THE "REPLACEMENT" CHIEF EXECUTIVE'S TWO-YEAR TERM: A PURE AND UNAMBIGUOUS COMMON LAW ANALYSIS

"And what is good, Phaedrus,
And what is not good –
Need we ask anyone to tell us these things?"[1]

I believe the plain meaning of the Hong Kong *Basic Law* is that the person replacing the Chief Executive ("CE") this year (2005) shall serve out the CE's present term, which is two years (2005–2007) only, and that it does not mean the replacement would have a new, full five-year term lasting from this year (2005) until 2010. I differ with some other lawyers on this point.[2] My reasons for this opinion are based upon my reading, as a common-law lawyer,[3] of the text of the Basic Law.[4] A number of official and unofficial commentators on the present subject have referred to outside sources – previous (unapproved) Basic Law drafts, comments of the drafting committee, reports of PRC and Hong Kong officials and legal scholars, to name a few – in reaching their conclusions. These, I feel, are both unnecessary and improper. On this issue, at least, the Basic Law is a self-contained constitutional document, is unambiguous, and speaks for itself.[5] It occupies the entire field, and the answer, I suggest, is found wholly within the text. In fact, I hold that in the case of the Basic Law, reference to these sources as a sort of "legislative

1 Robert M. Pirsig, *Zen and the Art of Motorcycle Maintenance: An Inquiry Into Values* (London: Corgi Books, 1989), epigram following frontispiece; unattributed but perhaps Pirsig's understanding or translation of Plato's dialogue.

2 A statement given by Secretary for Justice Elsie Leung, at a press conference on 12 Mar 2005, which reaches some of the same conclusions as I express here, but for somewhat different reasons, including legislative history of the Basic Law, and given as the official "stance of the Government of the Hong Kong Special Administrative Region," may be read online at http://www.info.gov.hk/gia/general/200503/12/03120310.htm and excerpted at http://www.news.gov.hk/en/category/ontherecord/050314/html/050314en11003.htm (visited 12 Mar 2005). Official responses of the Hong Kong Bar Association to her statements may be read online at http://www.hkba.org/whatsnew/index.html (visited 21 Mar 2005). Thanks to P. Y. Lo for pointing this out.

3 I am mindful that my discussion begs the question of whether the Basic Law itself is a common-law document but this is a much larger question that cannot be considered here.

4 In this analysis, I have tried to remain as hermetically apart from any party, policy, politics, constituency, agenda, special pleading, or potential outcomes as possible, but rather to consider only the text of the Basic Law itself – to wear "pure" lawyerly blinders. In this I probably come close to the views of Hans Kelsen, *A Pure Theory of Law*, Max Knight trans. (Berkeley: University of California Press, 2nd edn, 1970).

5 *See* generally *Halsbury's Laws of Hong Kong* (Hong Kong: LexisNexis/Butterworths, Vol 7 "Constitutional Law", 2001), pp 182–192 (hereinafter "Halsbury's *Constitutional*").

history" is risky business because of the fact that the full *travaux préparatoires* of the Basic Law are not available and appear to have been concealed as "state secrets."[6] Hence, reference to the patchy materials that are available is almost sure to be skewed.

No constitutional text such as the Basic Law speaks to each and every exigency that may arise during its tenure. It is not supposed to do so; there are always lacunae, and the Basic Law, like all statutes, is in places not artfully drafted. But as US Chief Justice John Marshall famously said:

> "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code ... Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be *deduced from the nature of the objects themselves ... [W]e must never forget that it is a constitution we are expounding*.[7]
>
> ... [Ours is] a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for *exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur*."[8]

Such "constitutional moments" as these are pivotal, but they are not necessarily complex or arcane. Nor is the issue of the CE's term a matter of "fundamental rights."[9] It is simply matter of counting numbers. And there is

6 Yash Ghai, "Litigating the Basic Law: Jurisdiction, Interpretation and Procedure" in *Constitutional Debate*, pp 3, 28–29. To see some but not all of such records is not right because "It is not right that the government can pick and choose as to what sort of documents it thinks useful or helpful to the construction of the provisions of the Basic Law." Halsbury's *Constitutional*, p 190 [105.149 para 4].

7 M'*Culloch* v *Maryland*, 17 US (4 Wheat) 316, 407 (1819); emphasis added. I adduce Marshall here and other US materials elsewhere for the substantive ideas only, as I consider they are consistent with and help explain Hong Kong law, with no suggestion that American common-law views or rules are specifically applicable in an adjudicatory sense. Art 8 of the Basic Law must relate to the common law of England; it cannot be read to mean that the rules of all common-law jurisdictions should have application in Hong Kong. *Y v Y* [1997] HKLRD 933–934, 937–938, [1997] 3 HKC 43–44, 48–49; *Halsbury's Laws of Hong Kong* (Hong Kong: LexisNexis/Butterworths, Vol 23 "Statutes", 2004), p 554 [365.020 n 1] (hereinafter "Halsbury's *Statutes*"). Even if Hong Kong courts might refer to the law of other Commonwealth jurisdictions, this would perforce exclude US law.

8 *Ibid.*, at p 415; emphasis added.

9 A distinction that is succinctly problematized vis-à-vis the common law and Basic Law in Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press, 1997), pp 179–185 (citations omitted).

no "impugned act" of any branch or agency of government at stake – this is not judicial review. Hence, the task constitutional interpretation remains much closer to that of "pure" statutory interpretation.[10]

What then, can be made of the text of the Basic Law on the subject of the CE's term using the traditional common-law rules of interpretation[11] so as to understand the text, the whole text, and nothing but the text?[12]

The Relevant Provisions

The Preamble of the Basic Law indicates that it enacts and embodies the principle of "One Country, Two Systems" (OCTS). In addition, there are three major portions of the Basic Law that are applicable to this question. Chapter IV, Section 1 ("The Chief Executive") and Section 2 ("The Executive Authorities"), Articles 43–65 inclusive, are the primary provisions. Article 45 therein incorporates by reference Annex I ("Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region"), paragraph 6 of which in turn incorporates by reference the "Decision of the National People's Congress of the People's Republic of China on the Method for the Formation of the First Government and the First Legislative Council (LegCo) of the Hong Kong Special Administrative Region" of 4 April 1990 (hereinafter the "Decision"). All of these sections have language that impinges on and modifies the subject interpretation. All the "units of sense"[13] must be read together as a whole because the Basic Law consists of a complete and comprehensive statutory scheme. No single provision may be taken in isolation as dispositive of the question.

[10] *See* discussion and citations in Sir Anthony Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (New South Wales: Federation Press, 1996), pp 13, 17–18.

[11] Many of which are found in the Interpretation and General Clauses Ordinance (Cap 1), Laws of Hong Kong, as well as implied in Articles 19 and 158 of the Basic Law.

[12] Something, perhaps, akin to John Rawls's "veil of ignorance" vis-à-vis the "original position." John Rawls, *A Theory of Justice* (Oxford, Clarendon Press, 1972).

[13] This is a summary of rules which may be seen, with cases and annotations, in Francis Bennion, *Statutory Interpretation* (London: LexisNexis/Butterworths, 4th edn, 2002), pp 991 *et seq* and Halsbury's *Statutes*, pp 541–644; this reference is to p 548 [365.009]. A shorter discussion may be read in Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Hong Kong: Oxford University Press, 3rd edn, 1998), pp 91–96; and a general discussion may be read under "Statutory Construction" in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 7th edn, 2001), pp 1410–1421. To be sure, the legislature can, if it wishes, specify that a certain term or provision within a statute be given special emphasis using language such as, "The terms of this article shall prevail, the provisions of any other article or provision herein to the contrary notwithstanding." No such special language exists in any of the relevant provisions of the Basic Law under consideration here. The "laws in force in Hong Kong" include both the Basic Law and the statutes (Art 18; compare Art 160). Common-law meanings are to be applied. Halsbury's *Statutes*, p 557 [365.0240].

In addition, there is the Preface or Preamble, which declares that the Basic Law went into operation as of 1 July 1997.[14] All relevant dates, times, and terms in that scheme are measured from that date in multiples of twos, fives, 10s, and 50s until 2047.[15] There is no provision in the Basic Law for counting such terms or periods in any other way, or for starting from any other date, unless there is an official amendment on the question. So far there has been none. Article 46 gives the CE a possibility of two five-year terms. In addition, the term of the CE "Election Committee" is likewise five years under Annex I.

As noted earlier, some of the relevant articles and sections specifically mention, refer to, and incorporate each other, but even where they do not provide such a direct link, the basic rules of interpretation still require that they be read together as a statutory whole.[16] All these items taken together constitute the "internal aids" to interpretation.[17]

Common Law Rules of Statutory and Constitutional Interpretation

In the common law, statutes must be interpreted to give full intent to the meaning of the legislature.[18] They must be interpreted within their four corners, giving full effect to all the words and provisions in their ordinary meanings. None may be considered surplusage. Where the language of a statute is clear and unambiguous, the meaning must be sought from within the text itself. It should be noted that "ambiguous" (多義), like "ambivalent" and "ambidextrous," means pointing in two directions at once – i.e., "competing alternative interpretations."[19] It does not mean "vague" (含糊).[20] Ambiguity and vagueness may, indeed, create or potentiate each other, but neither is a

[14] Preambles are part of the interpretable text. Halsbury's *Statutes*, pp 545 [365.004] and 583 [365.054].

[15] Due to space constraints, I must pass for now the interesting and altogether relevant question of the fact that the Basic Law is a "temporary law" having a certain sunset date – 2047. It is not, like most constitutions, designed to "endure for ages to come." The implications of this reality are vast. See, for example, Halsbury's *Statutes*, pp 626 [365.099] and 635–636 [365.108–365.110].

[16] Halsbury's *Statutes*, pp 568–569 [365.040–365.058]; 575 [365.046] and 576 [365.047].

[17] *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 2 HKLRD 533.

[18] Halsbury's *Statutes*, p 554 [365.020]. This is not identical to the idea of the "original intent" or "original understanding" of the framers of a constitution or the first generation that lived under it. The Basic Law was made primarily by mainland Chinese for Hong Kong Chinese. Chen, "Interpretation" pp 380, 421. The people of Hong Kong had little input to, or knowledge of, either it or the Joint Declaration prior to their adoption on the mainland. Deng Xiaoping said: "The contents of the Sino-British talks have not yet been made public, so many Hong Kong residents do not know the Central government's policy. Once they become familiar with it, they will have full confidence in it ... We are convinced that the people of Hong Kong are capable of running the affairs of Hong Kong well ... The people of Hong Kong themselves will agree to nothing less." *Selected Works*, Vol 3, p 70. Hence, I eschew the "original intent" approach to interpretation of the Basic Law in favour of a strictly textual approach.

[19] See n 17 above. Chen, "Interpretation" pp 380, 430.

[20] Halsbury's *Statutes*, pp 567–569 [365.036–365.040].

necessary concomitant of the other. Where there is a true ambiguity, "it must emerge from the provision [of the statute] that is said to be ambiguous or the instrument to which it forms a part. Extraneous material cannot be relied upon to *create ambiguity*."[21] But perhaps the most important fact to realize about both the 1984 Joint Declaration and the Basic Law is that vagueness in them was intentional, was considered to be a *desideratum*.[22] Deng Xiaoping said: "I have said the law should not be weighed down with too much detail."[23] He said this in the context of ruling out Western-style constitutionalism, democracy, elections, separation-of-powers, and in particular, a "British or American parliamentary system."[24]

Similarly, in a constitutional instrument, the mere fact that the constitution uses general language does not mean that such terms are either ambiguous or vague.[25] If the clear words are wide enough to cover a situation, it does not matter that it was not in the contemplation of the legislature at the time of enactment,[26] or if it never struck the draftsmen that they needed specific mention.[27] Where there is no ambiguity, the consequences of a particular interpretation may be disregarded,[28] and vice versa.[29]

Perhaps most importantly, the interpreter may not fasten upon any one provision as a hobbyhorse in isolation, to the exclusion of other relevant provisions – an error that can be fatal to proper analysis.[30] Several who have participated in this debate have made this mistake. An example of such an error is those who quote only Article 46, which states in unequivocal language that the term of the CE "shall be five years." If Article 46 or Annex I were the only provisions on the subject, that would be the end of the discussion and would settle the matter as to the rights of the "replacement" CE – the term would be five years. But Article 46 and Annex I are not the

[21] *Hong Kong Clays & Kaolin Co Ltd v Director of Lands* [1999] 1 HKLRD 527, 536; discussed in Halsbury's *Statutes*, pp 568 [365.038] and 597 [365.071]. *See* also and compare Halsbury's *Statutes*, pp 592–593 [365.067], 595–596 [365.070]; and 599 [365.074].

[22] A point noted as early as 1987 in Roda Mushkat, "The International Legal Status of Hong Kong Under Post-Transitional Rule", (1987) 10(1) *Houston Journal of International Law* 1, 12.

[23] *Selected Works*, Vol 3, p 218. This entire speech should be studied carefully for its insights into Deng's thinking on the Basic Law. All of Deng's major pronouncements on the Basic Law are conveniently collected in Deng Xiaoping, *Deng Xiaoping on the Question of Hong Kong* (Hong Kong: New Horizon Press, 1993). There are some differences in the English translations, some of them substantial, between this collection and the three-volume official English *Selected Works* published in Beijing, to which I have referred herein. In all questionable cases, reference should be made to the official Chinese text, 鄧小平, *鄧小平文選* (北京：人民出版社) in three volumes, various dates, also published in Hong Kong by Joint Publishing Co (三聯書店) – the former in simplified characters (簡體字), the latter in traditional characters (繁體字).

[24] *Ibid.*, p 219.

[25] Halsbury's *Constitutional*, p 185 [105.145].

[26] Halsbury's *Statutes*, p 573 [365.045 n 2].

[27] *Ibid.*, p 579 [365.050].

[28] *Ibid.*, pp 589–590 [365.064].

[29] *Ibid.*, p 590 [365.065].

[30] *Ibid.*, p 576 [365.047].

only relevant provisions, and therefore their seeming absolutes are qualified by other relevant provisions in the context. This is standard common-law interpretation.[31] "The literal meaning of a particular section may in this way be extended or restricted by reference to other sections and to the general purview of the statute."[32] As US Supreme Court Justice Oliver Wendell Holmes, Jr, wrote:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."[33]

It is this "neighbourhood of principles of policy" that is crucial in forcing us to consider the whole context, in which the relevant provisions all qualify, add to, subtract from, and colour the meaning of any one provision.[34]

The Basic Law provides for the enactment of laws for Hong Kong (Article 17) according to its provisions – hence, the Basic Law has been called Hong Kong's "mini-constitution." Thus, unless the Basic Law itself were amended, no laws enacted under the Basic Law can surpass or survive the Basic Law, which by its own terms is to have a lifespan of 50 years from 1997 to 2047. It follows, therefore, that any law or interpretation that seeks, by any means, to extend its operation past that date is itself *ultra vires* – i.e., beyond the power granted by the Basic Law. Any decision that would alter its present basic scheme of measuring terms and periods so as to be coterminus with 2047 would be illegal and therefore void. This would include, for example, the Hong Kong government's "Chief Executive Election Bill"[35] of 2001, which, the government assumed erroneously, provided that a replacement CE's terms would "run afresh for a period of five years."[36]

[31] In fact, this precise problem arose in *Medical Council of Hong Kong v Chow Siu Shek, David* [2000] 2 HKLRD 674, 683–684; [2000] 2 HKC 428, 438–439, in which interpreting a single provision "on its own and literally" was said to be "of no use" as it would lead to conflicting and absurd results.

[32] Halsbury's *Statutes*, p 576 [365.047]; favorably citing *Medical Council of Hong Kong v Chow Siu Shek, David* [2000] 2 HKLRD 674, [2000] 2 HKC 428.

[33] *Hudson Water Co v McCarter*, 209 US 349, 355 (1908).

[34] Halsbury's *Constitutional*, p 180 [105.140 para 2].

[35] Which became the Chief Executive Election Ordinance (Cap 569), Laws of Hong Kong. Regarding which, *see* the article at http://www.info.gov.hk/cgi-bin/cab/legco_brief.cgi?mode=update&uid=13 (visited 17 Mar 2005).

[36] *See* Secretary for Justice Elsie Leung's aforementioned statement, allegedly applying the common-law rules of interpretation, but making the same mistake of taking Art 46 in isolation and reading it literally. It is not surprising, therefore, that the government initially went astray in assuming that a replacement CE would have a full five-year term. In noting that the Basic Law is a "national law" of the PRC, and arguing from the practice of the mainland, Ms Leung also referred to the "institutional framework and rules of statutory interpretation of the Mainland" without specifying what that framework and those rules are or where they might be found.

When a constitution is to be interpreted, the rules of statutory interpretation, although not eschewed,[37] are liberalized somewhat because a "constitutional instrument is treated as *sui generis*, calling for principles of interpretation of its own, suitable to its character, without necessary acceptance of all the presumptions that are relevant to legislation of private law." Specifically, this means that the constitution must be interpreted in a broad, liberal, generous, and benevolent way so as to avoid narrow, pedantic, literal or technical interpretation.[38] In sum, the overall purpose of the instrument must be respected (the "purposive approach").[39] Absurd results are to be avoided, and the intent of the legislature must be enforced.[40]

Besides the common law, are there any other rules of statutory and constitutional interpretation available that may be applicable to the Basic Law in Hong Kong – rules, say, of mainland interpretation? The answer is no. Although the Basic Law itself may constitute an "organic link" or "marriage"[41] between the "two systems" of OCTS and their "interaction"[42] with each other, that fact does not by itself provide a rule or system of interpretation. If there are systematic rules of *statutory* interpretation on the mainland, they are not known, at least in full,[43] and this goes double for *constitutional* interpretation.[44] In the absence of such rules, any interpretation of the Basic Law would be a mere *ipse dixit*.

A Further Discussion

It is well to keep in mind that the phrase "Chief Executive" refers to a governmental office or title (長官); the term, period or tenure of that office (任期); and the person/individual who fills that office for that period – the first being Tung Chee-hwa (董建華). Article 46 limits each term of the CE to five years and not more than two consecutive terms, or a total of 10 years.[45] In

37 Halsbury's *Constitutional*, p 186 [105.147].
38 *Ibid.*, p 182 [105.141].
39 *Ibid.*, p 183 [105.142]. Relevant "extrinsic materials" may be used, p 185 [105.145], but this does not include the opinion of academics, p 191 [105.150]. *See* also *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, 2 HKLRD 533 (distinguishing between pre-enactment extrinsic materials and post-enactment extrinsic materials).
40 Halsbury's *Constitutional*, pp 167–168 [105.129]; Halsbury's *Statutes*, pp 561–562 [365.028] and 567 [365.055–365.056].
41 Chen, "Interpretation" pp 380, 408, 422.
42 Wang Chenguang and Zhu Guobin, "A Tale of Two Legal Systems: The Interaction of Common Law and Civil Law in Hong Kong" (1999) 4 *Revue Internationale de Droit Comparé* 917.
43 "Although some scholars have produced books and articles on the proper approaches to and principles of statutory construction in mainland China, no authoritative set of rules has yet evolved in this regard." Chen, "Interpretation" pp 380, 416.
44 *Ibid.*, at pp 411–416.
45 The Chinese text says, 可連任一次, that is, "is permitted a successive term once."

other words, mathematically speaking, the "first" CE's term may be a maximum of 10 consecutive years, during which the same or more than one person may serve. Under Chapter IV, Section 1, in which Article 46 occurs, there is never a time during the existence of the HKSAR when there is no CE. Thus, the first CE (person, office, term) may serve from 1997 to 2007. As noted earlier, all counting under the Basic Law starts from 1997. Hence, we simply count from 1997 in five-year increments through until 2047 – the end of the "50-year" period. All such terms are multiples of fives and 10s. The obvious reason for the selection of these increments is to make the term of the final CE coterminus with the 2047 end-date of the Basic Law itself (1997–2047 is 50 years) per Article 5. To alter either period so that they were no longer coterminus at 2047 would constitute an anomaly (**異常現象**), and constitutional documents may not be construed so as to produce anomalies.[46]

Any particular CE's (person's) total period (term) may be lessened if the CE resigns under any of the circumstances provided in Article 52(1) (such as for serious illness which causes the inability to discharge his duties (office) "or other reasons" (**其他原因**)),[47] but it may not be expanded or extended. If it were expanded or extended, that would move every subsequent CE's term back by the length of such extension – and past the end date of 2047. Significantly, paragraph 7 of Annex I provides that if there is a need to amend the method for selecting the CE subsequent to the year 2007, that amendment must (**須**) be made by a two-thirds majority of the Hong Kong LegCo and reported to the National People's Congress Standing Committee for approval. Paragraph 4 of the "Decision" additionally provides that the "term of office of the first Chief Executive shall be the same as the regular term (**與正常任期相同**)." Anything else that may occur (such as the appointment of a replacement CE (person) in the event of a resignation) has no express power to alter it (office, term).

The specific mention of the year 2007 as a demarcation date is significant. Under the common-law principle of *inclusio unius est exclusio alterius* (the inclusion of one thing is the exclusion of all other things),[48] the explicit mention of the method for changing the term post-2007, but the complete absence of any mention of changing the term pre-2007, plus the freezing of that term to be the "same as the regular term," means that the total initial term of the

[46] Halsbury's *Constitutional*, p 186 [105.147]. With statutes, there is a strong presumption that the legislature does not make mistakes, Halsbury's *Statutes*, p 569 [365.040] – a presumption that is probably even stronger with regard to constitutional documents, which are probably crafted with greater care, Halsbury's *Constitutional*, p 182 [105.141].

[47] In which case the rule of "*ejusdem generis*" may apply; i.e., the "other reasons," if any, must belong to the same kind, class, or category as the specific reasons mentioned. Halsbury's *Statutes*, pp 580–582 [365.051]. The same constriction applies to the Latin *et cetera* (etc.) – and so forth *similarly*.

[48] Halsbury's *Statutes*, p 579 [365.050].

"first" CE prior to 2007 may not be expanded or extended. It can only be shortened by the CE's (person) resignation, with the remainder of that term to be filled by his replacement. Any action or result which may flow from such resignation would have no separate power to do otherwise. In any event, the "first" CE's initial total of two terms equaling 10 years must end in 2007. So also must his replacement's term. In theory, so also must the term of that particular Election Committee. Doing otherwise would result in the anomaly that the term of the CE would become out of step with that of the Election Committee – and again, constitutional documents may not be construed so as to produce anomalies.[49] Yet even if such a lag were to occur, it could not alter the fundamental counting scheme.[50]

In sum, if we read all of these provisions together within the four corners of the Basic Law, and take them at their ordinary plain-language meaning, as we must under the common-law rules of interpretation, it seems clear that the pivotal date is 2007, the end of the "regular term" of the first CE, and neither that date nor the method for selecting the CE may be altered before that date without amendment – they are firm. If a replacement CE is selected now in 2005 and given a new five-year term through 2010, that would alter the basic counting pattern as explained above. It would move all subsequent terms back by three years, ultimately ending in 2050 – three years after the Basic Law itself is to end. In addition, it would run afoul of Paragraph 4 of the "Decision" which provides that the "term of office of the first Chief Executive shall be the same as the regular term." By extending the term of the final CE to beyond the end date of the Basic Law in 2047, or to be truncated at 2047 into something less than five years, it would be a decision which the Basic Law does not grant the power to make.

In the event that the CE cannot function for a "short period (短期)," the first paragraph of Article 53 provides that his duties shall be "temporarily (臨時)" assumed by others who are named in lexical order (Administrative Secretary, Financial Secretary, or Secretary of Justice). More to the immediate point is the second paragraph of Article 53, which provides that if the CE leaves permanently so that his office "becomes vacant (缺位)," a "new" CE is to be selected within six months "in accordance with the provisions of Article 45." We have already seen that Article 45 itself refers to Annex I for the "specific method" for selecting the CE – in this case the "new" one under Article 53. And we have already seen that Annex I freezes the term(s) of the first CE to 2007 and (per the "Decision") calls that the "same as the regular term (與正常任期相同)." Hence, any "new" CE selected prior to 2007 to fill

[49] *See* n 46 above.

[50] A point made by Secretary for Justice Elsie Leung, in the aforementioned press conference, available at http://www.info.gov.hk/gia/general/200503/12/03120310.htm.

the "vacant" office of the "first" CE is held to that same date as part of the "regular term." That it may be changed subsequent to 2007 per Annex I does not affect what happens prior to 2007. This is the reason that the Basic Law refers to a "new" CE but not to a "new" regular term. Only the person changes – not the numerical calculation of the term. This is why the term "new" (新，新的) always refers to the CE, never the term of the CE. It is unfortunate that this confusion of language occurs in the law, but such things often happen.[51] That is why we have the rules of interpretation.

Returning to Article 53, we see two paragraphs, the first of which deals with a "temporary" situation, and the second of which deals with a permanent "vacant" situation. While a superficial reading might suggest that the two situations contemplated in these two paragraphs are distinct and even mutually exclusive, they are not. They are tied to each other both logically and linguistically. What ties them together is the final sentence of the second paragraph: "During the period of vacancy, his or her duties shall be assumed according to the provisions of the preceding paragraph," i.e., the first paragraph. The key word in this sentence is the word "provisions."[52] The "provisions" of the first paragraph are not limited to the persons who, in lexical order, shall assume the CE's duties. Those "provisions" also include the "temporary" language relating to such assumption. Thus, Article 53 is a linguistic and conceptual whole.

A *fortiori*, Article 45, Annex I, and the "Decision" (particularly its paragraph 4) all add up to the conclusion that the term of the first CE "shall be the same as the regular term (**與正常任期相同**)." This is a crucial provision. There is no language in any of these provisions, taken separately or together, that permits the appointment of a "temporary" CE that would "start the clock anew," begin a fresh five-year term as CE, or add any number of years to the "regular term." The pivotal year 2007 cannot by such action be transmuted to 2010 or any other year. Neither can the end-date of 2047. Nothing in any of these provisions authorizes changes to the statutory scheme of twos, fives, 10s, and 50s measured from 1997 unless the Basic Law itself were to be amended.

51 *Ibid.*

52 The Chinese text provides, **依照上款規定辦理** – "to be done as determined/mandated according to the previous paragraph." This slight difference is not significant for my purposes here. However, the reference to "provisions" in statutory language is important. The usual term is **條款**, regarding which *see* Albert Chen, "Government's Argument Misses the Point", *South China Morning Post*, 23 Jan 2001.

Conclusion

Hence, I conclude, based on a strictly textual common-law reading of the Basic Law, that the person replacing the present "first" CE shall serve out his present term, which is two years (2005–2007) only, and that it does not mean that the replacement (person) would have a new, full five-year term lasting until 2010. The strictly textual common-law approach is the only proper approach in Hong Kong because the "original intent" of the Basic Law is not and cannot be known, mainland methods and rules of interpretation are not known or applicable, the full *travaux préparatoires* of the Basic Law are not available, and the mainland paradigm is the "socialist system" of communist law. It is also appropriate because the highest courts of Hong Kong have declared it to be so. My reading of the Basic Law is consistent with both OCTS and the Basic Law because the Basic Law enacts OCTS, and because OCTS, like the Basic Law, must and will end in 2047.

If reasonable minds can disagree, are my conclusions ineluctable? I believe they are. To conclude otherwise, that Article 46, for example, stands supreme and commands a five-year term no matter what, ignores the operation of the common-law canons of interpretation as well as the overall scheme of the Basic Law. I believe the text points in only one direction – there is no ambiguity.

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