

## **Use of Official Languages for Conducting Court Proceedings**

### **Purpose**

1. The purpose of this paper is to set out the policy and practices regarding the use of Putonghua as an official language in conducting court proceedings.

### **The Legal Provisions**

#### **(A) The Basic Law**

2. Article 9 of the Basic Law stipulates that in addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.

#### **(B) Official Languages Ordinance, Cap. 5 (“the Ordinance”)**

3. By section 3 of the Ordinance, the English and the Chinese languages were declared to be the official languages. As far as judicial proceedings are concerned, *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. Section 5(1). And his decision is final. Section 5(2).

4. But notwithstanding section 5(1):

- (a) *A party to or a witness in* any proceedings or a part of any proceedings may (i) use either or both of the official languages; and (ii) address the court or testify in any language. Section 5(3).
- (b) *A legal representative* in any proceedings or part of any proceedings may use either or both of the official languages. Section 5(4).

## **The Use of Official Languages in Court Proceedings**

### **(A) The Judge**<sup>(Note 1)</sup>

5. In accordance with section 5(1) of the Ordinance, a judge may use either English or Chinese or both in conducting court proceedings. Those are the official languages.

6. When a judge decides that the proceedings before him are to be conducted in one particular official language, this usually means that:

- (a) The judge will use that language;
- (b) The transcript of the proceedings will be kept in that language; and
- (c) His judgment will be in that language.

7. The judge has the discretion to use one official language for part of the proceedings and another official language for another part of the proceedings. An example is where Cantonese is used for the oral evidence and English for the submissions.

8. In Hong Kong, all judges are proficient in using English to conduct proceedings. However, not all judges are proficient in conducting court proceedings in Chinese. After consultation with the Chief Justice, guidelines for Judges regarding the use of Chinese in court proceedings were issued in January 1998 by the then Chief Judge of the High Court. These have been published.<sup>(Note 2)</sup>

9. The guidelines seek to assist judges in the exercise of their discretion. In deciding on the choice of official language for the whole or part of the case, the paramount consideration for the judge is the just and expeditious disposal of the cause or matter before him, having regard to all the circumstances of the case. The factors which may be taken into consideration include:

- (1) the language ability of the accused or litigants;
- (2) the language in which the witnesses will testify;

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<sup>(Note 1)</sup> The term “Judge” is used to include all judges and judicial officers.

<sup>(Note 2)</sup> The guidelines have been published in Hong Kong Civil Procedure, 2002, Vol. 2 at pp 980 to 910.

- (3) the wishes of the accused or litigants;
- (4) the right of the accused or litigants to instruct a lawyer of his or their choice;
- (5) the language ability of the lawyers representing the accused or litigants;
- (6) the factual issues in dispute;
- (7) the legal issues in dispute;
- (8) the volume of documents which may be required to be translated into the other official language; and
- (9) the language ability of the judge or judicial officer himself.

(B) The Witnesses and Parties

10. Whichever official language is chosen by the judge to be used, it does not mean that any witness or party must use the official language chosen by the judge. In accordance with section 5(3) of the Ordinance, a party or witness (a) may use another official language or (b) address the court or testify in any language. This would include any language which is not an official language. This is in contrast to section 5(1) relating to the judge and section 5(4) relating to the legal representatives both of whom may use only either or both of the official languages.

11. Indeed, since the Common Law was first introduced in Hong Kong, any witness or party has been permitted to use whatever language he wishes.

12. If a witness or party uses any language which is not the official language used by the judge, where necessary, the assistance of a court interpreter will be made available.

(C) The Legal Representatives

13. Notwithstanding the official language chosen by the judge, a legal representative may use another official language. See section 5(4) of the Ordinance.

14. In Hong Kong, since all lawyers are trained in English, all lawyers should be proficient in English. But not all lawyers are proficient in Chinese. Where the judge chooses Chinese as the official language, the legal representative may not be proficient in Chinese. Where necessary, the assistance of a court interpreter will be made available.

### **The Use of Putonghua in Court Proceedings**

15. It should be noted that the question of whether the official language of Chinese includes Putonghua did not arise in *Re. Cheng Kai Nam Gary* HCAL 3568/2001 (3 December 2001). Hartmann J did not rule on that question. In that case the applicant was seeking to have his case tried by a judge who speaks Cantonese in addition to English. Whether the official language of Chinese includes Putonghua was not an issue before him. Hartmann J did not rule that only English and Cantonese are the official languages and that Putonghua is not included. At paragraph 3 in the introduction to his judgment the judge simply said:

“Assuming that Chinese means, in Hong Kong, the language of the majority, namely Cantonese, as opposed to the other languages and/or dialects that fall under the description of ‘Chinese’, it means that our courts allow for two official languages in the spoken form : English and Cantonese.” *[Emphasis added]*

16. However, as a matter of fact, Putonghua has been used in a limited number of instances in short proceedings or parts of proceedings by a number of bilingual judges who are proficient in Putonghua at various levels of court. Although the Judiciary does not have data on this matter, examples are at Appendix I. Having regard to Article 9 of the Basic Law and section 5(1) of the Ordinance, the use of Putonghua by these judges meant that they by implication had taken the view that the official language of Chinese includes Putonghua.

Appendix I

17. Consistent with this practice and the view taken by implication, it is the Judiciary’s position that the official language of Chinese in its spoken form usually refers to Cantonese but also includes Putonghua.

18. It should be stressed that notwithstanding that Putonghua can be used as an official language in conducting court proceedings, whether the judge uses Putonghua or not for the proceedings or part thereof is a matter of discretion for the judge. In exercising that discretion, the judge

may be assisted by the published guidelines referred to in paragraphs 8 and 9 above.

19. It should also be noted that rule 2 of the Rules of Procedure of the Legislative Council (“the Council”) made by the Council under article 75 of the Basic Law provides that a member may address the Council in either Putonghua, Cantonese or the English language. Whilst the interpretation of laws is of course ultimately a matter for the courts, it should be noted that the Council in making that rule must have proceeded on the basis that the official language of Chinese in article 9 of the Basic Law includes Putonghua. Moreover, presumably on the same basis, oaths of office have been taken in Putonghua by officials in the three branches of government on 1 July 1997 and by officials of the executive authorities on 1 July 2002.

### **Proficiency of Judges in Putonghua**

20. Information on the proficiency of judges in Putonghua is at Appendix II.

Appendix II

21. Whilst the Judiciary has no data on the occasions on which requests have been made to conduct legal proceedings or part thereof in Putonghua, it is believed that at present the demand is not substantial. It is noted that proficiency in Putonghua in the legal profession is limited. But the demand may be increasing, especially from litigants in person. The Judiciary will monitor the demand for the use of Putonghua and if necessary, consider additional training for judges to increase the Judiciary’s capability in this regard.

### **The Recent Replies on the Use of Putonghua Issued by the Judiciary In Response to Press Enquiries**

22. Some concern has been expressed on the appropriateness of the recent replies issued on the use of Putonghua by the Judiciary in response to press enquiries. The Judiciary’s position on this matter is set out in Appendix III.

Appendix III

Judiciary Administration  
November 2002

**Examples of Instances where Putonghua has been used in  
Conducting Court Proceedings**

**Mr. Justice Chan, PJ**

Mr. Justice Chan, when he was in the High Court, has used Putonghua in conducting short hearings involving litigants in person whose native language is Putonghua. He has used Putonghua in a few magisterial appeals (sitting as a judge of the Court of First Instance) and some applications for leave to appeal (sitting alone as a single judge of the Court of Appeal).

**Mr. Justice Yeung, JA**

Mr. Justice Yeung has used Putonghua in a magisterial appeal in June 1997, involving an illegal immigrant from China. In that case, the appellant spoke in Putonghua, and Mr. Justice Yeung used Putonghua to deliver the decision.

There were other occasions when Mr. Justice Yeung has used Putonghua to have a direct dialogue with witnesses giving evidence in Putonghua.

**Madam Justice Kwan**

Madam Justice Kwan has used Putonghua in conducting court proceedings on a number of occasions. Mostly, this was in the course of bankruptcy petitions listed for call over.

Madam Justice Kwan has also heard one civil trial concerning a tenancy dispute in Putonghua in 2001. The subsequent hearing in this case for variation of the costs order nisi and for stay of execution of the writ of *fifa* was also conducted in Putonghua.

**Deputy Judge Fung**

Deputy Judge Fung has used Putonghua to clarify answers of witnesses in listing hearings, pleas in mitigation and cross-examination.

**Master Lung**

Master Lung has occasionally used Putonghua in court proceedings, especially in the Labour Tribunal or hearing legal aid appeals where the litigants were unrepresented. In most cases, Putonghua was used for part of the proceedings. Sometimes, Putonghua was used for the whole case involving a legal aid appeal.

**Master Au Yeung**

Master Au Yeung has used Putonghua since about 1988 in matrimonial cases (directions hearings and trials), small claims cases, Master's Chambers hearings, legal aid appeals and Court of Appeal directions hearings. Putonghua would usually be used throughout the proceedings by the litigant (usually in person) and by the court.

**Mr. Ernest Lin**

Mr Lin has used Putonghua in relation to pleas, sentences and short trials in cases relating to Breach of Conditions of Stay and Immigration related cases in the Magistrates' Court.

**Mr. Michael Wong**

Mr. Wong has used Putonghua in call-overs, mentions and ex-parte hearings in the Labour Tribunal.

**Information regarding the Proficiency of JJOs in Putonghua**

1. Of the 118 bilingual judges in the Judiciary, 56 have gone through some training in Putonghua. (29 have completed the Advanced Putonghua Course organized in conjunction with the Civil Service Training and Development Institute, 5 have attained the Intermediate Level, and 22 have attained the Elementary Level.)
2. At present, there are 11 JJOs attending an Intermediate Putonghua Course.

**The Recent Replies on the Use of Putonghua Issued by the Judiciary  
In Response to Press Enquiries**

**The facts**

- 1 *HKSAR v Pan Shenfang and others* (Case No. 823 of 2002) was tried before Judge Sweeney (“the Judge”) in the District Court. There were three defendants in this case. The first and second defendants (D1 & D2) faced one charge of attempting to obtain property by deception and the third defendant (D3) faced one charge of conspiracy to defraud.
- 2 On 23 October 2002 (Wednesday), the first day of the trial, counsel for the 1<sup>st</sup> defendant made an application to cross-examine the first prosecution witness (PW1) in Putonghua. (PW1 was the only police officer who said he had used Putonghua in questioning the suspects.) The hearing had so far been conducted in English. The application was made before PW1 was called. This was the first request for the use of Chinese in the proceedings in question. (Usually, an application for the trial to be conducted in Chinese in the District Court has to be made to the criminal listing judge sitting in the plea Court before the case is set down for trial and the matter is then considered.) The Judge stated his understanding that English and Cantonese are the two official languages. But the Judge said that he would not object to the application if counsel could show him that Putonghua could be allowed and asked counsel to submit arguments on whether Putonghua could be considered an official spoken language when the hearing resumed the next day.
- 3 In the late afternoon on 23 October, the Judiciary Press Office received questions from the SCMP on the use of Putonghua in proceedings. The Judiciary spokesman responded: “The Judiciary has no comment in view of the pending ruling”.
- 4 On 24 October 2002 (Thursday), counsel informed the court that he would not proceed with the application and the point was therefore not argued. Accordingly, the Judge did not make any ruling on this matter. The Judge however remarked that the form of Chinese used in Hong Kong is Cantonese, referring to para. 3 of Hartmann J’s judgment in *Re Cheng Kai-nam Gary*. He

commented that there had been no change in that position and referred to Article 87 of the Basic Law. He said that if called upon he would rule that in the Hong Kong context, “Chinese” means “Cantonese”. PW1 gave his evidence in Cantonese with English interpretation. Examination-in-chief by Prosecution counsel, cross-examination by counsel for D2 and by the solicitor for D3 were all conducted in English and interpreted into Cantonese. Cross-examination by counsel for D1 was conducted in Cantonese with English interpretation. There was no re-examination. PW1’s evidence concluded at about 4:30 p.m. on that day that is, 24 October (Thursday).

- 5 The Judge, in saying that the form of Chinese used in Hong Kong is Cantonese, referred to para 3 of Hartmann J’s judgment in *Re Cheng Kai Nam Gary*. HCAL 3568/2001 (3 December 2001). In that case the applicant was seeking to have his case tried by a judge who speaks Cantonese in addition to English. Whether the official language of Chinese includes Putonghua was not an issue before him. Hartmann J did not rule that only English and Cantonese are the official languages and that Putonghua is not included. At para 3 in the introduction to his judgment the judge simply said:

“Assuming that Chinese means, in Hong Kong, the language of the majority, namely Cantonese, as opposed to the other languages and/or dialects that fall under the description of ‘Chinese’, it means that our courts allow for two official languages in the spoken form : English and Cantonese.” *[Emphasis added]*

- 6 In the late afternoon on 24 October (Thursday), the Judiciary received press inquiries on the matter from the SCMP, Sing Pao and the Sun. In response, the Judiciary issued the following reply:

“Both Chinese and English are official languages in court proceedings.

In court proceedings, any parties, witnesses or persons can speak in either Chinese or English or in fact any other languages or dialects with the assistance of court interpreters, if required.

In the context of Hong Kong, spoken Chinese usually refers to Cantonese which is the dialect most commonly used by residents in Hong Kong but it also includes Putonghua and it does not exclude other Chinese dialects.”

7 On 25 October (Friday), the Judiciary's reply was reported in the press. On that day, the SCMP's article under the headline "Putonghua not an official language of the courts, says judge" referred to the Judiciary spokesman saying that in the context of Hong Kong spoken Chinese usually refers to Cantonese but also includes Putonghua.

8 In response to a further inquiry from the SCMP on 25 October (Friday), the Judiciary issued the following reply on that day:

"Since both Chinese and English are official languages for conducting court proceedings, and in the Hong Kong context, spoken Chinese usually refers to Cantonese and also includes Putonghua, court proceedings may be conducted in Putonghua. In deciding which language is to be used by the court in particular proceedings, the paramount consideration is the just and expeditious disposal of the cause or matter before the court, having regard to all the circumstances of the case. The factors which may be taken into consideration include: -

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

9 On the same day (25 October), in response to a further inquiry from the Sun, the Judiciary gave that newspaper a copy of the published guidelines on the use of Chinese.

10 The Judiciary's replies on 24 and 25 October in response to press inquiries were approved by the Chief Justice. At the time when

they were approved, the Chief Justice noted that there had been no previous judicial ruling on whether the official language of Chinese includes Putonghua, and that Putonghua had in fact been used in limited instances in proceedings. Further, the Chief Justice was informed after checking of the audio recording that as far as the proceedings before the Judge were concerned, the relevant application had been withdrawn and no ruling had been made. The Chief Justice therefore noted that the issue which had been raised in the proceedings on the use of Putonghua had already been disposed of.

- 11 On 28 October 2002 (Monday), the SCMP carried a further report on this matter quoting the Judiciary's reply on 25 October.
- 12 As already noted, the evidence of PW1 had concluded at about 4:30pm on 24 October (Thursday). But on 28 October 2002 (Monday), counsel for the 1<sup>st</sup> defendant referred to the SCMP report of that morning and applied to recall PW1 for cross-examination on the issues relating to language. (As already noted, PW1 was the only police officer who said that he had used Putonghua in questioning the suspects). The Judge allowed the application. PW1 was recalled at 10:28 a.m. for further cross-examination on 29 October (Tuesday). The Judge explained to PW1 the reason for his recall was limited to testing his Putonghua. PW1 was asked whether he agreed to be cross-examined in Putonghua and whether he was capable of and agreeable to give answers in Putonghua. He answered in the positive. Counsel cross-examined in Putonghua and PW1 answered in Putonghua. Each question and answer was interpreted into English. This part of the exercise took about 20 minutes. In re-examination by Prosecution counsel, PW1 gave his evidence in Cantonese which was interpreted into English. The re-examination took about 2 minutes. It should be noted that, although the Judiciary's first reply on 24 October stating that spoken Chinese also includes Putonghua had been reported in the press on 25 October (Friday), the application to recall was only made on 28 October (Monday).
- 13 On 28 October, in response to their inquiries, the Judiciary gave copies of the Judiciary's reply of 25 October to Sing Tao Daily and Asahi Shimbun. On 29 October, press inquiries were received from RTHK, Apple Daily, Hong Kong Economic Times, Sing Tao Daily News, Ming Pao and Sing Pao. In reply, they were given Chinese translations of the Judiciary's reply in English

of 24 October and/or the reply in English of 25 October in response to press inquiries.

- 14 On 30 and 31 October, further inquiries were received from the SCMP and the Judiciary spokesman replied:

“We have nothing to add at present. After the case is concluded, the Judiciary may consider whether any further comments will be appropriate.”

- 15 The hearing before the Judge concluded on Friday, 1 November and his reasons for verdict and sentence were delivered on Monday, 4 November.

***The Judiciary's comments***

- 16 The Chief Justice understands the concerns that have been expressed on the appropriateness of the Judiciary's replies to the press on 24 and 25 October 2002.

- 17 In response to these concerns, the Chief Justice would make the following points:

- (a) Having regard to the fact that (i) there had been no previous judicial decision on whether the official language of Chinese includes Putonghua and (ii) this is a matter which affects the administration of justice generally at all levels of court, it was appropriate for the Judiciary to make the general statements contained in the replies in question at some stage.
- (b) When the replies were issued on 24 and 25 October 2002, the issue that had been raised on the use of Putonghua in the proceedings in question had already been disposed of, after withdrawal of the relevant application. Moreover, the witness in question had completed his evidence. The replies were certainly not issued for the purpose of intervening in or influencing the proceedings but with a view to seeking to be helpful to the press in response to their specific inquiries on a matter in which the public is interested.
- (c) However, with the benefit of hindsight, it is accepted that the better and more cautious approach would have been to wait until the conclusion of the case before issuing the replies in

response to the press enquiries. In fact a “no comment” approach was adopted on 23 October while the application was pending (see para 3). At the time the replies were issued, the possibility of an application to recall PW1 to be cross-examined in Putonghua was unfortunately not anticipated.