

Achim Güssgen / Reimund Seidelmann / Ting Wai (eds.)

Hong Kong After Reunification

Problems and Perspectives

Nomos Verlagsgesellschaft, Baden-Baden, 2000, 378 pp., € 50.00 (paper)

Christian Starck (ed.)

Staat und Individuum im Kultur- und Rechtsvergleich

Deutsch-taiwanesisches Kolloquium vom 8. bis 10. Juli 1999 an der Georg-August-Universität Göttingen

Beiträge zum ausländischen und vergleichenden öffentlichen Recht, Band 14

Nomos Verlagsgesellschaft, Baden-Baden, 2000, 214 pp., € 44.00 (hardcover)

Chen-Shan Li (ed.)

Recht und Gerechtigkeit

Festschrift für Heinrich Scholler zum 70. Geburtstag

Wunan Book Co. Ltd., Taipei/Taiwan, 2000, 577 pp.

Alice Tay (ed.)

East Asia – Human Rights, Nation-Building, Trade

Nomos Verlagsgesellschaft, Baden-Baden, 2000, 598 pp., € 54.00 (paper)

Ever since a variety of causes put the 1997 expiry of the British lease of Hong Kong's New Territories on the agenda of Sino-British relations in the early 1980s, the termination of colonial rule in the entire territory quickly emerged as the only possible denouement. China, driven by nationalist ardour to expunge the humiliating loss of Hong Kong after the Opium War of 1840-42, would permit no other outcome. The United Kingdom, in view of her abiding wider interests in the region and lack of any means to force Peking's hand, speedily acquiesced in the reversion of the Crown Colony to Peking sovereignty without affording the population of Hong Kong, many of whom were refugees from the communist mainland or their descendants, any opportunity to express their preferences in the matter of Hong Kong's future status and governance. Britain's Conservative government at the time also took care, in spite of verbal protestations of concern for the fate of the people of Hong Kong, to bar, through amending the relevant legislation on nationality and the right of abode in the UK, any large influx of migrants from Hong Kong in the run-up to reversion and beyond. In the Sino-British negotiations prior to 1997, the Chinese side sought to limit the scope of local democratic participation in Hong Kong and to strengthen Peking's say in the formation of the territory's government. The British, in addition to efforts to entrench democratic elements in Hong Kong's future constitution through the Sino-British "Joint Declaration" of 1984, attempted to create facts on the ground, by pursuing democratic reform under the last London governor to a speed and degree they had by no means deemed imperative in times when an end to British rule had not been a serious prospect. The

Chinese in turn made sure that the changeover in 1997 would proceed outside the reach of local political opposition from Hong Kong. This was principally achieved by causing the first Chief Executive of the new Special Administrative Region (SAR) to be elected by an assembly hand-picked by Peking. There never was substantial international resistance to returning Hong Kong to the sovereignty of the People's Republic of China (PRC), and the Chinese residents soon found themselves left to their own devices. Profound satisfaction at the departure of the alien colonial régime mixed with deep disquiet of many at the new sovereign, however familiar through the bonds of common ethnicity, as well as concern at the risks of seeing the proven good governance under the British replaced by the opaque and corrupt clientelism of the mainland. The ambiguity is pointedly summed in the quip of a Chinese local at the time of reversion, "The British departure is like my mother-in-law leaving town in my new car: I'm glad she's gone, but what about my car?" Many in the Chinese business community in Hong Kong decided that their best commercial bet would be to accommodate inevitable Peking rule in their schemes and deftly professed their loyalty and patriotic trust in the new dispensation; other Hong Kongers chose to fight in the fora on offer for more democracy in the new SAR; some opted for emigration to English-speaking countries; most of course stayed and carried on.

The collection of papers on "Hong Kong After Reunification" from a conference held in November 1997 in Frankfurt, Germany, to appraise the reversion of 01 July 1997, offers assessments, in five chapters, on the event of the 'handover', political developments in the SAR, economic prospects, relations with the PRC, and wider regional and international issues related to the new status of Hong Kong. It was perhaps too early after the event for evaluating the outcome of Hong Kong's "return to the motherland's embrace", as Peking parlance would have it. Many of the papers limit themselves to either dutiful optimism on the viability of coexistence between Hong Kong's capitalism and mainland "socialism with Chinese characteristics" under Peking's talismanic formula of "one country, two systems" or to doomsaying that takes disaster as a foregone conclusion. Doubts voiced in the contributions about the acceptability of "one country two systems" to the much larger, and by now democratically self-governing, island of Taiwan would appear well founded, and the rather smooth transition from British rule to circumscribed autonomy under the watchful gaze of Peking may thus offer fewer clues for dealing with Peking-Taibei relations than the PRC leadership may have wished themselves and others to believe. Many of the texts are uncomfortably full of grammatical and typographical errors which strenuous proofreading could at least have reduced to more palatable proportions. Deng Xiaoping's "policy of opening and reform" (*gaige kaifang*) is carelessly rendered as "open-door" (e.g. p. 309) although the latter term, from US China policy of the late 1890s, means quite something else and is usually expressed in Chinese as *menhu kaifang zhengce* (scil. a policy of equal access to China by all foreign interests, including the then US, and not only of the powers already established in China at the time).

The legal traditions of “the West” and East Asia have long excited scholarly and political interest, from Enlightenment Europe’s early fascination by the meritocratic recruitment of public officials in imperial China to the stormy contemporary debates over “Asian values” in the area of human rights. Strong ties between Germany and Republican China, and today’s Taiwan, in jurisprudence and legal studies provide a particularly promising forum for dialogue on fundamental constitutional issues, such as comparative perspectives on the relationship of “State and Individual”. The papers, edited by *Christian Starck*, from a colloquium at the University of Göttingen in July 1999, offer reflections by lawyers from Germany and Taiwan, among them a former judge of the German Constitutional Court, *Hans Hugo Klein*, and *Jyun-hsyong Su*, member of the Judicial Yuan of the Republic of China in Taipei, which are complemented by summaries of discussion among the conferees. The added value of the conference lies not least in the familiarity of the Taiwanese participants, who have done legal research in Germany, with German law and the German language. The thematic chapters deal with “Human Rights”, “Guilt and Punishment”, “Separation of Powers”, and “State and Religion”. China’s traditional emphasis on substantive politico-ethical norms only weakly backed by institutional safeguards (censors, remonstrance by officials) appears from the survey of *Ai-er Chen*; the absence of a doctrine of separation of powers in traditional China and the purport of Sun Yatsen’s¹ distribution of powers under his “Five-Power Constitution” – which he intended as an alternative to “Western” separation of the legislative, executive and judicial branches of government – is presented in the paper of *Hsu Tzong-li*. Several of the papers, e.g. *Heuns’* historical overview on Western-style separation of powers, and *Starck’s* on state and religion in Europe and North America, are very helpful introductions to the subject. Regrettably, almost none of the vast body of extant modern research on Chinese law and comparative studies by Chinese, Japanese and Western authors is referred to in this volume, maybe because the discussants, as academics or practitioners of their own respective law, were not conversant with that literature². Taking account of that previous research would have helped to advise the reader of the academic context of the conference papers and might also have allowed to focus more succinctly on certain comparative aspects already well familiar in the area of Chinese legal studies. It may likewise have been due to lack of sinological assistance in preparing this volume that Chinese names and titles of works have not been transliterated according to scholarly usage so that names and sources cannot easily be identified. These technical criticisms aside, it remains to be hoped that the most valuable intellectual links

¹ On authoritarian tendencies in Sun’s politics, cf. *Yuan Weishi*, Sun Zhongshan yu minzhu ziyou xiangbei de guannian, MINGPAO Monthly (*Mingbao yuekan*) [Hong Kong], 10/2001, p. 50 et seq.

² A small selection of relevant sources (excluding works in Chinese and Japanese) can be found in the bibliographical annexes of *Robert Heuser*, Einführung in die chinesische Rechtskultur, Mitteilungen des Instituts für Asienkunde, No 315, Institut für Asienkunde, Hamburg, 1999.

between lawyers in Germany and Taiwan will allow further joint enquiry into the European and Chinese legal traditions.

The Festschrift for Professor Scholler, whose wide-ranging teaching and research in public law includes a visiting professorship in Taipei in 1986/87, was prepared by scholars in Taiwan and comprises seventeen essays mostly on constitutional law and organisation of the court system. It is yet another testimony to the lively and fertile exchanges between legal scholarship in Germany and Taiwan.

Southeast Asia, here taken as coextensive with the member states of ASEAN³, is characterised by remarkable diversity of topography (continental and archipelagic states), ethnicities (e.g. Malay, Chinese, South Asian) and religions (Buddhist, Muslim, Christian, Hindu). To these must be added political diversity spanning democracies of varying degrees of openness as well as a wide spectrum of ideological systems comprising highly developed, globally integrated capitalism, as in Singapore, and slow-moving departures from communist autocracy, as in Laos or Vietnam. The region is also home, at the same time, to two vocal advocates of 'Asian values' and 'Asian' ways of doing things (Malaysian Prime Minister Dr. Mahatir, and Senior Minister Lee Kwan Yew of Singapore) and to impressive economic development unthinkable without a high degree of dependence on the US market and on US strategic presence in the Western Pacific to counterbalance the growing weight of the PRC. The collection of essays in "East Asia – Human Rights, Nation-Building, Trade" deal with former British colonies (Burma/Myanmar, Malaysia, Singapore), the former Indo-China (Cambodia, Laos, Vietnam) and Indonesia and Thailand. Several contributors describe the reception of British law in former British possessions and national developments after independence, in particular in respect of the doctrinal ties, or their dissolution, with the Common Law of the former colonial power. The chapter on Indo-China centres on aspects of post-communist transformation in pursuit of forms of market economics – and, of course, foreign investment, a process much reminiscent of the earlier stages of China's "opening and reform". The paper on Indonesia highlights the dramatic shifts in the political order after the demise of the authoritarian New Order of President Soeharto and the difficulties of replacing the structures of graft and nepotism by a functioning government which will provide legal certainty and thus pave the way for sustained domestic reform and help recapture the confidence of foreign investors. Two essays, about "Law and Legal Culture in Malaysia from the Perspective of Public Law" by *Khoo Boo Teong* and "Apostates, Deviants and Visions of Modernity" by *Poh-Ling Tan*, allow outsiders a glimpse of the laborious attempts at reconciling the politically sacrosanct pre-eminence of Malays, and of Islam as their religion, with the rights of non-Muslim minorities. They tell a cautionary tale to all who assume that integration of large communities of

³ Association of Southeast Asian Nations: Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand, plus the later entrants of Cambodia, Laos, Vietnam and Burma/Myanmar.

different faiths and cultures is easily accomplished. This tome, as the one on Hong Kong, would clearly have benefitted from more stringent editing and proofreading.

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Sinclair Dinnen

Law and Order in a Weak State

Crime and Politics in Papua New Guinea

Pacific Islands Monograph Series, No. 17

University of Hawaii Press, Honolulu, 2001, 248 S., \$ 40,00

Sechszwanzig Jahre nach der Unabhängigkeit ist der südpazifische Inselstaat Papua-Neuguinea durch eine stagnierende Volkswirtschaft, explodierende Bevölkerungszahlen, wachsende Armut und Ungleichheit sowie Stammeskämpfe und ein Klima von „*fear, crime and violence everywhere*“ (so die dortige Katholische Bischofskonferenz, Post-Courier, 10.5.2001) gekennzeichnet. Korruption und politische Instabilität bedrohen die institutionelle Integrität und fragile Legitimität des postkolonialen Staates, der den Herausforderungen kaum gewachsen scheint. Mehr noch wird immer offensichtlicher, dass zumindest Teile des Staates und seiner Repräsentanten in diese Dynamik von Instabilität, Gewalt und Marginalisierung verweben sind und das Bild, wer nun deviantes Verhalten praktiziert und wer Autorität in der Gesellschaft beanspruchen darf bzw. darüber verfügt, zunehmend an Kontur verliert.

Das vorliegende Buch des Kriminologen Dinnen ist die überarbeitete Fassung einer 1996 an der Australian National University in Canberra angenommenen rechtswissenschaftlichen Dissertation. Sie thematisiert die oben genannten Probleme unter dem zentralen Gesichtspunkt öffentlicher Ordnung. Unternommen wird der Versuch, die Krisendynamik des Staates sowie dessen Interaktionen mit der Gesellschaft herauszuarbeiten. Eine Einführung skizziert die Strukturmerkmale des Landes, das durch die bis heute fortdauernde extreme soziale und kulturelle Fragmentierung mit über 800 Sprachgruppen charakterisiert ist (die auch landesweite Generalisierungen so schwierig macht).

Der folgende historische Überblick diskutiert die hochgradig personalisierten sozialen und politischen Beziehungssysteme staatenloser melanesischer Gesellschaften und deren Transformation über die Periode der Dekolonisierung hinaus. Wichtige Stichworte sind hier kleine, auf Abstammung beruhende soziale Einheiten, das *big-men*-System, das auf der Akkumulation von Ansehen durch Verteilung von Wohlstand beruht und auf beständig der Konkurrenz ausgesetzte Loyalität zielt, sowie das Prinzip der Reziprozität, die über den Austausch Bindungen und Verpflichtungen herstellt und damit als fundamentale Modalität sozialer Kontrolle und Kontinuität fungiert. Auch die Anwendung der im Hochland nahezu