

Tackling Bilingual Discrepancies in Statutory Interpretation

—Rethinking the Judicial Approach in Hong Kong

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Abstract

This article first examines the Hong Kong courts' approach towards bilingual discrepancies via a study of the legislative framework and a case trilogy—*Chan Fung Lan*, *Tam Yuk Ha*, and *Re Madam L*—and argues that the “mere translation” reasoning in Hong Kong courts tends to undermine the principle of equal authenticity between the two official texts (i.e. English and Chinese). Second, the present article considers the Canadian approach, which ensures linguistic equality between English and French legislation by strictly disregarding the enactment history of legislation. Finally, upon balancing the constraints and sociopolitical challenges, the article advocates that the judicial approach in Hong Kong should be reshaped to align with the Canadian approach on the grounds of legal coherence and constructive interpretation.

Keywords

bilingual legislation, statutory interpretation, equal authenticity principle, shared meaning rule, comparative study, Hong Kong and Canadian judicial approaches

Submitted: 17 June 2020, accepted: 31 August 2020, published online: 12 November 2020

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1. Introduction

“The very concept of multilingual authenticity often contains a fictitious legal element” (Tabory, 1980: 192)

“Canons of ‘interpretation’ cannot eliminate, though they can diminish, these uncertainties.” (Hart, 1994: 126)

The interpretative approach towards bilingual discrepancies in legislation raises complex issues, which often challenge underlying assumptions regarding bilingualism in society. In addition to reviewing the legalistic interpretative doctrines, one has to take a step back by undertaking a linguistic, sociological, and historical analysis in order to gain a view of the full picture of legal bilingualism in Hong Kong.

As observed by scholars, despite the formal equal language status of English and Chinese accorded by the Basic Law and Official Languages Ordinance (“OLO”) there seems to be a phenomenon of “asymmetrical bilingualism” in Hong Kong courts. This “shallow” nature of linguistic equality may be attributed to factors including the deep-rooted language ideology, the social hierarchy, and colonialism.

This article first argues that the equal authenticity principle has not been given its full effect by the current Hong Kong courts. By critically examining a trilogy of cases and official documents published by the Department of Justice (“DOJ”), the article argues that there has been a judicial tendency to regard the Chinese authenticated text as a “mere translation” and, in turn, treat any discrepancies as “translation errors”. This article submits that such “mere translation” reasoning severely curtails the equal authenticity principle, resulting in a *de facto* shallow form of legal bilingualism. The erosion of the equal authenticity principle and legal bilingualism has serious legal and sociological implications which should not be overlooked. On a microscopic level, individuals (particularly unrepresented litigants) with little language competence in English may have relied and acted upon the Chinese authenticated legislation in the course of their actions. Their right to access to justice would be denied if their only accessible source of law, the Chinese authenticated text, is later declared to be the “inaccurate” “translated” version. The legal determinacy of bilingual legislation would also be seriously undermined (Salembier, 2004: 592). On a macroscopic level, an asymmetrical bilingualism reinforced by courts arguably fortifies a deep-rooted language ideology and power dynamic existing in the social hierarchy of Hong Kong. I argue that a congruence between *de jure* and *de facto* bilingualism is crucial to community-building in light of the new constitutional order upon the handover.

Secondly, this article proceeds to assess the Canadian model as a possible solution for tackling bilingual discrepancies in Hong Kong in order to fully implement the equal authenticity principle. It critically evaluates the constraints and sociopolitical challenges expected in the adoption of the Canadian approach, including (i) longstanding and well-

established precedents and (ii) the alleged absence of the “nation-building” factor in Hong Kong when compared to Canada. Balancing against the constraints and challenges, the author argues that a full form of the equal authenticity principle accords with the sociohistorical functions of bilingualism both in the colonial era and under the new constitutional order. The article further justifies a full form of equal authenticity and linguistic equality on the basis of legal coherence (Butterworths on Hong Kong Statutory Interpretation) and Dworkin’s principle of “law as integrity”—an ideal which requires judges to formulate a coherent and principled scheme with reference to the overall community principles.

2. Equal Authenticity Principle in Hong Kong: Asymmetrical Bilingualism

2.1. Background and Framework

As a world city where East meets West, Hong Kong features a bilingual policy that is closely tied to its identity and the power dynamics of various linguistic communities. Due to the historical roots of colonialism, under which English-speaking elites enjoyed relatively superior status and power, the perception of English as a symbol of power and elitism and Chinese as a colloquial, vernacular language is rooted in people’s minds. Such language ideology and asymmetrical bilingualism continue to exert their influence after the handover, and have been sustained by the image of globalization and modernity which English brings. Viewed in this light, art. 9 of the Basic Law, in addition to entrenching the equal status of English and Chinese in Hong Kong, also reflects the power dynamics between colonialism and postcolonialism upon handover:

“In addition to the Chinese language, English may also be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region.” (art. 9)

On a constitutional level, art. 9 of the Basic Law establishes formal bilingualism in Hong Kong by conferring official language status to both English and Chinese. In addition, it is arguably “remedial” in nature and seeks to cure the pre-existing linguistic asymmetry in Hong Kong on a constitutional level. The equal status of English and Chinese was further consolidated in s.3(2) of the OLO, which specifically provides for “equality of use” for court proceedings.

The equal authenticity principle is enshrined in s.10B(1) of the Interpretation and General Clauses Ordinance (“IGCO”), the “legislation on legislation” which elaborates on the interpretative rules for bilingual legislations in Part 2A (General Provisions as to Laws in Both Official Languages). It provides that both language versions of a bilingual state are “official, original and authoritative” expressions of the same unity of law. On

the other hand, the negative aspect of the equal authenticity principle is that neither version shall be treated as a “copy” or “translation” and neither enjoys “priority” or “supremacy” over the other text. In the context of Hong Kong, even if the majority of Chinese ordinances were declared authentic subsequent to their English counterparts, once a Chinese text is officially scrutinized by the Bilingual Laws Advisory Committee, the Legislature, and the Governor in Council (see Section 2.2 below for detailed bilingual legislative process in Hong Kong), it should not be regarded as a “mere translation” of or subordinate to the English version.

In s.10B(1)–(2), the IGCO laid down the equal authenticity principle and the “shared meaning rule”. It established a legal presumption that the bilingual texts together express and encode the same meaning. As suggested by Tabor (1980), the very concept of shared meaning may contain an element of legal fiction. It is rare that the meanings of words in two languages are identical, especially given the fact that English is an Indo-European language with an alphabetic system whereas Chinese is a Sino-Tibetan language with a logographic system. Conceptually, the “penumbra of uncertainty” surrounding the language of rules and the “open texture of language” would further complicate the process of bilingual interpretation (Hart, 1994: 123, cited in Lyons 1999: 298). Such a rebuttable presumption of the legal fiction of shared meaning rule has its utility to sustain the equal language status of bilingual texts. However, once a discrepancy is found, the presumption of shared meaning between the two texts would be rebutted.

The interpretative rules for tackling bilingual discrepancies are laid down in s.10B(3) of the IGCO, which provides a “two-step” reconciliation:

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

Where a parallel reading of the two texts reveals a difference of meaning, the Court should approach the discrepancy through two steps:

First, the Court should invoke the ordinary rules of statutory interpretation to resolve the difference. Notably, s.10B(3) is silent on what the ordinary rules applicable to statutory interpretation are. It should be pointed out that the ordinary rules of statutory interpretation, such as the literal rule, the golden rule, the mischief rule, and other Latin-based canons like the *contra proferentum* rule (construed against the party who relied on the clause), are developed along a monolingual context. To tap into the mind of the Legislature, one may ascertain the relevant rules under the Vienna Convention on the Law of Treaties (“the Vienna Convention”). In s.10B, the IGCO mirrors art. 33 of the Vienna Convention, which sets out the principles on bilingual interpretation for “treaties authenticated in two or more languages”:

“1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

Art. 31 of the Vienna Convention further lays down the “general rule of interpretation”:

- “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.”

In the Hong Kong context, one may refer to Butterworths on Hong Kong Statutory Interpretation ([3.1]–[3.5]), which includes a list of ordinary rules of statutory interpretation. The non-exhaustive list includes the literal rule, the golden rule (i.e. presumption against absurdity), the mischief rule (i.e. the presumption that the legislation sought to remedy a defect), “fair, large and liberal interpretation” (s.19 IGCO), the purposive approach, etc.

In the event that discrepancies cannot be resolved by the ordinary rules of statutory interpretation, the Court’s second step is to adopt the “meaning which best reconciles the texts, having regard to the object and purposes of the ordinance”. This purposive approach echoes the spirit of s.19 of the IGCO, which provides that an ordinance shall be construed to “best ensure the attainment of the object of the legislation according to its true intent, meaning and spirit”.

Here, it is noted that in practice, Hong Kong courts rarely dogmatically follow the two-step approach under s.10B(3) of the IGCO. Instead, the courts have generally adopted a “holistic approach”, applying the two-step approach in a “fused manner”. For example, in *Re Madam L* [2004] HKC (facts set out in Section 2.2), a case concerning the application of interim relief for mentally incapacitated persons, Justice Lam first

adopted a literal approach by setting out the dictionary meanings of both the Chinese text and the English text of the provision (i.e. Limb 1 of s.10B(3) IGCO) (see § 29–31). Once a discrepancy was found by a parallel reading of the dictionary meanings, Justice Lam proceeded to consider the purpose and object of the Mental Health Ordinance. In ascertaining the legislative intent, Justice Lam has relied on the Bill, the Hong Kong Hansard, and the Explanatory Memorandum to the Mental Health Ordinance (see § 35–37). Similarly, in *HKSAR v Tam Yuk Ha* [1996] HKCFI 445 and *Chan Fung Lan v Lai Wai Chuen* [1997] 1 HKC (facts set out in Section 2.2), both courts applied the literal rule towards the meaning of bilingual texts and then resorted to a purposive approach once a discrepancy was found.

The above observation bears two implications:

First, the golden rule and the mischief rule are blended and assimilated into the “purposive approach” in the second limb of s.10B(3). In ascertaining the legislative intent, the court has often implicitly considered the defect that the legislation sought to remedy (i.e. the mischief rule) and whether the consequence of the court’s reading would result in absurdity (i.e. the golden rule). For example, the Court in *Re Madam L* was of the view that the Mental Health Ordinance and its Bill was gazetted to remedy the problem of “dual jurisdiction”. Under the original legislation, the applicant may apply to the Hong Kong High Court or the UK Supreme Court depending on their circumstances. Such “dual jurisdiction” has caused considerable confusion to the persons concerned, and the new Ordinance aims to cure such defect (see § 35 of its judgment). On the other hand, the Court adopted a consequential analysis and observed that it would be “rather surprising” if the Ordinance (being the amendment to the original legislation seeking to provide better safeguards to patients) would deprive the patients of the benefit of the interim relief. Thus, it may be concluded that the courts have in practice blended the ordinary rules of statutory interpretation together with the purposive approach.

The second implication is that in adopting a “blended approach”, the Hong Kong courts have arguably avoided two levels of complexities: (i) complexities involved in applying the ordinary rules of statutory interpretation to a bilingual context (since those rules were primarily developed along a monolingual context); (ii) complexities involved in competing rules of statutory interpretation. On (i), as mentioned, the ordinary rules of statutory interpretation, which were developed in monolingual context, may not be suitable to resolve discrepancies in a bilingual context. For example, where a comparison between the texts reveals an obvious difference in meaning (e.g. broad vs narrow), resorting to the golden rule or the mischief rule would result only in one text prevailing over another, but would not resolve a bilingual discrepancy (Salembier, 2003: 88). On (ii), there may be conflicts even within the ordinary rules of statutory interpretation. For instance, the mischief rule and the rule that any statutory ambiguities should be construed in favour of the accused (ancillary to the rules of presumption of innocent and benefit of doubt in criminal law) is in conflict in the case of *Tam Yuk Ha*. In *Tam Yuk Ha* (see facts set out in Section 2.2), the Food Business (Urban Council) By-laws aimed at ensuring

adherence to land use as particularised in the approved plan. Applying the mischief rule would likely result in a conviction. However, applying the presumption of innocence rule would lead to the accused's acquittal on the ground that any discrepancies in law should be construed in favour of the accused (Salembier, 2003: 88). Therefore, by using a holistic and blended approach in s.10B(3), the Hong Kong Courts surpassed the complexities involved in dealing with conflicting rules of statutory interpretation.

While the legislative framework on the interpretation and reconciliation of bilingual discrepancies seems solid, it will be seen that the principle of equal authenticity may be conceded or even curtailed in practice, resulting in a dissonance between bilingualism at law (*de jure*) and bilingualism in fact (*de facto*).

2.2. Authentic, Authenticated, but not Authoritative: Chinese Version as “Mere Translation”—A Case Trilogy

As famously invented by Dworkin (1986), the imaginary perfect judge Hercules, conceptually similar to Chomsky's (1965) perfect speaker-hearer, would arrive at “one right answer” according his principle of integrity. Dworkin's (1986) thesis of “constructive interpretation” and “integrity” perceive law and interpretation as a “chain novel” under which the forthcoming chapters of judgments are written under practical constraints to achieve legal coherence. However, it will be demonstrated that in cases of bilingual discrepancies in Hong Kong, it is possible that the defendant may be found guilty under one authentic text but innocent according to the other (Leung, 2019). It will also be seen that the Chinese version, frequently declared authentic at a later time, is often not as authoritative as its English counterpart. I will critically examine the trilogy of *Chan Fung Lan* [1997] 1 HKC 1, *Tam Yuk Ha* [1997] 2 HKC 531, and *Re Madam L* [2004] 4 HKC 115 to ascertain why the equal authenticity principle may not be fully implemented by the current judicial approach in Hong Kong.

Chan Fung Lan concerns a discrepancy arising from the difference in syntactic structures of the provision. In *Chan*, where the Estate Duty Ordinance was at issue, the Chinese version contained a sentence structure under which the object must be specified in the noun phrase:

“但如財產經真誠購買人 [...] 在不知該財產有押記的情況下購入，則不得對該財產施加押記”

Here the Chinese version provided that the property shall not be chargeable against a bona fide purchaser “without notice of the subsisting charge”. In Chinese, it is not possible to stop at “(bona fide purchaser) without notice” if the subsequent elements (i.e. “notice of [...]”) are not specified. However, the English text did not include “of the subsisting charge”. Naturally, the Court was faced with the question: notice of what? Was it notice “of the subsisting charge”, as in the Chinese text? Or, alternatively, was it notice

of the “facts giving rise to the charge” (where concepts such as unconscionability or wilful blindness can be invoked)?

The Court held that the latter meaning applies. However, the reasoning of Justice Cheung is problematic. The Court reached the conclusion that it is not possible to reconcile the two texts on the grounds that (i) the word “charge” does not appear in the English text, and (ii) the Chinese text contains “inaccuracies” which should not be given effect and the “original” English legislation should be relied on. The Court went on to hold that “one must bear in mind that the authenticated Chinese text started life *simply as a translation* of the *original* legislation” and that errors are “bound to arise in such a mammoth undertaking” (i.e. bilingual drafting in the 1990s).

The Court’s approach departed from the equal authenticity principle and the reconciliation principles laid down in s.10B of the IGCO. In response to ground (i), the fact that the word “charge” is absent in the English text does not mean the English text can best reconcile the two texts. Justice Cheung’s approach of reading the Chinese text against the English enactment, and finding any discrepancy to be a “deviation” from the English version, reflected the Court’s presumption of the superior status of the English “original” text. Such presumption arguably violates the shared meaning rule and equal authenticity principle laid down in s.10B(1)–(2), which provide that the Chinese authenticated text is neither the mere translation of nor subordinate to the English text (Tam, 1999: 353). Justice Cheung’s reasoning is flawed on the grounds that (i) it neglected the starting point that the two texts had a shared meaning and (ii) when discrepancies arose, the Court failed at attempting to reconcile the texts at all as it bypassed the ordinary interpretative rules and purposive approach entrenched in s.10B(3).

Secondly, in response to the “inaccuracies” reasoning, the possibility that a text contains inaccuracies cannot be ruled out. In my submission, once a text has been scrutinized by the Bilingual Law Advisory Committee and officially authenticated by the Legislature, any “inaccuracies” should not be inferred unless supported by solid evidential basis. The authentication process of the Chinese version has gone through stringent official scrutiny by various power organs. The work of enacting bilingual legislations started in the late 1980s, when the Official Languages (Amendment) Ordinance 1987 was adopted in preparation for the 1997 handover of sovereignty. The 1987 OLO provided for the legal basis of the establishment of the Bilingual Laws Advisory Committee, which consists of judges, lawyers, and academics, to scrutinize the Chinese texts drafted by the Legal Department of the Attorney General’s Chambers, i.e., the equivalent of the Department of Justice in post-handover era (HKSAR, 1998a). Further scrutiny was conducted by the Legal Service Division of the Legislative Council Secretariat and the Legislature as a whole before the Governor-in-Council’s official authentication of the Chinese provisions (see HKSAR, 2011).

Despite the Chinese text’s “translated” nature, it is inappropriate for the Court to regard the Chinese version as having “simply started life as a translation” given the strict control of official scrutiny. The “mere translation” reasoning would have the undesirable

effect of consolidating a longstanding linguistic asymmetry in courts and undermining the authority of the Chinese version (Leung, 2019: 194). In case of alleged “translation inaccuracies”, the Court must first adhere to the starting point of shared meaning and equal authenticity, and attempt to reconcile the texts under the rules of s.10B. The Court should not leap from “discrepancy” to “inaccuracy” when no attempt was made for reconciliation. Any inaccuracies must not be lightly inferred unless evidence on the legislative intent (e.g. LegCo discussion papers, meeting notes of the Bilingual Laws Advisory Committee) revealed inaccuracies.

Further, as pointed out by Tabory (1980), the Court must be cautious in ruling that the original text should prevail because one cannot overlook the possibility that even the original source can contain drafting defects. It is possible to have a defective “original” English text with a correct authentic Chinese version since the Law Draftsmen in Hong Kong may have remedied the original drafting errors (see also Fung, 1997: 224; Salembier, 2003).

Thus, the decision in *Chan Fung Lan* represented a “wrong turn of law” based on its “mere translation” reasoning, which curtailed the equal authenticity principle. As noted by Tabory (1980) in the context of art. 33 of the Vienna Convention, the Court should not place a premium on the “drawn up” text. Justice Cheung’s reasoning would arguably render all Chinese authenticated texts with a “translated nature” (more than 1,500 legislations and subsidiary regulations) to be a mere subordinate to the English text (Cheung, 2015).

How shall the Courts reconcile the court’s reasoning in *Chan Fung Lan* with the regime in IGCO? One possible remedial interpretation is based on s.10C of the IGCO, which provides that “where an expression of common law is used in the English language text [...] the Ordinance shall be construed in accordance with the common law meaning of that expression”. The term “bona fide purchaser for valuable consideration without notice” (also known as the “Equity’s Darling”) is a common law expression in the law of property for the protection of innocent third parties.¹ The expression “notice” is a “legal homonym”, a variety of vocabulary coined by Tiersma (1999), which contains a technical meaning at law but has a wider common usage. Terms such as *consideration*, *trust*, and *relief* are all legal homonyms which require special legal knowledge and whose true meaning depends on the specific context. Here, “notice” may mean “notification” or “the fact of paying attention” in a wider common usage (Lexico Oxford). However, “notice” at law is a technical term which can be roughly translated as “knowledge”. It can be further subcategorized into “actual”, “constructive”, and “imputed” notice (Goo & Lee, 2015: 432). Constructive notice and imputed notice are no more than legal fictions for the attribution of liability on grounds of unconscionability. Therefore, it can be said that constructive notice and imputed notice completely depart from the ordinary meaning

¹ At law, equitable proprietary rights bind all persons except “Equity’s Darling” (a bona fide purchaser for value without notice); see Goo & Lee, 2015: 427–460.

of “knowledge” since they are judicial inventions which do not require awareness on the part of the litigant.

On the other hand, the Chinese expression “真誠購買人 [...] 在不知該財產有押記的情況下購入” could not exhaustively encode the common law sense of “notice” and was thus unable to capture its underlying connotations (including the different shades of notice: actual, constructive, and imputed). The Chinese text only encapsulated the denotation (i.e. dictionary meaning) of “notice” without looking into the connotations (i.e. associated network of concepts) of common law rules (Becker & Bieswanger, 2006). It is against such backdrop that the discrepancy arose.

In my view, Justice Cheung could have relied on s.10C (common law expressions) as an ordinary rule of statutory interpretation (s.10B(3) step one) to reconcile the texts without resorting to the “mere translation” reasoning.

Unfortunately, the “mere translation” reasoning was further fortified in *HKSAR v Lau San Ching* [2004] 1 HKLRD 683 (§ 55), where the Court gave automatic preference to the English text based on a simple comparison of the time of enactment. The Court emphasized the fact that the English “original” legislation was enacted as early as 1932 whereas the Chinese text was authenticated only in 1992 (Cheung, 2015).

2.3. Traces of the Canadian Approach:

Tam Yuk Ha and *Re Madam L*

Despite the questionable line of authorities in *Chan Fung Lan* and *Lau San Ching*, there is arguably a parallel line of cases which did not endorse the “mere translation” reasoning.

The *Tam Yuk Ha* case [1996] HKCFI 445 contained an alternative reasoning which was expressly rejected in *Chan Fung Lan*. In *Tam Yuk Ha*, the focus was on the discrepancy between “addition to the plan” and “增建工程” (which involves a narrower meaning of “building additional *construction* works”).

The facts of *Tam Yuk Ha* are as follows. The defendant was a licensee of a fresh provision shop selling pork and fish. Without obtaining permission from the Urban Council, the defendant put metal trays, a chopping block, and a table on the pavement outside the shop. She was then charged under by-law 35(a) of the Food Business (Urban Council) By-laws, which stipulates:

“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 *alteration or addition* which would result in a material deviation from the *plan* thereof approved under by-law 33; [...]” (emphasis added)

The “plan” referred to in by-law 35(a) is required to include items such as “space allocated to the cooking [...] of open food”, “space allocated to the storage of any kind of open food”, “sitting of all furniture of a substantial and permanent nature”, etc. Here, the provision

did not merely include fixtures and fittings but was extended to space for various purposes. Any spatial addition needs to be licenced in the plan. In the defendant's plan, no space for placing metal trays, chopping blocks, and tables was provided.

In reconciling the discrepancy, Justice Yeung's reasoning was that the English term "addition to the plan" was ambiguous whereas the Chinese version "增建工程" was "clear and plain". It followed that Justice Yeung held that the Chinese text should be given effect, meaning that only *structural addition* is penalized.

On Justice Yeung's reasoning, the reconciliation of texts via regard of one text as "ambiguous" and another text as "clear" was at first sight unsupported by precedents or statutes (Fung, 1997: 222). However, even if Justice Yeung did not expressly spell out his legal basis, the "clear meaning prevails" rule in a "clear vs ambiguous" scenario actually has its roots in Canadian jurisprudence (Sullivan, 2014: [5.26]). As stated in Sullivan (2014), where one text is ambiguous while the other is clear, the presumption of the shared meaning rule is not rebutted. Here, the Canadian Court would adopt the "common meaning" of the two texts to clarify the ambiguity. Such an approach, which adheres to the shared meaning presumption, proceeds on the basis that both texts express a unity of law and the clear text can serve to clarify any ambiguity of the other text. Beaupré (1986) succinctly summarized the rule in a formula:

Ambiguous Text 1 (Either A or B) + Clear Text 2 (A only) = A

Here, the English "addition to the plan" is arguably ambiguous since it can either mean "construction or building works" (restrictive meaning, same as the Chinese text), or "any addition to the plan including the addition of space or substantial furniture (metal trays and tables)". Proceeding on the presumption that both texts express the same content, the clearer Chinese term ("增建工程") could come to the Court's aid in clarifying the ambiguity of the English text. Such an approach of linguistic reconciliation is acknowledged in DOJ's Paper on bilingual discrepancies, where the example of "entering and leave" and "進出" was used (HKSAR, 2010: 23). In the example given by DOJ, the Chinese "進出" is ambiguous and may mean: (A) a vehicle which is either entering or leaving the area (i.e. not within the designated zone), or (B) a vehicle which, having entered the area, is now leaving the area (i.e. already within the designated zone). The DOJ commented that one easy route would be to take meaning (A) since it was the "common meaning" shared by both English and Chinese. However, the DOJ also emphasized the need to take into account the overall object and purpose as stated in s.10B(3).

In my view, Justice Yeung's approach in *Tam Yuk Ha* only partially adheres to the shared meaning rule and equal authenticity principle since it first seeks to resolve the ambiguity by retaining the presumption that both texts expressed the same content. However, as reflected in the judgment of the Court of Appeal ([1997] HKCA 711), its decision was still wrong since it failed to construe the ambiguity against the object and purpose of the legislation in question. Both s.10B(3) and s.19 of the IGCO require the Court

to adopt a purposive approach. In my opinion, the starting point should be the presumption of the shared meaning rule (s.10B(2)), followed by a double-check against object and purpose (s.10B(3) and s.19 IGCO). This would be a desirable judicial approach which duly respects the equal authenticity principle. This also aligns with the Canadian approach, which ultimately favours the purposive approach (Salembier, 2003: 93).

Finally, *Re Madam L* [2004] 4 HKC 115 offers insights into an optimal balanced approach which attaches due weight on both the shared meaning rule and the need to take into account the object and purpose of the legislation as a whole. In *Re Madam L*, the person concerned (Madam L) is a mentally incapacitated person (MIP) who sold her property at apparent gross undervalue. A Mr T received the entirety of the sale proceeds. The Director of Social Welfare sought to set aside the impugned transaction pursuant to s.10D of the Mental Health Ordinance, which applies where “the Court is of the opinion that it is necessary to make immediate *provision* for any of the matters referred to in *section 10A(1)*”. The latter section stipulates that:

“The Court may, with respect to the property and affairs of a mentally incapacitated person, do or secure the doing of all such things as appear necessary or expedient –

- a) for the maintenance or other benefit of that person;
- b) for the maintenance or other benefit of members of that person’s family;
- c) for *making provision* for any other person or purposes for whom or for which the mentally incapacitated person might be expected to provide if he were not mentally incapacitated; or
- d) otherwise for administering the mentally incapacitated person’s property and affairs.”

In *Re Madam L*, the Court was faced with a discrepancy between the English version “making provision for” and the Chinese “提供款項” (literally translated as “provision of funds”, which arguably has a narrower meaning and is a subset of “making provision for”) in s.10D of the Mental Health Ordinance.

The Court first sought to reconcile the meaning of both texts by consulting their dictionary meanings. In its attempt to reconcile the meaning of the two texts, the Court referred to the Canadian principles of bilingual interpretation (§ 41):

“It is not enough to say, if one version is clear while the other is unclear, that the clear version shall be preferred and applied. Thorson P emphasized that the clear version must be in harmony with a reasonable construction of the unclear one. But what is reasonable can only be determined by reference to the whole Act. Both versions, in such a case, must be compared and, where possible, justified; one must attempt to extract a mutually compatible rendering. If that is impossible, the context naturally rules the inevitable choice of the version to be preferred.” (Beaupré, 1986: 25)

The above text revealed an approach which struck a balance between the shared meaning rule and the purposive approach. This intricate balance summarizes the essence of s.10B(1)–(3) of the IGCO which stems from the premises of equal authenticity and the shared meaning rule, to the purposive approach in case of discrepancies. The Court should (i) firstly attempt to construe the two equally authentic texts on the basis of the

shared meaning rule; failing this, the Court should (ii) move on to construe the discrepancy in light of the object and purpose of the enactments. For (i), courts should first use ordinary rules of statutory interpretation before resorting to the purposive approach (s.10B(3) IGCO). This logical framework perfectly sums up the gist of s.10B IGCO and is arguably a more balanced approach than Justice Cheung’s approach in *Chan Fung Lan* and Justice Yeung’s approach in *Tam Yuk Ha*. Such a framework has its roots in Canadian jurisprudence (Salember, 2003: 88).

Upon consulting the dictionary meanings of the texts, the Court held that the ordinary plain meaning of “provision” is not limited to the Chinese version of “provision of funds”, but is extended to cover the making of non-financial arrangement for certain matters, including the power to set aside an impugned transaction (§ 31 of *Re Madam L*). The presumption of shared meaning rule was hence rebutted.

After rebutting the shared meaning rule under s.10B(2), Justice Lam proceeded to examine the purpose and object of the Mental Health Ordinance (s.10B(3)). Reading the s.10D against s.10A(1), which provides for wide powers of the Court to grant relief to MIPs, the Court held that the Legislature could not have intended to curtail the wide powers of the Court to administer the general welfare of the MIPs by limiting it to “the provision of funds” (as in the narrower Chinese text) only. Notably, the Court blended the analysis of purposive approach (Limb 2 of 10B(3) IGCO) together with ordinary rules of statutory interpretation, e.g., presumption against absurdity and the golden rule (Limb 1 of s.10B(3) IGCO). Here, the Court’s holistic reading of the Ordinance also accords with s.19 of the IGCO, which requires a “fair, large and liberal construction” that “best ensures the attainment of the object of the Ordinance according to its true intent, meaning and spirit”. Justice Lam further reviewed the legislative intent, including the Explanatory Memorandum of the 1997 Bill and the Hong Kong Hansard 1996/97 (Limb 2 of s.10B(3) IGCO) and confirmed his reading.

However, it is regrettable that the *Re Madam L* case was only an “isolated island” in the sea of precedents. So far, to the best of the author’s knowledge, there has not been any judicial approval of the balanced approach adopted by Justice Lam.² In particular, it remains to be seen that whether the Canadian jurisprudence would be affirmed by subsequent case law, given that the Hong Kong framework largely followed the Vienna Convention instead of the Canadian approach. Second, the ruling on bilingual discrepancy was an “obiter” (non-essential ruling), which is technically non-binding but only persuasive on subsequent cases. Hence, it is unfortunate that mere translation reasoning, as in *Chan Fung Lan*, remains the current prevalent judicial approach.

² As of 13 May 2020, there have only been two cases considering *Re Madam L* [2004] 4 HKC 115, which are *Easy Fortune Property Ltd v Lai Moon Wing* [2008] HKCU 70 and *Re TBS* [2019] HKCFI 2919. Both concerned applications for relief under the Mental Health Ordinance, but neither touched upon or affirmed the principles of bilingual discrepancies set out in *Re Madam L* (CaseBase of Lexis Advance, Hong Kong).

2.4. Consequences and Implications of De Facto Limited Form of Equal Authenticity

The above demonstrates that the current judicial approach in Hong Kong has the tendency to curtail the equal authenticity principle by resorting to “mere translation” reasoning, leading to an asymmetry between bilingualism at law and in practice. This phenomenon is significant given its serious implications on two levels: microscopic and macroscopic.

On a microscopic level, access to justice for monolingual Chinese-speaking litigants (especially unrepresented litigants) is denied. On a macroscopic level, bilingualism and equal authenticity principle are crucial to the community-building and social unity of Hong Kong under the new constitutional order. In a wider theoretical perspective, it is also intrinsically connected to the importance of legal coherence and Dworkin’s “law as integrity” ideal, a point to which I shall return in Section 3.3.

On a microscopic level, a limited form of the equal authenticity principle may deny access to justice for monolingual language speakers who relied on a text which was later declared as a “mere translation” subordinate to another text (Salembier, 2004: 584). The certainty of law and the language rights of the monolingual speakers would also be undermined. According to a Hong Kong Census report (HKSAR, 2019: 81) on the use of language, more than 92.7 % reported Chinese (Cantonese or Mandarin) as their mother tongue, whereas only 1.4 % identified English as their mother tongue. 32.2 % of the respondents described their language competence in written English as “not so good” or as “no knowledge” (HKSAR, 2019: 82). These figures reflect that Chinese undoubtedly is the predominant language among the population. Imagine a scenario in which a monolingual Chinese-speaking unrepresented litigant has relied on the Chinese authentic text which prohibits any “增建工程” (“additional construction or building works”) on his site. The unrepresented litigant, who has little or no language competence in English, may have conducted his affairs proceeding on the assumption that the Chinese authentic text would be certain and authoritative. The authentication process itself, which involves the publication of laws in the gazettes, may arguably constitute a “speech act” by the government through the conferral of authority on the texts (Austin, 1962). Greenberg (2010) argued that the communicative content of legislation goes beyond the linguistic meaning, and includes normative and symbolic purposes such as fostering the legitimacy of legal authorities. Such a speech act elicited through the IGCO, OLO, and Basic Law (a “declaration” of linguistic equality under the classification of speech acts in the sense of Searle, 1969), which is composed by a collective authorship with a collective intent, exerts its perlocutionary force to generate the legitimate expectation for unrepresented litigants that the authentic text can be relied upon (Durant & Leung, 2016: 58). It would be unfair for the Court to subsequently declare the Chinese text as a “mere translation” containing “translation errors” since the Chinese version is the only accessible source of law for these unrepresented litigants.

It has been argued that bilingualism may actually cause more interlingual indeterminacies and hence would undermine access to justice for monolinguals since they could never be sure of the meaning of both texts (Leung, 2019: 250). Yet we are not dealing with the normative position of whether bilingualism should be implemented in Hong Kong. Once bilingualism has been put into operation, the only fair solution to monolinguals is to respect the equal authenticity rule in order to ensure their access to justice and the certainty of law.

As observed, there can be multiple sociopolitical missions for legal multilingualism in a jurisdiction, which include international cooperation (as in the Vienna Convention) and integration (as in the EU) (Leung, 2012: 488). In Hong Kong, one can trace the missions of bilingualism back to the 1967 riot and social disturbances which indirectly pushed for the enactment of the Official Languages Ordinance in 1974 (Zhao, 1997: 295). Historically, Hong Kong was a monolingual jurisdiction under the British colonial government for over a hundred years (Tam, 1999: 353). The 1967 riots and social unrest revealed a deeper conflict between the local Chinese population and the British colonial government, forcing the colonial administration to introduce an extensive reform programme by Governor MacLehose beginning in 1971 (Cheung, 2009: 138). As stated in the *Report of Commission Inquiry into the Kowloon Disturbances 1966*, the Commission concluded that one cause of the social grievance was the fact that the language and work of the law and administration were not properly accessible to the local population (Cheung, 2015: [4.009]). Viewed against the historical background, the bilingual policy was rooted in the right of access to law, justice, and administration for the general public as part and parcel of the colonial government's reform (Cheung, 2009: 139). It is also noted that the mission of multilingualism to increase access to law for certain communities can be found elsewhere in the world, such as the German-speaking community in Belgium (Leung, 2012: 489).

Therefore, undermining the equal authenticity principle would have serious implications for the right of access to justice and law, particularly for unrepresented monolingual litigants. People have a legitimate expectation that an authentic version, regardless of their time of authentication or enactment, should provide sufficient certainty to guide their course of action. It would be unfair if an implicit preference were placed on the English text since the Chinese text is their only accessible source of law (Leung, 2019: 192; Salembier, 2004).

Secondly, on a macroscopic level, incongruence between de jure and de facto bilingualism would be un conducive to the underlying objectives of bilingualism. As mentioned, the mission of legal multilingualism varies in different countries. In Hong Kong, I submit that decolonization and community-building are the major driving forces for the continuous implementation of bilingualism in the post-colonial era. As discussed, bilingual policy in Hong Kong originated in an effort to bridge the gap between the British colonial government and the local population and to enhance the locals' access to law and government. To a large extent, this image of "East meets West" manifested by bilingualism still holds true in a post-colonial era. In this sense, bilingualism—originally an

effort to foster social cohesion—has “crystallized” into a symbol of globalization and cultural diversity of Hong Kong as Asia’s World City under the new constitutional order. Official languages often connote a sense of symbolic power, and bilingualism is often associated with national identity and pride (Bourdieu, 1982: 47; Leung, 2019). As stated by Bourdieu (1982), “the granting of formal equality symbolically negates the social hierarchy among languages and the communities they index. It communicates a sense of solidarity that may facilitate community building”. Under the new constitutional order, adherence to the equal authenticity principle and symmetrical bilingualism is arguably the most ideal arrangement which is (i) coherent with “One Country, Two Systems” and the Sino-British Joint Declaration, (ii) reflects the historical roots of bilingual reforms in the colonial past, and (iii) facilitates future community building by reaffirming the values and identities in the post-colonial era.

On a theoretical note, the coherence principle and Dworkin’s theories of law as integrity and constructive interpretation further justify the implementation of equal authenticity rule in Hong Kong. I will further explore this concept in Section 3.3. Given the significant implications of a curtailed equal authenticity principle on both the microscopic and the macroscopic levels, it is useful to assess whether the Canadian approach may serve as a solution for Hong Kong.

3. Can the Canadian Model Provide a Solution?

3.1. Examining the Canadian Judicial Approach

Canada is a bilingual and bijural jurisdiction with elements of English common law and French civil law (Bastarache, 2012: 162). s.133 of the Constitution Act 1867 requires that Acts of the Parliament of Canada must be “printed and published” in both English and French. The requirement was subsequently interpreted by the Supreme Court of Canada to mean that legislation must be “enacted” in both languages (Sullivan, 2014: [5.3]).

The equal authenticity principle was enshrined in the landmark case of *Canadian Pacific v Robinson* [1891] S.C.J. No.26, which held that:

“[W]hether the article was first written in French or in English is immaterial. In the case of ambiguity, where there is any possibility to reconcile the two, one must be interpreted by the other.”

As seen above, the time of writing is clearly immaterial. The essence of the equal authenticity principle dictates that no explicit or implicit preference should be given to one text, and no version should be regarded as subordinate to another merely because of its translated nature (Bastarache, 2012: 162). The judicial approach in Hong Kong which implicitly placed a premium on the English “original” text would be inconsistent with the rule. By the same logic of *CP v Robinson*, the time of enactment should also be taken as immaterial in Hong Kong so long as both texts have gone through the official scrutiny of the

Bilingual Laws Advisory Committee and the Legislature.

The operation of the equal authenticity principle and the shared meaning rule was demonstrated in *R v Daoust* [2004] 1 S.C.R. 217, which laid down a three-step test for tackling bilingual discrepancies (Bastarache, 2012: 165). The first step is to determine whether there was a bilingual discrepancy at all. If not, the Court will extract the common meaning of the two texts (see Beaupre’s formula in Section 2.3) and test it against the legislative intent. In the case that the Court has decided that there was a bilingual discrepancy, the second step is to determine the nature of conflict between texts. Different types of discrepancies include (i) the “out-and-out” conflict, where both texts are clear and no shared meaning can be found, and (ii) the “one text is broad while the other is narrow” scenario.

As mentioned, one possibility is that “one text is clear while the other text is ambiguous”, as implicitly found in the Justice Yeung’s reasoning of *Tam Yuk Ha*. Justice Yeung’s approach, which favours the “clearer” meaning of “增建工程” (additional construction works) instead of the “ambiguous” text “addition to the plan”, is supported in *R v Daoust* and *Sullivan on Construction of Statutes* [5.26]. The only defect in Justice Yeung’s reasoning was that he neglected to “double-check” the common meaning against the object and purpose of the legislation. The clear meaning approach is illustrated in *Azdo v Canada (Minister of Employment and Immigration)* [1980] F.C.J. No. 72, where the Court was faced with an alleged difference between “guardian” and “tuteur” in the Immigration Act 1976. Here, the English word “guardian” is ambiguous: it can be taken to mean either (i) someone who looks after someone (plain ordinary meaning), but not a legal guardian; or (ii) a legal guardian in the technical sense. Since the French word “tuteur” could mean only the narrower legal sense, the Court made use of the clear text to clarify the ambiguity in the English text. Here, the presumption of the shared meaning rule is retained with the adoption of the common meaning. In addition, the Canadian Court verified its reading by cross-checking against the Parliament’s intent; the purpose of the legislation was to require a minor to have a legal guardian when he/she is subject to a deportation order.

It is submitted that the Canadian approach stands in harmony with s.10B of IGCO in Hong Kong. It requires the Court to firstly construe the texts within the boundary of the equal authenticity rule (s.10B(1)–(2)). In cases of discrepancy, the Court takes into account the ordinary rules of statutory interpretation and the object and purpose of the enactment (s.10B(3)).

3.2. Constraints and Sociopolitical Challenges in Adopting the Canadian Model

While it is normatively desirable to adopt the Canadian Model, one needs to consider the possible constraints and sociopolitical challenges involved in transplanting this judicial approach.

The first hurdle is the well-established line of precedents along the “mere translation” reasoning in *Chan Fung Lan*. As discussed, the “mere translation” reasoning was endorsed in cases such as *HKSAR v Lau San Ching* [2004] 1 HKLRD 683, where the Court explicitly compared the years of enactment (the English version was enacted in 1932 whereas the Chinese version was enacted in 1992) and placed supremacy on the “original” English text (Cheung, 2015: [4.071]). The common law principle of binding precedents is a pro-status quo rule which ensures legal certainty and the legal hierarchy by requiring judges to be bound by a decision once rulings on the subject have been laid down by upper courts.

However, *stare decisis* is far from a rigid, dogmatic rule. Instead, as argued by Manchester and Salter (2011), a close examination of cases would reveal the “dynamics of precedents and statutory interpretation”; precedents evolve over time. For example, until the decision of *W v The Registrar of Marriages* [2013] HKCFA 39, the terms “woman” and “female” under s.40 of the Marriage Ordinance (“MO”) precluded post-operative transsexuals. s.40(2) MO reads as follows:

“The expression *Christian marriage or the civil equivalent of a Christian marriage* (基督教婚禮或相等的世俗婚禮) implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others. (Amended E.R. 4 of 2019)”

In the case, the applicant W was a post-operative male-to-female transsexual. W sought a declaration from the Registrar of Marriages as to whether she could marry her boyfriend in Hong Kong. The Registrar of Marriages denied their marriage; thus, W lodged the current judicial review and appealed all the way to the Court of Final Appeal. The Court found that the MO was derived from the case of *Corbett v Corbett* [1971] P 83, in which the English Court affirmed the Christian nature of marriage encoded in the Matrimonial Causes Act 1965. The MO was fundamentally rooted in the Christian notion that marriage is for procreation, and the legislative intent was to define marriage as a civil union between opposite sexes as judged by the chromosomal/biological factor. However, the Court went on to hold that such original statutory construction should be struck out on the ground that it violated the freedom of marriage guaranteed under art. 37 of the Basic Law. Hence, the old statutory interpretation based on Christian marriage was invalidated. The “female” in s.40 of the MO was given a liberal interpretation to encompass post-operative transsexuals.

The above example demonstrates that even a rule rooted in statutes and longstanding precedents can evolve via the dynamics of interpretation. The seemingly rigid *stare decisis* rule maintains flexibility for judges to manoeuvre. In our scenario, firstly, *Chan Fung Lan* is not a ruling by the Court of Final Appeal (“CFA”) but a decision by the Court of First Instance. Neither the Court of Appeal (“CA”) nor the CFA has revisited the “mere translation” reasoning in *Chan Fung Lan*, leaving room for judicial scrutiny. Second, there are parallel cases such as *Re Madam L* (discussed in Section 2.3) which did not adopt *Chan*’s reasoning. Hence, it is argued that the interpretive approach on equal authenticity and

bilingual discrepancies should develop along the obiter of *Re Madam L* and the Canadian approach, and *Chan Fung Lan*'s "mere translation" reasoning should be rejected by the upper courts in future occasions. The overreaching purposive approach in multilingualism and the dynamics of precedents are fertile soil for judicial activism.

One may counter-argue that the second obstacle is that Hong Kong arguably lacks the sociopolitical goal of nation-building element as in Canada in the implementation of bilingualism. Sociopolitical motivations are crucial driving forces behind legal bilingualism (Leung, 2013: 222). It has been noted that asymmetrical bilingualism may be a pragmatic solution balancing decolonization and the stability of the common law system (Leung, 2013). The arrangement may turn out to be only a transitional policy between 1997 and 2047. However, this article submits that linguistic equality has a crucial role in the "community-building" of Hong Kong. A judicial approach which adheres to linguistic equality is preferable not only on a legal basis (in that it aligns with s.10B IGCO and the equal authenticity rule), but also from a sociological perspective. An intricate symmetry in linguistic representation is symbolic of the past and future of Hong Kong from the colonial era to the new constitutional order under "One Country, Two Systems".

As Greenberg (2010) argued, law is an expression which encompasses elements beyond mere words. It encapsulates the normative and symbolic functions of a community. On the one hand, bilingualism reflects the history of the 1967 riot and social disturbances in Hong Kong and symbolizes the power struggle and power dynamics between the British ruling class and the local population. On the other hand, the legal narrative of equal authenticity has its function in community-building under the new constitutional order. As expressed by Bourdieu (1982: 47), the use of languages can be seen as a symbolic capital. In Hong Kong, the power dynamics between English and Chinese reflect an intricate balance between globalization and decolonization (Evans, 2010: 153). The relationship between the two official languages has been viewed as diglossic, where English is the primary medium for professional workplace communication (arguably serving the "high" function for bridging Hong Kong with the international commercial world) whereas Cantonese (the local spoken form) functions as a vernacular language used in daily conversation among the local community (Pennington, 1998, cited in Wong & Chan, 2017: 439). The dynamics between the "intensification of globalization", which demands high proficiency in professional English, and the city's financial and political reintegration with China in the post-handover era, has primarily contributed to the current linguistic landscape in Hong Kong (Evans, 2010: 155).

On the one hand, the importance of English as a global business lingua franca in Hong Kong can be highlighted by the top-down effort of launching the "Workplace English Campaign", which sought to enhance business-related English skills in the local working class, as well as boosting the institutional role of English in Hong Kong, particularly in the domains of government, law, and education (Evans & Green, 2001: 248). As observed in Evans (2011: 301), there has been a strong tendency toward the use of written English especially in the legal sector. Michael Tien, Chairman of the Workplace English

Campaign, has remarked that any decline in the use or quality of English would undermine the city's competitiveness, and may eventually consolidate the perception of Hong Kong as “just another” Chinese city (Regan, 2000, cited in Evans & Green, 2001).

On the other hand, after the handover, the Hong Kong government has implemented a series of initiatives to reinstate the official status of Chinese (both Mandarin (i.e. Putonghua) and Cantonese). For example, the medium of instruction for almost 70 % of the city's secondary schools was converted from English to Chinese (Zeng, 2007, cited in Ng & Cavallaro, 2019). A language policy of “biliteracy and trilingualism” (兩文三語)—i.e., the use of English and Chinese (Cantonese and Mandarin)—has been widely promoted (Ng & Cavallaro, 2019: 31). Cantonese, as a variety of Chinese, functions as the unmarked language of spoken communication in informal situations (Evans, 2010: 165). Further, amid Hong Kong's increasing reintegration with Mainland China, Mandarin has become a compulsory language subject in Hong Kong primary and secondary schools since 1998 (Wang & Kirkpatrick, 2015, cited in Ng & Cavallaro, 2019). It has even been predicted that Mandarin may potentially surpass the influence of Cantonese and English as the major professional language in Hong Kong due to the growing influence of China-related commercial activities (Simpson, 2007, cited in Ng & Cavallaro, 2019).

In light of these circumstances, the narrative of linguistic equality shapes the identity of a community—a vibrant world city where East meets West—and unifies a diversified community under the new constitutional order. Strict adherence to and application of the equal authenticity rule is thus instrumental to the community-building of modern Hong Kong.

3.3. Coherence and Law-as-Integrity as the Ultimate Justification

Upon evaluating the constraints and sociopolitical challenges of adopting the Canadian model, I will argue that the ultimate theoretical justification for the transplantation of the Canadian approach lies in (i) legal coherence and (ii) law as integrity.

As Dworkin (1986) observed, law is fundamentally “interpretative”. It is a practice which requires the interpreter to retrieve social norms and values from a shared community. The interpretation of law is impossible unless the participants realize that the interpretation of law occurs within a larger framework of community. A judge must attempt to construe the black letter law against the values and norms of the social institution as a whole to reach the right answer. This is known as “law as integrity”—a coherent interpretive practice involving a holistic approach towards the social institution as a whole. The interpretative process, under which judges retrieve the community principles to reach the “one right answer” which fits the coherent scheme of justice in society, is known as “constructive interpretation” (Dworkin, 1986).

To illustrate the concepts of “law as integrity” and “constructive interpretation”, Dworkin used the metaphor of law as a “chain novel” in which judges are consecutive co-authors (Dworkin, 1986: 228). Three interpretive stages are involved in completing the “chain novel”:

- (i) Pre-interpretive stage: the judge has to retrieve the relevant materials from the principles of the community and from law which “fit” the entire social institution;
- (ii) Interpretive stage: a justification for the interpretation is settled upon; and
- (iii) Post-interpretive stage: lastly, the judge fine-tunes and re-adjusts its interpretation so as to better serve the community as a whole.

To write a sound judgment coherent with the overall scheme of community, each judge has to interpret the pre-existing legal framework by retrieving the relevant statutes and precedents in the pre-interpretive stage. In the interpretive stage, a judge settles upon a justification of law. Finally, the Court has to fine-tune and re-adjust the interpretation by checking it against the object, purpose, and overall socio-historical scheme to give due consideration to the principles of community.

To further illustrate his theory of “law as integrity”, Dworkin invented the imaginary perfect judge: Hercules. Take the case of *Brown v Board of Education of Topeka* 74 S. Ct. 686 as an example. *Brown* concerned the constitutionality of the arrangement of racial apartheid in public schools. Before *Brown*, it had been held that racially segregated schools were legal, so long as the facilities for blacks and whites were equal (*Plessy v Ferguson* 163 U.S. 537). This “separate but equal” principle was challenged before the US Supreme Court in *Brown*, as the applicants argued that they were deprived of the “right to equal protection of laws” guaranteed by the 14th Amendment (Franklin, 2005: 4). If the judge concerned himself solely with consistency by following the long line of binding precedents, he would have neglected the fundamental principles of the community: racial equality and social justice. Hence, in the pre-interpretive stage, the materials to be retrieved include not only the past decisions in the jurisdiction, but also the principles of justice and human rights found in the community as a whole. In addition to grounds of civil liberties, Klarman (2004) observed that the Cold War imperative further boosted the movement of racial equality in the ruling of *Brown*.

First, at the time of ruling, the Great Migration in the US had substantially empowered the black community in terms of ballot access. Furthermore, on an international level, the Cold War had incentivized the US to achieve racial equality to avoid the emergence of communism within the black community. Third, because of the advancement of transportation and television networks, the US had undergone a period of homogenization which largely generated close links between races. In *Brown*, the Court held that the apartheid arrangement was unconstitutional since it violated the applicants’ constitutional right to “equal protection of laws” guaranteed under the 14th Amendment (Dworkin, 1986: 220).

The case of *Brown* illustrated that even if there has been an entrenched line of precedents, the Court must seek to retrieve the community principles to achieve legal coherence and the integrity of law. The “*raison d’être*” of integrity in law is the need for a coherent scheme of justice within the community (Allan, 2014: 12). Law, as part of the wider socio-political framework, must reflect values, standards, and principles found in the community.

In response to the obstacle of the rule of *stare decisis*, to borrow Dworkin’s theory, the “integrity” of law is distinguished from “consistency” since the former demands a more dynamic approach to retrieving community principles and values (Dworkin, 1986: 220). Therefore, in addition to relying merely on precedents, the Court should look further to the legislative intent and purpose of bilingualism in adjudicating cases. Only through such an approach can the court construct a coherent scheme of principles under the overall constitutional regime.

The case of *W v The Registrar of Marriage* (discussed in Section 3.2), a landmark ruling delivered by the Hong Kong Court of Final Appeal, provides a cogent example of how Hong Kong courts have achieved the ideal of law as integrity by liberally construing the meaning of “female” found in the Marriage Ordinance. First, the Court rejected the principle of “consistency” in its legal reasoning by refusing to follow the original Christian meaning of “female”, defined exclusively by biological factors, in the *Corbett* case. Opting for the principle of “integrity”, the Court first retrieved the community principle that procreation is no longer the sole purpose of marriage in modern society to justify its liberal construction. Next, the liberal construction of “female” was further supported by the wider constitutional framework: freedom of marriage is guaranteed by art. 37 of the Basic Law and art. 19 of the Hong Kong Bill of Rights. This is a prime example illustrating that in order to achieve a coherent scheme of community principles, the courts may abandon the well-entrenched line of precedents in favour of an approach which is more coherent with the existing sociopolitical and constitutional framework.

To put Dworkin’s “constructive interpretation” and “law as integrity” into the context of Hong Kong, the adjudicative integrity of law requires the Hong Kong courts to formulate a judicial approach which is in coherence with the overarching principles of the community. Dworkin’s adjudicative principle stipulates that the interpretative practice of law in courts should ideally combine both “backward-looking” and “forward-looking” elements. Both angles must be incorporated into the interpretative approach of Hong Kong Courts towards bilingual discrepancies in statutes. Looking backwards, Hong Kong courts should trace the overriding intent of bilingualism as a sociolegal scheme under the colonial government following the 1967 riots and civil unrest. Looking forward, the function of bilingualism for community-building and as a symbol of Hong Kong’s convergence of Eastern and Western cultures remains important in the post-handover Hong Kong. The East-meets-West narrative provides a strong motivation which fuels the continual adoption of bilingualism in Hong Kong; the trinity of English, Cantonese, and Mandarin will no doubt continue to be the dominant languages in Hong

Kong. The equal authenticity rule, enshrined in s.10B of the IGCO, is a special arrangement which is coherent with the overall constitutional scheme of “One Country, Two Systems”, and the courts in Hong Kong are duty-bound to be the guardian of the rule.

The Canadian approach (i.e. reasoning reflected in *Re Madam L*) is also justified on the ground of legal coherence in statutory interpretation. As stated in Butterworths on Hong Kong Statutory Interpretation (Mak, Yan & Tsau, 2018: [6.2]), an Ordinance must be read as a whole to ascertain the legislative intent. In addition, the court should take into account the overall scheme of legislation (Mak, Yan & Tsau, 2018: [6.2.2]). Reference to other statutes (intertextuality of statutes) should be made. In this respect, the IGCO, being the “legislation on legislation” setting out the general interpretative approach towards statutes, should be taken into account.

Applying the above-mentioned approaches (Butterworths’ rules of statutory interpretation and Dworkin’s law as integrity) to the cases which I have discussed (i.e. *Chan Fung Lan*, *Tam Yuk Ha*, and *Re Madam L*), one can see why the Canadian approach aligns with the current legislative as well as community principles and should be the ideal approach for tackling bilingual discrepancies in Hong Kong. For *Chan Fung Lan*, the case regarding the Estate Duty Ordinance and the language of “bona fide purchaser without notice”, the “mere translation” reasoning adopted by the Court is inconsistent with the equal authenticity rule enshrined under s.10B(1) of the IGCO. Instead, the case should be based on s.10C of the IGCO, which requires the court to resolve the discrepancy by construing the common law expression of “notice” in accordance with its common law meaning, which prevails over the Chinese version of “notice of the subsisting charge”. Concerning the case of *Tam Yuk Ha*, while the “clear meaning approach” in the “clear vs vague scenario” is rooted in Canadian jurisprudence, as pointed out by Salembier (2003: 91), the element of “commonality” is not reliable since it is not necessarily the “indicium of legislative intent”. Ultimately, the court should check against the overall purpose and object of the scheme of legislation (Salembier, 2003: 94). On the facts of *Tam Yuk Ha*, if the Court had further considered the overall scheme of legislation, it would have come to a different conclusion: the wording “addition to the plan”, when read against other provisions such as by-law 33 of the Food Business (Urban Council) By-laws, should include any non-structural additions such as the placing of metal trays and tables, given that By-law 33 regulates not only structural alterations but also *spatial* additions. Hence, the reasoning of *Tam Yuk Ha* lacks coherence with the overall scheme of legislation.

Balancing all the above arguments, this article humbly submits that the Canadian approach, which adheres to the principles of equal authenticity and linguistic equality, should be adopted in Hong Kong. The approach in *Re Madam L*, identical to the Canadian approach, comprises two steps: (i) it first attempts to construe the two equally authentic texts on the basis of the equal authenticity rule (s.10B(1)–(2) IGCO), failing which (ii) the Court moves to construe the discrepancy in light of the rules of statutory interpretation

and the overall object and purpose of the legislation (s.10B(3) IGCO). A vigorous adherence to linguistic equality and the equal authenticity principle is further supported by coherence with the overall constitutional framework. The soul of the rule of law lies in its coherent and principled methodology, which takes into account the principles, values, and norms in the community. A constructive interpretation of bilingualism looks beyond the texts and takes into account the symbol and function of bilingualism. Bourdieu (1982: 47) once stated that a formal linguistic equality “communicates a sense of solidarity that may facilitate community building”. Full implementation of the equal authenticity principle (i) is coherent with the history of Hong Kong, including the Joint Declaration and the “One Country, Two Systems” principle; (ii) reflects the historical roots of bilingual reforms in the colonial past; and (iii) facilitates future community building by reaffirming the values and identities in the post-colonial era.

4. Conclusion

“Judges who accept the interpretative ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people’s rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.” (Dworkin, 1986: 254)

The law on bilingual discrepancies involves complex underlying issues ranging from the comparative jurisprudence of bilingualism to the symbolic meaning and utility of establishing a formal and de facto linguistic equality in Hong Kong.

This article deploys an interdisciplinary approach to the law on bilingual discrepancies, involving legal, linguistic, and historical perspectives to paint a full picture of the practice of bilingualism in Hong Kong courts. In addition to presenting the traditional debate between *Chan Fung Lan* and *Tam Yuk Ha*, this article introduces a parallel judicial approach in *Re Madam L*, which implicitly indicates a judicial reluctance to strictly follow *Chan Fung Lan*.

The equal authenticity principle is crucial to community building and access to justice for monolinguals in Hong Kong. It is a corner-stone which marks the symbol and identity of Hong Kong as a unique jurisdiction with Chinese common law. If the rule is undermined, it may have serious implications on both the microscopic and the macroscopic levels. Therefore, there is a need for reshaping the current judicial approach in Hong Kong towards the tackling of bilingual discrepancies in statutes to achieve linguistic equality in a bilingual legal system.

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