

Textualism, structuralism and originalism: the art of the NPC Standing Committee's interpretations of the Basic Law

Jiang Shigong

Law School, Peking University

本文分析了香港回归以来全国人大常委会对香港基本法三次解释中所采用的法律解释方法,包括文本解释、结构解释和立法原意解释等。文章强调“人大释法”在娴熟地采用这些法律解释方法时对法理学说的运用。文章指出,在居港权案中,特区终审法院与人大释法在法律解释方法上的分歧主要在于确定体现立法原意的权威本文的过程中,究竟是采取程序主义的形式审查,还是实质主义的意图推定,这不仅是法律解释方法的不同,而且是法理学说和政治立场的不同。在此基础上,文章批评了立法者不适宜解释法律的流行偏见,呼吁将基本法纳入到国家宪政体制中来理解。

关键词: 人大释法 香港基本法 文本解释 结构解释 原意解释

This paper offers an analysis of the approaches employed in the three interpretations of the Basic Law of the Special Administrative Region of Hong Kong by the Standing Committee of the National People's Congress (NPC) after the return of Hong Kong to China, including textualism, structural reading and originalism. The paper stresses the application of jurisprudential theory in the skilful employment of these methods in the NPC interpretations. In the case of “the right of abode” in Hong Kong the differences between the interpretations by the Court of Final Appeal of Hong Kong and by the NPC rest mainly in whether a formalist procedural review or a substantivist presumption of intent should be adopted in the process of determining an authoritative text that embodies the original intention of the legislation. That is not just a difference of legal interpretation but also one of jurisprudential theory and political stance. Based on the above considerations, this paper criticizes the common misconception that it is not appropriate for legislators to undertake legal interpretation, and calls for an understanding of the Basic Law in the framework of Chinese constitutional government.

Keywords: NPC Standing Committee's interpretations of the Basic Law, Basic Law of the Special Administrative Region of Hong Kong, textualism, structural reading, originalism

I. Introduction

With Hong Kong's return to the motherland, the idea of “one country, two systems” was turned

ISSN 0252-9203

© 2008 Social Sciences in China Press

DOI: 10.1080/02529200802091268

<http://www.informaworld.com>

from a theoretical conception into a political reality through the enactment of the Basic Law of the Hong Kong Special Administrative Region. As a result, both problems concerning the relationship between the Central Government and the Hong Kong Special Administrative Region and the internal problems of the Region are liable to evolve into problems of the Basic Law. Differences, dialogues, consultations and struggles round the interpretations of the Basic Law have been the most conspicuous political topics since Hong Kong's return to China.

Since the return of Hong Kong to China the Standing Committee of the National People's Congress has made three interpretations of the Basic Law.¹ Each interpretation was called in question by some people in Hong Kong, especially legal circles. No doubt, differences in political interests and political or cultural identity played their part in these controversies, but the most important cause is the difference between the continental law tradition of the mainland and the common law tradition in Hong Kong. People in Hong Kong legal circles have been educated in the common law; they believe that judges have a background of rigorous legal training and are therefore capable of interpreting the law. By contrast, in their view, legislators do not necessarily have legal training and are, therefore, not capable of doing so. Therefore, they are psychologically averse to the interpretation of the Basic Law by the NPC Standing Committee. The purpose of this paper is to display the art and technique of the three interpretations of the Basic Law by the NPC Standing Committee in order to refute the Cokeian myth of "artificial reason." Following this first introductory part, the second part will make a concrete analysis of the art of interpretation expressed in the interpretation of the Basic Law by the NPC Standing Committee on April 27, 2005, an interpretation that combines structural reading with originalism. The third part will concretely analyze how the interpretation of the Basic Law by the NPC Standing Committee on April 6, 2004, perfectly integrates legal text, constitutional structure and constitutional jurisprudence. In the fourth part, the focus is put on a comparison between the interpretive method used by the Court of Final Appeal of Hong Kong in its interpretation of the Basic Law in the case of *Ng Ka Ling v. The Director of Immigration* and that used by the NPC Standing Committee in its interpretation of the Basic Law on June 26, 1999. The author particularly points out the possible flexibility of the originalist interpretive method used by the NPC Standing Committee in its interpretation of the Basic Law and develops it into "constructive originalism" in sharp contrast with the formalist understanding of the original meaning by the Court of the Region. In the final conclusions, the author expresses the hope that legal research in China will transcend the "two systems," treating the issue of Hong Kong, especially the issue of the Basic Law, as an organic part of state law, and bringing it into research on Chinese constitutional issues, thus grasping the significance of the constitutional practice of the Basic Law for the development of constitutional government in China at the macro-level.

1 The three interpretations of the Basic Law by the NPC Standing Committee are respectively: interpretation of the right of abode in the Hong Kong Special Administrative Region on June 26, 1999; the interpretation of the annexes to the Basic Law on April 6, 2004; and the interpretation of the term of office of a Chief Executive selected through by-election on April 27, 2005.

II. Structural reading and intentional supplement

The Chief Executive of the Hong Kong Special Administrative Region, Tung Chee-hwa, handed in his resignation on 10 March 2005 to the Central People's Government, which approved it on the 12th of the same month. On the same day, Donald Tsang, the Administrative Secretary of the Special Administrative Region government, began to discharge the duties of the Chief Executive in accordance with the stipulations of the Basic Law. Article 46 of the Basic Law stipulates in clear terms, "The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years." Now the term of office of Tung Chee-hwa began in 2002 and he resigned three years later, in 2005. Then, should the term of office of the newly-elected Chief Executive be the full term of office of five years or the remainder of the term of the previous Chief Executive, i.e., two years? This was the so-called "dispute over whether it should be two or five." On April 7, 2007, the NPC Standing Committee made an interpretation of the Basic Law and decided that the term of office of the new Chief Executive would be the remainder of that of the previous Chief Executive.

1. Structural reading

In terms of the methods of legal interpretation, the first choice has always been the plain meaning method, which bases legal interpretation on the most readily understood, plain and literal meaning. This is because it imposes direct restraints on the court and reduces arbitrariness in judges' legal interpretations. Using this method, legal circles in Hong Kong maintained that the new Chief Executive should hold the position for the full term of five years, on the grounds that Article 46 of the Basic Law clearly stipulates, "The term of office of the Chief Executive of the Hong Kong Special Administrative Region shall be five years. He or she may serve for not more than two consecutive terms."

But we must be aware that the words in legal provisions are different from those in the dictionary, for they are embedded in specific clauses and provisions and, therefore, in using the plain meaning interpretation of legal language we must do so in the context of the whole legal text – a technique of legal interpretation known as textualism.² In the light of textualism, the Basic Law is not a hodgepodge of disconnected provisions but a coherent and integral text. That Article 46 is put in Section 1 of Chapter IV of the Basic Law, not in other chapters and sections or in the Preamble or Annexes, means that this article must be understood in the context of the stipulations in this section about "the Chief Executive." Legal texts, especially law codes, are well structured. Therefore, legal textualism necessarily includes the structural reading, that is, the structural meaning of a specific clause is to be understood through the inherent structure of the Basic Law and the meaning of particular words is defined by such an understanding.³ In this sense we can say that the plain meaning interpretation is liable to make the mistake of failing to

² Antonin Scalia, *A matter of interpretation*; John F. Manning, "Textualism as a nondelegation doctrine," p. 673.

³ Charles Black, *Structure and relationship in constitutional law*; Laurence Tribe, and Michael Dorf, *On reading the constitution*; Laurence Tribe, "Taking text and structure seriously: reflections on free-form method in constitutional interpretation," pp. 1221-1303.

see the forest for the trees, while structural reading requires not only a thorough understanding of the inherent structure of the legal text but also a comprehensive and accurate grasp of the general spirit in which the legislators enacted the law.

Section 1 of Chapter IV of the Basic Law, “The Chief Executive,” includes the following: nature of the Chief Executive (Article 43); qualifications for the post of the Chief Executive (Article 44); the selection and term of office of the Chief Executive (Articles 45 and 46); entrance into office of the Chief Executive (Article 47); powers and functions of and the exercise thereof by the Chief Executive (Articles 48-51); resignation of the Chief Executive (Article 52) and by-election of the Chief Executive (Article 53). These contents are ordered according to two kinds of logic: (1) according to the inherent sequence of time from the selection of the Chief Executive to the exercise of his functions and powers; (2) the Chief Executive in two types of circumstance, the normal and the abnormal. Articles about the Chief Executive’s resignation (Article 52) and by-election (Article 53) stipulate the norms the Chief Executive must abide by in abnormal circumstances, so they are put at the end of this section. This inherent structural logic means that the stipulation in Article 46 refers only to the term of office of the Chief Executive under normal conditions; with regard to the term of office of the Chief Executive in abnormal circumstances, that is, where he has come to office through a by-election, we should first of all take into consideration the stipulations in Article 53 about the by-election of the Chief Executive in abnormal circumstances.

Article 53 of the Basic Law specifies, “In the event that the office of Chief Executive becomes vacant, a new Chief Executive shall be selected within six months in accordance with the provisions of Article 45 of this Law.” This article tells us, as if we were looking up an index, that the determination of the term of office of a Chief Executive selected through a by-election must refer to the stipulations about the selection of the new Chief Executive in Article 45. Article 45 does not include any stipulation about the term of office of such a Chief Executive, but the third paragraph of this article clearly stipulates, “The specific method for selecting the Chief Executive is prescribed in Annex I: ‘Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region’.” Thus guided, we see that Annex I of the Basic Law stipulates in clear terms, “The Chief Executive shall be elected by a broadly representative Election Committee in accordance with this Law and appointed by the Central People’s Government.” (Item 1 of Article 1) “The term of office of the Election Committee shall be five years.” (Item 2 of Article 2) This stipulation means that an Election Committee with a term of office of five years elects, under normal circumstances, the Chief Executive with an anticipated term of office of five years. Of course, if the Chief Executive resigns three years after he takes office, the new Chief Executive will be selected under abnormal circumstances. The term of office of five years of the Election Committee for the Chief Executive means the newly selected Chief Executive will have a term of office of only the remaining two years instead of the full five years because the Election Committee, having a term of office of five years, will not be able to elect two successive

Chief Executives who would remain in office for a total of eight years.⁴

It can thus be seen that the term of office of a Chief Executive selected through a by-election is not provided for in explicit terms by the Basic Law but is hidden in the structure of the legal text. Articles 53 and 45 and Annex I form a well-organized structure with an inherent logic. Only when we understand the inherent structure of the Basic Law in a comprehensive way can we interpret it correctly.

2. The golden rule

A literal interpretation is liable to lead to contradictions among legal clauses and even to an absurd conclusion. If the term of office of a Chief Executive selected through a by-election is interpreted as a full term of five years in accordance with the stipulation in Article 46, two self-contradictions will arise: first, the plain meaning interpretation of Article 46 implies that an Election Committee with a five-year term could elect Chief Executives with successive terms of eight years, which obviously oversteps the power given by the voters when they elect the Election Committee and makes the provisions in Article 46 conflict with those in Annex I of the Basic Law. Second, the plain meaning interpretation would render meaningless the decision of the NPC Standing Committee on issues relating to the method for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008. The Standing Committee of the National People's Congress determined on April 26, 2004 that "The Election of the third Chief Executive of Hong Kong Special Administrative Region to be held in the year 2007 shall not be by means of universal suffrage." Under this precondition, "appropriate amendments that conform to the principle of gradual and orderly progress may be made."⁵ If interpreted literally, the term of office of the Chief Executive selected through a by-election would be from 2005 to 2010, which would mean that there would be no need to amend the method for selecting the Chief Executive in 2007 according to the decision of the NPC Standing Committee and that the decision of the NPC Standing Committee and the consultations of the Special Administrative Region would not be of any value. Such an interpretation clearly contradicts the stipulation in Article 45 and Annex I of the Basic Law that the method for selecting the Chief Executive in 2007 may be amended in accordance with the principle of gradual and orderly progress.

From the perspective of legal interpretation, the interpreter must assume that the contents of a legal instrument are self-justified, coherent and unified and do not contain any conflicts and contradictions; moreover, the legal interpretation must not lead to an absurd conclusion. This is the fundamental rule of legal interpretation, known in common law as the golden rule. It is precisely to avoid mutually contradictory interpretations that the interpretation of the Basic Law by the NPC Standing Committee kept away from the plain meaning method and employed that of structural reading. As Qiao Xiaoyang said, "You may place a special emphasis on the literal meaning of one or the other clause whereas we, while attaching importance to the literal

4 Li Fei, "Explanations on the draft interpretation of paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress."

5 "Decision of the Standing Committee of the National People's Congress on issues relating to the method for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008" (April 26, 2004).

meaning of a clause, stress a comprehensive investigation of other related clauses and the whole institutional design in order to find the meaning closest to what the legislators wish to express.”⁶

3. *Originalism*

All interpretive methods claim to adhere to “what the legislators wish to express” but they differ on the form the legislators use to express their intentions: words, the text, or structure. Once we shift the focus of legal interpretation from legal wording, texts or results to legislators, we must investigate the legislators’ thinking at the time they formulated the law, what their intentions were and what materials of reference value were left in the draft legal instruments. This approach to legal interpretation is called originalism.⁷

The prevalent view is that in the interpretation of the Basic Law the NPC Standing Committee lays stress on originalism, but in the interpretation of the term of office of a Chief Executive selected through a by-election originalism is only supplementary, not dominant. On this occasion in its interpretation of the Basic Law, the NPC Standing Committee used the authoritative materials produced in the process of legislation to prove the legitimacy of its interpretation. First, the drafting process of Article 53 of the Basic Law. In the draft Basic Law released in April 1988 (to solicit opinions), this provision was, “In the event that the office of Chief Executive becomes vacant, a Chief Executive of a new term shall be selected within six months.” In the draft Basic Law released in January 1989 and the Basic Law as officially approved in April 1990, the words “of a term” were removed and the wording “a Chief Executive of a new term” was changed into “a new Chief Executive.” This process of revision fully proves that a Chief Executive selected through a by-election is not one of “a new term” and does not, therefore, have a full five-year term. Second, explanations of the Basic Law provided by Ji Pengfei, Chairman of the Drafting Committee of the Basic Law. There can be no doubt that these are authoritative materials reflecting original intention. Ji Pengfei pointed out that the Chief Executive “shall be elected by a broadly representative Election Committee in the ten years from 1997 to 2007,”⁸ which testifies to the arrangement that in the first ten years after the establishment of the Special Administrative Region there would be two Chief Executives with a term of office of five years each and the two terms of office not extending beyond 2007.

III. Integration of the constitutional structure with principles of constitutional jurisprudence

Starting from 2000, the pan-democrats in Hong Kong raised the question of political development and asked the government of the Special Administrative Region to discuss amending the method

6 Qiao Xiaoyang, “Taking the law on its merits and making friends through law” (Speech at the forum of legal circles in Hong Kong).

7 See Jack Rakove, ed., *Interpreting the constitution: the debate over original intent*; Cass Sunstein, *The partial constitution*; Keith E. Whittington, *Constitutional interpretation: textual meaning, original intent and judicial review*.

8 Ji Pengfei, “Explanations of the Draft Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and related documents.”

for selecting the Chief Executives for the terms subsequent to the year 2007 and forming the Legislative Council in 2008. This involved a key political question: who decides whether the above processes need to be amended? With disagreement among people in Hong Kong over this question, the NPC Standing Committee issued an interpretation on April 6, 2004 and decided that the power to determine whether there is a need to amend one or both of these two processes rests with the Central Authorities. During this interpretation of the Basic Law by the NPC Standing Committee, structural reading remained the important approach. However, in this case the stress was not on partial structure but on the constitutional structure of the whole Basic Law and the constitutional jurisprudence behind it, with an attempt being made at the same time to grasp the legislators' intention or purpose through constitutional jurisprudence. This legal interpretation of the Basic Law by the NPC Standing Committee may be seen as a milestone in the perfection of the principle of "one country, two systems" in respect of constitutional jurisprudence and constitutional structure. It compares well with the case of *McCulloch v. Maryland* in the early days of the United States both in technique of legal interpretation and in practical political significance.⁹

1. Textualism

Annex I and Annex II make the following stipulations with regard to amendments of the method for selecting the Chief Executives and for forming the Legislative Council after 2007:

If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval. (Article 7 of Annex I)

With regard to the method for forming the Legislative Council of the Hong Kong Special Administrative Region and its procedures for voting on bills and motions after 2007, if there is a need to amend the provisions of this Annex, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for the record. (Article 3 of Annex II)

There were two main controversies over the understanding of the two clauses: first, does "if there is a need to amend" mean "there must be an amendment"? In the plain meaning, the phrase "if there is a need to amend" does not mean "there must be an amendment," but means "they may be amended or may remain unamended." In order to reinforce the meaning of the literal interpretation the NPC Standing Committee further adopted textualism in its legal interpretation

9 *McCulloch v. Maryland*.

of the Basic Law and linked the amendment procedure stipulated in the annexes with Articles 45 and 68 in the operative text that prescribe the selection of the Chief Executive and the forming of the Legislative Council. The two articles stipulate respectively that amendment of the method for selecting the Chief Executive and forming the Legislative Council shall depend on the actual situation in the Hong Kong Special Administrative Region and be in accordance with the principle of gradual and orderly progress. Therefore, whether the method for selecting the Chief Executive and forming the Legislative Council need to be amended subsequent to 2007 shall be based on an appraisal of the actual conditions in Hong Kong. Obviously, the Basic Law is future-oriented and adopts an open approach. “If there is a need to amend” can never mean “there must be an amendment”; its meaning must be “there may or may not be an amendment.” Then the second question arises: who determines whether or not there should be an amendment? This was the most controversial part and the crucial point in this legal interpretation of the Basic Law by the NPC Standing Committee.¹⁰ This question has a direct bearing on whether dominant power and decision-making power over the political development of Hong Kong lie with the Central Authorities or the Special Administrative Region.

2. Structural reading of the Basic Law and the Constitution

As seen from the relevant clauses of the two annexes to the Basic Law, there is no stipulation about who is responsible for deciding whether there is a need for an amendment. Superficially, this is a drawback of the Basic Law, but in fact this shows precisely the superb political skill of the Law’s drafters. Against the social background at the time of drafting the Basic Law it was imperative to reach a compromise among the various social strata in Hong Kong and between the Central Government and the Special Administrative Region through consultations; this ambiguity was just a part of the compromise, so that the areas of greatest common ground were written down while the differences were left for time to resolve. In 2004 both the Central Government and Hong Kong society had to face this political hangover from the past: the question of who had the power to determine whether there is a need to amend the method for selecting the Chief Executive and the Legislative Council. This was a test of the relationship between the Central Government and the Special Administrative Region under the principle of “one country, two systems” established by the Basic Law.

In keeping with the literal interpretation, the amendment procedure prescribed in the Basic Law consists of three links, of which the NPC Standing Committee is the last, responsible for approval and recording. The question arising therefrom is: does the responsibility of the NPC Standing Committee in connection with approval and recording represent a substantial or a procedural power? If it is a substantial power, the NPC Standing Committee may exercise a veto, wielding the power “not to approve” or “not to put on record,” which means the NPC Standing Committee enjoys the decision-making power over political development in Hong Kong. However, there may be a political dilemma here: according to the procedure, the Central

¹⁰ “The NPC won’t take up the matter itself unless absolutely necessary: Qiao Xiaoyang answering questions at the press conference held by the Information Office of the State Council.”

Authorities play their role only at the completion of the first two links, i.e., after the Special Administrative Region has amended the methods for forming the Legislative Council and for selecting the Chief Executive. There can be no doubt that this puts the Central Authorities in an unfavorable position. If the Legislative Council and the Chief Executive of the Special Administrative Region passed a motion for amendment unacceptable to the Central Authorities, would the latter approve the motion or put it on record? Such a possible political dilemma is an after-effect of the intentional ambiguity when the Basic Law was drafted. In order to resolve the dilemma, the Central Authorities need to exercise their power at the first link instead of the last, thus turning their passive power into an active one. Different answers to the question of whether the Central Authorities exercise an active and substantive power to make decisions on political development in Hong Kong or only a passive and procedural power of approving (or recording) them lead to different interpretations of who has the right to determine “if there is a need to amend.” There is no clue to this question in the clauses of the two annexes to the Basic Law and so it is impossible to find any answer from the literal interpretation. Since this issue involves the understanding of constitutional structure in China under the principle of “one country, two systems” we must read the two clauses by putting them in the framework of the entire Basic Law and even the Constitution.

In the light of the structure of the Basic Law, Annex I and Annex II are subordinate to Article 45 and Article 68 respectively and the two articles are a component of Chapter IV Political Structure, which, in turn, is based on Chapter I General Principles and Chapter II: Relationship between the Central Authorities and the Hong Kong Special Administrative Region. The political structure of the Special Administrative Region, the relationship between the Central Authorities and the Hong Kong Special Administrative Region and the principles laid down in Chapter I General Principles are all subordinate to the “Preamble” in terms of the structure of the Basic Law. According to the Preamble of the Basic Law, China establishes the Hong Kong Special Administrative Region in accordance with the provisions of the Constitution and enacts the Basic Law to prescribe the systems to be practiced in Hong Kong. Therefore, in understanding the Basic Law we must put it in the framework of the Chinese Constitution and take it as a national law enacted by the NPC. Only when we put it in the framework of the Chinese Constitution will it be possible for us to understand whether the power of the Central Authorities prescribed by Annex I and Annex II to the Basic Law is substantive or procedural and who has the power to determine whether there is a need to amend the methods for selecting the Chief Executive and forming the Legislative Council.

It is for precisely this reason that at the press conference held by the Information Office of the State Council on April 6, 2004, Qiao Xiaoyang, Deputy Secretary-General of the NPC Standing Committee, before explaining the reasonableness and legitimacy of the legal interpretation of the Basic Law by the NPC Standing Committee, expounded at the outset the five “basic concepts”: “the constitutional status of the Basic Law,” “the origin of power for the Special Administrative Region,” “the legal status of Hong Kong,” “the political system of Hong Kong” and “the power of interpretation and amendment of the Basic Law.” Only after he clarified these basic issues did

he set out to address the question of the annexes of the Basic Law.¹¹

3. Principles of constitutional jurisprudence

Once the Basic Law is put in the framework of the constitution and understood as a “national law,” then the understanding of the Basic Law must tally with the understanding of the Constitution. The following principles can be derived from the Chinese constitutional framework:

Firstly, the principle that sovereignty resides in the Central Authorities. The sovereignty of Hong Kong resides in the Central Authorities, which enjoy dominant power and decision-making power over Hong Kong issues. “The Hong Kong Special Administrative Region is a local administrative area with a high degree of autonomy directly under the Central People’s Government. The high degree of autonomy of Hong Kong comes from the authorization by the Central Authorities.”¹² Even during the occupation of Hong Kong by Britain, the Central Government never gave up sovereignty over Hong Kong. In the Sino-British Joint Declaration on the Question of Hong Kong the Chinese side affirmed that it would “resume the exercise of sovereignty over Hong Kong” while the British side affirmed it would “return Hong Kong to the People’s Republic of China,” avoiding the word “sovereignty.” From the principle of constitutional jurisprudence that sovereignty resides in the Central Authorities comes the second principle.

Secondly, the principle of a unitary state system by which the Central Authorities decide local political systems. According to the Constitution, China is a unitary, not a federal, state. The difference in structural form between the two categories of state lies in the different origins of their sovereignty: in a federal state, member states hold sovereignty first and then explicitly invest the federal government with part of that sovereignty, but the “residual powers” not given up still belong to the member states. However, in a unitary state, sovereignty derives from the central government, and the power of a local government, even if it exercises autonomy or a high degree of autonomy, comes from authorization by the Central Government. Articles 1 and 2 of General Principles of the Basic Law specify respectively that “The Hong Kong Special Administrative Region is an inalienable part of the People’s Republic of China” and that “The National People’s Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.” On the other hand, Article 20 of Chapter II further stipulates, “The Hong Kong Special Administrative Region may enjoy other powers granted to it by the National People’s Congress, the Standing Committee of the National People’s Congress or the Central People’s Government.” These provisions show that “the high degree of autonomy” enjoyed by the Hong Kong Special Administrative Region “is neither a full autonomy nor an autonomy to the greatest extent possible, but an autonomy within the limits of authorization in accordance with the Basic Law. We cannot talk about a high degree

11 “The NPC won’t take up the matter itself unless absolutely necessary: Qiao Xiaoyang answering questions at the press conference held by the Information Office of the State Council.”

12 Li Fei, “Explanations on the draft interpretation of Annex I (7) and Annex II (3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress.”

of autonomy without considering authorization in accordance with the Basic Law.”¹³ Within the framework of a unitary state system, any “residual power” that the Hong Kong Special Administrative Region has not been authorized to exercise belongs to the Central Government, not to the Hong Kong Special Administrative Region. Given that Annex I and Annex II to the Basic Law do not explicitly authorize the Hong Kong Special Administrative Region to exercise the power to determine whether there is a need to amend one or both of the two methods, then the power to do so is reserved by the Central Authorities. The Central Authorities enjoy substantive power, not merely procedural power, over the political development of Hong Kong, i.e., over the methods for selecting the Chief Executive and forming the Legislative Council.

Thirdly, the principle of the rule of law. The relationship between the Central Government and the Special Administrative Region is stipulated by the Basic Law, so if any disputes arise between them they should be resolved through the paths prescribed by the Basic Law and through the channels of the rule of law. This means that the legal interpretation of the annexes to the Basic Law by the NPC Standing Committee has the highest authority and that legal circles in Hong Kong must respect the dominant power and decision-making power of the Central Authorities over the political development of Hong Kong.

It is on the basis of the above principles of constitutional jurisprudence that the legal interpretation of the Basic Law by the NPC Standing Committee makes it clear that the Central Authorities enjoy dominant power and decision-making power over the political development of Hong Kong. The “dominant power” means that it is up to the NPC Standing Committee to determine whether there is a need to make an amendment to the methods for selecting the Chief Executive and forming the Legislative Council and the “decision-making power” means that the power of the NPC Standing Committee to the “approve” or “record” the amendment to the methods for selecting the Chief Executive and forming the Legislative Council is substantive and not only procedural.

IV. Reconstructing the original intention and original meaning

Of the three legal interpretations by the NPC Standing Committee, the most controversial and protracted was the interpretation of relevant provisions about the right of abode in Hong Kong. This interpretation arose from the fact that the Court of Final Appeal of the Hong Kong Special Administrative Region made an interpretation of the right of abode in Hong Kong in the case of *Ng Ka Ling v. The Director of Immigration* that triggered extensive discussion in Hong Kong society.¹⁴ This makes it possible for us to make a systematic comparison between the Court of Final Appeal of the Hong Kong Special Administrative Region and the NPC Standing Committee in their different approaches to the legal interpretation of the Basic Law.

13 “The NPC won’t take up the matter itself unless absolutely necessary: Qiao Xiaoyang answering questions at the press conference held by the Information Office of the State Council.”

14 See Chan, Johannes M., H. L. Fu & Yash Ghai, *Hong Kong’s constitutional debate: conflict over interpretation*.

1. Legislative intent: a high degree of autonomy in Hong Kong

Article 158 of the Basic Law seeks to establish a legal interpretation mechanism based on division of labor as well as cooperation between the Central Government and the Special Administrative Region; that is, if the courts of the Region, in adjudicating cases, need to make interpretations of the Law relating to affairs that are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, the courts of the Region shall seek an interpretation of the relevant provisions from the NPC Standing Committee through the Court of Final Appeal of the Region.

The case of *Ng Ka Ling v. The Director of Immigration* involves the relationship between Articles 22 (4) and 24 (2) (3) of the Basic Law. Article 22 (4) belongs to "provisions about the Relationship between the Central Authorities and the Hong Kong Special Administrative Region" in Chapter II of the Basic Law ("provisions beyond the limits of autonomy"). These two provisions are interrelated, but the heart of the matter is whether the "people from other parts of China" in Article 22 (4) and "persons of Chinese nationality born outside Hong Kong" in Article 24 (2) (3) are interrelated; if they are interrelated, then "provisions within the limits of autonomy" inevitably involve matters falling under "provisions beyond the limits of autonomy," and the courts of the Special Administrative Region should therefore seek an interpretation of the relevant provisions from the NPC Standing Committee.

The Court of Final Appeal of the Special Administrative Region is of the opinion that the true meaning of words should be ascertained by the legislative intent and the entire structure of the law. "It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied...in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context,...the courts must avoid a literal, technical, narrow or rigid approach."¹⁵ On the basis of the purposive approach, the Court of Final Appeal of Hong Kong believed that the "legislative intent" of Article 158 of the Basic Law was to confer an independent power of final adjudication on the courts of Hong Kong in order to embody a "high degree of autonomy" for Hong Kong.

Based on this legal reasoning, the Court of Final Appeal of the Hong Kong came to the conclusion that Article 22 (4) has no relation whatsoever with Article 24 (2) (3) for the following reasons: "people from other parts of China" in Article 22 (4) includes persons who enter the Region for the purpose of settlement, but does not include the permanent residents of the Region with the right of abode in accordance with the Basic Law. Based on the general understanding of these words, people who have acquired status of permanent residents of Hong Kong according to the Basic Law cannot be called "people from other parts of China." They are the permanent residents of this part of China, Hong Kong. It is not right to say they are persons who enter the Region for the purpose of settlement. So the legal provisions involved in this case are provisions within the limits of autonomy (Article 24 (2)). The Court of Final Appeal of the Hong Kong

¹⁵ *Ng Ka Ling v. The Director of Immigration*.

therefore held that there was no need for it to seek an interpretation of the relevant provisions from the NPC Standing Committee in adjudicating this case.

The Court of Final Appeal adopted, in fact, a literal and narrow approach to “people from other parts of China” in Article 22 (4) when it made the above interpretation, according to which these people do not include permanent residents of Hong Kong. This means that the Central Government can only administer matters in relation to persons from the mainland of China who try to enter the Region for the purpose of settlement but cannot administer matters in relation to persons who are both Chinese nationals and permanent residents of Hong Kong trying to do the same. Yet this conclusion is absurd because the premise on which the Court of Final Appeal of Hong Kong reached this conclusion was its own interpretation of Article 22 (4) – the “provisions beyond the limits of autonomy.” According to the logic of the Court of Final Appeal’s legal interpretation, any case involving “provisions beyond the limits of autonomy” may be considered by virtue of the legal interpretation of the Hong Kong Court of Final Appeal to be unrelated to these provisions, so there is no need to seek an interpretation of the relevant provisions from the NPC Standing Committee. This would be tantamount to putting the power of interpretation of the entire Basic Law in the hands of the courts of the Region and depriving the NPC Standing Committee of its power of interpretation. The NPC Standing Committee was therefore forced to make its own interpretation of the Basic Law in accordance with the provisions of Article 158 (1).

2. Legislative intent: maintaining the prosperity and stability of Hong Kong

The interpretation by the NPC standing committee on June 22, 1999 corrects, first of all, the interpretation of Article 24 (2) by the Hong Kong Court of Final Appeal and points out, “the interpretation of the Court of Final Appeal of Hong Kong is not consistent with the legislative intent.” It interprets “people from other parts of China” as “people from all provinces, autonomous regions, or municipalities directly under the Central Government, including those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents.”¹⁶ Obviously, this includes the Hong Kong permanent residents defined in Article 24 (2). Meanwhile, the NPC Standing Committee also issued an interpretation of the provisions within the limits of autonomy, Article 24 (2)(3), to the effect that the provisions regarding “persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2)” mean that whether or not the persons concerned were born before or after the establishment of the Hong Kong Special Administrative Region, one or both parents had to have been a Hong Kong permanent resident at the time of the birth.

The purpose of the interpretation by the NPC Standing Committee is to maintain the prosperity and stability of Hong Kong. It is to be noted that the NPC Standing Committee made the interpretation at the request of the government of the Special Administrative Region, which asked the State Council to submit a request for such an interpretation. Before that, the discussion in Hong Kong society about the inflow of a large number of people from the mainland as a result

¹⁶ “The interpretation by the Standing Committee of the National People’s Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China.”

of the judgment in the case of *Ng Ka Ling v. The Director of Immigration* by the Court of Final Appeal had been going on for a long time. In its report to the Central Authorities, the government of the Region pointed out that the judgment by the Court of Final Appeal of the Region would give rise to an inflow of 1.67 million people from the mainland. There could be no doubt that this would put great pressure on Hong Kong society; the land area and social resources of Hong Kong would by no means be able to cope with the new arrivals' demands for education, housing, health care, social welfare and other areas. As a result, the prosperity and stability of Hong Kong would be seriously affected. It was out of consideration for maintaining the prosperity and stability of Hong Kong that the NPC Standing Committee made the interpretation of the provisions of the Basic Law in order to have effective control over the population inflow from the mainland. Thus it could be seen that although both the Court of Final Appeal of the Region and the NPC Standing Committee adopted a purposive approach, they had different understandings of the legislative intent of the Basic Law due to their differences in judicial philosophy. The Court of Final Appeal followed a rights-oriented judicial philosophy and believed the purpose of the Basic Law was to protect the high degree of autonomy of Hong Kong, while the NPC Standing Committee followed a policy-oriented judicial philosophy in its interpretation of the Basic Law and held that the purpose of the Basic Law was to maintain the prosperity and stability of Hong Kong.

3. *Original intention vs. original meaning*

It is worth noting that on this occasion the NPC Standing Committee utilized the originalist method in its interpretation of the Basic Law. There are two approaches to originalism: original intention and original meaning. The former focuses on the actual intention of the legislators while the latter focuses on the way this intention unfolded. Therefore, the interpretation method makes more rigorous demands on original meaning. If we say the interpretation of Article 22 (4) of the Basic Law by the NPC Standing Committee belongs to interpretation of original intention, then the interpretation of Article 24 (2) (3) follows the interpretation of original meaning. The question arising here is: what is the channel through which the original meaning is expressed? The interpreter of the law must furnish official documents, materials or data that can prove the original meaning. It requires that materials embodying the legislative meaning be examined or proved by strict formalist legal procedure. This theory of the original meaning of the legislation with its strict procedure is not concerned with whether some provisions substantively embody the original meaning of the legislators, but only with whether the way they embody the original meaning is able to pass the strict review of legal procedure.

The NPC Standing Committee said in its interpretation of the Basic Law that the legislative intent of Article 24 (2) (3) of the Basic Law was reflected in the "Opinions on the Implementation of Article 24 (2) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" adopted at the Fourth Plenary Meeting of the Preparatory Committee for the Hong Kong Special Administrative Region of the National People's Congress on August 10, 1996. If examined by strict formalist legal procedure, it is difficult to see these "opinions" as authoritative material that records the original meaning of the Basic Law, because this document was worked out only after the Basic Law was enacted, not

during the drafting of the Basic Law. Therefore, jurisprudence infers that this document can only prove what was people's understanding of the Basic Law after it was enacted, not what was the original legislative meaning of the Basic Law during the drafting process.

It is just because of this that in the case of *The Director of Immigration v. Chong Fung-Yuen*, the Court of Final Appeal of the Region voiced an implicit criticism of the NPC Standing Committee over the authoritative material listed in its interpretation as embodying the original meaning of the Basic Law. The Court of Final Appeal opined, "Because the context and purpose of the Basic Law were established at the time of its enactment in 1990, the extrinsic materials relevant to its interpretation are, generally speaking, pre-enactment materials, that is, materials brought into existence prior to or contemporaneous with the enactment of the Basic Law, although it only came into effect on 1 July 1997."¹⁷ This amounts to negating the original meaning of the Basic Law affirmed in the NPC Standing Committee's interpretation. In fact, the mistake in the NPC Standing Committee's interpretation of the Basic Law lies in its confusion of original intention with original meaning, thus putting the Committee in a disadvantageous position in regard to legal method and incurring widespread misunderstanding and criticism from legal circles in Hong Kong.

V. Conclusions

Generally speaking, with regard to the three interpretations of the Basic Law by the NPC Standing Committee, doubts and opposition among Hong Kong legal circles have weakened over time. In part, this is because the NPC Standing Committee has shown increasing skill in interpretation and better command of legal principles in its interpretations of the Basic Law and, at the same time, its work in soliciting opinions and providing the necessary explanations and communication before and after the interpretations has become more regular and effective. On the other hand, this also shows that Hong Kong residents and its legal interpretation elite have gradually accepted the constitutional position of the NPC Standing Committee as the organization of supreme state power. In sharp contrast with the prevalent argument on the mainland that it is a "rubber stamp," in the Hong Kong Special Administrative Region the NPC Standing Committee is truly an organization of supreme state power. This should be attributed not only to the Basic Law, but also to people in legal circles in Hong Kong, for it is because of their unflagging defense of the rule of law – whether rational or otherwise – that the Central Authorities have had to deal with problems concerning the Basic Law, and especially to act in strict accordance with legal procedure. It is no exaggeration to say that, in the case of the Hong Kong Special Administrative Region, the Central Authorities administer state affairs strictly according to law, treating the Region as the most challenging and dynamic element in the whole country.

However, even though political, economic and social life in the Region has become a

17 *The Director of Immigration v. Chong Fung-Yuen*.

component part of “one country,” in knowledge and discourse systems Hong Kong still comes under the field of “regional research” because of the principle of “two systems,” especially in research on the law. Research on the Basic Law has not become an organic part of research on jurisprudence and constitutional jurisprudence; seemingly, it is the business only of a few Basic Law specialists or even a matter of “upholding the law.” This estrangement in theoretical studies makes jurists in the mainland of China generally ignore the rich experience and jurisprudential implications of the interpretations by the NPC Standing Committee of the Basic Law, a constitutional law. Instead, they generally accept the “common law-centric” domination of the US and the UK in the post-Cold-War period, adopt the approach of “constitutional adjudication” and ignore the power of the NPC Standing Committee to interpret the Constitution, a power conferred by the Constitution.¹⁸ This paper refutes, from the angle of legal technique at least, a Cokeian myth in the common law that it is not appropriate for legislators to undertake interpretation of the Law because they have little “artificial reason.” If we try to understand the Basic Law by bringing it into the practice of constitutional government, then the whole development of the framework of constitutional government in China will have a clearer goal, rather than being a matter of idle talk of constitutional review in the context of constitutional adjudication. In the framework of Chinese constitutional government, we should endeavor, in respect of legal principles and the path of institutional development, to promote the standardization and routinization of the interpretation of the Basic Law and then of the Constitution by the NPC Standing Committee; this will certainly serve as an example of induced institutional change and development.

Notes on contributor

Jiang Shigong, Bachelor of Laws (1990), Master of Laws (1996), Doctor of Laws (1999), Associate Professor and Deputy Director of the Law School, Beijing University. Visiting scholar at the Law School of Columbia University, USA (2001-2002). Researcher in the Liaison Office of the Central People’s Government of the PRC in Hong Kong (2004-2007). His main academic interests are legal philosophy, legal sociology, constitutional law, etc.. His representative works include *Legal System and Governance* (法制与治理, 2003), *City-State of Legal Professionals* (法律人的城邦, 2003), *Field of Vision beyond the Law* (超越法学的视野, 2006) and *Legal Philosophy of Law-Makers* (立法者的法理学, 2007).

References

- Black, Charles. *Structure and relationship in constitutional law*. Baton Rouge: Louisiana State University Press, 1969.
- Chan, Johannes M., et al. *Hong Kong’s constitutional debate: conflict over interpretation*. Hong Kong: Hong Kong University Press, 2000.
- “Decision of the Standing Committee of the National People’s Congress on issues relating to the method for selecting the Chief Executive in 2007 and for forming the Legislative Council in 2008” (April 26, 2004) (全

18 Jiang Shigong, “Paradoxes of constitutional adjudication.”

- 人大常委会对香港特别行政区2007年行政长官和2008年立法会产生办法的决定). *People's Daily* (人民日报), April 27, 2004.
- Ji, Pengfei. "Explanations of the Draft Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and related documents" (关于《中华人民共和国香港特别行政区基本法(草案)》及有关文件的说明). In *Basic laws of the People's Republic of China* (中华人民共和国基本法). Beijing: Foreign Languages Press, 1991.
- Jiang, Shigong. "Paradoxes of constitutional adjudication" (宪法司法化的悖论). *Zhongguo shehui kexue* (中国社会科学), 2003, no. 2.
- Li, Fei. "Explanations on the draft interpretation of paragraph 2, Article 53 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress" (关于《全国人民代表大会常务委员会关于〈中华人民共和国香港特别行政区基本法〉第五十三条第二款的解释(草案)》的说明). *People's Daily*, April 28, 2005.
- Li, Fei. "Explanations on the draft interpretation of Annex I (7) and Annex II (3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress" (关于《全国人民代表大会常务委员会关于〈中华人民共和国香港特别行政区基本法〉附件一第七条和附件二第三条的解释(草案)》的说明). *Legality Daily* (法制日报), April 7, 2004.
- Manning, John F. "Textualism as a nondelegation doctrine." *Columbia Law Review*, vol. 97, no. 3 (April 1997).
- McCulloch v. Maryland*, 17 U.S. 316 (1819).
- Ng Ka Ling v. The Director of Immigration*, FACV14/1998.
- Qiao, Xiaoyang. "Taking the law on its merits and making friends through law" (Speech at the forum of legal circles in Hong Kong) (就法论法, 以法会友). *Hong Kong Wen Wai Po* (香港文汇报), April 13, 2005.
- Rakove, Jack, ed. *Interpreting the constitution: the debate over original intent*. Boston: Northeastern University Press, 1990.
- Scalia, Antonin. *A matter of interpretation*. Princeton University Press, 1998.
- Sunstein, Cass. *The partial constitution*. Cambridge, Mass.: Harvard University Press, 1998.
- The Director of Immigration v. Chong Fung-Yuen*, FACV26/ 2000.
- "The interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" (全国人民代表大会常务委员会关于《中华人民共和国香港特别行政区基本法》第二十二条第四款和第二十四条第二款第三项的解释). *People's Daily*, June 27, 1999.
- "The NPC won't take up the matter itself unless absolutely necessary: Qiao Xiaoyang answering questions at the press conference held by the Information Office of the State Council" (非万不得已, 人大不出手: 乔晓阳在国务院新闻办记者会答问). *Ta Kung Pao* (大公报), April 7, 2004.
- Tribe, Laurence. "Taking text and structure seriously: reflections on free-form method in constitutional interpretation." *Harvard Law Review*, vol. 108, no. 6 (April 1995).
- Tribe, Laurence, and Michael Dorf. *On reading the constitution*. Cambridge, Mass.: Harvard University Press, 1991.
- Whittington, Keith E. *Constitutional interpretation: textual meaning, original intent and judicial review*. University Press of Kansas, 1999.

—Translated by Xiao Yun from
Zhongguo shehui kexue (中国社会科学), 2007, no. 5
Revised by Sally Borthwick