

**Hong Kong's multilingual legal system: Likely to lead to more bias and confusion?**

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### **Hong Kong's multilingual legal system: Likely to lead to more bias and confusion?**

Multilingual jurisdictions face additional complexities compared to their monolingual counterparts. While multilingualism might lead to benefits such as ease of doing business, making more citizens feel included, it might also harm the legal system.

Hong Kong has two official languages, Chinese and English (Basic Law of Hong Kong, 1990). Notably, the law does not specify which type of Chinese is official. Cantonese, spoken by a majority of Hongkongers (Hong Kong Census and Statistics Department, 2016), or Mandarin, official in Mainland China. English is used alongside in many important areas such as business and law (Joseph, 1996).

This bilingualism is evident. Hong Kong Cantonese is distinct in its encompassing usage of English words. All road signs are bilingual, so is all legislation with the specification that both texts are equally authentic (Section 10B, Interpretation and General Clauses Ordinance, 2017). It is even possible to apply to naturalize as a Chinese citizen in Hong Kong entirely in English, despite the requirement of adequate knowledge in Chinese (Hong Kong Immigration Department, 2021).

As Hong Kong practices common law owing to British colonial legacy, the legal system operates primarily in English, despite the majority of Hongkongers speaking Cantonese. All judges and lawyers are trained in English but only some have additionally been trained in Chinese (Legislative Council Secretariat, 2012).

This research has selected Hong Kong's legal system for analysis, owing to it sharing similar common law system with the United States, use of English as a primary language in the legal system, and author's own familiarity with it as a Hong Kong citizen herself.

## **Background**

### **Hong Kong's legal system**

Hong Kong's legal system is based on English common law in addition to other laws, such as Chinese customary law (Basic Law of Hong Kong, 1990). For example, although common law prohibits polygamy, Hong Kong still recognizes 'Customary Chinese marriage' which permitted Chinese men taking up 'concubines' (akin to lesser wives) in addition to their 'main' wife that took place before 1970 (Marriage Reform Ordinance, 1970).

Jurors are required to be Hong Kong residents, aged 21 to 65 (Jury Ordinance, 1887), minimum high school educated, imposed by administrative policy (Law Reform Commission of Hong Kong, 2010). Despite the multilingual legal system, jury is monolingual and uses only the language of the proceedings (Jury Ordinance, 1887), removing additional need of interpretation. Jury is employed in criminal trials and death inquests (Hong Kong Judiciary, 2021).

### **Language, ethnic and historical background**

Hong Kong is primarily ethnically Chinese, constituting 92% of the population, with the three largest ethnic minorities being Filipinos, Indonesians, and Whites. 96.7% can speak Cantonese, 51.9% can speak English, and 50.6% can speak Mandarin. Over 50% of higher-skilled workers are trilingual while only 34.9% of workers in elementary occupations are able to read and write both Chinese and English (Hong Kong Statistics and Census Department, 2016). This shows a clear discrepancy regarding language ability for people of different social classes.

British rule which lasted until 1997 brought along racism, such as segregation (Klein, 1995). Language policy reflected this racism. Official Languages Ordinance declared English and Chinese as official languages only in 1974, over a hundred years after when British rule

began in 1841 (History.com Editors, 2010). The government only encouraged secondary schools to teach in ‘Mother tongue’ 10 years after Chinese has been established as an official language in 1984 (Hong Kong Education Bureau, 2011). The first civil case conducted in Chinese was done in December 1995 and as of 2012, the majority of the cases are still heard in English (Legislative Council Secretariat, 2012).

### **Methodology**

Analysis will be based on prior research and attempt to evaluate the likeliness to lead to confusion and biases unique to a multilingual legal system. Possible confusion and biases will be evaluated through confusion and bias as a result of language, confusion and bias due to interpretation, and other considerations. The reason to select these criteria is they are the defining features of a multilingual legal system compared to a monolingual one, as the primary difference aside from the laws and proceedings is language.

### **Evaluation**

#### **Confusion and bias as a result of language**

Languages can be very different. A common example is the third person pronoun *ta* is gender neutral in spoken Chinese, as ‘*ta*’ referring to female 她, male 他, animals & objects 它, God 祂 and animals exclusively 牠 are pronounced identically, only differing in written form. When providing oral evidence, a witness’ speech might be interpreted by incorrectly without seeking further clarification. Imagine that a witness testifying in Chinese about their dog and their spouse, says “*ta* bit me”. Interpreter assumes it was the dog that bit the witness translates the statement as such without seeking further clarification, the outcome of a domestic violence trial could be very different due to an unintentional mistake.

Court interpreters therefore frequently engage in ‘non-renditions’ in order to seek clarification from the witness, interact with lawyers to seek their clarification etc. without translating everything word for word. However, some perceive such non-rendition to be evidence against the impartiality that interpreters are required to have, which will be discussed later.

Although not a legal requirement but rather an administrative practice, jurors are required to have completed high school (Law Reform Commission of Hong Kong, 2010). This stands in contrast with other jurisdictions which usually does not mandate a minimum education level. While this practice can be vouched for as Hong Kong consistently performs well on education, as shown by high HDI ranking (United Nations Development Programme, 2020), only 56.5% of persons aged 15 or older only meets this requirement. This could potentially disadvantage defendants that have not completed high school by excluding almost half of the population.

Moreover, most cases are conducted in English (Legislative Council Secretariat, 2010) and those in a higher social class is more likely to have better English skills as shown by the difference in language ability for employees in different levels of position (Hong Kong Statistics and Census Department, 2016). Given the educational requirement, this is likely to lead to a jury composed of mostly educated, English speaking jurors and lead to implicit class bias towards a defendant of a lower class. This combined with the minimum education requirement violates the basic principle of a jury trial, “tried by one’s peers” and constitutes a denial of equality of justice.

Even lawyers appeal to what is believed to be the “vulgar” and “unruly” nature of Cantonese to explain outbursts of witnesses (Ng, 2009). It is possible that the prevailing social attitude and other factors influence this perception. It is possible that the prevailing social attitude and other factors influence this perception. Such perception might be problematic as it is

similar to ‘exotic appeals’ and might contain racist elements. This might lead to negative bias on the credibility for a testimony done in Cantonese.

### **Confusion and bias due to interpretation**

Aforementioned ‘non-rendition’ might lead to negative perceptions on the impartiality of interpreters (Cheung, 2018). Participants perceived the interpreter as less impartial when interpreter engaged in English non-rendition with the judge (talking in English with the judge only without translating the conversation for participants who only understand Cantonese), as they believe the interpreter is ‘talking with the upper class’ while ignoring them and they felt being left out (Cheung, 2018). This might lead to negative attitudes when cooperating with the interpreter and adversarial results. Participants also perceived the skills of interpreters as worse when they engaged in English non-renditions, as they ‘abandoned’ the participant to communicate with others when participants role playing as witnesses expected the interpreter to be their ‘ally’. When only Cantonese non-rendition occurred, participants rated interpreter’s skills to be higher and more impartial compared with the control group when no non-rendition occurred, which itself has higher ratings for interpreter skill and impartiality (Cheung, 2018).

As laypersons have little to none experience with the court system, and the majority of Hongkongers speaking Cantonese, the court, especially if done in a foreign language, can be a very intimidating environment. Having the only person that understands both sides ‘betray’ you may lead to anger or anguish, either can cause additional stress and adverse case outcome.

Certain elements of the original speech might be missing after interpretation or is inaccurate, such as sarcasm, inaccuracy in propositional content, communicative intention,

degree of strength or simply linguistic inaccuracy (Liu & Hale, 2018). Unless the interpreter realizes the inaccuracy and corrects it themselves, could lead to further consequences.

As illustrated by the ‘*ta* bit me’ example above, if an interpreter felt confident enough about an ‘usual’ statement’s context and did not ask for further clarification, problems can occur. What is also potentially problematic is each interpreter’s individual interpreting style, resulting in potentially unequal levels of accuracy and injustice.

### **Other considerations**

Hong Kong’s laws are passed in Chinese and English, both texts being equally authentic (Interpretation and General Clauses Ordinance, 1966). However, at times it is not viewed by courts as such. In *HKSAR v. Lau San Ching and others* (HCMA 98/2002), the court decided that the English text was ‘more’ authentic than the Chinese text as the law was first passed only in English, having later been translated into Chinese and declared authentic. The court ruled “In ascertaining the ordinance’s legal meaning, the English text should be taken as more accurately reflecting the legislature’s intent at the time it was originally enacted. In this case, the meaning borne by the original official English text, which was already in existence as early as 1932, should take precedence over the Chinese authentic text”. This clearly shows that even for ‘equally authentic’ laws, one can be ‘more’ authentic than the other.

Internationally, ECJ has ruled that the meaning of the word “vehicle” was to be interpreted broadly, in favor of the French, English, Italian, Spanish, Portuguese, German, and Finnish versions and against the more narrow meaning of the Danish, Swedish, Dutch, and Greek versions (Cao, 2007). This creates a dilemma that a law created for all’s ‘most authentic’ meaning can only be understood by some, and those who happen to believe in the authenticity of

the version they can understand would not know they were mistaken until they were in the wrong through no fault of their own.

Counsel tactics might also be hindered if interpretation is needed, as the colour and texture of the language can be lost during so, putting a party with a counsel that does not speak the same language with one of the witness at a disadvantage. This colour and texture of the language will be further discussed.

## **Discussion**

### **Bilingualism as a recent development**

Despite the Official Languages Ordinance providing for use of Chinese as an official language, all laws were still done solely in English. In other words, Chinese ‘may’ but not ‘must’ be used as an official language. The first bilingual legislation was only passed in 1989 (Zhao, 1997). Bilingual legal system of Hong Kong should be seen as a recent development, with a little over 30 years of history and yet to fully become independent of the English legal terms. In fact, as most common law jurisdictions use English and with Hong Kong being the sole using Chinese alongside English, it has an oversized influence on language used in Hong Kong’s legal system. It would simply be inconceivable to ignore the case-laws written in English, one of the most important principles in common law, or attempt to translate them all into Chinese.

Although efforts are done by the government to translate Chinese case laws into English and vice versa, universities offering or sometimes requiring law students to complete certain law courses in Chinese, the fact is common law is still overwhelmingly English on the world stage. Without using English, the common law system in Hong Kong would transform from a system of law connected with some of the most prosperous countries in the world, into a purely



domestic law void of its bloodlines. As such, it is impossible to retain the complete system of common law while simply ignoring English. Recalling that only little more than 20 years ago that a civil case in Hong Kong was first tried in Chinese (Legislative Council Secretariat, 2012), Chinese as a language for common law is a unique Hong Kong experiment still in its infancy.

### **Use of Mandarin (Putonghua)**

Various Mainland Chinese laws are in force in Hong Kong by virtue of Annex III of the Basic Law, including the controversial National Security Law recently imposed by Beijing. As these are legislation passed by the Chinese Parliament, there is no obligation to provide an equally authentic English text. In these cases, the English text is only for reference and only the Mandarin version has legal force (Annex III, Basic Law of Hong Kong, 1990). This might pose difficulties as judges might be forced to issue judgements based on a Mandarin version that they may or may not fully understand, and potentially result in injustices.

As the Basic Law states “Chinese” without more specification, Hong Kong judiciary believes that is meant to include both Cantonese and Mandarin as official, a position accepted by judges evidenced by previous proceedings done in Mandarin (Judiciary Administration, 2002). Therefore, the legal system might be trilingual instead of bilingual, adding more complexities.

### **Potential injustice**

Given the differences in trials conducted in Cantonese versus English (Ng, 2009), the case might have different outcomes when tried in different languages. The “spitting bitterness” seen in Chinese trials (Ng, 2009) might appeal to the jurors’ emotions, as the defendant is allowed to voice their sufferings even if that is not necessarily answering the question itself. A trial conducted in English might not allow that, and the jurors might feel differently. This may

result in systematic unequal treatment due to different practices when conducting trials in different languages and may lead some to question of the validity of the system itself.

On the other hand, when a Cantonese speaking person testifies in an English-speaking proceeding through an interpreter, inequality can similarly occur due to the differences in language used. In a case heard in the High Court, applicant requested to have his case heard by a Cantonese-English bilingual judge instead of an English monolingual judge. As the judge understood it, “it is the applicant’s contention that language is more than a mechanical means of conveying meaning: language gives colour, subtlety and texture to that meaning. Interpretation, no matter how competent, cannot hope to capture the full dimensions of that colour, subtlety and texture. That being so, all interpretation is an exercise in diminishment.” Furthermore, applicant argued that “if the judge is not himself a Cantonese speaker, said Mr Lee, if he must rely on an interpreter, how will he be able accurately and fully to assess that demeanor?” (Re. Cheng Kai Nam Gary, 2001) Notably, the judge did not address the credibility of the argument above but rejected the request on other grounds.

In my opinion, that is the essence of the potential injustice that might occur out of language given the current state of Hong Kong’s legal system. While use of Cantonese is allowed, those who choose to do so might suffer unequal treatment. Merely allowing the use of a language without providing adequate accommodation does not change the fact that inequality occurs. While attempts have been made to bridge the gap, notably by Hong Kong’s judiciary that published Bilingual Common Law Series starting in 2003 containing English judgements from Hong Kong and other common law jurisdictions and their Chinese translation, 115 out of 150 judges are bilingual as of 31 Oct 2011 (Legislative Council Secretariat, 2012), disparities continue to exist. When one or both parties are underrepresented, the case language is often in

Chinese (Legislative Council Secretariat, 2012), suggesting more effort is needed. In Inner Mongolia, a region of China where Mongolian is a minority language, study has identified ways of improving access to the legal system for Mongolian speakers by educating law students in Mongolian-Chinese bilingual mode (Fu, 2018). As mentioned above, universities in Hong Kong do offer law courses in Chinese but they only make up a small proportion of courses due to English being the ‘default’ and Chinese being ‘additional’, and far from being bilingual. Ironically, this paper discusses the inequality that Chinese is merely ‘additional’ is in English.

### **Limitations**

An experimental research might have been able to provide more insights with the possible evaluation of specific stakeholders in the system. More time and word count would also have allowed for a more in-depth analysis. Research could also be done in overseas to ascertain whether some of the possible confusion and bias is an outcome specific to Hong Kong’s multilingual legal system or can be interpreted more generally.

### **Conclusion**

While multilingualism is no threat to the credibility of the legal system on its own, certain factors related to language can and are likely to lead to more bias and confusion. Hong Kong’s implementation of a Chinese-English common law system has various shortcomings that continues to allow inequality to exist because of language. It is not merely enough to bridge the gap between languages, but also bridging the gaps in justice that exist in relation to languages. Hong Kong has yet to perfect its delicate execution of a multilingual legal system in order to deliver justice for all, not just for the well educated and well spoken.

When such is not done, inequality exists, and inequality persists.

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