

THE SOURCES OF HONG KONG LAW BY PETER WESLEY-SMITH [Hong Kong:  
Hong Kong University Press, 1994. xlvii + 356 pp. Softcover: US\$24.50]

THERE can be little doubt that Professor Peter Wesley-Smith is one of (if not the) leading scholars on the Hong Kong legal system. The publication of this volume of essays is therefore not only welcome but is, to a certain extent, somewhat overdue. Whilst it is true that most of these essays have been previously published elsewhere, the present work brings them together in one convenient volume. It should also be mentioned that the author has painstakingly updated each essay. Further, although published as a book of essays, each piece, whilst self-contained, actually links on to the next; as the author himself observes in the *Preface*, whilst the essays “were not originally conceived as items in a collection, yet they fit together as a reasonably comprehensive treatment of the sources of Hong Kong law” (see p vii).

One very important general observation is appropriate at this juncture: this is a work of the highest scholarship. The fruits of the author’s high quality of scholarship are not only located in the excellent analyses but are also to be found in the footnotes themselves. The author’s research has been thorough and he has eschewed parochialism, drawing (wherever possible) from primary and secondary sources in a myriad of other (primarily Commonwealth) jurisdictions. It should, however, also be observed that his thorough treatment of the Hong Kong sources is no less impressive. All in, there are, in fact, a total of 1,546 footnotes, all of which are painstakingly cross-referenced, both within and even across chapters. These facts alone make the book an indispensable tool for any researcher of the Hong Kong legal system. But, as already mentioned, the main text itself is replete with perceptive analyses and it is to that aspect that our attention must now briefly turn.

It is impossible, within the confines of a review, to do justice to the substantive content of this book; I know that this is a cliché that reviewers often have resort to, but, in this instance, I must plead that it best describes the scenario at hand. Thus, a brief overview of the book must suffice for the purposes of the present review.

The book itself is divided into four parts and comprises a total of eighteen chapters.

*Part One* deals with *the common law* and contains the first five chapters. The *first* chapter is a learned and jurisprudential essay dealing with the various ways of looking at the common law. However, it is not all high-flown theory; it also specifically discusses the future of the law in the Special Administrative Region (*ie*, Hong Kong after 1997, when it reverts back to the People's Republic of China). The *second* essay is, by virtue of its very title ("Theories of Adjudication"), jurisprudential; again, however, the author utilizes many concrete (case law) illustrations to elucidate his analyses. Perhaps the most interesting feature of this chapter is the author's own "wavicle theory" which he tenders as a 'middle-way' between the contrasting ('traditional') views centring on the declaratory theory and the Realist view that all law is made (see pp 28-30).

The *third* essay, whilst placed in *Part One*, actually marks a sub-division, as it were, within that *Part* itself (most of the first part of this essay is, in fact, new: see the *Preface* at p viii). Entitled "The Theory of Stare Decisis", this chapter focuses (as expected) on the jurisprudential bases of the important common law concept of stare decisis. It is, however, a readable chapter and it should be mentioned that the author does bring to bear many Hong Kong decisions in his discussion of the per incuriam doctrine. The *fourth* essay, entitled "The Practice of Horizontal Stare Decisis", may be seen as a (partial) concretization (by reference to local cases) of the preceding chapter in the context of the extent to which (here, local) courts are bound by their own prior decisions; of especial interest (to the present reviewer at least) is the author's very detailed (probably exhaustive) listing of the various exceptions to the rule in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 which enjoins appellate courts to be bound by its own previous decisions or those of courts of co-ordinate jurisdiction (see pp 72-75). The *fifth* essay carries the aforementioned concretization logically forward by dealing with "Vertical Stare Decisis Within Hong Kong". The process of vertical stare decisis (at least within a particular courts system) has always been rather more straightforward, and this particular chapter epitomises this, if nothing else, by its length: a mere three pages.

*Part Two* of the book deals with *the reception of English law*, and comprises six chapters (6 to 11). As a British colony, it is axiomatic that the foundation of the Hong Kong legal system would be premised, in the main, on English law. This *Part* is therefore of the utmost importance. The *sixth* essay deals with "Statutory Provisions Importing English Law" and gives not only a good and succinct historical survey but also sets out the relevant statutory provisions themselves; also of interest is the author's little peek, as it were, into the future of English law after 1997. The *seventh* essay deals with the important issue pertaining to the applicability of English statute law, not least because of its interaction with the common law. This lastmentioned point leads, quite naturally, on to the *eighth* essay which deals with "The Effect of Pre-1843 Acts of Parliament", and which concerns rather complex issues arising from the local context in relation to the applicability of the common law *vis-à-vis* the effect of pre-1843 English statutes (1843 being the original cut-off date with regard to the reception of English law in Hong Kong). The *ninth* essay deals with "Common Law and Equity", and focuses on various (again, important) aspects of applicability and modification on the premise (as for English statutes) that English law is not automatically received into Hong Kong and may be either modified or even excluded where local circumstances so require. The *tenth* essay shifts tack somewhat, and is, in fact, a very comprehensive chapter on "Practice and Procedure"; however, the reader should note that this chapter (very interestingly) considers the *theoretical* underpinnings of this apparently pragmatic topic as well. The *eleventh* chapter returns us to "Vertical Stare Decisis", but not within Hong

Kong itself (that, the reader may recall, was dealt with in Chapter 5); this chapter deals, instead, with the binding effect (or otherwise) of English Court of Appeal and House of Lords decisions, as well as decisions of the Privy Council on appeal from other jurisdictions, and also looks at the implications of the discussion for Hong Kong after 1997.

*Part Three* of the book deals with *Chinese law and custom*. It actually comprises only one chapter (12), entitled “Chinese Law and Custom as a Source of Law”; this chapter is, however, very comprehensive and well-researched, dealing with, *inter alia*, the juridical basis for the retention of this part of the law; the nature of custom itself; the distinction between Chinese law on the one hand and Chinese custom on the other; their proof, as well as their geographical and temporal dimensions; and (perhaps most importantly) the manner in which customary law is in effect transformed in the process of adjudication by ‘modern’ courts, leading to intractable problems which (as the author concludes) are likely to remain unresolved (either legislatively or judicially) even after 1997.

*Part Four* of the book deals with *various aspects of statutory interpretation*. It comprises a total of six (remaining) chapters (13 to 18), of which three are in fact new (chapters 15, 17 and 18: see the *Preface*, at p viii). The *thirteenth* essay is entitled “Ejusdem Generis and the Disjunctive” and is, in fact, a rather interesting one dealing with the relationship between the “‘or’ rule” (contained in s 3 of the local Interpretation and General Clauses Ordinance) and the *ejusdem generis* rule, the former of which has no equivalent in England. The author focuses, in particular, on the relationship between s 3 of that Ordinance and s 2(1) of the same statute, and pertinently points to the fact that the “‘or’ rule” has, unfortunately, been frequently ignored or cavalierly displaced; he thus suggests that the rule be repealed. The *fourteenth* essay is entitled “Literal or Liberal?”, where the focus is on s 19 of the Interpretation and General Clauses Ordinance which, in turn, purports (at least) to embody a general approach towards statutory interpretation. Once again, there is no English counterpart for this provision which was imported from Canada via New Zealand. The *fifteenth* essay is simply entitled “Resort to *Hansard*” and, as the title suggests, examines the exclusionary rule in Hong Kong in the context of the recent House of Lords decision of *Pepper v Hart* [1992] 3 WLR 1032. The *sixteenth* essay, entitled “Offences of Strict Liability”, surveys the various principles relating to strict liability as embodied in the local case law. However, the author laments that Hong Kong cases have not looked at alternative (and more flexible) approaches in Australia, New Zealand and Canada; he also deals with the possible challenge to such offences under the Hong Kong Bill of Rights. The *seventeenth* essay, entitled “Mandatory or Directory?”, analyses both theoretical issues as well as the local position with regard to the distinction (not always clear, as the author points out) between mandatory and directory statutory rules. The *eighteenth* (and final) essay deals with “Retroactive and Retrospective Ordinances”; in this chapter, the Hong Kong cases are analysed in the light of general principles which, as the author pertinently observes, are easy to state but whose application “will often be exasperatingly difficult” (see p 290). It might also be mentioned that the author focuses on general principles as derived, in the main, from Dredger, “Statutes: Retroactive Retrospective Reflections” (1978) 56 Can Bar Rev 264.

As already mentioned, the present review cannot do justice to the scholarly and highly textured nature of the present book; and the relative length taken here to merely give the reader a superficial flavour of the work is itself an indication of the point just made. It should also be mentioned that the book is highly readable. This is not, however, a book for intelligent laypersons desiring a simple overview of the Hong Kong legal system; the author has already catered for such an audience

with his (also excellent and succinct) *An Introduction to the Hong Kong Legal System* (2nd ed, 1993) which, incidentally, the present reviewer would also highly recommend. It is, rather, a work intended for serious inquirers who desire an in-depth analysis of the Hong Kong legal system, whether they be students, judges, lawyers or comparative scholars. This collection of essays is clearly an essential building block in the continuing development of the legal literature of Hong Kong.

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