

## INFORMATION NOTE

### Use of Chinese in court proceedings

#### 1. Background

1.1 At the meeting of the Panel on Administration of Justice and Legal Services held on 20 October 2011, the Chairman highlighted the problems in the use of Chinese in court proceedings including the growing number of unrepresented litigants who fell short of legal knowledge and the lack of bilingual legal practitioners. It was suggested that the Panel should explore the work needed to be done on various fronts for further development in this regard. Members will discuss this matter at the Panel meeting to be held on 26 March 2012. To facilitate members' discussion, this information note highlights the relevant legal provisions, examines the recent developments of the use of Chinese in court proceedings, and summarizes the past deliberations on the matter at the Legislative Council.

#### 2. Relevant legal provisions

2.1 English was the sole official language of Hong Kong until 1974 when Chinese became another official language in the territory. Since then, lawyers and magistrates can use either one of the official languages in the Magistracies. With the enactment of the relevant legislative amendments to the *Official Languages Ordinance* (Cap 5) in July 1995, the restriction on the use of Chinese in higher courts was removed. Proceedings at all levels of court can be conducted in either English or Chinese.

2.2 Article 9 of the *Basic Law* stipulates that 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. Meanwhile, pursuant to section 3(1) of the *Official Languages Ordinance*, the English and Chinese languages are the official languages of Hong Kong for court proceedings.

2.3 Section 5(1) of the *Official Languages Ordinance* provides that a judge, magistrate or other judicial officer ("judge") may use either or both of the official languages in any proceedings or a part of any proceedings before him or her as he or she thinks fit; and section 5(2) states that the decision of a judge is final. It should be noted that as stipulated by sections 5(3) and (4), notwithstanding the judge's decision of the language to be used, the parties to, witnesses or legal representatives in any proceedings or a part of any proceedings may use either or both of the official languages to address the court or to testify. A party or a witness may even address the court or testify in any language which is not an official language. If the language so used is not the official language used by the judge, the assistance of a court interpreter will be made available, where necessary.

2.4 By section 5(5) of the *Official Languages Ordinance*, the Chief Justice may make rules and issue practice directions to regulate the use of the official languages in the courts. Separate sets of rules have been made pursuant to this section regulating the use of the official languages in the High Court and District Court respectively.<sup>1</sup>

### **3. Use of Chinese in court proceedings**

#### General guidelines

3.1 In January 1998, the then Chief Judge of the High Court, after consultation with the Chief Justice, issued guidelines for judges regarding the use of Chinese<sup>2</sup> in court proceedings. The guidelines seek to assist judges in the exercise of their discretion. They are for reference only, and thus are not binding. In deciding which official language is to be used for conducting hearings, the paramount consideration for the judge is the just and expeditious disposal of the cause or matter, having regard to all the circumstances of the case. The factors which may be taken into consideration include:

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<sup>1</sup> *High Court Civil Procedure (Use of Language) Rules (Cap 5C)* and *District Court Civil Procedure (General) (Use of Language) Rules (Cap 5A)*.

<sup>2</sup> It is the Judiciary's position that the official language of Chinese in its spoken form usually refers to Cantonese but also includes Putonghua.

- (a) the language ability of the accused or litigants;
- (b) the languages in which the witnesses will testify;
- (c) the wishes of the accused or litigants;
- (d) the right of the accused or litigants to instruct a lawyer of his or her, or their choice;
- (e) the language ability of the lawyers representing the accused or litigants;
- (f) the factual issues in dispute;
- (g) the legal issues in dispute;
- (h) the volume of documents which may be required to be translated into the other official languages; and
- (i) the language ability of the judge.

3.2 The nine factors listed above are factors which the judge may take into consideration in exercising his or her discretion. According to the Judiciary, these factors are neither prescriptive nor exhaustive. No weighting is and should be accorded to any of them.

3.3 The same criteria are applied in relation to proceedings instituted in the District Court.<sup>3</sup> Nonetheless, having regard to the limit of the jurisdiction of the District Court, the possibility of any substantial additional costs which may be occasioned by the use of one or the other of the official languages in the conduct of the proceedings in that court is a matter of material significance.<sup>4</sup>

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<sup>3</sup> *District Court Civil Procedure (General) (Use of Language) Rules*, rule 3(1).

<sup>4</sup> *Hong Kong Civil Procedure 2011*.

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3.4 If it is desirable to conduct the trial in the Chinese language, an application should be made to the listing judge to have the trial heard by a bilingual judge. However, the final decision on whether to use one or the other or both of the official languages at the trial is a matter of discretion for the trial judge. Before commencing to use Chinese at the hearing, a judge should always inform the parties involved in the case of his or her intention to do so and seek their views on the use of language.

3.5 Where at the outset of a hearing, after taking into account the relevant factors involved, the judge considers that it is appropriate to conduct part of but not the entire hearing in Chinese, he or she can adopt a pragmatic approach and decide at the outset that part of the hearing would be conducted in Chinese and part of it in English. An example is where Cantonese is used for the oral evidence and English for the submissions.

3.6 If a decision was made at the outset to use one official language but during the course of the hearing, it has become difficult for the judge and/or the parties or lawyers to continue the hearing in that official language, the judge may consider a change to the other official language. Before making any change, he or she should inform the parties and/or lawyers of his or her intention to do so and seek their views on the proposed change. If any party or lawyer makes a request to change from one official language to the other, the judge should hear representations from all parties and/or lawyers concerned. If there are good reasons to do so, such a change should normally be allowed.

3.7 Although a party to or a witness in any proceedings may use either or both of the official languages and address the court or testify in any language, the ultimate decision of which official language that the legal proceedings are to be heard rests with the judge. This raises the concern of the language rights of the parties to the legal proceedings. According to the Court of First Instance<sup>5</sup>, "the constitutional right of a person to use the Chinese language in a court of law in Hong Kong means no more than the right of that person to employ that language, that is, to utilize it, for the purpose of forwarding or protecting his interests. That right to employ or utilize the language does not imply a reciprocal obligation on the part of the court to speak and read that language. It is sufficient if processes, such as the employment of interpreters or translators, exist to facilitate the court comprehending what is said or written".

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<sup>5</sup> See *Re Cheng Kai Nam* [2002] 2 HKLRD 39.

### Using Chinese in courts

3.8 The first civil case that was conducted in Chinese was heard in December 1995 before the Hon Mr Justice Yeung of the Court of First Instance. Since then, the percentage of cases heard in Chinese has been on the rise.

3.9 Compared with other levels of court, the Magistrates' Courts use Chinese more extensively. In order to meet the needs of the court users and facilitate greater use of Chinese in court proceedings, a pilot scheme on "Chinese Trial Court" was launched in North Kowloon Magistrates' Courts and Shatin Magistrates' Courts in July 2000 and March 2001 respectively. In such trials, the Magistrates and all the parties would use Cantonese and the documents for use in the proceedings would be in Chinese as far as practicable, with no interpretation services provided. The scheme has been extended to all Magistrates' Courts since February 2002.

### Development of bilingual legal system

3.10 Further use of Chinese in court proceedings hinges on the development of a bilingual legal system in Hong Kong, which is related to a number of issues such as bilingual legislation, development of legal references in Chinese, and availability of bilingual judges and legal practitioners. In response to the request of the Panel and the legal profession, the Committee on Bilingual Legal System was established as early as April 1998 to advise the Government on a range of issues, including the policy and long-term goal of bilingualism in law and how that goal should be attained. The development of bilingual legal system is discussed in the paragraphs below.

#### *Bilingual legislation*

3.11 In keeping with the *Basic Law's* provisions on bilingualism, all legislation in Hong Kong is enacted in both Chinese and English, and both versions are accorded equal status. Authentic Chinese texts have been completed of all pre-existing legislation which had been enacted in the English language only. Hong Kong's statute book is now entirely bilingual.

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*Bilingual legal references*

3.12 With the increasing use of Chinese in courts, the Judiciary started from August 2008 to upload onto the Judiciary website<sup>6</sup> Chinese judgments of jurisprudential value handed down since 1995 along with the English translation. On the Judiciary website, there are 426 pieces of Chinese judgments of jurisprudential value being translated into English. Leading judgments written in English are also translated into Chinese and uploaded onto the Judiciary website to facilitate the work of the judges and the legal profession. As at 31 October 2011, 17 192 Chinese judgments and 50 872 English judgments had been uploaded onto the Judiciary website.

3.13 From January 2009, the Judiciary has also uploaded Reasons for Sentence handed down by the High Court and the District Court onto the Judiciary website. As at 31 October 2011, 1 761 Chinese Reasons for Sentence and 3 162 English Reasons for Sentence had been uploaded onto the website. In addition, the bilingual versions of 93 Practice Directions and one set of Specimen Directions in Jury Trial are made available on the Judiciary website.

3.14 The Judiciary has produced a Bilingual Common Law Series. The first case book in the series, on criminal law, was published at the end of 2003. It contains excerpts from judgments in English both from Hong Kong and other common law jurisdictions and their Chinese translation. These excerpts are those often cited in Hong Kong criminal courts. The second and third volumes of the series, on land cases and employment cases, were published in 2005 and 2006 respectively.

3.15 The Judiciary has also published the English-Chinese Glossary of Legal Terms and the Chinese-English Glossary of Legal Terms, which aim to provide handy reference tools for locating bilingual legal terms in legislation. The Chinese-English Glossary was first published in 1999 while the fourth edition of the English-Chinese Glossary was published in 2004. The Judiciary is intending to prepare an update of the English-Chinese Glossary in 2012.

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<sup>6</sup> A Legal Reference System is available on the Judiciary website which is open for public access. Reference materials including judgments, Reasons for Sentence, Practice Directions and Specimen Directions in Jury Trials are available on this website.

*Bilingual judges and judicial staff*

3.16 As at 31 October 2011, 115 out of 150 judges are fully bilingual. The Judiciary has provided various forms of training to the bilingual judges to master skills in conducting court hearings as well as preparing and delivering judgments in Chinese.

3.17 Court interpreters play a significant supporting role in the use of Chinese in courts. As at 31 October 2011, the Judiciary had a total of 143 court interpreters deployed at various offices and levels of court. There are also other judicial staff supporting the use of Chinese in courts, like the Law Translation Officers who prepare bilingual court documents. Language training courses have been organized regularly for these judicial staff.

*Legal education*

3.18 Three local law schools offers courses to enhance the proficiency of law students in using Chinese as a legal language. They are the Faculties of Law at the University of Hong Kong and the Chinese University of Hong Kong, and the School of Law at the City University of Hong Kong,

3.19 For Bachelor of Law ("LLB") students, the University of Hong Kong offers a course on Practical Chinese Language for Law Students, which is a general language course compulsory for all first year students. Electives on Use of Chinese in Law I and II are also offered to LLB students in their second to fourth years of study. Before joining the legal profession, students are required to complete the Postgraduate Certificate in Laws ("PCLL") programme. For PCLL students, electives on Use of Chinese in Legal Practice and Mediation in Chinese are offered.

3.20 At the Chinese University of Hong Kong, all LLB students are required to take the Professional Chinese course in their first year of study. Two electives in Putonghua Chinese on the Mainland are offered for students to acquire a deeper understanding of Chinese law and legal system. For the PCLL programme, there are two Chinese language elective courses, namely (a) Writing and Drafting Commercial Documents (in Chinese) and Writing, and (b) Drafting Litigation Documents (in Chinese) (Civil and Criminal).

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3.21 At the City University of Hong Kong, there is a compulsory course on Legal Chinese for LLB students. Legal System of the PRC is another compulsory course in LLB. In addition, students have an option to take law electives that focus on Chinese law. The School of Law also runs a credit bearing Legal Placement programme which enables students to work in a legal environment in China and/or in Hong Kong. For the PCLL programme, there is an elective called Foundations in Mainland Legal Transactions.

### Unrepresented litigants and the use of Chinese in courts

3.22 In Hong Kong, most litigants in person are Chinese speakers who prefer to have their hearings in court conducted in Chinese. As observed by the Hon Madam Justice Kwan<sup>7</sup>, Chinese is often used in cases in which both or one of the parties are or is unrepresented.<sup>8</sup> If both or one of the parties to any proceedings are or is unrepresented, it is common for such litigants to file their pleadings, to testify and to address the court in Chinese. Under these circumstances, if the case were to be heard in English, translation would be required in each and every step of the proceedings. Leaving increased costs aside, Madam Justice Kwan considers it will hardly be "a just and expeditious disposal of the proceedings".

3.23 According to Madam Justice Kwan, a litigant who does not know or is not conversant in English, despite the comprehensive and quality translation service provided by the court, psychologically, would still find it not as preferable as the direct use of Chinese which would enable him or her to understand everything that happens in court first hand. This observation is consistent with the results of some academic studies.<sup>9</sup> It has been highlighted in these studies that many Cantonese speakers prefer to use their mother tongue in a court environment because they are not familiar with, and do not have the confidence in using, legal language. To allay litigants' worries and to make these litigants feel as much as possible that proceedings are fairly conducted, the courts would generally tend to hear the case in Chinese.

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<sup>7</sup> Madam Justice Kwan, Justice of Appeal of the High Court of Hong Kong, has many years of experience in using Chinese in court proceedings.

<sup>8</sup> See Kwan (2011).

<sup>9</sup> See Wong (2003).



3.24 Madam Justice Kwan further comments that statute law is only part of the laws in Hong Kong. The principles of the common law are to be found in the judgments of the courts, both in Hong Kong and in other common law jurisdictions around the world. The language in which those judgments have been delivered over the years is mostly English. While in future there is likely to be an increasing number of judgments in Hong Kong delivered in Chinese, English will continue to be the only medium in which judgments from overseas is reported. In this domain, Madam Justice Kwan considers that unrepresented litigants who have no legal knowledge or are not conversant in English may face great difficulty.

3.25 Madam Justice Kwan also points out that since in most litigation conducted in Chinese, either both parties are unrepresented or only one party is represented, not many judgments written in Chinese over the years are of jurisprudential value. Generally speaking, Chinese judgments deal mainly with findings of fact and legal issues that are not so complicated, such that an incisive and thorough discussion of the law can rarely be found in them. Madam Justice Kwan considers that this could hardly be said to be a healthy development.

#### **4. Deliberations at the Legislative Council**

4.1 The Panel on Administration of Justice and Legal Services has discussed, among other things, issues related to the use of Chinese in court proceedings at meetings held on 26 October 1996, 3 March 1997, 26 April 1997, 2 June 1997, 13 October 1997, 13 January 1998, 13 December 2002 and 23 February 2004 respectively. The issues of concern raised by members are summarized below.

##### Deliberations before the handover

4.2 The preparatory work, the target date and problems for the use of Chinese in court had been discussed at the meetings held before the handover. Members had expressed dissatisfaction with the slow progress made by the Administration and the Judiciary on the use of Chinese in courts.

*Prolonged proceedings under a bilingualism court system*

4.3 Some members worried that the court proceedings would be unduly lengthened if there was disagreement over the language to be used in court and Chinese version of case laws were to be cited. The Judiciary Administration agreed that it was possible that duration of court proceedings might be longer when counsel took issue with a particular interpretation used. This gave rise to concerns that injustice would arise if law was made too expensive for the general public because of prolonged court proceedings.

*Discrepancies between English and Chinese texts*

4.4 Some members raised concerns over the problems arising from discrepancies between English and Chinese texts. The Judiciary Administration explained that the judge had to make reference to the purposes and functions of an ordinance if there was a discrepancy between the two authentic versions before he or she formed a view on the meaning and interpretation of a certain part of that ordinance.

4.5 Question was raised as to how a judge who was English-speaking only could deal with controversy over the legal meaning of a term in the Chinese text of an ordinance during the court proceedings which was conducted in English. The Administration responded that an English-speaking judge had to listen to representations of both parties before forming a view on the meaning and interpretation of a certain part of that ordinance. Assistance from linguistic experts on the literal meaning of a term could be sought if appropriate.

*Preservation of the common law system*

4.6 Some members expressed concern over the impact on the bilingual legal system on the common law system. Both the Administration and the Judiciary Administration considered that using Chinese in court would not change the spirit of the common law which was the foundation of the legal system in Hong Kong.

### Deliberations after the handover

4.7 Members have focused more on the progress towards the use of Chinese in court proceedings at the meetings held after the handover.

#### *Measures to support the use of Chinese in courts*

4.8 Some members asked about the Government's measure to support the use of Chinese in courts. The Administration replied that the Department of Justice had provided various assistance such as organizing training courses for government lawyers on the use of Chinese in courts, translating the laws of Hong Kong into the Chinese language, and publishing English-Chinese glossaries of legal terms.

#### *Availability of bilingual judges and the choice of language used in trials*

4.9 Some members expressed concerns that there were a considerable number of cases where the request for the trial to be conducted in Chinese was to no avail because a bilingual judge was not available. The Judiciary Administration advised that the capacity of the courts to conduct Chinese trials had not been affected by the increase in Chinese trials. It also advised that necessary steps had been taken to ensure that there was an adequate supply of bilingual judges proficient in conducting court proceedings in Chinese.

4.10 The Judiciary Administration reiterated that in deciding the choice of the language to be used, the paramount consideration for the judge was the just and expeditious disposal of the case after having considered all the circumstances of the case. Some members opined that in criminal cases, the wish of the defendant to have the trial conducted in the official language of his or her choice should be a factor of overriding importance to be considered by the judge in deciding on the language to be used.

*Waiting time for Chinese trials and low percentage of Chinese hearings in the higher courts*

4.11 Some members enquired whether the low percentage of Chinese hearings in the higher courts was attributable to the long waiting time for Chinese trials that had deterred users from opting for Chinese to be used in courts. The Judiciary Administration assured members that there were no cases which had been conducted in English instead of Chinese because of long waiting time for Chinese trials.

4.12 The Judiciary Administration further explained that the nature of cases could be a factor accounting for why there had been a higher percentage of Chinese hearings in the lower courts. As cases heard by the higher courts usually involved arguments of points of law, the parties concerned might prefer to use English for conducting the cases. On the other hand, cases heard by the lower courts were generally related to arguments about facts and therefore the Chinese language might be considered more appropriate to be used in conducting the cases.

*Plans to increase the percentage of Chinese hearings in the higher courts*

4.13 Some members asked whether the Judiciary had any plans to increase the percentage of Chinese hearings in the higher courts. The Judiciary Administration explained that while it was committed to implementing bilingualism in courts, the authority to decide on the choice of languages for a particular case rested with the judges. The Judiciary only played a supportive role by providing the necessary resources to enable a case to be conducted in Chinese if it was the official language decided to be used by the judge. Therefore, it had no plans to take any measures to increase the said percentage.

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