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Hong Kong: The Journey to a Bilingual Legal System

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I. INTRODUCTION

On July 1, 1997, Hong Kong will become a Special Administrative Region of the People's Republic of China (Hong Kong SAR) and no longer be a British colony. The shift in power will result in many changes, including changes within Hong Kong's legal system. Because language facilitates the communication of law, the language of the law is destined to undergo transformation.

This Article reviews the development of Hong Kong's language of the law and analyzes the possibility of establishing a sound bilingual legal system after 1997. Part II reviews the historical development of the language of the law in Hong Kong from 1842, when Hong Kong became a British colony, until the signing of the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration)¹ in 1984. Part III explains the necessity of establishing a bilingual legal system in Hong Kong, particularly in light of problems with the monolingual English legal system. Part III also discusses the elevation and stabilization of the status of the Chinese language under the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic

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1. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, U.K.-P.R.C., 23 I.L.M. 1371 [hereinafter Joint Declaration].

Law)² and stresses the importance of the English language in ensuring the continuity of law after 1997. Furthermore, Part III discusses the essential role of the English language in making the Hong Kong legal system open and accessible to the outside world. Such access is crucial for Hong Kong as an international center of trade, finance, and commerce. Part IV analyzes the efforts of the Hong Kong Legal and Judiciary Departments, as well as academics, to make the law available in Chinese in preparation for the establishment of a bilingual legal system. Part V discusses the difficulties with the transition from a monolingual English legal system to a bilingual legal system. Finally, Part VI concludes that the future of the Hong Kong SAR requires a sound bilingual legal system, but that such a system will become a reality only with the commitment and vision of future generations.

II. HISTORICAL DEVELOPMENT OF THE LANGUAGE OF THE LAW IN HONG KONG

A. English as the Sole Official Language

Pursuant to the unratified Convention of Chuenpi, the British began to formally occupy the island of Hong Kong on January 26, 1841.³ Hong Kong formally ceded from China through the Treaty of Nanking, which was signed on August 29, 1842 and ratified by the United Kingdom on June 26, 1843.⁴ A foremost British concern was the establishment of a familiar legal system that it could use to effectively control the indigenous population. This concern led to the Charter of April 5, 1843, which formed Hong Kong's first law-making body: the Governor, who was to act with the advice of the Legislative Council.⁵

2. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (1990), reprinted in 29 I.L.M. 1519 (1990) [hereinafter Basic Law]. The Third Session of the Seventh National People's Congress passed the Basic Law on April 4, 1990.

3. See Bryan A. Gregory, *Envisioning Futures: The Battle over Democracy in Hong Kong*, 19 N.C. J. INT'L L. & COM. REG. 175, 179 (1993).

4. Treaty Between China and Great Britain, Aug. 29, 1842, P.R.C.-U.K., 93 Consol. T.S. 465.

5. See JAMES WILLIAM NORTON-KYSHE, 1 THE HISTORY OF THE LAWS AND COURTS OF HONG KONG 23-24 (1971).

Since that time, the British started to impose English statutory and common law on Hong Kong. These bodies of law were developed in response to the values, needs, and traditions of the British people who were thousands of miles away from Hong Kong. As for the language of the law, distinguished linguist Sir Randolph Quirk once said, "The English language came to Hong Kong as an imperial instrument: a remote control device operated from ten thousand miles away in London."⁶

The colonial government thus transplanted to this small and faraway island a common law legal system and imposed on the Chinese people English as the official language used in government administration, including the judiciary. Consequently, the use of the Chinese language became virtually non-existent at the government level.

B. 1974 Official Languages Ordinance

Putting aside the considerations of fairness and justice, the English language—an "imperial instrument"—functioned in Hong Kong without serious problems for over one hundred years.⁷ Serious disturbances and riots, however, occurred in 1966 and 1967,⁸ partly as a result of the "language gap" between the government and the people.⁹ Following this civil unrest, college students campaigned in 1969 and 1970 to promote Chinese as Hong Kong's official language.¹⁰ The campaign gained widespread support from various segments of the community.¹¹ In response to pressure from the local population, the government passed the Official Languages Ordinance¹² in 1974.¹³ As a result, the Chinese language

6. Sir Randolph Quirk, *Speculations on the Future Role of English in Hong Kong and the Implications for Educational Policy*, Address at the International Seminar on Language Teacher Education: Future Directions (Dec. 16-18, 1985).

7. See Liu Ching-chih, *Language Needs in Hong Kong: Bilingualism to Trilingualism*, LINGUIST, Winter 1987, at 39, 39.

8. See *id.*

9. Tomasz Ujejski, *The Future of the English Language in Hong Kong Law*, in THE FUTURE OF THE LAW IN HONG KONG 164, 173-74 (Raymond Wacks ed., 1989); see also KOWLOON DISTURBANCES 1966—REPORT OF THE COMMISSION OF INQUIRY (1969).

10. See Liu, *supra* note 7, at 39.

11. See Albert H.Y. Chen, 1997: *The Language of the Law in Hong Kong*, 15 H.K. L.J. 19, 21 (1985).

12. Official Languages Ordinance, LAWS OF HONG KONG ch. 5 (1974).

gained official status for the first time in more than one hundred years of colonial governance.

The Official Languages Ordinance declared both English and Chinese to be Hong Kong's official languages for communication between the government or any public officer and members of the public.¹⁴ The Ordinance gave the languages equal status by providing for "equality of use."¹⁵ As a result, use of the Chinese language in public administration in Hong Kong has steadily increased. Important governmental announcements, reports, speeches, and papers became available in both English and Chinese.¹⁶ In addition, the government introduced simultaneous interpretation for both Legislative Council and District Board meetings.¹⁷ Whenever inconsistencies or disputes arose, however, English versions were regarded as the authority.¹⁸ Ironically, the legislative guarantee of equal status did not prevent the Chinese language's subordination to the English language.

Despite its great contributions to elevating the status of the Chinese language, the Official Languages Ordinance evidenced an extremely conservative attitude toward the language of the law. As for the language of legislation, the Ordinance provided that "every Ordinance shall be enacted and published in the English Language."¹⁹ Thus, the Chinese language plays no role in actual legislation or the legislative process.

As for the language of the judiciary, the Official Languages Ordinance provided that proceedings in the Court of Appeal, the High Court, the District Court, and any other court not specified in the Schedule to the Ordinance must be conducted in the English language.²⁰ The courts specified in the Schedule to the Ordinance have the discretion to conduct proceedings in either English or Chinese.²¹ Although, on its face, the Ordinance appears to take a

13. *See id.*; *see also* Liu, *supra* note 7, at 43 n.4; Ujejski, *supra* note 9, at 173.

14. *See* Official Languages Ordinance, LAWS OF HONG KONG ch. 5, § 3(1).

15. *Id.* § 3(2).

16. *See* Liu, *supra* note 7, at 39.

17. *See id.*

18. *See id.*

19. Official Languages Ordinance, LAWS OF HONG KONG ch. 5, § 4(1).

20. *See id.* § 5(2).

21. *See id.* § 5(1) (emphasis added). These inferior courts include, among others, Magistrates' Courts, the Labour Tribunal, the Small Claims Tribunal, and the Immigra-

big step in promoting greater use of the Chinese language in courts, judges still decide which language to use in each case.²²

Given the fact that less than half of the magistrates are Chinese-speaking, it has been impracticable to conduct trials in the Chinese language in most cases.²³ Until 1995, the law mandated English as the sole language for use in the higher courts, including the Court of Appeal, High Court, and District Court.

Out of necessity, the Ordinance conceded that "any party to or witness in proceedings in any court may use either the English language or the Chinese language, or such other language as the court may permit."²⁴ Without this provision, parties or witnesses speaking solely Chinese could not communicate with the court. Where a party or a witness presents evidence in Chinese, a court interpreter translates lawyers' and judges' questions from English to Chinese and parties' answers from Chinese to English. The interpretation service is provided only for parties and witnesses who require it, not for courtroom observers.²⁵ Generally, the court does not interpret counsel's submissions or court judgments either orally or in writing.²⁶

Although the 1974 Official Languages Ordinance gave the Chinese language a presence in public administration and the judiciary, the use of it did not progress satisfactorily. The government's lack of commitment and sincerity in promoting greater use of Chinese in every arena of public life meant that the Chinese language gained an equal status with English only on paper. In practice, it has an extremely limited use in the legal sphere.

tion Tribunal. *See id.* schedule.

22. Section 5(1) of the 1974 Official Languages Ordinance provides that "proceedings in any court specified in the Schedule may be conducted in either of the official languages as the court thinks fit." *Id.* § 5(1) (emphasis added).

23. Out of a total of 49 magistrates, only 12 were Chinese-speaking. *See* Michael Thomas, *The Development of a Bilingual Legal System in Hong Kong*, 18 H.K. L.J. 15, 20 (1988).

24. Official Languages Ordinance, LAWS OF HONG KONG ch. 5, § 5(3).

25. *See* Chen, *supra* note 11, at 25.

26. *See id.*

III. BILINGUAL LEGAL SYSTEM: A SENSIBLE CHOICE FOR HONG KONG

A. Problems with the Monolingual English Legal System

English has been the predominant language of Hong Kong's legal system. The law remains incomprehensible and largely inaccessible to the vast majority of Hong Kong's residents, who, despite being under colonial rule for approximately 150 years, primarily speak Chinese.²⁷ The monolingual English legal system established among the Hong Kong people, whose mother tongue is Chinese, has problems that are readily visible.

1. Language Rights as Human Rights

Language rights have been accepted as one aspect of human rights in many countries. Language is an integral part of the rights of freedom of expression and freedom of speech, both of which are universally recognized as fundamental human rights.²⁸ For example, Switzerland considers language to be necessary for the exercise of all the fundamental rights connected with the freedom of expression in written or verbal form.²⁹ Similarly, the Supreme Court of Canada commented on the relationship between language and freedom of expression:

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.³⁰

The Canadian Supreme Court recently reiterated its position and added that language choice is not only a utilitarian decision, but also an expression of one's culture, sense of dignity, and self-

27. See Teresa Scassa, *The English Language and the Common Law: China and Hong Kong After 1997*, in *ESSAYS IN HONOUR OF WANG TIEYA* 655, 664 (R. St. J. MacDonald ed., 1993) (stating that there is a barrier between the Hong Kong judiciary, which is primarily English speaking, and the general population).

28. See Fernand de Varennes, *Language and Freedom of Expression in International Law*, 16 *HUM. RTS. Q.* 163, 165 (1993).

29. See *id.* at 167.

30. *Ford v. Quebec*, 54 D.L.R. 4th 577, 604 (1988) (Can.).

worth.³¹

When Hong Kong finally enacted its own Bill of Rights in 1991,³² whether the right to language was included in the right to freedom of opinion and expression was unclear.³³ Nevertheless, articles 11 and 22 of Hong Kong's Bill of Rights clearly state the law. Article 11(2)(a) provides that everyone charged with a criminal offense is entitled "to be informed promptly and in detail in a *language which he understands* of the nature and cause of the charge against him."³⁴ Article 22 grants equal protection to all persons and prohibits discrimination on "any ground such as race, colour, sex, language, religion, . . . or other status."³⁵ Thus, charging accused persons in an alien language and depriving them of the right to use their native language in court clearly violate fundamental human rights guaranteed by law.

2. Moral Considerations

Because the primary concern of any legal system is to promote order, a principle of expediency dictates that ignorance of the law is not a defense. The consequence of punishing the morally guiltless, however, is worrisome.³⁶ Even if societal interests prevent such ignorance of the law from being an excuse, the government cannot escape the moral responsibility of dispelling that ignorance to the greatest extent possible.³⁷ By minimizing ignorance of the law, the government maximizes public support for the rule of law.³⁸ A law is safeguarded best when it is known, understood, and respected.³⁹ By making the law accessible to those whom it governs, the government avoids individual injustice and

31. See Reference Re §§ 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, 1181 (Can.).

32. Hong Kong Bill of Rights Ordinance, LAWS OF HONG KONG ch. 383 (1991).

33. See *id.* art. 16.

34. *Id.* art. 11(2)(a) (emphasis added).

35. *Id.* art. 22.

36. See Derek Roebuck, Language, Law and Truth, Inaugural Lecture at City University of Hong Kong 5 (Feb. 1990) (transcript on file with the *Loyola of Los Angeles International and Comparative Law Journal*).

37. See *id.* at 5-6.

38. See *id.* at 6.

39. See *id.*

enlists public respect and support for the law.⁴⁰

3. Trial by Jury

In common law jurisdictions, trial by a jury of one's peers ensures that justice prevails. The U.S. Supreme Court has pointed out that a trial by a jury of one's peers gives the accused an invaluable safeguard against abuse by either the prosecutor or the judge and allows the determination of one's guilt or innocence by community participation.⁴¹ Ideally, one's jurors should be picked from one's community.⁴² Any institutional or statutory exclusion of certain groups from a jury pool violates the cross-section principle of jury selection.⁴³

In Hong Kong, the accused may have a jury trial, but in most cases, the jury does not consist of the accused's peers. Jury qualification rules in Hong Kong require a person to have "a knowledge of the English language sufficient to enable him to understand the evidence of witnesses, the address of counsel and the Judge's summing up."⁴⁴ The English language proficiency standard inevitably results in a trial of an accused by his educational superiors who are not his peers in terms of social and economic status.⁴⁵ Such a jury selection mechanism that excludes the vast majority of the monolingual Chinese population can only result in a denial of justice.

4. Trial Through Interpreters

Normally, Hong Kong courts try solely Chinese-speaking defendants by using court interpreters, whose translation abilities affect the trial's outcome. Language interpretation is of variable, sometimes execrable, quality. A finding that court interpreters have jeopardized justice on many occasions urged the government

40. *See id.*

41. *See* *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

42. *See* James H. Druff, Comment, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555 (1985).

43. *See id.* at 1557.

44. Jury Ordinance, LAWS OF HONG KONG ch. 3, § 4 (1988).

45. For more discussion of Hong Kong juries, see Derry Wong, *Language Discrimination and the Hong Kong Jury*, 1 J. CHINESE & COMP. L. 153 (1995); Peter Duff et al., *The Hong Kong Jury: A Microcosm of Society?* 39 INT'L & COMP. L.Q. 881 (1990).

to require higher qualifications for applicants and to improve training for newly hired employees.⁴⁶

B. New Impetus to Elevate the Status of the Chinese Language

The goal of legal bilingualism became significant in 1984 when Great Britain agreed to return Hong Kong to the PRC on July 1, 1997.⁴⁷ The Joint Declaration provides that the laws currently in force in Hong Kong will remain essentially unchanged after 1997⁴⁸ and that both Chinese and English may be used in government administration and in Hong Kong SAR courts.⁴⁹ These provisions thus laid down the principle that both Chinese and English have a part in the language of the law.

Pursuant to the Joint Declaration, Chinese legislators passed a future constitution for the Hong Kong SAR, known as the Basic Law in 1990.⁵⁰ Article 8 of the Basic Law specifically provides for maintaining Hong Kong's common law system.⁵¹ Article 9 deals expressly with the question of language: "In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region."⁵² Although this provision allows English to continue as an official language of the Hong Kong SAR, the intent for Chinese predominance is clear.

As the Chinese language stands to become an official language after 1997, the colonial government can no longer ignore Chinese—and subordinate it to English—in the legal sphere. If Hong Kong law is not made available in Chinese, a danger exists that the current legal system will dismantle. Therefore, the government should play a more active role in promoting the greater

46. The incompetence of court interpreters raised serious questions about whether the courts could deliver justice. For further discussion, see Tom Iggulden, *Government Pushed on Row over Interpreters*, E. EXPRESS, Dec. 31, 1994-Jan. 1, 1995; Tom Iggulden, *Interpreters: Demands for Action*, E. EXPRESS, Dec. 30, 1994.

47. See Joint Declaration, *supra* note 1.

48. See *id.* para. 3(3), at 1371.

49. See *id.* annex I, sec. I, at 1373.

50. Basic Law, *supra* note 2, reprinted in 29 I.L.M. 1519 (1990).

51. See *id.* art. 8, reprinted in 29 I.L.M. 1519, 1521 (1990).

52. *Id.* art. 9, reprinted in 29 I.L.M. 1519, 1521 (1990).

use of Chinese for legal purposes.⁵³

C. The Choice of a Bilingual Legal System

To allow and to facilitate the use of Chinese as the language of the law goes far beyond mere compliance with the Basic Law. Apart from nationalistic and cultural concerns, the use of the vernacular in the legal sphere is a requirement for justice. Chinese not only has become Hong Kong's official language, but is also the requisite language of the law if justice is to be done in the eyes of the people.

Hong Kong, however, demonstrates a special situation. According to both the Joint Declaration and the Basic Law, Hong Kong's common law system will continue beyond 1997.⁵⁴ Using the English language as the medium of the common law may help provide a link with the outside world. According to some commentators, before Chinese fully develops into an autonomous language of the common law, the English version must be used to confer meaning on laws and to check the accuracy of the Chinese versions of the laws.⁵⁵ At the present time, the Chinese version of common law can only acquire its meaning through English.⁵⁶ It will take time for Chinese common law to develop from its early infancy and to assimilate into Chinese culture.⁵⁷

In addition, Hong Kong is an international trade center, whose continuous economic prosperity depends on international

53. Various branches of the government setup working parties to conduct investigations and to make recommendations on the greater use of Chinese as the language of the law. These working parties produced a series of reports, including: Attorney General's Chambers, Discussion Paper on the Laws in Chinese (1986); Report of the Chief Justice's Working Party into Greater Use of the Chinese Language in Courts and Court Procedure (1988); Report of the Working Party on the Use of the Chinese Language in the District Court (1993).

54. See Joint Declaration, *supra* note 1, para. 3(3), at 1371; Basic Law, *supra* note 2, art. 8, reprinted in 29 I.L.M. 1519, 1521 (1990) ("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.").

55. See Derek Roebuck & King-kui Sin, *The Ego and I and Ngo: Theoretical Problems in the Translation of the Common Law into Chinese*, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 185, 204 (Raymond Wacks ed., 1993).

56. See *id.*

57. See *id.*

commerce, finance, and investment. As the international language of trade, commerce, finance, shipping, and aviation, English plays an important and essential role in making Hong Kong's common law legal system open and readily accessible to foreign business partners. Such accessibility is crucial to assure Hong Kong's status as an international hub and to ensure its continued economic prosperity.

For these reasons, the Basic Law has made a sensible choice in opting for a bilingual legal system for Hong Kong. After 1997, English will not lose its official language status.⁵⁸ Use of the Chinese language, however, will enable Hong Kong residents to receive legal advice, obtain information about legislation, and attend court hearings in their own language.

In the long run, the administrative cost of establishing a bilingual legal system is not necessarily higher than the present system. In its well-developed form, a bilingual legal system will enable consumers of legal services to choose which language to use for legal documentation and litigation. It will not require every lawyer and judge to be competent in both languages. Rather, it will require that a sufficient number of personnel be capable of providing legal services in Chinese to Chinese-speaking people and in English to English-speaking people. Thus, where all parties in a case speak Chinese, they could choose Chinese as the language of the proceeding. Similarly, where all parties in a case speak English, they could choose English as the language of the proceeding. In either situation, court interpreters would be provided only if a party did not speak the same language of the proceedings.

In contrast, the existing system wastes resources on translation services in superior courts, including the Court of Appeal, High Court, and District Court, which use only English for court proceedings. Currently, even if the parties, lawyers, and judge are all native Chinese speakers, they cannot speak Chinese in court. They must speak English, and court personnel interpret the words to parties or witnesses who do not understand English. This rule also applies in most Magistracies, where the large majority of magistrates are non-Chinese-speaking foreigners. Therefore, a bilingual legal system offers the option to choose either language for

58. See Basic Law, *supra* note 2, art. 9, reprinted in 29 I.L.M. 1519, 1521 (1990).

a court proceeding, which is both just and efficient in the long run.

IV. EFFORTS TO ESTABLISH A BILINGUAL LEGAL SYSTEM

A. Efforts of the Hong Kong Legal Department

Hong Kong began to work toward a bilingual legal system in the late 1980s. In response to the Basic Law, the Official Languages Ordinance and the Interpretation and General Clauses Ordinance were substantially amended in 1987 to end the monopoly of English in legislation.⁵⁹ The two amendment ordinances, which came into force in April 1989, provide a statutory framework for bilingual legislation that paves the way for the development of Hong Kong's bilingual legal system. As a result, all new primary legislation will be enacted and published in both English and Chinese.⁶⁰ Both the English and Chinese texts are equally authentic and are presumed to have the same meaning.⁶¹

The Official Languages Ordinance requires that both new principal legislation and amendments to ordinances that are already in bilingual form be drafted in both languages.⁶² In practice, the Law Drafting Division of the Legal Department first drafts English versions of new principal legislation or amendments to legislation that are already in bilingual form and then subsequently produces Chinese versions based on the English text. This process differs from merely translating the existing legislation because the English version of the draft can be varied to accommodate the Chinese version and to ensure a uniform meaning of the ordinance. According to the law draftsmen, parallel drafting in both English and Chinese is not yet common practice because the policy branches invariably prepare the drafting instructions in English.⁶³ Thus, legislative drafters prefer to first consider the English

59. See Official Languages (Amendment) Ordinance, Ord. No. 17 (1987); Interpretation and General Clauses (Amendment) Ordinance, Ord. No. 12 (1986).

60. See Official Languages Ordinance, LAWS OF HONG KONG ch. 5, § 4(1) (1989).

61. See Interpretation and General Clauses Ordinance, LAWS OF HONG KONG ch. 1, § 10B (1989).

62. See Official Languages Ordinance, LAWS OF HONG KONG ch. 5, § 4(1)-(2).

63. See Tony Yen, *Bilingual Legislation in a Chinese Community: The Hong Kong Experience* 12 (Feb. 7-10, 1996) (unpublished paper, Towards a Legal Global Village Conference) (on file with author).

drafts.⁶⁴ In addition, most of the more experienced draftsmen in the Law Drafting Division are not bilingual lawyers.⁶⁵ These two factors render parallel drafting impracticable.

The 1987 Official Languages Ordinance established a Bilingual Laws Advisory Committee⁶⁶ to review the translation of existing legislation enacted only in English. The Governor-in-Council, after consultation with the Committee, may declare the authenticity of legislation translated into Chinese.⁶⁷

The 1987 Interpretation and General Clauses Ordinance deals with the legal implications of bilingual legislation, particularly the question of authenticity. Section 10B(1) declares: "The English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly."⁶⁸ Thus, one language cannot be preferred over the other. The most significant provision in the 1987 Interpretation and General Clauses Ordinance is section 10B(3), which resolves differences in meaning between the two texts by ascertaining "the meaning which best reconciles the text, having regard to the object and purposes of the Ordinance."⁶⁹ Section 10B(3) aims to ensure that no provision of a bilingual ordinance be construed differently in one text than in the other. The rationale underlying this provision is that, although there are two texts, there is only one law.

The first bilingual ordinance was the Securities and Futures Commission Ordinance,⁷⁰ which was published in both Chinese and English in the April 1989 *Hong Kong Government Gazette*.⁷¹ Since then, almost all new ordinances have been enacted in both Chinese and English.⁷² Subsidiary legislation is treated roughly the

64. *See id.*

65. *See id.*

66. *See* Official Languages Ordinance, LAWS OF HONG KONG ch. 5, § 4C. The Committee includes members of the Legislative Council, lawyers, linguists, legal scholars and government officials. *See id.* § 4C(3)(a)-(d).

67. *See id.* § 4B(1).

68. Interpretation and General Clauses Ordinance, LAWS OF HONG KONG ch. 1, § 10B(1).

69. *Id.* § 10B(3).

70. Securities and Futures Commission Ordinance, LAWS OF HONG KONG ch. 24 (1989).

71. *See* Yen, *supra* note 63, at 6.

72. *See id.*

same.⁷³ By September 30, 1996, a total of 143 bilingual principal ordinances and 80 bilingual amendment ordinances had been enacted.⁷⁴

In the meantime, the Law Drafting Division of the Legal Department started to translate all existing legislation originally enacted in English into Chinese. The Bilingual Laws Advisory Committee examines these translated drafts.⁷⁵ After the Committee's scrutiny, the Chinese texts are submitted to the Governor-in-Council for declaration of authenticity.⁷⁶ On July 14, 1992, the Chinese text of the Interpretation and General Clauses Ordinance was the first to be declared authentic.⁷⁷ By December 1995, after seven years of work, the Law Drafting Division had translated over 500 ordinances, all originally enacted in English only.⁷⁸ As of September 30, 1996, Chinese texts of 279 ordinances, as well as their subsidiary legislation, had been declared authentic.⁷⁹

A by-product of the Law Drafting Division's bilingual drafting and translation of existing ordinances is the *English-Chinese Glossary of Legal Terms*.⁸⁰ The first volume, published in April 1995, included more than 4,000 terms. This volume was updated and improved substantially, and a second volume, containing over 15,000 terms, was published in June 1996. The glossary incorporates almost all of the important legal terms used in ordinances and is a tremendous contribution to the widespread use of Chinese in courts and legal transactions in Hong Kong.

B. Efforts of the Hong Kong Judiciary Department

The existence of bilingual legislation can facilitate the establishment of a bilingual legal system. A legal system cannot be

73. See *id.*

74. The Law Drafting Division of the Attorney General's Chambers kindly provided this information on October 7, 1996.

75. See Yen, *supra* note 63, at 6.

76. See *id.*

77. See *id.*

78. See Mary Luk, *Chinese Translation of Laws Complete*, E. EXPRESS, Dec. 14, 1995.

79. The Law Drafting Division of the Attorney General's Chambers kindly provided this information on October 7, 1996.

80. LEGAL DEPT OF THE H.K. GOV'T, *THE ENGLISH-CHINESE GLOSSARY OF LEGAL TERMS* (1st ed. 1995) (2d ed. 1996).

truly bilingual, however, if both languages do not have equal status or are not equally available in the judicial process.

Before the Official Languages (Amendment) Ordinance became effective in December 1995, English remained the dominant language of the courts.⁸¹ By amending sections 5 and 6 and repealing the Schedule, the 1995 amendment to the Official Languages Ordinance makes it possible to conduct hearings in Chinese in the District Court, High Court, and Court of Appeal. According to section 5(1) of the amended ordinance, "a judge, magistrate or other judicial officer may use either or both of the official languages in any proceedings or a part of any proceedings before him as he thinks fit."⁸² In addition, section 5(3) provides that a party or witness may use either or both of the official languages to address the court or to testify in any proceeding.⁸³ Furthermore, section 5(4) allows lawyers to use either or both of the official languages to represent their clients in court.⁸⁴ There is a transitional period, however, during which the Chief Justice must grant permission to use the Chinese language in superior courts, including the Court of Appeal, High Court, and District Court, and in the Lands Tribunal.⁸⁵ Nevertheless, the 1995 amendment to the Official Languages Ordinance removed the obstacle to using Chinese in higher level courts. The increased use of Chinese in courts, especially in superior courts, marks another step toward the goal of a bilingual legal system.

To facilitate the use of Chinese in court proceedings, Hong Kong's Judiciary Department conducted a series of trainings and mock trials for both judicial officers and non-judicial staff. These activities led to the compilation of a glossary of common legal expressions used in court proceedings.⁸⁶

1. The Supreme Court—High Court and Court of Appeal

Following the 1995 amendment to the Official Languages

81. See Yen, *supra* note 63, at 1-6.

82. Official Languages (Amendment) Ordinance, Ord. No. 51, § 5(1) (1995).

83. See *id.* § 5(3).

84. See *id.* § 5(4).

85. See *id.* § 6.

86. See Benjamin Li, *Courts Prepare to Go Bilingual*, E. EXPRESS, Dec. 23-24, 1995.

Ordinance, the Judiciary Department made plans to adopt Chinese in courts. It allowed the High Court to begin using Chinese for criminal cases in January 1997 and for civil cases in March 1997.⁸⁷ The High Court set precedent, however, by allowing the use of Chinese earlier. The Chief Justice invoked section 6 of the 1995 Official Languages Ordinance to permit the use of Cantonese⁸⁸ in civil proceedings. In December 1995, the court conducted a civil trial concerning a family's dispute over property entirely in Chinese. Justice Wally Yeung Chun-kuen, the presiding judge, even wrote his judgment in Chinese. The trial in Chinese was a success. Most importantly, both parties felt comfortable during the trial because they expressed their views to the court in their own language and avoided the interruption and possible variation of meaning by court interpreters.⁸⁹

The Court of Appeal, the court with the highest appellate jurisdiction in Hong Kong,⁹⁰ is the sole forum where only points of

87. See HONG KONG GOV'T, POLICY COMMITMENTS: THE 1996 POLICY ADDRESS 42 (1996) [hereinafter POLICY COMMITMENTS].

88. Cantonese is a dialect that people use for oral communication in Hong Kong and its neighboring Guangdong province in the PRC. Putonghua (or Mandarin) is the official spoken language of the PRC and Taiwan, and it is one of the national languages of Singapore. Putonghua is based on the dialect of Beijing. Although Putonghua and Cantonese are very different dialects, they are similar in terms of lexicon, syntax, and grammar. The only difference is that the PRC and Singapore use simplified characters, while Hong Kong and Taiwan use standard (or classical) characters. This difference is not significant enough, however, to prevent people of different areas from understanding each other's written Chinese.

One must take into consideration the differences between Cantonese and Putonghua to determine which should be the Chinese language for Hong Kong after 1997. Article 9 of the Basic Law does not prefer one over the other as the language for written Chinese. Article 9 merely wants to avoid dispute or confusion. As for the spoken language in public administration and the judiciary, Cantonese is more likely to be adopted. Article 121 of the Constitution of the People's Republic of China empowers the local government in autonomous regions to employ local spoken and written languages instead of Putonghua. See XIANFA [Constitution] art. 121 (P.R.C.). Nevertheless, the recent trend indicates that local people will use Putonghua more as Hong Kong and the PRC become more economically and culturally connected.

89. A series of follow-up reports of the court proceedings can be found in the December 2-14, 1995 editions of various local newspapers, including *South China Morning Post*, *Hong Kong Standard*, *Eastern Express*, *Ming Pao*, and *Ta-Kung Pao*.

90. Presently, the court with the highest jurisdiction for Hong Kong is the Judicial Committee of the Privy Council, which is located in London. See Jin Huang & Andrew Xuefeng Qian, "One Country, Two Systems," *Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflict of Law in China*, 5 DUKE J. COMP. & INT'L

law are argued and determined. The Judiciary Department anticipates that the Court of Appeal will have the greatest difficulty in switching from English to Chinese.⁹¹ Therefore, the Judiciary Department granted the Court of Appeal more time to prepare for the change by scheduling it to start using Chinese in June 1997.

2. The District Court

The Judiciary Department scheduled the District Court to begin using Chinese in both civil and criminal proceedings in February 1996.⁹² The Judiciary Department expected that defendants would not automatically be able to try their cases in Chinese because a lawyer or judge could not be forced to use Chinese.⁹³ If a discrepancy arose between the parties as to which language to use, the final decision was left to the judge.⁹⁴

The District Court heard its first criminal case in Chinese on March 11, 1996.⁹⁵ The Chief Justice permitted the use of Cantonese in the court proceedings due to a dispute over the translation into English of a crucial Chinese term affecting the admissibility of evidence.⁹⁶

C. Efforts of Academics

Bilingual legislation cannot operate without bilingual lawyers and judges. A bilingual legal system needs a bilingual legal profession to ensure its development and success. Thus, legal professionals must be trained in both Chinese and English. Because Hong Kong's future lawyers will come from today's law students in the tertiary institutions, bilingual legal abilities must be nurtured and developed at this stage.

L. 289, 299 (1995). A Court of Final Appeal, which will be located in Hong Kong, will replace the Judicial Committee of the Privy Council beginning July 1, 1997. See *id.* at 300.

91. See POLICY COMMITMENTS, *supra* note 87, at 43.

92. See *id.* at 42.

93. See Official Languages Ordinance, LAWS OF HONG KONG ch. 5, § 5 (1989).

94. See Emma Batha, *Chinese in Courts Before Laws Approved*, S. CHINA MORNING POST, Dec. 23, 1995, at 3.

95. See Patricia Young, *Court Breaks Down Speech Barrier*, S. CHINA MORNING POST, Mar. 11, 1996.

96. See *id.*; see also Magdalen Chow, *Cantonese Hearing a 'Direct' Hit*, S. CHINA MORNING POST, Mar. 12, 1996, at 2; Camix Yau, *Cantonese Makes History*, H.K. STANDARD, Mar. 12, 1996.

There are two law schools in Hong Kong—the City University of Hong Kong (City University) and the University of Hong Kong (Hong Kong University). Both institutions have made efforts to prepare for the transition to a bilingual legal system. In 1988, Hong Kong University began offering “The Use of Chinese in Law.”⁹⁷ In the same year, City University began offering “Chinese for Lawyers” and “Chinese and English Skills for Lawyers” to LL.B. students.⁹⁸ In 1994, the names of these two courses were changed to “Chinese Legal Language,” which is now a compulsory course, and “Specialized Translation in Law,” which is an elective.⁹⁹ Since 1994, City University has also offered a moot court program conducted in Chinese, which aims to develop students’ advocacy skills in the Chinese language.¹⁰⁰

Apart from developing the students’ Chinese language ability, the academics at City University made significant contributions toward making Hong Kong law available in Chinese. The Legal Department has translated all existing legislation into Chinese, but the common law is found in case reports that are far too voluminous for any single organization to translate. The legal scholars at City University were creative enough to adopt the traditional format of a digest, which is a statement or restatement of legal principles distilled and extracted from reported cases. Their efforts have produced the *Digest of Hong Kong Contract Law*¹⁰¹ and the *Digest of Hong Kong Criminal Law*.¹⁰² An additional volume on Criminal Procedure is forthcoming. All of these volumes are presented in both Chinese and English.

97. See Scassa, *supra* note 27, at 669.

98. See Department of Law, City University of Hong Kong, Syllabus (1988) (on file with the Department of Law, City University of Hong Kong).

99. See Department of Law, City University of Hong Kong, Syllabus (1994) (on file with the Department of Law, City University of Hong Kong).

100. See *id.*

101. DIGEST OF HONG KONG CONTRACT LAW (Derek Roebuck & Wang Guiguo eds., 1995).

102. DIGEST OF HONG KONG CRIMINAL LAW (Derek Roebuck & Zhao Bingzhi eds., 1996).

V. PROBLEMS AND DIFFICULTIES INCURRED AND ENVISAGED

A. *Lack of Human Resources*

The most serious problem in establishing a bilingual legal system for Hong Kong is the lack of human resources. Qualified persons would need to be fluent in both English and Chinese, trained in common law, and familiar with the law in the People's Republic of China (PRC) or Taiwan. One commentator pointed out that a search for equivalent expressions in both languages would be difficult if a person was not well-versed in the terminology and context of the particular legal system.¹⁰³

There is a dire need for qualified people to draft bilingual legislation, to provide legal services to clients, to conduct court proceedings, and to provide legal education, but such people are hard to find. Their absence delays the transition to a bilingual legal system.¹⁰⁴ A sensible alternative to qualified candidates is providing on-the-job intensive training to enhance a staff's language competence and ability to carry out bilingual legal work; however, no such program has been organized regularly in recent years.

B. *Difficulties in Expressing Common Law Concepts in Chinese*

Legal concepts are difficult to translate from one language to another because they are identified and expressed in the context of the accompanying legal system, and therefore, bear their own particular meaning. Frequently, legal concepts reflect the needs of the society in which that legal system develops and exists. Legal terms such as "fee tail" and "choses in action" do not find readily available Chinese equivalents to convey the same meaning. The strict requirement of accuracy and precision in legal translation makes the task even more difficult. It will take courage, commitment, wisdom, and hard work to make Hong Kong common law available in the Chinese language.

There is a Chinese saying that "stones from those hills may be

103. See Scassa, *supra* note 27, at 667.

104. For example, the Hong Kong Legal Department spent more than seven years completing the translation of over 500 existing ordinances. See Yen, *supra* note 63, at 5-7. The production of the Chinese *Digest of the Hong Kong Contract Law* also took several years.

used by one to polish his gem." This ancient expression encourages people to keep an open mind and to learn from others' experiences. This idea is important for people who are trying to produce common law in Chinese. Some perceived difficulties or impossibilities may actually result from one's ignorance of the Chinese language and/or misconception of the law in The PRC. For example, although many believe that the English concepts of real property and personal property do not have Chinese equivalents,¹⁰⁵ these two legal concepts actually do exist in The PRC. The Civil Code of the Republic of China, passed in 1929, provides definitions distinguishing between the concepts of real property and personal property.¹⁰⁶

C. Acceptance of Chinese as the Language of the Law

Bilingual legislation, by itself, does not lead to a bilingual legal system. A bilingual legal system requires practicing lawyers who can effectively carry out their professional duties in Chinese as well as English. Chinese should be used in all facets of their work, including representing clients in court, advising clients, and drafting legal documents. The bilingual legal system will become more meaningful to the public only if more lawyers in the private sector perform their professional duties in Chinese.

Some lawyers in the private sector, however, have resisted the promotion of Chinese as a language of the law. They prefer the status quo over any type of reform for pragmatic and psychological reasons. The change to a bilingual system would require new skills to cope with new situations. Such change requires psychological adaptation and spiritual open-mindedness.

Full and complete acceptance of Chinese as the official legal language by Hong Kong's legal profession will take time. The success of a bilingual legal system will ultimately depend on the legal profession's willingness, sincerity, and determination to use the Chinese version of the law.

105. See Ujejski, *supra* note 9, at 179.

106. Article 66 provides that real property is "land and things permanently affixed thereto." THE CIVIL CODE OF THE REPUBLIC OF CHINA 69 (Ching-Lin Hsia et al. trans., 1930). The products of real property constitute a part of it as long as they are not separated from it. Article 67 provides that things other than real property mentioned in article 66 are personal property. See *id.*

VI. CONCLUSION

Arguments of justice and efficiency strongly support the creation of a bilingual legal system in the future Hong Kong SAR. The establishment of a sound bilingual legal system will ensure that both Chinese-speaking and English-speaking people have full and equal access to laws, legal services, and courts.

Hong Kong's future lawyers must be trained in common law and well-versed in English. There will be a difference, however, between future lawyers and present legal professionals. Future lawyers will have more confidence in using Chinese as the language of the law because they will have a much better knowledge of Chinese law. The use of Chinese by the legal profession in common law transactions will become the norm rather than the exception.

Hong Kong's future judges will be able to conduct court proceedings in both Chinese and English. The parties will be able to request a switch from one language to the other. Language will no longer be used as a criterion to exclude certain groups of people from jury service. Chinese-speaking and English-speaking criminal defendants will be tried by a jury of their peers to ensure equal treatment before the law.

Great efforts have already been made to promote the use of Chinese for legal purposes. The establishment of a bilingual legal system is no longer an impossible mission. The journey toward the ideal, however, demands vision, commitment, and the arduous efforts of several generations.

