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Bilingual Legislation for Hong Kong

A Thesis

Submitted to the School of Graduate Studies and
Research in Partial Fulfilment of the Requirements

For the Degree of

Master of Laws

in the

Faculty of Law

University of Ottawa

By

Francis Cheung

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ABBREVIATIONS

The following abbreviations are used in this paper

A.C.	Law Reports, Appeal Cases(Eng.)
All E.R.	All England Law Reports.
B.Y.I.L.	British Year Book of International Law.
C.A.	Court of Appeal.
C.B.R. (N.S.)	Canadian Bankruptcy Reports (New Series).
C.S.	Cour Supérieure.
Can. Bar Rev.	Canadian Bar Review.
D.L.R.	Dominion Law Reports.
Ex.C.R.	Canada Law Reports(Exchequer Court)
F.C.	Federal Court Reports.
H.K.L.J.	Hong Kong Law Journal.
H.K.L.R.	Hong Kong Law Reports.
K.B.	King's Bench Law Reports.
Ott. L.R.	Ottawa Law Review.
P.R.C	People's Republic of China.
Q.B.	Queen's Bench Law Reports.
R.O.N.W.T.	Revised Ordinances of the Northwest Territories.
R.S.C.	Revised Statutes of Canada.
R.S.N.B.	Revised Statutes of New Brunswick.
R.S.O.	Revised Statutes of Ontario.
R.S.Q.	Revised Statutes of Quebec.
S.A.R.	Special Administrative Region.
S.C.R.	Supreme Court Reports (Canada).
S.Y.	Statutes of the Yukon.
Tax A.B.C.	Canada Tax Appeal Board Cases.

U.K. United Kingdom of England.
W.L.R. Weekly Law Reports.

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Introduction

FROM MONOLINGUAL TO BILINGUAL

1. Hong Kong¹ lies at the south-eastern end of the Pearl estuary on the southern coast of China. It was ceded to Britain in the mid-19th century.² After its cession, English was introduced as the language in official communication and in courts. It remained the sole official language of communication and of law until 1972 when the Official Language Ordinance (Cap.5) was enacted. By that Ordinance, both English and Chinese languages were declared to be the official languages for the purpose of communication between the Government and members of the public, but legislation would still be enacted and published in the English language only. English therefore still dominated in the field of legislation.

¹ Hong Kong is a collective name for the Victoria Island, the small mainland peninsula of Kowloon across the harbour and the New Territories which are a larger part of the mainland adjoining Kowloon together with 235 neighbouring islands.

² In 19th century, Britain and the then Chinese Government concluded three treaties relating to Hong Kong -

(a) The Treaty of Nanking in 1842, under which Victoria Island was ceded in perpetuity;

(b) The Convention of Peking in 1860, under which the Southern part of the Kowloon peninsula and Stonecutter Island were ceded in perpetuity; and

(c) The Convention of Peking in 1898, under which the New Territories were leased to Britain for 99 years from 1 July 1898.

2. The dominance of English in legislation began to fade away in July 1985 when the Executive Council of the Hong Kong Government endorsed the proposal to have an authentic Chinese version of the laws of Hong Kong. The decision of the Executive Council means not only that Chinese will attain parity with English but also that Chinese will be given a new value as an original language of law.

3. Once bilingual laws are introduced, all sorts of issues are going to be raised: the language to be used in court proceedings, translation of pleadings and law reports, use of Chinese as a medium of legal education, the need for training lawyers in linguistic abilities, and so on. All these issues suggest a development of a bilingual legal system.³ Since bilingual legislation is the essential and first step towards a bilingual legal system, it is the object of the present paper to deal only with "Bilingual Legislation for Hong Kong". This is not to say that a bilingual legal system is a less important issue. But to keep the paper within bounds, it is appropriate to impose some limitation on the area to be covered.

4. The purpose of this paper is to briefly trace the development leading to the decision to legislate bilingually in English and Chinese; to look at the preparatory work required to be done before implementing bilingual legislation and to explain why certain approaches have to be adopted instead of others; and to examine the difficulties inherent in the production of the Chinese text. The paper will therefore be conveniently divided into two parts. Part I will confine its examination to the

³ A bilingual legal system is one which facilitates the transaction of all kinds of legal business in either one or both of two specific languages defined by Mr. Michael Thomas, former A.G. of Hong Kong, in the "Development of a Bilingual Legal System in Hong Kong", H.K.Law Journal (1988) Vol.18, p.15.

preparation of bilingual statute law in Hong Kong, the objectives to be achieved by the project and the legal foundation that needs to be laid to ensure its effectiveness. Part II will identify and discuss some difficult aspects associated with the production of an authentic Chinese text and whenever possible make recommendations to solve the difficulties. In its conclusion, the paper will affirm the value and necessity of the bilingual laws project because of the social needs and the requirement to preserve common law in Hong Kong.

HISTORICAL BACKGROUND

5. It may be of interest to quote clause 50 of the Treaty of Tientsin 1858⁴ in regard to the language employed in official communication as follows.-

'All official communications addressed by the Diplomatic and Consular Agent of Her Majesty the Queen to the Chinese Authorities, shall, henceforth be written in English. They will for the present be accompanied by a Chinese version, but it is understood that, in the event of there being any different of meaning between the English and Chinese text, the English Government will hold the sense as expressed in the English text to be the correct sense. This provision is to apply to the Treaty now negotiated, the Chinese text of which has been carefully corrected by the English original.'

6. The fact that English has been employed as the sole language of official communication and of law in Hong Kong is the usual consequence of any British colonization. In some countries which formerly were British colonies, (for example, India, Nigeria and Singapore), the choice of English as one of the official languages

⁴ Clause I of this Treaty confirmed the Treaty of Nanking 1842.

and the sole language of the law has solved an otherwise acute political dilemma of choosing one or more dialects out of several possible alternatives. In Hong Kong such choice has helped in the development of Hong Kong to become an international commercial centre and a participant in the community of common law jurisdictions.

7. Chinese was given a greater prominence in the early 1970s as a result of a movement to raise the status of the Chinese language; a Chinese Language Committee⁵ was set up to study the question. Most of the Committee's recommendations were accepted by the Hong Kong Government and implemented by 1974, when the Official Languages Ordinance was enacted. However, its proposal for translation of the statute law was not accepted, presumably due to the difficulties of the task and the shortage of expertise to undertake the translation.

8. The project of translating the statute laws of Hong Kong was given a new impetus by the Sino-British Joint Declaration⁶ which was signed in May 1985 over the future of Hong Kong. The Joint Declaration does not stipulate a legal language policy for the future of the Hong Kong Special Administrative Region (SAR) after 1997, but a clause in Section 1 of Annex 1 to the Joint Declaration reads -

⁵ This Committee, chaired by Sir Kenneth Ping-fan FUNG, was set up to examine to what extent Chinese can have equal status with English in official business.

⁶ By this Joint Declaration, Britain will relinquish the sovereignty and administration over Hong Kong on 1st July 1997 after which Hong Kong will become a Special Administrative Region (SAR). China's basic policy under the terms of the 1985 Sino-British Joint Declaration, is not to take back Hong Kong so that it becomes part of a communist regime after June 30, 1997 but to keep it separate, under the promise of "one country, two systems".

" In addition to Chinese, English may also be used in organs of Government and in the courts in the Hong Kong Special Administrative Region."

9. It is arguable that since the Joint Declaration has not ruled out the possibility of using English in the laws of Hong Kong after 1997, English may still be preserved as the prevailing language. The fact is that Hong Kong's constitutional status is going to change in 1997. The Joint Declaration places English and Chinese on an unequal footing just as did clause 50 of the Treaty of Tientsin, 1858⁷, only this time the order is reversed; the implications as to the use of Chinese in the SAR courts are clear.

⁷ Supra, note 3

PART I

THE DRAFTING FRAME.

(1) THE PROPOSED PLAN

10. The Law Drafting Division of the Legal Department in Hong Kong is responsible for drafting all new legislation and all the amendments to existing legislation. If an authentic Chinese version of legislation must be produced, the production must come under the authority of the Law Drafting Division. This is an extension of the Division's existing responsibility of preparing legislation generally.

11. The plan for the project of bilingual legislation has to be carefully worked out. The obvious implication is that unless a proper and comprehensive plan is made, much delay and more expenses will be caused to the project of producing an authentic Chinese version of legislation.

12. Up till April 1986 when the "Discussion Paper on the Laws in Chinese"⁸ was issued, people in Hong Kong talked about and advocated the translation of the laws of Hong Kong. They thought of employing translators to do the job. One vital question they did not ask was: "What is the purpose of translating the laws of Hong Kong?". If it

⁸ This Paper was prepared by a Working Party set up in the end of 1985 within the Legal Department, Hong Kong Government to study the feasibility of producing laws in Chinese.

is for the convenience of the public, or for their guidance and information, a full translation of the text of any piece of legislation seems a waste of time and effort. An explanatory memorandum accompanying the bill⁹ will serve the purpose or a pamphlet¹⁰ summarizing the ordinance to explain its objects and functions will be sufficient. If the purpose is to promote the use of Chinese in legislation, with the consequential acceptance of the use of Chinese in court as the language of law, "translation" is not the proper way to render the present English legislative text into Chinese. In translation, one language is the original, and the other the target language, the latter always being inferior to the former. In case of conflict, the original will always prevail. The Canadian experience has shown that courts sometimes were reluctant to base their decision on the translated text because it was not regarded as satisfactory for use in the courts.¹¹

13. To have legislation in authentic texts in both English and Chinese, the only proper way is by using English and Chinese draftsmen on the same piece of legislation simultaneously; only in this way can one hope to produce two versions with the same meaning. Simultaneous work will enable the draftsmen to adjust their versions to cope with the problems of the syntax and idiosyncrasies; for example, if an

⁹ In Hong Kong, a Bill is accompanied always at its end by an Explanatory Memorandum indicating the objects and reasons for the Bill, so as to provide an explanation of the subject matter to the discerning reader.

¹⁰ In Hong Kong, pamphlets summarizing the most important Ordinances which affect the daily life of the general public (e.g. Landlord and Tenant (Consolidation) Ordinance and Rating Ordinance) have been prepared and published.

¹¹ e.g. In *Rémillard v Couture et al.* (1955), C.S. 162, where the English translation "after death" for "à cause de mort" was considered inaccurate and not followed.

English expression is not readily translatable into Chinese, another expression must be found.

14. While accepting that the only way to achieve an authentic version of legislation is by drafting, draftsmen with the necessary skill to draft in Chinese are rare. He should be a lawyer trained in, and with practical experience of, the English law and be well versant with the Chinese language with all its subtleties and possess a basic knowledge of Chinese legal concepts and phraseology.

15. In view of the shortage of persons of such calibre, the practicable approach is that until a time when the bilingual legislation work can be taken over by a sufficient number of competent bilingual draftsmen, the work will have to rely on translators, people with linguistic abilities. A corps of translators will have to be recruited and equipped with sufficient legal knowledge and drafting skills. Reliance on the translators for the task should be only temporary, albeit lasting for a period of at least several years. The ultimate aim is a Chinese version of the legislation produced by draftsmen, not by translators. This means that the recruitment and training of lawyers with potential to become competent draftsmen need to be put in hand. In the initial stage, the practical way toward progress in a reasonably expeditious and systematic way is to start with translation and gradually, with the benefit of experience, move on to the ultimate objective of drafting all new legislation in an original Chinese version as well as an original English version. Translation must be understood as only a preliminary step to attain authenticity, not an aim in itself. The translators should work closely with the law draftsmen from the early stages of the drafting process so that

difficulties of translation can be ironed out and closely parallel meanings in both versions can be ensured.

16. There were at present 32 volumes, each measuring about 8 cm in thickness, of laws of Hong Kong containing 550 Ordinances as of 31st December 1990 together with delegated legislation. The total number of pages in the Revised Edition of the Laws of Hong Kong is about 18,000 pages. New legislation and amendments to existing legislation are added from time to time. The project of producing bilingual legislation broadly involves two exercises: -

- (1) producing new legislations including delegated legislation in both languages;
- (2) translating existing legislation into both languages.

17. The relationship between the two exercises can be complex because of amending legislation. If an ordinance, which is in English only, is amended, then an amending bill in Chinese will have little meaning unless the principal ordinance has been translated. A priority list of the work to be undertaken in stages has to be determined. New primary legislation should start first; delegated legislation, existing legislation and amending legislation should come afterwards. The experience gained in the first stage will determine the pace of progress in tackling the job of translating the existing legislation and of producing a Chinese version of the delegated and amending legislation.

(2) JUSTIFICATION FOR THE PROJECT

18. Before dealing with the specific situation of Hong Kong, it is appropriate and advisable to look at the experience of other countries. There are a number of countries with a polyglot legislation such as Belgium, Finland and Switzerland. In Switzerland, federal statutes and regulations gave equal authority in German, French and Italian.¹² The European Community has to deal with as many as eight different languages and in the law of international treaties, multilingual texts are preferred. However, we shall not look at the experience of these countries. For the purpose of the present paper dealing with Hong Kong, a British Colony, observation is best drawn from those countries which once came under the British rule and have adopted wholly or partially the common law system even after their independence. These countries may be divided into three basic categories :

- (a)** where English remains the dominant language as in Singapore (the monolingual approach);
- (b)** where a progressive approach is adopted as in India, Pakistan, Sri Lanka and Malaysia. The native language is declared to be the official language, while reserving the English language for some period of time for legislative, judicial and official purposes (the progressive approach); and
- (c)** where a dual system is adopted with two authoritative languages ranking side by side as in Canada where French and English enjoy the same legal status (the dual system).

¹² Federal Constitution of the Swiss Confederation art 116/2: "The official languages of the Confederation shall be: German, French and Italian."

(a) The Monolingual Approach

19. Singapore gained its full independence in 1959. There are four official languages today : Malay, Mandarin, Tamil and English.¹³ Section 7(2) of the Republic of Singapore Independence Act declares Malay to be the 'national language'. However, this is often treated as an empty political gesture to placate the Malays. The truth is English remains to be the authoritative text of all legislation. In brief, English is the exclusive language of the law.

(b) The Progressive Approach

20. The cases of India, Pakistan, Malaysia and Sri Lanka form a different category from Singapore. They inherited the common law legal system. On independence, they sought to replace English for legal purposes with the appropriate national language. The process was gradual and progressive, declaring the dominant native language to be the official language of the law but reserving English to be used for legal and other official purposes. The ultimate goal is to replace English with the native language for all purposes. The pace of such erosion of English differs in these 4 countries and will be discussed respectively.

¹³ Republic of Singapore Independence Act s.7(1) (No.9 of 1965)

(i) India

21. Under article 343 of the Indian Constitution 1949, Hindi is the official language but English was to be used for all official purposes for a period of 15 years from the commencement of the Constitution. Under the 7th amendment to the Constitution and by the Official Language Act 1963, the use of English language notwithstanding the expiration of the 15 year period, would continue in legislation and would continue for all official purposes. The transitional period was extended indefinitely. In other words, there is no "transitional period" for the replacement of English. In the states of the union, each of them could choose its own regional language for its official purposes¹⁴, but state legislation enacted in such a language was to be accompanied by an English translation.¹⁵

22. Such an approach has an historical root in that before independence, English was the sole language used in the higher levels of administration, the legislature and the courts. Moreover, there are 1,652 spoken languages used in India, of which Hindi is used by only 46 per cent of the population.¹⁶

¹⁴ (Arts.345-47).

¹⁵ Article 348 of the Indian Constitution 1949

¹⁶ See Basu, Introduction to the Constitution of India (New Delhi:Prentice-Hall of India, 6th edition 1976) p.336

(II) Pakistan

23. Pakistan adopts a similar approach to India. The 1973 Pakistan Constitution¹⁷ preserved English while phasing in arrangements for the national language, Urdu, for a period of 15 years. This period has been extended¹⁸ and laws continue to be enacted in English only, without an Urdu translation, although the matter is believed to be under review.

(III) Sri Lanka

24. Sri Lanka has adopted a more radical approach in supplanting English. Under article 18 of the 1972 Constitution, Sinhala was declared to be the 'official language'. But the 'national languages' are Sinhala and Tamil as stated in article 19. No provision was made for the use of English. Under article 9, all new legislation was to be enacted and published in Sinhala with a translation into Tamil.

25. However, the 1978 Constitution provides for a translation in English. Under article 23(1)(d),

*All laws and subordinate legislation shall be enacted or made, and published in both National Languages (i.e. Sinhala and Tamil) together with a translation in the English language. In the

¹⁷ Under article 251

¹⁸ Article 238 *ibid*

event of any inconsistency between the two texts, the text in the Official Language (Sinhala) shall prevail."

26. English language does not enjoy any official status. But the resort to English confirms its significant role in legislative activities. In practice, legislative drafting is still done in the English language. The Sinhala text, which is the authoritative one, is then produced by way of translation by the assistant law draftsmen. Such a practice is a result of the fact that law draftsmen and judges are trained and work in English language.

(iv) Malaysia

27. Section 152 of the Malaysian Constitution provides that Malay is the national language. Analogous to India and Pakistan, it also stipulates a ten year transitional period for the English language to phase out.

28. During this period, interestingly enough, English is the paramount text of all federal principal and subsidiary legislation. Article 152(3) reads :

"Notwithstanding the provisions of Clause (1) for a period of ten years from Merdeka Day, and thereafter until Parliament otherwise provides, the authoritative texts -

- (a) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament, and
- (b) of all Acts of Parliament and all subsidiary legislation issued by the Federal Government,

shall be in the English language".

Subsequently, the National Language Act 1963/67 requires that all future federal and state legislation (including subsidiary legislation) to be enacted both in Malay and English. Section 6 of the Act provides -

" 6. The texts -

- (a) of all Bills to be introduced or amendments thereto to be moved in Parliament or the Legislative Assembly of any state;
- (b) of all Acts of Parliament and all subsidiary legislation issued by the Federal Government ;
- (c) of all enactments and subsidiary legislation issued by any State Government; and
- (d) of all Ordinances promulgated by the Yang di- Pertuan AGong (federal head of state);

shall be in the national language and in the English language, the former being authoritative unless the Yang di-Pertuan Agong otherwise prescribes generally or in respect of any particular laws or class of laws."

29. It appears that Malay is gaining a more important role. The trend is moving away from the dominance of English to the restoration of the status of Malay. During the transitional period, the legislation process appeared to be in a bilingual form. More time is needed to see whether the ultimate goal, the eventual displacement of English, can be achieved.

(c) Dual System

30. Unlike other countries, Canada deliberately sought to establish a truly bilingual legal system, affirming both English and French as the official languages for legislative purposes.

31. Section 133 of the Constitution¹⁹ states :

"Either the English or the French language may be used by any Person in the Debates of the Houses of Parliament in Canada and of the Houses of the Legislature of Québec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or from any of the Courts of Québec. The Acts of the Parliament of Canada and of the Legislature of Québec shall be printed and published in both those languages."

32. Section 133 affirms the right to participate in legislative activities and the provision of legal materials in both languages. At the federal level, dominion legislation has always been bilingual, each version enjoying equal status.²⁰ This was further strengthened by constitutional entrenchment under the Constitution Act, 1982.

¹⁹ Constitution Act 1867, formerly known as the British North America Act, 1867, later changed by the Constitution Act, 1982 s.53(2)

²⁰ Official Languages Act, R.S.C. 1988, c.O-3.01, s.6.

33. Subsidiary legislation is governed by section 9 of the Official Languages Act²¹ which provides "All rules, orders and regulations governing the practice or procedure in any proceedings before a federal court shall be made, printed and published in both official languages." As for the two territories, the Northwest Territories have started bilingual legislation in 1986²² while the Yukon Territory will soon introduce bilingual legislation.²³

34. At the provincial level, a similar approach is adopted, to a varying extent, in three provinces. They are New Brunswick, Manitoba and Quebec.²⁴ New Brunswick adopted bilingual legislation under section 16 of the Constitution Act which provides that English and French are the official languages of New Brunswick and have equality of status and use in all legislative and governmental institutions. New Brunswick itself has also legislated that both English and French versions are equally authentic.²⁵

²¹ R.S.C. 1988, c.O-3.01

²² As from December 31, 1986 the ordinances of the Northwest Territories are required to be printed and published in English and French, and both language versions are equally authoritative under the Official Languages Ordinances, R.O.N.W.T. 1984(2), c.2 ss.11 and 22(1)

²³ As from January 1, 1994 all Acts of the Legislative Assembly of the Yukon Territory and the regulations made thereunder will have to be printed and published in English and French, and both language versions are equally authoritative under the Languages Act, S.Y. 1988, c.13 ss.4 and 13(2).

²⁴ It is to be noted that with effect from January 1, 1991 all public bills of the Legislative Assembly of Ontario are required to be enacted in both English and French under the French Language Services Act, 1986 R.S.O. c.45, s.3(2).

²⁵ Official Languages of New Brunswick Act, 1973 R.S.N.B. c.O-1, s.14.

35. The commitment to bilingualism was best illustrated in the case of Manitoba. Section 23 of the Manitoba Act, 1870 has a close semblance with section 133 of the Constitution Act, 1867.²⁶ In 1890, Manitoba enacted the Official Languages Act stating English to be the sole language used in Manitoba legislature and courts. Such a divergence was condemned in 1979.²⁷ The statute was held invalid and compliance with section 23 have since been made.

36. Similar things happened in the province of Quebec. When Quebec in 1977 enacted the Charter of the French Language, French was declared to be the sole official language of the province and all procedural documents prepared for the purpose of litigation before provincial courts were to be in French unless the parties agreed otherwise. It also provided in its section 9 of the Charter that only the French text of the statutes is official. These provisions were found to be unconstitutional and invalid.²⁸ Any act in conflict with section 133 of the Constitution Act, 1867 would be struck down. However, the specific case of Quebec demanded a compromise: French was the official language but legislation would be provided with two versions.

²⁶ Supra note 19

²⁷ A.G. of Manitoba v Forest [1979] 2 S.C.R.1032

²⁸ A.G. of the Province of Quebec v Blaikie, [1979] 2 S.C.R.1016

37. The approach adopted by Canada is that of a system of official bilingualism which according to Professor J.E. Magnet, "comprises a network of heterogeneous components institutionalized in all sectors of government. The components include international, constitutional and domestic laws; regulatory and watchdog agencies; government structures; service institutions; and institutionalized political conflict."²⁹ This is of course a much wider scheme than bilingual legislation. The Canadian system of official bilingualism is meant to create and to protect relative equality between Canada's two major linguistic communities in the machinery of governmental structure and institutions. In *Reference Re Manitoba Language Rights*³⁰ the Supreme Court of Canada rightly pointed out that "The purpose of both section 23 of the Manitoba Act, 1870 and Section 133 of The Constitution Act, 1867 . . . [is] to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike."

38. The unique feature of Hong Kong is that it will be after 1997 an integral part of China. The continued retention of the laws solely in a language other than Chinese is politically impossible. As provided in the Joint Declaration³¹, Chinese will be the dominant working language in the Hong Kong SAR Government and in its courts, with the use of English as the optional extra. Legislation after 1997 will inevitably be in Chinese. However, clause 3 (3) of the Joint Declaration provides "The Hong Kong

²⁹ Prof J.E.Magnet, "Canada System of Official Bilingualism:Constitutional Guarantees for the Legislative Process", (1986) Ott.L.Rev.227.

³⁰ [1985] 1 S.C.R.721 at 739

³¹ section 1 of Annex 1 to the Sino-British Joint Declaration 1985.

Special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."

39. "The laws currently in force" referred to in clause 3 (3) of the Joint Declaration are the laws presently in force in Hong Kong which are deeply rooted in the English legal system. The laws in Hong Kong are comprised of common law, laws of equity, customary law, ordinances and subsidiary legislation drafted by draftsmen trained in the common law system. English is the medium through which the common law legal concepts are conveyed, accepted and made known to the people. The fact that Chinese must be used in the SAR courts after 1997 in accordance with the Joint Declaration is a political reality to preserve the national pride of China. The retention after 1997 of the present legal system based on the common law principles is a practical necessity to preserve the prosperity and stability of Hong Kong because the Colony has been developing and flourishing as an international centre of commerce and finance under this particular legal system through which it maintains its communication and links with the whole of the English speaking world. The bilingual legislation project is therefore a right step in the direction of achieving both ends. The preparation and promulgation of legislation in Chinese equal in status with the English version is a matter of pressing need arising from the evolution of the political situation in the Colony.

40. Political aspect aside, it is a matter of principle that law should be available to people in their own language. Over 99% of the population in Hong Kong are Chinese. There is a large number of people who cannot read English or who cannot read

English well enough to understand the law in their own tongue. In the light of increased participation by Chinese speaking people in the legislative, judicial and administrative organs of Government, it is in the social interest of Hong Kong that laws enacted therein should be available in a text which is in the language of the vast majority of the community. Given the future, given the arrangements for the SAR, given the provisions of the Joint Declaration about the preservation of the current legal system, it is even more important that the language of the law should be in both English and Chinese: English, because that is the tradition of the law; Chinese, because that is the language of the people at large and increasingly the community will be Chinese. The intention of the scheme must be that both the English and Chinese texts should be of equal status.

41. The Singaporean monolingual approach is thus unsuitable for Hong Kong. The recommendation adopted by Hong Kong is that the Chinese text of legislation when enacted will immediately enjoy equal authenticity with the English text. This may be a rather radical change but in practice, as limited by resources and manpower, the promulgation of Chinese text will be on a gradual time-table in accordance with a priority list set out in the Discussion Paper on the Laws in Chinese 1986.³²

³² The priorities of the bilingual laws project, as recommended by the Discussion Paper on page 73, are -

- 1st priority: the bilingual drafting of principal, as opposed to amending, Bills;
- 2nd priority: the bilingual drafting of new subsidiary legislation under Ordinances which already have a Chinese text;
- 3rd Priority: translating existing Ordinances on a selective basis, in order to give effect to the 4th priority;
- 4th Priority: the bilingual drafting of amending Bills;
- 5th Priority: the bilingual drafting of new subsidiary legislation where the principal Ordinance is not translated, but which is of general public interest;
- 6th Priority: other legislation.

(3) CRITERIA FOR AN AUTHENTIC CHINESE TEXT

42. The plan for Hong Kong is to publish authentic texts of legislation in both the English and Chinese languages. The Chinese text to be produced is not just for information purposes. The objective is that it should be an authentic text. Authenticity has two aspects. First, the text must be given proper status in law and, secondly, the text must be accepted by the people and the courts as reliable.

43. On the legal aspect the Chinese text can be given equal status with the English whether it is a current law enacted in Chinese or a modern Chinese translation of an English text enacted many years ago or whether it is a good or bad text. Legal status can be conferred by legislation. The Canadian experience in relation to texts enacted bilingually in the 1950s and 1960s shows that where it appeared to the courts that one text (usually the English) was the original and the other (usually the French) was the translation badly rendered, they would recognise this fact and give primacy to the original text notwithstanding any provision of the law to the contrary.³³ John Honsberger has given some examples of the French version of some parts of

³³ The French version of the Income Tax Act R.S.C., 1952, c.148 is a difficult Act to read because of much literal translation of the technical terms. There are sections in the French version which are awkwardly written and difficult to read: see *In re Walter Crassweller* (1949), 1 Tax A.B.C. 1, at p.42 et seq.

many federal statutes being no more than a collection of French words but is not good French.³⁴

44. This leads us immediately to the practical aspect of authenticity: acceptance of the text by the courts. This in fact turns on the question whether the two texts carry the same legal meaning or legal message. Anyone who has worked in a dual language legal system, even one in which the language has common roots such as English and French, finds it at times extremely difficult to reproduce the same legal concept in the same way in two languages; "comptable"³⁵ is difficult to be expressed in a single English term just as "settlement"³⁶ to be expressed in French. The reason is that one legal term finds its meaning in civil law and the other in common law. Each term refers to the history and usage developed in its own particular legal system. Indeed, as

³⁴ J.D. Honsberger, *Bi-lingualism in Canadian Statutes*, (1965) 43 Can.Bar Rev.323: One of the example is section 4 of the Crown Corporations (Provincial Taxes and Fees) Act, S.C. 1964, c.11, which in the French version states in part: "... le gouverneur en conseil peut se prononcer sur la question de *savoir si ou dans quelle mesure*, selon le cas, cette taxe ou ce droit est réputé aux fins de la présente loi une taxe ou un droit décrit audit article."(Italics mine)

³⁵ The Privy Council in *Exchange Bank of Canada v R* (1886), 11 A.C.157 described "comptables" to be a technical term of French Law, meaning officers who collected and were accountable for the Kings' revenues. If a "comptable" became insolvent, the King was a privileged creditor. It was thus held that a bank which was put in liquidation and in which public money was deposited could not be considered to be a "comptable" as it was not a servant of the Crown. The Crown being an ordinary creditor of the bank is not entitled to priority of payment over its other ordinary creditors.

³⁶ A "settlement" is a term familiar to the common law, but foreign to the civil law. Thus the "settlement of property" in section 60 of the Bankruptcy Act R.S.C., 1952, c.14 is clear in its English version, but its French rendition as "disposition de biens" is held to be obscure in *In re Evaporateur Portneux Inc* (1961), 3 C.B.R.(N.S.) 182 at p.193.

pointed out by Andre Donner³⁷, the legal jargon of each legal system has its own "special cryptic meanings and implications" and an expression which in one legal system has a highly technical meaning involving important consequences may in another legal system be imprecise and devoid of any juridical sense.

45. The difference between English and Chinese is much wider apart than that between English and French. Linguistically and culturally, there is an enormous difference between English and Chinese in grammar, syntax, style and structure. The task of producing two versions which communicate an equivalent message in their own respective fashions is laborious, if not insurmountable.

46. The best way to ensure the two language texts reflect correctly and clearly the policy of the drafting instructions and to convey at the same time, as nearly as possible, the same meaning is by way of parallel drafting. That is to say, both English and Chinese draftsmen are employed on the same piece of legislation so that they will be able to adjust the texts to cope with the problem of syntax and idiosyncrasies of the two languages. For instance, if an English expression is not readily expressible in Chinese, another expression must be found. This is the method that will be used to cope with all new legislation. As to existing legislation, the text in English has already been enacted and the corresponding Chinese text will inevitably be prepared by way of translation. The translation work to be produced by the translators should not be the conventional (straight and literal) translation. The result should be one which, "when

³⁷ A. Donner, "The Role of the Lawyer in the European Communities", Evanston Ill, :Northwestern University Press (1986), 31.

examined by a comparatist who does not know which is the source text, cannot be distinguished from the original."³⁸ For the Chinese text to acquire authenticity, it must not give an impression of having been translated (though in fact it is translated), but must give an impression of having been written directly in Chinese and of being a true and original composition.

47. To this end, what should be the characteristics of a good version of a Chinese text? Since a statute is the highest governmental document, the objective for producing bilingual legislation must be clearly stated and the criteria for the standard of the work must be set. A statute relating to these objectives was formulated by the Working Party on the Laws in Chinese as follows.

"The purpose of the whole exercise is to produce an authentic Chinese version of the Laws of Hong Kong so that both the English and Chinese versions of the statute law will enjoy equal legal status with the object of facilitating equality of use of both official languages. For the bilingual legislation to be acceptable in practice -

- (a) the text in each language should accurately reflect the meaning of the other;
- (b) the texts should be presentationally in a similar form; and
- (c) the Chinese text should be in good, modern, educated Chinese."³⁹

³⁸ Alexandre Covacs in his "Preparation of the French Language Version of the Canadian Federal Legislation", page 28, speaks of "authenticity" as -

"Authenticity is the impression a translated text gives of not having been written directly in the target language, of being a true original composition. The desired ideal is to produce a translation which, when examined by a comparatist who does not know which is the source text, cannot be distinguished from the original."

³⁹ Discussion Paper on the Laws in Chinese, page 7.

48. The requirement of paragraph (a) is self-evident, as it is essential to ensure identical meaning of both texts. To conform with the formulated objectives -

- (a) the ideas to be conveyed in the Chinese text must be thoroughly apprehended and be expressed in a clear and intelligible manner;
- (b) every effort should be made to search for the right and appropriate legal terms in conveying the spirit and effect of the legislative intent in the Chinese text; for while it is "scarcely disputable that statutes ought, if possible, to be written in terms comprehensible to the non-lawyers"⁴⁰, law generally is not written for the men in the street, but mainly for those who practice and enforce it⁴¹; and
- (c) the Chinese text must reflect the linguistic and cultural characteristics of the Chinese language, laying emphasis always on

⁴⁰ Sir William Dale, "Legislative Drafting: A New Approach" , 1st Edition (1977) p.11.

⁴¹ Some people hold that laws should be such as can be easily understood by the citizen, for ignorance of law is no excuse for transgression. Common fairness requires that knowledge of law be accessible. In legislation, as elsewhere, life defeats fairness. The truth is best expressed by Professor E.A.Driedger:

"There is always the complaint that legislation is complicated. Of course it is, because life is complicated. The bulk of the legislation enacted nowadays is social, economic or financial; the laws they must express and the life situations they must regulate are in themselves complicated, and these laws cannot in any language or in any style be reduced to kindergarten level, any more than can the theory of relativity. One might as well ask why television sets are so complicated. Why do they not make television sets so everyone can understand them? Well, you can't expect to put a colour image on a screen in your living-room with a crystal set. And you can't have crystal set legislation in a television age' (Driedger 1971, "Statutory Drafting and Interpretation", Proceedings of the 9th International Symposium on Comparative Law, University of Ottawa, p.78.)

- precision (信) (i.e. search for the mot juste for the idea to be conveyed, without exaggeration or diminution thereof);
- clarity (达) (i.e. express oneself in plain, well-chosen and decent terms);
and
- conciseness (雅) (i.e. such choice and disposition of words as will achieve the clear presentation of the text most economically).⁴²

Paragraph (b) simply means that the Chinese text will be published in a horizontal manner and the two language texts, as a result of discussion with the Government Printer, will appear in one volume with the English text on one page and the Chinese on the other.

49. In relation to paragraph (c), there is only one written Chinese language in contrast with the multifarious spoken dialects. Generally two styles of written Chinese exist, namely, literary/classical (文言文) and vernacular (白话 / 语体文). The literary style is somewhat archaic and difficult to understand. In 1919, leading intellectuals including Dr. HU Shi (胡适) and CHEN Duxiu (陈独秀) led the "May 4th Movement"⁴³ which, among its other aims, reformed the style of literary writing. They and their followers advocated the use of modern vernacular style (白话 / 语体文) in place of the classical style. The success of the Literary Reform led to

⁴² The three qualities of "precision", "clarity" and conciseness" in translation have also been emphasized by Mr. Alexandre Covacs in the "Preparation of the French Language version of the Canadian Federal Legislation" cited above in note 35

⁴³ The "May 4th Movement" started spontaneously as a patriotic movement among the young intellectuals of China in 1919. It soon converged with other currents of new ideas and became the New Cultural Movement, which made a very strong impact on the traditional culture of China.

the discouragement of writing in the literary/classical style and the increasing acceptance and widespread use of the vernacular style. The vernacular style, however, has since then undergone and is still undergoing continual changes both in form and in content. In the process of change, foreign terms and concepts (such as "science", "democracy" and "inspiration") are incorporated and some of the classical vocabulary and structures are still retained.

50. A purely vernacular style is inelegant for formal documents like statutes, and a modified style for modern usage which lays emphasis on brevity and clarity and is comprehensible to the average educated reader, should be adopted. This is the style being used in the quality press in Hong Kong and in the legal writings of the People's Republic of China. This style has the good qualities of both the literary and vernacular styles and is understood by educated Chinese irrespective of the dialects spoken by them. "Good, modern and educated Chinese" may therefore be liberally construed as the vernacular style (白话 / 语体文) which is simple, refined and acceptable to the average educated reader and includes the following -

- (a) local terms which have been in use for a long time (e.g. "conviction recorded" (留案底), "admit to bail" (签保), "winding up (清盘);
- (b) acceptable elements of foreign languages, particularly those relating to new terms and concepts (e.g. "bus" (巴士), "taxi" (的士), "shirt" (恤衫), "cashmere" (茄士咩); and
- (c) classical expressions and structures that are still living.

(4) LEGAL BASIS**(a) HONG KONG ADDITIONAL INSTRUCTIONS 1986**

51. For the two texts (English and Chinese) to have equal status in law, there must be legal basis for such treatment. The first piece of legislation providing such legal basis is the Hong Kong Additional Instructions 1986.⁴⁴ This is an amendment to the Hong Kong Royal Instructions 1917 to 1985, Clause XXV of which is now replaced by the following new rule.

"Laws may be enacted in English or Chinese. All laws shall be styled "ordinances" and the enacting words shall be "enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof ", or the corresponding style and words in Chinese."

The enacting formula in Chinese will read -

由香港总督参照立法局意见并得该局同意而制定]

which in English reads -

"Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof."

⁴⁴ See Legal Notice 203 of 1986.

52. The amendment to the Royal Instructions came into force on 22 August 1986. Thus the constitutional provision relating to the form of enacting Ordinances has been extended to permit the enactment of legislation in both English and Chinese. The question still remains as to how the actual work shall be done. What is the legal framework for implementing the proposal? The answer lies in two important ordinances which were enacted in March 1987. They are the Official Languages (Amendment) Ordinance 1987 and the Interpretation and General Clauses (Amendment) Ordinance 1987. These two ordinances provide a statutory framework and pave the way for the introduction of bilingual laws. Their enactment represents a significant milestone in the history of law making in Hong Kong.

(b) THE OFFICIAL LANGUAGES (AMENDMENT) ORDINANCE 1987

53. The Official Languages (Amendment) Ordinance 1987⁴⁵ requires new principal legislation and amendments to Ordinances which are already in bilingual

⁴⁵ Section 4 of the Ordinance provides -

- “(1) All Ordinance shall be enacted and published in both official languages.
- (2) Nothing in subsection (1) shall require an Ordinance to be enacted and published in both official languages where that Ordinance amends another Ordinance and -
 - (a) that other Ordinance was enacted in the English language only; and
 - (b) no authentic text of that other Ordinance has been published in the Chinese language under section 4B(1).
- (3) Nothing in subsection (1) shall require an Ordinance to be enacted and published in both official languages where the Governor in Council -
 - (a) is of the opinion that a Bill is urgent and its enactment as an Ordinance in both official languages will occasion unreasonable delay; and
 - (b) directs that the Bill shall be presented to the Legislative Council in one of the official languages.

form, to be in both languages. The reason for this is that the new legislation consists mostly of amending bills or regulations. A Chinese text of the amending legislation makes no sense to a Chinese reader unless the principal legislation is in bilingual form. The requirement that the enactment of new proposed legislation should be in Chinese as well as English does not apply in the case of bills which the Governor-in-Council determines are urgent. If an Ordinance is enacted in one official language only under the "urgency" provision, a text in the other official language should be published as soon as practicable. As to the subsidiary legislation, it will be in bilingual form if so required by the Governor-in-Council. Because of the enormity and complexity of the work involved in the project as compared to the limited manpower resources in the Law Drafting Division of the Attorney General's Chambers, it is considered prudent to proceed with the work of producing bilingual laws by stages according to a system of priorities.⁴⁶

54. The Governor-in-Council is given power⁴⁷ to correct errors in an authentic text published under the amending ordinance, and any such corrections are deemed to

(4) Nothing in this section shall be construed as restricting the use of Chinese words in the English text of an Ordinance or of English words in the Chinese text of an Ordinance.

(5) This section shall not extend to subsidiary legislation.*

⁴⁶ Supra, note 32.

⁴⁷ New section 4B of the Official Languages (Amendment) Ordinance 1987 provides -

*(1) Where an Ordinance has been enacted in one official language, the Governor in Council may, by order in the Gazette made after consultation with the Bilingual Laws Advisory Committee, declare that the authentic text of that Ordinance in the other official language shall be as specified in the order.

have been incorporated in the text at the time when it was declared to be the authentic text. This power is necessary because though ideally speaking no error should have occurred, the reality is otherwise. The greater the number of authentic texts produced, the greater the possibility of occurrence of errors.

55. The Attorney General is given power⁴⁸ to amend the existing text of an Ordinance in one Language (which in practice means the English text) without affecting the intention of the legislature to ensure its harmonization with an authentic text in the other official language. This "harmonizing" power will serve a useful purpose of facilitating the preparation of Chinese text based on existing English legislation. One may object that the new section creates a power of intervention enabling the Executive to alter the legal effect of an Ordinance. However, the new provision is aimed at resolving a practical problem, namely, to provide a means for

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- (2) Where under subsection (1) the Governor in Council has declared a text to be an authentic text of an Ordinance and it appears to him that there is any manifest error, omission or inaccuracy in that text, he may, by order in the Gazette, correct that error, omission or inaccuracy; and any such correction shall be deemed to have been incorporated in the text at the time when it was declared to be the authentic text.
 - (3) The Attorney General may, by order in the Gazette, make formal alterations to the text of an Ordinance enacted in one official language, without affecting the meaning thereof, in order to achieve harmony of expression with a text declared under subsection (1) to be the authentic text of that Ordinance in the other official language.
 - (4) No order shall be made under this section unless a draft of it has been laid before and approved by resolution of the Legislative Council, and section 34 of the Interpretation and General Clauses Ordinance (Cap.1) shall not apply in relation to any such order."

⁴⁸ See new section 4B(3) of the Official Languages (Amendment) Ordinance 1987 in note 47, supra.

achieving a degree of exactness as between two texts in cases no equivalent or no close equivalent of an English expression exists in Chinese as for example, the word "Crown". The new provision could not in practice be resorted to to change the law since its only function is to find equivalents, not to give new meaning to existing law. There is no risk of abuse of power because of the overriding power of scrutiny vested in the Legislative Council. It is also noted that if any change of meaning is brought about by a purported use of the power to harmonize authentic texts, the result would render the relevant order ultra vires, null and void. That is therefore a further safeguard against any perceived abuse of power.

56. The Official Languages (Amendment) Ordinance 1987 also provides for the establishment of the Bilingual Law Advisory Committee. The Committee shall consist of a chairman and other members appointed by the Governor, including a legal officer, a practising solicitor, a practising barrister and not less than two persons with appropriate language skills who are not public officers. The function of the Committee is chiefly to advise the Governor-in-Council on the publication of authentic Chinese text of existing laws. The Committee will not concern itself with the new legislation. Its task will be to scrutinize texts which are prepared from the existing legislation. The number of existing laws which will need to be reproduced in authentic Chinese is large, so that the demands on time as well as expertise will be onerous. The Committee, however, may function through sub-committees so that more suitably qualified persons can be appointed to serve on the sub-committees to share the burden of this work.

(c) THE INTERPRETATION AND GENERAL CLAUSES (AMENDMENT)
ORDINANCE 1987

57. The Interpretation and General Clauses (Amendment) Ordinance 1987 deals with the legal implications of bilingual legislation, particularly the question of authenticity. It repeals the existing section 9(2) of the principal Ordinance which provides -

"If there is any conflict in any Ordinance between the meaning of Chinese words or terms and English words used therein, the meaning of the English words shall prevail."

Both English language text and the Chinese language text are declared equally authentic and there is no question of paramountcy of one language text over the other. However, it is envisaged that there will be problem in finding suitable equivalents for common law expressions in a bilingual text. Common law concepts such as "reasonable", "good faith", "legal estate", "equitable interest", "real property", and "judicial notice" are commonly stated unadorned in English statutes. These terms find their meanings in the common law and need not be defined in the statutes because of their clear meaning in a common law context. Whatever equivalent expression is used in the Chinese text of any legislation it will not, in the absence of definition (or text book), carry with it any such precise meaning. In proceeding from English to Chinese, the term "real property" and "personal property" are difficult to be expressed in Chinese. When an English lawyer thinks of the term "real property" he pictures the property that can be recovered in a real action (action in rem) that lays for the restitution of some object as opposed to personal action (action in personam) which lay for the recovery of damages. We know real property consists solely of interest in

land, but not every interest in land can be specially recovered by real action and one of the examples is leasehold property.⁴⁹ The term "real property"⁵⁰ finds its meaning in the history and usage of the legal concept developed in the English land law. As the development of Chinese land law is very much under the influence of civil law, the closest one can get for "real property" is (土地财产) meaning "land property" and for "personal property" (非土地财产) meaning "non-land property" and these linguistically are not quite the same as the two common law expressions because of what has just been said. A new section 10C(1)⁵¹ is therefore introduced into the Bill to deal with the problem. Expressions used in the Chinese text will be interpreted in conformity with English law rather than by reference to linguistic analogies having the concept of civil law. This also helps to ensure that, in accordance with the Joint Declaration⁵² and the Basic Law⁵³, the common law principles expressed in the

⁴⁹ See Modern Law of Real Property by C.Cheshire 1962, p.37.

⁵⁰ "Real property" is not quite the same as "immovable property" which is defined in the Interpretation & General Clauses Ordinance (Cap.1), see note 97 post. Incidentally, New Brunswick had a similar problem in finding French equivalents for "real or personal property" in the translation of the Property Act 1990, R.S.N.B. c.P-19. It was chosen to render the terms as "biens reels ou personnels", despite the influence of Quebec civil law on the expression of the legal concepts in French. Linguistically, English and French languages are more closely related than English and Chinese language. The problem is great when translation must be made from very different legal systems which use languages that are not or are hardly related.

⁵¹ Section 10C(1) of the Interpretation & General Clauses (Amendment) Ordinance 1987 -

"Where an expression of the Common Law is used in the English language text of an Ordinance and an analogous expression is used in the Chinese language text thereof, the Ordinance shall be construed in accordance with the common law meaning of that expression."

⁵² Clause 3 (3) of the Joint Declaration Provides -

"The laws currently in force in Hong Kong will remain basically unchanged."

statute law are not eroded by the use of terms in Chinese that are not apt to convey common law ideas.

58. Other problems will also arise in finding Chinese equivalents for English technical expressions⁵⁴, titles of public offices, short titles of ordinances and citations⁵⁵ of subsidiary legislation. There are many expressions which, though simple and familiar to an English lawyer, are difficult to translate into Chinese in a way that will satisfy everyone. The Ordinance in new section 10E⁵⁶ enables the Governor-in-Council by notice in the Gazette to prescribe that an expression in one language should bear the same meaning as an expression in another.

53 Article 8 of the Basic Law (promulgated in April 1990) stipulates -
"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."

54 See examples in paragraphs 93-96, post.

55 For example, Perpetuities and Accumulations Ordinance (Cap. 257) and Jetcat Catamarans (Exemption) Notice under Merchant Shipping (Safety) Ordinance (Cap. 369).

56 Section 10E -

"(1) The Governor in Council may, by notice in the Gazette, declare that any word, expression, office, title (including the short title of any Ordinance), citation or thing therein specified in one official language shall, in relation to the interpretation of an Ordinance, be the equivalent of any word, expression, office, title, citation or thing therein specified in the other official language.

(2) Any declaration under subsection (1) shall have the like effect as if enacted as a substantive provision of this Ordinance."

(d) BRIEF GUIDELINES FOR INTERPRETATION

59. The most significant provision of the Interpretation and General Clauses (Amendment) Ordinance 1987 is new Section 10B⁵⁷ which declares both texts of the laws to be equally authentic and deals with legal problems of interpretation that may arise from the existence of the two texts of law. It must be understood at the start that no one can remove the prospect of interpretation problems in courts. Lawyers vary in their perception of the words contained in a statute. They would interpret the words in their clients' favour. The word "interpretation" in relation to statutes does not necessarily import the linguistic meaning of a provision rendered in another language. For lawyers, the word involves legal construction, that is, construing written material in order to determine its meaning and effect according to law. It is important we should accept that no matter how accurately the texts reflect each other bilingual provisions will continue to attract the same "interpretation" problem over the meaning of the legislative intention that lawyers have always argued in the monolingual English text. Arguments over the meaning of terms and expressions in a statutory provision are before court day after day. They are part of our daily court life. When interpretation

57 Section 10B -

"(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.

(3)Where a comparison of the authentic texts of an ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted."

problems arise, they are dealt with by the courts which have exclusive jurisdiction over the interpretation of laws according to normal rules of construction. Problems posed by bilingual legislation are many. When an ordinance written in two official languages is examined to discover its meaning, one version may not mean exactly the same as the other. It may be that -

- (a) there is an ambiguity in one version but not in the other;
- (b) a word or expression in one version is open to a secondary meaning but not in the other version;
- (c) the meaning of a word or expression in one version is broader than the other, but there is a meaning in common;
- (d) on a strict grammatical reading, one version has no meaning or no clear meaning but the other version is clear;
- (e) one version may be completely irreconcilable with the other.

60. In searching for guidance on the construction of the two versions, experience in other bilingual jurisdictions has been examined. Canada long adopted the equal authenticity approach. Canadian experience in producing bilingual statutes and in resolving the discrepancies between the French and English versions is relevant. The federal laws of Canada provide that both the English and French language versions of a statute are equally authentic.⁵⁸ Thus the meaning in each language must be looked at in the construction of a statute. However, when both the English and French versions of a statute are examined to discover the meaning of a given provision, one version may not mean exactly the same as the other. It may be that -

⁵⁸ Section 6 of the Official Languages Act R.S.C., 1985, c.31 (4th Supp.) provides:

"All Acts of Parliament shall be enacted, printed and published in both official languages" and section 13 of the same Act says that "... and both language versions are equally authoritative.

- (a) one version is broader than the other, but there is a meaning in common; or
- (b) one version may be completely irreconcilable with the other.

Rules for interpretation of such cases were previously in section 8(2) of the Official Languages Act R.S.C. 1970, c.O-2.⁵⁹ This section provided rules for the interpretation of statutes whose two language versions differ. Where the problem is not due to the fact that an expression in the statute is only compatible with one of Canada's two legal systems, section 8 (2) does not override the normal canons of constructions.⁶⁰ The General rule is to ascertain parliamentary intention or "the true spirit, intent and meaning of enactment" which best insures the attainment of the objects of the statute.⁶¹ In other words, the general purpose in construing a statute remains the same whether it is bilingual or not. Indeed, the legislation expressing the rule of equal authenticity contained in section 8(2) has been questioned by Michael Beaupré,⁶² who says -

"There is strong evidence, on a comparison of the reasoning of the Ontario Court of appeal in *Re Black & Decker Mfg. Co. and R.*⁶³ and of the Federal Court of Appeal in *Dep. M.N.R. v Film Technique Ltd.*⁶⁴ and

⁵⁹ This Act has been repealed and replaced by the Official Languages Act R.S. 1985, c.31 and the provision of the old section 8(2) has disappeared.

⁶⁰ *R v La Compagnie Immobilière B.C.N. Limitée* [1979] 1 S.C.R. 865.

⁶¹ This rule appeared in section 8 (2) (d) of the Official Languages Act, R.S.C. 1970, c.O-2.

⁶² The late Senior Parliamentary Counsel of the House of Commons, Ottawa.

⁶³ [1973] 34 D.L.R. (3d) 308 (Ont.C.A.), reversed [1975] 1 S.C.R. 411.

⁶⁴ [1973] F.C. 75 (C.A.).

BCN Ltée⁶⁵ with the reasoning of the Supreme Court of Canada in BCN Ltée, that section 8 of the Official Languages Act leaves much to be desired as a legislative expression of the rule of equal authenticity and its application."⁶⁶

The provision of section 8(2) was removed entirely when the Official Languages Act R.S.C. 1985 c.31 was enacted to replace the 1970 Act.

61. There is one additional step in construing a bilingual statute. It is that the two versions must be reconciled.

"Unless otherwise provided, differences between the two official versions of the same enactment are reconciled by educing the meaning common to both. Should this prove to be impossible, or if the common meaning seems to violate the intention of the legislature as indicated by the ordinary rules of interpretation, the meaning arrived at by the ordinary rules should be retained."⁶⁷

The reconciliation of English and French versions does not result in any general rule on how to achieve this. Where there is a common meaning between the two versions, the narrow meaning will apply as long as it does not offend against any other cannon of interpretation. However, sometimes the wider version of the two, when tested against the entire context of the provision, may apply.⁶⁸

65 [1976] 2 F.C. 433 (C.A.), reversed [1979] 1 S.C.R. 865.

66 Michael Beaupré, "Construing Bilingual Legislation in Canada", 2nd Edition [1986] p.81.

67 Pierre-André Côté, "The Interpretation of Legislation" 1984] 242.

68 As was the case in Food Machinery Corporation v Registrar of Trade Marks [1946] Ex. C.R.266 and in R v Compagnie Immobilière B.C.N. Ltée [1979] 1 S.C.R. 865.

62. In Hong Kong, it is thought that some statutory guidance on construing bilingual laws will assist the courts in the early development of bilingual legislation. The courts in the common law jurisdiction enjoys exclusive jurisdiction over statutory interpretation. The sophistication of judicial reasoning should not be under-estimated. Some rules for their guidance are necessary. But courts should not be fettered with more rules than are necessary: it is essential to steer a course between too much in the way of instructions to the courts as to how to solve the problems and too little. What are recommended for Hong Kong are rather simple conflict rules based on the Vienna Convention on the Law of Treaties.

63. According to new section 10B(2) of the Interpretation and General Clauses (Amendment) Ordinance 1987⁶⁹, the provisions of a bilingual statute are presumed to have the same meaning in each authentic text. This enables the court in interpreting a bilingual statute to dispense with the need to consult both the authentic texts of the law, but can rely on a single text until the court is confronted with an alleged divergence between the two different authentic language texts of the statute. The presumption therefore avoids needless complications of interpretation process. One may however note that if the texts contain a discrepancy, the presumption does not help. It is submitted that a presumption has a limited function. As soon as it is argued that the other authentic language text presents a difference of meaning, the presumption ceases to be effective. It is necessary to have a presumption of this

⁶⁹ Supra, note 57.

character to retain the reliance on any single text as an expression of the legislative intent until a difficulty arises.

64. New section 10B(3)⁷⁰ reflects the general principle of statutory interpretation as stated in section 19 of the Interpretation and General Clauses Ordinance.⁷¹ The new subsection is drafted on the basis of Article 33 of the Vienna Convention⁷² which deals with the interpretation of multilingual treaties. The rule is to ascertain "the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance". This will ensure that any provision of a bilingual Ordinance cannot be construed as having a different meaning in one text than in the other, and that the legal

⁷⁰ Supra, note 57.

⁷¹ Section 19 :

"An Ordinance shall be deemed to be remedial and shall receive 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."

⁷² Article 33 "Interpretation of treaties authenticated in two or more languages:

1.)When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2.)A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3.)The terms of the treaty are presumed to have the same meaning in each authentic text.

4.)Except where a particular text prevails in accordance with paragraph 1, when comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purposes of the treaty, shall be adopted."

effect of a provision must be the same whichever text is referred to. The logic underlining this is that though there are two texts, the law is one. The addition of a second text must not be treated as additional law. The law is simply written in two language texts, each language text being part of the law. Both language texts constitute but one single law embodying one single meaning. There is only one body of law and one judicial system, not two laws.⁷³

65. The Courts, in interpreting the meaning of a given statutory provision, are concerned not so much with the linguistic meaning of individual words or expressions as they are with the legal message contained in that provision. "Words have no intrinsic significance; their meaning is that which is given to them in a given milieu at a given time. Further, each language possesses its own genius, which influences the choice of words and the arrangement of the sentence."⁷⁴ To maintain perfect harmony, in terms of terminology and formulation, between two different language texts of an Ordinance is therefore not always possible. But the two texts are not incompatible as long as they convey accurately in linguistically correct form the same legal theme.

⁷³ The International Law Commission (ILC) was involved in the codification of the law of treaties. In its commentary on the equivalent provision of Article 33 of the Vienna Convention of the 1966 draft, the ILC stresses that "In law there is only one treaty - one set of terms accepted by the parties and one common intention with respect to those terms - even when two authentic texts appear to diverge."

⁷⁴ Dr. Jean Hardy, "The Interpretation of Plurilingual Treaties by international Courts and Tribunals" B.Y.I.L. vol.37 (1961) p.83

66. Discrepancies between the two texts have to be reconciled by the courts in a way according to the cause of discrepancy. If, for instance, a discrepancy arises because one text is open to several interpretations, the judge can give effect to both texts by adopting a single interpretation to which they all lend themselves. In international treaties, this rule was enunciated and applied in the *Venezuelan Bond* case⁷⁵ where in determining the meaning of the word "claim" (reclamación), the Mixed Commission constituted by the United States and Venezuela under the Convention of 5 December 1885 considered the various possible meanings of those words and rejected all except those which they both had in common.

67. Problems of statutory interpretation can be dealt with by judges if they are bilingual. If a judge's personal knowledge of the other official language is inadequate for resolving the discrepancy between the texts, some aids must be available to help him determining the issue. One view⁷⁶ is that expert evidence by suitably qualified persons should be called, and as the present common law⁷⁷ or statutory rules governing the calling of expert witnesses does not allow the calling of expert witnesses on the meaning of a statute, legislation is necessary. The other view is that since the court is deciding on the meaning of a statutory text written on the common

⁷⁵ Moore, *International Arbitration*, Vol.4 p.3623

⁷⁶ See Discussion Paper on the Laws in Chinese, Paras. 120-124

⁷⁷ In the interpretation of statutes, evidence as to the meaning of ordinary words (not words with a technical meaning) therein is inadmissible, for "the court must take judicial cognizance of the language used without evidence" - see *Camden (Marquis) v Inland Revenue Commissioners* (1914) I.K.B. 641, 650; see also *Brutus v Cozens* (1973) A.C. 854.

law principles, not on the meaning of a text as if it were foreign law, the admissibility of such expert evidence does not conflict with the principle that it is the exclusive responsibility of the court to construe the legal meaning of the text; legislation is thus not necessary.

68. Fortunately, it is possible to find in decided cases some judicial assistance on what approach to adopt, since foreign language texts occasionally do enjoy authentic status in English law, as where an international treaty is made part of municipal law. Guidance on how to interpret an authentic foreign-language text has been given by the House of Lords in two cases : *Buchanan & Co v Babco Ltd* [1978] A.C.141, and *Fothergill v Monarch Airlines Ltd* [1980] 2 All E.R. 696. It is clear from these cases (in which the English courts have been confronted with texts that are in a foreign language but are not foreign law) that evidence is admissible as to the meaning of foreign words which form part of municipal law.

69. In the *Fothergill* case Parliament had enacted legislation (in a Schedule to the Carriage by Air Act 1961) in English and French, with a provision that the *French* should prevail in the event of inconsistency. The opinions of the House of Lords on how to approach the French text are -

- (a) "When the judge's personal knowledge of French, or other relevant foreign language, is inadequate for the immediate task, he should rely on dictionaries, or, if they are not sufficient, on evidence from qualified experts, as seems to him appropriate in the particular case." (per Lord Fraser p.710);
- (b) "My Lords, as in *Buchanan's* case, I am not willing to lay down any precise rule on this subject. The process of ascertaining the

meaning must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it; this is particularly true of the French or Latin language, so long languages of our courts. There is no reason why he should not consult a dictionary, if the word is such that a dictionary can reveal its significance; often of course it may substitute one doubt for another. (In *Buchanan's* case I was perhaps too optimistic in thinking that a simple reference to a dictionary could supply the key to the meaning of 'avarie'.) In all cases he will have in mind that ours is an adversary system: it is for the parties to make good their contentions. So he will inform them of the process he is using, and, if they think fit, they can supplement his resources with other material, other dictionaries, other books of reference, textbooks and decided cases. They may call evidence of an interpreter, if the language is one unknown to the court, or of an expert if the word or expression is such as to require expert interpretation. Between a technical expression in Japanese and a plain word in French there must be a whole spectrum which calls for suitable and individual treatment." (per Lord Wilberforce p.700-701.)

70. It is of course necessary always to keep in mind the distinction between the ordinary or grammatical meaning of an enactment and its legal meaning. As a general rule, the meaning of ordinary words in a statute is a question of fact.⁷⁸ Thus, a judge will not normally direct a jury as to the meaning of an ordinary word although he is perfectly at liberty to direct a jury that it is not open to them to give to a word a particular

⁷⁸ See *Cozen v Brutus* [1973] A.C.854 on "insulting behaviour" under the Public Order Act 1936, S.5; *R v Garwood* [1987] 1 W.L.R.319 on "menaces" under the Theft Act 1968, s.21(1); *R v Goddard* [1990] 92 Cr. App. R.185 on "an immoral purpose" under the Sexual Offences Act 1956, s.32; and *A.G.of Canada v Tucker* [1986] 2 F.C. 329 on "misconduct" under the Unemployment Insurance Act 1971, S.C. 1970-71-72, c.48, s. 41 (1).

meaning. The exception is where the word has been used in a context which indicates that it is being used in an unusual sense or has acquired a special meaning as a result of the authorities.⁷⁹ If an enactment does show that a word is used in an unusual sense, and in deciding what the unusual or legal meaning of an enactment is, the court is deciding a question of law and must make that decision itself.⁸⁰ It is also for the court to decide, not as law but as fact, whether in the circumstances of the case the words of an enactment apply to a given set of facts which have been proved.⁸¹

71. The distinction between the grammatical and legal meanings of an enactment exists regardless of the language of the enactment. All too frequently, it is not at all easy to decide whether certain words in an enactment have a clear ordinary meaning so that there is no scope for the various principles of statutory construction to apply. "Often words can mean two or more things; sometimes it is not clear what meaning or meanings they have; sometimes words seem to have no meaning."⁸² *British Amusement Catering Trade Association v Westminster City Council*⁸³ provides a

⁷⁹ As happened in *R v Feely* [1973] Q.B. 530 in relation to the word "fraudulently" under the Larceny Act 1916, s.1 (1).

⁸⁰ The proper construction of a statute is a question of law: Lord Reid in *Cozens v Brutus* [1973] A.C.854 at 861.

⁸¹ The construction of a statutory word is a matter of law; its application to particular facts a matter of fact: MacGuigan J. in *A.G. of Canada v Tucker* [1986] 2 C.F.341.

⁸² E.A.Driedger: *Construction of Statutes* [1983] Second Edition, p.5.

⁸³ [1987] 2 A.E.R.897.

striking illustration of how judges can disagree among themselves as to what the "clear" meaning of a statute really is. The question there was whether the phrase "exhibition of moving pictures" under the Cinematograph (Amendment) Act 1982,s.1 could have comprehended the operation of a video game so that premises used for playing video games required to be licensed. The Court of Appeal by a simple majority held that the operation of a videogame constituted an "exhibition of moving pictures." When considering the meaning of a word or phrase in an enactment, one often goes to a dictionary. When it comes to the question whether the context requires some special or particular meaning to be given to the words, evidence may be adduced on the technical meaning of the words before the court construes the legal meaning of the enactment.

72. In the *Fothergill* case, Lords Roskill and Scarman explained that where the law is expressed in a foreign language the ultimate decision is still that of the judge, not the language expert -

"The court may receive expert evidence directed not to the questions of law which arise in interpreting the convention, but to the meaning, or possible meanings (for there will often be more than one) of the French. It will be for the court, not the expert, to choose the meaning which it considers should be given to the words in issue. The same problem arises frequently with the English language, though here the court relies on its own knowledge of the language supplemented by dictionaries or other written evidence of usage. At the end of the day, the court, applying legal principles of interpretation, selects the meaning which it believes the law requires." (per Lord Scarman p.715)

73. Applying these reasoning to the proposals for bilingual legislation, the following conclusions may be drawn -

- (a) evidence as to the grammatical meaning of the text of our law is admissible at common law;
- (b) such evidence is admissible both in relation to technical expressions in the English language and in relation to ordinary terms of any other language (in practice, Chinese);
- (c) The admissibility of such evidence does not conflict with the principle that it is the exclusive responsibility of the court to construe the legal meaning of the text, and would not amount to treating the Chinese text of an Ordinance as if it were foreign law.

74. If the above conclusions are accepted, a major Bill is not required to provide for evidence to be admitted on the meaning of bilingual texts of legislation. However, there are two reasons why some statutory provision may still be needed -

- (a) At common law the courts are constrained by the requirements of the adversarial system, particularly in civil cases, to leave it to the parties to decide whether or not to call evidence. Consequently a monoglot judge who needs expert assistance which the parties decline to call may be at an insurmountable disadvantage in construing a text, unless he is enabled to call evidence of his own motion.
- (b) The common law does not apparently allow evidence to be adduced for the purpose of construing ordinary, as opposed to technical, words in the English language and it is presumably possible that this could present a problem for future judges whose understanding of English was severely limited.

(e)OPERATION

75. The Official Languages (Amendment) Ordinance 1987 and the Interpretation and General Clauses (Amendment) Ordinance 1987, though enacted in March 1987, did not come into operation immediately. Section 1 of each of these two amending ordinances provides that it will not come into operation until a date or dates to be fixed by the Governor. The intention is that there would be different dates for different provisions.

76. Before these two amending Ordinances came into operation, it was necessary to concentrate on two areas : resources and procedures. On resources, all the supporting arrangements within the Administration, including a strong team of bilingual draftsmen and law translators within the Attorney General's Chambers and additional equipment for the Government Printer, had to fully in place.

77. On the procedural side, it was thought necessary that several items of bilingual legislation should be brought before the Executive Council and the Legislative Council on a trial basis before the actual commencement of the bilingual laws project. On these "dummy runs", bilingual bills were treated exactly like ordinary bills intended for enactment, but only the English text was passed into law. The object of the transitional "dummy run" phase was to ensure that members of the Executive Council and Legislative Council would have adequate opportunity to examine for themselves whether existing procedures needed to be modified and adjusted in any way in order to facilitate the use of a second text in Bills. The first "dummy run" Bill was the Weights and Measures Bill 1987, followed by the Land Development Corporation Bill 1987 and

a number of others. All these "dummy run" Bills provided members of the Executive Council and of the Legislative Council further opportunities to discuss the procedural aspects and to finally satisfy themselves that existing scrutiny procedures were adequate as well as the procedures for debate. The "dummy runs" proved very successful in that they have not thrown up any problems or difficulties in the legislative process.

78. The Standing Orders to the Legislative Council were also during this transitional phase examined and amended to incorporate recommendations to introduce necessary revision thereto to accommodate bilingual legislation.

79. The "dummy run" programme was brought to an end in March 1989 when the two amending ordinances came into force and the bilingual laws project was formally brought into operation.

PART II

DRAFTING PROBLEMS

(1) EXPRESSION OF ENGLISH LAW

80. Problems concerning the accommodation of common law notions in the Chinese text have been tackled by section 10C(1) of the Interpretation and General Clauses (Amendment) Ordinance 1987.⁸⁴ The essence is that where English expressions embody established notions of the common law, such notions should also be recognised in the Chinese text, which should then be interpreted accordingly.

81. There were concerns however over expressions created by statutes such as "accident arising out of and in the course of the employment"⁸⁵, "by way of trade or business"⁸⁶ or "without lawful authority or excuse"⁸⁷. They are surely not expressions of the common law, but there are thousands of decisions giving flesh to these bare bones. Can the meaning of the English legal expressions as determined in decided cases be altered by the subsequent publication of an authentic text? The introduction

⁸⁴ See note 51, supra

⁸⁵ See Employees Compensation Ordinance, Cap.282

⁸⁶ See Section 3(2) of Gambling Ordinance. Cap.148

⁸⁷ See Cross-Habour Tunnel Ordinance, Cap. 203

of an authentic Chinese language text of an existing ordinance is not intended to undermine the established meaning of provisions within that ordinance. The question is whether anything can and should be done to ensure that this is the case.

82. One view is that it is necessary and advisable to legislate on this matter, because the case law on the English text has no logical relevance to the Chinese text. The meaning of the English text is not in issue. The question is what does the Chinese text mean? Judicial decisions may be relevant to bilingual texts in the following situation -

- (a) an existing ordinance, which has been subject to interpretation, is given an authentic Chinese text;
- (b) authentic texts in both languages are in force, and the English language text alone is subsequently interpreted e.g. in England;
- (c) a new ordinance is enacted in both languages, the English language text being based upon, for example, an English Act which has been interpreted;
- (d) authentic texts in both languages are in force and have been interpreted by Hong Kong Courts.

In respect of situation (d), there is no problem. Local decisions on an ordinance with two official language texts will be decisions on the meaning of the ordinance, not on one or other of the texts. In respect of the other three situations there may be a problem; to what extent are decisions on the English language text relevant in interpreting the Chinese language text?

83. If no legislative provision is made in respect of this question, how is a solicitor or barrister to advise his client? It may take years for the courts to settle their own

principles of construction. According to McEvoy in the "The Charter as a Bilingual Instrument"⁸⁸ -

"To refer to only one language version may result in a failure to properly ascertain the true meaning of the [law] where possible discrepancies of language exist between the two versions. The proper approach, it is suggested, is to refer to both of the provisions in issue, resolve any discrepancies of meaning and then apply the true meaning so ascertained from both versions."

Any lawyer who advises his client on the basis of one text only therefore runs the risk of being sued for negligence. How in practice will an English lawyer who does not know Chinese, cope?

84. It seems that the introduction of an authentic text will produce initial uncertainty as to the validity of existing authorities. A statutory provision which removes this uncertainty and obviates the need to study the Chinese text in every case appears to be needed.

85. For the sake of discussion, a draft provision along the following lines is put forth -

- "1) Where a court is bound by a previous decision to construe the English language text of an Ordinance in one way it shall construe the Chinese language text in the same way.
- (2) A court, in construing an Ordinance, shall have regard to any previous decision which is persuasive as to the meaning of the English language text as equally persuasive as to the meaning of the Chinese language text."

⁸⁸ Canadian Bar Review (1986) 64 p.157

Paragraph (1) leaves no room for doubt. A binding precedent, even if wrong, would not be open to review simply because a Chinese text has been produced and is arguably different from the English text. The importance of persuasive authorities (e.g. of the House of Lords or the English Court of Appeal) must also not be underestimated.

86. The counter-arguments are -

- (a) the courts will inevitably decide that the publication of a Chinese version of an existing text cannot alter the well established meaning of the English text; and
- (b) the Canadian experience shows that the provision of rules for construing bilingual legislation in the former section 8(2) of the Official Languages Act⁸⁹ may be too artificial and "leaves much to be desired as a legislative expression of the rule of equal authenticity and its application".⁹⁰

The question, as formulated in paragraph 82 is: "What does the Chinese text mean?" But the question ultimately is "What does the Ordinance mean?" To answer the latter question, it is necessary to consider the former; but the former is one of two merely subsidiary questions, the other being, "What does the English text mean?" In considering this last question the courts, as they move towards finding the correct construction of an Ordinance -

- (a) will inevitably be guided by previous decisions on identical wordings; and

⁸⁹ R.S.C. 1970, c-O.2.

⁹⁰ See M Beaupré, *Interpreting Bilingual Legislation*, 2nd ed. (Toronto, Carswells 1986), p.81.

- (b) will be engaged in a process that is logically relevant to the construction of a bilingually expressed Ordinance.

87. It may be argued that the fundamental point is that what has to be construed is the Ordinance, and not the Chinese text of it as opposed to the English text. Where there is a legislative history, the courts already (in the monolingual world) look at that history as an aid to interpretation.⁹¹ Where the history shows that a Chinese text was promulgated under statutory authority without any change being made to the pre-existing English text, it is not likely that the courts will allow the Chinese text to alter the well established meaning of the English text.

88. The suggested draft provision may therefore be considered as having very little practical effect. On the contrary, it does seek to impose a further rule on the courts in the sphere of judicial interpretation and to limit the discretion of the courts to deal creatively with the law.

89. Further, to regard precedent as "binding" on the courts may be an oversimplification of the judicial process. There are cases where courts cannot get round an objectionable precedent, but their ability to do so should not be under-

⁹¹ In *Gravel v City of St. Leonard* [1978] 1 S.C.R. 667, Pigeon J. said: "Legislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it..... The situation is completely different with respect to a statute subsequent in time to the facts which gave rise to the action. The construction of prior legislation is then exclusively a matter for the courts."

estimated. In *Conway v Rimmer*⁹², the House of Lords departed from its own decision in *Duncan v Cammell, Laird & Co.*⁹³, on a question of the discovery of documents. In *Herrington v British Railways Board*⁹⁴, the House of Lords overruled *Addie & Sons v Dumbreck*⁹⁵ by propounding the test of 'common humanity' which involves an investigation of whether an occupier has done all that a humane person would have done to protect the safety of trespassers. In *Vestey v Commissioners of Inland Revenue*⁹⁶, an income tax case, the House of Lords overruled its decision in *Congreve v Commissioners of Inland Revenue*⁹⁷. Courts will not fail to follow a precedent if they want to. One practical effect of the proposed draft provision in paragraph 85 is to take away a possible ground for not following a disliked precedent. With ingenuity some other ground will often be found, so the practical effect of the proposal, even to fetter judicial discretion, may be very limited.

⁹² (1968) A.C.910, H.L.

⁹³ (1942) A.C.624, H.L.

⁹⁴ (1972) A.C.877, H.L.

⁹⁵ (1929) A.C. 358.

⁹⁶ (1979) 3 All E.R. 976, H.L.

⁹⁷ (1948) 1 All E.R. 948, H.L.

(2) THE LANGUAGE DIFFICULTIES

90. Linguistically and culturally, there is an enormous difference between English and Chinese in grammar, syntax, style and structure. The task of producing two language texts of laws which should communicate an equivalent message in their own respective fashions is laborious. In preparing authentic texts of legislation, every effort will be made to match the two texts as identical as possible. In the case of new legislation, this means that the drafting instructions are studied and scrutinized thoroughly so as to find out what exactly is required to be written in law, and each of the texts so written should accurately reflect the meaning of the other. In the case of existing legislation, the work is primarily one of translation from English to Chinese. The Chinese text, in order to become authentic, should accurately transmit the spirit and legal effect of the original text, and preserve at the same time the linguistic and cultural characteristics of the Chinese language.

91. The process of translation is complex and requires great sensibility. About 50 years ago Stable J. had the following to say -

"The precise mental process of translating a word or sentence spoken or written in one language into another language is or may be somewhat complex. In fact, to say that you translate one word by another seems to me to be a summary method of stating a process, the exact nature of which is a little obscure. A substantive word is merely a symbol which unless it be part of a tale told by an idiot, signifies something. If that something is a concrete object such as an apple or a particular picture, the process of translation from one language to another is easy enough for any one well acquainted with both languages. Where the words used signify not a concrete object, but a conception of the mind, the process of the translation seems to be to ascertain the conception or thought which the words used in the language to be translated conjure up in his own mind, and then, having got that conception or thought clear, to re-symbolize it in words selected from the language into which it is to be translated. A possible danger, when the document to be translated is one on which legal rights depend, is apparent, inasmuch as the witness who

is in theory a mere translator may construe the document in the original language and then impose on the court the construction at which he has arrived by the medium of the translation which he has selected.⁹⁸

92. The problems which may arise in rendering into Chinese an authentic text of legislation are great. There are virtually untranslatable legal concepts, tricky and problematic expressions and words the nuances of which are not easy to distinguish. The following shows some of the difficulties that have been identified, but they are by no means exhaustive.

(a) Technical Terminology

93. Legal language is highly complex and technical. Technical terms pertaining to each particular branch of law present difficulties in translation. "Joint tenancy" and "tenancy in common" in land law, "devise" (applicable only to realty) and "bequeath" (applicable only to personalty) in the law of succession, and "fraudulent preference" and "floating charge" in company law are just a few of the many examples. Statutory terms of art commonly found in legislation such as "shall", "may", "subject to", "provided that", "notwithstanding", "without prejudice to", "as the case may be" and "in relation to" have their technical meanings which may vary according to contexts in which they are used so that there is no standardized translations of them.

⁹⁸ *Dies v British and International Mining and Finance Corporation Ltd.* (1939) 1 K.B. 724 at p. 733 per Stable J.

94. Industrialization, science and technology have already brought new vocabularies of their own to our laws on building, civil aviation, merchant shipping and radio telecommunication. The rapid growth of modern scientific technology in the field of nuclear energy, computers and electronics continues to add to our legislation new words to express new concepts. All these words are not easy to be expressed in simple Chinese terms, especially when the concepts are completely alien to the ordinary Chinese reading people. To find an appropriate term that equates the foreign technical term requires a sufficiently comprehensive knowledge of that particular industry in which the terms are used. A literal translation of a technical word or expression very often renders the content in which the technical word or expression appears meaningless or difficult to read. The term "latent defaults" in the English version of the Water Carriage of Goods Act⁹⁹ is translated literally into "défaults latents" in the French version. This is pointed out as wrong by Mr. John D. Honsberger because without a knowledge of English, this expression can be understood only with difficulty. The meaning would be readily understood however if the expression 'vices cachés' had been used instead".¹⁰⁰ Similarly, expressions like "summary offence", "indictable offence" and "bill of voluntary indictment" cannot be accurately translated into Chinese without a proper grasp of the meanings of these terms; a literal translation will not achieve the purpose.

⁹⁹ Revised Statutes of Canada, 1952, c.291, Art. IV, s.2(p)

¹⁰⁰ John D. Honsberger's article on "Bilingualism in Canadian Statutes" in the Canadian Bar Review (1965) Vol. XLIII, p.323.

95. The non-standardization of many of the common technical terms used by different classes of people has further complicated the problem. "Thinner" is known as (天拿水) by the average educated Chinese, but as (稀释剂) among the ordinary workers. Similarly, "Plimsoll's mark", a term in merchant shipping, is known as (载重线标志) and (燕疏唛); "self-closing tap" is known as (自闭式龙头) and (弹弓龙头); and "bridle joint", a term in building industry, is known as (勒式接驳) and (义驳). A consultation of dictionaries or glossaries of legal terms or of common technical terms is not always helpful because -

- (a) the same technical term may be translated differently in diverse dictionaries or glossaries; and;
- (b) some technical terms have no Chinese equivalents and cannot be found in any of the dictionaries or glossaries.

96. Since the objective is to render both English and Chinese to be equally authentic in legislation, it would not be acceptable for one version to be merely a translation of the other. "The two versions must meet the same standard of technical adequacy in the eyes of those qualified to critically evaluate them. This requirement can be particularly onerous where a legislative proposal is based on a precedent from another jurisdiction where legislation and related information, often of a very technical nature, are available in one language only".¹⁰¹ Laws on copyright, patents, civil aviation, merchant shipping and telecommunication would fall into this category. Adoption of English statutory provisions relating to the "Anton Pillar Order" and the "Mareva injunction" also involve highly technical terms which necessitate a significant

¹⁰¹ The Preparation of Legislation in Canada, by Government of Canada, Privy Council Office, p.4.

amount of time to allow for the "invention", testing and finalization of appropriate terminology for the Chinese language version of the legislation.

(b) Nuances of Words and Expressions

97. English synonyms have the same meaning but often with different implications and nuances. These fine distinctions are not easy to express in Chinese. "Ask", "request", "beg", "entreat", "solicit", "implore" and "beseech" are all synonymous verbs but have different shades of meaning or implication appropriate to different contexts. The Chinese equivalents are only two: (恳求) which means "ask, request, solicit" and (请求) which means "beg, entreat, implore and beseech". Similarly, "wine, spirit, liquor, alcohol and beverage" may be all expressed as (酒) in Chinese. This is not to say that the Chinese vocabulary is not as rich as the English, but because of the linguistic and cultural difference, each language has its own development and its own way of expressing a particular concept. For the word "pull", there are 4 variants in Chinese – (拉), (拖), (扯) and (拽) – with slightly different shades of meaning. However, for the concept of "fee" which is an important word in legislation, there is in Chinese only one general term (费用) used to cover such variants in English as "charges", "dues", "costs", "expenses", "reimbursements" and "disbursements". "Pledge", "charge" and "mortgage" in the law of conveyancing are all expressed in Chinese as (抵押) or (按揭). Phrases like "charge by way of mortgage" and "repeal includes rescind, revoke, cancel or replace"¹⁰² create problems in translation.

¹⁰² Definition of "repeal" in the Interpretation and General Clauses Ordinance. (Cap.1)

98. "Damage", "harm", "loss", "injury", "detriment" and "destruction" may be synonymous but have different shades of meaning. The word "damage", depending on the context in which it is used, may mean economic harm or physical injury. The meaning of the word varies according to the subject matter. Does "damage" include partial loss? This question was thoroughly canvassed in the House of Lords¹⁰³ when the word appears in Article 26 (2) of the Warsaw Convention as amended by the Hague Convention of 1955. The exact shade of meaning of a word has to be ascertained before a proper translation can be given to it.

99. The nuances of English terms are difficult to translate in a satisfactory manner. Plenty of examples may be cited. The following are but a few -

- (a) "complaint", "information", "summons", "charges" and "indictment" as modes of beginning criminal proceedings;
- (b) "causes", "action", "matters", "motion", "petition", "writ", "originating summons" and "claim" as modes of beginning civil proceedings;
- (c) "rule", "order", "declaration" and "proclamation" as part of subsidiary legislation¹⁰⁴ ;
- (d) "exemption", "exclusion" and "immunities" used in the citations of legislation¹⁰⁵;
- (e) "Valuable consideration" and "good consideration";

¹⁰³ See *Fothergill v Monarch Airlines Ltd.* (1981) A.C.251

¹⁰⁴ See definition of "subsidiary legislation" in the Interpretation and General Clauses Ordinance, Cap. 1.

¹⁰⁵ For example; Telecommunication (Exemption from Licensing) Order, (Cap.106); Tenancy (Notice of Termination) (Exclusion) (Consolidation) Order (Cap.7); and Consular Relations (Privileges and Immunities) (Commonwealth Countries and Republic of Ireland) Order (Cap.259).

- (f) "sufficient consideration" and "adequate consideration";
- (g) "any sum for or on account of costs, charges or expenses"¹⁰⁶;
- (h) repeal includes rescind, revoke, cancel or replace¹⁰⁷ ;

Efforts should be made to find the Chinese equivalents to each of the synonymous expressions in English. If no equivalent in Chinese can be found, the English text should be altered or the otiose words or expressions should be eliminated in order to coincide with the Chinese.

¹⁰⁶ Section 27(1) of the Money Lenders Ordinance, (Cap.163).

¹⁰⁷ Definition of "repeal" in the Interpretation and General Clauses Ordinance, (Cap.1).

(c) Prepositions and Prepositional Phrases

100. "In the most general terms, a preposition expresses a relation between two entities, one being that represented by the prepositional complement"¹⁰⁸ A preposition is commonly used to indicate the relational meaning of place, time, direction, source and method. When two prepositions are used in a clause to denote different relationships, for example -

"immovable property means -

- (a) _____
- (b) any estate, right, interest or easement in or over any land; and
- (c) _____; ¹⁰⁹

the translation of "in" and "over" into Chinese requires the repeating of the subject governed by the two prepositions so as to convey the two different relationships. When three or more prepositions are used in a clause, the sentence structure in Chinese may become clumsy. A story is told by Sir Ernest Gowers of the nurse who performed the remarkable feat of four prepositions at the end of a sentence by asking her charge ; "What did you choose that book to be read to out of for?"¹¹⁰

¹⁰⁸ Randolph Quirk and Sidney Greenbaum, "A University Grammar of English"(5th edition), p.143

¹⁰⁹ Definition of "immovable property" in the Interpretation and General Clauses Ordinance, (Cap.1). This statutory definition is required because in Hong Kong there is no freehold or real property except in the case of St. John's Cathedral on the Hong Kong island.

¹¹⁰ Sir Ernest Gowers, "The Complete Plain Words", 2nd Edition (1973), p.186

101. The difficulty in translation is even more aggravated when a pair of prepositions or prepositional phrases are put together to express the same relational meaning but to a different extent. This is not uncommon in English legislation because the draftsman, in describing a given situation, has the tendency to cover everything and to express a rule by means of an enumeration of details.¹¹¹ Pairs of prepositions are often used to cover the "direct and indirect" or "narrow and wide" aspects. Expressions such as "by and under", "save under and in accordance with"¹¹², "relates to and is connected with"¹¹³, and "incidental to or connected with"¹¹⁴, are frequently found in statutory provisions.

102. Very often a short provision, because of the presence of prepositions or prepositional phrases, is by no means simple. Section 56(1)(c) of the Internal Security Act 74 of 1982 of South Africa reads -

¹¹¹ The Renton Report on the Preparation of Legislation (Cmnd. 6053) para. 11.18 says, "The draftsman seeks above everything to ensure that legislation will attain its objective and that it will permit anyone completely to foresee the solution of any lawsuit which might relate to it.we think that this philosophy has led the English lawyer to the form of drafting one knows --- heavy, disorder and incomplete. In wishing to answer all the questions one is led to enumerate all the instances of application. One is led equally to recourse to a riot of details. This results, paradoxically, in lacunas, which necessitate recourse to a theory of lacunas."

¹¹² For example, sections 4, 6 and 8 of the Dangerous Drugs Ordinance, (Cap.134).

¹¹³ For example, section 105 of the Magistrates Ordinance, (Cap.227).

¹¹⁴ For example, the long title of the Interpretation and General Clauses Ordinance, (Cap.)1.

"Any person who -

(a) _____ ;

(b) _____ ;

(c) without the consent of the Minister, is in possession of any publication published or disseminated by or under the direction or guidance or on behalf of an unlawful organization;

shall be guilty of an offence."

An analysis of the provision shows that possession of documents is prohibited in the following circumstances, there being 8 in number -

- (a) publication published by an unlawful organisation;
- (b) publications published under the direction of an unlawful organisation;
- (c) publications published under the guidance of an unlawful organisation;
- (d) publications published on behalf of an unlawful organisation;
- (e) publications disseminated by an unlawful organisation;
- (f) publications disseminated under the direction of an unlawful organisation;
- (g) publications disseminated under the guidance of an unlawful organisation;
- (h) publications disseminated on behalf of an unlawful organisation.

The 8 prohibitions are neatly arrayed in English by the use of 4 prepositions or prepositional phrases : "by", "under the direction of", "under the guidance of" and "on behalf of". The concept of each of the 4 expressions is different from one another; each merits its place in the provision. Because of the terse and concise written style of Chinese language, the provision consisting of 8 prohibitions cannot be expressed clearly in Chinese without repeating several times the object, the "unlawful organisation", of the prepositional phrases.

(d) Complex Sentences

103. It is common in the English language to modify a subject by an adjective clause (a group of words containing its own subject and predicate). The clause may be introduced by a conjunctive pronoun (e.g. which, who, whom) or a preposition coupled to a relative pronoun. A sentence may become very long and complex by the use of conjunctions and clauses. In legislation, it is not uncommon to find a section which consists of one single sentence but which comprises a number of conjunctions and clauses, running through the whole page in the statute book.

104. In Chinese language, there is no such complex structure in a sentence. Chinese is a language without conjunctive pronouns. The lack of these Chinese equivalents makes translation of complex English sentences into Chinese very difficult. The translation of a complex sentence requires a restructuring of the sentence in the Chinese language in order to render the language comprehensible to the Chinese readers. The result may be that the Chinese version, although conveying the message of the English text, loses the solemn and imposing tone of the original.

105. Take section 5 of Cap.212 for example -

"5. All persons who within the colony conspire, confederate, and agree to murder any person, whether he is a subject of Her Majesty or not and whether he is within Her Majesty's dominions or not, and any person who within the Colony solicits, encourages, persuades or endeavours to persuade, or proposes to any person to murder any other person, whether he is a subject of Her Majesty's dominions or not, shall be guilty of an offence and shall be liable to imprisonment for life."

To follow closely the English pattern would result in a translation inelegant and unintelligible. The translated version may be rendered as follow -

(在本港串謀,共謀及同意謀殺他人,或誘使,鼓勸,怂恿或逼力怂恿,或建議第三者謀殺他人,不論被害人是否女皇子民或是否身在女皇領土,均屬犯罪.犯者可被判終身監禁.)

Translated back into English, it reads -

"In the Colony, it is an offence to conspire, confederate, or agree to murder any person, or to solicit, encourage, persuade or propose to persuade any person to murder any other person whether or not the person to be murdered is a subject of Her Majesty or within Her Majesty's dominions. The offender is liable to an imprisonment for life."

The style is akin to the terse statement written in Chinese law. It is not the words or the linguistic form of the English text which have been translated, but rather the message, i.e. the element of the author's intention. One will notice that the meaning and effect of the translated version above and the version in section 5 of Cap. 212 are the same, but the tones different.

(e) Foreign Terms and Phrases

106. Some terms foreign to the English language are retained in statutes because there are no satisfactory simple English equivalents. "The near-equivalents, though good enough for many purposes, lack a nuance or a precision which can be conveyed only by the foreign word and may be important to the context. The foreign word, in short, may be the *mot juste*."¹¹⁵

107. Thus we find in legislation terms like "*in transitu*"¹¹⁶, "*petit treason*"¹¹⁷, "*in loco parentis*"¹¹⁸, "*autrefois convict and autrefois acquit*"¹¹⁹ and many others. In

115 Sir Ernest Gowers, "The Complete Plain Words", 2nd Edition, p.108

116 Section 48 of Sale of Goods Ordinance, (Cap.26).

117 Section 6 of Offences Against the Person Ordinance, (Cap.212).

118 Section 33(3) of Trustee Ordinance, (Cap.29).

119 See section 64 of Criminal Procedure Ordinance, (Cap.221).

producing a Chinese text of legislation, it would be very odd to preserve these foreign terms because of the etymological and cultural difference. If the French and Latin terms found in legislation were allowed to remain in the Chinese text, it would be a big temptation to the draftsmen or law translators not to do the same with a difficult English legal term. Some of these foreign terms such as "*inter alia*", "*prima facie*" and "*mutatis mutandis*" can be easily avoided by finding equivalent expressions in Chinese. Others like "*eiusdem generis*", "*cy-préss doctrine*", "*profits a prendre*", and "*noscltur a sociis*" have no equivalents. To find simple and precise terms in Chinese with the exact nuance conveyed by the foreign terms is an extremely difficult task. The existing legal glossaries can help very little in this field. Unless the background and meanings of the foreign legal terms are precisely clear, the law translators will have difficulty in bringing out their exact meanings in Chinese. No matter how difficult the task may be, it is the responsibility of the draftsmen and law translators to hammer out a proper and simple translation in Chinese for all the foreign terms in legislation.

108. In Canada, Latin and other foreign terms are used less often in the French legislation than in the English legislation. There is a guide related to the use of foreign terms in legislation provided in article 33 of the Drafting Conventions adopted by the Uniform Law Conference of Canada¹²⁰ at its 71st annual meeting: "Terms from languages other than English should be used only if they are generally understood and if there is no equally clear and concise way of expressing the concept in English."

¹²⁰ Held at Yellowknife, Northwest Territories in August, 1989.

(f) Additions and Omissions

109. In translating one language into another language, one very often finds "that which is expressed and that which is not expressed do not necessarily correspond".¹²¹ Care must be taken to make the appropriate additions or omissions. If this is not done, the translation produced may have the effect of preventing the reader from properly understanding the message.

110. "Trust for sale" is a simple term in English but presents difficulty in translation. A free-lance translator might translate it as (出售信托) which literally means "sale's trust" or "trust of sale". This is not clear and not helpful to a reader because the translated version fails to convey the message of the term. Additional words are required to complete the hidden meaning ; the term should be translated (为出售而设立的信托) meaning "trust set up for the purpose of sale". To give a further example, the distinction between "contract of service" or "contract for services" cannot be clearly brought out in translation without addition of appropriate words.

111. Similarly, some of the words in the English text may be omitted for the purpose of translation without affecting the meaning of the text. Words like "who", "which", "that" and "whom" are obvious examples because there are no equivalent pronouns in Chinese. The word "any" in many instances may also be omitted because

¹²¹ See "preparation of the French Language Versions of Canadian Federal Legislation" by Alexandre Covacs, p.28

in the Chinese language if a noun is not preceded by "a", "the" or a number, the meaning of "any" is implicit. Sometimes a whole phrase or clause should also be omitted to respect the Chinese language and culture without affecting the meaning of the text.¹²²

(g) Differences of Sentence Pattern in the Two Languages

112. In conveying the message of the original text, the translator's basic principle is to render that message in the best form possible. Choice of words and construction of sentences must vary according to the usage of the target language. Addition of words is necessary to modify the introduction or the general presentation of a message.

113. In the following provision -

"Save with permission in writing of the Council or the Director of Urban Services, no person shall, without reasonable cause or excuse, engage in any of the activities commonly known as parachute jumping or parasailing on or from or over any bathing beach or into or from or over any part of the waters adjacent to any bathing beach set aside for the use of swimmers under by-law 10(1)".¹²³

It is not possible to render a Chinese version of the text accurately and elegantly without altering the structure of the sentence and the repeating of the objects (resulting

¹²² For example, translation of section 5 of Cap.212 in paragraph 105, supra

¹²³ Bathing Beach By-laws, By-law 11(3), (Cap.132).

in the addition of words) because of the series of the prepositions (as underlined) in the provision.

114. In the following provision -

"A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way."¹²⁴

The difficulty of translation lies in the fact that the first part of this short sentence (as underlined) consists of 4 subjects, viz. -

- (a) a trust to sell,
- (b) a trust to dispose of land,
- (c) a power to sell, and
- (d) a power to dispose of land,

followed by 4 corresponding subjects, further qualified by a clause. As Chinese readers are used to terse statement, a translation following closely the English sentence structure creates a muddled impression. The message is best conveyed by splitting the subjects and objects and by repeating the same qualifying clause.

¹²⁴ Section 13(2) of the Trustee Ordinance, (Cap.132).

(h) Grammatical Variations and Cognate Expressions

115. Section 5 of the Interpretation and General Clauses Ordinance (Cap.1) provides -

"Where any word or expression is defined in any Ordinance, such definition shall extend to the grammatical variations and cognate expressions of such word or expression."

This provision applies to the English language text. The expression "grammatical variation" covers, for example, different tense patterns as "go", "went", "gone", etc. But "grammatical variation" is not known to the Chinese language and it is clear that this part of section 5 does not apply to the Chinese language text.

116. The expression "cognate expressions" requires some explanation. The dictionary meaning of "cognate" is -

"of same linguistic family, representing same original word or root, of parallel development in different allied languages."¹²⁵

A good example is found in the Industrial and Provident Society (Amendment) Act 1987 of Northern Ireland. There, the definition for "bank" is provided but the cognate word "banker" is also used where the context requires and both are taken to have the same meaning. Another form of cognate expression is an extension of the original word. For instance, if in a bill, the word "office" is defined as "office means the office of Chief Justice", then the word "office holder" will mean the holder of the office of Chief

¹²⁵ Concise Oxford Dictionary

Justice. In other words, the definition of "office" will extend to its use as the component of a compound word.

117. If the defined meaning of a word is, by virtue of section 5, extended to its cognate expressions, the trouble of having to define similar words is avoided. For example, if "licence" is defined, then "licensee" will mean someone who is issued with that "licence" without the need of giving "licensee" a definition.

118. Chinese language is made up of single and independent characters. Two or more characters grouped together form a distinct term or expression. It can hardly be said that a single character constitutes a root of an expression. It is clear therefore that "cognate expression" is inapplicable to the Chinese language.

119. In Chinese language, situations may arise where an expression in the Chinese text may have to be split up in parts to allow for the better flow of the sentence construction. For example, "亲收送达" (which means personal service) may have to be rendered as "将...送达...亲收"; or "判案要点陈述" which means "case stated" as "将判案要点向.....陈述". A provision may be required therefore to cover these situations in the Chinese text of the Interpretation and General Clauses Ordinance (Cap.1). The proposed wording of the section reads –

“凡条例中下有定义的中文词句,在使用该词句时因行文需要而将其顺序分拆,其意义不受影响。”

Its English translation reads -

"Where any Chinese expression is defined in any Ordinance, such definition shall not be affected by the use in the Ordinance of that expression in split parts arranged in the same order as the linguistic structure requires."

(3) JURISPRUDENTIAL DIFFICULTIES

120. To the language difficulty there may be added jurisprudential difficulty: first, jurisprudential concepts peculiar to the Chinese¹²⁶, and secondly, jurisprudential concepts and terms in Chinese founded on the civil law system as opposed to concepts and terms founded on the common law system.

121. Prior to 1900, Chinese law was essentially a means to restore the natural order where preventive measures to preserve that order (e.g. education) had failed. It is interesting to note that this element of education is also incorporated in the present law of PRC.¹²⁷

¹²⁶ One example of the concept belonging exclusively to the Chinese is the maxim of "A son pays his father's debt" (父债子还), universally applicable in China. It means that the family successor, whether natural born or adopted, stands precisely in the shoe of the deceased. The succession is a succession of an undivided whole - to the "universitas juris" of the Roman Law, in fact - to a bundle of rights and duties (see Chinese Family and Commercial Law by Jamieson [1970] p.29). Even now in the PRC, if the head of a family is branded as a landlord or a rich peasant, his whole family shares the disgrace and suffers.

¹²⁷ Section 4 of the Organisation of the Peoples' Republic's Prosecution Department Code provides, among others -

122. The "Ta Ching Lu Li", or the General Code of Laws of the Chinese Empire (大清律例), was the first comprehensive criminal code compiled in the Manchu Dynasty (1644-1912). The Code was divided into 7 Chapters, dealing with definitions of offences and containing rules about respective punishments. The Code incorporated some of the laws originating in the First Code of Li Kuei (李愷) (424 to 387 B.C.), of the State "Wei", and in the Tang Code. (653 to 654 A.D.)¹²⁸

123. In about 1913, the Nationalist Government of China introduced a code (六法全书) on the six main branches of the law, namely –

- (a) constitutional law,
- (b) civil law,
- (c) commercial law,
- (d) criminal law,
- (e) civil and criminal procedures, and
- (f) organisation of the Judiciary.

The code was prepared on the Roman-germanic system from which are derived the jurisprudential terms in Chinese.

"A Peoples' Republic's Prosecution Department shall, through the activities of prosecution, educate citizens to be loyal to their Socialist mother land, abide by the constitutional law self-consciously and struggle positively against illegal acts".

¹²⁸ See "Introduction of the Criminal Law in China" by M.J. Meijer, De Uine 1950.

124. The PRC is presently equipped with a series of new laws and new regulations, the list of which is constantly increasing. The Constitution declares the fundamental policy of Chinese Socialism. The Criminal Code used Marxism, Leninism and Maoism as a guide and the Constitution as the basis.¹²⁹ The trial procedure in PRC is inquisitorial as opposed to adversarial. It is not certain whether the civil law, which is in a developing stage, will be founded on the continental system. Recent legal literature¹³⁰ shows that the PRC is interested in both the civil and common law system, but there is little Chinese legal literature dealing with common law legal concepts which one can consult. The jurisprudential difficulties include –

- (a) difficulty in expressing the legal concepts in Chinese;
- (b) legal concept expressed in different Chinese terms according to place; and
- (c) nuances of a term according to places where it is used.

¹²⁹ "To establish a Socialistic Country with Chinese characteristics" (建立中国的特式社会主义), 1985 edition.

¹³⁰ See, for example:

- (a) Paul Fifoot, "China's Basic Law for Hong Kong", *International Relations* 1991, 10(4), 301-327;
- (b) L. Nanping, "An Ignored Source of Chinese Law: the gazette of the Supreme Court People's Court". *Connecticut Journal of International Law*; 271-316 Fall' 90; and
- (c) Zhou Hairong, "The re-establishment of the Chinese Legal System: achievements and disappointments, (Progress since 1979)". *Civil Justice Quarterly* 1991, 10(Jan) 44-56.

(a) Difficulty in expressing the legal concept in Chinese

125. In the terminological field, there are English terms which have in Chinese a semantic equivalent and therefore a functional equivalent can be found. There are many specialised legal terms which have no equivalent in Chinese such as "consideration", "legal estate", "equitable interests", "legal mortgage", "equitable mortgage", "settlement", "land charges", "charge by way of mortgage", "choses in action", "fee simple", "fee tail", "interest in expectancy", "estate in remainder", "reversionary interest", "diminished responsibility", "demurrer", "undue influence" or "without prejudice". These terms are loaded with rich meanings and cannot be properly understood without adequate legal knowledge. These are terms of the Common Law upon which the Hong Kong ordinance is built. Terms like these are very difficult to translate if not untranslatable. These terms are alien to or have no equivalent in the Chinese language. They are concepts in a particular branch of the common law for which equivalent in Chinese does not exist.

126. A good example is afforded by the word "Crown". It is a convenient term to use but its meaning depends very much on the context in which it is used. "Crown" sometimes refers to the Sovereign, and sometimes is used to denote the executive branch of the government. In constitutional law the Crown was single and indivisible, but now becomes separate and divisible according to the particular territory in which it is sovereign.¹³¹ It is difficult to comprehend the concept of "Crown" without first involving oneself to an in-depth understanding of the English constitutional and

¹³¹ See *R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Indian Association of Alberta and others* (1982) W.L.R.641

commonwealth law. To try to assign to it a Chinese equivalent is even more difficult. The difficulty is that "Crown" is a pure English concept closely associated with the development of a constitutional monarch and the Commonwealth. The Chinese, not having either of these, would not have the concept and therefore do not have a term in Chinese which is an exact translation of the word "Crown".

127. The understanding of these common law terms is made easier with the aid of legal text books and legal dictionaries. There is no similar support for the equivalent Chinese terms which have to be created by the law translators. The bilingual legislation work suffers from the paucity of legal literature and terminology in Chinese on common law concepts. The sinophone lawyers are not using traditional Chinese legal terms to express something they are familiar with. They are using the Chinese language for the purpose of expressing through it not legal notions and concepts of their own but legal ideas nurtured in the peculiar background of the English common law.

(b) Legal concept expressed in different Chinese terms according to place

128. It is true that there is only one Chinese language used throughout China, Taiwan and Hong Kong. It is surprising to find in the legal field that -

- (a)** many legal concepts are expressed in slightly different terms in the three places; and
- (b)** the same Chinese term has different meanings in the three different places.

The following table shows some common examples of (a)

English Version	Chinese Version as Used In			
	Hong Kong (only)	P.R.C. & Taiwan	Taiwan	P.R.C.
To Prosecute (or prosecution)	检控; 起诉		公诉	控诉; 控告
Bill	法案(前译)		条例草案	法草案
Attempted offence	企图犯罪		未遂犯罪	犯罪未遂
Appointment	委任	任命		
Contract	合同; 合约	契约; 合同		
Adoption	领养	收养; 过继		
Confiscation	充公	没收		
Life Imprisonment	终身监禁	无期徒刑		
Robbery	行劫	抢劫		
Judge	法官		推事	审判员

129. A particular legal concept is expressed in different Chinese terms depending on the jurisdiction. In rendering a Chinese version of the Laws of Hong Kong, should the authorities attempt to standardize the terms in order to avoid confusion? Or is there any confusion? It seems that the difference of terms is due to the fact that one is Cantonese expression and the other Mandarin expression; for example, (充公) and (没收) for "confiscation". It may also be that one term reflects more accurately the English legal concept than the other, e.g. (行劫) and (抢劫) for "robbery". There may be other reasons for the divergence.

130. On one hand, it is desirable that the Chinese legal expression used in Hong Kong and in China should be the same as Hong Kong is to be integrated into China by 1997. On the other hand, it is desirable to retain the characteristics of Cantonese expression especially if it accurately reflects the English legal terms. If the terms used in China (or in Taiwan) are equally and accurately expressive of the English legal term, the term used in Hong Kong should perhaps be replaced by the one used in China (or in Taiwan) so as to achieve consistency. Before deciding which expression should be used, a small group of people should be assigned the work of -

- (a) collecting and compiling the different expressions for a single legal concept used in Hong Kong, China and Taiwan; and
- (b) studying and comparing these expressions.

(c) Nuances of a Term according to the Places where it is used

131. In contrast with "different expressions for a single legal concept" as mentioned under sub-heading (b) a single Chinese legal term may have different shades of meaning depending on the jurisdiction where it is used. Just as the word "freedom" (自由) may be construed differently in different places so are many of the legal terms and their nuances according to their use in the different legal jurisdictions. The following are some examples -

- (a) (契约) is a translated Chinese version for "covenant" or "deed"; it is a contract under seal. In China, (契约) and (合同) are synonyms for "agreement" or "contract".¹³²
- (b) (信托人) means "trustees". The meaning of (信托人) "trustees" used in China is not the same as used in the English Law of Trust. "Trustee" (信托人) in China is a legal person (as opposed to a natural person) who buys, sells or works in his name on behalf of the person who authorises it.¹³³
- (c) (特赦) means "pardon" or "amnesty". The term (特赦) in China¹³⁴ means "pardon to" but also includes "reduction to penal punishment" on a criminal who has been sentenced to a period of labour reformation and who has proved to have turned away from evil to good.

¹³² (法律词语析解) "Analysis of Legal Terms" by People's Publishing Co.

¹³³ (法律词语析解) "Analysis of Legal Terms" by People's Publishing Co.

¹³⁴ (法律词语析解) "Analysis of Legal Terms" by People's Publishing Co.

- (d) (豁免) here in Hong Kong means "immunity". In China (豁免) means "diplomatic privilege" in Public International Law.¹³⁵ The accepted translation for "diplomatic privilege" in Hong Kong is (外交特权).
- (e) (原本) in the context of a document means "original copy". In China, "original copy" is referred to as (正本) and (原本) means the "draft copy from which the original is prepared".¹³⁶
- (f) (管制) means "control" or "supervision" in Hong Kong. In China, (管制) "supervision" is a form of punishment in criminal law. The supervision period is not less than three months and not more than two years. A supervision sentence is similar to the one imposed on youngsters to a reformatory school here in Hong Kong.¹³⁷

132. The problems mentioned in (b) and (c) are unique in the legislative translation from English to Chinese. In choosing a particular Chinese expression for a legal term, the criterion is that the expression chosen should be the exact equivalent of the English legal term. There is an additional duty on the law translator to check other Chinese expressions (if any) used in China and Taiwan and to make a comparison of the expressions. The work is tedious because it involves study of, and research into,

¹³⁵ (法律词语析解) "Analysis of Legal Terms" by People's Publishing Co.

¹³⁶ (法律词语析解) "Analysis of Legal Terms" by People's Publishing Co.

¹³⁷ (法律词语析解) "Analysis of Legal Terms" by People's Publishing Co.

the laws of PRC and Taiwan. The deciding factors in choosing a suitable Chinese equivalent expression should be -

- (a) if the commonly accepted expression in Hong Kong differs from that used in China or Taiwan, the Hong Kong expression will be adopted. For instance, for "fine or penalty", China uses "罚金" or "罚鍰". In Hong Kong, the commonly known Chinese expression is "罚款". So the expression "各类罚款" is used in section 93 of the Interpretation and General Clauses Ordinance for "fine or penalty";
- (b) for expressions without commonly accepted Chinese equivalents in Hong Kong, reference should be drawn from China and Taiwan for the most suitable Chinese expression. Take for instance the term "easement", China uses "通行权" or "相邻权", Taiwan uses "地役权". On comparison, it is considered that "地役权" better reflects the meaning of the English term and so this equivalent is adopted;
- (c) for expressions without established Chinese equivalents either in China, Taiwan or Hong Kong, a new term should be coined, according to the following principles -
 - (i) The term must conform to the Chinese linguistic pattern; and
 - (ii) the term must make sense and the words themselves must be capable of conveying the intended meaning.

(4) SOME PITFALLS IN TRANSLATION OF EXISTING LEGISLATION

133. The existing legislation of Hong Kong is amended and revised from time to time to keep abreast of developments in society. Many of the existing Ordinances have a historical background of development in long established legal principles. These principles are heavily embedded in the English legal system and are difficult for a person not trained as a lawyer to understand. Translation of the existing legislation is much more difficult than the drafting of the new legislation because -

- (a) some of the old ordinances were written in a style and language difficult to understand; and
- (b) the original author is not available for discussion to solve any legal or linguistic difficulties that may arise.

134. Law translation, as all kinds of translation, involves two basic steps, namely –

- (a) comprehension of the source text; and
- (b) conveyance of the message in the source text into the target language accurately and intelligibly.

The mastery of these basic steps is especially essential to law translation. To acquire comprehension of legislation a translator must not only know the exact meaning of the legal terms and phrases in the source text, but also the context in which they are set; this requires knowledge of the particular legal topic on which he is translating and an

understanding of the general structure and the function of each part of a statute. To convey intelligibly the meaning of legislation, he must have a good command of the Chinese language and be able to apply it in clear and precise terms in the law translation. Unlike the translation of literary and other works, a law translator has limited freedom in the choice of words and phrases: he must neither overstate nor understate in his translation the meaning appearing in the original text. The terms he uses must be exact, no more and no less, to the meaning of that in the original text. This is "precision", an element which together with "conciseness" and "clarity" can never be over-emphasized in translation. He must also be aware of some areas of pitfalls peculiar to the translation of existing laws. These pitfalls are described below.

(a) Words and phrases the meaning of which have been judicially expounded

135. The enactment of statutes is a matter for the legislature but the interpretation of statutes is in the province of the courts. Judges from time to time pronounce upon the meaning of a word or phrase in a statute in an application to a particular case before them. Throughout the years, words and phrases in legislation on which judicial exposition has been given are in abundance. Stroud's judicial dictionary contains plenty of them. The word "aggrieved" is simple enough. "Where a person is aggrieved by a decision of the Authority, that person may request the Board to review under this section that decision"¹³⁸ may easily be translated by the unwary into (任何人不满当局决定,可根据本条要求委员会复检该项决定) which in English means "Any person who is dissatisfied with a decision of the

¹³⁸ See Section 22(1) of the Film Censorship Ordinance 1987

Authority may request the Board to review it under this section." It is good Chinese but the meaning is wrong. For a person to have a right to request for a review he must have locus standi as a person "aggrieved" by that decision. It is not that any person who is dissatisfied (不 滿) or disagrees (不 服) with the decision can ask for a review.

136. A local planning authority was not a "person aggrieved" who can appeal under section 23(5) of the Town and Country Planning Act 1947 against a decision of a court of summary jurisdiction quashing an enforcement notice.¹³⁹ A "person aggrieved" in section 113(1) of the Magistrates Ordinance (Cap. 227) does not include an unsuccessful private prosecutor.¹⁴⁰ A Full Court in Hong Kong, expounding on the meaning of the terms "party aggrieved" in section 39 of the District Court (Civil Jurisdiction and Procedure) Ordinance (Cap. 336), held that a tenant whose landlord obtains an order for the issue of a warrant of distress is not a "party aggrieved" by a determination or direction of a judge in point of law or any question of fact.¹⁴¹ The Chinese equivalent for the word "aggrieved" in the context would better be (受 屈) meaning in English "suffered grievance" and the whole sentence in Chinese has to be re-structured.

¹³⁹ *Ealing Corporation v Jones* (1959) 1 Q.B.384

¹⁴⁰ *Ng Chun-Lai v Dopehie* (1961) H.K.L.R.727

¹⁴¹ *Lee Chan Land Investment Co. Ltd. v Hui Tsun-yue* (1966) H.K.L.R.197

137. The word "occasion"¹⁴² is another simple word. Translations for expressions like "on one occasion", "on any occasion" and "a number of occasions" will have to be determined in the context of the provisions and in the light of decided cases. The formula "on any occasion" in the opening words of section 139 of the Crimes Ordinance (Cap. 200) in respect of the offence of keeping a vice establishment is used to obviate the necessity of proving habitual use by the individual of premises for the proscribed purpose.¹⁴³ With the evidence of a continuous activity of keeping a vice establishment, any moment of which could be charged as a separate instance of keeping should not be permitted to inhibit the bringing home of guilt to someone whose conduct has fulfilled the description of keeping a vice establishment. "On any occasion" in the context of section 139 of the Crimes Ordinance (Cap. 200) may be translated as (在 任 何 时 间). The exposition by the court on the words and phrases in legislation must be borne in mind when doing translation.

(b) Judicial gloss on statutory expressions

138. A draftsman sometimes deliberately uses a word or phrase which covers a general and wide meaning and leaves it to the court to decide as to what situations fall within it. The meaning of a word and phrase is clearer when it has received a judicial gloss. An example is the phrase "by way of trade or business" in section 3(2) of the Gambling Ordinance (Cap. 148). This subsection states:

¹⁴² See e.g. section 39(1) and section 70 of Interpretation and General Clauses Ordinance, (Cap. 1).

¹⁴³ R v Wong Chi-hung (1982) H.K.L.R.362

"Gaming is lawful if the game is played on a social occasion in private premises and is not promoted or conducted by way of trade or business or for the private gain of any person otherwise than to the extent of a person's winnings as a player of or at the game".

Does an employee who receives a bet or bets on behalf of his employer who runs a bookmaking business receive it or them in the way of trade or business? In *Lam Shek-yin v R*¹⁴⁴, Macdougall J. answered in the affirmative. The phrase relates to the purpose for which the bet or bets are received, and this is so irrespective of whose trade are received.

139. The meaning of "by way of trade or business" in section 3(2) of the Gambling Ordinance has also been explained in two other cases.¹⁴⁵ Decided cases provide a useful guide to a law translator in the comprehension of a particular word or phrase. It is important that the law translator grasps the meaning of the term as interpreted by the court. Unless he understands its meaning fully and exactly, he can hardly select an appropriate equivalent term in Chinese.

140. Another example of statutory expression is "in the course of [the victim's] employment". In *Lo Kwai-chun v H.K. Oxygen & Acetylene Co. Ltd.*¹⁴⁶, the deceased

¹⁴⁴ Criminal Appeal 496/82, Hong Kong.

¹⁴⁵ *Leung Shui v R* (1977) H.K.L.R.544 and *Wong Kar-kui v R* (1982) H.K.L.R.488

¹⁴⁶ (1980) H.K.L.R.420 (C.A.)

was a passenger in a coach provided by his employer for the transportation of its workers to and from its factory free of charge when the coach crashed on a public road and he was killed. The question was whether his death arose "in the course of employment". The same expression was also considered in *Lam Min & others v Yau On Construction Co.*¹⁴⁷ There have been many U.K. cases on this expression.¹⁴⁸

141. Statutes are cited and used in courts everyday. When a court exercises its functions to interpret a statutory expression, very often that expression is determined in a special sense. In order to grasp the proper meaning of the legal language in legislation, it is essential that the translator must not allow any relevant judicial exposition to go unobserved.

¹⁴⁷ [1981] H.K.L.R.646

¹⁴⁸ See A.I. Ogus and E. Barendt, "The Law of Social Security" (2nd ed.,1982) pp. 271-287.

(c) Words and expressions the natural meaning of which differ from the judicial interpretation

142. It is the judges' prerogative to resolve authoritatively disputes over the meaning of statutory provisions. Their decisions are binding on the parties and may constitute binding precedents in the future. In exercising the power to interpret the laws, it is not infrequent that a judge gives a meaning to a word or expression in a statute other than its natural and ordinary meaning.

143. The conjunction "and" and "or" are troublesome words. The conjunctive "and" in legislation is very often interpreted by the court as the disjunctive "or", and "or" interpreted as "and". Section 10(1)(b) of the Prevention of Bribery Ordinance (Cap. 201) makes it an offence, under certain circumstances, for a person to be in control of "pecuniary resources or property" disproportionate to his emoluments. The Privy Council in 1979 held¹⁴⁹ that the words "pecuniary resources" and "property", though separated by a disjunctive "or" are not mutually exclusive, and the offence created by the section could be committed in one or other or both of the two ways. This means that the word "or", which ordinarily is used in the exclusive sense (A or B, but not both), is extended to cover the inclusive sense (A or B, or both).

144. In the decision of the House of Lords in *Federal Steam Navigation Co. Ltd. v Department of Trade and Industry*¹⁵⁰ the statute there considered provided that

¹⁴⁹ R v Cheung Chi-kwong (1979), 1W.L.R. i 455

¹⁵⁰ [1974] 1 W.L.R. 505

"If any oilis discharged.....into a part of the sea which is a prohibited sea area.....the owner or master of the ship shall.....be guilty of an offence....."

The question there was whether either only owner or master, or both owner and master, should be liable. The majority held that the word "or " should be construed conjunctively, and should be replaced by "and".

145. Similarly, the word "void" in a statute may be interpreted by the court to mean "voidable", and the permissive "may" to mean the mandatory "shall". Must the translator or the bilingual draftsman, in producing a Chinese text of a statutory provision, give effect to the judicial interpretation. If he truthfully translates the text, the translated version may be taken to upset the court's decision when it is published as law. It is recommended that in such a case the draftsman should propose changes to the English text by legislation to accord with the judicial decision before producing the Chinese counterpart.

146. However, not every word whose ordinary and natural meaning has changed because of the judicial interpretation has to be amended. A word which itself is vague in meaning is better preserved in that meaning despite a judicial decision on its interpretation. The word "satisfied" appears frequently in legislation. By section 26 of the Immigration Ordinance (Cap. 115), an immigration officer may detain a person if he is satisfied that enquiry for the purpose of the Ordinance is necessary and that the

person to be detained may abscond if not detained. In *Yoo Soon-nam v A.G.*¹⁵¹ the court held that in exercising the power, the officer must have grounds for being so satisfied. The term "is satisfied" may be translated as (相信) meaning "believes" or (认为) meaning "think".

147. The same word "satisfied" in section 45(1)(a)(iii) of the Mental Health Ordinance (Cap. 136) was held to mean "satisfied beyond reasonable doubt."¹⁵² It could be translated into (确信) meaning "firmly believes" in the context. For a vague word like "satisfied" it is appropriate to give an equivalent vague term in Chinese (相信) meaning "believes" or (认为) meaning "thinks" and to leave it to the court to decide whether it is "satisfied" beyond reasonable doubt or on balance of probability or without any qualification. This indicates that a translator or a draftsman must be fully aware, by extensive research into case law, of the proper meanings of words and expressions found in existing legislation.

151 [1976] H.K.L.R.702

152 *Tam Kit-nin v R* (Crim. App. 1123/81)

(d) Words and expressions that have been rendered ineffective by judicial interpretation and yet remain on statute book

148. The expression "professes or claims" in section 20(2) of the Societies Ordinance (Cap. 151) has caused a lot of trouble to the court: the issue is whether "claiming" would be apt to cover such matters as the use of the triad allegation as a threat to procure advantage while "professing", i.e. claiming in the weaker sense, would be apt to cover mere matters of confession in response to questioning. The court has often been presented with the difficult task of ascertaining the difference between a charge of "claiming" to be a member of a triad society and a charge of "professing" to be a member of triad society.¹⁵³ Roberts, C.J., in a recent case¹⁵⁴ on a similar issue, followed the decision in *Cheng Chung-wai v R*¹⁵⁵ and said -

"that no sensible distinction can be drawn between "professing" and "claiming". Had it been necessary to find such a difference, we would have been inclined to interpret a "claim" of membership as arising when the claimant was asserting that he was; whereas "profess" could be reserved for those occasions on which a person asserts that he is a member when he is so in fact. However, we regard such a distinction as unrealistic and unnecessary. We think that the courts should regard the two words as being effectively synonymous."

¹⁵³ See, e.g. *A.G. v Ng Kwok-yum*, Crim. App 937/75; *Ngo Ngan Ting v R* (1976), H.K.L.R.143; *Leung Chi-ming v R* (1976) H.K.L.R. 247

¹⁵⁴ *Shing Hing v R* (1983) H.K.L.R.14(C.A.)

¹⁵⁵ (1980) H.K.L.R.593 (C.A.)

149. This raises the question whether the authentic Chinese text of Cap. 151 should reflect the decision of the Court of Appeal by removing one of the synonyms. If a court of the highest authority in Hong Kong takes the view that there is no difference between "claiming" and "professing", why should these two words, instead of one, remain on statute? It is better to delete one of the synonyms to facilitate the preparation of a proper Chinese text of the law. Whichever word is deleted, the remaining one will be reflected in the Chinese text.

150. There seems to be even more cogent reasons to recommend deletion of statutory expressions or clause which have been rendered null and ineffective by a judicial decision. One good example is section 53(3) of the Sale of Goods Ordinance (Cap. 26), which sub-section provides -

"(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or if no time was fixed for delivery, then at the time of the neglect or refusal to deliver."

This section is concerned with the assessment of damages where there is an anticipatory breach of a contract by one of the parties to it by reference to the data on which the other party accepts the breach and rescinds the contract. In *Tai Hing Mill v Kamsing Factory*¹⁵⁶, the Privy Council held that the wording of the second limb of section 53(3) was not sufficiently clear or specific to provide for departure from the general principle of the first limb, and that the section had no application in cases of anticipatory breach.

¹⁵⁶ [1979] A.C.91

151. Judgment was given on common law principles. With respect to the second limb of section 53(3), Lord Keith of Kinkel had the following to say¹⁵⁷ -

"It may well be, however, that the enactment was introduced into the subsection without consideration in depth of the juristic position, and that on analysis it proves, exceptionally, to have no content whatever. It would be surprising if the first limb of one and the same subsection were intended to be a specific subsection, and the second limb to be a radical departure from it. If Parliament had intended to introduce a new rule of the nature contended for, their Lordships would have expected this to be done by clearer and more specific language than appears in the second limb of subsection (3)."

152. The second limb of section 53(3) thus becomes a legal nullity by the Privy Council decision and should not be included in the Chinese version to be prepared. Fresh legislation is necessary to cure the defect in the subsection. It is important that a bilingual draftsman or law translator, in "translating" the existing legislation, must not be mistaken about the law that is being altered or the factual situation with which he is dealing.

(e) Incorporation by Reference

153. It is not unusual to make reference in legislation to a document or some foreign laws. The document or foreign law referred to in an Ordinance, depending on how it is incorporated, may be regarded as part of the Ordinance. Section 39 of the Societies Ordinance (Cap. 151) reads -

¹⁵⁷ At p.104 C-E

"39. In any prosecution under this Ordinance the Court or magistrate may refer, for the purpose of evidence, to "The Triad Society or Heaven and Earth Association" by William Stanton and to any other published book or articles on the subject of unlawful societies in general or of particular unlawful societies which the Court or magistrate may consider to be of authority on the subject to which they relate."

154. In these circumstances the referred work is not incorporated but used for evidentiary purposes only. There is no requirement to translate the referred work when the Ordinance is being translated.

155. However, the Merchant Shipping legislation of Hong Kong incorporates large slices of U.K. subsidiary legislation. The Merchant Shipping Ordinance (Cap. 369) incorporates in its Schedule some 34 sets of U.K. regulations. The Schedule may be amended by the Governor in Council by order. In these circumstances, the U.K. regulations become part of the Hong Kong legislation. When the Merchant Shipping Ordinance (Cap. 369) is translated into Chinese, should the U.K. regulations as referred to in the Schedule be also translated? If it is decided in the affirmative, then foreign law, work standards and international conventions referred to in the Hong Kong laws should also be translated. If translated, the translated text will enjoy equal authenticity by virtue of section 10B (3) of the Interpretation and General Clauses Ordinance(Cap.1).¹⁵⁸ Will the translated text be interpreted differently from the original authentic text? This kind of problem is best illustrated by the preparation of the Recognition of Trusts Bill 1989.

¹⁵⁸ Supra, note 57.

156. The object of the Bill is to enable The Hague Convention on the Law applicable to Trusts and on their Recognition to apply to Hong Kong.¹⁵⁹ Annexed to the Bill in the form of a Schedule is the text of the Convention. The original convention is in English and French, both texts being equally authentic. In accordance with the usual U.K. practice, only the English text is annexed to the U.K. Act. Clearly there is no problem in Hong Kong in this respect, but if a Chinese translation of the convention in the Chinese text is enacted, it may be argued that what is enacted is a document which strictly speaking is not the convention, but merely a translation of it. In interpreting the convention the Hong Kong courts in these circumstances will have to look not only at an authentic text, but also a text which has no claim to authenticity and this may lead to the construction of the text in a way that does not fully accord with the convention.

157. The possible options appear to be -

- (a) to annex the English text of the convention to the Chinese text of the Bill on the basis that this is the only authentic text;
- (b) to annex a Chinese text of the convention to the Chinese text of the Bill - the problem here is that, section 10B of the Interpretation and General Clauses Ordinance (Cap.1)¹⁶⁰ applies and, the Chinese text may be invoked to construe the English one. This may result in the convention being given an interpretation in Hong Kong differing

¹⁵⁹ The U.K. has enacted the Recognition of Trusts Act 1987 to give effect of the Hague Convention on the Law of Trusts. The declaration of the U.K.'s ratification of the Convention did not initially extend to Hong Kong. However, it was subsequently decided that the declaration would be modified to include Hong Kong.

¹⁶⁰ Supra, note 57.

from that it bears elsewhere - and, indeed, a provision in the law of Hong Kong having the effect of treating the Chinese text as authentic may be construed as departing from the provisions of the Convention as to what is the authentic text;

- (c) to annex the Chinese text in the manner indicated in (b) but also to say that, in the event of a conflict between the texts, either the English text is to prevail or, possibly, to say that in the event of a conflict the interpretation which best gives effect to the Convention as it has effect in public international law shall be adopted;
- (d) to adopt an entirely different approach from that adopted in the United Kingdom and to convert the Articles of the Convention into substantive enactments¹⁶¹ - although the risk here of creating law in Hong Kong which departs from the terms of the Convention is obviously greater if this option is adopted than if any of the previous options are, as certain of the provisions of the Convention would have to be worded rather differently.

158. It seems options (b) and (d) are unsatisfactory whereas the adoption of either option (a) or option (c) would enable Hong Kong to comply with her international obligations. In fact, there is a useful precedent in section 1 of the Carriage by Air Act 1961¹⁶² which gives the force of law to the provisions of the amended Warsaw

¹⁶¹ This is the Quebec practice in some instances and is considered not a good one. See, for example, An Act respecting the Civil Aspects of International and Interprovincial Child Abduction, R.S.Q. c.A-23.01 and amendments to the Code of Civil Procedure, Book VII on Arbitration, R.S.Q. 1977 c.C-25.

¹⁶² This is a U.K. Act, section 1 of which provides :

"1 (1) Subject to this section, the provisions of the Convention known as "the Warsaw Convention as amended at The Hague, 1955" as set out in the First Schedule to this Act shall, so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective to the nationality of the aircraft performing that carriage; and the Carriage by Air Act, 1932 which gives effect to the Warsaw Convention in its original form, shall cease to have effect.

(2) If there is any inconsistency between the text in English in Part I of the First Schedule to this Act and the text in French in Part II of that Schedule, the text in French shall prevail.

Convention, as set out in the Schedule in English and French, and provides that in the case of inconsistency the French text should prevail. In that case, the only authentic text of the Convention is in French and the English version is a translation.

159. It is not surprising therefore that the English text of the Convention was annexed to the Recognition of Trusts Bill 1989 with a Chinese translation of it, with an indication that in case of inconsistency the English text was to prevail.¹⁶³

160. To conclude this part about "Incorporation by Reference", it must be remembered that the referential legislation itself is voluminous. With the limited resources and the urgent task to produce authentic Chinese version of the current and existing legislation, it is perhaps advisable to put aside for the time being the translation of the referential legislation.

(3) This section shall come into force on such day as Her Majesty may by Order in Council certify to be the day on which the Convention comes into force as regards the United Kingdom.

(4) This section shall not apply so as to affect rights or liabilities arising out of an occurrence before the coming into force of this section."

¹⁶³ The bill was enacted in November 1989 and becomes The Recognition of Trusts Ordinance 1989, section 2(2) of which says "If there is any inconsistency between the text of the Convention in English as so set out and the text in Chinese, the text in English shall prevail."

CONCLUSION

161. The bilingual legislation project has a two-fold overarching purpose : to meet a social language need and to preserve common law for at least 50 years after 1997. Whether the project can operate effectively depends on the extent that this purpose is achieved.

(1) The Social Language Need

162. The legal language situation in Hong Kong was given a fresh impetus for change by the Joint Declaration of the UK Government and the PRC Government on the Future of Hong Kong 1985.¹⁶⁴ Under the Joint Declaration, the sovereignty of Hong Kong will revert to China on 1 July,1997. It is natural that both nationalism and social practical need demand that Chinese language be restored to its proper place. If the political change simply required that the existing legal system be replaced by a new one, things would be easier. The fact is that the present legal system based on English common law is to be retained after 1997¹⁶⁵ and both English and Chinese

¹⁶⁴ Section 1 of Annex 1 to the Joint Declaration provides: "In addition to Chinese, English may also be used in organs of Government and in the Courts of the Hong Kong Special Administrative Region."

¹⁶⁵ Clause 3(3) of the Joint Declaration provides: "The Hong Kong special Administrative Region will be vested with executive, legislative and independent judicial power, including that of final adjudication. The laws currently in force in Hong Kong will remain basically unchanged."

languages will continue in use.¹⁶⁶ There is a need not only to express the statute law in the Chinese language, but also to develop legal bilingualism.

163. Now the bilingual legislation has got off the ground. The embarkation by Government on the project has sparked the interest of lawyers, judges, legislators, educators and scholars in a number of issues. The Hong Kong Linguistic Society in December 1986 sponsored a conference on Language Policy and Language Planning in Hong Kong. A working party was set up in 1987 under the chairmanship of the Chief Justice of the Judiciary to examine the feasibility of extending the use of Chinese in courts and court proceedings; its report is being presently studied by the government. The Law Faculty of the University of Hong Kong introduced a new course on "The Use of Chinese in Law" in its LL.B. curriculum in 1987, in contemplation of the needs of a bilingual legal system. The City Polytechnic of Hong Kong in the end of 1988 proposed to compile "A Chinese Digest of the Common Law". The Bilingual Laws Advisory Committee¹⁶⁷ began its work in 1989 on the scrutiny of the Chinese texts of existing legislation. The Law Society of Hong Kong formed a "Committee on Bilingualism in Law" in 1990 with a view to providing a focal point for suggestions and queries relating to the issue of bilingualism in the law, for the general public, the media and members of the Law Society. An International Conference on Language and Law was held in 1990 to discuss the future language problems of Hong Kong. All these

¹⁶⁶ *Supra*, note 164.

¹⁶⁷ A statutory body established under new Section 4C of the Official Languages (Amendment) Ordinance 1987.

fascinating activities are but the natural consequences of the introduction of bilingual legislation.

164. The interest in legal language tends to show that Hong Kong is beginning to evolve from a monolingual legal system to a bilingual one. This will be the inevitable trend. Bilingual legislation, though it has paved the way for the development of a bilingual legal system, by itself is incapable of leading to such a system. It requires a concerted effort of all concerned including the Judiciary, the Legal Department, the Education Department, the tertiary educational institutions, the Bar Association and the Law Society of Hong Kong to bring about an operative bilingual legal system. A well-planned movement towards legal bilingualism will in turn reinforce the position of bilingual legislation.

165. Indeed, the success of bilingual legislation can only be measured by the extent that it is used : "law in the books" is of no effect unless it is expanded into "law in action".¹⁶⁸ If the Chinese text of legislation is not examined and interpreted by the courts, its legal effect is not clear. If it is not used through legal arguments of lawyers in court, it is deprived of the chance of receiving judicial interpretation. If there is an insufficient number of bilingual judges and lawyers to use the Chinese text in the performance of their professional duties, the Chinese text will lie on the shelves as dead letters. If legal skill is not developed in the Chinese language, there can never be an adequate number of bilingual lawyers and judges.

¹⁶⁸ see generally Roger Cotterrell's "The Sociology of Laws : An introduction" by Butterworth, London 1984

166. While bilingual legislation helps to open up the way to legal bilingualism, the latter in its proper development will in turn facilitate the implementation of the former. It is essential that Government should make and declare as its official policy the development of a bilingual legal system and should assist by way of financing and providing expertise in the promotion of legal bilingualism in its various fields. To ensure that the importance of legal bilingualism is recognized by all concerned and that it receives the direction that its importance merits, a single body¹⁶⁹ needs to be set up to oversee the entire field of legal bilingualism.

¹⁶⁹ This body may be empowered with functions similar to that of the Commissioner of Official Languages of Canada to promote and oversee the development of full bilingualism.

(2) Retention of Common Law

167. The statute law of Hong Kong does not stand by itself as a legal code. It is written against the background of the English common law legal system. The common law as received into Hong Kong and modified and developed by it since 1840s is one of the most valued elements of Hong Kong's way of life. Through its fundamental legal principles such as rule of law, natural justice and judicial independence, common law has provided means of redress in respect of administrative action and control over inferior tribunals. The transplantation of common law in Hong Kong over the past 150 years has helped facilitating commerce and economic development, controlling the abuse of governmental powers and protecting civil liberties. This way of life brought about by the common law is to be preserved after 1997 in Hong Kong for at least 50 years by the terms of the Joint Declaration.¹⁷⁰

¹⁷⁰ Clause 3(5) of the Joint Declaration provides:

"The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law."

Clause 3(12) of the Joint Declaration provides:

"The above stated basic policies of the People's Republic of China regarding Hong Kong and the elaboration of them in Annex 1 to this Joint Declaration will be stipulated, in a Basic Law of Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years."

168. The retention of common law is further retrenched in the Basic Law of the Hong Kong Special Administrative Region.¹⁷¹ Article 8 of the Basic Law stipulates -

"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 any that contravene this law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

Article 5 of the Basic Law stipulates -

"The socialist system and policies shall not be practised in Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

The maintenance of common law is thus declared a mandatory constitutional obligation for Hong Kong by both the Joint Declaration and the Basic Law. These two documents¹⁷² also reflect the changing social and political realities which indicate that, Chinese will gradually become the principal language of law and the government in Hong Kong after 1997. This prospect threatens the feasibility of maintaining common law in Hong Kong after 1997 to the extent that the present legal system exhibits a disproportionate reliance on the English language. To avoid such an imbalance, there is an urgent need to express the laws presently in force into the Chinese language.

¹⁷¹ This is the constitution of the future Hong Kong Special Administrative Region promulgated by Mr. YANG Shangkun, the President of the Peoples' Republic of China on 4 April 1990 and shall be put into effect as of 1 July 1997.

¹⁷² The Joint Declaration, in Section 1 of Annex 1, provides "In addition to Chinese, English may also be used in organs of government and in the courts of the Hong Kong Special Administrative Region". This statement is echoed by article 9 of the Basic Law saying "In addition to the Chinese language, the English language may also be used by the executive authorities, legislative and judicial organs of the Hong Kong Special Administrative Region."

169. The production of Chinese text in legislation is a timely project to enhance the maintenance of common law in Hong Kong. But the Chinese text produced must be capable of conveying accurately the common law concepts. Although the legal question of ensuring a Chinese expression to have the same meaning as the common law expression is dealt with by section 10C (1) of the Interpretation and General Clauses (Amendment) Ordinance 1987¹⁷³, the practical question of finding a Chinese equivalent for the common law expression remains. The Chinese legal background outside Hong Kong is continental rather than English in origin. To ensure that the language of the Chinese text relates to the common law background in the same way as the English text standing on its own does is a difficult task. The problems identified in paragraphs 125-127 are very real and admit of no easy solution. The creation of Chinese terminology is perhaps the key to the exercise. It is essential to develop within the adaptability of the Chinese language vocabulary and concepts necessary for the Hong Kong common law legal system to function in spoken and written Chinese. A body consisting of lawyers, draftsmen and linguists, with representatives from the two universities¹⁷⁴, the City Polytechnic of Hong Kong and the Legal Department, should be formed and entrusted with the work of developing and producing a legal glossary.

¹⁷³ *Supra*, note 51.

¹⁷⁴ The Hong Kong University and the Chinese University.

(3) Meeting the Challenges

170. The preparation of a Chinese text of law with equal authenticity with the English text is a science and an art. It is a science because law is written in a disciplined style and characterized by precision. The Chinese text is expected to convey exactly the legal message to the same extent, no more and no less, as in the English text. It is an art because it is expected to transmit the message into Chinese with clarity and brevity and preserving at the same time the cultural and linguistic characteristics of the Chinese language. The intent is that each language text will say the same thing in law as the other text. Neither text is a word-for-word following of the other text. And in no way is either text regarded as a "translation" of the other despite the presence of its element.

171. The difficulties inherent in the work are tremendous, for each language possesses its own genius which influences the choice of words and the arrangement of the sentence. The legal draftsman or translator who wishes to convey the meaning of an English legal concept in Chinese is limited by the means available in Chinese, by expressions in his own tongue which defy translation, by peculiar nuances of meaning and by a terminology which varies between the different legal systems.

172. All these difficulties in effect offer attractions and challenges, and provide incentives to participate in the work. An authentic text in Chinese of the Laws of Hong Kong can be very inspiring. It not only leads onto the path of legal bilingualism and helps to retain the common law legal system, but also provides the Chinese community with comprehensive information about the English legal system upon

which the laws of Hong Kong are founded. It is valuable to comparative law studies. It is useful in the preparation of other legal translations. And it aids Chinese perception of the value and spirit of the common law legal system in addition to the civil law system. Never before has common law been written in the Chinese language. The production of Chinese text in law based on the common law legal system marks a significant beginning with profound consequences for both the future of common law and the fuller development of the rule of law in China. It is noted that the recent economic and trade laws promulgated by the Shenzhen Special Economic Zone are patterned after Hong Kong legislation.