

CONSTITUTIONAL & ADMINISTRATIVE LAW IN HONG KONG By PETER WESLEY-SMITH, VOLUMES 1 & 2. [Hong Kong: China & Hong Kong Law Studies. 1987 & 1988. x + 500 pp. Softcover: HK\$280 each].

THESE two books are the first textbooks in the *One Country Two Systems Law Series* published by China and Hong Kong Law Studies Ltd.¹ In his preface, Wesley-Smith states that the main purpose of the book is to "provide text and materials for external university students" and hopes that it would also be "useful to those who have forgotten their constitutional law." As a preliminary matter, I must say that the books are printed on very high quality glossy paper (which is not entirely advantageous since the highly reflective surface makes for extremely difficult reading) and come handsomely bound in expensive-looking elegant maroon soft-covers uniform to the rest of the series. What puzzles me is the publishers' decision to publish a book of just slightly over 500 pages in two volumes. I can only guess that they have done so for reasons of uniformity (the other books in the series being single-volumed and similarly sized) and expediency (Volume 1 being published in 1987 and Volume 2 in 1988).

In keeping with the book's objectives, the coverage is neither exhaustive nor encyclopaedic but is sufficiently extensive for the purposes for which it is intended. In his introduction, Wesley-Smith sets the tone for his collection by adopting a very wide definition of "constitutional law" which he sees as a set of "legal or quasi-legal precepts" which "regulate the structure of and relations between the organs of government". These precepts also "determine the functions" of these organs and "regulate relations between government and citizen" as well as "identify law-making authorities."

The two volumes cover a total of 24 chapters in 5 parts. Volume One consists of two parts. Part One is entitled "Constitutions and the Law" and in it general principles of constitutionalism are discussed.² Materials on the constitutions of the United Kingdom,³ Hong Kong⁴ and the People's Republic of China⁵ are also covered in this part. Part Two deals with "The Institutions of Government" and in this part, Wesley-Smith provides relevant materials on the three traditional branches of government — the executive,⁶ the judiciary⁷ and the legislature⁸ (in that order). In Volume Two, Part Three deals with the "Relations Between the Institutions of Government". Here, topics include The Supremacy of Parliament,⁹ Legislative Competence in

¹ The other titles which have been published to date include: Robyn Martin, *Law of Tort in Hong Kong*; Carole Pedley Chui, *Law of Contract in Hong Kong* and Gu Chun De, *Chinese Legal System* (written in Chinese).

² Chapter 1.

³ Chapter 2.

⁴ Chapter 4.

⁵ Chapter 3.

⁶ Chapters 6 to 10.

⁷ Chapter 11.

⁸ Chapter 12.

⁹ Chapter 13.

Hong Kong,¹⁰ and Delegated Legislation.¹¹ Following that are three chapters¹² covering the various principles and aspects of Administrative Law. The fourth part is concerned with "Relations Between Government and the People". The five chapters in this part deal with Citizenship,¹³ Freedom of the Person,¹⁴ Freedom of Property,¹⁵ Freedom of Speech¹⁶ and Order and Security.¹⁷ The collection concludes with Part Five which is misleadingly entitled "Theory and Ideology", especially since the only chapter in this part is called The Rule of Law and the Separation of Powers.¹⁸

The most interesting chapters in the book are Chapter 5, dealing with the Joint Declaration and the Basic Law, and Chapter 22 which is concerned with the Freedom of Speech. Chapter 5 gives an excellent introduction to the history of Hong Kong's status under international law and the consequences of its return to the Peoples' Republic of China in 1997. It contains the full texts of the Joint Declaration, its Annexures and the Exchange of Memoranda between the British and Chinese Governments. The Draft Basic Law is also included and the author concludes with an interesting discussion on the anticipated constitutional developments in Hong Kong from 1987 to 1997. Chapter 22 contains excerpts from two cases which are connected to some recent headline-creating news — *R. v. Shamsudin* [1987] HKLR 254 in which two defendants of the Carrian case sought a restriction on the reporting of *Shamsudin's* case; and *AG (UK) v. South China Morning Post* (1987) CA, Civ. App. No. 114 of 1987 which is the "Hong Kong version" of the famous *Spycatcher* case. The author also provides very interesting commentaries and summaries on the law regarding obscenity laws in Hong Kong.

It is beyond the scope of this review to summarise the contents of the various chapters. A few points may, however, be highlighted. First, the "text and materials" format which Wesley-Smith has adopted is ideal for books which are intended for classroom teaching. The merging of the author's introductory remarks and commentaries with extracts from relevant materials gives the student a much better feel of the subject and the teacher is free to assign readings according to the syllabus he or she intends to cover. This format does not, however, lend itself to a cover-to-cover reading of the book. In this respect, I feel that these books will not prove helpful to "those who have forgotten their constitutional law" and wish to refresh their memories. Each chapter is written and compiled as if it were a chapter in a "pure" textbook — by this, I mean treatises and texts where little, if any materials are introduced — and this makes for heavy reading. Huge chunks of materials, sometimes running for two pages or more, are interspersed with the author's comments and introductory remarks. Although the

¹⁰ Chapter 14.

¹¹ Chapter 15.

¹² Chapter 16, The Development of Administrative Law, Chapter 17, Ultra Vires Administrative Action, and Chapter 18, Natural Justice.

¹³ Chapter 19.

¹⁴ Chapter 20.

¹⁵ Chapter 21.

¹⁶ Chapter 22.

¹⁷ Chapter 23.

¹⁸ Chapter 24.

¹⁹ See. for *e.g.*. The Royal Charter of 1843 at pp. 35-37.

author provides headings on the various topics, individual sections of the book are not self-contained. This is problematic because the reader is unable to dip into any portion of the book at his or her convenience. Instead, he or she would have to plough through an entire chapter to find what he or she is looking for. This shortcoming may perhaps be remedied if each chapter is preceded by a summary of the points covered in that chapter, or by including a far more detailed contents page similar to the type we are accustomed to seeing in American casebooks and textbooks.

The above problem is further compounded by a second shortcoming: The two volumes are poorly indexed. The entire index at the end of Volume Two only runs to three and a half pages and is so generalised as to be of little use. Furthermore, the index to the relevant statutes and cases are found towards the end of the book. This is rather unconventional and confusing since they are lumped together with the index. The index to the cases is also quite useless especially since it does not provide full citations. Cases cited in the index merely indicate the year in which the case was reported and the page at which the case has been mentioned. The reader would therefore have to look up the name of the case he or she is interested in and then turn to the page where it was cited to locate its citation. Needless to say, this is an extremely clumsy and inconvenient way of locating case cites. A similar problem arises in respect of the Table of Legislation. Only the titles of the legislation are cited and no section numbers are referred to in the table. In respect of citations, the author has adopted the Chicago Manual of Style system for humanities by including the full references of cases and materials within the text instead of footnoting or endnoting them. This makes it extremely difficult for someone who has read the materials to go back in search of a particular citation since this would entail scanning through the entire text again.

Thirdly, some of the materials are introduced without comment. Take the case of *Cameron v. Kyte*²⁰ cited in Chapter 9 for instance. The extract of the case, which runs into two closely printed pages is not preceded by any introduction by the author. Of course the author discusses the general powers and prerogatives of the Governor before the case is referred to, but no one can say for certain, before reading the case, what the case stands for and why it is important to our understanding of the subject. The reader is thus placed in a dilemma because he or she does not know the relevance of the case and cannot decide whether or not to read it. Furthermore, the publishers have not capitalised on modern printing technology by chpsing to print the book in only three different font sizes. This is particularly disturbing when one starts to read the extracted materials. The author's summaries and the words of the judgments are all printed in similar typeface and one has to scrutinise the material carefully to determine which is which.²¹

Generally, the materials and chapters are well-organised if one adopts Wesley-Smith's formulation of "constitutional law". I do,

²⁰ (1835)3Knapp332; 12ER678.

²¹ See, for e.g. the extracts on *China Navigation Co v. Attorney General* [1932] 2 KB 197 and *Rustomjee v. The Queen* (1876) 1 QBD 487 cited at pp. 118-121 and pp. 123-125 respectively.

however, have difficulty with the arrangement of some of the material. First, Wesley-Smith chooses to describe and discuss the constitutions of the United Kingdom, the People's Republic of China and Hong Kong in Chapters 2 through 4. The author fails to illustrate the relevance of such an arrangement. Of course, anyone well-versed in the history of Hong Kong can instantly see the connection between the three countries mentioned above. However, I think that this knowledge cannot be taken for granted. The author also devotes an entire Chapter 8 to a discussion of the Act of State Doctrine. This is certainly praiseworthy, except that the doctrine of immunity might perhaps be more appropriately discussed in the context of the judiciary and its jurisdiction. Of course, this is merely stylistic, but the connection between the Doctrine and judicial power and authority is not brought home to the reader if its discussion is sandwiched between a chapter on the Prerogative and another on the Governor.

The Chapter on the Supremacy of Parliament which introduces the second volume also seems rather out of place. In Volume One, the author allocates an entire chapter to the British Constitution and this chapter could easily have been subsumed in the discussion of the U.K. Constitution. The same comment applies in respect of Chapter 6 which is entitled "Executive Institutions in the United Kingdom." This is a very short chapter, running to 5 pages and if the author claims that he can only deal briefly with this subject, then why can't it be subsumed in his general discussion of the British Constitution or as part of his comparative study under the Hong Kong Executive? The author also appears inconsistent in his treatment of relevant legislation. In Chapter 22, he provides an interesting and detailed analysis of the 1987 Control of Obscene and Indecent Articles Ordinance. Nowhere else in the collection does he provide such an in-depth analysis. I can only guess that the author was anxious to articulate his views on a particularly recent piece of legislation.

Two points in terms of substance. First, in Wesley-Smith's discussion of the doctrine of the Separation of Powers, it is rather curious that he fails to mention the one name that has become synonymous with the doctrine — Montesquieu. Secondly, as a Singaporean reviewer, I was rather startled to find the following statement at page 9 of the book: "A flexible constitution, as in Singapore can be changed in the same manner and with the same ease as any other law."²² This is certainly wrong. Article 5(2) of the Singapore Constitution provides that "A Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of *not less than two-thirds* of the total number of the Members thereof (emphasis mine)." I suspect that Wesley-Smith had in mind the pre-1979 position when constitutional amendments could be effected by a simple majority vote in Parliament.

²² Interestingly enough, the authors of *O.Hood Phillips' Constitutional and Administrative Law* (7th ed. 1987) state: "The Constitution of Singapore is written but entirely flexible, while the constitutions of the Australian states are written and largely flexible". This is equally misleading, especially since the Singapore Constitution is flexible by reason of the ruling People's Action Party's overwhelming majority in Parliament, rather than by reason of the lack of specific constitutionally entrenched procedures.

One final point. Some of the language of the book seems to be inconsistent with the authoritative nature in which the book is set out. The author uses phrases and headings which sound rather casual. For instance, at page 35, he states that "[o]n June 26, 1843 the ratifications by the Chinese and the British Governments of the Treaty of Nanking were formally exchanged, thus making *the thing* binding and legal" (emphasis mine). At page 151, the author has a subheading which reads "Duties and Powers and *soforth*" (emphasis mine). These points appear to be minor and here, I open myself to charges of being picky. Nonetheless, I do find that such language gives the reader the impression that the author has not thought through his writing as carefully as he might have.

Notwithstanding the shortcomings mentioned above, Wesley-Smith's book is a major undertaking which deserves more than a cursory glance. It contains much material which is invaluable to students of Hong Kong constitutional and administrative law and the materials are also useful to those who research in comparative constitutional and administrative law. It would also be a useful addition to any institutional law library and some legal academics may even find space on their shelves for these two volumes.