

Symposium: China and the International Legal Order

Chinese Canons and the Basic Law: Tracing the Interpretative Shifts of the National People's Congress Standing Committee

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This Article considers the uneasy constitutional relationship between Hong Kong and the People's Republic of China Central Government through the lens of the National People's Congress Standing Committee's interpretations of the Hong Kong Basic Law. These interpretations have constrained and redirected Hong Kong's democratic development, and scholars have appropriately questioned the legitimate extent of the Standing Committee's interpretative authority in light Article 158 and the animating purposes of the Sino-British Joint Declaration Treaty. But the interpretations are less frequently treated as legal texts that both reflect and inform underlying constitutional developments.

This Article therefore evaluates the Standing Committee's normative and methodological commitments over the course of its Basic Law interpretations. While some interpretations are couched in interpretative frames familiar to a common-law audience—making appeals to the text of the Basic Law, to the original intent of the Basic Law's drafting body, or to the precedential weight of previous government decisions or historical practice—others eschew common-law concepts and instead resemble Chinese legislative interpretation of Mainland sources of law. The texts of later interpretations also express an increasingly vertical constitutional arrangement. These interpretative shifts, when considered alongside other historical developments, provide a window into the Standing Committee's changing constitutional posture and the intensifying interactions between common law and Chinese socialist-civil law systems.

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I. INTRODUCTION

Hong Kong has experienced a complicated and uneven form of self-rule and judicial independence from the People's Republic of China's (PRC) Central Government since 1997, when Hong Kong was “handed over” to the PRC from the United Kingdom. Pursuant to the 1984 Sino-British Joint Declaration that defined the terms of the Handover,¹ Hong Kong was to retain its common-law legal system under the authority of the Basic Law—a constitutional-like text, drafted by PRC and Hong Kong officials in the interim years. The “One Country, Two Systems” arrangement thus consisted of the Hong Kong common-law system governed by the Basic Law, separate from the Mainland civil-law system imbued with Marxist-Leninist principles as set by the PRC Constitution. But this arrangement has been destabilized by the Central Government's involvement in Hong Kong's domestic affairs, coming to a head with the Central Government's backing of the 2019 Hong Kong extradition bill² followed by the NPC's 2020 enactment—just a day before the twenty-third anniversary of the 1997 Handover—of a National Security Law, which extended an unprecedented degree prosecutorial authority into the island.³ The Court of Final Appeal (CFA), Hong Kong's highest court, has

1. See *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong: December 19, 1984*, 1399 U.N.T.S. 33, (1984) 23 ILM 1366 [hereinafter *Joint Declaration*].

2. See Holmes Chan, *Beijing's Office in Hong Kong Summons Over 100 Loyalists to Receive Marching Orders on Extradition Bill*, HONG KONG FREE PRESS (May 18, 2019), <https://www.hongkongfp.com/2019/05/18/beijings-office-hong-kong-summons-100-loyalists-receive-marching-orders-extradition-bill> (describing how Director of the Liaison Office Wang Zhimin instructed Beijing loyalists in Hong Kong to support the Hong Kong Administration's efforts); Sum Lok-kei, *Hong Kong Leader Carrie Lam Defends Beijing's Involvement in Extradition Bill Row, Pointing Out Foreign Powers 'Escalated' Controversy*, SOUTH CHINA MORNING POST (May 21, 2019), <https://www.scmp.com/news/hong-kong/politics/article/3011104/hong-kong-leader-carrie-lam-defends-beijings-involvement> (listing the high-ranking CCP officials who publicly endorsed the extradition bill); see also *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, LEGISLATIVE COUNCIL OF HONG KONG (April 8, 2019), <https://www.legco.gov.hk/yr18-19/english/bills/b201903291.pdf>. The bill was formally withdrawn in October 2019.

3. See Shibani Mahtani & Eva Dou, *China's Security Law Sends Chill Through Hong Kong*,

since ruled that it lacks jurisdiction to review the Security Law's compatibility with either the Basic Law or the International Covenant on Civil and Political Rights as applied to Hong Kong,⁴ presaging an ever-uncertain future.

But the Central Government's involvement begins well before 2019, anticipated to some degree by the formal terms of the Basic Law itself. Article 158 vests interpretative power in the NPC's Standing Committee (NPCSC),⁵ a legislative body also responsible for interpreting the PRC Constitution and the legislation passed by the NPC. Since Handover, the NPCSC has interpreted the Basic Law on five occasions, including most recently in 2016 when the NPCSC barred multiple Hong Kong LegCo members from holding office following their purported failure to adhere to the Basic Law's oath-taking provision. In May 2019, the NPCSC seemed prepared to initiate its sixth interpretation—this time, to lay the groundwork for long-awaited national-security legislation by interpreting the Basic Law's Article 23.⁶ Focus quickly shifted that summer to the extradition bill proposed by the Chief Executive,⁷ though an interpretation appeared again to be on the horizon after the Chief Executive withdrew the extradition bill in October 2019. Beijing readied an interpretation to undo the Hong Kong High Court's November 2019 ruling that an emergency anti-mask law, used by the HKSAR Government to crack down on the summer protests, was unconstitutional.⁸ The interpretation never ultimately came, though

23 Years After Handover, WASH. POST (June 30, 2020), https://www.washingtonpost.com/world/asia_pacific/hong-kong-national-security-law-ends-freedom-democracy-china/2020/06/30/c37e5a4a-ba8b-11ea-97c1-6cf116ffe26c_story.html; see also Austin Ramzy & Tiffany May, *Hong Kong Charges 47 Democracy Supporters with Violating Security Law*, N.Y. TIMES (Feb. 28, 2021), <https://www.nytimes.com/2021/02/28/world/asia/hong-kong-security-law-arrests.html> (reporting that Hong Kong police charged forty-seven political protestors with “conspiracy to commit subversion” under the National Security Law, which could carry up to life imprisonment). For the text of the National Security Law and its subsequent promulgation by the HKSAR Chief Executive, see 中华人民共和国香港特别行政区维护国家安全法 [“P.R.C. Law on the Preservation of National Security in the Hong Kong Special Administrative Region”], NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA (July 1, 2020), <http://www.npc.gov.cn/npc/c30834/202007/3ae94fae8aec4468868b32f8cf8e02ad.shtml> (Chinese); G.N. (E.) 72 of 2020, HONG KONG GOV. GAZETTE, <https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf> (HKSAR Logistics Department's English translation); Promulgation of National Law 2020, L.N. 136 of 2020 (June 30, 2020), <https://www.gld.gov.hk/egazette/pdf/20202444e/es220202444136.pdf> (HKSAR Chief Executive's promulgation of the law).

4. HKSAR v. Lai Chee Ying, [2021] HKCFA 3, at § 37.

5. THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA art. 158 (H.K.) [hereinafter THE BASIC LAW].

6. Article 23 bans treason, sedition, succession, or subversion against the central government. Chinese-language media reported on such a possibility. See 人大醞釀為基本法23條釋法 [The NPC Is Contemplating an Interpretation of Basic Law 23], HONG KONG 01 NEWS (April 8, 2019), <https://www.hk01.com/政情/315154/01獨家-權威消息-人大醞釀為基本法23條釋法>. At the time, it seemed as though Chief Executive Carrie Lam may have been preparing to solicit the interpretation from the NPCSC so as to circumvent domestic opposition within the Hong Kong legislature; indeed, when Lam entered office in 2017, she immediately made clear that the passage of a National Security Law was a central goal. See *id.*

7. See *Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019*, *supra* note 3.

8. See Tony Cheung, William Zheng & Gary Cheung, 'No Other Authority Has Right to Make Judgments': China Slams Hong Kong Court's Ruling on Anti-Mask Law as Unconstitutional, SOUTH CHINA MORNING POST (Nov. 19, 2019), <https://www.scmp.com/news/hong-kong/politics/article/3038325/hong-kong-judges-slammed-chinas-top-legislative-body>. In December 2020, the Court

Beijing's message was clear. In a stunning rebuke to Hong Kong judicial independence, Zang Tiewei, spokesman for the NPCSC's Legislative Affairs Commission, stipulated that "[w]hether Hong Kong's laws are consistent with the Basic Law can only be judged and decided by the NPCSC."⁹ Such a position—that the NPCSC's power to interpret the Basic Law is *exclusive* rather than *shared* with the Hong Kong judiciary—would imply that the hundreds of Basic Law interpretations made by Hong Kong courts over the past two decades have been jurisdictionally defective, and represents a radical departure from the NPCSC's longstanding position as reflected in public statements, Basic Law interpretations, and the NPCSC's other legislative acts.¹⁰

These recent references to legal intervention should be understood as the latest phase of a much longer historical arc. While the geopolitical and jurisdictional dimensions of past interpretations have received widespread attention, the texts of the interpretations themselves are often overlooked in popular and academic commentary. But an historically informed, intertextual reading reveals a number of interesting interpretative shifts—including, for instance, a move away from common-law principles and concepts—that provide a window into the changing distribution of power and erosion of Hong Kong's local autonomy.

This Essay unfolds in three subsequent Parts. In Part II, I argue that NPCSC interpretations provide a meaningful marker of the NPCSC's constitutional outlook even in light of legitimate concerns regarding sham constitutionalism and motivated interpretative reasoning. It draws upon recent work on authoritarian and Chinese constitutionalism to argue that Chinese legal institutions apply interpretative principles, albeit unevenly and at times contradictorily, such that NPCSC legal texts still have presumptive hermeneutical value. Part III then considers whether NPCSC interpretations of the Basic Law exhibit a common methodological approach by comparing them along three dimensions: concern for the originating vision of the Basic Law (Section III.A), an emphasis on reason-giving more generally (Section III.B), and consistency with a presumption against retroactive application of new legal rules (Section III.C). Part IV concludes by reflecting on recent crises and the steady unraveling of the shared interpretative commitments that had previously helped stabilized the "One Country, Two Systems" arrangement.

II. THE CHARACTER OF NPCSC INTERPRETATION

In declaring the meaning of particular provisions, NPCSC interpretations can and do reflect assumptions about the source of Basic Law authority and the

of Final Appeal ruled that the mask ban was constitutional and that the government's invocation of its emergency powers without approval from the legislature was appropriate. See *Kwok Wing Hang v. Chief Executive*, [2020] HKCFAR 42, at § 146 ("There is a clear societal benefit . . . when weighed against the limited extent of the encroachment of the protected rights in question.")

9. *Id.*

10. See *infra* Part II.

form of the constitutional relationship. Is the Basic Law a constitutional document generated out of the Joint Declaration agreement that thereby draws its authority from a source outside the PRC Constitution, or is it akin to a statute whose continued validity remains preconditioned upon the PRC Constitution? Such a debate over the Basic Law's status is not merely semantic—instead, it remains central to understanding the contours of “One Country, Two Systems” and the legitimate extent of Hong Kong's local autonomy.¹¹ If the PRC Constitution is foundational or presuppositional to the Basic Law, then it might be said—as former Tsinghua University law school dean Wang Zhenmin recently argued¹² and as is suggested by the text of more recent NPCSC interpretations¹³—that the PRC Constitution governs Hong Kong and remains a particularly salient legal authority on issues not obviously addressed by the Basic Law.

But one might assume that the NPCSC's legal texts are *wholly irrelevant* to an analysis of the Basic Law's status within the “One Country, Two

11. The Joint Declaration provided that the “policies of the People's Republic of China regarding Hong Kong . . . will be stipulated, in a Basic Law . . . , by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.” *Joint Declaration, supra* note 2. On one view, the Basic Law emanates directly from the Joint Declaration and the PRC's promulgation of the Basic Law was pursuant to a joint delegation of lawmaking authority rather than to the PRC Constitution as such. While alterable by the NPCSC to a certain extent and under particular conditions, the Basic Law is a standalone constitutional document. By extension, the NPC Constitution is not embedded within the Basic Law and would therefore not apply to Hong Kong—neither in part nor in full. This view was not uncommon among Mainland scholars and senior CCP officials at the time of the 1997 Handover. For instance, Peng Zhen, then-Chairman of the NPCSC, described how “Article 31 provides that the National People's Congress is empowered to establish special administrative regions. Apart from this, all the Articles of the Constitution are implemented in China, but for [Hong Kong], only Article 31 is applicable. We pursue socialism in our country, but the Hong Kong SAR pursues capitalism and will maintain its capitalist system.” See Johannes Chan & Wing Kay Po, *How China's Constitution Ensured That the Basic Law Remains Pre-Eminent in Hong Kong*, SOUTH CHINA MORNING POST (Aug. 6, 2018), <https://www.scmp.com/comment/insight-opinion/hong-kong/article/2158137/how-chinas-constitution-ensured-basic-law-remains> (noting that Peng Zhen's statement was contained in a document recently declassified by the UK Public Records Office).

Other commentators have sourced the Basic Law's authority in the PRC Constitution. On this view, the Basic Law supplemented and amended the PRC Constitution, and so the PRC Constitution “fully applies” to Hong Kong “apart from areas amended or replaced by the Basic Law.” Speech by Wang Zhenmin at Event in Hong Kong, in *Liaison Office Legal Chief Tells Hong Kong: Basic Law Is Not Your Constitution*, SOUTH CHINA MORNING POST (July 15, 2018), <https://www.scmp.com/news/hong-kong/politics/article/2155297/liaison-office-legal-chief-tells-hong-kong-basic-law-not>. Wang Zhenmin further noted that the Hong Kong constitutional regime “must have the Chinese constitution as root and the Basic Law as supplement,” and that “Hong Kong can have its own law, an independent judiciary, but it cannot have its own constitution.” *Id.*

Still others have carved out a middle path between these classifications of the Basic Law. Owen Fiss, for instance, observed at the time of the 1997 Handover that the Basic Law “is not self-authored by an independent, sovereign people. . . . It is formally a delegation of autonomy to a special administrative region, not a sovereign act of self-definition.” Owen Fiss, *Hong Kong Democracy*, 36 COLUM. J. TRANSNAT'L L. 493, 497 (1998). That said, Fiss argued that the Basic Law was acquiring a “near-permanent status” through social practice akin to constitutionalization: “the Basic Law is entrenched because *they* say it is.” *Id.* at 498.

12. See Su Xinqi, *Chinese Constitution Should Apply in Hong Kong and Basic Law Is Only a Supplement*, Beijing Legal Scholar Wang Zhenmin Argues, SOUTH CHINA MORNING POST (Nov. 29, 2018), <https://www.scmp.com/news/hong-kong/politics/article/2175699/chinese-constitution-should-apply-hong-kong-and-basic-law>.

13. See *infra* Section III.B.2.

Systems” arrangement. I suspect this position is driven less by fidelity to a particular theory of legal interpretation, and more by the belief that the NPCSC’s interpretative practices are thoroughly unbounded—that is, unrestrained by legal norms, institutions, or the need to provide reasons. By extension, NPCSC interpretations are acts of raw power that should not be expected to communicate non-arbitrary explanation or exhibit methodological coherence; subjecting such acts to scrutiny may reveal their baselessness, but would fail to shed light on the *actual* state of the constitutional relationship or the NPCSC’s conception of its own place within it. Worse still, ascriptions of “interpretative principles” or “methods” to the NPCSC may indulge in the illusion of objectivity and impartiality. On this view, the effects of NPCSC interpretations are of urgent geopolitical relevance, but the rhetorical substance of the interpretations should be set aside.

Such disregard is part of a broader concern over the “sham” constitutionalism exhibited by the NPCSC across both the Mainland and the special administrative regions.¹⁴ The 1982 PRC Constitution has not confined the Party’s power to a “cage of regulations”—though it continues to serve rhetorical and propagandistic purposes.¹⁵ In the HKSAR context, it could similarly be said that the NPCSC interpretations of the Basic Law are unrestrained and reverse engineered to the NPCSC’s desired outcome. But the absence of democratic guardrails does not mean that rhetorical substance of NPCSC interpretations is necessarily random or extraneous. Consider, for instance, recent work on authoritarian regimes’ varying uses of constitutions and legality principles, which defies the conventional view that authoritarian constitutions are vacuous “dead letters” through which little can be gleaned.¹⁶ Within the Mainland legal system specifically, law provides an organizing edifice through which the Party delegates legal power and controls lower-level bureaucrats, deals with “hard” legal cases, and binds itself to rules to mitigate internal discord and corruption.¹⁷ Inasmuch law is not functionally irrelevant,

14. See generally David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863 (2013) (defining Chinese constitutional noncompliance, or “sham constitutions,” across several indices).

15. Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the “Urgency” of Political Reform*, 11 U. PA. ASIAN L. REV. 337, 345 (2016) (describing the role constitutional rhetoric played in the 2013 debates between the Socialist Constitutionalists, the Liberals, and the Leftists).

16. *Id.* at 344 (describing the different functions constitutions serve in authoritarian systems); TOM GINSBURG & ALBERTO SIMPSON, CONSTITUTIONS IN AUTHORITARIAN REGIMES 3 (2014) (“As the literature has suggested, constitutions can help authoritarian rulers meet [the challenges of coordinating multiple actors, controlling subordinates, and eliciting cooperation from subjects], in some cases by increasing the ruler’s control and in others by tying the ruler’s hands.”); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANNU. REV. L. SOC. SCI. 281, 282 (2014) (“The volume of new research . . . finds that courts rarely serve as mere pawns of their regimes. Instead, courts more typically become lively arenas of contention, resulting in a ‘judicialization of authoritarian politics.’”).

17. Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION, 82-83 (2010) (arguing that China’s legal system reflects “a ‘thin’ version of the rule of law” because “political power must follow general rules and, although it can alter those rules, it can do so only following previously enacted procedures”); Yu Xingzhong, *Judicial Professionalism in China: From Discourse to Reality*, in PROSPECTS FOR THE PROFESSIONS IN CHINA 78, 90-91 (William Alford et al.

but helps structure Mainland political and administrative regime and the discursive framework of Party politics, the *ways in which* the sources of law are interpreted and construed by the NPCSC and other legal institutions to fulfill these functions deserve our attention.¹⁸

In a similar sense, the NPCSC’s framing of the Basic Law shapes legal and political life at the Mainland’s periphery and communicates the Central Government’s constitutional understanding to key decision-makers in the Mainland and Hong Kong alike. Breaks in interpretative practice may very well reflect ideological shifts within the NPC and developments in the constitutional relationship. They also reflect inconsistencies and contradictions in the NPCSC’s own approach, which can be used to sharpen criticism of NPCSC practice by drawing principled normative distinctions *between* interpretations. The 2016 interpretation that disqualified legitimately elected Legislative Council (LegCo) members, for instance, broke with many of the interpretative principles described in Part II, though criticism from Hong Kong civil society groups and the international community has largely rested on a symbolically important but analytically slippery distinction between *interpreting* and *rewriting* law.¹⁹ Critical examinations of the interpretation from the internal standpoint of the NPCSC’s own past practices can provide additional grounds for criticism and help supplement these accounts accordingly.

II. THREE INTERPRETATIVE DEVELOPMENTS

Though the Hong Kong judiciary’s approach to Basic Law interpretation has received some attention,²⁰ the NPCSC’s interpretative approach across the

eds., 2011) (describing how local administrators defer to courts to “deal with ‘hard cases’ . . . [and] solve administrative headaches”); Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 VA. J. OF INT’L LAW 306, 309-10 (2019) (arguing that the CCP’s recent centralization of power, especially since the 2018 constitutional amendments, has been highly legalistic, “empowering courts against other state and Party entities, insisting on legal professionalism, and bringing political powers that were formerly the exclusive possession of the Party under legal authorization and regulation”). *But cf.* Donald C. Clarke, *Order and Law in China*, George Wash. L. Faculty Publications & Other Works, at 5 (2020), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2762&context=faculty_publications (arguing that observed “inconsistencies” in Chinese legal institutions do not necessarily reflect a convergence toward legality or a move away, and that we must instead “leave open the possibility that the vocabulary and concepts of legality are not the best way to understand the institutions and practices we are looking at”).

18. The NPCSC’s approach to interpreting Mainland source of law remains opaque. *See* Albert Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives*, 30 HONG KONG L.J. 380, 416 (2000) (noting that the absence of clear canons of constitutional construction and interpretation “is understandable given the paucity of acts of legislative interpretation in the PRC legal system, and the fact that most of the judicial interpretations issued by the Supreme People’s Court are in effect subsidiary legislation designed to supplement and elaborate on existing laws”). Chen observes that the 2000 Law on Legislation did codify very general interpretative principles, including that “laws will not normally have retrospective effect [and] where there is inconsistency between two legal norms enacted by the same organ, the one later in time will prevail.” *Id.*; *see* 中华人民共和国立法法 [*P.R.C. Legislation Law of the People’s Republic of China*], ch. 5, art. 83-85 (promulgated by the NPCSC March. 15, 2000, effective July 1, 2000) [hereinafter *Law on Legislation*].

19. *See infra* notes 69-75 and accompanying discussion.

20. Albert Chen has previously analyzed early instances of the Hong Kong judiciary’s interpretation of the Basic Law within the framework of Philip Bobbitt’s constitutional modalities. *See*

complete set of five interpretations to date—issued in 1999, 2004, 2005, 2011 and 2016²¹—has often been overlooked. This Part traces the NPCSC’s changing interpretative approach across three dimensions.

Section III.A begins by observing the NPCSC’s early, express commitment to an original-intent-based approach that it has since abandoned. Section III.B then describes the NPCSC’s uneven attention to reason-giving more generally. Only some of the interpretations contain argumentation and invoke broader legal or normative standards, including appeals to the text of the Basic Law, to the originating vision or intent of the Basic Law’s drafting body, or to the precedential weight of previous interpretations. But other interpretations deemphasize reason-giving, and instead resemble the NPCSC’s infrequent interpretations of Mainland sources of law, where explanation is not typically provided per Chinese legal traditions of legislative interpretation.²² Section III.C then describes the NPCSC’s breaks with certain substantive interpretative commitments. In particular, the 2016 interpretation abrogated a rule against retroactive application—a staple of British common-law interpretation that helped rationalize the “One Country, Two Systems” shared power arrangement after the Handover. Perhaps unsurprisingly, when examined together and placed in historical context, the later interpretations suggest a verticalized and less independent constitutional arrangement than do earlier interpretations.

A. *The Waning Emphasis on Original Legislative Intent*

The third paragraph of the Joint Declaration provides that the Hong Kong government should be “vested with executive, legislative and independent judicial power, including that of final adjudication.”²³ This power of final adjudication was further codified in Article 82 of the Basic Law.²⁴ Still, Article 158 provides that “the power of interpretation of this Law shall be vested in the [NPCSC].”²⁵ Come the transfer of sovereignty over Hong Kong in July 1997, it became necessary to reconcile these seemingly opposing powers of Hong Kong

Chen, *supra* note 19, at 417-31. Chen observes that the Hong Kong courts had significant experience in constitutional interpretation and judicial review during the British colonial period, and that common-law interpretative principles as applied by the Privy Council of the United Kingdom were continuing, at least as of 2000, to shape the judiciary’s approach to Basic Law interpretation. *See id.* at 419. For a window into the Privy Council’s purposive approach to constitutional interpretation, see *Attorney General of the Gambia v. Jobe*, [1985] LRC (Const) 556, 565, which stipulated that “[a] Constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction.”

21. *See The Five Cases of HKSAR Basic Law Interpretation by the PRC NPCSC in 1999, 2004, 2005, 2011 and 2016*, 50 CHINESE L. & GOV. 9 (2018) [hereinafter *The Five Cases*].

22. *See* Hualing Fu, *Guide to Legislative Interpretation in China*, HKU LEGAL SCHOLARSHIP BLOG (July 19, 2017 11:37 PM), <http://researchblog.law.hku.hk/2017/07/guide-to-legislative-interpretation-in.html> (“When the Standing Committee decides that credit card includes debit card, cultural relic includes fossils of ancient vertebrates, and court order includes a mediation agreement, it, in its typical manner, does not offer explanations.”).

23. *Joint Declaration*, *supra* note 2.

24. THE BASIC LAW art. 82.

25. *Id.* art. 158, cl. 1.

final adjudication (per the Joint Declaration and Article 82) with NPCSC final interpretation (per Article 158)—a bifurcation that makes some sense in the Chinese civil law context where interpretation is done legislatively and not judicially, but that is far less intuitive in a common-law context where adjudication and interpretation converge in one branch of government. As early as 1997, lawyers and the legal academy raised concerns that NPCSC interpretative authority was irreconcilable with a meaningfully independent Hong Kong judiciary.²⁶

Such was the dilemma faced by the CFA in *Ng Ka Ling v. Director of Immigration*—the seminal 1999 case that led to the NPCSC’s first major interpretation of the Basic Law.²⁷ The case concerned the legal status of children born in the Mainland who had at least one parent with the right to abode in Hong Kong. The CFA interpreted Article 22(4) and Article 24(2) of the Basic Law—provisions that outlined the categories of permanent residency in Hong Kong—to require that broad classes of non-resident children be granted the right to abode. So as to reconcile Hong Kong “final adjudication” power with NPCSC “final interpretation” power, the CFA stipulated that the NPCSC’s power of interpretation was freestanding and plenary—that is, an interpretation could theoretically be issued by the NPCSC at any time without solicitation from an HKSAR authority.²⁸ But the CFA also noted that it would only refer future cases to the NPCSC if those cases implicate foreign policy or cross-border issues of particular concern to PRC sovereignty.²⁹

Moreover, the CFA noted that Article 158(3) prevents NPCSC interpretations from affecting “judgments previously rendered,”³⁰ such that the NPCSC’s newly recognized plenary power of interpretation would be compatible with the Hong Kong judiciary’s power of final adjudication.³¹ The CFA determined that this way of reconciling final interpretation and final adjudication—though not provided for in the Basic Law—would best satisfy Article 158’s dual goals of (1) authorizing Hong Kong courts to interpret the Basic Law as applied to Hong Kong’s domestic legal and political life and (2) satisfying the express requirement that the power of final interpretation be

26. See, e.g., The Association of the Bar in the City of New York: The Committee on International Human Rights, *Preserving the Rule of Law in Hong Kong After July 1, 1997: A Report of a Mission of Inquiry*, 18 U. PA. J. INT’L ECON. L. 367, 384 (1997) (expressing the concerns of Hong Kong lawyers and legislators that the Article 158 mechanism would be expansively construed by the NPCSC to “seriously undercut the S.A.R.’s autonomy and the independence of its courts”).

27. *Ng Ka Ling v. Dir. of Immigration*, [1999] 1 H.K.C. 291 (C.F.A.), reprinted at 38 I.L.M. 551 (1999).

28. *Id.* at 567.

29. *Id.*

30. *Id.* at 564.

31. In other words, the CFA’s judgment in an adjudication would only be abrogated if an NPCSC interpretation were *itself* to dispose of a case. In *Ng Ka Ling*, for instance, the NPCSC’s interpretation of Articles 22 and 24 repudiated and replaced the CFA’s interpretation of these provisions but did not affect the parties themselves. An NPCSC interpretation would erase the precedential effects of the previous CFA interpretation reached in the course of the particular adjudication, but would not alter the judgment.

vested with the NPCSC.³² From the standpoint of today, this scheme may appear to have sanctioned a sweeping view of NPCSC interpretative authority furthering the erosion of Hong Kong autonomy.³³ But at the time, the CFA's reasoning was understood by many to strategically and creatively carve out a space for judicial independence in the following ways.

First, *Ng Ka Ling* emphasized the importance of individual rights for Hong Kong residents, Hong Kong's political autonomy, and the central role of the Basic Law in the HKSAR legal system.³⁴ Second, the CFA seemed to winnow down the number of future referrals to the NPCSC by construing Article 158(3) as a limiting principle; that is, only cases that implicated PRC affairs would be referred. The viability of this principle turns on the assumption that the NPCSC would be unwilling or unable to issue *unsolicited* interpretations. This assumption would quickly prove false come 2004 when the NPCSC issued—without solicitation—its second major interpretation, though in 1999 the assumption was not unreasonable.³⁵ Third and most importantly for understanding early interpretative methodology, the CFA used the *Ng Ka Ling* decision to set forward a purposive, flexible, common-law-inflected interpretative framework that would allow legal development outside the textual confines of the Basic Law, which was understood to contain a number of explicit references to PRC objectives.³⁶ This dynamic approach to the “living”³⁷ Basic Law heralded by the CFA in *Ng Ka Ling* and since applied

32. See Todd Schneider, *David v. Goliath: The Hong Kong Courts and China's National People's Congress Standing Committee*, 20 BERKELEY J. INT'L LAW 575, 585 (2002).

33. At the time of the decision, a number of commentators admonished the CFA for its affirmation of NPCSC plenary interpretative power and predicted that the decision would erode the region's autonomy. See, e.g., Paul Gewirtz, *Approaches to Constitutional Interpretation: Comparative Constitutionalism and Chinese Characteristics*, 31 HONG KONG L.J. 200, 222-23 (2001) (“[T]he CFA spoke in unnecessarily sweeping utterances about ultimate powers. In particular, the Court said that the NPCSC's power to make ‘binding’ interpretation of the Basic Law is ‘general and unqualified,’ apparently including Basic Law provisions involving matters ‘within . . . the autonomy of Hong Kong’ . . . Since no issue involving a purely local matter was involved in the case before it, I think the CFA should not have conceded the issue pre-emptively.”); *Rewriting the Basic Law*, ASIAN WALL ST. J., Jan. 23, 2001, at 6; Schneider, *supra* note 31, at 586.

34. See Karmen Kam, Note, *Right of Abode Cases: The Judicial Independence of the Hong Kong Special Administrative Region v. The Sovereign Interests of China*, 27 BROOK. J. INT'L L. 611, 624 (2002).

35. Leading up to the 1997 Handover, Hong Kong and PRC officials alike noted that the inclusion of the NPCSC's power of interpretation in Article 158 was “principally . . . a symbolic gesture to Beijing” that lacked practical import. *Id.* at 618; see also Joseph R. Crowley Program, *Tenth Annual Philip D. Reed Memorial Issue Special Report: One Country, Two Legal Systems?*, 23 FORDHAM INT'L L. J. 1, 12, 12 n.37 (1999) (noting that government officials on both sides claimed that “the NPCSC's power of interpretation through referral, as well as its general power of interpretation, were specified mainly as a symbolic gesture to Beijing and would never actually be used”).

36. At the time of Handover, some commentators believed the Basic Law contained explicit overtures to Chinese policy objectives not necessarily shared by Hong Kong's government or society. See Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335, 350-52 (1997) (noting that the Basic Law could be read as Beijing's “political manifesto”).

37. In *Ng Ka Ling*, the CFA characterized the Basic Law as “a living instrument intended to meet changing needs and circumstances” that should be interpreted through a consideration of “the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context.” *Ng Ka Ling*, 38 I.L.M. at 563.

by Hong Kong courts could provide a liberating interpretative flexibility to facilitate democratic development.³⁸ According to the CFA, “the courts must avoid a literal, technical, narrow or rigid approach” in accordance with common-law principles to preserve the values animating the “One Country, Two Systems” arrangement.

But the HKSAR Government sought to nullify the CFA ruling, given its belief that enforcing the CFA decision and expanding the right of abode would precipitate an immigration crisis.³⁹ Though HKSAR Chief Executive C.H. Tung could have pursued a legislative amendment to the Basic Law, he ultimately decided to seek a reinterpretation of Article 22(4) and 24(2) from the NPCSC. In the solicitation report to the PRC State Council, Tung noted that the CFA’s interpretation “is different from the [Hong Kong Government’s] understanding of the wording, purpose and legislative intent of these provisions,” and that therefore the NPCSC should interpret the relevant provisions “according to the true legislative intent.”⁴⁰ While Tung’s request for the NPCSC interpretation was deemed *ultra vires* by broad swaths of the Hong Kong legal community,⁴¹ the State Council soon after motioned for the NPCSC to issue an interpretation. In opposition to the CFA’s purposive outlook, the NPCSC’s first interpretation would declare original legislative intent to be the touchstone of Basic Law meaning.

1. Early References to Legislative Intent

The NPCSC begins its interpretation of Article 22(4) and 24(2) by observing that the CFA’s *Ng Ka Ling* decision “does not conform to the original legislative intent.”⁴² The interpretation proceeds to state that the Basic Law provisions support a right of abode much narrower than that defined in *Ng Ka Ling*, but does not explicate why this reading of the provisions are preferable to the CFA’s reading. Instead, the interpretation simply states that “[t]he original legislative intent expressed in this Interpretation . . . w[as] reflected in the ‘Opinion on Implementing Article 24 Clause 2 of the PRC Hong Kong Basic Law’” that was adopted at a 1996 plenary session of the

38. The CFA has developed important areas of law that are underdefined or go unmentioned in the Basic Law. Strict adherence to Basic Law text would have made such developments difficult to justify. See Eric Ip, *The Politics of Constitutional Common Law in Hong Kong Under Chinese Sovereignty*, 25 WASH. INT’L L. J. 565, 566-67 (describing the common-law-like development of remedies for breaches of the Basic Law, including remedial interpretation and declarations of invalidity).

39. The Hong Kong administration estimated that 1.67 million Mainland children would acquire the right of abode over the seven years after the decision. This figure was criticized for being a gross overestimation. See Kam, *supra* note 33, at 624 n.107.

40. C.H. TUNG, CHIEF EXECUTIVE, HONG KONG SPECIAL ADMINISTRATIVE REGION, REPORT ON SEEKING ASSISTANCE FROM THE CENTRAL PEOPLE’S GOVERNMENT 4 (May 20, 1999), https://www.basiclaw.gov.hk/en/materials/doc/1999_05_20_e.pdf.

41. See Joseph R. Crowley Program, *Tenth Annual Philip D. Reed Memorial Issue Special Report: One Country, Two Legal Systems?*, 23 FORDHAM INT’L L. J. 1, 27-29 (1999).

42. *The Five Cases*, *supra* note 21, at 10-11.

Basic Law Preparatory Committee.⁴³ Though the interpretation does not clarify how original intent should be ascertained, the invocation of the pre-enactment plenary session suggests that legal meaning is at the least informed, if not entirely controlled, by what the Basic Law’s drafters believed it to be.⁴⁴

Historically, Chinese constitutionalism has emphasized an evolutive and elastic approaches to interpretation.⁴⁵ In the context of contemporary “One Country, Two Systems” politics, one might suggest that flux in the constitutional equilibrium is part of this *longue durée* of constitutional adaptation and change—and thereby identify a tension between the PRC’s history of repeated constitutional revision and the NPCSC’s narrowly original intent-based methodological approach. Within such a framework, the interpreter ascertains and retrieves what has already been decided by an earlier, unvarying, and notably pro-PRC authority—after all, the members of the PRC-Hong Kong Preparatory Committee were all from Mainland China.⁴⁶ The NPCSC’s use of original legislative intent thus conveys that Hong Kong society—past and present alike—has only a marginal place within the Basic Law’s authorial ambit.

In light of this battle between purposive and original intent-based interpretative methodologies and the NPCSC’s early endorsement of the latter, scholars have tended to assume that the NPCSC’s commitment to original intent has extended beyond the first interpretation.⁴⁷ On this view, original

43. *Id.* at 11.

44. The NPCSC’s implied conception of original intent could be characterized in the lexicon of Western constitutional theory as “original expected applications” originalism. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 446 (2007). According to “New Originalism” proponents like Balkin, the literal, original expected application of a constitutional text is distinct from the text’s original meaning and should not be relied upon. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292-93 (2007) (“[T]he expected application of constitution texts . . . is not binding law” but “the original meaning . . . is.”). *But cf.* John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 374 (2007) (arguing that there is convergence between expected applications and original meaning because the enactors of a legal text “would have believed that [the text’s] future application would be based [on] the interpretative rules accepted at the time” and so “assessment of the meaning and the desirability of the Constitution would depend on the interpretive rules that they thought would apply”).

45. Comparative constitutionalists tend to contrast the “continuous evolution of the PRC Constitutions” with the slower-paced, “zombie”-like development of the ROC Constitution. Chien-Chih Lin, *Constitutions and Courts in Chinese Authoritarian Regimes: China and Pre-Democratic Taiwan in Comparison*, 14 INT’L J. CONST. LAW 351, 375 (2016). Mainland Chinese “Socialist Constitutionalist” scholars, especially during the 2013 debates over constitutional reform, justified the need for state-directed and Party-led reforms within the frame of the PRC constitutional tradition of continuous repeal and revision. See Kellogg, *supra* note 16, at 386.

46. The Basic Law Drafting Committee consisted of fifty-nine people, all handpicked by the Chinese Communist Party and approved by the NPCSC. See Eric C. Ip, *The Politics of Constitutional Common Law in Hong Kong Under Chinese Sovereignty*, 25 WASH. INT’L L. J. 565, 572 (2016); Liu Yiu-Chu, *Interpretation and Review of the Basic Law of the Hong Kong Special Administrative Region*, 2 J. CHINESE L. 49, 51 (1988). It should be noted that Martin Lee Chu-ming was one of the selected fifty-nine members, though Chu-ming is now a central figure in the Hong Kong Democratic Party.

47. See, e.g., Yvonne Tew, *Comparative Originalism in Constitutional Interpretation in Asia*, [2017] SING. ACAD. L. J. 719, 739 (“NPCSC, on the other hand, has not hesitated to refer to the original intent of the drafters of the Basic Law in its interpretations of the constitutional document. Reliance on

intent remains tied to Central Government interests and preferred outcomes.⁴⁸ But that assumption is in need of historical qualification, as the constitutional equilibrium point, especially in light of the 2020 National Security Law, has dramatically shifted in the direction of Central Government control. Around the time of the first intervention, a dynamic and evolutive approach to the Basic Law would have suggested transformative democratic possibility. But given the worsening state of today's "One Country, Two Systems" relationship, it is a supreme irony that Hong Kong autonomy would be more robust in the world "originally intended" by the Basic Law's drafters than compared to today's reality.

2. *The NPCSC's Departure from Legislative Intent*

Significantly, none of the four subsequent NPCSC interpretations reference legislative history or original intent, and thus the assumed association between the NPCSC and original intent-based canons of interpretation should be reconsidered. It is true that Party leaders like Li Fei, currently the Chairperson of the NPC Constitution and Law Committee, have on occasion invoked legislative intent in public speeches over the course of subsequent interpretations.⁴⁹ Still, the absence of such references in the actual, enacted texts of the interpretations suggests that the NPCSC has shifted away from original-intent methods since *Ng Ka Ling* and the first interpretation.

Most recently, in the wake of the Hong Kong High Court's striking down of the mask ban, the Hong Kong and Macau Affairs Office of the State Council released a statement stipulating that the emergency powers ordinance (pursuant to which Chief Executive Carrie Lam promulgated the mask ban) is compatible with the Basic Law specifically because the Basic Law's enactors chose not to

legislative materials related to the drafting and enactment of the Basic Law form part of NPCSC's interpretative approach."); Simon Young, *Legislative History, Original Intent, and the Interpretation of Basic Law*, in INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE 15, 16 (Hualing Fu, Lison Harris & Simon N M Young eds.) (2007) ("The NPCSC treats legislative materials as a primary source for interpretation. Such materials are intrinsic to an interpretative approach based on the original intent of those responsible for drafting and enacting the Basic Law. While the intention sought is an original one . . . , the approach does not preclude post-enactment (post-1990) materials from being used as evidence of the original intention.").

48. As framed by Albert Chen after the first interpretation, "If the original intent were to be given effect to, does this mean that the Basic Law would have to be interpreted in accordance with mainland Chinese thinking?" Albert H.Y. Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives*, [2000] HONG KONG L.J. 380, 421.

49. Then-Deputy Director of the NPCSC Legislative Affairs Committee, Li Fei noted in his explanation of the draft of the third interpretation, which he gave by speech to NPCSC lawmakers at the 15th session of the 10th NPCSC on April 24, 2005, that the interpretation was consistent with the "original legislative intent" of Article 53. See Albert H.Y. Chen, Comment, *The NPCSC's Interpretation in Spring 2005*, 35 HONG KONG L. J. 255, 258 (2005); *infra* Section II.B.2 *infra* for additional discussion. Similarly, Li Fei noted in a speech in 2016—while in his capacity as Chairman of the Basic Law Committee and soon after the fifth interpretation was promulgated—that "[i]nterpretations are explaining the legislative intent of an article, [and are] not a new legislation in itself Its validity is included in the validity of the law that it seeks to explain." Tony Cheung, *Beijing Interpretation of Article 104 Needed for a City in Jeopardy: Chairman of Basic Law Committee*, SOUTH CHINA MORNING POST (Nov. 7, 2017, 11:30 PM), <https://www.scmp.com/news/hong-kong/politics/article/2043737/beijing-interpretation-article-104-needed-city-jeopardy>.

override the ordinance in February 1997.⁵⁰ It remains to be seen whether the NPCSC will return to selectively invoking original intent or historical precedent along these lines in future legal controversies.

B. Circumstantial Reason-Giving

The NPCSC's practice of providing reasons for its interpretative decisions has been uneven. Explanations based in shared reasons and interpretative material legible to Hong Kong society were provided in the first, third and fourth interpretations, all of which were solicited. But the second and fifth interpretations—both unsolicited and reflecting questionable readings of the Basic Law—refer to Basic Law text but otherwise lack justification. In light of the relationship between reason-giving and solicitation, this Section argues that the two modes of interpretation track fundamentally different political theories. For the solicitations, the NPCSC has functioned like an apex adjudicator reconciling interests at the boundary of two legal regimes by borrowing principles from each. But in the context of unsolicited interpretation, the NPCSC has intervened without regard for shared legality principles—in what are acts of raw power without even the pretense of legal constraint—to redirect and upend local decision-making.

1. Unsolicited: The Second and Fifth Interpretations

The NPCSC's second interpretation concerned the electoral process for selecting the HKSAR Chief Executive. Issued without solicitation in April 2004,⁵¹ the interpretation construed various Basic Law provisions to require that the HKSAR Government obtain final approval from the NPC before amending the Basic Law's annexes—which define the process for electing the Chief Executive and LegCo members as well as LegCo's rules of legislative procedure. Without providing justification or reasons, the interpretation only announces that “[t]he Chief Executive of the Hong Kong Special Administrative Region shall submit a report to the Standing Committee of the National People's Congress if there is a need to amend the methods or voting procedures, which shall be decided upon by the [NPCSC].”⁵² The unsolicited interpretation drastically expanded the Central Government's authority and ruptured the constitutional equilibrium from five years prior that had carefully sought to square the CFA's and NPCSC's respective powers of adjudication and interpretation. Though unsolicited interpretations from the NPCSC may have been ultimately unavoidable, it is worth considering counterfactual paths along which the *Ng Ka Ling* Court had not declared NPCSC interpretative

50. See Cheung et al., *supra* note 9.

51. *The Five Cases*, *supra* note 21, at 11-12; see Mark R. Conrad, *Interpreting Hong Kong's Basic Law: A Case for Cases*, 23 PACIFIC BASIN L.J. 1, 2, 17-18 (2005) (“[T]here was no concrete legal dispute, no lower court decision, no legislative resolution, and no request from the HKSAR administration to provide guidance . . .”).

52. *The Five Cases*, *supra* note 21, at 11-12.

power plenary.⁵³

A second unsolicited interpretation would occur twelve years later and in dramatic form come the oath-taking saga of 2016 (the NPCSC's fifth interpretation of the Basic Law). On November 7, 2016, the NPCSC interpreted Article 104 of the Basic Law to bar a number of young, newly-elected Hong Kong legislators from taking office. After the legislators had publicly slurred the oath in acts of protest, the NPCSC "clarified"⁵⁴ the Article 104 requirement to mean that a person who takes the oath in a manner "not sincere or solemn"⁵⁵ would be prevented from ascending to office without an additional opportunity to take the oath again. Like the second interpretations, this interpretation amounts to a series of imperatives regarding Basic Law meaning that eschews reason-giving. For instance, the interpretation instructs that "[t]he oath taker intentionally giving an oath different from that stipulated by law or not sincerely and solemnly making the oath also counts as refusing to give the oath"⁵⁶ But the interpretation does not attempt to describe why *this* interpretation should be preferred to other plausible readings of Article 104. Further analysis of the fifth interpretation is taken up in Section III.C.

2. Solicited: The First, Third, and Fourth Interpretations

On April 6, 2005, the HKSAR Government's Acting Chief Executive Donald Tsang requested an interpretation of Article 53(2) from the NPCSC.⁵⁷ Tsang had become Acting Chief Executive after the previous Chief Executive, Tung Chee-hwa, resigned his tenure two years early. The Basic Law was ambiguous as to the length of term a newly appointed Chief Executive should serve after a resignation, as the Article 46 text provides for five-year terms but does not specify whether this same rule governs replacements. Consistent with the HKSAR Government's preferred position, the NPCSC construed Annex I to require that the new Chief Executive's tenure run for the remaining two years of the term—not through a new, five-year term.

The solicitation report, which was circulated widely by the HKSAR Government in the days leading up to the NPCSC interpretation, noted that the Government faced a "practical" need to reach a definitive interpretation quickly to put the appropriate legislation in place before the special election—the delay of which could disrupt financial markets and government operations, and "even could precipitate a constitutional crisis."⁵⁸ The report also described how the

53. See *supra* note 33 and accompanying text.

54. *Id.* at 17.

55. *Id.*

56. *Id.*

57. Report from Acting Chief Executive Donald Tsang to the State Council Concerning the Submission of a Request to the Standing Committee of the National People's Congress Regarding the Interpretation of Article 53(2) of the Basic Law, ON THE RECORD NEWS.GOV.HK (April 6, 2005), <https://www.news.gov.hk/isd/ebulletin/en/category/ontherecord/050406/html/050406en11002.htm#>.

58. *The Five Cases*, *supra* note 21, at 13.

government had “hoped to avoid seeking an interpretation to resolve the issue as much as possible,” framing NPCSC review as a matter of last resort given practical exigencies, and thus implying that there are downsides to such a solicitation.⁵⁹ While the solicitation report did not itself argue for the “remaining term” rule, the Government formally introduced an amendment to the Chief Executive Election Ordinance announcing this view on the same day the report was issued.⁶⁰

The interpretation itself consists of a set of interlocking propositions: it notes that Article 53 Clause 2, which describes how a Chief Executive vacancy must be filled within six months, assumes that the electoral process accords with the method set forth in Article 45 Clause 3, which in turn refers to the procedures described in Annex I.⁶¹ The interpretation concludes by construing Annex I to require the “remaining term” approach.⁶² Mapping the propositional steps in this manner arguably amounts to a kind of justification for the decision.⁶³ But none of interpretations of the individual propositions are themselves justified. Therefore, the interpretation would seem to substantively resemble the unsolicited second and fifth interpretations—which lack justification entirely—more than the solicited first and fourth interpretations.

That said, public speeches by NPCSC officials at the time did supplement the interpretation with various justifications. For instance, Li Fei, then-Vice Chairman of the NPCSC Legislative Affairs Commission, argued that the legislative history and earlier drafts of Article 53 supported the “remaining term” reading.⁶⁴ Significantly, Li also argued that the year 2007—ten years after Handover—had long been assumed to mark a potential turning point in “One Country, Two Systems” relations, including a move to greater democratization within the HKSAR political system.⁶⁵ Ensuring that the next election would occur in 2007, in a moment of potential political renewal, was therefore responsive to the expectations of the Hong Kong public. In light of

59. *Id.* But as noted by the Hong Kong Bar Association, there were many pending judicial review applications at the time that would have brought the same interpretative issues before the CFA in a similar timeframe. See *The Bar’s Position Paper on the “Procedure for Seeking an Interpretation of the Basic Law Under Article 151(1) of the Basic Law*, HONG KONG BAR ASS’N 5 (April 14, 2005), <https://www.hkba.org/sites/default/files/20120605002.pdf>.

60. The Government had also publicly announced this position in the month before the report was issued. See Chen, Comment, *The NPCSC’s Interpretation in Spring 2005*, *supra* note 50, at 255 & n.6, 259 (2005).

61. *The Five Cases*, *supra* note 21, at 14.

62. *Id.*

63. See DANNY GITTINGS, INTRODUCTION TO THE HONG KONG BASIC LAW 245 (2013) (“In reaching its conclusion that the new Chief Executive should initially only serve for the approximately two remaining years of Tung’s five-year term, the Standing Committee sought for the first time to justify its interpretation with some analysis of the wording of the relevant provisions of the Hong Kong Basic Law.”).

64. Chen, *supra* note 61, at 258-61; see *Beijing’s Case for Tung’s Successor to Serve Two-Year Term*, SOUTH CHINA MORNING POST (March 24, 2005) (providing English translation of Li Fei’s speech).

65. See sources cited *supra* note 65.

Li's speech, the interpretation could be said to mix backward-looking consideration of legislative intent with a forward-looking, "responsive" concern for present values and understanding.⁶⁶

The NPCSC's fourth interpretation came in 2011, when the CFA issued a direct solicitation—the first and only time this has occurred—to resolve a case involving a contract between the Democratic Republic of Congo and Chinese-held companies.⁶⁷ The CFA ultimately sought an interpretation of Article 13(1) and 19(3), asking whether determinations of the rules of state immunity constituted "acts of state"⁶⁸ over which HKSAR courts lacked jurisdiction and therefore must certify to the Central Government. Because the PRC's laws regarding state immunity differed from the stricter state immunity standard applied within common-law systems, the interpretation also implicated whether the Basic Law incorporates Mainland sources of law, and by extension, whether Hong Kong courts are responsible for altering common-law doctrines inconsistent with the Basic Law.

The interpretation reflects forms of reason-giving not previously exhibited. For instance, the NPCSC references a decision it issued in 1997 before Handover—the "NPCSC Standing Committee Decision on Handling Hong Kong's Original Law Under PRC HKSAR Basic Law Article 160"⁶⁹—where it announced that Hong Kong's British colonial doctrines must be made to cohere with the soon-to-be-enacted Basic Law.⁷⁰ More significantly, the interpretation is the first and only instance in which the NPCSC cites PRC constitutional provisions other than Article 67. It describes how "under the provisions of PRC Constitution Article 89(9), the State Council, namely the Central People's Government, exercises the power to manage the state's foreign affairs."⁷¹ The interpretation concludes by explicitly noting that Hong Kong is "directly under the Central People's Government . . . [and] must enforce the state immunity rules or policies determined by the Central People's Government."⁷²

66. See ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 45 (1995) (distinguishing doctrinal interpretation, which focuses on rules of precedent, from responsive interpretation, which emphasizes present values and concerns).

67. See *The Five Cases*, *supra* note 21, at 14-17.

68. THE BASIC LAW, art. 19, cl. 3 ("The courts of [HKSAR] shall have no jurisdiction over acts of state such as defense and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state . . .").

69. See *Decisions of the Standing Committee on Handling the Existing Law of Hong Kong*, PRC MINISTRY OF COMMERCE (Feb. 23, 1997), <http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050288.html>.

70. See *The Five Cases*, *supra* note 36, at 16, 17. Arguably, this use of precedent bears similarity to the first interpretation's use of legislative intent. See *supra* Section II.A. While both are backward-looking, the 1997 NPCSC decision is framed as a legislative rule that abrogated the rule for state immunity at common law, not as a proxy for Basic Law drafter intent.

71. *Id.* at 15.

72. *Id.* at 16.

In making such a pronouncement, the interpretation formally subordinates the Basic Law to the PRC Constitution in a way not previously suggested by prior interpretations. By way of contrast, consider NPCSC Chairman Peng Zhen's statement in 1997 that "Article 31 [which empowers the NPC to establish SARs] provides that the National People's Congress is empowered to establish special administrative regions . . . [but that] apart from this, all the Articles of the Constitution are implemented in China."⁷³ The 2011 interpretation, however, envisions a vertical constitutional relationship at odds with earlier notions of constitutional separation. This new equilibrium point would come to animate Beijing's 2014 rejection of universal suffrage, the 2016 oath-taking saga, and the intensified rhetoric regarding the status of the Basic Law in the wake of the summer 2019 protests and 2020 National Security Law.

C. Anti-Retroactivity as a Substantive Canon

The NPCSC interpreted Article 104's language, "must, in accordance with law, swear," to imply that the oath taker "must sincerely, solemnly make the oath, and must accurately, completely, and solemnly read the legally-designed oath."⁷⁴ A 2004 Hong Kong High Court decision had previously held that the taking of the oath, in accordance with Article 104 and the local Oaths and Declarations Ordinance setting forth additional conditions, is a "mandatory constitutional obligation imposed on all members-elect of LegCo."⁷⁵ But the NPCSC interpretation imposes the additional, unwritten consequence that an insincere giving of the oath both "counts as refusing to give the oath" and "disqualifie[s]" the oath taker.⁷⁶ While some commentators have suggested that an interpretation based in common-law principles would have reached the same result,⁷⁷ civil society groups and activists have argued that the NPCSC acted beyond the limits of Article 158—unduly extrapolating from text and prototypical meaning of the Basic Law and therefore *making* rather than merely *interpreting* law.⁷⁸ On this latter view, legitimate legislative interpretation

73. See Peng Zhen, *supra* note 6.

74. The Interpretations, *Chinese Law and Government* 17 (2016 Interpretation).

75. *Government Statement on Oath-Taking by Members-Elect of Legislative Council*, GOVHK PRESS RELEASES (Oct. 11, 2016), <https://www.info.gov.hk/gia/general/201610/11/P2016101100639.htm> (describing).

76. The Interpretations, *Chinese Law and Government* 17 (2016 Interpretation).

77. See, e.g., Priscilla M.F. Leung, *An Oath: Constitutional Dialogue Between Chinese Law and Common Law*, 13 *TSINGHUA CHINA L. REV.* 59, 75-80 (2020); Han Zhu & Albert Chen, *The Oath-Taking Cases and the NPCSC Interpretation of 2016: Interface of Common Law and Chinese Law*, 49 *University of Hong Kong Faculty of Law Research Paper* (No. 2019/027) 1, 15 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359527 ("[I]t seems to be the natural and ordinary meaning of [section 21 of the Oaths and Declarations Ordinance] that disqualification occurs upon the oath taker's 'declining' or 'neglecting' to take the oath when he or she is 'duly requested' to do so"). *But see* Po Jen Yap & Eric Chan, *Legislative Oaths and Judicial Intervention in Hong Kong*, 47 *HONG KONG L.J.* 1, 1 (2017) (arguing in light of historical precedent that the Ordinance allows for subsequent attempts to take the oath properly).

78. See, e.g., Hong Kong UPR Coalition Steering Committee, *Interpretation of the Basic Law*, JUSTICE CENTRE HONG KONG 5 (Nov. 2016), <http://www.justicecentre.org.hk/framework/uploads/2013/03/HKUPR-Coalition-Fact-Sheet-Basic-Law-Interpretations.pdf> (arguing that the interpretation "went beyond 'interpretation,' undermining trust in the independence of the judiciary"); Suzanne Sataline, *The People of Hong Kong vs. The People's Republic of China*, FOREIGN POLICY (Nov. 11,

ascertains meaning without altering to the law that there is—and the additional consequence of disqualification constitutes *new law* by nature of being a result at odds with a common-law inflected reading of Article 104.

This formal distinction between interpretation and supplementation/amendment-making is understood by many scholars to be implied in the original structure of the Basic Law’s Articles 158 and 159.⁷⁹ The distinction is also reflected in Chinese constitutional thought and the text and structure of the PRC Constitution.⁸⁰ Still, a principled distinction between “legal interpretation” and “lawmaking” is notably elusive, in part because “interpretations” invariably apply or extend the existing law such that new law appears to be *made* (indeed, legal realist schools have levied such a critique since the early twentieth century)—and so the paradigms are distinguishable only by the *degree* to which they alter the law than by the *kinds* of legal consequences they precipitate. To complicate things further, the NPCSC has historically performed legislative supplementation or gap-filling under the auspices of its interpretation authority,⁸¹ as observed by the CFA subsequent to the fifth

2016), <https://foreignpolicy.com/2016/11/11/the-people-of-hong-kong-vs-the-peoples-republic-of-china>.

79. See, e.g., Cora Chan, *Implementing China and Hong Kong’s Preliminary Reference System: Transposability of Article 267 TFEU Principles*, [2014] PUB. LAW 642, 643; Patrick Jiang & Gonzalo Puig Villalta, *Article 158(3) of the Hong Kong Basic Law and the Preliminary Reference Procedure of the European Union*, 19 U. CHICAGO J. INT’L LAW 1, 13 (2018).

80. The fact that NPCSC interpretation is described in a separate constitutional provision (Article 67(4)) from supplementation and amendment-making (Article 67(2) and (3)) supports there being an implied difference. Moreover, the NPCSC “may supplement and amend laws on the condition that the supplementation and amendment do not violate the basic principles of the legal provisions to be supplemented and amended, [but] there is no such condition imposed on interpretation, implicitly because interpretation, being different from supplementation and amendment, is limited to the clarification of the meaning of law which it already has.” Hualing Fu, *Guide to Legislative Interpretation in China*, HKU LEGAL SCHOLARSHIP BLOG (July 19, 2017 11:37 PM), <http://researchblog.law.hku.hk/2017/07/guide-to-legislative-interpretation-in.html>. The differentiated structure of Article 67, when considered in light of the procedural distinction reflected in Article 67(4) observed by Hualing Fu, suggests that an Article 67(4)-based instance of NPCSC interpretation does not entail legislative supplementation or amendment-making. Consistent with the view that Article 67(4) constitutionally grounds the NPCSC’s interpretative authority, four of the five instances of NPCSC interpretation of the Basic Law (1999, 2004, 2011, and 2016) have justified the act by explicitly referencing—in the text of the interpretation—both Article 158 of the Basic Law and Article 67(4) of the 1982 PRC Constitution in particular. Only the third intervention (2005) references Article 67 generally without referencing a particular Article 67 provision.

81. According to Article 42 of the 2000 Law on Legislation, a law can be “interpreted by the [NPCSC] if: (1) the specific meaning of a provision needs to be further defined; or (2) after its enactment, new developments make it necessary to define the basis on which to apply the law.” Legislation Law of the People’s Republic of China (Order of the President No. 31) (Mar. 15, 2000), http://www.gov.cn/english/laws/2005-08/20/content_29724.htm. Han Zhu and Albert Chen have read the provision to allow for legislative interpretation that supplements extant law so long the interpretation does not “plainly contradict[] the law being interpreted.” Zhu & Chen, *supra* note 78, at 18 & 18 n.69. But other scholars have understood Article 42 to *further* the bifurcation between interpretation and supplementation. See, e.g., Feng Lin, *The Duty of Hong Kong Courts to Follow the NPCSC’s Interpretation of the Basic Law: Are There Any Limits?*, 48 HONG KONG L.J. 167, 170 (2018). Albert Chen did note at the time of the 2000 Law’s enactment that “the range of circumstances to which legislative interpretation is now applicable is narrower than that provided for in the 1981 resolution,” in part because a similar 1981 resolution refers both to “clarification” (明确界限) and “supplementary regulation” (补充规定) whereas the 2000 Law drops the latter from the ambit of legislative interpretation. Albert H.Y. Chen, *The Interpretation of the Basic Law—Common Law and Mainland Chinese Perspectives*, 30 HONG KONG L.J. 380 (2000); see also Fu, *supra* note 75 (describing the 1981

interpretation.⁸² In turn, while surfacing an interpretation-amendment distinction within Chinese constitutional thought is a worthwhile project, identifying where interpretation crosses over into law-making or legislative amendment is a notoriously difficult task.

Aside from the viability of an interpretation-amendment distinction, many if not all of the previous interpretations amount to supplementary rules that, from a common-law perspective, could be reasonably characterized as legislative amendments untethered from Basic Law text.⁸³ But the fifth interpretation qualitatively departs from previous interpretations in a number of additional respects that should be emphasized. First, the NPCSC's intervention in the election of legislative representatives can be qualitatively distinguished from the (also unsolicited) 2004 interpretations, for it implicated the role of the Chief Executive—who Yash Ghai once called the “lynchpin”⁸⁴ of the Central Government's influence in Hong Kong's domestic political system. The Chief Executive has always been appointed by the State Council of the PRC on the recommendation of a pro-Beijing electoral college consisting of 1,200 members,⁸⁵ whereas the 2016 interpretation intervened in the branch of Hong Kong politics most connected to representative democratic principles.

Second, the fifth interpretation deposed six LegCo members who had *already* ascended to office prior to the promulgation of the interpretation, thus abrogating the anti-retroactivity rule established through the first four interpretations.⁸⁶ Even if a common-law interpretation of Article 104 and the local ordinance, unconstrained by political pressures or the NPCSC's assumed view, were to also result in disqualification,⁸⁷ the retroactive quality of the NPCSC's action still raises a separate concern: it vitiates the *Ng* Court's careful reconciliation of its final adjudication power (as provided for in the Joint Declaration's Section 3(3)) with the NPCSC's final interpretation power,⁸⁸ and also likely contravenes the NPCSC's own anti-retroactivity presumption derived from Article 67 of the PRC Constitution.⁸⁹ The CFA's stipulation in *Ng*

resolution's definition of interpretation). This would seem to reflect that the category of “interpretation” has narrowed since the 2000 Law, though as Chen's more recent work seems to suggest, it may still accommodate some degree of supplementation.

82. See *Chief Executive v. President of the Legislative Council*, [2016] HKCA 573, cmt. 56.

83. See Chen, Comment, *The NPCSC's Interpretation in Spring 2005*, *supra* note 50, at 264 (characterizing the second and third interpretations as “amount[ing] to what the legal community in Hong Kong would regard as amendments to the Basic Law”).

84. Yash Ghai, *The Rule of Law and Capitalism: Reflections on the Basic Law*, in HONG KONG, CHINA, AND 1997: ESSAYS IN LEGAL THEORY 343, 365 n.100 (Raymond Wacks ed., 1993).

85. See ERIC IP, *THE POLITICS OF CONSTITUTIONAL COMMON LAW IN HONG KONG UNDER CHINESE SOVEREIGNTY* 573 (2016).

86. For discussion of the retrospective dimension of the NPCSC interpretation and related HKSAR Court of Appeal judgment, see Johannes Chan, *A Storm of Unprecedented Ferocity: The Shrinking Space of the Right to Political Participation, Peaceful Demonstration, and Judicial Independence in Hong Kong*, 16 *I•CON* 373, 378 (2018); and Zhu & Chen, *supra* note 78, at 21-29.

87. See *supra* note 78 and accompanying text.

88. See *supra* Section II.A.

89. In 2007, the Supreme People's Court codified an anti-retroactivity presumption, which

that the NPCSC retains plenary power to interpret the Basic Law was made at a time when unsolicited interpretations were both unprecedented and unforeseeable.⁹⁰ The 2016 interpretation thus marks a final stage in the dissolution of this implied constitutional compromise. Political developments since 2016, including Beijing’s heightened rhetoric around the 2019 extradition bill and the 2020 National Security Act, should be understood in light of this dissolution.

IV. CONCLUSION: THE VIEW FROM TODAY

This Essay demonstrates that the NPCSC’s interpretative posture has indeed shifted. NPCSC interpretation increasingly appears unmoored from Hong Kong’s own common-law methodological commitments or substantive legal precedents; indeed, the NPCSC has long deemphasized its early purported interest in original intent-based reasoning, has contravened implied rules in favor of solicitation and against retroactive application, and has opted against politically inconvenient reason-giving. Though the NPCSC once cast its interpretations in a way legible to a common-law public, that practice has faded. More generally, the set of interpretations exhibit few if any limiting principles or methodological constraints. Surfacing these shifting interpretative principles reaffirms what many have long experienced and observed from a host of disciplinary angles⁹¹: that Hong Kong has been increasingly subsumed into the Mainland legal system.

While the interpretations typify the Central Government’s involvement in Hong Kong’s local affairs, democratic erosion is also the result of what has occurred across the interim periods—from the 2012 proposal for “patriotic education” in Hong Kong schools, to the rejection of suffrage-expanding forms, to the Central Government’s support for the 2019 extradition bill and enactment of the 2020 National Security Law. This involvement takes many forms, abetted largely by the less-than-democratic structure of Hong Kong’s domestic political system—an arrangement that NPCSC interpretations have reinforced.

posits that legal interpretations should be generally construed to only have forward-looking effects after their promulgation. See 最高人民法院关于司法解释工作的规定 [*Several Provisions on the Work of Judicial Interpretation*], art. 5 (Mar. 23, 2007), http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=89508 (“司法解释自公告发布之日起施行” [“[J]udicial interpretations shall come into force (施行) on the date of publication . . .”]). *But see* Zhu & Chen, *supra* note 78, at 27 (arguing that “judicial interpretations fundamentally differ from legislative interpretations” and therefore questioning the relevance of the SPC presumption to debates over retroactivity in NPCSC legislative interpretation).

90. See *supra* note 24 and accompanying text.

91. See, e.g., Benny Tai Yiu-Ting, *Hong Kong Isn’t What It Was, Nor What It’s Supposed to Be*, N.Y. TIMES (Nov. 18, 2018), <https://www.nytimes.com/2018/11/18/opinion/china-hong-kong-benny-tai-umbrella-movement-trial.html> (“Hong Kong’s fundamental laws, called the Basic Law, are subject to the final interpretation of the Standing Committee of the National People’s Congress in Beijing. Resort to that power, after long being treated as an exception, has been normalized in recent times, in an effort to provide a semblance of constitutional backing — seasoned with arbitrary meanings — for the Chinese government’s repressive measures.”); Chan, *supra* note 87, at 387-88.

In turn, the interpretations are by no means the entire story, but they provide a valuable window into the devolution of the “One Country, Two Systems” arrangement. Critics of unbridled NPCSC interpretation may do well to point out the NPCSC’s own contradictions, perhaps by invoking the NPCSC’s early conception of legislative intent when leveraging Handover-era accounts of a balanced constitutional arrangement and the animating vision of the Joint Declaration. Ultimately, some semblance of shared principles and conventions around the future uses of NPCSC interpretation generally, and interpretative content specifically, would bring needed stability to the constitutional arrangement.