

LAW IN A FOREIGN LANGUAGE. THE HONG KONG EXPERIENCE

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INTRODUCTION

From 1 July 1997, Hong Kong will cease to be a British colony. After a century and a half, it will once again become an integral part of China. In an attempt to smoothe that transition, the British and Chinese governments have provided Hong Kong with a special status. For fifty years it will be a Special Administrative Region with its own constitution, the Basic Law.¹

Under the principle of 'one country, two systems', China has promised to allow no kind of socialism in Hong Kong. In a statement remarkable even for a government with China's own, shall we say 'pragmatic', form of Marxism-Leninism, Article 4 proclaims:

«Socialist system and policies shall not be practised in the Hong Kong Special Administrative Region and the existing capitalist system and way of life shall not be changed for 50 years.»

What splendid confidence! It seems churlish to doubt the ability of a government which is so sure of its longevity, to say nothing of its control over its subjects, that it can follow that boast with this:

«The Hong Kong Special Administrative Region shall maintain the education system previously practised in Hong Kong.» [Article 142]

1. The Draft Basic Law, published by the Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Hong Kong, October 1988.

None of the hundreds of commentators on the Basic Law seems to have found such statements fatuous.² Perhaps they can be taken seriously as reassurances of the Chinese Government's goodwill, rather than claims to omnipotence. Lawyers may wonder at the following:

«The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for those that contravene this Law or have been amended by the legislature of the Hong Kong Special Administrative Region.» [Article 8]

It will be interesting to see what fun lawyers have with the interpretation of 'maintained' and with a common law frozen in its development on 1 July 1997, amendable only by the new legislature. Will it still be within a definition of 'common law'?

After all that, linguists will be relieved to learn that the Basic Law does not attempt to preserve the languages of Hong Kong unchanged for half a century. But Article 9 is quite vague:

«In addition to the Chinese language, the English language may also be used by the executive authorities, legislature and judicial organs of the Hong Kong Special Administrative Region. The English language is also an official language.»

Here is not the place to consider the legal difficulties which may —no, must— arise from the Basic Law's acceptance of the politico-linguistic dogma that there is only one Chinese language. Cantonese, spoken by nearly all Hong Kong's citizens, is not comprehensible by those who speak Putonghua (Mandarin) the language of people from Peking and of the well-educated from the rest of China. No distinction is drawn in Article 9 between written Chinese and oral. There is nothing in the Basic Law to protect Cantonese from Putonghua. 'The English language may also be used' is intentionally unclear. What is obvious is that Chinese, both written and spoken, will become the constitutionally established language. English will have to fend for itself when the colonial government is no longer there to protect it.

THE LANGUAGES OF HONG KONG LAW

Nineteen out of twenty of the residents of Hong Kong speak only Cantonese, their mother tongue, with any proficiency. Yet the language of the

2. There is already a considerable literature, see for example *Hong Kong's Basic Law: Problems and Prospects*, Faculty of Law, University of Hong Kong, 1990.

law has until recently been English, to the exclusion of all others. Still most judges, magistrates and barristers are monolingual English speakers. Even those whose mother tongue is Cantonese would find it hard to use that language in court. Similarly most solicitors, whether English-speaking or bilingual, would not be able to write a letter, let alone a formal document, in decent Chinese. There are no law reports written in Chinese. Until recently, legislation was in English only. English is the only language of legal education.

Until 1970, the sole language of the law in Hong Kong was, to all intents and purposes, English. Moves to introduce Chinese as a language of the law began in earnest with the four reports of a Government committee in 1971.³ Over the last twenty years progress has been slow and sporadic. It can be divided into three initiatives: bilingual legislation, Chinese in the court room and the Chinese Digest.

BILINGUAL LEGISLATION

The Official Languages Ordinance, first enacted in 1974, declared that English and Chinese were both official languages, with equal status, but it did not require legislation to be enacted in Chinese. The Official Languages (Amendment) Ordinance 1987 changed that by requiring that all principal ordinances —those which do more than make amendments to earlier legislation— must thenceforth be enacted and published in Chinese as well as English. Moreover, the Ordinance empowered the Governor to declare translations of existing legislation authentic. The Interpretation and General Clauses (Amendment) Ordinance 1987 s10B (1), passed at the same time, declared the English and Chinese texts of all legislation to be equally authentic.

New legislation is now produced in both languages. Equally authentic texts are published simultaneously. The English draft is invariably produced first and then translated into a style of Chinese which is at least as far from that written in any other context as English legislation is from any other register of English. Though support and even enthusiasm have been expressed by officers of the Government for the success of the translation work, though there has been some (though not nearly enough) provision of resources, though there is a Bilingual Laws Advisory Committee made up of

3. The historical development to 1985 is fully covered by CHEN, A. H. Y. «1997: The Language of the Law in Hong Kong» (1985). *Hong Kong Law Journal*, 19-47. The first ordinance to be published in Chinese as well as English was Ordinance No. 2 of 1858 'An Ordinance for licensing and regulating the use of Prepared Opium', see NORTON-KYSHE, J. W. *The History of the Laws and Courts of Hong Kong etc.*, 2 vols. Vetch and Lee, Hong Kong 1898, 1971 reprint, Vol. I, 467.

eminent lawyers and linguists to advise, progress is slow. There is no chance of the hopes for completion by 1997 being fulfilled unless there are radical changes in the present processes.

THE LANGUAGE OF THE COURTS

The language of the courts remains English. Of course, evidence could always be given in Chinese and interpreters have always been available. Interpretation is of variable, sometimes of execrable, quality.⁴ Most cases are heard by magistrates, who have considerable criminal jurisdiction.⁵ Most magistrates are expatriate, with little or no dependable knowledge of Cantonese, the language of nearly all those they try.

There have been recent attempts by the Government to extend the use of Cantonese in the magistrates' courts, which culminated in a memorandum from the Chief Magistrate to all magistrates on 7 March 1990. It announced that a Working Party on the Greater Use of Chinese in the Magistrates' Courts had recommended that the magistrate, each lawyer and each unrepresented party should make an initial choice of language to speak during the trial. Changes would require the leave of the court. The official record could be written by the magistrate in either English or Chinese. The date for the changes to come into practice was set at 17 April 1990. But the Bar Association, representing the interests of barristers in Hong Kong, asked for a postponement, though its representatives on the Working Party had apparently not dissented from the Report. The Chief Magistrate acceded to this request and announced that the start was deferred until further notice. On 8 October 1990 the Chief Magistrate issued a third memorandum. It disclosed that the Bar Association had made representations to the Chief Justice, who had insisted that the provisions for greater use of Chinese in the Magistrates' Courts should be implemented without delay, on 15 October 1990, though with some slight modifications at the Bar's request. The Chief Magistrate was careful to 'stress that the new procedures are designed to provide a framework for the greater use of Cantonese and that there is no compulsion whatsoever on anyone to use Cantonese if they prefer to use English'. Writing less than a month later it is too early for me

4. A typical complaint is that of 'Man in Court' in a letter to the Editor of the *South China Morning Post*, 12 October 1988. And see CHAN, T. F., DUFF, P., FINDLAY, M. and HOWARTH, C., *The Jury in Hong Kong*, Law Department Working Paper No. 1, City Polytechnic of Hong Kong, 1990.

5. *The Jury in Hong Kong*, p. 10: 'In 1988, there were only 296 criminal cases heard in the High Court compared with 1,824 in the District Court... 147,045 charge cases heard in the Magistrates court.'

to assess the effects of the changes, though I believe I should have noticed if the heavens had fallen.

Not much has changed in the higher courts, which comprise the High Court (one judge sitting alone as in England) or the usually three-judge Court of Appeal. There is one significant case. In *Gammon Building Construction Ltd v Cho Hing Yiu*, Cons L No 9 of 1988, an unreported judgment of 15 September 1988, Sears J pointed out that the Official Languages Ordinance s5(2) (b) required proceedings in the High Court to be conducted in English but that s5 (3) provided:

«Notwithstanding subsections (1) and (2), any party or witness in proceedings in any court may use either the English language or the Chinese language, or such other language as the court may permit.»

Applying the Interpretation Ordinance s19, which requires the judge to give 'such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit' Sears J held that 'proceedings' included pleadings. Chinese should be allowed 'at any stage of the proceedings when the circumstances so warrant it'.

«In this day and age, where the Chinese language is of greater significance in our judicial process, it would be thoroughly unjust to prevent a Chinese citizen putting forward his defence in Chinese... I am not encouraging the normal departure from the use of English but, when a person does not have a solicitor acting for him, I can see no reason why he should be forced to expend money to have his case drafted in English.»

In the Court of Appeal, where only points of law are argued, it may be some time before Chinese is heard. The Privy Council, still the ultimate court of appeal for the Colony, will lose its jurisdiction in 1997 to a new court, foreseen by the Basic Law. The Privy Council can rest assured that it will not have to face pleadings in Chinese in the next seven years. The new court which replaces it may well have to quite soon thereafter. Debates in the Legislative Council are in both Cantonese and English but that body, not being elected in any democratic fashion, is neither a parliament nor, like the Houses of the English Parliament, a court.

THE CHINESE DIGEST

The law of Hong Kong, like that of England, is largely found in the reported judgments of the higher courts. Legislation is incomprehensible without that gloss and large tracts of law are for the greater part untroubled by legislative interference, as common lawyers characterize it. The Govern-

ment of Hong Kong is well aware of the problem⁶ but has taken no direct steps to deal with it. It has, however, granted research funds to support a project at the new City Polytechnic of Hong Kong Law School which sets out to produce a digest in Chinese of the whole of the common law. A digest differs from a code in two important ways. First, it has no legislative force. Secondly, it is not so frightening to common lawyers, who see codification as an alien disease, narrowly avoided in the time of the ill-advised tyrant Henry VIII, and always threatening to undermine the fabric of the common law and with it all that is truly English. Article 8 of the Basic Law provides that the common law shall be maintained. To give that provision a chance, however slim, of working for the fifty years for which the Basic Law provides, the proponents of the Chinese Digest believe that all the law, not just the ordinances, will have to be made available in Chinese. The task is immense. There has been no satisfactory or comprehensive digest of the common law of any jurisdiction, even in English. But no jurisdiction's legal system has faced quite the same challenge. There are rumours that similar work has begun in China, and more than rumours in respect of the translation of the ordinances. Some progress has been made with work on the Digest. Even some early drafts of Chinese text have been prepared. Although there is money available, it has so far proved impossible to use it to recruit research assistance which can afford to stay with the project at the very low salaries it is allowed to pay. Nevertheless, new ways are being sought to get round bureaucratic problems and the researchers are optimistic. But it will be a long job and not altogether free from either the political or theoretical problems that have beset all attempts at codification in other jurisdictions.

THE POLITICAL DIMENSION IN ENGLISH HISTORY

It may be hard for European readers to believe that there has been little political activity by Cantonese-speakers to get their law in their own language. After all, many Hong Kong people, educated in English in law and history, have had available the example of the struggles of the English for law in the vernacular.

From soon after the Norman Conquest there were English chroniclers who complained about the transfer of authority, both ecclesiastical and lay, from English to Normans. There is no evidence for the much later

6. As was shown in an address by the Attorney-General, Mr Michael Thomas, 'The Development of a Bilingual Legal System in Hong Kong' on 23 September 1987. This shows a development of the same author's ideas from his address to the Hong Kong Linguistic Society of 19 December 1986 'The Language of the Law in Hong Kong'.

interpretations put upon the sources which suggest that William the Conqueror imposed French in any way. Certainly his own government appears to have used Latin primarily, with some English, for official documents, though many of the officers in that administration must have spoken only French.⁷

Over the next three centuries the use of French increased, particularly in government and most of all in law. But in 1362 England was at war with France and patriotic feeling against the French language seems to have been strong. In that year *Piers Plowman* was published, which makes much of the problems which arise when clever lawyers aid injustice for money.⁸ And Avarice craftily pleads ignorance of the law in that he did not know the difference between theft and restitution, 'For I never learned to read a book, and I know no French, honest, except that from the furthest end of Norfolk'.⁹

In that year, too, Parliament 'to the... amendment of the outrageous grievances and oppression done to the people', passed (in French) a statute which provided:¹⁰

«Because the laws, customs and statutes of this realm are not commonly known... because they are pleaded, shown and judged in French, which is much unknown in the said realm, so that the people... have no knowledge or understanding of what is said for or against them by their serjeants and other pleaders; and that reasonably the said laws and customs shall rather be perceived and known and better understood in the tongue used in the said realm, and every man may govern himself better without offending the law and keep... his heritage and possessions, [and the king and nobles have seen that in other countries there is better government because it is in the vernacular] the king has ordained... that all pleas... in any courts... shall be pleaded... and judged in the English tongue and entered and enrolled in Latin.»

There is dispute about the effect of that legislation. Some scholars hold that it made no difference at all,¹¹ which cannot be right, others that

7. This and other questions of the early chronology of French in England have been considered in ROEBUCK, D., «The Chronology of a Cobweb: Anglo-Norman from 1066 to 1250» (1990), 2. *Working Papers in Languages and Linguistics*, 1-43 (City Polytechnic of Hong Kong), hereafter referred to as *Chronology*.

8. SCHMIDT, A. V. C. (ed.) *William Langland: The Vision of Piers Plowman*, Dent, Everyman's Library, new edition 1987, e.g. Prologue lines 212-3.

9. Ibid. Passus V lines 234-5. ALFORD, J. A., *Piers Plowman: a Glossary of Legal Diction*, Brewer, Cambridge 1988 is now indispensable.

10. (1362) 36 Edward III, cap. xv.

11. LEGGE, M. D.: 'Anglo-Norman and the Historian' (1941), 26, *History*, 163-175 at 175; WOODBINE, G. E.: 'The Language of English Law' (1943) 18 *Speculum* 395, at 396.

it did what it set out to do, which is equally unlikely.¹² What is certain is that the complaints against the use of French continued. Archbishop Cranmer, writing probably of his experiences in the 1520s or 1530s, defended the use of the vernacular for liturgical purposes, giving a fortuitous insight into dissatisfaction with Law French:¹³

«I have heard suitors murmur at the bar, because their attornies have pleaded their cases in the French tongue, which they understood not.»

In 1534, Reginald Pole's protest to Henry VIII against the use of Law French was based not just on English patriotism. It was an appeal to the king to get rid of the barbarous law and language of the Normans and replace them with the sweet and rational Roman law in English.¹⁴ But Pole used portentous words, describing the imposition as 'the great infamy and rot'. In the early years of the seventeenth century, John Selden was misled by a spurious manuscript purporting to have been written by William the Conqueror's secretary, Ingulf, and complained that William imposed French on the English courts.¹⁵ In John Dodridge's hands Pole's 'infamy and rot' became 'the badge of slavery',¹⁶ a powerful political symbol for revolutionaries like John Lilburne¹⁷ and Bulstrode Whitelock, Cromwell's Lord Commissioner.¹⁸

In 1650 and 1651, the revolutionary Parliament enacted that English should be the language of the law¹⁹ but on the restoration of the monarchy those reforms, like most advances made under the Commonwealth, were abrogated. Many lawyers rejoiced²⁰ and kept Law French artificially alive for another seventy years. That great conservative lawyer and scholar, William Blackstone, perhaps surprisingly, though patriotically, attacked the use of Law French, calling it 'a barbarous dialect. An evident and shameful badge... of tyranny and foreign servitude'.²¹

12. KIRALFY, K. R.: *Potter's Historical Introduction to English Law etc.* 4th edn Sweet and Maxwell 1958, 267 note 27.

13. COX, J. E. (ed.): *The Works of Thomas Cranmer*, Cambridge U.P. 1844, Vol. II, 169.

14. *Starkey's England* Early English Text Society 1878, 192ff. *Chronology* 2,3.

15. *Chronology* note 7.

16. DODRIDGE, J.: *The English Lawyer*, John More, London 1631, 51.

17. LILBURNE, J.: *The Just Man's Justification*, London 1646.

18. 'By an Impartial Hand' *The Lives of All the Lord Chancellors etc.* London, R. Bouwicke, 2 vols 1712, Vol. II, 135-45.

19. Statutes of the Commonwealth 1650 cap. 37; 1651 cap 4; 1654 cap 28; 1656 cap. 10.

20. E.g. BOLSTRODE, E.: *The Reports of Edward Bulstrode*, 2nd. impression, Twyford 1688. Part II, introduction.

21. BLACKSTONE, W.: *Commentaries on the Laws of England*, 4 vols. Oxford U.P. 1765-9, Vol. III, 317.

At last in 1733, against the judges' strong opposition, legislation was passed which insisted on law in English, at least for England and Wales.²² It is true that another conservative writer, Roger North, could say two years later in 1735 'For really the law is scarcely expressible properly in English, and, when it is done, it must be Franchoise or very uncouth'²³ and insist even then that 'Counts, Bars, and such transactions as reach no farther than the Bench and Counsel, with the Officers, and not to the Country [that is, to the jury]... are to be done in Law French'.²⁴ Apparently the reforms had not reached Ireland in 1736. There the arguments raged on as if there had been no reforms in England.²⁵ The problem of language in the law did not trouble the legislature in England again until Welsh became an issue two centuries later.²⁶

THE POLITICAL DIMENSION IN HONG KONG TODAY

The law in Hong Kong has never had to deal with any more Law French than the vestiges which remain in modern legal English but the problem of language was noted at the start of the colony's life. A newspaper noted as early as 1845:²⁷

«Regarding the Supreme Court we hardly dare hazard any opinion. Its leading members are able men, and have shown themselves worthy of the trust reposed in them. As friends of the Chinese, we should like to see this Court provided with its learned *Chinese* advocates. We have occasionally attended its sessions, when Chinese have been at the bar; and we have there supposed the case reversed, and the Chinese made the language of the Court, and the ablest sons of Han administering justice, and the foreigner seeking redress or labouring to make defence. Would the foreigner in that case be satisfied? Great care should be taken, in giving testimony, especially where life is concerned, that every word be *faithfully translated*; otherwise how can judge and jury decide rightly.»

22. (1733) 4 George II cap. 26 and (1735) 6 George II cap. 14. See note 25 below for Ireland.

23. NORTH, R. A.: *A Discourse on the Study of the Laws*, London 1824, 13.

24. NORTH, op. cit. 27.

25. ANONYMOUS *A Dialogue between a Lawyer and a Plain Country Justice of the Peace, Whether the Laws of the Country ought to be in the Language of that Country where they govern*, Dublin? 1736?

26. Welsh Courts Act 1942, 5 and 6 George VI cap. 40.

27. (1845) 14 *The Chinese Repository*, 297 quoted by NORTON-KYSHE, J. W.: *The History of the Laws and Courts of Hong Kong etc.* 2 vols. Vetch and Lee, Hong Kong 1898, 1971 reprint, Vol. I, 81.

This, like most subsequent suggestions, came from an expatriate. There seems to have been no Chinese movement to support this enlightened insight. Of course, Hong Kong has never had democratic institutions and the political parties, which might have taken up the cry 'Law in the Language of the People!', have been discouraged. Power has largely rested in an alliance of wealth and the colonial government. There have been occasional outbursts of opposition to this and other manifestations of colonial rule but up till now pressure has been fitful and largely academic. Perhaps the most important initiatives have come from the Government's top legal advisers themselves, notably the previous Attorney-General, Michael Thomas,²⁸ and his successor, Jeremy Matthews.²⁹

In the last few weeks, new political parties have been created, all so far of the centre to right. There is little public interest yet in the forthcoming elections, which will still give the people of Hong Kong no right to choose a government. Perhaps not surprisingly, few people are bothering to register as voters. But even if the alliance of the Chinese Government and conservative forces in Hong Kong continues to rule Hong Kong, it surely cannot be too long before the demand is heard for law in the vernacular. When it comes, it would be strange if any party seeking votes could stand against it.

28. See note 6 above.

29. On many public occasions and particularly in his opening address, still unpublished, to the Second International Conference on Language and Law, City Polytechnic of Hong Kong, February 1990. From time to time the Chinese-language newspapers complain about the delays in bilingual drafting and translation of ordinances.