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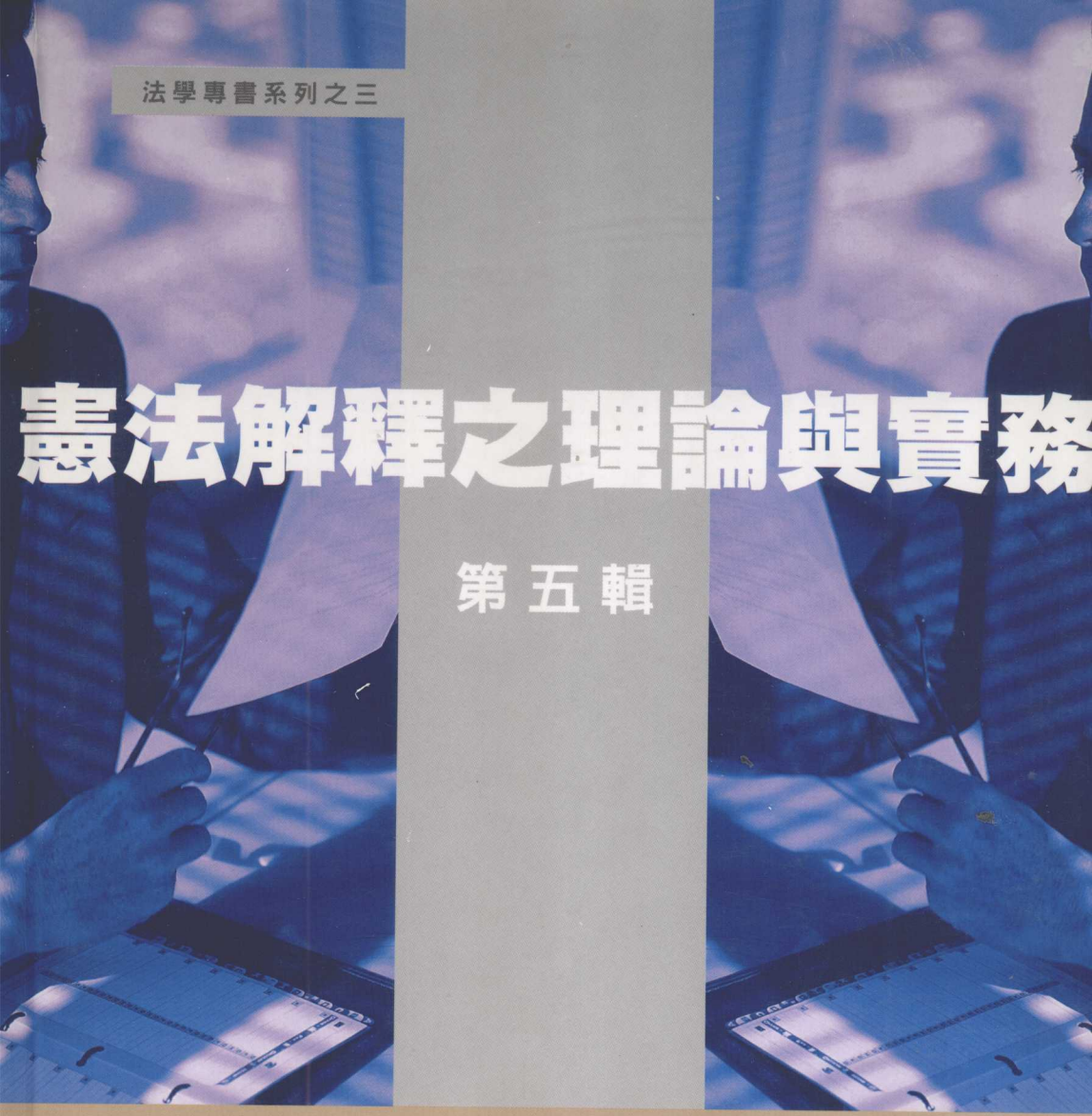

憲法解釋之理論與實務

第五輯

湯德宗、廖福特

主編

中央研究院 法律學研究所 籌備處

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楊德宋、廖福特
主編

中華民國九十六年三月
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憲法解釋之理論與實務(第五輯)

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出版序

本所前在中山人文社會科學研究所（社科所）法律組時期曾舉辦過四次「憲法解釋之理論與實務」學術研討會，蒙各界熱烈參與，蔚為盛會。會議論文經審查後，陸續出版專書《憲法解釋之理論與實務》四輯（共五冊）。第四輯審查完竣時，本所已成立籌備處，爰將之列為本所「法學專書系列之一」刊行。

為回應陳總統在「就職演說」中希望在2006年12月10日（世界人權日）複決新憲法的呼籲，本院李前院長遠哲於本所成立籌備處後旋即邀集本院政治學研究所（籌備處）吳玉山主任與我，商議以研究回饋社會的可能性，決定由兩所每一季合辦一次憲改研討會。嗣乃有2005年3月12日之中央研究院「憲改論壇——法政對話之一：憲政回顧與憲法修改圓桌討論會」，2005年6月25日之中央研究院「憲改論壇—法政對話之二：憲法實踐與憲改議題圓桌討論會」，2005年9月24日之中央研究院「憲改論壇—法政對話之三：從制度變遷看憲政改革：背景、程序與影響」，以及2005年12月16日及17日之中央研究院「憲改論壇——法政對話之四」暨第五屆「憲法解釋之理論與實務」學術研討會。

「憲改論壇——法政對話之四」暨第五屆「憲法解釋之理論與實務」學術研討會計有12位教授發表論文12篇，24位法政學者參與評論，全體與會人員約200人。並且邀請美國哈佛大學講座教授 Richard Parker 先生擔任主題演講人，及巴黎第一大學教授 Marie-Anne Cohendet 女士擔任特別演說人。會議除保留原有的（新近）「憲法解釋評論」場次外，主要依照會議主題（「2006年憲改議

題」）分為五個場次：「憲改社會基礎」、「面對現時憲法」、「憲政體制改造」、「基本人權增修」及「新興人權增補」。會後經作者參酌研討會意見修正、投稿、送審（由兩位以上匿名審查人審查）及（按審查意見）再修正等嚴謹程序，最後由本所「出版委員會」審議通過七篇，集成本書。為求存真，本書論文大致依會議發表之順序排序。

本書問世，承蒙會議助理蕭正宏先生及編輯助理王晨桓先生悉心協助，特此致謝。

湯　德　宗

民國九十六年一月

Opening Remarks
（開幕致詞）

(December 16, 2005)

Dennis T. C. Tang
Director & Research Fellow
Institutum Iurisprudentiae, Academia Sinica

In March 1997, in view of the rapid accumulation and increasing influence of constitutional interpretations rendered by the Grand Justices of the Judicial Yuan, the former Institute for Social Sciences and Philosophy of Academia Sinica held the first "Conference on Constitutional Construction: Theory and Practice." It was the first large scale conference to focus on constitutional construction in Taiwan, and won unusually warm approval from both academic and practicing lawyers alike. I remember, on the opening day, as most of the Grand Justices were present, Dr. Sher, the then President of the Judicial Yuan, joked that the quorum for the Council of Grand Justices was met and an *ad hoc* meeting was to be convened. Starting with the fourth Conference held in 2003, a main theme has been chosen (for example, "Constitutional Construction and Social Change" for 2003) to coordinate and unify the discussions, and an inter-disciplinary approach has been adopted in order to deepen the understanding of the Constitution. In the year 2006, seeking to echo sincerely the inauguration address call of President Chen to shape a new constitution for the Republic, the Institute of Political Science and the Institutum Iurispridentiae of Academia Sinica launched a series of dia-

logues on constitutional reengineering. Today and tomorrow's conference is the fourth and final run of these positive dialogues.

A total of 12 papers are to be presented and commented on by 24 eminent jurists and political scientists during the two-day conference. In addition, we are truly honored to have Professor Richard Parker from Harvard Law School as invited Keynote Speaker, as well as Professor Marie-Anne Cohendet from l'Université Paris I as Special Speaker.

Finally, I would like to take this opportunity to express my deepest gratitude to all of my colleagues and staff. Without your strenuous efforts and generous contributions, we could not have enjoyed the privilege of having such a free and thorough deliberation.

Keynote Address
（主題演說）

(Delivered on December 16, 2005)

THE FUNDAMENTAL 'LOGIC' OF FUNDAMENTAL LAW

Richard D. Parker
Paul W. Williams Professor of Law
Harvard Law School

Today, I want to address fundamental questions. Specifically, I want to speak about the fundamental law – the constitutional law – of nations that aspire to democracy. In particular, I want to speculate about the way in which the fundamental law of a democratic nation may tend to express the aspiration of, and so help create, such a nation.

To do so, I will describe the fundamental "logic" of the fundamental law of a democratic nation. By "logic," I mean a dialectic of ideals. What I have in mind is a dialectic that tends in a certain direction. It is a dialectic embedded deep in the conflicting ideals of democratic constitutional law. It pushes us, inexorably, toward democratic nationhood – and is, itself, pushed in that direction by one fundamental democratic ideal.

The fundamental ideal I have in mind is political equality. By that, I mean this: Despite the multitude of ways in which we are – on the surface and in effect – not equal to one another, we can be and must and will be equal as citizens. Whatever our wealth, our skills, our ethnicity – and whatever our practical differences in capacity for political power and influence – we are equal as voters. "One person, one vote" is, in truth, the great, transformative political ideal. In "mature" democracies it

may strike some as rather minimal. It is even denigrated by some. But its force, its "logical" force, is a force like the force of gravity.

The dialectical "logic" I have in mind is not, of course, a matter of formal logic. It has to do, instead, with aspirations. It has to do with aspirations expressed in, and motivating, action – myriad exertions of political energy by millions of people. As such, it cannot, in the end, be resisted by anything.

What follows is a sketch of four pairs of conflicting constitutional ideals. Each pair is, I believe, at the heart of our most fundamental understanding of fundamental law. The tension internal to each sets in motion the "logic" I want to portray. Each tension is bound to be resolved, as I imagine it, by the master ideal of political equality. Each resolution pushes on, then, to the next pair – and to its own tension and its own resolution.

In the end, this dialectic leads, I shall suggest, toward a specific destination. It leads toward a regime in which the decision of basic issues of constitutional law is accomplished, very frequently, by one method. That is the method of direct democracy: constitutional lawmaking at the ballot box.

Ⅰ. The Question of Constitutional Authority

We like to think that our fundamental law is more than just a good idea – that it is some sort of bedrock, that it is unusually stable, and that is so because it enjoys extraordinary authority, commands an extraordinary allegiance. Thus we often tell ourselves that it cannot easily be shaken by our day-to-day disagreements about this or that particular issue. What, then, do we imagine is the basis of this special status?

On one hand, we talk of it as "higher" law. Thus, we say, it is separate from, more universal than, ordinary law. We imagine it as located

in – and, as it were, speaking to us from – another dimension, a more essential and better dimension of life or nature or of ourselves. Our constitutional law, we seem to suppose, is roughly on a par with the "self-evident truths" proclaimed in the American Declaration of Independence. Its authority, its claim to loyalty and reverence, is steeply hierarchical. It is far "above" politics and "before" politics – "above" and "before" us.

On the other hand, we say that the authority and special status of our fundamental law is based upon the sovereignty of the people. This sovereign authority has its feet on the ground, so to speak. It is incarnated. It must be exercised. And it must be exercised by real people – particular people, at a particular time, in a particular context. Thus it takes shape "within" political life, not "above" it or "before" it.

These images of our fundamental law are mutually contradictory.

Attempts have been made to obscure the difference between the two images by combining them. The sovereign people, we are told, come into being only rarely, at "constitutional moments." These, we are told, are moments of "higher" politics, moments at which the quality of political engagement and debate – the quality of civic virtue – is far above normal. At these moments, and only at these moments, so the argument goes, may the sovereign will of the people be expressed. Then and only then may fundamental law be laid down. And, from then on, we are told, what has been laid down is "higher" law –"above" and "before" the continuing ebb and flow of ordinary political life, which it is meant to regulate.

Such an attempt to merge contradictory images of fundamental law – and so to erase the contradiction – must fail. It must fail because it relies on sophistry. That is, it re-defines the idea of popular sovereignty in terms of a standard of political value that is not internal to that idea,

but that purports to be "higher" than it – a standard of civic virtue. What is worse, by asserting a standard by which to measure the quality of political action – claiming that certain extraordinary modes of political action are "higher" in quality to, and hence entitled to govern, ordinary political action by ordinary people – they deny the one political value that is most basic to the idea of popular sovereignty.

That is the value of political equality.

It is the master ideal of political equality among citizens that – well over two centuries ago – enabled popular sovereignty to begin its eclipse of long-established ideas of the basis of political authority. Against it, the old ideas of "divine right" and hereditary or "natural" aristocracy ultimately stood no chance. In the last century, to be sure, newer versions of those old ideas have arisen – most notoriously, that of "vanguard" politics (primarily on the left) and, most pervasively, of policymaking "expertise" (primarily in the center). These revisions of the old ideas, like their predecessors, have claimed authority by virtue of supposed access to some "higher" realm of political wisdom. But they, too, have succumbed (or are continually succumbing) to the force of popular sovereignty – and to the ideal of political equality that lies behind it.

In our time, then, fundamental law is not "higher" law. Instead, it is law made by us – or by people just like us, under circumstances not so much unlike ours. We respect its mandates for the same reason (and to the same extent) that we respect our own decisions. That is to say, we respect it for a reason no less and no more than self-respect.

Ⅱ. The Question of Constitutional Meaning

Once brought down to earth – its authority rooted in the ideal of popular sovereignty – what sort of meaning does our fundamental law

have? We like to talk of what the Constitution "says." We tell ourselves that, in our constitutional order, governments "have" certain powers and individuals "have" certain rights. What sort of claim are we making when we state that our fundamental law "is" one thing or another? To turn the question around: what kind of meaning do we want it to have?

On one hand, we like to imagine that the meaning of the Constitution is clear – clear both in general and in application to particular problems. Sometimes, we go so far as to say that there are, consequently, "right answers" to constitutional questions. To complement that claim, we go on to portray the meaning of fundamental law as fixed, whether by the "plain" meaning of its words or the intent of its framers or by an understanding embedded in tradition. This belief in fixed and transparent meaning of law founded on popular sovereignty allows us, then, to give up the idea of "higher" law but, nonetheless, to hold on to the notion that, in operation, our Constitution has meaning that transcends – and so is capable of imposing a superior, external discipline on – the day-to-day disputes of ordinary political life.

On the other hand, we imagine that the genius of effective fundamental law is a vagueness of meaning. The reason, we believe, is that vagueness allows the meaning-in-application of our Constitution to change. With meaning that is vague, and therefore flexible, the Constitution may adapt to changing circumstances – and so endure, retaining its relevance and hence its usefulness through time. Such fluidity of meaning, such adaptation, entails turning away from the idea that constitutional questions have "right" answers in any strong sense as well as from the idea that the Constitution's meaning transcends ongoing political controversies. Instead, we say that constitutional meaning does – and must – "evolve" along, and in close connection, with those controversies.

Again, these images of our fundamental law are mutually contradictory.

And, again, attempts are made to obscure the contradiction. One of the most familiar is the claim that our Constitution expresses abstract "concepts" that are fixed but vague and that these "concepts" are then applied to changing circumstances through subordinate "conceptions" which, in turn, are clear but flexibly adaptable to such change. Once again, this is sophistry – a fast shuffling and cutting of the cards that ought not mislead the attentive eye. Its gestures toward the ideal of clear, fixed constitutional meaning thinly cover its embrace of the opposite ideal: that of constitutional meaning that is vague and adaptable.

In truth, the latter requires no cover up. The "logic" of fundamental law, by itself, assures its ascendancy. For the master ideal of political equality, the ideal which drives that "logic," is deeply biased in favor a Constitution whose meaning can, does and should evolve with the times.

Political equality among generations demands that much. Put differently: popular sovereignty cannot, consistent with this ideal, be turned on and then turned off. People of each generation have an equal right to expect and to see that their Constitution speaks, in one way or another, to their own situation. Whether the meaning of their fundamental law evolves by means of interpretation and reinterpretation or by means of political action – or some combination of the two – is a separate (and the next) question.

Ⅲ. The Problem of Flux in Constitutional Construction

If the meaning of fundamental law is to adapt to changing circumstances, what are the circumstances to which it should adapt? And through what sort of process should the adaptation take place?

On one hand, we imagine that constitutional law is meant to pro-

mote stability and wisdom in our public affairs. We assume that change in the meaning of constitutional law, therefore, ought to take place in a manner consistent with those values. Thus we say that such change is best effected through a gradual process of interpretation. And for that kind of interpretation we rely on officials equipped to resist immediate political pressures and to take a broad-minded, far-sighted of our deepest values and interests. That is, we rely on judges. We assume that judicial interpretation will respect precedent and tradition, innovating incrementally, blending change into settled practice. When judges set out to improve our fundamental law, we trust they will improve it by reference to values already embedded within it. Thus any change in constitutional meaning preserves our fundamental law by taking account of new facts and elaborating its latent wisdom.

On the other hand, we say that constitutional law must, above all, adapt to popular understanding and evaluation of those facts. That is, we say that it has to adapt to the ongoing development of popular values. This might occur through judicial interpretation – if judges endeavor to discern and reflect (perhaps even anticipate) broad changes in public opinion. Or it may occur through political processes of constitutional amendment. It follows in either case that flux in our fundamental law may not be smoothly continuous – indeed that, on occasion, it must foster instability, even disruption of established values and long-standing practices, in order to adapt to the current popular will.

These two ways of imagining the evolution of constitutional meaning contradict one another.

Some seek to blur the difference between the two. In judicial interpretation, they admit the importance of adapting the law to contemporary popular values, but then undercut the admission by sharply restrict-

ing any such adaptation – insisting, for instance, that it be narrow enough, piecemeal enough, to ensure stability. Or they accept a measure of instability, but insist that it be tempered by the restraint of established wisdom. And while, in principle, they recognize the legitimacy of constitutional amendment, they seek to hobble it in practice by condemning almost any proposed amendment as insufficiently compelling to justify their (supposed) threat to constitutional stability and traditional values.

Again, this effort to obfuscate a contradiction between images of fundamental law is, in fact, an effort to sugar-coat and, so, to preserve one of them. And, again, the effort is doomed– for the "logic" of fundamental exerts a gravitational force in favor of its opposite.

Just as the master value of political equality – with its corollary, popular sovereignty – requires change in constitutional meaning from generation to generation, so does it require the process of change to be governed, in the end, by adaptation – if necessary, disruptive adaptation – to contemporary public opinion. The competing values of stability and established wisdom, however attractive to "enlightened" elites, cannot hold out against a sustained tide of popular sentiment that eclipses those values. The reason, of course, is that these elites are no more than the equals of millions of other citizens – and there are many more of one than there are of the other.

IV. The Problem of Political Conflict

What, then, is the point – the mission – of constitutional law in a democracy? If, ultimately, the popular will must prevail, and if, ultimately, our fundamental law is subordinate to that will, what is left for the law to do? What is worth trying to do with it? Specifically, what may it contribute to the management of the most common political problem of all: the problem that arises when the popular will is at odds with it-

self – when citizens are in conflict with one another about the use of the power of government?

On one hand, we say that the primary purpose of our constitutional law is to check – to limit and divide – the power of political majorities. More specifically, we say it is to protect the rights of individuals and minorities. The assumption, of course, is that majorities tend to abuse their power and that constitutional law is the instrument by which those abuses should and can be stopped.

On the other hand, we say that the most obvious purpose of our Constitution was – and is – to empower a government chosen by a political majority. Consequently, we believe that the overriding purpose of constitutional law must be to ensure the effective working of that government, clearing away barriers to majoritarian authority, barriers set up by powerful individuals and minorities. To be sure, some such barriers are designed to protect rights. But nature and scope of those rights are to be determined, finally, by political majorities themselves.

Here, the contradiction could hardly be more obvious.

Here again, there are facile attempts at denial. First, there is sophistic move. "Democracy," we are told, does not "mean" majority rule. Rather, it "means" protection of individuals and minorities against majorities. As usual, this definitional argument is circular; it begs the question and should be ignored. Second, we are told that majorities, in fact, recognize their own tendency to abuse power and adopted a Constitution, in the first place, to tie their own hands. Later majorities, we hear, have accepted this regime of self-restraint. This line of argument seeks, of course, to turn the majoritarian position against itself. But, in truth, it merely reaffirms it. By grounding the limitation of majoritarian power on majoritarian authority – present and past – what it demolishes is its

own anti-majoritarian position.

Thus, once again, the gravitational force of political equality will tend, I believe, to resolve the contradiction. If each citizen is to count as one for purposes of politics, then in cases of political conflict, the majority of citizens must rule, which means that majorities are empowered and entitled to make law – not just ordinary law, but the fundamental law as well.

V. Is This a "Logic" We Should Embrace?

The law of gravity is not something one chooses to dismiss. But one does not have to like it, and one may attempt to resist it. That is doubly true of the sort of ideological and historical law of gravity I have been describing. The question arises: Is it something we ought to embrace? Or ought we try, against the odds, even if temporarily, to resist it?

If we embrace it, that would have certain implications. It would mean that we, the citizens of modern democracies, must kick the habit of deferring indiscriminately to judges in the making (known as the "interpretation") of constitutional law. We would, instead, take this lesson to heart: The making of constitutional law is our own job. We ought not delegate it to anyone else, however learned, however wise. We must make it on the basis of political equality. At that means that, at least in part, we might very well want to make constitutional law directly at the ballot box, by popular referendum or initiative. Is this a sort of political freedom we have the will to act upon?

Each of us – in fact, each nation – must answer the question individually. I would not presume to answer it for anyone else, much less for others in circumstances very different from my own. All I can do is reflect on it from my perspective in the United States. What follows, then, are considerations I draw from our own national experience, leaving it to