IMAGES OF THE INTERPRETER: A STUDY OF LANGUAGE-SWITCHING IN THE LEGAL PROCESS

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Chapter 5

PRAGMATISM, PRECEPT AND PASSIONS

INTRODUCTION

The examination in this chapter of the twin areas of entitlement to and provision of interpreters in the legal system begins with a historical overview which shows how English law changed from an overtly multilingual system to one which became resolutely monoglot. The switch from multilingualism to monolingualism was neither abrupt nor smooth, and on the numerous occasions on which legislative efforts were made to achieve it, it was always controversial. The chapter shows how emotive an issue both the early multilingualism and the subsequent switch to monolingualism were. It will argue that the legacy of this historical emotiveness about multilingual issues in the law is maintained and reflected in the contemporary confusion in respect of the entitlement to and provision of language-switching services for those who do not fall within the monolingual culture of the law (i.e., the deaf and those whose preferred language is other than that of the legal proceedings). It will also show the existence of two opposing judicial schools of thought on entitlement to an interlingual interpreter. One is the pragmatic approach, which agrees to provide an interpreter only if perceived as being necessary in order to ensure the smooth operation of the legal process, while the other is that of natural justice. This chapter will argue that the resultant judicial confusion in attitudes to entitlement to LS services spills

over to the arrangements for LS provision, in turn further affecting attitudes to entitlement because of the negative impact of often inadequate LS on the operation of the legal process.

MULTILINGUALISM AND THE LAW

The use of different languages in a single legal system is, of course, far from unknown. Mellinkoff notes the "countless collateral relatives as well as a polyglot parentage" of the common law of England and the language of that law.[1] Although objective reasons[2] may have led to the evolution of such situations, other factors are often responsible for their perpetuation.[3] The specific language used by the legal system may be far from a negligible quantity. Pollock and Maitland write that one of the "most momentous and permanent effects" of the Norman Conquest was its effect on the language of English lawyers, "for language is no mere instrument which we can control at will; it controls us".[4] Regardless of whether factors such as inertia, self-interest or bad translation are responsible for a particular language being used in a given setting or for language being used in a particular way, the result is that the actors in a certain legal system in which a given linguistic pattern or order prevails are not linguistically and psychologically free. Moreover, attitudes towards those who come into contact with the system but do not conform with the

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1 Mellinkoff 1963:35. Goodrich ('Legal Language', in press) notes that the legal glossary of the twelfth century included Greek, Saxon, Danish, Hebrew, law Latin and law French.

2 For example, Young (1990:761) cites Pollock and Maitland as showing in their *History of English Law* (1911) how a French-speaking King and barons wished to ensure that even if no one else understood legal proceedings, they would. French was accordingly spoken throughout all parts of the King's court. Mellinkoff considers the matter to be more complex.

3 Mellinkoff (1963:100-101) suggests that it was precisely the "unknown" nature of French that was responsible for perpetuating the use of this language in the law. In this profession, a monopoly was exercised by the noble and the wealthy, those groups who were primarily interested in the intricacies of land law and whose sons took up the legal profession.

4 Pollock and Maitland 1911:87.

established behavioural (including linguistic) codes may be coloured by prejudices including linguistic ones. In addition, the outsiders may resent the fact that they are excluded by linguistic codes from even understanding, let alone participating in, the legal system.

As a backdrop to examining the issue of the entitlement to language-switching services provided by interlingual interpreters of individuals who do not speak the language of legal proceedings, it is instructive to look briefly at the situation of language and the law in England, starting with the Courts of Justice Act 1731. This legislation was designed to put an end to a situation where the non-lawyer was literally utterly unable to follow legal proceedings because of the use of law Latin and law French:[5]

> Whereas many and great mischiefs do frequently happen to the subjects of this kingdom, from the proceedings in courts of justice being in an unknown language, those who are summoned and impleaded having no knowledge or understanding of what is alleged for or against them in the pleadings of their lawyers and attornies...: To remedy these great mischiefs, and to protect the lives and fortunes of the subjects of that part of *Great Britain* called *England* more effectually than heretofore, from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice in an unknown language, be it enacted...that all proceedings whatsoever in any courts of justice within that part of *Great Britain* called *England*, and in the court of exchequer in *Scotland*, and which concern the law and administration of justice, shall be in the *English* tongue and language only, and not in *Latin* or *French*, or any other tongue or language whatsoever...[6]

The emotiveness of the phrasing of this text makes it clear how greatly the issue of language use in legal proceedings can at times stir passions. A historical study of English legal practitioners' attitudes to legislation designed to ensure that all legal documents and proceedings would be in English belies Beloff's comment that "pragmatism rather than legal precept rules: no passions are stirred".[7] The present author would suggest

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5 For a detailed explanation of the development of the English legal system and its use of different languages, see Mellinkoff (1963), and in particular his chapter on the rise and fall of law French (1963:95-135).

6 Courts of Justice Act 1731, 4 Geo. II, c. 26. Emphasis in original.

7 Beloff 1987:154. Beloff was contrasting United Kingdom attitudes to bilingualism in the field of education, "which all the evidence suggests is and

that, like education, the judicial sphere has long been and remains an arena of considerable strife over language use.

The eighteenth-century Courts of Justice Act was the culmination of a succession of attempts to administer the law in English, the language of the common man. It came into force nearly four hundred years after the 1362 Statute of Pleading which deplored the use of French for pleas in court proceedings.[8] However, the fourteenth-century statute, which Mellinkoff calls the "first national outcry against the language of the law"[9] was so ineffective that in its aftermath, French became the regular language of the statutes of England. It has been argued that the passions that the Statute was supposed to address were stirred not by the technicality of the legal language of the time, but by its foreignness--its Frenchness.[10] However, although the statute--ironically, itself drafted in French--included references to citizens being less likely to violate the law if it were in a language they understood, it did not require English to be used for legal matters generally, but only for oral pleadings. The language of record remained Latin.

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always has been the major battle ground in whatever area or era", with other, ostensibly less controversial areas for the use of minority languages.

8 Statute of Pleading, 1362, 36 Edw. III, Stat. I, c. 15. Written in French, the statute noted (in an eighteenth-century translation quoted by Mellinkoff 1963:111-112): "*Pleas shall be pleaded in the English tongue, and inrolled in Latin.* Because it is often shewed to the King...of the great mischiefs which have happened...because the laws, customs and statutes of this realm be not commonly holden and kept in the same realm, for that they be pleaded, shewed and judged in the French tongue, which is much unknown in the said realm, so that the people which do implead, or be impleaded, in the King's court, and in the courts of other, have no knowledge or understanding of that which is said for them or against them by their serjeants or other pleaders...the King, desiring the good governance and tranquillity of his people...hath ordained...that all pleas...shall be pleaded, shewed, defended, answered, debated and judged in the English tongue, and that they be entered and inrolled in Latin..."

9 Mellinkoff 1963:111.

10 Blackstone (3 *Blackstone Commentaries* 317 (1768)) calls Norman or law French a "barbarous dialect. An evident and shameful badge, it must be owned, of tyranny and foreign servitude".

The problem was, as Mellinkoff points out, that "the suggestion of the statute...that English be used in pleading had to be weighed by the practitioner against the absence of legal learning in English and the ubiquity of French".[11] The victory was more apparent than real:

> English-language patriots have hailed the Statute of Pleading as the Magna Carta of the Anglo-Saxon tongue: "the victory of English"...The rejoicing overwhelms the fact. The statute may have sounded good for public consumption, but it underestimated the power of the bar.[12]

Gradually, however, despite these handicaps, English lawyers moved towards conducting proceedings in their native tongue, while still continuing to sprinkle their usage liberally with French and Latin. Mellinkoff shows how law French continued to hold sway well into the seventeenth century, and how court records, writs and written common law pleadings remained in Latin, making the very "sense of the law itself, as well as its pleading"[13] inaccessible to the ordinary literate citizen.

In 1650, during the Commonwealth, Parliament passed *An Act for turning the Books of the Law, and all Proces and Proceedings in Courts of Justice, into English*.[14] The lawyers objected, but gave in--temporarily, and not always wholeheartedly. Just ten years later, with the Restoration, the English-language statute was repealed.[15] It is suggested here that a major stumbling block to achieving the goal of anglicising the written texts of the legal system was the sheer volume of the enterprise. Given the fact that translation is a labour-intensive activity, large numbers of skilled, experienced individuals with excellent legal, linguistic and clerical skills would have been required in order to achieve satisfactory results. In the absence of such individuals, the enterprise was doomed to failure. It can

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11 Mellinkoff 1963:113.
12 Mellinkoff 1963:112.
13 Mellinkoff 1963:125-126.
14 II Acts and Ordinances of the Interregnum 455 (1650).
15 Pleading, 1660, 12 Car. II, c. 3. Mellinkoff (1963:129) writes that it was "killed in pique".

be safely hypothesized that the quality of the requisite translations into English of law books, reports, records, judgments, statutes and other documents left a great deal to be desired. The rate at which work progressed was doubtless infinitesimal.[16]

Under the 1651 Additional Act "concerning the proceedings of the Law in English", the translations into English of various law books and legal documents as required by the 1650 Act were to be referred to two or more of the chief legal notables.[17] Subsequently, following agreement, the text could be "certified".[18] Such awareness of the vital need for quality control is laudable. However--and here is the rub--the 1651 Act specified that "Mis-translation, or Variation in Form by reason of translation, or part of Proceedings or Pleadings already begun, being in Latin and part in English, shall be no error, nor void any Proceedings by reason thereof".[19] To state that pleadings already begun and held partly in Latin and partly in English should not be void seems eminently reasonable. To concede that "variation in form" resulting from translation factors was similarly acceptable would also appear to be a reasonable approach to adopt. To acknowledge the likelihood of translation errors occurring was to recognize a linguistic fact of life. "Literal translation",[20] that injunction

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16 In Firth & Rait (London, 1911, reprinted Holmes Beach, Florida, 1972) the text of the 1650 Act, dated 22 November 1650, requires that "from and after the First day of January, 1650, all Report-Books of the Resolutions of Judges, and all other Books of the Law of England, which shall be Printed, shall be in the English Tongue onely". This was perhaps a little optimistic if all pre-existing texts were to be translated into English--even if the reference to January 1650 was a mistake for 1651.

17 The Speaker of the Parliament, the Lords Commissioners of the Great Seal of England, the Lord Chief Justice of the Upper Bench, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

18 An Additional Act concerning the proceedings of the Law in English 1651: "...and what shall be agreed by them, or any two or more of them in translating the same, the Lords Commissioners shall and may affix the Great Seal thereunto, in Cases where the same is to be fixed."

19 The Act did not extend to Proceedings in the Court of Admiralty, where Latin certificates were allowed to continue.

20 See Chapter 2 above.

from lawyers which is frequently the bane of contemporary interlingual court interpreters, led during earlier days to stylistic monstrosities in English, which "failed to take into account that, unlike inflected Latin, intelligible English depends primarily on word order".[21] Given this tradition, the quality of translation into English during the Commonwealth period was doubtless far from satisfactory.[22] However, a pragmatic solution such as that embodied in the 1651 Act, accepting that in the LS area wrong could be "acceptable" or right, seems to be overstepping the mark of flexibility. Such a cavalier attitude to the accuracy of translations was likely to breed problems. This seems to have been partially acknowledged by the 1731 Act, which makes provision for subsequent correction of a range of errors.[23]

The centuries-long struggle between Latin and law French on the one hand, and English on the other,[24] paralleled by the conflicting desires of the lawyers to maintain exclusive control over legal proceedings and of the common man to understand and participate directly in the same,[25]

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21 Mellinkoff 1963:146.

22 A historical example of the cavalier approach to legal translations is provided by Athulathmudall (1962:228) who notes that much of the Ottoman legislation applied in Palestine was a translation of French, German or Italian texts, "translated carelessly; simply by a system of word-substitution". In acknowledgement of this situation, when at all possible Israeli judges examined the original-language text in considering Ottoman legislation and its ramifications.

23 Courts of Justice Act 1731 (4 Geo. I, c.26, s.2): "...all manner of mistranslation, errors in form, mispellings, mistakes in clerkship, may at any time be amended, whether in paper or on record or otherwise, before or after judgment, upon payment of reasonable costs only."

24 Mellinkoff (1963:125) quotes the most celebrated instance of decadent law French which is "as crude as the frontier justice it records. It is the report of the prisoner being sentenced who '...ject un Brickbat a le dit Justice que narrowly mist, & pur ceo immediately fuit Indictment drawn per Noy envers le prisoner, & son dexter manus ampute & fix al Gibbet sur que luy mesme immediatement hange in presence de Court.'"

25 Mellinkoff (1963:126) quotes John Warr (*The Corruption and Deficiency of the Laws of England, Soberly Discovered: Or, Liberty Working up to Its Just Height*): "The unknownness of the law, being in a strange tongue; whereas, when the law was in a known language, as before the Conquest, a man might be his own advocate. But the hiddenness of the law, together with the fallacies and doubts thereof, render us in a posture unable to extricate ourselves; but

eventually resolved itself as law reports were increasingly, and after 1704 exclusively,[26] published in English. Even prior to this, reports in French had been compelled to use English when a verbatim account was required, as in the case of a libel.[27] Mellinkoff comments that the "incongruity only served to make law French appear more ridiculous", as in the following example:

> ...que le Defendant parle ceux parols al auter, My Little Boy in my house is Anne Distols Bastard, I wonder you will keep company with her...[28]

MONOGLOTS AND POLYGLOTS, or MYSTIFICATION AND PREJUDICE

Twentieth-century discussions of language issues with special reference to the practice of law in former British colonies[29] echo the same kind of objections to switching to the vernacular as those voiced historically in England. They derive from linguistic, technical and attitudinal issues--the absence of textbooks and terminology in the vernacular, the existence and drawing up of law reports in a foreign language, the problems of inaccuracies arising from mistranslation, the need to quote certain material verbatim, and the belief that only English can serve as the language of the

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we must have recourse to the shrine of the lawyer, whose oracle is in such request, because it pretends to resolve doubts."

26 Mellinkoff 1963:130.

27 See Chapter 3 above on language-switching in libel and slander cases.

28 Mellinkoff 1963:130, citing *Anne Distols Case*, 124 ER 126 (C.P. 1628).

29 See Athulathmudall (1962) on Burma, Ceylon, Israel and Malaya; Beloff (1987) on Malaysia; Cheng (1993) on Hong Kong; Dubow (1976) on Tanzania; Harries (1968) on Swahili in East Africa; Hickling (1975) on Singapore; Kavugha and Bobb (1980) on Tanzania; Kidder (1976) on India; Kuo (1985) and Kuo and Jernudd (1993) on Singapore; Mead (1985) on Malaysia; Newman (1987) on South Africa; Polomé (1980) on Tanzania; Simpson (1984) on Nigeria; and van den Berghe (1968) on South Africa. Although their paper examines the role of English in resurgent Africa, the approach of Bloor and Bloor (1990) is also relevant. In his examination of criminal procedure in Uganda and Kenya, Brown (1970) discusses various aspects of language use and interlingual interpretation. Pilley (1962) has some interesting insights into interlingual interpretation in multilingual parliaments in Asia.

law. The latter is ironic, given the fact that in England in earlier times, it was Latin and law French which filled the role now occupied by English in the legal systems of a number of former British colonies. It was against this background that an eighteenth-century commentator observed that "the law is scarce expressible properly in English".[30]

Identifying an elitist and language-based attitude in the Indian legal system, for example, Kidder asks whether the quality of justice is strained by practices which make it impossible for most actors to comprehend the language of proceedings.[31] He concludes that the use of English in the Indian law system is just one of the weapons in the law's "arsenal of elitism", and that the mystification which is maintained in the courts does not depend on the use of English: "it is the mystification of elite discourse, and could be just as effectively perpetuated in any of the local languages".[32] This is precisely the complaint which the 1731 Act was designed to remedy in England more than two centuries earlier, and which is reflected in both earlier legislative attempts and later plain-language campaigns. It is also likely to be the explanation of the legal profession's spirited opposition to attempts to make the law more accessible to the lay person.[33]

Although many traces of English law's multilingual antecedents remain to this day, in the wake of the 1731 Act there did, eventually, come about the monolingual situation so longed for by the common man. Whether it enabled him to understand and participate more readily in judicial proceedings is highly debatable.[34] Whether the English of the law

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30 *Per* Roger North, quoted by Goodrich (1987:437), who calls the sentiment a "curious view".

31 Kidder 1976:235-236.

32 Kidder 1976:247.

33 See Note 244 below and Note 25 above.

34 Blackstone (3 Blackstone *Commentaries* 322 (1768)) writes of the 1731 Act: "This was done, in order that the common people might have knowledge and understanding of what was alleged or done for and against them in the process

is the vernacular is also contested.[35] It may be suggested, however, that in switching from a multilingual to a monoglot ethos, the legal system in England--and subsequently its offshoots in many of its colonies--entirely reversed its position. Lawyers formerly expended floods of indignation and passion in opposing the use of the vernacular and the introduction of monolingualism. When, after some four centuries of judicial obstruction, the shift to using English finally took place, English legal figures seem eventually to have embraced monolingualism almost over-enthusiastically, to the extent of adopting the opposite extreme of mistrusting all foreign languages. Goodrich identifies in English legal doctrine an "explicitly exclusory stance...toward all other linguistic communities and usages".[36] It is perhaps above all this tradition which appears to have survived--indeed, has perhaps been strengthened by--the shift away from multilingual law books and non-vernacular records.

Lay individuals' earlier criticisms that legal proceedings were held in divers alien tongues are henceforth echoed by judicial protestations that the court must not be addressed in any language other than English. Individuals with whom the court cannot communicate directly because they speak a language other than that of the proceedings and maintain that they are unable to understand what is said to them, arouse judicial suspicions. In a subtle variation on the earlier theme of silence and refusal to plead being considered suspect, and exposing the mute individual to

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and pleadings, the judgment and entries in a cause. Which purpose I know not how well it has answered; but am apt to suspect that the people are now, after many years experience, altogether as ignorant in matters of law as before."

35 In 1993, England's Royal Commission on Criminal Justice (Cm. 2263) notes in its Report (at 141) that training should impress "upon all practitioners in the criminal justice system the need for clear communication using plain English at all stages", and recommends (at 142) seeking the assistance of the Plain English Campaign in overhauling all forms and leaflets in use in the courts which have to be filled in or read by members of the public.

36 Goodrich 1987:435-436.

torture in the assumption that the silence is wilful,[37] it is frequently assumed that those who claim not to speak English are lying. The mistrust of the foreign-language speaker is used as an excuse not to provide the mediator, the interlingual interpreter; even if language-switching services are provided, the distrust remains, and in a further variation may be extended or transferred to the language-switcher.

The attitude embodied in the 1651 ruling on mistranslation[38] has a distinct bearing on the current situation in many English-speaking courts in respect of challenges to particular instances of LS performance. Indeed, it may even be argued that the *laissez-faire* stance that characterizes attitudes to the quality of language-switching in the legal system in contemporary England can be traced back to this seventeenth-century ruling.[39] It may be suggested that the justification for deciding that

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37 *Peine forte et dure*. This was the torture inflicted upon a prisoner indicted for felony who refused to plead and submit to the jurisdiction of the court. Heavy weights were applied to his body until he consented to be tried by pleading "guilty" or "not guilty", or until he died. This was abolished in 1772 by legislation which made refusal to plead to a charge of felony equivalent to a plea of guilty: "That if any person, being arraigned on an indictment...for felony or...piracy, shall...stand mute, or will not answer directly to the felony, or piracy, such person so standing mute...shall be convicted of the felony or piracy charged in such indictment..., and the court...shall thereupon award judgment and execution against such person, in the same manner as if such person been convicted by verdict or confession of the felony, or piracy..." (12 Geo. 3, c.20). Under more liberal 1827 legislation, the Court could order a plea of 'not guilty' to be entered for a prisoner standing mute of malice (Criminal Law Act 1827, s.2, 7 & 8 Geo. 4). The current legislation is the Criminal Law Act 1967, s.6(1)(c): "Where a person is arraigned on an indictment...if he stands mute of malice or will not answer directly to the indictment, the court may order a plea of not guilty to be entered on his behalf, and he shall then be treated as having pleaded not guilty."

38 See at Note 19 above.

39 In earlier times, the prescribed forms of writs had to be rigidly adhered to. The same was true for oral pleadings based on the writs. In the old days of oral pleading, when a pleader perceived any slip in the form of his allegation, he acknowledged the error by the expression *j'ay faille* (I have made a slip), and under the statutes of jeofails thereby obtained liberty to amend. (*Wharton's Law Lexicon*, 14th ed., 1938.)
The 1340 (14 Edw.III, Stat 1, c.6) Statutes of Jeofails were extended by the 1731 Act to cover errors in English. Section IV of the 1731 Act reads: "...that all and every error and mistake whatsoever, which would or might be amended and remedied by any statute of *Jeofails*, if the proceedings had been in *Latin*, all such errors and mistakes of the same and like nature, when the

mistranslation was not error was simply a desire to avoid the insistence on technical correctness that had so bedevilled the practice of the law in earlier times. Previously the oral pleadings had had to be absolutely true to ritual or the cause failed.[40] Translation, however, is not a matter of rite. Normally, there is no one absolutely "correct" version. There may be times when it is difficult to determine when a translation "error" is absolutely wrong, or when it is negligible or acceptable.[41] However, on the whole it is possible to identify a mistranslation fairly readily, and a significant difference in L2 meaning should not be allowed to stand unchallenged.[42] Research findings indicate that insufficient recognition of the need for LS quality has survived to this day in the English legal system.

A rough parallel to the shift from multilingualism to monolingualism in the law can be found in the (at times much contested) movement from oral to written culture. However, there is a world of difference between the textual v. oral antithesis embodied in the saying "the letter killeth, but the spirit giveth life",[43] and ignoring or denying the difference between a correct and an erroneous L2 rendering. The various Statutes of Jeofails enacted over a period of nearly four centuries were intended to break away from the tradition of meticulous insistence on a quasi-magical form of words as in an incantation.[44] The first Statute of Jeofails in 1340

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forms are in *English*, shall be deemed, and are hereby declared to be amended and remedied by the statutes now in force for the amendment of any *Jeofails*; and this clause shall be taken and construed in all courts of justice in the most ample and beneficial manner, for the ease and benefit of the parties, and to prevent frivolous and vexatious delays."

40 Mellinkoff (1963:115), referring to Coke, *Commentary upon Littleton*, ff. 304a, 304b (10th ed. 1703).

41 For a discussion of related problems see Chapter 3 above, and in particular at Note 60.

42 See Chapter 3 at Note 59 for an American judge's presentation of the issue of ignoring errors resulting from language-switching operations.

43 *Corinthians* II.iii.3.

44 Mellinkoff (1963:114) notes that the statutes of jeofails, "instead of liberalizing the rules of pleading, simply led to insistence on even greater

referred to clerical "misprision"--"wrong action" or "omission", denoting "mistaking in writing one syllable or one letter, too much or too little". Non-clerical, substantive errors in written translation and significant misunderstandings and inaccurate renderings in oral language-switching do not, however, fall into the same class as such "wrong actions" of legal or clerical form. To apply the same administrative remedy to both sets of "error" is to make a cardinal mistake, indicative of confusion as to the implications of the LS process.[45]

In a further historical perspective, perhaps the distrust of interlingual interpreters in the legal system derives in part from ancient memories of the twelfth and thirteenth century common-law oral pleaders, narrators or *conteurs* who literally told a tale.[46] Research findings indicate that when the interpreter stands next to the NESB[47] individual in the witness box, legal participants appear to find it hard to accept the interpreter's "*alter ego*" role, believing that instead a "story" is being concocted or fabricated,[48] or, in a marginally more charitable version, that the

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technical correctness at the level one step above the most trivial deviation". Writing in the twentieth century about the dominant contemporaneous practice in the United States of granting new trials "for an immaterial slip in the rules of evidence", Wigmore comments (1 Wigmore, *Evidence*, s.9 at 667 (Tillers rev. 1983)): "The most trifling error 'works a reversal' in the same wizard-like manner that the mispronounced word in the superstitious formulas of the Germanic litigation lost for the party his cause. This modern doctrine is the more discreditable of the two. They knew no better, then. We do know better; yet we preserve this technical trumpery."

45 The consequences and implications of the law of misprision (false spelling and inaccurate record) could be major, as in a case cited by Sir John Doderidge (1631:200), where "the clerk to the court had mistakenly recorded an outlawry where the writ had in fact been rebutted. On appeal by the plaintiff in person, the justices, who had been present at the original hearing, recollected that the record was wrong but observed that the misprision was none the less on the record and testified outlawry" (Goodrich 1990:138).

46 Goodrich 1987:430-431.

47 NESB: non-English-speaking background. The term comes from the Australian context.

48 Thus mistrust of the process is reflected by the suggestion in an Arabic newspaper that systematic "doctoring" of Adolf Eichmann's German occurred between the original, given in a soundproof booth, and the outside world. Reported by *The Jerusalem Post*, 28.4.61.

interpreter is giving his or her "version" of the "story", or putting his or her "interpretation" on the facts. While, strictly speaking, this hypothesis relates to the status of the interpreter, inevitably it colours judicial views on an NESB individual's entitlement to LS services.

There is some evidence to suggest that the "stigmatisation of the vernacular"[49] once prevalent in the legal system has now reversed to a stigmatising of the "alien's language" and, by extension, of the alien himself, who is identified as such precisely by requesting LS services. Indeed, it has been argued that in some ways an LS provider may actually undermine an NESB individual's claim or case, for example in the courtroom by emphasizing the individual's ethnicity, or during police questioning by inadvertently jeopardizing a suspect's right to remain silent.[50] The argument here is that just as, historically, a blend of both vindicable and unwarranted factors was advanced in counteracting attempts to make exclusive use of English in the legal system, so later a similar blend of objective factors and prejudice has come to be used in dealing with individuals who do not have English as their first or preferred language. It is suggested that these factors also apply to judicial consideration of the question of entitlement to LS services.

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49 Goodrich 1987:436.

50 Laster 1990:228. For example, in *Gudabi* v. *R.* ((1983) 52 ALR 133 at 144), the court quotes Brennan J. in *Collins v. R.* ((1980) 31 ALR 257 at 322): "A prisoner's friend is intended to enhance the suspect's ability to choose freely whether to speak or be silent". Since an interpreter, according to Forster J. in *Anunga*, may be a "prisoner's friend", there might possibly be a conflict of roles here. Brennan J. held (at 322) that this was the situation in *Collins*: "Bobby Armstrong became, from the beginning of each of the interviews with Collins, Williams and Woods, an interpreter acting in response to police instruction, and he was manifestly not available for private consultation with any of the appellants to whom he was translating the introductory remarks of Sgt Chung."

AN UNDERSTANDING MIND

Against this historical background of complex attitudes to foreign languages in the law, it is now necessary to consider the legal grounds for a decision to provide an individual with LS services. The relevant view of contemporary accusatory criminal procedure is that the very principle of a defendant being present at his or her own trial requires not only physical but also mental presence.[51] In other words, the defendant must understand both the nature of the proceedings and specific testimony against him or her. There is a concomitant need to plead with an understanding mind. Such understanding cannot exist without comprehension of both the words and--to some extent--the processes taking place in court. Where the defendant is represented, there is also a need to be able to communicate with counsel. For these reasons, legal "competence" requires the specific ability to communicate, which is normally understood as oral communication.[52] The communication must be two-way, i.e. the ability to both understand and make people understand.

Historically, English courts have long[53] considered individuals who do not plead but remain silent to be either "mute of malice" or "mute by visitation of God".[54] Unless communication can be established,

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51 See Poole [1968] *Crim.L.R.* 6 at 22: "The situation presented to English law when the accused stands mute or appears to be unfit to stand trial may, broadly, be related to its concern for his participation in the trial; it is a reflection of all that is meant when the English system of criminal procedure is referred to as 'accusatory.' Although originally his participation amounted to little more than his consenting to 'put himself upon his country' the way the law has developed has resulted in his being allowed to play such a role as will operate to his best advantage, and in the recognition that, if he is unable to do so because of some personal incapacity, the trial should not proceed."

52 *Dusky v. United States* 362 US 402, 4 L Ed 2d 824, 80 S Ct 788 *per* the Solicitor General and as accepted by the Supreme Court: "The test must be whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as a factual understanding of the proceedings against him."

53 Hale, (1736) *Pleas of the Crown*, ii. 317.

54 In *R. v. Francis Mercier* ((1777) 1 Leach 183 (168 ER 194)) a jury was empanelled and sworn as follows: "You shall diligently enquire, and true presentment make for and on behalf of our Sovereign Lord the King, whether

individuals found to be mute by visitation of God and who do not plead, cannot therefore be tried, and as a consequence may be detained at the sovereign's pleasure.[55] The same is not true of those considered mute of malice.

Where a physical handicap is responsible for an individual's muteness and inability to communicate orally, social attitudes and/or individual circumstances appear to determine the degree to which a court will attempt to establish communication in an alternative fashion, order a verdict of not guilty, put an end to the trial, or order the prisoner to be detained as non-sane.[56] Sacks makes the point that prior to 1750, the general situation of the prelingually deaf was a "calamity": English case reports certainly indicate that until then, it was expected on the whole that a prelingually deaf person would therefore also be "dumb" or "mute", unable to communicate and concomitantly considered stupid or insane.[57]

A pragmatic exception to the legal view anchored in such attitudes is provided by the oft-cited 1787 case of *Elizabeth Steel*. After a finding by the jury that she was "mute by visitation of God", the prisoner was

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Francis Mercier, otherwise Louis Le Butte, the now prisoner at the bar, being now here indicted for the wilful murder of David Samuel Mondrey stands mute fraudulently, wilfully, and obstinately, or by the providence and act of God according to your evidence and knowledge. So help you God." Evidence was given that the French-speaking defendant also had good command of English. He was found to be mute of malice. After medical checks, he was found guilty and executed.

55 This possibility is explicitly mentioned in the 1991 report of the 1985 *Iqbal Begum* appeal. Referring to the 1981 proceedings in the Crown Court at Birmingham, the report states ((1991) 93 Cr.App.R. 96 at 98-99): "When she was put up to plead, leading counsel told the judge that he had not been able to obtain any answers from her in the consultation which had taken place a very short while before in the cells, despite the activities of the interpreter. The judge then very quickly opened the mind of counsel to the possibility that she might have to face a jury empanelled for the purpose of discovering whether she was mute of malice or by visitation of God. Counsel and the judge discussed that possibility briefly."

56 Originally under 39 & 40 Geo. 3, c. 94, c.2.

57 Sacks (1990:19) identifies the condition as the inability to "propositionize", where thinking itself can become incoherent and stunted.

remanded in order for the question to be considered whether there was therefore an "absolute bar to her being tried upon the indictment":

> for although a person *surdus et mutus a nativitate* is, in contemplation of law, incapable of guilt, upon a presumption of ideotism, yet that presumption may be repelled by evidence of that capacity to understand by signs and tokens, which it is known that persons thus afflicted frequently possess to a very great extent.[58]

Although few details are given, the defendant was probably able both to lipread and to speak, because when asked whether she was guilty or not guilty, she is reported as replying, "You know I cannot hear". It was then suspected that Steel was pretending deafness, and the danger of this approach was pointed out to her.[59] A jury was again empanelled to determine the cause of her muteness, with the same finding as previously. The defendant was tried, found guilty, and sentenced to transportation for seven years.

With the introduction in the second half of the eighteenth century of sophisticated systems of sign language and the resultant trend towards literacy among deaf people,[60] communication with this group generally became possible. Criminal trials were therefore held and sentence passed on individuals who could not hear the proceedings, with whom communication normally took place through the medium of sign-language interpretation or, occasionally, writing. Similarly, deaf individuals of high birth were able to show by communicating in writing that although frequently without speech, they were not idiots and could inherit.[61]

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58 *R. v. Elizabeth Steel* (1787) 1 Lea. 452.

59 *Per* Heath J in *R. v. Elizabeth Steel* ((1787) 1 Lea. 452 at 453): "Your case has been considered by all the Judges, and they are of opinion that, even if you cannot hear, you ought to be tried upon the indictment; it will therefore be in vain for you to attempt to elude arraignment by pretended deafness; for as you must at all events be tried for the felony, you will lose, by such pretence, the advantage of asking proper questions of the witnesses."

60 See Sacks 1990:21-24.

61 Sacks (1990:14, n.20) writes: "As early as the sixteenth century some of the deaf children of noble families had been taught to speak and read, through many years of tutoring, so that they could be recognized as persons under the law (mutes were not recognized) and could inherit their families' titles and

However, in the second half of the nineteenth century attitudes changed.[62] This shift is reflected in a number of cases[63] in which deaf-mute individuals were detained without trial because of their muteness.[64] A nominally enlightened view thus led to a benighted situation, in which an individual was detained without having had the opportunity of presenting a defence to a charge of which s/he might well not be guilty.

Dyson's case[65] shows clearly how capacity to understand overlaps with the issue of sanity, to the detriment of sane individuals who have communicative handicaps. The defendant, deaf and dumb since birth, was "sufficiently intelligent" to cope with "common subjects of daily

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fortune...many of these educators depended upon signs and finger spelling to teach speech." See *Earl of Jersey and another, Demandants; Barnes and another, Tenants; Lady Mary O'Bryen, Vouchee* (1753) Barnes 168, 94 ER 860; *Dickenson v. Blisset* (1754) 1 Dick. 268; 21 ER 271.

62 In the 1870s, the situation changed radically, as "oralism", the insistence that the deaf learn speech and join the mainstream, became increasingly vociferous. Sign-language institutions were considered "old-fashioned" and oralist schools "progressive". At the 1880 International Congress of Educators of the Deaf held in Milan, deaf teachers were excluded from the vote, oralism won the day and the use of Sign in schools was "officially" banned. A consequence was that from then on, hearing teachers had to teach deaf students. Sacks (1990: 28) points out that none of this would have mattered if oralism had worked. The result of an oralist approach, however, is that prelingually deaf children expend enormous amounts of effort on attempting (with varying degrees of success) to acquire speech and therefore have little time for acquiring any other skills, knowledge, or culture.

63 *R. v. Dyson* (1831) 7 C. & P. 305; *R. v. Pritchard* 7 (1836) C.& P. 303; *R. v. Berry* (1876) 1 Q.B. 447; *R. v. Governor of H.M. Prison at Stafford, ex parte Emery* [1909] 2 K.B. 81.

64 For example, *per* Kelly C.B. in the case of a deaf mute (*R. v. Berry*) at 451: "It would be an outrage to the understanding of a man of common sense, to say that in such a case as the present the man should be convicted. He must be detained during His Majesty's pleasure..." Further, *per* Lord Alverstone C.J. in another deaf-mute case, *ex parte Emery* ([1909] 2 K.B. 81 at 84-85): "A practice has been established by judges of great authority over seventy years ago which has been followed ever since and which to my mind is in accordance with reason and common sense...The question as to the proper direction to the jury upon the issue whether the prisoner was insane came before two very learned judges over seventy years ago at the assizes, and though the decision of a judge at the assizes is not binding upon us, I should be very unwilling to upset a practice which was laid down so long ago and has been followed ever since, and which seems to me to be reasonable." The case referred to was *R. v. Pritchard*: see Note 69 below.

65 In which the indictment was for "the wilful murder of her bastard child by cutting off its head".

occurrence". However, testimony was given that she was incapable of understanding the nature of the proceedings against her, and making her defence.[66] The jury was told by the jury that "if they were satisfied that the prisoner had not *then*, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her non sane".[67] The physical handicap of deafness was thus subsumed into a mental one of insanity.

In another key case, *Pritchard*, the defendant[68] could read and write, and showed that he understood the charge. The jury found the prisoner able to plead, but when required to determine the prisoner's sanity, found him incapable of standing trial. In reaching this decision, they trusted the testimony of witnesses, rather than the evidence of their own eyes:

> It was however sworn by several witnesses that the prisoner was nearly an idiot, and had no proper understanding; and that though he might be able to be made to comprehend some matters, yet he could not understand the proceedings on the trial.[69]

Because of attitudes such as those of the juries and judges in *Dyson* and *Pritchard*, in Britain primary responsibility for communicating with the deaf eventually shifted to the social services, indicative of a

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66 *R. v. Dyson* (1831) 7 C. & P. 305 at 306: "*Then*...[though] with time and pains she might be taught to do so by the means used by the instructors of the deaf and dumb". Emphasis added.

67 *R. v. Dyson* (1831) 7 C. & P. 305 at 307.

68 Indicted for bestiality.

69 *R. v. Pritchard* 7 (1836) C.& P. 303 at 304. Alderson B. instructed the jury *inter alia* as follows: "if you think that there is no *certain* mode of communicating the *details* of the trial to the prisoner, so that he can *clearly* understand them, and be able *properly* to make his defence to the charge, you ought to find that he is not of sound mind. It is not enough that he may have a general capacity of communicating on ordinary matters." (Emphasis added.) It is noteworthy that the defendant was able to read and write, having been taught in the Deaf and Dumb Asylum in London. The jury found that he was able to plead. When the jury was sworn to determine whether the prisoner was at that time sane or not, evidence was given that he had similarly understood the charge and answered in writing when examined before the magistrates. See also Note 64 above.

disempowering attitude which viewed all deaf people as problematic or marginal members of society.[70]

If a prisoner's inability to understand the nature of the proceedings against him/her amounts, in point of law, to a "finding of insanity",[71] what is the situation of a non-English speaker facing a criminal charge? This is the issue touched upon in *Berry*'s case, and of crucial importance to the subject under discussion in this chapter. Berry, a deaf mute, was tried and found guilty of theft. The nature of the proceedings and the evidence against him were conveyed to the prisoner through the sign-language interpretation of his brother-in-law. The jury found that the prisoner was not capable of understanding, and had not understood, the nature of the proceedings. The chairman of the quarter sessions submitted the matter to the High Court for opinion. The Queen's Bench Division examined the authorities and considered the principle. The question facing the court was whether an individual who could not understand the proceedings could be convicted. Its understanding[72] that Berry was not capable of understanding was taken to mean that he had insufficient intellect to understand the nature of the proceedings. The court ruled that the conviction must be quashed and the prisoner ordered to be detained

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70 At the beginning of the 1980s, the National Council of Social Workers for the Deaf provided most of the sign language interpreting services for the deaf. The situation has since changed, partly as a result of the establishment of organisations such as CACDP (Council for the Advancement of Communication with Deaf People). However, Code C of PACE (Police and Criminal Evidence Act 1984) advises that most local authority Social Services Departments can supply a list of interpreters "who have the necessary skills and experience to interpret for the deaf". The 1993 report of the Royal Commission on Criminal Justice repeats this statement (at 34), and fails to note the existence of CACDP and other registers of sign language interpreters and other human aids to communication (HACs). In *Communication is Your Responsibility* (1992:31-32) it is recommended that a professional with LS skills should not act as an interpreter, even if qualified to do so, since impartiality could be seriously questioned.

71 *Per* Kelly C.B. in *R. v. Berry* (1876) 1 Q.B. 447 at 451.

72 *Per* Lush J., following Kelly C.B., Pollock B., Field and Lindley JJ. concurring, in *R. v. Berry* (1876) 1 Q.B. 447 at 451.

during His Majesty's pleasure. In the discussion in *Berry*, Kelly J. drew what he considered to be a parallel with the situation of a foreign-language speaker with no knowledge of English:

> I remember once trying a foreigner who knew no word of English, and, there being a doubt as to the efficiency of the interpreter, and whether the prisoner could understand every word of the proceedings, I ordered the jury to be discharged.[73]

This comment is remarkable not only for its clear assumption of a foreign-speaker's entitlement to LS, but also for its insistence that the language-switcher must be highly competent so as to ensure that the prisoner will have a complete understanding of the proceedings. For its date it may be considered an exceptional comment. At the time of writing of the present work, the end of the twentieth century, Kelly J.'s comment, with its emphasis on LS quality, still embodies an exceptional judicial attitude.[74] Its attitude to the foreign-language speaker is certainly more enlightened than the situation in which the law places an individual who, because of a physical condition--deafness--cannot communicate fully and is therefore placed in custody. For this reason Kelly J.'s analogy is, however, incomplete, as it contains an (unwarranted but at the time common) assumption that the deaf cannot ever[75] be made to communicate, whereas a foreigner can, assuming a competent provider of LS in the right language is engaged.[76]

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73 *Per* Kelly C.B. *in R. v. Berry* (1876) 1 Q.B. 447 at 451. Emphasis added.

74 It should be compared, for example, with the judicial observations on language and LS quality in *R. v. Mayor and Burgesses of the London Borough of Tower Hamlets ex parte Jalika Begum*, [1991] Imm AR 86.

75 Unless they managed to acquire speech, which as Sacks (1990) shows is a process likely to inhibit their understanding and experience of other intellectual and emotional aspects of life.

76 In the 1910 Canadian case of *R. v. Walker and Chinley* (15 B.C.R. 100), the court made extremely specific comments about the provision of competent LS services, basing itself on precedent, including both *Berry* and the trial of Queen Caroline (*Bill of Pains and Penalties against Her Majesty, Queen Caroline*: Parliamentary Debates, New Series, Vol. 3, House of Lords, August-September, 1820). The observations in *Walker* illustrate the symbiotic link between LS entitlement and provision: see the discussion of provision below.

Other similarly trenchant comments on entitlement to LS services[77] have, however, been criticised by various criminal courts fearful of the consequences for the judicial system of recognising a genuine right to LS services. These would involve the recognition of a duty for the courts to provide accurate LS in a range of languages, thereby imposing on the system financial costs and the burden of administrative arrangements which it is unwilling to bear.[78] The solution often espoused is for arrangements for LS services to be considered as resting with the parties to proceedings, thereby relieving the courts of any responsibility for provision. However, the court's ultimate responsibility for quality control cannot be evaded in the same fashion.[79] In civil cases, on the whole it is accepted that the state has no obligation to provide LS services although

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77 *Per* Martin, Adm.J. in *Donkin v. The "Chicago Maru"* (28 D.L.R. (1916)) at 804: "The registrar ruled that if the witness said he understood the questions that were put to him in English then he should answer in that language, and as he said he did understand them the services of the interpreter were not necessary. It depends upon a question of fact as to whether or no an interpreter should be employed, and that fact is--does the witness possess a sufficient knowledge of the language to really understand and answer the questions put to him, whatever the witnesses' opinion may be? There is no one so well able to determine that question as the tribunal before which the witness is being examined. It is desirable to point out for future guidance the course pursued in *Parratt et al v. Notre Dame d'Avor*, 16 B.C.R. 381; 13 Can Ex 456 (though not reported on that point), where on the trial I finally directed that the French master of a ship should be examined through an interpreter, after his examination had been conducted for a considerable time in English, because it became apparent to me, from my knowledge of the French language and otherwise, that he did not possess a requisite knowledge of English to properly conduct his examination in that language. Each party is in strictness entitled to an interpreter--*Rex v. Walker*, 15 B.C.R. 100 at 124-6--wherein will also be found observations upon the competency of interpreters and their selection."

78 See June 1992 Response by New South Wales Compensation Court Judge Margaret O'Toole to Commonwealth Attorney-General's Department Report, *Access to Interpreters in the Australian Legal System* (April 1991).

79 Thus in *Jalika Begum (R. v. Mayor and Burgesses of the London Borough of Tower Hamlets ex parte Jalika Begum* [1991] Imm AR 86), it was held: "If it were self-evident that the interpreter had not been capable of communicating in English, no doubt the court would interfere." See also the then Lord Chancellor's 1975 comment as quoted in Note 192 in Chapter 4 above, and contrast Scottish judicial practice as reflected in *Mikhailitchenko v. Normand* 1993 S.C.C.R. 56.

both judicial comment[80] and the literature[81] argue that LS can be just as important for the protection of civil liberties in civil proceedings as in criminal ones.[82] Employment tribunals and immigration appeal tribunals are two major areas in which LS is frequently provided by the authorities.[83]

DEALING WITH LINGUISTIC DIVERSITY IN THE LEGAL SYSTEM

Linguistic diversity is frequently present in the legal system, whether in the form of individuals who require a linguistic mediator in order to participate in legal proceedings or, alternatively, different linguistic groups who appear without linguistic mediation before specific lower courts which must then communicate with higher courts which may or may not cover the same linguistic gamut. Judicial arrangements show a considerable range of variation in pragmatic or institutionalised solutions to such situations.

A review of judicial comment in predominantly English-speaking jurisdictions shows that the question of entitlement to LS services--primarily as provided orally by an interlingual interpreter--is considered from one of two alternative viewpoints. One is that only when the handicap is so major as to interfere with the smooth running of legal proceedings should an interpreter be provided. The other is that considerations of natural justice require that NESB individuals be enabled

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80 *In the estate of (deceased) Hartley and Another v. Fuld and Others* [1965] 2 All E.R. 652 P.D.A.

81 See Blair 1979.

82 See Groisser 1981.

83 As witnessed by the large number of (largely unreported) English employment appeal cases involving LS and located by a *Lexis* search for "interpreter", such as *Hussain v. Cressal Group Ltd.*, EAT/581/90; *Tasnim v. B. Baker (Huddersfield) Ltd.*, Employment Appeal Tribunal, EAT/4/90; *Pirelli Ltd. v. Dhesi, Dhesi v. Pirelli Ltd.*, EAT/326/88, EAT/470/88; *Ali v. Joseph Dawson Ltd.*, EAT/43/89; *Streed Ltd. v. Singh*, EAT/582/89.

to speak and to follow a complete version of English-language proceedings in their preferred language, in order to make their presence at the proceedings meaningful.[84] Linking these two contrasting views is the central theme of this section: that any view of entitlement to LS services is frequently inextricably linked with the practical (and not infrequently problematic) arrangements for the provision of such services, so that the language of rights is supplanted by pragmatic arguments of varying degrees of soundness.

The consequence of the LS-as-the-last-resort viewpoint is that even judicial recognition of a defendant's complete inability to hear, understand or speak the language of the court is not necessarily tantamount to an acknowledgment of that particular individual's entitlement to the services of a competent intralingual interpreter who will provide the defendant with a complete and accurate version in his/her preferred language of everything said in court. Instead, the court, while acknowledging the linguistic handicap, may consider other solutions to be acceptable. These may include the provision of counsel, whether or not able to speak the defendant's language, and/or of frequent or occasional summaries, written or oral, of testimony. Often the question of a right to LS services is ignored altogether, and supplanted by the issue of need. Since the precise degree of need is normally assessed by monolingual speakers of the language of the court, who view the question in terms of perceived negative impact of any solution adopted on the proceedings, the threshold for triggering LS provision is often set extremely high. When testifying, defendants or witnesses may be required to try to manage without LS in order to prove their need for such mediation. In so doing, they may give a negative impression of their credibility, and the quality of their testimony

[84] These two views are discussed in Australia's Law Reform Commission Report *Multiculturalism and the Law* (1992: 49, 51).

is likely to suffer. A further problematic aspect involves the question of whose need: that of the court, or alternatively of the defendant or witness?[85]

Relevant international conventions stipulate no absolute right to the services of an interpreter, other than in the case of an individual charged with a criminal offence and who "cannot understand or speak the language used in court", when an interpreter must be provided free of charge. A grey area thus remains in respect of the provision of LS services for a person who has a limited ability to understand and/or speak the language of the proceedings, who has no absolute right to be provided with a free interpreter. Moreover, the conventions in question do not lay down rules governing the provision of LS services for witnesses. Thus where testimony is to be given for the defence by language-handicapped individuals, inadequate arrangements for providing LS could infringe Article 6(3)(d) of the European Convention of Human Rights, which relates to the calling and examination of witnesses.[86] In this way, a

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85 On this issue, Harris (1967:352) discusses how the right to an interpreter was handled in the Universal Declaration of Human Rights, U.N. Covenant on Civil and Political Rights, the Charters of the Nuremberg and Tokyo Tribunals, and the 1952 NATO Status of Forces Agreement, and then makes the following point (at 368): "At one stage a proposal in the United Nations Commission on Human Rights that the accused, rather than being allowed an interpreter, should be permitted to defend himself in court in his own language was only just lost. As was pointed out, there would be little difference in result since the judge would be likely to need an interpreter if the accused did not."

86 *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4.10.1950, amended 1970 and 1971):
"Article 5 (2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
Article 6 (3) Everyone charged with a criminal offence has the following minimum rights:
a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

specific right pertaining to the provision of LS services is restricted to the extreme case of a defendant in criminal proceedings who neither speaks nor understands the language of those proceedings. Furthermore, the all-important question of LS quality is almost never addressed in human-rights texts.[87]

Further examination of case reports from a variety of monolingual jurisdictions shows that determination of an individual's need for language-switching services does not simply involve a straightforward evaluation of the degree of linguistic handicap of the person who does not speak the language of the proceedings as his/her preferred language, or cannot understand the proceedings and communicate with the legal participants unassisted. Just as a historical review of the shift from multilingualism to monolingualism in the English legal system reveals both rational and irrational aspects to the arguments advanced in order to obstruct change, so a historical and contemporary review of attitudes to those who cannot (or prefer not to) communicate in the language of the legal system similarly reveals that judicial positions are not always governed by consistency, reasonableness or considerations of natural justice. Rather, confusion, mistrust and suspicion appear to abound.

None of the judicial systems surveyed stipulate an absolute right to an interpreter for all participants in the legal process on demand. In some

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d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."
The relevant references in the *International Covenant on Civil and Political Rights* (ICCPR), adopted by the UN General Assembly on 16.12.66, are Article 14, paragraph 3, sub-paragraphs (a)-(f).

87 Harris (1967:369) observes: "In order that the right may be of real value, the interpreter must, of course, be a genuinely qualified linguist. While the international human rights texts assume this, both the 1961 Harvard Draft Convention on State Responsibility and the NATO Status of Forces Agreement specify the need for a 'competent' interpreter."

countries and at certain times, it has been accepted that practice in the case of a represented defendant has not been settled and, accordingly, has varied[88]; or alternatively, that although the principle of entitlement to LS services has been accepted, the basic problem is to be found at the level of the organisation and provision of language-switching services, and the solution is to be sought therefore not in legislation but in practical arrangements.[89]

In English-speaking jurisdictions, on the whole the appointment of an interpreter is seen traditionally as a discretionary matter for the trial judge, rather than a right on the part of the NESB individual.[90] This point is made forcefully in the 1912 Canadian case of *Sylvester:*

> A prisoner who is ignorant of the language in which the trial proceedings are conducted has no inherent right to be furnished with a literal translation of all that takes place at the trial; where the substance of the evidence in chief of a witness called on behalf of the prisoner is explained to him, the omission to explain to him in like manner what the witness said on cross-examination is not a ground for quashing a conviction, the prisoner having been represented by counsel and having suffered no prejudice by the omission.[91]

Although the appeal court in the 1916 English case of *Lee Kun* essentially made the same finding, it was decided that it was "safer, and therefore wiser" for LS of evidence to be provided even to a prisoner represented by counsel. The court commented that although such practice might be "inconvenient" in some cases, and be somewhat time-consuming, "such a procedure is more in consonance with that scrupulous care of the

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88 *R. v. Lee Kun* (1916) 11 Cr. App. 3. 293 at 302-303.

89 Earl Ferrers, *Hansard*, House of Lords, 26.3.91, col. 1009.

90 Bergenfield 1978:550, Note 8. Similarly, in *Filios v. Morland* ([1963] S.R. (N.S.W.) 331 at 333-334) Else-Mitchell J. cites *Wigmore* (3 Wigmore, *Evidence*, s.811 at 221 (3rd ed. 1940)), dealing with the subject of "Interpreted Testimony", "where the learned author states as a first rule that 'interpretation is proper to be resorted to whenever a necessity exists, but not till then', and states further (*ibid*., at 222) that 'whenever the witness' natural and adequate mode of expression is not intelligible to the tribunal, interpretation is necessary. Whether the need exists is to be determined by the trial court'."

91 *R. v. Sylvester* (1912) 1 D.L.R. 186, 1 K.B. 337.

accused's interests which has distinguished the administration of justice in our criminal courts, and therefore it is better to adopt it".[92] Although the principle of meticulous linguistic attention to the defendant has thus been laid down clearly in English case law, its implementation in the intervening eighty-seven years does not indicate that it has enjoyed vigorous *de facto* judicial support.

Apart from the situation of the NESB individual, the second area in which linguistic diversity presents the system with a need to make appropriate practical arrangements is where different linguistic groups have acquired the right to participate without linguistic mediation in proceedings before all or some lower courts. This is the situation in certain bi- or multilingual countries. The right is not normally an absolute one: for example, even in bilingual Canada, the right to an interlingual interpreter cannot be enjoyed by all individuals in all courts. Thus Section 19 of the Canadian Charter of Rights and Freedoms, which governs the right to choose which official language will be used in court, cannot be invoked in support of a right to an interpreter. Moreover, Section 14 of the Charter is limited to parties and witnesses in proceedings. A lawyer therefore has no right to an interpreter, although the court has discretionary power to order that LS services be provided in such circumstances. This was the case in *Cormier v. Fournier*, in which an English-speaking lawyer exerted considerable efforts to be permitted to function in a French-speaking court (chosen by his client) through the medium of simultaneous[93] LS.[94]

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92 *R. v. Lee Kun* (1916) 11 Cr.App.R. 293 at 301.

93 Although in court usage the term "simultaneous" LS normally means "whispering" (as in *United States ex rel. Negron v. N.Y.* 434 F.2d 386 (2d Cir. 1970)), in this instance the mode was proper simultaneous ("UN style") LS from a separate booth. This is the technique used in the Canadian Supreme Court, as well as at the European Court of Justice (see Morris 1993c). See also Chapter 1 above.

The scope of this work precludes any discussion of the way in which certain bi- or multilingual countries have adopted the rule that their nationals can opt to be tried or undertake legal proceedings in one of the national languages, according to their free choice or as agreed by the parties.[95] Suffice it to say that countries such as Belgium, Canada, Ireland, South Africa and Switzerland have evolved their own solutions to the problem. In Great Britain, whose authorities appear to prefer to ignore the presence on its territory of speakers of languages other than English, Welsh Language activists have tried, with varying degrees of success, to achieve a situation in Wales more closely approximating that of Irish speakers in Eire or of French speakers in Canada.[96] On the whole, the argument advanced by the Welsh-language campaigners is that they should be entitled to use the Welsh language in Wales in the same way as English can be used in England. This argument is countered by those who, while recognising the validity of the claim to equal use of Welsh, refuse to yield on the English-language front, perceiving all-Welsh trials as an infringement of the English-language rights of English speakers, including court staff, lawyers, the press and the public. To some extent, the problem is insoluble; to some extent, it is merely one of technology, training and provision.[97] Thus in Great Britain, the situation of Welsh-speakers in legal proceedings in Wales falls into both of the two alternative approaches outlined above. For the legal system, the entitlement of a Welsh speaker who insists on speaking Welsh in court should be judged in terms of need, i.e. ability or otherwise to follow proceedings in English. For the Welsh

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94 *Cormier v. Fournier* (1986) 29 D.L.R. (4th) 675, 69 N.B.R. (2d) 155 (Q.B.), aff'd on other grounds 78 N.B.R. (2d) 406 (C.A.). In this case, the parties to a civil action had agreed that the trial would be conducted in French. The defendant's lawyer requested an interpreter because he was unable to understand submissions in French. See also below at Note 171.

95 Or, alternatively, according to the principle of residence.

96 See below on proceedings in Welsh in Wales.

97 See below on proceedings in Welsh in Wales.

Language campaigners, natural justice requires that they use Welsh as a matter of course in legal proceedings affecting them, which should themselves be held entirely in Welsh. The view of the London-based legal authorities appears to be that complete implementation of the rights of one (Welsh-speaking) group necessarily infringes upon the rights of a second (English-speaking) group. The Welsh Language campaigners, on the other hand, perceive the issue as involving natural justice, equality and national rights. An examination of issues arising in Welsh language trials[98] illustrates how a combination of hard-line attitudes (on both sides) and inadequate attention to technical aspects and proper procedure can exacerbate an already tense situation.

In a contrasting example of a historical situation in which three official languages were used in the court system on a pragmatic basis, Athulathmudall notes that in Mandatory Palestine,[99] proceedings were

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98 The inherent ambiguity of this unhyphenated phrase reflects the ambiguity of the situation. To a large extent, the trials described below were *about* the Welsh language; but the practical issue that came to the fore in connection with holding the trials concerned the *use* of the Welsh language for the administration of justice.

99 In an *Order on the Use of Official Languages*, (undated but probably August 1920) issued by Herbert Samuel, the High Commissioner of the Government of Palestine, paragraph 6 provides: "In the Courts of Law and Land Registries of a Trilingual Area, every process, every official copy of a judgment, and every official document shall be issued in the language of the person to whom it is addressed; and written and oral pleadings shall be conducted in any of the three languages. The Legal Secretary may from time to time issue rules restricting the languages of pleading in any Court or class of Courts outside the Tri-lingual Areas." Tri-lingual Areas were ones with a considerable (over 20%) Jewish population, where English, Arabic and Hebrew (the official languages of Palestine) could all be used. At the time they were Jerusalem City, Jaffa Town and District, Ramleh Town and sub-Districts, sub-Districts of Tiberias and Safed. Paragraph 5 specifies: "In districts which have not been declared to be Tri-Lingual Areas, Arabic alone, or both English and Arabic, may be used as is convenient, provided that nothing in this order shall prevent the use of Hebrew if the occasion requires." Paragraph 6 further specifies: "In a Tri-lingual Area the public notary of the Court shall, and in any other area he may, accept a declaration and register a document in any of the three official languages."
A *Rule of Court* (issued by Norman Bentwich, Legal Secretary of the Government of Palestine, under the sanction of the High Commissioner, undated but probably 1920) and headed *Language of Pleading*, specifies: "(1) In the Magistrates' Courts of Gaza, Hebron, Bethlehem, Ramleh, Beersheba,

frequently conducted and judgments delivered in Hebrew or Arabic.[100] At the same time, English remained the language of record and only judgments recorded in English were reported in the *Palestine Law Reports*. This had an important consequence: "arguments based on discrepancies arising as a result of the use of two languages could not arise in subsequent cases".[101] When the Supreme Court (whose judges were almost always drawn from the Colonial Legal Service and which used English exclusively for its deliberations) sat as a Court of Appeal, it had therefore to deal with cases which had normally been heard either in Hebrew or in Arabic and in which the judgment had been delivered in one or other of those languages. The problem was solved by the judge himself sending up an English-language "translation" of his own judgment.[102]

Given this situation in Mandatory Palestine, where all lower-court judges were fluent in both English and at least one other language, there was no problem with the fact that legal precedent existed and was cited in English only. A contrasting example is the post-independence situation in Tanzania. There the exclusive use of English for High Court decisions, without an accompanying Swahili translation, left the non-English-speaking primary court magistrate without "any source from which he can

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Tulkeram, Nablus, Jenin, Acre and Nazareth, Arabic shall be the language of pleading. (2) Where a District Court is trying a case or hearing an appeal in any of the above-mentioned places, and where the Court of Appeal is hearing an appeal from a case tried in such a place, Arabic or English shall be used as the language of pleading."

100 Athulathmudall (1962:223-224) notes that "after the first ten years of the mandate, about 1930 it became a matter of national pride for Jewish judges to conduct their business in Hebrew and Arab judges to conduct their business in Arabic. This led to the practice of only lawyers competent in the judge's language appearing before him".

101 Athulathmudall 1962:224.

102 Athulathmudall (1962:224) notes that it has "even been suggested in some quarters that as some of the judges were more competent in English it was the oral judgments that were translated!" For further insights into the subsequent problems of LS in the courts in the early years of the State of Israel, when immigrants from a vast number of different linguistic and cultural backgrounds arrived in the country, see Cheshin 1959.

routinely become aware of the precedents that he is expected to follow".[103] This problem was palliated by the periodical distribution of Swahili guidelines influenced by High Court opinions, but as Kidder notes, the result of this approach was that the primary courts operated more along the lines of a code law than common law. This linguicist approach on the part of the Tanzanian higher judicial authorities (failure to translate the relevant legal texts into the preferred language of the judges responsible for the application of the law in the lower courts) may therefore be said to have handicapped both the non-English-speaking (or non-English-reading) judiciary and those who sought justice in those courts.

"PRACTICAL AND FAIR" LS ARRANGEMENTS

The foregoing discussion of attitudes both to the use of different languages in various legal systems and to the specific situation of individuals who do not speak or for various reasons cannot understand the language of legal proceedings has sought to show how much individual or societal attitudes vary in determining reactions to and treatment of such individuals, particularly when the court uses its discretion to determine an NESB individual's entitlement to the services of an interpreter. It is contended that the same variation is seen in the factors which tend to be cited in considering the provision of specific solutions to the language-handicap situations under consideration here. These factors are--or are perceived to be--bound up in the arrangements for and impact of providing LS services. They are defined variously as "practical" or "reasonable". At times factors such as "judicial economy" may be cited. Commenting on a bilingual legal hearing, a Canadian court has observed

[103] Kidder 1976:95.

that although ideally, reasons should be delivered in the language of the litigants, "courts are not committed to ideal situations but rather to practical and fair dispositions".[104] This section examines judicial views of what comprise practical and fair language-switching arrangements.

Two major considerations should dominate: the availability of LS personnel for particular languages, and the quality of the LS provided. Ideally, there would be a register of competent individuals available at short notice to provide LS for all languages in any legal (and other) LS situation at any time in any location in a given country. In practical terms, this is clearly not going to be feasible. The question is where compromise is acceptable, and where the authorities are open to criticism for failing to achieve a situation closer to the ideal than the current haphazard arrangements which tend to exist.

In addition to availability and quality, other important factors relating to LS provision include responsibility, payment, mode,[105] extent and bias. The first two factors need to be settled as an organisational matter on a national basis; the last three must be dealt with on a case-by-case basis. An individual interpreter should be questioned to ensure that no reason exists for doubting impartiality in a particular set of circumstances. In Britain in 1993, as if *R. v. Lee Kun* had not taken place over seventy-five years earlier, it is still maintained that the extent of interpretation can

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104 *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198 at 208.

105 For foreign-language speakers, this refers in particular to the options of whispered, consecutive or simultaneous interpretation, with the further option for simultaneous interpretation being either from a separate booth (with wired or wireless transmission) or from a location within the body of the courtroom (with infrared transmission, including from a portable unit). For hearing-impaired individuals, LS may be provided by a sign-language interpreter, lipspeaker, cued speech facilitator or CAT (computer-aided transcription) operator.

involve providing LS either throughout the proceedings or for the defendant's own examination only.[106]

Judicial comment frequently justifies the use of a less than adequate interpreter by the fact that no better individual was available at the time, an attitude that has been roundly rejected by more than one court of appeal, as in *R. v. Walker and Chinley*: "The test is not one of availability but of competency".[107] The same reasoning was applied in the 1993 drink-

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106 The Royal Commission on Criminal Justice Report (1993:130) notes: "It is, however, customary for translation for the latter purpose to be dispensed with if the defendant is legally represented and his or her counsel applies for such dispensation, always provided that the judge is satisfied that the defendant substantially understands the case against him or her and the evidence to be given."

107 In *R. v. Walker and Chinley*, (1910) 15 B.C.R. 100, after the lower court had questioned the interpreter as to whether he was a friend of the defendants, and discovered that he was not, the Canadian Court of Appeal observed *per* Martin J.A. at 124-126, "the interpreter was sworn and proceeded to discharge the duties of his office. The only question before us is, how did he discharge them? The prisoners' counsel contends that though the learned trial judge has stated plainly in the original reserved case, and in the restated case that the interpreter was 'objectionable,' and that 'I certainly did consider the interpreter unsatisfactory,' and that he considered the word 'objectionable' as being synonymous with unsatisfactory and to a certain degree unreliable, and that 'the interpreter certainly seemed to lack ordinary intelligence and facility of expression,' yet notwithstanding all these defects, the learned judge permitted the interpreter to attempt to discharge duties which he had shewn himself incompetent to perform. The learned judge also states that he was satisfied that the interpreter was 'the least objectionable or unsatisfactory one available.' That, with all due deference, is clearly no ground for accepting his services, because *the test is not one of availability but of competency*. It is, of course, for the judge to determine at the outset the question of competency and, if he is satisfied on that point, to permit the proffered interpreter to be sworn as such, and I have only referred to the weighty objections raised at the outset by the prisoners' counsel to shew that in this respect he fully discharged his duty to the Court by drawing its attention to the bad character and criminal record of the interpreter, which was a material element in determining the question of his fitness. But though a judge might feel justified in accepting the services of an interpreter at the beginning of a trial, yet as it proceeded the judge might, on any good ground which might arise and become evident from, e.g., the demeanour of the interpreter, his drunkenness, partiality, or lack of understanding, decide that he was no longer to be deemed a fit and proper person to act as an officer of the Court, and in such case *it would at once become the duty of the judge of his own motion to discharge the interpreter and, if necessary, adjourn the trial so that a competent person could be procured*. It is, to me, clear on the fact of it that *no fair trial can possibly be had where the interpreter is not reasonably competent*. This question of competence is not one for the jury, as seems to have been considered below, but for the presiding judge. We have not been asked to pass upon the facts going to the question of competency, but we are properly

driving case of *Mikhailitchenko* by the Scottish High Court, which found that there had been unfairness and declared proceedings in the sheriff court void.[108] The grounds were that for the proceedings to continue with the same LS provider after the prosecution had agreed with the defence that the official language-switcher was not competent necessarily meant that the defendant's "mere physical presence"[109] was not sufficient to ensure that he had "the fullest opportunity of understanding the proceedings...taking place before him".[110] In other words, although--exceptionally for a court in the United Kingdom, and commendably--a separate defence interpreter was present in addition to the "official" court interpreter, the court's arrangements were such that the proceedings--for linguistic reasons--could not be fully understood by the defendant. The "requirements of justice"[111] were not thus satisfied. The provision of any number of interpreters cannot necessarily ensure that communication takes place. Where the court, as in *Mikhailitchenko*, is insensitive to communications (including LS) issues, justice is less likely to be done. When in *Mikhailitchenko* the sheriff refused permission for the defence interlingual interpreter to correct the official interpreter's errors, he was

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asked to say that where the trial judge has himself declared that the interpreter is incompetent, and yet despite that incompetency has allowed the trial to proceed and the accused have been found guilty, then, according to section 1,019, 'something not according to law was done at the trial' which has occasioned a substantial wrong or miscarriage of justice to the accused, and therefore they are entitled to a new trial." Emphasis added.

108 *Mikhailitchenko v. Normand* 1993 S.C.C.R. 56: "*Held*, that the purpose of having an interpreter is, inter alia, in order that an accused person may have the fullest opportunity of understanding the proceedings which are taking place in the court before him, and that for the proceedings to continue once it was appreciated that the Crown took the view that it was in the interests of justice to obtain another interpreter must mean that the complainer did not have that opportunity, and that there was therefore unfairness in the proceedings; and bill passed and sheriff's order recalled." Mikhailitchenko was a Russian-speaking Ukrainian on the Glasgow Rangers football team.

109 *H.M. Advocate v. Olsson* 1941 J.C. 63 at pp.63-64; 1941 S.L.T. 402.

110 *Mikhailitchenko v Normand* 1993 S.C.C.R. 56 at p.63.

111 *H.M. Advocate v. Olsson* 1941 J.C. 63 at pp.63-64.

obstructing a vital quality-assurance or monitoring process which should, ideally, be part of all situations where LS is provided.[112]

The emphasis that is placed on interpreter competence in *Walker* or *Mikhailitchenko* is rare in case reports, where compromise over LS quality appears to be the norm.[113] Yet the quality of the LS provided will inevitably affect the value of any entitlement to LS services that has been recognized. As Steele points out in a Canadian context, gaining the right to an interpreter, whether through the common law, statute or the Constitution, is a hollow victory unless the applicant can be assured that the LS will be of a high enough standard to ensure that justice is done.[114] In arguing that the traditional deference of the appellate courts to lower court judges' actions in respect of LS is misplaced, Steele further observes that the solutions adopted by trial judges have more to do with judicial economy than with a true test of need: "The result is that the right to an interpreter can, in practice, be a mirage".[115]

The assumption that trial judges refuse to adjourn proceedings or to require suitable LS arrangements to be made for reasons of cost-effectiveness is doubtless true in part; but in the light of the historical and attitudinal issues outlined above, it may also be argued that more contentious and less cost-bound aspects also play a role. If legal practitioners and the bench on the whole have little understanding of and little or no empathy with the situation of the NESB defendant or witness, as well as very little grasp of the complexities of the language-switching process, particularly in its oral form, it is hardly surprising that they find it

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112 For details of how monitoring was carried out at the Nuremberg Tribunals, and in particular how the transcript was checked and corrected daily against the tape recording of the original record, see Gaskin 1990:43-48. See also Shlesinger 1990.

113 As criticised by the Court of Appeal for Eastern Africa in the Kenyan case of *Meghi Naya v. R.* (1952) 19 E.A.C.A. 247. See Chapter 3 above at Note 165.

114 Steele 1992:237.

115 Steele 1992:226.

difficult to perceive the importance of ensuring "the highest standards" of interpretation.[116] It would appear obvious that what has been identified as the "inconsistent quality of interpreters" is the result of the current makeshift arrangements[117] that prevail in most parts of the judicial system in Britain as well as, to varying degrees, elsewhere.

The confusion in respect of responsibility for providing interpreters in the court system further complicates any attempt to achieve efficient and high-quality LS provision. In England, the 1993 Royal Commission on Criminal Justice expressed surprise at the current division of responsibility for provision of LS,[118] and recommended that the courts take over complete responsibility in this area. The question is whether the provision of LS is the responsibility of the state, and whether the courts or another body or bodies should be required to make the relevant arrangements. If the state has the responsibility of providing *competent* LS services, then logically there would appear to be a resultant obligation to ensure the availability of trained, competent, certified LS providers[119] and the need to deal with related problems.[120] In an alternative view, however, as stated in

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116 *Royal Commission on Criminal Justice Report*, 1993:130.

117 *Royal Commission on Criminal Justice Report*, 1993:130.

118 *Royal Commission on Criminal Justice Report*, 1993:130: "Currently, either the court provides the interpreter at the request of the defence out of central funds or the interpreter is provided directly by the defence and the cost is covered by legal aid." In fact, "the court" usually delegates the provision of an interpreter--for a prosecution witness or for the defendant--to the Crown Prosecution Service, who frequently use the police list. In other cases, a commercial agency may be contacted. In neither case is there normally any screening for competence.

119 For Britain, see *Access to Justice* (1993), *Royal Commission for Criminal Justice Report* (1993), and Corsellis (1988b, 1991, 1992, 1993a, 1993b). For Australia, see *Access to Interpreters in the Australian Legal System* (Commonwealth Attorney-General's Department, 1991), and *Multiculturalism and the Law* (Law Reform Commission, Report No. 57, 1992).

120 That this is not apparently the current thinking of the Home Office or the Lord Chancellor's Department is made clear by comments in the Nuffield Foundation's *Access to Justice* conference report (1993:59). In the discussion it was noted that it would make a significant difference if those with financial resources--namely, the Home Office and the Lord Chancellor's Department--could be persuaded "that a professional service ought to be available to

the House of Commons by the then Attorney-General in 1975, the responsibility may be viewed as being that of the parties.[121] Consideration should be paid to the result for the provision of LS services of maintaining the strict adversarial attitude in criminal proceedings, and whether it is practicable for the responsibility to be assumed by others than the parties.[122]

Unless a completely different attitude to NESB individuals is adopted by bench, lawyers and ancillary staff, even undivided responsibility on the part of the courts for providing LS services will not improve standards. If typical of the judicial viewpoint, an attitude such as the following, presented by a spokesman for the British government in 1991 bears out the present researcher's findings of a need to change attitudes, and not merely shift or concentrate responsibility for LS provision:

> In the course of time the courts have taken upon themselves the duty to try to find an interpreter. Very often the interpreter is a friend from within the immigrant's own community. There could be no better person, because the court will understand what the accused is trying to get at, what he needs to know and so on.[123]

It was suggested above that the result of recognizing entitlement to LS for NESB individuals would involve the recognition of a duty for the courts to provide competent language-switchers for a range of languages, involving financial and administrative consequences for the judicial system. However, views such as the one quoted above would seem to indicate that the attitudinal changes needed are far more urgently needed and, at the

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provide equal access to justice for all and to minimise the escalating costs of poor communication".

121 See Chapter 4 above, Note 192.

122 Relevant questions include the following: Is there a statutory duty to ensure that interpreters are provided? For what type of proceedings? Is such duty limited to provision, or does it include quality assurance? If so, what are the implications for various arrangements and formalities?--including training, certification, arrangements for contacting interpreters, ensuring availability (retainer? staff?), etc.

123 Lord Renton, *Hansard*, House of Lords, 26.3.91, col. 1008.

same time, far more difficult to implement than such "organisational" matters.

When in 1973 the then Lord Chancellor proclaimed in the House of Lords[124] that an interpreter is provided for (almost) anyone who cannot sufficiently understand proceedings in an English court, he was literally paying lip service to a fundamental human right not to be subjected to proceedings which one does not understand. However, in the light of prevailing societal attitudes and the system's self-avowed inability to provide competent interlingual interpreters in every court in the land, the justification for such glib assurances may be questioned.[125]

As the European Court of Human Rights ruled in *Kamasinski*, the obligation of the competent authorities is not limited to the appointment of a language-switcher; if they are "put on notice", it may extend to a control over the adequacy of the interpretation.[126] The point argued by Steele--that any right to LS services is meaningless unless a competent LS practitioner is provided--is thereby reinforced, albeit in a somewhat muted form, on the European level. The present thesis contends that legal authorities must *always* be responsible for the quality of LS provided in the judicial system, and must act accordingly.

A historical review of attitudes to the provision of LS services as reflected in case reports from England and the United States shows no progress towards an efficient system of providing quality LS on request for all individuals with a determined degree of language handicap. In Canada, the situation as far as LS in the two official languages is concerned appears to have improved in recent years. The resulting

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124 See at Note 245 below.

125 Mr. Justice Brooke 1992/1993:194 at 195: "There are also huge contemporary problems over the availability of competent interpreters in every court, and justice cannot be done if the interpreter is not up to the job."

126 *Kamasinski v. Austria*, (1989) 13 E.H.R.R. 36 at 74.

enhanced awareness of the importance of accurate LS in legal settings has recently started to spread gradually to Canadian native languages also.[127] The main factor to emerge from a historical review of case reports is the major impact that an individual attitude--whether on the part of a lawyer, a language-switcher or, occasionally, a judge--can have on LS standards and awareness.

The only major difference between contemporary practice and the historical situation is the availability of technical devices, such as wired and unwired amplification and transmission aids, and computer-aided transcription (CAT) systems. For example, although rarely used in the courts for literate hearing-impaired individuals,[128] CAT systems can provide a quasi-instantaneous transcript on a screen.[129] Had such a system been available, it would have obviated the court's dilemma in the American case of *Ferrell v. Estelle*, where it considered that to grant the deaf defendant's request that it provide stenographers who could "simultaneously transcribe words spoken during trial" might disrupt the public's right to an orderly trial.[130] The court justified its stance by arguing that a defendant's constitutional rights to understand legal proceedings are "practical, reasonable rights rather than ideal concepts of communication", and that even these pragmatic rights may not be exercised without limit. The question that arises is where and by whom the limit is set. The *Ferrell* court would have provided a sign language interpreter, who could have worked without disrupting the proceedings. It offered to grant

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127 See Roberts 1989; Roy-Nicklen 1988; and Roy-Nicklen and Phillips 1990.

128 Partly perhaps because of cost, but also probably because of lack of awareness by the legal profession of their existence.

129 It is reported that such a system was used in commercial proceedings in early 1993 in London in order to provide an immediate record for counsel.

130 *Ferrell v. Estelle* 568 F.2d 1128 (1978) at 1131. The appellant had lost his hearing in the incident for which he was put on trial, and had not yet acquired any alternative form of communication such as lipreading or sign language.

frequent recesses. Was it reasonable to refuse some form of written communication with the defendant?

In connection with the issue of LS mode, Bankowski and Mungham's observations on unsatisfactory technical aspects of the Swansea Welsh-language trial highlight some of the potential problems relating to the provision of LS:

> The business of translating caused great confusion at certain points; for instance when a policeman quoted in English a statement made originally in Welsh, which had then to be translated back into Welsh for the accused, who gave an answer in Welsh, which then had to be turned into English.[131]

This example of deficient practice illustrates the vital importance of treating original-language (L1) material as such.[132] A further issue concerns the impact of using the consecutive LS technique[133] in legal proceedings where the interlingual interpreter is unable to achieve "legal equivalence" not merely semantically but also rhetorically, as was the case at a Welsh-language trial:

> the use of translations made the presentation of any sustained or effective oratory or argument impossible. In the words of one observer of the trial, 'beautiful spasms of Welsh were followed by the interpreter's precise, though sometimes stumbling, English'.[134]

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131 Bankowski and Mungham (1980:68), citing (erroneously) Fishlock (1972:100) as the source of this information.

132 See Chapter 3 above for a discussion of the issue of "original" material and quotations across the language barrier, as well as Morris 1989c.

133 It may be speculated that it was as a result of this experience that the legal authorities decided to provide installations for simultaneous interpretation. Lord Hailsham stated (*Hansard*, House of Lords, Vol. 353, cols. 533-534, 12 June 1973): "In order to preserve the principle of equal validity between the two languages and the equally important principle of the random selection of jurors, the only practicable way of achieving this is...the provision of facilities for simultaneous translation. I am accordingly arranging for the necessary equipment to be installed in a number of selected Crown Court centres. Steps have been taken to recruit and train interpreters with the necessary skills, and experiments in the use of these facilities have been sufficiently successful to justify the installation of permanent equipment. I believe that nothing like this has been attempted in legal proceedings in the United Kingdom before, and I sincerely hope that all concerned will co-operate in making this interesting new experiment a success. When these centres are working, it will be possible for either language to be used at will without interrupting the smooth flow of proceedings."

134 Bankowski and Mungham 1980:68.

In Canadian courts, where bilingual judges tend to be the norm and greater sophistication generally prevails in respect of LS, the drawbacks of consecutive interpretation have even been the subject of judicial comment. The advantage of the consecutive mode of LS--that it is provided out loud[135] and can therefore be readily monitored--has as its antithesis the fact that for the listener who can understand the L1 version, concentration is made difficult, since it is impossible to prevent a good part of his/her attention from focusing on the quality of the interpretation itself.[136] It also requires more time, a factor which can become frustrating.[137] For this reason, in *Negron* it was stated explicitly that simultaneous LS (doubtless *chuchotage*, or a whispered version) should have been arranged, and that an L2 version of everything uttered in court should be provided for the defendant.[138]

Moreover, providing mediation through an interlingual interpreter is not necessarily the best or only form of LS. Even if the system remains officially monolingual, pragmatic bilingual adaptation may be necessary to bridge the language gap in certain situations, particularly the pretrial

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135 New Brunswick Regulation 86-2 (enacted 10.1.86) specifies: "2. In this regulation... 'interpreter' means a person who interprets orally in a manner able to be heard by every person present."

136 *Cormier v. Fournier* (1986) 29 D.L.R. (4th) 675 at 678.

137 The frequent pauses required traditionally in English courts in order for the judge to take a longhand note of evidence are, however, not considered time consuming. Against this background, it may be considered that the objections to the interruptions required for consecutive LS are an example of linguicist behaviour. See Seton 1990: Stevens 1992; Wolchover 1989:783. Similarly, when a Palantype computerized-shorthand system is used for the quasi-instantaneous generation of a transcript displayed on a monitor, it is considered perfectly acceptable for participants to be instructed to observe a certain rate of delivery (*Counsel*, June 1993).

138 *United States of America ex rel. Negron v. the State of New York* 310 F.Supp. 1304 (1970): "In murder prosecution, to afford right to confrontation of witnesses to non-English speaking defendant, particularly where one witness testifying in English recited inculpatory statement, it was necessary that defendant be provided with simultaneous translation of what was being said so that he might communicate with his attorney to enable latter to effectively cross-examine and to test credibility, memory and accuracy of observation in light of defendant's version of facts." Emphasis added.

phase. For example, a U.S. court has noted that "some mechanism, whether it be the use of written Spanish consent forms, training of police officers in a second language, or some other creative device, must be adopted to ensure that police do not abridge the constitutional rights of these individuals simply because they do not speak English".[139]

THE CHICKEN AND THE EGG

In the jurisdictions studied, it may be deduced from case reports that generally, when dealing with an NESB individual, courts do not determine their practice in respect of the provision of LS services in terms of any right arising under considerations of natural justice. Instead, the main consideration is the particular set of circumstances perceived as being present[140] and their presumed impact on the proceedings, rather than any objective assessment of the NESB individual's linguistic ability and

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139 For example, a "Publisher Paid Annotation" in *Books in Print 1992*, (Q-Z, Vol. 4, R.R. Bowker, New Providence, N.J.) extols the virtues of a book by Yolanda Baldridge called *Hispanic for the Patrol Officer* (1987, Babel Enter) as follows: "With the increase of Hispanics in communities law enforcement personnel have found it difficult to understand the needs of Hispanics, as well as to enforce basic law enforcement procedures due to the language barrier. 'Hispanic for the Patrol Officer' was created to help law enforcement personnel communicate with non-English speaking Hispanics within their community. In most cases all the officer has to do is to point to the questions and receive a "yes" or "no" answer. Phonetics have been used to aid the police officer in the pronunciation of difficult words. Each question is written in English, Spanish and then followed by the phonetic pronunciation. If ever there was a book created for the specific needs of the law enforcement agencies it is "Hispanic for the Patrol Officer." In Britain, it was at one point the fashion to suggest that police officers in areas with large NESB populations should take lessons in the appropriate languages. See, for example, for Lancashire, *Minutes of evidence taken before the Select Committee on Race Relations and Immigration*, County Hall, Preston, 3.2.1972, House of Commons Paper 471, 1972, Paragraph 11 at p.136. In the same report, a suggestion was made (at Paragraph 1833, p.418) that police auxiliaries should be employed who would be trained in a liaison role, including taking statements from individuals who cannot communicate properly with the police because of communications difficulties. See also House of Commons Report 210, 1985, *Bangladeshis in Britain*, Minutes of Evidence, 24.3.1986, paragraphs 170-183.

140 Which can include general attitudes subsumed under the "oh no!" reaction to a request for an interpreter: see Colin 1993.

recognition of any resultant right to equal participation through linguistic mediation.

In a critical evaluation of the situation, it may be argued that judicial participants' attitudes to language-switching generally are influenced by a lack of information and awareness of issues relevant to LS, and are further influenced at times by prejudice, confusion or inefficient administrative arrangements. It is such factors as these which govern specific attitudes to the provision of LS services to individual NESB defendants and witnesses, not infrequently outweighing or even precluding any consideration of rights.[141] An alternative reading is that the right of the NESB individual is viewed as conflicting with, and being held to be subordinate to, that of the English-speaking participants, particularly lawyers and jurors.[142] A third way of viewing the situation is to identify the legal system as entirely denying any specific, inherent right on the part of an NESB individual to use any language other than that of the proceedings.

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141 In *The King v. Sylvester et al.* ((1912) 1 D.L.R. 186 at 189-190) Townshend, C.J. refers to *The King v. Meceklette*, 18 O.L.R. 408, 15 Can. Cr. Cas 17 in commenting: "As remarked by Riddell, J., if it were a positive rule that in such cases all the evidence must be strictly interpreted, then, obviously, in many cases, it would render the administration of the law impossible. We can easily conceive of cases where no means exists of procuring an interpreter, and it would be unreasonable that crime should go unpunished where clear evidence is brought forward of guilt."

142 *Filios v. Morland* ([1963] S.R. (N.S.W.) 331 at 332-333): "The primary consideration, especially where the witness in question is a party, is that what the witness has to say should be put before the court as fully and accurately, and as fairly and effectively, as all the circumstances permit. It may be that a witness with an imperfect understanding of English cannot achieve this by using English. It is not always the case that it will be better achieved by the use of an interpreter. For evidence given through an interpreter loses much of its impact, and this is so in spite of the expert interpretation now readily available. The jury does not really hear the witness, nor are they fully able to appreciate, for instance, the degree of conviction or uncertainty with which his evidence is given; they cannot wholly follow the nuances, inflections, quickness or hesitancy of the witness; all they have is the dispassionate and unexpressive tone of the interpreter...Moreover, and especially where the witness has some knowledge of English, the cross-examiner is placed at a grave disadvantage."

The present author's argument is that perceived or actual difficulties related to providing specific LS services affect judicial perception of entitlement and the palliation of any acknowledged linguistic handicap. In other words, if it is known or feared that obtaining a competent language-switcher will be a problem, and if negative prior experiences have occurred, judges and lawyers are less likely to insist on LS for an NESB participant. The question of entitlement normally does not arise. The NESB individual is often in no position to insist on receiving LS services, let alone competent ones. Without a language-switcher, s/he is even more unlikely to indicate an inability to follow proceedings, yet will be even more distant from due process.

Essentially, I would argue, the legal system sees entitlement to LS not as a right but as a problem because of the difficulties of arranging for LS provision--i.e., the implementation of the right. Even in countries where it is the norm to hold trials through the medium of LS, it is frequently accepted that the standard of court interpreting is low, particularly in the lower courts, although the logical legal consequences are not always drawn.[143]

Since failure to provide competent LS can in turn pose a problem in legal proceedings, the situation takes on nightmarish aspects. In organisational terms cases involving NESB participants, particularly witnesses,[144] require more careful planning than do monolingual legal events. A judge's discretion to authorise the provision of LS services can further complicate scheduling and arrangements, since in a particular case

[143] *Meghi Naya v. R.* (1952) 19 E.A.C.A. 247; *Mohamed Farah Musa v. R.* (1956) 23 E.A.C.A. 469. See also Jones 1983:65-67.

[144] And in particular in a system such as the English, where counsel does not meet witnesses in advance of trial.

the court's perception and assessment of linguistic need and resultant entitlement may differ from that of the lawyer.[145]

A further aspect of entitlement to language-switching services relates to the way in which both NESB individuals and interpreters are perceived by and interact with the legal system. In a critical look at a draft report on access to interpreters in the Australian legal system, Laster argues that the proposed reform measures are "cost-based" rather than "rights-led".[146] Following this approach, unless both individual legal practitioners and the system address a multitude of issues such as access to legal advice, differences in discourse patterns and body language, and different perceptions of the legal system, no number of competent language-switchers readily available through any legal interpreter scheme, however efficiently organised, will be able to redress the inequalities of a multicultural society. In this vein, presenting an Australian research project designed to identify the major sources of difficulty in cross-cultural communication between lawyers and clients, D'Argaville lists a series of cultural barriers (not all exclusive to NESB individuals) to lawyer-client communication.[147] Although not new, the study's tentative finding that lawyers on the whole seem to be insufficiently sensitive to possible non-communication would bear out the indications of the case reports surveyed for this study. Where judges have discretionary and, sometimes, ultimate power[148] to order or exclude the provision of LS services, any such insensitivity will militate against the likelihood of palliating a language handicap.

The legal system's tendency to approve the provision of LS services only where the court considers that the smooth operation of the system

145 *Filios v. Morland* [1963] S.R. (N.S.W.) 331 at 332.
146 Laster 1990:228.
147 D'Argaville 1991.
148 *Filios v. Morland* ([1963] S.R. (N.S.W.) 331).

would otherwise be impossible has been noted in the literature and shown by case reports.[149] The tension between absolute judicial control of events in the courtroom and an interlingual interpreter's opposing view of his/her duties vis-à-vis the NESB individual has similarly been identified on appeal, with at least one ruling that the interpreter's professional duty to his/her client outweighs the judge's control over proceedings in his/her court.[150] The language of the *Gradidge* appeal court refers to the interpreter's duty to keep her client abreast of what is happening in court; the litigant's need for and right to LS services; and the judge's right to control his court.

Case reports refer less to the situation of witnesses, although arguably this is an area which may have even greater potential impact on proceedings than the provision of LS services to defendants.[151] In particular, in the absence of competent LS services NESB witnesses are unlikely to be prepared to testify, although this is difficult to document

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149 In the United States, Cronheim and Schwartz (1976:298) note that courts tend to appoint interpreters for the benefit of the court rather than for the welfare of the defendant. The same is noted in a series of immigration hearing appeals (for example, *El Rescate Legal Services Inc., Central American Refugee Center, et al., v. Executive Office for Immigration Review, et al.* 727 F. Supp. 557 (1989); *El Rescate Legal Services Inc., Central American Refugee Center, et al., v. Executive Office of Immigration Review, et al.* 941 F.2d 950 (1992); *El Rescate Legal Services Inc., Central American Refugee Center, et al., v. Executive Office of Immigration Review, et al.* 1992 U.S. App. LEXIS 3744; 92 Daily Journal DAR 3186 (1992)). It is also clearly illustrated by the Australian case of *Filios v. Morland* (see Note 90 above).

150 *Gradidge v. Grace Bros. Pty. Ltd.* (1988) 93 FLR 414 at 422-423: "the difficulties...arose because of the opinion which the interpreter formed, and expressed, about her duty to interpret exchanges between the court and the barristers, and to do so despite an instruction by his Honour, with the acquiescence of counsel then appearing for the appellant...Many witnesses will have a smattering of the English language. At least they may have enough to comprehend the general drift of the proceedings, even if their knowledge is insufficient to communicate and understand sufficiently to give evidence. But a deaf person, save for lip-reading, will be in a silent world where the mysteries of the court's process will inevitably be enlarged. The need is accordingly greater to ensure that such a person has as full an understanding as possible of what is occurring in the case."

151 *R. v. Ram* [1989] Crim.L.R. 457.

from case reports.[152] On the whole, failure to provide any or adequate LS services during pre-trial phases is not considered to justify the exclusion of statements made under those circumstances. However, where the judge hearing an appeal is prepared to entertain the notion that linguistic difficulties may create procedural problems, police failure to provide any or competent LS may lead to the exclusion of pre-trial statements.[153] It may also provide a defendant with a "reasonable excuse" for having, for example, failed to comply with a requirement to provide a specimen.[154]

On appeal, the provision of an incompetent or biased interpreter in the court below may be held sufficient grounds for ruling that the trial was unfair or a nullity.[155] The appellate court's judgment may take account of considerations of natural justice or of pragmatic circumstances.[156] However, the normal appellate view is that in the absence of any showing of prejudice (something normally impossible in the absence of recordings of both language versions), no specific disadvantage can be identified as having occurred and the appeal is therefore refused.[157] When an appeal is considered by several courts in succession, major differences will not infrequently be present in the degree to which opinions differ and passions are stirred on the issue of entitlement to LS services.[158]

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152 See Karuppiah 1993.

153 See *R. v. Bassil and Mouffareg* (1990) *Legal Action*, December 1990 at 23, *R. v. Van Axel and Wezer* (1991) *Legal Action* September 1991 at 12, both heard by Sich J. See also *United States v. Gaviria* 775 F. Supp. 495 (1991), at Note 191 below, *United States v. Fawaz Yunis* 681 F. Supp. 909 (1988) and *United States v. Fawaz Yunis* 859 F.2d 953 (1989).

154 *Beck v. Sager* [1979] RTR 475. See Chapter 1 above.

155 *H.M. Advocate v. Olsson* 1941 J.C. 63; *Liszewski v. Thomson* [1942] J.C. 55; *Mikhailitchenko v. Normand* 1993 S.C.C.R. 56; *Iqbal Begum* (1991) 93 Cr.App.R. 96.

156 See *R. v. Mayor and Burgesses of the London Borough of Tower Hamlets ex parte Jalika Begum*, [1991] Imm AR 86.

157 See Chapter 3 above.

158 *United States ex rel. Negron v. the State of New York* 310 F.Supp. 1304 (1970); *United States ex rel. Negron v. the State of New York* 434 F.2d 386 (1970). See also *El Rescate* at Note 149 above.

During times in which a distinction existed between felony and misdemeanour,[159] the absence of LS for an unrepresented NESB individual in the latter instance has been considered insignificant.[160] An echo of such attitudes is to be found in contemporary English reports which indicate that on the whole, greater efforts are made to provide LS services in serious cases.[161] The provision of counsel who also speaks the defendant's language has frequently been held to be a satisfactory substitute for the services of a language-switcher,[162] although some legal

159 Abolished in England by s.1(1) of the Criminal Law Act 1967.

160 See the New Zealand case of *R. v. Fong Chong and Clara Fong Chong* (1886) 6 N.Z.L.R. 374: "A foreigner charged with felony properly pleaded to the indictment, which was interpreted to him by an interpreter chosen by himself and duly sworn. The foreigner was defended by counsel. The conviction was of misdemeanor only. After verdict it appeared that the interpreter had not interpreted any of the evidence to the prisoner. Held, That as the conviction was of misdemeanor, there had been no mistrial, and the verdict must stand. Whether the same result would have followed had the conviction been for felony, quaere." *Per* Prendergast C.J. at 374: "The function of the Court, as regards interpretation in all criminal cases, whether felony or misdemeanor, is at an end, as to legal requirement, when the prisoner has properly pleaded." Here the point of law is slightly different from that raised in *Iqbal Begum* (93 Cr.App.R. 96) as to the degree to which a "proper plea" can in fact be tendered when--as a result of absence of any effective communication between defendant and the legal system, including the prisoner's own lawyer--there had been no "understanding mind". In 1886, Prendergast C.J. could rule in *Fong Chong*: "The plea was properly taken, the prisoner was defended by counsel, and there is no ground for holding that there was a mistrial." On the other hand, as in *Lee Kun* ((1916) 11 Cr.App.R. 293), the issue of basic fairness, as well as pragmatic concerns, might lead to a different practice being applied, as Prendergast C.J. noted: "But, expressing my individual opinion, I think that in all criminal cases if the plea be properly taken the function of the Court with respect to interpretation to the prisoner is, as to legal requirements, at an end; though in fairness to the prisoner the Court would, of course, see that a person was provided who was qualified to communicate to him the proceedings. In this colony, where there are many cases of trials of Maoris, grave difficulties might arise if a different rule prevailed." It may be argued that the last sentence provides an explanation of why practice in respect of provision of interpreters in courts has historically differed so notably between Great Britain and its former colonies, such as South Africa and India.

161 Lord Richards, *Hansard*, House of Lords, 26.3.91, col. 1007.: "...interpretation services are provided in the serious cases. It is at the lower end of the ladder that frequently they are not provided."

162 See references in Piatt 1990b.

commentators--rightly, in the view of the present author--hold this practice to be unsatisfactory.[163]

Case reports extending over a number of centuries and a variety of jurisdictions reflect a range of attitudes towards LS provision. These include not merely whether LS is to be provided, but for whom, by whom, and of what part of the proceedings. For example, in a seventeenth-century English murder trial, the court demonstrated overtly contrasting attitudes towards providing LS services for the various NESB defendants, differing on the basis of class, not on the basis of severity of language handicap.[164] Even in contemporary cases where the court has authorised the provision of LS for the defendant throughout the proceedings, instructions have been given for LS activities to be interrupted during the judge's charge to the jury in order to avoid the possibility of distraction.[165] Similarly, in a civil case involving a deaf plaintiff, the interpreter was instructed to refrain from rendering a particular passage for her client into sign-language.[166] In multidefendant trials, LS has sometimes been provided by one of the defendants to another, a practice which on appeal has been ruled to be unacceptable.[167] In certain jurisdictions, regulations require each NESB defendant to have a personal language-switcher providing a version of the proceedings out loud, a situation that has resulted in a cacophony which is rightly criticised by the judicial participants.[168] Only if the parties concerned agree to waive their personal interpreters can use be made of simultaneous interpretation provided via

163 Piatt 1990b.
164 *Borosky alias Boratzi and Ors* (1682) 9 Howell's State Trials 1.
165 *R. v. Reale* (1974) 58 D.L.R. (3d) 560.
166 *Gradidge v. Grace Bros. Pty. Ltd.* (1988) 93 FLR 414.
167 *Liszewski v. Thomson* [1942] J.C. 55.
168 California: August 17, 1992 letter from Frank M. Almeida, Director, Court Interpreter Services, United States District Court, Central District of California.

infrared transmission by a single interpreter.[169] Judicial comment on LS entitlement may specify the mode in which LS mediation is to be provided and, concomitantly, the extent of such LS.[170] Such comment may also refer to the perceived relative merits or disadvantages of different LS modes.[171]

On the whole, appellate comment on the issue of entitlement and provision of LS has reflected the natural justice view, while accepting that perfection cannot be achieved and that pragmatic considerations must be allowed to have their effect.[172] In the lower courts, perceived practical considerations appear to prevail over principle. Thus in practice, "ear-to-ear" contact[173] may not take place because of failure to provide LS services or because of the inadequacy of such services. Similarly, the obvious inadequacies of a particular interpreter's performance may not lead to the proceedings being interrupted or that interpreter being substituted. Yet again, an incompetent interpreter may, although his or her services have been dispensed with, subsequently be re-engaged, even re-appearing before the same judge.[174]

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169 August 17, 1992 letter from Frank M. Almeida; *People v. Resendes* 210 Cal.Rptr.609 (Cal.App.5 Dist. 1985).

170 *United States of America ex rel. Negron v. the State of New York* 310 F.Supp. 1304 (1970).

171 *Cormier v. Fournier* (1986) 29 D.L.R. (4th) 675, 69 N.B.R. (2d) 155 (Q.B.), aff'd on other grounds 78 N.B.R. (2d) 406 (C.A.). The case is discussed in Chapter 1 above.

172 For instance, in *Attorney-General v. Joyce and Attorney-General v. Walsh* (1929) I.R. 526 part of the evidence was given in Irish and interpreted into English, but the transcript was in English only. In giving the judgment of the Irish Court of Criminal Appeal, to the effect that no miscarriage of justice was held to have occurred because of the omission to transcribe the original (Irish) testimony, Kennedy CJ commented (at 531): "It would seem to me to be a requisite of natural justice, particularly in a criminal trial, that a witness should be allowed to give evidence in the language which is his or her vernacular language, whether that language be Irish or English, or any foreign language; and it would follow, if the language used should not be a language known to the members of the Court, that means of interpreting the language to the Court (Judge and jury), and also, in the case of evidence against a prisoner, that means of interpreting it to the prisoner, should be provided."

173 Piatt 1990b:16.

174 Morris 1993h.

Lastly, in jurisdictions in which political factors have led to regulation of the language in which legal proceedings are to be carried out, these may be cited as limiting a court's discretion to hear a case in a particular language and concomitantly mandating a particular party's use of an interpreter, even where the court has the linguistic skills to communicate directly with the party and the litigant in question has no funds to engage an interpreter.[175]

EFFECTS OF REFUSING TO PROVIDE LS

A survey of case reports indicates that judicial figures seldom acknowledge that coping with the linguistic aspects of legal proceedings in English can be genuinely difficult for non-native speakers who can manage most other situations in that language. This is a rule that appears to be proved by an exceptionally enlightened statement such as that in *State v. Inich* that "it is often the case that a person who understands and speaks with reasonable ease the language of the street, or of ordinary business, encounters difficulty and embarrassment when subjected to examination as a witness during proceedings in court".[176] Macy comments:

> If difficulty of expression and embarrassment were all that he encounters the matter would not be so important. Of greater importance is the danger of his using under cross-examination some word or phrase which means one thing to him, but means something else, crucial to the case, when taken as true English.[177]

In a similar vein, Britain's Hughes Parry Report on the legal status of the Welsh language quotes, at a distance of four hundred years, a sixteenth

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175 *In the estate of (deceased) Hartley and Another v. Fuld and Others* [1965] 2 All E.R. 652; *In re Trepca Mines Ltd.*,[1960] 1 W.L.R. 24.

176 *State v. Inich* (1918) 55 Mont. 1, 173 P. 230, cited in Macy (1947) 172 ALR 923 at 931.

177 Macy (1947) 172 ALR 923 at 931.

century English Catholic refugee in Louvain on the natural desire to use one's own language in matters of great importance:

> ne man is so well indued with the knowledge of forren tonges, but when a matter of greate importance is told hym, the truthe of the which he is desyrouse to knowe certaynly, and to the which he is mynded to make an aunswer wysely, had rather haue it declared in his natural and mother tonge be it neuer so barbarouse, then in a straunge language be it neuer so eloquet.[178]

There could be no greater contrast between both the views contained in this sixteenth century *cri de coeur* and Macy's insight into the situation of the non-native speaker on the one hand, and the attitude of Wolfe J. in the 1942 American case of *Vasquez* on the other. The *Vasquez* appeal court reversed the lower court's judgment on the ground that a fair trial had been denied because of the cumulative effect of a number of errors, including jury instructions. A further point argued in the appeal was that the State had failed to provide the defendant with an interlingual interpreter at the State's expense, and had denied him the right to testify in his own language. In the appeal court's opinion, Wolfe J. said:

> I cannot see error in the court's action. While a defendant is entitled to an interpreter where he cannot adequately express himself the jury is also entitled to have the benefit of his testimony directly if it can be conveyed to them in English. All of us who have sat as trial judges know that there have been times when witnesses who are familiar with a foreign tongue have sought to testify through interpreters because it has enabled them to fashion a story with a facility impossible if their testimony must be expressed in the simple English terms with which they are familiar. Certainly the reaction of the witness, his demeanor on the stand is much more discernible to the juror when questions and answers are framed in English.[179]

Vasquez demonstrates how one and the same legal opinion may contain two diametrically opposed views on the issue of a non-native speaker's entitlement to LS services and the justification for providing one in a specific case. In contrast to the view of Wolfe J. cited above, the attitude

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178 Hughes Parry Report (1965:21), citing Richard Shacklock, a fellow of Trinity College Cambridge who had taken refuge in Louvain: Preface to *The Hachet of Heresyes* 1565.

179 *Per* Wolfe J. in *State v. Vasquez* 140 ALR 755, 121 P(2d) 903 (1942) at 762.

of Moffat Ch.J. in the same case reflects great sensitivity to the linguistic complexities of the non-native speaker's situation:

> Degrees of understanding may present themselves between that of complete comprehension of the language to that of minor matters. The question, not properly heard or understood, may bring forth an answer that might turn the scales from innocence to guilt or from guilt to innocence. Then, too, the answer given might be made in words not entirely familiar or understood by the defendant. Mr. Justice Holmes once wrote: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[180]

Similarly, the court's attitude in *Duroff v. Commonwealth* reflects the prevailing judicial suspicion that witnesses do not act in good faith in claiming that they cannot speak English and therefore that it is always better to dispense with the services of an interpreter:

> If the witnesses are unable to understand and speak the English language the court should either on motion or of its knowledge call a competent qualified person to translate and interpret..., but where the witnesses are able to understand and speak the English language, even imperfectly, but so as to make themselves understood and to convey their thoughts and ideas, no interpreter should be called...This is true even in cases where the witness does not at first understand the question and it has to be repeated to him, if he can be made with reasonable effort to understand the question.[181]

An enlightened requirement that a "competent qualified person" be engaged to perform LS is thus modified by a rider applicable to individuals who have some--even an imperfect--knowledge of English. The upshot is to deny most NESB individuals the right to benefit from LS services. Such a denial would put a non-fluent non-native speaker in an unnecessarily stressful position in what are probably already intimidating circumstances.[182] This stance also shows that the court's insistence on not having a language-switcher is not simply a question of objecting to the

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180 *Per* Moffat Ch.J. in *State v. Vasquez* 140 ALR 755 at 758, quoting Mr. Justice Holmes in *Towne v. Eisner* (1918) 245 US 418, at p.425.

181 *Duroff v. Commonwealth* (1921) 192 Ky 31, 232 SW 47, cited in Macy (1947) 172 ALR 923 at 937. Emphasis added.

182 For a study of what can happen to a non-native speaker giving evidence in English, see Bresnahan 1979 and 1991.

additional time required by the consecutive mode. The objection here would appear to the mediation of a third party--the interlingual interpreter, who is viewed as at best a machine or interloper, and at worst a traitor.[183] The court is even prepared to waste its time by insisting on English being used although it knows that the witness has imperfect active and passive command of English. From here it is but a short step to the implication that a witness who requests LS is actually able to manage without but wishes to have one in order to gain extra time and thus protection in cross-examination.

This is precisely the issue considered in the 1858 Irish case of *R. v. Burke*. A witness was called on behalf of a prisoner; before the witness was sworn he professed an inability to speak English. No question was then raised about this fact by counsel for the Crown; accordingly, the witness was sworn in Irish and gave his evidence in that language through a language-switcher. On cross-examination he was asked whether, on a recent occasion, he had not spoken in English to two persons who were present in court, and shown to the witness. He denied the fact, whereupon those two persons were called by the Crown to contradict the statement so made, and their statements were sent to the jury as evidence. The issue was thus one of the honesty of the witness as evinced by his assertion that he had not addressed two individuals in English although he claimed to be unable to speak that language.

The court observed that the question was one of considerable importance for the administration of justice in those parts of Ireland "where many persons profess not to speak or understand the English language, and are examined in Irish",[184] and of particular importance for cross-examination:

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183 See Chapter 4 above.

184 *Per* O'Brien J. in *R. v. Burke* (1858) 8 Cox, C.C. 44 at 46.

> the great value of which arises from the demeanour of the witness, and the hesitation or fairness with which he answers questions unexpected by him, and put suddenly to him, and his demeanour while being so cross-examined is powerful with the jury to judge of the credit which they ought to give his testimony; and it is plain that the value of this test is very much lessened in the case of a witness having a sufficient knowledge of the English language to understand the questions put by counsel, pretending ignorance of it, and gaining time to consider his answers while the interpreter is going through the useless task of interpreting the question which the witness already perfectly understands.[185]

What this quotation from *Burke*'s case reflects is an assumption that a witness will deliberately disclaim any ability in English in order to protect himself in cross-examination by gaining extra time through the provision of language-switching.[186] Among other commentators, Roberts-Smith roundly rejects the argument advanced in *Burke*, arguing that to testify through an interpreter is never the same as being able to communicate directly, and individuals who choose the more stressful LS-mediated route should not have to bear the additional stigma of being assumed to be linguistically gifted liars.[187] Australia's 1992 Law Reform Commission Report on multiculturalism and the law notes that a person giving evidence through LS is actually more likely to be at a considerable disadvantage, because of the loss of impact of evidence mediated through LS, the general lack of competent court interpreters, the nature of the adversarial system, and the fact that neither courts nor those practising in them are properly equipped to work with LS providers.[188] The issue of judging a witness's demeanour when a spoken message is mediated through LS needs to be assessed in the light of the general standing of the concept of judging credibility from demeanour. On the whole, this once popular notion has been long under attack, and may be considered to be

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185 *Per* O'Brien J. in *R. v. Burke* (1858) 8 Cox, C.C. 44 at 47.

186 See also Note 149 in Chapter 4 above.

187 Roberts-Smith 1990:151.

188 Commonwealth of Australia, Law Reform Commission Report, *Multiculturalism and the Law* 1992:46-47.

largely discredited among the system as a whole[189]--except where it is raised in connection with reasons for refusing entitlement to LS services. Thus the demeanour argument may be classified with other dubious, spurious or unwarranted objections to authorising the provision of LS services for the NESB participant.

In the American case of *Vasquez* cited above, the court's discretion to approve the appointment of an interpreter is stated to be predicated on its right to determine the degree to which the non-native speaker can "adequately" express himself--for the benefit of the jury. Words such as "familiar with a foreign tongue" and "fashion a story with a facility impossible if their testimony must be expressed in the simple English

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189 On the issue of demeanour, Bingham (1985:10) makes the following highly pertinent observations: "However little insight a judge may gain from the demeanour of a witness of his own nationality when giving evidence, he must gain even less when (as happens in almost every commercial action and many other actions also) the witness belongs to some other nationality and is giving evidence either in English as his second or third language, or through an interpreter. Such matters as inflexion become wholly irrelevant; delivery and hesitancy scarcely less so. Scrutton LJ once observed: 'I have never yet seen a witness who was giving evidence through an interpreter as to whom I could decide whether he was telling the truth or not'. If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in a deceit or the reaction of an honest man to an insult? If a Japanese witness, accused of forging a document, becomes sullen, does this suggest that he has done or that he has not? I can only ask these questions. I cannot answer them. And if the answer be given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm." Devlin (1983:63) similarly rejects the demeanour argument: "The great virtue of the English trial is usually said to be the opportunity it gives to the judge to tell from the demeanour of the witness whether or not he is telling the truth. I think that this is overrated. It is the tableau that constitutes the big advantage, the text with illustrations, rather than the demeanour of a particular witness." Devlin endorses MacKenna J.'s scepticism (1974:10) of judicial ability to discern from a witness' demeanour or tone of voice whether he is telling the truth. Gibb (1991) quotes blind judge John Wall as follows: "When I was interviewed it became clear that they had certain reservations. The first was that blind people could not observe the demeanour of witnesses. They said you need to see people to know whether they are telling the truth. I pointed out that no self-respecting judge would reach his conclusions about a person's veracity on the basis of what they look like. I also pointed out that veracity can be judged in other ways, by how people say things and what they say." See also Stone 1991.

terms with which they are familiar" demonstrate a widespread suspicion of foreigners and foreign languages.[190] The question that arises in this connection is whether those who are to some degree unfamiliar with the local language are therefore to be denied the opportunity to express themselves and tell their "story" with the facility which would be enjoyed by a native speaker of the language of the proceedings. It appears obvious that such an attitude does not guarantee equality of treatment for NESB individuals.

Writing in the 1960s, Callejo presented an emotive picture of the Spanish-speaking defendant's experience of "due process" in the English-speaking justice system in the United States.[191] Callejo's argument--that

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190 A similar comment made in a House of Lords debate is cited at Note 123 above.

191 Callejo 1968:52-53: "The usual situation involves a Spanish speaking defendant who, from the time of his arrest, has been denied every procedural and substantive due process of law--in reality--while the appearance of due process is provided, making the denial all the more insidious...Thus the spectacle of a Spanish speaking veteran and taxpayer being arrested without being advised of his right to counsel in Spanish; being informed of this right by an interpreter, if one is available, who may or may not speak Spanish; of having the English translation go into the record as the statement of the Spanish speaking defendant, when usually there is no one present who can certify that the interpreter is doing a good job in either language, coupled with the absence of counsel or only an English speaking counsel gives the appearance of a fair trial but in reality it is a police state inquisition which treats the individual as if he were an animal and not a man...*Translation and interpreters are no substitute for an on-going, continuous awareness of what is happening because it is happening in the Spanish language*. On appeal the record would reflect what the defendant said in Spanish and the parallel meaning in English, and not just the potentially inaccurate interpretation of an interpreter who may or may not have stated the correct truth in English." Emphasis added.
Lest Callejo's statement that the interpreter, if available, "may or may not speak Spanish" be considered to be an exaggeration, cases such as England's *Iqbal Begum* ((1991) 93 Cr.App.R. 96) and *United States v. Gaviria* (775 F. Supp. 495 (1991)) should serve as a reminder of the fact that individuals who are totally incompetent linguistically in the foreign language do act, whether willingly or not, as interpreters in the judicial system. *Gaviria* involved a determination of whether the police had obtained the voluntary consent of a non-English-speaker to search his bag. The detective who supposedly communicated with the Spanish-speaker had spoken such bad Spanish that he basically failed to make himself understood, about which the appeal court commented (at 501): "While some of the language mistakes are humorous, it is also clear that Detective Underhill did not grasp the proper use of tenses. Some of his commands to Mr. Gaviria were in the first person, instead of the

LS services are not a satisfactory substitute for an "on-going, continuous awareness of what is happening because it is happening in the Spanish language"--is one that is accepted in officially bilingual countries such as Canada or Belgium.[192] It is one which would be wholeheartedly espoused by Welsh-language campaigners. However, despite the fact that there is an increasingly large Hispanic population in the United States, the system is still, officially, monoglot and English-speaking, and in the light of pressure from English Only movements will probably stay that way.[193] Nevertheless, as Bryant and Riche point out, "in many ways the majority population will have to assimilate to this increasingly large minority".[194]

The question is whether one way of adaptation will, eventually, be the introduction of court proceedings in Spanish, as Callejo so passionately advocates.[195] The scope of the present work excludes any in-depth treatment of the complex area of language policy, language rights and other related issues generally, and in the United States, the country of not a few of the above quotations, in particular. Suffice it to say that it is vital to remember how emotive an issue language may be, as demonstrated forcefully inter alia by *Lau v. Nicholls*,[196] the highly publicised landmark

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second person. Other "requests" were actually commands using the imperative tense. In addition to his frequent grammatical mistakes, Detective Underhill's pronunciation was poor. Very few of us are in a position to adequately understand how important subtle differences in pronunciation are. Ms. Rosado, a court-certified translator and Spanish teacher, testified that diphthongs and vowels are crucial in Spanish." If the court had considered the sometimes considerable importance, for example, of the length of the vowel in English (such as in words like piece or sheet), it might also have been able to provide its own illustrations of the importance of pronunciation in English.

192 The Belgian situation is even more complex than the Canadian and cannot be dealt with adequately here. On multilingual states, see, for example, Laponce 1987.

193 Zoglin writes in 1989 (1989:16): "The United States is experiencing a growing concern, occasionally bordering on hysteria, over what many view as the erosion of the use of the English language."

194 Bryant and Riche 1993.

195 This is the same argument as that of the Welsh Language Movement (see below).

196 *Lau v. Nichols* 414 U.S. 563 (1974).

case in the areas of bilingualism and biculturalism in the United States, and the post-First World War Anglo-Saxon backlash that led to state laws prohibiting German language instruction in private schools which were subsequently ruled unconstitutional in *Meyer v. Nebraska*.[197] Even reasonable sounding approaches may conceal far more irrational attitudes:[198]

> By its own account, the "official English" movement seeks to stimulate debate on the sensitive issue of language and to promote social unity through a common tongue. In fact, however, the movement makes language the rallying point for simmering intolerance, frustration, fear, and distrust.[199]

It should by now be obvious how small a distance separates eighteenth-century England and twentieth-century America. The issue of language use can be an emotive one at any time. The feelings of frustration, resentment and disempowerment resulting from inability to understand and hence participate meaningfully in judicial proceedings are illustrated by the language and sentiments of England's Courts of Justice Act in 1731 just as vividly as they are by Callejo's picture of the Spanish-speaker's situation in the Californian justice system nearly 250 years later.[200]

PROCEEDINGS IN WELSH IN WALES

An examination of the situation concerning the use of Welsh in Welsh courts provides a striking illustration of the range of issues actually or hypothetically connected with entitlement to LS services. The modern Welsh situation demonstrates the characteristic intertwining--not to say

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197 *Meyer v. Nebraska* 262 U.S. 390, 67 L. Ed. 1042 (1923).

198 Other writers on language policy in the United States include Amorose (1989), Cloonan and Strine (1991), Heath (1977), Piatt (1990a), Rubin (1984 and 1985), and R.A.Walker (1991).

199 Note (1987) "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States. *Harvard Law Review* 100:1345-1363.

200 See Note 191 above.

confusion--of political principle and aspects of practical application. For example, the fact that the records of all proceedings in courts in Wales are to this day kept in English can legitimately be presented as a pragmatic approach, since English will be the language of any subsequent appeal.[201] A tenuous technical justification for using English is reflected in the practice, noted in 1963 by the Hughes Parry Report, of having to translate into English any Quarter Sessions proceedings which had actually taken place in Welsh in order for the shorthand writer to be able to make a verbatim note, there being no Welsh shorthand writers available in the courts.[202] In this way, an unrevised oral L2 rendering became the official record of proceedings.[203]

The situation appears to have become even more complex after the passing of the 1967 Welsh Language Act. The experimental introduction of simultaneous LS at several Crown Courts led to a situation where a bilingual judge summed up in Welsh and his words were simultaneously

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201 Section 3 (2) of the Welsh Courts Act 1942 implies that the keeping of records of all proceedings in courts in Wales in the English language (necessitating on occasion the translation into English of any spoken or written proceedings in Welsh) is necessary in order to secure "the due and public administration of justice".

202 Hughes Parry Committee Report 1965. To palliate the latter situation, the Hughes Parry Report consequently recommended that local education authorities should establish courses in Welsh shorthand (paragraph 244), although the issue referred to there was one of shorthand typists in government offices rather than of the more highly trained and specialised court reporters.

203 On the importance of a shorthand writer's note, see the comments of Megaw L.J. in *Payne and Spillane* (1972) 56 Cr.App.R. 9 at 16 (the temporary engagement of an inexperienced shorthand writer had resulted in a totally inadequate record): "We have gone into this at some length, because of the very great difficulties and the very great possibility of miscarriage of justice if the provision which is traditional in these courts of a full and accurate note of both the evidence and the summing-up is for any reason not available. It will be obvious that it is something that must be watched under present conditions with the greatest of care, and the greatest possible care should be taken to ensure that justice is not interfered with by means of difficulties of this sort." Wolchover (1989:782-783) comments: "An absolutely essential handmaiden of cross-examination is an accurate record of testimony, for without it there can be no means of checking the witness's consistency. Without a precise record of testimonial narrative cross-examination will degenerate into disputes of recollection over what exactly a witness has earlier given in evidence."

rendered into English. The Lord Chancellor commented: "There are considerable difficulties about this method. What does the Court of Appeal do, for instance, if the two translations do not coincide?[204] It is not as easy as it sounds."[205] It was for this reason that Lord Justice Davies' 1973 recommendations suggested that "in order to allow for the possibility of an appeal, pleadings and all other Court documents should continue to be in English".[206] The parallel with the 1362 Statute of Pleadings in neighbouring England is striking.[207]

Apart from such ostensibly pragmatic features related to appeals, the Welsh-language judicial situation has clearly had major political overtones also. For example, the fact that as the law stood in 1965, Welsh people had no *right* to use their own language in a court of law in their own country[208] was eventually considered an aberration. Recognition of this state of affairs led to the passing of the Welsh Language Act 1967.[209] This

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204 The Lord Chancellor's reference to "two translations" is erroneous, as one version will be the original (L1) and the other a written translation or oral interpretation (L2). In the 1961 trial of Adolf Eichmann, a similar misconception prevailed. The transcripts of the proceedings in languages other than Hebrew bear a note on the cover page to the effect that they contain an unrevised transcript of the simultaneous interpretation and are not to be considered authentic. From the absence of any such comments on the Hebrew-language transcript it might be deduced erroneously that the version contained therein is authentic (i.e. utterly accurate in representation of the facts, trustworthy and reliable). In theory, this should be the case. However, in practice, as Morris (1989b) shows, the bilingual Eichmann judges relied on the original wording rather than any L2 version. See also Chapter 3 above. See also at Note 255 below, and Chapter 3 at Note 99.

205 *Hansard*, House of Lords, Vol. 353, col. 538, 12 June 1973.

206 *Hansard*, House of Lords, Vol. 353, col. 537, 12 June 1973.

207 Under the 1362 Statute of Pleading, although pleas were henceforth to be made in English, records were to be kept in Latin.

208 Hughes Parry Report 1965:21.

209 Welsh Language Act 1967: "1. (1) In any legal proceedings in Wales or Monmouthshire the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly. 3. (1) Subject to subsection (2) of this section, anything done in Welsh in a version authorised by section 2 of this Act shall have the like effect as if done in English. (2) Any power to prescribe conditions conferred by the said section 2 shall, without prejudice to the generality of that power, include power -- (a) to provide that in case of any discrepancy between an English and

legislation was the culmination of a lengthy process of fighting the situation brought about in Wales by the 1535 statute.[210] The struggle eventually led to the Welsh Courts Act 1942, of which Section 1 is a classic example of the language-use argument based on the concept of disadvantage,[211] rather than on principles of natural justice and an individual's right to use his/her language of choice:[212]

> Whereas doubt has been entertained whether section seventeen[213] of the statute 27 Hen. 8. c. 26 unduly restricts the right of Welsh

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a Welsh text the English text shall prevail; (b) to prescribe conditions subject to which a document containing a version authorised by the said section 2 of any provisions of another document shall be treated as a true copy of that other document."

210 27 Hen. VIII, c. 26, *Concerning the laws to be used in Wales*. The preamble includes the following: "(3) and also because that the people of the same dominion have, and do daily use a speech nothing like, ne consonant to the natural mother tongue used within this realm, (4) some rude and ignorant people have made distinction and diversity between the King's subjects of this realm, and his subjects of the said dominion and principality of Wales, whereby great discord, variance, debate, division, murmur and sedition hath grown between his said subjects." The text dealing specifically with the language of the courts is Section XX, which reads: "Also be it enacted by the authority aforesaid, That all justices, commissioners, sheriffs, coroners, escheators, stewards, and their lieutenants, and all other officers and ministers of the law, shall proclaim and keep the sessions courts, hundreds, leets, sheriffs courts, and all other courts in the *English* tongue; and all oaths of officers, juries, and inquests, and all other affidavits, verdicts and wagers of law, to be given and done in the *English* tongue; (3) and also that from henceforth no person or persons that use the *Welsh* speech or language, shall have or enjoy any manner of office, or fees within this realm of *England, Wales*, or other the King's dominion, upon pain of forfeiting the same offices or fees, unless he or they use and exercise the *English* speech or language." Emphasis in the 18th century version of the text.

211 Since the existence of the individual's disadvantage is determined by the court, frequently the result is that considerations appertaining to the court's own convenience prevail.

212 That this attitude exists would appear to be confirmed by the Hughes Parry Report's comment (1975:20-21): "There is, perhaps, less sympathy shown and less assistance given to a Welsh person who is known to be bilingual or is believed to have a better mastery of English than he admits and who is suspected of using Welsh in court not so much because he would be at a disadvantage if he were to use English but rather because he wishes to assert what he considers a right to use his own language in a court of law in his own country."

213 The reference to section seventeen of the 1535 statute appears to be incorrect, as this refers to the towns annexed to the county of Pembroke where, "from and after the feast of *All-Saints*, justice shall be ministred and executed to the King's subjects and inhabitants of the said county of *Pembroke*, according to the laws, customs and statutes of this realm of *England*, and after no *Welsh laws*, and in such form and fashion as justice is ministred and used to the

> speaking persons to use the Welsh language in courts of justice in Wales, now, therefore, the said section is hereby repealed, and it is hereby enacted that the Welsh language may be used in any court in Wales by any party or witness who considers that he would otherwise be at any disadvantage by reason of his natural language of communication being Welsh.[214]

Given the precise wording of the 1535 statute, it is hard to see how there could be any "doubt" about the undue restrictions imposed by it on the use of the Welsh language in the legal system, assuming that a natural-justice approach is considered warranted, as it was by the Hughes Parry Committee. From the actual wording of Section 1, as quoted above, it might be presumed that following the 1942 Act, the use of Welsh by a party or witness in legal proceedings in Wales would have become a matter of simple request. This should, logically, involve both the active use of Welsh for examinations and communication with the court, and also the provision of a Welsh version of the proceedings (including English-language testimony) for Welsh-speaking witnesses and defendants. That this was not the case is clear from the comment of the Hughes Parry Committee in 1965 that "only at the *discretion* of the presiding magistrate or judge *where he considers it necessary*, can a party or witness give evidence in Welsh and there is no legal provision for the translation of evidence given in English for the benefit of a Welsh-speaking party".[215] Even this relatively more enlightened situation[216] would appear to fall under Phillipson's definition of English linguistic

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King's subjects within the three shires of *North Wales*." For the text of section twenty, which would appear to be the correct reference, see Note 210 above. Emphasis in original.

214 Welsh Courts Act 1942, s.1.

215 Hughes Parry Report 1965:47, (iv) *Evidence* 203. Emphasis added.

216 Pollock and Maitland (1911:90) note how a modern victor "may deliberately set himself to destroy the nationality of his new subjects, to make them forget their old language and their old laws, because these endanger his supremacy. We see something of this kind when Edward I. thrusts the English laws upon Wales. The Welsh laws are barbarous, barely Christian, and Welshmen must be made into Englishmen."

imperialism, an example of linguicism.[217] The then Lord Chancellor, Lord Hailsham, wrote the following words in 1972:

> English and Welsh are in a privileged position; English throughout the country, and Welsh in the Principality. Welsh or English can be spoken by anyone in the Principality as of right. They are of equal validity, that is, a person is entitled to speak either tongue in court at his own option, but no one has a right to impose his own language of choice on anyone else who is entitled to participate in the proceedings. Those who have a right to participate in proceedings include parties, witnesses, judges, magistrates, advocates, clerks, jurors, and interpreters.[218]

The Lord Chancellor's comments provide an important backdrop to the series of "political trials" which have taken place in Wales since 1936, and in particular during the 1963-77 period, and in which the Welsh language issue has been uppermost. This is a reflection of the focusing of the Welsh Nationalists' struggle on various aspects of the use of the Welsh language.[219] A characteristic of these trials which is of considerable relevance to the present study is the way in which the judicial authorities'

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217 The term "linguicism" is used in the work of Robert Phillipson and Tove Skutnabb-Kangas. In Phillipson (1992:47) *linguicism* is defined as "ideologies, structures, and practices which are used to legitimate, effectuate, and reproduce an unequal division of power and resources (both material and immaterial) between groups which are defined on the basis of language". Phillipson's working definition (1992:47) of English linguistic imperialism is where "the dominance of English is asserted and maintained by the establishment and continuous reconstitution of structural and cultural inequalities between English and other languages".
The linguicist interpretation of the 1942 Act is confirmed by Beloff (1987:143) who quotes a contemporary commentator as acknowledging that "the habit of regarding English as the only official language of the Courts and officials had, after four centuries, become too ingrained to be much modified by an obscure Act of Parliament enacted in haste during a great world conflict, and so matters remained largely unchanged". In *Ex parte Jenkins* (*R. v. Merthyr Tydfil Justices* [1967] 2 Q.B. 21, [1967] 1 All E.R. 636), a schoolmaster fluent in English was refused permission to examine an officer in Welsh, and was unsuccessful in his appeal against his conviction. The comments in *Ex parte Jenkins* of Mr. Justice Widgery (the future Lord Chief Justice) similarly confirm that no automatic right to speak Welsh arises from the 1942 Act.

218 The reference to interpreters participating as of right is an unusual one. Normally they are considered technical adjuncts. They were not, for example, included in those who received questionnaires in the February 1992 *Crown Court Study*, (Zander and Henderson 1993).

219 See Bankowski and Mungham 1980. Fishlock (1972:50) writes: "to a considerable degree the history of Wales is the history of its language."

acceptance of the defendants' right to speak Welsh, which would then be interpreted into English for the court, was held to be unsatisfactory by the language activists. What the language campaigners wanted was all-Welsh proceedings, in which no English would be used, and there would be no need for language-switching. Bankowski and Mungham identify such disputes "over the use of translators" as a feature of these trials. Noting that there were various attempts at compromise, they quote the words of an unidentified speaker, summarising the fundamental anti-LS position of the language campaigners:

> Translators are abominable. The right to translation is to my mind the right to have an inferior trial....You know you will never sway a jury by cold argument alone: all this would be spoilt by the intervention of a translator.[220]

Or, alternatively and "more pointedly":

> Many people will say fair play to the authorities--they have given you a Welsh judge and Welsh translating equipment.[221] But it reminds us of our position and the position of the Welsh language.[222]

What cannot be denied is that on the whole, no language-switcher is truly capable of providing a rendering that will entirely convey all the emotional force of a passionate outpouring. Indeed, certain guidelines for judicial LS require interpreters not to imitate gestures or emotions.[223] The

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220 Bankowski and Mungham 1980:68.

221 This refers to the fact that in 1974, equipment for the provision of simultaneous LS was installed in the Crown Court in Cardiff in 1974 "and a panel of highly trained interpreters made available", according to the then Lord Chancellor, Lord Elwyn Jones (140 J.P. 349 (1976)). The researcher was informed that the equipment has been used once since 1986. In 1972, the then Lord Chancellor, the Rt. Hon. Lord Hailsham, (1972:134) wrote: "I am also doing what I can to provide both in the short and longer term an adequate corps of interpreters and even simultaneous interpretation. The aim is to set up a panel of interpreters who are conversant with legal procedure and terminology and capable of translating fluently and accurately from and into Welsh. Other possibilities, including arrangements for simultaneous translation, are also under examination."

222 Bankowski and Mungham 1980:68.

223 Canon 4 A of the proposed Code of Professional Responsibility for Court Interpreters and Legal Translators, formulated by the New Jersey Supreme Court Task Force on Interpreter and Translation Services, 1986, as reproduced in Berk-Seligson (1990:236), Appendix 5.

argument that the use of LS is necessarily indicative of an inferior position depends on the relative power of the two or more languages being used. Equality may exist: in South African courts, for example, case reports show that Afrikaans and English can be used interchangeably by the legal participants. In Welsh courts, however, when the very issue in contention is the position of the Welsh language in Wales, by definition one language will dominate the other.

Bankowski and Mungham comment that the reluctance of judges to give a generous interpretation of the provisions of the Welsh Language Act 1967[224] was guided largely by the judge's declaration in the 1971 Swansea trial[225] that to grant an "all-Welsh" trial, with an all-Welsh-speaking jury, would be, in effect, to sanction a "secret trial".[226] The

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224 Which according to Lord Justice Davies "confers upon all who speak Welsh the right to use it without let or hindrance in legal proceedings, however complete their facility in English". He qualified this as follows, however: "But it confers upon no one the right to dictate to other people the language those others are to use in Court." In order to ensure that justice would be "both seen and heard to be done", Lord Justice Davies recommended that the simultaneous technique of interpretation be used, with the requisite equipment being installed, so that everyone in court, including jurors, could choose whether to listen to Welsh or English. "Special training is necessary and encouraging results are reported from experimental courses for Court interpreters conducted at Aberystwyth. Appointments to such posts should be made financially attractive, for the work calls for a high degree of skill." The Lord Chancellor concurred in the definition of the high-level skills required by a simultaneous court interpreter: "Special interpreters have to be trained with the facility of simultaneous translation and it is no ordinary linguist who can do this. It requires not only a good knowledge of the language but facility and speed in translation. It is no use just being good at the other language: you have to translate legal terms straight into actual legal terms in the other language. A mere facility of speech will not do" (*Hansard*, House of Lords, Vol. 353, cols. 534-539, 12 June 1973).

225 In which eight defendants were arraigned on conspiracy charges. At the first hearing at Aberystwyth Magistrates' Court, the defendants asked that the Bench recommend that they be committed for trial at Carmarthen Assizes, claiming that it was important that the trial be heard by a Welsh-speaking judge and jury, in a Welsh-speaking area. The Bench agreed. However, when the application for proceeding with conspiracy charges was held at Carmarthen, the eight defendants refused to plead or recognise the court, and protests took place both outside and inside the building. The judge transferred the case to Swansea, the anglicised area of South Wales (Bankowski and Mungham 1980:63).

226 "The retort to this is the claim by the WLS that if this is so then the trials of all those Welsh people who have felt more at ease in Welsh, but who have been

question is whether the principle of "equal validity", as enshrined in the 1967 Welsh Language Act, was given full effect "both in spirit and in letter", as the then Lord Chancellor maintained was always his intention.[227] If Wales is genuinely a bilingual country, the notion of a "secret trial" taking place because proceedings are held in Welsh is a nonsense. A judicial comment to that effect must be taken, at face value, to reflect innate suspicion of Welsh speakers. To the extent that simultaneous LS into English would be provided in an all-Welsh setting, the comment further expresses suspicion that language-switchers cannot be relied upon to convey accurately the content of such proceedings. Had that been the Allies' view in 1945, the Nuremberg Tribunals would never have taken place. They were possible only because, for the first time in a judicial setting, use was made of the technology of simultaneous interpretation.[228] The use of appropriate technology can palliate problems, but it cannot of itself overcome the kind of mistrustful attitude reflected by the Swansea judge's comment.

SLAVES TO TRANSLATION, or URDU IN LEICESTER?

The particular question arising in the specific area of LS entitlement is whether judicial and political attitudes on this issue reflect an inherent linguistic imperialism on the part of the dominant speech community

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denied an all-Welsh trial, have just as emphatically been 'secret trials'--the more so in those cases where the defendants have refused to recognise the legitimacy of the law, its agents and its procedures"(Bankowski and Mungham 1980:68).

227 *Hansard*, House of Lords, Vol. 353, col. 534, 12 June 1973.

228 This is not to deny that many linguistic defects plagued the provision of interpretation in Nuremberg, as well as problems which went beyond the linguistic. See West 1984. For specific accounts of LS in Nuremberg, see Gaskin 1990. For a judicial view of LS by a client and user of such services, see Norman Birkett's comments in Hyde 1964, especially at 513-521. On the LS quality-assurance procedure adopted, see *Trials of War Criminals before the Nuernberg Military Tribunals* (1949-1953 at 118-149), as well as Conot (1983), Tusa (1983), and Gaskin (1990).

which feels threatened by the use of languages other than its own.[229] Thus in certain countries where the monoglot state is the norm, the term "bilingual" has over time become a charged one. For example, Fishman notes that in contemporary America, the term "bilingual" has become "a euphemistic code word for ascribed membership in a minority ethnolinguistic group".[230] He argues that in that spirit, the U.S. Bilingual Education Act is primarily an act for anglification of non-English speakers, an act *against* bilingualism.[231] Similarly, in Britain monolingual perspectives and policies in the field of education reinforce the prevailing view of bilingualism as a problem.[232]

Discussing the situation in Britain, Pattanayak identifies an ambivalent attitude which favours selective élite bilingualism, while resisting bilingualism for minority language speakers.[233] Not until the 1970s was official recognition[234] granted in Britain to the positive value of linguistic diversity, and debates about bilingualism still rage on. Some modern scholars have asserted that monolingualism is a necessary precondition for modernism. Alladina and Edwards reject this approach with a caustic comment that mother tongue maintenance only becomes an issue when language groups that do not hold political and economic power are under discussion.[235]

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229 Of course, unalloyed prejudice may also be involved, in this case expressed in the guise of concern for the speaker's mother tongue (English). See also Chapter 4 at Note 145 on comments concerning the "volubility" of foreign witnesses, and Oviatt (1992) on the perception of length of utterances in telephone dialogues conducted through LS.

230 Fishman 1986:170.

231 Fishman 1989:405.

232 Linguistic Minorities Project (LMP) 1985:6.

233 Pattanayak, introduction to Alladina & Edwards 1991:viii.

234 Bullock 1975:293-4 described bilingualism as "an asset, as something to be nurtured, and one of the agencies which should nurture it is the school".

235 Alladina and Edwards 1991:2. Zoglin (1989:16, n.1) notes that "languages other than English (including German and Spanish) historically have been granted official status in various regions of the United States. The non-English languages were often those of older, more established immigrants, as opposed to more recent settlers".

At times the dividing line between linguistic and ethnic/racial factors seems tenuous.[236] Various courts in the United States have ruled that there is a national interest in having English as a common language,[237] or even that linguistic and cultural diversity, "despite their occasional advantages", are actually detrimental to a nation.[238] The 1991 US Supreme Court majority ruling in *Hernandez*[239] identifies the dilemma in noting that bilingualism may be used as a cover for racial discrimination in striking all potential jurors who speak a given language.[240] Surely the concerned linguist must share the perplexity of the Supreme Court over the paradox of the bilingual juror who may, following the *Hernandez* ruling, become proficient enough in English to participate in the trial, only to encounter disqualification *precisely* because s/he knows a second language as well.[241] Language ability thus becomes a disability, at least in terms of prejudicing a bilingual juror's qualifications to serve in a case involving the use of an interpreter for a language in which the juror is competent. That a particular or local societal situation may determine judicial

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236 In the United States, it has been ruled that "Language, by itself, does not identify members of a suspect class": *Soberal-Perez v. Heckler*, 717 F.2d 36, quoted in Zoglin 1989:21: "The court reasoned that although Hispanics may be a suspect class for equal protection analysis, the *Soberal-Perez* plaintiffs failed to allege improper classification as an ethnic group."

237 Zoglin (1989:21), referring to *Frontera v. Sindell*, 522 F.2d 1215 at 1220. Frontera, a Spanish-speaking carpenter applying for a permanent job with a municipal government, claimed that he failed the civil service examination because it was administered in English. Frontera requested in advance that the exam be administered to him in Spanish. Although a commission agreed to translate it for him if possible, the test was given in English. Frontera had been working for the municipality on a part-time basis. The parties stipulated that he was skilled as a carpenter and that his language abilities did not interfere with his ability to perform his job.

238 Zoglin (1989:22), referring to *Guadalupe Organization, Inc. v. Temple Elementary School District No. 3*, 587 F.2d 1022 (9th Cir. 1978) at 1027. Public elementary school children of Mexican-American and Native American (Yaqui) descent brought suit to compel their school district to provide bilingual and bicultural education for the non-English-speaking students.

239 For the facts of this case, see Chapter 3 above.

240 *Hernandez v. New York* (1991) 114 L Ed 2d 395 at 414. For more details, see Chapter 3 above.

241 *Hernandez* (1991) 114 L Ed 2d 395 at 413.

attitudes to bilingualism generally and to LS quality control specifically is reflected in a comment by noted sociolinguist Ervin-Tripp on the *Hernandez* Supreme Court ruling. She comments that in highly bilingual areas, it is customary for the judge to instruct the jury to speak to her/him if there has been a questionable interlingual interpretation. In this way, the juror's bilingualism is effectively utilised to improve the record.[242]

A contemporary English example of linguicist attitudes, applied to the judicial setting, appears in a parliamentary debate concerning the provision of simultaneous interpretation in certain Welsh courts, in which Lord Clifford of Chudleigh asked, "My Lords, will the noble and learned Lord bear in mind the experiences in the Republic of Ireland in this connection?[243] And shall we soon be having courts in Urdu in Leicester?"[244] In his response, the Lord Chancellor reflects the English

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242 Susan Ervin-Tripp, electronic mail communication, Multi-L network, June 7, 1991.

243 For a comparative study of the Irish and Welsh languages in the courts, see Andrews and Henshaw 1983.

244 *Hansard*, Vol. 353, 5th series, col. 539, 12 June 1973. Lord Clifford's words are strangely reminiscent of a earlier incident in which the then Chief Justice of England, Lord Raymond, denounced the proposed 1731 "English-for-lawyers" legislation. Speaking in the House of Lords on May 3, 1731, according to Mellinkoff (1963:133, citing as his source Foss (1870:548, 549)), Lord Raymond "warned that if the traditional language of the law were abandoned, there would be no end to innovation. For even English was not understood by all Britons. In Wales, he predicted, there would be proceedings in Welsh." Mellinkoff notes in parentheses that "two centuries later this prediction came true", in reference to the 1942 Act. This statement is simplistic, as shown at Note 214 above.
It should be noted that Foss (1870:548) simply writes that Lord Raymond opposed the bill, "alleging that if the bill passed the law must likewise be translated into Welsh, as many in Wales understood not English". Cobbett's Parliamentary History (Vol. 8, col. 861) is more enlightening: "Lord Raymond saying, That if the bill passed the law must likewise be translated into Welch, since many in Wales understood not English. The Duke of Argyle replyed, That the meaning of the law had long been understood by the interpreters thereof, the Judges, and would surely be so when translated: That our prayers were in our native tongue that they might be intelligible, and why should not the laws, wherein our lives and properties are concerned, be so, for the same reason? His grace added, 'That he was glad to see that the said lord, perhaps as wise and learned as any that ever sat in that House, had nothing more to offer against the bill than a joke.' The jocular nature of Lord Raymond's comment may, of course, be queried.

legal system's ostensibly human-rights and natural-justice-driven attitude to LS in the judicial setting:

> It is a *fundamental human right*, which has nothing whatever to do with the Welsh language, that if anybody does not sufficiently understand the proceedings in which he is engaged in any English court of law it is our business to find an interpreter, if we can, because it is a *fundamental right of natural justice* that people should not have proceedings affecting them going on which they do not understand. Of course there will be all kinds of translations, not only in Leicester but in every town in England where they are required. I must add that there always have been.[245]

In the light of this clear-cut judicial recognition at the highest level in England of the principle of entitlement to LS services on the grounds of a basic human right, in practice the only room for difficulties would seem to lie at the level of provision. However, the lack of any determination to make proper arrangements for LS provision seems to demonstrate a lack of ideological support for the principle of entitlement as enunciated in 1973 by the then Lord Chancellor. Without proper provision, acknowledgment of any "right" to LS is meaningless. The test is the implementation of that right--i.e., the provision of quality LS services.

In this area, the English legal system is today admitting that major difficulties exist because of the current haphazard arrangements for obtaining sufficient competent interpreters in the languages required.[246] The contention of the present thesis is that where a system such as the English criminal justice system fails to make suitable arrangements for LS services for an NESB witness or defendant, it is demonstrating inherently linguicist attitudes, perhaps less overtly but no less than the Crown Court judge who considered it "stupid" that an individual who claimed to be

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245 The Lord Chancellor, *Hansard*, Vol. 353, 5th series, col. 539, 12 June 1973. Emphasis added.

246 See Royal Commission on Criminal Justice Report, July 1993, pp. 130-131, and discussion at the Nuffield Interpreter Project Conference (*Access to Justice*), February 1993.

British could not speak English sufficiently after 23 years in the country to manage in a court of law without LS.[247]

Linguistic racism in Britain is certainly not confined to the criminal justice system. Noting that European languages are legitimised tongues, in contrast to the "invisible" languages of black people,[248] Searle asserts that (non-white) bilingual school students are subjected to mental and physical abuse because they speak a language in addition to English at home. He

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247 "Cheat gets plain English", *The Guardian*, May 6, 1988: "Judge Malcolm Potter told Mohammed Sarwar, aged 46, originally of Pakistan, that after 23 years in Britain it was 'plain stupid' that he could not understand the language. The judge sentenced him to two years probation with compulsory English lessons. 'He says he is British and has been in this country for nearly a quarter of a century,' the judge said at Birmingham Crown Court. 'Why do we have to have an interpreter in Punjabi to explain the social security system to him? I think a person who lives here has a duty to understand the language so he can give truthful information. I think it is plain stupid that he cannot.'" The case was reported on the BBC World Service.

In a transatlantic context, Chang and Araujo (1975:803) cite a number of cases where citizens with periods of residence in the U.S.A. ranging between eight and 30 years were presumed by courts to therefore understand English despite indications to the contrary. Such attitudes contrast starkly with the sensitivity of linguists such as Brière (1978), Gibbons (1990), Gumperz (1982, 1984), Bresnahan (1978), Roy (1990), Segalowitz (1976), Vernon and Coley (1978), to "limited-English-speaking" individuals' difficulties in understanding judicial forms of speech.

On the comprehensibility of police cautions, Brière (1978:242-243) has no doubt about the principle: "Clearly, it is not up to the courts or the newspapers to decide what reasonable level of difficulty the language of the rights should contain. ESL specialists, language evaluators, linguists and reading specialists have to tell the courts and other interested parties what the level of language should be. Furthermore, these same people should get involved in decisions concerning what the procedure should be when a limited English speaking person is arrested. Should the rights be read to him immediately or should he be held until a court appointed interpreter can be present to translate the rights? Obviously, in trying to protect the rights of the limited English speaking individual, we don't want the remedy made worse than the disease."

248 This statement would appear to be corroborated by the emphasis in the Nuffield Interpreter Project report on the breakdown of interpreting needs by language group. Presenting the languages used by different courts according to frequency of use, Hazell (*Access to Justice* 1993:34) comments: "What languages do they use? This was rather surprising, at least to me. The main language group required is western European."

A similar point to Searle's was made at a founding meeting (London, January 1992) of ACITAL, the Association of Community Interpreters, Translators, Advocates and Link Workers, where several interpreters pointed out that Urdu had only just been accepted as a language which could be examined at GCSE and Advanced Level standard. See also *House of Commons Report* 210, (1985), Bangladeshis in Britain, Minutes of Evidence, 24.3.1986, paragraphs 121-127.

argues that the phenomenon is not limited to the school system: "The aggression demonstrated in British culture against any other language than English runs throughout the organs and infrastructures of the life of the nation".[249]

Writing of the situation in English law, Beloff's findings are similar:

> ...in short, national law provides little *positive* assistance for the speakers of minority languages. There is limited statutory provision for their encouragement. They cannot themselves discriminate to protect their language. They have no redress if they are discriminated against on the grounds of their language. And the protection given in the cases to *English* language requirements itself provides a powerful incentive for them to assimilate as quickly as possible.[250]

These are the attitudes which a comparative survey of case reports shows to be expressed, overtly or covertly, by the judicial system not only in England but generally in English-speaking jurisdictions. These attitudes are conveyed through the messages imparted by many of the actors in the system, whether consciously or unconsciously. The question arising is whether practical difficulties are inevitable, and whether alternative attitudes are possible in dealing with the use of several languages in a legal system.

In his discussion of the use of several or multiple languages in a legal system, Athulathmudall initially presents a straightforward attitude to the issue of bi- or multilingualism in a legal system. He argues that in practical terms, it is possible to conduct a case in any language:

> There is no doubt that evidence can be given in any language; cross-examination can also be done in any language. It may even be possible to address a jury in any language, provided the jury understands it. In brief, it is possible to conduct a case in any language.[251]

Clearly, such an approach assumes tacitly that the participants in an oral exchange share a common language. Language-switching arrangements

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249 Searle 1992:261.
250 Beloff 1987:146. Emphasis in original.
251 Athulathmudall 1962:231.

represent the other (unspoken) alternative solution. This appears to be a more equitable approach than that of Roxburgh J. in *In re Trepca Mines*,[252] according to which an unrepresented plaintiff is not entitled to address the court in a language other than English, even through a sworn interpreter.[253]

Athulathmudall goes on to note that legal documents, such as wills, contracts and deeds can be drawn up in any language without causing too much difficulty. However:

> The problem arises in matters of record such as statutes, decisions and reported judgments. First, it will be extremely inconvenient to have law reports in more than one language. Secondly, it will give rise to disputes as to meanings of words in all the languages in which the judgments are recorded. Lawyers and judges will have to acquire a good command of all the recognised languages. *Otherwise the lawyers will be slaves to translation and to any errors contained in it.* In South Africa, where both Afrikaans and English are permitted, arguments as to discrepancies are not infrequent.[254]

Here, then, is the second strand of the problem: the problems raised by discrepancies between two (or more) different language versions, one

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252 *In re Trepca Mines Ltd.* [1960] 1 W.L.R. 24. See Chapter 3.

253 In the 1960 case of *In re Trepca Mines Ltd.* ([1960] 1 W.L.R. 24 at 26-27), Roxburgh J. oted that "The question whether a foreign litigant can address the court through an interpreter does not seem to have been decided." Scarman Q.C. (as he was then) retorted that "Litigants in the courts of Wales have the right to address the court in Welsh." The judicial reply was simply, "Quite plainly, if a Welshman came here and sought to conduct proceedings before me through an interpreter I should be bound to refuse to hear him. Were I to give a Serb something which would be denied to a Welshman it might produce a Parliamentary crisis." Young (1990:762-763) argues that apparently Roxburgh J. was proceeding from the mistaken assumption that the 1731 Act was still in force, although it was repealed by the Civil Procedure Acts Repeal Act 1879, albeit without reinstating the use of Law French. Roxburgh J. does seem to refer particularly to French, a language he shared with the defendant (at 27): "There is, of course, no question but that the proceedings before me must be conducted in English and in no other language...In particular, the proceedings must not be conducted in French, which is unfortunate, because, from the point of view of saving costs I think I could get along without any interpreter at all if they were conducted in that language, but I am not allowed to do that." Following his elevation to the bench, in *Fuld (In the estate of (deceased) Hartley and Another v. Fuld and Others* [1965] 2 All E.R. 652), Scarman J. as he was by then was able to adopt a somewhat more flexible approach to an NESB individual.

254 Athulathmudall 1962:231. Emphasis added.

original (L1) and one (or more--L2, L3, etc.) translated.[255] Unless lawyers and judges have mastery of L1, they will depend on (or be "slaves" to) the quality of the LS process which has generated L2 and any other versions: and given the nature of the LS process generally, and in particular LS standards in judicial systems not organised with an eye to LS quality control and consistency, such dependence may be dangerous. The solution to the problem is either for all legal participants at all levels to be multilingual, or for the system, at least on the level of record, to be effectively monolingual. Any alternative involving the use of linguistic intermediaries and LS introduces problems. Discussion of the wording of international texts which exist in several versions (each "authentic") shows how impossible it is to achieve absolute equivalence and the absence of ambiguity across the language barrier, even under ideal conditions.[256] Under less than ideal conditions, given the fact--as Athulathmudall points out--that the common-law doctrine of precedent and its dependence on case law require the citation of authorities in English, the inability to read such authorities in the original, as was true of many lower-court Tanzanian judges following independence, will become a major handicap.

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255 For a realization of the potential difficulties that might arise in the Welsh-language context, see the comments of the Lord Chancellor at Notes 205-206 above.

256 See Rosenne (1971:361, 365): "...in the law of treaties the status of 'authentic text' derives from the agreement of the parties, and is not imposed by mere procedure. That standing itself will when necessary relate back to the language in which the negotiation and drafting took place, there being all the difference in the world between a negotiated language version and one produced mechanically by some translation service, however competent...Curiously enough, there is remarkably little international jurisprudence on the interpretation of multi-lingual resolutions of international organs..." Discussing a particular instance (Preamble: para. 1, subpara. i of United Nations Resolution 242) of the issues raised by Rosenne, Lapidoth (1992:308) writes: "If, however, the French version were ambiguous, it should be interpreted in conformity with the English text: the two versions are presumed to have the same meaning and since one is clear and the other ambiguous, the latter should be interpreted in conformity with the former."

Speaking in 1962, Athulathmudall commented: "what was thought to involve simple political decision has been found to be far more complex. The decision itself cannot be rigidly separated from the problems of implementation."[257] Just over ten years later in Britain, the Lord Chancellor's finding that "it is not as easy as it sounds" to conduct trials in Welsh in Welsh courts[258] is a particular illustration of the inevitability of problems in a system where more than one language is used in the lower courts and the appellate authorities are not bilingual or multilingual.[259]

The intertwining of the political and the practical, or principle and application, is a constantly recurring theme in the area. Earlier, reference was made to the problem of categorizing language-switching as either a technical enterprise, or alternatively as an political and interpretive one.[260] Similarly, although a decision to use a particular language in legal proceedings may be highly political in nature, technical or practical aspects may determine the success or failure of such use. What may appear on the face of things to be a "technical" issue--something as apparently objectifiable as evaluating the degree of linguistic "handicap" of a non-native speaker of the dominant language--may be handled in such a way as to permit subjective determinations to be made by unqualified and perhaps incompetent individuals.

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257 Athulathmudall 1962:232.

258 See at Note 206 above.

259 The South African case of *Martin v. Kiesbeampte* ([1958] (2) S.A. 649) illustrates both the bilingual nature of the South African appellate authorities and the psychological dimension to language choice. *Per* Holmes J. at 650: "In this case the applicant's affidavits were in English and his counsel addressed the Court in English. The first respondent's affidavit was in Afrikaans and counsel for the respondents addressed the court in Afrikaans. In which language then should the Court give judgment? One's experience is that the winner is usually content to know merely that he has won. But the loser likes to know the reasons why he has lost. I proceed therefore to give judgment in the language of the losers."

260 See Chapter 4 at Note 43.

The absurdities that may arise from a strict adherence to the principle that the only permitted language in courts of law is English[261] are illustrated by the following example from Nigeria:

> In my country, there are no legally enshrined language rights, and hardly any concessions are made to citizens who cannot speak the country's official language. The situation even becomes absurd when an accused person or plaintiff in court has to have his evidence interpreted into English when he/she and the judge may share the same indigenous language![262]

In other countries where bilingualism among the judiciary is exceptional, legal personnel not infrequently openly express their suspicions that individuals who claim to fall into the category of needing LS services are actually pretending to be handicapped when they can in fact cope perfectly. They may furthermore demonstrate exasperation at and intolerance of such claims of linguistic difficulty.[263]

Such "linguistic chauvinism"[264] is a complex matter, on which attention is increasingly being focused. The link between communications problems, racist attitudes, and resentment on both sides was described by Kelsey, writing of the British experience twelve years ago, as follows:

> In the host community there is no doubt that people's jobs are, unnecessarily, made far more difficult because of communication problems, and that this breeds resentment which fosters racist attitudes and behaviour. On the other hand, among the ethnic minority groups, many people are not receiving their full rights and benefits, such as community care, or simply the equal status that they are entitled to as citizens of the United Kingdom. This is due to inaccessibility, deliberate or otherwise--of the system caused by factors such as an inadequate knowledge of the English language--a state which has been termed 'institutionalised racism'. This experience in turn increases feelings of alienation and separatism from the host country.[265]

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261 The same principle, albeit in a different context, as that applied by Roxburgh J. in *In re Trepca Mines*: see Note 253 above.

262 Ayo Bamgbose, personal communication, in Phillipson (1992:77).

263 See comment by Samuels JA in *Gradidge v. Grace Bros. Pty. Ltd.* (1988) 93 FLR 414 at 426 in Chapter 4 above, at Note 149.

264 Rennie writes: "Ann Corsellis has aptly described linguistic chauvinism in her paper, in the phrase "Why don't they all speak English?" (Rennie:1991 and Corsellis:1991). For a definition of what Phillipson calls linguicism, see Note 217 above.

265 Kelsey 1981:30.

The issues raised by Kelsey exceed the focus of the present work. They are examined in considerable depth by a recent British study of communication in multi-ethnic workplaces.[266] To date, almost no work has been carried out in Britain into the communicative aspect of the public's relationships with law-enforcement and justice-administration agencies. Writing of the situation of ethnic-minority workers, Roberts' cycle of socially created identity shows the link between low class and work status, low communicative power and racism.[267] The question that arises is whether the provision of even excellent LS services in the legal setting can offset the racism that has already become associated with individuals from particular backgrounds. In the ensuing Catch-22 situation--labouring under the handicap of poor communicative skills in English, or relying on frequently incompetent LS services--the NESB individual is inevitably the loser regardless of the option chosen.

CONCLUSION

This chapter has sought to show that in the legal system, an NESB individual's entitlement to LS services is not an issue which is evaluated on the basis of objective criteria by qualified experts. The determination of any right to use a language other than that of the proceedings is predicated on an assumption that there must be a demonstrated need, generally defined narrowly as the court's inability to communicate with and control the NESB individual in its own language. This need is likewise assessed not in an objective fashion but in the light of ideological criteria. Those criteria are the linguicist or imperialist ones of a monoglot legal system, which looks with varying degrees of mistrust on those from different linguistic and cultural backgrounds.

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266 Roberts, Davies and Jupp 1992.
267 Roberts, Davies and Jupp 1992:13.

The present author would argue that the only solution to this situation is, firstly, for an automatic right to be granted to NESB individuals to speak their preferred language, with no need to demonstrate linguistic handicap; and secondly, for suitable arrangements to be made for the proper provision of LS services. This would circumvent the judicial citing of unavailable or inadequate language intermediaries as justification for rejecting claims of entitlement. A number of legal systems have long had to grapple with solutions to the situation of the non-native speaker. By acknowledging a formal right to LS services, and giving substance to that right by properly organising the provision of language-switching services, an enlightened system shows that its claim to administer justice is more than an empty slogan in the ears of non-native speakers. On evidence, Lord Widgery has said, "Quality is what matters in the end".[268] It is suggested that the same dictum holds equally true for the quality of interlingual interpretation at all stages in judicial proceedings.

On the whole, the judicial system sees problems as being necessarily created by the use of language-switching mediators. In reaction, there tends to be a belief that to a large extent these difficulties can be avoided by refusing to grant the right to LS or to authorise the provision of LS services for a particular individual. Such approaches ignore the attested major communicative and psychological difficulties that can result for a non-native speaker from attempting to function effectively in a second language in formal situations, including legal settings. Apparent financial savings made by not providing an interlingual interpreter or by using a cheaper and probably less competent individual are likely to be more than offset by the additional time required in the lower court because of faulty

[268] *R. v. Turnbull* [1977] Q.B. 224 at 231-A.

communication and any subsequent appeal lodged on the basis of linguistic inadequacies and resultant legal complications.

The case reports and other literature surveyed for the various (predominantly English-speaking) jurisdictions covered by this study relate to a considerable range of situations over time and space, and yet show that, on the whole, the issue of LS entitlement is considered a problem by all systems, whether for practical reasons (having to provide and, potentially, bear the cost of the language-switcher) or for more ideological ones (such as unwillingness to recognise the justification for an intermediary, or the system's reluctance to accept a loss of linguistic (and perhaps other) control over certain individuals, and, potentially, whole groups within the society administered by the legal apparatus). Like many other aspects of the situation, entitlement is not the apparently objective issue it might at first appear to be, and LS provision tends to be negatively affected by ideological factors.