Fair Trial, Language and the Right to Interpretation

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1. Introduction

The right to a fair trial may be viewed as an umbrella guarantee which spans a number of rights designed to prevent the arbitrary exercise and use of excess power by a state in the criminal trial process and, at the same time, promote trial fairness for an accused. Some aspects of this umbrella guarantee are concerned directly with language. The issue of language-related fair trial rights generally arises in situations where there is a language barrier in the criminal process involving the accused and where, inevitably, the right to language interpretation comes into play. This article undertakes a comparative review of the legislative and judicial treatment of the right of an accused who does not speak the language of the court to the assistance of an interpreter. It will first identify the sources of these rights in the law and then study how the right to interpretative services is legally interpreted, enforced or denied across a number of jurisdictions.¹

2. The Legal Basis of the Right to Interpretation

2.1. Express Constitutional or Statutory Provisions for Interpretation

Many constitutions and human rights statutes contain provisions which require that a person charged with a criminal offence be provided with the assistance of an interpreter if he cannot understand the language of the court.² Some Bills of Rights³ go

¹ Jurisdiction selection has been confined to some common law jurisdictions and guided largely by those in which the right to the assistance of an interpreter not only exists but has been the subject of judicial consideration. For the purpose of this discussion, the focus will be on Mauritius, New Zealand, Hong Kong, the United Kingdom (specifically England), Kenya, Nigeria, Aden (now Yemen), and to a lesser extent Canada, the USA, South Africa, Barbados and Australia. Decisions of international tribunals will also be discussed.

² Examples of such provisions are found in the constitutions of Barbados section 18(2)(f); Kenya section 77(2)(f); Mauritius section 19(2)(f) as well as in the UK Human Rights Act 1998 (incorporating clause 3(e) of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as amended, and the New Zealand Bill of Rights Act 1990 section 24(g).

³ One example of this is section 35(3)(k) of the 1996 Constitution of South Africa.
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further and provide that an accused has the right to be tried in a language that he understands. Generally, these constitutional or statutory language-related rights are couched explicitly within the framework of an accused’s right to a fair trial.

2.2. Other Constitutional Fair Trial Provisions

Even where a particular constitution does not expressly provide that interpreters must be made available to an accused person if he does not understand the language of the court, other constitutional provisions incorporating notions of fair trial are likely to generate judicial decisions that such an accused is entitled to have an interpreter. This is seen for example in the celebrated case of US ex rel. Negron v. New York.⁴ In this case, one of the Sixth Amendment guarantees of the Constitution of the United States of America, i.e. an accused’s right to be confronted with witnesses against him which includes the right to cross-examine those witnesses, was partially relied upon to set aside a murder conviction. This conviction came after a trial in which the English language testimony of twelve of the State’s fourteen witnesses had not been interpreted for a Spanish speaking accused who neither spoke nor understood English. The Second Circuit Court of Appeals reasoned that the lack of interpretation at trial led to the defendant’s “incapacity to respond to specific testimony [which] would inevitably hamper the capacity of his counsel to conduct effective cross-examination”.⁵ As a partial consequence of this,⁶ the court held that the inadequacy of translation at trial rendered it “constitutionally infirm”.

The Barbadian case of Ariza v. R⁷ also illustrates how fair trial considerations other than an accused’s right to be present at his trial or an explicit right to an interpreter can generate a judicial determination of a right to interpretation or translation facilities. In this case, depositions in the English language relating to his case had been handed to the accused, a speaker of Spanish with apparently little competence in English, on the morning of his trial. The Barbadian Court of Appeal was of the view that the aspect of the right to fair trial contained in section 18(2)(c) of the Barbadian Constitution, which grants an accused the right to have adequate time and facilities to prepare a defence, was breached because the trial judge had denied the request by the accused to have Spanish translations of the depositions to be used at

⁴ 434 F.2d 386 (2nd Cir. 1970).
⁵ Ibid., p. 390. Although US ex rel. Negrón v. New York has had far reaching effects, motivating as it did a federal statute, the Court Interpreters Act 1978 which confers the right, in certain circumstances, to non-English speaking parties in both criminal and civil actions in federal district courts, to have an interpreter at the court’s expense, it is interesting to note that there are state decisions which do not accept the constitutional basis for the right of an accused to an interpreter in criminal trials. See for example State v. Neave 117 Wis.2d 359 (1984) cited in B Piatt, ¿Only English? (University of New Mexico Press, Albuquerque, 1990) pp. 148, 153.
⁶ The Court also based its decision to allow the appeal on the common law ground that the defendant, because of inadequate translation, could not have been said to be present at his trial in the sense of possessing “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding”. Negrón, supra note 4, p. 389.