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## **THE SYSTEM OF LANDHOLDING IN HONG KONG**

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# **The System of Landholding in Hong Kong**

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## **Resumen**

En el presente artículo, procederemos a analizar la historia de las compraventas de terreno en Hong Kong desde 1843 hasta la actualidad; prácticamente todo el terreno de Hong Kong es de propiedad estatal, salvo la Catedral de Saint John, de tal modo que no existe terreno de propiedad verdaderamente privada. También procederemos a estudiar cómo el Derecho Inmobiliario opera en los Nuevos Territorios de Hong Kong, así como un tema de vital importancia: ¿qué les pasará a los derechos de propiedad a partir de 2047? En último lugar, procederemos a efectuar una breve comparación con el sistema español de propiedad del terreno, con la finalidad de poder ver las principales diferencias entre ambos sistemas, el de España y el de Hong Kong.

## **Palabras clave**

Hong Kong, derecho inmobiliario, derecho de propiedad, *common law*, Nuevos Territorios, derecho consuetudinario

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## **Abstract**

In this article we analyse the history of land dealing in Hong Kong from 1843 onwards and also its current situation. Almost all land in Hong Kong vests in the State and there is, with the exception of St. John's Cathedral, no privately owned freehold land in Hong Kong. We also study how Land Law operates in the New Territories and also a very important topic: what will happen to Property and Land Rights after 2047? At last, a brief comparison with the Spanish system of landholding is made in order to see the main differences of both systems.

## **Keywords**

Hong Kong, Land Law, Property Law, common law, New Territories, customary law

# THE SYSTEM OF LANDHOLDING IN HONG KONG

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## **Introduction**

In this article we are going to analyse the system of landholding in Hong Kong as well the history of land dealing in Hong Kong from 1843 onwards and also its current situation. The system of landholding in Hong Kong is an interesting case of study as it is a very unique case because of all the features that we will analyse throughout this paper.

According to the Basic Law, all land in Hong Kong is the property of the state and is managed, used, developed and leased out by the Government of the Hong Kong Special Administrative Region (article 7). This administration is carried out by the land authority, which is the government's Lands Department<sup>1</sup>.

The Lands Department has a main office on Hong Kong Island but operates locally through a number of District Lands Offices. As Merry establishes, "the responsibilities of the Lands Department include the grant and enforcement of Government leases, previously called Crown leases" (Merry, 2010: 1).

At no moment of time was land alienated by way of freehold tenure, except for the land on which St John's Cathedral stands. Instead, the norm was alienation by way of leasehold. Thus, we can affirm that, in Hong Kong, virtually all land is leasehold,

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<sup>1</sup> Lands Department of the Hong Kong SAR:  
<<http://www.landso.gov.hk/en/about/welcome.htm>>

except from the land in which St. John's Cathedral stands. From the early years of the settlement of the colony in 1843 from 1997, the land was alienated by way of a Crown Lease, referred to as Government Lease after 1997. Some of these leases were renewable: terms varied from 20 years up to 999 years, though the most common lease was the 75-year lease. Since the end of the 1960s, land has been alienated under Conditions of Sale when the Government ceased issuing formal Government Leases.

The grantee of a Crown or Government lease is known as the "owner" of the land (though he is no owner) and usually pays a money premium to the government for the grant, which the grantee will have purchased normally at a public auction or, in some rare cases, by negotiation with the department.

This grant is of a long lease of the land, which means that the "owner" of the land has the possession and use of that land for a limited period.<sup>2</sup> The period or "term" of the leasehold estate varies, as we stated in the previous paragraphs, broadly according to the age of the government grant and the location of the land. During the mid-nineteenth century in the older settled part of Hong Kong Island, Crown leases of 999 years were granted.

By the beginning of the 20th century, the policy became to give terms of 75 years, with an option for a further 75 years. After the future of Hong Kong was settled in 1984, the government began to grant leases that expired in 2047 and sometimes beyond that. And it is also important to remark that leases due to expire in 1997 were automatically renewed by legislation.

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<sup>2</sup> Which brings us again to recall that freeholds (grants which are unlimited in time) are extremely rare and restricted to grants for special purposes and are made by statute.

Older land differs from newer land in another point: in the nineteenth and early twentieth century, after land was sold at auction an actual lease document, a solemn deed called a Crown lease, was signed by the representative of the sovereign (sometimes the Governor, usually a land officer) in duplicate: these documents tend now to be lost or in poor conditions. Newer land was sold at auction subject to pre-publicised conditions, some general in nature and some special to the particular lot of land being sold. These Conditions of Grant, in effect a contract to enter into a government lease, became binding on the purchaser. Invariably the formality of entering into a lease after the conditions had been fulfilled was not followed, so the Conditions of Grant, instead of a government lease, became in effect the source of the purchaser's title.

As Merry establishes, "the adoption of a leasehold system of landholding has been of great benefit to the Government of Hong Kong. It has enabled the government to enjoy enormous and recurrent, if erratic, revenue from the sale of land and from the relaxation of restrictions contained in the lease (...). At the same time it has enabled the administration to control the development of land through provisions in the Conditions of Grant" (Merry, 2010: 2).

The annual rent for the lease, commonly called the government or Crown or ground rent, is normally quite modest and of far less financial significance than the capital payment (premium or price) charged for the grant or re-grant of the lease. The rent under modern leases, including those renewed by legislation, is usually 3 per cent of the rateable value (the annual market rental value) of the land.

On 15th July 1997, the Executive Council (ExCo) endorsed various provisions covering land leases and related matters under the Hong Kong Special Administrative Region Government (HKSAR), determining the new policy that had to be followed after the handover.

The general land grant policy as endorsed by the ExCo is set out as follows:

- i. "New leases of land shall be granted for a term of 50 years from the date of grant (except new special purpose leases for recreational purposes and petrol filling stations, new special purpose leases covered by franchises or operating licences and short term tenancies) at premium, and subject to payment from the date of grant of an annual rent equivalent to 3% of the rateable value of the property at that date."
- ii. "New special purpose leases for recreational purposes and petrol filling station will be granted for a term of 21 years from the date of grant. New special purpose leases covered by franchises or operating licences will normally be for a term commensurate with that of the associated franchise or licence. Short term tenancies shall continue to be granted for a term not exceeding 7 years."
- iii. "Modifications, whether by modification letter or conditions of exchange, shall continue to be granted at premium reflecting the difference between the "before" and "after" land value."
- iv. " Non-renewable leases (i.e. those fixed term leases containing no right of renewal), may, upon expiry, be extended for a term of 50 years without payment of an additional premium but subject to payment of an annual rent from the date of extension at 3% rateable value as for new leases in (i) above."

However, not every occupier of land will qualify as a lessee. His occupation must display certain characteristics, in particular:

- exclusive possession of the land; and
- a certain duration.

'Exclusive possession' "justifies the recognition of the tenant's occupation as an estate or interest in the land itself" (Nield, 2012: 267), as it marks the degree of physical control over the land that entitles the tenant to call the land his own and to keep out anyone he does not want to enter, including his landlord.

To sum up, it is very important to recall that almost all land in Hong Kong vests in the State and there is, with the exception of St. John's Cathedral<sup>3</sup>, no privately owned freehold land in Hong Kong. When Hong Kong was a British Colony, the Governor had been empowered under Article XIII of the Letters of Patent of Hong Kong to make and execute grants and dispositions of land within Hong Kong; as at 1 July 1997 the land and natural resources within the Hong Kong SAR became State property.

Accordingly, much of the Government's land in Hong Kong has been progressively alienated to private individuals or corporations by way of Crown (now Government) leases or Conditions of Sale, Exchange, Grant, Extension or Regrant. But there is one article that must remain clear: the ultimate owner of the land is still the Government of Hong Kong.

### **Historical background**

These are the four main periods in which the history of Hong Kong can be divided:

- From 221 BC to 1841: Imperial China era.
- From 1841 to 1997: British rule of Hong Kong (as a British Crown Colony). With the exception of 1941-1945: Japanese occupation of Hong Kong.

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<sup>3</sup> The University of Hong Kong was also granted land through a freehold grant in 1911, but the freehold was surrendered in 1916 in return for a grant to the University of additional land. Thus, the land in which St. John's Cathedral stands is the only privately owned freehold land in Hong Kong.

- From 1997 to the present: Hong Kong as a Special Administrative Region of the People's Republic of China.
- 2047: end of the status of Hong Kong as a Special Administrative Region under the principle "*One country, two systems*". What will happen then?

In this article, we are only interested in the period starting in 1841 and finishing in 2047, in other words, in the British rule of Hong Kong as well as Hong Kong as a Special Administrative Region, which is the period in which we are nowadays, at least until 2047.

The areas from Hong Kong came under the colony of Hong Kong at different times from 1841 onwards. On 20 January 1841 Hong Kong Island was ceded to Great Britain by the Convention of Chuenpi, though the treaty was not later ratified. The Royal Navy landed on the island six days later, and, by a proclamation issued from Macau on 2 February 1841, Captain Charles Elliot referred to the cession of the territory and the need to provide for the government thereof.

According to Carroll, "Despite Hong Kong's Chinese influences, we should not underestimate the effect of British colonial rule. Colonialism transformed Hong Kong's historical development, shaped from the encounters between the Chinese and British, and determined power relations between them" (Carroll, 2007: 3).

There were a few Chinese settlements on the island at the time, mainly in the south side, and a larger number of people lived on boats; it was estimated that the population varied between 2.500 to 7.500 (which clearly shows us that the growth and importance of Hong Kong came with the British domination).

British and foreign settlers (most of them merchants who were then living in the Portuguese Colony of Macau) arrived soon to inspect the land with the intention of constructing buildings to

facilitate their trading, especially in China. Some merchants entered into agreements to buy land from the local residents, while some others simply took possession of uncultivated and unoccupied land.

From Macau on May 1st 1841, Captain Charles Elliot issued a Public Notice and Declaration advising that land auctions would take place in Hong Kong, and the land sold was to be subject to a building condition and to a reservation of the Government's rights. However, the British Government had failed to consider the type of tenure, so the impression of the early settlers was that freehold titles would be granted subject to a well-ordered system for the collection of land revenue. Merchants urged the Government to grant freehold titles, but it finally decided to grant leasehold titles instead, though further confusion resulted from its decision because there was no uniformity in the duration of the Government leases with terms of 20, 99 and 999 years being variously granted.

In any event, the first land sales took place in 1841, and a Land Officer was appointed to deal with the sales. It had been planned to sell 100 lots, but only 50 marine lots were finally sold.

As Tsang establishes, “After the first sale of land, for 50 lots, construction of buildings, roads and other infrastructure followed –so much so that the elements of a regular establishment were soon formed, and the nucleus of a powerful European community soon planted” (Tsang, 2007:17).

Sir Henry Pottinger, who had been appointed Governor of Hong Kong on March 15th 1841, issued on March 22nd 1842 a Notification advising that a Land Committee had been established to demarcate lots. Nevertheless, after much confusion and, although there was still no clarification from London of the form of title, it was accepted that maybe a leasehold title only would be granted.

However, by 1843 the form of tenure for alienated land on Hong Kong Island remained undecided; a committee was established, to determine whether titles should be in perpetuity or leasehold. Its decision was in favour of leasehold, except the land on which St John's Cathedral was built, which was (and currently it still is) held under freehold tenure according to the Church of England Trust Ordinance (Cap 1014).

Regarding the form of tenure in the Kowloon Peninsula up to Boundary Street and Stonecutter's Island, perpetual leases were granted to Britain by China on the cessation of the Second Anglo-Chinese War (1856-1858). By the Convention of Peking in 1860 those were ceded outright. On the Peninsula, there were few landholders in the new areas held by the British, living most inhabitants within the Walled City<sup>4</sup>, where Chinese authority continued to be in force until 1986. A Land Commission was established to determine the compensation payable to those Chinese owners who sought to sell their lands

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<sup>4</sup> The Kowloon Walled City is indeed a very curious case. Due to the historic circumstances that we have just explained, it became a largely ungoverned settlement in New Kowloon, Hong Kong. Originally a Chinese military fort, the Walled City became an enclave after the New Territories were leased to Britain in 1898. Its population increased dramatically following the Japanese occupation of Hong Kong during World War II. In 1987, the Walled City contained 33,000 residents within its 2.6-hectare (6.4-acre) borders. From the 1950s to the 1970s, it was controlled by Triads and had high rates of prostitution, gambling, and drug use. In January 1987, the Hong Kong government announced plans to demolish the Walled City. After an arduous eviction process, demolition began in March 1993 and was completed in April 1994. Kowloon Walled City Park opened in December 1995 and occupies the area of the former Walled City. Some historical artefacts from the Walled City, including its *yamen* building and remnants of its South Gate, have been preserved there.

outside the Walled City. Though some leases of 999 years were granted, most of the leases were of 75 years.

And, at last, regarding the New Territories, we must recall that this area (north of Boundary Street on Kowloon peninsula to the Sham Chum River and 235 islands surrounding the Island of Hong Kong and the Kowloon Peninsula) was leased to Britain in 1898 by the Second Convention of Peking. However, the area of the Walled City was not included. Nevertheless, as we have been establishing along the paper, many aspects of Chinese custom and customary law had been previously in force prior to 1898 continued thereafter. For centuries before 1898 land in the New Territories had been occupied by Chinese farmers who held their titles from the Emperor.

### **Land law in the new territories**

Due to the historical reasons that we have just analysed in the previous page, Chinese customary law plays a role in Hong Kong Land Law in the New Territories.

First of all, it is important to distinguish *Chinese Custom* from *Customary Law*. In general, the distinction between both concepts is that "*custom represents established patterns of behaviour, of traditional practices, accepted by the community, or specific groups within the community, which can be verified*" (Sihombing and Wilkinson, 2014: 16). By contrast, where these practices have the force of law binding on the members of the community, and it is possible to ascertain some precedent regarding the way the principles operate, then these practices have become customary law.

Customary law is, therefore, an evolution of simple custom. For example, in *Wong Sui Yeung v Chiu Kwong Wing & Ors*<sup>5</sup>, action was taken for compensation for the destruction of a lychee that was claimed by the landowner as his family's *feng shui*'s tree even though it was not growing on his land. Expert evidence was unavailable for several reasons, so the court held that the interest in the tree could represent "traditional practices", but no evidence was produced to indicate that such practices had been "elevated into the status of custom or customary rights enforceable by law" (paragraph 29), so no cause of action was disclosed.

As we stated before, according to art 8 of the Basic Law, the laws previously in force in Hong Kong include Chinese customary law, being its main area of relevance the land law in the New Territories. And, under section 13 of the New Territories Ordinance (Cap 97) the courts may recognise and enforce Chinese customs or customary rights in relation to land in the New Territories.

Hase establishes that "the Customary Land Law of the New Territories of Hong Kong was not in any way based on the Common Law, and the society in which it grew up (...) was a simple and unsophisticated one. (...) [It] grew up in a simple rural area of subsistence rice-farmers, a society without lawyers or legal textbooks, and almost entirely without formal litigation. [But] for the villagers of the traditional society of the New Territories of Hong Kong, there was nothing more important than the ownership and control of rice-land" (Hase, 2013: 2).

Regarding the problem related to the fact whether or not Chinese customary law can override specific elements of the general law of Hong Kong (outside the matters preserved in

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<sup>5</sup> [2005] 3 HKLRD 495.

Part II of the New Territories Ordinance), the Privy Council settled in *Wu Koon Tai v Wu Yau Loi*<sup>6</sup> that, if there is not a law expressing the pre-eminence of customary law (a law like, for example, Part II of the New territories Ordinance or also the Buildings (Application to the New Territories Ordinance), then general Hong Kong law is applicable before the customary law of the New Territories.

Section 15 of the Land Court Ordinance, and also section 8 of the New Territories Ordinance, establishes that all land in the New Territories was deemed to be the property of the Government too: the Government would alienate to successful claimants either by way of Government lease or by licence. However, any decision on title had to take into account the fact that Britain has a lease for only 99 years only over the New Territories, so the solution adopted still under British rule was to issue Government leases to a whole area of land rather than to individual lots were issued: these were the Block Crown (now Government) leases.

The Land Court, thus, decided that the New Territories was to be divided into demarcation Districts which were then subdivided into Blocks containing proven claims to ownership. A Block Crown (and from 1 July 1997, Government) Lease was issued for each Block.<sup>7</sup> The Block Government lease thus related to a number of lots which, in most cases, were owned by the traditional owners. Each Block Government lease contained a Schedule detailing the separate ownership of the lots, together with the user to which the land was put at the date of the survey and the amount of tax payable at that time.<sup>8</sup> Block

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<sup>6</sup> [1996] 3 WLR 778 (PC)

<sup>7</sup> *Winfat Enterprise (HK) Co Ltd v Attorney General* [1985] 1 AC 733 (PC).

<sup>8</sup> *Lintock Co Ltd v Attorney General* [1985] 2 HKC 555.

Government leases were issued in respect of 354.000 lots; unoccupied land, and land to which no claim as proven, was vested in the Government.

The New Territories Ordinance (Cap 97) was enacted in 1910 to regulate New territories land, and especially to preserve Chinese custom and customary law in respect of that and. Thus, Block Government leases were subject not only to the Government Leases Ordinance but also to the Chinese customary tenure.

As a consequence of all that, Part II of the New Territories Ordinance (Cap 97) provides for several of the incidents of customary law to be applied to land in the New Territories so long as it has not been exempted from the Provisions of Part II.<sup>9</sup> Land capable of being exempt includes lands purchased after 17 April 1899 or which is held in a separate Crown or Government lease or which is a new grant of land.

Chinese Customary Law in the New Territories mainly refers o to intestate succession and to Chinese trusts over land.

- Regarding intestate succession, before 24 June 1994, section 17 of the New Territories Ordinance had enabled an indigenous or non-indigenous male, entitled by intestacy, to hold land in succession to the deceased owner to be regarded as an owner. The rule applied regardless of the ethnic origins of the deceased owner. However, from that date, the New Territories Land (Exemption) Ordinance repealed section 17 of the New Territories Ordinance thereby preventing Chinese customary law on intestacy being applied to indigenous and to non-exempted from Part II. Instead intestacy of any land in the New Territories is now subject to the general law of Hong Kong.

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<sup>9</sup> *Lo Chun-tak v Chan Foon-tai* [1992] HKDCLR 47, [1991] 2 HKC 650.

- Regarding Chinese trusts over land, it must be stated that a basic principle of Chinese customary law is that of the maintenance and preservation of family property in the male line. The clearest example of this patrilineal system is that of the customary trusts over land, the *t'so* (祖) or *t'ong* (堂), which have now been preserved in section 15 of the New Territories Ordinance. The customary trust applies only in relation to New Territories land, and no to land in other parts of Hong Kong, as stated in *Chan Kong v Chan Li Chai Medical Factory (HK) Ltd.*<sup>10</sup> The elements which make up the trust are:

- i. land is held for the benefit of the clan or lineage;
- ii. males have a lifetime interest in the land, from birth to death;
- iii. the interest is that of a perpetual entail;
- iv. no member of the clan or lineage has rights of succession.
- v. the members, or beneficiaries, of the trust are the direct male descendants of the ancestor;
- vi. a manager is required to be appointed and to be registered as manager of the land; and
- vii. the interest is an alienable, indivisible and perpetual one which, however, can be sold in limited circumstances to a purchaser who is not a member of the clan or lineage. The rule against perpetuities has no application to customary trusts.

The *t'so* (祖) was defined in *Tang kai-Chung v Tang Chik-shang*<sup>11</sup> as "an ancient Chinese institution of ancestral land-

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<sup>10</sup> [2007] HKCU 1603 (CACAV 161/2006, 19 September 2007, unreported).

<sup>11</sup> [1970] HKLR 276.

holding, whereby land derived from a common ancestor is enjoyed by his male descendants for the time being, living for their lifetimes and so from generation to generation indefinitely. Thus, every male descendant of the common ancestor automatically becomes entitled at birth to an interest in the land for his lifetime; on his death his interest merges so as automatically to enlarge the interests of the surviving male descendants (...) A t'so [seems] of filial duty in accordance with Confucian tradition for the purpose of veneration of the common ancestor".

Even though this topic is really interesting, we cannot proceed to the analysis of all the different kind of Chinese trusts.

To sum up, Chinese customary law plays a role in Hong Kong Land Law in the New Territories, bigger in some occasions than other, but Chinese customary law must be taken into consideration when dealing with the New Territories.

### **Vesting and disposal of government land**

As we have stated several times before throughout this article, almost all land in Hong Kong presently vests in the State and there is, with the exception of St John's Cathedral, no privately owned freehold land in Hong Kong. As at 1 July 1997 the land and natural resources within the Hong Kong Special Administrative Region became State property and the Government of the Special Administrative region is responsible for their management, use and development and for their lease or grant to individuals, legal persons or organisations for use or development, according to article 7 of the Basic Law.

For the avoidance of doubt, it was specifically declared that all property, rights and liabilities vested in or belonging to the Crown or the Government of Hong Kong immediately before 1 July 1997 have been on and from that date, subject to the Basic

Law, vested in or transferred to the Government of the Hong Kong SAR.

Thus, as we saw, much of the Government's land in Hong Kong has been progressively alienated to private individuals or corporations by way of Crown (now Government) leases or Conditions of Sale, Exchange, Grant, Extension or Regrant. The same system applies to land in the New Territories and customary law has no application to the devolution of such land. But it must remain clear that the ultimate owner of the land is still the Government of Hong Kong, as the way of alienation has been that of a leasehold and not that of a freehold estate.

However, once we have arrived to this point, it becomes very useful to analyse briefly the alienation of land. The current practice for the alienation of land in Hong Kong by the Government is by way of leasehold, by the selling of land at a public auction, though in certain cases the tender system is used.

Thus, the form of title is that of a Government lease, initially entitled Conditions, the form of which varies, depending on the circumstances. The reason for the use of the term "Conditions" is that a formal Government lease has not been issued since the late 1960s.

Generally, Conditions provide that on observance of the terms of the contract between the Government and the purchaser, the equitable interest of the purchaser will convert into a legal estate as Government lessee.<sup>12</sup> If the purchaser sells that land prior to the conversion, he is selling only an equitable interest

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<sup>12</sup> Section 14(1) of the Conveyancing and Property Ordinance (Cap 219).

under the Conditions of Sale.<sup>13</sup> On observance of the conditions, the purchaser is entitled to a Certificate of Compliance, which is issued by the Lands Department, if the purchaser's building is compliant with the Approvals and Consents of the Building Authority under the Buildings Ordinance (Cap 123), where observance of the Consent scheme is required.

The practice for land in the New Territories may differ, depending on whether land is subject to compliance with the building regulations (if it is not subject, then a Certificate of Exemption will be necessary).

There exist several forms of Conditions. The most usual are the Conditions of Sale under which the purchaser "buys" the land from the Government. Other forms include the Conditions of Exchange where one piece of land is exchanged for another, or where Old Lots in the New Territories are consolidated; Conditions of Grant where land is alienated for a particular purpose, and Conditions of Re-Grant where the former Government Lease is leased to a former lessee, or where the former Government Lease originally held by one lessee has come into the ownership of several co-owners.

Once the conditions have been complied with, the grantee will become entitled to a Government lease, and Government no longer issues any Government lease, as statute establishes that, upon fulfilment of the conditions (meaning this fulfilment of all the positive conditions and the absence of any current breaches of the restrictive conditions), the grantee will have all the protection of a Government lessee without an actual issue of the lease and is deemed to hold the legal estate, as established in s 14 of the Conveyancing and Property Ordinance:

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<sup>13</sup> See *Paul Chen v Lord Energy Ltd* [2002] HKCU 396 (FACV 14/2001, 4 March 2002, unreported).

"(1) Where a person has a right to a Government lease of any land upon compliance with any conditions precedent, then, upon compliance with those conditions-

(a) the equitable interest under that right shall become a legal estate in that land as if held under a Government lease issued in accordance with that right; and (Amended 31 of 1988 s. 7)

(b) for the purposes of section 42 and any other law, such a Government lease shall be deemed to have been issued upon compliance with those conditions. "

This policy of making leasehold, rather than freehold, has proved very successful, so successful that it is unlikely to think that there will be any change in the future. In Government leases, we see clearly the interface between the public function of government and its role as a private landlord. However, the government does not exercise its powers in the same way as a private landlord would, as the private landlord would generally act only in his own personal interests, while the government acts in the interests of all the territory at large.

### **Things growing in the land**

The principle, which applies to this subject, is that of "*quicquid plantatur solo, solo cedit*" ("whatever is planted in the land becomes part of the land"). Thus, things growing in the land are normally considered to be part of the land.

This principle was applied, for example, in *Swinburn v Ainslie*<sup>14</sup>, where the Court of Appeal held that trees growing in the land were part of the land and, therefore, formed part of the real estate devised by the testator.

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<sup>14</sup> (1885) 30 Ch D 485.

## **Relationship of land law with town planning**

To understand better this point we must always bear in mind the fact that Hong Kong is a leasehold land system. This point, which is also the main particularity in Hong Kong Land Law, will have its obvious effects when it comes to the moment of carrying a planning. As Lai reminds us:

“The concept of planning for Hong Kong as a high-rise and a high-density built environment is an intriguing one. To the tourist who is fascinated by the crowdedness of the business hub of the metropolis with the chaotic skyline of tower blocks, he or she may wonder whether planning exists. (...) [The intellectual foundations of “planning”, the evolution of modern town planning as a state activity and the interventionist ideology of the planner] would inform us about how planning intervention affects development potential within the context of the leasehold land tenure system of Hong Kong” (Lai, 2000:17).

Even if both the system of landholding in Hong Kong as well as its system of Town Planning seem very “socialist-like”, it is not true. Actually, we consider that this system is much more private than it may be thought at first sight.

According to Shelton, “It is one of that ironies of Hong Kong’s success that, although wedded to capitalist free-market development, the British crown government held a socialist-like (without the ideology) hold on ownership and control of land, to gain its main revenue from the sale of development rights for subsequently leased land [and so remains to this day]” (Shelton, Karakiewicz and Kvan, 2011:3).

It is indeed a “socialist-like” system as long as all the land vests in the Government and as long as there is an important interventionism (interventionism that we can clearly see in the big amount of public housing existing in Hong Kong). However, at the same time, we think that this system is also

what we could call semi- private at least. This is so because, in many times, the Government negotiates as a particular, with the only difference that the money raised will revert in the whole society, at least theoretically. To understand better this affirmation, we should remember that the Hong Kong government regulates land uses and the changes in such uses for a piece of land under private ownership through:

- The Government Lease (now, the Conditions); and
- Statutory town plan (draft or approved) produced under the Town Planning Ordinance (Chapter 131), that may be imposed on the same piece of land from time to time before or after the execution of the lease.

In other words, and this idea is extremely important, most of the control that the Government of Hong Kong carries on the land is not done through Town Planning, but through the inclusion of certain Conditions within the Government Leases. This idea is very important because it differs from the conception that we have in Spain: in Hong Kong, the control is carried on mainly through the Conditions imposed by the Government, not through Planning.

### **Validity of Property and land rights after 2047**

We are also going to study in this point the validity of Property Rights after 2047, focusing on those rights on the Land, studied by Gittings (2011: 4-8). First of all, we must remember that the People's Republic of China guaranteed that Hong Kong would be allowed to follow a different system from the rest of the country for a period of 50 years after 30 June 1997 (moment of the Handover of Hong Kong from Great Britain to China), under the principle "*one country, two systems*". Thus, June 30th

2047 is the expiration date of this guarantee. In the same way as there was a huge uncertainty before 1997 regarding what would happen to Hong Kong after its devolution to China, there is (and there will be an even greater) uncertainty regarding what will happen to Hong Kong after 2047.

Will this special status be extended for a newer period, maybe for 50 years more? Or will the Chinese Government end this special status of Hong Kong, and make it become a region/province with the same status as that of the other provinces, thus obliterating all its *common law* system and British heritage? The answer to this question remains still unknown, though some predictions can be made.

In this point, however, we are not going to analyse all the political implications of 2047, but we are just going to focus on the validity of Property Rights after 2047.

As Gittings reminds us, "because almost all private land in Hong Kong is held on long-term leases granted by the government, the government's authority to pass on good title to land is critically important" (Gittings, 2011:4).

Thus, much of the discussion about the future of Hong Kong after 2047 has focused on the land lease issue. This issue is especially troubling due to the fact that the Hong Kong SAR Government (which has administered Hong Kong since 1 July 1997) has not considered it necessary to apply a 30 June 2047 expiration date to the issuance and renewal of land leases<sup>15</sup>, expressing this in the following way:

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<sup>15</sup> The Government of the Hong Kong SAR, Housing, Planning and Lands Bureau, CB(1) 503/06-07(01), Permanent Secretary for Housing, Planning and Lands' Reply to the Hon. Alan Leong's question about Government's proposal of Granting a 50-year Lease for the operation of the cruise terminal (Dec. 12, 2006):

“In relation to the proposed 50-year land grant for the new cruise terminal, the term will extend beyond 30 June 2047. According to the 1997 HKSARG Policy Statement, which was promulgated in July 1997, new leases of land granted (except for a few categories of new special purpose leases) should be for a term of 50 years from the date of grant.

(...)

It is not evident from the Basic Law that all new grants of land should expire on 30 June 2047. Since land is a precious asset in Hong Kong, if the intention is such that all the land grants or leases should carry a term no further than that date, effect on both the land value and economy of the SAR would be detrimental. It also seems illogical to assume that the SAR government could only grant leases for an excessively short term as we approach 30 June 2047

(...)

Pursuant to Article 123 of the Basic Law, any lease of land without a right of renewal expiring after 1 July 1997 shall be dealt with in accordance with laws and policies formulated by the HKSAR. Such provision has not restricted the term of the lease granted after 30 June 1997 to be limited to 30 June 2047. The proposed 50-year land grant for the new cruise terminal follows the HKSARG’s policy promulgated in July 1997 Policy Statement that new leases of land granted should be for a term of 50 years from the date of grant.”

Another example of this could be seen in the lease for the land used to construct Hong Kong Disneyland, which includes a right to renew the lease for a second fifty-year period, a right

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<<http://www.legco.gov.hk/yr06-07/english/panels/plw/papers/plw1114cb1-503-1-e.pdf>>

which, if it is finally exercised, will allow this lease to continue until 2100.<sup>16</sup>

Some authors have expressed their concerns about this practice, questioning its legality, among them Hon. Alan Leong, the politician who made the question that led to the response by the Government of the Hong Kong SAR, Housing, Planning and Lands Bureau previously analysed. However, even if these concerns could be understandable, we must also take into consideration the fact that there are some important differences between the land lease problems existing during the last decades of the British rule and the current situation in Hong Kong: before 1 July 1997, leases were granted under the authority of the British rule, whose rule finished in 1 July 1997, while now there is no equivalent time limit because Hong Kong returned to Chinese sovereignty, and, as established in art. 7 of the Basic Law, all land and natural resources in Hong Kong belong to the Chinese state in perpetuity, a power that is delegated to the Hong Kong SAR Government by China, according also to Basic Law art 7.

Even in the worst possible scenario, "in the most extreme scenario of Hong Kong being abolished as a separate entity after June 30, 2047, and the simultaneous disappearance of the Hong Kong SAR Government that granted those leases, the rights granted under those land leases need not necessarily disappear" (Gittings, 2011:7).

Of course, this may be a somewhat frightening situation for Hong Kong habitants, as private property rights are much worse protected in Mainland China than in Hong Kong (even

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<sup>16</sup> See Press Release, Hong Kong Special Administrative Region Government, Land Lease Term for Disneyland Project (Nov. 4, 1999), available at: < <http://www.info.gov.hk/gia/general/199911/04/1104149.htm>>

though the Chinese Constitution, in its article 13, amended in 2004, establishes that "*Citizens' lawful private property is inviolable*").

Thus, to sum up, we can conclude by saying that the Government of Hong Kong can issue land leases that extend beyond 30 June 2047, according to article 123 of the Basic Law, which grants the Hong Kong SAR Government broad authority to renew land leases "*in accordance with laws and policies formulated by the region on its own*", and which makes no reference of a 30 June 2047 time limit, and also according to the position expressed by the own Government several times (like was the case in the reply that we analysed before). This omission, as remarked by Gittings (2011:8) is extremely important, as an otherwise similar provision contained in article 121 of the Basic Law, covering the renewal of land leases in Hong Kong by British authorities before 1 July 1997, set a 2047 time limit on any land leases renewed *while Hong Kong was still under British rule*. For this reason, it is considered that the Government of Hong Kong has the authority to issue land leases extending beyond 30 June 2047.

### **Comparison with the system of landholding in Spain**

Why is it necessary to compare two legal systems? What is the point of Comparative Law? Following Merryman's statement, "*lawyers are professionally parochial. Comparative law is our effort to be cosmopolitan*" (Merryman, 1999:10). From this perspective, Comparative Law is an attempt to become truly globalized jurists.

Many theories have been developed on the study of why comparative law is (or is not) an important area of knowledge. At the Paris Congress of 1900, the French comparatist Raymond Salleiles described the subject of comparative law as the discovery of concepts and principles common to all

civilized legal systems. This formalist and universalist conception was replaced by the functionalist approach developed by Ernst Rabel in the 1920s. According to this approach, the point of comparative analysis is not the rules themselves, but the concrete social problems, which the rules help to resolve. At last, the idea of comparative law as a pragmatic and utilitarian science was developed in the 1970s by authors like Ancel (1971) or Constantinesco (1974).

Of all the theories, we will mainly follow the pragmatic and utilitarian theory, developed by Ancel (1971), and very well summarized by Smits:

“In a world of national laws, it became inevitable that the work of comparative lawyers would be looked at through the prism of national law. Many of the aims of comparative law have thus been expressed in terms of its contribution, in different ways, to national law. (...) Comparative law would thus, on a purely cognitive level, contribute to a better understanding of one’s own, national law through the contrasts and greater range of information it provides.” (Smits, 2012:69).

As previously analysed, the system of landholding in Hong Kong is that of a leasehold system in which all land vests in the State and there is no privately owned freehold land in all the region. Thus, we are dealing with leasehold estates.

On the other hand, in Spain, we are not dealing with a leasehold system, but with a freehold system: the land is not vested in the State, but in the private owners of it for an uncertain period of time, so we are dealing with privately owned freehold land. We are thus talking about freehold estates.

It does not mean that all land in Spain is under a system of absolute freehold (*propiedad en pleno dominio*), as there are other full and limited ownership rights recognized under Spanish law, but the point is that those cases in which the land belongs to a public authority and is granted to a person for a

limited period of time (administrative concession, *concesión administrativa*) are rare, while in Hong Kong all the system works this way.

Besides, the Spanish Civil Code (art.348) defines property as “*the right to enjoy and to have a thing, without more limitations than those set forth in the laws*”<sup>17</sup>. This approach to property rights leaves the effective recognition of the right and the extent of that right in the hands of the legislative powers.

The Spanish Constitution (Article 33.2), quoted above, states that private property should serve a social function. This concept of "social function" has become of enormous importance. This article 33.2 is used to justify several diverse interventions in the land market, even expropriation. For example, Article 47 of the Constitution goes on to stipulate that “*the community will participate in the surplus value generated by the urban planning action of public entities*”.<sup>18</sup> This same article gives Spanish citizens the right to fitting an adequate housing. This is normally interpreted in the sense that the State will be responsible for securing social value from land via political intervention. Thus, there is an assumption that intermediaries in the markets cannot be relied upon to contribute to this end: “*the authorities will implement the*

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<sup>17</sup> Original Spanish text for Article 348 of the Spanish Civil Code:

“*Artículo 348*

1. *La propiedad es el derecho de gozar y disponer de una cosa, sin más limitaciones que las establecidas en las leyes.*
2. *El propietario tiene acción contra el tenedor y el poseedor de la cosa para reivindicarla.”*

<sup>18</sup> Original Spanish text of this part of Article 47 of the Spanish Constitution:

“*Artículo 47 (...)*

*La comunidad participará en las plusvalías que genere la acción urbanística de los entes públicos.”*

*conditions necessary to materialise this right and will stipulate the statutory requisites to do so, regulating land use for the general good and to avoid speculation"* (Article 47 of the Spanish Constitution).<sup>19</sup>

Apart from the fact that the system of landholding in Hong Kong is that of a leasehold system while in Spain is that of a freehold system, we must also remark that in Spain there exist more possible rights on the land than in Hong Kong: in Hong Kong, being all land owned by the State, the only actual legal institution we can talk about is that of the leases (even if the first lease, between the Government and the first acquirer, the developer, is actually an administrative concession), while in Spain we can find many legal figures affecting the land ownership, such as absolute ownership, co-ownership, administrative concessions, leases...

At last, as a third difference, the system of legal classification of land is slightly different in Spain when compared to Hong Kong. In Spain, the three land classes established by the 1956 Land Law, and still in force nowadays, are urban, developable and non-developable land. The assignment of land classifications and their respective rights is the key institution for delivering the urban planning competencies of local governments. On the other hand, in Hong Kong, even if land is of course divided as well into developable and non-developable land, the system works quite different, because of the concept

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<sup>19</sup> Original Spanish text of this part of Article 47 of the Spanish Constitution:

*"Artículo 47 (...)*

*Los poderes públicos promoverán las condiciones necesarias y establecerán las normas pertinentes para hacer efectivo este derecho, regulando la utilización del suelo de acuerdo con el interés general para impedir la especulación."*

of land uses and the dual system we mentioned previously . In Hong Kong, the fact of a land being developable or non-developable does not depend on local governments, but both on land leases and town plans, as well as in some statutes. Hong Kong's town planning system is a dual system in which the nature of property rights under the leasehold system must always be kept in mind, as it may become perfectly possible that a statutory town plan is superimposed onto a land where a property right already exists.

### **Conclusions**

In this point we have analysed the system of land holding in Hong Kong; as Nissim remarks, "Hong Kong [has] a unique position of being internationally acclaimed as one of the best, if not the very best example of a functioning capitalist economy which ironically is founded on what is fundamentally a socialist land tenure system" (Nissim, 2012: preface).

Nevertheless, the ideas we have just seen are not only very important *per se*, but are also basic in order to understand Town Planning in Hong Kong. Understanding Town Planning in Hong Kong and the Uses of Land and its Changes would be completely impossible if we had not studied how land is held in Hong Kong.

As Li establishes, as a conclusion to this paper and as a way of relating it with Town Planning, "As the original land parcels in urban leaseholds are invariably pre-specified by reference to a street block or subdivision plan based on government land surveys, the leasehold system described (...) can be regarded as a kind of planning by contract or consent. The elements of planning conducted by the government (...) [have] regard to the general character of the street block or subdivision" (Li, 1997: 235).

We have analysed how all land in Hong Kong is property of the State, its background, the importance of Chinese customary law in the New Territories (even if, broadly speaking, it generally cannot override the principles of Hong Kong law) and also a very important issue: what will happen to Property rights after 2047, stating that the Government of Hong Kong has the authority to issue land leases extending beyond 30 June 2047.

At last, we have also compared the system of landholding in Hong Kong with the system of landholding in Spain, comparison which has allowed us to see that both systems are quite different from a legal point of view, but, at the end, both of them serve the same " socialist-like" objective of trying to attenuate private land rights, in Spain through the introduction of the concept of the "social function" of property at the Spanish Constitution, in Hong Kong in a more direct way through the fact that, being all land vested in the State, they can decide in a more direct way how to comply with the social functions of the land.

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