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Résumé de l'article

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The Translation of Judgments

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RÉSUMÉ

Cet article préconise l'adoption d'une approche en langue quotidienne dans la traduction de jugements. L'objectif premier est de développer graduellement parmi les juristes la conscience d'utiliser le chinois comme langue juridique, que ce soit pour la rédaction de jugements ou pour les procès. Le projet pilote de la traduction du droit mis en place par le sous-comité de la traduction des cas de juridiction a été une bonne tentative de donner l'élan voulu, il a mis en relief un grand nombre de problèmes juridiques à résoudre. Cet article examine les solutions potentielles de ces problèmes, et notamment l'utilisation des usages généraux du chinois. Si on ne règle pas les problèmes de la rédaction et de la compréhension des jugements, le bilinguisme juridique devant les tribunaux ne sera pas un vrai succès.

ABSTRACT

This paper advocates the adoption of a plain language approach in the translation of judgments. The front-line objective is to gradually develop among legal practitioners the consciousness of using Chinese as a legal language, whether it is for judgment writing or for use as the trial language. While the pilot project on the translation of case law launched by the Subcommittee on the Translation of Case Precedents was a good attempt to boost the translation incentive, it exposed a number of problems in legal translation as yet unsolved. This paper explores potential solutions to these problems, including studying the syntactic differences between English and Chinese, the employment of common Chinese usages, and the application of legal knowledge, among others. This paper argues that legal bilingualism in courts will not be fully achieved if the problems of writing or understanding judgments persist.

MOTS-CLÉS/KEYWORDS

Hong Kong, judgments, syntactic differences, common usages, legal knowledge

Background

The legal system enforced in Hong Kong¹ before and since the handover of sovereignty to Mainland China in 1997 is the common law system. The signing of the Sino-British Joint Declaration in 1984 gave Hong Kong a high degree of autonomy by implementing the “one country, two systems” policy, thus creating the incentive to establish a bilingual legal system. A Basic Law was promulgated in 1990 with Article 9 providing that the legislature and the judiciary of the future government may use English in addition to Chinese as an official language.

Use of Chinese in Court Proceedings

Thomas has proposed that a bilingual legal system should “ensure full and equal access to the legislature, to the laws and to the courts by both the English and Chinese

speaking people each in their own language" (1988: 5). In order to develop full bilingualism, it is important that both languages be extended to court proceedings.² Before the 1990s, the progress of the use of Chinese in courts was slow. In 1988, under the recommendation of a working party, magistrates were allowed to write the notes of proceedings in English, even if the trials were conducted in Chinese.³ However, this did not receive much support from either the Bench or the Bar (Chen, 1990: 70-71; Chan, 1992: 26-27), as legal practitioners were educated in English and were accustomed to using English in courts. The Official Languages Ordinance was further amended in 1995. Under Section 5(1), 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, though it specifies in Section 6(2) that English should be used in the Court of Appeal, High Court, District Court and Lands Tribunal. In addition, Sections 5(3) and (4) provide that a witness or a legal representative may use either or both of the official languages in courts. The 1995 amendment has helped to extend the use of Chinese from the lower to the upper levels of courts step by step. Before the 1990s, English was the primary language of court proceedings and a person not conversant in English had to communicate with the court through an interpreter. All Chinese documents produced in court as evidence had to be translated into English before trial. All court records, such as notes of proceedings and judgments, had to be in English. Now, a judge has the absolute power to decide the language for a trial, but he will first take into consideration factors such as the nature of the case and the preference or interests of the parties involved. If any person is not conversant in the language to be used, an interpretation service will be provided. As is now practiced in Hong Kong's bilingual court system, important judgments with reference value are translated into either English or Chinese to facilitate their access by monolingual legal professionals and lay people.⁴ Judgments for appeal purposes must also be translated upon the request of any judicial officer or litigant.

In April 1995, in order to facilitate the use of Chinese in courts, a Bilingual Court Documents Unit (雙語法庭文件組) was set up under the Department of Justice's Prosecuting Division, to prepare bilingual versions of prosecution documents. These include charge sheets, indictments, summaries of facts, witness statements and documentary exhibits.⁵

In December 1995, the High Court heard its first case (*sun Er Jo v Lo Ching & Others*)⁶ in Cantonese.⁷ In this case, as the defendants were unrepresented and the title deeds in question were 30 year-old documents, the presiding judge, Justice Wally Yeung, decided to conduct the trial in Cantonese. The case was later reported in Chinese.⁸

In early 1998, a Bilingual Legal Documents Unit (雙語法律文件組) was established in the Department of Justice's Civil Division, to prepare Chinese texts of various types of legal and court documents for civil proceedings involving the Government, such as contracts, tenders and franchise agreements, etc.⁹

The use of Chinese from the lower to the upper courts has increased quite extensively since the passing of the 1995 amendment ordinance. Nowadays, a judge has the discretion to choose the language for a trial and for writing the judgment. Many judgments have to be translated for appeal purposes and for public access.

The function of the Committee on the Bilingual Legal System (雙語法律制度委員會),¹⁰ which was established in mid 1998, is to monitor the development of legal

bilingualism, including the translation of judgments. In order to investigate the feasibility of this task, a Subcommittee on the Translation of Case Precedents (案例翻譯小組委員會) was formed in October 1998.

Since judgments form an integral part of common law, it is worthwhile exploring the problems of translating judgments as well as the translation skills. This paper will look at the translation of judgments from the plain language approach. The next section will report on the pilot translation project launched by the subcommittee. The results of the project have revealed the difficulties of judgment translation, which will be dealt with in the later sections.

Establishment of the Subcommittee on the Translation of Case Precedents and the Launch of the Pilot Translation Project of Case Precedents

The objectives of the Subcommittee on the Translation of Case Precedents are to identify judgments for translation on a pilot basis, to formulate strategies for the systematic translation of case law, and to devise a mechanism for vetting the translations by legal professionals. In order to achieve these objectives, the subcommittee, under the chairmanship of Justice Wally Yeung, launched a three-month pilot project (from mid-January 1999 to late April 1999) to translate selected cases. A report on the findings and recommendations was compiled in May 1999.¹¹ The aims were to assess the feasibility of a full-scale exercise to translate significant case precedents, to identify problems that might arise during the translation process, to examine possible work arrangements and vetting mechanisms, and to explore likely resource requirements.

In view of staff constraints, the subcommittee selected 33 cases from among the cases recommended by the Judiciary, the Bar Association, the Law Society and the Department of Justice. The Judiciary, the Official Languages Agency and the Department of Justice shared the translation of these cases. By late April 1999 – the end of the pilot project – a total of 25 cases (483 pages) had been translated.

Recommendations made in the Report for the Pilot Translation Project

The report identified the problems that translators had encountered, some of which are included in a later section of this paper in which the translation methodology is discussed. At the end of the report, the Subcommittee recommended an appropriate translation strategy and authentication mechanism. The most important suggestions made, which are also the concerns of this chapter, are briefly reported below:¹²

(a) **Scope of a full scale translation exercise**

Regarding the intensive resource requirements in translating judgments, the Subcommittee agreed that if a full-scale translation exercise was to be launched, it should concentrate on local judgments ... Important past precedents and judgments of other jurisdictions should be translated on a selective basis.

(b) **Potential use of the translated precedents**

The original objective of the Subcommittee was to produce authoritative translation for citation in courts. To achieve this purpose, consistency and accuracy would be of paramount importance. Although producing verbatim translation was time-consuming and resource intensive, as borne out by the pilot exercise, the Subcommittee agreed that it was necessary to adhere to the original objective. However, if

the translation was to be used as reference or educational materials only, a comparatively “free” translation or even “paraphrasing” could serve the purpose and would require less time and resources; the resultant translation could also be more readable and comprehensible. There is therefore a need for the main committee to define the objectives of the translation exercise and the potential uses of the translated judgments.¹³

(c) **Dedicated translation team**

In view of the considerable background legal knowledge required for translating judgments, a special set-up is necessary to facilitate the accumulation of experience and expertise, to enhance efficiency and to ensure consistency of style and format. The availability of legal professionals as part of the team is essential to provide professional guidance and advice as and when required.

(d) **Translation protocol**

There is a need to develop guidelines on the general principles and translation protocols, the degree of consistency of key words on a similar topic, the use of Cantonese or Putonghua renditions of the slang, idioms or spoken words used in the judgments, and the means of dealing with different legal terms currently used by different sectors of the community. It may be necessary to deal with names and proper nouns in accordance with a standardized transliteration system.

(e) **Training of translators**

The progress of translation was surprisingly slow. On average, each translation team managed to translate only about 1.5 pages per working day. Legally inexperienced translators could only achieve a superficial word-for-word mapping because of their inadequate knowledge of the legal system, the subject matter of the case, and the relevant legal principles. They had difficulty in understanding legal concepts such as “estoppel” and “fundamental breach”. In view of the amount of legal knowledge required to appreciate the essence of the judgments, lay translators should be given some training on basic common law principles, basic legal concepts, the structure of courts, and court proceedings.

Purposes of and Arrangements for Translating Case Law

This paper will identify the approach involved in the translation of judgments, in response to some of the suggestions made by the Subcommittee on the Translation of Case Precedents. However, the approach that should be used in translating judgments depends on the need for translation and on its purposes. This involves two questions:

- (a) Is it necessary for Hong Kong to translate the case law after its statutory law is fully bilingual?¹⁴
- (b) If yes, what are the purposes of translating the case law?

There are many objections from within the legal profession, which argues that if Hong Kong needs Chinese case law for lawyers to use in courts, then Hong Kong will also need to translate the case law of other common law jurisdictions, because a common law legal system can draw on judicial precedents from other common law jurisdictions. Wong (1998 November: 34) did not think it is necessary to translate the precedents:

While the introduction of bilingualism in Hong Kong law has generally been welcomed by those outside of the legal profession, many of those within the profession have voiced

some concern. One of the issues often referred to is the inherent difficulty of translating into Chinese legal cases, precedents, and textbooks. However, I would argue that such a translation project is indeed unnecessary, as we are not pursuing a monolingual legal system where everything has to be in Chinese. Use of Chinese in Hong Kong legal practice is meaningful only where the interests of the client so demands.

Wong's remarks are true only if a lawyer, when giving advice to his/her client(s), does not have to explain in Chinese which legal case(s) s/he will refer to in courts and the legal arguments that will be involved. If a Chinese translation of a number of cases is available, a client is free to read the translation of any case that is similar in nature to his/her own case.¹⁵ Justice Wally Yeung (2002: 367) held the view that whether lawyers could have enough Chinese judgments and authoritative Chinese books to cite in courts depends on the number of Chinese trials: “如法庭少用中文審理案件，中文判案書及具權威性的中文法律書刊的數量不會多。律師陳述時亦不能援引足夠的中文案例或其他具權威的中文法律書刊將案件的法律觀點闡釋及引伸，以協助法官判案。” The availability of a great amount of Chinese judgments (whether written in Chinese or translated into Chinese), can in turn encourage greater use of Chinese in trials. A Chinese extract may not adequately present the subtleties of the legal arguments involved in a case, and this may affect a client's decision about how s/he should act in a case. Nowadays, lawyers play a leading role in explaining points of law to their clients. A Chinese translation of the case law can significantly improve a client's understanding of the law, and help empower a client in the decision-making process without undermining a lawyer's professional position as an advisor to his/her client. It is in the interests of the clients that Hong Kong should aim at a systematic translation of judgments that are of high reference value. The translated texts should accurately and clearly present the particular arguments of law put forward by the parties, the application of the law to the facts by the judge and the decision of the judge.

Barristers 梁家傑 and 徐嘉華 (2002: 189 and 194), when pointing out the value of using Chinese in writing judgments, agreed that the common law knowledge can be disseminated to the public through the process of translation:

... 無論是口頭的結案陳詞或是書面的結案陳詞，律師都應該把所有引述的法理根據及有關的普通法判例認真的翻譯過來，以協助法庭。此舉也可以令其當事人了解案情的理據。... 中文判詞是以中文發展普通法的一個重要基礎。法官在寫判詞時，可以把握機會將艱深的普通法概念及法理根據通過判詞中的討論有層次及理性地表達出來。這對中文讀者了解普通法概念及原則極有裨益 ...

Justice Wally Yeung (2002: 363-364) pointed out the difficulties that may be encountered, but emphasized the importance of using the language of the majority for writing judgments:

由於中文判案書的數量少，判案書中文翻譯版本的質素亦未有保證，其權威性及認受性便受到懷疑，加上沒有任何公營或私營機構有系統地將中文判案書輯錄和出版，故中文判案書未能普及，亦不能發揮其應有的效力。... 一個司法制度不採用大部分市民通常使用的語言，不論多麼完善，都不可能完全接受。市民對法律認識不足，再加上語言隔膜，會對整個法律制度產生疑慮。

The Government should continue to encourage more use of Chinese in courts. If the use of Chinese is going to increase in courts and judges are more eager to write judgments in Chinese, the Chinese common law will be more assimilated in Hong Kong. Chinese judgments are another door that can enable the public to know more law.

Although the Government strived to encourage the use of Chinese in courts, recent statistics show that more trials are conducted in Chinese in the magistracies than in the appellate courts.¹⁶ Tang (1998 January: 21) expressed his fear of using Chinese:

The Department of Justice has completed the compilation of bilingual statutes, yet most of the legal practitioners in Hong Kong continue to use English in drafting legal documents and in court. The use of Chinese is progressing slowly. The legal system is the cornerstone of social stability. Accordingly, we lawyers tend to be conservative and prefer to implement change slowly. We fear making mistakes and are unwilling to take the initiative required to use Chinese. A lack of training in Chinese compounds this fear, forming a vicious circle.

Tang's comments show two things. Firstly, for lawyers to feel confident in using a translated judgment for citation in courts, the contextual meaning in the source language should be reproduced accurately in the target language. Secondly, it is only through constant use and practice in courts that Chinese can become as effective a means of communication of legal thought as English. Hong Kong should continue to translate cases with reference value, especially significant cases from the High Court, so that lawyers or the public can access the Chinese version for reference and have more confidence in using Chinese in courts. It is encouraging that there is a steady rise in the number of Chinese judgments, especially in the District Courts (from 0% in 1997 to 27% in 2004) and the Courts of First Instance (from 9% in 1997 to 31% in 2004).¹⁷ Hong Kong need not aim at translating all the local and overseas judgments, but should aim to gradually build up among legal practitioners the consciousness of using Chinese as a legal language.

As suggested by the Subcommittee on the Translation of Case Precedents, a case selection committee should be set up to decide the priorities for translation. Lee's (1998: 4) suggestions of classifying and publishing the translated versions in loose-leaf editions are worth considering:

[...] we must embark on the formidable task of translating some of, if not all, the cases in different law reports [...] it is advisable and appropriate to translate these law reports on a case-by-case basis, and classify thereafter the translated versions according to the area of law to which they each belong [...] and then have the translated versions published in loose-leaf and put in one separate binder [...] At the end of the day, and over years of accumulation, we can expect to have numerous different binders containing translated versions of cases from different law reports titled 'Contract Law', 'Company Law', 'Family Law', 'Tort', etc.

As the Chinese translation is prepared for the use of both legal practitioners and the public, this paper will try to develop a methodology of translation from the plain language approach, so as to reduce the distance that separates the cultural background of the source text and the perception of the source text by the target readers.

The Nature of Judgments

Common law is constituted by legal rules established by judicial decisions after judges have heard the cases before them, and statute law comprises the legal rules contained in legislation passed by the HKSAR¹⁸ legislature. A judgment forms an integral part of a trial process. If any judgment involves important rulings on questions of law, it

will be reported and becomes a jigsaw piece in the large volume of precedents that form the case law. The doctrine of binding precedent is called *stare decisis*, by which precedents are authoritative and binding and must be followed by another court.

Today's legislative discourse retains its unique identity as a "highly specialized and distinctive discourse type"¹⁹ with the presence of complicated or semi-complicated legal concepts and syntactic structure. Judgments are less formal and rigid than legislative texts. Maley described the language of judicial decision, whether spoken or written, as "reasonably flexible and varied but nonetheless containing recognizably legal meanings, in predictable patterns of lexicogrammar", and he commented that it is "the closest approximation to everyday speech of all public legal discourses" (1994: 13). As a judgment is a decision of a judge or judges after hearing a trial or appeal, it usually contains components, like the description of the case, the parties' contentions and how they lead to the court's conclusion. Judgments follow a certain format. The introduction introduces the nature of a case, the parties involved and their legal relationship, as well as the charge(s) the defendant(s) is/are facing or issues in dispute. The introduction is followed by the "brief facts of the case", which may involve different topics and terminologies. The brief facts are followed by the arguments made by the involved parties from their perception of the legal points of view. Finally, the court's conclusion will be given with a detailed analysis of how it perceives the legal arguments presented by the parties. A judgment may contain the opinions of several judges if a case is heard by more than one judge.

A judgment has a significant social function as it contains reasoning of the law, and solutions to legal arguments. Justice Roslyn Atkinson (2002, 13 September: 1) stated that there are four purposes for any judgment that is written:

- (a) to clarify your own thoughts;
- (b) to explain your decision to the parties;
- (c) to communicate the reasons for the decisions to the public; and
- (d) to provide reasons for an appeal court to consider.

If lawyers have to explain to their clients that they won or lost a case, and a judgment serves as a reference to both lawyers and the public as to why a decision was reached, nobody will disagree that a judgment must be clear and precise so that it can be accessible to diverse readers. Some plain language advocates have suggested ways of simplifying the style of writing of judgments. Their suggestions are similar to those made for legislative drafting, and they include "keep sentences short", "prefer the active to the passive", "avoid archaic words", "prefer concrete terms to abstract ones", and "beware of unintended ambiguity" (Butt 2000: 2-5; Atkinson 2002, 13 September: 5-7). However, not many books or papers talk about the translation of judgments, especially from the plain language approach. Ng's statement helps provide a general description of the difficulties of translating judgments:

法律文字向來極難中譯，法庭的裁決詞內容涉及事實的描述、法理的爭辯、法律的闡釋，加上法庭口頭辯論傳統之下建立的一套語言，就比翻譯尋常的法律文字更難了...法官閒閒的一句話，譯者可能要搜索枯腸老半天...判詞原文引經據典...時間、心血，不是未經此道的人可以想像得到的。...法庭裁決的內容廣博，翻譯裁決書的最初幾年，可以料想，一定差不多每篇都是新材料，每篇都是開山劈石的工作；要打穩了基礎，累積了先例，立了實際的方法規則，才能快捷起來。(quoted from Li 1998: 8).

Translation experience has to be accumulated over a number of years before the development of legal Chinese can be improved for use in both statutes and judgments.

Translation Methodology

Translation was once viewed as a purely linguistic transcoding activity, whereby the linguistic signs of one language could be replaced by the linguistic signs of another language. A dominant approach that has recently been developed among a group of German scholars (like Katharina Reiss, Hans J. Vermeer and Justa Holz-Mänttari) is that translation is culturally rather than linguistically oriented. If translation is a cross-cultural transfer, whether or not a piece of translation is intelligible to target readers depends on the target readers' perception of the cultural background of the source text.

In order to identify the problems that would be encountered during the translation process and to find solutions to these problems, five judgments²⁰ with their Chinese translations have been examined. These five judgments are:

- (a) [1999] 3 HKLRD 907 (FACC 4/1999)
HKSAR v Ng Kung Siu and another
- (b) CACV 281/1998
Tong Tim Nui and others v Hong Kong Housing Authority
- (c) FACV 13A/2000
Secretary for Justice and others v Chan Wah and others
- (d) HCA 6662/1997
Charles Sin Cho Chiu v Tin Tin Publication Development Limited and another
- (e) HCB 3869/1999
Wong Kong Ming v The Hong Kong and Shanghai Banking Corporation Limited

Use common usage

In literary texts, one of the functions of language is aesthetics. The use of metaphors and sound effects is common to express personal emotions or to create certain effects. In contrast, the language used in the text of judgment is mainly expressive and informative in function, as a judgment is characterized by a straightforward description of facts and arguments of points of law. Hence, the use of archaic or metaphorical expressions is inappropriate. As pointed out by 孫懿華 and 周廣興, the use of direct and precise words is important for judgments:

起訴書系列與判決書系列，運用敘述性語言表達依法認定的事實，是為定罪量刑提供依據...只要將事實情節敘述得準確、簡明、扼要，就是達到了要求。正如陳望道先生在<<修辭學發凡>>中所說：“語辭常以意義為主，力求表現的意義不另含其他的意義，又不為其他意義所淆亂。”(1997: 236-237).

The three examples given below demonstrate the difficulty of understanding archaic, unfamiliar or metaphorical expressions:

Example 1: HCA6662/1997

“As I have already pointed out, the case of the 7 Honourable Men was water long gone under the bridge. There was no reason to dredge it up” (at 9).

“正如本席曾指出，七君子案早已是明日黃花，斷沒有理由去把它翻挖出來。”(at 7).

“明日黃花” is defined as “比喻已失去新聞價值的報導或已失去應時作用的事物” in the dictionary <<現代漢語詞典>>, which was originally an appropriate idiom for the translation of the idiom in the source text. However, “明日黃花” (literally translated as “tomorrow’s yellow flower”) is a metaphorical expression and would be better replaced by the common usage “陳年往事”.

Example 2: FACV 134/2000

“Mr Chan Wah ..., now in his late 60s, and Mr Tse Kwan Sang ..., now in his late 40s, were both born and brought up and have lived all their lives in their respective villages” (at 1).

“年近古稀的陳華先生 ...與年近五秩的謝群生先生 ...均分別在其鄉村出生、成長，並一直居住至今。” (at 2).

Both “古稀” and “秩” are classical Chinese. “古稀” is a surrogate for “seventy years old”; “秩” means “ten years”, and therefore “五秩” means “fifty years old”. “年近古稀” and “年近五秩” mean “near the age of seventy” and “near the age of fifty” respectively. As modern Chinese is used in Hong Kong, most people will be entirely unfamiliar with these two terms. Target readers will understand the terms if the ages are mentioned in a direct way as in the source text. “In his late 60s” can be translated as “年近七十”, and “in his late 40s” can be translated as “年近五十” or “年近半百” (“半百” literally means “half of a hundred” and is in common usage).

Translate the cultural meaning instead of the semantic meaning

It has long been established by linguists and anthropologists that there is a close and dynamic relationship between language and culture. Edward Sapir began his essay on “Language, Race and Culture” (1949: 207) with these words: “Language has a setting ... language does not exist apart from culture” (quoted from Katan 1999: 73). House (2002: 96) expressed a similar view:

Linguistic units [...] can in any case never be fully understood in isolation from the particular cultural phenomena for which they are symbols [...] Conceptions of language within the broader context of culture, whereby meaning is seen as contextually determined and constructed.

Katan (1999: 124-125) introduced the frame theory proposed by Neubert and Shreve and by Hans Hönl in his book *Translating cultures*. Neubert and Shreve (1992: 60) defined frames in terms of organization of experience and knowledge repertoires. Hans Hönl (1991: 79-80) described frames as a combination of prior knowledge, generalizations and expectations regarding the text. Katan (1999: 125) suggested that a translator should act as a cultural mediator who has the ability to understand and create frames during the decoding and encoding translation process: “The mediator will be able to understand the frames of interpretation in the source culture and will be able to produce a text which would create a similar set of interpretation frames to be assessed in the target reader’s mind.”

The following example shows that the translator involved understands the local culture well, and with his/her knowledge of the cultural characteristics of the Chinese language is able to find proper target-language equivalents for some of the terms in the source text:

Example 3: HCA6662/1997

“The reason why a libel published of a large or in-determinate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration” (at 5).

“所發佈的誹謗言論針對一大批或一批數目不明、籠統稱之的人，不構成訴訟根據。這是因為證明原告人實際上是誹謗陳述所指的其中一人是很難的事。教育程度不高的人或普羅大眾慣於籠統地提出毫無根據之批評。人們也有只為故作談諧而誇大其詞。” (p. 4).

“Habit” is usually translated as “習慣” or “慣於”, but either term will be a literal translation and imply “a repetition of behaviour with aim(s) in mind”. The adverb “籠統地” is skilfully added to imply that “people like to gossip in a casual way or without any serious aims in mind”. The translator also did not translate “vulgar minds” literally as “粗俗的人”, but chose to interpret it in a broad sense and translated it as “普羅大眾” (meaning “general people”) on realizing that the behaviour of “making unfounded generalizations” was something done by the general people. “Facetious” is a word to modify “exaggeration”, and if the phrase “facetious exaggeration” is literally rendered as “談諧的誇張” by following the structure of the source text, the expression will turn out to be very awkward. To produce a natural expression to reflect the cultural connotation of the phrase, the translator used “facetious” to describe instead the facetiousness of people and rendered the phrase as “故作談諧而誇大其詞” (meaning “people like to behave in a facetious way by exaggerating things”). The above analysis shows that “the usual meaning (or literal meaning) of a word or a sentence is different from the meaning it has in certain specific circumstances” (Ke 2001: 158). A translator has to understand the beliefs, customs, values and habits of a culture before s/he can produce an accurate translation.

Pay attention to the sequence of sentences

According to Newmark (1988: 47), when translation aims at translating at the author’s linguistic level rather than at the readership’s level, the semantic translation approach should be adopted. Semantic translation “attempts to render, as closely as the semantic and syntactic structures of the second language allow, the exact contextual meaning of the original” (1986: 39). In translating legal texts, it is desirable to render, in addition to the contextual meaning, the grammatical and stylistic pattern of the source text as closely as the semantic and syntactic structures of the target language allow.

Example 4: HCA6662/1997

“The court has to consider the natural and ordinary meaning which the words convey to ordinary reasonable persons” (at 6).

“法庭須考慮，有關言詞的自然及一般含義對一般合理的人所傳達的意思。” (at 4).

Example 5: [1999] 3 HKLRD 907 (FACC 4/1999)

“Article 1 states that this Law is enacted in accordance with the Constitution ‘with a view to defending the dignity of the National Flag, enhancing citizens’ consciousness of the state and promoting the spirit of patriotism’” ([1999] 3 HKLRD 907, at 913; FACC 4/1999, at 3).²¹

“第一條述明該法是‘為了維護國旗的尊嚴，增強公民的國家觀念，發揚愛國主義精神’而根據憲法制定的。”(FACC 4/1999, at.2).

Example 4 can also be translated as “法庭須考慮，一般合理的人對有關言詞的自然及一般含義的理解。” However, the translator chose to follow the word order of the source text, so as not to change the focus or stress of the text. In example 5, the focus in the translation has been changed by altering the position of the first (“this Law is enacted ... the Constitution”) and the second (“with a view ... spirit of patriotism”) subordinate clauses. To retain the focus in the source text, the sentence can be translated as “第一條述明該法是根據憲法制定的，目的是‘維護國旗的尊嚴，增強公民的國家觀念，發揚愛國主義精神’。”

Judgments that are written in English are characterized by long sentences with clause complexes. When discussing the topic of “cohesion and discourse”, Halliday (1994: 309-310) elucidated that conjunction is “a way of setting up the logical relations that characterize clause complexes” and is one of the devices used to achieve cohesion²² in a text. English syntax is called “hypotaxis” when sentence components or clauses are joined together using connective words (of which conjunction is one kind), as is shown in examples 6 and 7 (with the connective words underlined). Connective words are not often used in Chinese and Chinese syntax is characterized by “parataxis”. When translating from one language to the other, Chen observed that “the translator has to follow the author’s train of thought, and understand the various meanings and relationships in the source text in order to produce a faithful translation” (1999: 131). As some languages are more hypotactic and some are more paratactic, Eggins (1994: 105-106) described how a translator can handle textual construction appropriately:

[...] as part of their understanding of how a text is constructed and functions, translators should be able to recognize not just the specific functions of cause, reason, time etc., but also the more general functions of elaboration (restating or clarifying), extension (adding to or modifying) and enhancement (extending by specification) (Fawcett 1997: 97).

Example 6: [1999] 3 HKLRD 907 (FACC 4/1999)

“In considering the question of necessity,²³ the Court should give due weight to the view of the HKSAR’s legislature that the enactment of the National Flag Ordinance in these terms including Section 7 is appropriate for the discharge of the Region’s obligation to apply the national law arising from its addition to Annex III by the Standing Committee” ([1999] 3 HKLRD 907, at 925; FACC 4/1999, at 13).

“香港特區立法機關認為，鑑於人大常委會已通過將國旗法列入<<基本法>>附件三內，特區[立法會]制定包括第7條在內的國旗條例的有關條文，以履行在香港實施這條全國性法律的責任，此舉是恰當的。本院在處理‘是否必要’這問題時，應對這個看法予以充分考慮。”(FACC 4/1999, at 11).

In example 6, the translator took into consideration the paratactic nature of the Chinese language and translated the part “the view of the HKSAR’s legislature ... by the Standing Committee” in the following time sequence:

The view of the HKSAR's legislature that	{	the Standing Committee passed (the decision of) adding the National Flag Ordinance into Annex III [of the Basic Law]	}	should be given due weight by the court when considering the question of necessity
		the enactment of the National Flag Ordinance is appropriate		
		(the reason of enactment) was to discharge HKSAR's obligation to apply the national law		

The Chinese translation ends with the part “in considering the question of necessity, the Court should give due weight to the view”. In these two parts, the words “the view” are repeated, though they are translated differently as “認為” in the first part and “看法” in the second part.

“Repetition” is a way of creating cohesion, as Fawcett (1997: 91) explained: “The most obvious device for holding parts of a text together is simple repetition, or ‘recurrence’, to use the technical term ...”. If the structure of an English sentence is convoluted, containing clause complexes, this sentence can be deconstructed in the Chinese translation by breaking the sentence into smaller time events and arranging these time events in chronological order. The paratactic nature of the Chinese language allows the creation of an indefinite number of sentences interlinked with each other in meaning without the use of connective words.

Example 7: CACV 281/1998

“I am also satisfied that the Judge [Sears, J.] was in error in ordering that damages should be payable by the Hong Kong Government for the breach of the promise it had allegedly made” (at 12).

“本席亦信納施偉文法官命令香港政府須為違反其被指稱的承諾而作出損害賠償的判決實屬錯誤。” (at 10).

In the Chinese translation of example 7, in order to follow the source text’s subordination structure, the translator used the long clause “ordering that damages ... had allegedly made” to modify the word “judgment”; the structure of the translation is illustrated here in English using brackets:

I am also satisfied that Judge Sears, J.’s judgment in (ordering that damages should be made payable by the Hong Kong Government for the breach of the promise it had allegedly made) was in error.

To use a long clause as a modifier will render comprehension difficult and is not a normal order of words in Chinese. As pointed out by Allwood, Andersson and Dahl in their book *Logic in Linguistics*, “a formal language is a set of expressions which is such that it is correlated to a vocabulary from which the expressions are constructed according to the rules of syntax and interpreted by the rules of semantics” (1977: 45). In other words, “vocabulary” and “rules of formation”²⁴ are two essentials that make up the syntax of the logic.²⁵ In example 7, the translation should break the original sentence into two sentences. The two sentences can then be put side-by-side according to the time sequence, which is a construction manner of paratactic structure. Example 7 can be translated as “施偉文法官命令香港政府須為違反其被指稱的承諾而作出損害賠償， 本席信納此項的判決實屬錯誤。”

Background knowledge of the legal system and subject matter of the case are required

Linguistic awareness is a prerequisite for every translator. Alcaraz and Hughes believed that a legal translator should also have “a working knowledge of the main features of the English legal system” (2002: 47). “Legislation” is a body of statutes regulating social behaviour. A translator has to understand what legal action(s) is/are prescribed by a legal rule through language, before s/he will be able to render this legal rule into another language with the greatest possible accuracy. Judgments constitute another specific legal genre. A “judgment” is a court decision on a case based on law and thus also represents a legal action. A translator has to understand what a law means before s/he can accurately translate the legal points raised by the involved parties and the judge. The problems encountered by the translation teams in the pilot project of judgment translation that took place in early 1999 have been identified:

Translators who were not legally trained had difficulties in understanding the legal concepts [...] Extensive and time-consuming research into the legal principles and the cases used in the judgment was necessary in order to produce a piece of meaningful, stand-alone translated judgment (1999: 4).

Example 8: CACV 281/1998

“There was no breach of contract or tortious behaviour by the Hong Kong Housing Authority here which could have justified an award of ‘damages’ in these public law proceedings” (at11).

“在本案中香港房屋委員會根本沒有作出任何足以證明應在這些公法訴訟中判申請人‘損害賠償’的違約或侵權行為。” (at 9).

If one is familiar with the public law, the above sentence can have two meanings:

- (a) The breach of contract or tortious behaviour by the Hong Kong Housing Authority was not serious enough to have justified an award of damages.
- (b) There was totally no breach of contract or tortious behaviour by the Hong Kong Housing Authority, and therefore there was no justification for an award of damages.

The first meaning arose from the concept that remedies in administrative law are equitable and not available as of right; the courts have discretion in whether or not to award them (Clark, Lai and Luk 1989: 389). Remedies are sought by judicial review to determine whether or not a decision taken is lawful. The most common types of remedies include certiorari, mandamus, and injunction.²⁶ If there is a breach of contract or a tort committed by the Hong Kong Housing Authority, the injured party has a right to damages. However, the original sentence in this individual case should be interpreted with the second meaning, as in the judgment of this case the judge ruled that “... It follows that none of the applicants have, or ever have had, any ‘eligibility’ at all to make any claim against the Hong Kong Housing Authority; and the residents of Rennie’s Mill do not have, nor have any of them ever had, any legitimate complaint that it was unconscionable of the Housing Authority to seek to redevelop the area 35 years after it became a cottage re-settlement area with the residents enjoying for all those years only those rights conferred on them by their occupation permits” (at 11).

In the translation, the translator followed the style of the original sentence with the use of a long modifier (“which could have justified an award of ‘damages’ in these

public law proceedings”), which makes comprehension a bit difficult, but retains the ambiguity of the original sentence. The sentence is ambiguous, as this modifier is put before the nouns “breach of contract” and “tortuous behaviour”, and can therefore be regarded as either modifying the noun “breach of contract” or modifying both of the nouns. In this case, if the translator followed the cause-effect connection and changed the word order in natural Chinese, ambiguity might be avoided with a translation that reads as follows: “在本案中香港房屋委員會沒有作出違約或侵權行為，足以支持這些公法訴訟中的申請可獲判‘損害賠償’”。However, by doing so, it will risk litigation in courts since the original and the target texts are different in meaning.

The subcommittee quoted an example from the case *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd.* [1986] QG80 to show that an adequate knowledge of the subject matter is necessary to produce an accurate translation (1999: 26):

- 97H “If the banks fail on the general point of principle, they have submissions to make which arise from the particular circumstances of their respective relationships with the company. They rely on their banking contracts with the company and, if they cannot escape by contract, they seek protection by way of estoppel, submitting that the company is estopped by its own conduct from asserting that the various current accounts were incorrectly debited.”
- 34 “該等銀行在這一點上的一般原則不獲接納，則該等銀行就其與該公司的各別關係的特別情況而會另有陳詞，以該公司與該等銀行簽訂的銀行業務合約為依據。該等銀行如不能藉合約法而免於負責，則尋求根據不容反悔法而獲得保障，呈述該公司本身的行為禁止了該公司宣稱其各個往來帳戶被錯誤地扣除款項。”
- 110D “Their Lordships having held that the company was not in breach of any duty owed by it to the banks, it is not possible to establish in this case an estoppel arising from mere silence, omission, or failure to act.”
- 56 “各法官既然裁定該公司沒有違反向該等銀行負有的任何責任，則不可能在本案中確立純粹因緘默、遺漏或沒有作出某項行動而產生不容推翻的事實。”

Newmark pointed out that “visibly and linguistically, words are put into context by their collocations, their grammatical functions and their position in the word order of a sentence” (1991: 87). This means that a translator does not translate isolated words, but words bound by their context. Newmark believed that the degree of each type of context that bears on words will vary and some words are more context-bound than others. His study revealed that technical terms, which are semantically dependent, are normally translated or transferred one-for-one and free of linguistic as well as situational and topic context (1991: 87 and 89). However, there is no hard and fast rule. The above example shows that “estoppel” has to be translated differently in three different contexts, though the three “estoppel”s have linked meanings. The first “estoppel” in the first text refers to the common law concept itself, whereas the other two do not,²⁷ and so a separate “surface structure lexical item (or form)”²⁸ has to be used. The following citation of another case²⁹ was quoted by the presiding judge in case HCA 6662Y/1997:

Regarding qualified privilege, juries can be directed that the defence is defeated by proof that the defendant used the occasion for some purpose other than that for which the occasion was privileged. This direction can be elaborated in a manner appropriate to the facts and issues in the case (at 8).

As concluded by the Subcommittee in its report, citations of other cases and excerpts from the English laws and other legal publications/articles contained in the judgments add complexity to translation work (1999 May: 3). Translators sometimes have to refer to the original cases to ascertain the meaning of the text. The above citation mentions the legal term “qualified privilege”, which is not easy for laymen to understand, and if one does not know what “qualified privilege” means, it is difficult to translate even the general terms such as “occasion” and “purpose”.

The term is defined in the Defamation Ordinance (Cap. 21) at Sections 13 and 14:

- 13(1) A fair and accurate report in any newspaper or broadcast of proceedings publicly heard before any court shall if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter.
- (2) ...
- 14(1) Subject to the provisions of this section, the publication in a newspaper or the broadcasting of any such report or other matter as mentioned in the Schedule shall be privileged unless the publication is proved to be made with malice.
- (2) ...

The conceptual content of legal terms is characterized by the legal system to which the terms belong. Legal rules are delineated in legislation and established by judicial decisions. Readers have to be alerted that the concept of a legal term is subject to new interpretation by judges. In the past, it was an offence if defamatory comments were made “falsely” and “maliciously”. However, the meaning of “malice” was changed by the case of *Cheng and another v Tse Wai Chun* [2000] 3 HKLRD 418. In this case, Tse accused Cheng and Lam of making defamatory comments about him with malice in a radio programme. The trial judge found the two defendants liable and awarded damages. The two defendants appealed against the judge’s decision. The Court of Final Appeal held that if a comment fell within the objective limits of the defence of fair comment,³⁰ the defence could be defeated only by the proof that the defendants did not genuinely believe the opinion they expressed. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it might be, even if it was the dominant or sole motive, did not of itself defeat the defence. The meaning of “malice” would be different for the defence of fair comment. Based on this definition, the Court of Final Appeal allowed the appeal. All the above cases show that the translation of judgments poses a real challenge to a translator who needs to have some legal knowledge.

The statement quoted in case HCA 6662Y/1997 was quite faithfully translated: “至於受約制特權方面，法官可引導陪審團，指出被告人一經被證明利用享有特權的場合以達致該特權以外的其他目的，其免責辯護便不成立。法官作出此指引時，可因應案中的事實和爭議點，適當地加以詳細說明。” (at 7) A translator without legal training may have difficulty in grasping the meaning and reproducing the legal reasoning correctly, and it is well-advised for the Subcommittee to suggest that the availability of legal professionals as part of the translation team is essential to provide professional guidance and advice as and when required (1999 May: 6). It is also worthwhile considering the possibility that a vetted³¹ translation be further vetted by the judge who wrote the judgment, if the Government wants to build up people’s confidence in using Chinese in courts or quoting a case in Chinese.

Concluding Remarks

Until legal bilingualism has been fully implemented in Hong Kong, the English judgments will be considered as a type of text serving a particular set of communicative purposes recognizable only by those involved in the legal profession. Hence, those writing judgments will conform to this type of text to meet the expectations of their colleagues. Judgments are culturally situated texts containing rules of law, legal concepts and legal reasoning. To translate these judgments, a word-for-word approach cannot help in conveying the message, as pointed out by the Subcommittee on the Translation of Case Precedents (1999 May: 4):

[...] translators were bound by the words used and would understandably be hesitant to go further than word-for-word translation. While such an approach could get the *prima facie* message across, the subtleties and nuances (which might feature rather prominently between words) were often lost, resulting in an inadequate translation which was unable to bring out the different shades and colours of the implicit meanings of the judgments.

When translating the citation of any case, a translator should refer to the case first to know what the citation means instead of translating it out of context. A translator should know more about the legal principles before s/he can go beyond word-for-word translation to produce a more grammatical translation with the loss of the subtleties and nuances. The literal approach is still the guideline for the translation of the legal argument and the rules of law in a judgment. Ambiguities must be retained for accuracy and flexible interpretation. The facts of a case is a more direct part that resembles everyday language, and a more idiomatic approach can be used.

In order to meet the needs of the community, and to conform to the Subcommittee on the Translation of Case Precedents' request that guidelines for judgment translation should be developed, this paper has proposed using plain language for translating judgments. To translate using common usage and cultural terms can definitely enhance readability and arouse people's interest in reading the judgments. English judgments are characterized by long sentences with complex clauses. The readability of the Chinese text will be further increased if the text, without altering the original meaning, follows the paratactic nature of the Chinese language. Judgments allow a translator to produce a more fluent translation using Chinese expressions and sentence structure, particularly for the brief facts of case. However, when it comes to the points of law that have legal implications, a translator has to adopt the literal translation to avoid any misinterpretation or elimination of any inherent ambiguities. This plain language approach can to some extent suggest how a Chinese judgment should be written. This paper also proposed that more efforts should be made by the Government to encourage people to use more Chinese in courts. This can in turn encourage more judges to write their judgments in Chinese. Legal bilingualism in courts will not be fully achieved if legal practitioners resist using Chinese in courts and the translated texts of judgments are of such low quality that legal practitioners have no confidence to cite them in courts.

NOTES

1. Hong Kong became a British colony following the signing of the Treaty of Nanking in 1842.
2. Legal bilingualism should not be restricted to “bilingual legislation”. It should be permissible for trials and law reporting to be conducted in either or both of the official languages, and a witness or legal representative should be allowed to use either or both of the official languages in courts.
3. In 1987, the ex-Chief Justice, Sir Denys Roberts appointed a working party to study the possibility of a greater use of Chinese in court proceedings.
4. See the Annual Report of the Hong Kong Judiciary 1996-8, at 52.
5. See Paper No. 3/98 of the Committee on the Bilingual Legal System on “Development of Bilingual Legislation and Initiatives of the Department of Justice to promote Legal Bilingualism”, at 2 (document supplied by the Department of Justice).
6. See [1996] 1 HKC 1.
7. Cantonese is the dialect spoken by more than 90% of the population in Hong Kong. Nowadays, with the closer integration with Mainland China, there is a significant increase in the Putonghua-speaking population in Hong Kong.
8. In Hong Kong, the written language used by the local Chinese citizens is Modern Standard Chinese, which is a form different from the Cantonese dialect.
9. See *supra* note 5, at 3.
10. The function of the Committee on the Bilingual Legal System (CBLS) was different from that of the Bilingual Laws Advisory Committee (BLAC). CBLS is a policy advisory committee on legal bilingualism. BLAC, which was established in October 1988, was a legislation scrutinizing and advisory committee as mentioned in Chapter 4.
11. See Paper No. 4/99, Report of the Subcommittee on the Translation of Case Precedents (document supplied by the Department of Justice).
12. See *supra* note 2, at 5-7. Other suggestions made by the subcommittee included:
 - (a) Translated judgments should go through several rounds of vetting by experienced translators and legal professionals.
 - (b) The Judiciary should screen out those cases carrying little reference value and then a case selection committee (which should comprise representatives of the Judiciary, the Law Society, the Bar Association and the Department of Justice) should determine the priorities for translation.
 - (c) It is necessary to establish a centralized databank and publish glossaries on translated legal terms and expressions.
13. This thesis is trying to establish an objective for the translation exercise. It is suggested that legal bilingualism should be implemented for the general public to access the law. A plain language approach is introduced in this thesis to achieve this objective.
14. The implementation of bilingual legislation began after the passing of the Official Languages (Amendment) Ordinance 1987. The Government has now completed the translation of all the 532 ordinances originally enacted in English. Both the English and Chinese legislative texts have the same legal status.
15. Butt (2000 February: 1) stated that audience of a judgment would be very wide: “... when a judge decides a case, the primary ‘audience’ is the parties to the case. But, if the audience includes others as well: the lawyers in the case; appellate judges to whom the case may go; and later readers, who may come to the decision for a number of reasons.” The Chinese translation will have a wide audience too, so it has to be clearly expressed (without affecting accuracy) in a way that is accessible to the potential audience.
16. See the statistics provided by the Judiciary showing the English/Chinese trials for different court levels from 1998 to 2004.
17. See the statistics provided by the Judiciary showing the percentage of English/Chinese judgments for different levels of courts from 1997 to 2004.
18. A Hong Kong Special Administration Region (HKSAR) has been established since 1997 upon China’s resumption of sovereignty over Hong Kong.
19. An expression used by Maley (1994: 13) to describe the general legal discourse.
20. These five judgments are of reference value, as they were selected by the Government to be translated into Chinese. They are of a varying nature, with different terminologies and legal concepts, and they can offer some insights into the translation of judgments.
21. Article 1 of the Law of National Flag states the objectives of this law: “為了維護國旗的尊嚴，增強公民的國家觀念，發揚愛國主義精神，根據憲法，制定本法。”

22. The term "cohesion" is used to describe the way in which the components of a text or discourse are linked by grammatical features.
23. "The question of necessity" means "whether it is necessary to restrict the guaranteed right to freedom of expression for protection of the legitimate interests within public order".
24. Rules of formation are "rules that state the allowable combination of simple units" (Allwood, Andersson and Dahl 1977: 45).
25. "Logic" is defined as follows:
 "Logic is concerned with TRUTH and INFERENCE; that is, with determining the conditions under which a proposition is true and the conditions under which one proposition may be inferred or deduced from other propositions" (McCawley 1981: 1).
 "One of the most important aspects of logic is the study of valid inferences and sentences that are necessarily true" (Allwood, Andersson and Dahl 1977: 16).
26. Certiorari lies against a public authority. It is an order of the court that quashes a decision that has been made. Mandamus also lies against a public authority. It compels an authority which is under a duty, to carry out that duty according to law. Injunction lies against private bodies. It orders a party to desist from a certain action (Clark, Lai and Luk 1989: 335-346).
27. With the context of the second "estoppel", the first "estoppel" refers to the rule of law called "estoppel by conduct". It arises when the party estopped has made a statement or has led the other party to believe in a certain fact. See *A concise dictionary of law* (2nd ed.). The second and third "estoppels" are used in their ordinary sense.
28. This expression was used by Larson (1998: 7) when discussing the characteristics of language that affect translation.
29. See *Cheng and another v Tse Wai Chun* [2000] 3 HKLRD 418 at 438.
30. The objective limits of the defence of fair comment are five-fold: (a) be on a matter of public interest; (b) be recognizable as comment, as distinct from an imputation of fact; (c) be based on facts which were true or protected by privilege; (d) explicitly or implicitly indicate, at least in general terms, what the facts were on which the comment was being made; and (e) be one that could have been made by an honest person. See [2000] 3 HKLRD 418, at 419.
31. A translation can be first vetted by an experienced senior translator.

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