THE TISSUE OF JUSTICE[1]:
An overview of judicial attitudes to interlingual interpreting in the criminal justice systems of Canada and Israel

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INTRODUCTION

> "A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter." Section 14, *Canadian Charter of Rights and Freedoms,* 1982
> "Where it becomes apparent to the Court that the Accused does not know Hebrew, it shall appoint a translator for him or itself act as translator." Section 140, *Israel Criminal Procedure Law* [Consolidated Version] (5742-1982)

On the face of it, there is considerable similarity between the provisions of the 1982 Canadian Charter of Rights and Freedoms (Section 14) and Israel's 1982 Criminal Procedure Law (Paragraph 140) in respect of individuals who cannot understand or speak the language used in judicial proceedings. Both documents appear to meet the requirements of international

[1] "Through thousands of decisions, the Supreme Court of Canada has woven the tissue of Canadian justice. If one searches one can find *missed stitches.* But usually one finds that they have been taken up and reworked to make a fabric that is strong, serviceable and satisfying to our sense of how things should be in this, our part of the world. I think it is not exaggerating to say that in its first century and a quarter, the Supreme Court of Canada served Canadians well." The Right Honourable Chief Justice of Canada, Beverley McLachlin, P.C. – Supreme Court of Canada home page (http://www.scc-csc/gc.ca/home/index_e.html). Emphasis added.

conventions in the matter.[2] However, in specifically mentioning “a party or witness”, as well as including the deaf, referring to the right to the assistance of an interpreter, and covering both aspects (understand/speak)of the communication process, the Canadian text is considerably more comprehensive than its Israeli counterpart.

The question arising is the extent to which the two countries’ criminal justice systems actually expect to comply in practice with not only the spirit, but also the letter and substance of these provisions and the attitudes of their highest legal institutions. Based on a number of case reports from England, Australia, East Africa, Canada and Israel, the present paper will discuss judicial attitudes to interlingual interpretation with special reference to Canada and Israel.

IDEAL SITUATIONS OR PRACTICAL AND FAIR DISPOSITIONS?

It is a truism that venerable historical traditions are not always applied in modern practice. Hence, unlike their biblical counterparts (Deuteronomy 24:5), today’s newly married Israeli men are not exempt from army duty or reserve call up. The historical parallel for the subject matter of the present article dates to a somewhat later period in Jewish history.

Numerous Jewish legal traditions have been recorded in the Talmud, the storehouse of Jewish history, customs and lore which developed between the early third and late fifth centuries CE. Talmudic discussions about interpreting practice indicate that at least 1750 years ago, Jewish jurists were aware of important differences in linguistic ability which had to be taken into account when hearing cases involving interlingual interpretation. For example, it was accepted that although it is permissible to use an interpreter in order to convey the judge’s words to the witnesses, in contrast the judge must be able to understand testimony directly, without the mediation of an interpreter.[3] It is almost as if the Talmudic

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[2] See *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Articles 5 (2) and 6 (3) (a) and (e), and *International Covenant on Civil and Political Rights* (ICCPR), Article 14 (3), (a)-(f).

[3] The following Talmudic text explicitly recognises the difference between active and passive knowledge of a language and the impact that using interpreters can have on evaluating evidence: "The Sanhedrin [the tribunal] should not listen (to witnesses) through an interpreter." This somewhat bald statement is elaborated on as follows: "There were these people speaking only a foreign language who came before Rava [the president of the tribunal, who died in 352 C.E.] in a court proceeding and Rava appointed an interpreter to serve between them. How could he do this? Did we not learn...that the Sanhedrin should not hear through an interpreter? Rava was able to understand what they were saying but he was unable to reply" (*Babylonian Talmud, Tractate Makkot* 6b).

text, like Israel's Supreme Court in 1995, is quoting Bentham on the importance of evidence.[4] Can such an "ideal" situation really be achieved in today's world, however?

The seminal 1984 Canadian case of *Robin v. College de St-Boniface* discussed nineteenth century legislation guaranteeing the use of either French or English in Manitoba courts, and considered whether trial of a French-speaking individual by an English-speaking judge "assisted by an interpreter" violated this guarantee. In its discussion, the Manitoba Court of Appeal addressed such questions as the right to speak French in court; bilingual judges; fairness; the help of a translator; consecutive ("back-to-back") translation vs. simultaneous interpretation; ideal vs. practical and fair dispositions; nuances of language and language competence.[5]

In a dissenting opinion in *Robin*, Monnin C.J.M. argues, like his Jewish counterpart nearly eighteen hundred years earlier, that the trier of fact must have the ability to understand witnesses – as well as any documents submitted – directly, unencumbered by the mediation of an interpreter or translator.[6] Going further, he also makes the point that the ideal situation would be to deliver reasons in the language of the litigants, but "courts are not committed to ideal situations but rather to *practical and fair dispositions*."[7] Notably, *Robin* (again, through Monnin's insightful comments) addresses the specific means by which interlingual renderings are to be provided and a transcript produced. Monnin suggests that, pending the recruitment of more Manitoba judges capable of using French without assistance, arrangements should be made for simultaneously provided interpretation (i.e. the arrangement used in conference interpreting situations today, using electronic equipment) as well as audio-taping arrangements. He argues that such measures would both preserve the original-language testimony, needed for subsequent review, and also enable proceedings to flow smoothly, particularly on the vital level of cross-examination.[8]

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[4] Israel Supreme Court, *Hachamei Yosef vs. Tel Aviv-Jaffa Magistrate*, Case 6319/95: "Evidence is the basis of justice. Exclude evidence and you exclude justice." Cited in G.M. Caplan, "Questioning Miranda", 38 Van.L.Rev. 1417, 1453 (1985).

[5] *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198.

[6] *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198 at 207, *per* Monnin C.J.M.: "For the purpose of a trial in French, it is not essential that the person presiding at it be able to express himself or herself either orally or in writing in that language. It is preferable but not necessary. But in my view it is essential that he or she be able to understand fully and freely – without the help of an interpreter – the various documents offered as exhibits and the testimony of the witnesses. Without that ability, there will always exist the legitimate fear that the witnesses and the parties will not be thoroughly understood and that the nuances of language, intonations, accents, local expressions or colloquialisms will overshoot the ears of the trier of facts."

[7] *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198 at 208, *per* Monnin C.J.M. Emphasis added.

[8] *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198 at 208-209, *per* Monnin C.J.M.: "As a stopgap and for a limited period of time, simultaneous translation could be used. Although a little costlier, it is easier of operation and less tiresome for those who have to listen or to transcribe notes than back-to-back

In *Robin*, O'Sullivan J.A. makes an important distinction regarding the constitutional status of evidence given in languages other than French and English in Canadian courts. Concomitantly he assigns a different status to the interpreter working between French and English as opposed to the individual dealing with other languages:

> There is a clear difference between the constitutional position of French and English in Manitoba and the constitutional position of other languages. What is said by a witness in court in another language is not evidence. It is testimony given in English or French through an interpreter that is to be considered by the court. What is said in another language is not considered by the court; it is not transcribed. When a witness speaks French in court, what he says in French is evidence. What he says in French must be recorded so that on an appeal this court can consider his evidence in French. [...] There may be a significant practical difference as between, for example, a German-speaking and a French-speaking witness. *The interpreter of the German speaker is the interpreter of the witness; the interpreter of a French speaker is the interpreter of the court*.[9]

In practical terms, this distinction is arguably somewhat curious: ultimately, the court acts according to the evidence submitted to it, irrespective of whether it receives the evidence directly or through the mediation of the interpreter. It is true that in Canada, for constitutional reasons it should be possible to review the "best evidence" in the case of original-language evidence given in French or English in the relevant original language – the *ipsissima verba*. In contrast, in the case of evidence in other languages, unavoidably the original evidence will be displaced by the version given by the interpreter. Importantly, O'Sullivan allocates responsibility to the court – i.e. the judge – for overseeing the quality of the interpretation provided by the "court's translator", in other words the person who provides the English interpretation of French material, whose duties he defines as follows:

> When French is spoken in court the judge must *satisfy himself* that the court's translator is translating accurately. The court's translator is there *to assist the judge* in fulfilling the court's duty *to consider fairly all the legal evidence presented to the court* including evidence given in the French language.[10]

With its ruling that trials where the judge is assisted by an interpreter are perfectly constitutional, it might be argued that the dismissal (by a 4:1 majority) of the *Robin* appeal in fact represented a victory for the provision of interpretation in the bilingual Canadian situation. At the same time, the writer of the majority opinion, O'Sullivan, goes on to make a vital point about the quality of interpreting services – one which should be observed in all

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translation. By back-to-back translation I mean when one or two sentences are spoken by the witness in his language, the translator immediately cuts in, translates what has been said and the witness then goes on with his testimony and the process is continuously repeated. This back-to-back translation is slow, tedious, tiresome and does not allow for an uninterrupted cross-examination which is so vital to the proper conduct of a trial." What is here called "back-by-back" translation is known in the interpreting profession as consecutive interpretation.

9 *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198 at 217, *per* O'Sullivan J.A. Emphasis added.

10 *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198 at 217, *per* O'Sullivan J.A. Emphasis added.

common-law jurisdictions' arrangements relating to the provision of court interpreting services, as well as relevant international instruments:

> The practical recognition of constitutional rights requires a spirit on all sides of wanting to make the Constitution work; it also requires a willingness on the part of governments *not merely to pay lip service* to constitutional rights but also the *provision of services*, such as *competent translators responsible to the judiciary*. The present proceedings represent, in my mind, a sterile attempt to bring into discredit a system which can be a model for other countries which face divergent language problems.[11]

In contrast, the minority *Robin* opinion was based on recognition of the desirability in legal proceedings of gaining a direct impression of a speaker, unmediated by an interpreter, along the same lines as the Talmudic approach referred to earlier. This attitude coincides with the findings of modern scholars such as Loftus and O'Barr examining the impact of testimony and the importance of presentational style. Research studies derived from such findings have shown that the dynamics of legal proceedings are affected in many ways in which the court interpreter impinges on proceedings, albeit often inadvertently and unavoidably.[12] Although still accepted by some members of the legal profession, the concept of the interpreter as nothing but a neutral conduit is gradually being discredited.

Judaism's linguistic heritage clearly underpinned the sophisticated insights documented in the Talmud. These contrast markedly with demands by many present-day British and American legal figures that court interpreters provide "verbatim translation". A very public example of this view was given as recently as the 2000 Lockerbie trial (the bombing of Pan Am flight 103) in the Netherlands by Professor Black, Professor of Scots Law at the University of Edinburgh, who said:

> A fair trial demands that the accused persons should be able to understand the proceedings in the courtroom and the evidence led in it. This means that if the accused do not speak or understand the language of the court, *accurate* translation facilities must be provided for them by the prosecution. So important is this right that it is specifically enshrined in article 6.3 of the European Convention on Human Rights.[13]
> It appears that the facilities provided at the Lockerbie trial for translation from English into Arabic have been defective, in that what has seemingly been provided is not a *verbatim translation* but a "paraphrase" or "interpretation", the accuracy of which is

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[11] *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198 at 218, *per* O'Sullivan J.A. Emphasis added.
[12] See for example Berk-Seligson (1990), Hale (2002) and Morris (1989).
[13] Regrettably, despite Professor Black's assertion, the text of Article 6.3 of the European Convention on Human Rights does not refer to the provision of accurate translation facilities. The two relevant sub-paragraphs read as follows: "a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

> open to question. If this is so, then the right of the accused to a fair trial has been infringed.[14]

Such calls by lawyers for "verbatim" or "literal" renderings are indicative of a lack of background in the field, but fortunately there are exceptions to the rule.[15] Aryeh Kaplan, a noted Hebrew-English translator, has cogently presented the issue in his own field of expertise:

> It is obvious that the Torah contains much idiomatic usage, and translating it literally (as do most translations) distorts the meaning of the text. To a large degree, the "Oral Torah" consists of a tradition as to how to render the idiomatic language of the Torah. Thus, the Oral Tradition teaches that the expression literally translated "between the eyes"[16] is actually an idiom denoting the center of the head just above the hairline. To translate it literally would not only go against tradition, but would be incorrect. The Talmud itself warns of this. In one of the most important teachings regarding translation, the Talmud states, "One who translates a verse literally is misrepresenting the text. But one who adds anything of his own is a blasphemer."[17]

The problem was recognized by no less a figure than the great mediaeval Jewish scholar Maimonides, whose advice Kaplan suggests should be engraved in every translator's mind.[18] In Maimonides' own words:

> One who wishes to translate from one language to another, and tries to translate word by word, maintaining the order of both the subject and the words, will find his work very difficult, and will ultimately end up with a translation that is highly questionable and confusing. Rather, one who translates from one language to another must first understand the concept. Then he should relate and explain the subject according to his understanding, providing a clear exposition in the language [into which he is translating]. This is impossible without transposing the order of words. Moreover, the translator will sometimes have to use many words to translate a single word, while at other times he will have to use a single word to translate many. He will have to add and delete words so that the concept may be clearly expressed in the language into which he is translating.[19]

The modern court interpreter is often in a similar quandary, but by definition never has the luxury described by Maimonides of being able to take the time to gain an in-depth understanding of the concepts inherent in the material in question, nor the flexibility to transpose word order and use other devices. Indeed, many codes of practice expressly forbid

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[14] Robert Black QC FRSE, TheLockerbieTrial.com website. Emphasis added.

[15] In the Manitoba case of *Robin*, Monnin makes a terminological point which all English-speaking lawyers would be well advised to note: "At the appellate level, simultaneous translation – *or interpretation as it is more properly called* – is adequate. [...] The record is available to all members of the panel and the nuances of language are in the written text." *Robin v. College de St-Boniface* (1984) 15 D.L.R. (4th) 198 at 209, *per* Monnin C.J.M. Emphasis added.

[16] Exodus 13:9.

[17] Kaplan 1981:v. The Talmudic references are to *Kiddushin* 49a and *Tosefta, Megillah* 3:21.

[18] Kaplan 1981:vi.

[19] Maimonides, letter to Sh'muel ibn Tibbon, as translated by Aryeh Kaplan (1981: vi).

the court interpreter to add, omit, summarize or explicitate. The specific dilemmas facing the court interpreter are described as follows in *Fundamentals of Court Interpretation*:

> The dilemmas posed by the translation process are difficult under any circumstances, but court interpreters face a greater challenge because of their legal and ethical responsibility to provide a verbatim rendition (meaning that no item of meaning is omitted, including non-verbal messages) or a legal equivalent of the utterance for the record. They are not allowed to make inferences or assumptions about the source's intentions, yet the very nature of interlingual communication requires that some intuitive leaps be made.[20]

Ultimately, court interpreters try to square the circle. Even the best ones are doomed to failure from time to time. But when the system fails to acknowledge the need to train, qualify, certify and recruit according to the principle of excellence, it is condemning itself to low-calibre interlingual performance which will seriously impair the "tissue of justice", by building in systematic "missed stitches".[21]

ATTITUDES TO TRANSLATION ACTIVITIES IN THE LEGAL SPHERE

Even in a bilingual country, it is not always practical to expect the ideal situation – where testimony can be understood by all participants in the original language – to prevail. In these cases, the interpreter may then be a "necessary evil". Case reports in many common law jurisdictions clearly reflect such an approach. If asked their honest opinion about having to work through an interpreter, many – doubtless including numerous lawyers and judges – would probably agree unreservedly with the following statement by Jean Herbert, one of the world's first conference interpreters:[22]

> The interpreter is an evil, because as a rule two persons understand each other better when they possess and speak the same native tongue and do not require any go-between. But he is a necessary evil, because the need is often felt of bringing together people of various linguistic origins who were not able to devote a large proportion of their student days to the mastering of one or more foreign language.[23]

In the case of translations of documents within the legal system, Stable J. in the 1939 case of *Dies v. British and International Mining and Finance Corporation Ltd* presented the issue as follows:

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[20] *Fundamentals of Court Interpretation,* p. 314.
[21] See Footnote 1 above.
[22] The professional term "conference interpreter" here designates the activities of those interlingual interpreters who work in an international conference or similar setting where speakers present papers and engage in negotiations and related activities.
[23] Herbert 1952:4.

> Where the words used signify not a concrete object but a conception of the mind, the process of the translator seems to be to ascertain the conception or thought which the words used in the language to be translated conjure up in his own mind, and then, having got that conception or thought clear, to re-symbolize it in words selected from the language into which it is to be translated. A possible danger, when the document to be translated is one on which legal rights depend, is apparent, inasmuch as the witness who is in theory a mere translator in practice may construe the document in the original language and then impose on the Court the construction at which he has arrived by the medium of the translation which he has selected.[24]

The philosophical reason for jurists' distrust of interpreters in the courtroom is now manifest: interpretation is the exclusive province of legal figures, not to be trespassed on by the interlingual translator or mere court "interpreter". The duties of these individuals, irrespective of whether they are rendering written documents or oral material, are to provide a "translation" only.

As Baker has pointed out, when the State of Israel was founded in 1948, its heterogeneous body of law derived from various systems of law written originally in four languages (Turkish, Arabic, French and English).[25] Since then, Israel's legislature has over the years repealed and replaced a certain amount of earlier legislation, and supplemented it as appropriate. Some of the modern legislation is influenced by Jewish law.

In this process of updating and expanding Israel's legal corpus, language issues have sometimes played an important role. For example, among the features of the Ottoman legal system that the British left untouched in Palestine was a cavalier approach to written legal translations. Athulathmudall notes that much of the Ottoman legislation applied in Palestine was a version of French, German or Italian texts, "translated carelessly; simply by a system of word-substitution".[26] To offset the possible drawbacks of this historical state of affairs, when at all possible Israeli judges have examined the original-language (non-Turkish) text in considering Ottoman legislation and its modern ramifications.

However, the Turks should not be considered an exception to the rule in their approach to written translation. Traditionally, the translation standards applied in English law – another of the major influences on Israeli jurisprudence – have not been renowned for their rigorousness. In earlier days, 'literal translation' led to stylistic monstrosities in English, which, as Mellinkoff points out, "failed to take into account the fact that, unlike inflected

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[24] *Dies v. British and International Mining and Finance Corporation Ltd*. [1939] 1 K.B. 724, at 733-734, *per* Stable J., quoted in Sussman (1969) Note 44, p. 20.
[25] Baker (1968), Preface.
[26] Athulathmudall (1962), p. 228.

Latin, intelligible English depends primarily on word order".[27] Clearly, linguistic quality control has not historically been a sine qua of legal translation activities.[28] The question is whether nowadays, attitudes in the field of court interpreting are noticeably different.

The first appellate case considered by Canada's Supreme Court following the 1982 *Canadian Charter of Rights and Freedoms* was the seminal case of *R. v. Tran* (1994). Here, as indicated by Lamer C.J., the reasons for judgment were somewhat longer than would normally be warranted because this was the first time that the Court had considered Section 14 of the Charter, guaranteeing the right to the assistance of an interpreter.

In *Tran*, Canada's Supreme Court noted that Section 14 of the Charter confers upon all accused, irrespective of the gravity of the offence charged and its classification, a *constitutionally* guaranteed right to the assistance of an interpreter where the accused does not understand or speak the language of the court. It commented further:

> The elevation of the right to interpreter assistance to the level of a constitutional norm is a significant step requiring, at a minimum, that the rules and principles governing interpreters which have been developed under the common law and under various statutes be reconsidered and, where necessary, adapted to fit with the dictates of the new Charter era.[29]

It also noted that "the rich body of jurisprudence which already exists with respect to interpreters", including that developed under Section 650 of Canada's Criminal Code, would undoubtedly play an important role in determining the scope of the right guaranteed by section 14 of the Charter.

What *Tran* does specifically and saliently, is to address the issue of adequacy of interpretation, i.e. the area of quality, rather than the field of entitlement which was the focus of appellate discussion throughout much of the twentieth century.

> Where an interpreter was appointed and it is the *quality* of the interpretation provided that is being challenged, it is necessary to determine whether there has been a *departure or deviation* from what is considered *adequate interpretation*. While the interpretation provided need not be perfect, it must be *continuous, precise, impartial, competent and contemporaneous*.[30]

With *Tran*, Canada has definitely moved into a different era. In specifically laying down both quantitative and qualitative standards to be met by interlingual interpretation in court proceedings, the case signals a major departure from the kind of attitudes expressed in Britain's 1991 House of Lords debate in the following terms:

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[27] Mellinkoff (1963), p. 146.
[28] See Morris (1998).
[29] *R. v. Tran* (1994) 2 S.C.R. at 961. Emphasis added.
[30] *R. v. Tran* (1994) at 952. Emphasis added.

> It is the law, which has been settled for over 75 years, that where a defendant does not understand English the evidence must be translated, and there are already regulations for the payment of interpreters out of public funds for that. I think therefore this is a matter for organisation and not for legislation.[31]

The problem with such nominally reassuring statements is that the system's willingness (or ability) to "organise" interpretation is predicated on the assumption that it is sufficient simply to provide and pay persons engaged as interpreters. However, it may be argued that while provision (together with the concomitant standard acceptance of entitlement) is important, it is not sufficient unless underpinned by an affirmative approach based on a resolve to achieve adequate, i.e. competent standards of performance. Above all, the system should be free of the kind of innate suspicion of both the person claiming to need interpretation and of the interpreter recruited to work in the courtroom reflected in such classic cases as *R. v. Burke* (Ireland, 1858) and *Filios v. Morland*, heard by the Supreme Court of New South Wales over a hundred years later in 1963.

As was typical for the period, the discussion in the Australian case focused on whether or not an individual was entitled "as of right" to give evidence in his or her "native tongue", and the disadvantages to the cross-examiner of having to conduct a cross-examination through the mediation of an interpreter.[32]

> 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, even today it is all too common an experience to hear the interpreter giving the effect instead of giving a literal translation of questions and answers, and of his own accord interpolating questions and eliciting explanations. These matters may operate unfairly either to the advantage or to the disadvantage of the witness

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[31] Earl Ferrers for the Government, debate on the *Criminal Justice Bill*, *Hansard*, House of Lords, 26 March, 1991 at col. 1009. The legal reference is to the 1916 case of *Lee Kun*.

[32] *Filios v. Morland* [1963] S.R. (N.S.W.) 331, *per* Brereton J at 332: "The appeal is based on two grounds, one that the verdict was perverse and two 'that the plaintiff was entitled to give his evidence in Greek, his native tongue, through the official Government Interpreter'... Mr. Evatt's contention here is that a person who asks to give evidence in his native tongue is entitled, in our courts, as of right to do so. I know of no such rule. The matter does not appear to have been dealt with in English courts, but in Ireland it was clearly considered to lie in the discretion of the trial judge (see *R. v. Burke*)... In America it has been expressly held that it is a matter of discretion."

involved. *Moreover, and especially where the witness has some knowledge of English, the cross-examiner is placed at a grave disadvantage*." [33]

The "expert interpretation" referred to above was clearly expert in name only, and from his description the learned judge had evidently suffered at the hands of unqualified individuals acting unprofessionally. Yet at the same time, the statement conveys a judicial resentment and suspicion of witnesses who wish to give evidence through an interpreter.

[33] *Filios v. Morland* [1963] S.R. (N.S.W.) 331, *per* Brereton J at 332-333. Emphasis added.

CHANGED TIMES?

Brereton J.'s approach in *Filios v. Morland* may be considered characteristic of 1960s judicial attitudes in many common law jurisdictions. As has been acknowledged, it is notoriously hard to change attitudes. The English-speaking legal profession is no exception to this rule, and overall its members' attitudes to interpreters tend to be mistrusting, to say the least, as reflected in the above quotation. It is a moot point whether they have been caused by painful experiences with bad interpreters, or alternatively are the upshot of the basic philosophical difficulty experienced by such figures as Prof. Black, as quoted earlier.[34] However, the same jurisdiction which has given English-language case law on interpreters Brereton's narrow-minded comments in *Filios v. Morland* has also, at a remove of a mere 25 years, produced the far more enlightened *Gradidge v. Grace Bros. Pty. Ltd.*, where Kirby P. comments:

> In an earlier time, when there was less awareness of the scope and impact of physical disabilities, we were less sensitive to the difficulties of persons appearing in courts without an ability to hear or speak the English language.
> Times have changed. Change has been reflected in legislation. It has also been reflected in decisions of the courts. […]
> The changes are in my opinion beneficial. They translate *fine aspirations* about rights to due process, natural justice and reasoned decision-making *into practical utility* for persons with linguistic or physical disadvantages when compared to the ordinary litigant. In recent years, courts have begun to reflect a growing appreciation of the importance of allowing persons to communicate to the court in their own language.[35]

In addition to changes in Australian legislation and court decisions, the awareness of a "multicultural Australia" led to many other important developments in the Australian legal and administrative sphere which culminated in the Multicultural Australia Project. Space constraints preclude any detailed discussion of this field in this paper. One of its outcomes was the April 1991 report entitled *Access to Interpreters in the Legal System*, issued by the Commonwealth Attorney-General's Department under the auspices of the National Agenda for a Multicultural Australia. This covered such issues as the availability of competent interpreters in the legal system; the adequacy of existing and proposed arrangements for the provision of interpreters; the level of awareness by the public, service providers and the legal profession of the role and use of interpreters; the means by which professional standards of interpreters in the legal system can be maintained or improved; how interpreter services could

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[34] See text at footnotes 13 and 14 above.
[35] *Gradidge v. Grace Bros. Pty. Ltd*. (1988) 93 FLR 414 *per* Kirby P at 419-420. Emphasis added.

be provided in the most cost-effective manner; who should be responsible for the cost of interpreters; and the need for legislation concerning the use of interpreters in court.

It is in this selfsame spirit of "access to justice" that the *Canadian Charter of Rights and Freedoms* views issues relating to the provision of court interpreting services. As *Tran* puts it, "This right is also intimately related to our basic notions of justice, including the appearance of fairness." *Tran* and other cases considered by Canada's appellate courts have gone a long way towards literally moving on from merely paying "lip service" to a defendant's right to be linguistically as well as physically present in the courtroom, as the *Tran* court concluded:

> The level of understanding protected by s. 14 will, therefore, necessarily be high. Indeed, it has been suggested that a party must have the same basic opportunity to understand and be understood as if he or she were conversant in the language of the court.[36]

The court defines the three-fold purpose of the rights to be met under Section 14 of the Charter as follows:

> The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a *full opportunity to answer it*. Second, the right is one which is intimately related to our basic notions of justice, including the *appearance of fairness*. As such, the right to interpreter assistance touches on the very integrity of the administration of criminal justice in this country. Third, the right is one which is intimately related to our *society's claim to be multicultural*, expressed in part through s. 27 of the Charter.
> The magnitude of these interests which are protected by the right to interpreter assistance favours a purposive and liberal interpretation of the right under s. 14 of the Charter, and a *principled application of the right*.[37]

An important proviso, however, was made:

> Ultimately, the purpose of the right to interpreter assistance is to create a *level and fair playing field*, not to provide some individuals with more rights than others.[38]
> Importantly, the underlying principle behind all of the interests protected by the right to interpreter assistance under s. 14 is that of *linguistic understanding*. The centrality of this principle is evident not only from the general jurisprudence dealing with interpreters, but also more directly from the language of s. 14 itself, which refers to 'not understand[ing] or speak[ing] the language in which the proceedings are conducted'.[39]

As exemplified by *Tran*, the approach to the provision of court interpreting services in Canadian courts which requires both an appearance of fairness and compliance with the principle of understanding constitutes a considerable advance in judicial thinking compared

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[36] *R. v. Tran* (1994) at 978. Emphasis added.
[37] *R. v. Tran* (1994) at 952. Emphasis added.
[38] *R. v. Tran* [1994] at 978. Emphasis added.
[39] *R. v. Tran* (1994) at 977. Emphasis added.

with earlier attitudes in Canada, as well as most other common law jurisdictions. A 1912 Nova Scotia Supreme Court case, *R. v. Sylvester*, largely typifies the kind of attitude found throughout most of the nineteenth and twentieth centuries in many common law jurisdictions: case law is scrutinized for guidance at to how to deal with the issues at stake, and not infrequently astonishment is expressed at the fact that "there is surprisingly little discussion in the case law of the right to a translator or interpreter at criminal trials".[40] As in the 1916 English case of *Lee Kun*, so too in *Sylvester* ultimately practical considerations are viewed as taking priority:

> 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.[41]

At the time, the underlying belief of the majority of justices hearing such appeal cases was that no prejudice was suffered by individuals who did not speak or understand the language of the criminal proceedings against them if they either had legal representation without interpretation being provided, or alternatively if they were "made acquainted" with the substance of the evidence against them through the medium of an interpreter, irrespective of the quantity or quality of the linguistic performance: in other words if they were only given a summary of the proceedings, or if interpretation quality was bad.[42] Such views were not, however, shared uniformly, as Drysdale J. makes clear in his dissenting opinion in *Sylvester*:

> To say that the deaf man or the foreigner who does not understand the language of the proceedings has not the inherent right to have them made intelligible to him is to say that the privilege of being present during his trial and the privilege of hearing and cross-examining the witnesses against him was a *mere form* and that the *common law was satisfied to have the letter of its requirement complied with while its spirit and substance went unfulfilled*.[43]

The essence of Drysdale J's forthright comments would be echoed over 60 years later in the 1973 American case of *United States v. Carrion* in which the Supreme Court observed:

> The right to an interpreter rests most fundamentally...on the notion that no defendant should face the Kafkaesque specter of an incomprehensible ritual which may terminate

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[40] *United States ex rel. Negron v. the State of New York* 434 F.2d 386 (1970) at 389, referring to *United States v. Desist* 36 ALR3d 255 (1967).

[41] *R. v. Sylvester* (1912) 1 D.L.R. 186 *per* Graham, E.J at 198: "I do not say that the proceedings are to be made wholly intelligible to a foreign prisoner if anything turns on that. They are not wholly intelligible to most English-speaking prisoners. That is simply because you cannot have perfection."

[42] *R. v. Sylvester* (1912) 1 D.L.R. 186 *per* Drysdale, J at 203-204: "It seems to me that if a trial Judge takes care in such a case that prisoners have counsel that understand the language of a witness and that in addition to this course the substance or purport of the evidence of the witness to be furnished the prisoners he has done enough to safeguard the prisoners and to satisfy all reasonable requirements arising out of such a situation."

[43] *R. v. Sylvester* (1912) 1 D.L.R. 186 *per* Drysdale, J at 203-204.

> in punishment. Yet how high must the language barrier rise before a defendant has a right to an interpreter?[44]

Perhaps the answer to the latter question is to be found in Wigmore's insightful and somewhat scathing note when commenting on Graham E.J's dissenting opinion in *Sylvester*:

> the dissent deserves support, for a common official abuse is to supply inadequate interpretation; if the judges could be sent to a foreign country and there haled into court for crime, and made to feel the plight of an alien accused, some improvement might take place.[45]

In other words, it is in order to prevent a defendant's feeling of being caught up in a "babble of voices" [46] that the decision should be taken by any enlightened justice system to provide *competent* interpretation services at all stages in the criminal justice process. In the 1980s, judicial training in Australia, as if responding to Wigmore's suggestion, actually included role-playing sessions for judges designed to achieve this very aim. Reportedly, the sessions were extremely successful.[47]

Based on the above overview of judicial attitudes, let us now examine the judicial interpreting situation in Israel.

ISRAEL – "PRACTICALLY CONVENIENT" OR A CHANGED FACE?

Under the British Mandate, English, Arabic and Hebrew were recognized as the official languages of Palestine. According to an undated document (possibly 1920) entitled "Government of Palestine: Use of Official Languages", signed by the High Commissioner, Herbert Samuel, all government ordinances, official notices and forms were to be published in these three languages; correspondence could be addressed to government departments in any of these languages; and correspondence was to be issued from government departments "in whichever of the languages" was "practically convenient". Municipal and rural areas with a considerable (no less than 20%) Jewish population were called "Tri-Lingual Areas". In the courts of law and land registries of a tri-lingual area, every process, every official copy of a judgment, and every official document was to be issued in the language of the person to whom it was addressed: and written and oral pleadings could be conducted in any of the three languages.

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[44] *United States v. Carrion* 488 F.2d 12 (1973) at 14.
[45] Wigmore 1940, §1393 p. 145, note 4.
[46] "To Negron, most of the trial must have been a babble of voices." *United States ex rel. Negron v. the State of New York* 434 F.2d 386 (1970).
[47] Gobbo (1991).

Hebrew and Arabic are the official languages of the State of Israel. English ceased to be an official language on the day that Israel's Declaration of Independence was issued (14 May 1948). In the early period of the State's existence, when its population swelled immensely in just a few years, the court system had to find workable ways of dealing with the innumerable individuals who spoke little or no Hebrew and were largely unfamiliar with the local formalities of the administration of justice. Inevitably, as related by Cheshin, the court system applied a rough and ready approach to this problem, often involving what is known as "relay" interpretation provided by relatives or bystanders: "The charge was read first in Hebrew, then translated into Arabic, from Arabic into Ladino and finally into Bukharian. The accused made her replies in Bukharian; these were translated in Ladino, then into Arabic and finally back to Hebrew. By this tortuous method the judge learned that the accused denied the charge."[48] The fact that, to this day, Israel's Criminal Procedure Law allows judges to themselves provide interpretation between different languages used in court[49] reflects a persisting ad hoc approach to the use of different languages in the judicial system as well as in the country's administration. More than fifty years on, the "confusion of tongues" to which Cheshin refers has considerably abated, but the attitude of "making do" rather than applying an orderly approach continues to rule. Sometimes such officially sanctioned flexibility can, of course, prove useful. An example arose in the 1986 Demjanjuk trial in Jerusalem, when one of the judges provided Yiddish-Hebrew interpretation for the examination of an elderly survivor who was having difficulties understanding the official court interpreter's accent.

Israel's judges are aware of the unsatisfactory state of affairs in respect of the provision of interlingual interpretation in the judicial system. In 1990, Vardimus Zailer, recently appointed president of the Jerusalem District Court, was quoted in an interview as saying that he was disturbed by the problem of interpretation, not just in his official capacity but also as a citizen of the State whose rules had been applied to 160,000 Arabic speakers in Jerusalem alone:

> I think that the State should have provided an interpreting service for those people who appear before the authorities, and in particular in court where the whole art is that of speaking and understanding what is said. These people must also be able to express themselves as well as to hear what is being said in real time and at the speed at which things are said. To my very great regret, this is not how things are.
> Since my appointment, I have been trying to act in order to improve the situation. I have been assured that it will be improved and I hope that this will be the case. But my

[48] Cheshin (1959), pp. 171-172.
[49] Section 140, *Israel Criminal Procedure Law* [Consolidated Version] (5742-1982).

> position is extremely clear-cut: it will not be fair if there is a situation in which such a large population comes to court and there is a problem with their ability to cope with the language.[50]

Contacted a few years later for an update, Judge Zailer had no glad tidings to report. In Israel, administrative inertia would appear to be stronger than judicial will. Perhaps it was to this experience that Judge Zailer was referring when, he was reported by the media in 2002 to have said publicly that "due to past experience", he was not optimistic that the government would ever implement the findings of a State Commission of Inquiry headed by him.[51]

Nothing daunted, some Israeli judges still aspire to improve the situation. A notable example is Dr. Michael Agmon-Gonen, in the Jerusalem Magistrates' court, who is particularly outspoken in her criticism of the police for flouting their own standing orders requiring statements to be taken down in their original language. In a 2001 case (*State of Israel v. Andrei Sevrezein*), she roundly condemns the absence in her court of a Russian interpreter on a Saturday evening (i.e. the end of the Jewish weekend), quoting the provisions of the *Basic Law: Human Dignity and Liberty* (5752-1992)[52] and making the point that this Basic Law has "changed the face of criminal procedure in Israel". Judge Agmon-Gonen goes on to quote from Supreme Court Justice Aharon Barak's book, *Judicial Interpretation*,[53] to the effect that it is possible to deduce from the *Basic Law: Human Dignity and Liberty* the right to a lawyer and to a fair trial, and to prevent the delay of justice. In the case in question, Judge Agmon-Gonen observes forthrightly:

> *The respondent's right to a fair trial is infringed in the absence of an interpreter.* Were the language in question a rare one in our country, this would also be an infringement of his right, but this infringement might then be dictated by circumstances. This is not the case for a Russian-speaking respondent, and when the police have been specifically told that there is no problem whatsoever because an interpreter into the Russian language will be present in the courtroom if the person responsible for interpreters is notified accordingly, even during the afternoon. However, the police chose not to provide such notice, which is why there is no Russian-speaking interpreter. Any administrative discretion must be applied in the spirit of the Basic Law. A person's right to understand the criminal process to which he is a party derives both from the *Basic Law: Human Dignity and Liberty* and from the *Criminal Procedure Law (Powers of Enforcement – Arrests)* 5756-1996 (hereafter: *Arrests Law*), which stipulates in Section 29 that a

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[50] Judge Vardimus Zailer (1990) (Hebrew), *Halishka*, pp. 8-9 (translation: Ruth Morris).

[51] State Commission of Inquiry into the Safety of Buildings and Public Facilities, which began work in January 2002, seven months after Israel's biggest civil disaster, the collapse of the Versailles wedding hall in Jerusalem. *Jerusalem Post*, May 24, 2002.

[52] "*Purpose*: 1. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state. *Preservation of life, body and dignity*: 2. There shall be no violation of the life, body or dignity of any person as such."

[53] Barak (1994), Vol. 3, p. 422.

> detained person must be brought before a judge, and what is the point of us bringing the suspect to the court if he cannot understand the proceeding which is taking place?! The *Arrests Law* stipulates further that if the proceedings take place in the presence of the suspect, the suspect is entitled to question the police officer. *This right on the part of the suspect is also rendered an empty one if the suspect does not understand what is happening in the courtroom*. The suspect's right to a fair hearing is impaired, since he is unable to direct his legal representative's attention to inaccuracies in what the policeman says, if he thinks that these exist (*were he able to understand what is said*), or to ask her to put additional questions to the police officer.[54]

Addressing the issue of cost, Judge Agmon-Gonen makes the point that previous court practice had been not to arrange for the presence of an interpreter on Saturday evenings (the end of the Israeli weekend) on monetary grounds. However, she states that in the wake of judicial decisions, an Arabic interpreter is permanently available as standard, and an interpreter for Russian (and other languages) can be obtained at short notice. If (on the basis of the authorities cited by her[55]) "reasons of administrative convenience or financial savings cannot constitute grounds for infringing a basic right, then this certainly applies in the present case, where the police have not explained why they did not provide timely notification that a Russian-speaking suspect had been arrested and did not make it possible for the respondent to enjoy a fair hearing."[56] As a result, Judge Agmon-Gonen ruled that the absence of an interpreter constituted grounds for ordering the respondent's release from custody.

However, at this point Judge Agmon-Gonen continues with her analysis of the case, turning next to the statement made by the respondent to the police in Russian. Despite the fact that the statement was made during a police interview at which a Russian-speaking policeman was present, no record was made of the original Russian-language statement. She notes that Israeli case law requires statements made by suspects or persons questioned to be recorded in the language in which they are made, and she quotes Supreme Court Justice Sussmann's observations in the 1969 case of *Shalvi vs. State of Israel*:

> When a statement is made to the police in Arabic or another language and not in Hebrew, it is desirable and sometimes even necessary for it to be recorded in the very words of the person making the confession and as it came out of his mouth. No one is suggesting that the police officer who took the confession [did not] perform his duties faithfully, but anyone who is familiar with linguistic and translation issues knows that the accuracy of the translation depends not only on the translator's proficiency in the language but also on a special skill, and the court should not be required subsequently to rely on the

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[54] Judge Michal Agmon-Gonen in *State of Israel v. Andrei Sevrezein*, Remand Hearing 7383/01, pp. 6-7 (all translations from Judge Agmon-Gonen's rulings: Ruth Morris).
[55] Barak (1994) Vol. 3, p. 527, and Israel Supreme Court 4541/94, *Miller vs. Minister of Defence*, ILR 49 (4) 94.
[56] Judge Michal Agmon-Gonen in *State of Israel v. Andrei Sevrezein*, 7383/01, p. 7.

> translated version of the document, on the basis of which it is unable to determine what exactly was said by the person who made the confession.[57]

In *Bor vs. State of Israel* (1976), Shamgar J. observed that despite the Israel Supreme Court's repeated observations about the issue of recording statements in their original language, the Israel Police seemed not to be complying with this requirement. He made the point that failure to follow this instruction was likely to lead to subsequent problems in court, insofar as the practice leads to complaints and arguments which could be avoided were the police to comply with the instruction, by then already of long standing.[58] Later in *Bader*, Shamgar J. reiterated the point that this rule must be observed by police investigators since the utmost accuracy was required "in order to avoid queries, doubts and discussions in court, and therefore the statement must be written down faithfully in the form in which it was given, and this of course requires the statement to be recorded in the words in which it was given."[59]

The issue of statements made to the police and subsequently submitted in court proceedings regularly arose in countries which formed part of the British Empire. An example of common practice at the time is provided by the 1953 Tanganyika case of *Seif v. R.*, heard by the Court of Appeal for Eastern Africa. A statement was made by the appellant in Kiswahili. The police officer to whom the statement was made and who understood both Kiswahili and English recorded the statement in English. It was not read back, nor signed nor acknowledged by the appellant. The appeal court held:

> A statement made in Kiswahili in answer to a charge is admissible if taken down in English by a police officer proficient in both these languages. If such statement is not read back to the accused or signed or acknowledged by him to be correct it is nevertheless admissible if its admission does not occasion prejudice.[60]

This approach conveniently enabled courts in English colonies to try non-English-speaking defendants whose statements to the police were taken down in English. However, in some countries legal figures were more aware of the ramifications of such practice. Thus for India, the 1935 case of *Harilal v. Emperor* makes exactly the same point as Sussmann J. in *Shalvi vs. State of Israel*:

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[57] *Shalvi vs. State of Israel* Criminal Appeal 224/69, ILR 23(2) 763, *per* Sussmann J. Based on Sussmann J.'s comments, the Attorney-General issued instructions (50.029, dated 1 December 1969) for the taking of confessions, to the effect that a statement made after a caution and taken down from a suspect or accused must be recorded in the words in which it is made by the suspect or accused, and quoting from Sussmann J.'s comments in *Shalvi*.

[58] *Bor vs. State of Israe*l (1976) Criminal Appeal 875/76, ILR 31(2) 785 *per* Shamgar J. at 794. See also Kidmi (1983), *On Evidence*, Part 1, p. 60.

[59] *Bader v. State of Israe*l, Criminal Appeal 788/77, ILR 34(2) 818 *per* Shamgar J. at 828. See also Kidmi (1983), p. 44.

[60] *Seif v. R.* (1953) 20 E.A.C.A. 235.

> Furthermore, the fact is not sufficiently brought home to the juries and not sufficiently remembered by Judges, that the words of the witnesses are recorded by the Magistrate and the Police in a language which they do not in fact speak and therefore accurate recording is often a matter of accurate translation as well as of the rendering of sentences and the meaning of the statements of the witnesses.[61]

It might be argued that in the absence of clear-cut guidelines or rules, the attitude of any particular judicial figure to this issue is ultimately determined by that person's innate linguistic awareness. Once such guidelines have been laid down, it might have been expected that the situation would resolve itself. However, as illustrated by the repeated observations emanating from Israeli judicial figures, practice at the all-important earlier stage of police questioning has for the past 30 years and more failed to comply with the relevant judicial requirements for the recording of statements and confessions by non-Hebrew-speaking individuals

As Judge Agmon-Gonen observed, where the police submit a Hebrew statement allegedly made by a non-Hebrew speaker, any challenges to it will go only to its weight, not its admissibility. To date, no statement has been ruled inadmissible because it has not been taken down in the original language. Cases are potentially weakened, therefore, but certainly not dismissed on this ground. In *State of Israel v. Sevrezein*, Judge Agmon-Gonen noted that a Russian-speaking policeman was present at the questioning of the respondent. Indeed, according to the statement it was he who translated the questions and answers: "It is entirely unclear why the police did not make a point of complying with the rule. The police representative could give no explanation." Her dry comment reflects judicial bafflement with this state of affairs. Pinto and Avriel make a similar point.

A further example comes from Beit Shemesh, where magistrate Yoel Tsur ruled unequivocally in *Israel Police (Petitioner) vs. Alhajajale* that "although there is no explicit provision [in the *Criminal Procedure Law (Powers of Enforcement – Arrests)* (5746-1986)] concerning a suspect's right to understand in his own language a proceeding involving an application for his arrest, such a right is a *natural right* insofar as a person is entitled to understand a legal proceeding held concerning him and to receive a translation into a language which he speaks. […] While I understand the police force's logistical difficulties, it is unacceptable that a person's basic right to understand the legal process concerning him be

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[61] *Harilal v. Emperor* AIR 1935 (CrC 749). From Rao & Rao, *Criminal Trial – Fundamental and Evidentiary Aspects*, Bombay, Tripathi, 1973, pp. 479.

violated."[62] The local police had tried to short-circuit the process in order to avoid having to take the suspect to Jerusalem; instead, they wasted both their and the court's time, since the Beit Shemesh magistrate required them to appear the same day before the Jerusalem duty judge in the presence of a defence lawyer and an Arabic interpreter, before the deadline for holding the suspect in detention.

What happens when an interpreter is not available in court during remand hearings? Sometimes, as the record may show, defence lawyers interpret for the court (in other words, for the suspect), if they share a common language with their clients. A case heard in the Tel Aviv-Jaffa magistrates court in 1999 hints at another alternative: that no interpretation whatsoever is provided. The police had picked up a Chinese man, who was suspected of illegal residence in Israel and involvement in an aggravated assault. The lawyer for the police stated that they had failed to obtain a Chinese interpreter, but asked for the remand hearing to be held at that time. Referring to Section 24 of the *Arrests Law*, which requires suspects to be informed of the reason for their arrest,[63] the defence lawyer argued that no one should suffer as a result of police failures and omissions. The magistrate commented on the police failure to obtain – or "to make reasonable efforts to obtain" – a Chinese interpreter since 10.30 on the previous morning, and hence their failure to obtain the suspect's version of events. He further noted the absence of a Chinese interpreter in court, as well as the unsuccessful efforts to obtain one on the part of the court's registry, the court registrar, and other bodies. It would appear that neither the Israel Police nor the courts have available to them a comprehensive database of interpreters. Consequently, the judge ordered the suspect's immediate and unconditional release, on the grounds that his human rights took precedence over all other considerations.[64]

In 1999 Chinese was a rare language in Israel. The same cannot be said for Amharic in August 2001, when a Jerusalem magistrate dealt with an application to extend the remand in custody of an Ethiopian man suspected of spousal abuse. The person responsible for court interpreters informed the court that no Amharic interpreter could be obtained for a full two days. The implication was that no prior request had been received for an interpreter. The magistrate, Yehezkel Barkali, noted the collision of two rights: the suspect's right to a fair

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[62] *Israel Police (Petitioner) vs. Alhajajale*, Remand Hearing Case No. 6050/00 (16 March 2000), Decision by Magistrate Yoel Tsur, p. 2. Beit Shemesh Magistrates' Court. Emphasis added.

[63] As required by the European Convention for the Protection of Human Rights and Fundamental Freedoms, where Article 5 (2) states: "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."

[64] Judge M. Shinhav in Remand Hearing Case No. 13135/99 (2 April 1999), Tel Aviv-Jaffa Magistrates' Court.

hearing, and protecting public order and the safety of the complainant. Concurring with his fellow magistrates' rulings in the two cases referred to above, as submitted by defence counsel and appended to the case file,[65] he ordered the suspect's release on bail.

Israel's 2001 State Comptroller's Report similarly found that the police responsible for Judea (southern West Bank), Samaria (northern West Bank) and the Gaza Strip regularly infringed Israel Police standing orders concerning the recording of defendants' confessions and witness statements in the language in which they are given.[66] The review was carried out between October 2000 and February 2001. In June 2001 the police informed the State Comptroller's Office that they had a problem in respect of the availability of police personnel capable of taking down a statement in Arabic. They reported that they were continuing their efforts to recruit foreign-language speakers. At the same time they claimed that "instructions to all investigating units will be clarified in order to improve the situation." The report noted that an improvement had taken place in the Samaria prosecuting unit, while "witness statements continue not to be recorded in the defendant's language in the Judea area, because of a shortage of investigators able to write Arabic."[67] To tape-record and then arrange for the transcription and subsequent translation of such statements appeared to similarly exceed the logistical and/or financial capabilities of the Israel Police. Apparently, what was "practically convenient" for them was to produce a Hebrew version of statements.

CONCLUSION – MISSING STITCHES?

As shown by the cases reviewed above, Israeli magistrates draw the attention of the police to relevant case law and legal provisions regarding the taking down of statements in their original language. Sometimes, defence lawyers do so in their submissions to the court. The

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[65] Viz., magistrates Shinhav and Tsur, as referred to in notes 62 and 64 above.

[66] "RECORDING CONFESSIONS IN THE DEFENDANT'S LANGUAGE – The Israel Police Standing Order on 'Defendants' confessions, witness statements – recording and translating' stipulates, inter alia, that a defendant's confession will be recorded in its entirety and verbatim, as uttered by the defendant and in the language in which it was given; a defendant or suspect who does not know the Hebrew language will be questioned in his own language or in another language that he understands, and if the investigator does not know that language, the questioning will be carried out through an interpreter; a confession or statement will be recorded, as far as possible, in the interviewee's language, by the investigator or by an interpreter; as a rule, preference should be given to a translator who is a member of the police force, but if no police personnel can be found who knows the defendant's language, the investigator can use an interpreter who is not a member of the police force. The review revealed that for all cases in the area, with the exception of the Hostile Destructive Activity investigating team, statements were recorded in Hebrew and not in the language in which they were given." *State Comptroller's Report 2001*, Investigating Division in the Samaria and Judea District, Section 1 – Military Prosecutor's Office, Paragraph (b), p. 217.

[67] On the use of Druze interpreters in the Israeli military courts in the West Bank and Gaza, see Hajjar (2000).

country's Supreme Court has been commenting critically on unsatisfactory police practice for over three decades. The non-compliance of police in the Judea district with the rule on taking down statements in their original language is not an isolated example. In a 2001 article entitled "The 'Missing Link' in the Investigative Process: The taking of statements from non-Hebrew-speaking interrogatees without a record being made in the interrogatee's language", Pinto and Avriel reviewed the current situation. They report that from conversations with lawyers who appear in Israel's courts on behalf of the Public Defender's Office, it would appear that the instruction issued in 1969 by the Attorney General in the wake of Sussmann J.'s ruling in *Shalvi*,[68] is almost never observed except in serious cases.[69] Whether or not the police officer and the person being questioned share a common language seems to be irrelevant to the language in which the statement is taken down, which will almost inevitably be Hebrew. Similarly, irrespective of whether linguistic mediation is provided by an "interpreter" (normally a police officer) or a "third person" (often a family member or "even a passer-by"), the statement will be taken down in Hebrew.

At the time that Pinto and Avriel were writing their article, an Israeli parliamentary committee was considering proposed legislation requiring certain police interviews to be video-recorded. The authors advocate the urgent rectification (even before the bill becomes law), of what they call a "serious defect" in the evidentiary chain, in other words the standard but aberrant police practice reviewed above. In the event, on June 26, 2002 the Knesset passed a bill amending the Criminal Code in respect of the questioning of individuals suspected of criminal offences punishable by a minimum prison sentence of 10 years.[70]

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[68] See Footnote 53 above.

[69] On a related issue in the English court system, see Morris (1993).

[70] *Criminal Procedure Law (Interrogation of Suspects)* (5762-2002). Paragraph 2 of Part 1 stipulates: "The interrogation of a suspect shall be carried out in his language or in a language which the suspect understands and speaks, including sign language". While the video-recording of a suspect's entire interrogation is to be the norm, under certain circumstances it may be replaced by audio-recording or by a written record. The latter must cover the main points, as well as reactions or gestures where these replace speech, so as to provide a correct reflection of what took place during the interrogation (Part 1, 4(b)). Failure to comply with these requirements is a Israel Police disciplinary offence. In connection with the option of a written record, Paragraph 8(1) of Part 2 deals with the language of the record, stipulating that if the interrogation of a suspect has been recorded only in writing, then this record must be in the language in which the interrogation was carried out. Sub-paragraph 2 then states: "If no written record can be made of the interrogation of a suspect in a language in which it is conducted, the record of the interrogation shall be made by means of visual or audio documentation". Paragraph 8(2) would therefore seem to imply that where an interrogation is carried out in a language other than Hebrew, the preference is for a written record rather than video- or audio-recording. Moreover, no mention is made of the use of an interpreter and of the need to document both questions and answers in two language versions – the original and as interpreted. Other options covered by Part 2 involve the interrogation of a suspect outside the police station, and here in Paragraph 10 (2) the first reference is made to "translation" – in this case, a written translation is to be prepared of a record of an interrogation which for practical reasons has not been documented in the language in which it was conducted. Part 4,

The fact is that Israel's Supreme Court has identified a linguistic and procedural issue which is of great relevance to the administration of justice in the country. Because of its ramifications, to remedy the situation the country's Attorney General issued instructions to the police concerning its implications. This was in 1969, over 30 years ago. To this day, except in exceptionally "serious" cases, the Israel Police reportedly routinely fail to observe this instruction.

In England, considerable academic and legal attention has been focused on the record of police interviews, with both native English speakers and foreigners, with and without interpreters.[71] Since 1958, in the wake of the ruling in *R. v. Attard*, the person who acted as interpreter at a police interview (and who in England is normally not a member of the police force) has been considered the only competent witness to what was said during that interview. Since 1984, the *Police and Criminal Evidence Act* (PACE) has required the routine tape-recording of all police interviews in England and Wales. Because of practical considerations, the English courts normally work with summaries rather than the actual tape-recording. Despite this state of affairs, indications are that serious problems exist on the level of summaries of tape-recorded police interviews, even those conducted in English with native speakers. In the United States, anecdotal evidence would seem to indicate that defence lawyers are more insistent than their English counterparts on the proper preparation of bilingual transcripts in the case of disputes about the record of interpreted material at the pre-trial stage.

Under-financed, over-worked and with their resources constantly at breaking point, the Israel Police struggle to keep their heads above water. It must be said, however, that the kind of defective practice identified by the State Comptroller in the West Bank, reported by public defenders elsewhere in Israel and criticized by judges is symptomatic of a casual, not to say cavalier, attitude to linguistic issues which exists throughout Israeli society and culture. As a "melting pot", Israel in its early days had no choice other than to adopt the kind of ad hoc approach to court interpreting situations described by Cheshin. Indeed, the whole country probably survived and flourished because of this very culture of improvisation. However, having passed its fiftieth anniversary a few years ago, it is more than high time for Israel to come closer to a semblance of "best practice" in the area of language arrangements for non-Hebrew speakers caught up in the justice system.

Paragraph 12(c) specifies that regulations concerning the production of a transcript of a video- or audio-recordings, as well as a translation of such transcripts, are to be issued by the Ministers of Justice and Internal Security.

[71] See Baldwin (1993), Baldwin and Bedward (1991), Browne (1989) and Zander (1993).

In Israel, the arrangements for the provision of court interpreters in both the magistrates' and district courts are exclusively of the outsourcing variety. They rest to a considerable extent in the hands of private agencies, to whom the Courts' Directorate routinely delegates the engagement of interpreters.[72] Individual judges may well be fully and painfully aware of defects in the quality of interpretation provided in their courts. Remedying them is altogether another matter. In the 1990s, a very aware Jerusalem District Court presiding judge found that he was powerless to bring about a change in the unsatisfactory situation prevailing in his court in respect of this issue.

In Canada, the situation is also not ideal, as indeed *Tran* proves. Writing before *Tran* was published, Steele paints a dismal picture of quality standards regarding the provision of interlingual interpretation in his country's legal system.[73] A personal communication to the author indicates that despite a good start in the 1990s, recent government cuts and other priorities have led to the abandonment of a training programme for court interpreters in one part of Canada at least. The judicial insights of Canada's appellate courts do not appear to have been followed up by government action to remedy the situation.

As this article stated at the outset, it is notoriously hard to bring about changes in attitude. When it comes to the administration of criminal justice in Israel today, case law reveals that the linguistic sensitivity which typified Jewish law nearly two millennia ago is certainly present to some extent in the modern Israeli judiciary. Regrettably, however, the criminal justice system's judicial members have failed to convince – or to compel – its other arm, the police, to change their habit of recording suspect and witness statements in Hebrew only, other than in "serious" cases, irrespective of the language spoken by the person giving the statement. Moreover, anecdotal evidence indicates that the administrative arm of the courts is stronger than judicial will in respect of achieving high-calibre interpretation on their level, favouring what are presented as convenience and ostensible savings over quality and linguistic access.

None of these factors is exclusive to Israel. But Australia constitutes a telling example of how, in the wake of an overt political will to change, both judicial attitudes and, concomitantly, arrangements for coping with multiple languages in the judicial system can be

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[72] These are not specialist language-personnel agencies. For example, the business name of one of the agencies in question includes references to "recording and cleaning", implying that the recruitment and engagement of interpreters merits no mention.

[73] "…quality control of interpreters is in a chaotic state. There are no national standards and no standard judicial test for competence." Steele (1992), p. 242.

transformed in a matter of years rather than many decades or centuries. Discussing the provision of interpreters in the Australian legal system, Laster and Taylor note the Australian legal system's preference for bureaucratic measures over legislative approaches, in contrast to the approach adopted in other common law jurisdictions, such as the United States and Canada, where the emphasis is on "articulating broad statements of philosophy within legislation".[74] In this respect, Israel would appear to be somewhat closer to Australia than North America. Both Israel and Canada have two official languages. But just as Section 14 of the *Canadian Charter of Rights and Freedoms* is qualitatively different from the cursory and ad hoc scope of Section 140 of Israel's *Criminal Procedure Law*, so too Israel's Supreme Court justices as well as lower court judges seem to be operating in a different time frame. It may well be that in referring to the protection of human dignity and liberty, Israel's *Basic Law: Human Dignity and Liberty* (5752-1992) has "changed the face of criminal procedure in Israel". Logically, its ramifications for the provision of interlingual interpretation in the country's administration of justice should be permeated with the same linguistic sensitivity which informs Jewish tradition. But in respect of the issues discussed in this paper, there are undoubtedly critical "missing stitches" which seriously undermine the extent to which non-Hebrew speakers actually see this "changed face" in practice.

While in 1992 Canada's Supreme Court was addressing such issues as interpreting techniques, ideal vs. practical and fair dispositions, as well as nuances of language and language competence, 10 years later its Israeli counterpart was still trying to get the country's police force to comply with its own standing instructions and take down statements in the language in which they were made. In *Tran*, Canada's Supreme Court stated that the right to interpreter assistance touched upon "the very integrity of the administration of criminal justice in this country". True, the reason why *Tran* came before the Canadian Supreme Court was precisely because in this case, interpreting practice in the lower court had been found to be deficient. But on the face of it, there is every reason to believe that the *Tran* comments have at least resounded through Canada's criminal justice system. Whether they are being taken on board or at least carefully considered by the administrative authorities is a different point.

This paper has not sought to specifically address the issues of interpreting quality in Israel's judicial system. Anecdotal evidence certainly points to the existence of widespread

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[74] Laster and Taylor (1994), p. 9.

organizational and quality problems, with concomitant implications for the doing of justice in the case of non-Hebrew speakers.

In a different context, the Prophet Isaiah once asked in the Hebrew Bible, "Lord, how long?"[75] Those looking at Israel's criminal justice system may well ask the same question, but here it would specifically relate to remedying the taking down of statements made in languages other than in Hebrew. The present paper considers this to be one of the crucial "missing stitches" in Israel's current administration of justice. Hopefully, the response to this question will not be in the same spirit as the Lord's reply to Isaiah.[76] A reworking of the situation on the ground concerning interlingual issues would considerably strengthen the tissue of Israeli justice.

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[75] Isaiah 6:11.
[76] "Until cities be waste without inhabitant,
And houses without man,
And the land become utterly waste,
And the Lord have removed men far away,
And the forsaken places be many in the midst of the land." Isaiah 6:11-12.

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