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Committee for the Basic Law of the
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FINAL REPORT ON
LANGUAGE OF THE LAW

(passed by the Executive Committee on 8 August 1987)

Special Group on Law

1 Introduction:

- 1.1 With China's resumption of sovereignty over Hong Kong in 1997, the Hong Kong Special Administrative Region will be established. Under the concept of "One Country, Two Systems" the prevailing capitalist system and lifestyle of Hong Kong will remain unchanged for 50 years. On the other hand, the judicial system previously practised in Hong Kong will also be maintained. The problem of the language of the law thus arises.
- 1.2 Hong Kong has long been one of the common law jurisdictions in which English is the language of the law. Since the common law (including the rules of equity) will be maintained after 1997, the link with the language of the law, English, will persist because the common law is primarily expressed through decided cases and the courts look at decided cases not only from Hong Kong and the United Kingdom, but from the whole of the English speaking world where the system of common law is practised.
- 1.3 On the other hand, though English is the language of the common law and judges from other common law jurisdictions may be invited to sit on the court of final appeal in the HKSAR, it is politically and socially unacceptable to adopt English as the only language of the law after 1997 when China resumes its sovereignty over Hong Kong. Besides, with 98% of the population being Chinese and most of them do not understand English, the use of Chinese as a language of the law will have to be developed.
- 1.4 Members were of the view that the ideal solution was to develop a bilingual system ultimately, but they were also aware of the possible difficulties arising from differences in cultures, concepts, etc. between Chinese and English. Besides, it will take a considerable period of time for such a bilingual system to be fully developed. Nevertheless, members believed that attempts should be made to achieve this regardless of the difficulties.

2 Relevant Provisions in Annex I to the Joint Declaration

- 2.1 Section I, paragraph 4 - "In addition to Chinese, English may also be used in the organs of government and in the courts in the Hong Kong Special Administrative Region".

2.2 Section II, paragraph 1 - "After the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e. the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained ...".

2.3 Section III, paragraph 2 - "The courts shall decide cases in accordance with the laws of the Hong Kong Special Administrative Region and may refer to precedents in other common law jurisdictions".

2.4 Annex III, paragraph 4 - "The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdiction to sit on the court of final appeal".

3 Questions to be considered:

3.1 To what extent should the use of Chinese language be promoted for legal purpose, and what will be the future status of English as a language of the law?

3.2 Will it be possible to maintain the essential features of the existing legal system after 1997 if that system is to be conducted in the Chinese language? i.e. Will a common law system operate effectively in the Chinese language?

3.3 What strategies should be adopted in order to promote the use of Chinese as a language of the law?

4 Use of Chinese in the Government at present:

4.1 Communication with the public

-- Public notices, official forms, licences, and correspondence with the public are bilingual.

4.2 Councils and other advisory bodies

-- Papers are bilingual and simultaneous interpretation is provided at meetings.

4.3 Internal administration

-- With the localisation scheme, the Chinese language has been more commonly used, eg. in the Mechanical and Electrical Engineering Department.

-- In civil service recruitment, grades which require regular use of Chinese in their work, a minimum requirement of a knowledge of Chinese is normally stipulated.

5. Other developments in the wider use of Chinese language

- The Education Commission has recommended that individual secondary schools be encouraged to adopt Chinese as the medium of instruction.
- Additional teaching resources are provided for such school.
- A Chinese Textbooks Committee was established to ensure the availability of good quality textbooks in Chinese.
- The Working Party into Greater Use of Chinese Language in Courts and Court Procedure is also carrying out study in the use of Chinese.

6 Language of the Legislation

6.1 Background

- The third report of the Chinese Language Commission proposed in 1970 that all existing and future bills and ordinances be published in English and Chinese, but this recommendation has not been implemented due to the difficulty of legal translation, including a lack of sufficient expertise for such purpose.
- The Chinese Language Division later translated legislation of popular interest into Chinese and so far about 110 pieces of legislation or subsidiary legislation have been translated. But such translations are not authoritative, they are for information and guidance only, and there is room for improvement.

6.2 Present practice:

- The "Discussion Paper on the Laws in Chinese" was published in April 1986. The purpose of the Laws in Chinese project is to improve public legal knowledge by producing an authentic Chinese text of legislation enacted in Hong Kong.
- The Government has now embarked upon the task of producing by stages authentic bilingual legislation.
- The Interpretation and General Clauses (Amendment) Ordinance 1987 and the Official Languages (Amendment) Ordinance 1987 mainly provide for:
 - (1) enacting new legislation in Chinese as well as English, both texts being equally authentic.
 - (2) publishing authentic texts in Chinese of laws enacted in English, to be authorised by order of the Governor in Council after consultation with a Bilingual Laws Advisory Committee;

- (3) empowering the Attorney General to amend the text of an ordinance in one language, but without affecting its meaning, to ensure its harmonisation with an authentic text in the other official language;
- (4) resolving differences of meaning between the two texts;
- (5) empowering the Governor in Council to specify words and expressions in one language to be treated as equivalents of words and expressions in the other language.

-- The power under (2), (3) and (5) above will be subject to the prior approval of the draft text by resolution of the Legislative Council.

6.3 Future practice:

There are three different views regarding the future practice on language of the legislation:

- (1) Bilingual legislation;
- (2) English as the language of legislation and Chinese as a translation (but this proposal contravenes the Joint Declaration); and
- (3) Chinese as the language of legislation and English as a translation.

6.3.1 Bilingual legislation

-- The Chinese and English texts are equally authentic. There may be a period for gradual transition from having English as the primary language to having both Chinese and English of equal status.

-- Under a bilingual system, both languages have equal status.

Pros:

- i) When legislation is enacted in both Chinese and English, persons who are not proficient in English will be able to understand the legislation in Chinese which is equally authentic. Members of the legislature who are not proficient in English can also effectively participate in the process of law-making through the Chinese language.
- ii) It will maintain and strengthen the status of Hong Kong as an international business and financial centre. It will realise the resumption of China's sovereignty over Hong Kong on the one hand, and also take the practical value of English into consideration.
- iii) It is for the benefit of Hong Kong people since most of them are Chinese who are not proficient in English.

vi) Since the Joint Declaration stipulates that in addition to Chinese, English may also be used, it is desirable that legislation should be in both languages.

Cons:

1) When there are discrepancies between the two texts, it is difficult to decide which one shall prevail.

6.3.2 English as the language of legislation and Chinese as a translation.

-- This proposal is not in line with the Joint Declaration.

6.3.3 Chinese as the language of legislation and English as a translation.

Pros:

i) It can realise the resumption of China's sovereignty over Hong Kong.

ii) It is for the benefit of Hong Kong people since most of them are Chinese who are not proficient in English.

Cons:

i) The status of Hong Kong as an international financial centre will be undermined.

ii) Most legal professionals are trained in English. There may not be enough legal professionals who are proficient in Chinese. It will take a very long time before legal professionals who can practise or teach law in Chinese are available to adequately meet the demand of such change.

iii) Quite a number of legal concepts of the Common Law System have no Chinese equivalents, and it may be very difficult to translate the jurisprudential thinking behind those concepts.

iv) There may be difficulties in inventing Chinese Common Law terminology.

7. Language of the Courts

7.1 Present practice

At present, the proceedings in magistrate's courts and most tribunals may be conducted in either the English language or the Chinese language as the court thinks fit. Proceedings in the Court of Appeal, the High Court and the District Courts however must be conducted in the English language.

However, it does not preclude any party to or witness in proceedings in any court to use either the English language or the Chinese language, or such other language as the court may permit. (Please refer to Section 5 of the Official Languages Ordinance, Chapter 5 of the Laws of Hong Kong).

Court interpretation is available whenever required, but the language of the record is English. There may be a need for record to be kept in English until sufficient judicial personnel proficient in Chinese are available.

7.2: Proposals on the language of the courts after 1997

There are three different views in respect of the language of the courts after 1997.

- 1) "Higher courts"* may continue to conduct proceedings in English while proceedings in lower courts should be conducted in Chinese.
- 2) Chinese should be the language of the courts and English be a translation.
- 3) "Higher courts" may continue to conduct proceedings in English while proceedings in lower courts should be conducted in Chinese. This should be practised for a period of time and ultimately Chinese should be the language of the courts.

7.2.1 English should be used in "higher courts" whereas Chinese in lower courts

Pros:

- i) Since most personnel of the legal profession are proficient in English and receive their legal training in English, it will be more convenient and practical to take English as the language of the courts.
- ii) It is difficult to translate legal concepts under the Common Law system into Chinese. Some terms have no Chinese equivalents, which may have to be invented.
- iii) It is difficult to invent Chinese Common Law terminology.
- iv) Since the record is taken in English, there should be a continued use of English in "higher courts".

* High courts refer to the High Court and above. But if the jurisdiction of the existing district courts is to be expanded to include e.g. jury trial, then higher courts should include also the district courts.

- v) It will be a compromise in respect of the actual operation of the judiciary and the fact that China will be the sovereign state of Hong Kong. Since courts of the higher level have to handle cases that involve complicated legal principles, English should be used. On the other hand, courts of a lower level usually handle cases that are of simple factual nature, so Chinese can be used.
- vi) English is the language of international trade and finance as well as of technology. If Hong Kong is to maintain its position as an international commercial and financial centre as well as to attract foreign investment and technology, it is necessary that the international community has full confidence in its legal system. It is particularly important that the legal proceedings be conducted in the language which will be understood by the majority of the international community. For this reason, English should be used in the "higher courts".

Cons:

- 1) Since records have to be kept in English, the trial judge may have to act as his own interpreter (i.e. the trial proceedings are conducted in Chinese, and the judge interpret what he hears and writes the record in English).
- 11) Difficulties should not prevent earnest attempts from being made to implement the bilingual system in all of the courts.

7.2.2 Chinese as the sole language of the courts and English as a translation.

Pros:

- 1) It is a realisation of the resumption of China's sovereignty over Hong Kong.
- 11) It is in-line with the provision in para 4 of Section I of Annex I to the Joint Declaration, "In addition to Chinese, English may also be used.....", which implies a priority of Chinese over English.

Cons:

- 1) It will take a long time to train a new group of legal experts and staff who are proficient in Chinese. It is not practical for the time being.
- 11) Since the Common Law is essentially an accumulation of court cases which will be difficult to translate into Chinese, the need to rely on pre-existing case law may be reduced and the Common Law system may be eroded.
- 111) There are fundamental conceptual differences between the two languages and it is difficult to translate the legal terminology from one language to the other.

7.2.3 Bilingualism practised for a period of time and ultimately leading to using only Chinese in the courts.

Pros:

- i) It will be a natural development from a system of bilingual legislation. Initially, little Chinese will be used in courts but eventually with the availability of Chinese-proficient personnel, Chinese will become the sole language of the courts.
- ii) It is difficult to envisage the perpetual use of English in the SAR courts.
- iii) For the purpose of establishing a Common Law system in Chinese in the SAR ultimately, the use of Chinese as the language of the courts is advantageous, although the process will take a very long time.

8. Language problem of the Basic Law and resolution of conflicts

8.1 The Basic Law will be promulgated by the NPC in accordance with Article 31 of the Constitution of the PRC, hence the Basic Law will be written in Chinese.

8.1.1 However, in consideration of the unique situation of Hong Kong, and with the unprecedented practice of "One country, Two systems", a view held that the English version of the Basic Law should be given equal legal status as the Chinese original; and versions in both languages should be treated as official.

8.1.2 An opposing view held that since the Basic Law would be promulgated by the NPC which did not operate in English, it would be impossible for the NPC to pass an authentic English version of the Basic Law.

8.2 It was also suggested that the NPC should recognise an English version that has been adopted by the HKSAR legislature. In this way, the English version can be given authenticity and be used in the courts whenever necessary.

8.3 Another option would be the setting up of a Basic Law Committee under the NPC. All disputes regarding the discrepancies between the original Chinese text and the translated text of the Basic Law will be referred to this committee.

8.4 It was also proposed that in case of discrepancy between the texts, the Vienna Convention on the Law of Treaties (Cap 1) should be used.

8.5 Another view was that in case of discrepancy, the Chinese version should prevail.

9 Conclusion

- 9.1 Members generally maintained that a functional approach should be adopted in tackling the language problem of the legal field brought about by the establishment of the SAR. Objective elements such as the availability of Chinese-proficient judges, lawyers and interpreters, etc. should be taken into consideration.

- 9.2 Members advocated bilingualism and held that despite tremendous difficulties, an earnest attempt should be made to implement a bilingual system.

法律語言

最後報告

(1987年8月8日經執行委員會通過)

中華人民共和國香港特別行政區基本法諮詢委員會
法律專責小組

1. 前言

- 1.1 中國將在一九九七年對香港恢復行使主權，並設立香港特別行政區。根據「一國兩制」的構想，香港原有的資本主義制度及生活方式將保持五十年不變。此外，香港原有的司法制度亦將保留，因而產生法律語言的問題。
- 1.2 長期以來香港都是以英語為法律語言的普通法適用地區。由於在九七年後香港將沿用普通法（包括衡平法），普通法與其法律語言——英語的關係亦將繼續維持，因為普通法基本上是由以往的判例所構成的，而法庭在引用案例時不但引用本港及英國的案例，還會引用其他英語使用地區（普通法適用地區）的案例。
- 1.3 另一方面，雖然普通法制度是以英語為法律語言，而香港將來亦可從其他普通法適用地區聘用法官，但在九七年中國對香港恢復行使主權時，從政治及社會角度來看，香港都不宜採用英語為其唯一的法律語言。再者，百分之九十八的香港人口都是華裔人士，而其中大部份均不懂英語，所以需要把中文發展為法律語言。
- 1.4 委員認為最理想的解決方法是最終設立雙語制度，但同時他們亦瞭解中、英文各自不同的文化、概念所可能造成的困難。此外，要徹底發展雙語制度是需要相當長的時間的。但委員相信，無論所面對的困難是如何艱巨，總不應阻止香港人嘗試達到目標。

2. 聯合聲明附件一的有關規定

- 2.1 第一節第四段：「香港特別行政區的政府機關和法院，除使用中文外，還可使用英文。」
- 2.2 第二節第一段：「香港特別行政區成立後，香港原有法律（即普通法及衡平法、條例、附屬立法、習慣法）除與《基本法》相抵觸或香港特別行政區的立法機關作出修改者外，予以保留。」
- 2.3 第三節第二段：「法院依照香港特別行政區的法律審判案件，其他普通法適用的司法判例可作參考。」
- 2.4 第三節第四段：「香港特別行政區的終審權屬於香港特別行政區終審法院。終審法院可根據需要邀請其他普通法適用地區的法官參加審判。」

3. 有待考慮的問題：

- 3.1 在法律方面促進中文的使用，應至甚麼程度？將來英文作為法律語言的地位如何？

- 3.2 如香港的法律制度在九七年後以中文為法律語言，能否繼續保留現行法律制度的基本特色？即改用中文後，普通法制度能否有效運作？
- 3.3 為促使中文成為法律語言，應採取甚麼策略？
4. 目前政府使用中文的情況：
- 4.1 與市民溝通
- 公告、政府表格、牌照、與市民的書信來往都備有中英文本。
- 4.2 各議局及其他諮詢組織
- 文件備有中英文本，會議上提供即時傳譯服務。
- 4.3 內部行政
- 由於推行本地化計劃，中文使用更為普遍。在機電工程署的情況便是一個例子。
 - 在招聘公務員方面，如果招聘的職系在工作上需要經常使用中文，當局通常規定要有起碼的中文程度。
5. 推廣使用中文的其他發展
- 教育統籌委員會已建議個別中學採用中文為授課語言。
 - 教育署並向該等中學提供額外教學資源。
 - 為確保學校有質素高的中文教科書可用，當局已成立中文教科書委員會。
 - The Working Party into Greater Use of Chinese Language in Courts and Court Procedure (推廣在法院及審訊程序中使用中文的工作小組) 也在研究中文的使用。
6. 立法語言
- 6.1 背景
- 一九七零年，中文問題研究委員會第三次報告書建議現有及將來的條例草案及條例應有中、英文本。但由於翻譯法律的困難(包括這方面的專門人才短缺)，未能實行這建議。
 - 其後，中文公事管理局把市民關注的法例譯成中文，共翻譯了110條條例和附屬立法。但這些譯本都不是權威性的，祇能作參考或指導用途，而且譯文的水準也很參差。
- 6.2 現行情況
- 政府在一九八六年四月發表《中文立法問題討論文件》。中文立法計劃是為香港已通過的法例，制訂一套真確中文本，以增加市民對法律的認識。
 - 政府現已逐步為法例制訂真確的雙語本。
 - 一九八七年法律釋義及通則(修訂)條例及一九八七年法定語文(修訂)條例主要規定如下：
 - ① 以中文與英文制定法例，並兩者均為真確本。
 - ② 總督會同行政局在參照雙語法例諮詢委員會的意見後，授權就原以英文制定的法例，頒佈中文的真確文本。

- ③ 授權律政司對條例的一個文本，作不影響文意的修改，以使其與另一語文文本協調。
- ④ 解決中英文本在意義上的歧異。
- ⑤ 授權總督訂明以一種語文表達的單字和詞語，和以另一種語文表達的單字和詞語，具有相同意義。

— 在行使②、③、⑤所述的權力前，須先由立法局議決通過文本的草稿。

6.3 將來情況

就將來的立法語言，有三種不同意見：

- (1) 雙語立法
- (2) 用英文立法，設中文譯本(但這建議違反《中英聯合聲明》)。
- (3) 用中文立法，設英文譯本。

6.3.1 雙語立法

- 中英文本同為真確本。最初過渡時期，可能以英文為主、中文為次，但漸漸發展至中英文地位相同。
- 根據雙語制度，兩種語言地位相同。

贊成意見：

- (1) 如以中英文同時立法，不懂英語人士則可以明白法例，因法例的中文本也是真確本。不懂英語的立法機關成員可用中文有效地參與立法過程。
- (2) 香港能保持及鞏固國際商業及金融中心的地位。既能體現中國在香港的主權，又能兼顧英語的實用價值。
- (3) 對香港人有利，因為大部份香港人都是不大精通英語的華人。
- (4) 《中英聯合聲明》既然規定除使用中文外，還可使用英文，雙語立法是合理的安排。

反對意見：

- (1) 如兩個文本出現矛盾，很難決定以那一文本為準。

6.3.2 用英文立法，設中文譯本

- 這建議和《中英聯合聲明》有抵觸。

6.3.3 用中文立法，設英文譯本

贊成意見：

- (1) 可體現中國在香港的主權。
- (2) 對香港人有利，因為大部份香港人都是不大精通英語的華人。

反對意見：

- (1) 影響香港作為國際金融中心的地位。
- (2) 大部份的法律界人士都是以英語接受專業訓練的，精通中文的法律界專業人士可能為數太小。要培養能以中文執業及教學的律師，並要其人數足以應付這轉變的需求，實在需要很長的時間。
- (3) 不少普通法的法律概念，中文都沒有等同的概念可予表達，所以難以譯出這些概念所包含的法理思想。
- (4) 要創製普通法的中文詞彙，實非容易。

7. 司法語言

7.1 現行情況

目前裁判司署與大多數審裁署的審訊程序都可用中文或英文進行，視乎法院本身的決定。上訴法院、高等法院及地方法院的審訊程序則一定以英文進行。但與訟任何一方及証人在審訊中卻可使用英文或中文，或經法院批准的其他語文。（參閱法定語文條例第五條（香港法例第五章））

法庭設有傳譯服務，以供需要的人士使用，但紀錄則用英文。在未有足夠精通中文的司法人員之前，紀錄大概要沿用英文。

7.2 對九七年後司法語言的建議

就九七年後的司法語言，有三種不同意見：

- (1) 「高級法院」★可繼續以英文進行審訊程序，但低級法院的審訊程序則應以中文進行。
- (2) 以中文為司法語言，設英文翻譯。
- (3) 「高級法院」可繼續以英文進行審訊程序，但低級法院的審訊程序則應以中文進行。這做法只維持一段時期，最終應以中文為司法語言。

7.2.1 「高級法院」以英文為司法語言，低級法院則以中文為司法語言。

贊成意見：

- (1) 由於大部份的法律界人員都精通英語，並以英語接受法律訓練，法院使用英語則更方便實際。
- (2) 普通法的法律概念是很難譯成中文的。有些詞彙如在中文找不到相應詞時，便得自創新詞了。
- (3) 要創製普通法的中文詞彙，實非易事。
- (4) 由於紀錄用英文，「高級法院」應繼續使用英文。
- (5) 這是個拆衷辦法，既可照顧法院的實際運作，又能體現中國主權。由於「高級法院」審理的案件涉及複雜的法律原則，應使用英文。低級的法院通常只審理涉及簡單事實的案件，所以可使用中文。
- (6) 英文是國際貿易、金融及技術界所使用的語言。香港如要保持國際商業及金融中心的地位，並吸引外國投資與科技，則必須使人對其法律制度充滿信心。法律訴訟以國際通用的語言進行，實至為重要。因此，「高級法院」應使用英文。

反對意見：

- (1) 由於紀錄用英文，主審法官便要充任翻譯。（即訴訟程序如使用中文，法官便要把他所聽到的譯成英文，作為紀錄。）
- (2) 縱使困難重重，也不應阻撓司法雙語化的計劃。

★ 高級法院是指高等法院及在其以上的法院。但如目前的地方法院擴大司法權，例如審訊設陪審團，則高級法院也包括地方法院。

7.2.2 以中文為唯一的司法語言，設英文翻譯。

贊成意見：

- (1) 體現中中國在香港的主權。
- (2) 符合《中英聯合聲明》附件一第一節的規定：「...除使用中文外，還可使用英文。」，可見中英文有主次之分。

反對意見：

- (1) 要培訓精通中文的法律專才和人員，是需要很長時間的，所以目前這建議不切實際。
- (2) 由於普通法基本上是由以往的判例構成，把過去所有判例譯成中文，是異常艱巨的工作。如以中文為司法語言，可能會減少引用過去的判例，令普通法制度受損。
- (3) 兩種語言在法律概念方面有基本的分歧，所以翻譯法律詞彙十分困難。

7.2.3 起初一段時期使用雙語制，但最終中文會成為唯一的司法語言。

贊成意見：

- (1) 這是雙語立法制度下的自然趨勢。最初，法院祇小量使用中文，但有足夠精通中文的司法人員後，中文則成為唯一的司法語言。
- (2) 很難想像特區法院會永久使用英文。
- (3) 雖然整個過程需要極長的時間，但為了最終在特區設立一個使用中文的普通法制度，法院使用中文是有幫助的。

8. 基本法的語文問題及解決方法

8.1 基本法將根據中華人民共和國憲法第三十一條由全國人民大會頒佈，因此是以中文寫成的。

8.1.1 鑑於香港的獨特情況及全無先例的「一國兩制」原則，有意見認為基本法的英文本應與中文原文的法律地位相等，兩個文本同為正式的法律。

8.1.2 但反對意見認為基本法由人大頒佈，而人大不是以英文運作的，所以不可能要人大通過基本法的英文本為真確本。

8.2 有提議謂人大應承認香港特區立法機關通過的基本法英文本。這樣英文本便可成為真確本，供法院在需要時使用。

8.3 另有建議在人大之下成立一基本法委員會，所有因中文原文與翻譯本的歧義而產生的爭端，都交由這委員會處理。

8.4 有建議謂如原文與譯文有歧義，應引用維也納條約法公約(第一章)解決。

8.5 另一意見謂如原文與譯文有歧義，則以原文為準。

9. 結語

9.1 委員一般認為：在解決特區成立所帶來的法律語文問題時，應從實際功能方面着眼，顧及客觀因素(例如：精通中文的法官、律師、傳譯是否足夠?)。

9.2 委員主張採納雙語制度，並認為即使困難重重，也應竭盡所能，認真一試。

★ 本報告的討論過程以英語進行，故可參考英文本。