

Drafting Policy On Bilingual Legislation

-- Comments On The Hong Kong *Securities And Futures Bill*

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When the Hong Kong *Securities and Futures Bill*, drafted by the Department of Justice, was submitted to the Legislative Council for scrutiny, concerns over the discrepancies between the Chinese and English texts were raised. While each case of so call discrepancy may have to be studied carefully, it is more important to develop or to discuss over the drafting policy on bilingual legislation in Hong Kong. Consensus must be reached over the goal or criteria of bilingual legislative drafting either based on translation or toward a more liberal approach.

I. In Search for the Goal of Legal Translation in Hong Kong Bilingual Drafting

Alexander Tytler's *Essay on the Principles of Translation* (1791) is widely known as the first theoretical essay on translation in English. Intended to be a systematic study of the translation process in English, the essay was essentially a manual for 18th-century professional and amateur translators. Tytler starts his essay with the description of a "good translation" and establishes the "general rules" derived from that description. A "good translation" is one in which "the merit of the original work is so completely transfused into another language, as to be as distinctly apprehended, and as strongly felt, by a native of the country to which that language belongs, as it is by those who speak the language of the original work."¹

The general, normative rules deduced from the above description of "good translation" are: (1) the translation should give a complete transcript of the ideas of the original work, (2) the style and manner of writing should be of the same character as that of the original, and (3) the translation should have all the ease of the original composition.² The first two criteria are concerned with the transferring of the idea and the style of the source text. The third criterion emphasises that the target text should not reveal its foreignness to the

¹ Alexander Tytler, *Essay on the Principles of Translation*, at 15-16 (Amsterdam: John Benjamins B.V., 1978 reprint).

² Alexander Tytler, *Essay on the Principles of Translation*, at 16 (Amsterdam: John Benjamins B.V., 1978 reprint).

reader in the target language. These principles, abundantly illustrated in Tytler's work, found their correspondents in Chinese translation theories.

Modern translation theory in China emerged as Chinese scholars started to translate English works into Chinese at the beginning of the 20th century. Yan Fu's translation criteria of *xin da ya* (信、达、雅, meaning fidelity, fluency and elegance) established the foundation for Chinese scholars' investigation into the goal of English-Chinese translation. The three principles were widely accepted as the essential criteria used to discuss translations ever since their appearance in Yan's preface to his own translation of T.H. Huxley's *Evolution and Ethics* (1898).³ Yan Fu points out:

Translation involves three requirements difficult to fulfil: fidelity, fluency and elegance. Fidelity is difficult enough to attain but a translation that observes the rule of fidelity but is not fluent is no translation at all. Fluency is therefore of prime importance. Since China's opening to foreign trade by sea, there has been no lack of interpreters and translators. But if you assign them any book to translate and tell them to meet these two requirements, few can succeed.⁴

What he announced in the very first sentence of the preface to his first translation to be "the three difficulties of translation *xin, da, ya*" has become China's holy trinity of rules for translation, much praised over the years and still adhered to even today.⁵

The comments herein submitted on the bilingual texts of Hong Kong *Securities and Futures Bill* are made based on the following premises:

First, the Chinese text and the English text must produce the same legal effects on the two language communities. In other words, the two texts reflect the unity of a single instrument. Fidelity in legal translation is seen not in finding equivalents or "mirror images" but in achieving the intended function of the translation. It means that the translator must make sure that rights and duties or liabilities which arise from a specific term used, or the

³ Yan Fu, "Preface" to *Tian Yan Lun* (T.H. Huxley, *Evolution and Ethics* (1898)) (Beijing: The Commercial Press, 1981).

⁴ Yan Fu, "General Remarks on Translation", translated by C.Y. Hsu, 1 *Renditions* 4-6, at 4 (1973).

⁵ Noteworthy was the 1989 decision of the Chinese Academy of Social Sciences to make *xin, da, ya* the yardstick for translation excellency awards to be presented on the occasion of the Academy's tenth anniversary. See Feng Shize, "Faithful to What? Retrospect on the Debates Concerning Translation in Modern China", 45 *International Social Science Journal* 97-106, at 97-98 (1993, no. 1).

tenor of a sentence or text, remain exactly the same when the term in question, or the sentence or text in question, is translated into the target language.

Secondly, the Chinese text must conform to the grammatical rules of the Chinese language. Legislation can serve its function in prescribing social behaviour only when it is effectively communicated to the addressees, particularly the regulated community. In addition, the Chinese language community deserves the right to read the law in real and idiomatic Chinese instead of Anglicized Chinese.

Thirdly, the Chinese text should be written in the style of a legislative genre. It should conform to the norms of a legal discourse. It should be accurate and precise except when vagueness is needed to serve the legislative intent. It is formal and authoritative, thus excluding all dialects and slang. It can be plain and simple, but never vulgar.

A. Fidelity to the Legislative Intent in Achieving the Same Legal Effects

Traditionally, the goal of legal translation was to preserve the meaning of the original. In that meaning-based translation, the goal consists in reproducing, transferring, or reconstructing the meaning or content of the message of the source text as accurately as possible.⁶ Equivalence has been the primary concern of legal translators. The equivalence between lexical items and syntactic structures of the source and target texts were held sacred. Legal translators have traditionally been bound by the principle of fidelity. Convinced that the main goal of legal translation is to reproduce the content of the source text as accurately as possible, both lawyers and linguists agreed that legal texts had to be translated literally.

For the sake of preserving the letter of the law, the main guideline for legal translation was fidelity to the source text. Even after legal translators won the right to produce texts in the spirit of the target language, the general guideline remained fidelity to the source text.⁷ J.B. White is one of the few who points out that fidelity to the source language text cannot be defined as mindless literalism, which would be no fidelity at all, nor can the duty of fidelity be discharged in any other merely mechanical or technical way.⁸

⁶ Susan Sarcevic, *New Approach to Legal Translation*, at 65 (The Hague: Kluwer Law International, 1997).

⁷ Susan Sarcevic, *New Approach to Legal Translation*, at 16 (The Hague: Kluwer Law International, 1997).

⁸ J.B. White, *Justice as Translation*, at 243 (Chicago: The University of Chicago Press, 1990).

In word-for-word translation, not only the words of the source text are translated literally into the target language, but the grammatical forms and word order of the source text are retained as well. In essence, word-for-word translation is strict literal translation. It is distinguished from literal translation. In literal translation, the basic unit of translation is still the word, but changes in syntax are permitted to respect the rules of grammar in the target language, thus increasing comprehensibility while following the source text as closely as possible.⁹ Strict literal translation was criticized as "primitive", requiring no intellect on the part of the translator in the 17th century. Pierre-Daniel Huet advocated a "refined" form of literal translation, in which words are translated in context, not in isolation.¹⁰ In his opinion, the translator must respect the basic rules of grammar and syntax in the target language, yet not "adulterate" the source text by producing a free translation.

During the Napoleon period, literal translation became the accepted method of translation for legislative texts. The German text of *Code Napoleon* makes allowances to observe the basic rules of syntax of the target language, yet it follows the source text as closely as possible. With the widespread belief that unnecessary syntactic transformations might endanger the thought pattern of the original, the translators took care to reproduce all the words of the French text to acknowledge the importance of the letter of the law. Literal translation dominated the translation of legislative texts well into the 20th century.¹¹

It was not philosophical considerations but rather national language consciousness that finally aroused the interest of legal translators in the quality of the target text. No longer satisfied to produce a text that was difficult to be understood by their fellow countrymen, translators began to make a conscious effort to produce a text in good target language. Without openly rejecting the traditional method of literal translation, legal translators began to make greater concessions to conform to the rules of the target language.¹²

Emphasis on improving the quality of the target language in order to improve comprehension is definitely a move in the direction of challenging the use of literal translation. As language is seen to be the standard criterion of national identity, it is not

⁹ Susan Sarcevic, *New Approach to Legal Translation*, at 25 (The Hague: Kluwer Law International, 1997).

¹⁰ Susan Sarcevic, *New Approach to Legal Translation*, at 30-31 (The Hague: Kluwer Law International, 1997).

¹¹ Susan Sarcevic, *New Approach to Legal Translation*, at 32-34 (The Hague: Kluwer Law International, 1997).

surprising that legal translators began to insist that authenticated translations of legal texts be written in the spirit of the target language.¹³

It is time for legal practitioners in Hong Kong to address the question whether legal translations must follow the letter of the source text, as was traditionally believed, or whether they can be written in the spirit of the target language. Should Chinese text of the legislation reproduce the individual words and syntax of the English text? How closely a translation should follow the source text (if there is a "source text" at all). In my opinion, the translator's task is to convey the sense of the source text and produce the same legal effects in the target text.¹⁴ The parallel texts of a single instrument do not have to correspond visually, nor do the terminology and syntax have to be modelled on the original. It is the virtuality that counts. In other words, the effect must be the same. Upholding the principle of fidelity to the source text does not entail reproducing the source text word for word but rather producing a text that leads to the same results in practice. Sticking to the literal equivalents only adulterates the Chinese language, and mere substitution – the use of Chinese words in English phrases and syntax—in no way promotes clarity.

Susan Sarcevic in her book *New Approach to Legal Translation* no longer regards legal translation as a process of linguistic transcoding but as an act of communication in the mechanism of the law.¹⁵ In accordance with the principle of equal authenticity, each of the authenticated texts of a single instrument has the force of law and can be used by courts for the purpose of interpretation. In order to be effective in the mechanism of the law, the principle of equal authenticity rests on the presumption that the authentic texts of the same instrument are equal not only in meaning but also in legal effect. Accordingly, legal equivalence is achieved if the parallel texts of a single instrument lead to the same legal effects. This is sometimes referred to as "substantive equivalence"¹⁶ or "juridical concordance".¹⁷

¹² Susan Sarcevic, *New Approach to Legal Translation*, at 34 (The Hague: Kluwer Law International, 1997).

¹³ Susan Sarcevic, *New Approach to Legal Translation*, at 36 (The Hague: Kluwer Law International, 1997).

¹⁴ In the opinion of Rossel, producing a literal translation is a craft, but it takes an artist to produce an idiomatic translation without altering the substance. As he sees it, the real challenge to the translator is to be an artist, not the master of the craft. See Susan Sarcevic, *New Approach to Legal Translation*, at 40 (The Hague: Kluwer Law International, 1997).

¹⁵ Susan Sarcevic, *New Approach to Legal Translation*, at 55 (The Hague: Kluwer Law International, 1997).

¹⁶ Peter W. Schroth, "Legal Translation" 34 *American Journal of Comparative Law* 47-65, at 57 (1986).

¹⁷ Susan Sarcevic, *New Approach to Legal Translation*, at 48 (The Hague: Kluwer Law International, 1997).

As equally authentic instruments of the law, parallel legal texts can be effective only if all indirect addressees are guaranteed equality before the law, regardless of the language of the text. While lawyers cannot expect translators to produce parallel texts that are equal in meaning, they do expect them to produce parallel texts that are equal in legal effect.¹⁸ Thus the translator's main task is to produce a text that will lead to the same legal effects in practice. As confirmed by the late Justice Pigeon of the Supreme Court of Canada with an impressive record in legal bilingualism, it is the results that count in legal translation.¹⁹

Since the success of bilingual drafting is measured by its interpretation and application in practice, it follows that the translator can best preserve the "unity of the single instrument" by striving to produce a text that will be interpreted and applied by the courts in the same manner as the source text. Thus it can be said that the goal of legal translation is to produce a text that will preserve the unity of the single instrument by guaranteeing uniform interpretation and application.²⁰ The translator must produce a translation with the "same legal signification", i.e., legal consequences.²¹ To produce a text that leads to the same results in practice, the translator must be able "to understand not only what the words mean and what a sentence means, but also what legal effect it is supposed to have, and how to achieve that legal effect in the other language".²² Legal translators should be able to predict how the courts will apply the text to concrete fact situations. It requires considerable skill to produce bilingual provisions that will be interpreted and applied uniformly in the two languages.

B. Fluency in Idiomatic Chinese

Legal language is not a language *per se*. Despite the fact that it demonstrates some special features at lexical, syntactic and discourse levels, it does not have an independent system of phonology, morphology or grammar of its own.²³ Although Chinese has until recently been given a chance to develop as the language of the law in Hong Kong, it has been used as a legal language for several thousand years in mainland China, and half a century in

¹⁸ In Canada, the Law Reform Commission confirms that the legislator's intent is to express the message of the single instrument in two linguistic codes and still achieve the same effects.

¹⁹ Susan Sarcevic, *New Approach to Legal Translation*, at 71 (The Hague: Kluwer Law International, 1997).

²⁰ Susan Sarcevic, *New Approach to Legal Translation*, at 72 (The Hague: Kluwer Law International, 1997).

²¹ Susan Sarcevic, *New Approach to Legal Translation*, at 71 (The Hague: Kluwer Law International, 1997).

²² Peter W. Schroth, "Legal Translation" 34 *American Journal of Comparative Law* 47-65, at 55-56 (1986); Susan Sarcevic, *New Approach to Legal Translation*, at 72 (The Hague: Kluwer Law International, 1997).

²³ For an in-depth investigation on how to characterise legal language, see Dennis Kurzon, "'Legal Language': Varieties, Genres, Registers, Discourses", 7 *International Journal of Applied Linguistics* 119-139 (1997, no. 2).

Taiwan. It is of great importance to investigate the features of legal Chinese in comparison with legal English, both of which are the official languages of Hong Kong law. As we are developing Chinese for the common law in Hong Kong as an accurate, functional and effective legal language, we must bear in mind that we are not creating a new language. It is a discourse that must conform to the norms of the Chinese language.

Legislation aims to establish rules for the regulation and control of future social conduct. In essence, the principal purposes of legislation are (1) to establish and delimit the law; and (2) to communicate the law from the lawmaking authority to society and in particular to the persons affected by it.²⁴ Legislation is communication of a very special kind. Communication cannot be considered in a vacuum. It occurs only where the substance of the communication is transmitted to some person or persons. Successful communication depends on the reception of what is transmitted.

Insisting that legislation is addressed to the general public, linguists maintained that the lawmakers were at fault for failing to communicate effectively with the addressees. Believing that the problem could be corrected by simplifying legislative language, they joined forces with a group of lawyers who had revived a campaign to make legislation intelligible to the common man.²⁵ Today legislative guidelines throughout the world encourage drafters to make legislation "clear" and "intelligible to the common man".²⁶ In North America the parallel movement for "plain English" has resulted in the adoption of a number of *Plain English Laws* in the United States which require documents produced by state agencies to be written in "plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style".²⁷

The view that the addressees of legislative texts are those affected by the particular instrument has been challenged by lawyers who insist that the "man on the street" does not read the statutes and in any case he usually cannot understand them. In their opinion, legislative texts are a means of specialized communication and must remain so in order to be effective as instruments of the law. Hence, simplification is acceptable but not popularization. The main problem is not for drafters to make legislative texts intelligible to the general public

²⁴ G.C. Thornton, *Legislative Drafting* (4th ed.), at 47 (London: Butterworths, 1996).

²⁵ Susan Sarcevic, *New Approach to Legal Translation*, at 58 (The Hague: Kluwer Law International, 1997).

²⁶ G.C. Thornton, *Legislative Drafting* (4th ed.), at 48 (London: Butterworths, 1996).

but rather to improve the efficiency of legal communication by achieving interaction with the actual receivers.²⁸ But who are the actual receivers in legal communication?

As in general communication, a distinction can be made in legal communication between actual and intended receivers,²⁹ or to use Kelsen's terminology, between direct and indirect addressees.³⁰ Since legal communication is first and foremost a form of specialized communication, it follows that the actual or direct addressees of legislative texts must also be specialists. This is consistent with Sager's principle that the knowledge base of the producers and receivers is presumed to be on the same level in specialized communication.³¹ Accordingly, the direct addressees of legislative texts are also lawyers. Regarding legal norms as coercive acts, Kelsen maintained that the direct addressees of general norms are the specialists empowered to interpret and apply such norms, i.e. the competent law-applying organ. As for the persons affected by particular norms, Kelsen refers to them as indirect addressees.³²

Fluency in idiomatic Chinese not only promotes comprehensibility but also satisfies the requirement of equal language rights. In fact, the first real challenge to the literal translation of legal texts did not come until the 20th century when translators of less used official languages finally began to demand equal language rights, which set the stage for the development from literal to idiomatic translation.

Argument based on equal language rights was the major force behind the reform of drafting policy in Canada. Under the pressure to improve the quality of the French text of legislation, the Department of Justice in Canada finally took a decisive step to break with tradition. The Department acknowledged that literal translation violated the principle of equal language rights. In order to implement the principle of equal treatment, a new approach was necessary: instead of requiring translators to reproduce the source text as closely as possible, they were finally granted freedom to produce a new text in the spirit of the French language. Being incorporated into the drafting process and entrusted with greater

²⁷ Richard C. Wydick, *Plain English for Lawyers* (4th ed.), at 73 (Durham, N.C.: Carolina Academic Press, 1998).

²⁸ Susan Sarcevic, *New Approach to Legal Translation*, at 59 (The Hague: Kluwer Law International, 1997).

²⁹ John Lyons, *Semantics*, at 34 (Cambridge: Cambridge University Press, 1977).

³⁰ Hans Kelsen, *General Theory of Norms* (Oxford: Clarendon, 1991).

³¹ Juan Sager, *A Practical Course in Terminology Processing*, at 102 (Amsterdam: Benjamins, 1990); and Juan Sager, *Language Engineering and Translation*, at 40 (Amsterdam/Philadelphia: Benjamins, 1993).

³² See Hans Kelsen, *General Theory of Norms* (Oxford: Clarendon, 1991).

drafting responsibilities, translators are gradually converted into co-drafters. The new methods of bilingual drafting have succeeded in modernizing legal translation by swinging the pendulum to idiomatic translation and even beyond to co-drafting.³³

C. Elegance of the Legislative Genre

Lord Denning once quoted Samuel Wesley: "Style is the dress of thought: a modest dress, neat, but not gaudy, will true critics please".³⁴ Legal language is a highly specialized genre with its own particular style. Legal style refers not only to linguistic aspects of written legal language, but also to the way in which legal problems are approached and solved. Legal style results from legal traditions, thought, and culture. It is no surprise that the languages of the common law and civil law legal systems differ in style.³⁵ One of the main differences between civil law and common law legislation is the tendency for civil law drafters to rely more on context and inference, thus resulting in a looser texture that is not cluttered with detail. While civil law legislation is a broad statement of principles, common law legislation is an enumeration of instances.³⁶ Believing that each section and subsection of a statute should be self-contained, common law lawyers intentionally repeat words and entire phrases.³⁷ Nevertheless, in regard to stylistic diversity in common law and civil law legislation, Driedger maintains that many differences are merely "cosmetic" and do not affect the substance:

There are differences in style between statutes in different languages, or between statutes in different countries, arising largely out of differences in grammatical structure, differences in political institutions and their histories, and out of customs, habits and traditions. But many of these are cosmetic only, having little, if any bearing on substance.³⁸

Whatever the style of legislative writing in different countries, they share something in common. That is, they share the common goal of effective communication. Good style helps

³³ Susan Sarcevic, *New Approach to Legal Translation*, at 46 (The Hague: Kluwer Law International, 1997).

³⁴ Edmund Heward, *Lord Denning: A Biography* (2nd ed.), at 191 (Chichester: Barry Rose Law Publishers Ltd., 1997).

³⁵ Sylvia A. Smith, "Culture Clash: Anglo-American Case Law and German Civil Law in Translation" in Marshall Morris, *Translation and the Law 179-197*, at 190-91 (Amsterdam: John Benjamins Publishing Co., 1995). Smith arrived at this conclusion based on her study of English-German translation of US law.

³⁶ Elmer A. Driedger, *A Manual of Instruction for Legislative and Legal Writing*, at 12 (Ottawa: Department of Justice, 1982).

³⁷ Elmer A. Driedger, *The Composition of Legislation* (2nd ed.), at 77 (Ottawa: Department of Justice, 1976).

³⁸ Susan Sarcevic, *New Approach to Legal Translation*, at 181-182 (The Hague: Kluwer Law International, 1997).

communication by arranging words and sentences in such a manner as to make the text clear and precise.

1. Good Style Helps Communication

So far as style is concerned no absolute judgments may be passed; no arbitrary line can be drawn between "good style" and "bad style". Style is a relative matter and the criteria applicable to all prose writing are equally appropriate to the drafting of legislation. Good style must fit the purpose of the communication, and the degree to which the manner of expression achieves the purpose is the sole measure of the quality of the style.³⁹

The style which is appropriate to any particular enactment will to some extent depend on the identity of those people to whom the law will be communicated, the addressees of the legislation, particularly the people affected by the law.⁴⁰ Technical purposes are likely to require technical words and technical law may still be good law, even if unintelligible to most people, so long as it achieves effective communication with those addressees of the law. The careful use of definitions may assist the laypersons to comprehend.⁴¹

It is unrealistic to believe that all laws should, or indeed could, be drafted in language and in a style which is familiar and instantly intelligible to the addressees of the law. Even excellent drafting does not eliminate the need for careful study to understand legislation. Nevertheless the drafter must in each case endeavour to draft in such a way that the law is successfully communicated to the persons who are affected by the law, who are endowed with the responsibility to enforce and administer the law, and who will interpret the law.⁴²

2. The Pursuit of Clarity

The purposes of legislation are most likely to be expressed and communicated successfully by drafters who write clearly. The obligation to be intelligible and to convey the

³⁹ G.C. Thornton, *Legislative Drafting* (4th ed.), at 46 (London: Butterworths, 1996).

⁴⁰ G.C. Thornton, *Legislative Drafting* (4th ed.), at 48 (London: Butterworths, 1996).

⁴¹ G.C. Thornton, *Legislative Drafting* (4th ed.), at 48-49 (London: Butterworths, 1996).

⁴² G.C. Thornton, *Legislative Drafting* (4th ed.), at 48 (London: Butterworths, 1996).

intended meaning requires the unremitting pursuit of clarity by drafters. Clarity, in the legislative context, requires simplicity and precision.⁴³

The demands of simplicity and precision call for compromise. It is a compromise between the precision of technical language and the ready comprehensibility of the ordinary use of words. The words used should be reasonably simple and the sentence should be reasonably short. A law which is drafted in simple but imprecise terms will be uncertain in the scope of its application and for that reason may fail to achieve the intended legal result. Litigation does not lead to a satisfactory resolution of the problems for it is only concerned with the resolution of one particular dispute while an imprecise law may contain the seeds of many different disputes. On the other hand, a law drafted in precise but not simple terms may, on account of its incomprehensibility, fail to achieve the intended result. The blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along the way to obscurity.⁴⁴

The most important and difficult task for drafters is then how to balance the tension between complexity of material and simplicity of expression. The style adopted must be as simple and readable as the intended communication permits. The word "simple" has various facets of meaning that conspire to produce a compound effect well understood by most people in most contexts. They are economy, directness, familiarity of language and orderliness. Like simplicity, precision is an abstract word commonly used to denote various senses. In the sense of certainty or definiteness, it may fairly be said that the quest for precision has contributed to the unfortunate obscurity of much statute law. Mindless pursuit of this aspect of precision has led to unsuccessful attempts to foresee all possible contingencies. This has caused great complexities in the law. On the other hand, when the word precision is used in the sense of exact or accurate expression, its causal relationship with intelligibility is clearer.⁴⁵

An orderly approach is an invaluable aid to intelligibility. We cannot overstate the role logical organization can play in making the complex seem uncomplicated or if not

⁴³ G.C. Thornton, *Legislative Drafting* (4th ed.), at 52 (London: Butterworths, 1996).

⁴⁴ For more, see G.C. Thornton, *Legislative Drafting* (4th ed.), at 52-53 (London: Butterworths, 1996).

⁴⁵ For more, see G.C. Thornton, *Legislative Drafting* (4th ed.), at 53-55 (London: Butterworths, 1996). The needs of precision go beyond those of economy, however. Economy and precision both require that no unnecessary words be

uncomplicated then at least much less difficult to understand than otherwise might be the case. The concept is important in relation to the structure of sentences, sections, parts, schedules and acts. However dull the subject matter, if the material is dealt with in a planned manner and in logical sequence, and chronological sequence where appropriate, the writing will flow and be more readable and thus more readily comprehensible. It is quite impossible for writing which lacks orderly structure to be simple or elegant.⁴⁶

Consistency is a virtue that drafters are prone to undervalue, probably because it is time consuming to achieve. It has value at a number of levels—

- every draft must be consistent and in harmony with the common law and statutory context into which it must fit.
- a consistent approach to similar problems should be taken by all drafter within a jurisdiction and by the same drafters at different times. Such an approach should not of course stifle development and improvement of earlier approaches.
- consistency in word choice and usage is desirable.
- consistency is desirable in stylistic practices such as numbering, spelling, capital usage and presentation.
- consistency is desirable in the level of penal sanctions.⁴⁷

In summary, despite the traditional belief that strict concordance promotes uniform interpretation and application, it is generally held that there is room for stylistic diversity in parallel texts. There appears, however, to be no consensus as to how much diversity can be tolerated without posing a threat to the unity of the single instrument.⁴⁸ The manner or style of expression that best suits the purposes of the legislation shall be adopted. It is important for drafters to know how to approach the business of word choice and sentence structure. Style is not a gloss, not something applied at a late stage like icing on a cake; it is an inherent quality. The easy and accurate communication of legislative material should be the goal of legislative writing.⁴⁹

used, and precision also requires that the words chosen express accurately and unequivocally the meaning intended to be communicated.

⁴⁶ G.C. Thornton, *Legislative Drafting* (4th ed.), at 56 (London: Butterworths, 1996).

⁴⁷ G.C. Thornton, *Legislative Drafting* (4th ed.), at 56 (London: Butterworths, 1996).

⁴⁸ Susan Sarcevic, *New Approach to Legal Translation*, at 181 (The Hague: Kluwer Law International, 1997). Today, considerable stylistic diversity is tolerated in the English and French texts of Canadian federal legislation. Since the parallel texts are still printed side by side, notable differences immediately catch the eye.

⁴⁹ G.C. Thornton, *Legislative Drafting* (4th ed.), at 46 (London: Butterworths, 1996).

II. COMMENTS ON THE *SECURITIES AND FUTURES BILL*

A review of the so called "discrepancies" between English and Chinese text of the *Securities and Futures Bill* highlighted by the Legal Service Division demonstrates the use of the following techniques by the drafters: syntactic restructuring, deletion and addition. The use of those techniques itself shall not be the basis for dismissal of the Chinese text as correct and effective. As long as we agree in principle that Chinese text shall not be the reproduction of English text word-by-word with total disregard of Chinese syntactical and grammatical rules, we should allow the adoption of syntactic restructuring, deletion and addition. The focus of debate shall be to what extent such techniques may be used and in what circumstances the use is justifiable.

A. Syntactic Restructuring

Long and complicated sentences are a distinctive feature of English legal syntax, as a result not only of multiple qualifications, cases and conditions, but also as a result of the way they are arranged into legal sentences. To produce Chinese text of Hong Kong legislation that can communicate the intended effects of the law, it becomes necessary to adjust the sentence structures, shuffling the components of sentences, making necessary additions and deletions.

For centuries legal translators faithfully followed the syntax of the source text as closely as possible, mainly out of the fear that any changes might disturb the thought process. This fear disappears when translators understand how legal rules operate and are able to express the intended logical relations. There is essentially one basic underlying thought pattern. The basic logical structure of legal rules is expressed by the formula: if P, then Q, which means that Q shall be performed only in cases where the conditions constituting P are fulfilled.⁵⁰ P, the fact situation, could be what Coode designated as case and condition, and Q, the statement of law, is what Coode named legal subject and legal action. Since P is a precondition to Q, Coode insisted that the fact-situation precede the statement of law, and that each of the four elements appear in the particular order of case, condition, legal subject and legal action. Today, Coode's prescribed arrangement of elements is no longer considered

⁵⁰ Susan Sarcevic, *New Approach to Legal Translation*, at 162 (The Hague: Kluwer Law International, 1997).

mandatory. Instead, drafting experts believe that it is possible to formulate the same provision in different ways without altering the substance and disturbing the thought process.⁵¹ Driedger argued that Coode's case and condition can frequently be interchanged because they have the same basic function and are both adverbial modifiers.⁵²

An effective way to deal with long and complicated English legal sentences is to rearrange the components and to relocate long qualifiers. The Chinese language has its own grammatical structures. If an English statutory provision is rendered too literally into Chinese, the translated version will be anglicized in a way that it violates Chinese grammatical rules and ignores Chinese syntactic patterns.

In many cases if the English sentence structure is faithfully adhered to, the Chinese translation will be difficult to understand mainly because of the extensive use of modifiers and the peculiar position where they appear. As a general rule in legal English, each modifier is placed "as near as possible to the sentence element it modifies, thus making it appear 'logically and naturally connected to that element'".⁵³

Canadian drafting and translation practices are considerably more flexible in regard to the arrangement of elements, especially in recent legislation. At the outset of the legislative reform, Meredith encouraged translators to rearrange the elements of legal rules if such change would render the new text more clearly: "A translator should not feel bound to follow the construction in the source text. If the meaning of an article can be rendered more clearly by reversing the word order, this should be done, but with care."⁵⁴

1. Acceptable restructuring

sec.151(1)

A typical sandwich clause in the English text is transformed into a parallel structure in the Chinese text, effectively eliminating the discontinuity resulting from sandwich clauses

⁵¹ Susan Sarcevic, *New Approach to Legal Translation*, at 162 (The Hague: Kluwer Law International, 1997).

⁵² Elmer A. Driedger, *A Manual of Instruction for Legislative and Legal Writing*, at 3 (Ottawa: Department of Justice, 1982).

⁵³ G. C. Thornton, *Legislative Drafting* (4th ed.), at 23 (London: Butterworths, 1996).

⁵⁴ R. Clive Meredith, "Some Notes on English Legal Translation" 24 *Meta* 54-67, at 61 (1979, no.1).

that violate Chinese syntactic rules. What is more important, despite the discrepancies in the format or layout between the Chinese and English texts, we find the same legal effects achieved by both texts as one single instrument.

sec.212(1)

While it is the habit of English draftsman to put the case and condition ("Following the submission of an application for review") before the subject and verb ("the Tribunal shall review the specified decision to which the application relates"), Chinese syntactic rule dictates that the positioning of the subject at the beginning of a sentence increases clarity and comprehensibility. The restructuring in the Chinese text results in exactly the same legal effects as that of the English text.

sec.287(4)

The English text is an extremely long and complex sentence, suffering from discontinuity as a result of the insertion of several prepositional phrases, parallel structures and subordinate clauses. Such convoluted structure does not have to find their "mirror image" in the Chinese text. The restructuring of the subsection into two sentences in the Chinese text, with the addition and repetition of "有关效果", expresses the meaning of the English text and achieves the same legal effects in a more effective and clearer manner.

2. Unacceptable Restructuring

sec.138(1) (a)

This is an example where restructuring has led to confusion. The Chinese text has restructured the adverbial phrase "provided by the person to the Commission pursuant to section 119(6) or 120(4) (as the case may be);" that modifies (A), (B) and (C) into (A), while using "他如此提供的" in (B) and (C). The Chinese term "他如此提供的" itself is confusing in its reference and further, it imposes additional burden on the addressees of the legislation to refer to other segments of a parallel structure.

The English text is misleading too. The adverbial phrase "provided by the person...." is supposed to modify only (A), (B) and (C), but the format of the section indicates that it modifies (i) as well.

sec.224(2)(b)(c)

The substitution of "specified in section 211(3)" with "该段提述" in (b) and (c) causes confusion as to reference and imposes additional burden on the readers to refer to other sections, without achieving any positive goal of making the Chinese text clearer or more precise.

sec.335(3)

It is unnecessary to create sandwich clause in the Chinese text. The generally accepted rule is that more important elements of a sentence tend to appear at the beginning in order to draw attention from readers. By postponing "a director or chief executive of a listed corporation is under a duty to give notification to the listed corporation and the relevant exchange company on the occurrence" to the very end of the sandwich structure weakens the emphasis achieved by the English text and possibly intended by the policy instruction.

B. Deletion

Although it is generally agreed in Canada that deletions are permitted, there is no consensus on which words can be deleted and how extensive the deletions can be. When the legislative reform began in Canada in the early 1980s, the view was held that expressions which are "standard equipment" in the source text may be deleted in the target text, provided the substance is not affected.⁵⁵ Among other things, the so-called "standard equipment" of common law statutes includes archaic expressions and formal words that are often regarded as "clutter" by civil law lawyers.⁵⁶

At the beginning of the 20th century the letter of the law was still regarded as inviolate. It was generally believed that, for the sake of promoting consistent judicial interpretation,

⁵⁵ R. Clive Meredith, "Some Notes on English Legal Translation" 24 *Meta* 54-67, at 61 (1979, no.1).

every word of the source text had to be faithfully reproduced in the target text. Today, the pendulum has swung in the opposite direction, and even lawyers widely acknowledge that it is the sense that counts, not the words. In order to convey the sense, the deletion of words is perfectly legitimate in translating legislation.⁵⁷ But, on the other hand, translators should exercise caution and refrain from making any deletions that could endanger uniform interpretation of the parallel texts. Whereas deletions were previously justified only as a means of avoiding unnecessary repetition or increasing clarity, they are now made for reasons of style as well.⁵⁸

Due to cultural and language differences, different drafting practices have evolved in various jurisdictions, giving rise to distinctive drafting styles, each with a preference for certain modes of expression. Common law drafters attempt to limit judicial discretion by making statutes more detailed and complex than civil law legislation. Supposedly for the sake of precision, common law drafters repeat individual words and entire phrases, while their civil law colleagues avoid repetition whenever possible.⁵⁹

1. Acceptable deletion

sec.153(2)

The Chinese text avoids the repetition in the English text "of the licensed corporation or the associated entity (as the case may be)" in the three listed parallel components by deletion. Such deletion does not affect the meaning and the intended effects of the Chinese text. In addition, the insertion of "as the case may be" after an expression joint by "or" is redundant and serves no valuable function. It shall be deleted from both English and Chinese texts.

sec.192(1)(2)(3)

⁵⁶ David Mellinkoff, *The Language of the Law*, at 13 and 19 (Boston: Little, Brown, 1963).

⁵⁷ Susan Sarcevic, *New Approach to Legal Translation*, at 183 (The Hague: Kluwer Law International, 1997).

⁵⁸ Susan Sarcevic, *New Approach to Legal Translation*, at 185 (The Hague: Kluwer Law International, 1997).

⁵⁹ See Susan Sarcevic, *New Approach to Legal Translation*, at 167-168 (The Hague: Kluwer Law International, 1997).

The redundant expression "for the purposes of the provisions of this Ordinance" is simplified in the Chinese text as "就本条例而言". It is clear, simple and precise, without unnecessary repetition.

sec.237(2)(b)(c)

The Chinese text (2)(b) and (c) omits the repetition of the list of "shares, stocks, debentures, loan stocks, funds, bonds or notes" by using "(a) 段所述各项目". Here no additional burden is imposed on the Chinese text audience because by reading the English text "*such* shares, stocks, debentures...", one has to refer back to (2)(a) in order to understand the list of items.

The same case occurs with sec.277, where "securities" is defined again.

sec.268(4)(d)

This is one example of the widely used binomial expressions, or doublets in the English legislative writing. According to David Mellinkoff, the historian of legal English, "doublets" or word pairs usually combine a word of Anglo-Saxon origin with one of French or Latin origin, for example, "aid and abet", and "cease and desist".⁶⁰ Bhatia refers to this type of structure as binomial and multinomial expressions.⁶¹

"A binomial is a sequence of two words pertaining to the same form-class, placed on an identical level of syntactic hierarchy, and ordinarily connected by some kind of lexical link."⁶² It is a sequence of two or more words or phrases belonging to the same grammatical category having some semantic relationship and joined by some syntactic device such as "and" or "or". The semantic relations between the members of binomials are usually synonymous, antonymous, or complementary. Other relations are rare.⁶³ Typical examples include "signed and delivered", "in whole or in part", "to affirm or set aside", "act or omission", "advice and consent", "by or on behalf of", "under or in accordance with", "unless

⁶⁰ See David Mellinkoff, *The Language of the Law* (Boston: Little, Brown, 1963).

⁶¹ V.K. Bhatia, *Analysing Genre: Language Use in Professional Settings*, at 108 (London: Longman, 1993).

⁶² Yakov Malkiel, "Studies in Irreversible Binomials" 8 *Lingua* 113-160 (1959).

⁶³ Marita Gustafsson, "Syntactic Features of Binomial Expressions in Legal English" 4 *Text* 123-141, at 133 (1984, no. 1-3).

and until", "wholly and exclusively" and many others. These expressions have been used as extremely effective linguistic devices to make a legal document precise as well as all-inclusive.⁶⁴

Gustafsson found binomials to be four to five times more frequent in legal English than in other types of prose. The mere frequency of binomials is clearly a style marker in law language.⁶⁵ Legal binomials are needed for technical accuracy and for the sake of precision and unambiguity, but there are cases where doubling-up serves no specific purpose. To a layperson the two words mean the same thing, but to members of the profession there is clear distinction.⁶⁶ As for the reason of using doublets, Crystal and Davy's explanation is that draftsmen got into the habit of using these pairs at a time when there were in the language both native English and borrowed French terms for the same referent. In this situation there was often a certain amount of doubt as to whether such "synonyms" meant exactly the same thing, and there developed a tendency to write in both alternatives and rely on inclusiveness to compensate any lack of precision. For example, "goods and chattels" is an instance of an English word "goods" being complemented by its French equivalent "chattels".⁶⁷

The English expression "under or pursuant to" in 268(4)(d) is expressed in the Chinese text as "按照". Suggestion has been made to adopt the term "按照或依据". The question is does "under" and "pursuant to" mean the same thing? What distinction can be drawn between the Chinese terms "按照" and "依据"? If "under or pursuant to" is just a matter of the draftmen's habit of combining English term with French term, then there is no good reason to produce Chinese doublets as mirror images of the English expression.

sec.298

⁶⁴ V.K. Bhatia, *Analysing Genre: Language Use in Professional Settings*, at 108 (London: Longman, 1993).

⁶⁵ Marita Gustafsson, "Syntactic Features of Binomial Expressions in Legal English" 4 *Text* 123-141, at 125 (1984, no. 1-3).

⁶⁶ Marita Gustafsson, "Syntactic Features of Binomial Expressions in Legal English" 4 *Text* 123-141, at 133-134 (1984, no. 1-3).

⁶⁷ David Crystal and Derek Davy, *Investigating English Style*, at 208 (Harlow: Longman, 1969). Note that Brenda Danet has warned that unless the pairs are fixed in the mind as frozen expressions, typically irreversible, they should be treated as aspects of form, i.e. syntax, rather than of content or lexis. See Brenda Danet, "Legal Discourse", in Teun A. Van Dijk, ed. *Handbook of Discourse Analysis* (vol.1) 273-291, at 281 (London: Academic Press, 1985).

The expression "the same conduct" in (a) and (b)(ii) of the English text and “该行为” in the Chinese text are in effect identical. The suggestion of “该同样行为” causes confusion because in Chinese “同样” does not necessarily mean “同一”. Therefore, if the "same" must be expressed in the Chinese text for purpose of emphasis, the more appropriate Chinese term shall be “该同一行为”.

sec.335(1)(a)

The Chinese text avoids the repetition of the phrase "his spouse (not being herself or himself a director or chief executive of the listed corporation)" by moving it from the parallel components of the sandwich clause one level up to the overall statement. The format shows discrepancies but the legal effect is the same.

2. Improper and unnecessary deletion

One important feature of the legislative writing is that each section or even each paragraph is self-contained. If, by deletion, the section in the Chinese text becomes vague and additional burden is imposed upon the audience to refer to other sections of the Ordinance in order to interpret the section, such deletion is not acceptable. Further, deletion is accepted only when it is necessary for the Chinese text to achieve clarity, precision and fluency. Where literal translation can achieve that goal, deletion shall not be adopted.

sec.102(11)

The deletion of "the Commission" following "authorized by" that appeared in the English text certainly reduces clarity and imposes additional burden on the audience of the Chinese text to refer to other sections in order to find out the authorizing body.

sec.210(6) & (7)

This is an interesting example where the Chinese text paraphrases or interprets the English text "a judge within the meaning of paragraph (a) of the definition of "judge" in section 209" by spelling out what is defined by (a), i.e., “原讼法庭法官或暂委法官”. As

the statute stands today, we do not see discrepancies in meaning. But there is always a possibility for the amendment of sec.209(a) which may result in differences in meaning and effects of the two texts of sec.210(6) & (7), unless the Chinese text is amended accordingly. The concern for the use of such paraphrase in the Chinese text is that it reduces the flexibility and adaptability of expression.

The same case occurs with sec.243(8)(a) and sec.243(9) where the Chinese text produces a paraphrase of the English text by referring to sec.237(1).

sec.173(a)(ii)

The English expression "in the case of an associated entity of an intermediary" is significantly simplified to be "就该实体而言", which is confusing. Literal translation in this case, i.e., "就该中介人的相联系实体而言", can be more accurate and does not hamper intelligibility.

There are further examples of unacceptable or problematic deletions occurred in the following sections for various reasons: sec.103(7), sec.104(7), sec.105(1)&(3), sec.112, sec.179(3), sec.184(2), sec.199(5), sec.202(10), sec.205(3) and sec.333(2).

C. Addition

Addition may be justifiable where rearranging the order of the components in a sentence fails to produce comprehensible Chinese sentences that are idiomatic, or in other cases where reversing the order of a sentence is not practicable for purposes of emphasis and clarity, additional Chinese expressions could be inserted, as shown by sec.247(1), (2) & (3). If additional Chinese expressions are inserted in the legislation to produce a Chinese legal syntax that can communicate the desired effects of the English text or the policy instruction, and in the meantime conforms to the Chinese grammatical rules and syntax patterns, there is no good reason to prohibit the use of such techniques. This shows how flexibility and imagination can work to achieve both accuracy and observance of linguistic rules.

Some examples of acceptable addition include sec.206(4), sec.218(1), sec.255(1) and sec.264. While the following additions are seen as unnecessary sec.213(1), sec.199(2), and sec.325(5).

D. Consistency

The importance of consistency cannot be overstated. The choice of a different expression within the same context indicates that a different legal effect is sought.

sec.210(2)

"The other 2 members" is most accurately expressed as "另外两名成员". However, we find "该等其他成员" for "the 2 other members" in 210(2)(b), and "其他成员" for "the other 2 members" in 210(3). Here we find no good reason not to use the literal translation of "另外两名成员" when it is most clear and accurate to do so. The inconsistency in the English text also draws one's attention.

The same thing occurred with sec.243(2)(b) and (3).

sec.272(6)

As "damages" is a technical legal term, it is particularly important to maintain consistency. The Chinese expression for it has been "损害赔偿" in other ordinances and there does not seem to be any good and clear reason to divert from that established Chinese legal expression.

sec.294(4)

We find inconsistency in the Chinese text of (4)(a) and (b). "Up to (and including) the time" was expressed as "直至作出该陈述之时(包括作出该陈述的一刻)" in (4)(a) but "直至作出该陈述之时" in (4)(b). Such inconsistency leads to the natural inquiry whether (4)(b) covers the time of making the representation. As a matter of fact, the Chinese

term “直至” should be understood as being inclusive of the time of making the representation. It is the inconsistency that has created doubt and confusion.

E. Revising the English Text

Recognizing the equal authenticity of the two language texts and equal language rights of the two language communities, we should not refrain from revising English text either for reasons of substance (where the two texts may carry different legal meaning or discrepancies exist in the legal effects) or format (where the style of the composition causes difficulty in comprehension or even confusion).

sec.158(2)(a)

This is an obvious case where we find an extremely long and complicated English sentence in contrast to clearly drafted Chinese text, with shorter sentences achieving greater comprehensibility.

Other examples such as sec.172 (9)(b), secs.284-286, sec.326 (3) & (5), and sec.331 (5) all indicate the necessity of revising the English text to achieve more effectiveness in the communication of the law.

In summary, the key issue is to what extent legal translators can be creative with language in parallel texts and still preserve the unity of the single instrument. Examples have been cited to illustrate how translators can make basic alternations in syntax without affecting the substance of legal rules and consequently their operation. In particular, translators should be creative with syntax not for the sake of creativity itself but to achieve greater clarity, emphasis, and effect. Therefore, my proposition is to translate literally when appropriate and freely when necessary.

Being creative with language requires legal competence and intuition. Like the draftsman, an accomplished translator should "be able to express the same qualification in different ways so that he can select the one with precisely the correct shade of meaning, and can smoothly combine all his modifiers so as to produce not only a readable and

grammatically correct sentence, but one that expresses a complete, exact and workable law".⁶⁸

From my personal observation, literal translation (even strict literal translation) has been the rule of practice in Hong Kong. Legal translators continued to follow the syntax of the source text as closely as possible, allowing for exceptions only when deemed absolutely necessary. However, the overuse of literal translation can render the target text incomprehensible. Literal translation can even be absurd when the original word order is retained. Although it is true that language systems influence each other whenever there is language contact,⁶⁹ it is established that grammar and syntax are resistant to change and are relatively stable compared with lexicon and terminology. A language usually relies on absorbing and revitalizing its lexicology to accommodate the needs of a changing society. It is unlikely that rules of Chinese syntax can be replaced by English syntactic rules in the foreseeable future. Therefore, in introducing common law into the Chinese language, efforts should be made to express common law in conventional Chinese syntax. Once it becomes clear that the thought sequence can be expressed logically in the target language, translators should feel confident and comfortable with revising the target language text to conform to Chinese syntactic norms.

III. THE FUTURE OF BILINGUAL DRAFTING IN HONG KONG

Bilingual legislative drafting based on legal translation is probably inherently flawed and defective. Despite the declaration or recognition of "equal authenticity" of the source text and target text, the translated text cannot avoid the insinuation of inferiority as a result of the translator's search for equivalents or "mirror images" of the source text in literal translation. The proposed goals of legal translation, i.e., fidelity to the legislative intent or policy instruction to achieve the same legal effect of one single instrument, fluency in idiomatic Chinese and elegance as a legislative genre, could be used to improve the quality of the Chinese text of Hong Kong legislation. But, ultimately, the Chinese text shall be drafted based on the policy instruction instead of being translated from the English text. Canada has

⁶⁸ Elmer A. Driedger, *The Composition of Legislation* (2nd ed.), at 4 (Ottawa: Department of Justice, 1976).

⁶⁹ Kubler has conducted one of the most intensive studies on Europeanized grammar in modern written Chinese. He asserts that "in the course of the last 150 years, almost all aspects of the Chinese language, with the sole exception of phonology, have been more or less subject to European influence." See Cornelius C. Kubler, *A Study of Europeanized Grammar in Modern Written Chinese*, at 14 (Taipei: Student Book, 1985).

already adopted the approach of "parallel drafting" where English text drafters and French text drafters work side by side and each on its own text based on policy instruction. This drafting process brings the true equality and equal authenticity of the two language texts.

CONCLUSION

To strike a balance at the tension between precision and comprehensibility, it is submitted that we treat legal terminology and syntax with some distinction. Lexical adjustment is common as the lexicon is the most flexible part of a language. The importation of new concepts through borrowing is the most common form of lexical adjustment. Borrowing or neologism is accepted as last resort in translating legal terms. But, grammatical change happens less often because grammar is more resistant to change. That is, people are less prepared to change the grammar of their language.⁷⁰ Thus, at syntactic level, Chinese text shall conform to the grammatical requirements of the Chinese language. Common law Chinese is still Chinese and should not ignore the syntactic patterns of the Chinese language.

George Steiner once pointed out that at some level, part of the difficulty of translation may be that languages differ in order to prevent understanding, to draw the group together by excluding others.⁷¹ Translation is the bridge that connects different language communities and makes it possible for human beings to share different cultural experience. J.B. White once wrote:

Translation is thus the art of facing the impossible, of confronting unbridgeable discontinuities between texts, between languages, and between people. It recognizes the other – the composer of the original text – as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by the motives of dominance or acquisition, but by respect.⁷²

⁷⁰ King-kui Sin and Derek Roebuck, "Language Engineering for Legal Transplantation: Conceptual Problems in Creating Common Law Chinese", 16 *Language and Communication* 235-254, at 249 (1996, no.3).

⁷¹ George Steiner, *After Babel, Aspects of Language and Translation* (2nd ed.), at 285 (Oxford/New York: Oxford University Press, 1992).

⁷² J.B. White, *Justice as Translation*, at 257 (Chicago: The University of Chicago Press, 1990).