

Constitutional
Confrontation
in Hong Kong



*Issues and
Implications of the
Basic Law*

Michael C. Davis

Constitutional Confrontation in Hong Kong

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MACMILLAN

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This is the only Chinese Society that, for a brief span of less than 100 years, lived through an ideal never realized at any other time in the history of Chinese societies – A time when no man had to live in fear of the midnight knock on his door.

Tsang Ki Fan

Preface

As political events unfold almost daily in China people in Hong Kong are reminded of China's long-term instability. This subjects China's capacity to adhere to its commitments to serious doubt. Nevertheless, whoever prevails in China, this difficulty remains. Unless Hong Kong could be granted independence, which has always seemed extremely unlikely, the people of Hong Kong must deal with the government in China. For some people in Hong Kong China's behaviour and instability mean that 'one country, two systems' is a futile exercise. Others take heart from the fact that China has generally honoured Hong Kong's existing status, no matter how disagreeable, through the PRC's many unstable years of existence. There is at least the possibility that adjoining territorial communities with complex ties can co-exist. Other Hong Kong people, focusing on this possibility, place their hope in the evolution of direct elections and democracy in Hong Kong as a way to ensure both co-existence and autonomy. Yet others well recognize that direct elections and democracy, while essential to the task, do not alone ensure successful government. Constitutional democracy is, after all, more than direct elections; in general terms it must also include certain institutional ingredients as well as law and basic human rights, which interact with the democratic aspects.

This book, while recognizing these difficulties, focuses on the possibility of the Joint Declaration being effected. Direct elections and representative government are broadly recognized as necessary ingredients of this possibility. Key aspects of the concomitant ingredients of the task charted in the Joint Declaration are the focus of this book. We must consider how we might give life to this vision of the future, as the future will most certainly come. At a minimum, Hong Kong people will need to understand what key ingredients they must insist on maintaining and why.

Writing a book on a subject as broad in scope as the drafting of a Basic Law for an autonomous and capitalist Special Administrative Region (SAR) in Marxist-Leninist China confronts one with an almost endless list of topics for attention. In this regard, numerous articles and collections of essays have been written concerning the broad expanse of this array. This

book does not attempt such breadth or in any way to exhaust the topic; instead, it attempts to address some aspects of what might be characterized as the life of the enterprise or, on a conceptual level, the implementation of capitalist constitutional democracy in the Hong Kong SAR under China's policy of 'one country, two systems'. This alone is a very broad topic. Thus, only certain key aspects are selected for attention: the emerging nature of the Basic Law and its tensions or stresses, the role of the judiciary, the role of a vigilant public and a free press and Hong Kong's international status as an autonomous area with a peculiar configuration. These aspects represent the key topics. This examination in turn reveals much about this project that has broader application elsewhere. Finally, this effort may help us refine the instruments of comparative constitutional studies.

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1 Constitutional Stress in Hong Kong

In September of 1982 the British Prime Minister, Margaret Thatcher, reached agreement with Chinese leaders to 'enter into talks through diplomatic channels with the common aim of maintaining the stability and prosperity of Hong Kong'.¹ While parts of the colony of Hong Kong had in the middle of the last century been ceded to Britain in perpetuity the largest section of the colony, the so-called New Territories, was held under a lease that was due to expire in 1997.² Protracted negotiations followed the 1982 announcement and resulted in the signing of the Sino-British Joint Declaration in 1984.³ Under the terms of the Joint Declaration China will resume sovereignty over the entire territory of Hong Kong on 1 July 1997. As suggested by the original 1982 announcement, the Joint Declaration seeks to maintain Hong Kong's stability and prosperity under a capitalist common law system and afford a high degree of autonomy. The Joint Declaration calls for the drafting by China of a Basic Law for Hong Kong to provide a framework or constitution for the future Hong Kong Special Administrative Region of the People's Republic of China, thus implementing China's announced policy of 'one country, two systems'. The final draft of the Basic Law has now been prepared and thus substantial movement towards Hong Kong's promised future has been made.⁴

At the moment of this writing the events of China's 1989 political crisis are still unfolding. There are many who now see the Basic Law as a futile enterprise. Under the worst of conditions it may be. Under the worst of conditions all efforts at constitutionalism are futile. Nevertheless, the problem of Hong Kong's future after 1997 remains. Some form of Chinese government will continue in existence, as will Hong Kong. The obligations of the Joint Declaration will remain binding on China. People in Hong Kong and China will hopefully continue to consider it in their best interest to maintain Hong Kong's prosperity and stability. It is on this basis that this book takes the longer view of Hong Kong's political development and, assuming the continued sincerity of the participants, examines

those avenues best aimed at achieving the objectives of the Joint Declaration. If anything, recent events in China suggest the need for renewed vigour in effectively achieving the values set forth in the Joint Declaration. This book considers some avenues to such achievement.

The future is bursting upon Hong Kong at a rapidly increasing pace. The unfolding layers of China's Hong Kong policy seek to offer hope to Hong Kong's nearly 6 million people. These people, like the capitalists and communists that flock to Hong Kong's markets, are investors in Hong Kong's future. When one unravels the layers of competing claims vested in Hong Kong's Basic Law, one encounters almost every stress and tension that have met Western constitutionalism in Asia's century-long struggle with it. In some sense, this constitutional stress may best be characterized as a constitutional collision: the pre-planned programme charted in the Joint Declaration brings Western constitutionalism and Chinese political values into direct confrontation in a way that the numerous Chinese borrowings and constitutional developments of the past have seldom done.

In this book we will consider some elements of this constitutional confrontation. We will not assess the myriad details offered in the Basic Law but will instead seek to discover its heartbeat. As for a foetus about to spring into the world, we can make some preliminary assessment of its potential life; we can examine its potential to achieve the overriding objectives of the Joint Declaration, those objectives aimed at preserving Hong Kong's stability and prosperity in a capitalist, common law context.

This book will thus focus on the implementation of the constitutional mission. This assessment will include examination of the fundamental nature of both the Joint Declaration and the Basic Law, comparative examination of those fundamental elements, including judicial and public vigilance, that give life to democratic constitutional government in a common law context, and assessment on a conceptual level of the security offered by Hong Kong's projected autonomy and its resultant peculiar capacity as an international actor. All of these aspects are intimately related to Hong Kong's internal political development. Evaluation of these elements goes to the degree of confidence in Hong Kong's future, the degree of confidence in China's policy of 'one country, two systems'.

This assessment, however, is not confined in its revelations to Hong Kong; instead, it offers an opportunity for improved understanding of the modern constitutional task and refinement of the tools for comparative constitutional study. This study also offers an opportunity to understand the peculiar stresses and conceptual claims arising from Asian cultural acceptance of Western constitutional values. These broader implications, methodological, conceptual, and cultural, afford added significance to comparative studies of Hong Kong's current active constitutional environment.

In evaluating the constitutional developments in Hong Kong, this book aims further at the broader mission of improving the tools of comparative constitutional analysis. The overall comparative project in this case reveals a framework for a more application-oriented comparative constitutional analysis. Comparative constitutional law scholarship has often been pre-occupied with description of established constitutional systems. Therefore those parts of the world infected with upheaval and frequent constitutional change are neglected. No one wants to describe a moving target. Nevertheless, these areas are precisely where close comparative contextual examination of constitutional law fundamentals can do the most good – with an eye more to application than description. For example, the constitutional road map of Asia is changing at a rapid pace. This change often involves a struggle with Western constitutional values. Comparative constitutional scholarship can contribute to this adaptive process.

On a general level, a framework for comparative constitutional analysis might at least include the following: (1) the stated objectives of the participants; (2) the values or perspectives of the participants including both local cultural values and the Western conceptual values being employed; (3) development of a proposed model; and (4) critical examination of this model. This framework offers simplicity, openness and comprehensiveness.

Beyond the more general framework of analysis, each chapter in this book offers specific theoretical tools for comparative studies. These theories seek to examine the relationship between the above noted contextual factors, the concept being employed and the socio-economic development of the society. This analysis considers the values and objectives expressed by the participants

as well as those revealed in the concepts employed. Historical practices and external factors are also important.

The Hong Kong example is a particularly revealing convergence of the many constitutional stresses confronting developing Asian societies. Highlighting particular difficulties in this constitutional process serves to illuminate many aspects of modern constitutional development and offers improved tools for comparative constitutional analysis. This may afford a positive and not merely descriptive programme for comparative constitutional studies, and thereby enable us to construct a theoretical framework for dealing with problems of development in a society experiencing constitutional stress.

BACKGROUND FACTORS

The economic and political stakes in the Hong Kong endeavour are enormous. Hong Kong's nearly six million people certainly have the most immediate interest in the success of this endeavour. The intensity of debate over the Basic Law in Hong Kong reflects this concern, as do the recent mass political demonstrations concerning China's democracy movement. The stakes for China in the success of its Hong Kong policy are also considerable. Hong Kong is ranked near the top among the world's leading financial centres and could well become China's leading financial centre in the next century. Hong Kong's container port is also among the world's largest and a considerable portion of China's trade passes through Hong Kong. China has considerable investment in Hong Kong.⁵ In this light, Hong Kong's collapse would at a minimum be a major financial blow to China. Yet, one suspects the stakes for China are much larger than mere loss of the Hong Kong investment. Continued confidence in China's economic policies, already badly shaken by recent events, may also hinge on China's demonstrated commitment to the 'one country, two systems' policy. China, with its extremely shaky political history, faces a serious question of confidence both in Hong Kong and at home. Taiwan's future leaders are no doubt watching this process as well, as they contemplate China's long-term overtures towards unification.

These factors were no doubt in the negotiators' minds when they put the finishing touches to the 1984 Sino-British Joint

Declaration providing for the return of Hong Kong to Chinese rule. This Joint Declaration outlines the high aspirations of China and Britain for the future of Hong Kong and charts China's bold policy of 'one country, two systems'. This policy has its roots in China's 1982 constitution⁶ and seeks to welcome Hong Kong back to the motherland while assuring a very high degree of autonomy. This policy offers a formula for the return of those disconnected regions of China while seeking to assure continued prosperity and stability. As shown by Hong Kong's recent response to China's political turmoil, there is a serious problem of lack of trust in the Chinese government among Hong Kong's people, many of whom have escaped from the Mainland. This policy seeks to address this problem of trust by institutionalizing a sufficient level of autonomy and non-interference so as to assure confidence that no heavy hand will be applied by the Chinese government in Hong Kong. In its implementation, this policy raises profound and difficult constitutional questions. These questions especially arise from the convergence of several constitutional traditions and political value systems.

THE JOINT DECLARATION

On the surface, the Joint Declaration reveals certain shared aspirations for the future of Hong Kong. At the time of its negotiation in 1984, the negotiators were concerned about preserving Hong Kong's prosperity and stability upon its ultimate return to China. The leases for Kowloon and the New Territories were scheduled to expire in 1997.⁷ In a period of anti-colonialism, there appeared no serious question as to the ultimate return of Hong Kong to China. The difficult problem was to discover a way to effect this objective without undermining Hong Kong's dramatic success as a major trade, manufacturing, and financial centre in Asia. After all, Hong Kong's success has served her people and China well.

In its general features, the Joint Declaration seeks to have Hong Kong continue as it now is, under a liberal, capitalist, common law framework. A more detailed analysis of this formula is provided in the discussion of key aspects in later chapters. For introductory purposes the key features of this formula include the following: a greater emphasis on constitutionalism; Chinese

sovereignty over Hong Kong; a high degree of autonomy and self-government for Hong Kong; more democracy than was apparent under the colonial regime; continued capitalism; continued use of the common law legal system, with an independent judiciary; and a strong emphasis on human rights, including continued avenues of enforcement. Much of this commitment is stipulated in the Basic Law provided for under the agreement.⁸

While much of this commitment is sincerely and mutually held by all the participants, enough ambiguity exists in specific provisions to leave considerable creative room for the Basic Law drafters. Drafters have generally stayed within broad contours of the Joint Declaration, but have occasionally skirted the edge of these requirements, at least when viewed in light of its aspirations.

DRAFTERS' PERSPECTIVES

While mainland China and Hong Kong Basic Law drafters have certain shared aspirations for Hong Kong's future, the perspectives brought to bear on the Basic Law drafting process may vary widely.⁹ As revealed in divergent historical experience in Hong Kong and the Mainland and in the positions taken by drafters, some of these perspectives represent polar extremes. The Anglo-Hong Kong experience, to which some Hong Kong drafters are attached, brings to this constitutional enterprise a certain attachment to Britain's system of liberal capitalism and its concomitant notions of natural rights, or what might be characterized as bourgeois liberalism; added to this is the framework of a British constitutional and legal experience. There is a marked tension between this perspective and China's well-known tradition of antipathy to bourgeois liberalism and capitalist legality.

Hong Kong Perspectives

Generally, Hong Kong has been strongly influenced by the practices of the British unwritten constitutional tradition. This is evident both in a strongly British legal education and in actual practice. While Hong Kong has Letters Patent and Royal Instructions that function as a written constitution, these docu-

ments have not contained a bill of rights and have not enjoyed the rigorous judicial enforcement evident under the American system of constitutional judicial review of legislation. Nevertheless, Hong Kong does share Britain's rigorous system of judicial review in the administrative context and more generally, a liberal tradition of natural rights under a capitalist system of private ownership. With the above noted written constitutional documents delineating government powers, Hong Kong practice also includes a very limited and rarely used potential for judicial review of legislation.¹⁰

The Hong Kong élite participating in the drafting process are schooled in the Western liberal tradition that historically saw government as a somewhat passive umpire or even a facilitator of private endeavour. This liberal and natural rights tradition is traceable to enlightened thought and evident in Anglo-American constitutionalism. This social contract theory of such thinkers as Hobbs or Locke¹¹ includes a strong government commitment to uphold rights, upon which this system depends. A recent Hong Kong survey has shown very strong public support for the rights component of this system, although the nature of this component and its common law features are not broadly understood.¹² Nevertheless, Hong Kong evidently does take rights seriously and this may have some bearing on historic confidence in its economic and political institutions.

The Anglo-American Tradition

My characterization of this constitutional tradition more broadly as Anglo-American may initially seem problematic. The American written constitutional tradition obviously diverges radically from the British unwritten constitutional tradition. This divergence is particularly evident in the existence of constitutional judicial review of legislation in America and not in Britain. The appropriateness of this characterization, however, is evident not only in the roots of the American constitutional experience but also in practices under other written constitutions in common law jurisdictions.¹³

It has generally been true that practices fundamentally similar to the American Constitutional experience have emerged in former British colonies when British common law has been married with a written constitution, especially one with a bill of

rights component. This is certainly true if one views constitutional judicial review of legislation as the key distinguishing component of the American constitutional experience. This particular institution now exists in some form in every common law jurisdiction except New Zealand and Britain, neither of which have a written constitution that contains a bill of rights.¹⁴

Common law systems of constitutional judicial review of legislation are also distinguishable from the form of constitutional review generally practised in civil law jurisdictions.¹⁵ Common law jurisdictions also share a system of administrative judicial review based in the ordinary courts, though actual substantive doctrinal practices vary widely within the common law context. Given these historical practices, the characterization of the claims on one side of the Basic Law debate as Anglo-American seems appropriate. Frequent references by the Basic Law drafters to both American and British practices further supports this contention.

Chinese Perspectives

The Chinese drafters in the Basic Law drafting process come from a decidedly different constitutional tradition and perspective. These differences are evident in the current debate and the emerging draft. Because of its institutional components, this tradition is difficult to characterize. This difficulty is caused in part by the lack of vigorous and coherent enforcement under China's system of legislative interpretation of its constitution. Under this system, specific constitutional provisions, though generally informing public discussion, take on greater concreteness and enforceability only through legislation of the National People's Congress or its Standing Committee specifically implementing constitutional requirements.¹⁶

Recent scholarship in this area reveals some emerging agreement on key components of the Chinese constitutional tradition. Professor Andrew Nathan has recently noted certain consistent characteristics of Chinese constitutions: rights are not derived from human personhood but from citizenship or membership in the 'people'; rights are granted by the state and can be changed by the state; rights are programmatic; rights are subject to limitation by law instead of being a limitation on law; the law-making organ cannot be checked by other organs; and popular

sovereignty is often recognized in principle but without provision for its effective exercise.¹⁷ One might add to this list some tendency to simply ignore legal requirements, as is evident at the top in the separation between formal and actual leadership power. Professor Nathan contrasts this with American notions of natural rights, rights changing over time but not deliberately to meet state policy goals, rights claimed in the present, rights as a limit on legislation, independent organs to secure rights, and effective popular control over government.¹⁸ He notes further that Americans see government as an adversary of the individual while the Chinese assume a harmony of interest between the state and the individual.¹⁹ Professor Nathan notes with respect to the latter feature the initial tradition of *minben si xiang* (the thought of the people as a basis) in Chinese democratic theory.²⁰ This tradition emphasizes government concern with the welfare of the people rather than popular control of government. Early Chinese theorists found notions of natural right and the contract theory of Hobbs and Rousseau curious.²¹ In addition, the West was shifting from natural law to legal positivism at the time China began turning to Western law.²² This latter development was more consistent with Chinese practice.

In a similar vein, Professor Randle Edwards identifies five themes in Chinese legal values: individual rights being seen as an instrument for the attainment of broader socialist aims, a strong emphasis on harmonizing individual behaviour with the interest of society and the state, a perception that rights flow from the state as a gratuitous grant, a resistance to adversarial methods for resolving disputes, and a greater emphasis on substantive over procedural justice, with a practice of non-finality.²³ Generally, he sees a policy conception of rights as a gift from the state rather than as a limitation on the state. In short, Mainland Chinese drafters, to the extent that they are influenced in their habits of mind by their own political, economic and legal tradition, may bring perspectives to the drafting table that render their efforts at capturing in the Basic Law the essence of the Hong Kong experience difficult.

THE BASIC LAW

In late April of 1988, the Basic Law Drafting Committee