

## BOOK REVIEW

*Constitutional Confrontation in Hong Kong—Issues and Implications of the Basic Law*, by Michael C. Davis, New York: St. Martin's Press, 1990

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Two important legal documents have emerged that will govern the future of Hong Kong after sovereignty over the existing British Colony reverts to the People's Republic of China. They are (1) the Joint Declaration of the Government of the United Kingdom and the People's Republic of China on the Question of Hong Kong;<sup>1</sup> and (2) the Basic Law of the Hong Kong Special Administration Region of the People's Republic of China.<sup>2</sup> The former document is a bilateral treaty entered into between the Government of Great Britain and the Government of the People's Republic of China. The latter document is an enactment of the People's Republic of China. The

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1. The Joint Declaration is reprinted in Appendix 1 of the book under review. Also reprinted in 23 INT'L LEGAL MATERIALS 1366 (1984). See Corwin, *China's Choices: The 1984 Sino-British Joint Declaration and its Aftermath*, 19 L. & POL'Y IN INT'L BUS. 505 (1987); Mushkat, *The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues*, 14 DEN. J. INT'L L. & POL'Y 171 (1986); Chiu, *The 1984 Sino-British Agreement on Hong Kong and its Implications on China's Unification*, 21 ISSUES & STUDIES 13 (Apr. 1985); Comment, *Self Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV. 839, 853-54 (1985); Wesley-Smith, *Settlement of the Question of Hong Kong*, 17 CAL. W. INT'L L.J. 116 (1987); Slynn, *The Hong Kong Settlement: A Preliminary Assessment*, 9 INT'L RELATIONS 1 (1987).

2. When the book under review was published, the Basic Law was only in draft and reprinted in Appendix II of the book. Subsequent to the book's publication, the final version of the Basic Law was promulgated on April 4, 1990, by Yang Shanghukun, President of the People's Republic of China, at the 3rd Session of the 7th National People's Congress of the People's Republic of China. The Basic Law is reprinted with a brief commentary in 29 INT'L LEGAL MATERIALS 1511 (1990).

For literature on the Basic law, see Epstein, *China and Hong Kong: Law, Ideology and the Future Interaction of the Legal Systems*, in R. WACKS, *THE FUTURE OF THE LAW IN HONG KONG* 37-75 (1985); *Constitutional Journey*, in R. WACKS, *THE FUTURE OF THE LAW IN HONG KONG* 76-126 (1989); *The Basic Law and the Political Future of Hong Kong*, CHINA NEWS ANALYSIS, Sept. 15, 1988; H. CHIU, *THE DRAFT BASIC LAW OF HONG KONG: ANALYSIS AND DOCUMENTS* (1988); *Symposium on the Hong Kong Basic Law*, 2 J. CHINESE L. 1 (1988); W. MCGURN, *BASIC LAW, BASIC QUESTIONS—THE DEBATE CONTINUES* (1988); Fung, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China: Problems of Interpretation*, 37 INT'L & COMP. L.Q. 701 (1988); Fang Da, *Basic Law and Democracy*, BEIJING REVIEW, Mar. 19-25, 1990, at 13; Lau, *Breach of Promise? Draft Basic Law Raises More Fears Than it Assures*, FAR EASTERN ECONOMIC REVIEW, May 12, 1988, at 34; Davis, *A Common Law Court in a Marxist Country: The Case for Judicial Review in the Hong Kong SAR*, 16 DEN. J. INT'L L. & POL'Y 1 (1987); Plunkett, *Hong Kong's Post-1997 Constitution—Some Comments on the Draft Basic Law*, NEW ZEALAND L.J. 14, 17 (1989).

latter document is an enactment of the People's Republic of China. The book under review deals primarily with the second legal document, which was then in draft.<sup>3</sup> In short, the Basic Law is the constitution of Hong Kong after July 1, 1997, when Hong Kong will become the Special Administrative Region of the People's Republic of China. At the same time, the Basic Law will also be a legislative instrument of the People's Republic of China.

The author is an American lawyer and a scholar of comparative constitutional studies.<sup>4</sup> American constitutionalism is based on a written constitution, what has been interpreted by a prestigious and influential U.S. Supreme Court enjoying a high degree of independence. The British tradition, however, is based upon an unwritten constitutional practice.<sup>5</sup> In contrast, the Chinese perspective of constitutionalism is based upon the ideological premise of subjugation of individual rights to societal harmony, which is an amalgam of Confucianism and Marxism. As such, a Chinese constitution, even if written, does not purport to be declaratory of individual rights which can be asserted by the citizenry to challenge governmental actions, perceived or real, impinging on individual rights.<sup>6</sup> The author, by his training and orientation as an American legal scholar, understandably embodies the American bias in his writing. He attempts to deal with Hong Kong's future constitutional development, which will be torn between the British and Chinese dichotomy, in a comparative fashion. Hence, his book highlights the inherent paradoxes and tensions of comparative legal scholarship.

As the author correctly and boldly points out, the Basic Law is a "hybrid form of constitutionalism."<sup>7</sup> To what extent such a hybrid legal document will receive such respectable treatment it deserves by a future government which has not even been conceived at the time of writing, remains to be assessed by future scholars. When one observes that the American written constitution has been so differently interpreted at different stages of the country's political development,<sup>8</sup> one cannot be certain that the Hong Kong Basic Law will provide to Hong Kong's future citizenry the legal protections so much treasured in a Western-style democracy. Therefore, can it be argued that in the future, the spirits of the drafters of the Basic Law will be everlastingly adhered to, a concern that has been so often vociferously articulated in the constitutional debates in the United States? A legal document, be it a constitution or a contract, can only prove its worth if it is interpreted to accommodate myriad changes, some of which may not be conceived by the drafters while at the same time it maintains a respectable

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3. See *supra* note 2.

4. M. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG—ISSUES AND IMPLICATIONS OF THE BASIC LAW 145 (1990).

5. *Id.* at 7.

6. *Id.* at 8-9.

7. *Id.* at 33.

8. For example, compare *Plessy v. Ferguson*, 163 U.S. 537 (1896) to *Brown v. Board of Education*, 347 U.S. 483 (1954).

consistency. A constitution which can be trodden upon by policymakers, or swept aside at their whims, is not worth the paper it is written on!

The author is quick to draw the reader's attention to many potential tensions. For example, the Chinese socialist style of legislative implementation would be at odds with a Hong Kong laissez-faire economic community which has hitherto enjoyed a considerable measure of personal freedom.<sup>9</sup> This pertinent observation relates to two contradictory and ambiguous notions enshrined in the Joint Declaration: The post-1997 Hong Kong will enjoy a "high degree of autonomy," and it will have to operate with the People's Republic of China's declared policy of "one country, two systems."<sup>10</sup> If these two conflicting notions can ever be reconciled at all, it must be achieved by compromises and political feats.

Free speech, being the most fundamental right of all rights, forms the core and the best part of the author's scholarly analysis.<sup>11</sup> Besides repeated and elaborate allusions to American constitutional thinking, the author also makes references to constitutions of other Asian countries.<sup>12</sup>

If this book has a fault, it is that the chapter on the international status of Hong Kong is too brief and cursory.<sup>13</sup> Without any doubt at all, Hong Kong has developed from an entrepot to a cosmopolitan city. Its future relationships, economic and political, with countries other than the People's Republic of China or Great Britain, will depend heavily on the judgments and perceptions of these other nations. That was the reason given by the Chief Executive of the leading Hong Kong bank, The Hong Kong and Shanghai Banking Corporation, for the decision to reorganize its corporate structure to form a London-based holding company instead of continuing as a Hong Kong-registered corporation.<sup>14</sup>

Absent continuing economic prosperity, the role which Hong Kong has aptly played in contributing substantially to the economic viability of its future sovereign master, the People's Republic of China, will be severely undermined. In the final analysis, will the People's Republic of China be persuaded solely by economic considerations in determining its future governance of Hong Kong? Will other factors in the equation, such as national pride, paternalistic patronage, or even political instability of the People's Republic of China, upset the delicate balance of forces? History has provided no precedent.

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9. M. DAVIS, *supra* note 4, at 65-67.

10. *Id.*

11. *Id.* at ch. 4.

12. *Id.* at 127 (the Constitution of the People's Republic of Korea was compared).

13. See Mushkat, *The International Legal Status of Hong Kong Under Post-Transitional Rule* 10 HOUSTON J. INT'L L. 1 (1987).

14. *A brass, not China, plate*, THE ECONOMIST, Dec. 22, 1990, at 96.

**This book certainly is provocative in raising issues. It would be interesting to hear what the author would have to say in perhaps, thirty years time. Among all the publications on the same subject, this book is by far the most scholarly written.**