Yojana Sharma, 'CHINA: Top Students Opt for Hong Kong', *University World News* (21 July 2011).

²¹⁰ Residence status in Hong Kong is seen as an attractive side-benefit to investing in the Hong Kong SAR. This is provided under the Hong Kong government's 'Capital Investment Entrant Scheme'. See www.immd.gov.hk, 'Public Services' > 'Hong Kong Visas' > 'Capital Investment Entrant Scheme' (accessed 15 March 2014).

²¹¹ See, e.g., Emily Lau, 'Hong Kong's Summer of Discontent', *New York Times* (30 June 2013). An interesting twist to this movement is that it contains an element of fear and

Hong Kong's caretaker structure. This has put pressure on the Hong Kong government model and the socio-economic arrangement that it reflects.

The transition of Hong Kong away from a caretaker structure toward one with a more democratic legitimacy will not be without its challenges for the people of this Special Administrative Region of China. This is not just because of any hesitancy in Beijing, but more importantly because of the way low quality public discourse interacts with a government that appears to lack confidence because of its dual deficits of legitimacy towards the people of Hong Kong and full sovereignty vis-à-vis Beijing, creating a picture very different from 'the world's most competitive financial centre'. Take for example the case of Edward Snowden, referred to at the outset of this section. When the US whistleblower declared 'I am not here to hide from justice; I am here to reveal criminality', China's Hong Kong was handed a golden opportunity to showcase its high quality system of justice to the world through long extradition hearings that would review the quality of the US justice system for signs of inhumane treatment. However, this opportunity was cast away when Snowden apparently received advice from a mysterious, informal emissary of Beijing that he should flee the territory. The embarrassing story was announced by a pro-democracy member of the Hong Kong LegCo.²¹² This happened after the United States had sent Hong Kong a request for Snowden's provisional arrest, and the Hong Kong Justice Department, which did not follow up on the US request, could salvage its legal reputation only through reference to formalistic rigour,²¹³ because Snowden's name was not spelled out correctly on the US request.²¹⁴ The messy resolution of this matter meant that what the world had heard earlier about Hong Kong's high quality system of justice was then overshadowed by a picture of Hong Kong as Beijing's pawn in geopolitical manoeuvrings, with some dysfunctional, open agitation against Beijing on the side by a member of Hong Kong's LegCo.

resentment against the power of the mainland government and mainland immigrants in Hong Kong. One emotional chapter in this story was the (well substantiated) fear that mainland mothers seeking to give birth in Hong Kong – both because of superior medical treatment and Hong Kong residency for their offspring – would swamp the Hong Kong hospital system, leaving insufficient care for residents. See Stuart Lau, 'New Bid to Curb Rush to Give Birth in HK', *South China Morning Post* (14 August 2012).

²¹² Lana Lam, 'Hong Kong Lawyer Albert Ho Says "Middleman" Urged Snowden to Leave', *South China Morning Post* (23 June 2013).

²¹³ Patsy Mo, 'US Failure to Clarify Snowden Papers Tied HK's Hands, says Justice Chief', *South China Morning Post* (26 June 2013).

²¹⁴ There was a parallel political reason which the Hong Kong government did not refer to (Snowden had provided evidence that the United States had targeted Hong Kong

Another example of how poorly the delicate socio-political balance of Hong Kong can perform arose in a 2013 controversy regarding a duly enacted law – the Companies Ordinance 2012 – which was subject to public consultations between 2007 and 2011, and spent 18 months in the Legislative Council before adoption.²¹⁵ The controversy regarded provisions introduced to protect the privacy of directors' personal data. The Companies Ordinance attempts to reach a balance between transparency and accountability of directors and compliance with Hong Kong's Protection of Data Privacy Ordinance.²¹⁶ It contains a three-part rule: first, directors must provide their identity card number and residential address to the company's register of directors;²¹⁷ second, a company has discretion to deny a member access to these personal details of a director;²¹⁸ and third, although this personal data must be provided to the public register, the latter may not generally disclose this information in full,²¹⁹ except to persons – such as a public officer, liquidator or trustee – specified in a regulation adopted for this purpose.²²⁰ The result of this framework is to ensure that every director provides an address for service of process and that all information would be available for any official purpose, but to prevent these personal details from being available generally to the public, which brought Hong Kong law into line with the company laws of other major jurisdictions.²²¹

institutions for hacking strikes), but anyone familiar with Hong Kong administrative practices could attest that the formalistic reason given might well be real, as formalistic, administrative rigour is as much a part of life in Hong Kong as 90 per cent humidity.

²¹⁵ For the consultation papers on the Companies Ordinance 2012 and the history of its enactment, see information provided by the Hong Kong Financial Services and the Treasury Department at www.fstb.gov.hk, 'Companies Ordinance Rewrite', (accessed 15 March 2014) and by the Hong Kong Companies Registry at www.cr.gov.hk/en/home (accessed 15 March 2014).

²¹⁶ See the Hong Kong Personal Data (Privacy) Ordinance, Ordinance 81 of 1995, codified at Chapter 486.

²¹⁷ See s 643 CO 2012. ²¹⁸ See s 644 CO 2012. ²¹⁹ See s 47 CO 2012.

²²⁰ See s 51(3) CO 2012. Section 8 of the proposed 'Companies (Residential Addresses and Identification Numbers) Regulation' specified permitted disclosure to: '(a) a data subject; (b) a person who is authorized in writing by a data subject to obtain withheld information; (c) a member of a company; (d) a liquidator; (e) a trustee; (f) a public officer or public body; (g) a scheduled person.'

²²¹ See, e.g., the UK Companies Act 2006, sections 240–246; the Delaware General Corporation Law, section 132(d), which provides only for the disclosure of an address for an agent to receive communication with the corporation, and inclusion of information regarding directors only upon the company's dissolution (§275(d)(4)). The German Stock Corporation Act also protects the private data of company directors.

The delicate balance of this legislation quickly collapsed as soon as prominent international opinion coupled with local special interests put pressure on the provision. Although the purpose of company law is to provide for the creation of companies and their fair and efficient operation, the presence of residential addresses and full identity document numbers in the Companies Registry had for years provided journalists with a ready data source they employed for investigations unrelated to the operation of companies. Two US media firms (Bloomberg News and *The New York Times*), in particular, had gained significant readership in 2012 by investigating the economic activities of Chinese party officials and their families, and they found the Hong Kong Companies Registry a good source of data to this end. In early 2013, about six months after the adoption of the Companies Ordinance, these two firms published comments on implementing regulations that had been introduced in connection with the Ordinance,²²² and were joined by the employees of a private investor in Hong Kong who operates a database on Hong Kong companies and had also used this generally available data to operate his businesses.²²³ Following the published accounts from the US media firms, which contained significant errors as to the nature of the privacy protection rule and its consequences, 1,768 Hong Kong journalists published a petition against the privacy protection provisions.²²⁴ As *The New York Times* put it, the privacy provisions would mean limiting access to an 'online searchable database that is open to the public for a nominal fee'.²²⁵ For this reason, journalists had a direct interest in company law continuing to provide them with this handy source of data. The debate blithely

²²² The first sentence published by Bloomberg characterized the Companies Ordinance amendments as *proposed* legislation to protect dishonest mainland Chinese officials: 'Hong Kong proposed amendments that would make tracing the personal details of company directors in the city more difficult, amid increased scrutiny of the wealth held by Hong Kong and Chinese officials and their families.' Natasha Khan and Simon Lee, 'Hong Kong Proposal Makes Director Identification Harder', *Bloomberg News* (9 January 2013). *The New York Times* candidly admitted that its objection had nothing to do with company law: 'As part of a broader corporate paper trail, such information was used in 2012 by *The New York Times* in reports on the wealth of the family of Prime Minister Wen Jiabao of China, and by *Bloomberg News* in a report on the wealth of the country's presumptive next president, Xi Jinping.' Neil Gough, 'Hong Kong Moves to Limit Information on Executives', *The New York Times* (9 January 2013).

²²³ Webb-Site, 'HKIDs and Government Secrecy' (12 February 2013).

²²⁴ Tom Holland, 'Directors' Privacy is a Direct Attack on the Public Interest', *South China Morning Post* (29 January 2013).

²²⁵ Neil Gough, 'Hong Kong Moves to Limit Information on Executives', *The New York Times* (9 January 2013).

went forward despite (or more likely because of) the fact that it contained direct contradictions of both fact and law, which were swept aside amid allegations that the Hong Kong government was engaged in a 'cover up' following aggressive, investigative journalism.²²⁶ Among the assertions plainly in conflict with fact and law were:

- The Companies Ordinance, which had been duly enacted in July 2012, was still only proposed legislation in 2013.
- Labourers employed by a company need to know a director's residential addresses, so that they can seek back pay from the director at home if the company does not make payment, which is, first, untrue, because the contract would be with the company rather than with the director, and second, would promote breach of peace rather than orderly collection of debts through legal proceedings.
- Directors should disclose information in return for receiving limited liability from the company form, which has no basis in law, because the director would never be liable for the debts of a company that employs her;²²⁷ even an employee of a partnership is not liable for partnership debts, even though the partners are.
- The real problem is that identification numbers have been used by private actors such as banks and phone companies as 'authenticators', and if this is stopped, there is no problem with releasing numbers that merely 'identify' a person.²²⁸

In response to the criticisms by Bloomberg News and *The New York Times*, and even before the Webb-Site group and the Hong Kong journalists joined

²²⁶ As *The New York Times* put it: 'After a year in which short-sellers continued attacks on companies from China and journalists conducted in-depth investigations into the secret wealth of Chinese leaders' families, *Hong Kong is moving forward with legislation to restrict access to information* about corporate directors' (emphasis added). Neil Gough, 'Hong Kong Moves to Limit Information on Executives', *The New York Times* (9 January 2013).

²²⁷ The argument was made as follows: 'Statutory limitation of an individual's personal liability for corporate debt gives directors the assurance that they would not be personally bankrupt in the event of a business failure. In return for this protection, however, directors have to disclose key information about themselves, in particular their identity and how they can be contacted.' Gordon Jones, 'No Good can come of New Company Director Rule', *South China Morning Post* (13 February 2013). The concept of 'limited liability' means that a shareholder is only liable up to his contribution in the company, which is different from the liability a person would have if he engaged in contracting directly, rather than using a limited company as a vehicle to do so. Directors are employees of companies and are never liable for their debts.

²²⁸ This argument made by Webb-Site, 'HKIDs and Government Secrecy' (12 February 2013) is wrong for a couple of reasons. First of all, pursuant to section 2 of the Personal

ranks, the President of the Small and Medium Enterprises Association, who represents many of the 900,000-plus companies formed in Hong Kong (and their directors), agreed that the privacy protection given to the people he represented was misguided. The reasons for his position are very telling with respect to the difficult position of Hong Kong in adopting balanced policy: “Hong Kong has been so successful because of its transparency,” said Stephen Kwok Chun-pong ... “If we make it so that such information is not going to be public, it may affect the business transactions, especially for international businesses in Hong Kong.”²²⁹

Not much different from the complaints voiced by the Washington-based Heritage Foundation against Hong Kong’s attempt to protect some of its poorest residents,²³⁰ the American media companies judge Hong Kong quickly according to their own positions and needs without thinking too much about local circumstances or, indeed, whether the United States would meet the standards they apply (even in the case of a listed company, US law provides no information regarding a director’s home residence or her social security number). Mr Kwok, when hearing the US criticism, explains that ‘Hong Kong has been so successful because of its transparency’, but does not stop to think whether this is the kind of transparency that is useful. Hong Kong provides thorough disclosure of the financial position of companies, their outstanding liabilities, related party transactions and significant shareholdings.²³¹ Unlike these items, knowledge of a director’s identification number and residential address serves no company law purpose. The ‘transparency’ argument is thus nonsense. Nevertheless, LegCo resolved that enforcement of this aspect of the Ordinance was suspended.²³²

The handling of the Edward Snowden case and the failure to understand the Company Ordinance treatment of directors’ personal data has shown an Achilles heel of Hong Kong – a jurisdiction created under caretakers, where

Data (Privacy) Ordinance, ‘personal data’ (個人資料) is ‘any data (a) relating directly or indirectly to a living individual; (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and (c) in a form in which access to or processing of the data is practicable’ (emphasis added). Second, with regard to use of identification numbers as authenticators being an abuse, Hong Kong has machines located on its border crossings and in its airport which read a person’s identification number, associate it with a thumb print and allow or disallow the border crossing.

²²⁹ The quote is provided in Lana Lam, ‘SMEs Join Chorus of Concern over Hiding of Directors’ Identity’, *South China Morning Post* (27 January 2013).

²³⁰ The measure in question was a minimum wage rule. See Section D.3.

²³¹ The nature and quality of such provisions are discussed in Chapter 3.

²³² Danny Mok, ‘Watchdog Chief Slams Shelving of Privacy Law’, *South China Morning Post* (3 April 2013).

civic participation was not practised, and where the level of debate about civic issues is now often confused and easily manipulated. Vulnerability to manipulation is all the more because of Hong Kong's position as only semi-sovereign within China and its convenience as a base for arguments against China by the West. The future ramifications of this instability are unclear – the situation could lead to internal repair and an even stronger Hong Kong, in which a highly educated populous adds its voice to the shaping of policy. A worst-case scenario is that international 'clients' and critics of Hong Kong will all continue to assert their own agendas, and because Hong Kong lacks quality media (at least in English)²³³ and cannot carry forward a coherent public discussion on the issues, the mainland government will be tempted to increase pressure to calm things down.

3 *Laissez-faire policies are essentially fading path dependence*

Hong Kong originated in 1841 as a 'free port' without duties or tariffs.²³⁴ Its very existence was fruit of a war advocated by British merchants to protect their sales of opium on Chinese territory. As we have seen, the British colonial administration stayed small, and relied heavily on the private organization of leading merchants to liaise with the Chinese population and provide partial, informal governance over them. This framework meant not only that the colonial administration did not have the desire or organizational size significantly to impact the lives of Hong Kong residents on a regular basis, but also that the private sector had a tradition of engaging

²³³ An good example of how the *South China Morning Post* serves Hong Kong is a May 2013 report of how the findings of a study conducted by the Swiss business school IMD, which had changed its rating of Hong Kong. At the time, the World Economic Forum continued to rate Hong Kong as the most competitive financial economy in the world. Instead of running a story that the IMD had changed its mind and giving (perhaps also arguing with) the reasons (as a proud news outlet in New York or London might), the *SCMP* announced in the title of the front page article: '*Hong Kong No Longer Ranked World's Most Competitive Economy*', which was both factually incorrect and as sensationalist as possible. This piece by Ng Kang-chung and Stuart Lau (31 May 2013) did cite an academic referring to high property prices as being a problem, but made no mention of the international causes of these prices, which lie partly in the US inflationary monetary policy, or of measures (an anti-speculation stamp duty) that had been introduced in the same month to correct the matter. Although it is merely an anecdotal observation, over a 20-year period of daily reading I have never seen a local paper in New York, London or Frankfurt excitedly exaggerate their locale's alleged flaws in the manner embraced by Hong Kong's only English language paper (other than *The Standard*, which is handed out for free on the street and contains mostly advertising).

²³⁴ Tsang (2004: 17).

in public services. This historical path led directly into a situation that Financial Secretary (1971–81) Philip Haddon-Cave could retrospectively describe with the phrase ‘market leads, government facilitates’,²³⁵ and this exact wording was repeated officially as recently as 2004, appearing in the first sentence on economic policy in the official Hong Kong Year Book of that year.²³⁶ This policy was noted by prominent international observers as consistent with the rising philosophy of neo-liberalism that they espoused, and praised by Nobel Laureate Milton Friedman.²³⁷ The conservative US think tank Heritage Foundation awarded Hong Kong first place in its Economic Freedom Index for 20 consecutive years.²³⁸ However, following the close of the colonial era, historical evidence shows that the path of Hong Kong is changing and can no longer be seen as a simple case of *laissez-faire* economic policies in the Western mould. Leo F. Goodstadt, head of the Hong Kong Central Policy Unit from 1989 to 1997, has argued that although non-intervention was uniformly advocated during the colonial period, it was not uniformly practised: property developers in particular received protection against competition and price support intervention.²³⁹ According to Goodstadt, the *laissez-faire* blanket covered a more complex reality in which the government picked and chose when to succumb to industry pressure and when to keep its hands off. For example, Financial Secretary Sir John Cowperthwaite, one of the most famous proponents of non-intervention, did in fact intervene to create assistance programmes for the poorest residents and the disabled, but ‘he also helped to delay the introduction of free and compulsory education as long as possible, even at the primary level ... assisting the manufacturers by ensuring the youngsters were [free for] ... joining the labour force’.²⁴⁰ This form of ad hoc private–public partnership has decreased after the close of the colonial era. As Goodstadt notes:

Events after the British departure illustrated how central to political credibility the principles of *laissez faire* and non-interventionism has become ... Nevertheless, as a result of the post-1997 recessions, there was a shift in the public’s attitude towards traditional *laissez faire* management of the economy ... after the end of colonialism, the public had become less tolerant of the alliance between government and business interests. The partnership has been created originally by the British because the

²³⁵ See Latter (2007: 21).

²³⁶ See Hong Kong Special Administrative Region, *Hong Kong Year Book 2004*, Chapter 3, ‘Economic Policy’. Available at: www.yearbook.gov.hk (accessed 15 March 2014).

²³⁷ Goodstadt (2011: 98). ²³⁸ The Heritage Foundation (2014: 4).

²³⁹ Goodstadt (2005: 128–9, 135–7). ²⁴⁰ Goodstadt (2005: 125).

rulers were alien and needed 'respectable' intermediaries to represent the Chinese community. Beyond 1997, the government could claim no such justification.²⁴¹

The fact that 'laissez-faire' can essentially mean 'upward redistribution of wealth' has placed contemporary Hong Kong in the difficult position of trying to respond to the needs of its residents for fairness while also simultaneously ensuring that its polity and economy will prompt ticking of the right boxes in the rating schemes its foreign observers apply. And most of these observers champion laissez-faire as Hong Kong's award-winning trademark. While the laissez-faire policy remains officially championed, market intervention increases. Goodstadt notes the examples of substantial government funding for the development of both a large complex of residences, offices and conference facilities called 'Cyberport' on the west of Hong Kong Island and a Hong Kong Disneyland on Lantau Island.²⁴² Tony Latter, a former deputy chief executive of the Hong Kong Monetary Authority, provides further examples of a shift away from laissez-faire policies in Hong Kong: about 200 hectares of land grants and subsidies were used to create 'industrial estates',²⁴³ and the tourism industry was promoted through grants and other funding to the Hong Kong Tourist Association.²⁴⁴ Perhaps more telling examples can be found in the behaviour of the government during two financial crises. First, during the Asian Financial Crisis (1997–8), the government spent approximately US\$15 billion of public reserves in open market transactions to support its equity markets against what Andrew Sheng calls a 'double-play' bear raid conducted by international hedge funds which hoped to crack both the Hong Kong financial markets and the Hong Kong dollar.²⁴⁵ Ideological axioms dictating non-interference in the self-correcting mechanisms of financial markets, which the hedge funds counted on tying government's hands, were discarded in favour of facts regarding the dangerously manipulative nature of the raids being conducted. This example may not appear terribly significant because all governments tend to provide some sort of supportive intervention during an economic crisis. However, the manner in which Hong Kong has chosen to intervene tells us something about the nature of its actual regulatory philosophy. During the Global Financial Crisis (2007–9), while the United States

²⁴¹ Goodstadt (2005: 137–8).

²⁴² Goodstadt (2005: 138). Latter (2007) also discusses these projects at 31–5.

²⁴³ Latter (2007: 26). ²⁴⁴ Latter (2007: 29). ²⁴⁵ See Sheng (2009: 270–1).

was twisting the rules of contract law to bail out its largest financial institutions (which were not equally as generous with the many mortgagors who owned the banks money on home loans),²⁴⁶ Hong Kong was twisting the arms of financial institutions to force their repayment to retail investors who had purchased Lehman-arranged, credit-linked notes affectionately referred to as ‘mini bonds’. Thus intervention can come in many forms. In Hong Kong, formal compliance with law to the detriment of unsophisticated investors was trumped by a simple appeal to basic fairness and the bargaining power of the Hong Kong government, which was at least in part a result of public demonstrations by retail investors. This ‘mini bond’ settlement will be discussed at more length in Chapter 5.

The instances discussed above show that Hong Kong devotes energy and resources to directing its economy and safeguarding its market, and no longer advertises itself as a place where ‘market leads, government facilitates’, but such announcements have been increasingly made by others. Unlike the summary statement found in the 2004 Year Book, Hong Kong’s 2011 Year Book can refer to specific factors presented in reports written by others:

Hong Kong has a business-friendly environment with the rule of law, free trade and free flow of information ... a flexible labour market with a well-educated workforce and a pool of efficient and innovative entrepreneurs ... prudent fiscal management and a simple tax system with low tax rates. In view of these virtues, Hong Kong has been ranked by the US Heritage Foundation as the freest economy in the world for 18 consecutive years. Similarly, the Fraser Institute of Canada has also consistently ranked Hong Kong as the world’s freest economy. Hong Kong is ranked the world’s most competitive economy for the first time by the International Institute for Management Development (IMD) in 2011.²⁴⁷

The tightrope on which Hong Kong is balancing between high ratings as a laissez-faire star and the realities of its own economy and development is not an easy one to walk. The Hong Kong political framework is criticized locally as unacceptably undemocratic,²⁴⁸ whilst the economy’s division

²⁴⁶ See Pistor (2013: 319–20).

²⁴⁷ Hong Kong Special Administrative Region, *Hong Kong Year Book 2011*, Chapter 3, ‘The Economy’. Available at: www.yearbook.gov.hk (accessed 15 March 2014).

²⁴⁸ See for example the opinion piece by the founding chairman of the Democratic Party, Martin Lee, ‘Hong Kong People Can’t Just Wait Around for Democracy; They Must Act’, *South China Morning Post* (1 May 2013).

into wealthy entrepreneurs and successful professionals on the one side and those providing them inexpensive labour on the other is widely perceived as unfair.²⁴⁹ Given the facts that Hong Kong has a government which does not enjoy popular legitimacy and an income inequality coefficient similar to a lower income economy,²⁵⁰ neither argument is without merit. Yet, when Hong Kong does take a minor step towards protecting its poorest citizens, such as when it introduced a HK\$28 (about US\$3.60) per hour minimum wage in 2010,²⁵¹ the international ratings that have for years affirmed Hong Kong's good standing for laissez-faire policies are quick to react. The Heritage Foundation included the following rebuke and veiled threat in its 2013 report on 'economic freedom': 'Although Hong Kong remains number one in the Index rankings, the uniqueness of its commitment to economic freedom has eroded in recent years, and any further implementation of *populist policies* that empower the bureaucracy or undermine the principle of limited government could threaten its standing in the future.'²⁵² Beyond the question of being a laissez-faire champion, this problem highlights the predicament of a financial centre generally. As an international financial centre, Hong Kong has sold its policies and law to investors distant from its shores, which includes not only the Western financial community but also the controlling

²⁴⁹ One month into a 2013 dockworkers' strike at a subsidiary of Hutchinson Whampoa Ltd., the general secretary of the Hong Kong Confederation of Trade Unions observed that: 'Striking dockers are paid less now than they were in 1995. Adjusted for inflation, their hourly wage is now some 20 per cent below that of 18 years ago. Stevedores are often asked to work three eight-hour shifts in one go, and they even have to work up to 72 hours continuously during peak seasons. Crane operators work 12-hour shifts, and sometimes 24-hour shifts, in cabins 80 feet above the ground. They are not given proper meal and toilet breaks, and have to eat and urinate in the cranes.' Lee Cheuk-yan, 'HIT and Hutchison Whampoa Have a Duty of Care to Contract Workers', *South China Morning Post* (3 May 2013).

²⁵⁰ The gini coefficient of Hong Kong, which is classified as a 'high income' country by the World Bank, increased from 45 in 1981 to 54 in 2011, while during the same 30-year period the share of employment in manufacturing decreased from about 41% to 5% and that of the financial industry increased from about 5% to 18%. Government of the Hong Kong Special Administrative Region, *Hong Kong Half-Yearly Economic Report, 2012*, Box 5.2. Thus the Hong Kong gini coefficient was only slightly better than the 56 scored by Bolivia (a lower middle income country) and the 57.2 scored by Colombia (an upper middle income country) in 2008. The World Bank, GINI index.

²⁵¹ See the Hong Kong Minimum Wage Ordinance, Ordinance 15 of 2010, codified at Chapter 608.

²⁵² Heritage Foundation (2013: 239, emphasis added). It is good for Hong Kong that it also ranks at the top of other such rankings that are less ideologically driven, such as that of the World Economic Forum and the Z/Zen Group.

shareholders of major, listed issuers – in many cases that means the PRC, albeit indirectly.²⁵³ When the policies designed to serve this end bring local hardship to the people of Hong Kong and resulting social instability, these domestic matters call into question the legal framework which might have brought international standing. It cannot be ruled out that the ‘price of inequality’²⁵⁴ will in the future be factored into international ratings of financial centres and economic performance, but that is not the case today. The situation in a market like that of Hong Kong is very different than in places with socio-economic configurations like those of New York and London because the purely domestic economy is significantly smaller. The road forward between domestic fairness and international acceptance in this situation is full of delicate and difficult decisions. Nevertheless, the fact that leading financial centres can be found in places as different as New York, Hong Kong and Singapore shows that a central core of financial regulation is critically important – and comes close to being determinative – for the success of a financial centre. Hong Kong’s legal system, especially when we understand Hong Kong as part of the PRC, is its main competitive strength, and the genesis of this system will be discussed in Chapter 3.

4 Hong Kong must begin to make common law

The business elite of Hong Kong have greatly shifted their investment and client base towards the Mainland,²⁵⁵ and may also choose to adjust the positions and projects that they are willing to support, as Hong Kong becomes increasingly integrated into the Chinese economic and social system. Albeit the growing pains discussed above are affecting its political system, the historical path of Hong Kong – a city established to serve as a component in a larger whole – has left it well adapted politically, economically and culturally to manage at least its financial policy and regulation through a relatively small group of business and political leaders who can broker between local and distant interests. The shares of many Chinese

²⁵³ The presence of Chinese state-owned enterprises (SOEs) on the Stock Exchange of Hong Kong is discussed in more detail in Chapter 2. The gradual assimilation of Hong Kong into mainland China might have had some impact on the shift in Hong Kong away from laissez-faire, although this appears to be more the result of events (the two financial crises mentioned above) and greater participation of Hong Kong residents in public debate.

²⁵⁴ See, e.g., Stiglitz (2012).

²⁵⁵ This is particularly apparent in some of the leading property developers. See Chapter 2, Section C.

state-owned enterprises (SOEs) are listed on the Stock Exchange of Hong Kong because they benefit from both the Hong Kong legal system and the free convertibility of the Hong Kong dollar.²⁵⁶ In the passage quoted in Section A.2, above, Huang argues that Hong Kong currently serves China by supplementing its dysfunctional institutions. If this is true, a question for the future will be, if Chinese institutions become fully functional, will Hong Kong lose its utility for China and others? Perhaps the last Chinese institution we can expect to reach a par with Hong Kong is the judiciary. Whilst China cannot conceive of a branch of government independent of the CCP and the Central Committee, Hong Kong enjoys an independent judiciary. It is composed of talented, dedicated individuals whose tradition stretches back over 150 years and its coupled (previously by law, and now by tradition) to a culture of judicial lawmaking that has been found to perform reasonably well since its origin in the twelfth century. Given the time necessary for mainland China to gestate a high quality judiciary with its own balance and voice in that government, it would appear that Hong Kong holds a the trump card of superior law and regulation in its hand.

However, this main strength of Hong Kong could also become a source of weakness. As discussed above, Hong Kong's legal system is a mixture of local ordinances and common law. The ordinances were originally drawn from Britain's colonial toolbox and the drafting of new ordinances also includes consulting UK or Commonwealth models where applicable. The drafting and enacting of new ordinances can be used proactively to shape society if the electorate or general population (if, as in Hong Kong, suffrage does not fully determine government composition and influence is exercised informally) sees a need for change. The common law, however, is something that clearly arises from its social and cultural environment and is not meant to shape it, but rather reflect it.²⁵⁷ The manner in which power is organized in a jurisdiction's economy will feed into shaping the common law of that jurisdiction because the courts may be confronted with a need to check such power if it is abused. For example, courts developed principles of tort liability for defective consumer products only after consumer products were being manufactured and shipped on a large scale. Where Hong Kong's socio-economic structure presents risks and dangers not found in the UK, the UK will not have created solutions for a problem it does not have, so that a dependence on the courts of the UK to generate principles of common law for Hong Kong will be inadequate.

²⁵⁶ See, e.g., De Jonge (2008), generally.

²⁵⁷ Eisenberg (1991: 3, 154).

An example central to the quality of Hong Kong investor protection can be found in the way that the size of the average shareholdings in an economy might be reflected in the type of relief offered to minority shareholders whose interests are prejudiced by actions of the majority shareholders. Company law provides shareholders with voting rights to control management, and these rights are exercised by majority rule. Minority rule would both be unworkable and unfair. Moreover, shareholders are generally entitled to exercise their voting rights in their own best interests. Except in relatively intimate private companies that resemble partnerships, the problem of majority shareholders abusing their power has not presented itself as pressing in the modern UK economy, probably because the blockholdings of UK shareholders were broken up as the capital markets grew after the Second World War.²⁵⁸ Thus courts have not been forced to fashion duties for majority owners to check unfair use of their power, except in small companies that resemble partnerships ('quasi-partnerships') because of their dependence on personal relationships.²⁵⁹ The underlying system of powerful interests is very different in economies where large shareholders tend to dominate companies. For example, in Germany, large shareholders are very common and thus the courts have assigned such persons fiduciary duties in exercising their powers,²⁶⁰ quite similar to the duties assigned corporate directors. As will be set out in detail in Chapter 2, Hong Kong, which has shareholding structures more resembling those in Germany than in the UK, applies the common law developed in the UK to problems of dominant shareholders, and thus applies a law formulated over years in a completely different economic milieu, where the relevant problem did not arise and no solution was created. As a 2009 decision of the Hong Kong Court of Appeal made clear,²⁶¹ English Common Law has not developed satisfactory solutions for some problems, such as blockholder abuse in large companies. Hong Kong must develop its own solutions if it hopes to address abuse in its own economy. The Court of First Instance took a step in this direction by extending the 'unfair prejudice' action to apply to a company listed on the stock exchange,²⁶² which was upheld by the Court

²⁵⁸ See Cheffins (2010: 303 *et seq.*).

²⁵⁹ For a discussion of the UK concept of 'unfair prejudice', see Chapter 3, Section C.1, and *O'Neill v. Phillips* [1999] 1 W.L.R. 1092 HL.

²⁶⁰ See the translated decisions of *In re Linotype* and *In re Girmes* in Cahn and Donald (2010: 583–5, 594–8).

²⁶¹ See *Re PCCW Ltd* [2009] HKEC 738.

²⁶² See *Luck Continent Ltd v. Cheng Chee Tock Theodore* [2012] HKEC 567, discussed in Chapter 5, Section B.1.

of Appeals.²⁶³ If this line is continued, it will provide a good basis for the kind of relief that investors need to protect their rights in the Hong Kong economic environment.

As Hong Kong decouples from the British Empire and is reinserted into China, its courts should be aware of the occasional mismatch between the solutions it needs and the solutions the UK has offered, and make adjustments. Nowhere is path dependence more tangible than in the body of judicial decisions forming common law, which project their rules and principles onto the resolution of future disputes. The growing body of home-grown cases and a clear awareness that references to authority in other Commonwealth jurisdictions is only persuasive²⁶⁴ assists Hong Kong in its task of formulating common law rather than implementing English Common Law. On the other hand, some may fear that if Hong Kong were to decouple its legal system from the UK and the Commonwealth, to which it looks for almost all of its extraterritorial persuasive authority, there would be a dangerous slippery slope, at the end of which could be the mainland Chinese court system and a loss of the judiciary's core strength, judicial independence, which it draws from the common law tradition. While this fear may well be greatly exaggerated, it does show the delicate position in which Hong Kong currently finds itself. The existence of a strong and independent judiciary operating as it currently does presents only advantages and no disadvantages for Hong Kong. The prestige of the common law judge has led to a highly professional *corp* of dedicated justices in Hong Kong, who, regardless of the shape that the common law or statutory law of Hong Kong ultimately takes, will likely work to guarantee high quality adjudication under a rule of law. If this apparatus is consciously directed towards the customs, beliefs and principles of the people of Hong Kong, then the danger of mismatch would likely disappear in the medium term, and the danger of a slide into mainland China could be reduced. This is especially so given that immigration into Hong Kong might well have created a cross-section of people who value order highly. Although serious socio-demographic study must precede any assertion in this regard, it is possible that because most immigrants from mainland China were either fleeing the chaos of war and revolution or seeking an environment where property rights and (more recently) regulatory quality could be relied upon, these people have passed these values on to their

²⁶³ *Luck Continent Ltd v. Cheng Chee Tock Theodore* [2013] HKEC 1209, CA.

²⁶⁴ See, e.g., the Hong Kong Court of Final Appeal's explanation of the state of the courts following 1997, *Solicitor (24/07) v. Law Society of Hong Kong* [2008] HKEC 431.

descendants. In this way, respect for law and order is deeply imbedded at the granular level of Hong Kong culture.

From the brief historical analysis presented in this chapter, we may conclude that much of the efficiency of Hong Kong's relationship with the mainland Chinese economy – just as its previous relationship with Great Britain – can be found in Hong Kong's social and legal structure as formed over a century and a half. Its economy and much of its regulation is outward looking, serving the interests of those who would use Hong Kong as a port for trade or a market for trading financial instruments and services. Knowledge of what is necessary for those purposes has come from having a relatively small number of wealthy and talented individuals directly involved in managing Hong Kong's economic affairs and shaping much of its legislative policy. Hong Kong is very much an international (financial) centre at its core – a component of a larger networked whole. The caretaker structure of government was useful for governing large numbers of immigrants presenting linguistic and cultural differences. It also facilitated transition into the current governmental structure of 'one country, two systems'. Nevertheless, it appears that the residents of Hong Kong seek more than a set of civil liberties firmly embedded in a Basic Law and an independent judiciary to administer their protection, together with the enforcement of contract and property rights. It is open to debate whether these last issues should be given much attention in a work like this, which focuses on Hong Kong as an international financial centre. There is no definitive theoretical framework for deciding when inequality and disenfranchisement can become political risks, although Stiglitz, for one, has recently brought significant attention to the question.²⁶⁵ However, the observations made immediately above about the development of the common law of Hong Kong are directly relevant. While arguments regarding the caretaker system's obsolescence are mainly ethical and political, the absence of a body of case law to solve the problems actually presented in the courts of Hong Kong (as opposed to in those of the UK or Australia) is a core structural defect at the heart of Hong Kong law. Many questions will overlap and principles have been developed beautifully by British courts over the centuries, but many questions will not. If Hong Kong courts with mechanical dutifulness continue to apply ill-fitting UK or Australian solutions (or lack thereof) to local problems, quality will suffer, regardless of whether they indeed achieve a tick in the box of the international rating organization.

²⁶⁵ Stiglitz (2012).