# CHAPTER SIX

# THE RIGHT TO UNDERSTAND

## 6.1 INTRODUCTION

It is a fundamental principle that ordinary people should not only be given access to the law but they should be able to understand it. People should be able to understand the laws they are expected to obey in a democracy. The general public has an interest in being able to understand and follow court proceedings. It is a trite fact that when people do not understand the law or misunderstand it, they are less likely to comply with the law or exercise their rights under it. It becomes ironic when our legal language which is part of a system designed "for the people, by the people and of the people" is understood least of all by those it represents.[1] King Edward III is reported to have ordered lawyers to use English in the courtroom to cure the problem of citizens "having no knowledge or understanding of that which is said for them or against them".[2] The cry for clarity and understanding is even louder some six hundred years later in instances where the accused does not understand the language of the court proceedings. Therefore, the law must be communicated in the clearest manner possible.

The right not to understand the law means not to understand one's obligations and rights as a citizen, and as a result, not to be able to participate fully in the economic or social change that is ultimately implemented by legislation.[3] If our laws are properly conceived and well constructed, and our understanding of what we propose in them is exact, then we should be able to give them a clear form of expression.[4] Making the language in which the law is expressed easy to understand and accessible, is an important ideal in the quest for justice. The use of language if it is not understood by the ordinary people constitutes a denial of access to justice. The aim is not only to make the law more intelligible or understandable and therefore more accessible, but also to provide the general public with practical and legal knowledge. Therefore, one can improve access to justice by making the procedures in law more understandable and participatory. The lawyer must develop a sensitivity for the ordinary individual for whom the law is promulgated. This is because the ordinary citizen looks to his lawyer for clarity and guidance. For people to understand what they have to say, the law must be clear and simple. Lawyers must therefore strive to be effective communicators.

The arrested, detained or accused person has the right to understand and follow

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1 Moore "Short and plain statements: a pleading for plain language in legal writing" (1985) *Southern University Law Review* 47 at 48.

2 *Ibid at* 51.

3 Krongold "Writing laws: making them easier to understand" (1992) *Ottawa Law Review* 495 at 505.

4 Eagleson "Plain English in the statutes" (1985) *Law Institute Journal* 673 at 675.

criminal proceedings. This means that the proceedings must be conducted in a language that he understands, and that it must fall within the scope of his ability to comprehend the proceedings.[5] Language is the medium whereby one may understand or grasp the essence, material intent of the "moments" of the proceedings, and thereby achieve comprehension. If a person cannot comprehend and follow court proceedings or is disabled as a result of deafness or mentally disabled, then this prevents unaided participation in the judicial process. The second part of the right relates to the accused's inability to understand the proceedings. If it is uncertain at the plea stage of criminal proceedings whether the accused is capable of understanding the proceedings so as to make a proper defence, then an enquiry must be held in terms of the procedure prescribed by sections 77 and 79 of the Act.[6] Therefore, an accused must be "fit" to stand trial.

An accused must be communicatively present in order to participate in the proceedings. The right to adduce and challenge evidence also depends on the effective communication of one's rights. Mere physical confrontation of witnesses is pointless if the accused cannot hear or understand the testimony.[7] Similarly, the right to be prepared can only be realised when the accused understands the charge(s) against him. He needs to be able to plead to the charge and to exercise his right of challenge. The accused must therefore be able to understand the language of the proceedings and be able to communicate in it.[8]

This chapter will first address the accused person's competency to stand trial. Secondly, the accused's right to an interpreter will be addressed. This relates to instances where the accused does not understand the language of the court proceedings. Thirdly, this chapter will address the constitutional right to be addressed in the language of one's understanding. Principles extracted from comparative law will be applied where it is relevant. Finally, the conclusion will consider the impact and influence of comparative law on our law, and present proposals and recommendations.

## 6.2 THE ACCUSED'S COMPETENCY TO STAND TRIAL

An accused person's incapacity to understand the proceedings will impact on his right to participate in the trial. Such an accused will be regarded as not being "present" at a mental level. Thus, the presence of the accused means not merely

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5 Indeed, the "ability to understand and be understood is a minimal requirement of due process". As quoted by Wilson J, in *Société des Acadiens du Nouveau-Brunswick Inc v Association of Parents for Fairness in Education, District 50 Branch* [1986] 1 SCR 549 at 622.

6 This is because a mentally incompetent person cannot be tried in terms of s 77(6)(a) of the Act. Section 79 sets out the procedure for an enquiry to determine whether the accused is mentally ill. Section 79(1)(b) deals with the appointment of psychiatrists to the enquiry, whereas s 79(4) prescribes the requirements for the medical report and its contents.

7 See *Terry v State* 105 So 386, 387 (Ala 1925).

8 The right to communicate also has important implications for South African society which is multilingual. There are 11 official languages protected in the Constitution in terms of s 6(1) of the Constitution of the Republic of South Africa, 1996.

that he must be physically present, but also that he must be capable of understanding the nature of the proceedings. The accused may as a result of insanity, deafness or dumbness, be unable to understand the proceedings or hear them, or answer them either by speech or writing. In these cases, the court has to determine whether the accused is "fit" to be tried. This means that the court must ascertain whether the accused possesses sufficient intellect to comprehend the proceedings so as to make a proper defence.[9]

When it appears to be uncertain whether an accused is capable of understanding the proceedings at the trial, so as to make a proper defence, an enquiry into his mental state should be made in accordance with the procedure laid down in sections 77 and 79 of the Act.[10] The report of the enquiry must include a diagnosis of the accused's mental condition and a finding as to whether the accused is capable of understanding the proceedings so as to make a proper defence.[11] If the court establishes that the accused is capable of understanding the proceedings, then the proceedings will continue in the ordinary manner. However, if it finds that the accused is incapable of understanding the proceedings, it must direct that the accused be detained in a psychiatric hospital or prison, pending the significance of the decision of a judge in chambers.[12] An accused is entitled to appeal against a finding that he was capable of understanding the proceedings if he is subsequently

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9 The Australian case of *Kesavarajah v R* (1994) 123 ALR 463, restated the standard test governing fitness to stand trial. The majority made the following pertinent comments:

> "The defendant (accused) needs to understand what it is that he is charged with ... He needs to understand generally the nature of the proceedings ... He needs to be able to follow the course of proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the meaning of various court formalities .... Where he has counsel, he needs to be able to do this through his counsel by giving any necessary instruction and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is ... he must have sufficient capacity to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and his counsel, if any."

Therefore, the right to understand is linked to the right to present one's case.

10 Also see s 78(2) of the Act, which provides that if it is alleged at the proceedings that the accused as a result of mental illness or mental defect is not criminally responsible for the offences with which he is charged, or if it appears to the court that the accused may not be responsible, then the court will direct that an enquiry be held and a report be submitted in terms of s 79. Also see *S v Tom* 1991 (2) SACR 249 (B), which describes the enquiry to be undertaken in terms of s 78(2), and *S v Gouws* [2000] 2 All SA 291 (W), where the court held that an order in terms of s 78(2), should be granted to determine the question of whether the accused suffered from a mental illness or mental defect at the time of the commission of the offence. It should be noted that an enquiry into the mental state of the accused in terms of ss 77, 78 and 79 of the Act, is only permissible in the case of an acknowledged pathological condition. See *S v Kok* 1998 (1) SACR 532 (N) in this regard.

11 See Joubert (2001) *et al op cit* 202.

12 See *S v Skeyi* 1981 (4) SA 191 (E). An example of an instance where the accused was found to be incapable of understanding the proceedings by reason of mental illness is the case of *S v Pratt* 1960 (4) SA 743 (T). The accused was indicted for the attempted assassination of the then Prime Minister, Dr Verwoerd. A similar finding was made in the case of Tsafendas who assassinated Dr Verwoerd in 1966. *Ibid* at 203.

convicted, or against a finding if he is incapable, provided that he did not himself allege this at the trial.[13]

A deaf and dumb person who does not understand the proceedings as a result of his defect, is not regarded as being "present", despite his physical presence, and his trial is deemed to be null and void.[14] Where a witness is under 18 years, evidence can be tendered by demonstrations, gestures or any other form of non-verbal communication.[15] The case of *Pachcourie v Additional Magistrate, Ladysmith and Another*[16] which dealt with the position of a deaf mute P, is a case in point. The court held that the "presence of the accused" in terms of section 156(1) of Act 56 of 1955, meant more than physical presence: the accused had to be present both in mind and body. The accused must be able to hear and understand the import of the evidence being led at his trial. The court found on the facts, that no proper trial was held because the trial had not been properly interpreted to P. He could therefore not appreciate or understand the import of the trial.

The position in other countries is similar to our law. The position in **Canadian law** is that an accused is regarded as being unfit to stand trial if he cannot understand the nature and object of the proceedings, the possible consequences or communicate with his legal representative because of a mental disorder.[17] The court may direct that the issue of fitness be tried. This may be done at any stage of the proceedings, but before a verdict is given. However, the court must have reasonable grounds to believe that the accused is unfit to stand trial, in order to direct a hearing.[18] If a

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13 However, where an accused is declared incapable of understanding the proceedings, he may after becoming so capable, be indicted and tried for the offence in question. *Id*.

14 Section 161 of the Act caters for deaf and dumb persons. Section 161 provides that a witness must give his evidence *viva voce* at criminal proceedings. This expression can be interpreted in different ways, depending on the particular circumstances. Evidence can be given by gesture language in the case of a deaf and dumb witness.

15 See s 161(2) of the Act.

16 See *Pachcourie v Additional Magistrate, Ladysmith and Another supra* at 987. P had been represented by an attorney who had informed the court that K, who had known P for many years, had developed the ability to communicate with him by means of gestures. The attorney suggested that K would assist the court by interpreting during the trial. Therefore, the court was satisfied that P was in a position to stand his trial. P was convicted of the charge of dealing with dagga and sentenced to five years' imprisonment. On review, a report was submitted by two social workers, one of whom had acted as an interpreter for many years to deaf persons. The social workers held that K could not have interpreted the full context of the proceedings to P so as to properly keep him informed of what transpired in court. They also held that P could not have acquired an appreciation of the abstract concept of right and wrong, innocence or guilt. What had occurred was a gross departure from established rules of procedure. This led to P not being properly tried.

17 See Roach and Friedland "The right to a fair trial in Canada" in Weissbrodt and Wolfrum (1998) *op cit* 14. Also see s 2 of the Criminal Code which defines "unfit to stand trial" and *R v Taylor* (1992) 77 CCC (3d) 551 (Ont CA).

18 See s 672.23(1) of the Criminal Code. Also see s 672.23(2) which provides that where an application is made by an accused or the prosecutor, the burden of proof that the accused is unfit to stand trial rests on the person making the application.

person who has been deemed unfit to stand trial has been detained, then the prosecution will have to prove its case against the accused. This is similar to our law where no onus rests on the accused to prove his mental defect.[19] In *R v Pietrangelo*[20] the trial centred around the accused's fitness to stand trial. The conviction was set aside because the court found that the trial had proceeded with the real risk that the appellant was unable to understand the nature of the proceedings on account of mental disorder. A verdict of unfit to stand trial does not prevent the accused from being tried subsequently if he becomes fit to stand trial.[21] However, the burden of proof that the accused has subsequently become fit to stand trial rests on the party who asserts it, on a balance of probabilities.[22]

In the **United States**, the defendant (accused) must possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and he must have a rational as well as factual understanding of the proceedings against him.[23] The rule is that defendants who do not meet this standard may not be tried in court. However, they may be involuntarily detained for a "reasonable" period to ascertain whether they regain sufficient competency to be tried.[24] If there does not exist a substantial probability of regaining competency in the future, the state must either release the defendant or proceed under normal civil commitment rules.[25] In the past, deaf defendants in the United States were considered incompetent to stand trial because of their hearing impairments. This stemmed from the antiquated notion that deaf persons were of limited intelligence, and therefore fell under the same category as the mentally ill.[26] However, with the passage of time, the use of interpretation and society's increased understanding about the capabilities of deaf persons, have changed courts' views on whether or not a deaf person is competent

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19 See *S v Ebrahim* 1973 (1) SA 868 (A).

20 (2001) 148 CCC (3d) 475. Despite prior finding of fitness to stand trial, the accused displayed significant signs of mental illness at the trial, suggesting that he did not understand the purpose of the proceedings. The court found ample evidence before the trial judge to provide reasonable grounds to believe that the appellant was unfit to stand trial and particularly that he did not understand the nature or object of the proceedings. The court found that the trial judge should have directed that the issue of the appellant's fitness be tried.

21 This is similar to our law where an accused who is declared to be incapable of understanding the proceedings, may be tried for the offence later when he becomes capable or "fit" to stand trial. See Joubert (2001) *et al op cit* 203.

22 See s 672.32 of the Criminal Code.

23 See Frase "United States of America" in Weissbrodt and Wolfrum (1998) *op cit* 53.

24 This is similar to our law where the accused is sent to a psychiatric hospital for observation in terms of s 79 of the Act.

25 See Frase "United States" in Weissbrodt and Wolfrum (1998) *op cit* 53.

26 See Berko "Preserving the Sixth Amendment rights of the deaf criminal defendant" (1992) *Dickinson Law Review* 101 at 102,130. Berko argues that sign language is the only method of interpretation currently used in courts that preserves the deaf defendant's Sixth Amendment rights to be confronted by adverse witnesses and to effective assistance of counsel.

to stand trial.[27] The issue may still arise as only a few states have settled the question.[28] Nevertheless, many jurisdictions are sensitive to the deaf defendant's communication difficulties and are working towards a viable solution.[29]

The position in **Islamic law** is that if mental incapacity occurs at the same time as the crime, then the sanction is cancelled but the act is still regarded as a crime. The different schools of thought have different views on mental incapacity.[30] To illustrate this, if incapacity occurs after the commission of the crime but before sentencing is passed, then the trial is stopped, because no responsibility for the crime exists.[31] The Shafi and Hanbali schools of thought prescribe to the view that the judge should continue with the trial because responsibility is only acquired when the crime is committed. However, they do not accept the incompetent person's confession.[32] If the incapacity occurs after the sentence is passed, then the Shafi and Hanbali followers believe that the execution of the sentence should continue except in crimes with fixed penalties, when the sentence is based only on confession.[33]

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27 It was held in *Mothershead v King* 112 F 2d 1004, 1006 (8th Cir 1940), that to ensure constitutionally sound trials, courts must provide deaf defendants with a method of communication which enable the defendants to "hear" and understand the proceeding. This can be achieved through interpretative or non-interpretative methods of communication. See Berko *op cit* 103.

28 See, *inter alia*, *Belcher v Commonwealth* 117 SW 455, 456 (Ky 1915), where the court held that deafness is but one factor to be used in testing the defendant for fitness to stand trial. In *Singer v Florida* 109 So 2d 7, 30 (Fla 1959), it was held that a deaf person is no longer considered mentally ill and therefore may be required to stand trial. However, in *People v Lang* 391 NE 2d 350 (Ill 1979), the court questioned the deaf defendant's competency.

29 Berko *op cit* 103. Also see Sheridan "Accommodations for the hearing impaired in state courts" (1995) *Michigan Bar Journal* at 396-400, where he examines the problems that hearing impairment can pose in the courtroom setting and makes suggestions to overcome these problems. According to Sheridan, the inability to comprehend completely what is being said effectively excludes the deaf or hearing impaired from full participation in courtroom activities. Nevertheless, he states that the Americans with Disabilities Act provides the most clear cut and comprehensive mandate available for ensuring their access to the courtroom at no extra cost or burden to themselves.

30 It should be noted that the diversity of local practices in the Sunni Muslim world has given rise to many interpretations of Islamic law. Schools of thought have developed which are named after their leaders. The largest is the Hanafi school which is predominant in the Middle East and Central Asia, while the Shafi school of thought is prevalent in East Africa and South East Asia. The Maliki school operates in North Africa, and the Hanbali school operates mainly in Saudi Arabia. See Safwat "Crimes and punishments under various schools of Shariah: a comparative overview" in Mahmood *et al op cit* 56-61. It is noteworthy that the Muslims in South Africa tend to follow the Shafi school of thought in the Western Cape and certain parts of Gauteng, whilst the Hanafi school of thought is followed in KwaZulu-Natal and Gauteng.

31 This is the view of the Maliki and Hanafi schools of thought.

32 See Attia "Islamic countries" in Weissbrodt and Wolfrum (1998) *op cit* 355.

33 According to them, sanctions were legislated to punish the wrong-doer and to restrain others from committing similar crimes. Therefore, if punishment is stopped as a result of incapacity, inhibition is sufficient to justify the execution of the sentence. However, the Maliki and Hanafi schools of thought believe in stopping execution in this instance. *Id*.

Some Islamic jurists maintain that a deaf or dumb mute cannot be punished for *hadd* crimes.[34] If the mute person was capable of speaking, he might be able to raise doubts that negate the *hadd* punishment with the result that a lesser *ta'zir* punishment is imposed.[35] Such a person may not be able to use sign language to express his intentions. If the *hadd* punishment is administered under such circumstances, then justice will not be seen to be done because the *hadd* will have been administered in the presence of doubt.[36] Thus, Islamic law also exercises leniency in the case of deaf and dumb persons.

In the **United Kingdom**, mentally handicapped or disordered persons are given special rights when they are arrested and detained. The police is obliged to inform a "responsible adult" of the detention and request that person to come to the police station. The adult must be present before the mentally handicapped person can be interviewed.[37] Mentally handicapped persons who are tried for criminal offences can claim that they are unfit to plead. Such persons are dealt with by the mental health system rather than the criminal justice system. They can also plead "diminished responsibility" in cases of alleged murder.[38] Persons who are insane are entitled to a verdict of guilty. They are then subjected to a detention order issued by the court.[39] If an accused is found to be suffering from recognised levels of mental instability, he may receive an indeterminate sentence for the crimes. The accused will be confined to a secure hospital in terms of section 37 of the Mental Health Act 1983.[40] A mentally incompetent person is also unable to stand trial in **Germany**. The trial is suspended if the inability to stand trial is only temporary. However, the case is dismissed in instances where the accused is permanently unable to stand trial.[41] The court evaluates the accused's inability to stand trial. The court is assisted by medical experts in conducting this evaluation.[42]

In **Australia**, the position is that if it appears that the accused may be unfit to stand

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34 A *hadd* punishment refers to a fixed punishment without a minimum or maximum limit.

35 A *ta'zir* punishment refers to a discretionary punishment.

36 See Taha al-Alwani "Judiciary and rights of accused" in Mahmood *et al op cit* 274.

37 If the mentally handicapped person makes a confession in the absence of an independent person, then the magistrate or jury is obliged to exercise caution before convicting the person. See Dickson "The right to a fair trial in England and Wales" in Weissbrodt and Wolfrum (1998) *op cit* 506.

38 This means that they were suffering from an abnormality of mind that impaired their mental responsibility for their acts and omissions. This defence may reduce the crime to manslaughter if it is successful. *Ibid* at 506-507.

39 *Ibid* at 507. This is similar to our law where the accused is detained in a psychiatric hospital or prison in terms of ss 77 and 79 of the Act.

40 Cheney *et al op cit* 125.

41 See Samson "German criminal proceedings" in Weissbrodt and Wolfrum (1998) *op cit* 523.

42 This is similar to our law where psychiatrists are appointed to the enquiry to determine whether the accused is mentally ill in terms of s 79 of the Act. *Id*.

trial as a result of his mental state or for any other reason, this issue should be raised before the accused is required to plead.[43] The trial judge is entitled to determine whether a real question of fitness is present.[44] However, in the Australian Capital Territory, the issue of fitness is decided by the Mental Health Tribunal. Where the accused is found unfit to be tried, he may be detained in a psychiatric hospital and various procedures then apply depending on the particular jurisdiction.[45] If the accused subsequently becomes fit to stand trial, the matter should be determined again by a jury.[46]

Therefore, our law conforms with trends in foreign systems in that a mentally incompetent person is regarded as being unfit to be tried. Mental incapacity affects one's ability to comprehend and follow the criminal proceedings. The accused's presence at the trial is rendered ineffective if he is incapable of comprehending the proceedings. This renders the accused incapable of making a proper defence. Thus, the accused must be "present both in mind and body" for him to exercise his right to a fair trial.[47] Mentally handicapped persons are usually detained in a mental hospital, where an enquiry is held to evaluate their fitness to stand trial. If the accused becomes capable of understanding later on, he can be tried again.

## 6.3 THE ACCUSED'S RIGHT TO AN INTERPRETER

The topic of language rights in the judicial system concerns the choice of language proceedings and the right to address the court in the official language of one's

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43 See, *inter alia*, *R v Judge Martin*; *Ex Parte A-G* (Vic)[1993] VR 339 at 356 SC (VIC). It is irrelevant where the information regarding the accused's fitness originates: it could be raised by the court (see *R v Dashwood* [1943] KB 1 at 4; [1942] 2 All ER 586); or it could arise from observations of the accused during the trial (see *R v Khallouf* [1981] VR 360 at 364, SC (VIC)) or from the inappropriateness of the plea (see *R v Grant* [1975] WAR 163, where the Aboriginal accused was unable to understand the language and unable to communicate with the interpreter). Also see *R v Bradley* [No 2] (1986) 85 FLR 111 (NT Sup Court), where the accused had suffered substantial head injuries. This rendered him incapable of following the course of his trial or of instructing his lawyer. Therefore, he was found to be incapable of making a proper defence. Similarly, in **New Zealand**, it has been held that a trial would be unfair if the accused suffered from a disability preventing him from effectively defending himself. The accused's presence at the trial would be ineffective unless the accused was capable of comprehending what was taking place. See *R v Duval* [1995] 3 NZLR 202. Nevertheless, the court found on the facts that the accused was not suffering from a disability which would prevent him from entering a plea or facing a trial.

44 See *Pioch v Lauder* (1970) 13 ALR 266 at 271; SC (NT). The test of fitness is whether the accused has the ability to : (1) understand the nature of the charge; (2) plead to the charge and exercise the right to challenge; (3) understand the nature of the proceedings; (4) follow the course of the proceedings; (5) understand the substantial effect of any evidence that may be given in support of the prosecution case and (6) make his defence or answer to the charge. The jury may be sworn to determine the issue of fitness. Also see *R v Presser* [1958] VR 45; [1958] ALR 248 (Vic Sup Court), regarding what constitutes unfitness to plead.

45 See *inter alia*, *R v Jabanardi* (1983) 50 ALR 147 at 153; Fed Crt of Appeal; *R v Parker* (1990) 19 NSWLR 177; 47 A Crim R 281, CCA (NSW).

46 See *inter alia*, *R v Khallouf supra* at 365; *R v Forrester* (1982) 31 SASR 312 at 315.

47 See the position of the deaf and dumb person in this regard.

choice. It is therefore important to bear in mind the fundamental distinction between the right of a party or witness to obtain the services of an interpreter, which flows from the principles of fundamental justice, and the right of everyone appearing before a court to use the official language of his choice. The right to understand the proceedings has long been entrenched in South African law. Section 6(2) of the Magistrates' Courts Act 32 of 1944 imposes a duty on the court in criminal cases to request an interpreter at state expense if it appears that an accused does not understand the court language.[48] The High Court imposes a similar duty in terms of Rule 61(1) of the Uniform Rules of Court.[49] The state bears the costs of interpretation without any reference to the financial situation of the accused.[50] A similar position applies in international law.[51] The position is that an accused is not entitled to pay for the services of an interpreter where the guarantee of free assistance denotes a once and for all exemption.[52]

It is a fundamental principle of a fair trial that the accused must understand the proceedings at all times. Therefore, the presiding officer must ensure that the accused understands the language used by the witness. However, where the accused through his conduct leads the court to conclude that he understands the language being used, he will not easily after his conviction be able to claim a review on the ground of an irregularity because he did not understand the proceedings. This was held in *Geidel v Bosman, NO and Another*[53] where it was stated that a

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48 Section 6(2) provides as follows:

> "If in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the representative of the accused is conversant with the language used in evidence or not."

It is interesting to note that this subsection does not apply to civil proceedings.

49 Rule 61(1) of the Uniform Rules provides that where evidence in any proceedings is given in any language with which the court or a party or his representative is not sufficiently conversant, such evidence shall be interpreted by a competent interpreter, sworn to interpret faithfully and to the best of his ability in the language concerned.

50 See s 6(2) of the Magistrate's Courts Act 32 of 1944.

51 See art 14(3)(f) of the ICCPR and art 6(3)(e) of the ECHR respectively. Article 14(3)(f) of the ICCPR provides that every accused person has the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court". Article 6(3)(e) provides that an accused person must have the free assistance of an interpreter if he cannot understand or speak the language used in court. It is necessary that the accused should be able to understand the court language so that he can defend himself adequately.

52 See Leigh "ECHR" in Weissbrodt and Wolfrum (1998) *op cit* 665.

53 See *Geidel v Bosman supra* at 253. The accused contended that a gross irregularity had been committed in the proceedings in that the magistrate had failed to satisfy himself that the language in which the evidence was given was given in a language which the accused was conversant. It appeared that state evidence adduced against him was given in Afrikaans which is unknown to him and cannot be understood by him. Therefore, he contended that he was unable to understand the nature of the evidence and proceedings and was prejudiced in his defence in that

magistrate is merely required in terms of section 6(2) of Act 32 of 1944 to form an opinion that the accused is conversant with the language of the witness.

The presiding officer is obliged to appoint a competent interpreter in terms of section 6(2) of the Magistrates' Courts Act 32 of 1944. His failure to appoint a competent interpreter constitutes a serious irregularity, which will lead to the proceedings being set aside. This was held in the case of *S v Abrahams*[54] which dealt with a deaf mute. Similarly, the need for a competent interpreter was considered in *S v Mafu*[55] where the appeal court considered section 6(2) of Act 32 of 1944, and held that the failure to provide a competent interpreter amounted to a gross irregularity. The irregularity led to the appellant not being properly tried and this was *per se* a failure of justice. Thus, an accused's right to effective communication imposes a duty on the state to provide competent interpreters.[56] The presiding officer must also ensure that the interpretation meets the required constitutional standard.[57] It may be a violation of this constitutional duty to have inadequate control mechanisms in court.

The impact of section 6(2) was considered in *Ohannessian v Koen, NO and Another*[58] where the accused was an Armenian immigrant who had been resident in the country for 16 years. The court found that section 6(2) means that a duty rests on the judicial officer to apply his mind to, and form an opinion on, the question of whether the accused is sufficiently conversant with the language in which the

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he was unable to instruct his attorney regarding the cross-examination on the evidence. However, the court concluded that the magistrate acted reasonably and did not commit any irregularity. The court found that the wrong conclusion was due to the fault of the accused and his attorney in not informing the court of his ignorance of Afrikaans. The accused therefore failed to prove that there was any irregularity or gross irregularity in the proceedings.

54 1997 (2) SACR 47 (C). Although the accused was assisted by an interpreter who was conversant in sign language, the interpreter was not adequately conversant in Afrikaans which was the language of the court proceedings. Consequently, the interpreter experienced great difficulty in understanding the accused's evidence and translating it correctly. The interpreter also did not understand the probation officer's report which was in Afrikaans. The court therefore set aside the conviction and sentence as a result of the gross irregularity.

55 1978 (1) SA 454 (C). Both the magistrate and accused were dissatisfied with the manner in which the evidence had been interpreted during the trial. The appellant who did not understand Afrikaans, had complained to the prosecutor about the way the unofficial interpreter was interpreting the evidence during the trial. The magistrate also criticised the interpreter's interpretation.

56 See *S v Ndala* 1996 (2) SACR 218 (C).

57 See *S v Ngubane* 1995 (1) SACR 384 (T), which calls for high standards of interpretation. This means that the interpretation must be continuous, precise, impartial, competent and contemporaneous. The word "continuous" means that the interpretation should be given without interruption and not in the form of summaries. Interpretation occurs contemporaneously when dialogue is conveyed to the accused at the time it is given. This is not the same as simultaneous. Interpretation should be given after the person has spoken. The interpreter must translate the testimony to the accused and record the translation on the court's recording apparatus.

58 See *Ohannesian v Koen NO and Another supra* at 663. The accused was not sufficiently conversant with the English language in which evidence was given at the trial. The issue arose whether the magistrate should have allowed the trial to proceed without a competent interpreter to translate the evidence into the accused's language.

evidence is being given. The object of this section is to ensure that the accused knows and understands the evidence against him so that, having heard it, he can reply to it.[59]

Where the language used by the witness is not one of the official languages, an interpreter must translate the evidence. The interpreter must be sworn in either when he takes office, or at the commencement of the case in which he acts as an interpreter. If the interpreter is not sworn in, this amounts to an irregularity which may lead to the trial being aborted. This was held in *S v Naidoo*[60] where it appeared that the evidence of certain witnesses had been interpreted to the jury by a casual interpreter who had not been sworn in . The court held that the production of such unsworn testimony constituted an irregularity in the trial. Therefore, such testimony was found to be inadmissible. An accused's right to a fair trial is also infringed in terms of section 25(3)(i) when an interpreter is not properly appointed or sworn in.[61]

The general role of the interpreter was discussed in *S v Mabona*.[62] The court considered the evidence of an interpreter in respect of communications made to him personally and voluntarily in the absence of a magistrate by a detained person.[63] The court found that the role of an interpreter should be that of an impartial conveyer of the words of the maker of the statement and not the interrogator of him. However, the court held that if it could be proved beyond a reasonable doubt that a detainee voluntarily made a statement to the interpreter, then the contents of such statement was admissible in evidence against him.[64] The accused can apply to court to set aside the proceedings where there is a lack of or inadequate interpretation.[65] The Canadian Supreme Court suggested in *R v Tran*[66] that monetary damages could be awarded in appropriate circumstances. Proof of actual prejudice is not required because effective communication is one of the prerequisites of a fair trial.

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59 The court also stated that a judicial officer is not required under s 6(2) to call an interpreter if in his opinion, based on valid and cogent grounds, the accused is sufficiently conversant with the language in which the evidence is given as in this case. The accused's failure to show that any irregularity had been committed in the proceedings before the magistrate, led to the appeal and review summons being rendered unsuccessful.

60 1962 (2) SA 625 (A). This case involved an appeal from a murder trial.

61 See *S v Ndala supra*, where the interpreter had not being appointed as an official or casual interpreter, nor had he been sworn in. The court held that the "evidence" of someone who has not been duly sworn in or affirmed does not have the characteristics of evidence.

62 1973 (2) SA 614 (A).

63 The detainee had already made a statement to a magistrate.

64 The court also remarked that when a detainee makes a statement to a magistrate it is important that suitable questions be asked by the magistrate for purposes of clarity. This is done before the statement is made and taken down. If an interpreter obtains a supplementary statement from a detainee in the absence of the magistrate after a statement has been made to the magistrate, it is obvious that such practice could lead to abuse.

65 See, *inter alia*, *S v Mafu supra* at 454 and *S v Ngubane supra* at 384.

66 (1994) 117 DLR (4th) 7 (SCC).

The presiding officer has a responsibility to explain the accused's rights and their implications to the accused. He cannot delegate this responsibility to the interpreter in any way. This was held in *S v Mzo*[67] where the magistrate had delegated his responsibility to the interpreter to explain the accused's rights and their implications to the accused. There must be no room for doubt as to whether the accused has had an opportunity to understand and appreciate the seriousness of a charge and its consequences. This was held in *S v Yantolo*[68] where the court remarked that the accused must have time to arrive at a mature and unhurried decision on how to plead and to conduct his case. The court found *in casu* that the accused did not appear to have had a reasonable opportunity to weigh her position to seek advice if she wanted to do so and to come to a mature decision with full knowledge of the implication of the decision. Therefore, the court set aside the conviction and sentence.[69]

Thus, an accused is entitled to an interpreter when he does not understand the court language. An interpreter is usually appointed when requested by the accused. However, the court can refuse this request if it is convinced that the accused does understand the language of the proceedings and the request was not made in good faith.[70] Effective communication is a necessary part of a fair trial. Therefore, the court should not wait for the accused to complain about communication difficulties, but it should investigate the matter as soon as it becomes apparent that the accused is experiencing difficulties.[71] The Canadian Supreme Court held in *R v Tran*[72] that a court's failure to conduct an enquiry when there is "some positive indication" that the accused may not understand the proceedings, could result in a miscarriage of

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67 1980 (1) SA 538 (C). The court held that it is the magistrate's responsibility to decide how and to what extent he must explain the accused's rights and their implications. The interpreter's function is merely to convey this explanation to the accused in a language that the accused understands. Therefore, the magistrate commits an irregularity if he delegates his responsibility to the interpreter.

68 See *S v Yantolo supra* at 146. The accused was an illiterate female who was ignorant of court procedure. She had been arrested on a charge of dealing in dagga. In review proceedings before the High Court (then the Supreme Court), the state alleged *inter alia,* that when the accused was arraigned, she had requested that the case be concluded as soon as possible and that she did not require the services of a lawyer. The accused denied the allegations and claimed that she was confused throughout the proceedings. She also claimed that the proceedings were wrongly interpreted, as were her statements, through the interpreter to the court.

69 See 149H-150B. It should be noted that this case illustrates that the accused's right to understand the case impacts on his right to prepare and conduct the case.

70 This is similar to **Canadian** law, where the Canadian Supreme Court has held, that an accused who requests an interpreter should generally be provided with one, unless the accused's request has an oblique motive. The interpretation must also be contemporaneous and competent. See Roach and Friedland "Canada" in Weissbrodt and Wolfrum (1998) *op cit* 14. Also see *R v Tran supra*. This view regarding high standards of interpretation conforms with the findings in *S v Ngubane supra*.

71 This was held in *Mackessack and Others v Assistant Magistrate, Empangeni* 1963 (1) SA 892 (N); *Ohannessian v Koen supra*; *S v Xaba* 1996 (2) SACR 218 (CC) at 221g.

72 See *R v Tran supra* at 7.

justice. The court also remarked that the accused should be informed routinely of this right. This will prevent complaints being made by the accused regarding communication difficulties.

The Canadian Constitution expressly provides for the right to the assistance of an interpreter.[73] The following remarks made by the Supreme Court of Canada per Wilson J, when considering whether there is a right to be tried by a judge who understands the French language, are pertinent regarding section 14:

> "The right to an interpreter has usually being identified with the right to be present at trial. For example, in *AG v Ontario v Reale* [1975] 2 SCR 264, this court held that an accused, though physically present at his trial, was not present within the meaning of section 177(1) of the Criminal Code because he was unable to understand the language in which the proceedings were being conducted. It seems to me that the right to the assistance of an interpreter would extend to all cases where the right to be heard was either expressly or impliedly provided for by law and also to all cases where the rules of natural justice required that a hearing take place. For example in *Unterreiner v The Queen* (1980) 51 CCC (2d) 373, it was held that the absence of a competent interpreter amounted to a denial of natural justice serious enough to order a re-trial. These cases indicate that the
> ability to understand and be understood is a minimum requirement of due process."[74]

An accused is entitled to know, in detail and contemporaneously, what is taking place in the proceedings. This ensures compliance with the right to a fair trial,[75] and is also considered to be a principle of fundamental justice.[76] The onus of proof in establishing the need for an interpreter and in establishing a violation of the Charter rests on the accused. However, assistance should not be denied unless there is cogent or compelling evidence that an accused's request for an interpreter is not made in good faith, but for an oblique motive.[77] The English case of *R v Lee Kun*[78] is

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73 See s 14 of the Charter. Section 14 provides that a party or a 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. The right to an assistance of an interpreter is also related to Canadian society's claim to be multicultural. See s 27 of the Charter. Also see Steele "Court interpreters in Canadian criminal law" (1992) *Criminal Law Quarterly* 218 at 220, and Heller "Language bias in the criminal justice system" (1995) *Criminal Law Quarterly* 344-383.

74 See *Société des Acadiens du Nouveau-Brunswick Inc v Association 50 Branch supra* at 621-622.

75 See s 11(d) of the Charter.

76 See s 7 of the Charter.

77 See *R v Tran supra*. Also see *R v Petrovic* (1984) 41 CR (3d) 275 (Ont CA, Lacourciere) and *R v Tsang* (1985) 27 CCC (3d) 365 (BCCA) at 371. The Ontario and British Columbia Courts of Appeal have held, regarding s 14, that the trial judge should not reject an accused's request for an interpreter, unless there is "cogent and compelling evidence" that the request is not made in good faith. In *R v Kent, Sinclair and Gode* (1986) 27 CCC (3d) 405, the Manitoba Court of Appeal rejected one defendant's request for an interpreter on the basis that the transcript of a *voir dire* clearly indicated the defendant's ability to speak and understand English. According to Steele,

the leading case on the subject of court interpreters in Canada, where it was held that "presence" in court meant more than physical presence, it also included understanding of the proceedings.[79] The primary purpose for using an interpreter in criminal cases is to permit the accused to understand the proceedings, and if he wishes to present evidence, to make full answer and defence. This is because the right to full answer and defence is a cardinal feature of the criminal process.[80] An interpreter should be allowed unless the court is convinced that the applicant is able to understand the proceedings to the same degree as if those proceedings were conducted in the language in which the applicant has the greatest facility.[81] However, the use of an interpreter may be objected to on the ground that it is sought for a tactical advantage.[82]

However, the right protected by section 14, is not an absolute one, so that cross-examination of the party seeking such assistance as to his linguistic competence is not necessarily oppressive or vexatious to the point of rendering the exercise of the right illusory. If such cross-examination is allowed but it does not diminish his credibility, it cannot be said that his fundamental right to the assistance of an interpreter has been restricted.[83] Where an accused does not understand the

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an interpreter should be provided even without a request, if it becomes apparent to the trial judge that one is needed. Failure to do so may justify a new trial if the result is a miscarriage of justice. See *R v Tsang supra* at 371 (CCC). However, the trial judge is under no obligation to inform the accused of his right to an interpreter, nor is the judge required to enquire into the accused's capacity to understand the language of the court. See Steele *op cit* 236.

78 [1916] 1 KB 337 (CCA). Lee Kun was a native of China who did not speak or understand English. He was charged with murder. At the preliminary enquiry before the magistrate, the evidence was interpreted to him. However at his trial, his counsel did not request that the evidence be translated and it was not. The evidence at the trial did not differ from the evidence given before the magistrate. Accordingly, the leave to appeal was denied on the ground that even if the failure to interpret was an irregularity, there was no substantial miscarriage of justice.

79 See *Lee Kun supra* at 341-342 KB. The court also used a procedure whereby it could determine whether an accused was "fit to plead", that is, whether he could understand the proceedings against him. If the accused was found fit to plead, he might also be unable to communicate orally for example, in the cases of deafness, muteness or inability to speak the court's language. In these cases, the court had to ensure that appropriate means of communication were provided. However, Lord Reading found that no difficulty had arisen in practice in such cases, because the evidence was translated through an interpreter.

80 See Steele *op cit* 223-224, where Steele also examines the principles to be applied when an accused cannot communicate adequately in the language of the court, such as the provision of a state-funded interpreter for such an accused, and when the right applies.

81 *Ibid* at 227.

82 See *R v Burke* (1858) 8 Cox CC 44 (Ir CCA), where it was held that the use of an interpreter will lessen the force of cross-examination, and so should be granted only when the danger is minimal. Steele believes that this principle is unsound. Although the use of an interpreter will incidentally affect the force of cross-examination, that consideration should not outweigh true need. If an applicant seeks an interpreter strictly for the sake of tactical advantage, this means that he or she has no real need for one, and the court will deny the interpreter on that ground. See Steele *op cit* 227-228.

83 See *Roy v Hackett* (1987) 62 OR (2d) 365 CA Lacourciere JA.

language used by the witness, counsel, judge and jury, the interpreter is for the benefit of the accused and to enable him to understand the proceedings and what is being said about his actions, so that he may effectively instruct counsel.[84] Where the accused has willingly provided his own interpreter for that function, it may be that there is an implied waiver of any right to expect more of the court.[85] Where there are witnesses who testify in another language than that used in court, there is an additional reason for an interpreter: the need to ensure a fair trial through the witnesses being understood, and understood accurately, by the presiding officer. This need can be satisfied only by accurate interpretation of the testimony to the court. The accused or a witness cannot be heard afterwards to say that his right to an interpreter has been infringed, unless he asserts the right at the time the interpretation is needed. If he fails to assert this right, it has been held that there is not a waiver of the right but a failure to exercise it which bars him from asserting it later.[86]

A critical issue unaddressed by section 14 is whether the party or witness needing an interpreter must pay for the interpreter herself. At common law, an interpreter will be provided free of charge to an accused in a criminal trial.[87] It is arguable that s 14 of the Canadian Charter, even though it does not expressly require the provision of the services of an interpreter free of charge, may by implication require the state to pay for such services.[88] Support for this view may be found in a case interpreting the right of an accused to a bilingual trial in Alberta.[89]

However, the European Convention provides that the accused has a right to the free assistance of an interpreter.[90] In *Luedicke, Belkacem and Koç v Germany*[91] the European Court of Human Rights had to consider an accused's right to a free

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84 McDonald *Legal rights in the Canadian Charter of Rights and Freedoms* The Carswell Co Ltd (1989) 591.

85 *Id*.

86 See *R v Tsang supra* at 365.

87 See Steele *op cit* 234. According to Steele, the issue will be resolved along lines analogous to the issue of state-funded counsel.

88 McDonald *op cit* 592.

89 See *Paquette v R* [1986] 3 WWR 232 (Sinclair J).The court held that the accused had a right to have witnesses and counsel speak in French, and to a judge who could understand both official languages, but not to a jury who could do so. It was stated that the interpretation must be provided by the court.

90 See art 6(3)(e) in this regard.

91 28 Nov 1978 Series A No 29. Also see the case of Öztürk (1984) where the European Court decided that because of art 6(3)(e), interpretation fees could also not be charged in cases of ordinary Ordnungswidrigkeiten (administrative offences such as disregarding of traffic offences). The European Court decided that if the accused was exempted from interpretation costs in criminal proceedings, then this also had to be the case even though the offence was considered less criminal by the legislative and had been made subject only to administrative proceedings. See Gearty *European civil liberties and the European Convention on Human Rights: a comparative study* Martinus Nijhoff Publishers (1997) 161-163.

translation service. The court imposed an absolute duty on states to provide translation services free of charge. This duty applies to oral court proceedings and to documentary material and pre-trial proceedings.[92] Therefore in **Germany**, all the important statements in the trial must be translated word-for-word. This includes the indictment, applications, decisions and testimony. Restrictions or limitations are only made for the final submissions.[93] A similar position applies in the **United States**, where the accused also has a right to translation of the oral proceedings and written documents in the case such as the charges, statutes, plea agreements and pre-sentence investigation reports.[94] However, they are not entitled to a bilingual attorney.[95]

A different view was taken in *Kamasinski v Austria*.[96] The court stated that the duty does not entail a written translation of all items of written evidence or official documents in the procedure. The interpretation which was provided should enable the defendant to have knowledge of the case against him and to defend himself.[97] The court also noted in *Kamasinski* that a defendant who is not conversant with the court's language may be put at a disadvantage if he is not also provided with a written translation of the indictment in a language that he understands. However, the absence of a written translation does not amount to a violation of article 6(3)(e). It appears that one does not need to comprehend what is transpiring in the courtroom. The questions put to witnesses were not interpreted in *Kamasinski*. However, the court found that this did not establish a violation *per se* of article 6(3)(e). The state is responsible for providing an interpreter and ensuring accuracy. However, the accused could waive this right by not protesting against its inadequacy.[98]

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92 The latter is said to include questioning of an accused by the police and communications between an accused and his or her legal representative. See Steytler *Constitutional criminal procedure* 360. Also see *Akdogan v Germany* 11394/85 (Rep) July J, 1988, where the European Commission found a violation even where an applicant who was required to pay costs of interpretation after the conviction was covered by his legal insurance.

93 See Samson "German criminal proceedings" in Weissbrodt and Wolfrum (1998) *op cit* 524.

94 See Frase "USA". *Ibid* at 53-54.

95 *Id*.

96 (1991) 13 EHRR 36.

97 Steytler *Constitutional criminal procedure* 361.

98 This judgment is not as progressive as the approach of our courts. See, *inter alia*, *S v Ngubane supra*, where the court held that the accused has a fundamental right to a fair trial to be tried in a language that he understands. It was held that the accused was deprived of his right to a fair trial in terms of s 25 of the Interim Constitution, by having the proceedings interpreted for him in a language which he only partially understood. However, see *Brozicek v Italy* (1990) 12 EHRR 371, where the applicant who did not understand Italian, received notice of the accusations in Italian. The European Court held that the documents constituting an "accusation" within the meaning of art 6 should be provided to the applicant "in a language that he understands". The applicant had informed the competent judicial authorities of his lack of knowledge in Italian. It was their duty to observe the requirements of art 6(3)(a) unless they established that the applicant had sufficient knowledge of Italian to understand the purport of the communication. There was no such evidence before the court. Therefore, a breach of art 6(1)(c) together with 6(3)(a) was found.

The issue arose in *Harward v Norway* [99] whether the failure of Norway to provide written translations of all the documents used in the preparation of the trial, amounted to a violation of the accused's rights to a fair trial under article 14(1) and under article 14(3)(b). The United Nations Human Rights Committee noted *inter alia*, that article 14 does not contain an explicit right of an accused to have direct access to all documents used in the preparation of the trial against him in a language that he can understand. Nevertheless, it added that it is an important guarantee of a fair trial that the defence has an opportunity to familiarise itself with the documentary evidence against an accused. However, this does not entitle an accused who does not understand the language used in court to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to the accused or to his counsel.[100]

In the **United States**, the constitutional guarantees of due process and effective assistance of counsel require that interpreters be provided to accused whose mental and physical disability or limited ability to communicate in English, prevents them from fully understanding the proceedings against them.[101] The state and federal statutes also provide for the assistance of an interpreter.[102] Some state statutes require interpreters to be present at all preliminary court proceedings and interrogations. These statutes also require the arresting officers to obtain a qualified interpreter who can communicate with the defendant.[103] Interpreters are regarded as

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99 See *Harward v Norway supra* at 451/1991 (1994). The case concerned a British citizen, who was extradited from Spain to Norway on drug charges. Also see *Hayward v Sweden* 14106/88 (Dec) 6, 1991, where a British applicant tried in Sweden was unable to understand Swedish. He complained that all the documents were in Swedish. The Commission noted that his Swedish lawyer understood English and there was no indication that an interpreter was refused when requested.

100 Also see *Hill v Spain* Communications No 526/1993 UN Doc CCPR/C/59/D/526/1993 (1997), where the Committee noted that the accused was represented by a Norwegian lawyer of his choice who had access to the entire file, and who had used an interpreter during each of their meetings. Therefore, the lawyer had the opportunity to familiarise himself with the file, and inform the accused of the contents if he thought it was necessary. The Committee found that if the lawyer found the time available to prepare the defence to be inadequate to familiarise himself with the entire file, he could have requested a postponement of the trial, which he did not do.

101 Interpreters are also provided for deaf defendants during criminal proceedings. However, the use of an interpreter does not guarantee that the deaf defendant's trial will be equivalent to the trial of a hearing defendant. To illustrate this, the defendant may have to pay the extra costs of an interpreter. See Berko *op cit* 103-104. For a detailed discussion about the issue of interpreters with respect to the right to confront witnesses, see Berko *op cit* 115-118.

102 See Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 53. Also see Molvig "Overcoming the language barrier in court" 74 (2001) *Wisconsin Lawyer* 10, where the writer argues that qualified interpreters can help preserve the court's accountability and integrity of their records and, ultimately save court time and resources.

103 *Ibid* at 53. Also see Mehta "Translating justice" (1994) *Texas Bar Journal* 1004-1007, where the writer argues that the only way to attain a threshold of competence for court interpreters is to develop some form of certification process that accurately tests their skills and abilities. Also see Salimbene "Court interpreters: standards of practice and standards for training" (1997) *Cornell Journal of Law and Public Policy* 645-72. This article focusses on the training of interpreters, and argues that providing court interpreters who are trained in the standards of practice under the

assisting both the court and the defendants.[104] American courts have often wrestled with the question of using interpreters for its non-English speaking citizens.[105] State and federal trial courts are constitutionally and statutorily compelled to provide interpreter services where the defendant's lack of English proficiency interferes with the assertion of Sixth Amendment rights.[106] Thus, it has been argued that the Sixth Amendment should be construed as the source of a defendant's right to an interpreter.[107]

The United Nations Human Rights Committee has wrestled with the questions of whether and at what moment, an interpreter should be made available to a suspect or an accused. The case of *Griffin v Spain*[108] is a case in point. The Committee found

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appropriate college-level curriculum guidelines, will improve non-English speakers' access to justice.

104 See Morris "The gum syndrome: predicaments in court interpreting" (1999) *Forensic Linguistics* 6-29. The "gum syndrome" refers to two contrasting situations typical of the provision of court interpreting namely, the law views the interpreter as a mechanical instrument to be used entirely as the court sees fit. In the contrasting situation, defendants who have no command of the language relate to interpreters as their saviours. Morris discusses, *inter alia*, the following predicaments, namely, attempts by judicial figures to silence an interpreter, truculent attitudes on the defendant's part seeking to exploit the language situation, absence of proper interpretation, expressions of prejudice against the defendant, witness or interpreter by other participants in the proceedings. According to Morris, the predicaments that interpreters experience can generate a considerable amount of additional stress for the interpreter. This derives from the linguistic difficulties inherent in interlingual interpretation, but also from the diverse predicaments in which they find themselves. Changes in attitudes by the bench, bar and court administrators are required to improve court interpretation and raise standards of justice.

105 Also see Hench "What kind of hearing? Some thoughts on due process for the non-English speaking criminal defendant" (1999) *Thurgood Marshall Law Review* 251-278.

106 See Dery "Disinterring the 'good' and 'bad immigrant': a deconstruction of the state court interpreter laws for non-English speaking criminal defendants" (1997) *The University of Kansas Law Review* 837 at 842-843. The article contains a detailed discussion about state court interpreter laws for non-English speaking criminal defendants in the United States. Usually, the trial judge determines the extent to which a particular defendant is proficient in English. However, Dery believes that access to an interpreter is a *per se* a legal right that should be granted on demand rather than determined by the exercise of judicial discretion. Also see Grabau and Gibbons "Protecting the rights of linguistic minorities: challenges to court interpretation" 30 (1996) *New England Law Review* 227, for a detailed discussion about the common problems that trial court judges experience with court interpreters.

107 According to Dery, the Supreme Court should construe the appointment of an interpreter for non-English speaking defendants as a fundamental Sixth Amendment right made obligatory upon the states. An interpreter should be provided to any non-English speaking defendant on demand without judicial interference. Appointing an interpreter on demand may not overcome America's pervasive nativism (intense opposition to an internal minority on the grounds of its foreign or un-American connection), but it will protect the immigrant from the American justice system's English language hegemony. *Ibid* at 894-895.

108 No 493/1992 Communications No 493/1992 UN Document CCPR/C/53/D/493/1992 (1995). The case concerned a Canadian author, who did not speak Spanish. He had claimed a violation of art 9(2) of ICCPR because there was no interpreter present when he was arrested and he was therefore not informed of the reasons for his arrest. Article 9(2) provides that anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. This is similar to s 35(1)(b) of our Constitution.

that although no interpreter was present during the arrest, it is wholly unreasonable to argue that the author was unaware of the reasons for his arrest. The Committee also found that he was promptly informed in his own language of the charges held against him.[109] Accordingly, the Committee held in *Griffin* that the absence of an interpreter during the arrest did not amount to a denial of the accused's rights under article 9(2).[110]

**Islamic law** holds similar views on the need for competent interpreters. In Islamic law if one of the parties or both of them do not understand the court language, then they are entitled to an interpreter. Some jurists favour one interpreter, whilst others favour two interpreters.[111] The interpreters are required to satisfy the conditions of competence and good reputation in all instances.[112] It is also a fundamental principle that if one is to prepare an effective defence, it is necessary to acquire a complete understanding of the alleged crime and the evidence so that the charges can be refuted.[113] In **Germany**, the court also provides a translator. The defendant or accused pays the translator's fees where he has caused these costs culpably and unnecessarily.[114] The court chooses the translator. However, the accused is entitled to object to the translator where he suspects bias on the part of the translator.[115]

In **Australia**, it has been held that where an accused person is unable to adequately give evidence in the English language, the right to the use of an interpreter for the purpose of giving evidence must be regarded as an essential incident of a fair trial, and thus a trial will be unfair if an interpreter is not provided.[116] It will also be unfair if

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109 See De Zayas "UN Human rights treaties" in Weissbrodt and Wolfrum (1998) *op cit* 680-681.

110 The Committee also rejected a complaint regarding the incompetence of the interpreter provided by the Spanish court, because the accused did not refer to this issue before the judge at the trial, even though he could have done so. The accused's claim that faulty interpretation had deprived him of the opportunity of presenting evidence in his favour was also dismissed, because he was offered the opportunity to make a statement in his own language during the proceedings. Also see Weissbrodt (2001) *op cit* 131-132.

111 See Attia "Islamic countries" in Weissbrodt and Wolfrum (1998) *op cit* 356. Steele also favours using two interpreters at the hearing. This is referred to as "concurrent" control as it occurs at the same time as the interpretation, and the advantage is that it is likely to provide the "best" interpretation available. It has the advantage of better protecting the ability of the accused to understand and respond to the evidence. The one interpreter would interpret the evidence, while the other would provide any additional assistance required by the accused. However, objections have been lodged based on the possibility of significant costs such as money, delay and administration. Steele maintains that the delay will not be significant. See Steele *op cit* 243-244.

112 *Id*.

113 See Taha al-Alwani "Judiciary and the rights of the accused" in Mahmood *et al op cit* 276.

114 See Samson "German criminal proceedings" in Weissbrodt and Wolfrum (1998) *op cit* 524.

115 *Id*.

116 See *R v Saraya* (1993) 70 A Crim R 515 (NSW Ct of Crown Appeal). Also see *Ngatayi v The Queen* (1980) 147 CLR 1; 54 ALJR 401; 30 ALR 27 (HC), where the court held that where an accused does not understand the language in which the proceedings are conducted, his incapacity is removed if an interpreter is available. Also see Crouch "The way, the truth and the

the interpreter lacks the skill and ability to translate accurately the questions asked by counsel and the answers given by the accused person.[117] However, the Aboriginal people have been disadvantaged because of a lack of court-trained interpreters in Australia.[118] With the exception of the Anunga Rules and the Crimes Act 1914 (Cth), the situation of the Aboriginal people with regard to legal interpreting, is governed by general Australian law, under which there is no fundamental right to a legal interpreter.[119] It has also been held that the general proposition that a witness is entitled to give evidence in his native language is one that cannot be justified.[120] Therefore, in the Australian legal system, the Aborigines are in a literal and formal sense present at their trials, but through the exclusive use of a language foreign to them, they are effectively absent.[121] Nevertheless, attempts are being made to redress the imbalance.[122]

In **New Zealand**, the need for a defendant to be provided with an interpreter in order to be given a fair trial, was explicitly recognised by the New Zealand courts in 1888, although it was regarded as a legal requirement.[123] However, the touchstone case

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right to interpreters in court" (1985) *Law Institute Journal* 687-691.

117 See *R v Saraya supra*.

118 Also see Mildren "Redressing the imbalance: Aboriginal people in the criminal justice system" (1999) *Forensic Linguistics* 137-160, where the writer discusses how people involved in the criminal justice system in the Northern Territory of Australia are disadvantaged because of the lack of court-trained interpreters, and because of cultural difficulties which affect their ability to understand and be understood. The article also examines efforts made to establish an Aboriginal Languages Interpreter Service, and to establish methods which can be employed by the courts to reduce the effect of these difficulties in the investigative and trial processes. Also see Pether "Comment: 'We say the law is too important just to get one kid': refusing the challenge of *Ebatarinjar v Deland and Ors*" (1999) *Sydney Law Review* 114, where the writer considers a recent High Court decision on the question whether a deaf, mute and illiterate Aborigine defendant can be the subject of committal proceedings which he cannot understand or follow. The article is critical of the High Court's decision that the defendant could not be subject to committal proceedings. The decision also raises questions about the persisting conflicts between Aborigines and an Australian legal system.

119 The Anunga Rules refers to the case of *R v Anunga* (1976) 11 ALR 412, where rules were laid down establishing judicial guidelines for the use of interpreters for Aboriginal people in police interviews. Also see Goldflam "'Silence in court!' Problems and prospects in Aboriginal legal interpreting" (1997) *Australian Journal of Law and Society* 17 at 21.

120 See *Dairy Farmers Co-operative v Acquilina* (1963) 109 CLR 458 at 464. Rather, the matter is one for the discretion of the court. See *Filios v Morland* [1963] SR NSW 331.

121 In South Africa, the interpreter is regularly used by the state to "facilitate the expeditious completion of cases" on its behalf. See Steytler "Implementing language rights in court: the role of the court interpreter" (1993) *South African Journal on Human Rights* 205 at 208. However, in Australia, the Aboriginal interpreter is rarely used to expedite the completion of cases, as there is general agreement that their use in court would generally slow down, complicate and increase the cost of proceedings. See Goldflam *op cit* 34-38.

122 See Mildren *op cit* 137-160.

123 This was held in the case of *R v Fong Chong* [1888] 6 NZLR 374. See Lane *et al* "The right to interpreting and translation services in New Zealand courts" (1999) *Forensic Linguistics* 115 at 120.

establishing the common-law right of criminal defendants to interpreters is also the English case of *R v Lee Kun*.[124] Section 24(g) of the New Zealand Bill of Rights Act 1990 grants everyone who is charged with an offence the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court.[125] The right to the assistance of an interpreter has been described as a flexible one which depended on the circumstances, in the light of the overall need to ensure that the accused received a fair trial. It was necessary to ensure the accused understood the proceedings, was able to instruct counsel fully and prepare a defence.[126] Therefore, a denial of the services of an interpreter is regarded as a denial of a right to a fair hearing.[127] Interpreters are also required to maintain high standards of professional conduct and ethics to ensure that the accused has a fair

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124 See *R v Lee Kun supra* at 337. The court stated that "no trial for felony can be had except in the presence of the accused ... The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings". Also see Lane *op cit* 121.

125 Section 24 of the New Zealand Bill of Rights provides that "everyone who is charged with an offence ... (g) shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in court." Also see arts 7 and 10 of the Universal Declaration of Human Rights, which guarantees equality before the law, regardless of the language of the individual. Also see Burns "Court interpreters" (2001) *New Zealand Law Journal* at 475, where she argues that as a result of changes in New Zealand society, there is a need for an increased awareness by lawyers and other legal service providers of the need for qualified interpreters, the process of interpretation, and the risk of misunderstanding because of cultural and linguistic differences.

126 See *Alwen Industries Ltd v Collector of Customs* [1996] 3 NZLR 226, which concerned an application for an order that trial documents be translated. The applicant could not communicate with his solicitors in English and at all times required the assistance of translation. The court held that s 24(g) of the New Zealand Bill of Rights Act 1990, required that extensive written briefs of evidence be translated, at the cost of the court, for a defendant who understood Chinese ('Mandarin or Cantonese') but not English. The court was responsible for providing the translation and meeting the costs of translation, and therefore it granted the application. Therefore, the right was interpreted as being a general one, which is triggered when a person is unable to speak or understand the language used in court. The word "interpreter" was held to be broad and inclusive, not limited to only contemporaneous oral translation in court.

127 See *R v Cooper DC Whangarei* T63/96, 3/6/97 [1997], where the court held that the defendant, who was a native speaker of Maori, had a right to a Maori-English interpreter, even though he had used English in prior proceedings, and had not given prior notice of his wish to speak Maori, on the basis of s 4 of the Maori Language Act 1987 and s 24(g) of the New Zealand Bill of Rights Act 1990. The learned judge made the following pertinent remarks:

> "It is not sufficient that an accused has some understanding and ability to speak the language used in court: they must be able to understand and speak it sufficiently well to be able to obtain ..., and enjoy and exercise all their rights in the proceedings to the best of their abilities. Unless they have that level of understanding and speaking ability, to deny them the services of an interpreter would be to deny or unreasonably derogate from the pivotal right to a fair hearing (s 25(a)) and would be a failure to observe the principles of natural justice (s 26(1))."

trial, and that the rules of natural justice are observed.[128]

It is a fundamental requirement of a fair trial that an accused should be furnished with the assistance of an interpreter to facilitate his understanding and comprehension of the court proceedings. Thus, the presiding officer has to ensure that evidence is given in a language with which the accused is conversant. If he is not, the presiding officer is obliged to call a competent interpreter to translate the evidence into a language with which the accused is sufficiently conversant. The court is obliged to appoint a competent interpreter to safeguard the accused's right to effective communication.[129] Similarly, the interpretation must be of a high standard.[130] Any failure by the court, will constitute a serious irregularity, and will lead to the proceedings being set aside. A competent interpreter must be provided even if the accused has a legal representative who understands the language concerned. Therefore, the fact that the accused is represented is immaterial.[131] An interpreter's task is to translate accurately, comprehensively, and without bias, all communications in court to a language which the accused can understand. The interpreter's role is therefore, to facilitate communication where one party is not conversant in the court language. He should deliver an expert service and assume a neutral position in the contest between the parties.[132] To this end, a good interpreter must have the ability to translate faithfully without adding to the questions asked or the answers given. He must be completely impartial, and take no personal interest in the outcome of the case and remain unaffected by anything he sees or hears.[133] Any bias on the part of the interpreter will also lead to an irregularity in the proceedings. Similarly, a presiding officer may not delegate his responsibility to explain the accused's rights to the interpreter, as this is not the interpreter's function.[134] However, an accused cannot request an interpreter to gain a tactical advantage. The court will deny such request, unless the accused establishes a real need for one.[135]

## 6.4 THE RIGHT TO BE TRIED IN THE LANGUAGE THAT ONE

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128 In *R v Mitchell* [1970] Crim LR 153, the accused was charged with assaulting the proprietor of a Chinese restaurant. The interpreter was a waiter from the restaurant. It was held that the interpreter must be impartial and the conviction was squashed. Also see Burns *op cit* 476.

129 See *S v Ndala supra*.

130 See *S v Ngubane supra*.

131 See *Mackessack v Assistant Magistrate, Empangeni supra* at 893.

132 See Steytler (*SAJHR*) *op cit* 206.

133 *Ibid* at 219-220. According to Burns, interpreting is a very complex and skilled process in that an interpreter must maintain a delicate balance between the need to convey nuances of meaning in the testimony of a witness – social and cultural implications that were often left unsaid in the original tongue – with a duty to avoid embellishment, editing or siding with the witness. This places a heavy burden on the interpreter as only his version is recorded in court. See Burns *op cit* 476.

134 See *S v Mzo supra*.

135 See s 6(2) of the Act 32 of 1944.

**UNDERSTANDS**[136]

An accused's right to communicate effectively in court is protected in the Constitution. However, the Constitution contains no general provision which refers to the languages of record, unlike the Interim Constitution.[137] The communication provisions in the Constitution should be considered in the context of the language rights contained in the Constitution. In a multi-racial country such as ours, where many people speak different languages, it is important that the accused understands the language in use.[138] The use of a particular official language will be dependant on usage, practicality, expense, regional circumstances and the needs and preferences of the population in a particular province.[139] The government may also not select only one official language. However, the court expressed the view that one official language should be adopted which could be used extensively for the purpose of court proceedings, irrespective of the mother tongue of the court officials in *S v Matomela*.[140] In this case, the criminal trial was conducted and recorded in an indigenous language (Xhosa) in which the accused, complainant and presiding officer were all conversant. No interpreter was also available to interpret at the trial. The court found that such course was justified in the circumstances of the case by reason of necessity.

The accused has a fundamental right to a fair trial to be tried in a language which he

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136 It should be noted that this section addresses the accused's right to be tried in court in the language of his choice. This section can thus be distinguished from the previous section (s 6.3) which dealt with the accused's right to an interpreter *per se*.

137 Section 107(2) of the Interim Constitution provided that the official languages were languages of record but this provision was subject to two qualifications namely, that Parliament could designate which official language should be used for the functioning of government on the basis of usage, practicality and expense (see s 3(8) of the Interim Constitution) and Parliament could not diminish the status of existing languages of record such as English and Afrikaans. See Steytler *Constitutional criminal procedure* 359.

138 There are eleven official languages. However, the national government is not obliged to use all eleven languages when conducting its affairs.

139 See s 6(3) of the Constitution. Also see Sachs "The language question in a rainbow nation: the South African experience" (1997) *The Dalhousie Law Journal* 5-16. For a perspective on the American position, see Cole *et al* "The role of counsel and the courts in addressing foreign language and cultural barriers at different stages of a criminal proceeding" (1997) *Western New England Law Review* 193-228, where the learned writer addresses the difficult challenges facing US courts administering to the legal needs of those participants with language or cultural barriers.

140 1998 (3) BCLR 339 (Ck). The court's remarks on the practicality of conducting court proceedings in indigenous languages is pertinent. Any official language may be used to try an accused. The court remarked that the conduct of court proceedings in indigenous languages will entail inconvenience, delay and the additional expense of translating the record, when the proceedings become subject to an appeal or review. Therefore, the court expressed the view that one official language should be adopted as the only language to be used in court proceedings. According to De Waal *et al*, it is difficult to see why this should be so, if the appeal or review is handled by a judge conversant in the language of the trial. See De Waal *et al op cit* 558.

understands.[141] The court held in *S v Ngubane*[142] that the accused had been deprived of his fundamental right to a fair trial in terms of section 25(3)(i) of the Interim Constitution by not having had the proceedings simultaneously interpreted for him in a language which he fully understood. The proceedings were therefore set aside. The court also found that the interpretation must be given in a language which the accused fully understands and not into a language which he understands partially.

Section 35(4) of the Constitution provides that whenever section 35 requires information to be given to a person, it must be given in a language that the person understands.[143] This also applies when a summons or an indictment is served on an accused outside the courtroom setting. Where the accused is represented, communication is effective if the defence lawyer understands the language of the documents.[144] Where the accused is notified in court, then the right to an interpreter caters for the situation. A charge sheet
does not require to be translated into a language other than a court language if it has been interpreted competently to the accused.[145]

Section 35(3)(k) of the Constitution provides that an accused has the right to be tried in a language that the accused understands or, if that is not practicable, to have the proceedings interpreted in that language. Section 35(3)(k) therefore has two distinct rights namely, the right to be tried in a "language that the accused understands" and the right to have the proceedings interpreted in a language that the accused understands. The first right means that an accused has the right to have the proceedings conducted in a language that he understands. This right applies when the accused cannot understand the languages in which the court usually conducts its

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141 This right to a fair trial is found in s 25(3)(i) of the Interim Constitution, which provides that an accused has a right to be tried in a language which he understands or failing this, to have the proceedings interpreted to him. This is similar to art 6(3)(a) of the ECHR which provides that an accused person must be informed "in a language which he understands" of the charge against him.

142 See *S v Ngubane supra* at 384. The accused who was Zulu-speaking had the proceedings translated for him by an interpreter who was not fluent in Zulu.

143 Section 35(2)(a) provides that everyone who is detained, including every sentenced prisoner has the right to be informed promptly of the reason for being detained. This must be done in a language that he understands. This language requirement also applies to s 35(1)(b) of the Constitution. The latter section provides that an arrestee has the right to be informed promptly of his right to remain silent and of the consequences of not remaining silent. Also see art 14(3)(a) of the ICCPR, which provides that every accused person has the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him. The accused's rights to cross-examination also includes the right to give evidence and cross-examination in the language of his choice, irrespective of his apparent race. See *S v Leseana* 1993 (2) SACR 264 (T). Therefore, the right to understand is linked to the right to information, the right to be prepared and the right to present one's case.

144 Steytler *Constitutional criminal procedure* 230. This is in stark contrast to s 6(2) of Act 32 of 1944 which provides that a competent interpreter must be appointed to translate the language of the court proceedings even if the accused's legal representative understands the language.

145 *Id*. Also see *Kamasinski v Austria supra*.

proceedings. According to Steytler, this right contains two important qualifications, namely, the right relates to a language that the accused understands and not prefers.[146] In *Mthethwa v De Bruin NO*[147] the court stated that section 35(3)(k) of the Constitution, does not give the accused the right to have a trial conducted in the language of his choice. The section merely confers a right to be tried in a language which he understands or to have the proceedings interpreted into such a language. Therefore, section 35(3)(k) refers to the accused exercising a communication right and not a language right.

Secondly, the court may comply with the duty to conduct the proceedings in the language which an accused understands only if it can reasonably be executed in practice. However, where the language the accused understands is not one of the designated languages of record, it would not be practicable to do so. It is necessary to conduct proceedings in the designated languages of record to facilitate the sound administration of justice.[148] The accused is entitled to an interpreter where it is not "practicable" to conduct the proceedings in the language which the accused understands, that is in a language other than a designated court language. However, the accused must actually require such an interpretation and the interpretation must be of a high standard. This right applies to all trial proceedings. The interpretation of the word "language" also refers to sign language.[149]

The question arises whether the right "to be tried in a language that the accused understands" means that the accused is only entitled to an interpreter during court proceedings. It would appear that pre-trial investigative procedures are excluded from the ambit of this right. However, section 35(4) applies where information must be given to an accused during this phase.[150] The right applies to all communications during court proceedings. In *R v Tran*[151] the Canadian Supreme Court limited the right to communications that involve a "vital interest" of an accused. Steytler questions whether this limitation is justified.[152] It is not only important that the

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146 Steytler *Constitutional criminal procedure* 362.

147 1998 (3) BCLR 336 (N).

148 Afrikaans and English are presently the designated languages of record. Court personnel are also trained in the various languages and proceedings recorded for purposes, *inter alia*, of appeal and review.

149 See s 6(5)(a)(iii) of the Constitution and *S v Abrahams supra* at 47. Section 35(3)(k) is similar to s 14 of the Canadian Charter. It is also noteworthy that s 14 of the Canadian Charter specifically refers to the right of deaf persons to have the assistance of an interpreter. Section 14 is said to go beyond art 14(3)(f) of the ICCPR. Refer to art 14(3)(f) in this regard.

150 Section 35(4) provides that such "information must be given in a language that the accused understands". This can be compared to the US position where some state statutes require interpreters to be present at all preliminary court proceedings and interrogations.

151 See *R v Tran supra* at 7. The Canadian Supreme Court held that accused persons must hear the case against them, understand the evidence at trial, and have the opportunity to answer it. Therefore, translations must be of a high standard so that an accused is able to participate effectively. Waiver of this right will be difficult to prove by the prosecution.

152 Steytler *Constitutional criminal procedure* 364.

accused has effective communication to enable the accused to understand the course of the proceedings, but also that the accused regards the trial as being fair by being aware of what is happening including all communications on collateral issues. The failure to interpret such issues can be regarded as a violation. However, this will not necessarily lead to the setting aside of the proceedings.[153]

The detainee should be informed of the reason for the detention in a simple and non-technical language which the detainee can understand. The issue arises whether what the accused was told was viewed reasonably in the circumstances of the case, and whether it was sufficient to allow him to make a reasonable decision to decline to submit to the arrest or to exercise his right to counsel.[154] The detainee should ideally be informed in a language which he understands.[155] The case of *Naidenhov v Minister of Home Affairs*[156] is a case in point. It concerned a Bulgarian national who was detained as an illegal immigrant. The court held that section 25(1)(a) of the Interim Constitution did not require that a detainee should be informed in his native language, but only in a language which he understood. It held further that although his knowledge was limited, he understood enough to communicate in it. The same requirement applies where the mother tongue of the detainee is an official language. The detainee is said to be exercising a right to information and not a language right.

Therefore, the detainee's right to be informed of the right to a lawyer should be conveyed in such a way that the detainee will be able to understand the right and know how to exercise it. However, the information should not be given in an official language of a detainee's choice, only in a language which he or she understands even if it is imperfect.[157] Where it is clear that a detainee has difficulty in understanding the right, the police should take additional steps to ensure that the right is adequately communicated which may often be the case with juveniles.[158]

A somewhat differing view was held in *S v Pienaar*[159] where the court considered the

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153 *Ibid* at 365.

154 *Ibid* at 153. Also see *R v Evans supra* at 303.

155 This provision applies to the whole of s 35.

156 See *Naidenhov v Minister of Home Affairs supra* at 891. This case is authority for the proposition that whenever the accused must be informed of some or other right in s 35, the information must be given in a language that he understands. The court rejected the contention that the reasons for detention should have been given in Bulgarian. The court also found no allegation in the papers that the applicant at any stage indicated to those who dealt with him that he could not properly understand or communicate with them. He also never called for or insisted on the services of an interpreter. *Ibid* at 898I - 899B.

157 *Id*.

158 See *S v Melani supra*.

159 2000 (7) BCLR 800 (NC). Section 35(3)(g) provides that an accused person has the right to have a legal practitioner assigned to him at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. In this case the Afrikaans-speaking accused was assisted by legal aid board, which assigned to him a public defender who was English-speaking. The public defender was unable to communicate with the accused in Afrikaans. No steps were

ambit of the right contained in section 35(3)(g). The court held that the right contained in section 35(3)(g) embraces the right to be assigned a legal practitioner who can communicate with the accused in the accused's own language of choice, either directly or through the medium of an interpreter. Thus, the *Pienaar* case, established that an Afrikaans-speaking accused in the Northern Cape had a right to be tried in Afrikaans.[160] This basic right was extended to include the right to be represented by an attorney with whom he could communicate in Afrikaans.[161] The court in *Pienaar* also referred to section 6(1) and section 35(3)(k) of the Constitution as a basis for the right of an accused to be tried in his own language. This would mean that every endeavour should be made to conduct a particular trial in the accused's mother tongue. The court then extended this to cover the situation of the provision of a legal representative who can communicate directly with accused persons in their respective mother tongues. According to Cowling, the court's decision raises a number of fundamental issues such as the question of practicality when it comes to the use of indigenous languages in the courts, and the right of an accused to be represented by a legal representative with whom the accused can communicate in his own language.[162]

The view of the court in the *Pienaar* case regarding the rights of linguistic minorities, differs from the courts' findings in *Guesdon v France*[163] and in *Yves Cadoret and*

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taken at the trial to obtain an interpreter. The accused elected to conduct his own defence without the assistance of the public defender. The court held that such election did not amount to an effective waiver of the right contained in s 35(3)(g). The court held that the accused had a right to a fair trial which included the right to be tried in Afrikaans. The magistrate had a duty to ensure that these rights had been properly explained to the accused.

160 The court also referred to *S v Matomela supra*, which held that consideration should be given to adopting one official language as the language of court proceedings and found it to be unacceptable. It found that the freedom of choice was meaningless in the absence of a duty resting on the state to take positive steps to implement language guarantees. The court also considered the dangers of interpretation. It found that where it was necessary to interpret proceedings into another language, the duration of the trial would be doubled. This had implications for both costs and the expeditious disposal of criminal cases. Interpretation also entailed the danger that evidence would not be accurately rendered. Interpreted evidence also lost precision of meaning where it was not interpreted correctly. There was also the danger that although evidence and judgments would be interpreted, argument was not interpreted.

161 The court referred to the Canadian case of *R v Beaulac* 1999 (1) SCR 768, where the court held that the language rights within the context of a criminal trial were not a procedural matter but an absolute right. Thus, they were directly linked to the fundamental right of liberty. Therefore the court concluded that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognising the rights of official language communities. The court in *Pienaar* adopted the Canadian approach to languages and concluded that language rights were fundamental rights linked to the principle of human dignity.

162 Cowling maintains that something more is required than that the accused's assertion that he cannot understand his attorney before it can be held that an accused had been denied a fair trial. See Cowling "Criminal procedure: recent cases" (2000) *South African Journal of Criminal Justice* 372-378, for a more detailed discussion of the *Pienaar* case.

163 Communications No 219/1986 UN Doc A/45/40 vol 2 at 61 (1990). The case concerned a French citizen, whose mother tongue was Breton, who was charged with defacing road signs in French. He was tried in a French court. He requested that the court allow him and his witnesses to give their testimony in Breton.

*Hervé Le Bihan v France*[164] respectively. Article 14(3)(f) right is said to be independent of the outcome of the proceedings and must be available to both aliens and nationals. This right is important in cases where the ignorance of the court's language or difficulty in understanding the language used could constitute a serious obstacle to the right of defence.[165] The court in *Guesdon* denied the accused's request for an interpreter and his right to speak in Breton, and conducted the trial in French.[166] The Committee noted that article 14(1) ensures procedural equality and the equality of arms in criminal proceedings. However, it found that this does not prevent a state from using one official court language. This provision does not entitle a state to provide for an interpreter for a citizen, whose mother tongue differs from the official court language. The state is obliged to provide an interpreter under article 14(3)(f) if the accused or the defence witnesses have difficulty understanding or expressing themselves in the court language. Therefore, the court concluded that denying the accused the right to speak in Breton, when he understood and spoke French, did not violate his right to a fair trial or his rights under article 14(3)(f).[167]

Similarly, in *Yves Cadoret v France*, the HRC found no violation of article 14(3)(f) of the ICCPR, when members of the Breton minority, who are completely fluent in French, demanded interpreters in court, claiming that they understood Breton better than French.[168] The Committee held that the right to an interpreter does not grant linguistic minorities the right to conduct the proceedings in the language of their choice.[169] It held further that if members of linguistic minorities or aliens are sufficiently proficient in the official court language they do not have the right to free assistance of an interpreter. This view seems to conform with the viewpoints held in *Naidenhov* and *Matomela*. However, the *Pienaar* case may be distinguished from the *Guesdon* and *Yves* cases in that there was no indication in *Pienaar* that the Afrikaans-speaking accused was fluent in English, whilst in the *Guesdon* and *Yves* cases, the accused were fluent in French.

In **Canada**, section 133 of the Constitution Act 1867, governs the use of official languages in the courts.[170] The nature of the rights conferred by section 133 raises many difficult issues. French or English may be used in all communications, oral or

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164 Official Records of the General Assembly, Supplement 40 (A/46/40), Nos 221/1987 and 323/1988.

165 See Weissbrodt (2001) *op cit* 131.

166 This was because the accused could express himself in French and his witnesses also understood and spoke French, although they preferred to speak in Breton. The accused alleged that denying him the right to express himself in his mother tongue, violated his right to a fair trial.

167 Also see *Barzhig v France Communications* No 327/1998 UN Doc A/46/40 at 262 (1991).

168 See De Zayas "UN Human Rights treaties" in Weissbrodt and Wolfrum (1998) *op cit* 687.

169 Steytler *Constitutional criminal procedure* 360.

170 It states, *inter alia*, ... and either of those languages (English or French) may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

written, by the parties or by the court.[171] However, it is unclear whether the right extends to pre-trial procedures or preliminary hearings. The Supreme Court of Canada recently decided that documents served on the parties, such as summons, may be used in only one official language, even where the language is not the language spoken by the party being served. It also held that the right to use the official language of one's choice does not include the right to appear before a judge who can understand that language without the aid of an interpreter.[172] Thus, it clear that section 133 does not create two distinct rules
for legal proceedings, and that the choice of language it provides is available to parties, witnesses, judges and court officials.[173]

The rules of procedure are bilingual in order to give effect to the basic right to address a court in the official language of one's choice.[174] The court will also provide translations of any documents in the other language, unless it considers that the ends of justice do not require the expense of translation.[175] Section 13(1) of the Official Languages of New Brunswick Act provides that a witness or an accused has the right to be heard in the official language of his choice without being placed at any disadvantage. The fundamental principles guaranteeing the right to a fair trial and to natural justice, also favour a broad interpretation of any right arising "at the trial".[176] The main purpose of the right in question is to enable the litigant to know exactly what is being alleged against him. Therefore, it would be pointless to grant the right to use either French or English at the trial, but to deny the right at the preliminary hearing.[177]

The principle of fundamental justice is generally equated with procedural fairness in

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171 It is a right enjoyed by corporations as well as by physical persons. See *AG v Quebec v Blaikie* (No 1) [1979] 2 SCR 1019.

172 See, *inter alia*, *MacDonald v City of Montréal* [1986] 1 SCR 460, *Bilodeau v AG Manitoba* [1986] 1 SCR 449.

173 However, the question arises whether the phrase "in or arising from any court" limits the application of s 133 to the trial itself and excludes all pre-trial proceedings. See *inter alia*, *MacDonald v City of Montréal* at 485. In this case, the Supreme Court of Canada, also drew a distinction between the right to use the language of one's choice, which is recognised by s 133, and the right to be understood in that language by the court which is not governed by any constitutional language guarantee.

174 This is supported by s 136(4) of the Courts of Justice Act, 1984 which ensures that the court will provide at the request of the party or legal representative who is not bilingual a translation of anything given orally in the other language. See Bastarache *et al Language rights in Canada* Les Editions Yvon Blais Inc (1987) 119-172, at 127.

175 *Id*.

176 See ss 7 and 11(a) of the Charter. Also see, *inter alia*, *R v Côte supra* at 13.

177 To do so would not only violate the spirit of s 133 and be inconsistent with its objects, but also be contrary to common sense in view of the use that is being made at the trial of the testimony of witnesses given at the preliminary hearing. See Bastarache *et al op cit* 128.

the judicial system.[178] The question whether the definition of fundamental justice includes within it the language of the proceedings, has received some support in cases where the inability of a party to understand the proceedings at the trial has been equated with being physically absent from the court.[179] It has been held that the fact that a party or witness understands English but chooses to testify in French, his mother tongue, ought not to lead the trial judge to cast doubt on their credibility.[180] A party has an unqualified right to choose the official language he will use before the court, whatever his mother tongue.[181] If he chooses a language which the judge does not understand, he will have the right to an interpreter under section 14 of the Canadian Charter, to ensure that he will be understood. The right to address the court in the official language of one's choice in terms of section 19 of the Charter is available to "every person". It follows that a Francophone lawyer representing an Anglophone accused would be entitled to plead in French and to obtain the services of an interpreter in order to be understood by the judge.[182] Thus, it seems that every person is entitled to address the court in the language of his choice.[183] However, section 20(1) of the Charter and Part IV of the Official Languages Act do not require

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178 It includes the right to know in full the charge being made, the right to a speedy trial properly conducted, the right to make a full answer and defence, the right to cross-examine witnesses, the right to be present at the trial etc.

179 See *R v Lee Kun supra*. In *AG Ontario v Reale supra* at 909 (Ont CA); aff'd, [1975] 2 SCR 624), the Ontario Court of Appeal considered that the inability of the accused to understand the proceedings constituted a breach of the principle of equality before the law. It is noteworthy that the right to the services of an interpreter has become part of the right to a fair trial. Section 10(c) of the Charter requires that an accused be informed without delay of the reasons for his arrest and detention. This implies that the right to the services of an interpreter, guaranteed by s 14, arises before trial. Thus, the right to obtain the assistance of an interpreter flows from the right of an accused to make full answer and defence.

180 See *Serrurier v The City of Ottawa* (1983) 420 R (2d) 321 (Ont CA). Similar observations were made by the Saskatchewan Court of Appeal in *Mercure v The Attorney General of Saskatchewan* Saskatchewan CA (Oct 28 1985) at 33, where the court stated that the litigant had neither the right nor the power to require the state to provide him with a bilingual court.

181 See Bastarache *et al op cit* 136.

182 However, see *Société des Acadiens da Nouveau Brunswick v Minority Language School Board No 50 and Association of Parents for Fairness in Education supra* at 549, where the Supreme Court held that the right to address the court in a given language must be distinguished from the right to be understood in that language.

183 This right stems from s 133 of the Constitution Act, 1867. Also see s 19(1) and s 19(2) of the Charter, s 23 of the Manitoba Act, 1870 and s 110 of the Northwest Territories Act. Also see *Miller v Kyling* [1970] SCR 214, where the judge refused to allow a Francophone lawyer to question Francophone witnesses in French because the trial was being concluded in English before an English-speaking jury. The Supreme Court of Canada held that the judge had made an error of law. It is interesting to note that the court of appeal had held that the cost of translation in terms of time and money could not be cited as a ground for refusing to allow French to be used any more than the argument that the accused would not suffer any prejudice. Also see *Zaurini v the Queen* Quebec Court of Queen's Bench (Montreal) Criminal Division March 30 1973, where the court of the Queen's Bench (Criminal Division) had to rule on the choice of language made by an accused whose maternal tongue was Italian. Having determined that the language chosen was not that of his counsel, the court decided that the trial should be held in the official language "most familiar" to be accused.

that the disclosure of evidence be done in the official language of the accused in a criminal matter.[184] A proper criterion is whether a meaningful language choice is given to the individual along with his right and opportunity to express himself and to be served in either official language. Any person being detained or arrested by the police should understand why he is being detained or arrested, and his legal rights as guaranteed by the Charter should be respected.[185]

Therefore, the accused has a fundamental right to be tried in the language that he understands.[186] Similarly, in Canadian law, the right to address the court in the official language of his choice is available to "every person".[187] The accused is also entitled to be furnished with information in the language that he understands.[188] This raises the question of the practicality of indigenous languages and the rights of linguistic minorities.[189] However, the accused is not entitled to have the trial conducted in the language of his choice.[190] This is because section 35(3)(k) refers to the accused exercising a communication right and not a language right.

## 6.5 CONCLUSION

It is a fundamental right of a fair trial that the accused understands and comprehends the proceedings at all times.[191] The above discussion illustrates that an arrested, detained or accused person must be able to understand and comprehend the criminal proceedings in order to make a proper defence. First and foremost, the accused must be "fit" to stand trial, as a mentally incompetent person lacks comprehension, and therefore cannot be tried. This means that the accused must be able to understand what he is charged with, he needs to be able to plead to the charge and to exercise his right of challenge, he needs to understand the substantial effect of any evidence that may be given against him and he needs to be able to

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184 See *R v Rodrigue* (1994) 91 CCC (3d) 455 . It has also been held that s 20(2) of the Charter did not impose any duty on the police to advise the accused of his language rights. See *R v Haché* (1993) 1 MVR (3d) 172. Also see *R v Forsey* (1994) 95 CCC (3d) 354 (Que SC), where the court held that the accused's right to a fair trial would be compromised unless he was tried in the English language.

185 See *R v Bastarache* (1992), 128 NBR (2d) 217.

186 See, *inter alia*, s 25(3)(i) of the Interim Constitution and s 35(3)(k) of the Constitution.

187 See s 19 of the Charter. Also see s 13(1) of the Official Languages of New Brunswick Act, which guarantees the accused the right to be heard in the official language of his choice. However, see s 20(1) of the Charter.

188 See s 35(4) of the Constitution.

189 See *S v Matomela* and *S v Pienaar supra*. Also see the view of the European Court of Human Rights in *inter alia*, *Guesdon v France supra*.

190 See, *inter alia*, *Mthethwa v De Bruin supra*.

191 After all, the conviction of a person whose infirmities are such that he cannot understand or comprehend the proceedings resulting in his conviction, and he cannot defend himself against such charges, is violative of certain immutable principles of justice. See *Mothershead v King supra* at 1006.

make his defence or answer to the charge.[192] Therefore, the accused must be mentally "present". A mentally incompetent accused is detained at a mental hospital or prison, pending the decision of the Minister.[193] If the accused is regarded as "fit" to be tried, then the court must ascertain whether he understands the court language. If he does not understand the language of the court proceedings, then a competent interpreter must be appointed and be sworn in by the court.[194] His request for an interpreter must be made in good faith. The presiding officer cannot delegate his responsibility to the interpreter to explain the accused's rights and their implications to the accused.[195] The interpreter merely has a role to act as a translator, and he cannot interrogate the accused.[196] The accused has recourse to the courts to set aside the proceedings as an irregularity, if any of the above requirements are not met.

The position in other countries is similar to our law. An accused is also regarded as unfit to stand trial if he or she cannot understand and appreciate the criminal proceedings as a result of a mental defect. Such accused can be detained at a psychiatric hospital. This is line with South African law. **Islamic law** follows different schools of thought. The Maliki and Hanafi schools of thought are more lenient towards mentally incompetent persons, while the Shafi and Hanbali schools of thought adopt a more conservative approach. This depends on when the mental incapacity arises, either before or after the commission of the crime. However, deaf and dumb persons are treated more leniently and with caution.

The position in the **United Kingdom** is enlightening in that a "responsible" person or adult must be present when the mentally impaired accused is questioned by the police. This illustrates the extreme caution exercised by the British courts regarding such persons. Mentally incompetent persons are also dealt with by the mental health system rather than the criminal justice system. This relieves the burden on the criminal courts. It is recommended that the South African criminal justice system adopt this practice. This will greatly alleviate the burden on our criminal courts which have huge case backlogs. A responsible adult should also be present when a mentally incompetent accused is interrogated by the police. This will ensure fairness and equity. **German Law** is similar
to our law in that medical experts assist the court to evaluate an accused's fitness to

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192 See *R v Presser supra* at 45.

193 See ss 77 and 79 of the Act respectively. Similarly, in Australia, a mentally incompetent accused may be detained in a psychiatric hospital. See, *inter alia*, *R v Jabanardi supra*.

194 See s 6(2) of Act 32 of 1944 and R61(1) of the Uniform Rules of Court. Also see, *inter alia*, *S v Naidoo supra*. According to Steele, an interpreter should be called whenever it becomes apparent to the judge that an accused or witness is having difficulty expressing himself or herself or understanding the proceedings or if the accused requests the services of an interpreter. The only exception would be cases in which the judge exercises her discretion to disallow an interpreter to prevent abuse. See Steele *op cit* 247.

195 See *S v Mzo supra* at 538.

196 See *S v Mabona supra* at 614.

stand trial.[197]

The right to understand the criminal proceedings, is also entrenched in international law. The accused has recourse to an interpreter if he cannot understand the language of the court proceedings. The right to the assistance of an interpreter, is linked to a society's claim to be multicultural.[198] The United Nations has adopted a different approach to linguistic minorities. The HRC prescribes to the view that linguistic minorities are not entitled to have proceedings conducted in the language of their choice if they are proficient in the designated court language,[199] whereas the *Pienaar* case comes out strongly in favour of freedom of expression and language guarantees. The European courts have also held that the accused is merely entitled to a written translation of all necessary and relevant documents to the case.[200] A similar view is followed in the United States. Our courts have been silent on this issue, but this view may well be followed.

The *Kamasinski* case, which held that the lack of interpretation of the questions of witnesses, was not found to be a violation of article 6(3)(e), is not a progressive decision.[201] Our courts have found a lack of interpretation to be an irregularity in the proceedings. This has led to the proceedings being set aside.[202] The *Griffin* case is also not a progressive decision. The court held that an arrested person need not be informed of the reason for the arrest in a language that he understands. Both South African law and American law maintain that an arrestee must be informed of the reasons for his arrest in a language that he understands or that an interpreter be provided to translate such information.[203] The American position is similar to our law in that an interpreter must be present at the time of the arrest.

The requirement of two interpreters in Islamic law is not prescriptive. However, it may ensure the accuracy of the interpretation.[204] The view that the accused pays the

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197 In South African law, psychiatrists are appointed to evaluate the accused at an enquiry in terms of s 79 of the Act.

198 Many countries, such as the United States, Australia and New Zealand have wrestled with the question of linguistic minorities. See, *inter alia*, the views of Hench *op cit* 251-278, Dery *op cit* 842 (US), Mildren *op cit* 137-160 (Australia) and Lane *et al op cit* 115 (New Zealand) in this regard.

199 See, *inter alia*, *Yves Cadoret v France* and *Guesdon v France supra*.

200 See *S v Luedicke, Belkacem and Koç v Germany supra*.

201 It was held that art 6(3)(e) does not extend to requiring translations of all documents in the proceedings. However, if the applicant is assisted by interpreters, translations and the help of his lawyers so that he has adequate knowledge of the case to defend himself, then this is sufficient and any failure to provide all the translations that an applicant wants is no irregularity. See *Harward v Norway supra*.

202 See for instance *S v Mafu supra* at 454.

203 See s 35(1)(b) of the Constitution and Frase "USA" in Weissbrodt and Wolfrum (1998) *op cit* 53 respectively.

204 Steele supports this view. See Steele *op cit* 243-244.

interpreter's fees if his request is made in bad faith is an interesting one. The principle behind this is that such a request must be made in good faith, and any abuse of the system will be penalised. This conforms with the view in most countries.[205]

Thus, by far our law is in line with international trends. The ideal is to ensure that the accused can communicate his intentions. Therefore, he must be "present" at both a physical and mental level. The law, if it is to be administered justly, must be administered equally and be seen to be; there can be no exceptions simply because a witness does not speak English (or a designated court language) and has only a limited knowledge of it.[206] Justice in a multicultural society, will neither be done, nor seen to be done, while witnesses with little or no English (or knowledge of a designated court language) do not have the right to an interpreter.[207] Indeed, countries with multicultural societies, must continue to strive to improve the fairness of their criminal justice system for all cultures. For an accused, the ability to understand all proceedings and communicate and consult with his legal representative at all times, has a direct impact on his right to a fair trial, and to other constitutional protections. The prosecution must also confront the issue of language. If a victim cannot communicate adequately in court, the state will have difficulty in meeting its burden of proof.[208] Accordingly, the accused must be able to understand and comprehend the nature of the proceedings so that he can prepare a proper defence. Once it has been established that the accused is "fit" to be tried and he understands the language of the court proceedings, the next step is to prepare his defence. The next chapter will therefore discuss the accused's right to be prepared for his trial. The accused must have both adequate time and facilities to prepare an effective defence. Then only will he be able to exercise his right to a fair trial and participate effectively in the proceedings.

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205 To illustrate this, in Germany, the accused is obliged to pay the interpreter's fees where he makes an unnecessary request for an interpreter. The Canadian law follows a similar approach.

206 See Crouch *op cit* 690.

207 *Ibid* at 691. However, the requirement for interpretation must be genuine and necessary to the fair conduct of the proceedings. Where an applicant has sufficient understanding of the language of the proceedings, he cannot claim a cultural or political preference for another language.

208 See Cole *et al op cit* 194.