

priority to human contacts with our new colleagues in Eastern Europe and the Soviet Union in all fields and at all levels in the law. We must devise means whereby we can explain and proclaim the principles of our system and the moral values that are needed to underpin it. We must devise means by which the experience that is gained is shared and promulgated and we must be ready to offer help and counsel even before it is sought. To give our minds to all this has become a duty for all who profess the law, for judges, for practitioners, for academics, and indeed for those curious hybrids (a permanently endangered species) the Law Officers.

What a role there is here for this Institute especially. Let us each take care that in times to come we and our successors do not look back upon these days, when the Eastern sky was clearing and a free market in ideas was opening even amidst the rubble and the ruins of oppression, only to acknowledge ruefully that through lack of vision these higher opportunities were missed.

Notes:

¹US v Schwimmer 279 U.S. 644

²Ovid: Fasti Bk III

³250 U.S. 616 at 630

⁴Commercial Law p.32

The Chinese Digest of the Common Law

by Professor Derek Roebuck, City Polytechnic of Hong Kong

The Research Projects

Two research projects at the new law school of the City Polytechnic of Hong Kong may be of interest to members of the Institute. The first, a pilot study, was part of a more general project on the nature of the bilingual milieu in Hong Kong. Depending on the chosen definition, probably fewer than one out of ten of the inhabitants of Hong Kong are functionally bilingual, at least in English and Cantonese. They may speak more than one Chinese language but, for political reasons, those are always referred to as dialects. What matters is that the great majority do not speak the language of the law, the English Common Law, the only significant source of the legal system. The Basic Law, which will become the territory's constitution when it reverts to Chinese sovereignty in 1997, and for fifty years thereafter, enshrines Chinese as the official language -

whatever that will mean - and the English Common Law, amended by legislation, as the prevailing source of law.

The objectives of the pilot study were to investigate the methodologies needed to create in written Chinese a statement of the common law as it applies in Hong Kong and to test them by a substantial sample, a digest of the law of contract. When a further grant was received, to support the creation of a digest of the whole of Hong Kong's common law, the original research became in effect a feasibility study. That study is nearing completion, though the inquiries it has stimulated are not likely to be easily completed nor their interest quickly exhausted.

Strategy

Because we were determined to adopt as scientific an approach as we could

conceive of and knew that we were likely to encounter political opposition, we resolved to construct, as soundly and as comprehensively as possible, every objection that could be anticipated against the feasibility of the digest. The political precautions proved necessary. The scientific problems are not without their daunting aspects. The objections can be summarised:

1. The Common Law can be stated, argued and transacted only in English.
2. The Common Law cannot be stated in the form of a digest.
3. There is some characteristic in the Chinese language - spoken or written - which make it unsuitable for stating or discussing the Common Law.

Put another way, there are differences between Chinese and English cultures, or between Chinese law and Common Law, which create conceptual gaps too great to be jumped.

4. The resources need to create such a digest would make it impossible or, at least, too expensive.

The First Objection

The first objection may be expanded to:

The Common Law has such a symbiotic relation with the English language that it is not possible to transact it adequately in any other.

This argument is commonly expressed, usually by monolingual English lawyers. It can be countered by either of two proofs, historical or comparative.

- Historical

The most elaborate part of the research so far has been a study of the languages of the Common Law in England. That has shown that for most of its formative period the Common Law was translated in three languages: Latin, French and English. Latin was never a spoken language of the Common Law. Its use in speech in England was minimal outside religious ritual and other work of the Church. It was, however, the language of record for most purposes of the Common Law, from soon after the Norman Conquest, when it replaced English, to the eighteenth century, with a few interruptions - nearly seven hundred years. A form of French, Law-French, though it changed greatly over a similar period, was spoken and written for some purposes by lawyers. When it finally fell into disuse and was finished off by Act of Parliament in 1733, there were serious suggestions that the Common Law would not survive without it.

The use of other languages, particularly Law-French, throughout the childhood and youth of the Common Law, and indeed the full maturity of some of its more important parts, such as the law of property, proves that the Common Law could then be transacted in a language other than English. It does not prove that it could be now, even less than it could be in Chinese.

- Comparative

There are jurisdictions where one of the languages of the law is not English though the Common Law is the major source of the legal system. Lawyers regularly use that other language in their legal discourses - oral, written or both. It would be sufficient proof to dispose of the objection to produce one such jurisdiction and there are a few obvious ones. In Canada, New Brunswick has a Common Law system where all law work

and, indeed, legal studies are transacted in French. Quebec too has the Common Law as the basis of its legal system. There are other jurisdictions which are greatly influenced by the Common Law which use languages more different from English, not coming from an Indo-European ancestry: Sri Lanka, Malaysia and Israel. Work continues as the range expands to consider more recent developments in Papua New Guinea or in New Zealand, where we hear there are attempts to translate Common Law concepts into Maori.

The Second Objection

For nearly four centuries reformers have suggested the codification of English law. Francis Bacon was no doubt serious when he offered the king his services from the Tower. Some have spent much effort on total or partial codifications. But there have always been powerful voices raised against such schemes and sometimes scholarly ones have accompanied them. Hong Kong already has the partial codifications imported from England and applied here as there without much noticeable damage to the Common Law system. sale of goods, partnership, bills of exchange and bill of sale in the last century; corporations, securities, monopolies and tax in this. Much more significant, though, is the recently stated intention of the Government to introduce a Criminal Code much like the English draft. That has greatly encouraged the Chinese Digest project by showing the Government's confidence that such a task is possible and, perhaps even more, by removing from the project what would probably have been its most difficult and certainly its most controversial task.

Of course a digest is not a code. The American Law Institute's Restatements have shown that it is politically easier to create digests, though by no means likely to avoid all hostility. They have also shown that it is technically possible.

There seems to be sufficient evidence that a Common Law system can survive even comprehensive digesting. It is possible that there are parts of Hong Kong law which do not lend themselves at this stage of their development to being incorporated into a digest. If so, the best way to find out is to try.

Such proofs as we have against the second objection are therefore twofold. First a similar task has proved possible and fruitful in conditions which do not seem to be too dissimilar in relevant respects. Secondly, first trials have shown what previous partial codifications would suggest, that there are no factors which make a digest of Honk Kong's Common Law impossible. Whether it can be created in Chinese is another matter.

The Third Objection

The third objection is that the Chinese language has some defect which makes it incapable of reproducing the concepts of the Common Law in such a way that the law can be transacted satisfactorily. The best proof against this fallacy will be provided by the successful use of the digest and, perhaps, no other can be conclusive. But there are strong arguments already available. First the Chinese language is already used this way. Preliminary surveys and other observations show two interesting phenomena.

The law students at the City Polytechnic of Hong Kong - the LLB(Hons) course has just finished its second year - regularly prepare for lectures and tutorials, discuss with their colleagues the finer points of law in their assignments, and prepare for moots in Cantonese. The last is the most illuminating. Students start moots in their first term. Students appreciate this method of learning, not only for the same general reasons that students in England do, but perhaps

especially because many of them feel they need as much practice as possible in spoken English. Yet they prepare in Cantonese. Already they have received praise from senior counsel and judges for their presentation, both oral and written, of course in English. Though they work in Cantonese, their speech is liberally larded with English expressions. That is true of students in all disciplines. But the syntax is Chinese. Moreover, we who use English as our mother tongue should not forget our helplessness if forbidden to use typically English expressions such as "habeas corpus" or "nisi prius", or even "profits a prendre" or until recently "feme sole".

This phenomenon, of lawyers using Chinese informally, though for all kinds of thinking and arguing about law, can be observed also in the offices of Chinese solicitors. Except for the largest firms, there are few English-speaking clients, proofs of evidence are taken in Chinese, lawyers talk to one another in Cantonese, but all correspondence and, of course, all pleadings are in English. The first changes are now taking place, allowing Chinese to be used in pleadings in the High Court and in argument in the Magistrates' Courts, and it may not be long before the present sprinkling becomes a torrent.

It may be of no scientific value as a proof but it is of interest and relevance that the Government must believe that the Common Law can be put into a Chinese code. The Law Reform Commission has recently been charged with the task of producing, in English, a comprehensive code of the criminal law. By Ordinance that must be 'simultaneously translated' into Chinese. The criminal law is not the whole of the Common Law but, if it can become a Chinese Code, it is not obvious why the other parts of the Common Law cannot.

The Fourth Objection

There are practical difficulties. Nobody could deny that the project is ambitious. It has received public money sufficient for its present purposes but cannot spend it to the best use because the limits on salaries payable to research assistants, and the greater rewards available for young lawyers, let alone experienced ones, in practice make it impossible to recruit the right helpers in sufficient numbers. It is not impossible but still difficult to find research assistants with the necessary linguistic skills. Moreover, all the experienced scholars who have offered assistance have very full responsibilities which prevent them from giving more than intermittent attention to the project. Yet much has been done of a preliminary kind and some text - on a digest of the law of contract - is now beginning to appear. Further into the future, promises of drafts on administrative law and conflicts of laws will bear fruit. Torts and property seem a little further off.

Structural problems abound. There are questions of style and register which are not likely to be answered except *ambulando*. Yet there is also considerable goodwill and support from the Government and private lawyers which, being friendly and informal, is also unrestricting. Scholars abroad have also been ready with their expert advice and promises of continuing help.

If there are no intrinsic impossibilities, then the practical difficulties are there to be overcome.

A Challenge

The full-time academic staff of the City Polytechnic will have leaped from five to forty in just over three years. Among them will have to be found the administrative nucleus of the project team. A research administrator and a research assistant have been appointed. The

generous offers of expert help will now be taken up and I hope that among the scholars of many interests and talents who read the Institute's Bulletin there will be some who are attracted by what they read here to lend their scholarly support to a research project which, whatever its faults

and its researchers' shortcomings, cannot be accused of triviality. They should write to Derek Roebuck, Professor of Law, City Polytechnic of Hong Kong, Tat Chee Avenue, Kowloon Tong, Hong Kong.

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