The historical study of economics and of legal systems has shown that a path – whether that be something like a form of government, a structure of regulation, or a policy toward economic dealings – once chosen and implemented will greatly determine the future shape of a jurisdiction’s legal system. Centres for international trade and finance serve an outward looking function within an economy, bringing together a network of international actors and local goods or services. Colonies also have outward looking structures, in that they are designed to serve the larger network of the colonizer’s interests. Hong Kong was built as a colony for the British and serves as an international financial centre for China. The essential structure of the first function has led into the efficient fulfilment of the second. Moreover, unique characteristics of the Hong Kong colony (located on the edge of Mainland China and always populated more than 90% by Chinese who spoke a language generally impenetrable for the English) led to government through a caretaker structure that both in many ways resembled traditional Chinese government and allowed leading merchants to exercise significant influence in governance. Next to this paternal form of government, Hong Kong raised an independent judiciary in the British tradition. The result has been a powerful mixture for international financial regulation, one that serves China’s interests well and one that other Chinese centres such as Shanghai will not be likely to imitate in the near future.

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A. Hong Kong’s historically driven component culture

International financial centres, like internationally active trading ports, are outward looking. Prosperity at home is derived from how hospitable they are to foreign capital, traders, and their interests. The London and New York we know as international financial centres are simultaneously cities that appear to be somehow conflicted, with many of their wealthy residents holding foreign passports and much of their regulatory effort directed at protecting the capital that foreign investors place in the local markets. Local citizens benefit greatly from this, both through employment opportunities and the economic spillover effects from the financial market itself (think, for example, of the markets for office property, the concentration of legal talent available for locally oriented projects or the thriving art markets that find both buyers and patrons among financiers). Thus, like any other hub of international activity, such financial centres form gateways between two worlds and must seek to balance the interests of two worlds – the nationally internal and the internationally external. Three such places currently top international rankings: London, New York, and Hong Kong. This study focuses on the latter. More than the other two, Hong Kong from its very inception was designed as a gateway between the local and the international, primarily a component of a larger whole. As such, it is arguably in essence the world’s best international financial centre. It originated as a gate controlled by the British facilitating the export of goods from China and now serves as a gate (mostly) controlled by the Chinese to facilitate investment into China. Although all international financial centres tend to stratify between the wealthy financiers and the locals providing support services, only Hong Kong has always known a government designed to allow management by the former of the latter. One might
argue that Singapore presents this type of control in a form that is even deeper seated than in Hong Kong. Singapore, however, has a multilateral position – potentially brokering between almost any two given counterparties – that makes it very different from London as a gate first to Britain and then to Europe, New York as a gate first to the US and then to North America, and Hong Kong as a gate to China, with a planned future broadening yet to be determined. As such, Hong Kong presents structural and geopolitical characteristics that make it a more natural financial centre than either of its three peers. The question, whether Hong Kong has taken all the measures necessary successfully to build on this basic natural endowment, can best be approached from the perspective of understanding of Hong Kong’s socio-political and legal structure and the historical path by which this structure was formed. This paper is an introduction to that project.

The Crown Colony and later Special Administrative Region of Hong Kong has always served as a component of a larger whole, providing a point of access from one culture, economy, and political system to another. While serving this function, the particular composition and governance structure of Hong Kong has melded many aspects of British public administration and rule of law into Chinese culture, creating a unique form of civil society. 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. Hong Kong, originally just another strategic port seized as the spoils of war, became a safe haven for large numbers of Chinese, who comprised nearly all of the British colony’s population, during some of China’s darkest hours, times of occupation, revolution and restructuring. This lent Britain a caretaker position over a surprisingly homogeneous population of Chinese refugees who generally accepted their rule during the 150 years plus that it governed Hong Kong. In many ways, 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. Yet although the Hong Kong Chinese found themselves in a government in which they had no say, they also experienced a government stressing law, individual rights and procedural mechanisms to protect these rights. The result was a general framework presenting the Hong Kong people with extensive formal congruity between authoritarian systems in Hong Kong and China, while also exposing them increasingly to a very foreign social structure based on law and a proud exercise of the rule of law above government authority.

In terms of what economists and legal theorists call “path dependence”, the British chose an administrative caretaker structure, resembling the existing path in the Chinese Empire, for a number of 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. For similar reasons, a judicial system with high independence and expectations of competence was introduced to administer a body of law that tended to enforce individual rights and the protection of private property. This was the English legal system, the only one the colonial administrators had at their disposal, and was introduced because no other system was available to them, not because Great Britain was preparing to school millions of Chinese in the Western legal tradition. 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 tellingly entitled *Capitalism with Chinese Characteristics: Entrepreneurship and the State*, MIT political economist Yasheng Huang has recently argued that 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.¹

Leaving aside for the moment Huang’s judgment that China’s “inefficient” institutions survive thanks to use of “efficient” institutions just across the border – Huang does succinctly highlight Hong Kong’s salient characteristics: safe harbour (it is 99.9% peopled by “immigrants” into Hong Kong and their offspring),² at China’s doorstep (it is linked economically and infrastructurally to Shenzhen, a Chinese city of some ten million),³ laissez-faire (ranked the world’s freest economy 17 years in a row),⁴ and efficient financial market (ranked a “global leader” among financial centres, statistically tied with London and New York).⁵ Yet Hong Kong also earns a prominent place in books with titles like *Asian*...
Godfathers: Money and power in Hong Kong and Southeast Asia, because of the historic power and prominence of a small group of families, locally called “the tycoons,” in the Hong Kong economy, 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.” 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. Yet even today, many Chinese see emigration to Hong Kong as an alternative more attractive than remaining in China, where prosperity may indeed be arriving, but rights and their exercise are still uncertain. Thus Hong Kong is seen as orderly and efficient, yet twisted by powerful interests, placing the desires of international investors and issuers above its local population, yet always a desirable haven for Chinese seeking a safer and more just society.

What aspects of Hong Kong’s character attract such high accolades while also provoking such disconcerting criticism? The key appears to lie in the caretaker structure of Hong Kong’s political and economic system and its internalization of the British system of rights and procedural justice at the level of public discourse. This arrangement allowed and still allows governmental and economic leaders to give distant interests, whether they arise in London or in Beijing, a central place in policy making, potentially ignoring negative local impact. Yet it also provides fair system of public law and efficient avenues for the resolution of private disputes. Hong Kong’s judicial system handles an admirable case load and receives praise by interested parties for the quality of its adjudication. The quality of both a colonial trading outpost and an international financial centre is judged by meeting the needs of the colonial administration on the one hand or the international financial community on the other, regardless of whether this function might override and neglect the needs of many local citizens. Similarly, the private lives of most local citizens living under foreign colonial rule might well never come into direct contact with or be changed by the criminal and civil justice systems provided by the colonial master. Nevertheless, each of these factors – whether international economic activity, private life, or the operation of a system of justice – will come to at least indirectly affect the others. In Hong Kong, these elements coexisted through a 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

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6 Studwell (2007).
7 “Richard Li raid sends out an equality signal,” South China Morning Post, 23 February 2010.
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 common law importing law on demand from a network of courts with a rich corpus of case law stretching back hundreds of years, including cases from a multinational network of developing economies spanning (what is now) the entire Commonwealth. Whilst this body of law was well designed to provide solutions acceptable to enterprises operating globally, it was less tailored for local needs. When the Colony’s local inhabitants became involved in this British system, its caretakers attempted to adjust it to the new environment. The work done was just as skilful as the results were interesting. 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 careful adjustment. The public sphere and its law gradually merged into the Chinese culture in Hong Kong to synthesize a truly unique blend of rights-based and relationship-based dealing, but the dominant structural characteristic has remained that of an economy and polity seeking its goals and rules from abroad.

B. Hong Kong’s origins as Britain’s entrepôt neighbouring a failing Chinese Empire

Aside from the obvious fact of British rule over a primarily Chinese population, 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 stay. This has been summed up with the colourful expression that, “trouble in China was a ‘god-send’ for Hong Kong.”

This was particularly true because, given the language barriers and the ratio of a few British colonial administrators to thousands of Chinese subjects, having 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. The type and extent of “trouble in China” greatly determined the type and extent of emigration from China to Hong Kong, which then determined the need for, and possibility of finding, an informal body of leading Chinese citizens in the colony. Further, the presence/absence and strength/weakness of the co-opted Chinese elite had a significant influence on the development of Hong Kong’s legal system as it progressed from a group of Guangdong fishing villages populated by about 2000 persons to a metropolitan area of about seven million.

As will be explained below, the development of Hong Kong’s economy and legal system to this day greatly follow the paths cut for

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11 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.
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 a 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. 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. 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. Because neither China nor Britain was satisfied with the Chuenpi Convention, they both repudiated it and hostilities resumed, in which Britain showed China that the balance of power in this clash of civilizations was very much in its own favour. Britain inflicted high casualties on the Chinese while quickly seizing Zhoushan, Xiamen, Ningbo and Shanghai and then besieging Nanjing. The resulting Treaty of Nanjing, signed on August 29, 1842, gave Britain, among other things, five treaty cities: Guangzhou, Fuzhou, Xiamen, Ningbo and Shanghai. 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. 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

12 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: 151-166), Munn (2001: 24-31), Ferguson (2004: 139).
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.\(^\text{18}\)

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 labourers out of China.”\(^\text{19}\) 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.”\(^\text{20}\) Colonial officials therefore faced an economic base that tended toward criminality, a disease-prone European community that remained very small,\(^\text{21}\) and a population of uneducated, migrant Chinese labourers with very few sophisticated members to whom the colonial government could communicate its intentions and policies.\(^\text{22}\) 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 in 1608,\(^\text{23}\) whereby the royal prerogative to impose English law was absolute over people conquered by that king, a practice still used today under war powers, but did not give the crown power to “alter the law governing the rights of free Englishmen.”\(^\text{24}\) 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

\(^{18}\) Munn (2001: 33).
\(^{19}\) Munn (2001: 23).
\(^{20}\) Sinn (2003: 10).
\(^{21}\) Munn (2001: 59-60).
\(^{22}\) Tsang (2004: 50); Munn (2001:71).
\(^{23}\) See Calvin’s Case (1608) 77 ER 1308.
\(^{24}\) 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).
alike to accept the fact that Hong Kong was foreign territory.” 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. These factors fed directly into the fundamental character of the colony’s legal system. Although Charles Elliot had declared in January 1841 that the local Chinese would be “governed according to the laws and customs of China, every description of torture excepted,” 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. Although, as explained above, this did comply with the older case law, it was an unusual policy for Britain to apply to a conquered population, and had much to do with Hong Kong’s unusual circumstances.

During the first decades of the colony, its government imposed English law in an often discriminatory and exaggeratedly harsh manner. This had a number of causes. The Chinese inhabitants, who, as said 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. A lack of communication, understanding and any form of loyalty meant that reciprocal misunderstanding and mistrust was high. This situation led to an enduring fear of political unrest in the Colony and a siege mentality among colonial officials. As Governor MacDonnell expressed in a 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.

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

26 Munn (2001: 40, 168)
27 Sinn (2003: 8); also see Tsang (2004: 46); Munn (2001: 163).
28 Sinn (2003: 8); also see Munn (2001: 168).
30 See, e.g. Sinn (2003: 10-12).
31 Munn (2001: 327-28); Goodstadt (2005: 33);
character, given that at the time punishment in China was often severe and 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 Chinese inhabitants, and most were too poor to fine. Pre-emptive monitoring was also used. First a curfew and then a registration system 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. The poverty of such draconian methods was well displayed in their ineffectiveness, and led directly toward 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 necessary services to the Chinese population and maintained control over all but the most visible criminal activity and social disorder, greatly reducing necessary contact with the colonial government.

Such intermediation initially occurred through organizations that were not designed for governing purposes, such as the Man Mo Temple, and then later, and above all, the Tung Wah Hospital. Munn gives credit to Governor John Pope Hennessy for the first successful breach of the racial barrier, as he began to seek advice from and cooperation with the Chinese “elite”, including those directing the Tung Wah Hospital. Sinn dedicates a book-length study to this institution, and the manner in which it both supplemented the colonial government and set up a parallel, Chinese social order operating in occasional contact with the colonial government. This fulcrum of Chinese elite between the mass of the population and the British governing organs not only became an indispensable part of the colonial

36 Munn (2001: 126-28, 286-88). See in one of its later forms, Ordinance no. 6 of 1857, “Registration and Regulation of the Chinese People.”
40 Sinn (2003).
government, but was later institutionalized in the “functional constituencies” of the Basic Law which currently serves as Hong Kong’s constitution.\footnote{See The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Annexes I and II.}

Both the composition of this 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 rebellions, invasions, civil war, mismanagement and ideological cleansing 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 counterparties 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,\footnote{Goodstadt (2005: 195-200).} 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 at the opening of this section.

The caretaker structure, which served distant interests and mediated relations with the local population through a small body of elite merchants, has shown itself to be ambidextrous: what was done with a view westward toward London could also be done with a view northward toward Beijing. In a ceremony on 30 June 1997, 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,\footnote{See Stigliz (2004: 89-132).} Hong Kong was returned to China. This occurred for a mix of legal and political reasons. Although Britain had acquired sovereignty over the Island of Hong Kong and the tip of the Kowloon Peninsula in perpetuity, it acquired only a 99 year lease over the remainder (and geographically larger) portions of land acquired in 1898 that was joined to the colony of Hong Kong.\footnote{Tsang (2004: 39-41).} When, in the early 1980s, the lease was revisited by the United Kingdom and the Peoples’ Republic of China, 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 politically incorrect colonial past, while China was some four years into a process of reform that would lead it to economic stardom and solid super-power status.\footnote{See Tsang (2004: 211-15, 229-30).} It was thus agreed that the entire colony of Hong Kong would be returned to China at the expiration of

\footnote{See The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, Annexes I and II.}
\footnote{Goodstadt (2005: 195-200).}
\footnote{See Stigliz (2004: 89-132).}
\footnote{Tsang (2004: 39-41).}
\footnote{See Tsang (2004: 211-15, 229-30).}
the lease in July 1997, and that Hong Kong would be a “special administrative region,” whose social, economic and political systems would enjoy a 50 year protected status under a “basic law”. The formula is known as “one country, two systems,” a policy originally formulated with a view towards reunification with Taiwan.

The historical process sketched above was largely responsible for Hong Kong’s government, economy and society taking its current shape, in which a population that is nearly 100% Chinese feels deeply at home with a legal system that is nearly 100% British, although all laws and most legal proceedings are available in Chinese (Cantonese). Misgivings, however, are certainly found in the popular view of an economy that appears structured more to compete in international review exercises than meet the needs of its inhabitants, and is dominated by a relatively small elite who comfortably mediate between East and West without formal political mandate. These wealthy businessmen were a key to Hong Kong’s utility as a trade and financial centre for the British Empire, and they have also led Hong Kong’s integration into the Chinese economy, the Chinese “Empire” in arrival, including some strong criticism of British, democratic policies. During recent decades, these elite have performed in Beijing a mediating role that is comparable to that which their forbearers once performed towards London. As would be expected of a government designed to function as a useful component of a larger system, Hong Kong as a colony acted as a conservative, passive caretaker, engaged much more in avoiding risks and losses than in realizing the hopes and dreams of its local population. This socio-political path cut during 150 years of colonial rule has changed little, also because it was cut by the British at least partly with Chinese society in mind. With the handover, the larger system in which Hong Kong acts as a component was swapped, but Hong Kong’s role of dutifully serving the motherland in its dealing with foreigners, while skimming off a share of prosperity for itself, and the use of a relatively small body of sophisticated merchants to achieve this goal, has remained greatly unchanged.

C. Building the Hong Kong legal system

1. Laying the foundation

For nearly a decade, a debate has raged in academic journals about the power of the English Common Law working in a society to create more successful economies. Arguments are marshalled that the common law protects property and offers flexibility in a way not seen in the ‘rigid codes’ of

47 Tsang (2004: 216-17, 236).
48 Goodstadt (2005: 107)
the Civil Law. Along the lines of this argument, if Hong Kong has been a success, it owes a great
dept to fact that its legal system is based on common law. Mere statutes and other forms of written law
would never have had this power. Responses to the argument that societies prosper or fail because of
the origin of their law have largely shown the causality of the legal origins allegations to be
questionable. Some authors have pointed out colonial powers intending to settle its own people in a
colony chose more inhabitable locations and built up stable institutions – rather than mere extractive
facilities – and that, “British colonies are found to perform substantially better … in large part because
British colonized places where settlements were possible, and this made British colonies inherit better
institutions.” Others have reminded us that British colonies might well have prospered because the
British were masters of the sea throughout much of the 18th and all of the 19th century, and thus had
their pick of colonial locations with high comparative advantage. This group of scholars have also
presented evidence indicating that the results achieved by the colonial administration practiced by the
British were higher regardless of legal origin (such as where the British took over a Dutch law
colony). Certainly the loss of the North American colonies in 1781 put Great Britain on warning that
they should take more care in managing their holdings. Still other authors, turning to assertions of
common law’s beneficial qualities, have shown that most of the law affecting economic development
and capital markets is statutory – i.e., “civil law” in essence – and does not at all correspond to the
inspired imagination of a judge wrestling a novel solution out of plain custom and common sense.

Supporting the argument that the common law leads to stronger economic growth, one can indeed find
strong statistical support: Hong Kong, Singapore and Malaysia, former British colonies all, lead the
growth league tables of colonies. Yet these jurisdictions all have other unique characteristics.
Looking at Hong Kong, in particular, many facts about the Colony’s development would tend to
indicate that economic prosperity, while strongly connected to rule of law and high ethical standards,
does not come from in any primary way from the presence of a system that uses the jury and for which
judicial decisions form law. Judicial independence, however, has been an important element in Hong
Kong’s recent success attracting foreign capital to the city, and while European Civil Law countries do
guarantee their courts significant independence, the prestige of the common law judge is likely to be

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50 La Porta, Lopez-de-Silanes & Shleifer (2007: 304).
51 La Porta, Lopez-de-Silanes & Shleifer (2007: 300).
53 Klerman, Mahoney, Spamann & Weinstein (2011: 8).
56 Klerman, Mahoney, Spamann & Weinstein (2011: Table 2).
higher, and may have contributed to the strength of Hong Kong’s legal system in a way that the Civil Law could not. A close look at the development of the legal system in Hong Kong will help us answer this issue with more precision.

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, although provision was made for Chinese customs that did not conflict with local ordinances. This decision was contrary to normal practice in the British Empire, and was made for a number of reasons, particularly that Hong Kong’s position was perilously close to the edge of a hostile state, plus the mitigating effect of Charles Elliot’s promise. 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. 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.” Its charter provided for the crown appointed governor to be assisted by both executive and legislative councils. The foundation of law laid by the colonial government can be seen in terms of four essential elements: written ordinances issued in Hong Kong, which closely paralleled existing UK law and the selection of which doubtless reflected the accumulated centuries of British colonial knowhow, English law incorporated by statutory reference, particularly English Common Law, legal institutions (primarily courts) for enforcement, and, finally, the culture the law needs to supplement its operation.

Introducing law itself was as simple as passing ordinances. 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 Chinese criminal ‘justice’ – would today be considered serious violations of human rights.

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58 Sinn (2003: 8); also see Munn (2001: 168).
59 Sinn (2003: 9); also see Munn (2001: 169).
60 McPherson (2007: 2-4).
61 Munn (2001: 40, 168)
62 Sinn (2003: 8); also see Tsang (2004: 46); Munn (2001: 163).
63 Munn (2001: 56, 163)
64 Tsang (2004: 26).
and the development of a culture promoting rights and justice was a slow and difficult process, but it was ultimately Hong Kong’s greatest success.

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 the experience gained through nearly a quarter millennium of controlling less developed territories to its last Asian colony, Hong Kong. In 1844, just months after the Treaty of Nanjing was ratified, a virtual “colonization kit” of ordinances was unpacked in Hong Kong. These ordinances appear to reflect an exact knowledge 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. Another 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. 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, as well as 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. This bundle of ordinances subjected the Chinese people of Hong Kong to a complete and systematic legal system just as quickly as if the French had moved in with their Code Napoleon.

2. Linking Hong Kong to the English Common Law

Yet England was a country of the common law, and common law needs at least two things – courts and customary principles, the latter expressed in culture, written law and in prior judicial decisions. Both of these necessary components were provided in a single ordinance: Supreme Court Ordinance No. 15 of 1844, which both created the Supreme Court and ordered the retroactive

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68 See the Merchant Shipping Ordinance No. 4 or 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.
69 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.
70 See the Salt, Opium Licensing & c. Ordinance No. 21 of 1844 and the Restraint of Trade in China Ordinance No. 9 of 1844.
71 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.
72 The Colonial Office disapproved of the formula for the reception of English law used in this Ordinance, and it was amended and reissued the Supreme Court Ordinance 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
reception of English law as from 5 April 1843. Thus Hong Kong began very early a tradition in which its statutory law was locally controlled and its case law was linked to a constantly developing mass of decisions originating in England and its colonies. The Crown Colony found instant legal nourishment through an umbilical cord running to the body of English Common Law that had developed for half a millennium and was still developing. With this, the colonial authorities had transplanted much of English law and part of the English legal system at China’s doorstep. However, there were naturally high barriers to recreating the English legal system in Hong Kong, for the courts had to be manned with competent professionals, and the last element of the legal system, the culture 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. 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 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.

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 restricting the actual application of the common law to the European population and a relatively small segment of the Chinese population, with the remainder subject to informal Chinese institutions as is discussed below in section D. However, as Berkowitz, Pistor and Richards 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.” Although the market was restricted to that segment of the Hong Kong population that came into contact with the

74 See e.g. Watson (1993) and Nelken & Feest (2001).
75 Nyali Ltd v Attorney-General [1956] 1 QB 1, 16.
English authorities, the quality of the intermediaries used to develop the law presented a considerable problem to increasing the demand for law 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.

3. Institutional implementation of the law

Munn looks closely at the judiciary and the bar in early Hong Kong and finds them severely lacking, primarily because of the short supply of qualified personnel. In selecting its first Chief Justice, John Walter Hulme, the Colonial Office was forced to settle for “at least” its “eighth choice.” 77 Hulme had no judicial experience, and in addition to limited competence was suspended from the bench in 1848 for drunkenness. 78 Charles Molly Campbell, Hulme’s replacement during this suspension, was described as “an abortion of justice, both for honesty and capacity.” 79 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 Register 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 evidence against a policeman; after spending some time in prison for having used his power on the court to groundlessly incarcerate a personal enemy, McSwyney became an agent in the small debts court, but was “ejected for having taken out summonses without authorization.” 80 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, “By 1849, the colony had no barristers and, out of the six attorneys who had come to the colony, only two remained,” 81 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. 82 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

77 Munn (2001: 210).
78 Munn (2001: 211).
79 Munn (2001: 211).
80 Munn (2001: 211).
81 Munn (2001: 212).
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.83

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.84 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, 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.’85

Although laced with the kind of racist assumptions widely held in the 19th century, we see in Caldwell’s answer to the court an attempt to discern whether the causal link between untruth and hellfire 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 repeatedly had expert sinologists serving as governors. Caldwell’s advice that the justice system should employ corporal punishment to create the necessary link, 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.86

in Europe, where the purpose of criminal justice had swung towards rehabilitation in the mid-19th 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.”

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.” Although efforts were clearly being made, the evidence indicates that in early Hong Kong both the supply of and the demand for an effective common law judiciary were lacking.

The difficulty of bridging the linguistic and cultural gaps between the British and the Chinese was a significant factor leading to the structure that Hong Kong society eventually took in relationship to its legal system: the use of leading Chinese as intermediaries between the population and their colonial masters. As explained above, because of the northern treaty ports, Hong Kong could not initially attract the merchant class it desired, but this situation gradually changed. A first attempt was to use a variation of a traditional Chinese tepo (dibao) scheme, and this showed significant success, but was abandoned when Daniel Caldwell was charged with corruption and his informant network collapsed around 1860. 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.

As discussed below, the number of Chinese educated in English law steadily increased, gradually leading to the deep and solid acceptance of English legal culture we now see in Hong Kong. In the area of laws connected to business operations, which primarily concerned educated Chinese merchants who had regular dealings with Western counterparts, the development is different and much less painful than that found in the criminal law: it shows Chinese merchants using parallel structures that at first only occasionally fall into contact with English law and the Hong Kong courts, although the two parallel systems gradually converge.

D. The necessary mediation of the business elite

Hong Kong existed as a colony “for diplomatic, commercial and military purposes,” and was operated autocratically to those ends. 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

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88 Munn (2001: 201).
89 See the Chinese Peace Officers Regulation Ordinance No. 13 of 1844.
91 Munn (2001: 369).
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.”

The European managers were always very few, and because of the linguistic and cultural problems discussed above, it was natural for the European elite to seek Chinese counterparts.

The Chinese “elite” who arrived very early in Hong Kong were sometimes badly managed by the British, as the story of Too-hing demonstrates. 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 $1000. 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. The last information available on the son was that he had become a vagrant opium addict. Although the relevant ordinance was later amended to avoid a repetition of this event, it is little wonder that the Chinese elite took some time to warm to the British, and even when they did, were willing to play both sides of the fence by keeping in the good graces of the Guangdong and national governments. Munn gives 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.

A key to establishing this relationship was for the merchant class to differentiate themselves from the opaque mass of migratory Chinese that the colonial government feared and avoided. This took place through three, closely related developments: the creation of institutions, the increasing wealth and education of the leading Chinese, and events in China that forced wealthy, educated Chinese to seek refuge in China. The following subsections discuss each of these in turn.

1. Informal institutions

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.

94 Ranging from a couple of hundred in the early years to a couple of thousand in 1870. See Munn (2001: Figure 2.1).
95 Munn (2001: 74).
96 Munn (2001: 74).
97 Munn (2001: 74).
98 See Ordinances Nos. 4 and 5 of 1856.
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. The Chinese community’s centre thus gravitated to 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 Aqui and Tam Achoy, lower class Chinese who had made their fortunes by collaborating with the British. The temple became a centre for Chinese to gather, and by the 1950s its leaders were serving as a de facto governing body for the Chinese community – they “acted 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.” 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.”

As the colonial government provided infrastructure and services primarily with a view to the European community, health services for Chinese were extremely 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. The result was the Tung Wah Hospital, which was established 1872. 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 Register General who had decreed otherwise, McDonnell agreed, which was a significant display of early Chinese power. Throughout its life, the hospital was known as a bastion of Chinese medicine and practices and refused European techniques (such as amputation). 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 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.” 108 From the outset until the close of the 19th Century, the Board represented six major trade guilds, thus reintroducing the Chinese private ordering system that the British had tried to squash earlier on. 109 The Tung Wah’s Board even held the title of “gentry” (shen) as bestowed upon them by Chinese officials. 110 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. 111

As Sinn observes, this dominance of the guilds 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.” 112 Thus Hong Kong allowed acceleration of a social change present in the West as well, as the aristocracy gave way to the bourgeoisie. In this way as well, the structure of Chinese society in Hong Kong came to reflect the British colonial purpose of placing business first. The 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. 113 The Committee served as a direct line of communication to convey complaints to the governor, 114 formulated and proposed legislation to respond to the needs of the Chinese business community, 115 heard and judged disputes among Chinese on a daily basis according to Chinese customary laws, such as those regarding the status and relations of family members, 116 and arbitrated commercial disputes. 117

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

113 Sinn (2003: 70-71).
Guangdong, and came under criticism from the colonial government for its relief efforts helping, and close relations with, the Chinese government in Guangdong. However, Chinese were invited (at the request of the Tung Wah Board) to join the Legislative Council in 1880, 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 basically mimicked a traditional Chinese guild structure, remained. Indeed, when Tsang writes, with respect to appointing members to Hong Kong’s Basic Law Drafting Committee, that “The Communist Party preferred to give the business tycoons a stronger say. After all, it needed to secure their investments,” 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. 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. If as Rawls argues, procedure is a key to Western justice, then civil behaviour as expressed in rites (理) is a key to Confucian justice.

2. Growing sophistication
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 government, 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). 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,

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120 Tsang (2004: 70).
124 Rawls (1971: 75).
125 Sinn (2003: 87).
126 Sinn (2003: 87, purchase of titles; 43 on their contribution)
contributing over 90 percent of the colony’s revenue and holding 90 percent of the note circulation.”

With education from the UK or the US and an incomparably better knowledge of and chance of successfully dealing with the Chinese, the leaders of the Chinese community in Hong Kong increasingly outdistanced the European competition. A few examples of such community leaders is useful.

Ng Choy (in Mandarin, “Wu Tingfang”) was a Singapore born, co-founder of the Tung Wah Hospital. He studied at University College London and was the first Asian admitted to the Bar in England, was appointed as a Justice of the Peace in 1878 and then as the first Chinese member of the Hong Kong legislative council in 1880. During the early years of the 20th century, he served as a diplomat to the United States and the Americas for the Chinese Republic and then was appointed to work with the ministry that drafted the first Chinese corporation law enacted in 1904. Wu is seen as a strong advocate of using western law to strengthen China, and was a visionary in legal scholarship. In his 1914 book expressing his observations on the United States, 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?” Wu was active and prominent in every role he played in the legal system. Another Hong Kong leader was Ho Amei (in Mandarin, “He Xianchi”), who Sinn characterizes as “exceptionally dynamic and aggressive.”

Ho was Chairman of the Tung Wah Hospital in 1882. 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 20th century. 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. Another prominent 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

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127 Sinn (2003: 84).
130 Wu (1914: location 350, Kindle edition).
131 Sinn (2003: 58, 137).
Kong Sanitation Board. He promoted the use of western legal tools to protect the Chinese in Hong Kong.

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 pointed out 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, lead them 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.” Indeed, the “new generation taking control of the economy was more sophisticated, and its fortunes were dependent on Western markets.” This appeared to be the kind of motivation animating the Chinese elite when they sought to accommodate the Japanese invaders of Hong Kong to preserve their prerogatives, 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.” On both occasions, it can 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 separate from China. On the basis of this historical knowledge, an obvious moral hazard seems to be present in Hong Kong government. Given the relative sizes of the Hong Kong and Chinese economies, the majority of assets operated by many wealthy Hong Kong businessmen now are found in China. If China were to take a strong stance supporting the ascendance 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? To answer this question successfully, it will be necessary to analyze the success rate of necessary legislative and regulatory

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136 Goodstadt (2005: 105)
137 Goodstadt (2005: 105).
138 Goodstadt (2005: 101-02)
140 The structure and holdings of Hong Kong’s major economic groups will be discussed in detail in a later chapter of the text to which this serves as the opening chapter.
reforms proposed in the recent past, as seen against the interests served by either reforming or retaining the former state of law and regulation.

3. Events in China

Hong Kong is populated by the children of immigrants, nearly all of them Chinese. These people needed both a reason to relocate from China and some competitive advantage for Hong Kong to prosper. China’s painful transition from a monarchy to a republic, to a victim of Japanese aggression, to a socialist state that has experienced a number of ideological swings, created both incentives for relocation and significantly hampered China’s competitiveness during long periods: thus the expression quoted above, “trouble in China was a ‘god-send’ for Hong Kong”\(^{141}\) expresses how Hong Kong received both talent and competitive advantages at the expense of Mainland China. As, for example, in the case of the persons driven to the United States by hunger, war and persecution in Europe over centuries, the type of person driven to emigrate from China 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.\(^{142}\) Hong Kong provided that. With the coming of the 20\(^{th}\) Century and the rise of ideologically motivated change, leading citizens like Wu Tingfang and Sun Yat-sen participated in Hong Kong society and looked for Western solutions to Chinese problems. Later, civil war, revolution, and political purging brought the bourgeoisie and other persons undesirable for the current ideological trend to the safe haven.\(^{143}\) This has ensured that tiny Hong Kong, with little level land and few natural resources, had no lack of talented immigrants. Of course, as the economic fortunes of China changed with the coming of the 21\(^{st}\) century, the attractiveness of Hong Kong as a refuge also diminished. As major Chinese cities move toward levels of economic prosperity comparable to Hong Kong, we will have evidence as to whether the hybrid legal culture that developed in Hong Kong under British rule exerts an attraction strong enough to motivate Chinese citizens to emigrate.\(^{144}\) In 2011, Hong Kong had to take measures because the ability of Hong Kong hospitals to provide maternity services the surging demand of pregnant women from Mainland China was simply too great.\(^{145}\)

\(^{141}\) Munn (2001: 49).

\(^{142}\) See e.g. Spence (1999: 167-191), 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.

\(^{143}\) Goodstadt (2005: 195-200).

\(^{144}\) 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/ehtml/hkvisas_13.htm (last accessed on 1 November 2011).

\(^{145}\) Stuart Lau, “New bid to curb rush to give birth in HK,” The South China Morning Post (Sept. 23, 2011).
E. Reversal: Hong Kong as a component of the Chinese “Empire”

Hong Kong was created as a colony to serve the commercial, diplomatic and military needs of the British Empire. It was operated by a small management team of colonial officials directly answerable to London, and the colonial officials were able to manage an increasingly large Chinese population through the mediation of a prosperous Chinese merchant and financial class. As discussed above, most of these persons were forced out of their homeland by misfortunes and mistakes in China, and all of the Chinese immigrants to Hong Kong recognized that the British relationship with them was based on need, not on some larger desire to create a multicultural settlement. Indeed, as Tsang and Goodstadt observe, the only times the colonial government really pushed hard for social justice and democracy in Hong Kong were for diplomatic purposes – in reaction to abuses in China or so to use British led Hong Kong as a foil to emphasize errors in the Chinese political system.\footnote{146} However, just as the British used the leading Chinese as a shortcut for governing the colony, the latter also used the British to protect their commercial operations. As discussed above, when the Japanese occupied Hong Kong, the same business leaders were able to adjust their behaviour to the new dominant class, as this corresponded with their rational self-interest of receiving protection from the currently dominant political class. Also, 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.\footnote{147} While, also as discussed above, this general characterisation has been marked by notable exceptions of great public service by many – both the directors of Tung Wah Hospital and others – it still gives cause for careful study and evaluation.

The business elite of Hong Kong can thus be expected to shift their investment and client base, 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. The historical path of Hong Kong – a city established to serve as a component in a larger whole – has left its structure well adapted politically, economically, and culturally to be managed by a relatively small group of business and political leaders brokering between local and distant interests. The British used it as a base of war and trade with China. The Chinese have used it primarily as a window for corporate finance and a training ground for Chinese business elite active in international dealings. The shares of many state operated enterprises (SOEs) are listed on the Stock Exchange of Hong Kong, benefiting both from the Hong Kong legal system and the free convertibility of the Hong Kong dollar.\footnote{148} In the

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147 Goodstadt (2005: 45, 106)  
148 See e.g. De Jonge (2008), generally.
passage quoted at the opening of this paper, 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? Perhaps the only solid statement that can be offered on this point regards the judiciary. Hong Kong enjoys an independent judiciary 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 law making that has been found to perform reasonably well since its origin in the 12th century. Given the current structure of the PRC government, and in particular the necessary time for gestating a high quality judiciary with its own balance and voice in that government, it would appear that the growth of a strong, independent judiciary in Mainland China – a necessary component for true rule of law – is unlikely in the foreseeable future.

In its competition for regulatory primacy, 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 machine and continue to rely on the UK or Commonwealth model 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.149 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. Where Hong Kong’s socioeconomic structure differs from the United Kingdom, elements of English Common Law introduced before 1997 could be problematic for the common law of Hong Kong. A simple yet important example 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 of a company 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

149 Eisenberg (1991: 3, 154).
blockholdings of UK shareholders were broken up as the capital markets grew after World War II.\textsuperscript{150} Thus courts have not been forced to fashion duties for majority owners to check unfair use of their power. This is a very different situation from 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,\textsuperscript{151} quite similar to the duties assigned corporate directors. Hong Kong, which has shareholding structures more resembling those in Germany than in the UK, applies the common law to these problems and thus applies a law formulated over years in a rather different economic milieu, with a different mix of agency problems. As a recent decision of the Hong Kong Court of Appeals made clear,\textsuperscript{152} English Common Law has not developed satisfactory solutions for some problems, such as blockholder abuse in large companies, found in the Hong Kong economy. 

As Hong Kong shifts to serve as a component of China, its courts should be aware of this occasional mismatch, and make adjustments. The growing body of home-grown cases and a clear awareness that references to authority in other Commonwealth jurisdictions is only persuasive of course assists in this task. 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 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 toward the customs, beliefs and principles of the people of Hong Kong, then the danger of mismatch would likely disappear in the medium term. 

From the brief historical analysis presented in this paper, we may conclude that much of the efficiency of Hong Kong’s relationship with Beijing – just as its previous relationship with London – can be found in Hong Kong’s social and legal structure as formed more than a century ago. Its economy and much of its regulation is outward looking, serving the interests of those who would use

\textsuperscript{150} See Cheffins (2009: 303 et seq.).

\textsuperscript{151} See the translated decisions of \textit{In re Linotype} and \textit{In re Girms} in Cahn & Donald (2010: 583-85, 594-98).

\textsuperscript{152} See \textit{Re PCCW Ltd} [2009] HKEC 738.
Hong Kong as a port for trade or a market for trading financial instruments and services. Flexibility and sophistication are found in the agility of a relatively small number of wealthy and talented individuals who have historically managed most of Hong Kong’s economic affairs and shaped most 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 facilitates smooth dealings with the current governmental structure in Beijing. Nevertheless, this outward looking “caretaker” culture enjoys a set of civil rights firmly embedded in a basic law and a highly competent, independent judiciary to administer them. While this too benefits the enforcement of contract and property rights, and thus Hong Kong’s function as an international financial centre, it creates significant, positive spillover externalities for the average Hong Kong citizen’s desire for protection under the rule of law. To decide whether the overall mix of characteristics means that Hong Kong presents, as Tsang has argued, a new, possibly Confucian form of democracy, a viable option for the future of China, or rather that Hong Kong’s legal system has merely been shaped for the benefit of a small group of economically powerful persons, we need a more complete understanding of the structure of the Hong Kong economy and polity. We need to gauge the ability of powerful interests to shape the law of Hong Kong, as well as an analysis of whether the business law of Hong Kong and its enforcement show evidence of any “tilt” in the playing field toward powerful economic interests. The next three chapters of the study which this paper introduces will address those issues.

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