

## BOOK REVIEW

HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW BY YASH P GHAI [Hongkong: Hongkong University Press, 1997, xiv + 593 pp (including index) Softcover: US40.00

THE hand-over of Hong Kong in July 1997 must rank as one of the most significant Asian political events in the post-War period. In keeping with the significance of this much hyped-up event, a slew of books have been published since the British entered into serious negotiations with China in the 1980s on the terms of the hand-over, which culminated in the Joint Sino-British Declaration of 1984. The centre-piece and product of these intense and sometimes antagonistic negotiations was the Basic Law which provides the constitutional framework for post-colonial Hong Kong. To the already long list of books comes this stellar effort by Yash P Ghai, who is Sir YK Pao Professor of Public Law at the University of Hong Kong.

Most of the books that have been written on either the Hong Kong hand-over or the Basic Law have been collections of essays,<sup>1</sup> or discussions<sup>2</sup> or critiques<sup>3</sup> of the provisions of the Basic Law. Few books contain a sustained argument and overview of the issues involved in the hand-over and the Basic Law. One early – and now-outdated book – which is succinct and highly-readable is Michael C Davis' *Constitutional Confrontation in Hong Kong: Issues and Implications of the Basic Law* published by Oxford University Press of Hong Kong in 1990. In the light of these contributions comes Ghai's excellent volume. This massive book (which contains only about 80 pages of appendices featuring the most important documents) is clearly not aimed at the man in the street even though it is very clearly written and very readable. The weight of Ghai's scholarship and grasp of the socio-economic and political environment shaping the issues is evident from the first page and for anyone interested in Hong Kong or the Basic Law or China for that matter, it is

<sup>1</sup> See for example, Peter Wesley-Smith ed, *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988); Ming K Chan ed, *The Hong Kong Reader: A Passage to Chinese Sovereignty: An Interdisciplinary Reader* (New York: ME Sharpe, 1996); and Ming K Chan, *Prekarious Balance: Hong Kong Between China and Britain 1842-1992* (New York: ME Sharpe, 1994).

<sup>2</sup> See for example, Hungdah Chiu, *The Draft Basic Law of Hong Kong: Analysis of Documents* (Maryland: University of Maryland, 1988) and Ming K Chan & David J Clark eds, *The Hong Kong Basic Law: Blueprint for 'Stability and Prosperity' Under Chinese Sovereignty? (Hong Kong Becoming China: the Transition to 1997)* (New York: ME Sharpe, 1991).

<sup>3</sup> See William Goodhart, *Countdown to 1997: A Report of a Mission to Hong Kong* (International Commission of Jurists, 1992).

difficult not to be riveted to this book, long as it may be. Ghai wears his immense scholarship lightly and the reader is caught up in his conversational tone and style which permeates the entire volume.

This book is divided into 11 chapters<sup>4</sup> and 6 appendices.<sup>5</sup> The layout and ordering of the chapters indicates Ghai's personal approach to the issues involved here, and while the book may or may not be read in chronological order, I strongly suggest that the reader tackles the first three chapters before selectively dipping into the rest. In the first three chapters, Ghai acquaints the reader with the historical context of the Hong Kong problem and introduces them to China, the new sovereign. Beginning with the international law dimension of the unequal treaties signed between Great Britain and China,<sup>6</sup> Ghai adopts a refreshing approach to constitutional law by contextualizing Hong Kong in its economic, social, cultural and historical milieu. These three chapters are written in vintage Ghai fashion: lucid and all-encompassing in scope. Ghai, like the best public lawyers, recognizes that constitutional law cannot be studied in isolation and that constitutions are 'not only, and some would say, not even primarily, legal instruments.'<sup>7</sup> He tackles the historical, sociological, economic and political issues with a broad sweep and vision of one in full command of the subject. Yet, there is nothing overly idealistic or romantic in his writing, for Ghai is as much a practitioner of constitutional law as he is a constitutional theorist and scholar.<sup>8</sup> Of these introductory chapters, I found Chapter 3, 'China: The New Sovereign' particularly interesting, especially the discussion of China's autonomy experiments (and difficulties) in Tibet and Xinjiang.<sup>9</sup>

The most important chapters in the book must, I think, be Chapters 4 and 5, where Ghai discusses the fundamental issues of sovereignty and autonomy and interpretation of the Basic Law. He introduces the basic points succinctly and then moves quickly to make his points. Some of these are very practical and deal with implementation of the Basic Law provisions while some others can be highly conceptual.<sup>10</sup> In Chapter 4, Ghai draws on his vast knowledge and experience of

<sup>4</sup> The Chapters are: 1) The Acquisition of British Sovereignty; 2) The Resumption of Sovereignty; China: The New Sovereign; 3) Sovereignty and Autonomy; 4) The Framework of the Basic Law; 5) Interpretation of the Basic Law; 6) The Political and Administrative System; 7) The Legal and Judicial System; 8) Sources of Law; 9) Rights, Freedoms and Social Policies; 10) International Aspects of the HKSAR; and 11) Reflections.

<sup>5</sup> The documents featured in the Appendices are: 'Continuity of Laws, Rights and Obligations' which is a short commentary by the author; the Treaty of Nanking 1842, the Convention of Peking 1860, the Convention of Peking 1898, the Sino-British Joint Declaration of 1984, and the Basic Law of Hong Kong SAR and Related NPC Decisions.

<sup>6</sup> For an in-depth study of the unequal treaties, see Peter Wesley-Smith, *Unequal Treaty 1898-1997: China, Great Britain and Hong Kong's New Territories* (Hong Kong: Oxford University Press, 1980).

<sup>7</sup> See p 467.

<sup>8</sup> Indeed, Ghai has been constitutional adviser to a number of South Pacific Island states in the drafting of their constitutions.

<sup>9</sup> See pp 128-135.

<sup>10</sup> For example, his discussion of the division of powers and sovereignty in respect of China and Hong Kong is, for example, very theoretical and academic, but such is Ghai's style that the general reader remains unintimidated. See pp 148-151.

other constitutional systems throughout the world in a comparative study and attempts to juxtapose Hong Kong within the various constitutional frameworks for autonomy. He concludes that Hong Kong does not easily fit into any of these categories<sup>11</sup> and argues that the Basic Law was designed 'to preserve a particular kind of economic and political system in Hong Kong' and as such, autonomy 'is secondary and is contingent on the other, larger aim.'<sup>12</sup> If the basis for autonomy were purely economic, the justification for One Country, Two Systems would be very weak indeed, and Ghai postulates that as far as the people of Hong Kong were concerned, the justifications for autonomy are more deeply in the difference of political and cultural values and 'a distinctive Hong Kong identity.'<sup>13</sup> Despite the difficulties and problems of the structure of the Basic Law, Ghai is cautiously optimistic. This optimism arises not from the provisions of the Basic Law which the Chinese central authorities are unlikely to regard too seriously as 'hard law' but from the economic and political realities surrounding Hong Kong and Taiwan.

In Chapter 5, Ghai the technical legal scholar emerges and his concern for developing an appropriate model of constitutional adjudication and interpretation demonstrates his serious treatment of the Basic Law as a fundamental legal instrument. The big problem with interpretation is that under Article 158 of the Basic Law, the final interpreter of the Basic Law is the National Peoples' Congress Standing Committee (NPCSC). The lack of an independent interpreter prompted Ghai to advance an approach to interpretation which balances the sovereignty of the PRC with the autonomy of the HKSAR, brings coherence to the various powers and functions of the HKSAR, and allows for the capacity to respond to changing conditions and circumstances in Hong Kong.<sup>14</sup>

The remaining chapters deal with various other aspects of constitutional principles and the Basic Law in Hong Kong, such as the political and administrative system, the legal and judicial system, the sources of law and rights, freedoms and social policy, and the final descriptive chapter deals with the status of Hong Kong under international law. There are many insights in each of these chapters in which Ghai demystifies much of the legalese and identifies potential problems in future implementation of the various aspects of the Basic Law. Of these succeeding chapters, I found Ghai's discussion of the contradictions of the political system as envisaged under the Basic Law to be particularly illuminating<sup>15</sup> and his analysis of the common law's future in Hong Kong, very thought-provoking.<sup>16</sup> In his chapter on rights and freedoms, Ghai's pessimism over the future of human right in Hong Kong is evident. In his words, the future is 'problematic' because the principles of the International Covenant on Civil and Political Rights 1966 (ICCPR) 'sit uneasily with the Chinese concept of rights.'<sup>17</sup>

The final chapter of this book ties the loose ends together. More importantly, it gives the reader a rare insight into the mind of Ghai and his attitude and approach

<sup>11</sup> See pp 181-182.

<sup>12</sup> See p 181.

<sup>13</sup> See p 182.

<sup>14</sup> See p 215.

<sup>15</sup> See pp 263-270.

<sup>16</sup> See pp 338-347.

<sup>17</sup> See p 425.

to public law in general. His practical understanding of realities is nonetheless fired by his idealistic notions and hopes for the rule of law in general. His realism, as evinced in the following passage:

These perspectives on the economy and politics immediately suggest a model that has considerable appeal to many in China and Hong Kong: Singapore, with a (relatively) liberal economy but a restrictive and authoritarian political order. It thrives on a truncated version of legality, where commercial rights are considered more important and more deserving of legal and judicial protection than human rights and freedoms. Given the likely pressures from the mainland on the autonomy of Hong Kong, the Basic Law is largely meaningless without the shield of legality—few legal instruments seem so desperately in need of it.<sup>18</sup>

sits comfortably with his faith in good old common sense and political acuity on the part of the Chinese:

... China stands to gain more from a faithful adherence to the Basic Law, to keep promises of autonomy, to permit people of all persuasions to participate in public affairs, to respect rights and freedoms, and to let an independent judiciary enforce the Basic Law and other laws. This is a more effective way to win the loyalty of the Hong Kong people. An adherence to legal norms and consultative and democratic procedures would ultimately also benefit the Central Authorities as they grapple with the difficult task of managing affairs on the mainland as economic reforms and the movement for democracy generate renewed tensions.<sup>19</sup>

This is a book which must be read by anyone interested in constitutional law. That it is mainly about the Basic Law in Hong Kong and China is incidental to the numerous insights into the subject which Ghai offers in his analysis. Of the many books that have been published on the subject, this one goes right to the top of my list.

KEVIN YL TAN

<sup>18</sup> See p 470

<sup>19</sup> See p 471.