

*PART II COUNTRY STUDIES*

## CHAPTER 5

### LEGAL LITERATURE IN HONG KONG

By Peter Wesley-Smith\*

#### Introduction

"Legal literature" is probably incapable of precise definition. I take it to include published material by which one can discover what the law is (primary literature) and in which the law is described, discussed, analysed, criticized and so on (secondary literature).

I assume that the development of a local legal literature is a thing of value. It is much easier to assume this than to demonstrate it. But if such general notions as a government of laws and the rule of law are accepted, it necessarily follows that the citizen must be readily able to discover and understand what the rules governing his conduct are. And if emphasis is placed on the "art" of achieving "legality" and the creation and maintenance of a healthy legal system,<sup>1</sup> the importance of legal literature is even more obvious. At the level of the technical operation of the system, where such basic precepts as stare decisis and the supremacy of the legislature over common law are taken for granted, easy access to law reports and the statute book, and to commentaries upon these, is fundamental.

In formal terms, therefore, it is a simple matter to indicate why it is justified to assume the value of legal literature. Of course, it may be that in individual cases justice is not well served by a highly developed legal literature: "palm-tree justice" might be preferred, or the demands of an on-going social revolution might severely lessen the need for published materials on the law. Legal literature in a place like Hong Kong might even be deplored as contributing to the efficiency of a colonial legal system which should be weakened and destroyed, not strengthened. But these matters are not the concern of this paper.

If legal literature is important, it should reflect the social context of the law: it should be localized. The social and cultural environment of Hong Kong is in some respects far different from that in which the common law developed, and imported legal principles and rules may require constant, careful assessment and adjustment if they are to be appropriate. A transplanted common law will flourish, said Denning L.J. in Nyali Ltd v Attorney General,<sup>2</sup> but it needs careful tending

"It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task which calls for all their wisdom."

That wisdom can be crucially assisted by a literature devoted to critical analysis of English law in a local context.<sup>3</sup>

One question which was raised at the Toronto seminar related to the effect in functional terms of an abundance or an absence of legal literature in a particular legal system. I make no attempt to answer that question here. Neither do I discuss the suggested topic "information needs and present user habits".

#### *Particular Features and Problems of the Jurisdiction*

##### *The Setting*

*The City-State of Hong Kong.* The "city-state" of Hong Kong is actually twin cities with rapidly growing satellite towns in their rural hinterland. The total area is just over 400 square miles (1,049 square kilometres), consisting of mainland and numerous islands. Much of it is mountainous, and the vast proportion of Hong Kong people live in urban areas and depend on imports, mostly from China, for food. The population is estimated to be 4 million people (4,720,200 at the end of 1978). More than 98 per cent

\* Lecturer in Law, University of Hong Kong

of these are Chinese, predominantly Cantonese, and they are culturally cohesive and conservative, in some ways remarkably little affected by Western influences.<sup>4</sup> The economy of Hong Kong is primarily industrial, though commerce plays an important part. Historically, Hong Kong owes its economic survival to its port and its position on the south China coast: its traditional economy was entrepot trading and financing between China and other countries. But establishment of the People's Republic in 1949 and the United States embargo on trade with China after Chinese entry into the Korean war forced Hong Kong to switch rapidly to industry, based mainly on light manufacturing. The economy is adamantly capitalist and the government, in many areas, is content to let market forces prevail.

*Acquisition of Hong Kong.* Hong Kong is a British colony carved out of China in three stages: by cession, in 1842 and 1860, and by lease, in 1898. The lease agreement covers by far the greater land area of Hong Kong and is due to expire in 1997. The People's Republic of China does not recognize the validity of any of the nineteenth century Sino-British treaties and has declared Hong Kong to be part of Chinese territory occupied by the British authorities; the "question" of Hong Kong is to be "settled in an appropriate way when conditions are ripe".<sup>5</sup>

*Constitutional Structure*<sup>6</sup>. Constitutionally, Hong Kong is a colony of Great Britain. The principal administrator is a governor appointed by and responsible to the British government through the Foreign and Commonwealth Office. He is advised by an Executive Council, which is composed of unofficial, official and ex officio members. Of a similar composition is the Legislative Council, the principal legislative assembly in and for the colony. The governor is not obliged to sign into law bills which are presented for his assent, though he always does so. He is required to reserve some bills for the royal assent, and local ordinances may be disallowed or declared to be repugnant to an applicable Act of Parliament. In practice, however, there is little restriction on the local government's legislative power.

*Legal Sources of Hong Kong*<sup>7</sup>. These are:

1. Acts of the United Kingdom Parliament which apply by their own terms (express or implied) or are applied by prerogative Order in Council, imperial subsidiary legislation or ordinances of the Hong Kong legislature;
2. Orders in Council (under prerogative or statutory authority) and other prerogative legislative instruments made specially for Hong Kong or generally for dependent British territories;
3. local ordinances and subsidiary legislation not disallowed and not repugnant to superior legislation;
4. English common law, equity and practice and procedure not inapplicable to the circumstances of the colony (decisions of the House of Lords and of the Privy Council are considered binding by Hong Kong courts, and English Court of Appeal decisions are highly persuasive);
5. "Hong Kong common law" (a small category consisting of local judicial decisions applying rules not part of English common law, for example rules from the residue of Chinese law and custom which still applies).

The bulk of the statute law emanates from the local legislature, though much of it is modelled on British legislation, while the English common law applies virtually in toto. The law is administered by a court system at the apex of which is the Judicial Committee of the Privy Council (which hears about five appeals from Hong Kong per year). Within the colony, minor crime is dealt with by magistrates; middle-range crime goes before the District Court; indictable offences are usually heard before a judge and jury in the High Court. Small civil claims are the preserve of a special tribunal, and other civil matters are taken to the District Court or the High Court. The Court of Appeal is the highest court in Hong Kong, while at the lower end of the scale are the Labour Tribunal and the Tenancy Tribunal. The Lands Tribunal occupies an intermediate position.

*General Remarks.* The facts and factors mentioned above lead to the following generalizations which are relevant to any discussion of legal literature in Hong Kong - though they are rather speculative and research is needed to verify them:

1. Although the economic history of Hong Kong is one long success story there is a continual sense of impermanence and vulnerability: Hong Kong is largely dependent on trade with other countries for its raw materials, many finished products, and even for food and water. Politically the situation is the same: a British colony in an age of anti-imperialism, a territory regarded by the Communist regime in China as Chinese and of which the greater part reverts to China anyway in less than

twenty years' time. For the Western businessman, Hong Kong has always been a place in which to make large profits in a relatively short period before going home to enjoy them: the British have not "settled" their colony. For many of the Chinese, Hong Kong has been a place of refuge providing a temporary respite from less attractive social conditions in China; but the ultimate aim, or the ultimate destiny, is to return to the native soil. The argument here, therefore, is that there is less a sense of community, of permanence, or of national or local consciousness in Hong Kong than in many other jurisdictions in the common law world. Thus there is no real sense of a local culture. More specifically for our purposes, there is no cultural context in which a local legal literature could develop.

2. In addition, there is no fully developed "legal culture" in Hong Kong. Confucian concepts of social organization emphasized conciliation and mediation at the expense of confrontation and sought a solution to disputes which was least disruptive to society. This idea contrasts strongly with the Western idea of litigation and a government of laws. Thus resort to lawyers and the courts, in Hong Kong as in traditional China, has generally been undertaken reluctantly. Partly for this reason (a relative lack of demand), the legal profession in Hong Kong has always been small.
3. Given Hong Kong's economic situation, there is a market for legal practitioners who specialize in such areas as international trade, company law, taxation and shipping law. The financial rewards for the able practitioner in these areas of law are considerable, and this, combined with the small number of lawyers, has ensured an understandable concentration of expertise into a fairly narrow range of legal services. Accordingly, there may be a demand for legal literature which analyses the applicable rules in profitable areas of law, but market forces are intimidating to the aspiring publisher of works on, for example, Hong Kong's legal system, public law, or legal history.
4. In many areas of law the differences between English and Hong Kong law are non-existent or negligible: the statutes are virtually identical and the common law rules are the same. Thus, as far as doctrinal literature is concerned, reliance can be placed on English textbooks, articles in the learned journals, Halsbury's and so on. That is, there is no great demand for locally produced studies of this nature, which in any event are unlikely to improve on their English models. This is not to deny, however, that there are many areas of Hong Kong law for which English works are unsuitable and which deserve systematic exposition. Of course, "law and society" or "law in context" studies from outside Hong Kong do not have much relevance to the colony, and there is an open field for this kind of legal scholarship.

#### *British Law in a Chinese Context*

*The Legal System.* The Hong Kong legal system is, of course, inherited from England: there is a similar general structure of courts, the same general rules apply to judges and practitioners, the laws themselves are often virtually identical. The differences between the Hong Kong and English legal systems are quite minimal: there has been very little "adaptation of an inherited legal system to a new social or political situation" and thus no novel new system demanding study and provoking research. In addition, there has not been any clearly perceived need for a radical rethinking of the system as it works in Hong Kong. Thus the impetus for a local legal literature which analyses the system and studies its components has not existed. When the British commissions on the provision of legal services are concluded there may be pressure to investigate that topic in the specific context of Hong Kong; until then, the legal system will probably remain largely unexplored.<sup>8</sup>

*Different Language Groups.* Chinese and English are both official languages in Hong Kong; though English predominates at the higher levels of government and is used by the personnel of most courts of law. Most children learn English at school, but probably only a small proportion of Hong Kong's young people reach a high degree of fluency in the written and spoken English word. This means that the market for legal literature in English is reduced from what it could potentially be, while publication in English and Chinese adds significantly to the cost. Since the education of aspiring lawyers is in English, and since many of the system's personnel do not read Chinese, it is unlikely that serious works of law would be published in Chinese only. If a market could be found for legal literature in Chinese, however, the diversification of dialects would of course present no problem, since each dialect has the same written script.

## *General Problems*

*Rapid Legislative Change.* As described below, the statute book in Hong Kong is a good one, and rapid changes in legislation can generally be easily followed by its users. Insofar as legislative change might rapidly outdate textbooks and other legal works, there is no such problem in Hong Kong owing to the general paucity of legal literature. In any event, however, in few areas of Hong Kong law is there any rapid legislative change. The government is normally reluctant to intervene in most areas of society, and the average legislative output is small. In the 1970s the annual number of ordinances has averaged about 85, many of them incorporating only minor amendments.

*Conflicting Interests Between Professional and Academic Lawyers.* There is so little legal publication of any sort in Hong Kong that anything of quality, unless particularly narrow in scope, is likely to appeal to all sectors of the legal world. In terms of sales, however, an author would be wise to write for the professional rather than the academic market. The Law Lectures for Practitioners series sells reasonably well (about 170 copies of each book) whereas one would imagine a similarly sized and priced book of general legal essays, for example, would scarcely sell at all. It is likely that many practitioners subscribe to the Hong Kong Law Journal for its personal injuries reports and sentencing section rather than for its academic articles.

*Small Markets for Local Educational Material.* The market in Hong Kong for any kind of legal literature is tiny. The education market occupies a large proportion of it, yet many students are studying for examinations in English law set by various English examining bodies and are not interested in Hong Kong variants of the rules they are required to know. With some specific exceptions, students likely to be interested in locally produced legal literature are those in the law department of the University of Hong Kong - and these students are much more likely to use library copies than to acquire their own.

## *Historical Evolution of Legal Literature in Hong Kong*

### *Statute Law*

*Revised Editions of the Law.* In 1864 an ordinance "for compiling a New Edition of the Ordinances of this Colony" was passed, empowering the governor to appoint two commissioners charged with the task of preparing, printing and publishing a revision of the ordinances.<sup>9</sup> Eleven years later a similar measure, the Legislative Commissioners Ordinance,<sup>10</sup> provided similar powers. Both ordinances were repealed in 1886 by the Statute Law Preservation Ordinance,<sup>11</sup> whose preamble referred to a collection of ordinances from the commencement of the colony down to and inclusive of Ordinance No. 30 of 1886. This collection was deposited with the registrar of the Supreme Court and was declared to be a true and authentic record of the ordinances comprised within it. The first specially printed and published edition of the ordinances of Hong Kong was that prepared by Mr. A.J. Leach and produced in four volumes in 1887. Since then there have been periodic revisions: in 1904 by the Chief Justice, Sir John Carrington (up to the end of 1901), in 1913 by C.G. Alabaster (up to the end of 1912), in 1924 by Arthur Dyer Ball (up to the end of 1923), in 1938 by J.A. Fraser (up to the end of 1931), in 1950 by Sir John Bowes Griffin and others (up to Ordinance No. 31 of 1950), and in 1966 by H.A. de Barros Botelho (up to December 31, 1964). (See para III.1 below.)

### *Law Reports*

*The Hong Kong Law Reports.* For the first sixty years or so of the Supreme Court's existence there was no organized official system of law reporting, nor were regular professional reports published by any private concern. The daily newspapers, it seems, provided the only source of reports of previous cases until 1905, when the Hong Kong Law Reports series was established. This series was probably instigated by the new Chief Justice, Sir Francis Piggott, who referred on his retirement to the "scrapbook days" which had preceded the reports.<sup>12</sup> No other reports have ever emerged. J.W. Norton-Kyshe, who reported cases while in the Straits Settlements prior to his arrival in Hong Kong in 1896 as registrar of the Supreme Court, spent his time in Hong Kong writing a history and feuding with colleagues rather than carrying on the good work as a law reporter.<sup>13</sup> The interim report of a working party on law reporting established by the Attorney General in 1978 noted:

"In the early years the work of editing and preparing of the Reports for publication was undertaken by members of the Judiciary. After World War II, barristers in private practice assisted by Mr. G.S. Edwards, Court Clerk to a

puisse judge and later Deputy Registrar of the District Court, took over the editorial work. For their efforts the editors were paid an honorarium, the amount of which was calculated on the basis of \$125 for a Supreme Court case and \$100 for a District Court case. The sum so paid was taken into account in fixing the price of each issue of the Reports. In the early sixties, with legislation and litigation on the increase law reporting became too heavy a burden on private practitioners undertaking the work and delay in publication resulted. The Attorney General offered assistance and in late 1966 the editorship of the Hong Kong Law Reports was transferred to a Crown Counsel. Since 1969 the holder of the post of Law Reform Draftsman in the Legal Department also took on the added responsibilities of Editor of the Hong Kong Law Reports."<sup>14</sup>

Since 1950 the reports have been printed and published by the Government Printer and sold and distributed by the Department of Information Services. Five hundred copies of each quarterly part are printed, of which 126 are distributed free to the judiciary and to some government departments and institutions and about 150 copies are sold to members of the public.

### *Secondary Material*

*The Early Development of University Education.* There was no university education in Hong Kong until 1911, when the University of Hong Kong was established. The founders envisaged a high-minded role for their institution as a bridge between East and West which would assist in the modernization of China. A faculty of law was originally to be among the first three faculties in the university, and one of its main functions would have been, in Governor Lugard's words, the training of "sons of gentry who aim at official posts"<sup>15</sup> - international law and treaties were mentioned as subjects of practical utility for this purpose. But when the university first opened its doors there was no provision for legal studies.

In Easter 1924, however, George W. Keeton arrived as Senior Lecturer in Political Science and Jurisprudence, and he began teaching these two subjects as well as commercial law. Keeton was an enthusiastic proponent of a school of comparative law: a scheme embodying this idea was apparently approved by the university senate in 1925,<sup>16</sup> and the new governor Sir Cecil Clementi, himself a legal scholar who had become well-versed in aspects of Chinese land law, supported it.<sup>17</sup> Alas, in his farewell address to the university's Law Society in April 1927, George Keeton admitted: "I myself am the only representative of what ought to be a great and flourishing School of Law..."<sup>18</sup> Despite having been promoted to Reader in Law and Politics, Keeton was embarking for a distinguished academic career in England. Whilst he had been in Hong Kong, however, he said:

"...I have had a single object constantly before me - the extension of legal studies. Failing to accomplish that object through the existing University organization (since, as the Vice-Chancellor pointed out at the last degree congregation, we still lack the 'few paltry dollars' necessary to equip the required Professorships and Lectureships), I have sought to approach the same end through the Law Society and the Law Journal."<sup>19</sup>

*A Law Journal.* "The Law Journal" was a publication which began life in 1926 as the Hong Kong University Law Journal, though it apparently only managed three issues before falling "a victim to the tyranny of financial stress".<sup>19</sup> Its aims were "to promote the scientific study of Chinese Law, and to help forward, in some measure, the process of legal regeneration in China".<sup>20</sup> In April 1928 it merged with a commerce journal, and Volume I, No. 1 of the Hong Kong University Journal of Law and Commerce was published. Volume II, No. 1 appeared a year later, and there were various issues during the 1930s. The last was probably in 1940.

Thus in the 1920s a beginning was made in the academic study of law in Hong Kong and in the development of a legal literature. But Keeton's ideas concerned far broader legal perspectives than the law of Hong Kong,<sup>22</sup> and even when final year students in the Department of Commerce contributed notes on recent commercial law cases for the first issue of the law journal the cases they chose for commentary were all from the English courts. Further, the law journal and its successor published virtually nothing on local law: the overwhelming emphasis was on the law and jurisprudence of China.

*The Development of University Law Teaching.* It was some time before the University of Hong Kong abandoned its self-image as a standing contribution to the government and people of China: before World War II, for example, it had never been suggested that course of legal studies leading to a qualification for the practice of law in Hong Kong was at all appropriate. Thus when a plea was made in 1930 for legal education in Hong

Kong the only concern was that lawyers in China be properly trained - primarily in the interests of foreign businessmen:

"It would be a short-sighted policy not to establish a law school in Hong Kong, because of the fear of producing a superfluity of half-baked lawyers as in India, when the chief complaint of the business man is that the Chinese judges have neither the proper training, traditions or [sic] spirit. The more lawyers China has trained in British traditions the more satisfactory will be the position of foreign traders. Lawyers there will be anyway. Why not have well trained ones?"<sup>23</sup>

But after 1945, and particularly after 1949, local concerns became paramount. In the post-war years, as Evans points out,

"it occurred both to the University and to the legal profession that Hong Kong needed to look again at its legal education, the University because Law was, perhaps, the only major discipline not represented in its curricula and the profession because it was becoming apparent that the existing system of qualification principally in England was not meeting entirely the needs of Hong Kong."<sup>24</sup>

The Department of Extra-Mural Studies at the university hired teachers in the 1960s to prepare students for the University of London external LLB exams, and so, for perhaps the first time since Professor Keeton left Hong Kong, academic lawyers existed in the colony. The Department of Law, now the School of Law, was established in 1969 with a teaching staff of four. It has expanded during the 1970s, and is still expanding, while the Hong Kong Polytechnic has also recruited full-time law teachers. Thus it is only very recently that there has been a group of law-trained personnel who might be expected to contribute to legal scholarship. In addition, the primary teaching function of the university's academics relates to the law of Hong Kong, not of China, and their writings naturally reflect this.

*Amount of Legal Literature.* Until the Hong Kong Law Journal began publication there was only a minute collection of secondary material on Hong Kong law: occasional committee reports, sporadic articles, one book purporting to be a history of the laws and courts of Hong Kong (published in 1898) and another on taxation law by a tax consultant. Civil servants have never been encouraged to write for publication, legal practitioners never found the time, and judges and magistrates, if they were ever interested, were probably inhibited by a vague notion that extrajudicial legal commentary is improper. There has been, in relative terms, a veritable explosion in the realm of secondary legal literature since 1971.

#### *Imported v Locally Produced Materials*

*The Use of English Materials.* As mentioned above, English legal literature is often quite suitable for use in Hong Kong, in many areas needing only very minor qualification. In the field of mercantile law, for example, the statutes are virtually identical, the common law rules are the same, and there is no topic for which local variants have developed to any great degree. It is unlikely that a book on Hong Kong mercantile law could be produced cheaper than an English rival, and preparation of such a book would, in any event, have to be considered low on any order of priorities referring to local legal literature. The only advantage a local book might have is in the use of examples more related to a student's experience.

*The Scope for Local Legal Literature.* There are other areas, however, where the legal literature of another jurisdiction is not suitable. Obviously, the constitution of Hong Kong is sui generis and must be studied as such, however useful and valid it may be to consult works on other British colonies; Hong Kong family law contains its own special problems; landlord and tenant law is based on a complicated set of provisions designed in response to specific historical circumstances and social conditions. Particular topics, too, involve a legal situation unique to Hong Kong (for example, the law of corruption). There is ample room for lengthy studies on many aspects of Hong Kong law. In addition, of course, the constant review of legal developments, by means of notes and commentaries on recent cases and statutes, editorial comments and critical articles on the legal system, is a valuable locally-generated contribution to legal literature.

#### *Existing Materials*

##### *Statutes*

*The Statute Book Described.* The Laws of Hong Kong, 1964 edition, was published in 1966 and brought into operation on February 1, 1967.<sup>25</sup> Its characteristics are:

1. It originally contained every law enacted in the colony which was in force on December 31, 1964. The adoption of a loose-booklet format, and the imposition on the Attorney-General of a duty to publish an annual revision of amended ordinances, enables the laws to be kept up to date.
2. Each ordinance is given a chapter number and is placed in a volume together with its subsidiary legislation, if any. Ordinances on cognate subjects were originally grouped together, but as time goes by it is increasingly difficult to maintain that system. For example, the "Star" Ferry Company (Services) Ordinance is now between Third Parties (Rights Against Insurers) and Venereal Disease.
3. Each section or subsection, as appropriate, is annotated with its history, indicating origin and any repeal, replacement or amendment.
4. The contents of the 1964 edition, as it stands in 1979, are quite comprehensive:

Vol 1: Preface

Revised Edition of the Laws Ordinance (No. 53 of 1965)  
 Table of Contents (chapters listed in numerical order with short title and subsidiary legislation, page designation and year of current edition)  
 Chronological table of ordinances (year and original number, subject and remarks (e.g., whether disallowed, when repealed))  
 Chapters 1 to 4

Vol 21: Chapters 1111 to 1129

Appendix I: Letters Patent, Royal Warrants, Regulations and Miscellaneous Instruments  
 Appendix II: English Acts applicable to Hong Kong by virtue of terms thereof or made applicable by Order in Council or Ordinance (the Acts are merely listed, not reprinted)  
 Appendix IIA: English Acts applicable to Hong Kong by virtue of the Application of English Law Ordinance (cap 88) (texts reproduced but for reference only)  
 Appendix IIB: List of references to United Kingdom statutes

Vol 22: Appendix III: Her Majesty's Orders in Council, Rules etc which are applicable to Hong Kong

Vol 23: Appendix III (cont)

Appendix IV: A selection of constitutional documents, conventions and treaties

Vol 24: Minor amendments (amendments not sufficiently extensive to justify publication of a new revised edition of each relevant chapter are contained in this annual cumulative booklet)

Separate volume: Index: Part I (ordinances and subsidiary legislation) and Part II (Acts, Orders in Council etc)  
 Lists of appointments (under various ordinances)  
 List of previous editions extracted from the Laws of Hong Kong

*In Praise of the Statute Book.* Judged by the criteria suggested by William Twining in a lecture delivered in Lagos in 1975,<sup>26</sup> the statute book in Hong Kong merits considerable acclaim. It is:

1. comprehensive, in that it contains all ordinances and subsidiary legislation in force and constitutional documents, applicable Acts of Parliament, Orders in Council etc (that is, nearly all enacted law is reproduced therein; only some enacted law originating outside Hong Kong is not reproduced, but it is nevertheless listed);
2. up-to-date, if the user's noting-up system is efficiently administered;
3. reliable (indeed, authoritative);
4. accessible to main users in that, although very expensive, most practising lawyers have their own sets, government lawyers and the judiciary are given easy access to it, and at least three different law libraries situated near the main groups of users have up-to-date copies. It can also be consulted in public libraries;
5. efficient and convenient to use: by use of the Index, it is easy to find the chapter number and volume of any item of legislation, and the printing and paper quality are of a high order. Individual ordinances, which are stapled in booklet form, may be easily taken out and consulted separately from their bulky folders.

In the opinion of G.W. Bartholemew

"the revision undertaken in Hong Kong is incomparably the best which has appeared to date. It satisfies to the fullest extent possible the criteria of completeness, conciseness and up-to-dateness and will surely remain a model to which all other revisions will aspire."<sup>27</sup>

*Criticisms of the Statute Book.* There are a few criticisms, however:

1. the index is very basic and provides scarcely any more information than the table of contents. It is probably usually adequate for the needs of practising lawyers but it is of little assistance to the academic researcher. Nevertheless the Rules of the Supreme Court and the merchant shipping legislation are separately indexed;
2. in practice there is often considerable delay in the issue of new booklets for ordinances which have been much amended.

*The Government Gazette.* In addition to the Laws of Hong Kong, the government Gazette is a useful source of legislation, and is essential for very recent ordinances or amendments and for earlier editions. Bills are published in one supplement to the Gazette, legal notices (dealing with the commencement of some ordinances, signification of non-disallowance, proclamations etc) are in another, the complete original texts of ordinances are in another, and subsidiary legislation is in a fourth. A good library has each supplement separately bound each year. There is no difficulty finding any item of legislation for any year, especially if the chronological list of ordinances from 1843 to date, found in Volume 1 of Laws of Hong Kong, is consulted.

#### *Law Reports*

*The Hong Kong Law Reports Described.* This series is edited in the Attorney General's department. It has been published without a break (except for the Second World War) since 1905 and comes out quarterly, usually between six and nine months after the period covered. Reports of selected cases before the Court of Appeal and the High Court and of cases before the Judicial Committee of the Privy Council on appeal from Hong Kong are published. In a supplement are reports of cases in the District Court. There are a separate loose-leaf volume of tax cases published by the Government Printer at the behest of the Inland Revenue authorities and a folder of printed practice directions. The law reports are not proper "reports" in the sense that a barrister attended in court and personally vouchsafed the accuracy of the printed proceedings; they consist solely of the written judgment as it emerged from the judges' chambers, supplemented by headnotes and index. Digests, consolidated indices, tables of cases and statutes and noters-up are also provided.

*Assessment of the Hong Kong Law Reports.* Again using the criteria suggested by Professor Twining, the Hong Kong Law Reports are:

1. reasonably comprehensive: most of the important cases in the District Court and above are reported; there are occasional omissions, of course, and some practitioners consider there is an over-emphasis on criminal cases;
2. not especially up-to-date, but the delay is not intolerable;
3. reliable;
4. accessible to main users: as for the Laws of Hong Kong, the reports are expensive but many practitioners have a full set and judiciary, law officers, university teachers and their students have easy access to library copies;
5. reasonably efficient and convenient to use. In the last couple of years there have been minor improvements in printing style and editing. Although the indexing is still insufficiently detailed, the semi-official digests and indices compiled by Frank Addison (formerly of the District Court, now a puisne judge) and other published aids are of considerable assistance in using the reports.

*Reform of the Hong Kong Law Reports.* It is not quite fair to place Hong Kong's law reports in what Alan Milner calls "the classic English tradition: randomly selected, negligibly edited, atrociously indexed and sporadically published".<sup>28</sup> Nevertheless, this in an area where improvements are needed. An editorial in the Hong Kong Law Journal in 1978<sup>29</sup> suggested the desirability of reform, and later in the year the Attorney General established a working party to consider proposals made in a separate memorandum which I submitted to the government.

The principal proposal was that there should be a three tiered structure consisting of an editorial board, an editor and an editorial committee. The working party considered that this proposed system would be an improvement. The editorial board would have a supervisory and advisory role, and the editor (who hitherto has had sole responsibility for producing the reports) would be able to consult the board on policy matters. The editorial committee would undertake the actual hard work of editing and this should enhance the quality of the reports.

For the purposes of law reporting the law would be broadly divided into five areas, viz: commercial and business law, constitutional law and legal system, criminal law and procedure, property law, miscellaneous (family law, labour law, civil practice and procedure etc).

The working party agreed that the committee should be made up initially of ten lawyers, two for each division and they should be 'specialists' (as far as possible) in that division of the law. To ensure reporting of high calibre it was suggested that an honorarium be paid to each member.

The working party at this point decided to submit an interim report to the government making two recommendations: that the three tier scheme be implemented and that the government should provide an annual fund for payment of honoraria to the editorial committee. The reasons in support of the second recommendation were: that without such funds, which only government could provide, the reform as envisaged could not be accomplished; that government as administrator of the law ought to be responsible for the proper service of law reporting; that the cost of the new system would be partially offset by the reduction in the level of editorial contribution by members of the Legal Department, at present only balanced by the fact that the government receives free copies of the report; and that new sales resulting from aggressive marketing locally and abroad for the improved law reports may reduce the recommended subsidy in future. The working party's recommendations have not yet been implemented and their fate is uncertain.

*Unreported Judgments.* In theory, all written decisions of the Supreme Court of Judicature since 1968 are available, in cyclostyled typescript, on file in the Supreme Court library; many of them are circulated by the registrar of the Supreme Court to the School of Law at the university, where they are also filed and spasmodically indexed. The Supreme Court library's system, similar in objective to the Bar Library transcripts scheme, is unfortunately not very efficiently run: the collection is incomplete, the cases are often out of order or borrowed by the judges, and xeroxing is inordinately expensive. If properly indexed, and if greater care is taken on their filing and preservation, these typescripts would be a much more useful supplementary source of "reports" (these are, in fact, what gets printed in the Hong Kong Law Reports, and when in the library file they are only lacking index headings and headnotes).

*Hong Kong Law Journal Road Traffic Summaries and Sentencing Section.* In addition to the official Hong Kong Reports, the Hong Kong Law Journal has since 1974 published summaries of cases involving claims for personal injuries and fatal accidents. Although not strictly reports, the courts are not accustomed to citing these cases according to their HKLJ reference and they even, it seems, sometimes rely on the journal summaries exclusively. Since 1978 a digest published in the journal has provided a brief guide to current sentencing practice in the colony's courts.

*Circulated Headnotes.* The editor of the Hong Kong Law Reports prepares each month draft headnotes of cases being considered for inclusion in the reports. These are circulated round the profession for comment. The Hong Kong Law Journal also publishes headnotes (prepared by its own contributors) of cases deemed worthy of a commentary.

*Tribunal Decisions.* Beginning in 1977, selected Lands Tribunal cases have been printed and published, but these are the only tribunal proceedings which are regularly reported. Application to the appropriate registrar, which would not invariably be successful, would be necessary for a practitioner or researcher to see written judgments emanating from a tenancy tribunal, the Small Claims Tribunal or the Labour Tribunal. Magistrates' decisions are not normally available.

#### *Legal Archive*

*The Public Records Office.* Hong Kong's historical documents have only recently begun to be treated with respect - too late, alas, for a great many of them. In particular, the loss of government records during the Japanese occupation 1941-45 was considerable yet, after the war, records continued to be haphazardly stored and indifferently preserved. In July 1972, however, the Public Records Office (PRO) was established. According to the Government Archivist:

"The main function of the Public Records Office is the conservation of all government records of permanent value for official reference and private research. More specifically, this means all documents which possess value for:

- (i) documenting the constitutional and legal basis of government;
- (ii) documenting the origin, development, organization, functions, policies and substantive activities of government departments;
- (iii) protecting the rights and privileges of private citizens and organizations; and
- (iv) research into political, social and economic affairs and the history of the community."<sup>28</sup>

There are huge gaps in the material which has been collected so far and it will be a long time before all available records have been sent to the PRO and properly catalogued. Some useful documents have already appeared, however, and, with the recent acquisition on microfilm of the C0129 series of governor's despatches, the future legal historian of Hong Kong already has enough material with which to begin work. For example, files transferred from the Registrar General's department include Land (Crown Lease) Registers 1843-1975, Miscellaneous Maps, Plans and Charts of Hong Kong (1845-1954), Crown Rent Rolls 1843-1924, 1935-1958, and case files relating to dissolved local companies (1885- 1970). In general there is a thirty year rule applying to such materials, though government sensitivity on some matters might restrict access to particular files.

#### *Secondary Materials*

Rear's chapters on labour law in Chinese Labour under British Rule provide a comprehensive coverage amounting to a text, but otherwise there is no textbook for practitioners or students of Hong Kong law. Penlington's recent book Law in Hong Kong is too thoroughly mediocre to qualify and Newton's Hong Kong Taxation is aimed more at taxpayers than at students. There are no case-books, no lengthy monographs (other than O'Brien's articles on landlord and tenant law reprinted from the Hong Kong Law Journal), and no major reference works except a series of digests and indices prepared by Frank Addison. There are no full-length biographies of legal personages in Hong Kong and no primarily legal studies by anthropologists. Writings on Hong Kong law are largely restricted to journal articles, especially in the Hong Kong Law Journal.

The Hong Kong Law Journal. This journal is published by a private company financed by practising lawyers and is edited in the School of Law, University of Hong Kong. It began publication in 1971. It is published three times a year, in January, May and September. Each volume has about 400 pages and contains articles, notes and comments, notes of recent cases and statutes, summaries of personal injuries and fatal accident cases, book reviews and editorial comments. There are annual tables of cases and statutes cited and there is an annual index. Although material on the law of other countries in the Asian region is occasionally included, and a few articles have only a tenuous link with things legal, the bulk of the material is directly concerned with Hong Kong law. This journal is by far the single most important source of secondary legal literature in Hong Kong.

It is significant, however, that the Hong Kong Law Journal is not a viable commercial undertaking. Founded with an Asia Foundation subsidy, the publishing company does not lose money but is dependent upon the unpaid (or only nominally paid) services of a business manager and editors and sub-editors and upon the profits from the annual series of law lectures for practitioners. In the past it has relied on the occasional largesse of its shareholders, a source of finance which would no doubt be available again if need arose in the future.

The Hong Kong Law Journal Limited Publishing Company which is responsible for this journal has other achievements to its credit. It has published three annotated ordinances and has organized six highly successful annual two-day seminars for practitioners. The proceedings of these seminars have been published and are a significant contribution to the corpus of legal literature in Hong Kong. Hong Kong Law Journal Ltd would willingly sponsor other publications on Hong Kong law but is hampered by a lack of copy and by insufficient editorial and sub-editorial assistance.

Other Periodicals. Apart from the Hong Kong Law Journal, the only periodicals dealing with Hong Kong law are Obiter Dicta and Justitia. Obiter Dicta is the mimeographed newsletter of the Magistrates Association. First published in 1974, it provides comments on legal developments of particular interest to magistrates. It is an engagingly edited little periodical, but unfortunately its cheap format makes it

difficult to use as a reference tool. Justitia is an annual collection of essays on legal topics by students of the School of Law, University of Hong Kong. Each contributor has invariably rewritten the dissertation he was required to submit in the second year of the LLB programme. There are obvious limitations to the usefulness of student work (which is undertaken more as a training exercise in legal writing than in the hope of producing valuable original research), but the dissertations are written under staff supervision and some of them are very good. In 1977-78 the students completed a special study of the Small Claims Tribunal for publication in Justitia.

*The Cost Factor.* It has been noted above that it is only recently that full-time law teachers have been appointed in Hong Kong. That is one obvious reason for the paucity of secondary legal literature in the colony. Another is the tiny size of the potential market. A third is the condition which has affected legal publishing all over the world: rapid increases in costs.

### *Resources and Conditions*

#### *Personnel Resources*

*Potential Authors.* Clearly, the personnel resources in Hong Kong for the development of a local secondary legal literature are very limited - in effect they are restricted to the university's law department. This is not to say that law officers of the Crown, barristers, solicitors, members of the judiciary or even students cannot make valuable contributions to legal literature; but for a sophisticated, sustained piece of research and writing only university academics are likely to have the time and opportunity. Polytechnic law teachers spend too much time teaching and do not have the facilities at their place of work for legal research. This means that the hope of a developed corpus of literature devoted to Hong Kong law primarily rests with the full-time teachers employed to teach law at the University of Hong Kong and whose duties include "contributing to scholarship."

The eight volumes of the Hong Kong Law Journal and the five booklets of law lectures for practitioners are testimony to the contribution already made by members of the teaching profession. Each item of literature thus contributed is, in the main, doctrinal (expository), quite short, and was researched and written over a relatively short period of time. This type of legal writing is likely to continue, for it (1) is necessary and useful, (2) is not especially difficult to produce, and (3) fills up the curriculum vitae. This last is not intended to be cynical: it merely recognizes that promotion boards in Hong Kong university are no less impressed than such bodies elsewhere by the length, rather than the quality, of lists of publications. The more detailed, thoughtful analysis and the long-term research project are not superficially as attractive on the record of a candidate for promotion. Nevertheless, long-term research has been undertaken and will no doubt continue.

The university provides vocational teaching for students who enrol for the one-year Post-graduate Certificate in Laws (PCLL). This type of teaching can, of course, best be carried out by teachers who are qualified, experienced practitioners of the law. It is reasonable to assume that staff members who fall into this category are less likely than their more "academic" colleagues to contribute to legal literature. In the first place, since they are usually permitted, indeed encouraged, to engage in private practice, they will usually do so, especially as private practice in Hong Kong is quite lucrative. Secondly, the School of Law operates its own legal aid and advice scheme, which relies heavily on the services of practising members of staff. The demands of teaching, practice on one's own account and participation in the legal aid scheme leave little time for research and writing.

The university teacher who wants to, however, can usually find a fair amount of time to devote to research, both in term-time and in vacations. Long leave (which in effect takes the place of sabbatical at the University of Hong Kong) can be used exclusively for this purpose. Facilities will usually be adequate, though of course this question depends on the type of research being conducted.

#### *Financial Resources*

*Grants for Research and Publishing.* The University of Hong Kong has funds allocated to assist those engaged in research, and in the past successful applications for grants have been made by members of the law department. Generally speaking, doctrinal legal research and writing do not need extensive financial support, so long as library services are adequate. When it comes to publishing, however, financial

resources are probably non-existent: if a worthwhile book could not find a publisher because of expected small returns from sales, there is no formal means by which money can be made available. It may be possible to find charitable sponsors for a particular publishing project, but this has not been truly tested. A serious work lacking in popular appeal could not, unfortunately, be guaranteed a publisher, however valuable a contribution it may be to legal scholarship. For example, in the early 1970s, a proposal made by John Rear for a book on Hong Kong's laws and legal system, upon which a number of academics were prepared to collaborate, foundered because of market factors: despite such a work's potential value for students, even the Hong Kong University Press was not prepared to risk capital on it.

#### *Facilities for Research*

*Law Libraries.* For doctrinal research, the three main law libraries in Hong Kong between them probably cover the Commonwealth common law world reasonably extensively. The main deficiency is in legislation from other areas, text-books and monographs, though if necessary the secondary materials can be obtained from overseas on interlibrary loan. As pointed out above, Hong Kong's law reports and statutes are readily available and generally easy to use. Secondary literature on Hong Kong law is, of course, so sparse that it is a simple matter for public and, indeed, private libraries to stock it all.

*Non-doctrinal Research.* For historical, sociological or anthropological legal studies the facilities are not impressive. But for the last fifteen years or so the collection and publication by the government of raw data on the economy and society of Hong Kong has been increasingly comprehensive, and the Public Records Office is processing fairly large quantities of historical documents. A start has been made, and in most areas it would be the faint-hearted scholar who gave up a research project for lack of material. For these types of research, however, law teachers are not well qualified, both because in fact only one of them (in 1979) can use Chinese materials and because few have any familiarity with or formal training in other disciplines.

#### *Future Developments*

*The Size of the Market.* The legal profession in Hong Kong is expanding quite rapidly and the number of students taking law courses has increased considerably over the last few years and will probably continue to increase. The potential market for legal publications can only grow, though it will never be very large.

*Legal Research Unit.* The School of Law at the University of Hong Kong is considering seeking funds for the establishment of a legal research unit. If established, the unit will encourage, promote, plan and facilitate research into legal topics in Hong Kong and, where possible, assist in the publication of data, research aids and individual studies. The success of the unit would mean a significant boost to the development of a local legal literature.

*Computerization of Legal Material.* A lecturer in the university's law school has begun a programme for the computerization of personal injuries and fatal accidents cases in Hong Kong. It is designed as an information storage and retrieval system, and it could be extended to cover other types of legal material and to perform other jobs (indexing, for example). Computerization could well render some species of legal literature redundant.

*Hong Kong Law Journal Limited.* The development of legal literature in Hong Kong is, almost certainly, largely dependent upon the company which has so far produced eight volumes of the Hong Kong Law Journal, five booklets of law lectures for practitioners, and three annotated ordinances. "The company" is, in reality, one part-time secretary: the "business manager" is a busy QC and the editors and sub-editors are lecturers. There is an obvious limit to the range of publications it can put out, and, indeed, even continual production of the Journal itself cannot be guaranteed, depending as it does on so much of the time, energy and commitment of unpaid personnel. If suitable works are submitted for publication, Hong Kong Law Journal Limited will do its best to publish them, but its limited resources are unlikely to improve dramatically in the near future.

*Other Publishers.* The Hong Kong University Press is a potential publisher of local legal materials, but in the past it has not been able to subsidize publications and has been very slow in producing its books. Commercial publishers are of course even more constrained than others by the need to show a profit, and it is unlikely that narrowly legal literature would appeal to them as a viable publishing proposition (fringe material, however, will be acceptable: Oxford University Press, for instance, have published England and Rear, Chinese Labour under British Rule, Hopkins (ed), Hong Kong:

The Industrial Colony and Miners, Government and Politics of Hong Kong). Yet some interest is currently being shown by commercial publishers in some types of legal material.

*Needs.* The first priority is to consolidate and secure what has already been achieved. The Hong Kong Law Journal must continue its good work; the annual seminar for practitioners and the resulting booklet of lectures must be retained; the series of annotated ordinances should be expanded by the addition of new titles. Secondly, resources must be provided, if and when necessary, for the publication of any worthwhile legal material which is seeking a publisher. Thirdly, the preparation of works on Hong Kong law should be actively encouraged. Priority here should be given to studies of those aspects of Hong Kong law which are unique - in particular, to studies of the legal system.

*The Meeting of Needs.* Legal literature in Hong Kong is characterized by part-time production: the editing of the Hong Kong Law Reports is an extra (and usually unwelcome) duty imposed on the law reform section of the Attorney General's chambers, the Hong Kong Law Journal emerges from a busy teaching department, practitioners or practising academics strive to keep the occasional weekend free to write a lecture or a note for publication. Some kind of funded institutional support is necessary. The proposed legal research unit could fulfil a role here. It could possibly provide an editor/sub-editor for the Hong Kong Law Journal, someone who would be free from the demands of teaching and researching on his own account. The unit might also, under some kind of arrangement with the government, assist in the editing and publishing of the Hong Kong Law Reports. In effect it would become a subsidized, non-profit-making publishing company. Alternatively, Hong Kong Law Journal could be supported to the extent that it could hire full-time staff to look after the journal and other publications.

*Conclusion.* Any kind of recommendation must be tentative, for there are many practical difficulties: securing a source of funds, co-ordinating legal research unit activities with Hong Kong Law Journal Ltd ventures, finding sub-editorial staff, and so on. A realistic assessment would probably admit that the near future of secondary legal literature in Hong Kong will be, at most, no different from its near past: a regular professional journal, an annual book of lectures, and the occasional booklet, Justice report or annotated ordinance and the rare book-length study. The output, however valuable, will be small, unco-ordinated and haphazard. Yet even this is insecure while there is no full-time staff to organize the publication of finished work. If the development of a secondary legal literature and the improvement of primary legal source-material are worthwhile, financial provision must be made for the support of a publisher undistracted by other duties.

# FOOTNOTES

1. See, for example, Lon L. Fuller, The Morality of Law (New Haven and London: Yale University Press, rev. ed. 1969), and Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 LQR 195.
2. [1956] 1 QB 1, 16-17.
3. See also the comments by Henry Litton QC in the Hong Kong Bar Association Annual Statement 1978/79, pp 7-8.
4. Details taken from Hong Kong 1979 (Hong Kong: Government Press, 1979) (the government's gloss annual report).
5. The phrase used in the letter of March 8, 1972, from the Permanent Representative of China to the United Nations to the Chairman of the Special Committee of 24.
6. The definitive account is by John Rear, "The Law of the Constitution" in Hopkins (ed), Hong Kong: The Industrial Colony (Hong Kong: Oxford UP, 1971). For a short introductory essay see the booklet on Hong Kong in Blaustein and Blaustein (eds), Constitutions of Dependencies and Special Sovereignties (New York: Oceana, 1976).
7. See the Application of English Law Ordinance (cap 88, LHK 1972 ed).
8. See, however, my editorial comment in (1977) 7 HKLJ 289.
9. No. 7 of 1864.
10. No. 10 of 1875.
11. No. 31 of 1886. Ordinance No. 10 of 1875 had the distinction of being repealed again, in No. 29 of 1901.
12. See the unpaginated note bound in with volume 7 of the Hong Kong Law Reports (1912).
13. See my description of his Hong Kong career in (1972) 2 HKLJ 278.
14. Working Party on Reform of Hong Kong Law Reports. Interim Report, 1978 (unpublished).
15. G.B. Endacott, "The Beginnings" in Brian Harrison (ed), The University of Hong Kong: The First 50 Years (Hong Kong: Hong Kong University Press, 1962) 29.
16. See the note in (1928) 1 Hong Kong University Journal of Law and Commerce 7.
17. Keeton, "Forty-five Years On" (1971) 1 HKLJ 6.
18. Printed in (1928) 1 Hong Kong University Journal of Law and Commerce 82.
19. *Ibid.*
20. See editorial comment in *ibid*, 2.
21. See editorial note in (1927) 1 Kong Kong University Law Journal 79.
22. See note 16 above.
23. W. Astor, in a memorandum sent to the Foreign Office in July 1930: F0371/14724, p 99 (Public Record Office, London).
24. D.M. Emrys Evans in Legal Education in Hong Kong (Hong Kong: Hong Kong University Press, 1974) 3.
25. See the Attorney General's first reading speech for the Revised Edition of the Laws Bill 1965 in LegCo Proc 1965 (Nov 24) 587.
26. "Statute Law Revision" (1971) 1 HKLJ 274, 287.
27. (1978) 8 HKLJ 142.
28. Ian Diamond, "The Paper Chase" (1974) 14 Journal of the Hong Kong Branch of the Royal Asiatic Society 12, 23.