

LCQ15: Terms used in Chinese and English texts of legislation

Following is a question by the Hon Kingsley Wong and a written reply by the Secretary for Justice, Mr Paul Lam, SC, in the Legislative Council today (November 1):

Question:

Last year, a drunken foreign man was charged with desecrating the national flag and the regional flag for hurling 12 bamboo poles with national flags attached to them and 12 bamboo poles with regional flags attached to them onto the street after pulling them down in North Point. It has been reported that the Acting Principal Magistrate has pointed out that while the Chinese texts of both the National Flag and National Emblem Ordinance and the Regional Flag and Regional Emblem Ordinance use the term "故意" for the mens rea, the corresponding terms used in their English texts differ, i.e. "intentionally" is used in the former ordinance and "wilfully" is used in the latter ordinance. Based on the legislative intent of the two ordinances, conviction under the former ordinance requires proof of "specific mens rea" on the part of the defendant, whereas mens rea under the latter ordinance covers the element of "recklessness" (i.e. "general mens rea"). As such, he found the defendant not guilty of the offence of desecrating the national flag but guilty of the offence of desecrating the regional flag. In this connection, will the Government inform this Council:

- (1) whether it has reviewed if there is a situation in which the court attaches more importance to the English text than the Chinese text when interpreting the provisions of legislation at present;
- (2) how it will avoid the situation of the use of different terms in the English texts of different pieces of legislation for the same Chinese term when drafting legislation in the future to avoid ambiguity; and
- (3) whether it has assessed if the Government currently affords greater protection to the regional flag than the national flag, and whether the Government will take actions to better protect the national flag?

Reply:

President,

After consulting the Constitutional and Mainland Affairs Bureau (CMAB), our reply to the Hon Kingsley Wong's question is as follows:

(1) The status of the Chinese and English languages is laid down by the Basic Law. Article 9 of the Basic Law provides that "[i]n addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region". Furthermore, section 4 of the Official Languages Ordinance (Cap. 5) provides that all ordinances must be enacted and published in both official languages, being Chinese and English; and section 10B of the Interpretation and General Clauses Ordinance (Cap. 1) provides that the English language text and the Chinese language text of an ordinance are equally authentic. Therefore, neither the Chinese nor the English version is a translation of the other.

The Hong Kong Special Administrative Region (HKSAR) Government strictly observes the Basic Law and the laws of the HKSAR. The courts also deal with court cases on this basis. There is no question of one text of the laws overriding the other. Where a comparison of the Chinese language text and the English language text of an ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the Court will adopt the meaning which best reconciles the texts, having regard to the objectives and purposes of the ordinance. The law does not stipulate that where a comparison of the Chinese language text and the English language text of an ordinance discloses a difference of meaning, the Chinese language text or the English language text must take precedence over the other language text.

(2) When it comes to law drafting, the Law Drafting Division of the Department of Justice adopts the same drafting policy for drafting both the Chinese and English texts, that is, laws drafted must accurately reflect the legislative intent. Subject to this overriding principle, provisions must be easy to read and understand, and there must not be any discrepancies in meaning between the two texts. Messages conveyed to readers through the Chinese text must be identical to those conveyed through the English text.

The Law Drafting Division's prime objectives are to ensure that the laws can accurately reflect the policy intention, that their legal meaning is accurate and that the

two texts of laws carry the same meaning. Maintaining uniformity and consistency of the use of expressions in the laws is also a fundamental principle for law drafting. There is an established standard procedure in the law drafting process, under which before a law drafter adopts a particular expression as a corresponding expression for its equivalent in the other text, the drafter must meticulously search through the existing laws and consider how the expressions are used in their respective contexts. This is to ensure that in addition to observing the basic principle of maintaining accuracy of legal meaning, the use of expressions in the texts of laws is consistent. For this purpose, other than the simplest items, all drafts prepared by law drafters must be vetted by two tiers of directorate officers for quality assurance.

(3) As regards the penalty provision against acts of desecrating the national flag and national emblem in the National Flag and National Emblem Ordinance (NFNEO), CMAB's policy intent is to prohibit any public and intentional desecrating act in relation to the national flag and national emblem. In the course of amending the NFNEO in 2021, we revised the English text of "故意" from "wilfully" to "intentionally" in order to better reflect the abovementioned policy intent. With reference to the corresponding amendment in the NFNEO, the Regional Flag and Regional Emblem (Amendment) Bill 2023 submitted to the Legislative Council in July this year has also proposed that the word "intentionally" be adopted as the English text of "故意" in section 7 of the Regional Flag and Regional Emblem Ordinance (RFREO) on desecration of the regional flag and regional emblem. This proposed amendment seeks to better reflect our policy intent and make the provision consistent with that in the NFNEO. Upon amendment to the RFREO, the English text of "故意" in the two ordinances will be aligned.

Ends/Wednesday, November 1, 2023