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Assessing Parallel Texts in Legal Translation

#### ABSTRACT

Sarcevic in *New Approach to Legal Translation* (1997: 71) writes, in connection with parallel legal texts, "While lawyers cannot expect translators to produce parallel texts which are equal in meaning, they do expect them to produce parallel texts which are equal in legal effect. Thus the translator's main task is to produce a text that will lead to the same legal effects in practice". This paper explores the implications of such an approach to the assessment of the 'success' of a piece of legal translation and bilingual legal drafting to (a) general translation theory, and (b) legal translation assessment practice in the academic context.

The preceding quotation would suggest that a judge is in the position of the ultimate judge of the quality of the parallel legal texts. Moreover, he/she has at his/her disposal, a panoply of interpretation rules to help him/her reconcile discrepancies in parallel texts. However, is such an authority just a beautiful fiction? And can general interpretation rules be established that apply to non-legal texts? Whatever the answers, the judge's attempt to reconcile discrepancies already provides an interesting lesson to the translation teacher-assessor in the approach to translation assessment.

#### KEYWORDS

legal translation, translation assessment, translation pedagogy, bilingual legislation, parallel legal texts, translation effect, legal effect.

## 1. Introduction

"Tam Yuk-ha could have been guilty under the law in English but innocent according to the Chinese translation. Mr Justice Wally Yeung Chun-kuen said", as reported in the *South China Morning Post* on 31<sup>st</sup> October, 1996 (3). This is the kind of headline that could create chaos in the legal field as Hong Kong moves into bilingual legislation after 1997, after its return to China. The English and Chinese versions of the law have both been declared authentic and any alleged discrepancies between the two are potential minefields.

Sarcevic writes, in connection with parallel legal texts, "While lawyers cannot expect translators to produce parallel texts which are equal in meaning, they do expect them to produce parallel texts which are equal in legal effect. Thus the translator's main task is to produce a text that will lead to the same legal effects in practice" (1997: 71). In the end, it is up to the court to determine whether the same legal effect has been achieved and make the ruling. It is a reassuring idea that there is a judge who is in the position of the 'ultimate' judge of the quality of the parallel legal texts and whose assessment is a matter of public record, and that this judge has also

at his disposal a panoply of interpretation rules to help him/her to interpret, resolve and reconcile the alleged discrepancies in the parallel texts. However, is such an authority just a beautiful fiction? Can general interpretative procedures be established that can apply to both legal and non-legal texts?

This paper discusses a lesson that could be learnt from the interpretation of bilingual legislation and its judgment for translation assessment pedagogy. Though bilingual legislation is a relatively new phenomenon in Hong Kong, it does have an established tradition in other communities in the world and the experience has been sought for (Fung, 1997). Translation quality assessment, including legal translation quality assessment (Maier, 2000) is a developing field. As in many other disciplines when the issue of assessment arises, traditionally the focus has been on the errors the learners make. The teacher-assessor is the authoritarian figure who corrects. In some of the cases of bilingual legislation interpretation and reconciliation, the judge, also a traditional authoritarian figure, however, is seen as assuming initially the two language versions are both authentic and any alleged discrepancies between the two have to be carefully examined and proven to be the case. This alternative mindset can be instructive. Furthermore, the fact that the judge has to explain and justify openly his/her ruling in a judgment provides an example of the kind of assessment process that can be beneficial to both the teacher-assessor and the learners who need to become self-assessor of their work.

The paper is divided into six sections: (1) Introduction, (2) Theories of translation assessment, (3) Theories of legal translation, (4) Bilingual legislation and statutory interpretation, (5) Pedagogy of translation assessment, and (6) Conclusion.

## 2. Theories of Translation Assessment

Maier in her introduction to *Evaluation and Translation* (2000) writes perceptively about the various uses and discussions of the terms 'value', 'quality', 'evaluation' and 'assessment' in relation to translation. In this paper, the concern is more focused: how to judge a piece of translation, in particular, a piece of legal translation. This concern is no doubt also the concern of the client who commissions a translation, the translation teacher-assessor who marks a student's translation, or a bilingual judge who needs to interpret a translation which has been authenticated, or to reconcile bilingual legislation.

Any attempt to judge a translation presupposes the existence of some criteria, whether objective or subjective, and these criteria further presuppose a theory of translation. If a strict literal source-bound linguistic transcoding is required (Catford, 1965), the resulting translation will be judged with this criterion. When Reiss defines translation as "the version of a source text in a target language where the primary effort has been to reproduce ... a text corresponding to the original" (2000: 90), one looks at the translation to see whether the version has been able to capture the "equal value" (2000: 3) of the original. As Vermeer's Skopos theory (1996) re-directs the focus onto the target text and the target readers, reception theories are explored to help determine the responses of the target text's readers. Schaffner also points to a change of focus, "from translation as text reproduction to text production. The basic tenet is that we do not translate words or grammatical structures, but texts as communicative occurrences, i.e. we are always dealing with texts in situation and in culture, and these texts fulfil a specific function" (1998: 1).

Lauscher in her paper "Translation quality assessment" (2000) proposes two models of translation quality assessment: (1) equivalence-based approaches, and (2) functional approaches. The first centres on the concept of 'equivalence' (Shveitser, 1993, Halverson, 1997) as it is variously defined, from Nida & Taber's formal and dynamic equivalence (1969), Newmark's semantic and communicative translation (1981) to Koller's denotative, connotative, text-normative, pragmatic and formal equivalence (quoted in Munday, 2001: 48). The second, functional approaches, however "are based on the assumption that translating is not so much determined by the source text as by factors relating to the target culture (Lauscher, 2000: 156). When the function is successfully achieved, the translation can then be deemed felicitous.

Equivalence, with its close association with the concept of 'fidelity', has been a central concept in translation studies. Catford's linguistic theory to translation (1965) is one equivalence-based approach which could be stretched into a form of literalism that posits word-for-word translation. House expands on this and treats translating as a linguistic procedure that aims at "the replacement of a text in the source language by a semantically and pragmatically equivalent text in the target language" (1997: 31) - bringing in the pragmatic, and therefore functional, dimension. The function is reflected in the linguistic properties of the text, and she makes use of the twin concepts of genre and register in her analysis. Her evaluation procedure is described by Lauscher (2000: 153) as follows:

- (1) establishing a 'source text profile' along the operational-enabling parameters against which the target text is measured;
- (2) establishing the

function of the source text; (3) comparing source text profile with target text; and (4) providing a statement of quality that lists, in addition to errors, the matches and mismatches along the parameters of genre and register, and comments on the translation strategy.

House's scheme has also several presuppositions, for example, "works translated for special audience (e.g., classical works "translated for children") or special purposes (e.g., "interlinear translations" which are designed for a clarification of the structural differences between the two languages involved) are explicitly excluded" (2000: 46). Thus, Lauscher concludes (2000: 155):

Following that model, a good translation would be one that respects scientifically established cultural differences in verbalization strategies, but otherwise tries to reproduce the linguistic properties of the original as closely as possible (which rises the question of what 'close' means). In practice, many target texts would be considered inappropriate translations because they respect target culture and target language conventions.

Here then are where the functional approaches come in.

In the functional approaches, the target text is no longer slavishly tied to the source text. Rather, it is seen as a text in its own right, produced with the source text as a starting point but ultimately obeying the function specified by the translation commissioner (and, sometimes, the translator) with regards to the use of the target text in the target culture context (see Nord, 1997a). Lauscher refers to D'Hulst's view that "a translation is "an independent text functioning, by definition, in the target culture"", and "a target text is considered "good" if it fulfills the function it has been intended for" (2000: 157). The function intended for the target text can be the same as that for the source text, or it can be different. Lefevere (1992), for example, sees translation as rewriting, as the translation process is manipulated by power, ideology, poetics and patronage, resulting in a target text that functions in a target culture context quite differently than how the source text functions in its source culture context.

Lauscher's two models of translation quality assessment of course do not form a dichotomy. They represent two perspectives, each with its own special emphasis. Legal translation has a history of preference for respect for the letter of the law, and for strict literalism, if not, word-for-word (Sarcevic, 1997). However, it does not prevent Sarcevic from writing thus in connection with parallel legal texts, "While lawyers cannot expect translators to produce parallel texts which are equal in meaning, they do expect them to produce a text that will lead to the same legal effects in practice" (71). So, some form of pragmatic equivalence is required, and the

judge needs to interpret the parallel texts to determine whether the same legal effect is obtained.

### 3. Theories of Legal Translation

Sarcevic's book (1997) contains a fairly comprehensive survey of legal translation. Zhao's article (2000: 21-25) is more concise and divides the history of legal translation into three major periods: from a period of strict literal translation, to a shift to literal translation, and then to increased concessions to the target language, paralleling the move in general translation theories from an approach which is linguistics- and equivalence-based to a more function-based one. Garzone (1999) also makes the connection between legal translation and functional theories, suggesting a principle of 'legal equivalence' which is seen to be similar to the concept of 'functional equivalence' (1999: 397):

In this context, the translation of a legal text will seek to achieve identity of meaning between original and translation, i.e. identity of prepositional content as well as identity of legal effects, while at the same time pursuing the objective of reflecting the intents of the person or body that has produced the original. In specifically linguistic and translational terms this corresponds to identity of prepositional content, of illocutionary and perlocutionary force, and of intentionality or author intent.

Hong Kong, as it started its ambitious programme of translating all its English legislation into Chinese in advance of 1997, had to wrestle first with the problem of translating English Common Law into Chinese, a language which is as yet unfamiliar with the concepts of the Common Law. To bridge the conceptual gaps, Sin and Roebuck (1996: 247-250, and also Roebuck and Sin (1993)) argue for three measures:

- (1) fixing the Common Law as the semantic reference system;
- (2) adjusting the Chinese language in three forms:
  - (i) assigning a new meaning to an existing word or expression;
  - (ii) enlarging or narrowing or specifying the meaning of an existing word;
  - (iii) coining a new word for an English term with a technical meaning;
- (3) building a metalinguistic mechanism.

The Drafting Division of the Department of Justice, [Hong Kong Government] adopts a similar position: "In order to make Chinese the language of the common law, Chinese legal terms must reflect the common law meaning that exists behind their English equivalents", and adds "[w]hen selecting the Chinese term, we must consider the 'adequacy' and 'acceptability' of the term (1999: 39). It defines 'adequacy' to mean "whether a Chinese term can carry under the grammatical rules and semantic schemes of the Chinese language the meaning of its English equivalent, and

'acceptability' to mean "whether the Chinese translation complies with the grammatical and usage rules of the Chinese language and whether it is comprehensible" (39). In the final resort, "...the translation of statutory law often involves the seeking of a balance between 'acceptability' and 'adequacy', and in most cases the predominant consideration remains 'accuracy' (the Chinese version shall have the same legal effect and be interpreted in the same manner as the English is" (40).

Sin also elaborates on the need for a meta-translation mechanism (1999:205):

The building of such a semantic reference scheme was effected in the very same act of translating; the translation was at the same time a creation of a new variety of Chinese, namely, common law Chinese, which was given a new meaning by the translator with reference to the English text. Here understanding the thinking process underlying the translation is vital for understanding the translation, for it was in the thinking process that semantic connections between the two texts were established. However, the thinking process can nowhere be found in the Chinese text. It has to be reconstructed from the mountains of documents relating to the [translation] project – minutes of meetings, research files, discussion papers, correspondence, personal notes, tape recordings, and whatever.

The focus here is still primarily at the terminological level, but such extrinsic information could also clarify the intended legal effect of a statute and help statutory interpretation.

As Sarcevic points out, "...the basic unit of legal translation is the text, not the word" (1997: 5). Terminological equivalence has an important role to play, but 'legal equivalence' used to describe a relationship at the level of the text may have an even greater importance (Sarcevic, 1997: 48):

In such cases, one should note that it does not describe a quality of the translation but rather the relationship between the translation and the other parallel texts of that instrument. In accordance with the principle of equal authenticity, each of the authenticated texts of a single instrument has the force of law and can be used by courts for the purpose of interpretation. In order to be effective in the mechanism of the law, the principle of equal authenticity rests on the presumption that the authentic texts of the same instrument are equal not only in meaning but also in legal effect. Accordingly, legal equivalence is achieved if the parallel texts of a single instrument lead to the same legal effects. This is sometimes referred to as 'substantive equivalence' (Schroth 1986:57) or 'juridical concordance' (Rosenne 1983:784).

This legal equivalence could prove to be even more elusive than terminological equivalence. Zhao suggests "[I]t means that the translator must make sure that rights and duties or liabilities which arise from a specific term used, or the tenor of a sentence or text,

remain exactly the same when the term in question, or the sentence or text in question, is translated into the target language" (2000: 40). However, what is the tenor of a sentence or text and how can it be captured in a translation? Apparently, word-for-word translation may not necessarily help. Similarly, the reverse can also be true, that is, so long the legal effect is achieved, there can be divergences in expressions and meanings from the source text. This result-that-counts approach of course echoes one form of functionalism in general translation theory (for example, Nord's equifunctional translation, 1997b: 53), and brings in a factor of variability that can either stimulate creativity or cause chaos.

#### 4. Bilingual Legislation and Statutory Interpretation

During its years as a British colony, the language of the law in Hong Kong was of course English. It was only in 1974 with the passage of the Official Languages Ordinance (Cap. 5) English and Chinese were both established as the official languages of Hong Kong for the purposes of communication between the Government and the general public. Then, in 1984, with the signing of the Sino-British Joint Declaration on the Question of Hong Kong, it became obvious that serious attention must be given to the production of an authentic Chinese version of the Hong Kong's law. To anticipate the return of Hong Kong to China in 1997, Section I of Annex I to 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". Subsequently, a programme of translation to prepare Chinese texts for all statutes originally enacted in English only was established and completed its work in May 1997. Bilingual legal drafting was also implemented, with the first bilingual ordinance the Securities and Futures Commission Ordinance (Cap. 24) enacted in April 1989.

To clarify the status of the two texts of a bilingual ordinance, in 1987 a new Part IIA on the General Provisions as to Laws in Both Official Languages was inserted into the Interpretation and General Clauses Ordinance (Cap. 1). The principal provision in that Part is section 10B, which lays down the general rule on construction of bilingual statutes. Section 10B(1) provides that both language texts of an Ordinance shall be equally authentic, and either text is neither subordinate to, nor a mere translation of its counterpart. This applies also to Chinese translations of English statutes which have subsequently been declared authentic. Thus, in court, for example, the legal representatives can refer to both authentic texts, or to one of them.

Interpreting monolingual legislation is difficult already; interpreting bilingual legislation will no doubt be more problematic. The legal profession has at its disposal a panoply of rules for statutory interpretation and they should be applied where necessary. The object in such statutory interpretation will remain the determination and application of the legal meaning of the statute, i.e., the meaning that conveys the legislative intent. In Hong Kong, the Interpretation and General Clauses Ordinance is the ordinance that provides for the rules to interpretation of its legislation. A new Part IIA was added in 1987 to deal with bilingual legislation. This Part contains five sections. Section 10A provides that Part IIA applies to newly enacted bilingual ordinances and those Chinese translations declared authentic.

Section 10B(3) is the important section. It states “[W]here a comparison of the authentic texts of an Ordinance discloses a difference in 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.”

The Law Drafting Division of the Department of Justice in a document entitled “A Paper Discussing Cases Where the Two Language Texts of an Enactment are Alleged to be Different” (1998) clearly states the steps in the reconciliation of two divergent texts. The steps are too lengthy to be quoted in full here, and the following is a summary.

Step One has recourse to the rules of statutory interpretation ordinarily applicable. Before they are applied, two other provisions relevant to bilingual construction should be considered: (i) Chinese words and expressions in the English text should be construed according to Chinese language and custom, and vice versa; (ii) if an expression of the common law is used in the English text while an analogous expression is used in the corresponding Chinese text, the statute should be construed in accordance with the common law meaning of that expression. A statute is deemed to be remedial and shall receive such a fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the ordinance according to its true intent, meaning and spirit. In construing, the court can depart from a strict, literal construction in order to avoid unreasonableness or injustice especially in the light of a clear legislative purpose. Judges traditionally make use of three different rules of interpretation: (i) the mischief rule, (ii) the literal rule, and (iii) the golden rule. Recently there is a fusion of these rules, bringing about the interpretation of both the letter and the spirit of the law. This approach gives special prominence to the



overall purpose if that can be done without straining the words or violating the intention of the legislature.

Step Two looks at the method of reconciliation when rules of statutory interpretation ordinarily applicable cannot resolve the difference in meaning. One solution is to identify the highest common denominator of the meanings in the two texts, having regard to the legal meaning intended by the legislators. The legislative intent sometimes may have to be determined with the aid of any admissible extrinsic materials. The court, however, should not arbitrarily speculate as to what the intent of the legislature might have been and then to strain the language of the enactment in order to bring particular cases within such assumed intent.

According to this paper, the grammatical and literal meanings of the expressions in the texts are subordinate to the legislative intent. Within general translation theory, such an emphasis on intent would be in line with the ideas of such functionalist scholars like Vermeer and Nord.

The first test case on the interpretation of bilingual legislation is *The Queen v Tam Yuk-ha* of 1996. Tam Yuk-ha was a fish shop owner who had been fined after being found guilty of twice breaching Urban Council by-laws – that of permitting an addition to the approved plan of the shop without the permission of the Urban Council. She had placed heavy metal trays and other objects outside the shop. On appeal, the issue focused on whether the placing of such objects outside the shop constituted an addition within the meaning of by-law 35, which provides as follows:

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 –

- (a) any alternation or addition which would result in a material deviation from the plan thereof approved under by-law 33; ...

The controversy lies in the word 'addition', which in the equally authentic Chinese version reads 增建工程. Yeung J ("Judgment on the case between R and Tam Yuk-ha", 1996) who presides first looked at the English version and referred to previous case law on this issue, citing the case of *the Queen v Cheng Chun-ye*. He referred to Bewley J who interpreted the declared purpose of the legislation was to make provision for public health and thus thought that a more liberal interpretation should be adopted - the term 'addition to the plan' could be construed as addition in the form of creating more space and/or placing significant items of furniture of equipment beyond the confines of the approved plan. However, if

the English version was interpreted to mean it barred any alteration or addition which would result in a material deviation from the plan, then it was arguable this would include items found outside Tam Yuk-ha's shop. To help him decide, Yeung J also then reviewed the Chinese version 增建工程 and interpreted it to mean building additional construction or building works. Comparing these two language versions, he saw a conflict, for to him no one who understands the Chinese language would regard the placing of metal trays and other objects in front of the shop as 增建工程. So, since the English expression was ambiguous and the Chinese expression was plain, in court, the version which carried a clear and plain meaning would take priority over one which is ambiguous. He further added that in case he was wrong and the two versions could not be reconciled, the only step the court could take was to adopt the one most favourable to the appellant (i.e., the accused in this case).

Yeung J's ruling caused a debate in the legal circle. Fung (1997) summarized the aftermath (1997: 208)

Yeung J's approach to reconciliation of the two language texts aroused much discussion. Some argued that the Chinese text was a mere translation. There must have been an error of translation and so the English text should prevail over the Chinese text. The Legal Department however reiterated that the two language texts were equally authentic and argued that there was no error of translation. The relevant expression to be interpreted should be 'addition or alternation ... in respect of the premises.' 'Addition' and 'in respect of the premises,' read together, could only mean making big changes, such as construction work. The wrong section had therefore been used to combat illegal construction by store operators. It could well be that the Legal Department was arguing that the Chinese text was the text that best reconciled the texts, having regard to the object and purposes of the ordinance. In any event, by-law 35 was later amended to make clear that the placing of items in contravention of an approved plan was also prohibited under the by-law.

Tam's case was revisited in *The HKSAR v Tam Yuk-ha*, where the prosecution appealed against Yeung J's ruling. The case was heard on 29 July, 1997. Liu J ("Judgment on the case between the HKSAR and Tam Yuk-ha", 1997), one of the presiding judges, started by applying the ordinary statutory interpretation rules and referring to the related provisions of the ordinance and other contextual clues. He concluded there was no ambiguity in the English version. The legal intent of the by-law was to restrict the operation of the food business to the location, area and dimensions of the allocated space set out in the plan. Variation or expansion of spaces allocated may be achieved without doing construction works or works of structural nature, and accordingly, it would be an addition to place objects outside a shop premises so as to create more space for the handling or storage of food. Liu J then proceeded to construe the Chinese

expression 增建工程 by referring to the Dictionary of Terms published by the Commercial Press in 1987. He interpreted the expression to mean 'additionally erected work', which, like the word 'addition' in the English version, was capable of referring to non-building additional construction or building works. In this regard, according to him, Yeung J had attached too narrow a meaning to the Chinese 增建工程. So understood, the English version and the Chinese version did not necessarily disclose a difference of meaning.

In Yeung J's approach, he had first applied the mischief rule (Law Drafting Division of the Department of Justice, 1998: Note 22), which "refers to the legal position before the statute was passed and the mischief that the statute was intended to cure. The statute is then construed in such a way as to suppress the mischief and to advance the remedy". He determined that the mischief that the by-law meant to cure or the legislative intent was to regulate the addition of space and addition of substantial furniture, which was ambiguous. For the expression 'addition', he applied the Literal rule (Note 22), which "applies words of a statute in their natural and ordinary sense with nothing added and nothing taken away, even if an inexpedient, unjust or immoral outcome occurs...". He found it ambiguous. When he interpreted the Chinese version, he again applied the Literal rule, finding it neither a common law term nor a technical term. Thus he determined it could not achieve the same legal intent as the meaning of 增建工程 was narrow. So, ordinary statutory interpretation rules cannot reconcile the discrepancy. Unfortunately, Yeung J stopped there and did not go on to apply the second limb of Section 10B(3), which requires one to find the meaning which best reconciles the texts, having regard to the object and purposes of the ordinance.

Is the expression 'addition' really ambiguous, as Yeung J claimed? Bennion points out that "many words and phrases have both an ordinary and technical meaning. In deciding which is intended, it is necessary to consider the surrounding words. If these are technical, it is reasonable assumption that the term is intended to bear its technical meaning" (1992: 838). 'Addition' can have both an ordinary and technical meaning. When construed in its ordinary meaning, it could be regarded as ambiguous. However, in a context where other expressions like 'alteration' and 'plan' also appear, 'addition' probably should be taken as technical. According to the *Encyclopedia of Building and Construction Terms*, 'addition' is defined as "a term used in *Building Codes* to mean new construction which adds to the physical size or floor area of an existing building or structure as opposed to "Alteration"" (Sin:1996). So interpreted,

it was not ambiguous and there is no meaning difference between the English and the Chinese versions.

In terms of the legislative intent of the by-law, Government Law Draftsman Yen clarified, "the purpose of this Section is not to prevent people obstructing a public place. This Section is designed to prevent people from making big changes, such as construction works" ("Wrong Law' Used to Get Tough on Food Outlets", 1996).

So, in the case of *The Queen v Tam Yuk-ha*, the alleged discrepancy between the English and Chinese versions could be resolved by a study of the contextual meaning of the expression concerned and the legislative intent of the by-law.

In the case of *The HKSAR vs Tam Yuk-ha*, Liu J took a different approach by applying the Golden rule (Law Drafting Division of the Department of Justice, 1998: Note 22) to the interpretation of the Chinese expression 增建工程. This rule

so construes a statute as to avoid absurdity or anomalies by adopting a secondary (or less usual) meaning which is also linguistically possible in order to produce a reasonable result. Sometimes, a judge may read in words which he considers to be necessarily implied by words already in the statute. He may even, to a limited extent, alter or ignore statutory words for reconciling an unintelligible provision with the rest of the text (for example, judges have occasionally corrected an "and" in a statute when it meant "or").

Liu J interpreted the Chinese expression by varying its meaning to make it broader. Apparently, a linguistically possible secondary meaning was adopted to allow it to cover a greater range of meanings. So, by a different route, the same conclusion was drawn, that the two language versions did not contain any difference in meaning.

These two cases involving Tam Yuk-ha demonstrate some of the techniques in statutory interpretation. What other techniques are available for bilingual legislation? Articles 31 and 32 of the Vienna Convention on the Law of Treaties, as Fung surmises, contain "a condensed statement of the ordinary meaning rule, the contextual rule, and the purposive approach which are applicable to the resolution of ambiguities in statutes" and allow recourse to be made to supplementary extrinsic aids, including the preparatory work of the treaty and the circumstances of its conclusion (1997: 214). Similarly, the emphasis is on object and the purpose of the treaty as the final arbiter. In Canada, according to Fung (1997), the shared meaning rule seems popular, though if the common meaning leads to absurd or unacceptable results, it can still be rejected. The

court also has to make sure that the shared meaning is consistent with the purpose and the general scheme of the legislation. Beaupre also points out (1986: 200):

We have proved that the reconciliation of the English and French texts in our statutes may not be reduced to a search for mere linguistic equivalence between the one text and the other. Such an exercise only leads, in most cases, to the lowest common denominator and ignores an infinitely larger context. The interpretation of a bilingual Act in Canada consists rather in drawing from the two texts what we have called the "highest common meaning" that is compatible with the purpose of the Act and its overall context.

The constant refrain to the purpose and object of the legislation underlies their importance in statutory interpretation. However, it is not an easy task to identify the purpose and object. In literary interpretation, the concept of 'intentional fallacy' is already a well-established notion, first made popular by the school of 'New Criticism' in literary criticism (Tyson, 1999). To the 'New Critics', even if the author has left a record of his/her intention, all one has is a record of what the author wants to accomplish, not what he/she does accomplish. The term 'intentional fallacy' is thus used to refer to the mistaken belief that the author's intention is the same as the meaning of the text. The meaning of a text therefore comes from a close reading of the formal elements of the text, in other words, its language and patterning.

In legislation, the notion of authorship is even more complicated. Who is the author of a legislation? The person(s) who draft(s) it? The person(s), the committee, or the government department who initiates and sponsors the legislation? The legislative authority which ultimately passes it and makes it into a law? And even if one can identify the sole author, the notion of 'intentional fallacy' will be a constant reminder of the problem involved in interpretation. So, in the end, it is up to the judge, who, armed with a handful of principles of statutory interpretation, has to attend to the letter, i.e., the written words, of the legislation and to refer to or infer the purpose of the legislation, where possible, and make his ruling, well aware that sometimes his ruling may be appealed against and overturned. As seen in these two cases involving Tam Yuk-ha, the interpretative rules can be applied in different ways to come up with different results, since they are not prioritized. The legislative intent, the ultimate mediating factor, is not often clearly spelled out in the statute and inferring it from the words of the law is highly problematic.

## 5. Pedagogy of Translation Assessment

In the teaching and assessment of legal translation in the academic context in Hong Kong, the concern should no longer be on what House (1997: 45) calls

the overtly erroneous errors which resulted either from a mismatch of the denotative meanings of source and translation text elements or from a breach of the target language system. Cases where the denotative meaning of elements of ST were changed by the translator were further subdivided into omissions, additions, and substitutions consisting of either wrong selections or wrong combinations of elements. Cases of breaches of the target language system were subdivided into cases of ungrammaticality, ..., and cases of dubious acceptability.

Traditionally, the translation teacher has spent much time trying to identify such errors, probably because they lead easier to quantification. House (1997: 40-45) asks instead for greater effort on her so called 'covertly erroneous errors', which results from a dimensional and functional mismatch, along the five situational dimensions of medium, participation, social role relationship, social attitude and province. However, if reference is made to the preceding discussion on statutory interpretation, House's dimensions will still be inadequate to illuminate the legislative intent and ascertain the legal effect, as statements are only made about the functions of the text – mainly on the ideational and interpersonal components, following Halliday - but not much on how they are arrived at. Her primary focus is on the formal features. Interpretation of these linguistic and textual features should lead to the purpose and object of the legislation. The intentional fallacy does not preclude this, but it also invites greater subjectivity.

House's approach is also typical of assessment pedagogy in focusing on errors. This may be necessary when the translation learners are at the beginner's level. For more sophisticated learners, such a focus can be counter-productive as it encourages dependency – the teacher always has the ready correction for every error. Here, it may be instructive to draw a parallel with bilingual legislative interpretation. As mentioned, the judge starts with an assumption the two language versions are both authentic and have the same legal effect. Only when an alleged discrepancy arises does he/she try to resolve the issue, and it is this spirit of resolution and reconciliation that is most instructive. As mentioned in the previous paragraphs, there is a routine he/she can perform for this, with a panoply of established interpretation rules at his/her employ. Such rules: the mischief rule, the literal rule, the golden rule, the shared meaning rule, the contextual and purposive approach are not in themselves novel to translation study. The literal rule, golden rules and shared meaning rule are variations on literal translation and allow the flexibility to stretch the language of the target text. The mischief rule and the purposive approach help to focus attention on

the intended purpose or function of the source text. The identification of such a purpose of the source text can of course prove to be as problematic as the identification of the legislative intent, but such a debate is a key notion in contemporary intellectual enquiry since the New Critics' time. The lingering doubt is not going to go away, but it also does not deter the search. In fact, in the production of the judgment where the judge makes clear his/her thinking process in the resolution of the matter, there is a new perspective that can be borrowed for translation assessment.

In writing up the judgment, the judge describes his application of the statutory interpretation rules following a well-established set of procedures. With reference to the letter of the law – and the legal profession is famed for its scrupulous attention to the linguistic and textual properties of the law – the judge scrutinizes the statute and the case law without preconception that one version of the legislation is wrong. In the end when the reconciliation proves difficult, the judgment will record the thinking process in dealing with the problem. Many translation assessors, however, start with a preconception that errors are to be found in the learners' work and consciously or subconsciously there is a kind of model translation which provides the yardstick to measure the learners' performance. This model-answer approach is deep-rooted in pedagogy, so much so that the learners themselves demand a model answer. Like the non-legal ordinary people in the court, they look to the judge/assessor as the ultimate authority, but also like the ordinary people, they only want the result and are not interested in how the result is arrived at. This attitude is often encouraged by some translation assessors for practical reasons – errors are so quantifiable. However, the kind of dependency this fosters in fact can limit the potentialities of the learners and create a climate of failure. One way of countering this is to re-direct the learners' attention from a sole concern with the result to the process of arriving at the result. The learners are given the opportunity to explain and describe their own thinking process as they translate, and they will treat their translations with confidence and respect, not just potential errors awaiting the assessor's correction. This change in mentality, and the skills acquired in writing about their own thinking process can have beneficial effect on learners' positive motivation, development of critical intelligence, and skills in expression and communication.

## 6. Conclusion

The two cases involving Tam Yuk-ha illustrate that judges can, and do, interpret bilingual legislation in different ways, the panoply of interpretation rules and the well-established procedure

notwithstanding. Fung (1997: 226), in the later part of her paper, asks, "Should there be further interpretation rules?" and her reply is: "It is inadvisable and at least premature at this stage to lay down the interpretation rules exhaustively. We had an interpretation ordinance only many years after we had legislation. In the light of the Vienna Convention and Canadian experience, it seems that the better approach is to let the courts develop the rules of interpretation themselves" (227). It is also in the spirit of the case law. While discrepancies between the two language versions can be expected and further debates likely, an open mindset is seen as more important. Similarly, in translation assessment, giving the learners the experience of being allowed to describe, explain and justify the process of translation in a spirit free of the negative burden of error correction could be a more positive move. Kiraly, in explaining his social constructivist approach to translator education, proposes, "Through assessment, teachers construe how students are constructing knowledge, which can help the teachers re-direct their instructional efforts to facilitate those construction processes" (2000: 140). He further adds, "And by the time they graduate, learners must have internalized sufficient self-assessment skills to be able to undertake and complete professional tasks without an omnipotent teacher standing by to provide corrections" (140). This is the kind of empowerment that translation assessment practices should promote.

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