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Universal Suffrage in Hong Kong: Promise or Illusion? A Critical Analysis of National People's Congress Standing Committee's Interpretation of Hong Kong Basic Law Annexes

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# COMMENTS

## UNIVERSAL SUFFRAGE IN HONG KONG: PROMISE OR ILLUSION? A CRITICAL ANALYSIS OF NATIONAL PEOPLE'S CONGRESS STANDING COMMITTEE'S INTERPRETATION OF HONG KONG BASIC LAW ANNEXES

Ricky Y.H. Fong†

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## I. INTRODUCTION

In late 2005, the Chief Executive election in 2007 and the Legislative Council election in 2008 became headline news<sup>1</sup> when the government of the Hong Kong Special Administrative Region (“Hong Kong”) made proposals that would alter the election method of the Chief Executive and the size of Legislative Council.<sup>2</sup> Members of the Democratic Party,<sup>3</sup> who fiercely objected to the proposal, won on December 21, 2005, when the government failed to gain the necessary two-thirds support<sup>4</sup> in favor of the proposals. Despite the demonstrations and media-coverage in late 2005, the discussions and debates pertinent to the 2007 and 2008 elections originated from an earlier time.

Under The Basic Law of the Hong Kong Special Administrative Region of The People’s Republic of China (“Basic Law”),<sup>5</sup> residents of Hong Kong do not have the privilege to directly elect their Chief Executive<sup>6</sup> and all members of the Legis-

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1. See, e.g., Jimmy Cheung et al., *Defeated Hands Down*, SOUTH CHINA MORNING POST (Hong Kong), Dec. 22, 2005, at A1; see also DONGFANG RIBAO (Hong Kong), Dec. 22, 2005, at A1.

2. The proposals include (1) increasing the size of the Election Committee of the Chief Executive from 800 to 1,600 members, and (2) adding 10 additional seats to the Legislative Council. See K.C. Ng & Philip P. Pan, *Hong Kong Democrats Blast Reform Plan*, WASHINGTON POST, Oct. 20, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/19/AR2005101902310.html>.

3. The Democratic Party, founded on October 2, 1994, aims “to further unite the democratic forces in Hong Kong to shoulder the responsibility for the future of Hong Kong.” As of July 12, 2006, the party has 631 members and is chaired by Albert Ho Chun Yan. The party, led by prominent political figures such as Mr. Martin Lee Chu Ming, pursues “a high degree of autonomy and an open and democratic government of Hong Kong.” *Manifesto*, The Democratic Party of Hong Kong, available at [http://www.dphk.org/e\\_site/index\\_e.htm](http://www.dphk.org/e_site/index_e.htm). The party believes that “[t]he practice of ‘one country, two systems,’ high degree of autonomy, and the establishment of a democratic government in Hong Kong are the wishes of the people in Hong Kong” and that they “will help to contribute to the stability and prosperity of Hong Kong, and foster the development of China.” *Id.* Furthermore, the party believes that “[d]emocracy is the prerequisite for Hong Kong to establish a high degree of autonomy and is a natural consequence of the termination of the British colonial rule.” *Id.*

4. Amendments to the Basic Law require a two-thirds support from the Legislative Council. See Basic Law, *infra* note 6, art. 159, at 1545. At the time of the vote, the Legislative Council consisted of 60 members, which means 40 supporting votes are required.

5. The shorthand “Basic Law” or “Hong Kong Basic Law,” when used in this article, unless otherwise specified, refer generally to the entire set of Hong Kong Basic Law documents, which includes the Annexes. Also, within this article, unless otherwise indicated, all textual analysis and references are applicable to both the English and Chinese versions of the Hong Kong Basic Law and Annex I Clause 7 and Annex II Clause 3.

6. The Chief Executive is the head of Hong Kong, represents Hong Kong, and reports directly to China. See Zhonghua Renmin Gongheguo Xianggang Tebie Xingzhengqu ji ben fa [The Basic Law of Hong Kong Special Administrative Region of the People’s Republic of China] art. 44-58, translated in 29 I.L.M. 1511, 1527-30

lative Council (Hong Kong's legislative body).<sup>7</sup> The dissatisfaction over this electoral framework reached a pinnacle in July 2003, when half a million Hong Kong citizens instigated the largest pro-democracy demonstration in Hong Kong since the 1989 Tiananmen Square incident.<sup>8</sup> After this protest,<sup>9</sup> polls indicated that over 80 percent of Hong Kong people demanded universal suffrage for selecting the Chief Executive in 2007 and forming the Legislative Council in 2008.<sup>10</sup>

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(1990) [hereinafter Basic Law]. The Chief Executive is elected, not through universal suffrage, but by an 800-person Election Committee. See Todd Schneider, *David v. Goliath?: The Hong Kong Courts and China's National People's Congress Standing Committee*, 20 BERKELEY J. INT'L L. 575, 578 (2002).

7. See *id.* annex I, II, at 1546-48; (the Chief Executive is "elected by a broadly representative Election Committee. . ." and the Legislative Council is "composed of 60 members in each term," with 30 members elected through direct elections.); but see *Top Legislature's Decision on HK's Electoral Methods "Indisputable"*, FM Spokesman, XINHUA, Apr. 27, 2004, available at LEXIS, News Library General Service, (quoting Kong Quan that "Hong Kong residents enjoyed more extensive rights and freedom in accordance with law and were empowered to elect the chief executive of Hong Kong SAR"); Chinese Foreign Ministry spokesman Kong Quan's statement is not entirely incorrect. As a British colony, the governor of Hong Kong had traditionally been appointed by the British government, and the Hong Kong people had only begun to elect some members of the legislative body in 1987. See also Martin Lee & Szeto Wah, *THE BASIC LAW: SOME BASIC FLAWS* (1988) (according to Martin Lee, the methods of electing the Chief Executive and members of the Legislative Council do not promote a genuine election. He reasons that "[a]lthough the Election Committee seems to include representatives from different sectors of society, in actual fact the selection process will be greatly influenced by the [Communist Party].")

8. See M.L. Clifford, *Don't Hand Over Hong Kong's Democracy*, BUSINESS WEEK ONLINE (July 3, 2003), available at [http://www.businessweek.com/bwdaily/dnflash/jul2003/nf2003073\\_6867\\_db065.htm](http://www.businessweek.com/bwdaily/dnflash/jul2003/nf2003073_6867_db065.htm).

9. See *id.* (The purpose of the July 2003 protest was for the Hong Kong citizens to express their dissatisfaction with Tung's administration. In the preceding months, concerns that the implementation of Article 23 of the Basic Law might negatively affect human rights had been steadily increasing. Some people were concerned that the legislation could introduce China's methods and principles on national security into Hong Kong. It was reported that "Beijing wants to see the legislation enacted, which sets out the ground rules for the city's governance as part of China" while "Hong Kong's people remain leery."). Another journalist wrote that it is difficult to determine the precise cause of the protest, but it was probably, in part, a lack of accountability—and the resulting sense that the leadership in both places was unresponsive that led the Hong Kong citizens to initiate the protest. *The Long March*, TIME ASIA MAGAZINE (July 7, 2003), available at <http://www.time.com/time/asia/covers/501030714/story.html>.

10. V. Hung, *Prepared Statement By Veron Hung Presented at Hearing on Recent Developments in Hong Kong Before Subcommittee on Asia and the Pacific, House International Relations Committee* (June 23, 2004) available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1567&prog=zch>. See *THE HONG KONG BASIC LAW BLUEPRINT FOR 'STABILITY AND PROSPERITY' UNDER CHINESE SOVEREIGNTY?* (Ming K. Chan & David J. Clark eds., Hong Kong Univ. Press, 1991) [hereinafter BLUEPRINT] (The concept of universal suffrage is not a novelty to the local people of Hong Kong; they thought that the Joint Declaration had already made this promise to them.).

Yet, as the events in the subsequent months began to unfold, Hong Kong people's modest hope for universal suffrage gradually became an illusion. On April 7, 2004, the fate of the Hong Kong people was first foreshadowed when the National People's Congress Standing Committee<sup>11</sup> issued the *Interpretations of Clause 7 of Annex I and Clause 3 of Annex II to the Basic Law of the Hong Kong Special Administrative Region* ("Interpretations"),<sup>12</sup> whose central purpose was "[t]o ensure a correct understanding and implementation" of the two Annexes.<sup>13</sup> Eight days later the former Chief Executive of Hong Kong, Mr. Tung Chee-hwa,<sup>14</sup> submitted to the Chinese officials a report on whether the methods for choosing the Chief Executive and forming the Legislative Council for the year 2007 and 2008 ("Methods") should be modified.<sup>15</sup> In response, the Standing Committee, on April 26, 2004, declared that "the method of universal suffrage shall not be applied."<sup>16</sup> In July 2004, aggravated by Beijing's decision, over 530,000 protestors<sup>17</sup> marched to the streets to express their anger and disappointment.<sup>18</sup>

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11. See XIANFA [Constitution of the People's Republic of China] art. 57 (1982) (National People's Congress is the "highest organ of state power."); see also DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 91 (West Group 2003).

12. The English text is translated by Xinhua; See *Interpretations on HK Basic Law Annexes by Top Legislature* (Apr. 6, 2004), at [http://news.xinhuanet.com/english/2004-04/06/content\\_1404273.htm](http://news.xinhuanet.com/english/2004-04/06/content_1404273.htm). [hereinafter *Interpretations*].

13. *Explanations, infra* note 51. See also *Officials Explain Aim of Basic Law Interpretation* (Apr. 9, 2004) at [http://english.people.com.cn/200404/09/eng20040409\\_139870.shtml](http://english.people.com.cn/200404/09/eng20040409_139870.shtml). (According to Qiao Xiaoyang, deputy secretary-general of the Standing Committee, "[t]he purpose and ultimate objective of the interpretation is to ensure the implementation of the 'One Country, Two Systems' and maintain the long-term prosperity and stability of Hong Kong." Further, Qiao highlights the "one country" component of the system by reminding us that without *one country*, there would not be *two systems*.)

14. The current (as of January 2006) Chief Executive is Mr. Donald Tseng. Former Chief Executive Tung Chee-hwa officially resigned in March 2005. Although Tung cited health problems as the reason why he stepped down, some speculated that he was forced to resign. See *BBC News Profile: Tung Chee-hwa*, BBC News website (January 11, 2006), at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1708244.stm>.

15. "Full text" of *Chinese Legislature Decision on Suffrage in Hong Kong*, BBC Worldwide Monitoring, Apr. 26, 2004, available at LEXIS, News & Business, News [hereinafter *Decision*].

16. *Id.* See also *NPC Rules Out HK General Elections in 2007, 2008*, China Daily website (Apr. 26, 2004) at [http://www.chinadaily.com.cn/english/doc/2004-04/26/content\\_326436.htm](http://www.chinadaily.com.cn/english/doc/2004-04/26/content_326436.htm).

17. As estimated by Civil Human Rights Group, the protest organizer; other estimates ranged from 200,000 to 400,000; See John Chan, *Huge Protest Rally in Hong Kong Demands Democratic and Social Reform*, World Socialist Web Site (July 6, 2004), at <http://www.wsws.org/articles/2004/jul2004/hkon-j06.shtml>.

18. See *Thousands in Hong Kong Protest March*, BBC News Website (July 1, 2004) at <http://news.bbc.co.uk/2/hi/asia-pacific/3853723.stm>.

A different genre of response comes from Hong Kong's political commentators, who have challenged the *Interpretations'* legitimacy on socio-political grounds.<sup>19</sup> This article takes a different approach by providing a textual analysis of the actual documents. The following analysis includes both procedural and substantive components. From a procedural perspective, I will first examine whether the Standing Committee has the authority to interpret the Annexes. Moving on to the substantive component, I will analyze the Standing Committee's interpretations on two key phrases—"subsequent to the year 2007"<sup>20</sup> and "if there is a need to amend"<sup>21</sup>—and determine whether or not the Standing Committee has accurately interpreted the Annexes. My procedural analysis will show that it remains questionable whether the Chinese officials actually have the power to interpret the Annexes pursuant to Article 158 of the Basic Law. Further, assuming that the Standing Committee can legitimately interpret the Annexes, my substantive analysis will conclude that using a strict formalistic perspective<sup>22</sup> in analyzing the Basic Law, the Standing Committee's *Interpretations* is flawed.

## II. PROCEDURAL ANALYSIS

The procedural question at issue is whether the Standing Committee has properly exercised its authority to interpret Annex I Clause 7 and Annex II Clause 3 of the Hong Kong Basic Law. The Standing Committee claims that it derives its interpretive authority from the Constitution of The People's Republic of China<sup>23</sup> and Article 158 of the Hong Kong Basic Law.<sup>24</sup> The text

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19. See, e.g. Yeung Sum, Albert Ho, Martin Lee, *Please Respect Hong Kong People's Opinion*, The Democratic Party of Hong Kong website, March 26, 2004, available at [http://www.dphk.org/e\\_site/press\\_release/042603.htm](http://www.dphk.org/e_site/press_release/042603.htm); see also *DAB Responds to the NPCSC April 26 decision based on the Chief Executive's April 15 Report*, Democratic Alliance for the Betterment and Progress of Hong Kong website, available at <http://www.dab.org.hk/en/main.jsp?content=article-content.jsp&categoryId=1196&articleId=178>.

20. Basic Law, *supra* note 6, annex I cl. 1, at 1547.

21. Basic Law, *supra* note 6, annex I cl. 1, at 1547.

22. This is like the *strict literalist approach* discussed by Professor Frances H. Foster. See, e.g., Frances H. Foster, *Translating Freedom for Post-1997 Hong Kong*, 76 WASH. U. L.Q. 113 (1998). In an attempt to understand the meaning of "freedom of the press," a proponent of the *strict literalist approach* follows "the literal wording of the Joint Declaration and Basic Law" to draw the conclusion that the said documents mandate absolute freedom of the press. As it will be shown in my paper, the Standing Committee seems to adhere to a similar approach in its interpretation of the Annexes. While their methods arguably avoid a literal understanding of the words, they confine the sources of interpretation to strictly and only the Annexes themselves.

23. XIANFA art. 67 (1982). See *Interpretations*, *supra* note 12 ("the NPC Standing Committee has decided, in accordance with Subparagraph 4 of Article 67 of the Constitution of the People's Republic of China and the first paragraph of Article 158

of Article 158 vests the ultimate authority of interpretation of the Basic Law in the hands of the Standing Committee.<sup>25</sup> This specific provision unambiguously states that “[t]he power of interpretation of *this Law* shall be vested in the Standing Committee of the National People’s Congress.”<sup>26</sup> This section of the analysis shall begin by exploring some of the arguments in favor of the Standing Committee’s position. It will then challenge the Standing Committee’s position by illustrating that the Standing Committee is merely interpreting the Annex—not the Basic Law full text itself (hereinafter, “Basic Law Text”)—and concurrently demonstrating that the two—the Basic Law Text and the Annex—ought to be treated separately.<sup>27</sup> Ultimately, the analysis aims to resolve whether or not “this Law” (*benfa*), as it is used in Article 158, includes the Annexes (*fujian*) of the Basic Law. If it does, then the Standing Committee has properly exercised its authority to interpret Annex I Clause 7 and Annex II Clause 3 in accordance with Article 158.

#### A. EVIDENCE THAT DEMONSTRATES THAT “THIS LAW” ENCOMPASSES BOTH BASIC LAW AND THE ANNEXES

The Standing Committee’s actions suggest it believes that the scope of “this Law” covers both the Basic Law Text and its Annexes. There are valid arguments in support of the Standing Committee’s position. First, the Annexes have always been an indispensable part of the Basic Law drafting process and debate.<sup>28</sup> In as early as the first draft of the Basic Law dated April 1988, the Basic Law already included Annex I (titled “Method for Selecting the Chief Executive of the Hong Kong Special Administrative Region”) and Annex II (titled “Method for Constituting the Legislative Council of the Hong Kong Special Administrative Region”).<sup>29</sup> Both Annexes of the April 1988 draft outlined several alternatives for choosing the Chief Executive and forming the Legislative Council.<sup>30</sup> On July 13 and 14, 1988, prominent members of the Executive Council, legal scholars, and Basic Law drafters convened to discuss the first draft of the Basic Law.<sup>31</sup> During the Basic Law debate, several speakers

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of the Basic Law. . .”). Subparagraph 4 of Article 67 authorizes the Standing Committee “to interpret statutes.” Yet, is the Basic Law merely a statute?

24. See *Interpretations*, *supra* note 12.

25. See Basic Law, *supra* note 6, art. 158, at 1545.

26. *Id.* (emphasis added).

27. See *supra* note 5; When the term “Basic Law Text” is used, I mean only the full text of the Basic Law—in other words, only the Preamble, and Articles 1 to 160.

28. See BLUEPRINT, *supra* note 10, at 63-91.

29. See *id.* at 85-91.

30. See *id.*

31. *Id.* at 92.

made explicit references to the Annexes of the Basic Law.<sup>32</sup> The Standing Committee might point to the common “birth date” of the two documents as evidence that they should be considered as a unit.<sup>33</sup> Given that the two documents—the Basic Law Text and its Annex—have always been grouped together, why should the scope of “this Law” be restricted only to the Basic Law Text itself?

Second, there is at least one instance where “this Law” seems to refer to or to include the language within the Annex. In Annex I, the first paragraph states “[t]he Chief Executive shall be elected by a broadly representative Election Committee in accordance with this Law. . . .”<sup>34</sup> The composition of the “broadly representative Election Committee” is not found in the Basic Law Text, but in the next paragraph that begins “[t]he Election Committee shall be composed of 800 members from the following sectors. . . .”<sup>35</sup> Opponents to the Standing Committee would immediately point out that “this Law,” as it is used in Annex I, may be referring to Article 45. Nevertheless, even with this assertion, it is difficult to deny that “this Law” does not encompass at least some provisions of Annex I.

Third, the Annexes do not include any interpretive provisions, nor does the Basic Law Text itself explicitly provide any additional provisions that suggest an alternate interpretive authority or method for interpreting the Annexes. In the absence of any identifiable interpretive methods specifically prescribed for the Annexes, one can reasonably argue that the Standing Committee ought to have a *constructive* power to interpret the Annexes. It is a constructive power because even though the Basic Law does not overtly vest the power of interpretation of the Annexes to the Standing Committee, the Standing Committee could rely on both the Chinese Constitution Article 67 and the Basic Law Article 158 to obtain the right to interpret the Annexes.<sup>36</sup> In other words, if no one was officially assigned the task

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32. *Id.* at 103, 113, 114, 116, 119.

33. *See id.* at 63-91.

34. Basic Law, *supra* note 6, annex I cl. 1, at 1546.

35. *Id.* annex I cl. 2, at 1546.

36. *See* XIANFA art. 67, sec. 4 (1982) (stating that “[t]he Standing Committee of the National People’s Congress exercises the following functions and powers: . . . to interpret laws”); *see also* HONG KONG’S CONSTITUTIONAL DEBATE 184-88 (Johannes M.M. Chan et al. eds., 2000); Hongshi Wen describes how the 1981 Resolution confirmed “the highest status of the [Standing Committee] in the system of interpretation of law in China.” Further, he claims that “[t]he highest status of the [Standing Committee] is not only demonstrated in its monopoly in providing interpretation of law or making stipulations by means of decrees ‘in cases where the limits of articles of laws and decrees need to be further defined or additional stipulations need to be made’, but also in mandating the SPC and the SPP to submit to the [Standing Committee] for interpretation or decision if their interpretation are at variance with each

of interpreting the Annexes, then there is no better entity than the Standing Committee to do so. Furthermore, given that one of the definitions of *fujian* is “*additional* accompanying documents to a *main* component,”<sup>37</sup> the Annexes could be perceived as *extensions* to the Articles in the Basic Law to which the Articles refer; namely, Articles 45 and 68. If this is the case, then the authority who interprets Articles 45 and 68 ought to have the duty to interpret the Annexes as well.

## B. TEXTUAL EVIDENCE THAT UNDERMINES STANDING COMMITTEE'S POSITION

Notwithstanding the preceding arguments in favor of the Standing Committee, there are persuasive arguments that undermine the Chinese officials' position. In its publication *Views on Articles 45, 68 and Annex I, II of the Basic Law: Constitutional Development*,<sup>38</sup> the Hong Kong Bar Association (“HKBA”)<sup>39</sup> explains why the Basic Law and the Annexes should not be considered together. Under paragraph 27, the HKBA asserts that “[t]he Bar Association takes the view that an amendment to the method of selection of the [Chief Executive] pursuant to [the Basic Law] Annex I [Clause] 7 is not an amendment to the provi-

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other in principle.” *But see, id* at 193 (Hongshi Wen claims that the principle of “democratic centralism” is reflected in article 67(4) of the Chinese constitution and the 1981 Resolution. Yet the principle of “democratic centralism” is inconsistent with “one country, two systems.” Thus, he claims, one must treat the interpretation of the Basic Law by the [Standing Committee] as independent of its interpretation of other laws. He further asserts that if the Standing Committee solely relies only on article 67(4), the Standing Committee would not have the power to interpret the Basic Law); *see also, id* at 204 (Professor Yash Ghai notes that “given that the Basic Law has its own mechanism for the amendment of the Basic Law (article 159), the powers of the [Standing Committee] under article 158 must be more narrowly construed than under mainland law). *But see Interpretations; see also* Hong Kong's Constitutional Debate 478-80 (In both the *Interpretations*, as well as the Interpretation by the Standing Committee of National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of Hong Kong Special Administrative Region of the People's Republic of China, they begin by stating that the Standing Committee's power to interpretation comes from the Chinese Constitution Article 67(4) and the Basic Law Article 158.).

37. Translation from a Chinese definition found in a Chinese dictionary. *See* XIANDAI HANYU CIDIAN [Modern Chinese Dictionary] 347 (Beijing Shangwu Yinsiguan 1990).

38. *Views on Article 45, 68 and Annexes I, II of the Basic Law: Constitutional Development*, the Hong Kong Bar Association, (Mar. 11, 2004), available at [http://www.hkba.org/whatsnew/submission-position-papers/2004/20040311\\_english.pdf](http://www.hkba.org/whatsnew/submission-position-papers/2004/20040311_english.pdf) [hereinafter *HKBA Views*].

39. *See About Us - The Bar Association*, The Hong Kong Bar Association [hereinafter *HKBA*], at <http://www.hkba.org/the-bar/aboutus/index.html> (last visited Mar. 31, 2006) (The HKBA is a “professional organisation of barristers in Hong Kong” and its purpose is “to consider and to take proper action on all matters affecting the legal profession and the administration of justice,” which include “the improvement of the administration of justice in Hong Kong.”).

sions of the [Basic Law] under [Article] 159.”<sup>40</sup> Rather, the HKBA continues to explain, “[an] amendment to the method of selection of the [Chief Executive] pursuant to [Basic Law] Annex I [Clause] 7 is at most an amendment to [the Basic Law] Annex I itself.”<sup>41</sup> In making this distinction, the HKBA argues that the right to interpret the Basic Law does not imply a right to interpret the Annexes. By this reasoning, when Article 158 vests the power of interpretation of “this Law” to a legislative body, it *does not at the same time vest the same power of interpretation of the Annexes* to the same legislative body.

The HKBA statements aside, ample evidence indicates that Chinese officials and Basic Law drafters saw the Basic Law Text and the Annexes as independent but related documents from very early on. First of all, both on the Hong Kong government official website<sup>42</sup> and on a brochure<sup>43</sup> published by the Information Services Department of the Hong Kong government, the Hong Kong government acknowledges that the term “Basic Law” covers four separate sections: the “Basic Law full text,” (*jibenfa quan wen*, or “Basic Law Text”)<sup>44</sup> Annex I, Annex II, and Annex III.<sup>45</sup> The description and the choice of words seem to indicate that the government officials see the “Basic Law” as a broad, multi-sectioned entity which includes a section called the “Basic Law full text.” It follows that if only one of the four documents of the Basic Law is called the full text (*quan wen*), then the other three sections are not part of this “Basic Law full text” section. Although it may seem confusing to construe the Basic Law in this manner, the Decree of the President of the People’s Republic of China, No. 26 suggests that the Chinese officials

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40. *HKBA Views*, *supra* note 38, ¶ 27.

41. *Id.*

42. *Some Facts About the Basic Law*, The Government of Hong Kong Special Administrative Region of People’s Republic of China, available at [http://www.info.gov.hk/basic\\_law/facts/content.htm](http://www.info.gov.hk/basic_law/facts/content.htm) (last visited March 24, 2006).

43. *Hong Kong Facts Sheet on Basic Law*, The Government of Hong Kong Special Administrative Region of People’s Republic of China, available at [http://www.info.gov.hk/basic\\_law/upload/972381161/Basiclaw.pdf](http://www.info.gov.hk/basic_law/upload/972381161/Basiclaw.pdf) (last visited March 24, 2006).

44. *Some Facts About the Basic Law*, The Government of Hong Kong Special Administrative Region of People’s Republic of China, at [http://www.info.gov.hk/basic\\_law/facts/index.htm](http://www.info.gov.hk/basic_law/facts/index.htm) (last visited Apr. 1, 2006). “*Quan*,” by itself, also means “full” or “complete.” “Basic Law full text” is equivalent to what I have called “Basic Law Text” in this paper.

45. *See id.*; see also *Hong Kong: The Facts The Basic Law*, Information Services Department Hong Kong Special Administrative Region Government (Sept. 2003), available at <http://www.info.gov.hk/hkfacts/baslaw.pdf> (The Basic Law has four sections “1. The full text of the Basic Law which comprises a total of nine chapters with 160 articles; 2. Annex I, which sets out the method for the selection of the Chief Executive of the HKSAR; 3. Annex II, which sets out the method for the formation of the Legislative Council of the HKSAR and its voting procedures; and 4. Annex III, which sets out the national laws to be applied in the HKSAR.”).

more or less agree with this construction. The text of that decree reads:

I hereby promulgate the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, including Annex I, Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region, Annex II, Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures, Annex III, National Laws to be Applied in the Hong Kong Special Administrative Region. . . .<sup>46</sup>

The message appears to remind everyone that the "Basic Law" includes not only the Basic Law full text, but also the Annexes. The precision of the Chinese officials' use of language in the Decree and in government documents indicates that they would not use words like "Basic Law" without also being fully aware of the words' exact meaning and scope.

Official Chinese documents published after the *Interpretations* also support the view that Chinese officials distinguished between the Basic Law and the Annexes. For instance, an article<sup>47</sup> published on the website of the Consulate General of the People's Republic of China in Los Angeles appeared soon after April 6, 2004, declaring that: "China's top legislature, the Standing Committee of the 10th National People's Congress (NPC), adopted the interpretations of two clauses in the Annexes of the Basic Law. . . ."<sup>48</sup> Also, the *Interpretations* document itself begins by saying that "[t]he 8th meeting of the 10th NPC Standing Committee deliberated '*Interpretations of Clause 7 of Annex I and Clause 3 of Annex II to the Basic Law*'"<sup>49</sup> rather than the Basic Law itself. There are other examples<sup>50</sup> scattered throughout the

46. Basic Law, *supra* note 6, Decree of the President of the P.R.C., at 1520 (emphasis added).

47. The article is considered an official Chinese source because it is derived from the official website of the Consulate General of the People's Republic of China in Los Angeles.

48. *China's Top Legislature Interprets Hong Kong Basic Law*, The Consulate General of the P.R.C. in Los Angeles (Apr. 6, 2004), at <http://losangeles.china-consulate.org/eng/news/topnews/t82691.htm> (emphasis added).

49. See *Interpretations*, *supra* note 12 (emphasis added).

50. Examples include:

- (1) Under Section 3 of the *Interpretations*: "[t]he provisions, in the two annexes mentioned above. . ." rather than "the provisions, in the Basic Law. . ." See *id.*
- (2) The end of Section 4 of the *Interpretations*: "on bills and motions in Annex II" rather than "on bills and motions of the Basic Law." See *id.*
- (3) In the *Explanations*: "The Basic Law [of Hong Kong] stipulates on Hong Kong's constitutional system in accordance with the principle of 'one country, two systems'. . ." See *infra* note 39.
- (4) In the *Explanations* Paragraph 3: "Methods for the Selection. . . and Formation. . . are important components of Hong Kong's con-

*Interpretations and the Explanations on "Interpretations of Clause 7 of Annex I and Clause 3 of Annex II to 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 (draft)" ("Explanations").*<sup>51</sup> Whether evaluated individually or collectively, these examples seem to suggest that Chinese officials realize and admit that, in light of the most precise language, they are not interpreting the Basic Law Text. These examples also strengthen the notion that the Chinese officials' use of language is not imprecise. The Chinese officials acknowledge, for instance, that words such as "actual situation" are not from the Annex but from the Basic Law, and as a result, they direct the readers' attention to the "Basic Law."<sup>52</sup> Meanwhile, when referring to the Methods, the Basic Law pinpoints the Annex rather than asking its readers to see "the Basic Law."<sup>53</sup>

An even more persuasive set of evidence is found within the Basic Law itself. Article 158 starts off by declaring that "[t]he power of *interpretation of this Law* shall be vested in the Standing Committee. . . ."<sup>54</sup> Although the meaning of "this Law" is not explicitly defined by the drafters, the text of the Basic Law illuminates the intended meaning. Numerous provisions have made references to "this Law."<sup>55</sup> For example, Article 13 states that Hong Kong is authorized to conduct external affairs on its own but that its methods must comport with "this Law."<sup>56</sup> Since the Annexes do not include any provisions pertinent to foreign affairs, one can infer that "this Law" does not refer to the Annexes, but rather, Articles 48, 62, and the entire Chapter VII of the Basic Law Text. Because the drafters know that Annex I, II, and III do not deal with issues of external affairs, one can easily infer the meaning behind "this Law." At the very least, this ex-

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stitutional system. The two methods are separately prescribed in Annex I and Annex II. . . ." See *infra* note 39.

51. Li Fei, vice-chairman of the Legislative Affairs Comm'n of the Nat'l People's Cong. Standing Comm., *Duiyu Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui yu Zhonghua Renmin Gongheguo Xianggong Tebie Xingzhengqu Fujian Yi diqitiao he Fujian Er disantiao de Jieshi (Caoan) de Shuoming* [*Explanations on "Interpretations of Clause 7 of Annex I and Clause 3 of Annex II to 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 (draft)"*], delivered to the National People's Congress Standing Committee (Apr. 7, 2004), available at <http://www.china.org.cn/english/government/92298.htm> [hereinafter *Explanations*].

52. See *supra* note 38.

53. *Id.*

54. Basic Law, *supra* note 6, art. 158, at 1545 (emphasis added).

55. See *id.* at 1520-46 ("this Law" appears in Articles 2, 3, 8, 11, 13, 15, 16, 17, 18, 22, 43, 48, 49, 62, 70, 73, 74, 75, 84, 89, 90, 99, 134, 160).

56. *Id.* art 13, at 1522.

ample demonstrates that "this Law" can mean only the Basic Law Text by itself.

On the other hand, when the drafters want the reader to consider the provisions in the Annexes, they do so explicitly. Article 68, when describing the method for forming the Legislative Council, does not merely tell its interpreter to look at other provisions of "this Law," but rather, unambiguously highlights Annex II: "[t]he specific method for forming the Legislative Council and its procedures for voting on bills and motions are prescribed in Annex II: 'Method for the Formation of the Legislative Council. . .'"<sup>57</sup> The specific reference to the Annex, rather than a generic "in accordance with this Law" (*yizhao benfa*) provision, is another testament to the precise word selection of the drafters; if the drafters desired to include or to refer to the Annexes, they would have done so unequivocally. As illuminated by this comparative analysis, the choices of words and the way in which the Basic Law was drafted support the premise that "this Law," when used in the Basic Law (Article 158, to be more exact), does not necessarily include its Annex. The preceding discussion shows that it remains questionable whether Article 158 truly bestows the power of the interpretation of the Annexes on the Standing Committee.

### III. SUBSTANTIVE ANALYSIS

#### A. THE NEED TO AMEND

For the purpose of a substantive evaluation of the *Interpretations*, let us assume the Standing Committee has the authority to interpret the Annexes. The question is: did the Standing Committee accurately interpret them? Annex I Clause 7 and Annex II Clause 3 immediately start off with the first hurdle to overcome: among other conditions to be met,<sup>58</sup> the Methods can be amended "[i]f there is a need to amend" (*ru xu xiugai*),<sup>59</sup> Presumably most people would agree with the Standing Committee's interpretation of this phrase in the sense that it means "the methods may be amended or they may not be amended,"<sup>60</sup> since the language of the text is conditional. A more disputatious discussion concerns the meaning of the phrase "the *need* to amend"

57. *Id.* art 68, at 1531.

58. *Id.* annex I cl. 7, at 1547 (In order to amend the Methods, other conditions to be fulfilled include: "the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and [being] reported to the Standing Committee of the National People's Congress for approval.").

59. *Id.* annex I, II, at 1546-1548.

60. *Explanations*, *supra* note 51, at sec. 2.

and whose needs (*xu* or *xuyiao*) the phrase describes. The Standing Committee provides the following explanation:

China is a unitary state instead of federation, and localities have no power to decide on or change their constitutional system on their own. Constitutional development in Hong Kong has a bearing on relations between the central authorities and the SAR, and should proceed within the framework of the Hong Kong Basic Law. The methods for selecting the Chief Executive and forming the Legislative Council, and the procedures for voting on bills and motions in the Legislative Council, are major issues in Hong Kong's constitutional development. The power to make decisions on whether or not there is a need to amend and how to amend rests with the central authorities.<sup>61</sup>

While this statement is facially accurate, it fails to address the real meaning of the phrase "the need to amend." The Chinese officials' statement breaks down into the following components: since

- (1) localities such as Hong Kong on their own *have no power to change* their constitutional system, and
- (2) methods for selecting the Chief Executive and forming the Legislative Council are major issues in Hong Kong's constitutional development, therefore
- (3) the power to make these decisions must rest with central authorities.

If premises (1) and (2) above are true, (3) is a logical conclusion. However, in its formalistic analysis, the Standing Committee fundamentally fails to distinguish between "the power to decide" and the *need* to do so. The power to decide on changing the constitution is governed by Article 159 of the Basic Law,<sup>62</sup> but this is distinct from the concept of "need." Need for change is not synonymous with the ability or power to change, rather a need (*xu*) is "something one should have or something requisite," or "a desire, a longing or request for an object."<sup>63</sup> The central authorities may deny a locality the power to change without effectively removing its need to do so. Since the phrase in question is "if there is a *need* to amend," not "if Hong Kong has the *power* to change," the Chinese officials' logical reasoning addresses a separate question. The Standing Committee has completely missed the point.

While this strict, formalistic construction of a single phrase of the Annexes does not provide a definitive answer, other parts

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61. *Id.* at sec. 3.

62. See Basic Law, *supra* note 6, art. 159, at 1547-48.

63. Translation from a Chinese definition found in a Chinese dictionary. See XIANDAI HANYU CIDIAN [Modern Chinese Dictionary] 1299 (Beijing Shangwu Yinshuguan 1990).

of the Basic Law clarify the meaning of the phrase in question. The significance of understanding a Basic Law provision together with other provisions or documents has previously been noted. The Hong Kong Court of Final Appeals<sup>64</sup> recognized the importance of context in its ruling on the eminent right-of-abode case:<sup>65</sup> “As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. *They must consider the context.* The context of a particular provision is *to be found in the Basic Law itself as well as relevant extrinsic materials.* . . .”<sup>66</sup> Furthermore, Articles 45 and 68 of the Hong Kong Basic Law state that the Methods shall be made “*in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress.*”<sup>67</sup> In other words, the relevant context for interpreting the “need to amend” is “*the actual situation*” of Hong Kong, not the preferences of the Standing Committee or even the situations of other geographic regions in China. The Hong Kong people’s needs and views ought to be heard and respected.<sup>68</sup>

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64. Hong Kong’s Court of Final Appeals is the highest court of Hong Kong. For more information, see *Court of Final Appeal*, Judiciary of the Hong Kong Special Administrative Region of the P.R.C., at [http://www.judiciary.gov.hk/en/organization/wel\\_message.htm](http://www.judiciary.gov.hk/en/organization/wel_message.htm) (last visited Apr. 1, 2006).

65. In Hong Kong, the courts may interpret provisions of the Basic Law that touch on central government responsibilities or on the relationship between the central authorities and the special administrative region. See *Jurist Hong Kong*, University of Pittsburgh Jurist, at <http://jurist.law.pitt.edu/world/hongkong.htm>. However, before the Court of Final Appeal can make final judgments on these matters, it must seek an interpretation of the relevant provisions from the Standing Committee of the National People’s Congress. *Id.* In the right of abode case, the “Government, which had lost the case in the Court of Final Appeal, asked the court to clarify its decision.” *Id.* After the clarification, which did not fundamentally alter the court’s decision, the Government sought a reinterpretation of the Basic Law provisions at issue in the case from the NPC Standing Committee. *Id.* The Standing Committee’s reinterpretation “meant that the ruling by the Court of Final Appeal, which remained in force for the abode claimants involved in the case, would not apply to those with similar abode claims”, while it also “raised questions about the potential future independence and ultimate authority of Hong Kong’s judiciary. Since the controversy, the Government has expressed its intention to make recourse to the NPC interpretation mechanism a rare and exceptional act. In several right of abode cases before the Court of Final Appeal during the year, the Government argued that the Court should seek [a Standing Committee] interpretation of relevant Basic Law provisions, but did not seek one itself when the Court declined to do so, even in the one case that it lost.” *Id.*

66. *Ng Ka Ling & Others v. Director of Immigration*, 1 HKLRD 315, 319 (Ct. Fin. App., January 29 1999) (emphasis added).

67. Basic Law, *supra* note 6, art. 45, 68, at 1527, 31.

68. See *HKBA Views*, *supra* note 38, ¶ 11 (The Hong Kong Bar Association demands that the Task Force on Constitutional Development (established by the Chief Executive) explains whether there is a difference between ‘consult’ and to ‘listen,’ and if there is, the Task Force ought to provide its reasons for doing so).

Recent developments in Hong Kong show that the city's current *situation* is one where its people are prepared and eager for *progress* in constitutional reforms, at least with respect to democracy and elections. Here are some key elements of the actual situation in Hong Kong: over 80% of the Hong Kong people demand universal suffrage,<sup>69</sup> the government led by the executive and legislative council constantly disagrees;<sup>70</sup> the media and Legislative Council frequently criticize government policies;<sup>71</sup> it appears that the government is always "out of touch" with popular sentiment, as illustrated by the march on July 1, 2003;<sup>72</sup> a sequence of events such as the aforesaid march and the impressive voting turnout suggests an increased political awareness of Hong Kong residents;<sup>73</sup> and demands for further democratization are rising.<sup>74</sup> Other commentators have made similar observations.<sup>75</sup> The actual situation of Hong Kong strongly favors progress and change. Nevertheless, this textual analysis is incomplete. Progress must not be made in a hasty and imprudent manner; the Basic Law urges one to make them in a gradual and orderly manner.<sup>76</sup>

Similar to the other provisions previously examined, the scrutiny of the principle of gradual and orderly progress would be futile without other pertinent parts of the Basic Law. The phrase "with the principle of gradual and orderly progress" does not have an unambiguous meaning. On its own an interpreter cannot confidently conclude what the text precisely meant by gradual and orderly. As a result, one must search for other textual support to accompany its analysis. Fortunately one need not look too far. While one does not know how fast or slow "grad-

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69. See *supra* note 8 and accompanying text.

70. P. Lo, *Constitutional Development of Hong Kong Special Administrative Region: The Constitutional Affairs Committee of the Law Society Expresses its Views on Constitutional Development*, Constitutional Affairs Committee, sec. 1, at <http://www.hk-lawyer.com/2004-4/Apr04-constitutional.htm> (last visited Apr. 1, 2006) [hereinafter *Constitutional Development*].

71. *Id.*

72. See *supra* note 8.

73. See *Constitutional Development*, *supra* note 70, sec. 1.

74. *Id.* In the more recent 2005 demonstrations, as many as 250,000 Hong Kong citizens joined the protest to express their dissatisfaction over the proposed amendments to the Basic Law. See Robert Marquand, *Major Hong Kong Protest*, Christian Science Monitor, Dec. 5, 2005, at <http://www.csmonitor.com/2005/1205/p01s02-woap.html>.

75. See W. Overholt, *The Hong Kong Legislative Election of September 12, 2004 Assessment and Implications*, RAND Corporation (Sept. 23, 2004), available at <http://www.cecc.gov/pages/hearings/092304/overholt.pdf>; see also *Hong Kong After the Elections: The Future of One Country Two Systems* – Statement by Randall G. Schriver, Congressional-Executive Commission on China (Sept. 23, 2004), at <http://www.cecc.gov/pages/hearings/092304/>.

76. See Basic Law, *supra* note 6, art. 45, 68, at 1527, 31.

ual” is, the preceding part of the text informs one that the Methods must be made in light of the actual situation of Hong Kong. It cannot be denied that ever since the turnover of Hong Kong to China, its people have enjoyed gradual democratization.<sup>77</sup> In the past, the pace of democratization has been gradually made and its progress properly and orderly executed. Most significantly, the progress toward democratization is not an aimless political exercise; rather it is a purposeful pursuit as mandated by the Basic Law itself: “The ultimate aim is the selection of the Chief Executive by universal suffrage. . . .”<sup>78</sup> The parallel Article 68 for the formation of the Legislative Council also shares the same end goal.<sup>79</sup> Because the “ultimate aim” is defined, the gradual and orderly progress should no longer be vague and uncertain. Even if Hong Kong residents do not wish to progress towards democracy and universal suffrage, they are bound by the Basic Law to advance forward.

Now, returning to the main question: with the phrase “if there is a need to amend,” whose “need” matters? If one were to follow the analysis above, the “need,” when read along with the principles of “actual situation” and “gradual and orderly progress,” ought to reflect the needs of Hong Kong people.

## B. THE YEAR 2007

The remainder of my substantive analysis deals with the timing of introducing universal suffrage in Hong Kong. The text in question here is the phrase “subsequent to the year 2007” (*er ling ling qi nian yihou*) found in Annex I Clause 7 as well as the heading of Annex II Clause 3 of the Basic Law.<sup>80</sup> As Li Fei, vice-chairman of the Legislative Affairs Commission of the National People’s Congress’ Standing Committee,<sup>81</sup> has admitted, two distinct interpretations of this controversial phrase exist.<sup>82</sup> The first is that the phrase “subsequent to the year 2007” refers to “the period after the end of the year 2007, not including the year 2007.”<sup>83</sup> The second is that the phrase includes the year 2007.<sup>84</sup>

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77. See Overholt, *supra* note 63.

78. Basic Law, *supra* note 6, art. 45, at 1527.

79. *Id.* art. 68, at 1531.

80. *Id.* annex I cl. 7, at 1547.

81. According to the official website of the National People’s Congress, the Legislative Affairs Commission (Fazhi Weiyuanhui) is the Standing Committee’s legislative body. See *Legislative Affairs Commission*, The National People’s Congress of the People’s Republic of China official website, at <http://www.npc.gov.cn/zgrdw/english/organization/workAndAdmin/commission.jsp?id=legislative> (last visited Jan. 3, 2007).

82. See *Explanations*, *supra* note 51, sec. 1.

83. *Id.*

84. *Id.*

The interpretation of this particular phrase is a pivotal point. Because of how Annex I Clause 7 and Annex II Clause 3 were written, the exclusion of the year 2007 would allow the *possibility* of amendments, and as a consequence the possibility of universal suffrage in 2007. An inclusion of the year 2007 would rule out this possibility.<sup>85</sup>

In the *Interpretations*, the Standing Committee unequivocally states that “[t]he period defined as ‘subsequent to the year 2007’ . . . shall include the year 2007.”<sup>86</sup> To support its position, the Standing Committee explains: “According to stipulations in relevant Chinese laws, any period defined in the laws as ‘before’ or ‘after’ a specific year shall include the year itself.”<sup>87</sup> As a result, the Standing Committee insists the phrase in question must include the year 2007.

First, one ought to question whether it is appropriate for the Standing Committee to use only Chinese laws (*woguo youguan falu de guiding*) to justify the meaning of the texts that were crafted not by Chinese drafters alone, but in collaboration with the pre-1997 Hong Kong legal scholars.<sup>88</sup> Second, neither in the

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85. If the phrases include the year 2007, then the entire paragraph of Annex I Clause 7 and Annex II Clause 3 would have no effect until the complete passage of the year 2007. As such, any possibility of amending the election methods could only take place in a year of election after 2007. However, if the relevant phrases exclude the year 2007, then the possibility of amendment can occur in as early as the year 2007. I emphasize *possibility* because even if it is determined an amendment is needed, the amendments “must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and consent of the Chief Executive, and [the amendments] shall be reported to the Standing Committee. . . .” See Basic Law, *supra* note 6, annex I cl. 7, at 1547.

86. See *Interpretations*, *supra* note 12.

87. See *Explanations*, *supra* note 51, sec. 1.

88. See BLUEPRINT, *supra* note 10, at 92-122; also, legal scholars have suggested that perhaps international standards and laws should be used in understanding the Basic Law. See generally Raymond Wacks, *One Country, Two Grundormen? The Basic Law and the Basic Norm*, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 151, 174-75 (Raymond Wacks, ed., 1993) (“Since Hong Kong’s future was settled by an agreement between China and the United Kingdom, is it possible to argue that the solution to the problem of legal continuity might lie in international law? The Sino-British Joint Declaration certainly provides a basis in international law for both the validity and continuity of Hong Kong’s post-1997 legal system.” Wacks states that this argument is dependent on a theoretical approach to international law described in Kelsen’s General Theory of Law and State: “To assume that the continuity of national law, or—what amounts to the same—the identity of the State, is not affected by revolution or *coup d’etat*, as long as the territory and the population remain by and large the same, is possible only if a norm of international law is presupposed recognizing victorious revolution and successful *coup d’etat* as legal methods of changing the constitution. No jurist doubts, for instance, that it is legally the same Russian State that existed under the tsarist constitution and that now exists under the bolshevist constitution and under the new name of USSR. But this interpretation is not possible if we, ignoring international law, do not go beyond the Russian constitution as it exists at a given moment. Then the continuity of the

*Interpretations* nor the *Explanations* documents did the Chinese officials give specific examples to illustrate why the period in question “shall include the year itself”—after all, what exactly are the “stipulations in relevant Chinese laws”?<sup>89</sup> Finally, to a Hong Kong or foreign interpreter, there is an additional layer of complexity that arises from a language discrepancy. Does the phrase “subsequent to the year 2007” literally and accurately translate to its Chinese text counterpart (*er ling ling qi nian yi hou*)?<sup>90</sup>

Placing these questions aside, it seems, however, that the Standing Committee’s conclusive interpretation is not entirely without merit. Given the concrete definition,<sup>91</sup> I find it impractical to argue over the meaning of “subsequent to” (*yihou*). As such, if one were to disagree with the Standing Committee, then one must believe the remaining text—“the year 2007” (*er ling ling qi nian*)—means something other than the entire duration of 2007. Semantically, the date January 1, 2007 falls within “the year 2007” while the date December 31, 2007” also falls within “the year 2007.” To which one do the Annexes refer? The Standing Committee in essence read “the year 2007” to include the date December 31, 2007, thereby encompassing the entire year of 2007, while the opposing side would argue that the phrase only includes January 1, 2007. But if one takes the opposing side’s view that the phrase “subsequent to the year 2007” means “subsequent to January 1, 2007,” it would render the original phrase invalid since “the year 2007,” as it is used, clearly also covers the subsequent months, including the very last day of 2007. It appears that strictly analyzing this phrase in question, notwithstanding the Standing Committee’s vague and perhaps less-than-

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legal order and identity of the Russian State become incomprehensible. If the situation is judged from this point of view, the State and its legal order remain the same only as long as the constitution is intact or changed according to its own provisions”).

89. I so far have been unable to determine the sources of these “stipulations.”

90. The full answer to this question is beyond the scope and purpose of my article. In my opinion, it makes more sense to translate “er ling ling qi nian yi hou” to “after the year 2007.” I believe my translation is more or less a natural response from a typical Chinese student, if he or she were asked what “er ling ling qi nian yi hou” means in English. But for the purpose of this paper, I will proceed to treat “er ling ling qi nian yi hou” (after the year 2007) and “subsequent to the year 2007” as equal. Nonetheless, legal scholars have found the Chinese version of the Basic Law Annex to be even more ambiguous than the English language. See *HKBA Views*, *supra* note 38, ¶ 22.

91. “*Yihou*” means “the time frame after the present or after a specified time” - Translation from a Chinese definition found in a Chinese dictionary. See XIANDAI HANYU CIDIAN [Modern Chinese Dictionary] 1365 (Beijing Shangwu Yinshuguan 1990).

convincing justification, would favor the Standing Committee's conclusion.

This strict, formalistic approach<sup>92</sup> in interpreting the Basic Law, nevertheless, renders the interpretation incomplete. The method of "cutting it apart"—reading or interpreting a particular phrase in isolation—risks taking the law out of context and is disliked by the Chinese officials.<sup>93</sup> To ensure a more accurate, comprehensive understanding of the Basic Law, one must go beyond the Annexes by interpreting them with the Basic Law Text as a whole,<sup>94</sup> and supplementing one's analysis with historical perspectives as well as with the current developments of Hong Kong. Hence, like the analysis of "the need to amend,"<sup>95</sup> the textual analysis of "subsequent to the year 2007" ought to incorporate Articles 45 and 68.

The HKBA<sup>96</sup> argues that Article 45 provides some guidance for interpreting the controversial language.<sup>97</sup> In the light of the key phrases in Article 45—the "ultimate aim" and "gradual and orderly progress"—the HKBA asserts that "[i]f there is an ambiguity in [Basic Law Annex I Clause 7] so that there are two possible interpretations but one interpretation of the provision will assist in achieving progress towards the ultimate goal and the other will not[,] then the interpretation that does not put unnecessary obstacles in the way of achieving the aim should be the one that is preferred."<sup>98</sup> The HKBA also notes that this interpretation comports with the Drafting Committee<sup>99</sup> Chairman Ji Pengfei's explanations delivered over a decade ago.<sup>100</sup> Ji explains that "[t]he political structure of the Hong Kong Special Administrative Region should accord *with the principle of 'One Country, Two Systems'* and aim to maintain stability and prosperity in Hong Kong *in line with its legal status and actual situation*. To this end, consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While *the part of the existing political structure proven to be effective will be maintained*, a democratic system that suits Hong Kong's situation

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92. See Foster, *supra* note 22 and accompanying text.

93. See Foster, *supra* note 22, at 120 n.33.

94. See, e.g., *id.* at 122-24 (This is like the integrated constitution approach, which "calls upon China to read meaning from the context of the document as a whole).

95. See *supra* Part II.A.

96. See *supra* note 39 and accompanying text.

97. See HKBA Views, *supra* note 38, ¶ 23.

98. *Id.*

99. The Drafting Committee was responsible for creating the Basic Law.

100. HKBA Views, *supra* note 38, ¶ 24.

*should gradually be introduced.*"<sup>101</sup> These words emphasize the original vision of autonomy for Hong Kong "under the principle of 'one country, two systems.'"<sup>102</sup> Based on the HKBA and Ji's assertions, a strict, formalistic interpretation of "subsequent to the year 2007" may include the year 2007, but because the alternative interpretation—an exclusion of the year 2007—would "assist in achieving progress towards the ultimate goal," the alternative interpretation ought to be adopted.

Earlier drafts of the Basic Law also indicate that this vision of universal suffrage accords with the Basic Law framers' intent. The current Basic Law is the "ultimate culmination of [a] five-year drafting process."<sup>103</sup> The first draft of the Basic Law was completed in April 1988<sup>104</sup> while the second draft in February 1989.<sup>105</sup> The 1988 Article 45 states "[t]he method for selecting the Chief Executive as prescribed in Annex I *may be modified* in the light of actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress."<sup>106</sup> Similarly, its Legislative Council counterpart—Article 68—states "[t]he methods for forming the Legislative Council provided in Annex II *may be modified* in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress."<sup>107</sup> The first draft does not specify the methods for selecting the Chief Executive and forming the Legislative Council.<sup>108</sup> Instead, Annexes I and II list several options as possible methods.<sup>109</sup> Although the first draft of the Basic Law is incomplete in many respects,<sup>110</sup> it is worth noting that the architects of the Basic Law draft already recognized that the Methods could be modified.<sup>111</sup>

The second draft features further developments in the Annexes—the notion of "gradual and orderly progress" emerges in the Annexes for the first time. The second draft of Annex I describes the methods for selecting the Chief Executive for the first

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101. *The Constitutional Development Task Force's Visit to Beijing: Chief Secretary for Administration's Statement at LegCo*, ¶ 13 (Feb. 11, 2004), available at <http://www.info.gov.hk/gia/general/200402/11/0211260.htm> (emphasis added).

102. Basic Law, *supra* note 6, Preamble, at 1520; The meaning of "one country, two systems" is, nevertheless, one of the most controversial topics.

103. See BLUEPRINT, *supra* note 10, 165.

104. *Id.* at 63.

105. *Id.* at 145.

106. *Id.* at 74 (emphasis added).

107. *Id.* at 79 (emphasis added).

108. *Id.* at 63.

109. *Id.*

110. *Id.*

111. The word "can be modified" is later changed to "specified."

three terms. Annex II, on the other hand, specifies the methods for forming the Legislative Council for not only the first three,<sup>112</sup> but also the *fourth* term.<sup>113</sup> According to the second draft, the same methods should be used to elect a total of 80 members of the Legislative Council during the third and fourth terms.<sup>114</sup> Of the 80 Legislative Council members, 40 should be selected by district general elections, 16 should represent industrial, commercial and financial sectors, 12 should represent professions, and 12 more should represent labor, social services, religious communities and other sectors.<sup>115</sup> Although these numbers were modified in the final draft of the Basic Law,<sup>116</sup> the fact remains that there was an increase in directly elected members of the council from the second to the third term. These differences indicate that the framers of the second draft had embraced the concept of “gradual and orderly progress.”

The same trend is evident in a comparison of the second draft and the final draft. Unlike the second draft, Annex II Clause 3 in the final draft gives only the second and third term’s election methods,<sup>117</sup> remaining silent on the method of election for the fourth term. The disappearance of the method for the fourth term poses a serious challenge to the Standing Committee’s position. Derived from this piece of evidence, one could perhaps posit a more disturbing hypothesis: the reason why the fourth term’s method needed no explanation was because the framers thought that Hong Kong should already have achieved universal suffrage by that point. At the very least, this omission indicates that the election method of the fourth term was *meant to be something different* than the third term.

Those who support the Standing Committee’s view might argue that using the method of universal suffrage to select all of the Legislative Council members in 2008 is contrary to the Basic Law doctrine of “gradual and orderly progress” because the process of switching from fifty percent elected members to one hundred percent elected members would be neither gradual nor orderly. While this may be true, it does not undermine the assertion that for each term more members of the Legislative Council ought to be directly elected. As previously discussed, if we were to compare the methods employed in the election of the first, second, and third term of the Legislative Council, a pattern of gradual development would become evident. Each term surpassed its

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112. *Id.* at 157-58.

113. *Id.* at 158.

114. *Id.*

115. *Id.*

116. Basic Law, *supra* note 6, annex II at 1547-48.

117. *Id.*

previous term in the number of members chosen through direct election.<sup>118</sup> According to this pattern, the 2008 election of Legislative Council—the fourth term—should not employ the same election method and proportions as the third term. To do so would violate the Basic Law's doctrine of gradual and orderly progress because no progress would otherwise have been made. Thus, as an aside, in the final paragraph of the *Interpretations*, the Standing Committee plainly erred when it states:

If there is no amendment to the method for selecting the chief executive and the method of forming the Legislative Council, as well as the procedures for voting on bills and motions in the council, as defined in the above two annexes, the method for selecting the chief executive shall follow the provisions on the method of selecting the chief executive in Annex I; the *method of forming the Legislative Council* and the procedures for voting on bills and motions shall follow the provisions on the *method for forming the Third Legislative Council* and on procedures for voting on bills and motions in Annex II<sup>119</sup>

Returning to the original premise: if there are two possible approaches to interpret “subsequent to the year 2007,” one should adopt the approach that would not frustrate the ultimate aim and the other provisions of the Basic Law. The foregoing arguments demonstrate that the Standing Committee's strictly formalistic interpretation would severely hinder the pursuit of the “ultimate aim” and the adherence to the doctrine of “gradual and orderly progress.” On the other hand, the alternative interpretation of “subsequent to the year 2007”—that the phrase excludes the year 2007 and thereby renders universal suffrage possible in 2007—strengthens the intent of the Basic Law, including the “ultimate aim,” and is strongly supported by the other Basic Law provisions.

#### IV. CONCLUSION

This Article has shown that the Standing Committee's position on the interpretation of Annex I and II is subject to procedural and substantive challenges. Procedurally, although there are solid reasons why “this Law” can be interpreted to include the Annexes,<sup>120</sup> after a careful review, the evidence indicating

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118. *Id.* (Under the second term there are 24 directly elected members, while the third term has 30 directly elected members); see also BLUEPRINT, *supra* note 10, at 290-92 (For its Legislative Council, Hong Kong, since 1985, has gradually increased the ratio of directly elected members. In 1985, Hong Kong “conducts the first ever indirect elections for twelve functional constituency and twelve district members to the fifty-seven-seat Legco.” In 1991, 18 members of the Legislative Council are selected through direct election. In 1995, 20 members are directly elected).

119. See *Interpretations*, *supra* note 12, sec. 4. (emphasis added).

120. See *supra* Part I.A.

that “this Law” excludes the Annex is more compelling.<sup>121</sup> The Basic Law provides that the Standing Committee shall have the power to interpret “this Law;” the Basic Law does not specify that the Standing Committee can interpret the Basic Law *and its Annexes*. While the evidence that challenges the Standing Committee’s position cannot conclusively proclaim that the Standing Committee’s interpretation of the Annexes is beyond the purview of the Basic Law, the evidence does suggest that the Standing Committee’s power to interpret the main text of the Basic Law may not necessarily include the power to interpret the Annexes.

Given the ambiguities within the Basic Law and the difficulties of an accurate interpretation, it is also unsurprising that the Standing Committee’s *Interpretations* is imperfect. Limiting the Basic Law’s interpretation to a strict, formalistic approach, different aspects of the Standing Committee’s *Interpretations* ranged from *mildly correct*—“subsequent to the year 2007,”<sup>122</sup> to *vaguely distorted*—“if there is a need to amend,”<sup>123</sup> and *blatantly erroneous*—that the third term methods should be carried over to the fourth term.<sup>124</sup> Nevertheless, if the Standing Committee had not restricted its *Interpretations* to a strict, literal approach, it could not have drawn the same conclusion as it did on April 7, 2004, and consequently, the Standing Committee would prevent itself from legitimately publishing its decision on April 26, 2004.

Let us take a step back and be reminded of why all of this matters. Hong Kong people wish to directly elect their Chief Executive and all of the members of the Legislative Council. Their wish was denied in April 2004. Yet, like an ancient book that promises its faithful followers a heroic savior, the Basic Law prophesizes the coming of universal suffrage, which shall grant the people democracy and empower them to elect their leaders directly, perhaps for the first time ever. This prophecy was not fulfilled in 2007;<sup>125</sup> Hong Kong people who still believe in univer-

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121. See *supra* Part I.B.

122. See *supra* Part II.A.

123. See *supra* Part II.B.

124. *Id.* It seems the Chinese officials are aware of this and have quickly covered the mistake in their April 26, 2004 decision: “Under the premise that the first clause of this decision are not violated, specific methods for selecting the chief executive. . . and forming the fourth Legislative Council. . . could be appropriately modified in the principle of gradual and orderly progress and in accordance with provisions in [Article] 45 and 68, and the clause seven of Annex I and the clause three of Annex II of the Basic Law. . .” *Decisions, supra* note 8, sec. 2.

125. Hong Kong citizens continue to demand universal suffrage, or at least, a timetable that would clearly indicate when the promise for universal suffrage can be fulfilled. See Keith Bradsher, *Hong Kong Protesters Want Election Timetable*, N. Y. TIMES, Dec. 4, 2005, available at <http://www.nytimes.com/2005/12/05/international/asia/05hong.html>. As of late 2005, the Chinese government refuses to provide such a

sal suffrage must persevere<sup>126</sup> and wait for an opportunity to be heard.

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timetable. See Lindsey Beck, *China gives no ground on democracy for Hong Kong*, ABC NEWS, Dec. 27, 2005, available at [http://chinadigitaltimes.net/2005/12/china\\_gives\\_no\\_ground\\_on\\_democracy\\_for\\_hong\\_kong\\_lindsa.php](http://chinadigitaltimes.net/2005/12/china_gives_no_ground_on_democracy_for_hong_kong_lindsa.php) (President Hu Jin-tao provided "no hint on a timetable for universal suffrage for Hong Kong on Tuesday and said any change must be gradual, a week after lawmakers [in Hong Kong] rejected Beijing-backed election reforms").

126. See, e.g. Bradsher, *supra* note 125.