

# Language rights in danger

Access to justice and linguistic (in)equality in multilingual judicial contexts

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 <https://doi.org/10.1075/impact.42.04hal>

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Pages 61–85 of

**Endangered Languages and Languages in Danger: Issues of documentation, policy, and language rights**

**Edited by Luna Filipović and Martin Pütz**

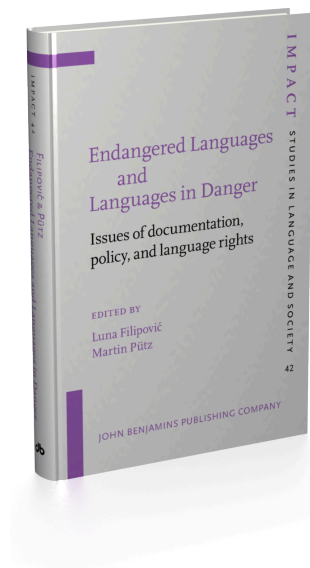
[IMPACT: Studies in Language, Culture and Society, 42]

2016. ix, 413 pp.

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# Language rights in danger

## Access to justice and linguistic (in)equality in multilingual judicial contexts

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This chapter provides a discussion of communication problems that arise in a multilingual legal context. We analyse witness interview reports and interviews from both the UK and the US in order to assess the difficulties that non-English speakers can face in an English-speaking justice system. The problems encountered indicate the need for the provision of adequate language support and improved professional training that will focus on particularly problematic lexical and grammatical contrasts for translation. We argue that people's language rights can be endangered as a result of the difficulties we discovered, even for speakers of a major language (such as Spanish). We conclude that for the purpose of equality in access to justice these problems need to be addressed by both scientific and professional communities involved.

**Keywords:** access to justice, endangerment, English, interpreting, language rights, migrant, Spanish, translation

### 1. Introduction

This chapter explores the endangerment of the right to understand and be understood, for those whose first language is not Standard English, when they are processed through the criminal justice and immigration procedures in English-speaking countries. It explores the degree to which the impact of this is recognised in assessing the need for support and resultant service provision, to ensure that those whose cases are being processed have the same access to just outcomes as English speakers. This includes the provision of adequate professional interpreting and translating services and correct interpretation of statements for the officials working within these systems. Translation must take account of the impact of structural differences between language, as well as the challenges of interpreting

where intonation, gesture and facial expression<sup>1</sup> contribute to meaning-making in culturally specific ways. In terms of language rights in danger we include examples at different ends of the language spectrum. The cases discussed include minority languages, where the speaker may face the additional disadvantage of illiteracy, as well as “big” languages (i.e. those with multitudes of speakers around the world), like Spanish, who can also be disadvantaged when they find themselves in the communicative situation where English is the language of interaction.

This paper is based on original empirical data gathered in two English-speaking countries, with different legislative systems; the UK and the US. This comparative dimension allows us to highlight the extent to which the problems are pervasive, at different levels and in different justice systems. It also looks at the issues from the two different perspectives: that of a social anthropologist who has been a practitioner in the criminal justice system for many years in the UK (Hales), and that of a linguist whose work includes research in the criminal justice system in the US (Filipović). Both perspectives recognise the dynamics of the interaction between those in authority, the person who has been held in custody and the interpreter or translator, the impact of stress on the ability to think and speak clearly and the importance of the accuracy of the recorded statement in critical decision making.

In Section 2 we illustrate this in relation to the justice system in England and Wales with references to research findings by Hales and Gelsthorpe (2012). In Section 3 we provide some specific examples that cause problems in communication due to particular differences between two languages (English and Spanish) in the US justice system, based on previous research by the second author. In the final section we highlight the impact of service provision on outcomes, and propose remedies that ensure more effective communication between the individual and those working within the legal systems.

These areas of research should be seen in the context of other projects that tackle the relationship between language and law in relation to access to justice and infringement of language rights.<sup>2</sup> This area of work grows in importance with the impact of increased levels of international migration for work, study and to seek asylum.<sup>3</sup> The result of this, in a number of countries with a high GDP, is the

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1. For example lack of eye contact, a sign of respect in many cultures could be wrongly construed as indicative of making false statements.

2. See Freeman and Smith (2013) *Law and Language. Current Legal Issues Volume 15* for a recent overview.

3. As exemplified in the annual reports made by the International Organisation for Migration (IOM)

tightening up of immigration control and growing numbers of migrants being held in prison and immigration removal centres, having been charged with offences in relation to their illegal entry, undocumented status, or illegal activities within their destination country. Unfortunately there is evidence that this growth in need has not been matched with resources to ensure that the language barrier is successfully overcome in the way these migrants are managed through the criminal justice and immigration procedures.

## 2. Facing the law without speaking the language: UK migrant prisoners' perspective

Hales and Gelsthorpe (2012) carried out an 18 month research project on the criminalisation of migrant women in England and Wales.<sup>4</sup> The goal of the project was to identify whether there are potential victims of trafficking, smuggling and work under duress in custody and, in the context of national data, give an indication of the extent of the problem. By identifying and monitoring these cases, the second task was to provide evidence on how such victims are managed within the Criminal Justice System and by the Immigration Criminal Casework Division and to what degree this is in compliance with the European Convention on Trafficking<sup>5</sup> and Human Rights legislation.<sup>6</sup>

From initial interviews with 103 migrant women held in prison and immigration removal centres, 58 women were identified by the researchers as potential victims of trafficking, work under slavery or servitude or abuse by smugglers and extensive data was gathered from this target group in terms of nationality, language skills, their socio-economic background and reasons for migration. Data was also gathered on their management through the criminal justice and immigration systems, with 73 follow up interviews, observation of 33 court hearings, examination of relevant paper documentation held by the interviewees, their legal representatives and others wherever this was feasible, and on-going communication by letter.

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4. The term *Migrant Women* is used for those who have entered the UK to seek work or asylum, voluntarily or under duress.

5. Council of Europe Convention on Action against trafficking in Human Beings (May 2005). Since completion of this research this has been replaced by the EU Directive on preventing and combating trafficking in human beings and protecting its victims 2011/36.

6. For the full report on this research see Hales and Gelsthorpe (2012) *The Criminalisation of Migrant Women*.

A key finding of this research was the low level of recognition of victim status, at point of arrest and/or during the criminal justice proceedings, which should have led the courts to consider whether it was in the public interest to continue with the criminal charges. Of the 43 who were identified as victims of trafficking by the researchers, only 11 were processed through the National Referral Mechanism (NRM) to formally establish victim status and this did not happen for two of these women until their sentences were complete. Within this group, where action was taken, there were only eight positive decisions.<sup>7</sup> With women, who had worked under slavery or servitude or were transported by smugglers who withheld their travel documents, there were similar failures in recognition of the absence of knowledge or culpability in relation to the criminal act. During the period of the research there were comparable negative outcomes from asylum applications, with only two victims, both of whom had been formally assessed as children whilst in the adult estate, initially granted leave to remain within the UK.

These women and children<sup>8</sup> had complex and traumatic stories to tell and in seeking to identify reasons for low levels of victim recognition a number of factors were recognised; however, one of the recurrent themes was that of the language barrier. This together with low levels of education, lack of previous life experiences outside of their country of origin and ignorance of the foreign criminal justice and immigration systems led to further disempowerment. It impacted on their ability to understand, be understood and the development of trust which is critical to the management of victims of multiple trauma. Women's statements, written communications and court hearings observed by the researchers raised the following issues:

- Failure to recognise the need for interpreter and translation support, particularly where the arrestee appeared to speak some English.
- Recognition of need, but failure in provision.
- Exacerbation of problems by the use of technical English.
- Concerns around accuracy, completeness, impartiality, confidentiality and conflict of interest in relation to interpreter provision.
- Failures to ensure the work of interpreters was limited solely to language interpretation work.
- The impact of shame in disclosing experiences of sexual abuse through a male interpreter.

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7. See National Crime Agency website for description of NRM procedures and conclusive grounds decisions.

8. From this point on we refer to the research sample as women, although it included two children.

- The lack of time to ensure accurate interpretation and translation of statements made in relation to the criminal charge and asylum applications.
- The impact of the physical court structure and proceedings in the level of comprehension.
- Important communications by letter to those in custody written in English.

These issues were exemplified at all the key stages of the criminal justice and immigration proceedings as outlined in the following research case material.

## 2.1 At point of arrest

Arrest was described by all those interviewed as the most critical and stressful time and those who spoke some English were often the most disadvantaged in relation to the language barrier, as disclosed in the following statements.

“At the police station I was confused. They spoke quickly. They never asked if I needed an interpreter. I did not understand what was going on. I was crying ... just wanted to tell them everything – I wanted them to listen and understand. If I had been able to talk then maybe I would not be here. The solicitor just said ‘say no comment, no comment, no comment’. No one would let me talk to them.”  
(Yoruba speaker)

“They were talking to me at police. I did not understand. Were all talking too fast they asked if I need an interpreter. I said Esan<sup>9</sup> – they said ‘it is not on the system’.”  
(Esan speaker)

These statements were made by two victims of sex trafficking from Nigeria, both arrested for use of false documents. The second was formally identified as a child, nine months into her sentence in the adult estate. This was not recognised at point of arrest, nor was the fact that she was totally illiterate when asked to sign her witness statement.

Where interpreters were provided there were additional concerns with regard to their role and the impact of additional information they gave on management of the case. For example one Farsi speaker, who had been arrested for entering the country without legal documentation, despite the fact that she reported the theft of her passport by her smuggler as soon as she disembarked from the flight, stated that she heard the interpreter state in English that:

“She says her English is not good – that in no true, all educated women like her speak and understand English.”

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9. Esan is a tonal Edoid language of Nigeria.

In another case (a Columbian woman arrested for street robberies under the control of her trafficker) the same interpreter used at the police station was also used in court the following day, which is contrary to the national guidelines for use of interpreters in criminal justice matters.<sup>10</sup> The woman was upset by this and she clearly described the inadequacy of the treatment on that occasion:

“I did not trust the interpreter used by the police and then by the court. In the police station she was not just interpreting – she was saying lots of other stuff to the police. She was used to interpret for all of us arrested and then my solicitor had to use her and then she was the court interpreter the next day.”

There are further instances of unethical interpreter behaviour. Two women who spoke no English stated independently that at the police station the interpreter challenged them saying “Why are you lying?”. They did not describe this question as interpreting what the police were asking, but rather as an independent question.<sup>11</sup> In another incident the defendant in court asked the interpreter to intercept on her behalf as an inaccurate statement was made to the court. The interpreter refused to do this saying it would be a “waste of time”.<sup>12</sup>

## 2.2 Criminal court proceedings

One of the themes repeated in numerous interviews was the fact that the women interviewed did not understand what was happening in court, and this was made even more problematic where there was inadequate or no interpreting support when they were in dialogue with their legal representative. The unfamiliarity of the system exacerbated this problem as the following case shows.

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10. Section 4.4.1 of the national guidelines state that; *It is important that so far as possible the interpreter arranged for court is not the one who interpreted at the police station either for the police or the defendant's solicitors at any stage prior to the court appearance. If however it is not possible to find another interpreter (where for example the language is rare) then the court and all parties must be notified of the intention to use the same interpreter for the court proceedings and agree to that course of action.* In this case the language was Spanish and therefore access to alternative interpreter support should not have presented a problem.

11. If this question *why are you lying* had in fact been made by the arresting officers, this would indicate the type of confusion as to what was being interpreted and what was being stated independently by the interpreter, as evidenced in the research material from the US (Section 3).

12. This statement error was noted and the interaction was observed by the researchers in the court room.

“I spoke to the solicitor on video link before going to court. I said I do not understand and want a Dutch speaking solicitor.”

She restated this in her request to change her legal representative and the following is an extract from the letter sent in response:

“You should write to the court again, giving them a much stronger reason why you want legal aid changed. ... Nobody in this firm speaks Dutch.”

Her request to have her legal aid transferred, which she had to make in English, a foreign language, was never taken as an indication that interpreting support was essential. When observed in court there was no interpreter present and she was not asked formally as to whether she understood the proceedings.

When interpreters are used in court, the interpreter has to make an oath to the court. In none of the observed criminal court proceedings cases, was the oath made by the interpreter and then repeated in the language of the defendant. In only one case (a video link court hearing) did the court formally identify the role of the court interpreter to the defendant. In a second case the interpreter stopped proceedings to remind the lay bench that this should happen.

Where interpreting support was used, there were two types of interpreting provision observed. The first was a short consecutive interpretation where the bench, that is the judge or magistrate, was involved in direct dialogue with the defendant. This was done to confirm name and date of birth of the defendant, outline the charges, advise on the date of next hearing, to hear the plea and, in the context of Crown Court trials, where the defendant was being cross examined. The second type was simultaneous interpretation, where the court expected that the matters discussed would be interpreted for the defendant so that she was aware of what was happening.

Failings in both types of provision were observed and also identified by the women themselves. In two hearings that were observed the interpreter failed to appear. The court recognised the need, as neither of the defendants spoke or understood any English. However as proceedings in court that day were arrangements for a further adjournment, and there was to be no direct dialogue with the defendant, the courts decided to *proceed anyway*. In this case there was no interpreter support for a de-briefing after the court appearance. In other cases the women reported that by the time they met with their solicitor in the court cells after the hearing the court interpreter had left the building and they did not understand the outcome. Observations of meetings between women and their legal representatives confirmed this failure and the fact that the use of incomprehensible legal jargon exacerbated this problem.



In all cases observed, where interpreter support was needed for co-defendants speaking the same language, this was provided by the same court interpreter. In only one hearing was the judge observed requesting that the Crown Prosecution Service take account of the need for adequate interpretation in terms of how they proceeded, and no cases were observed where the defendant felt they could stop proceedings for clarification. A common statement by those interviewed was that they did not feel they were benefitting from a full interpretation of all that was being said, and they tried desperately hard to follow the gist of the proceedings as well as listen to the words of the interpreter.

This ability to hear, understand and engage in dialogue with the legal representative through the interpreter was also impacted on by the physical court structure and layout.<sup>13</sup> The defendant was normally positioned at least two metres behind her legal representative and thus unable to get his/her attention. In all but two criminal cases the defendant was held in a dock at the back of the court, behind a ceiling-high glass screen, where she was joined by the interpreter. Two court interpreters independently talked with the researchers about the impact of working within this screened off area, stating that they also faced difficulty in hearing all that was said as “the speaker system is often faulty”. Another pointed out that “if the officer in the dock jangles his keys it is so easy to miss key words”.

Of equal concern is the fact that there was no evidence of third party checks that the interpretations were full and accurate. Three interviewees, who were bilingual, stated that there were many mistakes in the interpretations they heard in court provided by court interpreters for co-defendants. They expressed frustration that they could not raise the attention of the court in relation to this.

In addition, those most in need of interpreting support, such as those from Vietnam, were often arrested with others who had control over them, or whom they could not trust in terms of passing information back to those who had trafficked or worked them and to whom they were in debt bondage. They were therefore fearful of making any statements that, if not dealt with in confidence, could prejudice their future safety. The fact that the same interpreter was used by the different legal representatives for the co-defendants, for pre-trial briefings at the court, exacerbated these anxieties.

Talking about these procedures, views routinely expressed by those in custody were confusion, frustration and disempowerment. A common statement to the researchers was the feeling that they were effectively “off stage” and not involved or able to impact on what happened within the court. This is despite the fact that any person charged with a criminal offence in the UK has the right to “have the free assistance of an interpreter if he cannot understand or speak the

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13. For analysis of the impact of this see Mulcahy (2011).

language used in the court.”<sup>14</sup> It is therefore the duty of the Bench<sup>15</sup> to ensure that the defendant understands what is being said and if they become aware of the need for interpreting support to ensure the case is adjourned for this to be arranged. However there were no routine checks observed in the hearings observed.

The impact of the language barrier was recognised in one trial observed where the judge advised the jury that:

“You must make allowance for the fact that the defendant has given evidence through an interpreter. It is more difficult to get across the real flavour of what you want to say when it is done through an interpreter. Someone ... I cannot remember who it is ... once said that you lose the poetry, that is the feeling, the nuances, the clarity of what a witness said when his or her evidence is interrupted. So you must make allowances for that as you think appropriate.”

At this trial the level of interpreting was also very high, with the interpreter explaining at times that he needed to explain the term used by the court, and asking at one stage, before deciding on the intonation he should use, whether the statement made in cross examination that he was interpreting had been posed as a question.

Unfortunately however the above case was the exception and there were a worrying number of statements outlining lack of effective interpreting support. Even where the interviewee spoke English as a second language and did not require interpreting support in the context of the research interviews, key legal terms, sometimes including the actual meanings of the charges, were not understood. This is exemplified in the following two statements:

“Although I understand English there are professional words I do not understand. I did not know what is meant by ‘conspiracy’” (to which she was advised to plead guilty).

“I wanted to say to the judge, I do not understand the English you are talking. I do not know what is going on.”

It is also of significance that in three of the cases studied in this research the original conviction and sentence was finally overturned. However in none of these Appeals was lack of adequate interpreter support listed in terms of procedural failings by the Appellant or formally recognised by the Court of Appeal.<sup>16</sup>

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14. In compliance with Article 6 of the European Court of Human Rights

15. The Bench is a legal term used to describe the Judge or Magistrates hearing the case.

16. It is of relevance that this factor was not recognised in other appeal hearings observed by Hales, following the publication of the 2012 research.

## 2.3 Immigration proceedings

In asylum procedures, the lack of translation also disempowered the asylum applicant's ability to ensure that she had disclosed all the relevant information, or to challenge the grounds for negative decisions. For example after the full asylum interview, carried out with the support on an interpreter, one woman stated:

“Yes they showed me the interview notes – but it was impossible to check if they were right. They were all written in English and I could not read some of the handwriting.”

Several weeks after this interview this woman received an asylum decision which was one of refusal. This standard refusal letter, written in English, stated that the applicant had five working days in which to appeal and if she wished to appeal she had to complete the attached document. This was a lengthy document asking for details of the basis of the appeal and contact details for the immigration solicitor. It was not an easy document to understand for an English speaker. In relation to these procedures it is of relevance to note that Article 10 (1) of the Asylum Procedures Directive (APD) which requires:

“Member states to inform asylum applicants of the decision on their application in a language that they must reasonable be supposed to understand, unless they are represented by a legal adviser or free legal assistance is available, in which case the requirement may be waived.”<sup>17</sup>

As with many of the other asylum seekers in custody she faced huge challenges in accessing legal support and her limited English further inhibited her ability to access her representative by phone or letter and thus seek explanation of the latest communication from Immigration.

Some of the same issues that were apparent in criminal court hearings were also observed at Immigration and Asylum Tribunals.<sup>18</sup> In one of the cases the level of interpreting was so poor in terms of accuracy and failure to replicate the intonation of the answers that the applicant asked to be able to speak directly to the judge in her limited English. This was denied by the judge who also seemed

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17. EU member states remain committed to the APD under Article 68 of the Treaty and Functioning of the EU.

18. These were the next stage of appeal for those refused asylum. For those in custody at the time of these hearings, they were held in a closed dock area of the court and they were not allowed to sit beside their legal representative in the open court, as normal applicants were. It also meant that in some cases they were physically separated from the court interpreter.

unaware of appropriate protocol where interpreters are used, in terms of ensuring that face to face contact is between the applicant and the court, when she stated:

“We have an interpreter in court. I will ask my questions to the interpreter who will interpret them to you. You will answer to the interpreter who will interpret to me what you have said.”

In the context of the letters from the Immigration Department, which stated that asylum had been refused and which were seen by the researchers, one of the key reasons stated was often “lack of consistency” between statements made at initial immigration interviews and full asylum interviews. Linked to this is the fact that a dominant reason for asylum applications within this group was the experience of rape, and the fear of future rape and sexual abuse. Women interviewed talked about *shame* and *fear* involved in disclosing these issues in front of a male interpreter at the initial interview.<sup>19</sup> In relation to the following extract from a letter from Immigration it is also possible to conclude that these apparent inconsistencies may have more to do with the actual process of interpretation.

“In your account of the rape you first stated ‘when we got somewhere they took me. They took me from a different place they took him. From there they raped me’. You also state, ‘after they raped me they took him to a different place’ ... it is considered that you have supplied conflicting accounts of the rape and consequently it is difficult to accept that this is a true account of a real event.”

One explanation of this is the fact that the victim was highly traumatised, with resultant difficulties in narrating all that she had experiences in a logical coherent manner. However it is also possible that, in the process of interpreting, some personal pronouns or prepositions have been confused (such as they “took me from a different place they took him” vs. “they took him to a different place”). In any case, the excerpts “they took me from a different place they took him” and “from there they raped me” are inadequately rendered into English and it is this inadequate interpreted English that appears to be the major source of confusion. However in this case as with others in the UK there was no routine practice of comparison between the statement in the original language and the interpreted statements, nor the production of bilingual transcripts that could be checked by a control translator, as is practices in the US for police interviews.

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19. For fuller discussion on the issue of inconsistency and gender specific persecution see Quernton (2012, Section 3).

### 3. Police interviews in the US: Barrier of translation

The importance of the translation and interpretation quality *per se* is an issue that is of crucial relevance in the context of police interviews (see Drugan 2013 for a general discussion on ethics and translation quality). This is particularly evident in the research results of Filipović (2007, 2013a), who investigated the language provision practices in the judicial system of the state of California, with particular focus on non-English speaking migrants in the US courts of law. The United States, like the UK, are under significantly high pressure due to immigration. In particular, some areas of the US have specific immigrant groups that are present in large numbers. Such is the presence of Spanish-speaking citizens from Latin American countries in the state of California, where Spanish-speaking interpreters for both police and court interviews are in constant, relentless demand. Filipović (2007, 2013a) reports on the fieldwork findings from a number of jurisdictions within California (San Francisco, San Jose and Oakland), where over 17 000 pages of police (127 files) and court interview (69 files) transcripts were collected. The police interviews and the resulting transcripts were bilingual (Spanish original with English translation). The court interviews were carried out bilingually with an interpreter, yet however, only the English translation is recorded there. Police transcripts in the US are regularly produced as bilingual documents verbatim for the interviews with non-English speaking subjects, while the court transcripts are produced as monolingual (English only) files even when the defendants and witnesses speak languages other than English. Crucially, police interview transcripts are additionally checked and translated post-interview by an independent translator (different from the one present in the original interview). In this way, the quality control of police interview transcripts is impressive and the quality of the service is very high. This can serve as an example of good practice for others to follow. The control translator has the opportunity to correct interpreting errors or clarify the use of certain words or expressions.

Unfortunately, the same procedure is not available for court proceedings due to the incurrence of high costs, especially with lengthy criminal trials. The problems in access to justice that arise as a result of having monolingual records of multilingual communication have been widely documented. A number of previous studies have addressed many relevant issues that arise in a multilingual courtroom (e.g. Berk-Seligson 1990), or other instances of multilingual interviewing (e.g. police investigation (Berk-Seligson 2009) and community interpreting (Hale 2004)). Numerous researchers have tackled the general problem in multilingual legal cases that stems from the extremely difficult role that interpreters on occasion have to play. For instance, Berk-Seligson (1990) lists a number of features that characterize court interpreting (e.g. hedges, insertions, hesitations, etc.). These

features underlie the perception of witness testimony style as either powerful or powerless. A further example of cross-linguistic contrasts in translation is Hale's study (Hale 2004), which documented the difficulty of translating tag questions from English into Spanish.<sup>20</sup> On this occasion and for the purpose of this section of the paper, we focus on the police data since it is only possible to discuss issues of language contrasts and difficulties in translation based on bilingual transcripts, which are the police interview ones.

We draw attention to two issues relevant for professional practice that were evident in the US data and that bear consequences for the endangerment of language rights: (a) police officers acting as interpreters and (b) points of contrasts between languages that create particular difficulties even when the interpreting is carried out professionally.

### 3.1 Police officers as interpreters

Investigative police interviews in a bilingual communication setting are effectively more challenging than monolingual ones. The problems that arise as a result of having bilingual police officers as interpreters instead of using professionals has been documented, acknowledged and explicitly addressed by the US judiciary (as well as some other jurisdictions, e.g. the UK and Australia; see Abad Vergara and Filipović (submitted)), and this judicial awareness can serve as an example for other justice systems throughout the world. Such high standards of service provision are not easy to achieve, or always adhere to, but an exemplification of problems that are caused by having officers perform dual roles (that of an investigator and an interpreter) can lend support to the argument against such practice.

Abad Vergara and Filipović (submitted) carried out a case study analysis using an authentic case of a suspect being interviewed by two police officers, one of which was introduced as an interpreter. The police interview was carried out with a Spanish-speaking suspect charged with a serious offence (sexual assault), and one of the two officers was also acting as an interpreter throughout the interview. During the interview, the suspect was increasingly confused by the impossibility to understand which questions were coming from the principal investigating officer, which ones were coming from the officer-interpreter. The interview in question took place in the United States in 2000; that is, before the introduction of new regulations regarding the employment of professional interpreters in police interviews. The US Department of Justice had researched the employment

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20. The most recent holistic overview of themes and methodologies in the field is given in Gibbons (2011).

of language services and provisions in legal cases and as a result they “elaborated a set of prohibitions on the use of non-professional interpreters by law enforcement agencies” in particular, the use of bilingual officers or employees regardless of level of bilingual competency (Berk-Seligson 2009: 13). Abad Vergara and Filipović draw attention to the ways in which both linguistic accuracies and the lack of impartiality on the part of the interpreting officer could contribute to blame attribution and lack of neutrality required for the interpreter as a result of the interpreter’s dual role (i.e. interpreter and police officer).

For instance, there are constant references to the suspect in the third person, whereas professional interpreters are required to use the first person when speaking in the words of the original speaker:

- (1) a. Suspect: Oh, no le pregunté.  
Translation: Oh I didn’t ask her.
- b. Police officer-interpreter: He never asked her.

Similarly, subtle differences in the choice of words by a person whose proficiency in the foreign language is not attested can cause differences in the interpretation of the statements in the original and the translation, as in:

- (2) a. Suspect: [...] ya de ahí pues ella quería ir a la escuela.  
Translation: [...] from there well she wanted to go to the school.
- b. Police officer-interpreter: [...] she had to go back and I took her back to school.

The difference between the modal meaning in Spanish and its translation into English adds an extra layer of meaning, whereby the police officer-interpreter conveyed the message as an obligation (i.e. *had to go*) whilst the suspect speaks of a desire (i.e. *wanted to go*). The suspect is saying that the alleged victim wanted to do something and, as evidenced later in the script, he complied with her wish and walked her back to school. The translated statement, on the other hand, indicates that the alleged victim had the obligation to go to school but does not indicate that it was actually her wish that the suspect complied with. There are further examples that illustrate inadequate level of proficiency and skill of the police officer-interpreter, e.g. in his use of verbs and constructions as evident in the following example:

- (3) Police officer-interpreter: \*Cuando usted la caminó para la escuela...
- Translation: When you walked her to school...

This construction of using motion verbs (such as *walk*) transitively (*to walk somebody somewhere*) does not exist in Spanish. It is a calqued English construction,

and as it stands in Spanish, it makes no sense and, furthermore, causes confusion. The police officer-interpreter uses this construction on a number of occasions and the suspect hesitates and falters each time, asking for clarification on occasion (i.e. by saying “*Comó?*” = “What?” or similar). We know that pauses and hesitations have negative consequences on communication in general (Dingemanse & Enfield 2014; Roberts, Margutti & Takano 2011), especially in judicial contexts where it creates the impression of a speaker being powerless and consequently less convincing or trust-worthy (Berk-Seligson 1990). The cause of such negative judgment can create a language barrier, as exemplified here.

The crucial insight that stems from the results of the Abad Vergara and Filipović study is that it is not enough to be a bilingual speaker in legal interviews and that specialist training, especially in the field of legal translation, is extremely beneficial (see also Abad Vergara 2014 for a detailed study on the necessity and benefits of professional training). Non-native speakers are put in a disadvantageous position from the very start, in a first interview with law enforcement and then further throughout the judicial process in courts, where the original statements they make are never recorded. The excellent practice of making bilingual transcripts in the United States police interview contexts is extremely helpful for the purpose of revealing the kind of disadvantage that non-native speakers may face. Further issues stem from the fact that languages differ with respect to ease or difficulty with which their speakers can express certain meanings. We turn to those language-specific difficulties and the barrier they create in translation-assisted legal communication.

### 3.2 Language barrier due to language contrasts

Language contrasts present communication participants with additional difficulties with regard to the adequacy with which original information is rendered in translation. For instance, two typological dimensions along which English and Spanish are very different are the use of verbs and constructions for the expression of motion and causation. These differences have been widely documented by numerous scholars (e.g. Slobin 1997, 2000, 2004, 2006; Filipović 2007, 2013a, 2013b; Gibbons 2003). In this section we present examples that illustrate the typological contrasts that are responsible for the inaccuracies in translation and that are not necessarily due to interpreting incompetency but rather to the different habitual practices in each language that are conditioned by the specificities of grammar and use in each language.



### 3.2.1 *Motion expression in legal translation*

Spanish and English offer different strategies for speakers to use when verbalizing motion events. In English, speakers habitually say where and how something or someone moved (e.g. *Harry skipped into the shop*) while Spanish speakers tend to say only *where* something or someone moved, omitting the information about the *how* (i.e. the manner of motion; as in *Javier entró en la tienda (brincando) = Javier entered the shop (skipping)*). This is due to the fact that the manner of motion is expressed in an obligatory element in the English sentence (the verb) while the Spanish verb is used to express the path. The information about the manner, if at all provided, is given in a non-obligatory element, the gerund (*brincando*-skipping) and can (and often is) excluded from the expression of a motion event in Spanish (see Slobin 1996, 2006). This typological difference has numerous consequences for the description of motion in the two languages. Namely, Spanish translators often omit information about the manner from English: English translators add manner information even though it is absent from the Spanish original because their pattern of expression involves manner verbs and they feel obliged to provide manner information. A constant use of path verbs, as is done in Spanish, would sound somewhat unusual in English (e.g. *He ascended the stairs running* instead of *He ran up the stairs*). These contrasts have been documented in extensive research data from a variety of contexts of use (literary texts, spoken discourse, metaphorical language; see Slobin 2006) and at different stages of language acquisition (infants, children, adults; see Filipović & Ibarretxe-Antuñano 2015 for a detailed overview). Filipović (2007, 2013a) were the first studies that document the effect these specific typological differences on the understanding of communicated and translated message in a legal context.

For example, even in cases of sexual harassment and knife attack, which are events that must have occurred with highly salient (probably intense and aggressive) manner of movement, information on manner is conspicuously absent throughout the description of events:

- (4) Me salí de la oficina y me fui. Y él se fue atrás de mí, se fue, pero él se fue para allá y yo me vine para allá  
Translation: I got out of the office and I left. And he went after me, he left, but he went over there and I came over there.
- (5) ... y yo le caí atrás, lo vi que traía la, la, la navaja y le caí atrás y cuando le caí atrás, muchos le caímos atrás para agarrar al que agredió el muchacho.  
Translation: ... and I took off after him, I saw that he had the, the, the knife and I took off after him and when I went after him a lot of us went after him to grab the guy who had attacked the guy ...

The descriptions of the two situations in example (4) and (5) also seem to lack dynamicity and intensity, which undoubtedly accompanied the reported events that relate to a sexual assault. However, the victim in that case was using the usual Spanish pattern of expression, which does not involve manner detail, potentially crucial for the creation of the impression regarding the speed and flow of events that could explain the situation better, for example, why the victim was unable to flee or escape her assailant. This lack of detail may have an impact on the victim's case, but the victim's language does not encourage the provision of such information habitually. Therefore, such information, about the manner in which the events unfolded, has to be sought explicitly.

While these accounts sound natural in Spanish, the absence of manner verbs makes the account sound very untypical in English. This is why in the process of interpreting the information about the manner of motion can be, and often is, spontaneously added, because it is the most natural way to lexicalize motion events in English, as we can see from the following example:

- (6) Original: pero ... salió por la puerta detrás.  
 Literal translation: but ... he exited through the back door.  
 Official translation: but he ... ran out via the back door.

The dynamicity of the situation from which the example (6) was taken induced the interpreter to add manner to describe a chase of the suspect even though the witness did not mention it explicitly in Spanish. The consequence of this is the possibility to impede the identification of a suspect or his whereabouts since the suspect could have run for a while but exited via the back door walking in order to avoid suspicion. In this specific case of a chase in the streets no information was made available in the Spanish original witness description on how quickly the suspect or the witnesses that followed him were moving. As a result, the situation can be interpreted as more dynamic in the English translation.

Information about the manner of motion is very important because it allows us to speculate about the suspect's physical state and location (e.g. if the suspect was running all the time, he could be tired and hiding in the search area; he would have gone further from the crime scene if he had run than if he had limped; if he had run, it means he had not been wounded or hurt, etc.). The communicative consequence is that we could draw different conclusions about a described event from the Spanish original and its English translation respectively. In the case of pattern-clashing such as this between English and Spanish, it may be useful for the interviewers to explicitly encourage speakers of languages like Spanish to provide information about the manner during interrogation.

### 3.2.2 Causation expressions in legal translation

Another relevant dimension of language contrasts is that of the expression of causation. The difference in how causation can be expressed in English and Spanish has presented interpreters with further significant difficulties that are hard to overcome in a high-pressure situation such as police interviews of suspects. One particular construction has been highlighted by Filipović (2007, 2013b), since it best illustrates the profound impact on the case outcome that this typological dimension may have. English is typologically an agentive language, where agents are clearly marked by their syntactic position in the subject slot. English is a language that clearly expresses agents, but does not oblige its speakers to state clearly whether the agents performed the action voluntarily or non-voluntarily (e.g. *Bill dropped the bucket*). Spanish on the other hand has two distinct constructions (discussed below) that clearly indicate whether the action was performed with intention (voluntarily) or without intention (non-voluntarily), but agents in that language are not obligatorily expressed.

This typological difference was shown to have profound effect on witness memory in experimental psycholinguistic studies. For instance, Fausey and Boroditsky (2011) have shown that English speakers remember agents better in both voluntary and involuntary causation events, and they had also confirmed (Fausey & Boroditsky 2010) that the explicit causation expressions (such as ‘X broke Y’) elicit more direct blame implication than the non-causational expressions used to describe the same events (such as ‘Y broke’). Filipović (2013b) has shown that Spanish speakers remember better the difference between which actions were voluntary and which were not, in line with the Spanish speakers’ language preferences of distinguishing clearly between the two action types. Namely, when the action is performed on purpose both languages have similar options as seen below:

- (7) a. John threw the bottle.
- b. Juan botó la botella.
- Juan threw the bottle.

However, when the action was performed *accidentally*, English and Spanish show an important difference in expression, whereby Spanish has a more precise construction for which English does not have an adequate translation equivalent.

- (8) a. Se le cayó la botella (a Juan).
- b. To-Juan-it-so-happened-that the bottle fell. (i.e. Juan did not do it on purpose)
- Juan dropped the bottle (non-intentionally).

In a case of police interviews, one particular case can be used to illustrate the importance of drawing attention to this typological difference and the need for its precise translation (see Filipović 2007 for details). ‘Se me cayó en las escaleras’ (meaning ‘to-me-it-happened-that-she-fell on the stairs’) was used extensively by a suspect who was describing what had happened to the victim and it was repeatedly translated as “I dropped her on the stairs” in English. The English expression *I dropped her* could refer to both intentional and non-intentional dropping, it is ambiguous and can therefore legitimately be used as an equivalent for the translation of the non-intentional expression in Spanish, so the interpreter was not at fault here strictly speaking. Throughout this particular interview the suspect was using the non-agentive expression in Spanish (“Se me cayó” = “It happened to me that she fell” or “I dropped her accidentally”) that clearly signals lack of intentionality on his part (as in the example (8)). In the English translation however this clear non-intentional meaning was not available. In addition, the police officer did not make the questioning easier by asking “Did she fall or did you drop her?” It was obvious in the analysis that the interviewing officer used the verb “fall” in English for the non-intentional action and the verb “drop” for the intentional act. However, to the question “Did she fall?” the suspect responded “No” because technically, the victim did not fall, she was not in control of the motion. Crucially, the suspect responded “Yes” to the second part of the question, to the interviewer’s intentional “did you drop her?” but his response was, in fact, the non-intentional, accidental version of “I dropped her” (“Se me cayó”). This was not understood by the police interviewer and the assumption was that the suspect was admitting guilt for an intentional act of throwing his victim down the stairs. In some US states, like California, which still administer the death penalty, admitting to an intentional act of murder is not something that can be treated lightly and the imprecise translation that leads to the understanding that suspect was doing precisely that is potentially highly detrimental, not just to the case, but also to the suspect’s life. This is not to say that the interpreter was necessarily doing a bad job since, as we explained, the English phrase “I dropped her” can refer to both intentional and non-intentional act of dropping. Rather, due to the typological difference between English and Spanish in this domain, it is possible to leave certain important information as ambiguous and liable for wrong, and potentially extremely harmful, interpretation. Neither the interpreter nor the police interviewer was aware of this problem during the interview and it is not our aim to lay blame on any interview participant here. This communicative context is particularly sensitive and highly stressful, this must be borne in mind. Our goal here is to highlight the key point, which is the need for more empirical studies in this vein in order to detect what specific language contrasts create serious difficulties in translation between any two languages, resulting in serious misunderstandings.

What this example shows clearly is the central importance of raising awareness about language contrasts for the understanding of what a suspect is or is not confessing to. Furthermore, studying patterns in language use, characteristic of two different language types, and the speakers' habitual preference for certain constructions, can help us detect the exact points at which problems in translation may occur between any two languages. This is achieved by studying both the finely grained typological differences between languages and the analysis of real, authentic interactions among all participants in a social context (e.g. police interviewers, witnesses and interpreters) as we illustrated in this paper. In this way we can improve the focus of professionals involved in the process of collecting information that may be used as evidence.

One example of good practice in the US context is the employment of *control translators*, especially in cases of serious crimes. The role of a control translator is to check the transcripts and make sure that the original interpreting that took place was correct, accurate and faithful to the original statement of a witness or a suspect. The importance and value of this procedure becomes clearer and more convincing if we look at the following example:

- (9) Original: De ahí *la llevé* para la calle arrastrando y la puse sobre las, sobre las gradas y ahí *se volvió a dar el otro golpe* así, pero ya estaba muerta.  
 Transcript translation: Okay, and then he *grabbed* her and he try to take her out of the house and *put* her on the sidewalk.  
 Control translation: From there I *took her* to the street, *dragging her* and I put her on the, on the stairs and *she hit herself like this again*, but she was already dead.

The control translation highlights the differences between the original text and the interpreting registered in the transcript that took place before the control translation. We get different imagery based on the two translations, the latter of which, the control one, is the correct one, while the interpreted text that was given during the interview contains numerous lexical and grammatical errors. Namely, the words such as “grabbed” in the interpreted statement instead of “take” that the witness used can create an impression that the action may have been more violent than originally described. We know from previous research (Trujillo 2003; Ibarretxe-Antuñano & Filipović 2013) that the use of more complex and intense manner verbs can affect jury opinions about the events described. Moreover, the information about how the victim sustained further injuries (control translation: “she hit herself like this again”) is missing from the original interpretation into English.

Packaging information in a language-specific way is so deeply rooted in our everyday experience and interaction with the world around us that we are often

unaware that we are doing it, namely organizing information according to a certain entrenched underlying system of words and rules. Specialist training targeting specific points of serious conflict between two languages can target this problem and prevent it from occurring in the future. In addition, if we are carrying out the extremely stressful job of interviewing and interpreting, we are naturally inclined to revert to the comfort of our typical and familiar linguistic frames. By this we mean that, when under pressure, people in general rely on entrenched stereotypes, including the linguistic ones (see Mendoza-Denton 2010). As was argued in this section, the typical way of describing the situation of dropping somebody that was carried in English is indeed the construction 'I dropped her' and the interpreter was not really completely wrong in the choice of expression when he used that ambiguous construction to render the non-agentive Spanish expression 'to-me-it-happened that she fell'. However, the potentially very damaging ambiguity that remained should have been clarified. An additional problem for interpreters is the uncertainty in their position, since they are required to refrain from any intervention, and the extent to which they are allowed to stop, or detract from the flow of, the interview proceedings can vary depending on the legal counsel in charge. The need to clearly explain the realm of intervention that the interpreter can have in advance would be immensely helpful to those professionals, and it would facilitate their hard job and add further sense of value to their service, in addition to a better quality of the translation itself. Moreover, it would reduce the gap between the service available to native speakers and those disadvantaged categories of non-native speakers discussed in this chapter.

#### 4. Conclusion

In Sections 2 and 3 of this article we have looked at access to justice for those whose first language is not English in two very different settings; however there are common themes in relation to this. These include the need for adequate interpreting support from point of arrest through to the conclusion of the court procedures, to ensure just outcomes. This would appear to be most significant in relation to establishing not simply whether a criminal act has been committed by the person charged, but rather the role that the defendant has played in this action including awareness and intent. For example, with those trafficked or smuggled into the UK, the use of a false document is easily established. However, what is not so easily established, and what has the greatest impact on outcome, is intent and/or awareness of the fraudulent nature of the documentation and the level of duress. This is even more critical when we look at the impact of intent on those charged with murder in California.

A second theme is ensuring that service provision is at an acceptable level, that there is very clear boundary management of the role of the interpreter and that legal professionals have adequate training in their use. A third is the recognition that communication is a two way process and as well as ensuring the foreign language speaker understands the process, it is critical that those investigating and prosecuting cases are correctly advised in terms of statements made, which necessitates interpreting activity which takes into account the impact of language structure and intonation. There is evidence in the US that this is taken very seriously in relation to bilingual documentation and third party checks of police interviews. However, these precautions are lacking in other areas of work.

The relevance of the findings is enhanced if we look at current data which indicates the level of need. The latest Ministry of Justice data for England and Wales shows that foreign nationals represent just under 12% of the total prison population.<sup>21</sup> There is no recorded analysis of literacy and levels of spoken English within this group, but as pointed out in Hales (2014), English is not the mother tongue in the top ten nationalities listed. Of equal significance are the numbers of Gypsy, Roma and Travellers in custody in the UK, where high levels of illiteracy exacerbate the language barrier.<sup>22</sup> Within the US the percentage of foreign nationals is slightly higher, at 14.6%.<sup>23</sup> However published data would appear to indicate a dominance of Spanish speakers within this group with almost 17% of the total population being those of Mexican nationality.

Within both countries there is formal acceptance of the rights of non-English speakers, but this paper attempts to demonstrate that there are still many ways in which those who are not fluent in English feel that they do not have the same access to what they view as just outcomes. This may be a result of numerous factors including their perception of the impact of their status as a migrant or outsider, the unfamiliarity of the judicial system and the additional impact of court decisions on future residential status. However in this paper we propose that the key factor is that of language. The examples we discussed come from English and Spanish, but we are confident that our study approach could be applied to other languages, whereby the relevant typological language contrasts and their manifestations and consequences in discourse and translation can be highlighted for any other language pairs.

To remedy the impact of this, good interpreting and translating facilities as well as additional time to process cases is critical. However, to keep abreast of a

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21. Data from Ministry of Justice (April 2016).

22. For fuller analysis of this see Hales (2014) *The Language Barrier to Rehabilitation*.

23. Data from U.S. Federal Bureau of Prisons *Inmate Citizenship* 30th August 2014.



growing demand means additional funding and in the UK attempts were made to cut the cost of interpreter fees though provision of a single contract in 2011. Unfortunately this was recognised as having negative consequences including costly delays in processing court cases where there were failures in interpreter delivery.<sup>24</sup> Where resources are undoubtedly limited the response must therefore be targeting areas where the consequences of poor translation are most severe. Of equal importance is raising the awareness of those who manage these cases of the impact of failures in delivery.

Acknowledging that the danger of injustice exists is the first step forward, and this paper is hopefully making this kind of step. In addition, the real life examples of good and bad practice, as outlined in this research material, can be the key to work-focussed training for those working in these fields. However, there is still a huge need for further research that engages with the stages in criminal and immigration proceedings, whose outcomes have major impacts on the speakers of other languages. Communication and mutual understanding is key to all these procedures and our goal should be that of a fair playing field, where participants do not feel that they are in danger of not understanding and of not being understood. We hope that this and future research projects will help remove the language barrier on the road to equality in access to justice.

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24. See House of Commons Justice Committee 2013.



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