

DR JANNY LEUNG:
TENSION AND GOALS IN LEGAL COMMUNICATION

I'm going to situate my talk in two kinds of contexts. That's how I'm going to begin. The first kind of context is the study of legal English as in the wider academic discipline of language and law, so this is an area of interest for me. And this is actually... So legal English is only one intersection where lawyers and linguists might work together. There're actually other areas that I'd like to very briefly mention, including areas such as forensic linguistics, so how linguists have been involved in assisting with criminal investigations, studying things like suicide notes, bomb threats, analyzing discourses to determine whether someone really made the threat... Issues like that. I mean language in law, legal language, they're more similar. And then other kinds of language issues in law such as access to justice: when you have children, second language speakers and other vulnerable witnesses speaking in a courtroom, what kinds of linguistic accommodation needs to be made to them? Language subject to law, so regulation of language. And other wider issues that I'd just call law, language and society. So these are just kind of wider academic contexts in which this, I think, legal English topic is situated.

A second kind of context, I feel obliged to talk about it more today because I'm the only local person speaking today and I want to say a bit more about the Hong Kong context.

Referring back to the theme of the symposium – 'Learning the language of the law' – I want to begin by saying that there is actually more than one language of the law in Hong Kong, that Hong Kong is a bilingual legal system, that if you look at the Basic Law which is the mini-constitution in Hong Kong, the Chinese is actually the authentic version of the law. English is equally authentic, but where there is dispute, the Chinese prevails.

When it comes to statutory law, Chinese and English texts of the law are equally authentic. This is provided in various ordinances. It's also constitutionally recognized in the Article 9 of the Basic Law. I won't go through details. I just want to highlight the fact that there're actually languages of the law that students have to learn in Hong Kong.

Very briefly highlighting equal authenticity principle, which basically means that both English and Chinese texts of the law are authoritative that you should be able to depend on the Chinese texts of

the law in litigation in Hong Kong. So, according to government papers, you should not treat the Chinese texts as being subordinate to, nor a mere translation of, its English counterpart. This is not a principle invented in Hong Kong. This is actually taken from international law – the equal authenticity principle and it's also practiced in the EU where there are twenty four official languages and also in Canada where English and French are official languages. I just want to highlight this context because when you're practicing law in Hong Kong, I know the focus today is mostly on the English, but the Chinese texts may actually come up.

How is this relevant to our discussion today? Firstly, interpretation issues, so you have the equal authenticity principle. It's possible that the person that you're litigating against can be reading a different text than what you're reading. Another thing is it has to do with the medium of courtroom discourse, especially if you're involved in local practice. Most cases in lower courts in Hong Kong are actually tried in Chinese instead of English. Chances are that if you're practicing criminal law in Hong Kong, you have to at least be able to practice in Chinese.

A realistic phenomenon that I've looked into in a government-funded project is that there is a huge increase in unrepresented litigation in Hong Kong since the handover. And the large majority of unrepresented litigants in Hong Kong litigate in Cantonese. So if you're learning legal English as a student in Hong Kong, chances are that in a moot court like this, you'll be learning to argue against another person who's being trained in the law. But in practice, in Hong Kong, chances are that when you go to a lower court, you might be arguing against someone who's not trained in law. So it's not just a question of whether you can explain a legal idea to your mother or to your wife – why is it always women? – but also if you're in a courtroom litigating against someone who's like your mother and your wife, that you may be making actually have to be arguing against them, and I'll give you some examples from an ethnographic work in a bit.

Even in private practice... So I direct a double degree programme in The University of Hong Kong in law and literary studies, in the opening when I was preparing for some information session, I was talking to a lawyer friend who's an incorporate lawyer in Hong Kong, I was asking her, 'If there's one thing you want to say to my future law students in Hong Kong, what is it? How should they prepare

themselves to become a good lawyer in Hong Kong?’ The one thing she said is, ‘Learn Mandarin.’ So I just wanted to highlight the fact that there’re all these other kind of linguistic dimensions to legal practices in Hong Kong. And I’m coming to legal English.

So I think it’s important to clarify what we mean by legal English. Some of the talks, some of the videos and some of the points about plain language, you know, in a way we can be talking about the same kinds of issues anywhere, could be Australia, can be the UK, can be the US. So in a way, legal English means slightly different things in different jurisdictions and at different points in time. I think just now the dean of CityU (School of Law) has mentioned that, you know, there are differences, say, in vocabulary between American legal English versus British a kind of English in the common law language. And also different points in time. So as lawyers, I mean, perhaps less so in the cooperate world, but then if you’re, say, when they’re reading legislations that were written a hundred years ago, you’re reading a kind of quite different kind of legal language.

And another point that you mentioned was that in Hong Kong, we actually retain quite a lot archaic legal English, so there are kind of peculiarities about legal English used in Hong Kong. There’s something about post-colonial jurisdictions, the way they act like a time capsule in terms of retaining features that perhaps in the UK they no longer retain. In UK, they got rid of wearing wigs in the courtroom, but here we want to retain that tradition, so kind of local nuances.

I want to also emphasize the fact that legal English involves both comprehension and production. I think most of the discussion we’ve had so far emphasize on production, so how students can write better, how they can talk better, but echoing what I think Christopher was just saying, you also have to take into account input. What have the students been reading? How good are they in understanding legal texts? So I think there’s more emphasis should be given to questions of comprehension. I’ll give you more examples on that in a bit. And legal English involves both spoken and written aspects. I think in the second panel, we’re going to move on to more spoken issues. I’ll also include one or two examples in my talk. And lastly, I want to highlight the fact that legal English may be read by both legal professionals and laypersons. For my ethnographic work, I’ll show you that unrepresented litigants have attempted to read legal texts on their own without assistance and

what happens in those situations.

So, because I want to emphasize comprehension as an important dimension of understanding or learning legal English, I'm going to start with a little bit of history. There are distinctive features, such as the ones that Richard was talking about in modern legal English, that actually these are not just random stylistic features that lawyers like and put in the law, but they're there because of sociolinguistic complexities in different historical periods. One example that you have raised was, say, 'cease and desist' – like this kind of pairs of words, nouns or verbs that we like to use together, they tend to reflect a historical effect, which was trilingualism in the English common law system after the Norman conquest, so between English, French and Latin. You'll see also a lot of alliteration, so for example, 'to have and to hold' in marriage. This is used for memory aid because in the English common law used to have an oral culture, which was very different from the current written culture that we're accustomed to. So they all have the historical origins that if you appreciate the historical origins, you appreciate the texts that you're reading much better.

I want to bring in a little bit of the Hong Kong context here. So if you consider such pairs of words, which have their historical, you know, origins of one word may be reflecting the French origin, another word might be reflecting the Anglo-Saxon origin. What happens when you have to translate these terms? So one example I have – these are all taken from the DoJ's bilingual glossary, which is freely available online. There's not a lot of consistency in how these are translated. So in the first example, you don't have to understand Chinese in order to appreciate my point. For the first example, you have a pair of verbs, and in the Chinese version, you have retained that structure, you have another pair of verbs. And the second example, you have 'null and void,' and in Hong Kong is a much simplified translation instead of corresponding to the English structure. And if you consider, for any reason, you have to do any back translation, chances are that you're not going to translate back into this English original English structure. So those are a lot of complexities involved in legal translation issues because of the complexities of legal English and you have to have an appreciation of its history in order to understand its complexities.

I highlight... I won't go into details but a lot of these features of legal language, which can be

described as legal register, so from things like layout to questions of grammar to lexis – a lot of which was highlighted in the last talk. These are the kinds of things that actually laymen can pick up. So from my ethnographic work, I've seen one very sophisticated and very well educated unrepresented litigant because she has pursued at least three cases in Hong Kong courts. If you just take a short segment of what she says in a courtroom, and she litigates in English, you would almost think that she's a lawyer because through the course of her experience as a litigant, she picked up a lot of these things like grammar and vocabulary. What she does not pick up is genre features. So genre features have to do with functional aspects of texts, so even though she was talking like a lawyer because she has some of the vocabulary and formality and all that, she misses some of the important functional aspects of legal language. I'm not going to repeat details of genre discussions because I think the other two speakers said quite a lot about it. Just wanted to highlight very quickly the fact that these genre markers, the way they're different from register, what we talked about in the last slide, is that genre markers are structural features that if you miss one genre marker, the whole text can fall apart. That's a major difference between legal register and legal genre. With register, if you remove one formalistic feature, you still have a legal text. So when we talk about simplifying legal English, we're talking about register features. But genre features are completely different things.

I'll give you one example from a case study. This is a litigant who is, again, very well educated in Canada actually, so bilingual person. Cantonese is his first language. When asked how he attempted to understand legal language, he says, 'From my personal experience, I mostly guess.' So that's what laymen, you know, attempt to do.

I do want to say that the government because there are now a lot of unrepresented litigants, so in 2003, the government set up a resource centre for unrepresented litigants. And I've a PhD student whose PhD basically focused on what this resource centre offered. They hold experience. He was interviewing an unrepresented litigant who was doing ethnographic work in the courtroom. One finding that he has from the materials, the resources the government offered was that those resources are utterly incomprehensible to a layperson, and these are resources that are directed for laypersons. I've read some of these texts. I have, you know, multiple degrees in language, I cannot

understand what they say. One example, if you understand Chinese, is the term ‘飭令’ [cik1 ling6] which we looked up in the modern Chinese corpora is not in the modern Chinese vocabulary. They, in their course of translation, for some reason, they coined a term, they picked the term from ancient Chinese and used it in modern Chinese texts. And there’s just no way an average person can understand this.

But this kind of guessing does not always work. One example that the litigant told us about was ‘counsel’s certificate.’ When he came across this term, his guess was that ‘Okay, this must be some kind of license that the barrister has, but that doesn’t make sense because, of course, he’d have to have a license in order to become a barrister,’ so he couldn’t make sense of what’s going on. And it turns out that it’s something entirely different than what he had imagined. It’s something that the court has to grant for counsel to be representing someone in the lower court in order to control kind of imbalances of power.

One other example that he raised and this is actually the crucial ordinance for the case that he was litigating in – he was basically suing a club which he was a member of. So he stopped paying membership fee for a while and then that club charged him compound interest for the money that he owed the club. So he was relying on mostly Section 22 of the Money Lender Ordinance, where this applies only to a money lender, so I’ve highlighted in italics in that section. But he was also pointing to the fact that ‘No, I read the whole ordinance. So Chapter 163, more than half of the ordinance says anyone, any person, so this whole ordinance must apply to anyone, any person.’ And the court just told him, ‘Wait, no, but this section that you rely on only talks about money lenders.’ I think that’s a question of understanding of genre, so how functionally this ordinance works.

Very briefly move on to issues of spoken interactions in courtroom. So Heffer (2005) posited that in courtroom, courtroom interaction actually contains more than one genre, so it has a paradigmatic mode of speaking, so similar to what is taught in law school, kind of a legal reasoning, rational kind of discussion. There is also one other very important element, which is narrative. So in opening statements, closing statements, even within like judicial summing up, there is narrativization of storytelling. And these don’t come from nowhere. It goes back to what I was saying about

comprehension or input – what students get as input. So what I do at The University of Hong Kong is, because I run a double degree programme in law and literary studies, students not only study law, they actually have to read literature, they have to read stories. I think in order to become good storytellers, you have to read stories to start with.

Legal-lay discourse in Hong Kong is a bit more complicated than what Heffer describes. So these are kind of generic features that apply to almost any common law courtroom. So you have counsels talking to, you know, jurors and to witnesses, but on the other hand, their main target audience is jurors, so there is kind of multidimensionality in courtroom interactions. I won't go over these details. But just to give you an example of the additional layers of complexity of Hong Kong courtrooms, you have litigants who don't play by the rules and you have to learn how to deal with them. One example that I have taken from my own ethnographic work is I have heard a litigant who used 'objection' as a means of conveying disagreement. I disagree with what you say and therefore I shout, 'Objection!' Now, this is something they pick up probably from television. So, you know, they see that people can raise objections at some point, but they don't understand the rules that govern when you're supposed to object. And this is not the kind of thing that law students are trained to deal with, but it's happening in Hong Kong courtrooms every day. So I think this just cause for kind of greater need to understand what's going on in the courtrooms right now in Hong Kong.

I will end my talk by highlighting the necessity for interdisciplinary knowledge. So I mentioned that in my double degree programme there is the literature component, but here, I want to focus on the more linguistic kind of component. For example, I think it's really important for students to develop sensitivity towards various kinds of linguistic indeterminacies. So this goes back to what people are saying about precision, but in order to write precisely, you have to understand where imprecision comes from. And this is the kind of thing that linguists do, so we highlight, you know, where vagueness comes from, how words are different, what kinds of ambiguity may exist. Ambiguity may come from a word, it may come from structures, it may come from how you put words together. So all these intricacies like punctuations, lists and connectives etc. This is a kind of thing that we teach in our double degree programme.

The second point seems to be, you know, I don't know, it may seem really obvious to you, but let's look at this one particular example. This text is taken from a recent US Supreme Court judgment. Here, the court needs to decide whether 'carries a firearm' is limited to the carrying of firearms on the person. So in the case, the firearm was in the car trunk. Now, this is an ordinary word, so they're not looking for a technical legal meaning. So what the court did was, 'Okay, let's look up some dictionaries and see what they say about the word "carry".' 'Consider the word's primary meaning. The Oxford English Dictionary gives as its first definition "convey..." Does that read good to you? So you look up a dictionary. Now, Oxford English Dictionary is an authoritative dictionary. We know that. It's got a good reputation, so we look it up and we find a first meaning. As its ordinary meaning, does that sound good to you? Yes? Except that, do you know what the Oxford English Dictionary is about? This is from the Oxford English Dictionary website, so what are the main differences between the OED and Oxford Dictionaries? I'll skip to the important part: The OED, on the other hand, is a historical dictionary and it forms a record of all the core words and meanings in English for over a thousand years, from Old English to the present day... Meanings are ordered chronologically in the OED. Meaning the judges did not know fully the tools they were using, even though, you know, it's the primary resource that they draw on when they try to understand legal meaning.

So, okay. Let's get to the second kind of tool. I don't know whether most of you might have heard of corpus? It's a fair simple idea. You can see Google as a corpus, like a body of texts, and then you can use this tool to help you understand how meaning... What a word means, for example. And it's quite common these days for courts to just look up, say, Google news or Lexis or kind of various kinds of online databases for them to see how a word is used in certain contexts. This is... On the slide, there are two examples from the same case where the judges were trying to do that. In the first example, they were looking at... Okay, in order to show that there's a meaning of a word is valid, he says, 'Okay, the great writers have written this word,' and they use this to refer to this particular sense. So the first example was the King James Bible. Anything odd about that? Obviously, that was a piece of translation. It's not original. I don't know whether that should change your judgment as to how, you know, how persuasive this example is.

Second, a more general point is, if you want to show what a word means in a particular context, does it do anything to just draw from examples of ‘Yes, the great writers have written this word’ and use it to refer to a particular sense? Is that good evidence for the meaning of a word in a particular context? That’s the question I wanted to ask. Same, this is from the same case where the court looks at New York Times database and looks up the meaning of words in this database. All I wanted to highlight is that there are better tools that linguists have come up with for such tasks that eliminate some of the biases you might have by just doing a Google search. Now, Google search contains results that are organized not just by frequency. There are other considerations that Google has when it organized its results – commercial considerations. There are questions of replicability because when you use Google or Google News as a database, if you do a search today versus if you do a search thirty days later, you may get slightly different results. So there are tools called corpus or corpus linguistics that people have come up with where you can have access to language data that’s cleaned up. It’s organized purely based on frequency that it’s not tamed by commercial considerations and that you can have replicable results when you do such searches.

I think I’ll have to stop there. I’m already overtime, but this is what I wanted to highlight that it’s important to understand the local context when we talk about legal English, especially the case of legal bilingualism in Hong Kong. I’m shocked that in legal education in Hong Kong, say, in my university, students can go through the whole legal education curriculum without knowing anything about legal bilingualism. There is one optional use of Chinese in a legal context course that they can take if they want to. Otherwise, they don’t have to do anything about that. And secondly, importance of interdisciplinary knowledge. And I’ll just say that most of the materials that I presented today come from this book and I have it with me. If you’re interested to take a look during the coffee break, you’re most welcome to.