# Bilingualism and Law in Hong Kong

*Translatophobia and Translatophilia*

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**Abstract**

Although translation may be considered the *sine qua non* of bilingual legislation, the perceived authenticity and equivalence of different language versions of the same law are contingent on the disavowal of translation. Yet precisely because of such disavowal, translated versions of law are paradoxically valorized as equal in meaning and status to their originals, notwithstanding possible infelicities in the translation, so as not to compromise the precepts of legal bilingualism. This paper theorizes such a situation in relation to Hong Kong's bilingual jurisdiction. On the basis of relevant legislation, official guidelines on statutory interpretation, and court cases in Hong Kong, the paper proposes the terms Translatophobia and Translatophilia to highlight the double bind that entraps translation in institutional discourses on legal bilingualism. More specifically, it reveals the language ideology generating anxieties over translation, and observes how such anxieties may be channelled into a fetishization of translation.

**Keywords**

Legal bilingualism; translation; Translatophobia; Translatophilia; language ideology; Hong Kong

## Background

This paper looks at the position of translation in Hong Kong's bilingual jurisdiction, with an eye on the language ideological tension in the relation between English and Chinese in respect of statutory interpretation. The story of legal bilingualism in Hong Kong begins on 15 February 1974, when the Official Languages Ordinance (OLO) became operative in the then British Crown colony. S.3 (Cap. 5) of the OLO (as it then was) declares the English and Chinese languages as Hong Kong's official languages "for the purposes of communication between the Government or any public officer and members of the public",[1] possessing "equal status" as well as enjoying "equality of use" for such purposes. Prior to this, the Chinese language had no legal status, despite being the mother tongue of the vast majority of the population. Yet despite the OLO, there was no bilingual legislation as such in Hong Kong before 1989 (Cheung 1997: 318). English remained the only working language as far as the enactment of legislation was concerned. The Chinese language, although increasingly featured in government publications, had practically no role in law making at the time; in other words: "the legislative guarantee of equal status did not prevent the Chinese language's subordination to the English language" (Zhao 1997: 296).

The theme of dual languages was to emerge again in 1984 in the historic Sino-British Joint Declaration on the Question of Hong Kong, which determined the resumption of Chinese sovereignty over Hong Kong on 1 July 1997. Section I of Annex I of the Joint Declaration provides that "in addition to Chinese, English may also be used in organs of government and in the courts in the Hong Kong Special Administrative Region". This provision was subsequently enshrined, with a slight alteration in wording, in Article 9 of the Basic Law of the Hong Kong Special Administrative Region (BL).

> **Article 9 BL**
> *In 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. (Emphasis added)

Prima facie, Article 9 affords Chinese and English equal official status in line with s.3 of the OLO. There is, however, a curious point about the structure "In addition to … may". The wording bears the subtle suggestion that the

[1] The current formulation of the provision is a 1995 amended version that added "for court proceedings" as one of the purposes of the government's bilingual policy.

Chinese language was always already an official language used by the three major government institutions, to be supplemented by English, which *may also* (cf. "should also" or "must also") be used for similar purposes.

The reality is that Chinese acquired legal status as an official language as late as 1974 – more than a century after the British had occupied Hong Kong; and for several years thereafter (and certainly in 1984 when the Joint Declaration was signed) English continued to function as the dominant language for government and administration (Chuen 2001: 245). Since English was, by virtue of the British colonial administration, the preexisting language used in government and judicial bodies, and Chinese was the subsequent hence technically "additional" official language instituted in 1974 pursuant to the OLO, should the logical structure not instead be: "in addition to the English language, Chinese…"?

In Article 9, the tentative modality in "may also" further mitigates the position of English in administrative and legal matters, with a latent insinuation that English is optional. This would have been fallacious at least as regards the judiciary, where even today English remains the dominant language in the superior courts (Kwan 2011). The linguistic formulation of BL Article 9 therefore constructs Chinese as a prevailing (at least as of the 1980s) language of law and administration in Hong Kong, with English coming to be recognized as an official language as though it were initially secondary. The Article discursively establishes the power relation between English and Chinese in such a way that is not in alignment with the reality at the time the BL was drafted, but in a way that conforms to the language ideological imperatives of the prospective handover of Hong Kong's sovereignty from Britain to China.

To continue with the story: bilingual legislation was institutionalized in 1987 following amendments to the OLO and the Interpretation and General Clauses Ordinance (IGCO). The Law Drafting Division (LDD) under the Legal Department then began translating into Chinese all legislation originally enacted in English. In 1988, the Bilingual Laws Advisory Committee (BLAC) was established as a kind of translation quality assessment body to "authenticate" the Chinese translations. From 1989, all new legislation were simultaneously enacted and published in English and Chinese;[2] and by May 1997, all ordinances and subsidiary legislation previously available only in English had authenticated Chinese versions (Law Drafting Division 1998; Cheung 1997: 318-319n16).

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[2] S.4(1) IGCO (Cap. 1) states that "All Ordinances shall be enacted and published in both official languages". The first piece of bilingual legislation was the Securities and Futures Commission Ordinance (Cap. 24), enacted in April 1989.

In the rest of this paper, I examine three relevant Hong Kong legal sources from the perspective of translation, namely: (a) s.10B IGCO, specifically its notions of authenticity, equivalence, and reconciliation; (b) LDD guidelines on the interpretation of bilingual legislation, in particular the proposed euphemisms around translation; and (c) case law revolving around alleged differences between English and Chinese versions of the same law. I will demonstrate, by way of the concepts Translatophobia and Translatophilia, that translation exemplifies a Catch-22 situation in Hong Kong's bilingual jurisdiction.

## Translation Disavowed

### *S.10B IGCO*

In Hong Kong, the defining provisions that govern the relation between English and Chinese in respect of legal interpretation are contained in s.10B IGCO. The latter constitutes the basis on which local courts resolve alleged differences between two language versions of a piece of legislation.

**10B. Construction of Ordinances in both official languages**

(1) The English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly.

(2) The provisions of an Ordinance are presumed to have the same meaning in each authentic text.

(3) Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted.

S.10B(1) encapsulates the equal authenticity rule, a common legal instrument in multilingual jurisdictions that bestows equal legal status to official state languages (Sullivan 2014: 115-116). The purpose of this rule is to ensure that no official language is prejudiced against under the law. Authenticity is not an immanent quality of a text, but one brought into existence by way of a meta-legislation, i.e. legislation on legislation, in this case the IGCO. Therefore, to declare a piece of (translated) legislation authentic is to perform a speech act; and it is in this sense that authenticity may be considered a legal fiction (Fuller 1967).

A corollary of the equal authenticity rule is the presumption of equivalence across the language divide, as enunciated in s.10B(2). Where the translated version of a piece of law has been authenticated, the presumption is that it is equivalent in meaning to the original version and carries the same legal force. This is notwithstanding possible discrepancies that may have been inadvertently introduced in the process of translation. In the event that such discrepancies are recalcitrant, for instance due to the inherent ambiguity of language itself, s.10B(3) dictates that they are to be "reconciled", that is, interpreted in such a way that they dovetail into some common ground as undergirded by "the object and purpose of the Ordinance".

What is striking about the wording of s.10B is the conspicuous absence of "translation", even though translation is obviously part of the subject matter at hand, in light of the history of Hong Kong's legal bilingualism and legislative development (see previous section). This strategic silencing of translation, along with the tripartite operation institutionalized in s.10B – the declaration of authenticity, presumption of equivalence, and reconciliation in the event of a "real" difference in meaning – belies a conception of translation that I call Translatophobia.

Translatophobia is a discourse or complex that frames translation as inherently derivative, liable to infidelity, and potentially disruptive of the organicity of the Word of law, a necessary evil in the making of bilingual legislation. The avoidance of direct mention of translation in s.10B is thus symptomatic of an underlying anxiety over the potential frailties of translations, seen as fundamentally inferior copies of original texts. To declare and presume two language versions of a piece of legislation as authentic and equivalent is to maintain, with a leap of faith, that both *are* original, even if one is in fact a translation of the other. The irony of the matter is that while translation may be considered the *sine qua non* of legal bilingualism,[3] the perceived authenticity and equivalence of different language versions of the same law are contingent on the suppression of the fact of translation.

*LDD Guidelines*

My preceding argument finds support in a set of guidelines issued by the LDD, contained in a document with the self-explanatory title, "A Paper Discussing Cases Where the Two Language Texts of an Enactment are Alleged to be Different". Although this document is positioned as a "paper"

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[3] Even in the case of so-called parallel drafting of bilingual legislation, elements of translation are involved, not least as an invisible process in the cognition of the bilingual drafter.

and is therefore not legally binding, it is nonetheless written by the same government body responsible for the translation of English legislation into Chinese (before 1989) and the bilingual drafting of legislation (after 1989) in Hong Kong. The prescriptions detailed in the document can thus be taken to represent the official position on translation in relation to statutory interpretation.

The LDD paper can be seen as fleshing out the provisions of s.10B IGCO. It first prescribes the terms in which bilingual legislation should be referenced:

> It is inappropriate to use phrases or expressions that suggest that the English texts enjoy a higher status or the Chinese texts are mere translations. (LDD 1998 para 2.4)

Corresponding to the equal authenticity rule in s.10B(1), this prescription preempts the imputing of differential status to the two language versions of a statute. It betrays the insecurities associated with the translatophobic view of translation as subsidiary and secondary – the single adjective "mere" exposes all the underlying prejudices against and anxieties over translation. Hence, even though the Chinese versions of Hong Kong legislation from the pre-1989 era were technically translations from English, they are not to be labelled or described as such, leading to the paradoxical conclusion that a translation (in fact) is not a translation (in law).

Translatophobia thus effects in a systematic euphemism around translation. This is highlighted by LDD's recommendations on the specific formulations (not) to be used in respect of translation:

| **To be avoided** | **To be used** |
|---|---|
| the Chinese translation | the Chinese text/version |
| the expression is translated as .... | the Chinese equivalent expression is… |
| an error in the Chinese text; incorrect translation | a difference of meaning; divergence; discrepancy |

(LDD 1998 para 2.4)

These recommendations can be read as LDD's response to s.10B(2). It is suggested that we avoid speaking of a translation as a "translation", but instead as a "text" or "version" to confer upon it a façade of legitimacy. Now while "text" may be more or less neutral, "version" can be problematic. Whereas LDD employs "version" with an intention to evade the perceived aberrant qualities of translation, the same term as used in translation studies

connotes a loose or adaptive mode of translation; as defined in the *Dictionary of Translation Studies*, "version" is "[a] term commonly used to describe a TT [target text] which … departs too far from the original to be termed a translation" (Shuttleworth and Cowrie 2014 [1997]: 195).

In a similar vein, the suggested use of "equivalent expression" in place of "translation" smacks of circularity from the perspective of applied translation, where to translate is precisely to produce an equivalent in another language, however equivalence is scaled and defined. If for LDD the term "equivalent" is believed to connote closer proximity to the original text than "translation", that is purely a discursive illusion. The proposed formulation in this instance is no more than a word game meant to sidestep the term-concept "translation", based on the false, translatophobic premise that translation is by nature deviant – and therefore that any other substitute term can create differentiation and is more appropriate. Yet the word "discrepancy", and to a lesser extent "divergence", is in fact highly questionable, as it can bear negative connotations of variance from or inconsistency with some standard or norm (OED), hence potentially undermining LDD's claim that the Chinese texts possess an autonomous identity.

*Translatophobia to Translatophilia*

Overall the LDD recommendations seek to sustain the legal myths of authenticity and equivalence in s.10B(1) and (2) that are central to bilingual legal regimes. What these recommendations amount to is an express disavowal of translation in the making of bilingual laws. The explicit advice against the use of the terms "translation", "error", or "incorrect", and for the use of euphemistic alternatives, evinces an ostrich mentality in respect of translation – a refusal to come to terms with the historical fact that the majority of the Chinese versions of Hong Kong legislation are indeed translations, and also with the practical fact that translation is not by default free from errors or inaccuracies.

These recommendations may in fact underscore the translational nature of the authenticated Chinese texts, ironically invoking that which they attempt to repress (if I say to you: "Don't think about a blue elephant in the room", a blue elephant is exactly what will conjure up in your mind!). In the manner of self-deconstruction, the euphemisms inadvertently recall the phantom of the original English legislations, whose primacy is supposed to be circumnavigated through the use of euphemistic language.

The real danger of the terms LDD suggests in lieu of "translation" (and its corollary terms) lies in their construction of an apparently egalitarian ethos where different language versions of an enactment are determined to be equal

in footing a priori, hence glossing over the possibility of mistranslation, undertranslation, or overtranslation. Crucially, this can lead to a *fetishization of translation*, such that a translation is assumed at the outset to be equivalent to the original enactment despite prima facie evidence to the contrary. A situation then arises where Translatophobia paradoxically leads to Translatophilia – the extreme valorization of translations. We will see this coming into play in court cases in the next section.

Further still: according to the LDD paper, the reconciliation provision we saw in s.10B(3) cannot be activated frivolously; the requisite condition is the existence of "a 'real' (i.e., substantial as opposed to merely conjectural or fanciful) doubt or conflict as to the legal meaning of the two language texts of the law" (LDD 1998 para 3.6). Exactly how we should determine whether the alleged difference in meaning is real/substantial or conjectural/fanciful is however unclear; a degree of subjectivity is conceivably involved. And even where a "real" doubt has been established, the Court does not have immediate recourse to the reconciliation procedure: the usual linguistic canons of statutory interpretation must first be exhausted.[4] This carefully instituted procrastination of the imperative to reconcile bilingual texts indicates a strong reluctance to compromise the declared authenticity of and presumed equivalence between the different language versions of the law.

## Case Law

We now turn to a seminal case on legal bilingualism in Hong Kong in two courts: *R v Tam Yuk Ha* (High Court) and *HKSAR v Tam Yuk Ha* (Court of Appeal). Tam Yuk Ha, the licensee of a provision store selling fresh meat and fish, was convicted of placing metal trays, a chopping block, and a table on a pavement outside the designated area of her shop without written permission from the Urban Council. She was found by the magistrate court to be in breach of by-law 35 of the Food Business (Urban Council) By-laws (Cap. 132):

> **35. Restriction on alteration of premises or fittings after grant of licence**
> After the grant or renewal of any licence, no licensee shall, save with the permission in writing of the Council, cause or permit to be made in respect of the premises to which the licence relates:

[4] For a comprehensive and authoritative account of the linguistic canons of statutory interpretation, see Bennion (2008: 1155-1270).

(a) <u>any alteration or addition</u> which would result in a material deviation from the plan thereof approved under by-law 33; …

**35. 限制在批出牌照後對處所或裝置作更改**

在任何牌照批出或續期後，除非獲得市政局書面准許，否則持牌人不得安排或准許對牌照所關乎的處所 —

(a) 進行任何<u>更改或增建工程</u>，而該更改或增建會令該處所與根據第 33 條獲批准的圖則有重大偏差；

One of the key issues the case turned on was whether the phrase "any alteration or addition" in the English version of the regulation was in conflict with the equivalent phrase *genggai huo zengjian gongcheng* 更改或增建工程, in the Chinese version. As the presiding judge Yeung J correctly argued, construed in its ordinary and literal sense, *zengjian gongcheng*

> plainly means 'building additional construction or building works'. No one who understands the Chinese language would, by any stretch of the imagination, come to the conclusion that the placing of metal trays and other items in front of the shop would be a '增建工程' (Zeng Jian Gong Cheng).[5] (*R v Tam Yuk Ha*, p.611)

Here Yeung J did not refrain from exercising his intuition as a native speaker of Chinese in his interpretation of the phrase at issue (Leung 2019: 191). He treated with seriousness prima facie evidence indicating that the Chinese text gives rise to a different meaning than that of the English text – specifically, that the Chinese *zengjian gongcheng* implies structural undertakings, as opposed to the broader English term "addition".

Invoking s.10B(1) IGCO, Yeung J first established that the Court had recourse to the Chinese version of the Ordinance alongside the English version. On the basis that a difference was disclosed upon comparing the two versions (and therefore that the presumption of equivalence in s.10B(2) is rebuttable), he proceeded with the reconciliation procedure provided in s.10B(3), to "consider both texts to see if the two texts can be reconciled and if so, what is the interpretation which best reconciles the differences in the

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[5] Grammatically the phrase *genggai huo zengjian gongcheng* should be analyzed as *genggai gongcheng huo zengjian gongcheng* ("alteration work or addition work"); the issue of whether the "work" in question needs to be structural in nature pertains to both alteration and addition. Yeung J somehow focuses only on the second phrase *zengjian gongcheng*; cf. Liu JA's approach in the appellate court below.

two texts, having regard to the object and purposes of the Ordinance." (*R v. Tam Yuk Ha*, p.612). Yeung J then concluded that

> In my view, the English language term of 'addition to the plan' is ambiguous and the Chinese language term of '增建工程' (Zeng Jian Gong Cheng) is clear and plain. The court must reconcile the difference of meaning of the two authentic texts in such a way as to give effect to the authentic text which carries a clear and plain meaning over the one which is ambiguous. (*R v. Tam Yuk Ha*, p.613)

The learned judge added that if he was wrong in deciding that the English text was ambiguous, the logical conclusion would be that the two language versions of the law were irreconcilable (ibid.). And if the latter was the case, then "the only reasonable step for the court to take is to give effect to the text which favours the appellant" (ibid.), an approach that has been adopted in other bilingual jurisdictions (Fung 1997: 221, 223).

What is noteworthy about Yeung J's line of argument is his readiness in acknowledging the disparity between the English and Chinese texts of the same law, should such disparity be discernible on the face of the language (cf. Court of Appeal's reasoning below). In his interpretation of the Chinese phrase *zengjian gongcheng*, Yeung J was in fact using its plain, ordinary sense, in line with the spirit of statutory interpretation, where "the meaning given by these definitions [in Cap. 3 IGCO] are in general within the ordinary meaning or usage of the words and expressions to which they apply" (Moran et al. 2010: 10).

Given that the Chinese version of the Food Business (Urban Council) By-laws came about after the English version, as part of the general legal translation and authentication exercise undertaken by the LDD in the lead-up to 1997, Yeung J was virtually recognizing a discrepancy between the original English text of an enactment and its Chinese translation, even though he carefully evaded the term "translation" in his judgment and stopped short of declaring the Chinese version "wrong" as such. In the terms developed in this paper, Yeung J did not subscribe to a translatophilic stance, that is, the illusory discourse that the Chinese (translated) text of an enactment, simply by virtue of its authenticated status, must be equivalent in meaning to the English (original) text, in spite of evidence to the contrary.

Not everyone was in favour of Yeung J's decision. Some commentators argued that the Court should have allowed the English version of the law to prevail, since the Chinese version being a translation was liable to error (Fung 1997: 208). Although such an argument would turn the outcome of the case around, it is consonant with Yeung J's approach on one point; that is, the

recognition that the Chinese version of the law at issue is a translation and, further, that in this instance the translation has clearly departed from the original. This position does not sit well with s.10B and the LDD guidelines, which adopt a translatophobic position that seeks to suppress the discursive existence of translation.

*Tensions between authenticity and accuracy:* Chan Fung Lan v Lai Wai Chuen *compared*

If the recognition of non-equivalence in translation on the part of Yeung J in *R v Tam Yuk Ha* was implicit, that recognition was to come to the fore in the subsequent case *Chan Fung Lan v Lai Wai Chuen*. The latter case, in which *R v Tam Yuk Ha* was cited as an authority, pivoted around a proviso in s.18(1) of the Estate Duty Ordinance (Cap. 111):

> **18. Charge of estate duty on property**
>
> (l) Subject to subsection (2) —
>
> (a) a rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which estate duty is leviable;
>
> Provided that the property shall not be chargeable as against a bona fide purchaser thereof for valuable consideration <u>without notice</u>.
>
> **18. 就遺產稅對財產施加押記**
>
> (1) 除第(2)款另有規定外-
>
> (a) 凡以任何未就遺囑執行人的身分而轉移給他的財產價值,在一份遺產的遺產 稅中,按比例計算出來的部分,須屬施加於該須徵收遺產稅的財產的第一押記;
>
> 但如財產經真誠購買人以有值代價及<u>在不知該財產有押記的情況下</u>購入,則不得對該財產施加押記。

At issue here is the phrase "without notice", rendered as *zai bu zhidao caichan you yaji de qingkuang xia* 在不知該財產有押記的情況下, literally "in the event that it is not known that the property bears a charge". In respect of this Cheung J expressly pointed out the infelicity of the Chinese text:

> As the notice is notice of the facts that a charge may arise on a future death of the donor within the three year period, the inclusion of the words "押記" or "charge" in the authenticated text is incorrect. Firstly, the word "charge" simply does not appear in the English text. Secondly, the reference to notice is not notice of a subsisting charge but notice of facts giving rise to a charge. (*Chan Fung Lan v Lai Wai Chuen*, p.8)

By saying the inclusion of the word *yaji* in the Chinese text was "incorrect" as there was no corresponding word in the English text, Cheung J was effectively pointing out an error in translation. Crucially, the Chinese text was referenced by Cheung J as "a translation of the original legislation":

> One must bear in mind that the authenticated Chinese text started life simply as a translation of the original legislation and if there are errors in the translation, which are bound to arise in such a mammoth undertaking, such errors should not be given effect simply because under s.10B of the Interpretation Ordinance the two texts are said to be equally authentic. (*Chan Fung Lan v Lai Wai Chuen*, pp.8-9)

Legislative history shows that Cheung J was right: the Estate Duty Ordinance (Cap. 111) was promulgated in 1932, which means that the Chinese version of said Ordinance is, as a matter of historical fact, a translation. Yet, as we have seen, pursuant to s.10B IGCO, authenticated Chinese versions of English enactments are equally authoritative and are presumed to be equivalent in meaning to the original versions.

This is the point where the present case distinguishes itself. In a statement that, in retrospect, pushed directly against LDD's position.[6] Cheung J maintained that a translation may "contain inaccuracies", in which case the Court should exercise its discretion to refuse to give effect to it:

> When the Court comes to the view that the authenticated Chinese text contains inaccuracies then it should not give effect to that text but should instead rely on the original legislation. (*Chan Fung Lan v Lai Wan Chuen*, p.8)

[6] The LDD paper came about shortly after *R v Tam Yuk Ha* and *Chan Fung Lan v Lai Wai Chuen* (and cited both cases); indeed the paper can be seen as a response to the position of those two cases on the question of translation, and a clarification of the official position on the issue, especially in light of the decision in *HKSAR v Tam Yuk Ha* (discussed below).

From the perspective of legal translation, this is a ground-breaking argument, for it was and still is one of those rare occasions where translation is recognized by the judiciary on its own terms. There is no euphemistic circumlocution around the notion of translation; nor is there any idealistic illusion that a translation is perfect by virtue of its being authenticated.

In declaring, in my opinion quite sensibly, that: (a) a translation may be infelicitous; and (b) a clearly infelicitous translation should not be adhered to, Cheung J drew (on p.8) on the authority of the then s.4B(2) OLO, which reads as follows:

> Where … the Governor in Council has declared a text to be an authentic text of an Ordinance and it appears to him that there is any manifest error, omission or inaccuracy in that text, he may, by order in the Gazette, correct that error, omission or inaccuracy; and any such correction shall be deemed to have been incorporated in the text at the time when it was declared to be the authentic text.

The latter provision provided an important qualification to s.10B IGCO, counterbalancing the discursive authority accorded the authentication procedure and equivalence presumption. S.4B(2) OLO was subsequently repealed in 2011 (i.e. it is no longer the law), which means courts now have no convenient legal recourse to proclaim, as Cheung J did, that an authenticated Chinese version of the law is flawed.

*HKSAR v Tam Yuk Ha*

Returning to the Tam Yuk Ha case: can *genggai huo zengjian gongcheng* be interpreted as equivalent to "alteration or addition (in respect of the premises)"? From the vantage of translation: arguably not. As contended by Yeung J in *R v Tam Yuk Ha*, the word *gongcheng* indeed suggests a sense of structural work that is manifestly absent in "addition". Yet in the face of s.10B IGCO, even this apparently straightforward instance of lexical interpretation can be complicated by the Court's imperative to refrain from flouting the letter of the law.

The Tam Yuk Ha case was subsequently referred to the Court of Appeal. It was found that the appellant was unable to invoke the authenticated Chinese version of by-law 35 of the Food Business (Urban Council) By-laws because that version had not come into existence at the time she committed the offence (*HKSAR v Tam Yuk Ha*, p.536). This is the principle of non-retrospective application of law which, unfortunately for Tam Yuk Ha, meant that she could not exploit the apparent discrepancy between the English and Chinese versions of the law. It turned out that Yeung J had made a mistake

on this crucial legal point, even though this did not mean his linguistic argument was wrong.

Of interest to us is how, in spite of the above, the Court proceeded to discuss whether the English and Chinese versions of the by-law in question were in fact incompatible in meaning. Note that the judgment did not hinge on the bilingual issue anymore, since the Chinese version of by-law 35 could not be considered at all. Still the Court found it pertinent to address the language issue in detail, as that issue was said to be one of the reasons why the case was referred to the appellate court (*HKSAR v Tam Yuk Ha*, p.538). It is to the leading judgment by Liu JA that we now turn, with an eye on the linguistic arguments put forth.

To start with, the Court's premise was based on s.10B(2), i.e. the a priori assumption of equivalence that downplays, even precludes, from the outset the possibility that a translation could be found to be different from its original:

> [T]he draftsman of the Chinese language text must have striven to reproduce with accuracy a meaning compatible, if not identical with that of the English language text, bearing in mind that the Chinese language text was brought in later after the original by-law 35. (*HKSAR v Tam Yuk Ha*, p.535)

What is espoused here is a Translatophilic stance: the Chinese translation — the word "translation" is of course rigorously avoided — is expected to be "identical" (a very high if not impossible threshold) with the English version *before* it is even subject to critical analysis. This constituted a stilted lens through which the Chinese translation was seen in an unjustifiably positive light, which produced the inevitable conclusion that there was no "real" difference between the two language versions.

Liu JA's object was clear: to prove that the alleged difference between the English and Chinese versions of by-law 35 was merely conjectural, and therefore that "it could hardly be claimed that the clear intention of the legislature evinced in the English language text has been obfuscated" (p.535). In his linguistic excursion, Liu JA first resorted to the dictionary meaning of the Chinese word *gongcheng* to test the claim that *gongcheng* connotes work of a structural nature. Citing the *Dictionary of Terms* published by the Commercial Press in 1987, Liu JA established that *gongcheng* refers to "all kinds of work, job, making/production and related programmes" 泛指一切工作，工事以及有關程式 (Liu JA's English translation; *HKSAR v Tam Yuk Ha*, p.536).

The judge then zoomed into two words featured in the preceding definition, namely *gongzuo* 工作 and *gongshi* 工事. Based on the aforementioned dictionary, *gongzuo* was understood to mean “building construction matters” 土木營造之事, “various kinds of menial works, undertakings” 百工操作, and “ingenious, crafty works” 巧妙的制作; and *gongshi* was found to denote “[a]ll matters universally referrable to making/production” 營造製作之事總稱, with a more pointed reference to “natural-silk embroidery/weaving” 專指蠶桑織女中繡之類的工藝. (pp.536-537).

Using the logic of semantic accretion, i.e. *gongcheng* 工程 = *gongzuo* 工作+ *gongshi* 工事, Liu JA came to the conclusion that *genggai gongcheng* 更改工程 means “alteration job” and *zengjian gongcheng* 增建工程 means additionally erected work, both including but not limited to a structural kind: “any form of alteration/addition would suffice” (*HKSAR v Tam Yuk Ha*, p.537). The outcome of Liu JA’s parallel text analysis was that there was no substantive difference of meaning between the English and Chinese versions of By-law 35 of the Food Business (Urban Council) By-laws.

Yet there is a certain arbitrariness to Liu JA’s analysis, based as it was on a dictionary definition that happened to work in favour of his argument. This becomes clear if we invoke the definition of *gongcheng* offered by an alternative dictionary: the *Applied Chinese Language Dictionary* 应用汉语词典, also published by Commercial Press. The latter defined *gongcheng* as:

1. （名词）需要用大而复杂的设备来进行的土木建筑或其他工作 (noun) Civil engineering constructions or other work that require large-scale and sophisticated facilities for their operation
2. （名词）泛指由多方合作、需投入大量财力、人力、物力的工作 (noun) Refers generally to work that requires the collaboration of various parties as well as the consumption of enormous financial, manpower, and material resources

   (Commercial Press Lexicographical Research Center 2000; English translation mine)

Following this alternative dictionary definition, the word *gongcheng* clearly cannot point to work as trivial as the placement of metal trays, chopping blocks, and tables. The latter dictionary could not be used at the time of the Tam Yuk Ha case, as it was published only some years later (in 2000). My point is that Liu JA’s lexicographical argument, based on some random,

"catch all" definition, was governed by his will to defend the integrity of s.10B(1) (authentication) and s.10B(2) (equivalence), such that s.10B(3) (reconciliation) need not be activated at all.

This privileging of the letter of the law before common linguistic sense can ensue in a translatophilic approach to bilingual legislation, where obvious discrepancies between two language versions of an enactment are explained away, in this instance by way of a favourable definition. Such an approach – essentially, putting the cart before the horse – is evident in Liu JA's pronouncement on why the alleged difference between the English and Chinese versions of by-law 35 was immaterial. In the following I demonstrate the discursive moves in Liu JA's reasoning (quotations from *HKSAR v Tam Yuk Ha*, p.537):

- **Establishment of s.10B as the point of departure**: "Section 10B of the Interpretation and General Clauses Ordinance presumes these texts [the English and Chinese versions of by-law 35] to have the same meaning".
- **Postulation of the legal fiction of textual equivalence and suspension of disbelief about the potential fallibilities of translation (Leung 2019: 190-191). This is a manifestation of translatophilia, where the possibility that a translation may be non-equivalent (to the original) is rejected in advance:** "It is undeniable that in every case a uniform statement of the law must have been attempted for both of the authenticated texts. If the texts are not simultaneously prepared, the language of the text in current use, if still embraced, would most probably impress upon the endeavours of the draftsman to capture the legislative intent in his preparation of the text following. His efforts will be undoubtedly geared to achieving a coherence in language".
- **False attribution of universal validity to the definition given in a chosen dictionary, without justification as to why that particular dictionary is used**: "Once a universally acceptable definition is available for affirming the intended language assimilation in the two texts, cogent reasons must be lacking for rebutting the statutory presumption that they are compatible".
- **Positing of "fundamental flaws" as the threshold for rebutting presumed equivalence between two language versions of the same law to forestall the identification of translation discrepancies, ignoring the fact that the tension between said definition and ordinary meaning already constitutes a "fundamental flaw" (and a "cogent reason" for rebuttal)**:

"Therefore, unless the pertinent definitions of the Commercial Press, albeit published in 1987, can be demonstrated to have fundamental flaws, it would be quite unnecessary to proceed to consider a whole spectrum of meanings of these two characters. With these definitions in the *Dictionary of Terms* published by the Commercial Press being consonant to consistency between the two texts, there would seem to be no warrant for displacing the statutory presumption of by-law 35(a) as having the same meaning in each authentic text".[7]

- **Statement of conclusion which in the first place premises the argument, ensuing in a kind of circularity, i.e. English and Chinese texts are (presumed to be) the same → there must be "cogent reasons" or "fundamental flaws" for rebuttal of equivalence presumption → there is no material difference between the English and Chinese texts**: "In my view, there is no ambiguity to resolve in the English language text and on the above definitions there need not be any difference of meaning as between the English language text and the Chinese language text".

As seen above, Liu JA's justification of the ostensible equivalence of the Chinese version/translation of by-law 35 to its English version/original is based on a dogmatic faith in lexicography, resulting in what Hutton (2011) calls *objectification through definition*. Such objectification derives from "a fiction both of law, lexicography and mainstream academic linguistics" whereby every word is seen to be eminently reducible "to a definition (or set of definitions)" (Hutton 2011: 44). In consequence of such inflexible adherence to dictionary definitions, a contentious word or words may be defined "at many removes from the unfolding linguistic-behavioural social world" (ibid.). For Hutton, objectification through definition effectively turns a dictionary into a "quasi-statute":

[7] The same point was made by another judge in the court, Wong J: "In so far as the Chinese language text could be resorted to in aid of interpretation, one should first apply a meaning of the two characters '工程' consistent with the English language text. If the two texts could be explained in harmony, there would be no reason to override the statutory presumption that they carry the same meaning" (*HKSAR v Tam Yuk Ha*, p.538). Interestingly, the suggestion here that one should apply a meaning of the Chinese word *gongcheng* consistent with the English version is tantamount to using a highest common meaning to reconcile the two language texts – an approach explicitly rejected by the LDD; see LDD (1998, para 5.4.5 and 5.4.6).

> To attribute authority to dictionary definitions over the domain of linguistic facts is to treat the lexicographer as a kind of linguistic legislator. The legislator produces quasi-statutes in the form of definitions which are then used as general statements which 'prescribe meaning' and are to be applied to particular fact patterns. (Hutton 2011: 44-45; in-text citation omitted)

Hutton's point was made in respect of ordinary English words such as "man" and "woman". The situation is further complicated in cases of bilingual legislation where translation becomes an issue, and where bilingual dictionaries may be used, as in *HKSAR v Tam Yuk Ha*, to mediate across the boundary of two languages. The specific choice of dictionary matters, as we have seen; yet, in the final analysis it is the Court's discourse on bilingualism in general and translation in particular that finally governs its arguments and decisions. Such discourse will dictate not only the choice of dictionaries (if one is used), but also whether dictionary definitions should be allowed to override language intuition, as well as whether the threshold for rebutting the presumption in s.10B(2) (that authenticated translations are equivalent to their originals) should be so high as to be practically unattainable.

**Conclusion**

What would happen if another Tam Yuk Ha case were to be brought to the Court today? By-law 35 of the Food Business (Urban Council) By-laws (Cap. 132) has since become Regulation 34 of the Food Business Regulation (Cap. 132X). The phrase at issue in the Tam Yuk Ha case has, in its Chinese version, undergone a slight revision from 進行任何更改或增建工程， 而該更改或增建會令該處所與 … 的圖則有重大偏差 to 進行任何更改或增建工程，而該更改或增建工程會令該處所與 … 的圖則有重大偏差. Not only is the word *gongcheng* still present in this version, it appears twice instead of just once ("alteration or addition *gongcheng*, and the alteration or addition *gongcheng*"). It is as if the legislature wanted to underscore the contentious word despite – perhaps precisely because of – the fact that it gave rise to court cases. Now that the authenticated Chinese case can be fully activated in court under s.10B IGCO, the question is whether the Court will resolve the alleged tension between the English and Chinese versions (arguably exacerbated thanks to the repetition of *gongcheng*) in favour of Yeung J's approach in *R v Tam Yuk Ha* or Liu JA's approach in *HKSAR v Tam Yuk Ha*.

For better or worse, no other case along similar lines has occurred thereafter. Yet it remains pertinent for us to observe that the two contrasting approaches reveal the tension between language and law in Hong Kong. Here, as this paper has demonstrated, translation exemplifies a Catch-22 situation: while translation is key to the formulation of law in bilingual jurisdictions, legal bilingualism is often premised on an express denial of translation, so as to afford equal status to both language versions of the same law. This double bind between functional indispensability and formal invisibility is symptomatic of a translatophobic complex — a discourse perpetuating a positivist conception of translation, within which translation is seen as a secondary copy in potential infringement of the integrity of a sacrosanct original. Paradoxically, where a piece of law can be invoked in either or both of its language versions, Translatophobia, by way of suppressing the identity of translation, can lead to the inverse outcome of Translatophilia, the fetishization of the equal status of translation notwithstanding its potential infelicities.

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