

Policy Papers

December 2020

Addressing linguistic inequality in legal settings

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- **Individuals have different linguistic competence in using the ‘standard’/official language(s) set by the state, and the differences can lead to inequality in the justice system.**
- **Translators and interpreters in legal settings can be used as an immediate approach to compensate disadvantaged individuals.**
- **The right to an interpreter and/or translator for those who do not speak, or (far less often) who speak non-standard varieties of the language of the court, is protected in many countries and mainly applies to criminal cases, leaving gaps in other legal cases where this right is not guaranteed.**
- **In non-criminal trials, the responsibility to request interpreters and/or translators often falls either on those in need of the service, who sometimes are unaware of their needs or cannot afford the service, or on the judges who have not received sufficient training and support in recognizing and fulfilling these needs.**
- **Practices addressing the issue include court transcription and interpreting, but even the use of these techniques does not eliminate errors which are extremely difficult to correct afterwards, leaving court participants’ rights unprotected.**
- **More rigorous policies on legal interpretation and translation services are needed and a list of suggestions are provided in this paper.**

Inequality is inevitable; injustice is not. Some are taller, some shorter, some richer, some poorer, some fluent in an official language of their state, others not. While physical inequality cannot be corrected, social inequalities can be and are addressed through policy. Such policies are a matter of constant negotiation. Policy determines if rules or standards are rational and necessary, or irrational and arbitrary. Policy also establishes the balance between efficiency and equality; justice can be time-consuming and expensive.

In language the efficiency of a single standard of an official language is balanced against the principle of equality in citizenship and before the law. The political philosophy of the modern democracy is based on the belief that every citizen enters into a social contract and participates as an equal member in a given polity. People who do not speak the language of the international or national institutions, or who do not speak the privileged form of that language, are at a significant disadvantage. This applies whether the state in question has one or many official languages. Without the ability to obtain and process information that is crucial to participation in decision-making, citizens cannot make informed choices in their governance and cannot make their voice heard. Agency requires linguistic competence or compensatory action by the state.

One approach, over the long term, is to improve the level of linguistic competence of the official/standard language of all citizens through educational programs. For immigrants naturalized or seeking naturalization this might involve special programs in primary and secondary education, and continuing education for adults. While this reduces the necessity of interpreting and translation, it will never cover all cases.

A more immediate approach is compensatory action, in particular the use of interpreters and translators. Interpretation and translation are necessary for many government services. In this policy paper we shall focus on the issues relating to the justice system, and specifically the complexities of interpretation and translation in the legal setting, expanding on Kibbee (2016).

Equality in the justice system concerns the evaluation of fairness. Fairness depends on two factors: the comprehension of what is happening in a legal process and, through such understanding, the ability to prepare a defence. In this era of mass migrations and international travel, interpreting and translation are crucial in extending these protections to the ever-increasing percentage of people who find themselves in a State where their language is not the language of the court. Similarly, speakers of indigenous languages find themselves at a disadvantage in the legal system. Protections for those in such situations are outlined in international declarations and treaties, national constitutions, and legislation at the national and secondary levels. Less well recognized are the needs of those who speak a non-standard form of the national language.

At the international level, Article 10 of the Universal Declaration of Human Rights (1948) guarantees a “fair and public hearing”, while Article 11 requires that anyone accused of a penal offence will have “all the guarantees necessary for his defense.” Article 14 of the International Covenant on Civil and Political Rights (1966) defines what constitutes fairness in the legal system. Among those expectations are the right to free assistance of an interpreter if the accused does not understand or speak the language of the court. A defendant who does not understand the proceedings is considered not present at his or her own trial, and thus incapable of mounting a defence. Similar guarantees are incorporated into the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The

European Parliament in Directive 2010/64/EU then clarified its understanding of the specific requirements concerning the right to interpretation and translation in criminal proceedings. A 2018 report evaluated the success of this Directive.

At the national level, constitutions in at least 67 countries include provisions for interpretation in criminal trials. In the United States, the right to a fair trial is guaranteed under the 5th amendment, along with the due process requirements of the 6th amendment (part of the Bill of Rights), reiterated in the 14th amendment. These general statements about equality and fairness have been extended by statute, most pertinently the Court Interpreters Act (1978), and by jurisprudence (for example the precedents set by *U.S ex. rel. Négron v. New York* (1970)). Similarly, in the United Kingdom, the Human Rights Act of 1998 (Article 6(3)(a) and (e)), specifies that charges must be understood and offers free assistance of an interpreter throughout the legal process. In Canada jurisprudence established the basic principles (*R. v. Lee Kun*, 1916) which have since been enshrined in federal and provincial declarations of rights. In France the *Circulaire du 31 octobre 2013... droit à l'interprétation et à la traduction dans le cadre des procédures pénales* specifies when and how interpretation and translation should be provided to suspects or the accused in criminal investigations.

Subnational jurisdictions have similar guarantees. In the United States two states guarantee the right to an interpreter in their state constitutions. At least 42 states have statutory requirements, with specific practices further detailed through legal precedents established by court rulings.

Despite this array of legal requirements, there are many gaps in the law and in legal practice. The declarations of rights, constitutions and statutes are framed to apply to criminal cases involving felonies. However, statistics from US state courts show that felonies constitute a small percentage of legal actions. In 2017 statistics from the Court Statistics Project, slightly more than 20% of all cases were criminal cases, and only 20% of those were felonies. The vast majority of cases – traffic infractions, civil suits, domestic relations (divorce, protection orders, child custody), asylum/ immigration issues - do not fit the model envisioned by human rights protections. In these other legal disputes, the right to an interpreter, free of charge, is frequently not guaranteed. Many of these are handled by different kinds of courts, some without legal counsel and most without a trial by jury.

Typical of non-criminal trials are the conditions on interpretation in the state of Wisconsin (United States): the judge determines if a person's knowledge of English is so limited as "to prevent the individual from communicating with his or her attorney, reasonably understanding the English testimony or reasonably being understood in English". The adverb 'reasonably' gives wide latitude to the judge. If the judge feels an interpreter is necessary, the interpreter is free only if the person cannot afford to pay the interpreter's fees. The court determines if the person is truly indigent.

Litigants and witnesses are not the only ones who require the services of an interpreter. The American Bar Association standards (2012) recognize the need for others in the courtroom to understand the proceedings, extending the right to an interpreter to “persons with legal decision-making authority and persons with a significant interest in the matter.” Legal decision-making capacity might include parents or legal guardians of minors or of incapacitated persons. Other interested parties could be non-testifying victims or members of a class-action lawsuit.

How does the court evaluate the need for an interpreter? The clearest situation is a request by the defendant, litigant or witness for the assistance of an interpreter. However, failure to make such a request does not mean that the person does not need an interpreter. People frequently overestimate their ability in the language of the court, a kind of linguistic bravado. Others may have a cultural propensity to agreeing with authorities that leads them to waive their right to an interpreter (for instance indigenous communities in Australia).

Accordingly, judges are obligated to determine necessity, a task for which they are ill-equipped. Furthermore, they have a conflict of interest, because they are aware that interpreters are expensive and slow down court proceedings. This encourages quick and easy judgments, as expressed in *State v. Xiong Yang* (201 Wis. 2d 721, 1996) “The trial court’s factual determination does not require an elaborate hearing.” The Ohio handbook for the use of interpreters in the legal system suggests the following questions that a judge might use to determine if the defendant or a witness might need an interpreter:

- Please tell the court your name
- How did you learn English?
- Tell me about your country
- What is the highest grade you completed in school?
- Describe some of the things you see in this courtroom

While some of these are open-ended questions that require a sentence or two, none of these provides any indication of the ability to comprehend legal proceedings.

Though judges almost never have linguistic training for evaluating the need for an interpreter, alternative solutions are rarely used to provide a more scientific determination of need. Standardized criteria such as the Oral Proficiency Interview (OPI) or Elicited Oral Response (EOR) testing can be expensive and time-consuming. In one California case (*Marin v. Busby*, 2014) the linguist Roseann Dueñas González, using the OPI, evaluated a defendant as having a level of English at the 0-1 level (5 being native-like language skills), but the court preferred to believe the defendant’s former neighbor, who claimed to have conversed with him in English.

The protections envisioned by human rights declarations relate solely to those whose primary language is not the language of the court, but they fail to cover those who speak a different version of the national language. In the United Kingdom certain forms of English are

recognized as distinct languages with interpretation available, for instance Jamaican Creole. More frequently, though, failure of native speakers of the national language to speak the variety best understood by the court is perceived as a failure of the individual and as an indication of the lack of intelligence or trustworthiness of that person.

Some legal professionals have recognized the need. Court transcribers have pleaded for help in understanding testimony in non-standard varieties. In 2010 the Atlanta office of the US Drug Enforcement Administration requested nine translator/interpreters for African-American Vernacular English to assist in their investigations. Judges, however, have almost never addressed the need for translators/ interpreters for non-standard forms of the national language. The failure to do so has led to substantial confusion and error but the error has not led to reversals upon appeal.

Court interpreting is a most challenging occupation. The interpreter is expected to “interpret completely and accurately, adding or omitting nothing, giving due consideration to grammar, syntax, intent, register and level of language of the original speaker.” Even when highly competent professional interpreters are used, some errors are inevitable. It is however exceedingly difficult to obtain a reversal of a guilty verdict on the basis of mistaken translations. The evaluation of quality is difficult, and so evaluation was omitted in the original version of the European Union Directive 2010/64. Though added in the final version, the definition and the monitoring of quality is left to the discretion of each individual state in the European Union.

In the United States the defendant in a criminal trial must protest the mistranslation at the time of the trial; if the defendant or other participant in the trial does not know the language of the testimony the evaluation of quality is problematic. An appeal on the grounds of inaccurate interpretation is rendered extremely difficult because the original language of the testimony is not recorded. The 9th Circuit Court of Appeals in the United States proposed three ways to determine prejudicial inaccuracy in the face of this obstacle: (1) identifying a specific word a more competent interpreter might have used; (2) the circumstantial evidence of incoherent responses in a trial transcript; (3) a declaration, at the time of the trial, that the witness or the defendant does not understand the interpreter.

An inaccurate translation or interpretation is considered a breach of the promise of due process. Most often, such inaccuracies are dismissed as harmless error. As one Ohio Court of Appeals concluded, “a defendant is entitled to a fair trial, not a perfect one.”

Oral interpretation of legal interactions is generally required (aside from exceptions discussed elsewhere in this policy paper), but written documents that accompany a case are not necessarily available in translated form. In the case *Kamasinski v. Austria* (European Court of Human Rights, 1989), the court emphasized that Article 6-3-e of the Convention for the Protection of Human Rights and Fundamental Freedoms “does not go so far as to require a written translation of all items of written evidence or official documents in the procedure.” Instead the court can use its discretion to determine if a document is relevant, or, even if

relevant, whether a full translation or an oral summary is sufficient. This principle was applied in *Harward v. Norway* (1994), in which 1100 pages of documents in Norwegian were submitted, but only the indictment and a small proportion of other documents were translated for the defendant, a citizen of the United Kingdom who knew no Norwegian. The Human Rights Committee argued that the defendant could have requested oral summaries from his interpreter. Oral summaries do not provide the same opportunity for reflection. When the prosecution has access to more documents than the defense equality between the adverse parties is denied.

The gaps in human rights declarations and statutory laws of individual countries for the provision of interpretation and translation services suggest the need for more rigorous policies. Too often the discretion of the court, a court that has a vested interest in limiting such services, denies equal justice to those who do not speak the language of the court. While it is impossible and unwise to eliminate judicial discretion, the following steps would assist judges in using that discretion to assure equality and due process. The responsibility for implementing such policies will vary from country to country, or even between different political subdivisions of a country

1. The same provisions as those foreseen for defendants in felony trials should be extended to participants in other types of legal proceedings.
2. At the beginning of any proceeding a determination should be made of all who might need assistance (not just defendants).
3. Reliable means of determining if an individual needs an interpreter should be developed, combining linguistic and legal expertise.
4. Courts should be sensitized to the need for interpretation services for speakers of non-standard forms of the national language. Formal preparation and certification procedures for professionals to provide such a service should be developed.
5. Testimony in languages other than the language of the court should be recorded to facilitate challenges to the accuracy of interpretation.
6. Translation should provide full access to all written documents so that all participants in legal interactions are on equal footing.

Further reading

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European Parliament / European Council *Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0064>

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Resources

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Cite this article

Kibbee, Douglas A. 2020. 'Addressing Linguistic Inequality in Legal Settings', *Languages, Society and Policy*. doi.org/10.17863/CAM.61993

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