BOOK REVIEW


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Much has been written about the flight of Hong Kong residents to various western countries in the past few years. The popular fear of political instability, which has caused this flight, stems from the anticipated transfer of Hong Kong's sovereignty from the United Kingdom to the People's Republic of China ("PRC" or "China") in 1997. If present emigration figures⁴ are used to predict the future, however, fewer than one million people are expected to leave Hong Kong before 1997. The rest of the population, roughly five million people, will live in the new political entity known as the Hong Kong Special Administrative Region of the People's Republic of China ("HKSAR" or "SAR").

The Sino-British Joint Declaration, signed in 1984, promised to allow Hong Kong to enjoy a high degree of autonomy and to maintain economic prosperity and social stability.¹ The parties involved agreed that the next step was the drafting of the "Basic Law," a constitutional document on which future Hong Kong laws would be based.

After two major drafts in 1988 and 1989, a final draft of the Basic Law was adopted by the PRC's National People's Congress in April 1990. Michael Davis, a lecturer in law at the Chinese University of Hong Kong, has written a book about underlying issues and problems of the 1989 draft, a version similar in spirit and substance to the final

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¹ In 1989, approximately 42,000 Hong Kong residents emigrated. The 1988 figure was 45,800. The annual emigration figures are expected to increase as 1997 approaches. See Jones, Hong Kong to Lose a Growing Share of its Best, Brightest to Emigration, Wall St. J., Sept. 18, 1989, at 7, col. 1.

text.

Davis first explains why it is so important for the Basic Law to succeed — the future of the Hong Kong society and its people, the territory's status as a leading financial center, and the reputations of both the PRC and the British governments are at stake. While all the players involved in the drafting process would like to maintain Hong Kong's status quo as a capitalist society, the author points out the different perspectives brought into the negotiations by the PRC, the British and the Hong Kong representatives, and how those perspectives created much disagreement and tension.

Davis notes that under the present system, Hong Kong does not possess a written constitution, but retains some form of judicial review of its legislation much like the British system from which it is derived. Human rights and freedom of speech are well observed in Hong Kong. China, on the other hand, maintains a written constitution. The interpretation and enforcement of its provisions rest with the National People's Congress or its Standing Committee, both of which are political institutions. The PRC also bases its policies on its beliefs in strong state and weak individual powers. Such beliefs stem from both traditional Chinese philosophies and more recent socialist values.

After setting the stage for the potential clash of views over both constitutional interpretation and human rights, Davis presents the provisions of the 1989 draft concerning these important aspects of the Basic Law. The Basic Law requires the Standing Committee of the National People's Congress to interpret provisions of the Basic Law concerning the central government of the PRC or the relationship between the central government and the SAR government. The Standing Committee also has the power to veto any legislation of the SAR that may affect "the responsibility of the Central Authorities and the relationship between the Central Authorities and the Region." While acknowledging that Hong Kong does not at present have a constitutional judicial review system under British rule, Davis nevertheless casts doubt on the Basic Law alternative which uses a political entity as the final interpreter of the Basic Law. By referring to *Marbury v. Madison* and various theories on non-interpretivism of constitutions, Davis explains the advantages of constitutional judicial review. He emphasizes the development and growth of the constitution through judicial review, a theory espoused by Alexander Bickel; the stabilization of

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4 According to Davis, this term refers to theories of judicial review calling for reference beyond the Constitution and its legislative history.
government through the judiciary, based on Dean Henry Wellington’s views; and John Ely’s vision of judicial review as participation democracy and protective of minority rights. Davis supports his arguments with statements from the original Joint Declaration and the more liberal Basic Law Consultative Committee (as opposed to the pro-PRC Drafting Committee), requesting, but ultimately failing to obtain, constitutional judicial review.

Closely linked to the question of constitutional judicial review is the protection of individual human rights. Davis again expresses his concerns over the Basic Law’s treatment of the human rights issues. In the 1989 draft, the drafters incorporated international human rights covenants into the Basic Law. However, Davis notes that the international covenants have been poorly enforced and are not familiar features to common law judges. The danger of human rights abuses is also heightened by another provision of the draft which states that “the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless prescribed by law.” Such a provision means that the future SAR Legislature can pass laws curbing the rights and freedoms of the SAR citizens without obvious limitations.

One particular category of individual rights which may not be thoroughly protected by the Basic Law is free speech. Davis explores the development of free speech from the liberal beliefs of Justice Brandeis to the narrower interpretations of Judge Robert Bork. While noting that different strands of free speech theory exist, Davis brings the ideas together and finds that they all promote the “[reflective] capacity [that] in turn speaks to our general well-beings...” He also stresses the importance of constitutional judicial review through the relatively objective common law judges in protecting the rights of free speech.

Davis devotes a section of the book to an interesting comparison among the different types of constitutional formats that exist in various countries. The succinct list provides a useful insight into major constitutional systems and their respective merits. According to Davis, the American system, which is decentralized and employs incidenter review, may be the best system available. Quoting an Italian constitutional scholar, Davis remarks that the American system, relying on all courts of the land to interpret the constitution when issues are raised in ordinary cases, may be better than other systems which “tend to focus on the abstract and ignore concrete reality.” The rights of individuals

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5 Id. ch. III, art. 39 (emphasis added).
6 This indicates that a court exercises constitutional judicial review when issues are raised by parties in ordinary cases. Constitutional jurisdiction is merely incidental to the case.
under the American system are considered better protected because of the use of real cases in constitutional interpretation.

To put all the potential constitutional problems with the Basic Law into perspective, Davis outlines the current political climate of Hong Kong and what the future may hold. Decades of "executive-led colonial power" have led to legislation and regulations in Hong Kong which may seem heavy-handed when compared to their United States counterparts. The laissez-faire attitude of the British Hong Kong government, however, has ensured that the present obscenity laws, political censorship laws, secrecy laws and emergency powers of the government are no more than token ordinances on the books. Davis carefully examines each of these areas and probes the possibilities for potential abuse in these fields. In addition to these dangers, Davis sees other barriers facing the smooth operation of the Basic Law. They include the use of the Chinese language for interpreting common law, the PRC's attitude towards direct elections and self-censorship by the local press.

Davis' comprehensive study exposes the unique difficulties encountered by the drafters who tried to develop a constitution for a future society with two sets of clashing values. There are, however, a few topics Davis merely touches upon which he should have explored in greater detail. For instance, Davis' description of the electoral process fails to show the urgency and acrimony which developed. The electoral process for the HKSAR was the most widely debated issue in the drafting of Basic Law. Instead of direct elections of legislators, Hong Kong has always relied on the British governor to appoint a majority of its lawmakers. While this may have been accepted by the politically apathetic residents of Hong Kong for decades, they now demand more popular control of the legislature in anticipation of the changing sovereignty. While the PRC was completely against direct elections, conservatives and liberals on the drafting committee still fought bitterly over which intricate model of elections HKSAR should eventually adopt. The version that was finally adopted (after Davis' book was published) authorized only one-third of the legislature's seats to be directly elected by 1997. Other legislators are to be elected through constituency groups, such as doctor or lawyer groups. Conservative drafters supported this blueprint of the election process, while liberals denounced it as "a shameful act of surrender."

The Hong Kong people's plea for more political involvement stems from their attitude towards the PRC government, a topic also

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Dealt with only briefly by Davis. After all, over 40% of Hong Kong’s population was born in China, but left the “mainland” for social, political or economic reasons. Many of those fled China when the Communist forces defeated the Nationalists during the civil war which lasted from 1945 to 1950. Other acts by the PRC government, including the June 4th, 1989 incident in Tiananmen Square, have also undermined the Hong Kong people’s confidence in the PRC regime. The distrust of the PRC government may seriously erode public confidence in the future SAR government, which will look to the PRC for both political and judicial guidance. Hong Kong’s status as an international financial center is built on little more than the hope for a capitalistic future free from political interference. Any actions by the PRC government that may be interpreted locally as political interference could seriously affect Hong Kong’s infrastructure.

Davis’ essay is a thorough and thought-provoking study about the preparation of ground rules for an unknown venture. He concentrates on the constitutional theories that have worked in practice, and warns that the omission of constitutional judicial review could lead to the erosion of rights the Hong Kong people currently enjoy. In his pursuit of the possible shortcomings of the Basic Law, however, Davis neglects to elaborate on the underlying issue of distrust. Even the best drawn set of rules cannot be put into use if the participants refuse to believe that other players will obey the rules. Davis legitimately expresses his concerns over the micro-issues on the future of Hong Kong, but the macro-issues may prove to be more troublesome in the long run.

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8 While 98% of Hong Kong’s people consider themselves ethnic Chinese, according to the 1981 census, 57.2% were actually born in Hong Kong. This leaves roughly 40% as having been born in China. See HONG KONG GOVERNMENT INFORMATION SERVICE, HONG KONG 1984 236 (1984).
10 In the early hours of June 4, 1989, PRC soldiers confronted Chinese students in Beijing’s Tiananmen Square, resulting in the death of an unknown number of students and marking the end of the 1989 democracy movement in China. See Beijing Death Toll at Least 300; Army Tightens Control of City but Angry Resistance Goes On, N.Y. Times, June 5, 1989, at A1, col. 6.
11 The Hong Kong stock market plunged 22% and wiped out nearly HK$17 billion in stock value on June 5, 1989. It is thought that signs of instability in the Chinese government could again send the Hong Kong financial market into a tailspin. See Jokiel, Panic in Hong Kong, 35 HAW. BUS., Aug. 1989, at 34.