

## DOES THE WORLD NEED MORE CANADA? LEGAL MULTILINGUALISM AND STRATEGIC PLURALISM

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Article abstract

*Canada has a global reputation as a diverse and tolerant country, with linguistic duality being a proud marker of its pluralistic society and a defining feature of its nationhood. This paper evaluates the extent to which legal bilingualism as practiced in Canada provides a good and practicable model to the rest of the world, which has seen a rise in legal bilingual and multilingualism in recent decades. Through tracing convergent and divergent practices across jurisdictions, the paper probes whether the apparent embrace of linguistic diversity, in Canada and beyond, safeguards justice and liberty. By providing a realistic understanding of legal bilingual or multilingualism in the world today, this paper cautions against excessive optimism that is sometimes expressed towards the emancipatory potential of official linguistic pluralism.*

**DOES THE WORLD NEED MORE CANADA?  
LEGAL MULTILINGUALISM  
AND STRATEGIC PLURALISM\***

par Janny H. C. LEUNG\*\*

*Le Canada a la réputation d'être un pays tolérant, caractérisé par sa diversité, dont la dualité linguistique constitue un véritable trait national distinctif de sa société pluraliste. Cet article détermine dans quelle mesure le bilinguisme juridique, tel qu'il existe au Canada, offre une solution intéressante et transposable au reste du monde qui a vu s'accroître le bilinguisme et le multilinguisme au cours des dernières décennies. En étudiant les contours des diverses pratiques convergentes et divergentes des différents systèmes juridiques nationaux, cet article aborde la question de savoir si le fait d'avoir embrassé la diversité linguistique, au Canada et ailleurs, a permis d'y préserver les valeurs de justice et de liberté. En dressant un portrait réaliste du bilinguisme et du multilinguisme dans le monde d'aujourd'hui, le présent article sert de mise en garde contre l'optimisme débordant exprimé par certains face au potentiel émancipant d'un pluralisme linguistique officiel.*

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*Canada has a global reputation as a diverse and tolerant country, with linguistic duality being a proud marker of its pluralistic society and a defining feature of its nationhood. This paper evaluates the extent to which legal bilingualism as practiced in Canada provides a good and practicable model to the rest of the world, which has seen a rise in legal bilingual and multilingualism in recent decades. Through tracing convergent and divergent practices across jurisdictions, the paper probes whether the apparent embrace of linguistic diversity, in Canada and beyond, safeguards justice and liberty. By providing a realistic understanding of legal bilingual or multilingualism in the world today, this paper cautions against excessive optimism that is sometimes expressed towards the emancipatory potential of official linguistic pluralism.*

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\*. This paper is based on a plenary speech given at the 11<sup>th</sup> Summer Institute of Jurilinguistics and my upcoming monograph entitled *Shallow Equality and Symbolic Jurisprudence in Multilingual Legal Orders*, New York, Oxford University Press, 2019.

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Writing in 1962, former Prime Minister Pierre Elliot Trudeau expressed his vision of Canada's place in the world:

The die is cast in Canada: there are two main ethnic and linguistic groups; each is too strong and too deeply rooted in the past, too firmly bound to a mother-culture, to be able to engulf the other. But if the two will collaborate at the hub of a truly pluralistic state, Canada could become the envied seat of a form of federalism that belongs to tomorrow's world. Better than the American melting-pot, Canada would offer an example to all those new Asian and African states... who must discover how to govern their polyethnic populations with proper regard for justice and liberty.

As far as governance of linguistic diversity is concerned, Trudeau's vision appears to have become reality today. Just like legal bilingualism in Canada, many Asian and African states have also designated two or more languages as their national or official languages. But in what ways has Canada become a "truly pluralistic state" and how could the rest of the world learn from it? In states with extreme linguistic diversity, how could an official language policy be formulated such that it shows "proper regard for justice and liberty"?

Fast-forward to "tomorrow's world" in 2015. In a *New York Times* interview, Pierre Trudeau's son, current Prime Minister Justin Trudeau, has called Canada the world's first "post-national state"<sup>1</sup>, hinting that Canada has opened an era of post-nationalism. Justin Trudeau explains, "There is no core identity, no mainstream in Canada. There are shared values – openness, respect, compassion, willingness to work hard, to be there for each other, to search for equality and justice. Those qualities are what make us the first post-national state<sup>2</sup>". Although a lot of Canadians may

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1. Guy LAWSON, "Trudeau's Canada, Again", *The New York Times*, December 8, 2015, online: <<https://www.nytimes.com/2015/12/13/magazine/trudeaus-canada-again.html>>.
  2. Some Canadian scholars have argued that Canada is on a path to post-nationalism for different reasons. Heller, for example, documents how discourse about the nation has been destabilized by the globalized new

indeed identify with these values, the claim seems to contradict prima facie the position held by the Office of the Commissioner of Official Languages. In a 2014 report, the Office called post-national theories “illusory” and defeatist<sup>3</sup>, arguing that Canadians do have a national identity, with linguistic duality being a core component of this identity. According to their research, even recent migrants believe in the value of Canadian bilingualism.

In 2017, Canada celebrated its 150<sup>th</sup> birthday. Merchandise bearing the slogan “The World Needs More Canada”, a phrase invented by the Canadian Tourism Commission in 1995, was sold everywhere. With this exact phrase, former President of the United States Barack Obama brought his praise of the Canadian Armed Forces to a climax during a speech given in the Canadian Parliament in 2016 and won a round of applause from the audience.

A consistent theme in these three episodes is that Canada has found a path towards a utopian society and that the rest of the world should follow suit. Amidst the growing display of intolerance in the world today and backlash against multiculturalism in recent times, Canada does seem to manage plurality better than others, as exemplified by the welcome that it has shown to displaced people in the recent refugee crises. In fact, Pierre Trudeau says Canada should take pride in how Canada handles plurality, highlighting especially plurality arising from the “two main ethnic and linguistic groups<sup>4</sup>”.

This paper focuses on the issue of linguistic plurality, and evaluates the extent to which legal bilingualism as practiced in Canada provides a good and practicable model to the rest of the world, especially “all those new Asian and African states”. It probes

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economy. Monica HELLER, *Paths to Post-Nationalism: A Critical Ethnography of Language and Identity*, New York, Oxford University Press, 2011.

3. OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES, “What New Canadians Can Tell Us About the Canada of Tomorrow: Discussion Forums on the Perspectives of Canadians of Diverse Backgrounds on Linguistic Duality”, June 2014.
4. Later on he also promoted multiculturalism alongside official bilingualism.

whether an official bilingual or multilingual policy can be taken as evidence of a pluralistic society. To what extent does such apparent embrace of linguistic diversity, in Canada and beyond, safeguard justice and liberty? What exactly has learning from the Canadian model brought to the rest of the world? Can experiences from these other jurisdictions in turn inform Canada in some ways? Building on my prior comparative legal research on official language practices, this paper raises questions and pinpoints nuances that complicate the rosy picture that the above episodes present, and provides a realist approach to understanding legal bilingual or multilingualism in the world today.

The structure of the paper is as follows. The first section of this paper provides a broad overview of the contemporary phenomenon of legal bilingualism and multilingualism around the world today. The second section focuses on divergences, identifying some distinctive features of the Canadian model of legal bilingualism. Such divergences stem from the dependence of the legal development in official bilingualism on the individual and political goodwill, and the sociopolitical contexts that limit the transplantation of the Canadian model into other jurisdictions. After evaluating divergence, the third section turns to commonalities across jurisdictions in their bilingual and multilingual legal practices, and evaluates the limits of these common practices in furthering justice and liberty. The fourth and last section offers a realist interpretation of the observations made, cautioning against excessive optimism that is sometimes expressed towards the emancipatory potential of legal bilingualism and multilingualism.

### **Legal Multilingualism in Canada and Beyond**

Among all modern states, Canada is no doubt a pioneer in incorporating linguistic pluralism into governance<sup>5</sup>. In fact, linguis-

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5. Switzerland has also practiced official multilingualism from mid-19<sup>th</sup> Century, but the Swiss model is based on territorial monolingualism.

tic duality took root in Canada long before most bilingual and multilingual modern states came into being.

Most existing research into legal bilingualism or multilingualism focuses on the practical challenges of policy implementation (such as the drafting and translation of statutes<sup>6</sup>, and bilingual or multilingual legal interpretation<sup>7</sup>) in one or a few jurisdictions. Few paid attention to the extent to which this phenomenon has sprawled globally. In what I believe to be the first book-length study of official multilingualism at a global scale, I reveal that linguistic pluralism has become a prevalent practice in governance<sup>8</sup>. My research shows that almost 40% of sovereign states are officially bilingual or multilingual<sup>9</sup>, of which the great majority are postcolonial states that acquired sovereignty only after the second world war. Many of these states are located in Asia and Africa, which happen to be some of the most linguistically diverse regions on Earth. However, such states may also be found in Europe (especially in southern and eastern parts of Europe), the Pacific (including New Zealand and eight other island countries) and

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6. Lucja BIEL, "Translation of Multilingual EU Legislation as a Sub-Genre of Legal Translation", in *Court Interpreting and Legal Translation in Enlarged Europe 2006*, ed. D. KIERZKOWSKA, Warszawa, *Translegis*, 2007, 144; Karen MCAULIFFE, "Enlargement at the European Court of Justice: Law, Language and Translation", (2008) 14-6 *European Law Journal* 806, online: <<https://doi.org/10.1111/j.1468-0386.2008.00442.x>>; Andreas LÖTSCHER, "Multilingual Law Drafting in Switzerland", in Günther GREWENDORF and Monica RATHERT (eds.), *Formal Linguistics and the Law*, Berlin, Mouton De Gruyter, 2009, p. 371; Vanni BRUNO, "Ensuring the Quality of Drafting of Legislation in a Multilingual Context: Belgium, Luxembourg, Malta", *European Commission - Legal Service*, September 20, 2013, online: [http://ec.europa.eu/dgs/legal\\_service/seminars\\_en.htm](http://ec.europa.eu/dgs/legal_service/seminars_en.htm).
  7. Rémi M. BEAUPRÉ, *Construing Bilingual Legislation in Canada*, Toronto, Butterworths, 1981; Rémi M. BEAUPRÉ, *Interpreting Bilingual Legislation*, 2<sup>nd</sup> ed., Toronto, Carswell, 1986; Michel BASTARACHE et al., *The Law of Bilingual Interpretation*, Markham, LexisNexis Canada, 2008.
  8. J. H. C. LEUNG, *Shallow Equality and Symbolic Jurisprudence in Multilingual Legal Orders*, New York, Oxford University Press, 2019.
  9. My figure is based on *de jure* multilingualism. If taking into account *de facto* multilingualism, the figure will be much higher, for linguistic accommodation in the legal system has almost become a necessity in the globalized world.

the Americas (Canada being a prime example). In addition to bilingual and multilingual sovereign states, there are also numerous sub-state, supranational and international jurisdictions that operate bilingually or multilingually<sup>10</sup>. Judging by the number of national or official languages all these jurisdictions have adopted, they appear to have indeed followed the Canadian pluralistic approach rather than the American hyphenation approach.

Notwithstanding voices of discontent expressed from time to time within Canada about its bilingual policy<sup>11</sup>, many jurisdictions from all over the world have looked up to Canada for good practices in legal multilingualism, as evident in court decisions<sup>12</sup>, government research papers<sup>13</sup>, and comparative academic studies<sup>14</sup>. When the

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10. There is of course a long history of legal encounters between civilizations/empires/nations taking place in two or more languages, but supranational polities (with the European Union being a prime example) operating in multiple languages is a modern phenomenon. See Alexander OSTROWER, *Language, Law, and Diplomacy: A Study of Linguistic Diversity in Official International Relations and International Law*, Philadelphia, University of Pennsylvania Press, 1965; Mala TABORY, *Multilingualism in International Law and Institutions*, Rockville, Sijthoff and Noordhoff, 1980.
  11. Such as Scott REID, *Lament for a Nation: The Life & Death Of Canada's Bilingual Dream*, Vancouver, Arsenal Pulp Press, 1993; Russell DOERN, *The Battle over Bilingualism: The Manitoba Language Question, 1983-85*, Winnipeg, Cambridge Publishers, 1985.
  12. See for example *S. v. Pienaar*, 2000 (2) SACR 143 (NC), in South Africa; and *MacCárthaigh v. Éire*, [1980-1998] T.É. (Tuairiscí Speisialta) 57, [1980-1998] IR (Special Reports) 127, and *Ó Griofáin v. Éire*, [2009] IEHC 188, (23 April 2009) HC, in Ireland.
  13. OFFICE FOR CRIMINAL JUSTICE REFORM, "The Use of Bilingual (English and Welsh-Speaking) Juries in Certain Criminal Trials in Wales - A Consultation Paper", December 2005; Fernand DE VARENNES, "International and Comparative Perspectives in the Use of Official Languages: Models and Approaches for South Africa", *South African Language Council Afrikaanse Taalraad*, 2012; OFFICE OF THE COUNSEL GENERAL, "Bilingual Lawmaking and Justice: A Report on the Lessons for Wales from the Canadian Experience of Bilingualism", April 4, 2006.
  14. Dirk BRAND, "Constitutional Language Rights in Canada and South Africa", (1997) 4 *Journal of South African Law* 689; Dáithí MAC CÁRTHAIGH, "Interpretation and Construction of Bilingual Laws: A Canadian Lamp to Light the Way?", (2007) 2 *Judicial Studies Institute Journal* 211; Albert H. Y. CHEN, "1997: The Language of the Law in Hong Kong", (1985) 15 *Hong*



Department of Justice (known as Attorney General's Chambers before the handover of sovereignty to China) in Hong Kong was researching how to transition from a monolingual (English) to a bilingual (Chinese and English) jurisdiction<sup>15</sup>, and how to resolve discrepancies between two equally authoritative texts<sup>16</sup>, Canada was a major source of reference. Similarly, an Irish scholar has expressed hope that Canadian practices in bilingual legal interpretation may be a "lamp" that lights the way for Ireland<sup>17</sup>. Apart from bilingual drafting and interpretation, there is also cross-jurisdictional fertilization in the administrative structure of linguistic management. The Language Commissioner model, established in 1970 in Canada which assigns ombudsman, compliance and advisory functions to a government watchdog, has spread across bilingual and multilingual jurisdictions in Europe and North America. There is now a small but global network of language commissioners ([www.languagecommissioners.org](http://www.languagecommissioners.org)) who meet every year for experience sharing.

Despite clear attempts at mutual learning, there are distinctive features in the Canadian model of legal bilingualism that prevent them from being easily copied by other jurisdictions. We will examine these features in the next section, before moving on to consider the limits of existing practices across the board.

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*Kong Law Journal* 19; Deborah CAO, *Translating Law*, Bristol, Multilingual Matters, 2007; Deborah CAO, "Inter-Lingual Uncertainty in Bilingual and Multilingual Law", (2007) 39-1 *Journal of Pragmatics* 69, online: <<https://doi.org/10.1016/j.pragma.2006.08.005>>.

15. ATTORNEY GENERAL'S CHAMBERS HONG KONG, "Discussion Paper on the Laws in Chinese", Hong Kong, 1986.
16. DEPARTMENT OF JUSTICE OF HONG KONG – LAW DRAFTING DIVISION, "A Paper Discussing Cases Where the Two Language Texts of an Enactment Are Alleged to Be Different", May 1998.
17. D. MAC CARTHAIKH, *supra.*, note 14.

## **Divergences: A Leader without Followers?**

### *Judicial Activism*

Although the decision to become a bilingual and bijural state is inevitably political in nature, most of the legal consequences of official bilingualism in Canada have been derived from judicial interpretation.

Although linguistic duality has been a concern since the founding days of Canadian federation, status equality between English and French was a much later judicial innovation<sup>18</sup>. Section 133 of the 1867 Constitution provides that all Acts of the Parliament of Canada and of the Legislature of Quebec have to be published in both English and French and that both languages 'may' be used in the Parliament, legislature and court proceedings. It was, however, only in 1935 that the Supreme Court, in its decision of *The King v. Dubois*<sup>19</sup>, established that the two language texts of federal law are equally authentic. The principle was later placed on a statutory footing in Official Languages Act 1969, which stipulates the official and equal status of English and French in Canada and obliges federal institutions of Canada to offer services in both languages. The same Act also creates the Office of the Commissioner of Official Languages. The Act was further strengthened through amendments in 1988 and 2005, which made the rights enforceable. The official status of English and French is constitutionalized in the Canadian Charter of Rights and Freedoms, contained in Constitution Act 1982, which confers the right to use either language to communicate with the federal government of Canada and some provincial governments.

The significance of official bilingualism has continued to widen in Canada, not least thanks to the liberal approach the Canadian Supreme Court has taken in interpreting language rights.

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18. R. M. BEAUPRÉ, *supra*, note 7.

19. *The King v. Dubois*, [1935] S.C.R. 378.

Over time, the perception of language rights as a political compromise<sup>20</sup> (which is associated with a more restrictive approach to the interpretation of language rights as a negative liberty) has given way to a view of those rights as a positive right. The Court held, in a 1999 decision, that language rights are not only a matter of formal equality but also a means of preserving and developing official language communities and their culture (*R. v. Beaulac*<sup>21</sup>).

Judicial activism is not absent in other bilingual and multilingual jurisdictions, but in most of the jurisdictions I have surveyed, although judicial push may be instrumental in realizing language rights that have been implied or promised in the constitution, it seldom expands the scope of such rights. For example, the South African Constitution (Section 6, Act No. 108 of 1996) provides for equitable use of its 11 official languages, which consist of two languages of colonial heritage (English, and Afrikaans<sup>22</sup>, which is derived from Dutch) and nine indigenous languages (Ndebele, Northern Sotho, Sotho, Swazi, Tsonga, Tswana, Venda, Xhosa and Zulu). However, critics have long complained about the lack of effective implementation of those provisions. The High Court in Pretoria held in *Lourens v. President of South Africa and others*<sup>23</sup> that the government had failed to comply with its constitutional obligations to regulate and monitor the use of official languages (Section 6(4)). This and other relevant criticisms led to the passing of Use of Official Languages Act in 2012 to promote more equitable use of the official languages.

Among states that have granted official language status to two or more languages, very few have interpreted such status as a

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20. Denise G. RÉAUME, "The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?", (2001) 47-3 *McGill Law Journal* 593.

21. *R. v. Beaulac*, [1999] 1 S.C.R. 768.

22. The characterisation of Afrikaans has been controversial. See Hans DEN BESTEN, "Double Negation and the Genesis of Afrikaans", in Pieter MUYSKEN and Norval SMITH (eds.), *Substrata versus Universals in Creole Genesis*, Amsterdam/Philadelphia, John Benjamins Publishing, 1986, p. 185.

23. *Lourens v. President of South Africa and others*, [2010] ZAGPPHC 19; 2013 (1) SA 499 (GNP).

positive obligation on the state to ensure the survival of the languages concerned. Courts in bilingual and multilingual states in Asia and Africa are conservative in their interpretation of official language rights, at least in part due to the potential resource implications. To continue with the South African example, in *Mthethwa v. De Bruin NO*<sup>24</sup>, the defendant who understood English applied to have the trial conducted in the official language of his choice, i.e., Zulu. In rejecting his application, the high court held that Section 35(3)(k) of the Constitution does not give an accused the right to have a trial conducted in the language of his choice. I argued that it is impractical for proceedings to be conducted in any language other than English or Afrikaans, because most legal professionals cannot understand an indigenous language. This, in effect, renders the official status enjoyed by indigenous languages meaningless as far as court proceedings are concerned.

### *Legislative Innovation*

A number of measures taken by the Canadian federal legislature are particularly conducive to facilitating linguistic equality of the two official languages. I will briefly discuss two of them: bilingual re-enactment of laws and legislative co-drafting.

#### Bilingual Re-Enactment of Laws

Section 133 of the Constitution Act, 1867, requires that federal legislation be printed and published in both official languages. This stipulation on bilingual printing and publication has been interpreted by Canadian courts as encompassing a requirement of simultaneous bilingual enactment. That is to say that federal laws need to be enacted simultaneously in English and French.

After the Supreme Court of Canada decided, in *Attorney General of Quebec v. Blaikie et al*<sup>25</sup>, or *Blaikie No. 1*, and *Blaikie No.*

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24. *Mthethwa v. De Bruin NO*, 1998 (3) BCLR 336 (N) (S. Afri.).

25. *Attorney General of Quebec v. Blaikie et al*, [1979] 2 S.C.R. 1016.

<sup>26</sup>, that section 133 also applied to certain legislative instruments (also known as regulations or delegated legislation), the Parliament of Canada passed the *Legislative Instruments Re-enactment Act*<sup>27</sup> to re-enact monolingually enacted legislative instruments to ensure their validity<sup>28</sup>. The re-enactment in two languages is deemed to come into force retroactively, on the same day as the coming into force of the original regulation in one language.

As for provincial and territorial legislation, the requirement to publish law in English and French extends to Quebec, Manitoba, New Brunswick, Ontario, and Federal Territories (Nunavut, Northwest Territories, and Yukon). Re-enactment of legislation also took place in Manitoba. Section 23 of the Manitoba Act is virtually identical to section 133 of the Constitution Act. In *Re Manitoba Language Rights*<sup>29</sup>, the Supreme Court of Canada held that statutes in Manitoba that had been enacted in English only were invalid. To prevent a legal vacuum, the court held that these statutes were deemed to have temporary force and effect until they were re-enacted. Saskatchewan found itself in a similar situation in *R. v. Mercure*<sup>30</sup>, but its legislature resolved the problem through repealing a pre-confederation law rather than through re-enactment of its statutes.

Although the bilingual re-enactment of legislation became a necessity<sup>31</sup> in Canada after its courts ruled that monolingually enacted statutes were invalid, such legislative action is far from the norm. Whilst many jurisdictions have stipulated that their laws are to be published in two or more languages (it is noteworthy that some jurisdictions have even legislated for the simultaneous enactment and publication of bilingual laws), Canada is a very rare example of

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26. *Attorney General of Quebec v. Blaikie et al*, [1981] 1 S.C.R. 312.

27. *Legislative Instruments Re-enactment Act*, S.C. 2002, c. 20.

28. Mollie DUNSMUI, "Bill S-41: The Legislative Instrument Re-Enactment Act", Legislative Summary LS-425E, Library of Parliament, April 23, 2002.

29. *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

30. *R. v. Mercure*, [1988] 1 S.C.R. 234.

31. Peter W. HOGG, "Necessity in a Constitutional Crisis", (1989) 15 *Monash University Law Review* 253.

a jurisdiction in which laws were repealed and re-enacted as a result of official bilingualism. Although the legislative move may be chiefly motivated by the need to ensure the validity of laws, it turns out to be also crucial for linguistic equality. Legislative action prevents legislative history from undermining the equal authenticity principle, whose foundation was laid down in the landmark case of *Dubois*<sup>32</sup>, which established that the two language versions are equally authentic because they passed through Parliament and received the assent of his Majesty at the same time according to the same procedure.

Bilingual re-enactment – or the lack of it – is particularly consequential where a language acquires official status later than another language. This situation is very common among postcolonial jurisdictions in Asia and Africa, where a colonial language is often retained as an official language and an endogenous language acquires official status as part of a decolonization process. In these jurisdictions, the endogenous official language is often considered to be inferior<sup>33</sup>, a view which is reinforced by its shorter history as a legislative language.

To illustrate what the absence of bilingual re-enactment may result in, let us take a look at the bilingual jurisdiction of Hong Kong, where English has been used in an official capacity during the colonial period for over 150 years, and the Chinese language only became a legal language shortly before the handover of sovereignty in 1997. Hong Kong courts routinely favour the English text of the law, despite the formal adoption of the equal authenticity principle<sup>34</sup>. In *HKSAR v. Tam Yuk Ha*<sup>35</sup>, where the Chinese and English texts of a regulation appeared to diverge in meaning, Justice Liu in the

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32. *The King v. Dubois*, *supra*, note 19.

33. Janny H. C. LEUNG, “Negotiating Language Status in Multilingual Jurisdictions: Rhetoric and Reality”, (2016) 209 *Semiotica* 371, online: <<https://doi.org/10.1515/sem-2016-0013>>.

34. Janny H. C. LEUNG, “Cross-Jurisdiction Appropriation of the Equal Authenticity Principle”, (2013) 45-2 *The Journal of Legal Pluralism and Unofficial Law* 209, online: <<https://doi.org/10.1080/07329113.2013.772463>>.

35. *HKSAR v. Tam Yuk Ha*, [1997] 2 HKC 531.

Court of Appeal expressly undermined the value of the Chinese text in his judgment:

First of all, the authenticated Chinese language text of By-law 35(a) was obviously not designed to have any remedial effect. On the contrary, the 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.... Any rectification would have to be effected by an amendment, not by the other language text. What effect, if any, would the subsequently authenticated Chinese language text have on the English language text? (para. 8-10)

The same approach was adopted in other cases such as *Chan Fung Lan v. Lai Wai Chuen*<sup>36</sup>, *The Queen v. Tse Hing San & Others*<sup>37</sup>, and later in *HKSAR v. Lau San Ching & Others*<sup>38</sup>. It was officially endorsed in a 1998 paper published by the Department of Justice, which stated that the English version will take precedence if the Chinese text was only prepared and declared authentic subsequent to the English text. This interpretive approach effectively undoes the significance of the equal authenticity principle.

In fact, there are many postcolonial jurisdictions that have assigned the same legal status to different languages, but do not treat these languages equally. Consider Lesotho, a south African state which became independent from Britain in 1966. Article 3 of its constitution provides for the official language status of Sesotho (a Bantu language spoken by the majority of the population) and

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36. *Chan Fung Lan v. Lai Wai Chuen*, HCMP4210/1996.

37. *The Queen v. Tse Hing San & Others*, MA No. 1395 of 1996.

38. *HKSAR v. Lau San Ching & Others*, MA 98 of 2002. Judge Lugar-Mawson in this case argued that ‘...it necessarily follows that if the ordinance was initially enacted in English, the English text was the original official text from which the Chinese text was subsequently prepared and declared authentic. In ascertaining the ordinance’s legal meaning, the English text should be taken as more accurately reflecting the Legislature’s intent at the time it was originally enacted.’

English, but also states that “no instrument or transaction shall be invalid by reason only that it is expressed or conducted in one of those languages”. Thus equal authority here does not imply parallel usage. In reality, English is still the language of government and administration. To cite a more radical example, Bolivia has granted official status to 37 languages, among which some were already extinct when they received official recognition. One simply does not expect the government to use all these languages in the same way.

### Parallel Drafting of Federal Legislation

Another important innovation made by the Canadian federal government concerns legislative drafting. Co-drafting of bilingual legislation was introduced in the late 1970s. To ensure the harmony of their legislative texts, the idea of drafting a text and then translating it was abandoned altogether. In the spirit of both bilingualism and bijuralism, a Francophone, usually trained in civil law, and an Anglophone, usually trained in common law, work in partnership in drafting federal legislation<sup>39</sup>. They are guided by bilingual instructing officers who are legal advisors from the sponsoring department. They attend all meetings so they both fully understand the background to the bill that they need to draft. They work together in each assignment, going back and forth to discuss each section of the draft, with the help of jurilinguists<sup>40</sup> (members of the Jurilinguistic Services Unit in the Legislative Services Branch) who are specialists in the language of the law. The jurilinguists ensure the linguistic quality of the texts (with a focus on style, terminology and phraseology) and their equivalence in meaning<sup>41</sup>.

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39. Lionel A. LEVERT, “The Cohabitation of Bilingualism and Bijuralism in Federal Legislation in Canada: Myth or Reality?”, *Harmonization and Dissonance: Language and Law in Canada and Europe*, May 7, 1999, online: <<http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b1-f1/bf1e.html>>.

40. Their European equivalents are known as lawyer-linguists.

41. GOVERNMENT OF CANADA, PRIVY COUNCIL OFFICE, “Guide to Making Federal Acts and Regulations: Part 2 - Making Acts - 2.3 Preparation and Cabinet Approval of Bills”, accessed February 26, 2017, online: <<https://www.canada.ca/en/privy-council/services/publications/guide-making-federal-acts-regulations.html>>.



The output is then reviewed by legislative revisers and paralegals. Both the English and the French texts are treated as an original expression of the law and are printed side by side. Since the translator and the draftsman are one, it may be said that this method of bilingual textual production has by-passed translation, at least in the traditional sense of the term. It is believed that co-drafting produces legislative texts that are idiomatic and of consistently good quality in both language versions. Similar to bilingual re-enactment, co-drafting prevents the situation where a translated legislative text is treated as less authoritative. It helps to reaffirm the equal authenticity principle.

The Canadian model has inspired legislative drafting in a few other bilingual and multilingual jurisdictions in Europe, such as Belgium, Switzerland and Wales. In Belgium, the French and Dutch versions of the law are co-drafted by a native speaker of each language; a German translation is produced afterwards for reference only. This drafting respects the internal structure of each drafting language and has replaced the earlier approach where the Dutch version followed the French text word for word. Every bilingual draft has to be vetted before approval. The drafting procedures are detailed in a manual published by the Council of State<sup>42</sup>. In Switzerland, co-drafting may be more accurately described as co-revising. Federal legislative drafting usually starts with German and is translated into other official languages, in a way that prioritises the naturalness of the target language text. It takes place at an intermediary stage as a quality assurance procedure, when linguists and jurists who are speakers of different official languages discuss and suggest revisions to the drafts both in form and content, and may even spot textual issues not restricted to questions of linguistic equivalence<sup>43</sup>. In Wales, legislation had been typically drafted in English and then translated into Welsh for over two centuries; however, drawing on the Canadian experience, co-drafting was introduced in 1999 so that Welsh and English versions

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42. COUNCIL OF STATE (BELGIUM), "Principles of legal technique - The legislative drafting manual", 2017, online: <[http://www.raadvst-consetat.be/?page=technique\\_legislative&lang=en](http://www.raadvst-consetat.be/?page=technique_legislative&lang=en)>.

43. A. LÖTSCHER, *supra*, note 6.

of legislation are now drafted alongside each other. Some have argued that co-drafting can be more cost-effective and time-efficient than translation. There have also been calls for co-drafting in Ireland, where the Irish legislative text has a higher status than the English text<sup>44</sup> (except in the rare occasions where a bill has been introduced in Irish).

In most postcolonial bilingual and multilingual jurisdictions in Asia and Africa, officially recognized languages are simply not treated equally; if the law is available multilingually at all, it is prepared through translation. In the Philippines, which is officially bilingual (English and Filipino), legislation and judgments are written in English and rarely translated into Filipino.

*An Interim Analysis: Contextual Variance*

The advancement of legal bilingualism in Canada has been propelled by judicial activism. Equality between the official languages was a judicial invention before it became constitutionally entrenched. Judicial activism is a balancing force against majoritarian lawmaking in constitutional democracies, especially when it comes to the protection of minority rights<sup>45</sup>. When it comes to the official languages of Canada, the importance of Canadian courts does not lie so much in countering majoritarian decisions but in formulating the meaning of linguistic equality and expanding the scope of official language rights through liberally interpreting constitutional and legislative provisions that are broadly crafted. The dependence on judicial activism means that the goodwill and moral judgment of individuals have played a key role in advancing legal bilingualism in Canada. When similarly drafted laws are adopted in other jurisdictions, the conditions for judicial activism

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44. Harry MCGEE, "Experts Say Constitutional Changes Should Look at Subtlety of Irish Translation", *The Irish Times*, sect. News, February 21, 2015, online: <<http://www.irishtimes.com/news/politics/experts-say-constitutional-changes-should-look-at-subtlety-of-irish-translation-1.2111749>>.

45. Robert M. COVER, "The Origins of Judicial Activism in the Protection of Minorities", (1982) 91-7 *The Yale Law Journal* 1287.

are often weaker. For one thing, many bilingual and multilingual jurisdictions are postcolonial states that are still struggling to achieve a balance of power among the three branches of government. A crucial sociopolitical context that distinguishes Canada from Asian and African states that became bilingual and multilingual is that Canada was a settler colony, and its official bilingualism focuses on two languages that were spoken by its two major colonisers. Postcolonial Asian and African states were predominately exploitation colonies. In the great majority of bilingual and multilingual Asian and Africa states I have surveyed<sup>46</sup>, their language policy is a balance of power between colonial (exogenous) and endogenous languages, reflecting both external pressure from globalization and internal pressure from interethnic tensions. In most cases, the exogenous languages still occupy a superior position, not least due to entrenchment in colonial legal systems, often retained by decolonizing states. Most imperialist European languages have transitioned into world languages, and thus there are also economic incentives to retain these languages for access to the global economy. On the other hand, the official recognition of endogenous languages is necessary as a symbolic acknowledgement of nationhood and sovereignty, and linguistic equality can be a useful political rhetoric to appease sub-state nationalism and to enhance political reputation. There seems to be a division of labour as to what each official language is perceived to be good for: usually exogenous languages for their instrumental value, and endogenous languages for their identity or sentimental value. There is little sense in which they are comparable or truly equal. It is therefore not surprising that the legislative measures Canada has taken to ensure linguistic equality, including the re-enactment of statutes and the practice of co-drafting, have not been adopted in most other bilingual and multilingual jurisdictions. If anything, there is a stronger parallel between official multilingualism in many Asian and African states and the way Canada treats its indigenous languages: although aboriginal languages have been granted official status in some territories (e.g., Northwest Territories), alongside English and French, such status seems to be

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46. See J. H. C. LEUNG, *supra*. note 8.

primarily symbolic<sup>47</sup>. The extent to which official status is taken seriously seems to be proportional to the degree to which separatist sentiment among the language community in question poses a threat to national unity. The power disparity between endogenous languages and exogenous languages, and that between settler languages and indigenous languages, tends to be too significant to warrant truly equal treatment.

The lack of commitment to fully utilizing an endogenous language in an official capacity is bolstered by long-held language ideologies about European languages being more modern and progressive<sup>48</sup>, and endogenous languages being associated with ignorance and imprecision. Bahasa Malaysia (BM), for example, is often seen by Malaysian lawyers as inferior to English as a legal language:

I often compare the use of BM in legal arguments to the use of a hammer instead of a screwdriver. The job will indeed be done but it will be messy and brutal whereas the use of English would be like using a screwdriver - elegant and each turn of the argument can be appreciated<sup>49</sup>.

The strongest resistance to the adoption of endogenous languages for official functions tends to come from local elites, especially legal professionals, who have vested interests in the perpetuation of colonial languages<sup>50</sup>.

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47. Mark FETTES, "Life on the Edge: Canada's Aboriginal Languages under Official Bilingualism", in Thomas RICENTO and Barbara BURNABY (eds.), *Language and Politics in the United States and Canada*, New York, Routledge 1998, p. 117.

48. Strikingly, the new nation of South Sudan has chosen English as its official language because it will make the country "different and modern", according to the country's Minister of Higher Education Edward Mokole, despite there being very few fluent English speakers in the country. Rosie GOLDSMITH, "BBC News - South Sudan Adopts the Language of Shakespeare", *BBC News Magazine*, October 8, 2011, online: <<http://www.bbc.co.uk/news/magazine-15216524> >.

49. Azzat, FAHRI. The Language of the Court. Malaysiakini.com, 3 July 2001. <http://www.malaysiakini.com/letters/8743> (accessed 11 July 2019).

50. See further examples and discussion in J. H. C. LEUNG, *supra*, note 33.

**Convergences:****The Common Trappings of Legal Multilingualism**

Despite the divergences highlighted above, there are a few commonalities across bilingual and multilingual jurisdictions that define the nature of such official recognition of linguistic plurality and equality in the contemporary world.

*Indeterminate Legal Meaning*

Most bilingual and multilingual states enshrine official language status in their constitutions, usually in the form of a simple sentence: “the official languages of XXX shall be YYY and ZZZ”. Entrenchment in the supreme law of the land conveys a sense of authority and a vision of how people in a state are to live together. However, the terms ‘official language’ or ‘national language’ do not carry well defined legal meanings. In fact, when the Royal Commission on Bilingualism and Biculturalism in Canada was trying to decide what status to assign to English and French, commissioner Royce Frith supported the use of the word ‘official’ because it was *not* ‘a term of art’ in law, thus its precise meaning could be worked out by the courts later through jurisprudence. The vagueness in drafting means that the realization of constitutional aspirations depends on implementing legislation, which is in turn dependent on the political climate of the day. Alternatively, as discussed above, it may also be propelled by judicial activism, but there is no guarantee that this will happen. For many jurisdictions that have granted official status to two or more languages, such status recognition remains symbolic. Since status symbols attached to languages have no clear legal meaning, Laws establishing official languages mainly work through its symbolic capital<sup>51</sup>. I call this *symbolic jurisprudence*<sup>52</sup>. A positivistic approach to law views law as a set of rules that controls or changes behavior, the effectiveness of which depends on enforcement. Symbolic jurisprudence recognizes that law does not only perform instrumental but also symbolic

51. Pierre BOURDIEU, *Language and Symbolic Power*, Cambridge, Harvard University Press, 1991.

52. See J. H. C. LEUNG, *supra.*, note 8.

functions. Symbolic law<sup>53</sup> makes a statement about who we are as a society and has the potential to influence social norms. To say that official language law works through its symbolic power does not imply that it is necessarily inconsequential. Symbolic capital may be translated into cultural and political capital under the right circumstances; substantive rights may also be derived from symbolic recognition. Official language status can lead to individually enforceable rights in legal processes, such as the right to not only speak an official language but to be heard in it without interpreter mediation, but the scope of such rights varies widely across jurisdictions thanks to the indeterminacy of official language law<sup>54</sup>.

### *Administrative Fix*

Where the state does institutionalize bilingualism or multilingualism into their governance, the solution they adopt tends to be an administrative one. As mentioned earlier, one method of linguistic management adopted in Canada, and followed by a number of other bilingual and multilingual jurisdictions in the West, is the setting up of a dedicated office headed by a language commissioner responsible for facilitating and monitoring government compliance with official language law. How the language commissioner is selected and who s/he reports to are not apolitical questions. Importantly, although often said to be independent, such offices are still inevitably funded by the government. Most of these government watchdogs are practically living on a shoestring. Commissioners in both Wales and Ireland have complained of inadequate funding<sup>55</sup>, and of vulnerability to budget cuts in times

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53. Joseph R. GUSFIELD, "Moral Passage: The Symbolic Process in Public Designations of Deviance", (1967) 15-2 *Social Problems* 175, online: <<https://doi.org/10.2307/799511>>; Mark TUSHNET and Larry YACKLE, "Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act", (1997) 47-1 *Duke Law Journal* 1.

54. See J. H. C. LEUNG, *supra*, note 8.

55. Meri HUWS, "Welsh Language Commissioner's Budget 2016-2017", January 27, 2016; "Budget 2017 - Implications for the Funding of the Irish Language and the Gaeltacht", (Conradh na Gaeilge, n.d.).

of recession. Sometimes these agencies are also given conflicting roles, being responsible for both critiquing and monitoring government practices but at the same time also for the promulgation and facilitation of those same practices<sup>56</sup>. Three further features of these offices, in particular, limit their emancipatory potential for minority language speakers. Firstly, failure to comply with official language law rarely results in legal sanction. Language commissioner offices generally do not have the power to punish non-compliance. Complainants are usually not compensated for the inconvenience they suffered either. The administrative structure provides a non-legal means of resolving grievances arising from undelivered legal promises. Secondly, these offices consist of unelected salaried officials. They are not the chosen spokespersons of minority groups, nor do they monitor the needs of minority communities. They cannot replace bottom-up advocacy. Thirdly, although official language status arises from intergroup relationships and the survival of languages and cultures is a collective concern, there is a strong tendency in these government agencies to translate group interests into matters of individual rights, which are not enforceable by individuals but only through the dedicated office. All these features give credence to the criticism of rights discourse that it risks displacing progressive social movements.

Many Asian and African bilingual and multilingual jurisdictions do not have a compliance office for their bilingual or multilingual policy. In fact, such a policy is often barely implemented. Instead, some of those jurisdictions have heritage and culture offices that are responsible for promoting and developing endogenous languages. The nature of such offices is such that there is no clearly stipulated standards or benchmark that their work needs to meet. Regardless of whether we are dealing with a language commissioner office or a heritage office, the shared feature is that these all represent administrative strategies to

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56. Diarmait MAC GIOLLA CHRIOST, *The Welsh Language Commissioner in Context: Roles, Methods and Relationships*, Cardiff, University of Wales Press, 2016.

address status recognition in official language law with under-specified consequences.

### *Selective Equality*

Distinct from linguistic accommodation that forms part of due process (such as the right to an interpreter for a defendant who cannot speak the language of the trial), many language rights enjoyed in Canada are derived from official language status. The Canadian government<sup>57</sup> describes linguistic equality between the two official languages in the Canadian legal system as “true equality” and “substantive equality”. The Supreme Court, in *DesRochers*<sup>58</sup>, states, “(s)ubstantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation.” In this case, the court understands substantive equality as something that is achieved through treating groups differently according to their situation and needs.

Regardless of how true and substantive equality is between the two official language communities, such kind of equality is not extended to other language communities. Although official multilingualism has the potential to change the lives of communities who speak an official language, we must not forget that every act of acknowledgement is simultaneously an act of denial to others who also made an identity claim. In the case of Canada, the most obvious group of the excluded others is the indigenous populations. About one million Canadians claim Aboriginal descent. Many do not speak their ancestral language, at least in part due to years of forced linguistic assimilation and neglect<sup>59</sup>. Today only some languages spoken by indigenous populations enjoy regional recognition (in Nunavut and the Northwest Territories respectively). There have been calls to give official status to all 60 indigenous languages in Canada, with the proviso that perhaps implementation could be

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57. Marie-Ève HUDON, “Bilingualism in the Federal Courts”, Publication No. 2011-40-E, Library of Parliament, Background Paper, November 30, 2011.

58. *DesRochers v. Canada (Industry)*, 2009 SCC 8, par. 31.

59. M. FETTES, *supra*, note 47.



limited to localities<sup>60</sup>. Even with official recognition, indigenous language speakers do not enjoy the same legal rights as speakers of English or French. For example, a criminal defendant can request for a trial to be heard before an English- or French-speaking judge and jury, but Canada has consistently refused to form an indigenous jury for indigenous populations (see *Lamirande*<sup>61</sup> and *Teerhuis-Moar*<sup>62</sup>), and mastery of only an indigenous language has been one reason why indigenous persons have been excluded from jury service<sup>63</sup>.

Apart from indigenous populations, who may be said to live in a state of internal colonialism, commonly excluded groups include migrants, forced labour, and refugees. There might be more grounds to exclude some of these populations in an official language policy than others – equality as citizens does not nevertheless prevent their exclusion.

The Canadian example makes it clear that it is not exactly heritage and connection to the land that justify official language status. In many African states, where a colonial language is spoken only by a small number of elites but still dominates official communication, it is clear that it is not linguistic demographics that matter either. When one considers all the people who are excluded from official recognition, then it is obvious that the linguistic equality proclaimed is a very limited kind of equality, a pragmatic kind of equality that is used to maintain power balance between the more powerful groups in a polity.

It is this balancing act that leads to the notion of equality in the official language context, a notion that is inherently more

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60. “Declaring All 60 Indigenous Languages in Canada as Official Is Doable, Expert Says”, *CBC News*, July 17, 2017, online: <<http://www.cbc.ca/news/canada/british-columbia/indigenous-languages-in-canada-can-and-should-be-made-official-expert-says-1.3147759>>.

61. *R. v. Lamirande*, 2002 MBCA 41.

62. *R. v. Teerhuis-Moar*, 2007 MBQB 165.

63. Richard JOCHELSON et al., “Revisiting Representativeness in the Manitoban Criminal Jury”, (2015) 37-2 *Manitoba Law Journal* 365.

shallow than the kind of equality that is advocated for in human rights or natural justice. I have therefore called it *shallow equality*<sup>64</sup>. In most bilingual and multilingual jurisdictions, regardless of whether official languages are formally equal, it is common knowledge that the official languages are not truly or substantively equal, in official treatment or in terms of the sociopolitical power that the languages signal.

### *Pragmatism and Identity Construction*

In Canada, linguistic duality has become part of the national identity. Robert Cover famously stated that there is an epic in every constitution<sup>65</sup>. For many states, official language status, enshrined constitutionally, is a core element of this epic. For Canada, a national narrative may be constructed which tells a story of two major groups coming together and forming a nation. English and French became official languages because they were spoken by descendants of colonial settlers who dominated the territory. As Pierre Trudeau's quote at the beginning of the paper acknowledges, these languages enjoy official recognition because of the political strength of their corresponding speaker groups. His words express a sense of inevitability – "(t)he die is cast", and there is no alternative path. Official bilingualism was much more a reactive than proactive policy. This is especially evident considering that the Royal Commission on Bilingualism and Biculturalism was set up in 1963 as a response to the rise of Quebec nationalism, and granting official status to English and French was a recommendation by this committee that was followed by Pierre Trudeau.

Although, from the 1970s, Canada has adopted a multiculturalist policy, there are only two federally recognized official languages. Canadian case law justifies the choice of official languages not through the use of language as a tool of commu-

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64. See J. H. C. LEUNG, *supra.*, note 8.

65. Robert M. COVER, "Foreword: Nomos and Narrative", (1983) 97 *Harvard Law Review* 4.

nication<sup>66</sup> but through the use of language as a marker of identity. It matters not whether a defendant is fluent in an official language, if s/he chooses to be tried in another official language, s/he is entitled to do so (s.530 of the Criminal Code). As the Supreme Court in *Beaulac*<sup>67</sup> sees it, official language rights serve to ensure that the corresponding language groups flourish and that their cultural identity is preserved. Of course this brings up the question of why citizens belonging to other smaller linguistic groups, especially indigenous populations, do not receive the same identity protection. In recent years, support for official bilingualism among Canadians tends to embrace the commodification of linguistic capital, such as the argument that multilingualism is a useful skill in the globalized world<sup>68</sup>. But not all languages are equally useful in the global linguistic market. Canada is well positioned in the political economy of language, in that the two languages that are dominant in the country are also dominant in the world today.

This identity rhetoric does not work well in most Asian and African multilingual jurisdictions, which became bilingual or multilingual because they have to balance between ensuring political stability – by retaining a colonial language, and recognizing local identity – by promoting the status of one or more endogenous languages. Clearly, elevating the status of an endogenous language may be used to promote local identity and contribute to the nation-building project. However, it would not be politically correct in these contexts to say that an exogenous language associated with colonial exploitation is retained to preserve the vitality of its speaker group. Instead, pragmatism – such as ensuring legal and political stability, or linguistic access to regional or global economy, is usually emphasized in justifying their retention. In order to preserve the

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66. This approach justifies the need for linguistic accommodation from a natural justice perspective. For example, in the interest of fair trial and transparency, the state needs to ensure that defendants can fully comprehend a trial.

67. *R. v. Beaulac*, *supra*, note 21.

68. Tamara BALUJA and James BRADSHAW, “Is Bilingualism Still Relevant in Canada?”, *The Globe and Mail*, June 22, 2012, online: <<https://www.theglobeandmail.com/news/national/is-bilingualism-still-relevant-in-canada/article4365620/>>.

coherence of a national narrative, some jurisdictions have underscored the transitional nature of this bilingual or multilingual arrangement, claimed ownership of an exogenous language by domesticating it (which contributes to the phenomenon of Global Englishes), or assigned different status labels to languages (typically, official language status is granted to an exogenous language and national language status given to endogenous languages<sup>69</sup>).

A problem common to all bilingual and multilingual jurisdictions is that even a linguistically plural policy will inevitably fail to satisfy all identity claims that exist within a political boundary. The problem is particularly acute in Asian and African postcolonial polities, many of which have hundreds of spoken languages. In many cases there is no dominant language or lingua franca. In multi-ethnic polities, elevating one language at the expense of others can lead to violent conflicts, especially in transitional times. The colonial language thus provides a politically neutral medium of communication among diverse ethnic groups. This explains why, if postcolonial Africans have to choose one official language only, this language is almost inevitably a colonial legacy. It is unclear how the Canadian model can provide a ready solution that has 'proper regard for liberty and justice'.

It is difficult to disguise the pragmatism that underlies legal bilingualism or multilingualism, notwithstanding liberal universal values such as diversity, equality and multiculturalism that are frequently called upon in official rhetoric about such a policy. Official language status arises from a politics of difference<sup>70</sup>, and is

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69. This may mean that national languages are hardly used in official capacity. A Cameroon linguist, for example, laments that national languages in Cameroon "have no national function". Eric A. ANCHIMBE, "Functional Seclusion and the Future of Indigenous Languages in Africa: The Case of Cameroon", in John MUGANE et al. (eds.), *Selected Proceedings of the 35th Annual Conference on African Linguistics*, Somerville, Cascadilla Proceedings Project, 2006.

70. This refers to the desire to distinguish oneself from others, as a way of negotiating one's identity. See Charles TAYLOR, *Multiculturalism and the "Politics of Recognition"*, Princeton, Princeton University Press, 1992.

never diverse or equal enough to satisfy a universalist claim. Such status recognition may however be compatible with majoritarian democracy, which respects individual equality but does not guarantee the cultural survival of minority groups. The preservation of official languages and cultures is a political project that cannot be easily justified by legal principles.

### **Conclusion:**

### **Nationalism, Strategic Pluralism and Linguistic Justice**

The bloom of bilingual and multilingual states across the world today definitely shows a departure from romantic or linguistic nationalism<sup>71</sup> – the ideology of “one state, one people, one language” that underlies the notion of nation-state. One state with multiple languages has become a viable model of nation-building. Does this necessarily mean that we are marching towards a post-national era? Although Justin Trudeau claims that there is “no core identity” and “no mainstream” in Canada, Canada has not moved away from privileging the linguistic legacy of its former empires.

Canada has been the leading example of a bilingual jurisdiction, providing insights into how a legal system and public bodies may serve its multilingual citizens. It has taken bolder steps and more radical measures than most other jurisdictions in ensuring equality between its two official languages. Although aspiring to be a “truly pluralistic state”, Canada provides a less than exemplary model when it comes to its treatment of non-official languages whose speakers may also have a strong identity claim.

What underlies legal bilingualism or multilingualism is not so much nationalism or post-nationalism, but what Joshua Fishman calls *nationism*, which ‘is primarily concerned not with ethnic authenticity but with operational efficiency’<sup>72</sup>. Canada for-

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71. Under the romantic notion of linguistic nationalism, people who share the same cultural root and speak the same language should come together and form a political unit.

72. Joshua A. FISHMAN, “National Languages and Languages of Wider Communication in the Developing Nations”, in Joshua A. FISHMAN,

mally adopted legal bilingualism when the threat of separatism was looming, to ensure the operational integrity of the state and the political legitimacy of the ruling regime. In other words, both symbolic jurisprudence and shallow equality are components of a policy of strategic pluralism that is deployed for conflict avoidance and social cohesion. Although nationalist sentiments are real, and we are seeing their resurgence today in many parts of the world, the romantic idea of linguistic nationalism has almost always remained an unrealized ideology and a myth; hardly any state in the world has a monolingual population. Linguistic nationalism does not bring together people who share the same culture and language to form a political unit; rather, it homogenizes the culture and language of the people who supposedly live within a political boundary. Both linguistic nationalism (which promotes official monolingualism) and official multilingualism have been driven by nationalism.

Nationalism explains convergences in multilingual legal practice. It is strategic pluralism that has inspired other jurisdictions to follow in Canada's footsteps. A survival instinct needs not be learnt. What Canada has provided instead is a success story of how strategic pluralism can be used to contain secessionism and to promote harmony in a diverse population. For many postcolonial Asian and African states, a colonial language retains its stronghold through local elites, but symbolic recognition of endogenous languages is required to legitimize the new political regime. Vaguely drafted official language law does not result in clear rights and duties, and paying lip service to multilingualism helps a new government gain political capital. Although legal multilingualism is about the survival of the state before it is about the survival of languages and the corresponding communities, vaguely drafted official language law disguises the difference between the two. Expectations for language rights may be created, but such rights are only a derivative, epiphenomenon. National unity as a priority also explains the administrative structure of legal

bilingualism or multilingualism. Such structures effectively turn intergroup conflicts into individual grievances that can be redressed through bureaucratic means, or living cultures into something that can be preserved in a museum. Despite potential benefits such as improving linguistic access to law and increasing employment opportunities for minorities, linguistic equality is fundamentally a measure to preserve existing power relations and does not radically elevate the political rights of linguistic minorities. The kind of linguistic equality that multilingual jurisdictions uphold shares little in spirit with the normative notion of multiculturalism, which entails equal respect for all cultures.

Although strategic pluralism is not designed to emancipate, and despite the fact that official bilingualism or multilingualism should not be taken as direct evidence of a “truly pluralistic” society, the silver lining is that it lays the foundation for legal development and norm creation. In his influential essay *Nomos and Narrative*, Robert Cover argues that law should be understood less as a set of rules and institutions or a source of power, than as a system of meaning that helps define the world we live in. Whether it is one of the objectives of lawmaking, pluralism inscribed by law may induce pluralism as a social value. Regardless of the motivation behind lawmaking, law that has been laid down may acquire a life of its own. In addition to different sociopolitical contexts, the gradual entrenchment of linguistic duality as a legal norm and the acceptance of linguistic duality as a core element of Canadian national identity by legal professionals over time may have contributed to the divergences observed earlier in this paper.

My intention here has not been to cast a cynical eye at the official language policy of Canada and other jurisdictions but rather to contribute towards a descriptive theory of legal bilingualism and multilingualism. Canada has developed a global reputation as a diverse and tolerant society; it has persisted in its multiculturalist policy amidst a global backlash against that policy<sup>73</sup>. The point is

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73. Keith BANTING and Will KYMLICKA, “Canadian Multiculturalism: Global Anxieties and Local Debates”, (2010) 23-1 *British Journal of Canadian Studies* 43, online: <<https://doi.org/10.3828/bjcs.2010.3>>.

that *even* for Canada, it is not clear how an official language policy can be equitable to all. Both indigenous communities and immigrants are still expected to integrate linguistically; whether the government takes a multiculturalist or a melting pot approach, language shift and loss of heritage language typically take place among migrants within three generations<sup>74</sup>. One in five Canadians are foreign born, and their offspring will most likely become English or French speakers. On the other hand, it is not clear whether giving official status to all really promotes linguistic and cultural diversity either. Experience from other countries shows that granting official status to many languages actually leads to increased pressure to adopt a singular lingua franca<sup>75</sup>. The challenge of achieving linguistic justice<sup>76</sup> in a diverse society cannot be met through official recognition, however inclusive or exclusive the recognition is. More fundamentally, official recognition is inherently counter-egalitarian; universal recognition means no recognition. Weinstock argues that status recognition is the root of the problem, and suggests that states should do nothing more than what is minimally required to effectively communicate with its citizens<sup>77</sup>. This anti-symbolism

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74. Hannah SLAVICK, "Language Maintenance and Language Shift among Maltese Migrants in Ontario and British Columbia", (2001) 151 *International Journal of the Sociology of Language* 131, online: <<https://doi.org/10.1515/ijsl.2001.052>>; Patrick SABOURIN, Alain BÉLANGER and Paul REEVE, "The Dynamics of Language Shift in Canada", (2016) 70-4 *Population* 727.
75. See a relevant discussion in the South African context in Max LOUBSER, "Linguistic Factors into the Mix: The South African Experience of Language and the Law", (2003-2004) 78 *Tulane Law Review* 105. There is also a parallel discussion in the EU, which has 24 official languages, about whether English should be adopted as a single working language.
76. Referring to fair distribution of resources, for speakers of different languages, in a society. That speakers of some languages need to invest more time and effort in second language learning than others in order to participate in a shared community may be considered linguistic injustice. See Philippe VAN PARIJS, "Linguistic Justice", (2002) 1-1 *Politics, Philosophy & Economics* 59, online: <<https://doi.org/10.1177/1470594X02001001003>>.
77. Daniel M. WEINSTOCK, "The Antinomy of Language Policy", in Will KYMLICKA and Alan PATTEN (eds.), *Language Rights and Political Theory*, 1<sup>st</sup> ed., 2003, New York, Oxford University Press, 2007, p. 250.



proposal is, of course, diametrically opposed to the current obsession with status symbols and recognition.

So, does the world need more Canada? As far as official language policy is concerned, if the purpose – viewed from a top-down perspective – is to secure political stability or economic opportunities, strategic pluralism may well be effective<sup>78</sup>. The Canadian approach in official bilingualism and multiculturalism may be seen as a good way of balancing power struggles, operational efficiency, and respect for diversity. However, aspirations of the state under such an approach do not always align with the needs and desires of language communities. Taking a bottom-up perspective, it is risky for linguistic minorities to count on official language law for cultural survival. The reality, as this paper has shown, is that the emancipatory potential of officially assigned language status is inherently limited.

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78. Chua provides further evidence of how hyperpowers in the world succeeded by being strategically tolerant. Amy CHUA, *Day of Empire: How Hyperpowers Rise to Global Dominance - and Why They Fall*, New York, Reprint ed. Anchor, 2009.