

Language Rights in Criminal Proceedings in Hong Kong

A Case Study of *Rex v Kwok Leung and Others*

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I. Introduction

A universal definition of human rights is the rights everyone has simply because one is a human being.¹ However, the content of human rights has been a controversial topic in human's history all over the planet. With the mission of promotion and protection of international human rights, the United Nations ("UN") introduced the Universal Declaration of Human Rights ("UDHR") in 1948, which has been regarded as possibly the most important document of a universal standard of human rights.² Later, the International Covenant on Civil and Political Rights ("ICCPR") was announced by the UN in 1966, and came in force in 1976. More details of human rights are added in the ICCPR, including language rights in criminal proceedings. In Hong Kong, the Hong Kong Bill of Rights Ordinance Cap.383 ("BORO") in line with the standard of the ICCPR³ came into effect in 1991. This signifies Hong Kong to have followed the international standard of human rights. It is seen that the situation of language rights in the world has come a long way in recent decades. Over a century ago, however, a criminal case tried in Hong Kong, the *Rex v Kwok Leung and Others*⁴ ("the Case") has been considered as a landmark case in the revolution of language rights of the accused in criminal proceedings in Hong Kong⁵ This essay is going to discuss this case and find out its significances with respect to language rights.

II. Summary of the Case *Rex v Kwok Leung and Others*

i. The background of the Case

The trial was conducted in the Full Court in Hong Kong on 3 February 1909. In 1842

¹ Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 400 *Human Rights Quarterly* <<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/hurq6&div=33&id=&page=>> accessed 19 November 2011.

² Peter Bailey, 'The Creation of the Universal Declaration of Human Rights' (Universal Rights Network) <<http://www.universalrights.net/main/creation.htm>> accessed 19 November 2011.

³ United Nations, 'International Covenant on Civil and Political Rights' (United Nations) <<http://www.un.org/millennium/law/iv-4.htm>> accessed 19 November 2011.

⁴ (1909) 4 HKLR 161.

⁵ *R v Tran* [1994] 2 SCR 951.

right after the First Opium War with China, Hong Kong was claimed by Britain,⁶ and returned to China on 1 July 1997 as a Special Administrative Region of the People's Republic of China under the principle of 'One Country, Two System.' During this period, especially at the early stage of colonization, the legal system of Hong Kong was largely imported and transplanted from the Britain.⁷ The system of English law is called common law system, with the major characteristics of case law that many uncodified legal rules and principles are derived from the judicial judgment in precedent cases. This is called the doctrine of precedent or stare decisis. That means when the parties in the court have dispute on what the law is, the inferior court would look at the legal principles and rules in the previous cases with similar situations made by the superior court. Therefore, both the English common law and the past decisions of the Hong Kong courts were the major sources of Hong Kong legal system at that time. Once a decision is made in a case, the legal principles and rules shall be followed by the inferior courts in subsequent cases with similar circumstances.

Another outcome of British colonization is the language system. English was the only official language in Hong Kong and also the dominant language used in courts until 1974 when the Official Languages Ordinance declared that both Chinese and English are official languages in Hong Kong. In the Case, the language used in the court was still English.

ii. The court

The Case was tried in the Full Court in Hong Kong. At that time, appeals in Hong Kong were heard by a Full Court which made up of three judges. From 1910 to 1943, a judge of the British Supreme Court for China in Shanghai was eligible to sit in the Full Court. A Shanghai judge would regularly come to Hong Kong to sit in the Full Court in the 1910s and 1920s. From 1910 to 1920, Havilland de Sausmarez, the Judge of the Shanghai court, was the President of the Full Court in Hong Kong. From 1925 to 1943, a judge of the Hong Kong Supreme Court would also sit in the Full Court.⁸

The Court of Appeal was established in the 1970s. Before the return of sovereignty to China, appeals from the Court of Appeal and Full Court, and certain criminal appeals

⁶ Hong Kong Tourism Board, 'History' (Hong Kong Tourism Board) <<http://www.discoverhongkong.com/eng/trip-planner/hongkong-history.html>> accessed 19 November 2011.

⁷ Albert H Y Chen, 'The Legal System', in Richard Y C Wong and Joseph Y S Cheng (eds), *The Other Hong Kong Report 1990* (The Chinese University Press 1990).

⁸ Wikipedia, 'Supreme Court (Hong Kong)' <[http://en.wikipedia.org/wiki/Supreme_Court_\(Hong_Kong\)](http://en.wikipedia.org/wiki/Supreme_Court_(Hong_Kong))> accessed 19 November 2011.

from the High Court, were laid to the Judicial Committee of the Privy Council in the United Kingdom. In order to appeal to the Privy Council, leave to appeal was required either from the court appealed from or the Privy Council.

After the return of sovereignty the Supreme Court was renamed as the High Court which was later renamed as the Court of First Instance. Appeals from the Court of Appeal (and where there is such a direct appeal, the Court of First Instance) are now heard by the Court of Final Appeal in Hong Kong which was established on 1 July 1997.

iii. The judges

The presiding judges of the Case are Piggott CJ and Gompertz J.

Sir Francis Taylor Piggott was born in London, and was the Chief Justice of Hong Kong from 1905 to 1912.⁹ The position of the Chief Justice was the most senior judge in the court system in Hong Kong until 1997. Since 1997, this title was changed to Chief Judge of the High Court, and the head of the Hong Kong Judiciary was assumed by the Chief Justice of the Court of Final Appeal.¹⁰ There have been twenty Chief Justices in Hong Kong, and Piggott CJ was the most well-known by his vigorous, sometimes outspoken judgments.¹¹

Mr Henry Hesse Johnstone Gompertz was a Puisne Judge of the Supreme Court in Hong Kong since 1909 until 1925 when he was appointed Chief Justice of the Federated Malay States.¹²

iv. The facts of the Case

In the Case, three men, Kwok Leung, Li Shek Shun and Hung Loi, were charged with the murder of Ku Tung. All of them were Hok Lo men. The Hok Lo people are Han people whose traditional Ancestral homes are in southern Fujian of South China. They

⁹ Peter Wesley-Smith, 'Sir Francis Piggott: Chief Justice in His Own Cause' (1982) 12 Hong Kong Law Journal 260.

¹⁰ Wikipedia, 'Chief Justice of the Supreme Court of Hong Kong', <http://en.wikipedia.org/wiki/Chief_Justice_of_the_Supreme_Court_of_Hong_Kong> accessed 19 November 2011.

¹¹ *Supra* n.9.

¹² The Straits Times, 'New Chief Justice, F.M.S.: Hongkong Puisne Judge Appointed', *The Straits Times* (Singapore, 16 November 1925) <<http://newspapers.nl.sg/Digitised/Article/straitstimes19251116.2.66.aspx>> accessed 19 November 2011.

are also known as Min-nan people or Hokkiens.¹³ Therefore, the three accused spoke Min-nan language. However, some of the evidence for the Crown given in English, and some in Punti which refers to Cantonese dialect, of which the prisoners were wholly ignorant, was not translated to them.

The Full Court held that the conviction must be quashed, and that it made no difference that the prisoners were defended by Counsel and that Counsel has not asked for the evidence to be translated.

v. Reasoning

In the judgment, it states that:

One of the English witnesses for the defence, Mr Holworthy, had given evidence that the first prisoner Kwok Leung was his chair coolie: he said that when he arrived at the Peak on the day of the murder by the 12.15 or 12.30 tram, he found his chair waiting for him as ordered, but there were only three chair coolies, among them Kwok Leung. In cross examination he said that he asked why the four were not there, and that No. 1 prisoner said that there had been a fight, and that was why the fourth coolie, No.2 prisoner was absent.

When Kwok Leung was in the box, he gave evidence that there had only been three coolies at the tram station. In cross examination he said that No. 2 prisoner was the missing coolie; he then said, in answer to a question put by the Attorney General, that he did not tell his master Mr Holworthy that there had been a fight.¹⁴

It may be seen that Mr Holworthy's evidence was not translated to the prisoner. The jury acquitted No 1, but found the 2nd and 3rd prisoners guilty of manslaughter. Mr Calthrop, the attorney for the prisoners, also pointed out that some of the other evidence, either English or Punti, had not been translated to the prisoners. Therefore, a question was raised in the court, whether a conviction can stand, when the prisoners have no knowledge of the evidence given against them.

Piggott CJ suggests three reasons to support his judgment. First, the prisoner is always entitled to make a statement; therefore he must know what the evidence against him is.

¹³ Wikipedia, 'Hoklo People', <http://en.wikipedia.org/wiki/Hoklo_people> accessed 19 November 2011.

¹⁴ *Rex v Kwok Leung and Others* (1909) 4 HKLR 161, 162.

Secondly, because the prisoner should not be assumed guilty until he is found so, it is important that the prisoner should know the evidence against in case he may give evidence and tell the truth. Thirdly, if the prisoner does not hear what the witnesses are saying, he cannot assist his Counsel in cross-examining him.¹⁵

III. Language rights

i. Human rights

Notwithstanding the first international recognition of human rights, the UDHR, was adopted by the UN General Assembly on 10 December 1948¹⁶, the sense of human rights can be traced to ancient times. Human rights have been the controversial topic in many places in the world, and continue to provoke debates.

Human right is a concept of protecting every human being in the world from severe political, legal, and social abuses.¹⁷ The core concept underlying the protection of human rights is equality. It forms a basic and foundation principle underpinning the international human rights regime. It can be found throughout the UDHR. Take some examples, all human beings are born free and equal in dignity and rights.¹⁸ Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁹ Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.²⁰ In the UDHR, it proclaims some fundamental human rights, including life, liberty, freedom of movement and residence, right to leave and return on own country, freedom of thought, freedom of opinion and expression, freedom of peaceful assembly and association, etc. The language right has not been proclaimed as a fundamental human right in the UDHR.

The human rights framework laid out in the UDHR requires that member states ensure equality by refraining from interference with the exercise of individual liberty and

¹⁵ Ibid, 163.

¹⁶ United Nations, 'History of the Document' (United Nations)
<<http://www.un.org/en/documents/udhr/history.shtml>> accessed 19 November 2011.

¹⁷ Nickel J, 'Human Rights', (The Stanford Encyclopedia of Philosophy, 2010)
<<http://plato.stanford.edu/entries/rights-human/>> accessed 19 November 2011.

¹⁸ Universal Declaration of Human Rights, Article 1.

¹⁹ Universal Declaration of Human Rights, Article 2.

²⁰ Universal Declaration of Human Rights, Article 10.

taking positive actions in realizing equality in effect. Also, member states shall guarantee that other rights be implemented without discrimination of any kind.

Years later, after the UDHR being adopted, the ICCPR was announced by the UN General Assembly on 16 December 1966, and came into force on 23 March 1976.²¹ The ICCPR followed and elaborated the human rights framework laid down in the UDHR. The language right of human beings grounded in equality was enshrined in the ICCPR. Article 14(3) of the ICCPR states that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; ... (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Also, Article 27 of the ICCPR states that:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

ii. Language rights

Hong Kong is a party to several of the core international human rights treaties including the ICCPR. Therefore the ICCPR has applied to Hong Kong and has incorporated into the law of Hong Kong as the BORO coming into effect on 8 June 1991. Article 11(2) of the BORO adopts the exact content and wordings of Article 14(3) of the ICCPR.²² Also, Article 22 of the BORO is equivalent to Article 27 of the ICCPR. The language right of human beings becomes a legal right of Hong Kong people following the incorporation of the ICCPR.

As to the scope of the language right in Hong Kong in legal aspect, it includes the right to speak and be understood in court proceedings. In particular, a person shall have the right to use his or her own language to speak and be understood in the legal language before the court, and if he or she does not understand or speak such legal language, he or she shall have the right to be provided free assistance of interpreter or translator. This is confirmed by Mr. Justice Hartmann of the Court of First Instance in the case of

²¹ United Nations, 'International Covenant on Civil and Political Rights' (United Nations) <<http://www.un.org/millennium/law/iv-4.htm>> accessed on 19 November 2011.

²² Hong Kong Human Rights Monitor, 'Hong Kong Bill of Rights' (Hong Kong Human Rights Monitor) <http://www.hkhrm.org.hk/english/law/eng_boro2.html> accessed on 19 November 2011.

Re Cheng Kai Nam Gary.²³ However, it does not include the right of an accused to choose a judge who can speak his or her own language.²⁴

People today in Hong Kong may take these rights for granted. However, a century ago, when there were a lot of limitations and restrictions, the Case demonstrates strong need to protect individual rights. In the Case, the Attorney General defended that the custom of the court was that it never translated the evidence when prisoners were represented by Counsel. However, Piggott CJ broke the custom and emphasized that in murder cases, when it is essential that everything should be done to ensure the fairest trial possible, the slacker custom of not interpreting is not sufficient. Comparing the custom of the court with the defendant, the judges put more weight on the defendant not being deprived of life or liberty.

The Attorney General also defended that the translation of the evidence to a prisoner, who did not understand it, was a mere irregularity. However, Piggott CJ opined that it is a point of law: "...looking at the reason of the thing, I have no hesitation in saying that it is not merely as grave an irregularity as could well be imagined, but that it is contrary to those fundamental and elemental principles of justice for which, to use a phrase of one of the old Judges, rhetorical yet pregnant with meaning, English administration of justice is so justly famous, and which has made it respected and trusted by the people."²⁵ This seems to be unprecedentedly escalated the right to interpretation as a basic individual right.

Both ICCPR and BORO ensure the accused being informed in a language he or her understands of the nature and cause of the charge against him or her, as well as provide assistance of language interpretation if he or her cannot understand or speak the language used in court, and these statutory language rights are included. Language rights are essential factors for the court to effectively exercise other rights such as the right to be tried in his presence, to examine the witnesses and to defend himself.

In the Case, 82 years before BORO came into effect, the trial was conducted in English and the evidence was given in English or Puntli. Both languages were not understood by the accused, and no interpretation was provided. One of the noticeable evolutions of the Case is that it gives new definition to the concept of "the presence of the defendant". The then law states that "(n)o trial for felony can be had except in the presence of the

²³ [2002] 2 HKLRD 39, 45.

²⁴ Ibid.

²⁵ Supra n.15, 169.

defendant.”²⁶ Based on general understanding, the “presence of the defendant” refers to the defendant physically appearing in court during the whole proceedings, however, the judges opined that the real purpose of the law is to make sure the defendant to hear what is going on during the proceedings, therefore the defendant is involved not only physically but also mentally, which means it must assure that the defendant hears and also understands what is going on. Physical presence does not make any differences if the defendant is not capable to understand the evidence giving in foreign languages without interpretation provided. In such cases, although he or she may hear the evidence, in fact has no more perception of the proceeding than if he or she is absent from the court.

Locally and worldwide, the Case had been a milestone in the legal history because it pointed out the necessity and importance of language rights in criminal proceedings. The judges thought that in order to implement the fundamental principle of justice, under the circumstance that the evidence being given in a language the prisoners do not understand, interpretation of the evidence is a legal necessity flowing from the legal necessity that the prisoner should present. This Case set a model of protecting individual right of the accused in criminal proceedings in terms of language rights. Since then, the Case has been cited by a number of cases in different countries in order to support the rights to interpretation in criminal trials. The Case also could be an important reference for lawmakers to set up relevant ordinance of statutory provision of interpretation in legal settings.

IV. Conclusion

It is believed that the awareness of human rights has generally increased around the world in recent decades as people's living standard has been improved following the rapid global economic developing pace. Without exception, the desire and demand for full human rights in Hong Kong have become stronger and higher. Legislation concerning various human rights has come into effect to incorporate international standards. Language rights to interpretation in courts are included in the human rights provision in Hong Kong. This essay analyzes the Case *Rex v Kwok Leung and the Others* which tried in 1909 in Hong Kong and discusses the significances of the Case with respect to promoting and improving language rights to the accused in criminal proceedings, which can be concluded in three influential views from the judges. First, under the circumstance which an accused was charged with a criminal offence, the accused does not understand or speak the language used in the court, the evidence given at

²⁶ *Supra* n.15, 173.

the trial must be interpreted to him or her. Second, even if the accused is represented by a counsel, the evidence must also be interpreted and the court must ensure the accused substantial understanding of the evidence against him or her. Last, the “presence of the defendant” does not only refer to the physical appearance of the accused in court, but also should include the meaning that the accused hears and understands what is going on in the criminal proceedings. When the BORO came into force on 8 June 1991 in Hong Kong, it gave details of language rights to the accused in criminal proceedings that the accused has the free assistance of an interpreter if he or she cannot understand or speak the language used in court. Comparatively, over a century ago, the judges of the Case *Rex v Kwok Leung and the Others* have already suggested clearly the necessity and importance of interpretation to the accused in criminal proceedings, and set an unprecedented standard of language rights by way of common law.

Bibliography

Bailey P, 'The Creation of the Universal Declaration of Human Rights' (Universal Rights Network) <<http://www.universalrights.net/main/creation.htm>> accessed 19 November 2011

Brown-Blake C, 'Fair Trial, Language and the Right to Interpretation' (2006) 13 International Journal on Minority and Group Rights 391-412

Chan, P CW, 'Important Decisions of Hong Kong Court in 2002 (Part 1): Language Rights, Foreign Offender's Sentencing, and Immigration and Refugee Laws', Chinese Journal of International Law (June 2005) 4(1): 219-234

Chen AHY, 'The Legal System' in Wong RYC and Cheng JYS (eds), *The Other Hong Kong Report 1990* (The Chinese University Press 1990)

Cheung, A SY, 'Language Rights and the Hong Kong Courts', Hong Kong Journal of Applied Linguistics, Volume 2, No.2 December 1997

Cheung, A SY, 'Constitutional and Legislative Provisions governing the Use of Language in the Hong Kong SAR' (2010) <<http://ssrn.com/about=1711662>> accessed 19 November 2011

Department of Justice, The Government of the Hong Kong Special Administrative Region, 'The Legal System in Hong Kong' <<http://www.doj.gov.hk/eng/legal/>> accessed 19 November 2011

Donnelly J, 'Cultural Relativism and Universal Human Rights' (1984) 400 Human Rights Quarterly

Hong Kong Human Rights Monitor, 'Hong Kong Bill of Rights' (Hong Kong Human Rights Monitor) <http://www.hkhrm.org.hk/english/law/eng_boro2.html> accessed 19 November 2011

Hong Kong Journal, 'Timeline' (Hong Kong Journal 2005) <<http://www.hkjournal.org/timeline/timeline1900s.html>> accessed 19 November 2011

Hong Kong Tourism Board, 'History' (Hong Kong Tourism Board) <<http://www.discoverhongkong.com/eng/trip-planner/hongkong-history.html>> accessed 19 November 2011

Ishay M R, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2004)

James N, 'Human Rights', (The Stanford Encyclopedia of Philosophy, 2010)
<<http://plato.stanford.edu/entries/rights-human/>> accessed 19 November 2011

Koo A, 'Truth through Court Interpreters' (2009) *The International Journal of Evidence & Proof* 212-224

Lubbe H J, 'The right to language in court: A language right or a communication right?'
<http://dialnet.unirioja.es/servlet/dfichero_articulo?codigo=3199505andorden=0>
accessed 19 November 2011

Murav H, 'Justice as Translation' in Austin Sarat and Matthew Anderson (eds), *Law and the Humanities* (Cambridge University Press 2010)

Penlington V A, *Law in Hong Kong: An Introduction* (3rd edn, Federal Publications 1993)

Poggeschi G, 'Language Rights and Duties in Domestic and European Courts' (2003) 25(3) *Journal of European Integration* 207-224

Primus R A, *The American Language of Rights* (Cambridge University Press 1999)

The Straits Times, 'New Chief Justice, F.M.S.: Hongkong Puisne Judge Appointed',
The Straits Times (Singapore, 16 November 1925)
<<http://newspapers.nl.sg/Digitised/Article/straitstimes19251116.2.66.aspx>> accessed
19 November 2011

United Nations, 'History of the Document' (United Nations),
<<http://www.un.org/en/documents/udhr/history.shtml>> accessed 19 November 2011

Wesley-Smith P, "Sir Francis Piggott: Chief Justice in His Own Cause" (1982) 12 *Hong Kong Law Journal* 260

Wesley-Smith P, *An Introduction to the Hong Kong Legal System* (3rd edn, OUP 1994)

Wesley-Smith P, *The Sources of Hong Kong Law* (Hong Kong University Press 1994)

Wikipedia, 'Chief Justice of the Supreme Court of Hong Kong',
<http://en.wikipedia.org/wiki/Chief_Justice_of_the_Supreme_Court_of_Hong_Kong
> accessed 19 November 2011

Wikipedia, 'Hoklo People', <http://en.wikipedia.org/wiki/Hoklo_people> accessed 19
November 2011

Wikipedia, "Human Rights", <http://en.wikipedia.org/wiki/Human_rights> accessed
19 November 2011

Wikipedia, 'Supreme Court (Hong Kong)',
<[http://en.wikipedia.org/wiki/Supreme_Court_\(Hong_Kong\)](http://en.wikipedia.org/wiki/Supreme_Court_(Hong_Kong))> accessed 19 November
2011

