

Language disadvantage in Malaysian litigation and arbitration

RICHARD POWELL* and AZIRAH HASHIM**

ABSTRACT: Based on extensive observations of courtroom proceedings and more limited observations of arbitration practice, this study compares how each system approaches language disadvantage. In Malaysian common law the usual constraints on courtroom discourse, institutionalised by *de jure* rules of speaking and reinforced by professional practice, are supplemented by a language policy, enshrined in the constitution, statutes and judicial directives, which requires the use of Malay while also allowing English where deemed in the interests of justice. The result is a bilingual system, with all other languages admissible only through interpretation. In the fast-growing alternative dispute sector, however, there are few hard and fast rules governing either code choice or discourse. With most Malaysian arbitrations involving commercial disputes, English is the dominant medium, but as in the courts, English-Malay code-switching is common. Ways of speaking are generally more relaxed than in the courts, but with a majority of alternative dispute resolution (ADR) advocates coming from common law, many discursive practices are carried over. While the more relaxed atmosphere of ADR seems to encourage freer discourse than in the courts, there are some indications that current practice may be underestimating the needs of participants who are less proficient in English. The stricter rules imposed on courtroom discourse may inhibit free discussion but they do reveal a high awareness of the problems of language disadvantage.

GENERAL VIEW

The dominant legal system in Malaysia is based on adversarial common law. It retains a central role for oral testimony and operates bilingually – in Malay, the national language, and English, the ‘second most important language’ admissible ‘in the interests of justice’. Bilingualism is a feature of other Malaysian legal systems as well, including customary *penghulu* courts, many of which function in Malay and some other Austronesian languages, and *syariah* courts, which use both Malay and Arabic. All these institutions exist within a wider context of multilingualism, with several Chinese, Indian and Bornean languages widely spoken. Thus, there is relatively high awareness of the problems of language disadvantage before the law. The courts provide support for the main languages through a system of court-based clerk-interpreters. For other languages, outside interpreters are hired, at public expense for criminal cases but at the litigants’ expense in civil cases. Strict High Court Rules of Speaking give some structure to the way testimony is elicited, given and translated.

In alternative dispute resolution (ADR), however, provisions for language support are much vaguer. The government and many in the legal community promote arbitration and mediation as quicker, cheaper, friendlier and more culturally appropriate than the imported adversarial way of resolving conflicts, and the rules of speaking and language choice in Malaysian ADR are consequently more flexible than in litigation. Data obtained so far

*Nihon University College of Economics, Misaki-cho 1-3-2, Chiyoda-ku, Tokyo 101-8360, Japan. E-mail: richard.powell@nihon-u.ac.jp

**Faculty of Languages and Linguistics, University of Malaya 50603, Kuala Lumpur, Malaysia. E-mail: azirahh@um.edu.my

from court observations, interviews with lawyers, arbitrators, mediators and interpreters, and limited access to arbitrations, however, suggests that although the greater flexibility of ADR has advantages over litigation in terms of the speed and flexibility of proceedings, there may be some risk of restricting the ability of language-disadvantaged parties to put over their case efficiently and effectively.

MALAYSIAN LEGAL CONTEXT

The oldest legal system still in use in Malaysia is *adat*, the customary law that evolved over many centuries among Malay and other indigenous groups. During the 15th century *syariah* was introduced into Malaya and coastal areas of Borneo, and from the early 19th century colonial administrators brought in English common law, starting with the Straits Settlements of Penang, Melaka and Singapore, where commercial activity was most intense and the population of British subjects largest. There was slower penetration into the Federated and Unfederated States, where local sultans ruled under the supervision of British 'advisers' and English law was received only through local enactments.

Each system tended to encroach upon pre-existing jurisdictions. As the Malay population converted to Islam, *adat* came to apply only to village-level disputes. *Syariah*, in turn, became restricted to family disputes and religious infringements among Muslims, as *de facto* adoption of English law in most areas preceded the *de jure* adoption that came with enactments such as the 1879 Civil Law Ordinance for the Straits Settlements, a 1937 Ordinance for the rest of Malaya, and a 1938 Ordinance for Sarawak. Since independence in 1957, English law has continued to have persuasive authority. Some post-independence legislation states it as the default authority where local law is silent. Nevertheless, the British colonial preference for legal dualism, reinforced by a propensity for working with existing hierarchical structures (as long as they did not interfere with commercial interests), has ensured that each legal system remains active. The current constitution recognises a role for *adat* at local level and for *syariah* in certain matters concerning the majority Muslim population. There is periodic debate about which system takes precedence, particularly in cases concerning the ownership of tribal land and in inheritance matters where the religion of the parties is in dispute.

ADR is sometimes thought of as a recent addition to this multi-jurisdictional mix, yet an arbitration ordinance based on English models was applied to the Straits Settlements as early as 1809, and another to Penang and Melaka in 1890.

Horowitz and Oldham (1993) trace the origin of the 1698 Arbitration Act in England to a meeting attended by John Locke and others on 19 August 1696 'to draw up a scheme of some method of determining differences between merchants by referees, that might be decisive without appeal' (p 138). Arbitration was apparently quite popular in the 17th century, either 'in lieu of or at least prior to litigation' (p. 140). Problems with arbitration such as enforcement of awards were already being discussed then. The authors put forward two possibilities for the decline in arbitration after a period of popularity in the 17th century. One is that the courts felt threatened by it. Another involves problems with enforceability of awards.

Consensual traditions of dispute resolution (that are arguably more in the spirit of modern ADR than adversarial law), have a history in the region that long predates the introduction of common law. One of the most important roles of the *penghulu*, or head of the Malay village,

has always been to act as a middleman in disputes; Islam has several long-established methods of dispute resolution, including *shafa'a*, *tashkim* and *sulh*. The current common law system is sometimes criticised as unsuited to local consensual cultural practices. In 1988 the head of the Consumer Association complained that Malaysians had become too fond of litigation and should turn back to more conciliatory methods of conflict resolution (cited in Mead 1988:53). In 2002, after the government lost an important appeal, the Chief Justice publicly mulled replacing the common law system with one in which 'the truth prevailed, and not one where the side with the more pervasive legal mind triumphed' (*The Star Online* 2004).

An Arbitration Act, modelled closely on British law, was enacted in 1952. Section 34 was amended in 1980 to reduce court interference with the aim of attracting international arbitrations to the Kuala Lumpur Regional Centre of Arbitration, set up in 1978. In 2005 a new act to cover both domestic and international arbitrations, based on UNCITRAL procedures replaced the 1952 Act to encourage more parties to use the Kuala Lumpur venue for arbitration. The main aim of this new act is to reduce court intervention which the 1952 Act provided for. This can be seen in the reduction of clauses that allowed for court intervention that were present in the 1952 Act. (Hashim 2004; 2008). In addition, stay of arbitration proceedings, which was discretionary in the 1952 Act, is now mandatory in the new one except under a few conditions.

Statutory-backed mediation began in the decade after independence. A Banking Mediation Bureau was set up under the 1965 Companies Act, and the 1967 Industrial Relations Act provided for mediation, as well as arbitration. Under the 1976 Law Reform (Marriage and Divorce) Act, couples must attend mediation before filing for divorce. The Housing Buyers Tribunal, the Tribunal for Consumer Claims and PIAM (Malaysian Insurance Union) also use mediation. In 1999 the Malaysian Mediation Centre was established to provide facilities for solving both commercial and matrimonial disputes. Under Order 34 of the Rules of the High Court 1980 (RHC), judges can recommend mediation to litigants, and under a pilot project initiated in 2005, High Court judges are required to stay proceedings for two months if they think there is a reasonable chance of resolution through mediation. With people becoming more aware of their legal rights, the number of disputes has increased, leaving the court system hard-pressed to cope with the demands of litigation. The popularity of arbitration has been lauded by legal experts and the government. In addition to expediency, it offers a shorter resolution process than court cases, together with a high degree of confidentiality. The requirement for confidentiality, however, has been questioned. Bhatia, Candlin and Sharma (2009: 11), for example, point to its potential for concealing inconsistencies in resolution of disputes and lack of materials for training arbitrators.

There is a dual system in Malaysia for international arbitrations – with some regulated under the Malaysian Arbitration Act 1952 and others conducted under the rules of the Kuala Lumpur Regional Centre of Arbitration (KLRCA). KLRCA was established in 1978 as the main organisation responsible for international commercial arbitrations taking place in Malaysia. Its rules are based on the UNCITRAL model, but there are some differences: parties are given considerable autonomy in relation to procedure and the appointment of arbitrators. There are also *ad hoc* arbitrations which do not necessarily abide by any prescribed procedural rules.

MALAYSIAN SOCIOLINGUISTIC CONTEXT AND EVOLUTION OF LANGUAGE POLICY IN THE LEGAL DOMAIN

Summaries of first-language use in Malaysia typically describe about 60 per cent of the population as Malay-speakers, perhaps 25 per cent Chinese, and something less than 10 per cent Tamil. While this is a gross simplification of a complex situation, it is not easy to obtain accurate up-to-date data since questions about language are no longer included in national censuses. Another complication is the prevalence of multilingualism. Those speaking Malay as a first language probably make up around half the population, including Malays in states such as Kelantan and Sarawak who use a dialect very different from the standard form, but who are generally fluent in standard Malay too. Up to another 10 per cent speak other Austronesian languages such as Javanese and Minang in West Malaysia and Iban and Dusun in the East. The term 'Chinese' covers a number of mutually incomprehensible varieties including Hokkien, Cantonese, Mandarin and Hakka. 'Tamil' is sometimes used to cover the related but quite distinct Malayalam. Remaining numbers are made up mostly of Bangla, Burmese, Hindi/Urdu, and Thai speakers, many of whom are recent or temporary immigrants. The number of first-language speakers of English tends to be underestimated in official statistics, with many urban Malays, Chinese and Indians using it more often and in more domains than their declared 'mother tongue'. Like Malay, English is widely used as a second language between different ethnic groups.

Over the last quarter of a century, Malaysia's legal profession has been transformed from one dominated by lawyers trained in English into a bilingual one. Article 152 of the 1957 constitution declared Malay the national language but provided for English to continue in legal and administrative affairs for a transitional period. Since then, a succession of language planning measures has expanded the role of Malay in law, following similar reforms in government and education. In 1967, a constitutional amendment made Malay the official language for West Malaysia (and for East Malaysia from 1974), permitting its use without translation in the courts. In 1980 a directive by the Lord President required judges, magistrates and court administrators in West Malaysia to use Malay (Mead 1988: 1), and an amendment of the Rules of the High Court made Malay compulsory for documentary submissions (Rules of the High Court 1980). The 1983 National Language (Amendment and Extension) Act applied these changes to the higher courts and in 1990 they were extended to East Malaysia, though in practice they have yet to be fully implemented there.

Today, most discussion in the lower courts, where most of the cases begin and end, is in Malay (Powell 2008). However, legal provisos (e.g. in the National Language (Amendment and Extension) Act and directives of the Chief Registrar), for the use of English where deemed in the 'interests of justice' justify the continuation of the colonial language in many areas. English is frequently used in the High Court and dominates the Court of Appeal and Federal Court. It is the default language of most commercial law and much civil litigation. Permission to use English cannot necessarily be assumed, however. But many legal practitioners feel that the Malay legal lexicon, while innovated by projects undertaken by *Dewan Bahasa dan Pustaka* (the National Institute for Language and Literature), remains inadequate for modern legal arguments, particularly those depending on authorities available only in English (Powell 2008). For the foreseeable future, law will continue to operate bilingually.

This use of Malay alongside English ‘in the interest of justice’ is insufficient to cater to the needs of a linguistically and culturally diverse country where large numbers of people understand neither language well. Hence there is a constant need for court interpreters.

PROVISIONS FOR MANAGING LANGUAGE DISADVANTAGE IN ADVERSARIAL LAW

The Criminal Procedure Code grants the right to an interpreter to those involved in a court appearance as an accused or litigant who are deemed not to speak the national language well enough (CPC ss. 269, 270). Witnesses and defendants also have the right to have proceedings explained in the language of their choice (CPC s.270).

While the colonial common law system functioned in English, a system of court-based clerk-interpreters was developed to deal with language disadvantage. Clerks whose duties included drawing up each day’s case list and logging testimony and exhibits would also be required to interpret evidence from Malay or (depending on the location), Chinese, Tamil, Iban or Dusun, etc. into English and to interpret questions posed in English back into those languages for the benefit of witnesses and defendants. This system has remained in place since the shift to using Malay in the courts. Nearly all clerk-interpreters can function in Malay and English, with some of them also having Chinese or Tamil in their repertoire. As the number of court cases has increased, however, an inadequate number of clerks have to deal with an increasingly heavy workload. Whereas conference interpreters usually rotate every twenty minutes, clerk-interpreters could be translating for several hours at a stretch before then going back to their administrative duties. Many interpreters start with minimal training, and although refresher courses are offered from time to time, overburdened courts may be reluctant to release them for long enough to attend (Hashim and Powell 2009a).

In criminal cases, language assistance is provided at the court’s expense, but if a case is delayed because of difficulty in finding an interpreter, some defendants hire their own. Several cases have gone to appeal on the premise that a defendant was encouraged to go ahead with proceedings before an interpreter could be found (e.g. *Yu Kim Seng v. PP* [2008] 4 CLJ 95 [HC]). On occasions, judges question Malaysian nationals before granting their request for an interpreter, particularly if they are young enough to have undergone compulsory education in the national language (Powell 2008). A rise in the number of foreign-born defendants has brought a greater role for external interpreters, particularly for Bangla, Burmese and Thai. While the Ministry of Justice remunerates external interpreters (RM500 to 700 per day, depending on the language), cases may face considerable delays because a suitable interpreter cannot be found (Powell 2009).

Clerk-interpreters also provide language assistance in the main Malaysian languages in civil cases. In the industrial courts, for example, about 80 per cent of cases are conducted in English, but assistance in Malay is always available. Parties requiring support for Chinese or Tamil must give advance notice. For other languages, however, litigants must hire an interpreter agreeable to both sides and will not be reimbursed for this (Norizah 2010).

There seems to be some confusion with regard to payment of interpreters, with some litigants appearing in civil actions without adequate language assistance. There also appears to be a lack of clarity in procedures regarding when and why interpreters are required and how they are trained. Legal language is difficult for many, yet the high level of competence that is needed and the stressful nature of the work are by no means compensated for by high rates of remuneration (Zubaidah 2002). In addition, the presence of a number of different

ethnic groups means an interpreter may need to know several varieties of a language, not merely its most widespread or standard form.

PROVISIONS FOR MANAGING LANGUAGE DISADVANTAGE IN ADR

In the spirit of the informality and flexibility to which arbitration aspires, the 2005 Malaysian Arbitration Act places few restrictions on language choice. As laid down in section 24:

- (1) The parties are free to agree on the language to be used in the arbitral proceedings.
- (2) Where the parties fail to agree under subsection (1), the arbitral tribunal shall determine the language to be used in the arbitral proceedings.
- (3) The agreement or the determination referred to in subsections (1) and (2) respectively shall, unless otherwise specified in the agreement or determination, apply to any written statement made by a party, any hearing and any award, decision or other communication by the arbitral tribunal.
- (4) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language agreed upon by the parties or determined by the arbitral tribunal.

The arbitration clause on which parties rely when going to ADR, and the subsequent terms of reference, usually indicate the language in which the arbitration will be held. Under the rules of UNCITRAL, which KLRCA-authorized proceedings abide by, and also those of the International Chambers of Commerce, provisions for language support should be made from the start, but in practice these are frequently varied after arbitration has commenced. The KLRCA Rules refer to the language to be used in arbitration, as do many arbitration clauses in contracts, but *ad hoc* arbitration is rarely specific. According to one arbitrator (pers. comm. 31 October 2008), in a multilingual setting, if the parties disagree on the language to be used, the tribunal will decide. It was also suggested that language choice can influence the choice of arbitrators, but this does not seem to be very common in practice, presumably because in most cases, all parties agree – or assume – that the arbitration will be conducted in English. KLRCA administrators usually estimate needs and costs for language support after processing the statement of claim, order of claim and counter claim (Noorashikin 2008).

In Malaysia, English is by far the most common language used in arbitrations, whether they involve international or only domestic parties (Noorashikin 2008). In selecting arbitrators, adequate English is usually the sole language consideration. For example, in a dispute involving a Malaysian and a German company, the parties requested arbitrators who could use English and whose nationality was neither German nor Malaysian, leading to the appointment of an American, an Australian and a Briton. Some Japanese firms, however, have requested arbitrators who can read Japanese documents as well as speak English. In contrast to litigation, Malay comes a distant second to English. Whereas the only Malaysian lawyers who can work monolingually in English nowadays are confined to non-contentious commercial cases or certain appeals in the highest courts, many Malaysian-based arbitrators, particularly those of the older generation, lack competence in Malay.

KLRCA has its own specialised interpreters for French and Spanish among other languages, but regularly employs outsiders, often contacting embassies for recommendations. For local languages it is common to hire retired court interpreters – being employed by the government they are not normally available while still in active service.

Language provisions for *ad hoc* arbitrations and for mediations are even more relaxed. According to one former official of the Consumer Tribunal, there are no formal rules about use or choice of language in mediation; neither is there financial provision for interpreters (Hashim and Powell 2009a). Nearly all officials can cope, and assist parties, with Malay and English, but for other languages parties bring along an assistant who more often than not is unqualified to interpret. Since there are no rules of speaking, discourse is unstructured and interpreting takes the form of simultaneous ‘whispering’ – commonly judged to be the least accurate of all forms of translation (Nagao 2009).

DISCUSSION: COMPARING THE STRENGTHS AND WEAKNESSES OF LANGUAGE MANAGEMENT IN COURTS AND ARBITRATIONS

Rules of speaking

Whether in Malay or English, common law proceedings in Malaysia are subject to constraints on who may speak when and to whom and what they may say and how they may say it. While rules are enforced largely by the discursive norms of the legal profession, there are also *de jure* restraints, such as the Criminal Procedure Code, Evidence Act, Legal Professional Act and Rules of the High Court.

Some procedural features differ from those in most other Commonwealth jurisdictions, such as ‘trial by ambush’ – waiving of the rules of discovery to allow a party to introduce witnesses and tender statements without giving the other side a chance to examine it in advance (Noraini 2007). However, the ritualised order of examination, cross-examination and re-examination of witnesses, and much of the associated discourse, would be familiar to any common law practitioner. For example, known information is elicited from friendly witnesses by short prompts from counsel, who are enjoined not to ‘lead’ their interlocutor. Questions put to hostile witnesses are more expansive and often rhetorical, aimed at getting the other side to agree, or at least to fail to dispute strongly, a reconstruction of events that damages their case, and sometimes restricting them to Yes/No answers. Thus the “I put it to you”-type questions so characteristic of common law are found in Malay as well as in English and were lampooned in the early days of the national language policy when English-trained advocates struggled to find the right words in the national language (see Example 1):

1 *Saya taruh sama engkau, engkau terbaring.*

(I_put_it_together_with_you_you_are lying_down) (cited in Mead 1988: 103).

Discussion among lawyers is normally directed through the judge and honorifics such as ‘My Lord’/‘Yang Arif’ and ‘My learned friend’ are used. Witnesses may not speak unless to answer a question or ask for clarification. Members of the public gallery do not talk at all – except in the rare case of being questioned (as when someone taking notes for academic purposes arouses the curiosity of the judge).

In Malaysian arbitrations, procedure is largely conducted according to UNCITRAL guidelines (but sometimes under ICC rules or on an *ad hoc* basis). While consecutive examination of witnesses by both sides has been adopted, questioning is usually less coercive than in court. However, demands for short, straight answers to long, embedded questions are not uncommon:

2. Based on the letter would it be correct to say that the conclusion you came to was purely speculative? (Hashim and Powell 2009b).
3. Isn't it a requirement by the board if you wish to practise to be registered? (Hashim and Powell 2009b).
4. I put it to you all those projects you have failed to carry out successfully (Hashim and Powell 2009b).

Arbitrators have stated that arbitral cross examination is different from in the courts, usually describing the process as 'less wordy, less intrusive and not coercive' (Hashim and Powell 2009b). It was admitted, however, that due to the high number of former judges who have become arbitrators, there is a need for conversion courses to enable them to adapt to the discourse of arbitration. In general, leading questions are not allowed in arbitration and 'the role of tribunals is to strongly resist improper modes of questioning' (Hashim and Powell, 2009b)

One discursive complication that has yet to be examined is interaction among lawyers from different legal traditions (e.g. common and civil law). Although highly unlikely in civil litigation, this is a distinct possibility in an international arbitration and could form the basis for an interesting study of discursive differences and the possibility of cross-talk, (also see Bhatia 2011, and Hafner 2011).

Code choice

As with the rules of speaking, code-choice is controlled in Malaysian courtrooms both by legislation (such as the National Language Act and the Rules of the High Court), and also by social and professional conventions.

The formal status of Malay is recognised symbolically in the opening and closing of sessions and reinforced by signs in courtrooms instructing parties (in Malay), to use the national language. In much civil litigation and many criminal cases in the higher courts, discussion will often drift into English and then remain in it, but few lawyers assume that they can start using it without either asking for permission or, more commonly, waiting for a cue from the judge, who may be the first participant to start using the language (Powell 2008).

A recent reminder that the status of the national language is not merely a symbolic matter came with the dismissal of an appeal by former deputy prime minister Anwar Ibrahim because it was drafted in English. In a ruling unlikely to have been made without due thought for political implications, Justice Abdul Malek Ishak declared that failure to submit the appeal in Malay amounted to "blatant breach that would compel us to conclude that no memorandum has been filed at all" (*Malaysiakini* 2009).

In most cases, however, there is considerable leeway when it comes to the choice between Malay and English. A Practice Direction of 1990 allows use of the latter even for documentary submissions provided a judge accepts the urgency of the application and the submitting party undertakes to supply a Malay version as soon as possible. In oral mode, most proceedings include some use of both languages, although the balance, as noted above, depends on factors such as the level of the court, the nature of the case, and the preference of the presiding judge. Where the language policy is very clear-cut, however, is in ruling out the admissibility of a third language in court. Many Malaysians, especially non-Malays, are trilingual, but while a lawyer may talk informally to her colleague or a

clerk in Tamil or Cantonese before the judge enters, once the court is in session, anything not said in Malay or English must go through an interpreter.

Powell (2008) identified a large set of factors that may influence code-choice, including the outlook of the judge (with those coming from government service more likely to favour Malay), the social background of witnesses (expert witnesses and commercial litigants tend to give their evidence in English), and the language of the documents referred to (although a set must be submitted in Malay, in practice English versions are often relied on). However, there is a marked tendency for the use of more Malay in criminal cases and in the lower court cases and for more English in civil cases and in the higher courts. This suggests a pragmatic application of the language policy, reflecting the language that most participants are likely to be more comfortable in.

There are no hard and fast rules about code choice for ADR. The 2005 Act states that the parties can choose the language of the arbitration. In a multilingual setting, if the parties disagree over the language to be used, the tribunal makes the decision. However, data from interviews with arbitrators and limited observation of arbitration proceedings suggest that there is fairly strong expectation that parties will mostly use English and that this will be the language of documentary submissions. Most arbitrations in Malaysia cover commercial matters, and the fact that commercial documents there tend to be in English contributes to an expectation of English in oral proceedings. Furthermore, since many of the arbitrators are ex-judges and lawyers who obtained their tertiary education and training overseas, mainly in the UK, English tends to be the language that they use at work. English is also often chosen when counsels, claimants, respondents and witnesses are from varied ethnic and language backgrounds.

Style-switching

Within the ambit of the rules of speaking and the language policy, there is some discursive flexibility in Malaysian courts in the form of style-switching between more formal and less formal Malay and English. While changes in register are often use-based, reflecting different tasks (including encouraging one's own witnesses, coercing hostile ones and citing legal precedents), they may also have user-based motivations, with some lawyers and judges using acrolectal forms of English (which can be quite similar to British counterparts), and of Malay (as taught in schools and based on West Coast and Johor speech), among themselves but shifting to mesolectal and more characteristically Malaysian English, or to regional Malay, with court officials and police officers.

As the participants with most authority and therefore most psychological freedom, courtroom judges appear to have the greatest tendency to switch between more and less formal Malay and English. Thus in Example 5, an Etonian-accented judge, who had been hitherto been excessively polite, switches his style in order to berate an advocate:

5. C (=counsel): It is inadmissible in law because he did not comply with the Witness Act, Yang Arif.
J (=judge): Oh don't be so daft! (Powell 2010).

In Example 6, defence counsel uses local English with a court official and then almost pompously acrolectal English with the judge, who responds informally in local English:

6. C (to clerk): This one lah. [Gives bundle to clerk]
 C (to J): I humbly request for a short break, *Yang Arif*.
 J: Short one is it, ah? (Powell 2010).

While style-switching also occurs in Malaysian arbitrations, the lower level of constraint on discourse seems to favour a more neutral, polite style, with less polarisation between the formal and informal. Example 7 illustrates the exchanges between the counsel, the witness and the arbitrator in an arbitration.

7. C: Can you elaborate?
 W: Yes . . . I think Mr X put the blame on us rather than project owner. The project is still ongoing. The date of completion is . . .
 A: It's the same company?
 W: Yes. X . . .
 A: Fully owned subsidiary?
 W: Yes. Fully owned.

Code-switching and language alternation

Switching between Malay and English may also mark an indication of greater or lesser formality. Neither one language nor the other necessarily implies informality in itself, but a switch may indicate a change of style (Powell 2008). Advocates are unlikely to feel they can speak informally back to the judge; however, they may take cues from preceding discourse as to the possibilities for switching between Malay and English.

The main forms of code-switching identified in Malaysian courtrooms (e.g. David 1993; 2003; Powell 2008), are: lexical code-mixing (typically, the insertion of single words or phrases from one language into a matrix of the other); intra- and intersentential code-switching (language alternation between clauses); code-shifting (alternation when addressing different interlocutors); and non-accommodating alternation (where interlocutors speak to each other in their respective preferred languages without need of an interpreter to understand each other).

The prevalence of insertion of English legalese into a Malay matrix appears to suggest that an important motivation for code-mixing is a deficiency (in the Malay lexicon or the speaker's individual lexicon, in the legal registrar of the national language, or else a reluctance to use Malay legalese because it is unfamiliar or lacks *gravitas* (Example 7). However, the argument should not be overstated in view of the fact that insertion of legal Malay into English also occurs, if to a lesser extent (Example 8). Moreover, English-Malay code-mixing is endemic among Malaysians and can be found in the courtroom in many non-legal as well as legal contexts (Example 9).

8. C: *Minta* deterrent sentence. *Mangsa seorang yang kurang 16 tahun.*
 (We are asking for) (The victim is under 16)
9. J: She had the *surat akuan* in 1992.
 (statutory declaration)
10. W: *Saya offkan* handphone *sebab takut ayah atau nurse*
 (I switched off) (being afraid father or his nurse)
hubungi saya.
 (would contact me) (Powell 2008).

Instances of interlocutor-related code-shifting seem easier to explain, in many cases reflecting the tendency of lawyers to use English among themselves but Malay with witnesses – either because of the latter’s perceived language preference or as a way of keeping them in their place:

11. J [to C]: So what is the purpose of your question? That the zero was originally a six?
 C: Yes.
 J: Then ask him. You see, it is as simple as that.
 J [to Witness = W]: *Nombor enam telah ditulis menjadi nombor kosong?*
 (Was the number six rewritten as a zero) (Powell 2008).

Witnesses are the most psychologically constrained participants in court discourse and are generally expected to stick to the language they chose to take their oath in. However, some witnesses do slip between Malay and English, most commonly to assert their language competence and show that they understand questions without waiting for the interpreter’s intervention (Powell 2008), and also simply because language alternation is so endemic in Malaysia that it is done without thinking.

Whereas code-mixing and code-shifting often appears to be deficiency-related (e.g. a gap in the speaker’s own lexicon or a perceived lack of proficiency in an interlocutor), instances of intra- and intersentential code-switching in the courtroom are frequently proficiency-related. A common function is rephrasing and reiteration for emphasis:

12. J: What is the purpose? *Untuk apa?*
 (For what?) (Powell, 2008).

Codes may also be switched in order to coerce an interlocutor.

13. W: *Saya tak ingat.*
 (I don’t remember)
 C://*Tak ingat? Soalannya setuju atau tidak.* You agree or not?
 (Not remember)? (It is a matter of whether you agree) (Powell 2008).

Sometimes the switch seems merely contextual, or even textual, as in marking an administrative aside apart from a legal argument:

14. C: *Merujuk surat ini, adakah tanda tangan kamu.* Look at the letter.
 (Is this your signature on this letter) (Powell 2008).

KLRCA administrators claim that code-mixing is rare in comparison to courtrooms and mediation. The reason for this could be that in cases that involve international parties, English would be the language chosen for arbitration and the common language for all parties concerned. Code-mixing would be avoided unless the parties have the same first or second language. In cases where any of the parties are not able to speak English, interpreters are used or interpretation is done by the counsels.

However, samples of discourse taken from arbitration suggest the claim that code-switching is rare may be overstated. Code-switching between English and Malay is found in the discourse of counsel and the witnesses when all of them are Malaysians:

15. C: Any other *kesilapan* (mistakes) in this document?
 W: *Mungkin takda* (maybe not). *Cuma di peringkat* (just at the level of) supervision *sahaja* (only).
16. C: *Pada permulaan* (at the beginning) X, subsequently Y.

In addition to lexical code-mixing, code-switching from clause to clause also seems to be common, although as in Hong Kong, many arbitrators in Malaysia are unhappy about it for fear it may lead to discrepancies in meaning (Hashim and Powell 2009a). Its functions often parallel those that have been found in the courtroom, such as reiteration of questions:

17. How do you confirm? Who made the payment? *Siapa yang bayar?* (Hashim and Powell 2009b).
18. C: Is any money owing to Universiti X.
 W: *Tak ingat.*
 (I don't remember.)
 C: *Ada atau tidak?*
 (Is there or is there not.)
 W: *Ada lagi.*
 (There is.)
19. C: I put it to you that you have not completed this project.
 W: *Cuma satu tak siap.*
 (Only one is not ready.)
 C: I put it to you all the projects you have failed to carry out successfully.
 W: *Tak pernah.*
 (Never.) (Hashim and Powell 2009b).

Something emerging from the arbitration data so far gathered is an apparently greater tendency than in the courtroom for code-switching as a manifestation of lack of proficiency. Whereas courtroom code-switching often indicates language competence (e.g. as a strategy by lawyers to control witnesses or by witnesses to resist being controlled), in some arbitrations, witnesses who have chosen to, or have been persuaded to, use English, appear to have recourse to Malay after struggling to cope with questions in English:

20. C: *Tuan Haji*. . . Question 12 is. . . scope of agreement.
 Who preferred the design of X?
 W: [Pause]. . . *Kita lantik Y dari pihak X.*
 (We appointed Y from X)
 C: X? But that's not what you said in your statement (Hashim and Powell 2009b).

As can be seen in the above examples, there are a number of instances when the lawyer uses English and the witness replies in Malay. While arbitral advocates do seem prepared to help language-disadvantaged witnesses rather than exploit them, the fact is that if such a witness were appearing in court, an interpreter would be used – or proceedings suspended until one could be found.

Arbitrators, many of whom are less proficient in Malay than courtroom judges, have sometimes been observed as the participants needing language assistance. In the following example, an arbitrator asks counsel to clarify a witness's response in Malay to a question in English:

21. C: If I say about 6 months, would you agree?
 W: *Saya tak ingat. . .3 bulan, 4 bulan*
 (I don't remember. . .3 months, 4 months)
 A: Did he say 3 months?
 C: He's not sure, long ago.

It can be seen, therefore, that, lack of understanding can arise for any of the parties in arbitration when code-switching takes place.

Flexibility in ADR – the other side of the coin

Both witnesses and counsel are required to present evidence in a clear and unambiguous manner to have a chance of winning their case. The proficiency of witnesses' oral communication in front of the arbitral tribunal may be crucial. But because arbitrations are less formal than court, provisions for interpreters are less stringent. Although there is an overwhelming tendency to use English in arbitration, few parties are native speakers. There is some evidence that this can result in witnesses giving evidence in a language in which they lack competence, although no examples in the data collected so far indicate this has a bearing on the final outcome.

There are several factors which could potentially conspire to force parties to struggle with language disadvantage in ways that rarely occur in the court. One is financial, given that interpreters are budgeted for before proceedings commence and not provided free of charge by the venue.

Another is time constraints: one of the main reasons parties elect to go to arbitration is to avoid lengthy litigation, and administrators are generally very strict about keeping parties to the time that has been allotted. Pausing proceedings to find language assistance that had not been anticipated is likely to make proceedings overrun and could lead to financial penalties for the party deemed responsible for the omission.

A third factor is face: parties to arbitrations are typically company executives and professionals who in the Malaysian context would normally be expected to be proficient in English. Those lacking proficiency might attempt to disguise the fact by not seeking language assistance when statements of claim are being filed.

One arbitrator has stated that it can be difficult to obtain suitable interpreters. The interpreter may not be familiar with arbitration, may interpret wrongly and thus hinder the process of arbitration – as in one case where the word 'dough' was translated as 'flour' instead of 'money' (pers. comm. 24 October 2008). Then we have legal professionals who do not understand the processes involved in interpreting and insist on a word for word translation.

As yet there is insufficient data to conclude that arbitration's combination of informality and strict time constraints does in fact disadvantage certain witnesses, but there is clear evidence of some advocates themselves translating for their own witnesses and of witnesses being asked to 'do their best' when faced with language difficulties. It should also be reiterated that whereas nearly all courtroom judges and lawyers are bilingual, many of those in arbitrations are not. Further, international arbitrations based in Malaysia are also

nearly all conducted in English, and parties will vary greatly in their competence in the language, from insecure foreign-language proficiency through competent second language proficiency to native speaker levels, as has been observed in a case involving a Malaysian company relying on a number of Korean witnesses (Hashim and Powell 2009a).

Strict rules of speaking in courtroom proceedings, requirements for lawyers to be bilingually competent, and formalised use of interpreters are among the factors that slow down and constrain litigation and encourage parties to go to ADR. However, there is a need for ADR administrators, who have a tendency even in multilingual Malaysia toward monolingualism, to ensure that in their pursuit of greater speed and greater flexibility they do not overlook or underestimate problems of language disadvantage.

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