

## Book Review

CONSTITUTIONAL CONFRONTATION IN HONG KONG. By MICHAEL C. DAVIS. MACMILLAN, 1989 (154 pp.)

THE FUTURE OF THE LAW IN HONG KONG. RAYMOND WACKS, Edited by OXFORD UNIVERSITY PRESS, 1989 (443 pp.)

The shape of Hong Kong's legal future is slowly coming into view following ratification in March, 1989 of the Basic Law of the Hong Kong Special Administrative Region of the Peoples Republic of China (hereinafter Basic Law) by the National People's Congress. Two recent books map out areas of conflict projected for the post-1997 period, when China and Hong Kong become in the words of Deng Xiaoping "one country, two systems."<sup>1</sup> Both books, written in the more hopeful climate just prior to June 1989, suggest important areas for legal reform in the transition period.

*Constitutional Confrontation in Hong Kong* is one of a series of scholarly and popular critiques of the Basic Law written during its drafting phase.<sup>2</sup> To the extent that the version of the Basic Law actually promulgated differs little from the draft Davis evaluates, his particular suggestions for revision are of note primarily as opportunities missed. More enduring are his insights into the interpretations of the Basic Law necessary if it is to secure Hong Kong's future as a highly autonomous territory with a liberal democratic government and a capitalist economy.

An introductory chapter lays out the fault lines below the surface of the British-Chinese accords, which extend to the Basic Law itself. Western democratic distrust of unchecked executive power ill-comports with the Chinese tradition of centralized paternalistic rule. This tension surfaces in the Basic Law's failure to provide for a chief exec-

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1. Edward Epstein tracks the development of this now-famous formula in *China and Hong Kong: Law, Ideology, and the Future Interaction of the Legal Systems* in THE FUTURE OF HONG KONG 49 n. 38 (1989).

2. The literature in this area is extensive. A useful bibliography of English language commentary on the Basic Law can be found in WESLEY-SMITH & CHEN, THE BASIC LAW AND HONG KONG'S FUTURE (1988).

utive who is directly elected and its parsimonious allocation of directly elected legislators.<sup>3</sup> There is also the unresolved question of whether the executive and legislative branches of government shall be answerable for compliance with the Basic Law to an independent Hong Kong judiciary or only to the National People's Congress in Beijing. Similarly, the liberal view that human rights are naturally derived conflicts with the Marxist view of rights as limitable grants from the state that entail reciprocal obligations. The Basic Law rights provisions are phrased as affirmative grants rather than as negative commands to government.<sup>4</sup> They are subject to such restrictions "prescribed by law" that do not contravene the international human rights covenants<sup>5</sup> and persons in Hong Kong have the duty to abide

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3. Annex I to The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China [hereinafter BL], (April 1990) provides for the election of the Chief Executive by an Election Committee of 800 members divided between four functional constituencies, namely the business sector, the professions, a sector comprising labor, social services and religious groups, and finally the government sector. Members of the Election Committee shall be chosen by as yet unspecified "corporate bodies." The method for choosing the first Chief Executive is even farther removed from popular franchise. A "Selection Committee" of 400, constituted similarly to the Election Committee, shall merely "recommend" a candidate to Beijing for appointment. Decision of the National People's Congress on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong Special Administrative Region, Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990.

The 60-member legislature will be constituted in its first term by 20 members directly elected by geographic constituencies, 30 members elected by functional constituencies, and 10 members selected by an election committee. In the second term, four fewer legislators will be selected by the election committee and four more by direct election. In the third term, the legislature will be consisted of 30 members chosen by direct election and 30 by functional constituencies. Annex II to the Basic Law.

4. Compare BL art. 27 ("Hong Kong Residents shall have freedom of speech . . .") with U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

5. BL art. 39 provides:

The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

As Davis points out, the International Covenants themselves have restriction clauses that are the product of compromises in drafting. DAVIS, *CONSTITUTIONAL CONFRONTATION IN HONG KONG* 26 (1989).

Hong Kong is presently bound by the mandatory reporting provisions of the International Covenant on Civil and Political Rights by virtue of Britain's accession to the Covenant. Britain has not ratified the Optional Protocol to the International Covenant on Civil and Political Rights, and so Hong Kong residents do not have a means of exercising an individual right of petition to the United Nations Human Rights Committee. Actual implementation of the Covenant rights for individuals must take place through Hong Kong legislation. A draft Bill of Rights Ordinance was published in March 1990 which specifically incorporates most of the

by such laws.<sup>6</sup>

Davis begins with and returns to a central question: who is to have power to interpret the Basic Law, given that Hong Kong's powers of government are to be exercised "in accordance" with it.<sup>7</sup> The Basic Law vests the power of interpretation in the Standing Committee of the National People's Congress, which may then authorize Hong Kong courts to interpret those Basic Law provisions "which are within the limits of the autonomy of the Region."<sup>8</sup> This grant leaves ambiguous the question of whether Hong Kong courts will have the power to carry out constitutional review of governmental acts, a question at the heart of civil rights and liberties protection.

Arguing from the text and spirit of the Basic Law, the Joint Declaration and the PRC Constitution,<sup>9</sup> Davis urges the Hong Kong judiciary to assume this power, much as John Marshall did in *Marbury v. Madison*.<sup>10</sup> Local judicial review, Davis contends, will help secure basic rights and stabilize inter-government relations. After comparing various systems of constitutional review, he endorses an American model as the most appropriate whereby courts review constitutional issues incident to deciding particular cases. Courts could then invoke the political question doctrine, lack of ripeness, mootness and other common law "dodges" where expedient. Such a system allows for the gradual and particular articulation of rights and social values, while providing for dialogue and accommodation with the political branches of the government.

One question is the degree to which the American model is theoretically compatible with a "constitution" such as the Basic Law.

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Covenant guarantees. For criticism of areas where the draft restricts the scope of rights enumerated in the Covenant, see AMNESTY INTERNATIONAL, HONG KONG: THE DRAFT BILL OF RIGHTS ORDINANCE 1990 (June 1990).

6. See BL art. 42.

7. See BL arts. 2, 11.

8. BL art. 158.

9. The argument runs roughly thus: Article 31 of the PRC Constitution permits the National People's Congress to institute appropriate systems in special administrative regions according to their specific conditions. Accordingly, the National People's Congress is able to delegate to the Hong Kong judiciary its power to interpret the law. Such a delegation can be found in certain provisions of the Joint Declaration and the Basic Law. These include the provisions that preserve past 1997 all of Hong Kong's law (including presumably common law review of government acts for conformity with Hong Kong's constitution) that does not contravene the Basic Law; the empowerment of the Hong Kong legislature to enact laws in accordance with the Basic Law; and the provision of independent judicial power to Hong Kong, including that of final adjudication. See Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, ¶ 3(3) and Annex I, ch. I-III; and BL arts. 8, 11, 19.

10. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Although it sets forth the structure of Hong Kong's government and delineates basic principles of social organization and individual rights, the Basic Law can in no way be taken for the will of the people of Hong Kong.<sup>11</sup> It is a national law of the People's Republic of China and can be amended or repealed only by the National People's Congress. The courts must draw any mandate to review government action not from the people but from the Joint Declaration and Chinese law.<sup>12</sup>

Though Davis tends to deemphasize this point, the virtue of judicial review for Hong Kong seems to lie less in the judiciary's sensitivity to the political branches than in its insulation from them. The appointed first Chief Executive and the indirectly elected legislature will be particularly susceptible to Beijing's influence.<sup>13</sup> In contrast, the judiciary is assured independence, life tenure and continuity of personnel.<sup>14</sup> What is missing, of course, is a branch of government wholly accountable to the Hong Kong people.

In the absence of a significant franchise, Davis argues, the right of free speech takes on special importance. Open debate is vital not only to the dialogue between those who govern and the governed, but also to the development of what Davis terms a "reflective" capacity, meaning political consciousness, social tolerance and self-fulfillment. Local political consciousness has emerged only recently in Hong Kong, while partisan organizations under either Taipei or Beijing's banner have been prevalent for some time. The colony's relatively free political, artistic and social debate is the product of a tolerant

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11. Indeed, a majority of the Hong Kong members of the Basic Law Drafting Committee opposed the final version. See Lau, *Backroom Betrayal*, FAR EASTERN ECONOMIC REVIEW, Mar. 1, 1990 at 14. Justice Marshall rested judicial constitutional review on the belief that a government of limited powers was the result of the American people's exercise of their "original right to establish, for their future government, such principles, as in their opinion, shall most conduce to their own happiness". *Marbury*, 5 U.S. (1 Cranch) at 176.

12. See *supra* note 9.

13. The functional constituencies which shall choose election committee representatives and legislators are heavily weighted towards the colony's conservative business interests, which in turn have been eager to avoid conflict with Beijing. See Lau, *Political Shell Game*, FAR EASTERN ECONOMIC REVIEW, Apr. 5, 1990 at 25. In practical terms, the constituencies are likely to embed special commercial interest groups in the government, and to counterbalance candidates who espouse liberal social welfare or political causes that may be popular with Hong Kong's general electorate but not with Beijing. The business community has already begun to form a political party (the Liberal Democratic Federation) that is courting Beijing supporters. See Lau, *Peking's Tune*, FAR EASTERN ECONOMIC REVIEW, Aug. 23, 1990 at 22.

Examples of the present government's solicitude toward Beijing's position include censorship of politically charged films or the prosecution of democracy movement leaders on misdemeanor charges. See DAVIS, *supra* note 4, at 94,95; and J. Nip, *Pressure may benefit human rights*, South China Morning Post, July 22, 1990 at 2.

14. See BL arts. 85, 89, 82, 92, 93.

British administration restrained in exercising its formidable colonial powers of censorship (Davis suggests that the legal constraints on speech of the colonial administration should be deleted from the legal legacy it passes on in 1997). The view that Hong Kong's superior rights record owes more to British cultural attitudes than to colonial laws underscores Davis's trust in a counter-majoritarian judiciary as the best guardian of rights. It also explains his concern that English continue to be an official language of the courts, lest Hong Kong jurists lose touch with the common law world.

Concern over institutionalizing Hong Kong's relatively liberal administrative tradition while democratizing its society is shared by the authors of *The Future of the Law in Hong Kong*. This collection of thoughtful and provocative essays addresses the question of maintaining a common law system within a socialist nation and forecasts developments in specific legal areas including criminal law, civil practice, taxation, aviation law, evidence, accident compensation, alternative dispute resolution, and employment and trade union law.

In his introduction, Editor Raymond Wacks notes that the legal culture of Hong Kong is far removed from the Confucian values held by the majority (as an example, he points to a survey showing that over 80 per cent of Hong Kong's residents favor criminal punishment for unfilial neglect of one's parents).<sup>15</sup> His conclusion is that transplanted laws and western-trained lawyers will not ensure Hong Kong's transition to a highly autonomous society. The more essential element, he argues, is the support of the Hong Kong people. Like Davis, he nonetheless sees the counter-majoritarian judiciary as the best guardian and promoter of rights in Hong Kong's post-1997 political order. His essay, entitled *The Judicial Function*, portrays an educational role for the bench, which he sees as uniquely positioned to provide a theory of morality and fairness in Hong Kong's emerging political culture. This view of the judiciary as the protector of rights derives from a liberal philosophy of what judges do. Wacks and others refer to Dworkin's idea of law as "integrity,"<sup>16</sup> a process of principled interpretation within a given society's political structure and values.<sup>17</sup> At present, the political structure and values of Hong

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15. R. WACKS, *THE FUTURE OF THE LAW IN HONG KONG* 6 n.18 (1989) citing LAU SIU-KAI & KUAN HSIN-CHI, *THE ETHOS OF THE HONG KONG CHINESE* 139 (1988).

16. *Id.* at 26 n.32, 145 n.43.

17. Dworkin's own words are worth quoting at some length:

Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behavior. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process. . . . It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each

Kong are determined by Britain. It remains to be seen, however, whether the judiciary can preserve a liberal rights regime when the Chinese of Hong Kong and Beijing supply the norms.

Peter Wesley-Smith addresses this question in his essay *Understanding the Common Law*. What will survive the 1997 transition, he emphasizes, is the common law method as much as a set of legal rules developed in the context of British history and mores. The hallmarks of this method are attention to precedent, legal rules that are highly particular to the facts of given cases, and a judicial bent towards pragmatism over formal logic. This lack of formal rationality, argues Edward Epstein, makes successful absorption of Hong Kong's common law unlikely by China's civilian and socialist legal system, even in zones targeted for capitalist development. In *China and Hong Kong: Law, Ideology, and the Future Interaction of the Legal Systems*, Epstein argues that common law terms cannot be transmitted by mere translation (when attempted, it often produces confusion between Chinese and common law doctrines) without an understanding of the history of practical problems and disputes that gave rise to the doctrine in question.

This leads to the issue of whether the common law in Hong Kong can withstand the decline of not only English rule, but also of the English language. The Basic Law permits English to remain an official language.<sup>18</sup> Nevertheless, there will be strong pressures to increase the use of Chinese, as Tomasz Ujejski relates in *The Future of the English Language in Hong Kong Law*. Not the least of these is the desire to make law intelligible to the general public in Hong Kong. Any notion of the judiciary as a source of social values is surely diluted by the fact that the usual distance between the lay person and the common law is compounded by the language barrier. And although Ujejski does not mention it, the exodus of English-speaking professionals and the increasing localization of legal education in Hong Kong will continue to erode English as the exclusive legal lan-

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citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances. The protestant character of law is confirmed, and the creative role of private decisions acknowledged, by the backward-looking, judgmental nature of judicial decisions, and also by the regulative assumption that though judges must have the last word, their word is not for that reason the best word.

DWORKIN, *LAW'S EMPIRE* 413 (1986).

18. BL art. 9 provides:

In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.

guage. What is at risk is the rich history of precedent upon which Hong Kong's common law stands.

Within their respective specialties, other essayists debate the question of whether common law doctrines should be codified before 1997. In the area of criminal law, Michael I. Jackson argues that codification would preserve common law fundamentals such as the presumption of innocence. Codification into Chinese has the additional merit of making the law accessible to the people. But without an adequate period for judicial elaboration, a code could de-emphasize the differences between Hong Kong's criminal law and the criminal code of the People's Republic of China and discourage judges from developing Hong Kong's law by reference to that of other common law jurisdictions. In contrast to these views, Nihal Jayawickrama maintains that the common law is too malleable in the area of civil rights to adequately protect individual liberties. The problem is not whether a Bill of Rights is desirable, but how to entrench it as a supreme law that supercedes all others.<sup>19</sup>

What none of the authors attempts to predict is the likely attitude of Beijing toward the future government and legal system of Hong Kong. No law, including constitutional law, can withstand concerted attempts by a determined sovereign to subvert it. Fear that China will ignore (in the case of the Basic Law) self-imposed legal constraints in its dealings with Hong Kong has deepened political reticence since the June 4th massacre. Yet it would be wrong to mistake reticence for a popular indifference toward legal rights. Moreover, the view that Hong Kong's legal protections depend on the preservation of the English language both obscures the potential for Hong Kong's independent common law evolution and devalues the universality of basic rights.

The future of the rule of law in Hong Kong rests largely with its people. There would be little point to perfect laws if citizens were unwilling to assert their rights under them. Albert Chen notes in his examination of Hong Kong's constitutional journey that the Basic Law, while falling short of expectations for democratic self-government, provides the framework for a far more autonomous and plural-

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19. The draft ordinance provides that any inconsistent law or enactment prior to the commencement of the ordinance is repealed or abrogated to the extent of the inconsistency, and that every future enactment shall be construed as being subject to the ordinance. Hong Kong Bill of Rights Bill 1990 Part I(3) and (4). These provisions would not prevail, of course, if their application contravened the Basic Law. See BL arts. 8, 11.

The Foreign Office has proposed that the supremacy of the Bill of Rights be made part of Hong Kong's current constitution by amendment of the colony's Letters Patent. See Andy Ho, *Amendment to Letters Patent Proposed by Foreign Office*, South China Morning Post, July 24, 1990, at 1, col. 8-9.

istic government than ever enjoyed before. "It is up to the people of Hong Kong to give substance to it and to make it work."<sup>20</sup>

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20. WACKS, *supra* note 15, at 126.



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