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Article

Litigating without speaking legalese: the case of unrepresented litigants in Hong Kong

Matthew W. L. Yeung[a] *and Janny H. C. Leung*[b]

Abstract

The increasing number of unrepresented litigants in various jurisdictions raises the question of what challenges these lay people face in their access to justice. This article seeks to examine this by conducting a small ethnographic study and survey in Hong Kong. Based on 6 hours of courtroom observation in two cases and 8 hours of pre-trial, during trial and post-trial interview data obtained from 7 sessions, we show that unrepresented litigants may find navigating difficult legal phrases, legal homonymy, legal genre and linguistic repertoire in court particularly challenging. They also risk overestimating the merit of their case when they deploy lay strategies (i.e. a translation approach or a literal reading approach) to legal interpretation and case preparation. The survey results lend support to our ethnographic study by revealing why unrepresented litigants seem to be ill-prepared for their cases in the eyes of legal professionals. We conclude that unrepresented litigants face both linguistic and legal challenges during their participation in legal processes, and often these challenges are intertwined. We therefore suggest that both linguistic accommodation and legal assistance are essential to help unrepresented litigants participate effectively in legal processes. This is especially important in the adversarial courtrooms of common law jurisdictions, to ensure access to justice for the general public.

KEYWORDS: UNREPRESENTED LITIGANTS, COURTROOM DISCOURSE, LEGAL AND LAY IDEOLOGY, COMPREHENSION, COMMON LAW

Affiliation

[a] The Hong Kong Polytechnic University [b] The University of Hong Kong
email: yeungmatty@gmail.com janny@cantab.net

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1. Introduction

Unrepresented litigants, who are lay people choosing to represent themselves in their own legal cases, have been found to be on the rise in various jurisdictions. Over the past two decades, countries such as the United States of America, the United Kingdom, New Zealand, Canada and Australia have noted a substantial increase in the number of unrepresented litigants in the legal system (Applebey, 1997; Carruthers, n.d., cited in Smith, Banbury and Ong, 2009; Family Court of Australia, 2008; Hough, 2004; Law Council of Australia, 2004; Osborne, 2007; Ontario Ministry of the Attorney General, 2010; Williams, 2011; Grimwood, 2016). In British Columbia in 2011, 57% of the family cases involved at least one self-represented party, while 35% of the cases in the British Columbia Supreme Court faced the same situation (Macfarlane, 2013). As for the case of Hong Kong, 35% of civil trials in the High Court and 55% of civil trials in the District Court were recorded to have involved at least one self-represented party in 2009 (Judiciary Administration, 2010). This shared phenomenon raises the following questions that we hope to examine in this article: what are the challenges that unrepresented litigants face as they prepare and argue for their case? And how do they attempt to overcome them?

Research has revealed that unrepresented litigants' access to justice is mostly restricted by two factors, namely a limited understanding of legal knowledge (Staudt and Hannaford, 2002) and of legal language (Gibbons, 2008; Simpson, Mayr and Statham, 2018). First of all, unrepresented litigants have little procedural knowledge about how to conduct a case and summon witnesses, which often lengthens the trial (Klein, 2010; also see Stafford, 2013). They are not familiar with substantive law and evidential rules, and often they have difficulty evaluating whether the evidence in hand is relevant and reliable or not (Lewis, 2007). Some unrepresented litigants cannot even pinpoint the essence of the dispute (Moorhead and Sefton, 2005).

Legal resources are usually written in legal language, which makes it an essential key to one's access to legal knowledge. Unfortunately, unrepresented litigants often have trouble understanding legal texts due to the complexity of legal language (Charrow and Charrow, 1979; Dumas, 1999; Masson and Waldron, 1994; Mattila, 2013). Their limited competence in legal language puts unrepresented litigants in a disadvantaged position when they are pitched against professionally trained advocates in an adversarial trial. This often translates into an unbalanced power relationship in court (see Tkačuková, 2010, 2011) and may be why unrepresented litigants are less likely to win their case in court:

> In fields of average complexity in trial courts, lawyer-represented people are on average 6.5 times more likely to win their cases than are unrepre-

> sented people in trial courts. In fields of average complexity in tribunals, lawyer-represented people are on average 7.6 times more likely to win their cases than are unrepresented people.
>
> (Sandefur, 2010: 73)

62% of American judges agreed that self-representation is likely to lead to worse legal outcomes (Klein, 2010). Although it is impossible to tell the extent to which differential legal outcomes are attributable to competence in representation, limited legal knowledge and language problems encountered by unrepresented litigants in the course of a trial no doubt present hurdles to justice.

Existing research tends to characterise unrepresented litigants as the main cause of communication failure in court, but Lord Woolf suggests that such a view may not be appropriate: 'I think it's quite hard for a judge to realise how difficult it is for a person who is not a trained lawyer to handle a grievance themselves' (see Lowe, 2013). Indeed, previous studies have mostly adopted a top-down approach by interviewing judges and lawyers about unrepresented litigants' performance in the courtroom (see Cameron, Kelly and Chui, 2006; Kelly and Cameron, 2003; Kelly, 2005; Ng, 2009). This, however, overlooks unrepresented litigants' perspectives. As end-users of the legal system, unrepresented litigants' voices are equally important and ought to be addressed. Therefore, this article fills the gap by conducting a survey with unrepresented litigants and by using ethnography to follow a litigant through his litigation experience –before, during and after the trial. This offers a bottom-up perspective to the examination of the complexity of the problems encountered by unrepresented litigants.

2. Legal bilingualism in Hong Kong

Hong Kong is a useful site for a case study not only because of its rising incidence of self-representation, but also because of its relatively recent bilingual policy which necessitated the adoption of English common law in the local tongue – Chinese. Chinese in Hong Kong takes two forms: the oral language, also known as the local tongue, is Cantonese, while the written one is standard Chinese. In bilingual common-law jurisdictions, English has often been mythologised as the only language that can carry common law concepts (see Chen, 1985; Ng, 2009), and the other legal language – usually an indigenous language in a postcolonial jurisdiction – is frequently attacked as the deficient one, for example the case of Bahasa Malaysia (BM) in Malaysia and Filipino in the Philippines (Leung, 2016). In Hong Kong, the Chinese legal language is no exception (see Tang, 1998). Yet, research shows that the seeming inability of the Chinese legal language to express the law should be attributable to the way it is written (Yeung and Leung, 2015b), rather than to any inherent properties of the language. The case study here will

contribute to this linguistic debate by examining the extent to which Chinese legal language is accessible to a layperson in an actual legal case.

The mentioned spike in lay litigations may be related to the evolving of legal consciousness in postcolonial Hong Kong. Tam (2013) argues that new legal opportunities emerge as the judiciary gains greater power after the enactment of the Hong Kong Bills of Rights, the establishment of the Court of Final Appeal and the promulgation of the Basic Law. In fact, the Basic Law may have provided a linguistic trigger for litigation by providing for the use of the Chinese language in the judiciary, ending the monopoly of English as the only legal language in Hong Kong during most of the colonial era. Since Chinese is the mother tongue for the majority of people in Hong Kong, the bilingual policy potentially extends lay people's access to justice, and this may be one of the reasons there has been a noticeable increase in the number of unrepresented litigants in Hong Kong (see Judiciary Administration, 2010).

However, unrepresented litigants in Hong Kong have been found to be lacking in a substantive knowledge of the law even when the law is available in Chinese. They do not tend to fully understand participant roles in the adversarial courtroom, and their behaviour may deviate from the expected norm (Leung, 2015; Yeung and Leung, 2017). They do not quite know how to formulate and ask questions in cross-examination (Yeung and Leung, 2017). This has posed various challenges to the court, such as demands for judicial time and resources that may over-burden the legal system in Hong Kong (Judiciary Administration, 2003). For the sake of expediting proceedings and justice, the various courtroom participants, especially judges, often see the need to offer assistance to unrepresented litigants, and the help ranges across compiling documents, summoning witness and forming arguments (Cameron and Kelly, 2002; Kelly and Cameron, 2003; Ng, 2009; also see Trinder, Hitchings, Miles, Moorhead, Smith, Sefton, Hinchly, Bader and Pearce, 2014 for more challenges noted in other jurisdictions). Similar to overseas experiences, judges and lawyers in Hong Kong mostly come to the conclusion that unrepresented litigants are rather incapable of representing themselves well (see Cameron, Kelly and Chui, 2006; Kelly, Cameron and Chui, 2006). This raises the question about the nature of the challenges faced by unrepresented litigants in their litigation.

3. Methodology and case background

This article draws on data from (1) a survey and (2) an ethnographic study consisting of trial observation and interviews. Eighty-six Chinese questionnaires with stamped envelopes were given out to unrepresented litigants after the end of a case management or a trial in the District Court in Wan Chai, Hong Kong between October 2012 and February 2013. By the end of data collection, 15 ques-

tionnaires were returned (a return rate of approximately 17.5%). These questionnaires surveyed unrepresented litigants' background, case information, preparation work, trial experience and general opinions on the legal system. Even though the sample size is evidently small and may not represent an overall picture of unrepresented litigants in the legal system, it provides a glimpse at how they prepare for their cases and the difficulties they encounter in litigation.

Apart from this, we conducted a detailed ethnographic study with an unrepresented litigant named Chan (pseudonym), who was born and mostly raised in Hong Kong but received his university degree from Canada. His mother tongue is Cantonese Chinese, but he is also fluent in English. He pursued two civil cases consecutively as a plaintiff in the District Court of Hong Kong from October 2009 to October 2013, and proceedings were all conducted in Cantonese. Data were collected from four observations (3.5 hours in total) of the first case from November 2012 to May 2013, three observations (2.5 hours in total) of the second case from July 2013 to September 2013, and also from seven in-depth interviews (around an hour each) conducted from December 2012 to September 2013. A total of 8 hours of face-to-face interviews were recorded and they captured Chan's views during pre-trial, trial and post-trial stages. Judgment was used to supply the official views of the cases discussed.

In 2011, Chan filed his first lawsuit against a yacht club in Hong Kong, which was represented by counsel. Since 2004 Chan had refused to pay the monthly membership fee (roughly HK$1,000) as a protest against the allegedly poor management of the club. He was then forbidden to enter the club. In 2006, the club decided to withhold Chan's membership and use its market value (HK$165,000) to repay the fee he owed (HK$34,000 at the time). In calculating the debt, the yacht club used two newly added ordinances from the club's charter (updated version 2009) which permits the use of compound interest. Between February 2004 and May 2009, the accrued fee reached over HK$173,000, exceeding the value of Chan's membership and leading it to be confiscated. Chan contended that the use of compound interest to calculate the owed membership fee at an exorbitant rate was a violation of the law and requested the yacht club to (1) re-evaluate the debt using simple interest at a reasonable rate and (2) return the membership. The case was settled by a consent order in court and did not proceed further.

The second lawsuit filed by Chan can be seen as a follow-up action to the first case. The lawyers in the previous case handed in several confidential Without Prejudice letters (henceforward as WP letters) to the judge. Chan believed that this act had severely affected the trial and should have led to the disqualification of the judge from presiding at the trial. Therefore, Chan deemed that the previous case ended in an unfair manner, and thus, in this second civil case, he requested the court to 'punish the lawyers for their misbehaviour' and sought compensa-

tion for the damage caused. The case was dismissed by the court for lack of merit.

Whilst we cannot expect this case to be representative of all cases involving unrepresented litigants in Hong Kong, we argue that it gives us a glimpse of the struggles even well-educated unrepresented litigants might encounter when they navigate the legal system on their own. The same struggles are likely to be faced by average unrepresented litigants, and they might be even more problematic for them. We hope that the identification of such struggles can inform us on how legal–lay communication can be improved for unrepresented litigants in general.

4. Making sense of legal language

Interpreting legal language is by no means an easy task given its obscure features. The opacity of the English legal language often lies in its use of archaic words, technical jargon and convoluted sentence structure (Tiersma, 1999; also see Mattila, 2013). The English ordinances in Hong Kong also suffer from these features (see Poon, 2002). Since the Chinese legal language in Hong Kong was first created by translating the English ordinances, some of the arcane features have also been retained. A previous study by Yeung and Leung (2015a) has indeed found that the Chinese legal language in Hong Kong may pose comprehension problems to the reader, for example through its use of odd collocations and unusual words.

Chan said that he had a hard time understanding the Chinese legal language in the official reference texts which are provided by the government to prepare unrepresented litigants for civil trials, echoing earlier findings (Yeung and Leung, 2015a, 2015b). Despite having received a university education, Chan was still perplexed and troubled by the language used in the texts. He said, 'it's not that I don't understand at all. I do understand some', but 'I have to read the same material over and over again. It is hard.' He specifically commented on the Ordinance 336H O.42 r.5A below:

Consent judgments and orders (O. 42, r. 5A)

(2) This rule applies to any judgment or order which consists of one or more of the following

  (a) any judgment or order for—

    (i) the payment of a liquidated sum, or damages to be assessed, or the value of goods to be assessed;

    (ii) the delivery up of goods, with or without the option of paying the value of the goods to be assessed, or the agreed value;

    (iii) the possession of land where the claim does not relate to a dwelling-house

(b) any order for—

(i) the dismissal, discontinuance or withdrawal of any proceedings, wholly or in part;

(ii) the stay of proceedings, either unconditionally or upon conditions as to the payment of money;

(iii) the stay of proceedings upon terms which are scheduled to the order but which are not otherwise part of it (a *Tomlin order*);

(iv) the stay of enforcement of a judgment, either unconditionally or upon condition that the money due under judgment is paid by instalments specified in the order;

(v) the setting aside of a judgment in default;

(vi) the transfer of any proceedings to the Court of First Instance or the Lands Tribunal pursuant to section 42 of the Ordinance; (*L.N. 153 of 2008*)

(vii) the payment out of money in court;

(viii) the discharge from liability of any party;

(ix) the payment, taxation or waiver of costs, or such provision for costs as may be agreed;

(c) any order, to be included in a judgment or order to which the preceding paragraphs apply, for—

(i) the extension of the period required for the service or filing of any pleading or other document;

(ii) the withdrawal of the record;

(iii) liberty to apply, or to restore.

He said that 'the legal language is very interesting. If you look at it word by word, you do understand, but when you put the words together, you don't.' He reasoned that this was because 'the ordinance is just too lengthy. One phrase connects to another, another, another, another …' A brief look at the ordinance reveals structural complexities of the legal language where sentence embedding is commonplace and the information is spread out over several sub-sections. For one to find out whether an order is applicable to the case, one has to check against all the conditions in 2(a)(i–iii), 2(b)(i–ix) and 2(c)(i–iii). Since Chan was unsure as to whether his interpretation of all the conditions was correct or not, he went to consult a lawyer on this particular ordinance to avoid potential misinterpretation. However, such consultation only took place once, despite his acknowledged limited understanding of legal discourse. For the rest of the litigation, he adopted his own strategies for interpreting legal texts, which he shared in the following inter-

view excerpts, together with the difficulties he encountered in understanding the official legal reference texts.

Difficult legal phrases

Chan shared how he could not understand the legal phrase 登錄判決 ('enter judgment') and how he tried to make sense of it:

> 咩叫登錄呢咁樣? 即係你隻船登陸咁樣, 就係喂你埋岸。咁但係你係個案件你話登陸? … 咁就喺度諗, 就其實佢登錄呢就應該係英文嗰度呢譯過來嘅 … 即係即係register咁樣。
>
> what is 'enter judgment' then? It is like a ship landing ['land' 登陸 and 'enter' 登錄 are homophones in Cantonese]. That is hey you get close to the shore. But in a case you say you land? … Um then I think actually 'enter judgment' must have been translated from English … from the word 'register'.

There seem to be two elements to Chan's limited understanding of the legal materials – content and language. The former relates to the inherent procedural complexity of civil litigation, whereas the latter refers to the unfamiliarity with Chinese legal terms. The latter problem can be seen in his interpretation of the phrase 登錄判決 ('enter judgment'), which seemed to be influenced by phonological aspects of Cantonese Chinese. He mistook 登錄 ('to enter') for 登陸 ('to land'), where the first character in the terms is identical and the second character of both words are homophones in Cantonese i.e. /luk6/. Whereas 錄 in 登錄 means 'recording', 陸 in 登陸 ('to land') refers to land/ground. Their meanings are radically different, but the phonetic resemblance made Chan believe that 'entering' may be related to landing or docking of ships. Yet, his later contextualisation of how a lawsuit can be 'landed' only made it even more confusing to him, as evident by the rhetorical tone. This suggests that words with phonetic resemblance may hinder lay people's interpretation of legal discourse. This is likely to be the case in Chinese, where homophones abound. For example, /si1/ has 54 homophones in Cantonese (Kwan, n.d.), and even though only 7 of them are commonly used in daily life, it can be confusing to people as to which /si1/ is being referred to without a 'robust and early' exposure to the context (see Yip and Zhai, 2018: 2).

Yet, this linguistic issue aside, it seems that our litigant's interpretation was also affected by his understanding of legal knowledge. For example, Chan tried to interpret the phrase 登錄判決 ('enter judgment') through back translation; he speculated that 登錄 ('enter') may be translated from the English word 'register'. This translation (i.e. 'to register') denotes the act of recording something on a list, which seems to convey roughly the same meaning as 'entering judgment' – officially recording the result of a case where facts are determined and relevant laws are applied. However, there is a legal distinction between 'entering judgment' and 'registering judgment'. Whereas the former denotes the official making and recording of a judgment, the latter refers to the entering of a judgment in

another jurisdiction (see Wilkinson, Cheung and Booth, 2011). The translation approach clearly cannot capture the legal differences and may therefore lead to an under-reading or even misreading of the legal terms. This raises an underlying problem that lay people do not have the substantive legal knowledge to appreciate the meaning of legal terms.

Chan may also have adopted a strategy called lexical inferencing to help him interpret the texts. As Haastrup (1991: 13) notes,

> The process of lexical inferencing involves making informed guesses as to the meaning of a word in light of all available linguistic cues in combination with the learners' general knowledge of the world, [one's] awareness of context and [one's] relevant linguistic knowledge.

In language acquisition, learners often come to know a word by correlating its context with their experience. 'Meaning is in fact created by the receiver in light of the experience which he already possesses' (International Commission for the Study of Communication Problems, 2004: 28). The same may apply to how Chan approached the phrase 'entering judgment':

> 即係碰到一啲實質嘅例。聽到一啲野，今次又睇到少少嘅嘅嘅野，下一次又睇到少少嘅野，咁你就會覺得，哦原來登陸呢就係話，即係呀差唔多叫第一次，即係一掂到，就就解決啦！咁樣，即係有少少咁嘅味道。
>
> Have to encounter some actual examples. Listen to some stuff. This time you see bits of something. Next time you also see bits of something, then you will think actually 'enter judgment' is almost like the first time that you touch it, then it is resolved! It has a bit of that connotation.

He noted that the accumulative experience of each encounter with the phrase would gradually reveal its meaning to him. Yet, his elaboration implies an uncertainty in the effectiveness of the approach, in that he could only suggest what the phrase connotes rather than denotes. He later even admitted that he did not have a concrete understanding of the phrase. In what follows, Chan further explicated how he made sense of the phrase.

Chan explained that one component of his interpretation strategy came from guessing or gut feeling:

> 咁所以嗰陣時由第一次，接觸到登錄，咁就即係有個感覺呢就係話呀登錄就係，呀佢有個有個日期，你要做一啲野，你唔做你就可以即刻做另外一樣野。
>
> From the first moment I encountered 'enter (judgment)', there was a feeling that for 'entering (judgment)', they have a date for you to do something. If you don't do it, you can immediately do another thing.

He sensed that entering judgment seemed to take place in a particular fashion: by a certain deadline, if one fails to complete a 'certain action', the other party can immediately perform another action. It is unclear what 'another action' means,

but it may refer to 'entering judgment'. The definition nevertheless remains vague, even when he attempted to recontextualise it in his case after the trial. He claimed that when he had refused the resolution offer from the other party, it would have granted the other party the right to apply for judgment to be entered. However, during the trial, the judge said in court that he did not have rights to force any parties to agree on resolution terms if there is any disagreement. Thus, Chan's formulaic conception of entering judgment may not be binding as 'certain action' does not include rejecting resolution offers. Based on this example, it can be seen that the lexical inferencing may provide a rudimentary explanation of the phrase, but at the same time its prime reliance on guessing, if the person is not sufficiently well-informed, may cast doubts on the accuracy of interpretation (see Wesche and Paribakht, 2010). The strategy may become more useful if consolidation is sought (Oxford, 1990; Wesche and Paribakht, 2010); that is, consulting other resources for reassurance, e.g. a legal dictionary and legal experts.

Misinterpretation of key legal phrases may have an impact on one's perception of justice. In Chan's case, since the other party failed to submit the acknowledgment of service within the deadline, he believed he could have applied for judgment to be entered:

> 第一次碰到呢就係話我咪遞左份呀陳述書嘅？咁但係對方呢，就冇如期呢去遞嗰份抗辯書，咁呀遲咗，咁遲咗呢我就可以去申請登錄判決，明唔明呀？
>
> The first time I encountered it was when I submitted a statement? But the other party did not submit the defence on time. They were late. I could have applied to enter judgment, you understand?

He stressed that he would have had a chance to win if he had known what 'entering judgment' meant earlier. His tone carried a sense of regret and disappointment at his previous lack of action. From the legal perspective, Chan was correct in suggesting such a possible case outcome. However, this is only based on the assumption that the other party would not object to the judgment order after it is entered, because according to the Rules of the High Court Chapter 4A O.42 r.5B (6), an order will only become absolute if no application has been made to change it within 14 days after its pronouncement. Judging by the fact that the opposing counsel already filed the reply two days after the due date, even if Chan had applied to have judgment entered, the decision would still have been overthrown. In this regard, Chan may have under-read the procedural implications of 'entering judgment'.

Confusing legal homonymy

Another difficulty Chan had with the legal language is to decide when a legal word is to be understood in the ordinary or technical sense. Legal homonymy arises when legal words do not only have a technical meaning in law but also associated non-technical meanings in everyday life (Tiersma, 1999; also see

Durant and Leung, 2016). Chan explained his struggle with the legal term 'barrister's certificate':

> 人人都以為係個大律師個牌。其實唔係咁呀，嗰次上庭呢咁個大律師就向法庭呢申請，個大律師證書。咁我都抓曬頭咁個大律師本身都有牌啦，已經係大律師啦，點解仲要申請個證書呢?
>
> Everybody thinks it is 'barrister's licence'. Actually, it is not. Last time in court the barrister applied to the court for a 'barrister's certificate'. That made me scratch my head. A barrister already owned a licence to be called a barrister. Why would he have to apply for a licence?

Chan conjectured that every lay person would follow the intuition to read the term 'barrister's certificate' in a literal sense – a practising licence as a qualified barrister. Yet, the literal reading clearly makes no sense since it would be ethically and procedurally inappropriate for a barrister to claim the title before he/she has enrolled on the Bar list by the Hong Kong Bar Association. For one to appreciate the meaning of the term, legal knowledge about institutional roles and civil litigation is required. In common law, both solicitors and barristers have the right to address the District Courts, but since a barrister can only receive instructions from a solicitor to represent a client, counsel fee would be incurred if a barrister is hired (see Hong Kong Bar Association, n.d.; Slorach, Embley, Goodchild and Shephard, 2015). Given that the litigation fees would be imposed on the losing party, an unnecessary employment of barristers would be unfair. Therefore, by Chapter 336H of the District Court Ordinance O.62 r.32 schedule 1, any party seeking to hire a barrister in District Court would have to obtain a prior approval to certify that the attendance of counsel is proper in the case. In this light, a barrister's certificate can be seen as permission of attendance for barristers in District Court. This is why Chan suggested that the term be replaced by 大律師的收費證 ('barrister's charging licence') or 大律師的出庭證 ('barrister's presence licence'), whose literal sense plainly spells out the nature of the document. Otherwise, the literal meaning of the barrister's certificate seems to be too confusing or even misleading in the current form.

The literal reading approach may have also confused Chan's understanding of the role of barristers. Barrister is translated as 大律師, the characters of which literally read as 'big lawyers'. The character 大 ('big') suggests that barristers are only different from other lawyers by ranking or seniority. This may be a reason why Chan suggested that one can hire a barrister in district court but treat him/her like 普通律師 ('a normal/regular lawyer'):

> 你冇明文規定話，區域法院唔可以用大律師出庭架嗎？咁你大律師當你普通律師出庭都得架。
>
> You have no rules stating that barristers can't appear in district courts, right? And you can treat barristers as normal lawyers in court.

By 'normal/regular lawyers', Chan should be referring to solicitors in common law. However, barristers and solicitors are two streams of lawyers with different duties and powers, e.g. rights of audience (Bar Standards Board, 2019; Barnes, 2010). Such differences cannot be explained readily by a literal reading of the term (i.e. ordinary meaning) and would require an interpretation in the context of the law (i.e. legal meaning).

Without legal training, it is not easy for lay people to know when the ordinary or legal meaning of a term would apply. In common law, 'words are to be understood in their ordinary, everyday meanings – unless the context indicates that they bear a technical sense' (Scalia and Garner, 2012: 69). When a term has been particularly defined by a statute or an authoritative precedent, the legal meaning prevails (Hutton, 2014). Yet, there is a fuzzy boundary between legal and ordinary meaning at times, and 'there is no way of knowing in advance where the boundary between the plausible and the implausible lies' (Hutton, 2014: 42). For example, in *Morris v. Revenue and Customs Commissioner (2006)*, it was ruled that 'camper van' belongs to the category of 'car' even though the appellant argued that it was not so in the ordinary sense. The court widened the definition of 'car' to include 'any mechanically propelled road vehicle' (see Hutton, 2014 for a further discussion). This illustrates how legal interpretation at times goes beyond the ordinary meaning and requires one to look for its technical meaning in law. The lay strategy of approaching the text only for the ordinary meaning may therefore not be comprehensive and effective in this regard.

Unfamiliar legal genre

In constructing the legal argument, Chan seemed to have difficulty understanding and navigating the legal genre of ordinances. He argued in court that 'the law clearly states that it is illegal for "any person" (任何人) to collect money by compound interests, and since the defendant admits committing such act, this forms an indisputable argument for the case'. Specifically, he quoted two clauses from Chapter 163 Money Lender Ordinance to support this case:

1. Section 22 (1) – Any agreement made for the loan of money by *a money lender* shall be illegal if it provides directly or indirectly for (a) the payment of compound interest.
2. Section 24 (1) – *Any person* (whether a money lender or not) who lends or offers to lend money at an effective rate of interest which exceeds 60 per cent per annum commits an offence.

However, the lawyer disputed that such a legal argument was absurd as the yacht club was not a money lender by law. The judge agreed, adding that he could not see any relevance between this ordinance and the case.

In court, Chan did not provide further justification to his legal argument, but during the interview, he reiterated how the ordinance should be applicable to the defendant because of the key phrase 'any person' (任何人) as in section 24 (1):

> 因為呢個放債人條例係講，所有人家嘛，呢個條例唔係得一條家嘛。呢個放債人條例好多條家嘛，咁呀好多條啲法例嚟講，好多時呢佢唔係條條都話任何人任何人任何人咁樣講家嘛！但係其實入面有一半就已經講緊任何人都唔得家啦，下話？咁任何人都唔得咁你理得佢係咪放債人呀，係咪？佢今日我都費事用佢駁，因為我感覺到佢根本就唔想審。
>
> Because this money lender ordinance is talking about 'everyone'. There is more than one ordinance (meaning more than one section here). This money lender ordinance contains a lot of sections. Given that there are so many sections, not every single one of them mentions the phrase any person! But actually, if half of the sections mention 'any person', then it is already not ok, right? If 'any person' is forbidden you don't have to care whether they are money lenders, right? I didn't bother to argue with him (the judge) today because I felt that he didn't want to try the case.

Chan's insistence on the Money Lender Ordinance's coverage on 'everyone' shows that he may not understand legislation as a legal genre. Legislative documents function to impose obligations or prohibit someone from doing something (Durant and Leung, 2016). In order to achieve such an illocutionary force, a legal instrument needs to be read as a whole, with each section performing a specific function. When there is a definition clause, the main body of the ordinance needs to be read in light of the definitions provided. Yet, Chan did not seem to be aware of how section 22(1) functions in the Money Lender Ordinance. He did not locate the legal subject from section 22 (1) that he specifically quoted, nor did he refer to 'section 22(2) Interpretation' for the legal definition of 'money lender' – 'every person whose business (whether or not he carries on any other business) is that of making loans or who advertises or announces himself or holds himself out in any way as carrying on that business'. Instead, he summarised all the sections of the concerned ordinance to find a generic subject. He noted that the law does not always use the word 'anyone' to outline the legal subject in every ordinance, but he believed that when half of its sections allude to 'anyone', it already implies that 'any person is forbidden' in the act. It seems that Chan did not have a clear grasp of the textual mapping in an ordinance – how sections or paragraphs carry a specific purpose, and how their meaning is structured within an ordinance (see Durant and Leung, 2016). This potentially explains Chan's selective reading of the sections in the ordinance and shows how legal knowledge is required for one to navigate the legal genre of legislation.

One can see how Chan may have picked keywords from different sections of the ordinance to build his case. In his macro reading of the Money Lender Ordinance, he focused on the frequently appearing legal subject 'any person' but put aside another key subject 'money lender'. In his micro reading of section 24 (1),

he similarly centred on 'any person' and 'compound interest' but – intentionally or unintentionally – ignored the qualifying phrase 'who lends or offers to lend money'.

The above example highlights the tensions between legal professionals and lay people's interpretive approaches, which may be better spotted and eased if their respective voices are heard. Yet, Chan deliberately chose to conceal his thoughts from the court, and seemingly accepted the judge's criticism of his reading of the ordinance even when he disagreed. One might ask what prompted Chan to hide his voice. Research on medical communication may offer useful insights into this. It has been found that a predominant institutional framework may suppress patients' views because the contextualisation cues (verbal or non-verbal clues for making sense of interactions – see Gumperz, 1982) in medical talk already provide them with a clue as to what is right or wrong (see Mishler, 1984). Patients would rather choose to follow the cues and hide their own voice. This may make physicians believe that a consensus is reached when in reality patients may not follow or acknowledge the medical voice at all. It is therefore questionable if health instructions are being followed.

In the same vein, when the judge explained why it was unsuitable for Chan to quote the concerned ordinance, Chan did not sense that there was much room for negotiation. Consequently, despite disagreement, Chan did not pursue to defend his framework, and instead he chose to do his 'own work':

> 我都費事同佢鬧，我做我自己野囉。
>
> I didn't even bother to argue with him (the judge). I just do my own work then.

In retrospect, his line of thinking was what promoted his later appeal to the case. The current case concluded with a consent order in which both sides settled on the resolution without moving into further procedure. Yet, Chan felt that this order did not address all the issues, including his proposed framework: that the other party should be punished according to the Money Lender Ordinance. He thereby filed an appeal, but it was later dismissed due to the lack of legal merit. A lack of open dialogue between parties might have taken away the chance of clearing any potential misunderstanding.

Incomprehensible linguistic repertoire in court

Legal styles can be difficult for lay people to comprehend especially in spoken form. In order to understand this, it may be useful to look at the linguistic repertoire between Chan and the judge. This can be seen from the following excerpt in which the judge asked Chan whether he agreed to the terms proposed by the defence counsel:

Judge: 第五，原告人俾喺法庭入面嗰二萬五千蚊。

Fifthly, the defendant's twenty thousand and five hundred dollars deposited in court.

Chan: 二十五萬。

Two hundred and fifty thousand dollars.

Judge: Sorry二十五萬，連埋利息俾返晒你喎？同唔同意呀？

Sorry two hundred and fifty thousand dollars, together with interest will be returned to you? Do you agree?

The judge conversed with Chan mainly in Cantonese, with an occasional insertion of simple English words such as 'sorry'. As noted from the observation, code-mixing was kept to a minimum extent such that, even when English was inserted, Chinese translation would immediately follow. For the frequently referred-to subject of the 'Without Prejudice (WP) letters', the judge would even use the full Chinese term for Chan i.e. 無損雙方利益的信. However, the judge's linguistic repertoire took on a drastic change when he was addressing the opposing lawyer who was bilingual in Chinese and English. This can be illustrated from the following discussion in which the judge reminded the defence counsel of the inappropriateness of disclosing the WP letters to the court. According to Chapter 336H the Rules of District Courts Order 22 Rule 25, WP letters must not be communicated to the trial judge before the questions of liability and monetary disputes are determined.

Judge: 有一樣想提提嘅就係，辯方律師行呢 ，小心啲，Order 22 rule 25係唔可能違反嘅

One thing I would like to remind the defence counsel. You need to be more careful. Order 22 rule 25 cannot be violated.

Lawyer: 法官大人我地係呢一方面係，準備個書冊上面都諗過呢樣野。咁佢有第一點就係講sanction offer 就係好似 without prejudice correspondent 咁處理。咁 under without prejudice … 佢地就講緊 without prejudice is to the maker itself ，咁個maker 嘅admission in essence 嗰個maker waive 左嗰個 without prejudice right 就可以。

Your honour we have thought about this when preparing the papers. The first point mentions that the sanction offer should be treated like without prejudice correspondent. Then under without prejudice … They are talking about without prejudice is for the maker itself. The maker's admission in essence. If the maker waives the without prejudice right, then it should be fine.

Judge: 當然唔得啦，你咁樣會影響到個 court 嘅官感架嘛。

Of course not. This way you will affect the court's impression.

Lawyer: But 就算如果係咁嘅情況我地有個 open offer 出咗嚟呢。Even by way of summons 去到法庭呢個係 open offer 嚟架喎。It's not even without prejudice.

But even if that is the case, we have an open offer proposed. Even by way of summons, in court this is still an open offer. It's not even without prejudice.

Judge: It's sanction offer. Sanction offer is a sanction offer.

The above talk exemplified courtroom discourse in which legal language and legal information abound. English legal terms such as 'sanction offer' and 'open offer' were frequently mentioned, and sometimes expressed together in common English legal phrases, for example 'by way of' (meaning 'via' or 'through' in plain language), and 'without prejudice' (meaning 'without abandoning the rights of litigation or admitting any liability'). A certain grasp of legal knowledge is certainly required for one to understand the above discourse, for example discussion on the principles and prerequisites of WP letters and the issue of liability. It is thus questionable if lay people would understand such a discourse, especially its legal vocabulary.

There was noticeable recurring code-switching and code-mixing throughout the discourse. The judge would habitually insert an English constituent (embedded language) into Cantonese, also known as the matrix language, which is the dominant base of the utterance (Myers-Scotton, 2002). For instance, the English word 'court' was inserted into a formulaic phrase in Cantonese 你咁樣會影響到X ('This will affect X') where X can be most English objects. At other times, the judge would switch the code entirely from Cantonese to English (the last line). The change of code may be an act to accommodate the speech style of the addressee. It is evident that the lawyer was the one who essentially adopted a bilingual way of speaking. He code-mixed with chunks of English as a reply to the judge's comments in the first place, and also code-switched frequently in subsequent interactions. In fact, there were even times in the lawyer's linguistic repertoire that the matrix language was indistinguishable from the embedded one, as the constituents from the two languages followed each other in ways that neither language could claim to be dominating. This is what Muysken (2000) calls alternation.

The shared linguistic practice may enable the judge to establish (or break) an in-group boundary and make the speech event a(n) (un)cooperative one (Myers-Scotton, 2000). Given that the trial language of the case was Chinese, Cantonese Chinese by default was the unmarked language, and the insertion of English may thus be seen as a marked conversational strategy (Myers-Scotton, 2000) for the above purposes. When the lawyer appeared to be reluctant to accept the judge's opinion, the judge asked:

點解一個summons 就可以解除咗呢個order 22 rule 25 呢件事呢？你可唔可以enlighten我呢？

How can a summons lift the order 22 rule 25? Can you enlighten me?

The deployment of the marked English word 'enlighten' might indicate sarcasm. 'Enlighten' connotes that one is more knowledgable than the other, and it sounds especially condescending when a judge invites a lawyer for enlightenment. Code-mixing here has become a rhetorical resource by which the judge presented resistance to the lawyer's argument. Following the lawyer's reply to the above question, the judge even code-switched to English by emphatically asking 'do you understand?', an utterance that did not just serve to conclude the discussion, but also to reassert and index the power relation that the judge's 'reminder' represented the court's interpretation of the law – he has an authorised voice from this authoritative centring institution, namely the Hong Kong Judiciary (see Heffer, 2013a).

The judge may well be aware of how the talk with the lawyer was legalistic and different in speech style (see Irvine, 2001), and that may be why in the middle of the discussion he suddenly took on a responsive shift to speak to Chan:

Judge: 請坐陳先生。我地討論緊一啲野啫。
Please sit down Mr Chan. We are just discussing something.

It can be seen that the utterance was monolingual in Cantonese only. The contrast in speech style manifested a dichotomy between legal and legal–lay communication. Chan was essentially excluded from participating in the preceding exchange discussing a legal point. In a post-trial interview, Chan confessed that he had no idea what the judge and the lawyer were talking about, but he said that the judge nevertheless had provided essential clues for his case direction – applying for an appeal because the judge should be disqualified from this trial due to the disclosure of WP letters. He seemed to derive such a conclusion from his limited understanding of the above discourse. Arguably, the discourse revolved around two prominent propositions: the judge's emphasised rejection to the lawyer's approach and the reiteration of how the court's impression would be negatively affected by their mistake. The judge even subsequently added that 'it [reading WP letters] somehow pollutes my mind'. All these further seemed to reinforce Chan's belief that an appeal was needed for this mistreated case. Yet, the appeal was later dismissed for lack of merit.

The above analysis shows how lay people might feel disoriented in courtroom communication due to certain features of legal discourse. Such discourse by legal professionals may come from their 'legal-linguistic habitus – their accumulated, normalized, and unquestioned experience of discursive practice in legal settings' (Heffer, 2013b: 207). In other words, they are comfortable with legal discourse being conducted in Chinese, English or both languages at the same time. How-

ever, this discursive practice may exclude lay people from participating in courtroom interaction, leaving them to guess the meaning of the ongoing discourse. Such an attempt is likely to lead to miscommunication, especially when the discourse involves unexplained legal concepts. Based on this, legal–lay communication may require legal professionals to pay more attention to their speech style even when the discourse is not directed at the lay person. If legal jargon cannot be avoided, interpretive assistance should be provided to lay people participating in legal processes.

5. Resonance with other unrepresented litigants

Our survey data further triangulate the litigant experience reported above. The results (Tables 1 and 2) suggest that unrepresented litigants find both the legal vocabulary and sentence structure difficult to comprehend.

Table 1: Difficulties of understanding ordinances

Do you have any difficulty understanding the ordinance? (You can choose more than one answer)	Percentage (N = 14)
1. Yes, I do have difficulty understanding their legal vocabulary	71% (10)
2. Yes, I do have difficulty understanding their complex sentence structure	71% (10)
3. Yes, I do have difficulty understanding their intended legal meaning	64% (9)
4. Others (Please specify)	0% (0)
5. No	14% (2)

64% of the respondents reported having difficulties in understanding the intended legal meaning of ordinances while 71% reported difficulties in comprehending the legal vocabulary and sentence structure. This lends support to our analysis of how legal interpretation by lay people might by affected by difficult legal phrases, legal homonymy and the legal genre of ordinances.

Despite the difficulties, Chan attempted to prepare for his case by making sense of legal language through his own strategies. Similarly, it has been found that unrepresented litigants resort to various means for case preparation that may be surprising to legal professionals (Table 2).

Discussion with friends (67%) ranks the top among the resources for case preparation. Reliability of folk knowledge of the law is obviously questionable. Apart from this, 47% of the respondents conducted their legal research using search engines, notwithstanding the fact that information found on the internet may not always be verified. As to legal resources, less than half of the respondents (47%) read ordinances, and the respondents who read relevant case laws were down to only 33%. These numbers suggest that unrepresented litigants may not have paid enough attention to points of law, or have difficulty locating the relevant case law. As one respondent said, 'I don't know how to look for case law, not

Table 2: Resources for preparation of trial

What did you do to prepare for your case? (You can choose more than one answer)	Percentage (N = 15)
Search engines (e.g., Google, Yahoo)	47% (7)
Reading case law	33% (5)
Reading ordinances	47% (7)
Doing research in the Basic Law Library	0% (0)
Discussing with friends	67% (10)
Personal experience	20% (3)
Reading the news	13% (2)
Watching drama series	13% (2)
Reading the official reference texts for unrepresented litigants	27% (4)
Consulting staff at the Resource Centre for Unrepresented Litigants	20% (3)
Others	7% (1)

to mention the relevant ones to my case'. Furthermore, although the above legal resources can be obtained from the Basic Law Library in Central Hong Kong, none of the respondents paid a visit. It is unclear whether members of the public are aware of its existence. The infrequent use of legal resources puts unrepresented litigants in a precarious position. Yet, even when they have located these resources, our litigant's experience suggests that the same old question might come back to haunt them – can they understand the legal materials?

6. Conclusion

The educated informant of our ethnographic study is a very good test case of self-representation because his experience suggests that the challenges he faced could not be encapsulated by basic problems of literacy in Chinese or English.

In the courtroom, spoken legal discourse filled with Chinese and English code-mixing and switching prevented our informant from understanding the discussion, even though he is fluent in both languages. Judges and lawyers may be comfortable with this way of communicating, but such in-group communication ought to be made accessible to the out-group: lay people who are also a party to the litigation. It is often suggested that acculturation or out-group accommodation is apt to minimise the group or cultural differences between parties (Scollon, Scollon and Jones, 2012). Cultivating unrepresented litigants to understand or use legal personnel's language style is rather time-consuming. It is also unrealistic given the brevity in unrepresented litigants' contact with the law. This leaves accommodation or what Heffer (2013a) called 'converging' to be done by the other parties. Legal personnel may therefore consider (1) minimising the use of

code-mixing and code-switching so that the discourse can be more accessible to monolingual speakers, and (2) removing stock legal phrases (e.g., 'by way of') from the speech so as to render the speech closer to the colloquial form and thus more intelligible to the general public.

Apart from spoken legal discourse, written legal language is found to be equally challenging to our informant. He struggled to understand the legal texts and attempted to deploy his own interpretation strategies. Their effectiveness, however, is questionable. A literal reading of legal terms, for example, may sometimes be misleading because their literal, ordinary meaning may not correspond with the common law meaning. A selective reading of the law, as another example, shows how lay people may not be able to understand the working of legislation – how the texts are mapped out with reference to their legal subject and action. It would be difficult for lay people to construct legal arguments according to the law if they are not familiar with the legal genre (see Heffer, 2005; Rock, Heffer and Conley, 2013). While these problems are seemingly linguistic (i.e. legal homonymy and legal genre), the underlying hurdle to our litigant's comprehension may well be his lack of legal knowledge. This reveals how the problems unrepresented litigants face may not be stripped down to either linguistic or legal ones, as more often than not they are entwined.

This leads to the question of how unrepresented litigants' access to legal discourse can be facilitated. Using plain language for drafting has often been proposed as a solution. As a general doctrine, plain language aims to make documents more user-friendly by addressing readers' needs for simple and clear language (Asprey, 2003). Its techniques usually involve the removal of abstruse legalese features like negatives, passives and nominalisation (Gibbons, 2002; see Rock, 2007). Countries like the United States, Britain, Canada, Australia and New Zealand have already introduced plain language to their law to various extents (Butt, 2002; Williams, 2004; Walsh, 2010). In Hong Kong, the Department of Justice (2012) has attempted to introduce plain language drafting by setting some guidelines. However, in an actual litigation, our litigant's experience suggests that not all the laws have been written in plain language, and even if plain language is used, it may not get him far. This is because understanding legal homonymy and legal genre is less concerned with writing style but more with legal knowledge. It may not be fixed with better drafting. This also echoes with an argument made by critics of plain language that there is a limit to what plain language can do (see Crump, 2002).

This case study further provides insight into the reality of legal bilingualism or multilingualism in postcolonial contexts. Having one or more official languages in a legal system has often been seen as a way for balancing different political interests and increasing access to justice (Leung, 2016). However, merely intro-

ducing a new legal language does not automatically make navigating the law easier and might even lead to misguided judgment about the ease of unrepresented litigation. Although introducing the local language into the postcolonial legal system is certainly a step in the right direction, more needs to be done to alleviate the challenges facing unrepresented litigants. After all, as shown in this study, the problem with unrepresented litigation is as much about language as it is about legal knowledge. Therefore, for any postcolonial country that attempts to be bilingual or multilingual by elevating the local tongue as a legal language, it should not presume that the newly adopted legal language would make the legal system readily accessible to the general public. Instead, such a jurisdiction should remove obstacles that make it hard for lay people to participate in legal processes, including providing adequate linguistic accommodation as well as legal assistance. In Hong Kong, at present, the Resource Centre for Unrepresented Litigants only advises on procedures but not on any other aspects of law, and this is far from sufficient.

In sum, there are three major insights that can be drawn from this case study: (1) unrepresented litigants face linguistic and legal challenges that are often intertwined during their litigation, and their lay litigation strategies cannot compensate for their limited legal knowledge; (2) extrapolating from this, introducing the local language into the legal system does not guarantee sufficient linguistic access to the law; (3) the limited room for lay people to project their voice during litigation negatively impacts upon their experience with the law, and dispute resolution mechanisms that better balance the voice of lay people against legal professionals will be a welcome change. These contribute to the existing study of unrepresented litigants from a bottom-up approach and provide directions for further research on how their access to justice in terms of case preparation and litigation in court can be improved in common law jurisdictions.

About the authors

Matthew Yeung is a Lecturer at The School of Professional Education and Executive Development (SPEED), The Hong Kong Polytechnic University (PolyU). He obtained his PhD in Language and Law from the University of Hong Kong. His primary research interest lies in legal bilingualism in Hong Kong with a particular focus on interactions between legal professionals and lay people.

Janny Leung is Professor of English, Programme Director of Law and Literary Studies (BA & LLB), and Associate Dean (for Teaching and Learning) in the Faculty of Arts at The University of Hong Kong. She obtained her MPhil and PhD in English and Applied Linguistics from the University of Cambridge, an LLB from the University of London, and an LLM from Yale Law School. She has been a

Visiting Scholar at the Harvard Yenching Institute, Harvard University, as well as at the Faculty of Law of McGill University (through a Universitas 21 fellowship). She received the Outstanding Young Researcher Award from the University of Hong Kong in 2017/2018.

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