

Bi-lingual Drafting in Hong Kong¹

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Introduction

I am very pleased to see you all in Hong Kong this morning. I am also honoured to have been asked to speak at this Conference. Hong Kong had indeed experienced both interesting and challenging times in the years that culminated in a change of sovereignty in 1997. Huge volumes of legislations contained new social concepts such as human rights law, laws on equal opportunities and privacy and data protection were enacted in the period from the late '80s to 1997. Laws that were required for a smooth transition to the new regime were also put on a top priority time table of the Chinese Central Government, the British Government and the local Hong Kong Government. The onerous burden of the drafting of all these laws fell on the shoulders of the 30 or so legislative counsel in Hong Kong. This group comprised both counsel who were locally recruited as well as counsel from other common law jurisdictions, such as England, Scotland, Ireland, Australia, New Zealand, Canada and Sri Lanka. They were a magnificent team of which luckily I was a member. I would like to take today's opportunity to express my gratitude to them for their contribution to Hong Kong's legal system.

In addition to the conventional legislative drafting work, one other major undertaking of Hong Kong's legislative counsel at that time was the production of a bilingual statute book. This was a historic and unprecedented work. Today, I would like to share with you Hong Kong's experience in bilingual legislation and how that experience affects the way we now draft our law.

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When the United Kingdom established sovereignty over Hong Kong in 1842, the English language became the official language and the predominant language of the law. As far as written laws are concerned, all legislation was drafted only in the English language. The English texts of the draft laws were then debated in the Legislative Council, passed through the legislative process and published. English language was also the only language used in court proceedings. The exclusive use of English in legislation and in court proceedings has resulted in a “linguistic apartheid” and has alienated Hong Kong’s Chinese speaking local population from the legal system. In those years, Hong Kong people who were not proficient in English were also disadvantaged in their dealings and communications with the Government, since almost all governmental documents and official correspondence were done in the English language. This system resulted in the public’s alienation from the law, and thus led to inequality and injustice.

With the signing in 1984 of the Joint Declaration the Governments of the United Kingdom (‘the UK’) and the People’s Republic of China (‘the PRC’) on the future status of Hong Kong, there was little doubt that the Chinese language (being the official language of the PRC and the language used by the majority of the population of Hong Kong) would become at least one of the languages of the law of Hong Kong. This event triggered a flurry of legal language reforms.

Enactment of legislation to provide for bilingual laws in Hong Kong

In 1987, legislation was passed in both the UK and Hong Kong to provide that all laws of Hong Kong may be enacted in both English and Chinese. The passing of these laws laid the constitutional framework for the implementation of bilingual laws in Hong Kong.

Hong Kong’s choice for producing a bilingual system is an obvious one. Both the PRC and the UK saw the advantage of maintaining the existing legal system in which the English language is entrenched. Apart from being the working tool of the legal system, the English language is also a language of international trade and commerce. If one wanted to preserve Hong Kong’s position as an international commercial, financial and communication centre, the continued use of English language was necessary. On the other hand, with the prospect of Chinese sovereignty over Hong Kong, it was clear that nationalistic considerations would impinge. The fact that Hong Kong is a predominantly Chinese community was also extremely pertinent. Most people in Hong Kong are not proficient in the English language. The Chinese language is an integral part of their identity and cultural consciousness. Nationalistic and cultural reasons aside, the Chinese language’s continued subordination to the English language as the language of law in Hong Kong was not seen to be in the interest of administration of justice. The decision to produce a bilingual legal system was therefore a compromise between these considerations.

In Hong Kong, the construction of a bilingual legal system started in 1987. Prior to that, all legislation was drafted and enacted in the English language only. Since then, however, all new legislation has been drafted and enacted in both Chinese and English. Also starting in that year was the program of translating all existing legislation from English into Chinese. This was a mammoth exercise involving the translation into Chinese of over 22,000 pages of legislation, much of which was drafted and enacted long time ago.

In drafting new legislation in Chinese and in translating existing legislation into Chinese, the legislative counsel and translators in Hong Kong are guided by the principles laid down in the laws. The relevant statutory provisions are contained in the Interpretation and General Clauses Ordinance which provides –

“(1) The English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly.

(2) The provisions of an Ordinance are presumed to have the same meaning in each authentic text.”.

These provisions make it clear that both the Chinese and English texts of the legislation enjoy the same legal status. This also means that the legal effect of the two different languages texts should be the same. The logic underlying this is that, although there are two texts and two languages, the law is one. This has put an extremely onerous burden on Hong Kong legislative counsel and translators, for they must ensure, whether in drafting new bilingual legislation or in translating existing legislation from English into Chinese, that no one single provision of a bilingual legislation can be understood and construed in one text as having a different meaning from its meaning in the other. What they are aiming to achieve is that no court will be persuaded to give words used in one language version a meaning different from the other language version. Because of this requirement of strict legal precision, bilingual drafting and law translation are much more difficult than drafting and translation for most other purposes.

Difficulties in bilingual legislative drafting and law translation

Difficulties in bilingual legislative drafting and in law translation are many. Two main difficulties can be mentioned here. One is the lack of an equivalent Chinese expression to convey an English common law expression. Another concerns the complex sentence structure of most of the English language statutory provisions.

English legal expressions originate in the English legal system and reflect the socio-cultural context in which that legal system evolved. A legal expression does not exist in isolation. The historical evolution of English law is an interaction of the philosophical, moral, ethical, linguistic and cultural values. Many English legal expressions are historical and often archaic. It is not always possible to identify an existing Chinese expression that can accurately and fully convey the same ideas or concepts behind the English legal expression.

The lack of an equivalent Chinese expression to exactly convey the English expression has sometimes compelled a bilingual drafter and law translator to coin a new Chinese expression. These newly coined legal expressions have gradually crept into everyday usage in the local Chinese speaking community, especially among lawyers, with the result that some of them have now become accepted Chinese expressions. Thus, the difficulty of expressing English common law terms into Chinese has now been largely resolved. However, the other main difficulty, namely, the complex sentence structure of English legislation, poses an even bigger problem in the development of Hong Kong’s bilingual legislation system.

Enormous differences exist between English and Chinese in grammar, syntax, style, and structure. English legal sentences, especially those written a long time ago, often have a ‘run-on’ structure that contains numerous commas or semi-colons, but only one full-stop. English sentences also have adjectival clauses modifying a subject and adverbial clauses modifying a verb. Either a conjunctive pronoun, such as “which” or “who” or a preposition coupled with a relative pronoun may introduce the adjectival clause. The use of conjunctions and clauses makes English sentences long and complex. Such long and complex sentences are quite commonly found in English laws, especially the older ones.

In contrast, the Chinese language has a much simpler sentence structure and is usually expressed in terse statements. The rendering of complex English sentences into Chinese requires restructuring in the Chinese language; otherwise, the sentence is either incomprehensible or unclear to the reader. As a result, legislative counsel or translators preparing the Chinese texts face a difficult task.

A notorious example of unintelligible translation is section 31 of the *Evidence Ordinance* of the laws of Hong Kong. The original English section contains 354 words, 32 commas and with only one full-stop. This structure is extremely difficult to read and understand and, therefore, extremely difficult to translate. The resultant Chinese translation version is also unintelligible. This has attracted many criticisms from readers of the Chinese texts.

Many of the problems and difficulties illustrated earlier on were brought into focus in the preparation of the Chinese texts of the laws. The difficulties are more manifest in the 22,000 pages of pre-1987 laws into Chinese than the case of drafting new bilingual laws. In translating pre-1987 laws, translators were mostly confronted with old laws that were not drafted in plain, modern style. The translators were stuck with these old laws and were not able to change them or seek to improve their language when doing the translation. On the other hand, the drafting of new bilingual laws always begins with the preparation of the English text. Based on the English text, the Chinese text is then prepared. When difficulties are encountered in preparing the Chinese text, the drafter of the English text is able to make changes to the linguistic aspects of the English text to suit the preparation of the Chinese version. It is found that if the English text of a piece of new legislation is drafted in plain language, preparation of the Chinese text is often much easier. As a result of this experience, Hong Kong’s legislative counsel became aware of the need to prepare the English texts of the laws in modern, plain language.

Language re-engineering exercise

Some 15 years ago, legislative counsel in Hong Kong initiated a “language re-engineering” exercise. This was actually a gradual movement towards plain legal drafting. In drafting the English texts of new legislation, Hong Kong legislative counsel have been required to draft or write in a plainer and more modern manner. In particular, the slavish following of old fashioned precedents and the adoption of long, convoluted sentences are discouraged. Also, legislative counsel are reminded always to draft in a style that focuses on the needs of the audiences of the legislation. By audiences, I mean all members of the public who are affected by the legislation,

not just lawyers and judges.

Since embarking on this language re-engineering exercise, it has been found that the preparation of Chinese texts of the laws has been made much easier, with the result that the Chinese texts of our more recent laws are also found easier to read and understand.

It is clear that the traditional wordy, cumbrous and impersonal nature of statutory provisions and legal instruments has resulted in Hong Kong statute law being less effective. It has also hindered the construction of an effective bilingual legal system. With the language re-engineering exercise mentioned above and with the writing of Hong Kong laws in a plainer and more modern manner, those laws are now more accessible to the Hong Kong public than they were before. This helps enhance the public's awareness of their rights and obligations and thus helps to promote the rule of law in Hong Kong.

Plain language legislative drafting

While the advantages of plain legislation are now generally acknowledged, few people realise that plain language drafting is often more difficult than the traditional style of legislative drafting. Legislative counsel often have to spend extra time and effort in order to make the laws they write plain and clear enough for everyone to understand. Given Hong Kong's very busy legislative program, combined with the fact that legislative counsel are sometimes burdened with almost impossible deadlines for the completion of the drafting of legislation, plain language drafting is not always readily achievable.

This is to be regretted, but it is a political reality that sometimes has to be accepted. To overcome this problem, the Government administration and the Legislative Council have to be continually convinced of the need to allow more time for the preparation of draft legislation.

Only a decade ago, legislative debates in Hong Kong were largely conducted in the English language. Now, almost exclusively, debates in the Legislative Council are conducted in the Chinese language. The Chinese language is also used more frequently in court proceedings and among lawyers in their professional work. Many of the newly coined Chinese versions of common law expressions used in the Chinese language versions of Hong Kong laws are now in everyday use in Hong Kong. This all suggests that the common law can work in the Chinese language, and also that Hong Kong legislation can be more effective if it is drafted in plain language.

Conclusion

I will conclude by saying that, with the determination and efforts of Hong Kong's administration, legislators, judges, lawyers, legal academics and legislative counsel during the years since 1987, a solid foundation of a bilingual legislative system has been laid in Hong Kong. However, the system is still relatively new and there is still room for improvement in the way Hong Kong laws are drafted and made. Continual efforts in training legislative counsel on plain language drafting and in promoting public awareness about the advantages of plain language legislation are still very necessary.