

A critical-semantic approach to the Basic Law

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1. Introduction

The Basic Law is a mini-constitution of the Hong Kong Special Administrative Region, which will be in effect after 1997. It is a constitution outlining the future government structure which aims at securing the implementation of 'One Country, Two Systems'. However, there is lot of debate concerning the interpretation of the Basic Law during the transitional period, especially with the loosely defined terms. In view of the disagreement, people have started to question the real meanings of words in the Basic Law. Which meaning is more 'exact' or more 'real'? What accounts for the diverse views in the interpretation of the Basic Law? Furthermore, the Basic Law is written both in Chinese and in English. Apart from Chinese, English 'may also be used as an official language' (Article 9). However, the status of English in future is unclear. If that is uncertain, how can the judicial system remain as it is now following the Common Law, which has its roots in Western civilisation? Is it really - as some people have suggested - impossible to translate the terms used in Common Law into the Chinese language? How do Wittgenstein's ideas of meaning in use and form of life shed light on the local context? If meanings are indeterminate by nature, how can words construct the seemingly determinate constitutional laws? In my thesis, I am using a critical-semantic approach to investigate the crisis of the breakdown of meaning.

Constitutions, as a legal genre, should be written to be rigid and flexible at the same time. For if the writing of constitutions is too rigid, there is less room for them to apply to different situations and catch up with the changes in the society. On the other hand, if they are very flexible, different interpretations of it will result and constitutions will lose its authority as the central binding force. Either extremes would endanger the status of constitutions. In the case of the Basic Law, problematic words are found in the Articles which makes its interpretation very difficult. For example, the temporal terms used in the Basic Law are fairly arbitrary.

2. Semantic problems in the Basic Law

Words like 'existing', 'previous', 'gradual' and 'orderly', are not so clear semantically as they might seem. These words appear again and again in the text, yet what they really mean is not specified. Nevertheless, most people tend to take their meanings for granted. In this case, componential analysis does not help us much to know their meanings, nor does the dictionary.

Contemporary dictionaries define 'existing' as 'present' or 'something which is now in use or in operation'. 'Previous' suggests 'happening, coming, or being earlier in time or order' in contemporary usage. Why was the word 'existing' in the draft (1988) replaced by the word 'previous' (1990)? Is the word 'previous' less vague in its meaning?

'Existing' and 'previous' refer to a vague, abstract concept of time. Besides, it is not clear when is the starting point. It depends on where you draw the time line. The drafting period of the Basic Law lasted for five years, from 1985 to 1990. The final draft was adopted on 4 April 1990. During this transitional period, drastic changes have taken place in Hong Kong. Then how could the exact situation be pinned down to a particular moment? Does the word 'previous' simply mean the time period immediately before 1997? One of the leading principles, in this Law is Article 5, 'the previous capitalist system and way of life shall remain unchanged for 50 years', which shares the same problem. How to count fifty years? The starting point is not specified. Is it intended as a guarantee of an ongoing capitalistic way of life in future? Is this kind of arrangement simply a temporary one? The official publication 'Zhongguo Xianfa Jiaocheng' states, 'The purpose of "One country, two systems" is to allow a few places (Taiwan, Hong Kong, Macau) to establish a Special Administrative Region, not to practice the socialist system and policy for a long period of time, and to retain the previous capitalistic, social, and economic system and way of life'. It is rather apparent that the ultimate goal is the unification of China, which may imply the practice of the socialist system in Hong Kong eventually.

As pointed out earlier, the word 'previous' is already problematic. How can the 'previous system' be retained if we are not sure what the 'previous system' refers to? Also, 'the' is the definite article. It seems as if there is a particular system we are talking about. 'Remain' suggests 'to stay or continue to be' which implies an unchanging state. Paradoxically, way of life is not something static or fixed. It seems to be impossible to keep it unchanging. Besides, what is the meaning of 'way of life'? Does it simply mean 'Go on horse racing, go on dancing' as the Chinese former leader (Deng Xiao Ping) defined this term ten years ago? Because of the conjunction 'and', the meaning of the sentence becomes less clear. Does 'way of life' mean capitalistic way of life or a separate entity?

Article 68

'...The method for forming the Legislative Council shall be specified 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.' [Emphasis added]

'Gradual' suggests 'step by step, proceeding by degrees'. 'Orderly' means 'arranged in order'. The question is who sets the steps? This is bound to create problem in interpretation.

In the Basic Law, Hong Kong residents are divided into two types - permanent residents and non-permanent residents. However, the distinction between the two is not precise. Part of the reason for this uncertainty is the intended flexibility for Hong Kong emigrants to get back to Hong Kong. Especially in Chapter 3, 'Fundamental rights and duties of the residents', the articles 24, 25, 26 imply that there is a distinction between permanent

residents and non-permanent residents. Nevertheless, other articles do not address this distinction, 'Hong Kong residents' is used instead as a general term. This confusion creates difficulties in interpretation, for it is not certain what the word 'residents' refers to. In other chapters, the status of 'permanent resident' gives an individual the right to vote, the right to be elected, or a qualification to be selected as the Chief Executive or principal official (Article 26, 44, 61). Therefore, the meaning of 'permanent resident' needs to be pinned down to facilitate the implementation of the Law.

Article 24 (2)

'Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of **not less than seven years** before or after the establishment of the Hong Kong Special Administrative Region;' [Emphasis added]

Article 44

'The Chief Executive of the Hong Kong Special Administrative Region shall be a Chinese citizen of not less than 40 years of age who is a permanent resident with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of **not less than 20 years.**' [Emphasis added]

Article 61

'The principal officials of the Hong Kong Special Administrative Region shall be Chinese citizens who are permanent residents of the Region with no right of abode in any foreign country and have ordinarily resided in Hong Kong for a continuous period of **not less than 15 years.**' [Emphasis added]

So how long is 'permanent'? A continuous period of not less than seven years? Not less than 20 years or not less than 15 years? Instead of defining the term, the definitions given in the Articles only show the inconsistent interpretations of the same term.

People may argue that these are only trivial differences. But each of them directly affects our interpretation of the Law. Apart from these temporal terms, another groups of words like 'allegiance' and 'dedicated' is no less problematic. Both words arose and developed in a context implying a sense of devotion and loyalty to deity, king, country. In English, there still remain semantic traces of this context. As in Article 99 and Article 10,

Article 99

'Public servants must be **dedicated** to their duties and be responsible to the Government of the Hong Kong Special Administrative Region.'

[Emphasis added]

Article 10

'When assuming office, the Chief Executive, principal officials, members of the Executive Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with the law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear **allegiance** to the Hong Kong Special Administrative Region of the People's Republic of China.' [Emphasis added]

What is the target of dedication? A socialist country or a capitalist society? The two systems have different ideological orientations and worldviews. Could this then create an internal tension of dual loyalty?

Another phrase, 'acts of state', caused difficulties in the discussions on the establishment of the Court of Final Appeal in Hong Kong. 'Acts of state' is the term of art in Common Law, which is different from common usage.

Article 19

'...The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over **acts of states** such as defence and foreign affairs....' [Emphasis added]

'Acts of state' is not very well defined term. 'A term of art' is a technical term with a special meaning. Laymen may not understand the term but the problem is precisely that they may not recognise it as being a term of art, and take it as having its ordinary meaning. In an informal survey with my students and family members, I asked them what 'acts of state' means. Typical reactions are making judgements based on common sense. They assume the term means the actions of state. If then confronted by me asking them to explain more, they would say the term could be a special legal term which they do not understand. This result may reflect how most people without legal training interpret the law. If not being confronted, most people would take the ordinary meaning as the 'real' meaning. Mellinkoff (1962) introduces the characteristics of the language of the law. He points out that some words have special meanings which are different from common usage. For example, the word 'prayer' does not mean speaking to God. It is used at the end of a petition to summarise what the litigant is asking the court to do. (Mellinkoff 1962:16)

3. Chinese or English?

In the Common Law tradition, the understanding of 'acts of state' is based on precedent. It appears that the term is being given a new meaning in the Chinese version of the Basic Law. The literal meaning of 'acts of state' is being taken to be what the state can or cannot not do, or some sort of national policy. Actually, it is more of an abstract concept which the British government uses to defend its acts concerning war or diplomacy. It is not unusual that using the same term may have different meanings. This shows some of the pitfalls in transplanting the Common Law into Chinese, that brings forth the language issue of the Basic Law. In article 9, the law outlines the status of the Chinese and English languages in future.

Article 9

'In addition to the Chinese language, English may also be used as an official language by the executive, legislature and judiciary of the Hong Kong Special Administrative Region.'

Here, the status of English is unclear. 'May also be used' seems very optional. In what circumstances will English be treated as an official language? As in Articles 8, 81, 87, 91, 94, they are all reinforcing the idea that the previous judicial system will be retained. The judicial system in Hong Kong is deeply influenced by the Common Law tradition. This leads to the question of the translatability of the Common Law into Chinese as Hong Kong lawyers fear. Sin (1992) argues that the Common Law is not inseparable from English. In his discussion, he rules out two main arguments