# IMPLICATIONS AND EXPLICATIONS OF POLICE TRANSLATION OF COMPLAINANTS' SWORN STATEMENTS: EVIDENCE LOST IN TRANSLATION?

**BY**

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# DECLARATION

"I declare that the dissertation hereby submitted by *Monwabisi Knowledge Ralarala* for the degree of Doctor of Philosophy (PhD): Publishable articles at the University of the Free State is my own independent work and has not previously been submitted by me at another University/Faculty. I furthermore cede copyright of the thesis in favour of the University of the Free State."

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# ABSTRACT

This interdisciplinary case study demonstrates that 'retelling and rewriting' of complainants' legal narratives constitutes translation. The police officers' (hereafter referred to as *transpreter*s) exercise of translating such narratives from isiXhosa (ST) into English (TT) is quite essential in the administration of justice in a multilingual and multicultural environment such as South Africa, and specifically in the South African Police Service. The challenge (amongst others) in the current system is that *traspreters* are neither accredited nor posses the necessary credentials to perform this fundamental role and function. The key objectives of this study were investigated by means of scientific papers – both publishable and published as book chapters as well as journal articles in both international and accredited journals. Drawing on various conceptual and analytical frameworks (Sturge 2007, 2009; Asad 2010; Goffman 1981; Dollerup 1999, 2003, 2006, Schiavi 1996 and Chatman, 1978, 1990), the study teases out both micro and macro elements that emanate from 20 voice-recorded and 20 textual translation episodes of sworn statement – which were used as data. The research contributes significantly to scholarship. Apart from calling for a debate on the identifiable flaws of the current model of record construction within the criminal justice system, the study also paints a clear picture of the perpetuation of inequalities and dominance, and points out that these issues seem to have a direct bearing on the failure to observe social justice, access to justice and linguistic human rights in the South African Police Service. Elaborating on research-based explanations for these existing gaps, the study also offers important recommendations that are directed towards the revisiting of the current model of police record construction.

**Key words:** translation, complainants' legal narratives, sworn statements, administration of justice, dominance, *transpreters*, social justice, access to justice.

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The views expressed in this work are mine, and I take full and sole responsibility for this work.

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# CHAPTER 1
# INTRODUCTION

## 1.1 BACKGROUND AND RATIONALE

The guiding research idea for this dissertation could be summarized as 'Implications and explications of police translation of complainants' sworn statements: evidence lost in translation'. This idea was, to a great extent, influenced by the circumstances surrounding the 'trial within a trial' of Eugene Terre' (ET) Blanche. Of concern to me was the notion of police record construction during the course of the trial, the details of which will be briefly explained in subsequent discussion, in this chapter. For this reason, it is proper to subject the issues of implications and explications to some demystification before proceeding.

Gewaily (2007:57) makes an important point when arguing that, '…it is important to question the right of the translator [*transpreter*] to delete [add] as many sections from the original as may be desired, with the result that the target audience cannot make any real assessment of the work that has been translated'. An equally important observation is submitted by Jarmołowska (2011:209-210) in relation to translation of police sworn statements and the implications thereof:

> The translation of witness statements requires the translator [*transpreter*] to recontextualise the story without access to the original participants. The original context cannot be reinstated, but knowing the goals of a witness statement and the function of the translation can help in choosing the most suitable translation strategy. Translators [*transpreters*] of witness statements and other court documents need to read with caution and remember that somebody's liberty hinges on their work.

These views by both Gewaily and Jarmołowska form part of the major concerns in this study, especially if we understand the possible adversarial implications of inaccurate translation and misinterpreting of legal text and discourse. The method of implication, on the one hand, refers to a situation in which some explicit utterances in a source text (ST) are deciphered implicitly in the target text (TT) (in Gewaily's terms). In some instances, the same method may reflect some implicit utterances that are rendered explicitly, as is evident in some of the data analysed in this study. On other hand, explications relate to the translator's tendency to '… smuggle explications into their texts mostly because they take very seriously their task as mediators between the original and its new readership' (Lefevere, 1992:107). Put more aptly, explications are what I consider to be

additions and, in some cases, subtractions, distortions or manipulations employed by a *transpreter* when specifically dealing with translations of complainants' sworn statements. Hence the claim: evidence is lost in translation. It is therefore these translation issues in the context of language and the law, briefly described above, that represent what seems to transpire in the police record construction.

The tragic death of Eugene Terre'Blanche at his Ventersdorp home on 3 April 2010 caused a serious stir and shock amongst many South Africans. As he was the co-founder of the far right Afrikaner Weerstandsbeweging (AWB), (Afrikaner Resistance Movement), his death was received with mixed reactions by the general public: "He was revered by some, but despised by others," as Judge Horn noted in his 46-page judgment (S V MAHLANGU AND NDLOVU). Many held that the crime was politically and racially motivated and, as such, his murderers should be pardoned; but others, who viewed the incident as one of the most ruthless crimes ever committed, were of the opinion that the criminals should rot in jail. Judgment was released in 2012, marking the end of more or less 24 months of trial.

Terre' Blanche's 'trial within a trial', to an extent, motivated the researcher to pursue the current research focus. The researcher – although, of course, not a professional lawyer – has always been keen to follow issues of legal debate, particularly those involving language and law. This interest was reinforced by, amongst other things, the Terre' Blanche case, and hence the latter motivated the pursuit of his research goals. Notably, this involved analysing the three-page commentary from the judgment that illustrated the flaws and inconsistencies contained in police work in the domain of record construction. What was clearly stated and was imperative in the judgment – and which had a direct bearing on the present study, as it motivated the pursuit thereof – is worthy of note:

> Police statements and statements obtained from witnesses by the police, are notoriously lacking in detail, are inaccurate and often incomplete. A witness is in the main required to enable the prosecuting authority to determine whether a prosecution is called for, on what charge and to consider which witness to call on which issue (S V MAHLANGU AND NDLOVU 2010 CC70).

Based on this observation, the importance and centrality of sworn statements in the administration of justice cannot be emphasised enough. If the process of record construction is bungled, either through poor translations (as translation is the current mode through which most statements are formulated by the police) or as a result of inaccuracies – as alluded to by the judge – it is possible that the secondary phase, which constitutes the real criminal process, will equally be bungled. The

initial or the primary phase obviously commences with pre-statement sessions (police interviews) and is considered as, 'the first opportunity for the witness to tell the story as part of a legal process' (Jarmolowska, 2011: 36).

Taking a closer look at Terre' Blanche's trial within a trial, it became apparent to the researcher that this criminal incident raises questions about general issues involving the South African criminal justice system, as well as the administration of justice. In the main, it brought to question the current model of record construction used by police for pre-statement sessions, as well as the compilation of actual sworn statements, as the latter are the only apparent source of information that courts rely upon for legal proceedings.

So far (to the best of the researcher's knowledge), there has been scant or no research interest in the area of interdisciplinary work that focuses mainly on translation and forensic linguistics, with specific reference to police record reconstruction within the South African context. Of course, various studies (Moeketsi, 1999; Kaschula & Ralarala, 2004; Cote 2005) within the South African context have highlighted critical issues related to courts (from a language perspective), but have not necessarily dealt with police record construction in great depth, at least not from the point of view of translation. Nevertheless, a recent attempt has been made (Molefe & Marais, 2013), in which issues of translation were mulled over, although not necessarily foregrounded, within the catholic purview of forensic linguistics.

Language and the law seem to be a field of interest and study in South Africa, although not blossoming as much as one would imagine, given the controversial official state of the indigenous languages in the various domains. Nevertheless, the interface of language and the law has received considerable attention as an area of study in the international community. This phenomenon of a global scholarly interest in language and the law has manifested in the study of (i) Forensic Linguistics (Coulthard & Jonhnson, 2007; Eades, 2010); (ii) Linguistic Human Rights (Cote, 2005; Arzoz, 2007; Lubbe, 2008); and (iii) Translation and the Law sub-disciplines (Morris, 1995). Waterhouse (2009: 42) points out that:

> …law exists through words and is made possible by language, which is a basic human characteristic; crime is part of the human condition, and communication constitutes a vital part of the criminal process which is made up of language events from beginning to end.

It is apparent, therefore, that an encounter with the police with the intent of laying a charge at a local police station in South Africa is a classic example of a language event that connects language,

law and crime. This is one of the fundamental components of the administration of criminal justice that initiates the function of the courts; and this is made possible through translating sworn statements presented by members of the public (mostly from African languages into English, and in some cases, into Afrikaans). Such translated documents are ultimately used in court as evidence for proceedings. Translation is an important aspect of the law that is often underestimated, as it is regarded as a simple and straightforward task; but, for the researcher, the actual translation of police sworn statements as reconstructions of complainants' narratives has far-reaching and serious consequences and implications, not only for the complainants and the perpetrators, but also for the law enforcement personnel or police officers who might find it more difficult or even impossible to gather accurate evidence as a result of a language barrier.

The problem of language barriers in legal systems is not unique to South Africa: it is a problem of multilingual and multicultural societies around the globe. It has been well documented in Australia (see Cooke, 1995), in the United States (see Shah et al., 2007), Ireland (see Waterhouse, 2009) and elsewhere. What makes South Africa peculiar are the real life human costs that result from this challenge, including the sentencing of people to imprisonment, possibly for crimes they did not commit. A case in point relates to a High Court case presided over by Cloete JP and Kannemeyer J in S v Kimbani. S v Kimbani is one of the interesting cases in relation to this study in that it clearly shows the level of bias and controversy in the framework of language and the law within the context of criminal justice in South Africa. It is also worthy of note that this case has, amongst others, indirectly triggered interest in the proposal of this study. Somewhat similar cases have been thoroughly examined by Cote (2005) in his research work: *The Right to Language Use in South African Criminal Courts*; and that immediately strengthens the need and rationale to explore research orientated in this direction. Undoubtedly, failure to address appropriately the deficits of the past in terms of the language question in judicial hierarchies in the new dispensation in South Africa presents a very strong case for the execution and pursuit of a study of this nature. The proposed study will therefore focus on police translations of complainants' sworn statements with the intention to find out more about the nature, scope and intricacies of such translations so as to understand the interface between language and the law within a law enforcement agency, and the implications for access to justice in South Africa.

The study under consideration assumes a somewhat unique yet interdisciplinary approach, and this approach will be achieved through fleshing out and foregrounding key and relevant interconnected notions, concepts and insights that emanate from the three sub-disciplines cited above. Furthermore, for a broader understanding of the implications and explications of language and the

law, with specific reference to the intricacies of translation in the framework of law enforcement in South Africa today, an interdisciplinary approach to the problem is inevitable. Further motivation for opting for this approach relates to the fact that the proposed approach will be applicable and employable in the fulfilment of the aims and purpose of this study.

## 1.2 THE PROCESS OF RECORD CONSTRUCTION (COMPILATION OF SWORN STATEMENTS)

It is at this point proper to consider very briefly the process through which sworn statements are compiled by the police. However, a cursory note about the important language related provisions enshrined in the constitution, as well as the *de facto* languages of record, is relevant, as these issues inform the police process in the South African context.

The *Constitution of the Republic of South Africa* (1996) declares that all languages must "enjoy parity of esteem and equal treatment" (1996: 8); and, specifically, that

> Every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language (1996: 19).

In response to the new dispensation after 1994, and in view of our diversity which is characterised by, amongst others, 11 official languages (isiZulu, isiXhosa, Afrikaans, Sepedi, Setswana, English, Sesotho, Xitsonga, siSwati, Tshivenda and isiNdebele), and in accordance with the constitution, peoples' rights, including linguistic human rights, have to be acknowledged. In creating an enabling environment insofar as facilitating efficiency and effectiveness in adjudicating cases, various Statues were endorsed, including the Magistrate Courts Act 32 of 1944 which gives magistrates authority to provide court interpreting and documentary evidence as and when they see fit (see Cote, 2005 and Mpahlwa, 2015, for a detailed account). Be that as it may, the actual implementation and enforceability of such linguistic human rights in particular, is still a challenge, if not a myth. This is evidenced by the tacit agreement, despite the unconstitutionality of this arrangement, that only English and Afrikaans should remain the *de facto* languages of record. It is also a contradiction in terms that this position is receiving support from members of the judiciary: '...the recommendation of adopting a sole language of record for courts should stand (in favour of English)' (S V DAMOYI 2003 JOL SA 12306 (C)). If the status quo remains and the cited provisions do not appropriately address the initial or the primary phase of the criminal process (as is currently the case), as it is a crucial component of the legalese and legal process, it is clear that the

criminal justice system retains an ongoing and serious flaw which remains a threat to the principles of justice.

In the South African experience, sworn statements from members of the public are frequently translated (mostly from African languages into English and, in some cases, into Afrikaans) and eventually these are used in court as evidence for proceedings (Geldenhuys, 2001). Typical cases brought to local police stations involve a variety of crimes, such as theft, assault, domestic violence and murder, to mention but a few. In some (if not most) of these cases, the people laying the charge or suing (that is, 'the complainant') are generally economically disadvantaged and have Limited English Proficiency (LEP). Additionally, the system (institutional norms) forces them to rely solely on a police officer to represent them in crafting their sworn statement, as the means of building their ultimate evidence for the court. This occurs in a language that is acceptable to the court, namely English (and, in some cases, Afrikaans). Code switching and mixing by a police officer is the typical pattern of communication for purposes of indicating selective emphasis and eliciting as much information as possible from the complainant. The police officer thus attempts to channel the information into a successful compilation of a translated sworn statement. Most such interactions occur in local police stations. The police who are entrusted with this daily assignment are professional police officers who are employed by the South African Police Services (SAPS), and who have fulfilled the requirements of six months of Police Basic Training. Additional job requirements for one to be appointed as a police officer are a matriculation certificate, as well as a driver's licence.

## 1.3 THE PRESENT STUDY

As part of this study, the researcher set out to collect data. The data set consisted of 20 recorded oral and 20 textual translation episodes of sworn statements. Once permission was eventually received from the National office in Pretoria (Office of the National Commissioner), as well as from the Provincial offices (Office of the Provincial Commissioners – Western Cape and Eastern Cape), police stations were identified in areas such as Gugulethu, Khayelitsha and Mdantsane. Unfortunately, not all of police stations were keen to cooperate insofar as releasing information. Only one police station was eager to participate in the study: Khayelitsha. The selection of Khayelitsha was informed by the researcher's language expertise, which is a Xhosa/English combination, as both languages are official in the province in question.

For ethical considerations, exact names, locations, dates and times have been kept confidential throughout this dissertation.

Through the support and cooperation of Brigadier X, two senior police officials (at the rank of Captain and Lieutenant) were assigned to supervise two junior members (at the rank of Constable and Student Constable) who assisted in this research exercise. The statement-taking sessions were conducted at a normal charge office (police station) in the presence of the researcher (occupying an observer status), with the two police officials seeking and obtaining information at various times from a variety of complainants who, at different times, came to report an array of criminal offences, ranging from common robbery to assault. The collection of original data in an institutionalised and inaccessible domain by a lay person, whose knowledge of the law was limited, proved to be a serious challenge in this study. Nevertheless, the presence of the researcher during the actual data collection was crucial, although it had no direct influence whatsoever on the interactions. As a result of the researcher's presence, the process of collecting data was well coordinated and appropriately followed by the participants as had been initially determined by the planned research procedure and thoroughly explained by the researcher.

The usual procedure for taking statements, guided by the institutional norms, was followed: members of the public were required to rely solely on a police officer, who assisted them in crafting their sworn statement, using pen and paper, ultimately aiming to gather evidence for court proceedings in a language that is acceptable to the court – English in this case. The only striking deviation from the norm (about which all complainants were cautioned) was the use of audio-recording during the statement-taking sessions (specifically for the purpose of this study). The verbal narrations which constituted the descriptions of the events and their unfolding were produced mainly by the complainant, in the language (isiXhosa) understood by both the police officer and the complainant. This interaction, led by the police officer, eventually resulted in the successful compilation of a hand-written translated sworn statement (in English). The original (verbal) version was transcribed (from the audio-recorder) with the help of bilingual research assistants with expertise in the Xhosa/English combination.

The following are some of the striking and peculiar findings that emerged from the data which, in some way, contributed to the streamlining and reformulation of some of the specific research questions that were posed:

- The police set up and infrastructure (see Figures 1 and 2 below).

- The low levels of literacy (in both African languages and English), as well as poor economic and social backgrounds of the complainants.
- The substandard interviewing techniques and language (translation) skills of the police officers responsible for statement taking.
- The manner in which some of the information was sought and obtained (with unethical distractions, either caused by a second police intervention or by the interviewing police officer abandoning the complainant to go to the toilet).
- The evolution of the oral narrative (from one language to the next – through translation) into a written form and subsequently into a legal and evidential text.
- The format of the actual sworn statement: hand-written.
- The authenticity of the empirical data – normally categorised as 'classified information' that is also not available to the general public.
- Institutional presence and power relations at play in pre-statement sessions as well as in actual statements.

In this study, the researcher has emphasised the use of textual analysis as one research method (amongst others) to provide a description of the content and structure, interpretation of the function, nature, status and characteristics of police record construction insofar as pre-statements and sworn statements are concerned. This decision has been deliberately taken to exclude other methods such as interviews (for example, with the police, complainants, senior members within the criminal justice system) and policy or document analysis, etc. Foregrounding the study in textual analysis was motivated by various reasons, three of which deserve mention here: One, the specific type of research questions (see section 1.5 below) that were raised and pursued were specifically designed to be addressed appropriately through the scope of this method. Two, various scholars (Milne and Shaw, 1999; Rock, 2001; Komter, 2002; Heyden, 2005) have embraced textual analysis as a viable method of dealing with police record and statement taking (widely known as 'police interviews' in other parts of the world, such as Australia, Netherlands and Britain). It is worth stating that this method, as testified in the works of these cited scholars, seems to have been a utility, and produced different kinds of useful information in various research expeditions where it has been tried and tested. Three, because, as Leedy and Ormrod (2005:135) would suggest, a case study will usually '… focus on a single case, perhaps because its unique or exceptional qualities can promote understanding or inform practice for similar situations', so this work was primarily meant to be an initial foray into what the researcher considered to be a single poorly (if at all) understood area in South Africa. Essentially, this study was aimed at, amongst others, creating a research window of

opportunity into further studies within the South African context in as far as police record construction is concerned.

**Figure 1** An artistic image drawn by a professional graphic designer (on the researcher's request) at one of Khayelitsha's police stations (in Cape Town, Western Cape), depicting police officers (*transpreters*) sitting behind the counter during an information exchange with a member of the public.


**Figure 2** An artistic image drawn by a professional graphic designer (on the researcher's request) at one of Khayelitsha's police stations (in Cape Town, Western Cape), depicting police officers (*transpreters*) attempting to obtain information related to the criminal activity.

## 1.4 RESEARCH PROBLEM

Law enforcement agencies – local police services and courts alike – are expected to translate and interpret utterances of the source text as succinctly and accurately as possible. Failure to commit to such levels of fidelity to the original tends to result in translation casualties, and that on its own becomes an infringement in terms of access to justice – as has been noted in the case, S v Kimbani. Dollerup (2005: 82) shares a critical position in relation to the notion of fidelity when he argues that,

> It must be kept in mind that in real life there are situations in which professional translators, senders, and recipients all have to behave as if a 'perfect' translation is possible: in a court of law, it is taken for granted that everything should be (and is) interpreted and translated 'exactly' the way it was in the source utterance or text. Technical texts are supposed to be 'identical' in the source and target languages.

As it stands now, the cited desired reality, as noted by Dollerup, remains utopian in the South African lower and higher judicial hierarchies as evidenced by the miscarriage of justice in the higher circles of the judiciary. Aside from the institutional (police station) power and mundane set of rules, the complexities of the set-up are further exacerbated by the sophistication of the function and competency (translation), as well as the lack of skilled human resource group, in this domain. Morris (1995: 6) makes a point when arguing that,

> Thoughtful translators and interpreters can see where to keep and where to adapt form, and what the effect will be of failing to do so. They know how to use the resources of the target language and society to exploit, and not to offend against the traditions and imaginative possibilities of that other language. They know …Yet the hard-won knowledge that they possess is virtually invisible to monolinguals and to superficial bilinguals…. Such persons may otherwise be splendidly and expensively educated, as are lawyers and judges, who can cut things fine in their language.

This explication is certainly exorbitant, but the fundamental question is: Has the South African Police Service reached this level of sophistication in terms of infrastructure and human resources? The general outcome of cases reviewed suggests a rather bleak outlook in response to this enquiry. Police officers, or *transpreters* – as I prefer to call them – who have to provide translation services for sworn statements, are confronted with an even more complex and sophisticated exercise as they have to tap into their cognitive capabilities online. My conception of *transpreters* to refer to the designated police officers is informed by the type of dual dramatic performance required of them in rendering this unique service (that is, consecutive translation and interpreting). This mind-numbing

procedure requires cognitive functioning and message production in milliseconds. It is also worthy of note that *transpreters* commit to this duty despite not being appropriately trained nor officially sworn in – which actions, the researcher supposes, would have been consciously binding, considering the sensitivity and delicacy of their translation assignment.

## 1.5 RESEARCH QUESTIONS AND OBJECTIVES

Taking heed of this problem and sub-problems, the following research questions are worthy of consideration in this investigation:

- What is the nature of, and what are the intricacies involved in, a *transpreted* language event in a law enforcement agency in South Africa?
- To what extent does the system of *transpreted* statements represent the complainants' own words?
- What implications (if any) does this type of language event have for the notion of access to justice in South Africa?

The objectives of this investigation are explicit:

- ❑ To consider the problem of this type of language event as exemplified in record construction of police translations of complainants' sworn statements.
- ❑ To describe and shed some light on, and understanding of, the complexities that emanate from the police translation/representation of the complainants' sworn statements – which could introduce bias in the gathering of evidence.
- ❑ To explore the scope, nature and usefulness (if any) of this language event in relation to the notion of access to justice and social justice.
- ❑ To review the current model of police record construction, as well as the language policy, within the criminal justice system.

## 1.6 ORGANISATION OF THE STUDY

The study is presented in the form of articles (published and publishable). The first article aspires to be a theoretical paper. Its inspiration is the work of Sturge (2007, 2009) and Asad (2010). Cultural translation – as a concept 'enmeshed in the conditions of power' – is broadly considered in the discussion and, as such, its institutional presence and practice within the criminal justice system (police) is dealt with within the catholic purview of the notion of (a) bias in record reconstruction,

paying particular attention to issues relating to relativism and allegiance. The discussion further mulls over (b) institutional discourse and its goals, and foregrounds this in the process of seeking and packaging information, as well as the idea of languages and their unequal status.

The second article investigates transpreters' 'voices' and their discursive presence that manifests in pre-statement sessions, as well as in the actual sworn statements of complainants, and the potential effect that these may have on the translation 'style' used in the translation process. From a theoretical point of view, this paper is rooted in the works of Schiavi (1996), Chatman (1978, 1990) and Hermans (1996, 2007). Furthermore, embracing Millan-Varela's (2004) conceptualisation of voice in the translated text, with specific reference to cases of literary texts that are translated into a minority language, this work will generate relevant categories – as part of the analysis – that are meant to expose the 'metaphors' of 'voice', 'discursive presence' and 'styles'. My focus will be on the *transpreter's* voice detection of covert and overt instances, along with his or her discursive presence, and these cases will be unveiled through comparing the source text (ST) and the target text (TT).

The third article, from a theoretical and analytical perspective, draws on Goffman's (1981:226) participation framework, as well as on Dollerup's (1999, 2003, 2006) model of textual analysis. Firstly, this article examines the nature and the manner in which sworn statements are crafted and constructed. Secondly, based on a translation perspective, the article moves on to illustrate how sworn statements are mis/represented both in the 'retelling and rewriting' forms, in Maria Tymoczko's (1995:12) terms, through manipulation and deficient translation. Thirdly, and finally, the article highlights the implications of such potential misrepresentations of complainants' narratives in as far as the legal process is concerned.

The fourth article draws its inspiration on Eades' (2004) 'difference approach'. This approach considers languages as equal, a situation which goes against the tacit – but quite unconstitutional – agreement that English and Afrikaans remain the languages of record. From this point of view, the article adopts a narrative perspective in which cultural and linguistic differences are fleshed out from an examination of selected High Court judgments affecting speakers of African languages: S V KIMBANI 1979 (3) SA 339 (E); HRH KING ZWELITHINI OF KWA ZULU V MERVIS AND ANOTHER 1978 (2) SA 521 (W) G; S V MAHLANGU AND NDLOVU 2010 CC70. Particular attention is paid to issues related to (i) silence, (ii) comprehension and (iii) 'translating against the grain'.

Based on a broad analysis of the judgment of Eugene Terre' Blanche's (ET) 'trial within a trial', the fifth article poses and addresses the following research questions: (i) Do language rights remain myths or reality in the South African judiciary?; (ii) Can police officers fulfil their role competently as *transpreters*?; (iii) What asymmetric role do police officers occupy in handling language events relevant to their duty?; and (iv) What are the practical implications of the ET 'trial within a trial' in the context of law enforcement in South Africa? Accordingly, the article is grounded in a sociolinguistics approach.

## 1.7 LIMITATIONS OF THE STUDY

Firstly, ideally, an interdisciplinary exploratory study of this nature (which takes into account issues that emerge from Translation Studies, as well as those that emanate from the area of Forensic Linguistics) should have been well coordinated and synchronised if its design and methods had followed a sequential approach in relation to data collection and data analysis. This means that phase one would have been the collection of data (pre-statement and actual sworn statement) and analysis within the context of a police record construction, with phase two followed by the collection of data analysis of the court room outcomes or judgment of the same cases, as they were initially reported at charge offices. The current study was not able to follow this line, and thus the focus is limited to complainants' oral narratives and police translations of such narratives, which partly constituted the data set. A selected set of court case judgments, in which language is one of the central issues, further served as a source of data for the current study. Analysis has therefore been based on somewhat fragmented but related categories, which the researcher found to be a limitation. Of course, achieving the ideal approach would have posed an insurmountable challenge, given feasibility and time factors, as some of these cases extend over a lengthy period of time (six months to two years) before a matter is concluded.

Secondly, although this thesis is presented in the form of articles, it broadly represents a case study. Although the researcher set out to collect data (which consisted of 20 recorded oral and 20 textual translation episodes of sworn statements), analysis has been based on almost half of the intended data set. Only one police station (in one province) was used as a research site. Notwithstanding this limitation, the study (through the various articles) has brought to the fore a multiplicity of issues and groundbreaking findings. However, given its limited scope – based on its originality and peculiarity – it may not be convincingly used to draw generalisations.

Thirdly, another limitation relates to the restriction of languages involved in the study. The researcher opted to explore a two-language combination, that is, isiXhosa and English. Given the

multilingual nature of the South African society, and as a matter of corroborating the current findings, it would have been ideal to include other language combinations, such as isiZulu and English, seSotho and English, Tshivenda and English, whose distribution is high in other provinces such as Kwazulu-Natal (in the case of isiZulu) and Limpopo (in the case of seSotho and Tshivenda).

Finally, the difficulty of collecting data which is not necessarily available to the public has proven to be quite cumbersome to the point of being unfeasible. The challenges included the immense amount of time involved in seeking permission and awaiting full approval from the relevant authorities. Requests for access to somewhat classified information in the police system are sometimes viewed with suspicion. Precisely, there may be an incorrect notion that the researcher's intention is to expose the potential incapacity and lack of quality control, monitoring and evaluation insofar as police record construction is concerned.

# CHAPTER 2

# (PAPER 1)

## 'Cultural Translation' of *transpreters'* translation of complainants' narratives into sworn statements

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## 2.1 ABSTRACT

*Statement-taking sessions may be perceived as ordinary narratives but their content and intent make them extraordinary language events that may ultimately determine someone's fate in a criminal trial. In South Africa, these so-called ordinary narratives (presented by either the accused or the complainant or a witness) get translated from African languages into English or Afrikaans in order to provide access to these statements for English- or Afrikaans-speaking members of the judiciary (judges, magistrates and prosecutors) during courtroom proceedings. This seems to be the norm in cases where speakers of African languages are embroiled in criminal activities. One reason for this 'norm' stems from the tacit agreement, despite the new dispensation, that only English and Afrikaans should remain the de facto languages of record. Further exacerbating this problem is the fact that speakers of African languages hail from unique backgrounds with a rich and diverse cultural heritage; and this uniqueness involves a linguistic and cultural structure of thinking that is somewhat different from that of the native speakers of other languages' (Ralarala, 2013, p.91). From a theoretical point of view, this chapter is rooted in the 'Cultural Translation' (Sturge, 1997, 2007, 2009; Asad, 2010) approach. In this context, Cultural Translation is concerned with, amongst other factors, the manner in which power relations emanate in the process of record construction between these individuals: transpreters (police officers) who are in a position of power by virtue of their status and of their 'proficiency' in the language (English/Afrikaans) of record-taking; and the complainants, who are ordinary members of the community, who also occupy a less powerful position in the context in which record construction occurs. This chapter examines issues of power imbalances that are prevalent in pre-statement-taking and reconstruction of sworn statements, and the manner in which various forms and levels of*

*power relations are used by transpreters to manipulate and, oftentimes, distort the original narratives in order to serve the interests of the criminal justice system.*

Keywords: *cultural translation; narratives; sworn statement; transpreters, institutional discourse and power.*

## 2.2 THEORISING 'CULTURAL TRANSLATION' IN *TRANSPRETATION* PRACTICE

The concept of 'Cultural Translation, which has its roots in the discipline of cultural anthropology, provides the basis upon which the discussion in this chapter rests. In his convincing article, 'The Concept of Cultural Translation in British Social Anthropology', Asad (2010, p.27) provides a critical account of the concept of Cultural Translation as follows:

> ...the process of 'cultural translation' is inevitably enmeshed in conditions of power - professional, national, international. And among these conditions is the authority of ethnographers to uncover the implicit meanings of subordinate societies. Given that that is so, the interesting question for enquiry is not whether, and if so to what extent, anthropologists should be relativists or nationalists, critical or charitable towards other cultures, but how power enters into the process of 'cultural translation', seen both as a discursive and as a non-discursive practice.

Sturge (2007, pp.8-9) complements this view when pointing out that:

> The powerful ethnographic 'authority' of the text subsumes the voice of the original speakers into seamless written English partly by hiding the processes of editing and translation that have gone on ... Because of the unequal relationship between the cultures [languages] concerned, the translation does not remain cordoned off inside some Western ivory tower but instead takes up a powerful position in the practical world.

This understanding of cultural translation by Asad and Sturge which is partly realised through the translation of '…field experiences… into text for people who were not there, bridging as well and as reflexively as possible the gaps between the presence and absence, between languages…' (in Jordan's terms, 2002: 96), resonates with the assigned *transpretation* practice in which the interests of the future readership (members of the judiaciary) as well as the TT (in English) remain the primary concern. The discourse conventions in cultural translation which are, in part, comphenended and sustained through seeking and obtaining, '…unconnected bits and pieces manifest in ritual practice and in what native actors do and say and to construct from them a coherent philosophy that no informants articulated themselves' (Keesing 1985:202), are somewhat

representative of deciphering acts in police record construction in which *transpreters* take charge insofar as facilitating ordinary narratives into becoming 'coherent' and 'meaningful' legal text that eventually constitutes a basis for determing someone's fate.

The form of representation refered to or translation is by its very nature one of the discourses that have potential to influence hegemony. And thus, as Asad contends, cultural translations are mostly communicated through the powerful cultures and languages of the West, and English is a case in point. The *transpretation* practice, which is my concern in this chapter, is not just saturated in somewhat similar configuration but rather trapped in it. The fact that we are continuously confronted by linguistic inequalities (that is English versus African languages not vice versa), as mentioned by Sturge, and the fact that translation does not take place in avoid is a clear indication that the criminal justice system's perception of reality mediates through the asymmetry of power vested in the Western languages and culture. Represented in this way, it stands to reason that the issue of *transpretation* practice is inherently a matter of institutionalized discourse and power. These issues will be further interrogated later in the discussion.

Before deeping in, it is worth commenting on some imperatives, in the context of *transpreters* and their pre-statement-taking and record reconstruction of sworn statements within the police service, in relation to the afore-mentioned observations: One, the process of seeking information or obtaining information by *transpreters* for purposes of further investigation, and possibly to secure a conviction, is inevitably and intrinsically authoritative. Thus, *power and authority* are a hallmark of this exercise. Two, the instant relationship between the *transpreters* and the complainants or witnesses could be described as a relationship between un-equals, the reason being that the former is not only in control but also possesses a peculiar knowledge in terms of legal and administrative modus operandi, which determines the discursive direction in relation to the 'retelling and rewriting' of the narratives. By contrast, the complainants or witnesses are subjected to a set of procedures, generated by the authorities, with which they have to comply and thus co-operate. The perpetuation of inequalities is thus clearly inherent in the discourse of police record reconstruction. Three, the question of 'translation' or representation – also central in this discussion – resonates with the assigned function of *transpreters*, who are duty bound to 'translate' (from African languages into English) original narratives of those who lack proficiency in the language (that is, English) of the legal record in order to benefit the English-speaking readership – primarily those in control of the courts. Within this context, *transpreters* assume an audible 'voice' in the 'story retelling' process, the content of which may not be contested or disputed by those that are being 'represented'. Thus, the current system reinforces the silencing of the 'voiceless' complainants or

witnesses by virtue of their societal inferiority status and linguistic limitations. In essence, *transpreters* "…assume(s) final authority in determining the subject's meanings and as such becomes the 'real author' of those meanings", in Baker's (2010, p.8) terms. With *transpreters' transpretation* assuming 'a voice of reason' in this form of representation, and thus subjecting the original to nullification, brings into question the status of originality of the translated legal text which is accorded a status of the original in the 'eyes' of the readership.

Trivial as this may seem, a closer look at these submissions reveal that the imperatives raised here do not necessarily reveal the intricacies and the complexities involved in the pre-statement-taking and record reconstruction sessions (as a form of 'translation'), but that, in Eades' (2010, p.108) terms, they also exemplify the extent to which these so-called ordinary interactions between *transpreters* and complainants (or witnesses) are pertinent in reflecting and shaping, amongst other things, wider societal power relations and struggles. Later in the discussion, I shall return to this conceptualisation in the context of institutional discourse and societal power dynamics.

In this chapter, I attempt to draw some parallels between Asad and Sturge's conception of cultural translation of institutionalized discourse and power and the process of police record construction within the criminal justices system. And on the basis of this conceptualization, I argue, firstly, that *transpreters* – as 'translators' – are bound to conform to a certain level of bias and subjectivity in carrying out their set function of 'translating' complainants' narratives into sworn statements. My next contention revolves around the notion of institutional discourse and its goals – a system in which asymmetrical power relations are rooted. Finally, I will show that a system of such a nature is, to a certain degree, responsible for the perpetuation of not only linguistic, but also social inequalities.

Sturge (2009, p.67) describes how anthropologists and /or ethnographers – as fieldworkers in their research expeditions - would oftentimes be confronted by the concept of difference, either in the form of culture, or language, or both. Thus, she (Ibid., p.67) contends: "As linguistically challenged outsiders trying to understand what is going on, fieldworkers may encounter cultural differences in a very immediate and even painful way". It thus stands to reason that, in these types of encounters, meaning and mutual intelligibility between the source language and the target language can only be made possible through various forms of interpretation and translation. "Like the literally 'cultural translator', the ethnographer has to reconcile respect for the specificity of the 'native point of view' with the desire to create a text comprehensible to the target readership" (Sturge, 2009, p.67). In line with this reasoning, there seem to be very important connections

between the translation function fulfilled by ethnographers in their ethnographic work and that of *transpreters* in their process of 'translating' complainants' narratives into sworn statements. Thus, exposing the connections between these functions in this chapter is an attempt to do justice to this discussion.

In many societies, including African societies, there is a long history of distinction and connection between the oral tradition and the writing tradition. The intrinsic domination of the latter over the former has, from time immemorial, been clouded by a focus on the orality and literacy debate. Valero-Garces (1995, p.557) sheds some light on this when she points out that the natives who were unable to write at the time were referred to as "…barbarians as writing was considered a higher stage than speaking". She further notes that, "...this tyranny of the alphabet was going to be of crucial importance: firstly, for the colonisation of the New world and other cultures with oral tradition; secondly, for the understanding of culture" (Ibid). This view is important for two reasons: One, it provides us with a brief historical explanation pertaining to the supremacy of the written word (English, in this case), as it has a direct bearing on the work and function of both *transpreters* and ethnographers (thus, underscoring the fact that those 'others' who operate by a different set of cultural and linguistic rules in this 'translation' context remain on the receiving end of the process and, as such, are perceived as inferior). Two, it gives us a glimpse of the significance and role of translation in multicultural societies, without which understanding and appreciation of other cultures would have been impossible.

Ethnographic translation assumes a dual function, and this commences "...from the oral to the written form as well as from one language to another" (Sturge, 1997, p.22). The *transpretation* translation is carried out through a similar conceptual pattern in which the oral interaction takes place between the *transpreter* and the complainant or witness (that is, in a pre-statement-taking session) whilst the complainant lays a charge for purposes of investigating a crime. The subsequent phase is constituted through a written record construction which culminates in a formal statement. This exercise involves two languages; and the original narratives are orally communicated through the medium of the mother tongue of the 'natives' by the 'natives' themselves, and then retold or translated by the *transpreters* into the English language. In both systems (ethnographic and *transpretation*), the end product is intended to benefit a specific target group; there are also striking similarities pertaining to the groups whose 'text' is 'translated'. For example, in the case of ethnographic translation, it is primarily meant to address the English-speaking elite, as Asad (2010, p.24) succinctly puts it: "...anthropologist typically writes about an illiterate (or at any rate non-English speaking) population for a largely, English academic audience". Similarly, for purposes of

*transpreters*, Ralarala (2014, p.378) recounts that, "These translated versions are, amongst others, meant to provide access for English or Afrikaans speaking members of the judiciary (judges, magistrates and prosecutors) during court proceedings".

The other striking connection between ethnographic and *transpretation* practices resides in the respective and peculiar work that these entities are concerned with, which then culminates in the representation of somewhat similar forms. In ethnographic practice, life experiences are transformed into a textual form (Sturge, 2009); and this configuration "...rules out a range of other possible forms to express what the anthropologist has learned – forms like participation in dance or performance". In the same vein, Asad (2010, p.23) purports that:

> ...translating an alien form of life, another culture, is not always done best through the representational discourse of ethnography, that under certain conditions a dramatic performance, the execution of a dance, or the playing of a piece of music might be more apt.

The same analogy is prevalent in the context of the *transpretation* practice. The 'conversion' of oral narratives in African languages into written English is not necessarily a mere translation from one language into the next. This fundamental exercise has far-reaching consequences that cannot be reduced to a narrow sense of information transfer. As the final record reconstruction is described as a "private legal text" in Jarmołowska's (2011, p.44) terms, it stands to reason that a sworn statement comprises a representation of thoughts and actions (some of which may be premeditated) which represent the actual criminal activity. To this end, as in the case of the ethnographic practice, when oral narratives assume the *transpreter's* textual form, this phenomenon does lead to a 'fading away' of the aesthetic or 'dramatic' circumstances and events that led to the actual crime. In the context of this exercise, the *transpreter "*...makes the source text, not only the target text, and the translation itself cannot claim to be an 'accurate and faithful record' of a static original" (Sturge 2007, p.8).

***The concept of bias in record reconstruction***

In an essay entitled, "Not You/Like You: Postcolonial Women and the Interlocking Questions of Identity and Difference", Trinh Minh-ha (1997, p. 418) writes:

> The moment the insider steps out from the inside she's no longer a mere insider. She necessarily looks in from the outside while also looking out from the inside. Not quite the same, not quite the other, she stands in that undetermined threshold place where she constantly drifts in and out. Undercutting the inside /outside opposition, her intervention is necessarily that of both not quite an insider and not quite an outsider. She is, in other words, this inappropriate 'other' or 'same' who moves about with always at

> least two gestures: that of affirming 'I am like you' while persisting in her difference and that of reminding 'I am different' while unsettling every definition of otherness arrived at.

This lengthy quotation lies precisely at the heart of the notion of 'relativism' and 'allegiance', as crucial sources of bias in the record reconstruction phenomenon. Both will be dealt with here.

*Relativism*

Relativism – narrowly defined as the notion that human beings are shaped by culture, and thus the "…worldview of a culture is shaped and reflected by the language its members speak" (Adler & Rodman 2006, p.106) - inherently "...shows a bias towards functionalism and tends to justify dysfunctional beliefs and customs of non-Western cultures while marginalising non-dominant voices within those societies" (Zechenter 1997, p. 328). An important observation in relation to this conceptualisation resonates with *traspretic* practice. In her practice, the *transpreter* remains in her comfort zone and continues to pretend that she is foreign to the expression of her culture and identity as the telling – through the medium of a local language - is rewritten or retold in English. Further exacerbating the problem of bias in this regard, as Valero-Garces (1995, p. 558) observes, is "...the process by which the collected information is placed under the parameters of the new culture". In this context, the *transpreter* has to "...choose and that evaluative discrimination is always a matter of selection" (Ibid., p. 558). Arguably, although the *transpreter* may not be aware of her subjective and contaminated judgment (bias), it is inevitable for her to uncover that she is caught up in an unpleasant dissonance in terms of being "...this inappropriate 'other' or 'same' who moves about with always at least two gestures: that of affirming 'I am like you' while persisting in her difference...', in (Trinh Minh-ha's 1997) terms. In fact, she has no clear position in terms of the two cultural dimensions; instead she dangles silently between 'her' own and that of the 'other', and very much inclines towards the latter dimension. In such cases, record reconstruction – as a translated text - is bound to replicate in some way the identities of the 'other'. Of course, there may be further reasons for this type of ambiguity and that will be dealt with in the section below.

*Allegiance*

Lambert (1994, p. 19) maintains that, "The translator's habits and options will normally be influenced by his society's dominant norms, especially by the institutional ones". It is notable that allegiance to the system – as a source of bias – reinforces selective attention to some information and/or eliminates other information, either purposefully (possibly in most cases) or aimlessly (in other cases); and *transpretation* practices are not immune to this type of behaviour. This behaviour, (Ibid., p. 19) is "[…] in harmony with the organisation of *public discourse*". The rule-governed

nature of public or institutional discourse, which has always been carried out through the medium of English language and culture, tends to force the *transpreter*'s 'translation' function to lean towards the individualistic, low context culture at the expense of 'her' original communal, high context culture. Accordingly, the persistence of English language and its cultural elements has filtered through, from 'her' professional orientation towards 'her' personal life, to the extent that it may cause her, intentionally or unintentionally, to despise and belittle 'her' own being in 'her' practice. This situation is described by Freire (1985, p. 178) as a certain form of ambiguity, in which people who, as a result of fear, pay full allegiance to the system and "…keep both their feet squarely inside the system". In so doing, they advance the interest of the system through the recurring function and goal of the *transpretation* practice. The record reconstruction process echoes this reality in many ways. Clearly, if the system remains untransformed, bias is bound to have acute effects on the *transpretation* practices and the danger is its connection to the partial administration of justice, with the consequential potential of compromising a fair trial.

## 2.3 INSTITUTIONAL DISCOURSE AND POWER RELATIONS IN *TRANSPRETATION* FUNCTION

In an earlier paper (Ralarala 2012, p. 66), I have drawn attention to a number of instances that relate to inequalities within the police system, some of which are substantially dealt with in the context of asymmetry in Van Charldorp's (2011) research. In what follows, I will briefly examine a few of the related issues within a catholic purview of 'Cultural Translation'.

*Seeking and packaging information*

The process of seeking information (as depicted in Figure 1), in as far as *transpreters* are concerned, is highly influenced by the institutional frame of reference as well as by power relations rooted in society. The reality of this language event is that *transpretation* function – as an administrative and legal procedure - is more about acquiring and obtaining information than about seeking it. In line with this view, Braz (2010, p. 10) argues that, "…the police, who hold the authority status, make use of linguistic strategies that may restrain the suspect's contribution to the interaction". This form of talk, referred to as a "police interview" by Eades (2010), "…is a speech event specific to western societies" (Eads, 1996, p. 217). The expectation in this speech event is that the information exchange between the parties should be characterised by brevity and succinctness in order to subscribe to the institutional norms. In the same vein, Braz (drawing on Draw and Heritage 1992) argues that "...one of the participants in an institutional interaction displays an orientation

towards some core goal conventionally associated with the institution" (2010, p. 10). Arguably, this unequal distribution of asymmetric power relations, resulting from ownership of privileged information and institutional discourse, is not only typical of the *transpretation* function of pre-statement-taking and record reconstruction processes, but also resembles the manner in which information is directly sought from those who are of a lower status.

Apart from obtaining the information and classifying it in a certain way, the information is subjected to some reformatting and packaging (that is record reconstruction) by *transpreters*. This includes, but is not limited to, a simple 'translation' of information from the source (conveyed in an African language) into a target language (English) in order to comply with the requirements of institutional categories (namely, to create accessibility for a designated readership, as noted earlier). This configuration - exemplified by an English translated text - represents another fundamental component of *transpretation* function. It further exacerbates a fundamental divide between those who are considered illiterate (and thus bound to have their narrative accounts translated into the dominant culture when embroiled in criminal activities) and those who are 'perpetuators' of the institutionally-controlled discourse. In this respect, Venuti (2010, p. 68) makes an important observation that has a direct bearing on the *transpretation* function, arguing that, "Translation is the forcible replacement of the linguistic and cultural difference of the foreign text with a text that will be intelligible to the target-language reader. This difference can never be entirely removed". The impact of translation in this context is notably quite fundamental in that it is presumably the only audible voice that becomes accessible to the target readership.


**Figure 1.** An artistic image drawn by a professional graphic designer (on the researcher's request) at one of Khayelitsha's police stations (in Cape Town, Western Cape), depicting police officers (*transpreters*) sitting behind the counter during an information exchange with a member of the public.

The nature of the institutional setting (refer to Figure 2) dictates and influences the rules of engagement governing the broader activities and business of the day within the police service. A closer look at the setup reveals an interesting phenomenon. Van Charldorp (2011, p. 17) observes that, "The setting of the interrogating room displays an asymmetry as the officer sits on a proper desk chair behind the computer whereas the suspect [complainant or witness] sits on a normal chair without a computer in front of him". Another related structural observation (although it is not a concern of this chapter) relates to the privacy within the charge office (as evident in Figure 2). This leaves very much to be desired as *transpreters* deal with an array of crimes ranging from domestic violence to sexual crimes, such as rape and child molestation. The charge office as it is does not, in any way, make provision for vulnerable witnesses who might be affected and thus does not enable them to have their personal matters treated with the highest degree of privacy, dignity and sensitivity.

These observations exemplify the setting and physical environment within which *transpreters* discharge their respective police functions, as well as the discomfort and indecency experienced by those who are affected. In this context, roles and functions are well defined. The explicit role

assigned to the *transpreter* is – amongst others - to raise questions, based on the institutional frame of reference, that are supposedly crucial for purposes of record reconstruction and for the benefit of the investigation. The suspect or witness is obliged to comply and contribute to the interaction by responding to questions and furnish the necessary detail as and when required. On the basis of this reality, it could be argued that the authority structure of the charge office or police station have some effect on the *institutionality* of the discourse (a matter discussed in some detail by Haworth 2009).

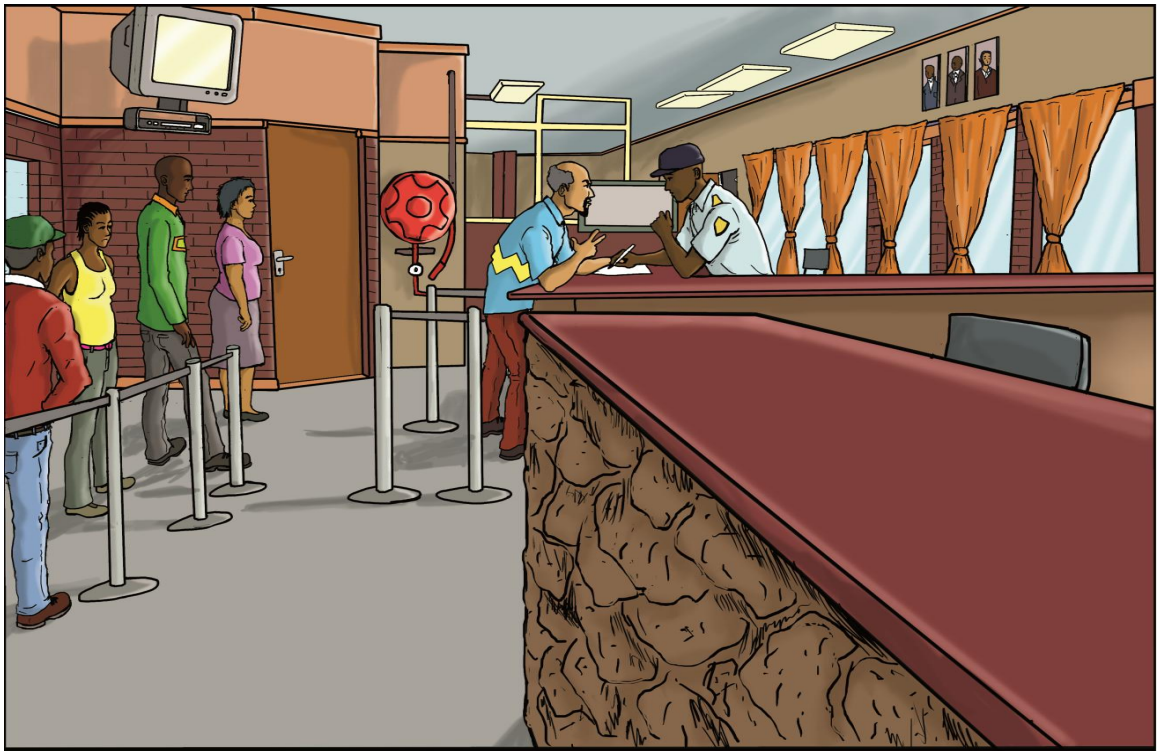

**Figure 2.** An artistic image drawn by a professional graphic designer (on the researcher's request) at one of Khayelitsha's police stations (in Cape Town, Western Cape), depicting the physical environment of a police station, and the manner in which members of the public have to interact with the police offices (*transpreters*).

Van Dijk (2003, p. 363) advances a very convincing argument when pointing out that, "…power and domination are reproduced by text and talk". The pre-statement-taking and record reconstruction exercise falls precisely within this reasoning; and the manner in which the record (the actual sworn statement) is presented by *transpreters* follows an institutionally predetermined format and structure, as shown in Figure 3. It is true that *transpreters* are trained to provide a synopsis of the events surrounding a crime, as the detailed information is presented before them by witnesses. Molefe and Marais (2013, p. 85) shed some light on the important features of this predetermined format and the implications thereof. For instance, they emphasise the fact that,

> ...summarising and simplifying pose a challenge as the officers writing these statements only have one opportunity to listen to the oral statement and attempt to write the summarised version. This, in itself, may lead to information loss or distortions.

Another interesting observation which Molefe and Marais (2013, p. 85) mention in passing relates to the phrase, "UNDER OATH". This phrase, in my view, is another critical feature of the predetermined format. Although there is no symbolic undertaking conducted as in the case of a courtroom, the legal implications of this phrase are adversarial. As evidence of this, refer to the following extract from Figure 3: "I CONSIDER THE PRESCRIBED OATH TO BE BINDING ON MY CONSCIENCE". The reason for this is that the undertaking is obligatory and, as such, the witness is not in a position to dispute what she might have said under the prescribed oath when the matter was brought to court, a substantial part of which would have been reconstructed by a *transpreter*. To do so could then constitute a criminal offence, construed in legal terms as lying under oath or as committing perjury.

A related feature of the predetermined format is the signature of the witness. With reference to the following extract from Figure 3, "THE STATEMENT WAS SWORN TO AND THE DEPONENT'S SIGNATURE WAS PLACED THEREON IN MY PRESENCE AT KHAYELITSHA ON...", Ralarala (2014, p. 389) comments:

> Another central feature of sworn statements is as an undertaking which, in some cases, is coercively enforced by *transpreters*. This activity is marked by the appending of the signature (on the template containing the English version), subsequent to the reading of the statement, as an affirmation of accuracy and comprehensibility.

Thus the record is derived from a pre-statement-taking session conducted in an African language; but once that record is reconstructed in English, it is then immutable, as if 'etched in stone'. At that stage, the witness is not in a position to contest the content represented in that record; instead, she is obliged to make a binding declaration asserting that s/he comprehends the record in its entirety (although it is now in English, the language of the judiciary), whereas this is probably not the case. Asad (2010, p. 26) testifies to a similar manifestation in the context of ethnographic work: (an) "...ethnographer's translation/representation of a particular culture is inevitably a textual construct, that as representation it cannot normally be contested by the people to whom it is attributed". Coulthard (2002, p. 20) shares a somewhat related view when asserting that, "…if he [accused or witness] disputed the accuracy of the record, his only option was to refuse to sign, but that did not prevent the record being taken as true provided it was countersigned by a second police officer".

This, in any case, leaves the witness or those who are subordinates with no option but to comply and append the signature of affirmation on the pre-determined format. The irony of this situation is that, in most cases, the witnesses or those whose narratives are retold on their behalf, tend not to comprehend the language of the judiciary, and it therefore stands to reason that they remain equally unfamiliar with the content of the record or stories which are allegedly produced by them. Thus embedded institutional authority is bestowed on both the translated text and in the *transpreter's* assigned function, dictating the terms of reference in this regard. In concluding this part of the discussion, Ainsworth (2012, p. 26) makes an important point that further echoes these views when asserting that, "Disparities in power between participants in a discursive interaction may inhibit the possibility of a denial of accusatory statements...".

**KHAYELITSHA CASE _____ / ____ / 2013**

NAME & SURNAME: _____ RACE: _____
IDENTITY NUMBER: _____
ADDRESS: _____

_____

TEL: _____ CELL: _____
OCCUPATION: _____ WORK: _____
ADDRESS: _____ TEL: _____

**STATES UNDER OATH IN ENGLISH**

_____

_____

**KHAYELITSHA CASE _____ / ____ / 2013 A ( )**
_____ STATES UNDER OATH

_____

_____

I KNOW AND UNDERSTAND THE CONTENTS OF THIS STATEMENT.
I HAVE NO OBJECTION TO THIS TAKING OF THE PRESCRIBED OATH.
I CONSIDER THE PRESCRIBED OATH TO BE BINDING ON MY CONSCIENCE.

~~DEPONENT SIGNATURE~~ _____

I CERTIFY THAT THE ABOVE STATEMENT WAS TAKEN BY ME AND THE DEPONENT DECLARES THAT HE/SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS STATEMENT. THE STATEMENT WAS SWORN TO AND THE DEPONENT'S SIGNATURE WAS PLACED THEREON IN MY PRESENCE AT KHAYELITSHA ON
AT

_____ _____

~~COMMISSIONER OF OATH~~ _____

~~FULL NAMES AND SURNAME~~ _____
BONGA DRIVE
KHAYELITSHA
RANK _____ SAPS

**Figure 3. Predetermined format/template**

***Languages and their unequal status***

Drawing on his notion of Critical Discourse Analysis (CDA) in which he examines the relationship between discourse and its determinant role in the process of reproducing power and dominance in society, Van Dijk (2003) provides us with a glimpse of the basic concepts that inform his reasoning. For our purpose, his overlapping distinction between 'micro' and 'macro' levels of social order is useful. Van Dijk (2003, p. 354) explains that, "Language use, discourse, verbal interaction, and communication" fall primarily within the former category; yet, "Power, dominance, and inequality between social groups" belong within the latter category. He adds: "In everyday interaction and experience the macro- and microlevel ...form one unified whole" (Ibid., p. 354). In our case, a classic example of the micro level of social interaction involving language use, verbal interaction, etc. is the everyday experience of pre-statement-taking sessions and record construction by *transpreters*. This practice (that is, the retelling of oral narratives and rewriting or translating them from African languages into English in order to benefit the English-speaking judiciary) forms a constituent of the tacit agreement that only English and Afrikaans should remain the *de facto* languages of record. This national arrangement thus endorses the reproduction of power and inequalities at the macro level of social interaction. In the context of *transpretation* function - relevant to our discussion - Venuti (2010, p. 68) has this to say:

> The violence of translation resides in its very purpose and activity: the reconstitution of the foreign text in accordance with the values, beliefs and representations that pre-exist in the target language, always configured in hierarchies of dominance and marginality.

This position is further echoed by Asad (2010) when pointing out the primary reasons that inform and reinforce the unequal relationship between Western (English in this case) and Third world (African languages in this case) languages, and thus the people who speak such languages: "Western nations have the greater ability to manipulate the latter ...Western languages produce and deploy desired knowledge more readily than Third World languages do" (Ibid., p. 22). Although it is not within the scope of this chapter to prove or disprove Asad's claim, it is sufficient to suggest that traces of this reality are quite apparent in the South African context, particularly in the language practices of the criminal justice system. This makeup arises from a long tradition which relates to the apartheid language policies and other aspects of the apartheid era which date back to the mid 1800s (an issue examined in some detail by Cote 2005). Arguably, translations, or the types of knowledge being produced through *transpretation* function, replicate the principles of oppressive legislations. Though different in form, character and time, it remains a 'one-way traffic' of

meaning, meant to provide access for English- or Afrikaans-speaking members of the judiciary during courtroom proceedings. In essence, the current linguistic and 'translation' practices in the judiciary can be said to "...signal inequalities in the power (i.e., in the capacities) of the respective languages in relation to the dominant forms of discourse that have been and are still being translated" (Asad 2010, p. 22). Arguably, access to justice and social justice essentially hinges on the ills of the language question in the South African context, and this configuration is bound to linger as long as the systems remains untransformed. Blommaert aptly asserts that, "Part of linguistic inequality in any society – and consequently, part of much social inequality depends on the inability of spekears accurately to perform certain discourse functions on the basis of available and accessible resources" (2005, p 71). This submission also holds for the *transpretation* practice in that the inequality that is inherently linked to the power of language used is inextricably connected to the true power of linguistic discourse that is "…used by dominant classes who have access to the dissemination tools necessary to maximise exposure to their beliefs" (Linfoot 2007, p. 208).

## 2.4 CONCLUSION

This chapter support the call for agency in translation and interpreting (in Marais' 2012 terms); it also endorses Blommaert and Bulcaens' (2000, p 449) strong views:

> It is not enough to lay bare the social dimensions of language use. These dimensions are the objects of moral and political evaluation and analysing them should have effects in society: empowering the powerless, giving voice to the voiceless, exposing power abuse, and mobilising people to remedy social wrongs.

In this chapter, the conceptual framework of 'Cultural Translation' has been employed in an attempt not only to expose linguistic inequalities and the notion of bias in *transpretation* function and practices in the criminal justice system, but also to lay bare the reflections of power relations and dominance, particularly in the discourse between *transpreters* and complainants and witnesses. These implicit and explicit dynamics should, without doubt, be perceived as fundamental realities of our broader societal makeup in terms of the gaps between those who have power and those without, between those perceived literate and those considered illiterate. As such, attention (in practical terms) should be paid to addressing such deficits of the past which continue to permeate current societal imbalances.

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# CHAPTER 3
# (PAPER 2)

## An analysis of critical 'Voices' and 'Styles' in *Transpreters'* translations of Complainants' Narratives

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## 3.1 ABSTRACT

*Police officers (hereafter referred to as transpreters) have a fundamental role and function as both 'interpreters' and 'translators' in the process of the administration of justice This role and function hinges, oftentimes, on how the two agents, that is, the transpreters and the complainants, relate to each other. What is it that they represent? What do they stand to gain? What mechanisms are at play that they exploit to reach their various goals and desires? In discharging these roles and functions, transpreters in particular become actively engaged in the activities of listening to, visualising, then retelling and rewriting the complainants' isiXhosa oral narrative text into the English language. All these laborious and tedious activities are conducted to compile sworn statements that become essential in the leading of a criminal investigation, as well as in compiling the evidence that is ultimately used in court. In this context, the 'voices' that inform the 'styles' in and through which the original narratives are reconstructed (as translations) into police records remain critical as part of the legal discourse in the South African criminal justice system. These 'voices' and 'styles' signal the extent to which sworn statements are mediated and manipulated.*

*This paper investigates transpreters' 'voices' and their discursive presence that manifest in pre-statement sessions, as well as in the actual sworn statements of complainants, and the potential effect that these may have on the translation 'style' used in the translation process. This work draws on an ongoing research project in which 20 voice-recorded and 20 textual translation episodes of sworn statements are used as units of analysis. From a theoretical and analytical*

*perspective, this paper draws on the works of Chatman (1978, 1990), Hermans (1996, 2007) and Schiavi (1996). The latter scholars in particular have a direct bearing on this work and, as such, their work will not only underpin my ideas through providing a communicative model of translation, but will also forge essential connections between narratology and translation constructs.*

**Key words:** voices, styles, *transpreters'* translations, complainants' narratives, translated narrative text, discursive presence.

## 3.2 BACKGROUND

***Transpreters'*** 'voices' (or 'translator's voice(s)' as conceived in some Translation studies) emanate in different forms in the translation of narratives. This is especially true in *transpreters'* record reconstruction of sworn statements. In a recent study, Ralarala (2014, 17), has raised the issue of voice(s) in translated narrative text in particular, in which a contention is made in relation to the legal discourse, that, ''[...] retelling and rewriting of sworn statements is not only the result of the complainants' contribution but rather of a collaborative exercise in which the *transpreters* are the most powerful voice." In dealing with a somewhat similar issue, a convincing argument has been made by Hermans when pointing out that the translator's 'discursive presence' and 'voice' "...insinuates or parachutes itself into the text, breaking the univocal frame and jolting the reader into an awareness of the text's plurivocal nature (2010, 208)." It is therefore apparent that "[...] there are numerous intertwined voices within the [translated] text" (Koskinen 1994, 448). In fact, the *transpreter's* voice(s) in translated legal narratives arguably remains the most powerful instrument, as it not only carries the potential to influence the outcome of a case, but may dictate the course of the trial in some cases (Heaton-Armstrong and Wolchover 1999 provide a detailed account of this notion).

The current model of translation or the retelling and rewriting of pre-statements into actual statements has a long history in the South African criminal justice system, presumably dating as far back as the late 1600s in the case of Afrikaans and to the early 1800s in the case of English, when both languages were entrenched in the legal system as languages of record (see Cote 2005). This linguistic arrangement was meant, amongst other purposes, to benefit and provide access for English- or Afrikaans-speaking members of the judiciary (who were predominantly White) to preside over cases and conduct court room proceedings (Ralarala 2014), particularly in situations where speakers of African languages were involved in criminal activities. Arguably, from this

point of view, further marginalisation of African language speakers is enmeshed in a political and sociolinguistic context in which the resulting Target Text (TT) was – and is still – used to silence the majority of speakers who are not conversant in, or comfortable speaking, the *de facto* languages of the criminal justice system. This situation in which African languages continue to dwell in the shadow of English (and, to some degree, of Afrikaans) persists in most public domains, despite the constitutional provisions that all the other nine African languages of the Republic have equal status along with English and Afrikaans, and as such should be afforded the same status and usage within the criminal justice system.

That said, the pertinent questions that should take centre stage in the discussion here, are: a. 'Whose audible voice do we hear in *transpreters'* translations of complainants' narratives?'; b. 'Can a translation of the pre-statement into a sworn statement be considered a true reflection of the original?'; and c. 'To what extent does the *transpreter's* 'voice' and 'style' lend to his or her 'discursive presence' in a translated narrative text?'

Hermans (2010, 199) introduces three forms of voice manifestation in a translated narrative in which the 'other voice' (in his terms) could be perceived:

(1) In "cases where the text's orientation towards an Implied Reader and hence its ability to function as a medium of communication is directly at issue";
(2) In "cases of self-reflexiveness and self preferentiality involving the medium of communication itself"; and
(3) In "cases of contextual overdetermination."

Two important observations about all three cases are noteworthy: a. that the voice manifestations tend to affect the translated narratives to varying degrees of presence and influence; and b. the extent of the *transpreters'* 'voices', or the Translator's voice(s) or presence, is inherently linked to and, to a certain degree, influenced by, the translation style that is elected by the *transpreter* or translator. This view is echoed by Munday when pointing out that, "[...] the translator' presence may be measured by creative linguistic choices as well as by repeated linguistic selections" (2008, 20). In the context of *the transpreter's* and complainant's relationship, it seems that the complainant is framed as the 'Real Author', the original teller of the narrative and the central point from which the discourse is generated (Hermans 2010). In the same narrative communication line, the *transpreter* assumes and thus occupies the status of the Narrator or *transpreter*. Unlike in other forms of literature, such as in children's translated narrative texts – as O'Sullivan (2003)

acknowledges – *transpreters* are not in a position to directly determine the construction of an 'Implied Reader'. The 'Implied Reader', in Chatman's (1978) terms, is there, very powerful and influential. Looking more closely at critical 'voices' and 'styles', this observation also leads us to question whether, in discharging their work, *transpreters* are purely representing themselves or entrenching institutional gate-keeping mechanisms, a practice which Baker perceives as "echoing and strengthening the 'voice of authority'" (2010, 11). I will return to this conceptualisation later in the discussion.

This paper, as an attempt to address the guiding questions, seeks to examine *transpreters'* 'voices' and 'styles' that manifest in pre-statement sessions, as well as in the actual sworn statements of complainants, and the potential effect that these may have on the transpreter's 'discursive presence' in the translated narrative text. Embracing Millan-Varela's (2004) conceptualisation of voice in the translated text with specific reference to cases of literary texts that are translated into a minority language, this work will generate relevant categories – as part of the analysis – that are meant to expose the 'metaphors' of 'voice', 'discursive presence' and 'styles'. My focus will be on the *transpreter's* voice detection of covert and overt instances, along with his or her discursive presence, and these cases will be unveiled through comparing the source text (ST) and the target text (TT).

## 3.3 THEORETICAL FRAMEWORK

### 3.3.1 Narratology/Translation

The narratology model by Chatman (1978, 1990) has been widely cited and, in some instances, employed (i.e., Munday 2008; O' Sullivan 2003) by scholars who have researched issues related to discursive presence, translators' 'voices' and 'styles' evident in translations. Chatman (1978, 151) proposes three pairs of narrative communication derived from six components which constitute a narrative text. These pairs are outlined in the following scheme:

**Real author... Implied author... (Narrator)...(Narratee) ... Implied reader ...Real reader**

**Figure 1** ***Narrative text :*** **Chatman's (1978) model of narrative communication**

In this narratological representation of the narrative process, the first pair in the rectangular box depicts the *Implied author* and the *Implied reader* connection. Chatman (1978, 148) portrays the former component as 'implied', suggesting that it is "reconstructed by the reader from the narrative

... it has no voice, no direct means of communicating." Put differently, "The implied author is the agency within the narrative fiction itself which guides any reading of it" (1990, 75). In informal terms, it could be described as a memorable message that, as a reader, one can 'write home about' after one has read an author's work. Yet the implied reader is considered to be the counterpart of the former, described by Chatman as "the audience presupposed by the narrative itself" (1978, 150), or, as Munday puts it, "the image of the reader or readership constructed by author or real reader from reading the text" (2008, 11).

The optional pair, that is, *Narrator* and *Narratee*, are also significant components of the narrative transaction. According to Chatman (1990, 76, 87), the "Voice belongs uniquely to the narrator, [and thus] [...] the only voice of narrative discourse." This is what I would refer to as the designated 'speaker' or the 'teller of the tale'; or, in O'Sullivan's (2003, 199) words, "the voice audible when the story is being told." Therefore, the *Narratee* could be simply described as the audience being addressed in a given time and in a given text by a *Narrator*. In highlighting an important relationship amongst some of these narrative components, O'Sullivan (2003, 200) submits that, "The narrator is created by the implied author and is not to be confused by that agency. Similarly the narratee should not be identical with the implied reader [at least not always]."

The *Real author* and the *Real reader*, that is, the pair located at the outermost part of the box, do not – at any stage – exist in the text. Instead, their presence is sequentially construed as entities responsible for inventing the actual text (in the case of the former), and comprehending the knowledge contained in the text (in the case of the latter). Chatman is particularly explicit about the function of the former: "The real author retires from the text as soon as the book is printed and sold [...]. Yet the principles of invention and intent remain in the text" (1990, 75).

As can be seen, the narratological representation is well designed to account for narrative communication – without due consideration of a translated narrative text – as the above scheme is applicable and relevant to an original text, along with its readers. Nevertheless, the criticism against Chatman's (1978, 1990) narrative communication model levelled by Hermans (1996, 2010), Schiavi (1996) and others (Munday 2008; O' Sullivan 2003) is equally sensible, as it is grounded on the basis that the model lacks the structural expression of a textual presence that recognises translator and translation as 'entities'. Thus, for a better understanding of this communication phenomenon, the original and the translated narrative text should not be perceived as "[...] texts built upon an identical textual and communication situation..." (Schiavi 1996, 9), but rather as separate yet related entities that are in some way sequential, thus allowing for "[...] an extra

presence within the narrative structure...” (ibid, 9). Realising that the terms of the narrative theoretical model (narratology) do not appear to be exhaustive and thus they tend to exclude instances of translation, a model of this nature in the translation domain is, arguably, unsustainable (Schiavi 1996). What is required, according to Hermans (1996, 2007, 2010), is a comprehensive model of translated narrative communication, “[...] which accounts for the way in which the Translator’s voice insinuates itself into the discourse and adjusts to the displacement which translation brings about (2010, 209).” In making a theoretical case, Schiavi (1996, 14) maintains that:

A reader of translation will receive a sort of split message coming from two different addressers, both original although in two different senses: one originating from the author which is elaborated and mediated by the translator, and one (the language of the translation itself) originating directly from translator.

There are some apparent gaps of knowledge in the narratological representation of the narrative process insofar as accounting for translation in a narrative communication. That said, Chatman’s (1978, 1990) conceptualisation has something to offer, however little, in relation to the *transpretation* context: One, apart from usefully underpinning critical views within a narrative text, it serves as an entry point, and thus carries potential for extension to explain the translation activities involving both ST and TT. Two, and more importantly, it allows us to draw some parallels between narratology and translation, with specific reference to the implications and explications pertaining to the role and function of *transpreters*, as well as the *transpretation* system as a whole. To account for the *transpretation* system, an extended scheme that represents a translation narrative communication is proposed:

**.....**

INSERT FIG 2 HERE

**Source Text** **Target Text**

Real author/Narrator ...Implied author/Narrator ... *Transpreter* ... Implied *transpreter* ... Implied reader ... Real reader

(Collaborative narration) as framer of the source text of the translation

**Figure 2 *Translation narrative communication*: A narratological representation of the translated narrative text – integrating a *transpretation* system**

**.....**

This proposed representation in Figure 2 obviously varies from the one depicted in Figure 1. The scheme is symbolic and characteristic of the narrative communication line of *transpretation* function. It incorporates the *transpretation* activities and the sequential process involved from the initial phase of the Source Text (ST, that is, the original text), to the ultimate phase of the target text (TT, that is, the translation of the source text). This is exemplified, first, by the complainant's *telling* of the original narrative in his or her own language (isiXhosa) – during an initial collaborative process (that is, in pre-statement sessions); into this, the *transpreter's* 'voice' and 'discursive presence' is insinuated as the narrative unfolds (as will be shown in the analysis below). In this instance, the complainant assumes a somewhat dual yet mutually inclusive role: that of both a *Real author* as well as that of the Narrator. Secondly, *Visualising and reconstructing* of the 'told' narrative – a process that is cognitively captured, and that takes into account encoding and decoding of the narrative – occurs on the part of the *transpreter*. Thirdly and finally, *Retelling and rewriting* the complainant's narratives – as a mode of representing the other in a future environment – is considered as a process which follows a systematic translation in which, in some cases, framing (by the implied translator/*transpreter* of the source, as well as the *Implied reader* of the translation) becomes prevalent). In fact the implied translator/*transpreter* is the force(s) behind the message, that which shapes the actual translation as well as its interpretation.

### 3.3.2 Literature: Translation, 'Voice' and 'Style'

Before considering the literature that deals directly with the notions of 'voice' and 'style' in translation and narratology, it may be useful to provide a cursory glimpse of the concept of 'invisibility' which is somewhat similar to, and perhaps serves as some form of prelude to a discussion of, the former notions ('voice' and 'style'). The concept of the translator's 'invisibility' in translation was initially conceived by Venuti (1995, 2008). This 'invisibility' refers to two phenomena; and the one more relevant to our context, '[...] is an illusionistic effect of discourse, of the translator's own manipulation of the translating language, English in this case' (ibid.). He adds that, "The illusion of transparency is an effect of a fluent translation strategy, of the translator's effort to insure easy readability [...]" (ibid.). Accordingly, a translation should not be considered a translation but rather an 'original'. Apart from the translator's individual concerted efforts to make his or her work a 'carbon copy' of the original, thus concealing his or her visibility, this level of compliance is equally reinforced by the interests of the readership as they "[...] also play a significant role in insuring that this illusory effect takes place" (ibid., 1). What is also striking in this reasoning, is this: "The more fluent the translation, the more invisible the translator, and, presumably, the more visible the writer or meaning of the foreign text" (Venuti 2008, 1).

In echoing Venuti's view, Koskinen (1994, 451) submits a convincing argument:

The translator is often seen as a dangerous and invisible middleman hampering communication. There is need to trust him /her, but at the same time one can never know for sure whether s/he is telling the truth or a lie. The translator has power because s/he has something to say, and s/he may decide not to say it, or what is worse, decide to say something else instead [....]Translation, as well as any other form of writing, is always manipulation for some purpose. No discourse is free from ideology.

This position, as advanced by both Venuti and Koskinen, is indeed characteristic of the discourse of *transpreters* and the *transpretation*. The danger here is embedded in the invisible voices and styles that emerge in the translated or target text. This is especially true if "[...] the text does not return to its writer as identical to the one s/he wrote. If it ever returns it is no longer the same, new situations, commentaries and new intertextual relations have changed it" (Koskinen 1994, 450). Unlike the notion of translation hierarchy, "[...] where the original is considered to be far above the translation" (ibid.), the context of the *transpretation* system operates by a completely different set of rules in that the resulting translation is considered way above the original. In fact, its primacy, supremacy, authority and perceived value in the eyes and minds of the readership make it more essential than the original. Linked to its status orientation, this type of discourse is not free from vehemently influencing a designated public readership (mostly prosecutors, magistrates and judges) in terms of their reasoning and their making of important decisions pertaining to the legal future state of affairs. Snell-Hornby (1995, 113) substantiates this view: "The text of a public directive is the direct product of a specific situation, and its translation has a prescribed function to fulfil for specific target-language readers [...]." It also warrants mention that, in our context, pre-statement sessions are considered unofficial records and, as such, are not admissible in as far as the court record is concerned; and yet the significance of this initial process cannot be overemphasised. The actual statement – as reconstructed by *transpreters* – remains the only official and acceptable record, and thus the only audible voice in the dossier. In line with this notion May (1994, 115) posits that [translators] "[…] step in to impose standards of language propriety and even of moral propriety [...]" and this is achievable through "[...] subtly altering all the power relations in and around the text – between character and narrator as well as between author and text or text and reader." If anything could be used in the *transpretation* function to validate the authenticity of the original narrative (originating from the pre-statement session), it would be a presiding officer's elicitation of reaffirmation from the concerned witness during court proceedings. The potential flaws associated with this process are clearly enormous, as the validation of the original record will

partly depend on the memory of the witnesses of an actual encounter or incident which might have occurred quite some time before.

Hermans (1996) and Schiavi (1996), in parallel written 'companion pieces', explore somewhat related issues, approaching 'invisibility' and 'visibility' of the Translator in terms of the notions of the 'Translator's discursive presence', the 'Implied Translator', and the 'Implied Author'. Since then, debate on these issues has received considerable attention and impetus from various translation and narratology scholars (Baker 2000; Munday 2008).

## 3.4 EXPLICATING 'VOICE' IN TEXT

According to Hermans (1996, 2007), the discursive presence of the Translator in translated texts constitutes what he conceives of as the 'other voice'. An interesting observation in this regard relates to the use of the first person pronoun 'I' when dealing with issues of 'directness' and 'indirectness'. In advancing this model, he argues: "The suspension of personal views and values is not always easy to achieve for translators or interpreters, even when they are in sympathy with what they translate" (2007, 57). In some translation instances – relevant to the current data – translators falsely pretend the usage of the first person pronoun for some reason. Accordingly, he adds:

[The] 'I' that addresses the reader in English refers exclusively to ... [the complainant] and not to the translator, even though it was the translator who wrote 'I'. The first-person pronoun therefore carries a double load: the translator's implied 'I' is the face behind the mask ... (ibid, 56).

In his later work (in the republication of his 1996 article), Hermans (2010, 198) contends that, "[...] translated narrative discourse always contains a 'second' voice', which may be referred to as a 'Translator's voice." This voice, he points out, "[...] may be more or less overtly present [...] [and] may remain entirely hidden behind that of the Narrator, rendering it impossible to detect in the translated text." It is therefore "the illusion of the one voice, that blinds us to the presence of this other voice" (ibid.). In his analysis, Hermans (2010) exemplifies instances of voice manifestation, paying particular attention to areas where the translated narrative text (by itself) unveils traces of discursive presence. His focal point relates to instances in which the translator employs additional paratextual materials – as part of the translation. It is in these instances that he concludes that there is not much that we can do, because the discursive presence seems to be inevitable.

Essentially, the translator's voice, or his or her discursive presence, as O' Sullivan (2003, 205) puts it, "[...] can be located in every translated narrative text on an abstract level as the implied translator

of the translation," let alone its manifestation and tendencies "[...] on a paratextual level as that of the translator and inscribed in the narrative..." (ibid., 205).

Foregrounded within the theoretical purview, Schiavi (1996) examines the same concept, paying particular attention to the notions of *Implied Author* and *Implied Reader*. He (1996, 7) focusses on the argument that, if we want to do justice in describing the communication situation that takes place in a narrative translated text, we cannot:

[...] ignore the agent who brought about [translation], namely the translator, who by interpreting the original text, by following certain norms and by adopting specific strategies and methods builds up a new [...] relationship between what we must call a "translated text" and the new group of readers.

The point being made here, as Schiavi (1996, 3) underscores the notion of translator's voice or his or her discursive presence in the translated narrative text, is that, "A translation is different from an original in that it also contains the translator's voice which is in part standing in for the author's and in part autonomous." Hermans echoes this idea when suggesting that: "[...] translation remains a text in its own right while at the same time, as a translation, it also 'exhibits' another text" (2007, 105). Accordingly, the perceived presence is said to reinforce what Schiavi (1996, 3) labels as "[...] a privileged relationship with the readers of the translation [...]."

## 3.5 EXPLICATING 'STYLE' IN TEXT

As pointed out earlier in this discussion, the extent to which these 'voices' and 'discursive presence' are manifested and their degree of visibility relates to employable styles in the process of translation. In her exploratory study, Baker (2000) examines the notion of style with specific reference to distinctive patterns that relate to the translator's outputs. She offers possible explanations that could form a basis for methodology. She submits that style should be considered as the translator's "[...] consistent use of specific strategies, including the use of prefaces or afterwords, footnotes, [and] glossing in the body of the text" (2000, 245). In advancing her argument, she postulates, however, that a study of the translator's style should not only be restricted to instances of open intervention by the translator, but rather encompass and consider, "[...] the translator's characteristic use of language, his or her individual profile of linguistic habits, compared to other translators" (ibid.). For this reason, she points out that style should also be considered as being concerned with "[...] describing or recurring patterns of linguistic behaviour, rather than individual or one off instances of intervention." Logically, therefore, apart from other elements, pattern and patterning are key identifiable features of style. If style, in Baker's (2000,

245) terms, could be "[...] expressed in a range of linguistic – as well as non-linguistic – features," it could be submitted that 'voice' and 'style' are intrinsically inextricable. In essence, for one to have a holistic view of the emanation of these literary and linguistic features, one needs to consider their potential co-existence and mutual exclusiveness.

Hermans (2010, 198) subtly echoes this notion of the co-existence and inextricable link between 'voice' and 'style' when he argues that, "Some translation strategies [styles] will effectively paper over the cracks and leave the reader unaware of the other voice." Malmkjaer (2004, 14) takes up the debate through her conceived 'translational stylistics'. She points out that "[...] the question of how the text affects the reader [...]" is crucial, as it is inherently linked to the manner in which, "[...] the writer [translator/*transpreter*] seeks to express various concepts" (ibid.). When making these decisions and committing to specific translation choices and strategies [styles], "Writers [translators/*transpreters*] select those terms and expressions which they believe mostly likely to elicit the desired response on the part of the reader [readership]." The level of execution of all of these decisions and commitments, I maintain, hinges – in part – on the audibility of the *transpreter's* hidden 'voice' (in Hermans' terms, 1996) in a given context. Arguably, the *transpreter's* 'voice' creates a profound impression on his or her conceived discursive presence that then has a direct bearing on the translated narrative text; and thus confines the potential effects that this could have on the mind and reasoning of the readership. Saldanha (2011, 31) provides a revised (and what I perceive to be an exhaustive) definition of translator style: It is a way of translating which,

- is felt to be recognisable across a range of translations by the same translator,
- distinguishes the translator's work from that of others,
- constitutes a coherent pattern of choice,
- is motivated in the sense that it has a discernible function or functions, and
- cannot be explained purely with reference to the author or source-text style, or as the result of linguistic constraints.

What seem interesting and distinguishable from Saldanha's definition in relation to our *transpretic* context are mainly bullets 3 to 5. The analysis (below) will exemplify some of these issues. Also of interest in our context is Boase–Beier's view of style:

[...] style results from the author's choices and embodies the author's attitude, contrasting with the fictionality of content which serves as a vehicle for style. If we locate author's intention in the style

of the text, features of style can be seen both as clues to the particular cognitive state which the author intends to convey and as a devices which have particular effects on the reader (2004, 29).

## 3.6 ANALYSIS

Evidence of the translator's 'voice' and discursive presence could be noticeable in different forms, for example, the presence of the translator's footnotes and prefaces (Munday, 2008). This phenomenon is also detectable "[...] in the words of the translated text ... read in isolation and judged as the unmediated words of the ST author" (ibid., 14). Relevant as they may be in certain text types, such methods of analysis do not seem to be applicable to analysis of the current data. What seems to be a viable mechanism of detecting the *transpreter's* 'voice' and discursive presence, at least for our analysis, is a confrontation between the 'authorial voice' and the *transpreter's* voice (paraphrased terms in Hermans 1996a). Parallel to this exercise is the unveiling of the employable 'styles' that will be conceived as 'distinctive' linguistic and non-linguistic characteristic patterns opted for by the *transpreter* in the translated narrative texts. The non-linguistic factors or 'extratextual' or 'extralinguistic' information, in Saldanha's (2011, 31) terms, have been proven equally significant as another level through which 'style' could be unveiled (see Baker 2000 for further reading). According to Munday (2008, 14), "Any alteration, muffling, exaggeration, blurring or other distortion of authorial voice will remain hidden until and unless some element of the TT reveals the mediation or until the TT is compared to its ST". In essence, "[...] translations are dealt with in terms of comparisons with originals, be it in terms of equivalence, shifts, successful and successful speech–act reproduction ..." (Schiavi 1996, 1). In echoing this view, Malmkjaer (2004, 15) discusses the significance of the relationship between the translated text and its source text, and emphasises that due consideration should be given to – amongst others – matters of 'writer–orientation', 'text–orientation' and 'reader-orientation' during analysis of translator style. If anything should be of concern in a mediated translated text, as Malmkjaer (2004, 16) maintains, it is the characteristics that affect it, which she outlines as follows:

- a mediated text is affected by the mediator's interpretation of the original;
- mediation through translation always has a purpose;
- the purpose of the translation is intended to serve may differ from the purpose the original text was intended to serve;
- the audience for the translation is almost always different from the audience for the original.

Based on the consulted literature, there is no doubt that a fruitful and critical analysis of translator's 'voice' or 'discursive presence' in a translated narrative text – with a view to uncovering inherently

employable 'styles' and the effect(s) thereof – rests, as Millan-Varela (2004, 52) convincingly puts it, not only in a target text alone, but should also take into account "[...] a comparative analysis of source and target texts, paying attention to the influences and strategies [styles] involved in the process[...]"

As part of the analysis, the following section of the paper examines four randomly selected cases, using data from two versions. The data used in this article is drawn from my ongoing research. For ethical considerations, exact names, locations, dates and times have been kept anonymous throughout this article.

The data used in this study were collected at a local police station in the Western Cape in 2013. The selection of this designated area was informed by the researcher's language expertise, that is Xhosa and English, as both languages are official in the province. Through the support and cooperation of Brigadier X, two senior police officials (at the rank of Captain and Lieutenant) were assigned to supervise two junior members (at the rank of Constable and Student Constable) who assisted in this research exercise. The statement-taking sessions were conducted at a normal charge office (police station), with the two police officials seeking and obtaining information at various times from a variety of complainants who, at different times, came to report an array of criminal offences, ranging from common robbery to assault. The usual procedure for taking statements, guided by the institutional norms, was followed: members of the public were required to rely solely on a police officer who assisted them in crafting their sworn statement, using pen and paper; they ultimately aimed to gather evidence for court proceedings, in a language that is acceptable to the court – English in this case. The only striking deviation from the norm (about which all complainants were cautioned) was the use of audio-recording during the statement-taking sessions (specifically for the purpose of this study). The verbal narrations which constituted the descriptions of the events and their unfolding were produced mainly by the complainants, in the language (isiXhosa) understood by both the police officer and the complainants. Such an interaction, led by a police officer, eventually resulted in the successful compilation of a translated sworn statement (in English). The original (verbal) version was transcribed (from the audio-recorder) with the help of bilingual research assistants with expertise in Xhosa and English.

Permission to conduct the study was obtained from the Office of the National Commissioner in Pretoria through their research office headed up by the Divisional Commissioner. For operational purposes, permission to collect data from local police station was sought and granted by the Provincial Commissioner (Western Cape). For purposes of ethical clearance and consideration, the

exact names, locations, dates and times have been kept anonymous throughout this study. In the course of data collection, participants were dully cautioned about their statements being recorded before the commencement of the sessions, and thus informing them of their rights and consent to participate in the study voluntarily.

The primary purpose of this study was to identify the *transpreter's* 'voice' as well as his or her 'discursive presence' in these texts, and the potential effect that these might have on the choice of translation 'styles' used in the translation of such statements.

For the purpose of analysis, we will refer to selected excerpts from 4 Cases. In the extracts, the *transpreter* is identified as 'T', and the complainant as 'C'.
Table 1 contains symbols used in the transcripts, and the conventions which are based on the outline of Eades (2010), Heydon (2004) and Rock (2001).

**Table 1 Transcription conventions and symbols that are common in the cited transcriptions**

| Symbol | Description |
|---|---|
| :: | The sound is lengthened by one syllable for each colon |
| (.) | Micro-pause of less than 0.2 seconds |
| ... | Omitted talk |
| (1.35) | Silence measured in seconds |
| (( )) | *Transcriber's* remarks, including comments made on voice quality or non-verbal sounds |

Each sworn statement was generated during the discursive interaction between a *transpreter* and a complainant. The actual or final sworn statements were translated into English by *transpreters*, and statements were converted – for ease of reference – from a hand-written version into a Word document. The English translations in brackets that appear below each turn-taking utterance, are those of a professional, sworn translator.

Synopsis of cases

Case 1

On a certain date (stated in full in the original text) in 2013, the Complainant (a 24-year-old female; name stated in full in the original text) reported that she was allegedly assaulted by her boyfriend. The police opened a case of Common Assault, Under D/V (domestic violence) against him. The

complainant was advised to apply for a Protection Order against him because this was not the first time she had been attacked by him.

Case 2

On a certain date (stated in full in the original text) in 2013, the Complainant (born in 1948, female; name stated in full in the original text) reported that her clothes and other possessions had allegedly been stolen by her son (name stated in full in the original text). The police opened a case of contravention of protection order against him as this was not the first time his mother had reported him to the police.

Case 3

On a certain date (stated in full in the original text) in 2013, the Complainant (born in 1988, female; name stated in full in the original text) reported that she had allegedly been assaulted by her neighbour. The police opened a case of Common Assault against the neighbour. A peace order had previously been issued for the same alleged perpetrator but that did not deter her from continuing to harass the complainant and her family.

Case 4

On a certain date (stated in full in the original text) in 2013, the Complainant (female; name stated in full in the original text) reported that she had allegedly been assaulted by her husband. The police opened an Assault Common, Under D/V (domestic violence) case against the alleged perpetrator.

## 3.7 TRANSPRETERS' VOICES, STYLES AND DISCURSIVE PRESENCE

As part of understanding the subsequent discussion, it is crucial to note that the *transpreter's* 'voice' and 'discursive presence' manifesting in both pre-statement and actual statements leads to her/his style – which should be viewed as reflecting "clues to intention and vehicles of effects," in Boase-Beier's (2004, 29) terms.

From Case 1 (Pre-statement):

(1) Inconsistencies and Inaccuracies

The *transpreter's* 'voice' and 'discursive presence' is traceable through inconsistencies and inaccuracies that emerge in the comparison of the ST and the TT. Reference is made to the following extracts cited from Case 1.

From Case 1 (Pre-statement)

66 C: (0.2) *Ndiphakame (.) xa nd' phakamay' ebhedini (.)*[...]

(I got up (.) and while I was getting up from the bed [...])

From Case 1 (Actual sworn statement):

T: Then I got a chance to wake up [...]

In the account of words of the *Implied author/Narrator* – brought to bear by the *Collaborative narration* – the *Real author/Narrator* is very explicit about the state she was in as the events were unfolding. She was wide awake, and (as suggested in the original record, the pre-statement), she was arguing with the alleged perpetrator before she got up from the bed. Yet the translated version insinuates that she was asleep at the time, and hence: 'Then I got a chance to wake up.' Such a mistranslation carries two serious implications: One, it affects the content and, as such, misrepresents the truthfulness of the original (whether intentionally or not). Two, if the matter eventually goes to trial, the case could well be regarded as one of those cases formulated on the basis of 'Alleged verbals,' in which the witness would disown the charge when the matter goes to court on the basis that the police record was prefabricated (see Eades 1997 for a detailed account). A case in point is *S v Kimbani* dealt with in some detail in Ralarala (2013). In this case, the police statement was allegedly distorted and obtained through coercion and, as a result, the actual translated statement contradicted the original statement presented by the witness in isiXhosa. Nevertheless, the English translated version (TT) was given official status and supremacy by the *Real reader* (Judges, Magistrates and Prosecutors), irrespective of such inconsistencies and inaccuracies, and thus the accused person ended up being convicted. The evident inconsistent and inaccurate translations and interactions exemplified above reflect the *transpreters* 'voice' and the 'discursive presence' and 'style' of translation, as well as the effect of this 'discursive presence' on the translated narrative text.

(2) Errors in the translated text

A particularly observable pattern of *transpreter's* 'voice' and 'discursive presence' in the *transpretion* system relates to the errors that become visible in the Implied *transpreter* of the source text, that is, the reconstructed record of the original. The following extracts cited from Case 4 are worthy of note:

From Case 4 (Pre-statement)

256 T: "(0.10) *So i-i-i-ilento uye wak' betha awuva like i-injari::z akho ndaw' ib' hlungu*?"

(So the-e-e, he hit you; you are not having any injuries; you do not feel any pain?)

257 C: *Kub' hlungu nje aph' emzimbeni*

(My body is aching)

From Case 4 (Actual sworn statement)

T: I left with back pains after he assaulted me [...]

Apart from the inaccuracy shown in the Implied *transpreter's* version of the source text (Line – depicts the actual sworn statement) with specific reference to the distortion of information (i.e., 'My body is aching' versus 'I left with back pains after he assaulted me'), when the example is compared to Line 257, it also unveils errors which relate to the *transpreter's* inability to construct grammatically correct sentences that are directed at record construction.

From Case 3 (Actual sworn statement)

Further examples of errors in the translated text – extracted from the actual statement – are illustrative:

T: While I was in my house trying to insert the key in order to open the door I heard someone hitting me on my head. I turned my head because there was no one behind me, it was Nodoli with her hand. She hitted me again a second wound and I run away [...]

This lack of the *transpreter's* linguistic competence in both English and isiXhosa, in both spoken and written language forms – as exemplified by inappropriate code mixing, word order, slang etc. – highlights the complexity of accurately accessing the complainant's intended meaning, let alone the actual meaning conveyed by the words of the *Implied author/Narrator*. In essence, the persistent linguistic errors that emanate from the pre-statement sessions encroach upon the meaning conveyed in the record, and thus distort the Complainant's intended meaning as reflected in the original record (pre-statements constructed by the *Real author/Narrator*. Critically, the emanating misinterpretation could have adversarial consequences for concerned witnesses as the real readership only has access to the TT at the time when important legal decisions are made.

(3) Insinuation by a second transpreter in pre-statement sessions

The involvement of a second *transpreter* is another example in which his or her audible 'voice' and 'discursive presence' are unveiled. The following examples, extracted from Cases 1 and 2, illustrate this notion:

From Case 1 (Pre-statement)
((Police 2 asks questions of complainant))
T: (0.2) Who beat you now? (0.2) Who are angry for you? Huh?
C: (0.5) Who is angry for me?
T: *Mmh*
C: My boyfriend ((speaks in a soft voice))
T: *Yoh!* (0.8) What you done to your boyfriend, ma'am?
C: (0.5) Nothing (.) maybe it's because I talk too much ((in a very soft voice))
T: (.) You talk too much *anden?*
C: (0.2) Maybe he doesn't like that (.) that I talk too much

From Case 2 (Pre-statement)
T1: *(*0.2) Is the suspect *urm::* arrested already?
T2: 138- Arrested
T1: 139- Oh (.) Ok
T2: 140- Where's the ( )
T1: So must put them in the::docket?

The type of insinuation by a second transpreter illustrated in these cases is likely to be seriously destructive to the complainant's case. Apart from demeaning the woman's allegation and belittling her by suggesting that she must be responsible for her boyfriend's anger and violence towards her, as the record shows (see Case 1: T, third turn), this could potentially violate the structure of the chain of thoughts in the process of record construction, as this demeaning attitude would potentially be reflected in the wording of the record. This dimension, in the main, is a strategy or style that demonstrates the level of power bestowed upon *transpreters* against those who have less power (here, complainants) within the police system. The attitudinal manner in which he/she infers blame and questions the complainant using a belittling disposition (Refer to example extracted from Case 1) is a classic example of the extent of power that *transpreters* possess over witnesses. In addition, a second *transpreters'* insinuation in the record construction process is further reflected in the ownership of privileged information and how to act on that information. The second example (extracted from Case 2) provides us with an indication of a possible arrest based on the compiled

information contained in the docket. Such information is privileged because it is not known to the complainant.

(4) Additions and Omissions

A strategy or style which is also applicable in the context of *transpreters*' translated narratives relates to additions and omissions. A case in point (in terms of an addition) is the target reference – which does not appear anywhere in the source texts in all the selected pre-statements of the cited Cases, but is visible enough in the context of translated versions (that is, the TT). It is to the effect that 'further investigation must be conducted on behalf of the Complainant,' as the example below illustrates:

From Case 3 (Actual sworn statement)

T: I gave no one permission to break the school premises and took items. I request further police investigation for this matter.

It is a foregone conclusion that, subsequent to the laying of a charge, an investigation is bound to ensue. However, such a strategy or style creates the illusion that the instigation of the investigation is borne out of the complainant's verbatim words, yet this is not the case. This is a clear reflection of the *transpreter's* hidden 'voice' and 'discursive presence' in the translation of the complainant's narratives. Based on this observation, the *transpreter's* framing of the complainant's words in this instance is recognisable, with the main purpose of eventually securing a conviction.

Omissions and distortions that are far-fetched are common in *transpreters*' translated narratives to the point of compromising the authentic content of the original narrative. This strategy or style is illustrative of the *transpreter's* 'voice' and 'discursive presence' in the process of record construction. The following examples relate to this notion:

From Case 2 (Pre- statement)

82 C: *E-eh nephone yam andina phone way' thatha lo mntan' iphone yam (.) andinaphone (.) andinaphone.*

(E-eh and my phone; I do not have a phone; this child took my phone)

294 C: *Zi (.) ilokhwe eny' iblue*[...]

(They (.) the other dress is blue [...])

295 T: *E-eh E-eh*

296 C: *Kweza lokhwe (.) enye ilantuka i:: enye i-oerenji::*

Of those dresses (.) the other one is:: the other one is orange::

From Case 2 (Actual sworn statement)

T: On Tuesday 2013-01-29 at approximately 11:00 I was at home with my son Thabile Ntsini at W267 at Site b. I left a plastic bag on top of my bag with my black and white dress, orange skirt and blue skirt they were all inside the plastic bag.

As can be seen, apart from misrepresenting the factual information that is, referring to 'dresses' (from the original narration) as 'skirts' (in the rendition), valuables such as the cell phone have not been included among the stolen items in the *transpreter's* constructed record. The omission of such important information (mistakenly or intentionally) is bound to affect the strength, as well as the importance, of the case.

(5) External Features

External features that tend to be imposed by *transpreters* in record construction may be presented in different forms, and are able to find their way into the *transpreters*' translated narrative text. For example, leading questions – as representation of the *transpreter's* 'voice' and 'discursive' presence – are critical in the collaborative narration process, as these questions serve to seek and obtain selective information. Accordingly, this feature is inherent in institutional conventions and influences the structure and nature of record construction. Note the following examples:

From Case 3 (Pre-statement)

105 T: *Sek' phuma negazi?*

(And also the blood was flowing?)

106 C: *Sek' phum' igazi ke ngoku selixhifiza kakhulu* [...]

(Blood was already flowing out, and flowing out fast [...])

From Case 2 (Pre-statement)

114 T: Uyafun' abanjwe ?

(Do you want him to be arrested?)

115 C: Ndiyafuna abanjwe u Thabile ...

(I do want Thabile to be arrested ...)

The above examples reveal that the leading questions are not merely meant to reaffirm the agreement by both parties over the current situation, but they underscore the *transpreter's* insinuation in terms of the future action – which usually constitutes an arrest.

Another important aspect related to external features is the modification or escalation of the charge. This strategy or style has a direct bearing on the voice and discursive presence of the *transpreter*. The following extracts drawn from Cases 2 and 4 bear relevance:

From Case 2 (Pre- statement)

156 T: (0.2) *Yiva mama, siza k'vulel' i case elantuka kuba wophule umthetho malunga nale protection order.*

(You understand mother? We are going to open the case for you, because he contravened the law regarding this protection order)

157 T: (.) *Ngoba iyatsh' ub' angaphind' ak' bele neh?*

(Because it does state that he should not steal from you again, neh?)

158 C: Eh:: Eh::

159 T: *Ja, ngoba xa sizovula eyetheft uzophinda aphume ngomso*

(Yes, because if we open a theft case, he will be out again tomorrow)

160 T: *(.) kanti kule xa sivule le yoba ophule umthetho malunga nento ayinikiweyo imiqathango*[...]

(Whereas with this one, if we open this one of contravening terms that he had been given...)

161 C: Eh:: Eh::

162 T: *Izawuba yeyona izakusinikeza ubutyebi icase yethu*

(It will make our case stronger)

From Case 4 (Pre- statement)

265 T: *Then ke ngok' uzand' fundela ubon' uba u:: yiyo na yonke na lento uye uyithethileyo*.

(Now then, you are going to read to check if all that you said is there)

266 T: *(.) Uba yiyo ndizocela uzund' say' nela apha (.) uphinde und' fakele isig' nitsha yakho apha und' fakele isig' nitsha a::pha ya::kho.*

(If it is all there, I'll ask you to please sign for me here (.) and then again give me your:: signature:: here)

267 T: (0.53) *So itshajizi zakho zizaw' ba yithu bikhozi ukubethile waphinda emven' koko wathatha ifown yakho 268- (.) So ifown yakho akay' bang' uy' robhile"*

(So your charges will be two, because he assaulted you and then thereafter he took your phone 268- (.) So, he has not stolen your phone; he has robbed you of it)

As observed in these examples, charges have been escalated from less serious to more serious crimes: A charge of theft (Case 2) was converted to contravention of a protection order; and a charge of theft (Case 4) converted to robbery. Although this has been negotiated through a collaboration narration (as shown in the above examples) in which the *transpreter's* voice and 'discursive presence' has assumed a high level of audibility, logically such negotiations are enmeshed in the conditions of power. In each case, the *transpreter* occupies a more powerful position than the complainant. The implications of the *transpreter's* insinuations in this regard are explicit: to secure a conviction and a possibility of a longer sentence upon the alleged perpetrator.

(6) First Person Pronoun

The first person pronoun, 'I' is commonly used in all translations of sworn statements - as depicted in all the 'Actual sworn statement' examples cited in the above cases. Although it may appear (in the eyes of the readership) that it represents the verbatim 'words' of the complainant as they have been framed, this reality does not necessarily take away the involvement of the *transpreter*. This observation reflects what Venut (2008, 1) refers to as an "illusionistic effect of discourse, of the translator's own manipulation of the translating language, English". In this context, as a matter of institutional discourse and translation convention, indeed the *transpreter* puts his/her identity behind the veil. However, masking or concealing his/her identity in this way does not necessarily make his interventions completely vanish from the translated narrative – as it has been revealed in the analysis of the data. In fact, adopting this translation style in the translation of complaints' narratives, arguably, reinforces the *transpreter's* emotional involvement in the entire process of record construction, and hence his or her 'voice' and 'discursive presence'.

## 3.8 DISCUSSION

In this study, an attempt has been made to present a critical analysis of 'voice' and 'styles' in *transpreters'* translations of complainants' narratives. Pertinent research questions have been raised and addressed: a. 'Whose audible voice do we hear in *transpreters'* translations of complainants' narratives?'; b. 'Can a translation of the pre-statement into a sworn statement be considered a true reflection of the original?'; and c. 'To what extent does the *transpreter's* 'voice' and 'style' lend his or her 'discursive presence' to a translated narrative text?' In an attempt to address the aforementioned questions, selected categories that have a direct bearing on the current data have been generated and analysed to derive answers. Metaphors of 'voices' and 'styles', and the effect that these have on the notion of discursive presence, have demonstrated important interventions and interferences by *transpreters* in the *transpretation* process.

In relation to the first research question, it is apparent through the analysis of the data that, in some cases, distorted information (which is reflected in the form of inconsistencies, in accuracies and errors in both pre-statement and sworn statements), as well as the use of directedness (which is depicted in the form of the usage of first person pronoun), are all factors that do not only find their way permanently into the TT but they also contribute meaningfully to what Schiavi (1996, 14) refers to as a situation in which a translation ends up comprising two different senses, that is, the author's intended sense and the translator's 'elaborated and mediated' sense on the one hand, as well as the 'language of the translation' which originates directly from the translator on the other hand. It is in this context that audibility of the *transpreter's* 'voice' and 'discursive presence' become 'visible'. That it becomes the 'voice' that the future readership –constituted largely by judicial officers- is heard more. That it becomes the heard 'voice' that indicates that the *transpreter* is more powerful than the *Real author/Narrator*; and this greater power means that the *transpreter's* distortion of the *Real author/Narrator's* original meaning goes unchallenged.

Pertaining to the second research question, it should be noted – as revealed through the analysis of the data – that the 'inputs' and 'interventions' that are both voluntary and involuntary through insinuations by fellow *transpreters* during the process of record construction, as well as in the form of additions and omission styles advanced by *transpreters* in the translated narrative text, are quite revealing and impactful in 'exhibiting another text' in Hermans' (2007, 105) terms. In fact, the resulting manipulation of the text may have some effect on the designated readership (i.e., Magistrates, Judges, Prosecutors) – let alone the unintended consequences on the part of the witness – as the translation could be viewed as containing a somewhat different message from that of the original. Therefore, referring to a translation of the pre-statement into a sworn statement as a true reflection of the original in the current state of affairs, leaves us with some grave misgivings.

In relation to the third research question it is evident that the power of the *transpreter* –derived from representing an institutional discourse along with the translation itself – is designed to "addresses an audience different from that addressed by the original" as noted by Hermans (2010, 210), and this cannot be overemphasised. The packaging of this sort of information through leading questions – as noted in the analysis, as well as modifying such as and when the need arises (with or without intention) does not only reinforce the distribution of power or disparities of such between the participants but also underscores the larger extent and the entrenchment of the *transpreter's* 'voice' and 'style' which lend his or her 'discursive presence' in a translated narrative text.

As a final note, a link arising from narratology and translation through the translated narrative text has been exposed in this work. This has been made possible through lending critical components of both narratology and translation to the analysis. For example, the *Narrative text* which could only account for a narrative communication - without due consideration of a translated narrative text has been extended for the purposes of integrating translated narrative text through the proposed model of *Translation narrative communication.* And this has been accomplished in order to give an account and better understanding of the translation processes emerging in the process of record construction - from translation of pre-statements into sworn statements. To this end, other critical voices are now recognisable in this 'line' of communication, that is, the 'Transpreter as a framer', 'Implied transpreter of the source text' and the 'Implied reader of the translation'. Accordingly,

If this adjustment calls for the recognition of the Target-Culture Implied Reader for positing an Implied Translator and for the possibility of discerning the Translator's discursive presence in certain cases and under certain circumstances, then there is nothing to prevent extending this principle from translated narrative to translated texts in general (Hermans 2010, 210).

## 3.9 CONCLUSION

In the present study, the notion of 'voice' and 'discursive presence' of *transpreters* has been examined in the context of translations of complainants' narratives in record construction and the manner in which the influence of employable 'styles' can impact the *transpreter's* discursive presence in a translated narrative text. Through a comparative analysis, instances of *transpreters*' 'voice' manifestation and 'discursive presence' have been unveiled and exemplified in the framework of the following six categories: a. Inconsistencies and inaccuracies; b. Errors in the translated text; c. Insinuation by a second *transpreter* in pre-statement sessions; d. Additions and omissions; and e. External features and f. the First person pronoun. Based on my analysis and resulting observations, it is therefore apparent that the *transpreter's* 'voice' and styles – his or her 'discursive presence' – remains 'visible' and influential in the process of record construction and, in some cases, overrules the intended meaning of the *Real author/Narrator* and *Implied Author/Narrator*. In addition, the employable styles or strategies which emanate in the form of recurring patterns, in linguistic and non-linguistic forms (as illustrated in the six categories), further exacerbate the notion of *transpreters'* voice, and thus, to a greater extent, generate and articulate – through his or her discursive presence – the discourse that eventually constitutes the official record.

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# CHAPTER 4
# (PAPER 3)
# Transpreters' Translations of Complainants' Narratives as Evidence: Whose Version Goes to Court?

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## 4.1 ABSTRACT

*Law and language are inherently related, and as such the efficient functioning of the law has a direct bearing on the appropriate use of language. Any encounter with an officer of the law at a local police station in South Africa is a classic example of a language event that connects language, law and crime. This language event forms a fundamental part of the administration of criminal justice. Sworn statements, taken from members of the public, initiate the court process, and their role culminates in court, as evidence for proceedings. The taking of a statement is thus a critical aspect of the law. This is especially true in multilingual contexts, and not only for the complainant and the perpetrator, but also for law enforcement personnel or police officers – hereafter referred to as transpreters –who might find it harder or close to impossible to gather evidence as a result of language barriers. Existing data relating to oral narratives in isiXhosa and translated versions presented in English show differences and inconsistencies between the two sets of texts. Such statements are supposed to be a true reflection of the complainant's or suspect's own words. However, more often than not, they tend to be the police officers' written versions of what was obtained during the pre-statement taking session. The significance of the translation of a sworn statement cannot be underestimated as it carries with it far-reaching consequences and serious legal implications when the emerging criminal matters are brought before the courts. This article examines the oral narratives of complainants, which are framed in a form of dialogue between the transpreters and the complainants. The 'retelling and rewriting' of such narratives into sworn statements by transpreters, as a form of translation, is primarily taken into account. Scrutinising pre-statement taking sessions and translated English versions of sworn statements, the article argues that such sworn statements constitute a misrepresentation of the complainants' own words. As a result, the complainants' actual evidence is manipulated, so that it fails to fully surface in*

*court – as an essential part of court proceedings – in its original form. The effect of these practices, it is further argued, has serious implications for the notion of access to justice in South Africa.*
**Keywords:** Sworn statements, transpreters, complainant, access to justice, retelling and rewriting.

## 4.2 BRIEF BACKGROUND: THE LANGUAGE QUESTION AND LANGUAGE USE IN THE CRIMINAL JUSTICE SYSTEM

In the South African experience, sworn statements from members of the public are frequently translated (mostly from African languages into English and in some cases into Afrikaans) and eventually used in court as evidence for proceedings (Geldenhuys 2001). With this background in mind, the South African language scenario demands special consideration in order to gain a sense of the linguistic complexity produced by having 11 official languages. The situation is further complicated by the fact that African language speakers' English proficiency is often low or non-existent. In their documentation of various languages spoken in South Africa, I. Van Der Merwe and J. Van Der Merwe (2006:15) provided (now somewhat out-dated) statistics for languages most widely spoken in the period 1991-2001. According to this study, South Africans officially speak 11 languages: isiZulu, isiXhosa, Afrikaans, Sepedi, Setswana, English, Sesotho, Xitsonga, siSwati, Tshivenda, isiNdebele. Other, less frequently spoken, languages include German, Portuguese, Mandarin, Greek, Hindu, Italian, etc. While old, these details are still broadly accurate for 2013. As far as figures are concerned, we can note that almost 70 percent of South Africans are speakers of African languages or have an African language as their mother tongue. On the contrary, only approximately 30 percent are speakers of either Afrikaans or English, or have Afrikaans or English as their mother tongue.

However, English and Afrikaans remain the two languages of record in South Africa (Cote 2005, Geldenhuys 2001) and are entrenched in most, if not all, functions of the South African criminal justice system. A significant percentage of South Africans are not conversant in the language of the criminal justice system, that is English and Afrikaans, and it is unlikely that these percentages will change dramatically in the near future. This remains a challenge, and the reality of this situation is unsustainable and unbearable in a democratic South Africa. English and Afrikaans remain linguistically hegemonic, while African languages are effectively excluded, particularly in the judiciary system, despite the Constitutional provisions that all languages must "enjoy parity of esteem and equal treatment" (*Constitution of the Republic of South Africa*, 1996). Judge John Hlophe (2004:47) echoes this view when arguing that:

> A considerable part of our colonial heritage involves dominance by two languages, accessible really only to a privileged minority. Maintenance of this state of affairs threatens to alienate people from their individuality and culture.

Continuous failure to recognise our linguistic diversity and multilingualism in as far as the legal process is concerned threatens the equality in any individual's ability not only to speak but also to be heard in one's own language (Kaschula and Ralarala 2004; Ralarala 2013). The linguistic state of affairs outlined above is not only limited to court room proceedings and trials – where interpreting services are utilised –, but it also applies to the transpreters' construction of record during the process of obtaining or seeking information. Simply put, the communication between the transpreters and witnesses (complainants / suspects) may be in the language that is understood by both parties (in most cases an African language), nevertheless the only officially recognised record of what is being said has to be hand-written in the medium of English and, in some cases, Afrikaans. These translated versions are, amongst other things, meant to provide access for English or Afrikaans speaking members of the judiciary (judges, magistrates and prosecutors) during court room proceedings. This brief overview of the language question and of language use in the criminal justice system highlights the potential impact that this model may have in the myscariage of justice.
Following this reasoning, this article examines, from a discourse point of view, the nature and the manner in which sworn statements are crafted and constructed. Secondly, based on a translation perspective, the article moves on to illustrate how sworn statements are mis/represented both in the 'retelling and rewriting' forms, in Maria Tymoczko's (1995:12) terms, through manipulation and deficient translation. Thirdly, and finally, the article will highlight the implications of such potential misrepresentations of complainants' narratives in as far as the legal process is concerned.

## 4.3 CONTEXT OF THE STUDY

The process of giving a sworn statement is an essential component of the administration of criminal justice, often initiating the court process. Transpreters are, from time to time, confronted by this tedious evidential exercise in their line of duty. Four major challenges that exacerbate the language problem in this context relate to: (a) the credentials of those entrusted with this high level of responsibility; (b) the social and economic status of those mostly involved in the criminal activities; (c) the process of record construction or statement taking in the South African Police context; and (d) the institutional context in which the process of statement taking unfolds.

In relation to the first challenge, transpreters are professional police officers who are employed by the South African Police Services (SAPS) and who have fulfilled the requirements of a six-month Police Basic Training – the major requirements of which are a driver's license and a matriculation certificate. In other words, at the point of entering the service, more often than not police officers do not possess a post-matriculation qualification that would enable them to offer a better quality service in as far as this specialised function is concerned. They are not sworn translators or interpreters – a legal undertaking meant to attest skills and commitment to the highest standard of competence and performance, as well as other possible prerequisites for acting in a specialised function.

With regard to the second challenge, typical cases brought to local police stations involve a variety of crimes such as theft, common assault, domestic violence, amongst others. In some cases, those involved are socio-economically and educationally disadvantaged individuals, and as such have Limited English Proficiency (LEP). This is partly indicative of the literacy levels of the South African public with regard to the languages of the criminal justice system (English and Afrikaans) and also of the possible language complexities that revolve around the process of statement taking.

In terms of the third challenge, the South African Police system of statement taking could be considered 'archaic' in that sworn statements compiled between transpreters and complainants/suspects/witnesses are still recorded by hand irrespective of the seriousness of the crime. The danger of this method is that it leaves open the possibility of tampering with important evidence since the sworn statement produced by transpreters has greater authority and official status over complainants'/suspects' or witnesses' narratives when evidence is heard in the court of law.

With reference to the final challenge, it is apparent that the institutional context in which the statement taking process is performed is centred around power relations, and this asymmetry in interaction is conspicuously reflected in record construction. Tessa van Charldop (2011) describes a paradoxical setting in which the transpreter and the suspect have different roles to accomplish (Ralarala 2012:66). This institutional arrangement is equally applicable when a transpreter is involved in an interaction with the complainant. For example, in both cases the institutional setting is organised in such a way that the transpreter assumes control of the process of obtaining or seeking information as s/he is the one leading the enquiry and eventually formulating the written record, based on the spoken dialogue.

## 4.4 CONCEPTUAL FRAMEWORK

From a conceptual framework's perspective, the analysis in this article follows Erving Goffman's (1981:226) participation framework. In relation to this framework, systematic work has been accomplished in the domains of interpreter role and role shift (Nakane 2009), as well as the structure of police evidentiary interviews (Heydon 2004). For our purpose, translation has been framed within the context of other academic disciplines. Adopting this particular framework to look at an interdisciplinary study which encompasses both translation and forensic linguistics is not unprecedented (Tymoczko 2005). In fact, *representation* has been used as a framework to understand certain forms of translations (*ibid*.:1091), in ways which somewhat resemble Goffman's model, where speaker participation statuses are structured in terms of the roles that are occupied in spoken discourse: (i) *animator*; (ii) *author*; and (iii) *principal*. Goffman defines the *animator* as "the sounding box from which utterances come", while the *author* is perceived to be "the agent who puts together, composes, or scripts the lines that are uttered" (1995:226). The *principal* is described as "the party to whose position, stand, and belief the words attest" (*ibid*.). These concepts, according to Goffman, "comprise a production format of an utterance" (*ibid*.). It is through the lens of this 'production format' as an analytical tool that we will be able to understand and appreciate the nature of and the manner in which sworn statements are crafted and constructed.

Although the participation framework, along with the participants' roles, may be crucial, the analytical tools described above may still not be sufficient, given the complexity of the sworn statements drawn from the data. Therefore, in order to fully ascertain the extent to which the system of *transpreted* (translated/interpreted) sworn statements emanating from the existing data are mis/represented, both in the 'retelling and rewriting' forms, we will use Cay Dollerup's (1999, 2003, 2006) model of textual analysis as an additional tool. The model comprises four overlapping layers (Dollerup 2003:29): (i) the structural layer – which considers the "textual order of elements, passages, and episodes"; (ii) the linguistic layer – which deals with "words, word order, phrases, repetitions of words, sounds, assonance, euphony and style"; (iii) the content layer – which takes into account "facts and points and elements in the structural and linguistic layers which can serve for interpretation"; and (iv) the intentional layer – which is meant for "external meta-understanding of the text as related to human experience". Notably, the intentional layer relates to a practical state of fidelity that is sought between the original and the target text.

## 4.5 LITERATURE REVIEW

The notion of story 'retelling and rewriting' is not only unique to the legal process. Scholars such as Maria Tymoczko (1995) have examined this notion from the point of view of translation – and their analysis has a direct bearing on the present work. Tymoczko (*ibid*.:13) points out that

> while a marginalised text is a retelling or rewriting for its original audience, it is neither for the target audience. The translator is in a paradoxical position of "telling a new story" to the receptor audience, even as the translator refracts and rewrites a source text – and the more remote the source culture and literature, the more radically new the story will be for the receiving audience.

This view reaffirms the complexities that are associated with 'retelling and rewriting' as a form of translation. The difficulties involved in the process will be further exacerbated by any inability and lack of skill on the part of the individual(s) whose task it is to represent (in translation) the metonymies of the source text in the target text, particularly if the target text assumes a dominant status, as in the case of English. In our case, this is obviously accentuated by the unfamiliarity of the legal process to the source text (African language), owing to the latter's marginalised status. Tymoczko concludes by suggesting that, for a translator to do justice to the task at hand, "awareness of the metonymies of translation are a key to the construction of representations" (*ibid*.:22).

In her research, Martha Komter (2002, 2003) investigates the manner in which police records are formulated – during the interaction process – as written reports. She points out that such records are crafted by the police in the initial stages of the process, and subsequently used by the prosecution to decide whether further prosecution is viable or not. She further argues that written statements are treated as straightforward representations of the suspect' words, even though the record was formulated and written by the police. In spite of this, "the suspects are held accountable for what they supposedly told the police" (2002:168). She also contends that "the style of the records as first-person narratives […] gives no information about the original interaction between the suspects and police interrogators" (*ibid*.:184). With this status quo, it goes without saying that the system could have adversarial effects for the suspect in as far as access to justice is concerned.

Another study, by Linda Jönsson and Per Linell (1991), focuses on the transformation of spoken dialogue into written reports in the process of police interrogation. They look at the manner in

which a "story may be differently organised and perspectivized when told twice within two phases of the same overall situation" (*ibid*.:420). Apart from discrepancies in language varieties, their findings underscore a legally relevant perspective which is characterised by an elaborated monological text.

Frances Eileen Rock's convincing research, outlined in "The Genesis of a Witness Statement" (2001), examines the statement taking session along with the resulting statement. She elaborates on the unfolding of the process in which the police officer engages the witness in order to co-construct and co-produce the final statement. As part of the research, Rock also provides an account of the elements that are transformed, from the point of view of the witness, and the manner in which such changes are carried out. Specifically, she asks: "...through what processes does the original version provided by the witness change through the subsequent renderings during the statement-taking session and in the final statement text"? (*ibid*.:44). One of the critical findings highlighted in this research suggest that, "[a]ny statement-taking session risks creating an incorrect or incomplete record" (*ibid*.:70). For this reason, audio recordings of witness statement-taking sessions seem to be a viable solution that could circumvent the problem.

In her sociolinguistics study of storytelling and retelling in the legal context, Diana Eades (2010) takes a closer look at the process of recontextualisation, and argues that taking a story from one context and having it retold in another involves significant transformation. Eades goes on to suggest that "many legal decisions involve the evaluation of individuals' stories, in terms of such features as consistency, accuracy, reliability and honesty. In the evaluation and assessment of people's stories and their recontextualisations, there are some recurring language ideologies" (*ibid*.:247). Based on this reasoning, Eades (*ibid*.:256) further points out that the sociolinguistic study of language can play a valuable contribution in appreciating the notion of delivery of justice (or failure thereof).
Karolina Jarmołowska (2011), for her part, investigates the impact of unqualified interpreters on criminal trials, specifically their assistance in the pre-trial process, with reference to witness statement writing. The fact that police and court interpreting are neither regulated nor accredited in the area where the study was conducted (that is, Poland) is one of the issues she highlights. One of the important findings of this study is that there is a serious danger in commissioning unqualified interpreters and translators in a legal setting.

Further, Georgina Heydon (2004) provides a description of the structure of police interviews. In her examination of this type of discourse, she employs Goffman's participation framework and participant roles. Her primary findings suggest that a shift from the introductory part of the

interaction to the point where information is sought is marked by participants' roles in a participation framework. According to Heydon, this is a scheme through which the confessional narrative of the suspect can be facilitated.

Susan Adams and John Jarvis's (2006) analysis somewhat resonates with Heydon's (2004) study, in that they examine the linguistic and structural features that are present in written criminal statements. The study was aimed, amongst other things, at determining the likelihood of veracity and deception in statements written by suspects and victims through the employment of linguistic analysis techniques. Their findings revealed a positive association between specific linguistic attributes on the one hand and veracity and deception on the other.

In his ground breaking research, Malcolm Coulthard (2002) takes a closer look at text from three murder cases. Central to the investigation was the fact that the "police had unfairly concealed their own voice and/or represented what they had said as having been said by the accused" (*ibid*.:22). In this same study, Coulthard highlights the importance of linguistic evidence, some of which was used to incriminate the accused. In his conclusion (2002:33), he explains that:

> by being in control of the written form in which the original interaction was to be subsequently presented to the Court, the police were able to create a misrepresentation which would significantly influence the outcome of the case and help to secure a conviction.

It is worth mentioning that most of the studies that have been reviewed here underscore the fact that story 'retelling and rewriting' is a product of interaction. Central to this situation is the downplaying of the original voice, which by itself carries adversarial implications, particularly in the legal context.

## 4.6 THE DATA

The data used in this article is drawn from my on-going research in which 20 voice-recorded and 20 textual translation narratives of sworn statements were collected. For ethical considerations, exact names, locations, dates and times have been kept anonymous throughout this article. The data used in this study were collected at a local police station in the Western Cape in 2013. The selection of this designated area was informed by the researcher's language expertise, that is Xhosa/English combination, as both languages are official in the province in question. Through the support and cooperation of Brigadier X, two senior police officials (at the rank of Captain and Lieutenant) were

assigned to supervise two junior members (at the rank of Constable and Student Constable) who assisted in this research exercise. The statement-taking sessions were conducted at a normal charge office (police station), with the two police officials seeking and obtaining information at various times from a variety of complainants who, at different times, came to report an array of criminal offences, ranging from common robbery to assault. The usual procedure for taking statements, guided by the institutional norms, was followed: members of the public were required to rely solely on a police officer, who assisted them in crafting their sworn statement, using pen and paper, ultimately aiming to gather evidence for court proceedings, in a language that is acceptable to the court – English in this case. The only striking deviation from the norm (about which all complainants were cautioned) was the use of audio-recording during the statement-taking sessions (specifically for the purpose of this study). The verbal narrations which constituted the descriptions of the events and their unfolding were produced mainly by the complainant, in the language (isiXhosa) understood by both the police officer and the complainant. This interaction, led by the police officer, eventually resulted in the successful compilation of a translated sworn statement (in English). The original (verbal) version was transcribed (from the audio-recorder) with the help of bilingual research assistants with expertise in the Xhosa/English combination.

The remaining part of this article examines three randomly selected cases, using data from two versions, that is, the transcribed texts (which represent the statement-taking sessions) and the hand-written text (which constitute the actual sworn statements).

## 4.7 SYNOPSIS OF CASES

*Case # 1* (1)

On a certain date (stated in full in the original text) in 2013, the complainant (a 38-year-old female; name stated in full in the original text) was assaulted by her husband (name stated in full in the original text) for disciplining her stepson after he had disappeared with the house keys. Upon the complainant laying a charge, the police officer opened a case of Common Assault under Domestic Violence against her husband. The complainant was advised to apply for a Protection Order against her husband because of this not being the first time she experienced assault from her husband in relation to her stepson.

*Case # 2* (2)

On a certain date (stated in full in the original text) in 2013, the complainant (a 25-year-old female; name stated in full in the original text) suffered a break-in. She reported her boyfriend (name stated in full in the original text) for allegedly breaking into her apartment and stealing some of her possessions. The police opened a case of House Breaking and Theft against the boyfriend. Due to

claims made by the Complainant that he was abusive towards her, she was advised to apply for a Protection Order against him.

*Case # 3* (3)

On a certain date (stated in full in the original text) in 2013, the Complainant (a 21-year-old female; name stated in full in the original text) was attacked by her neighbour. She reported him (name stated in full in the original text) for attacking her and forcing her into a relationship with him. The police opened a case of Common Assault against him. The complainant was advised to apply for a Protection Order against him due to the fact that this was not the first time she had been attacked by him.

## 4.8 THE NATURE OF SWORN STATEMENTS

In their work on witness (suspect) statements, Rock (2001) and Adams and Jarvis (2006) present a convincing analysis in relation to the arguments contained in the present study. The structure and composition of their studies (as we shall see later in the discussion) is in many ways similar to the issues raised here. Notably, in all cases examined in this study, the data reveal that the dialogical exchange between the transpreter and the complainant generates lengthy and comprehensive information, which then becomes the basis for the actual crafting of the sworn statement. Anthony Heaton-Amstrong confirms this when asserting that "statement interviews are preceded by preliminary chat, or several chats, during which a police officer may endeavour to marshal a disorganised narrative into more coherent form" (1995:138).

In order to provide a detailed account of this practice, I will refer to selected excerpts, extracted from Cases (1), (2) and (3). In the extract, the transpreter is identified as T, and the complainant as C. Table 1 below contains symbols used in the transcripts, and the conventions of which are based on the outline of Eeads (2010), Heydon (2004) and Rock (2001).

**Table 1**

| Symbol | Description |
|---|---|
| :: | The sound is lengthened by one syllable for each colon |
| (.) | Micro-pause of less than 0.2 seconds |
| ... | Omitted talk |
| (1.35) | Silence measured in seconds |
| (( )) | *Transcriber's* remarks, including comments made on voice quality or non-verbal sounds |
| H | Audible out breath |

All sworn statements used have been generated during the dialogical interaction between the transpreter and a complainant. Sworn statements were translated into English by a transpreter, and Figure 1 below depicts a classic example of a translated version (this has been converted – for ease of reference – from a hand-written version into a Word document). For purposes of clarity, comprehensibility and ease of reading, I have added my own translations, in brackets, below each turn taking utterance.

**From Case 1**

32 T *so ngok' akubethayo kukho oomeza, oomeza baye beza ngok' akubethayo?*
(So, while he was beating you, were your neighbours present, did they come?)

33 C *Bame phaa:: bakrob' eziyadini zabo..*
(They were looking on from the yards)

34 T *but bayabona uba uyabethwa?*
(...watching whilst you are being beaten?)

35 C *but bayabona uba ndiyabethwa coz bendivuz' umongo ndizilume noziluma ndiligazi*,
( ...watching whilst I was being beaten, was also bleeding from the nose, and had bitten myself – inside of my mouth – had blood all over me)

36 C *i-shirt ebendiy' nxibile iyilonto.*
(my shirt had blood on it)

**From Case 2:**

27 T *Kuxesha nini xa kwenzeka le nto?*
(What time was it when this happened?)

28 C *Igqiba kwenzeka ngoku, inoba ina 10minutes ngoku.*
(It happened now, I suppose some 10 minutes ago)

29 T *10 minutes?(.)*
(10 minutes ago?)

30 T *Izinto ezi zakho umbonile xa ezithathayo okanye uyam::rhanela nje?*
(Did you see him when taking your belongings or you are just suspecting him?)

31 C *Ebephethe ...i-envelope ngoku ndimbonayo, ephethe nekomityi.*
(He was carrying an envelope when I saw him along with a cup)

32 C *Ikomityi ke yeyakhe?*
(Is the cup his?)

33 T (0.2) *Ungene njani phana?*

(How did he get inside?)

34 C *Ugqekezile.*

(He broke in)

**From Case 3:**

47 T *Yintoni isizathu sokuba akubethe, yintoni ingxaki yakho nalo mfana?*

(Why does he beat you, what is your problem with him?)

48 C *Lo mfana uyandifuna (.) kwaye eyona nto andibethela yona kukuba mna ndingamfuni(.)*

(This guy wants me, and he beats me because I don't want him)

49 C *... kuba eyona nto wakhe wayithetha wathi undibethela le nto ndingamfuni kwaye yayiphuma kuye emlonyeni azange ndiyive ngamntu (.)*

(He once mentioned that he beats me because I don't want him, this was not hearsay, was directly said by him)

50 T *Ungamfuni njani, yeyiphi le ntlobo yokungamfuni?*

(What do you mean when you say you don't want him, explain?)

51 C (.) *U::funa ukuthandana nam.*

(He wants to have a love affair with me)

It is apparent from these examples that the process leading to the crafting of a sworn statement involves a series of interruptions, through which the transpreter conducts the enquiry session with the intention of obtaining as much information as possible. This practice, according to Rock (2001:50-51), is mostly derived from the actual crime narrative aspect of the process, in which the interviewer prioritizes the re-working of the statement. Each re-working, she points out, takes a different shape from the rest. In some cases (*ibid*.) the "...witness talks most and the interviewer rarely interrupts while in others the interview dominates", "in some the witness is encouraged to talk whilst others centre on joint text production and result in a written text". Notably, the data examined in the present study confirms a) the prevalent dominance of the transpreter in the interaction; b) the encouragement of the complainant (witness) to speak; and c) an interaction style that reinforces joint text production. The examples below illustrate this point:

**From Case 3:**

103 T (1.35) *Uye wathini xa umbuza kutheni esenza le nto?*

(What did he say when you asked as to why he was doing this?)

104 C (.) *Uthe uyenzela ikaka (.) utshilo uthe "ndenza ikaka".*

(He said he was doing shit, that is what he said)

105 T (1.14) *Uye wakuqhwaba andithi?*

(He clapped you, right?)

106 C *Ewe (.)*

(Yes )

107 T (1.5) *Uye waku::khaba ukuze uwe aphinde azokutsala?*

(He kicked you, and you fell and he dragged you?)

A closer look at the data reveals that a sworn statement is 'anatomical', that is, for the various pieces to comprise meaning and sense, they have to be connected in some way, and thus constitutes some form of structure, starting with initial narratives and lengthy 'chats', which I call pre-statement taking sessions. The latter preludes and feeds into the 'commencement' section of the actual sworn statement. As the pre-statement taking session builds up from the initial stages, it advances into what could be described as a 'core' (the actual crime narrative), before descending to the actual 'closing' section. The commencement section establishes the background of the incident, with specific reference to time and the circumstances leading to the criminal activity. The core gives a detailed account of the criminal activity: it describes the crime scene in relation to who was involved, along with the entire episode that ultimately constitutes a crime. The closing section delineates steps that are taken subsequent to the incident. These stages, in terms of data examined in this study, are mostly influenced by the transpreters' dominance through his/her leading and encouraging questions – informed, in most instances, by institutional rules and conventions. I shall return to this point later in the discussion.

The following example is an illustration of a sworn statement (extracted from Case 3), as co-constructed and co-produced by the transpreter and the complainant.

**Figure 1: A classic example of a sworn statement (from Case 3)**

**Commencement:**

On Saturday 2013.01.26 at approximately 13h00 I was at my home with my friend known as (Name of the friend). We were standing outside the yard on the road opposite my home. Whilst we were standing **I** saw my neighbour known as (Name of the neighbour) coming from the shop.

**Core:**

He came straight to me and tripped (kicked) me on my feet, **I** then fell down without saying

anything. **I** asked him why he is doing this to me, he then answered me with insulting language. **I** then stood up. He smacked me several times in my face I then tried to fought back, He also hit me all over my body, **I** then fell down again, he dragged me on the road, then my friend and my other neighbour tried to stop him **I** then ran to inside the house and locked the door. He keep on shouting and swearing at me up until he left.

**Closing:**

**I** decided to come to the police station to report this matter because it is not the first time he assaulted me. He want me to have an affair with him but I told him **I** wont do that. **I** sustained with injuries in my left forearm and bruises as per J88.

No one has the right to assault me **I** request further police investigation for this matter

Although approached slightly differently, this type of internal organisational system can also be found in witness statement studied by other researchers. For example, Adams and Jarvis (2006:7) assert that the statement can be divided into three parts, namely, the "Prologue", the "Criminal Incident", and the "Epilogue"; the contents of each section tend to bear some resemblance to my own analysis of the segments. In his conceptualisation of the structure of a statement, on the other hand, Rock (2001:50) offers a more complex view of the partitioning of statements. She points out that a statement-taking session is divided into four extended formulations which she (*ibid*.) outlines as Versions 1-4. Version 1 she terms "the witness's offer": "The witness narrates the event with minimal intervention from the interviewer...". Version 2 is termed "co-construction": "...the interviewer asks questions about the event, locations and actors...witness provides answers of greatly varying lengths...". Version 3 is referred to as "note checking": "...the interviewer feeds back information to the witness who confirms that the information is correct or offers corrections". Version 4 is termed "text construction": "...the interviewer drafts the statement aloud. He constructs the written text sentence-by-sentence ...implicitly requesting, and usually receiving, confirmation... This version is similar to the statement". Some underlying nuances – reflective of difference and similarities between Rock's work and the data under examination here – are worthy of commentary. Firstly, it would seem that there are apparent overlaps between the pre-statement sessions and Rock's (2001:52) description of Versions 1 and 2. The following examples relate to Version 1:

**From Case 1:**

1 T *Ok, kwenzeke ntoni ke sisi?*
(...what happened my sister?)

2 C *Bendifika ndivela emsebenzini, ndafika ndam' emnyango ndalind' istixo ndihamba nomyeni wam .h*
(I was from work with my husband, I had to stand at the door and wait for the key?)

3 C *So njemba ndimile ndilinde isitixo (.) ndiqhele ukwenza 'ucall back' ndenzele indodakazi yam coz isitixo ndisishiya kuyo.*
(I normally wait for my key there and do a 'please call me' for my sister in-law because she keeps the key). [A 'call back', is commonly called a 'please call me' – a free cell phone function sent by a caller when not in a position to make a normal call- for the callee to return the call to the person sending the 'please call me' message].

4 C *Ndenz' ucall back for uba lo mntana aze nesitixo.*
(I did a 'please call me' in order for the child to bring the key.)

**From Case 2:**

1 T (0.3) *Ndiza::w' cela undixelele uba kwenzeke ntoni na (.) sonke istori, akhonto uzayishiya uyeva?*
(Please tell me what happened, everything, and don't leave out anything, right?)

2 C *(0.2) I boyfriend yam ifikile endlini yam yaphula ibuglar, yaphula ne::cango, yathatha izinto ebezingaphakathi. I::nto zayo ilearners, bendi stud (isha) ilearners.*
(My boyfriend came to my house and broke in, he broke the burglar door and my door, and took some stuff from the house. His only stuff was the learner's material for which I was studying)

3 C *Then ke ngoku bekuzezayo iinotes zelearners, then wathatha ne CV nento zam ze cashing yahamba nazo.*
(Those notes were his, he also took away my CV and my work stuff)

4 C *bekukhona nethousand rand ebiphantsi komqamelo (.) ndifike ingekho.*

Lines 27-34 above (extracted from Case 2) share a striking resemblance to Version 2. Similarly, Version 4 is neatly fleshed out in Lines 103-106 above (extracted from Case 3). In relation to Version 3, the complainant is put under obligation to read the translated statement and, as a form of confirmation of correctness of information, must append his/her signature in order to claim full ownership of the content. The example below reveals the procedure:

**From Case 3:**

110 T (5.35) *Jonga ke sisi ndisigqibile isi statement sakho,*
(Listen my sister, I am done with your statement)

111 T *into eyenzekayo uza kundifundela apha.*
(All you need to do is to read it for me)

112 T *Ukuba uyayibona ukuba yiyo le nto ubuyithethile, uza kundisign(ela) apha (.)*
(If you think that this is all what you said you will sign here.)

113 T *kodwa ukuba ikhona into endiyibhalileyo ongakhange uyithethe wena uza kundixelela (.)*
(If there is something that I wrote which you didn't say, you will let me know.)

114 T *Okanye ukuba kukho izinto endingazibhalanga obuzithethile wena uza kundixelela ke (0.3)*
(If there is something that you said which I didn't write, you will let me know)

115 T *Uza kundisayinela apha, nalapha nalapha (0.5) Ndiyabuya ngoku ndisaya ngasese, uyeva?*
(You will sign here and there... Will come back shortly, going to the loo.)

116 C *Ok. Ndiqale ndizijonge?*
(... Do I look at it first)?

117 T *Ndithi kuwe funda isi statement uyabona?*
(I'm saying to you ((forcefully)) read the statement before you …)

118 T *Ukuba ke ngoku yiyo yonke le nto ubuyithethile uza kundisayinela apha, nalapha kwakunye nalapha (.)*
(If that is everything that you said, you will sign here, here and there.)

The irony about this legal process is that some of the complainants involved in the criminal activities dealt with in this study have a Limited English Proficiency (LEP), whilst others have zero English proficiency. This leads us to the next section, that is, role participation and representation analysis.

## 4.9 ROLE PARTICIPATION AND REPRESENTATION ANALYSIS

A pre-statement taking session which culminates in a sworn statement could be described as a state of affairs that is goal directed. Three of the goals are: firstly, to collect and collate evidence; secondly, to sway the future readership or audience (that is the court) towards a particular perspective in relation to legal decision making processes; and finally, to secure a conviction (Coulthard 2002, Coulthard and Johnson 2007, Heydon 2004). These observations are true of the data examined in this study and they are clearly fleshed out in the role participation and representation status assigned to transpreters when dealing with complainants' sworn statements.

One of the key features of written sworn statements in the South African Police Service is that they are written as first-person narratives (see the use of 'I' in Figure 1 above). Although not ideal, this seems to be a common practice in other parts of the world (Coulthard 2002, Komter 2002, 2003). In Goffman's (1981) terms, this translation style assigns the transpreters a position of *author* as they seem to give expression to the sentiments of the complainants' utterance. This, in my view, is dangerous as the court treats sworn statements as a verbatim record of complainants' accounts, yet in some cases, as revealed by the data, they are not. Furthermore, 'misrepresenting' the complainants in this way further exacerbates the problem of criminality, given the authoritative status of sworn statements when it comes to court proceedings.

According to Malcolm Coulthard and Alison Johnson (2007:84), "[J.C.] Heritage and [D.R.] Watson (1979:123) say that in normal conversation a "formulation enables co-participants to settle on one of many possible interpretations of what they have been saying', but, as a practice this is overwhelmingly restricted in police interviews to the interviewer". Accordingly, Coulthard and Johnson perceive this situation as "a key feature of the asymmetry and a powerful way of transforming the story". In my study, this type of inter-textuality (that is, the transformation of verbal dialogue into a written monologue) is indeed informed by the covert and overt influence and by the dominance of the transpreters. The following example explains this further:

**From Cases 2:**

348 T *Usamthanda wena?*
(Do you still love him?)

349 C (0.5) ((giggles)) *Ewe nam... ewe ndisamthanda.*
(Yes, yes I still love him.)

350 T (0.10) *So ufuna abanjwe ke ngoku neh?*
(You want him arrested, right?)

351 C *Ewe ndifuna abanjwe.*
(Yes, I want him arrested.)

Line 350 in the above example does not only serve as a compliance gaining function (as positively responded to in line 351), but has a direct bearing on the *principal* participant role (on behalf of the institution) of the transpreters. The leading question and the selective use and emphasis of the word *neh?* (translated as *right*?) are a clear indication of this fact. Thus, it could be argued that assuming this role does not only demonstrate the paying of allegiance to the institution by the transpreters, but it also advances the consequential goals that are embedded in the pre-statement taking session, as well as those implied in the sworn statement. It is therefore safe to suggest that, in this one instance

as well as in others present in the data, the *principalship* is a shared role between the transpreter and the institution – since the former acts as the representative of the police force as a whole, in Heydon's (2004) terms.

Another central feature of sworn statements is that they represent an undertaking which, in some cases, is coercively enforced by transpreters. This activity is marked by the appending of the signature (on the template containing the English version), subsequent to the reading of the statement, as an affirmation of accuracy and comprehensibility (for a suitable example refer to Case 3, lines 110-118). The next section again provides a glimpse of this practice.

In the initial stages of my discussion, I made a passing mention of the challenge presented by LEP for most complainants in the legal process. This linguistic gap raises a number of issues for the complainants, two of which are accuracy and comprehensibility. The same applies to the transpreters – whose English proficiency is often equally low. I will not expand on this issue, except to note that its complexity further exacerbates the broader problem, since one of the legal requirements is that sworn statements must be written in English. According to Nadia Hussein (2011:26), "accuracy is manifested in the absence of errors, omissions, modifications or embellishments in rendering the speaker's words". By contrast, Rock (2004:11) considers comprehensibility as revolving around meaning, understanding and consequences, as they relate to the addressee. The fundamental question therefore is whether the complainants 'own up' to what is perceived to be a true reflection of their own perspective in terms of both accuracy and comprehensibility. My immediate reaction to this question is negative, given their poor English proficiency. Case 3, Line 110, marks responsibility and ownership of the activity on the part of the transpreter. Lines 112, 115, 117 and 118, on the other hand, denote the shifting of this type of enforced responsibility and ownership and implicitly introduce the accountability of the complainant, which will be applicable and become useful for a future readership or audience, that is, in the court room. The crux of this matter also revolves around Eades' (2000:14) notion of 'gratuitous concurrence', extensively explored in Australia with specific reference to Aboriginal use of English in the Australian criminal justice system. In describing this notion, she states that: "gratuitous concurrence is the tendency to agree with the questioner, regardless of whether or not you actually agree with, or even understand" their statements. Gratuitous concurrence has a number of consequences:

> Suffice it to say that from the initial stage this may seem to spare the accused person or the witness from the embarrassment of seeming

> unintelligent, yet eventually it may bear some potential for adversarial consequences for the accused person or witness (Ralarala 2012:67).

It is apparent that the common usage of this concept is centred around interactions among un-equals, as in the case of a lawyer and a victim-witness (Eades 2004). Eade's (2000, 2004) conceptualisation neatly fleshes out the transpreters' control and manipulation of the process of record construction (as shown in the examples from Case 3). In essence, the data in this study uncover another shared participant role, in which both the transpreters and complainants assume the role of an *animator*. This participation framework is made possible, for the former, through a form of misrepresentation (in English) which suggest that what they say was in fact said by the complainant. With reference to the latter, on the other hand, this role is further entrenched through a formal undertaking, that is, the signing of the sworn statement.

## 4.10 TEXTUAL ANALYSIS

I shall now consider issues relating to textual analysis. It is true that "police records should not just be read for what they say, but also for how they are produced" (Komter 2003:204). Thus, discrepancies between the pre-statement taking sessions and sworn statements could be explained not only by means of discursive elements, but also through textual analysis – which, according to Dollerup, "enables the critic to discuss at which level translations realise or do not realise features in the source text and other factors that may have a bearing on the translational product" (2006:162). The data under examination seems to illustrate the importance of this type of comparison in enhancing our understanding of discursive elements as well as of the textual dynamics of this particular legal process. It has been observed that pre-statement taking sessions are characterised by important and prominent features that tend to disappear or fail to be incorporated in the actual sworn statement. The example below, from Case 1 illustrates this point:

1 T *Ok, kwenzeke ntoni ke sisi?*
( ...what happened, my sister?)

Apart from eventually producing a lengthy dialogue, the above formulaic opening triggers the occurrence of an ordinary narrative which, due to legal requirements, will not – in its present condition – form part of the final sworn statement, at least in the commencement section. Another striking structural feature of the original which is rendered substantially different in the target

language relates to the completion of the interaction, as compared to the closing of the sworn statement. Compare Case 3, lines 111-115 above with the following extract (from the same case):
"I gave no one permission to assault me. I request further police investigation for this matter".
In accordance with the structure, this line marks the actual closing of the sworn statement (as evident in the data set examined in this study). It goes without saying that it is the transpreters' responsibility to follow the sequential pattern as part of his or her function, which is to deliver a fully fledged sworn statement before the investigation begins. In a sense, the success of transpreters in translating or transforming pre-statement taking sessions into an official record is rooted in them following the institutional conversion patterns – in accordance with a set structural form – whatever the human costs might be.

Apart from common and normal linguistic features that differentiate the verbal from the written text (see Jönsson and Linell 1991), such as the lengthy nature of the original interaction against the 'condensed' translation product, code-switching also seems to be one of the defining linguistic features that runs through the pre-statement taking sessions (refer to Case 2, lines 1-4 above). Whether this type of linguistic form is meant to facilitate and ease communication or possibly expresses concepts that lack equivalence between the source and the target language is a question that goes beyond the scope of this article. What is worth stating here is the fact that this form of linguistic behaviour does not seem to have a place (due to, among other things, its informal nature) in highly hierarchical domains such as the court room. Notably, it is freely used and prevalent in the pre-statement taking sessions, and yet prohibited in the actual sworn statement. This leaves a lot to be desired. Thus, it could be argued that the lack of fidelity between the source and the target language, with respect to accentuated linguistic features such as code-switching, may also have potential for adversarial consequences when the dossier lands in the hands of a future readership or audience.

Komter (2003:204) argues that in a statement "[a]s the negotiated and interactional qualities of the interrogation have been transformed into a first person narrative, the outcome of the interrogation is shown, not the process". This is true of the data examined in this study, especially with reference to both the content and intentional layers. The example below (drawn from Case 1) forms part of the 'process' that is not shown in the final statement, and only the transformed English rendition – which is given following the dialogue below – constitutes the official record. As Komter remarks, it is the outcome of the interrogation that gets shown.

23 *Xa umyen' am ke ngok' ebuza yena akasabuzi ngendlel' eright ukhwela kum ubona qha lo mntan' ulilayo (.) angene kum.*
(When my husband asked me about this he was not polite, and having noticed that the child was crying he jumped at me.)

24 *Undibethe ngenduk' yomtshayelo aph' emqolo, wandibetha ngestena eyona nto izondonzakalisa;*
(He beat me up with a broom stick on the back, and continues with a brick. That is what injured me.)

25 *ndiyabon' uba yeyona nto i (.) ndenze ipain kakhulu .*
(I realised that is what caused the pain.)

26 *h And then ebekhikhiza ke icing.. laphela tu elase kamreni engafun' nomnt' umnqandayo endibetha nangamanqindi.*
(He was kicking my bedroom door to a point of destroying it, and he didn't want anyone to intervene as he was also hitting me with his fists.)

> ...then my husband asked me why I beat him, I told him that I did not beat him that much, I was just showing him he did the wrong thing by not leaving the keys when he is going to play with his friend, Then my husband started **shooting** at me. He also hit by his fists and took the broom stick and assault me all over my body I then went to the bedroom and closed the door but he forced it to open and took the brick and beat me on my back (shoulder) **I then sustained with injuries all over my body**...

Although the English rendition shows an orderly progression of the narrative, some of the statements are not factual, and as such are not the complainant's 'own words'. This dangerous inconsistency and lack of accuracy affects not only the content layer but also the intentional layer, in that it officially modifies a charge of Common Assault into a possible Attempted Murder in the eyes of the future readership or audience, who solely rely on this official record for their legal decision-making process. The reality of the matter is clearly indicated by the transpreter's addition of the passages in bold, as part of her inter-textuality. For example, shooting at someone is only possible when a gun or rifle is used, and yet there is no trace of the use of a fire arm in the pre-statement taking session. The transpreter's behaviour, whether by error or intention, has the effect of aggravating a criminal act into an explicit serious and violent crime. This is a total misrepresentation of the complainant's words – a misrepresentation which, in my view, could

undoubtedly have a significant influence in the judgment. And this is just one of many instances where the data demonstrate a similar pattern at work.

My analysis has provided some insight into the role of translation and institutional norms and conventions in the administration of justice, and thus access to justice. Within the data examined, instances of enforcing institutional norms and conventions have been detected in role participation and representation of complainants by transpreters. This state of affairs is facilitated by the transpreters' dominance and by their tendency to assume control of the interactional 'game'. Given the fact that the rules of engagement are biased in favour of the transpreters, it becomes possible to enforce responsibility and ownership upon complainants of sworn statements, the latter being taken as verbatim record of their accounts (whereas in some cases they may not be). The authority of a sworn statement in the court room remains non-negotiable, and thus places the complainant or witnesses on the receiving end in as far as access to justice is concerned.

The analysis of the data has also revealed instances of manipulation and deficient translation. In some cases, as shown in the above examples, omissions of information contained in the original and additions in the target text are apparent. In the process, key elements in any translation activity such as accuracy and consistency are being compromised. Another observation emerging from the analysis relates to the lack of skills and empowerment of transpreters as professional translators. Given this situation, it stands to reason that the standard and quality of translation – as exemplified above – have a lot to be desired. Arguably, the mistranslations resulting from this state of affairs do not only distort the complainants' own words but also constitute a blatant misrepresentation of the truth, which is to say of an inherently useful record for future decision making by the court.

## 4.11 IMPLICATIONS FOR ACCESS TO JUSTICE IN SOUTH AFRICA

Having dealt with the issues relating to the role of translation and institutional norms and conventions in the administration of justice, this section will provide a glimpse into the implications of current practice for access to justice in as far as the South African criminal justice system is concerned. Anthony Heaton-Amstrong and David Wolchover shed some light on the implications of sworn statements when they argue that:

> [Statements] provide the basic structure governing the direction of an enquiry, the selection of defendants and the choice of offence to be charged. In furnishing an advance blueprint of the shape of the evidence they enable the case to be prosecuted and defended coherently and the trial to be

> supervised fairly. But chief among their functions is the preservation of original accounts and this will have three uses. First, they provide a narrative form from which witnesses can refresh their memories. Secondly, they furnish a text against which consistency can be checked during the trial. Thirdly, they provide a documentary narrative which can be read at trial in lieu of live evidence in exceptional circumstances (1999:224).

Several scholars whose research is similarly focused have shared the same sentiments (Coulthard 2002, Coulthard and Jonson 2007, Eades 2004, 2010, Komter 2003, 2002, Jönsson and Linell 1999, Ralarala 2012, Rock 2001). The fundamental question is whether our criminal justice system meets Heaton-Amstrong and Wolchovers' (1999) proposed criteria. The answer is a definite 'No'. Yet this study argues strongly in support of Amstrong and Wolchovers' (1999) position, which could be used as a solid base for a viable model for police record construction or sworn statement writing.

The world view of the South African criminal justice system is rooted and founded in Western perceptions and principles (Kaschula and Ralarala 2004, Kaschula and Anthonissen 1995). This carries serious and adversarial implications for the notion of access to justice – particularly for those individuals and groups whose English proficiency is low or non-existent. This is evidenced and exacerbated, amongst other factors, by the hegemony of English (and to some degree Afrikaans) in the judiciary, irrespective of the Constitutional provision that suggests that all 11 languages should be given equal status and usage in all official domains, including the legal domain. The continuing use of English (and Afrikaans) only, at the expense of African languages, in the official business of the criminal justice system has a direct bearing on matters concerning human and language rights in a democracy. If the Constitutional provision is not enforced and we do not rethink the current model of police record construction, as this article proposes, the human rights element of democracy will remain forever utopian.

## 4.12 CONCLUSION

In this article, a broad analytical view of the construction of police records has allowed us to reach significant findings relating to the use of language and translation in the South African criminal justice system. In relation to previous research, this article has specifically demonstrated the persistence of power and control entrenched in the system through the transpreters' function – primarily in pre-statement taking sessions, culminating in sworn statements that ultimately constitute evidence which in turn translates into courtroom proceedings. Secondly, it has also been shown that the 'retelling or rewriting' of sworn statements is not only the result of the complainants' contribution but rather of a collaborative exercise in which the transpreters are the

most powerful voice. This is attributed, in some cases, to the transpreters' allegiance to the system - at whatever human costs. The question therefore has to be asked as to whose voice goes to court. Thirdly, and finally, this article has shown the implications that the status quo has, and will continue to have, for access to justice if the system remains unchanged, particularly when speakers of African languages whose English proficiency is low or non-existent are involved in criminal activities.

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# CHAPTER 5
# (PAPER 4)

## 'Meaning rests in people not in words': linguistic and cultural challenges in a diverse South African legal system.

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**Key words**: silence, comprehension, translation, language and culture

### 5.1 INTRODUCTION

In the South African criminal justice system there seems to be no understanding of the significance of the interface between language and the law and its implications for social justice. Yet, this important aspect proves to be quite fundamental in the administration of justice particularly when handling cases that involve speakers of African languages whose English, and to some extent, Afrikaans proficiency is low or non-existent. Eades (1986: 215) points out that, 'It is becoming increasingly obvious that accesses to justice are partly a linguistic issue'. Further exacerbating this problem is the fact that speakers of African languages hail from a rich and diverse cultural heritage, and as such this human peculiarity involves a somewhat different structure of thinking from the native speakers of other languages. Stroud (2010: 2) makes a similar observation when suggesting that, 'Cultural and language heritage remains embedded in their discourse, with variations in politeness, taboo, terminology used for specific occasions and different words to speak to people in different relationship'. Arguably, cultural variability is not at all considered in our criminal justices system (Kaschula & Ralarala 2004: 254). This article will, firstly, show that the South African criminal justices system operates by a different set of rules, which is not quite compatible with the (language) conventions and heritage of an African language speaker. Secondly, apart from demonstrating that cultural practices are difficult to represent as linguistically equivalent in different languages, this article will, thirdly, reveal that certain court judgments are decided on the basis of cultural misunderstanding. St Clair (n.d.) argues in relation to this discussion:

> …Western court systems are based on the rhetorical metaphors of print culture and as a consequence they serve only urban societies. Those who enter the court system from outside of this framework are hindered in making their case which is based on oral culture and visual culture

> frameworks. They operate in disparate mental spaces and function in through different social constructions of reality

It stands to reason therefore that linguistic and cultural nuances in the communication patterns of those who often get embroiled in criminal activities, yet lacking in terms of the knowledge and understanding of the language of the legal process, pose serious challenges in terms of access to the system of justice. In some previous work primarily focusing on language variety and misunderstanding a number of problems could be attributed to the notion of cross-cultural / intercultural communication (see Kaschula & Anthonissen 1995). Walsh (1991), for example, examined conversational styles in Australia in which he takes a closer look at their common features and their implication for intercultural communication. Having reviewed some of these works, it is worthy of note that very few studies in South Africa (to the best of my knowledge) that have documented issues relating to the interface of language and the law through a lens of cross-cultural / intercultural communication (see Moeketsi 2002; Kaschula & Ralarala 2004). Yet, this type of work has proven to be quite useful where it has received thorough grounding (see Eades 1996; 2000a; 2000; 2004; 2012; Berk-Seligson 2008).

The present article partly draws on my recent work (Ralarala 2012), which examines issues relating to language rights, communicative competence of *transpreters*, asymmetry of police interaction and implications thereof pertaining to Eugene Terre' Blanche's (ET) trial within a trail. It will adopt a narrative perspective in which cultural and linguistic differences are fleshed out from an examination of selected High Court judgments, affecting speakers of African languages: S V KIMBANI 1979 (3) SA 339 (E); HRH KING ZWELITHINI OF KWA ZULU V MERVIS AND ANOTHER 1978 (2) SA 521 (W) G; S V MAHLANGU AND NDLOVU 2010 CC70. Before turning to the actual analysis, the article will first provide a synopsis of the selected judgments. This is followed by a discussion in which the key concepts- towards supporting my hypothesis-: (i) silence, (ii) comprehension and (iii) 'translating against the grain' (that is, 'enabling suppressed voices from one language to be heard in the language of the dominant group in the society', in Ridge's 2009:207 terms) are demystified and fleshed out in the analysis of the judgments. The article will conclude by relating briefly the important implications of cultural and linguistic differences for the delivery of justice in South Africa.

From a theoretical perspective, the research reported in this article is embedded in a 'difference approach' (in Eades' 2004 terms). This approach considers languages as equal (*ibid*) , which goes against the tacit – but quite unconstitutional – agreement that English and Afrikaans remain the languages of record. The approach sets the scene in terms of providing a model towards explaining

and shedding some light as to how and why cultural differences emanate from the South African criminal justice system, of course, with language occupying a centre stage of this reality.

## 5.2 SUMMARY OF CASES

### 5.2.1 S V MAHLANGU AND NDLOVU 2010 CC70 (commonly known as the Eugene Terre' Blanche trial – hereon refered to as the ET trial).

The two accused persons, Chris Mahlangu (accused 1) and Pembi Patrick Ndlovu (accused 2), were charged with housebreaking with intent to rob and robbery with aggravating circumstances, murder and attempted robbery with aggravating circumstances. It was alleged that on the 3rd of April, 2010 at or near Witrandjiesfontein Farm, Ratzegaai, in Ventersdorp, the two accused broke into the house of the deceased, Eugene Nay Terre'blance (ET), robbed him of his Nokia cell phone, murdered him and attempted to rob him of his white, Opel Corsa motor-vehicle. The state alleged that, at all material times, the accused acted with a common purpose. The accused pleaded guilty to all the charges.

The trial was conducted in camera, reason being that accused 2 was still a minor. It is also true that the trial attracted immense media interest, both locally and abroad by virtue of the deceased's close connections with the Afrikaner Weerstandsbeweging (AWB). The cause of death contained in the post mortem report was described as "blunt –force head, chest and neck trauma".
Accused 1, Chris Mahlangu, was found guilty as charged.

As to accused 2, Pembi Patrick Ndlovu: In respect of Count 1: Housebreaking with intent to rob and robbery - he was found not guilty, but found guilty of housebreaking with intent to steal. With reference to Count 2: Murder - he was found not guilty. In respect of Count 3: Attempted robbery – he was found not guilty (Record cited from the judgment: ***S V MAHLANGU AND NDLOVU 2010 CC70***).

### 5.2.2 S V KIMBANI 1979 (3) SA 339 (E)

In this case, the accused was called as a witness for the State to give evidence under oath, and he made a statement which conflicted with the one made to the police. The accused was then charged with statutory perjury. In order to prove its case the State called the policeman to whom the sworn statement was made, who handed in evidence in this regard. The court then held, on review, that,

on a charge of statutory perjury, there was no need to call the interpreter who had interpreted what the accused had said when giving evidence in the judicial proceedings referred to in the charge. He pleaded not guilty but was convicted. He was sentenced to 12 months' imprisonment. The State case was that the accused made a sworn statement to a policeman in connection with the death of a person which eventually led to a charge of culpable homicide. The accused then gave evidence as follows: 'I am an adult male aged 23 years residing at Dikidikana Location, Zwelitsha. I never said this to the detective. They hit me and made me sign a statement made by Nqabisile'.

In closing the case, the Judge pointed out, '…the direct evidence of the interpreter and not the hearsay evidence of the present accused was recorded in case RC 54/78. In terms of s 235 of the Act it was, *prima facie*, correctly recorded, and as there is nothing to suggest that it was not correctly recorded, the *prima facie* proof is now elevated to proof beyond reasonable doubt (*ibid*). The conviction was confirmed. However, the sentence was reduced to six months imprisonment due to the mitigating circumstances: lack of previous record. (Record cited from the judgment: ***S V KIMBANI 1979 (3) SA 339 (E))***

### 5.2.3 HRH KING ZWELITHINI OF KWA ZULU V MERVIS AND ANOTHER 1978 (2) SA 521 (W) G

In the headline and the body text of an article published in an additional portion of a newspaper with a wide circulation amongst the Black readers (Sunday Times Extra on 29 September 1974) it was stated that the plaintiff, who was the hereditary King of the Zulus and who had three wives, was a 'ladies' man'. The term 'a ladies' man' had been translated by a journalist from a Zulu source text: *mina ngiyisoka*.

In an action for damages (in the sum of R10.000 against the defendants) for alleged defamation, the plaintiff alleged that these words were false, malicious and defamatory and were meant and understood to mean that he was 'promiscuous' and, notwithstanding that he was the king of the Zulus, a large nation, he was 'a man of loose morals'. Furthermore the facts of the article were false. Reference is made to the judge's closing statement: '…In the result, nothing has emerged from the evidence or from the analysis of the article as a whole to persuade me that I ought to find that a reasonable ordinary and right-thinking reader would read the words complained of or the article generally as being defamatory in either of the senses pleaded'. '…Words not defamatory even when applied to a king. Article as a whole not defamatory. The Action was dismissed. (Record cited

from the judgment: ***HRH KING ZWELITHINI OF KWA ZULU V MERVIS AND ANOTHER 1978 (2) SA 521 (W) G))***

## 5.3 BRIEF BACKGROUND ON THE LANGUAGE SCENARIO IN THE CRIMINAL JUSTICE SYSTEM

The linguistic and cultural challenges that tend to confront the legal process revolve around the language question in South Africa. It is therefore fundamental to draw some attention to this state of affairs as it somewhat contributes to the debate and the content of this article. Section 6 (35) of the Constitution of the Republic of South Africa (1996) broadly addresses the question of language rights and 'right to a language' as it relates to the function of the criminal justice system. Geldenhuys (2001:135) contextualises these Constitutional provisions when noting the challenges facing the system: (i) the fact that the Police Service must meet the Constitutional requirements when communicating internally, as well as when dealing with the public whom it serves; (ii) the fact that the functions of the Police Service form an essential part of the administration, and as such the administration produces and packages documentation that is required for court purposes; (iii) the fact that the Constitution requires that arrested, detained and accused persons be informed of their rights in terms of the Constitution in the language that they understand. For the purpose of this discussion, the latter provision seems to be the point at issue. It is common knowledge that in South Africa witnesses and accused persons whose English (and to some degree Afrikaans) proficiency is low on non-existent provide their testimony through the services of interpreters and translators. In my view, this is solely meant to sustain the hegemony of English and Afrikaans as languages of record within the judiciary. This, according to Pierre De Vos (2008), happens even when all the parties before the court speak a first language other than English or Afrikaans. Notably, it would seem that there is no consensus amongst the judicial 'powers that be' as to the manner in which justice should be accomplished. It also remains a point of controversy on whether African languages (as a legal entitlement to the speakers) carry the potential to handle legal phenomenon, thus occupying their constitutional and official position -in a practical sense – in the criminal justice system. Elsewhere (Ralarala 2012: 60), I have argued that this status qou is nothing short of continued inequality and discrimination in South Africa, and this is unjustifiable considering the present language configuration.

### 5.3.1 Silence is loud in S V MAHLANGU AND NDLOVU 2010 CC70

In a paper, titled, 'I don't think it's an answer to the question: Silencing Aboriginal witnesses in court', Eades (2000: 167) makes a very powerful case comparing the use of communication features such as the ways of seeking information (which avoid direct questions) and the use of silence (which is unique to the Aboriginal community) with the conventions and conversational styles of mainstream Western English – speaking societies in a legal context. Her findings reveal that interlocutors feel uncomfortable with lengthy silences. This communication feature, normal amongst the Aboriginal communities (*ibid*), carries some potential for uncertainty and misunderstanding especially in instances where communication has to be carried out across cultural boundaries (Basso 1970). The fact that silence, as a cultural and social construction phenomenon, is at odds with the 'language' of the judiciary, and the fact that some magistrates and judges lack understanding of certain cultural and linguistic idiosyncrasies raises serious challenges for the delivery of justice, not necessarily only in Australia but across the globe where multilingualism and multiculturalism are perceived as a problem rather than a resource. South Africa seems to be a classic example of this realty.

Silence has some presence in certain high context cultures as against low context cultures (i.e., the former being perceived as a situation in which less information is contained in the verbal part of the message and more in the context, with less reliance on the explicit verbal messages, and the latter being viewed as having less focus on the situational context, with emphasis on self-expression and explicit uttering of feelings, desires, opinions etc.) (see Adler and Rodman 2006). This presence of silence is validated by a research conducted by Mushin & Gardner (2009:2049), and part of their findings is reported as follows: 'Our data suggest that while there may indeed be culturally based differences between Anglo and Aboriginal Australians in how longer silences are oriented to and negotiated in interaction, these are not linked to a particular interval of time'. Arguably, speakers of African languages – particularly those who still uphold their traditions and cultures belong in the former (that is, high context cultures) category. And as such the notion of silence, it could be argued, can be traced in their communication patterns especially when confronted with critical information in a foreign environment such as the courtroom. As noted earlier, Eades (2000) regards silence as an important and valued part of communication between Aboriginal persons. It may indicate a desire to think about a matter, or a desire to become comfortable with a social situation. It may simply be a way of enjoying another's company in a non-verbal way. However, in non-Aboriginal society silence tends to be negatively valued. Among non-intimates, silence may cause embarrassment and/or indicate that communication has broken down. In a legal context, for

example, silence may be viewed as being consistent with evasion, insolence, confusion, ignorance and/or guilt (Eades 2000; 2004).

Diverging interpretations of silence are particularly interesting and significant in the context of the ET trial. This is evidenced by the judge's submission, in his judgment:

> **Extract 1**. *…where the evidence against an accused is so overwhelming, accused's failure to answer those allegations can be a factor that may weigh against the accused when the court considers his guilt or innocence. The state of mind of the accused when he committed the crime can be important and thus the accused's* ***silence*** *may be more weighty against him… The case against accused 1 is arguably unanswerable and one would have expected an answer from accused 1. It may very well be that because of the convincing case against accused 1 he considered it futile to give evidence. Be that as it may, his failure to proffer any explanation leads to no other conclusion that he committed the crimes attributed to him* (2010:22-23).

Cross- examination as a speech event is a hallmark of legal proceedings – a serious effort through which factual information is to be elicited, and the roots of which are solely based on the Western societies. On the contrary, such a speech event is not typically prominent in high context cultures. When such cultural elements collide, as they inevitably do in the South African criminal justice system, there seems to be a great potential to have the delivery of justice affected. This view is confirmed by Kaschula and Ralarala (2004: 259) when they argue that, 'There is no doubt that if one cannot express one's point of view effectively in one's mother tongue within courts of law, the mother tongue which is the language of one's culture, the language which remains the vehicle of one's world view, then there can be no concept of a fair trial'. It is therefore safe to suggest that the lack of African language awareness amongst the judicial officials and understanding of cultural dynamics of communities they serve tends to prevent them from providing appropriate interpretation of a language event that connects language, law and crime.

## 5.4 COMPREHENSION AND COMPREHENSIBILITY

Earlier on in this discussion I have mentioned the significance of sworn statements as formal language events aimed at packaging ordinary narratives into formal evidence for the purpose of court proceedings. It is not uncommon, as part of statement taking sessions, that crimes get

verbalized (see Coulthard 2002: 19). Alleged verbals (in Eades' 1997 terms) – a situation in which 'a person charged on the basis of a police record of interview claims that this record of interview was fabricated' (*ibid*), (of which is not a major concern of this article) still leaves much to be desired despite the fact that we are living in a democracy. Furthermore, the notion of comprehension which is central in the process of record construction in police interviews in South Africa also tends to present adverse consequences in the context of our criminal justice - as I will show later in the discussion. The S V KIMBANI (cited above) is a classic example of an alleged verbal. Reference is made to the evidence given by the accused person:

> **Extract 2**. *I am an adult male aged 23 years residing at Dikidikana Location, Zwelitsha. I never said this to the detective. They hit me and made me sign a statement made by Nqabisile* (1979)

It is a well-known fact that a number of incarcerations (linked to alleged verbals) in South Africa may be attributed to the Apartheid era, when overt racial and political undertones surrounding judgments were often present. However, it is a matter of great concern that in the new dispensation instances of alleged verbals still surface (as shown in S vs Kimbani) in our criminal justice system. This problem is not unique to South Africa as it tends to affect most Multicultural and Multilingual societies across the globe (see Berk-Seligson, 2008; Eades, 2012 for a detailed account).

Let me now turn to the notion of comprehension and comprehensibility. Eades (1997: 19) defines comprehension as an 'extent to which the accused person understands the questions (being asked in the process of seeking information or obtaining evidence) and the police caution', which according to her, 'advises the accused of their rights to remain silent, and the possibility that anything they say in the interview may later be used against them in evidence in court'. It is apparent that understanding is central and crucial in this important information transfer, and as such it affects both parties, that is, the police officer and the suspect. Rock's work on 'Recontextualisation in the police station' presents a very persuasive argument regarding the activities that are involved in the process of record construction and text transformation. In examining issues of comprehension and comprehensibility, he points out that, 'whilst meaning revolves around words and their combinations, more importantly, understanding is about consequences – situated meaning for particular address' (2004:11). To flesh out the notions of comprehension and comprehensibility, and its potential adversarial effects in the legal process, we can refer to the judgment:

> **Extract 3.** *There were however a number of aspects which troubled me insofar as accused 2 was concerned. It is evident that Lt Col Mano initially interviewed accused 2, he did so without his mother being present. It was in fact during this time that Lt Col elicited from accused 2 certain admissions and his willingness to do a pointing out. Explaining such procedure and particularly the possible implications thereof to practically illiterate boy of not quite 16 years of age is meaningless. This is such a serious case and the implications for accused 2 so crucial, that surely his ability to understand and appreciate what he was in for should have received more consideration and attention from the police. Moreover, to talk to his mother about these things, a woman who allegedly is illiterate and afflicted with a serious drinking problem, certainly did not help matters. Did accused 2 really understand what was going on? I seriously doubt it* (2010: 28-29).

The judge's specific commentary in Extract 3 on the issue of 'ability to understand' (that is, comprehension and comprehensibility as conceived by Eades 1997 and Rock 2004) is indicative of the essential role of the 'right of language' and the 'right to a language' (in the terms of Makoni et al. 2008) in following the legal process. Furthermore, the fundamental nature of this 'right' is also made apparent by the judge's expression of his grave misgivings over issues of comprehension and comprehensibility as they have turned out in the legal processes surrounding the case. And more importantly, the fact that these issues might possible affect the outcome of the case. Hajjar (2005), (cited in Ridge 2009: 210) points out a somewhat similar view:

> In any courtroom, *understanding*, is a charged term, even without the problem of language barriers and the mediating role of translators, there is a always the question of whether the various parties are communicating and comprehending accurately in exchanges often fraught by explicitly contradictory and competing interests

Following this observation, the delivery of justice under such circumstances amounts to nothing but a myth. My submission therefore is that access and active participation of ordinary people in the justice system (especially those whose English and Afrikaans proficiency is low or non-existent) could, in part, be promoted and achieved through comprehension and comprehensibility of a language, African languages in this case. It is also my submission that misunderstanding and miscommunication attributed to various communication styles in the legal system (discussed in this article) could be avoided as a result of comprehension and comprehensibility of languages that the

people understand. Challenges and obviously critical questions that mull over our minds are worthy of consideration: (i) Whose language ideology permeates the legal process? (ii) What does this mean for speakers whose language is not part of the judicial mainstream, especially in the context of insufficient human resource group in terms of interpreting and translation resources? Although there are no readily available solutions to these issues, legal recognition of cultural and linguistic realities of ordinary communities within the criminal justice system seems to be essential as our point of departure.

## 5.5 'TRANSLATING AGAINST THE GRAIN'

The concept of 'translating against the grain' (which is discussed in relation to HRH KING ZWELITHINI OF KWA ZULU V MERVIS AND ANOTHER in this particular section) is strongly influenced by the work of Stanly Ridge (2009). It would imply that 'indigenous voices are characteristically subsumed in a metropolitan interpretation and can never be heard on their own terms' (*ibid:* 195), but that translation against the grain would enable suppressed voices from one language to be heard in the language of the dominant group in the society (*ibid*: 207). As a matter of fact translations from a so-called indiginous language (that is, isiZulu in this case) into the dominant language (that is, English) tend to take place within a a web of inequalities (in Sturge's 2007 terms).

The HRH KING ZWELITHINI OF KWA ZULU V MERVIS AND ANOTHER case is a classic representation of this. The way a culturally loaded concept such as *Mina ngiyisoka*, was represented in the court was not at all done according to the principle of 'translating against the grain'. It was rather a denial of the 'right to a language and a right of a language'. The result of this failure is a misrepresentation of the plaintiff's linguistic and cultural world view due to a narrow rendition supplied through an English dictionary: *I' m a ladies' man*. As a consequence one could argue that the case itself was decided on the basis of cultural and linguistic misunderstanding. This is particularly dangerous as it jeopardizes the delivery of justice to those who are not well versed in the language of the judiciary. Arguably, adopting and embedding the principle of 'translating against the grain' in the translator's or interpreter's practice is certainly a positive and open – minded approach that resembles cultural agency. Such an approach will not only deal directly with our linguistic and cultural challenges but will also add value and make a difference in the South African legal system.

Ridge makes an important observation that, 'language is much more than a set of verbal counters" and that "it can be understood only in context, in a context of culture, discourse and immediate circumstances' (2009: 203). In sum one can conclude that:

- Linguistic translations are very seldom exact.
- In order to understand a cultural practice we need to understand the context in which it is located.
- In order to understand the complexities of difference, it is crucial to note that dominance and control are pertinent and recognizable components in the SA criminal justice system.
- Meaning should not only be considered in the framework of words but needs to be viewed in terms of comprehension, consequecenses and repercussions as it rests in people not in words.

## 5.6 CONCLUSION

Elsewhere (Ralarala 2012) I have argued that there are no prospects for the development and empowerment of African languages, particularly in the South African criminal justice system. This will continue as long as the question of language is not urgently revisited in the judiciary. Put it bluntly, the prospects of providing African languages equal usage and status as English and Afrikaans in the South African legal system will forever remain gloomy. In other words, such languages will forever linger in a compromised position, and the implication of this is that the non – middle class speakers of these languages will forever remain in the receiving end of the law. This article is another attempt to raise critical cultural and linguistic issues that emanate from the function and practice of the legal system and the possible implications for the delivery of justice.

From the findings of the present article it is evident that there are serious adversarial impediments that arise from our diverse cultural and linguistic issues, especially against the backdrop of the function of the South African criminal justice system. The implications are huge for ordinary South Africans, particularly for those whose English or Afrikaans proficiency is low or non- existent. Some adversarial implications result from the lack of understanding (or pretence thereof) of cultural and linguistic dynamics of communities by judges and magistrates, and police – as loyal servants of the judiciary – is not excluded from the system. The danger attached to this reality is a direct result of the recurring of conflicting world-views, with prevalence and preference of the Western legal system over our own. The question arises as to whether ordinary South Africans are in a position to have justice delivered upon them or whether they will remain on the receiving end in as far as

access to justice is concerned? In this article, I have tried to deal with these questions through fleshing out some cultural and linguistic nuances emanating from three case studies, that is, (i) Silence, (ii) Comprehension and Comprehensibility, (iii) and 'Translating against the grain' as these three are suggestive and offer some insights and hints on possible guidelines to deal with our diverse cultural and linguistic diversity in the context of the legal system.

## 5.7 RECOMMENDATIONS

Firstly, having examined the three case studies, it has become apparent that the South African criminal justice system requires a complete overhaul in as far as the question of language and its implementation is concerned. Related to this aim are possible spinoffs meant, amongst others, to protect and promote the notion of 'right to language' and a 'right of a language', and thus reinforce the access to justice. This view is fully supported by Majeke's (2002:153) convincing argument: 'We all know that no legal system will ever succeed in establishing itself as a social system efficiently if it is not founded on the fundamental cultural rhythms of the majority of the population in its borders'.

Secondly, these cases, particularly S vs Kimbani and the ET trial, confirm the necessity to introduce audio- recordings during statement – taking sessions which culminate into sworn statements that constitute crucial evidence during court proceedings. This could be an important transformation step as judges or magistrates will have the liberty to consult this 'live' evidence, should legal disputes subsequently occur. Currently, such a facility does not exist within the law enforcement, that is, the South African Police Service. Heaton-Amstrong and Wolchover (1999:248), shed some light in this regard, 'Potential witnesses who are also potential suspects may be particularly vulnerable to threats of prosecution if they do not fall in with an investigator's theories about the case'. It goes without saying therefore that this situation is bound to recur as long as the entire evidentiality completely draws and solely relies on hand-written translated (mostly from African languages into English) sworn statements by police officers.

Thirdly and finally, my analysis of the three cases is grounded within the 'difference approach', in which descriptive accounts of cultural and linguistic nuances, for which miscommunication and misunderstanding in the criminal justice system, are attributed. A closer look may reveal that this approach is not exhaustive enough to deal with the broader question of language and the law. Nevertheless, it has provided some traction on conceptual issues in as far as cultural and linguistic differences are concerned. For purposes of future research, there seems to be a need for a

comprehensive approach to this phenomenal situation. Eades' (2004: 314) proposition that '…we need sociolinguistic micro-analysis of courtroom interaction in conjunction with the analysis of the wider power struggles… and the ongoing police control' seems to be a utility that could be employed to flesh out and expose the inherent power and control that centers around the criminal justice system.

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# CHAPTER 6

# (PAPER 5)

## A compromise of rights, rights of language and rights to a languagein Eugene Terreblanche's (ET) trial within a trial: evidence lost in translation

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## 6.1 ABSTRACT

*The trial (within a trial) of Eugene Terreblanche (referred to as the ET Trial) in a high court which took place in Ventersdorp, in January/ February, 2010 sparked intense interest in South Africa and abroad, and raised critical questions about issues of (i) language rights, (ii) communicative competence of law enforcement agency particularly the police, and (iii) the asymmetries in the police interaction with the accused persons. Apart from communicating the rights of the accused persons in a language that s/he understands, the police officers are entrusted with additional responsibilities which include, among others, being a channel or conduit that encodes and decodes information within milliseconds in an attempt to reconstruct an accused person's narrative into a formal evidence for purposes of court proceedings. This reality is further substantiated by Komter (2002/2003:202) when suggesting that, '... police officers should record the fact that they informed the suspect about his right to silence and...that they record the suspect's statement as much as possible in his own words'. Against this backdrop, it is also worth stating that the South African multilingual setting is confronted by serious complexities especially in cases where the accused person/s is a speaker of an African language-who can only rely on interpreting/translation services in order to follow the legal discourse- wherein languages of record are still English and Afrikaans. Through examining the judgement of ET trial within a trial, this article aims to address the following questions: (i) Do language rights remain myths or reality in the South African judiciary? (ii) Can the police officers fulfil their role competently as transpreters? (iii) What asymmetric role do police officers occupy in handling language event relevant to their duty? (iv)What are the practical implications of the ET trial within a trial in the context of law enforcement in South Africa?*

**Keywords**: language rights, communicative competence, asymmetry, *transpreters*, trial within a trial.

## 6.2 INTRODUCTION

Law is made possible by language. Crime is part and parcel of the human condition, and as such communication constitutes a fundamental part of the criminal process (Waterhouse, 2009). An encounter with officers at local police stations in South Africa, with the intention to lay charges is a classic example of a language event that connects language, law and crime. This is one of the fundamental components of the administration of criminal justice that initiates the court process, made possible by translated sworn statements, taken from members of the public (from mostly African languages into English, and in some cases Afrikaans), and culminating in court as evidence for proceedings. This important aspect of the law is often underestimated and regarded as a simple and straightforward task, yet the actual translation of police sworn statements as reconstruction of the complainants' oral narrative has far-reaching consequences and serious implications when involving witnesses that come from different cultural and linguistic backgrounds, not only for the complainant and the perpetrator but also for law enforcement personnel or police officers (*transpreters*) who might find it harder or close to impossible to gather evidence as a result of language barriers. Existing literature show some differences and inconsistencies in relation to the oral narratives and translated versions presented in English and in some case Afrikaans (S v Kimbani 1979 (3) SA 339 (E)); S vMahlanguandNdlovu 2010 (2) SA CC70. Komter (2002/2003) points out that sworn statements are supposed to be written down as far as possible in the suspect's (complainant's) own words but they tend to be the police officers' written versions of what was initially said during the interview. The problem of language barrier is not unique in South Africa; it is a problem of multilingual and multicultural societies around the globe. It has been well documented in Australia (See Cooke, 1995), in the United States (See Shah et al. 2007), Ireland (See Waterhouse, 2009) and elsewhere. What makes South Africa more peculiar are the human costs that are presented by this challenge in real life situations, including sentencing people to imprisonment, in some cases for crimes they did not commit. A case in point relates to a High Court case presided by Cloete JP and Kannemeyer J (See S v Kimbani 1979 (3) SA 339 (E).

Language and the law seem to be a field of interest and study in South Africa, although not blossoming as much as one would imagine given the controversial official state of the indigenous languages in the various domains. Nevertheless, the interface of language and the law has received considerable attention as an area of study in the international community. The scholarly interest in the language and the law phenomena across the globe has assumed the study of (i) Forensic Linguistics (Eades, 1997; Coulthard&Jonhnson, 2007); (ii) Linguistic Human Rights

(Kaschula&Ralarala, 2004; Arzoz, 2007; Waterhouse, 2009; Cote, 2005; Lubbe, 2008) and (iii) Translation and the Law sub-disciplines (Morris, 1995). Partly influencing this work is outstanding research by Eades (1996; 1997; 2010) that has been highly recognised in the direction of language and the law in Australia. According to Eades (1997: 15-16), the use of linguistic evidence (that is Forensic Linguistics) takes into account (i) speaker identification- phonetic analysis of voices of people who make threatening phone calls; (ii) tape transcription- focussing on disputes that might arise over tape recordings of interviews with the police; (iii) Alleged verbals- examination of disputes over fabricated records and contested authorship of texts; (iv) Cross-cultural communication differences -consideration of issues relating to language and cultural differences that tend to disadvantage primarily speakers of African language, when embroiled in a 'foreign' criminal justice system, whose English proficiency is low or non-existent; and (v) Comprehension- examination of the extent to which accused persons or witnesses may have not understood the police caution or questions during the interview.

Although the issue of (iv) Cross-cultural communication from the point view of Forensic Linguistics has been, to some degree, studied in South Africa (see Kaschula&Anthonissen; 1995; Moeketsi, 2002; Kaschula&Ralarala, 2004), there seems to be scant research or none whatsoever (to the best of my knowledge) that has dealt with (v) Comprehension within the South African context. Yet, this type of work has proven to be quite useful where it has received thorough grounding (See Komter, 2002/2003; Eades, 2012). Interestingly, comprehension,in my view,coincides and overlaps in more ways than one with cross-cultural communication when viewed from the South African angle. It is also for this reason that the paper does, directly and indirectly, make some emphasis and inroads into the latter area as an area worthy of serious research consideration in South Africa today.

Apart from attempting to open a debate on issues relating to the recognition of African languages and cultures – in the framework of rights, from a sociolinguist perspective, in the criminal justice system in South Africa, the paper also attempts to hint and respond to the language concerns about accused persons, complainants and witnesses who become embroiled in the criminal justice system. It is also the aim of this paper to initiate the interest of the law enforcement agency to explore viable means and ways of seeking information and acquiring evidence that could support social justice and prevent the notion of bias.

## 6.3 THE FACTS ABOUT THE CASE AND THE JUDGEMENT

The two accused persons, Chris Mahlangu (accused 1) and Pembi Patrick Ndlovu (accused 2), were charged with housebreaking with intent to rob and robbery with aggravating circumstances, murder and attempted robbery with aggravating circumstances. It was alleged that on the 3rd of April, 2010 at or near Witrandjiesfontein Farm, Ratzegaai, inVentersdorp, the two accused broke into the house of the deceased, Eugene Nay Terre'blance (ET), robbed him of his Nokia cell phone, murdered him and attempted to rob him of his white, Opel Corsa motor-vehicle. The state alleged that, at all material times, the accused acted with a common purpose. The accused pleaded guilty to all the charges.

The trial was conducted in camera, reason being that accused 2 was still a minor. It is also true that the trial attracted immense media interest, both locally and abroad by virtue of the deceased's close connections with the AfrikaanseWeerstandsbeweging (AWB). The cause of death contained in the post mortem report was described as "blunt –force head, chest and neck trauma".

## 6.4 SYNOPSIS OF THE ORDER BY THE JUDGE

(Justice John Horn: High Court of South Africa, South Gauteng)
Accused 1, Chris Mahlangu, was found guilty as charged.
In terms of accused 2, Pembi Patrick Ndlovu: In respect of Count 1: Housebreaking with intent to rob and robbery - he was found not guilty, but found guilty of housebreaking with intent to steal. With reference to Count 2: Murder - he was found not guilty. In respect of Count 3: Attempted robbery – he was found not guilty.

## 6.5 SOCIOLINGUISTIC PRINCIPLES RELEVANT TO THE LEGAL SET UP

Eades (2010:5) defines Sociolinguistics as a discipline that is concerned with the complex relationship between language and society. She further points out three main ways in which this relationship could be conceptualised. One, that language reflects society. Such an assumption would view the hierarchical ways of addressing participants in the courtroom environment. Simply put, this relates to the reflection of the authority and power relations within the court environment. Referring to the Judge or the Magistrate as *My Lord* is a classic example of this situation.

Two, that language determines society or aspects of society, or culture or thought for that matter. This assumption, according to Eades (*ibid*), 'reverses the direction of the relationship between language and society, so that the hierarchical authority structure in the courtrooms would be seen partly as the effect of such language usage'. It is worth stating that this second position on language and society points aptly to the notion of Linguistic determinism which highlights the fundamental differences that separate speakers of various languages such as the Eskimos who are said to have '...eighty-seven words for snow and not one for malpractice'(Adler & Rodman, 2006:106).The best well known theory that has dealt with linguistic determinism is the Whorf- Sapir /Whorfian hypothesis.

Three,that language concurrently reflects and shapes society. This third sociolinguistic assumption seems to be the most favoured, and thus forms the basis for a reciprocal relationship between language and society. Eades (2010:5) asserts that, 'This axiomatic understanding of society underpins the best sociolinguistic work on language in the legal process'. This view is supported by Kaschula and Anthonissen (1995:83) when suggesting that a broad sociolinguistic framework which draws on both ethnographic and ethno-methodological principles bears much more relevance when dealing with issues of language and the law. The ET trial and judgment seems to be one of the classic examples that provide practical situations, from a broad sociolinguistic perspective, upon which legal recognition of both linguistic and cultural differences along with the rethinking of record construction by the police, should be advocated.

## 6.6 ANALYSIS OF SELECTED EXTRACTS FROM THE JUDGMENT

In order to echo and demystify the focus of the issues that relate to (i) language rights in the criminal justice system;(ii) asymmetric role of the policeand (iii) thecommunicative competence of *transpreters*, the paper takes the angle of critically examining the lengthy commentaries contained in the judgment as cited by Judge John Horn, as his detailed explications and implications of the circumstances surrounding the case, and his ultimate delivery of the judgment.

## 6.7 LANGUAGE RIGHTS IN THE CRIMINAL JUSTICE SYSTEM: PROSPECTS AND CONSTRAINTS

In terms of the Constitution (Chapter 1, Section 6, Constitution of the Republic of South Africa, 1996),11 languages are entrenched in the Constitution, and thus given official status and supposedly

usage. According to Van Der Merwe and Van Der Merwe (2006:15), South Africans speak the following languages:

**Table1. Language composition of South Africa**

| **Language** | **1991** | | **2001** | | |
|---|---|---|---|---|---|
| | **Numbers** | **Percentage** | **Numbers** | **Percentage** | **Numbers** |
| isiZulu | 8 343 590 | 22.1 | 10 677 306 | 23.8 | 2 333 716 |
| isiXhosa | 6 646 568 | 17.6 | 7 907 154 | 17.6 | 1 260 586 |
| Afrikaans | 5 702 535 | 15.1 | 5 983 426 | 13.3 | 280 891 |
| Sepedi | 3 530 616 | 9.4 | 4 208 982 | 9.4 | 678 366 |
| Setswana | 3 482 657 | 9.2 | 3 677 016 | 8.2 | 194 359 |
| English | 3 414 900 | 9.1 | 3 673 197 | 8.2 | 258 297 |
| Sesotho | 2 420 889 | 6.4 | 3 555 189 | 7.9 | 1 134 300 |
| Xitsonga | 1 439 809 | 3.8 | 1 992 207 | 4.4 | 552 398 |
| siSwati | 952 478 | 2.5 | 1 194 428 | 2.7 | 241 950 |
| Tshivenda | 673 540 | 1.8 | 1 021 759 | 2.3 | 348 219 |
| isiNdebele | 477 895 | 1.3 | 711 818 | 1.6 | 233 923 |
| Other | 630 927 | 1.7 | 217 297 | 0.5 | -413 630 |
| **Total** | **37 716 404** | **100%** | **44 819 779** | **100%** | **7 103 375** |

Table1. above might be a little outdated by slightly more than a decade in terms of the South African language scenario, but the reality on the ground my not show any significant differences when considering 2012, especially when one takes a closer look at the trend between 1991 and 2001. Essentially, more than 65 to 70 percent of South Africans are speakers of African languages or have an African language as their mother tongue. On contrary, 30 to 35 percent are speakers of either Afrikaans or English or have Afrikaans or English as their mother tongue. The rest, of course, accounted for in the 'Other' category, and this comprises languages such as German, Portuguese, Mandarin, Greek, Hindu, Italian etc.

Language rights in South Africa are also entrenched in the Constitution (Chapter 1, Section 6, Constitution of the Republic of South Africa, 1996). However, the concomitant infrastructure and organisational realities make this policy difficult to implement in law courts (Kaschula and Ralarala, 2004). The reality of the situation is unsustainable and unbearable in the new dispensation. Further exacerbating the problem are languages of record, that is English and

Afrikaans, which have permanently remained unshaken, with the total exclusion of African languages, even post 1994. It is worthy of note that the maintenance of this status quo is vindicated by issues of practicality and costs, and such constraints, in my view, are unjustifiable related to the recurrence of the present language configuration which is nothing short of inequality and discrimination in South Africa.

According to Makoni et al. (2008:5) 'The right of language refers to the right of each individual language to exist and the equality of opportunity for it to develop. The right to language functions at an individual level. It refers to the rights an individual has to taking part in a court hearing in a language of their choice'. The problem of compromising of language rights is even more prevalent and serious in the domain of law enforcement, mainly in police stations, where evidence is first initiated. Further complicating the issue is the fact that speakers of African languages hail from a rich cultural background and heritage, and as such this human peculiarity involves a somewhat unique structure of thinking and a variety of communication patterns that are influenced by particular speech acts, which are different from the native speakers of other languages such as English.

Apart from the Constitution, a number of concerted efforts, borne out of the Constitution, towards obtaining linguistic rights in South Africa have been embarked on: the establishment of the Pan South African Language Board through an Act of Parliament, Act 59 of 1995; the establishment of the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Rights of Communities through an Act of Parliament, CRL Rights Act 19 of 2002. Underlying these political initiatives was a desire to reclaim, develop, protect and promote all diminished and diminishing heritage associated with the afore-mentioned establishments. Despite these efforts, along with precious time and resources invested, a generic survey continue to reveal minimal achievements in the direction of language development and multilingualism in South Africa, and the criminal justice system is a case in point (See Cote, 2005).And this is appropriately put by Berk - Seligson (2008:12) when equating thishopeless situation (although in Ecuador) to an '...outmost universal lip- service support for the right of indigenous peoples to use their ancestral languages in judicial contexts'. It is, however, worth mentioning that the South African Languages Bill (2011), currently tabled in parliament, with its ambitious objects and application could be South Africa's last attempt that could, only if equipped with independent powers and enforcement mechanisms, stand the test of time towards winning the battle for language rights.Once the proposed legislation is ratified, it remains to be seen as to how its implementation will unfold.

In order to flesh out the notion of compromising of rights in relation to the ET trial, reference is made to the judgment:

> **Extract 1.***The details which Lt Col Jacobs supplied to accused 2 and his mother were interpreted to them in Setwana. The undisputed evidence of Lt Col was that where the wording was somewhat complicated he explained the meaning and import thereof in broader terms. This was confirmed by Reserve/Constable Mthembu, the interpreter. Reserve/ Constable Mthembu stated that he interpreted from Afrikaans to SeTswana and vice versa. At no stage did either accused 2 or his mother complain that they did not understand him or that they did not understand the proceedings* (2010: 26).

From the citation, it is clear that the Judge finds nothing sinister with this information transfer. Whether this situation, as it is, might have influenced the outcome of the case in favour of the accused person/s or the state, remains a controversy. Scholars (Moeketsi, 2002; Eades, 2010; Hussein, 2011) who have extensively investigated this problem shed some important light when they all concur that when suspects are provided with non-partisan, unqualified, untrained interpreters/translators can bear serious implications in the practice, and as such this type of malpractice has potential for miscarriage of justice. It is worth mentioning that this type of malpractice in the criminal justice system has a long history in South Africa, dating as far back as the apartheid era. And it goes without saying that if the question of language is not urgently revisited in the judiciary, the prospects of transformation in favour of social justice and prevention of bias is rather bleak. Put it bluntly, the prospects of providing African languages equal usage and status as English and Afrikaans in the South African legal system will forever remain gloomy. In other words, such languages will forever linger in a compromised position, and the implication of this is that the non – middle class speakers of these languages will forever remain in the receiving end of the law. In proposing a different approach to the problem, the paper argues that individual language rights are to some degree entrenched in the Constitution. That much said, there seems to be no mechanisms in place to enable the security of such rights – a situation which carries far reaching effects in as far as the notion of access to justice is concerned.

The paper advocates that part of the mechanism that could be put in place within which South African indigenous languages could be recognized and protected in the legal spheres is through their equation to human rights in South Africa. In pursuit of this position the author embraces the view submitted by Karton (2008:10) that being able to exercise your right entails, amongst others, due process rights. The simple reference to this notion is a concept of a ‘fair trial’ (See Section 35 (3) (k)of the Constitution of the Republic of South Africa)). In essence, the notion of a fair trial tends to run through all human rights treaties and conventions (Karton, 2008). If the right to a fair trial is framed (as it is the case with the South African Constitution) as inherently related or part and

parcel of the right to be tried in a language that the accused person understands...it stands to reason therefore that for a trial to be considered fair, the associated rights, including language rights must be guaranteed. Failure to provide such may contribute towards crippling the procedural rights (Karton, 2008:44), particularly if interpreting or translation services are characterised by distortive elements. Secondly, failure to uphold these rights (precisely language rights) may also lead to grave misgivings in relation to the correctness of judicial truthfulness (*ibid*). Therefore, I submit, embracing the approach of equating language rights to human rights carries with it promising underlying principles which embrace the notion of equality and non-discrimination before the law. Associated spinoffs to this position contain, amongst others, potential to circumvent any possible adversarial consequences related to compromising of language rights in the criminal justice system as all languages will, in actual fact, be accorded equal status and usage and thus operate without limitations. This stance is supported by one of Africa's renowned scholar of literature, NgugiWaThiong'o (2012:1), when arguing that,

> One of the basic, most fundamental means of individual and communal self realisation is language. That's why the right to language is a human right, like all other rights enshrined in the constitution. Its exercise in different ways, communally and individually chosen, is a democratic right.

He further states that,

> To have mother tongue, whatever it is, and add another language to it is empowerment. But to know all the other languages and not one's own is enslavement. I hope Africa chooses empowerment over enslavement.

The fact that the language situation in South Africa remains unchanged post 1994, primarily in the judicial hierarchies from bottom to the top remains a serious challenge for Limited English Proficiency (LEP) South Africans. Cote (2005:13) makes a relevant observation that relates to the problem, arguing that,

> …the generous provisions of s. 6 (of the Constitution) are tempered by concerns over practicality in the subsequent guarantees. This is especially true for s. 35(3) (k) where issues over practicality concerns have allowed for a situation where the pre 1994 privileged status of English and Afrikaans as the only languages in the country's courtrooms to continue.

Undoubtedly, failure to appropriately address the deficits of the past in terms of the language question in the hierarchies of the judiciary, South Africa will indeed be embracing enslavement over empowerment.

## 6.8 COMMUNICATIVE COMPETENCE OF TRANSPRETERS

Police officers or ***transpreters*** – as I prefer to call them – who have to provide translation services for sworn statements are confronted with even more complex and sophisticated exercise as they have to tap from their cognitive juggling on-line. My conception for using this phrase (*transpreters*) in addressing the designated police officers is informed by the type of a dual dramatic performance – on the job – in rendering both the cognitive and social service of message production in the framework of both translation and interpreting. It is also worthy of note that *transpreters* commit to this duty despite not being officially sworn in - which the researcher supposes would have been consciously binding, considering the sensitivity and delicacy of their translation and interpreting assignment. The non- partisanship, lack of proper training and relevant qualifications of *transpreters* raises very important questions that are associated with communicative competence that, amongst others, concerns (i) accuracy and (ii) objectivity in translation and interpreting practices in relation to the ET trial and judgment. The issue that gets immediate treatment relates to accuracy, which according to Hussein (2011:26), '...is manifested in the absence of errors omissions, modifications or embellishments in rendering the speaker's words'. Karton's (2008:8) view of accuracy is somewhat consistent with Hussein (2011) when pointing out that, '...inaccurate interpretation does encompass instances such as those in which a word is improperly rendered into its grammatical equivalent, or a concept that is clear in one language and culture has no equivalent in another'.

Although it may not be simply to know or detect inaccuracies that go into the record from the entry point, the possible consequences of such inaccuracies might be implicit or explicit in the outcome or judgment:

> **Extract 2.**, *...the impromptu examination conducted by MrMajavu, who at that stage handled the cross- examination on behalf of accused 2 supposedly to gauge the interpretational skills of Reserve /Constable Mtembu must be viewed in its proper perspective. Firstly, although MrMajavu is adept in the use of Afrikaans language, I truly at times, had difficulty grasping MrMajavu's Afrikaans pronunciation. No wonder Reserve/Constable Mtembu had difficulty understanding him. Secondly, having regard to the fact that the impromptu test was performed in the tense atmosphere of a court, Reserve /Constable in fact did relatively well in the circumstances. Reserve/ Constable Mtembu's evidence was not that his interpretation would be flawless, but that he will interpret to the best of his ability. And that, I believe, he succeeded in doing so* (2010: 26).

The Judge might have done so well to defend the justice system, and this is well understood as his credibility is, among others, primarily depended on his judgment. But does that suggest that he has

acted in the full interest of justice? This question remains unanswered as inaccuracy of the*transpreter* (in the name of Reserve/Constable Mtembu)is uncovered by the defence attorney through cross - examination. This reality of this situation is also observed by SAPA (2012) when cited as saying,

> The boy's lawyer, Zola Majavu, tried to show how information could be misinterpreted or misunderstood. He asked reserve Detective Constable Emmanuel Mthembu to translate phrases from Afrikaans to Tswana, as he would have done when he explained the rights of the youth to him and his mother before the teenager pointed out the crime scenes. Mthembu struggled to do so correctly at all times. When he translated incorrectly, the court translator explained that Mthembu's version was not verbatim, but a simplified version.
> Majavu was questioning the accuracy of Mthembu's translations between Lieutenant Colonel Frans Jacobs, the youth and his mother, after Terre'Blanche's murder.

If this paper followsboth Hussein's (2011) and Karton's (2008) definitions of accuracy, which I suppose it should embrace in this context, it goes without saying that the judge's perspective is surrounded by controversy. Furthermore, failure to commit fidelity to the original tends to result in translation casualties, and that on its own becomes an infringement of justice - as it has been contested in this paper.

Morris (1995:6) makes a point when arguing that,

> Thoughtful translators and interpreters can see where to keep and where to adapt form, and what the effect will be of failing to do so. They know how to use the resources of the target language and society to exploit, and not to offend against the traditions and imaginative possibilities of that other language. They know…Yet the hard –won knowledge that they possess is virtually invisible to monolinguals and to superficial bilinguals…Such persons may otherwise be splendidly and expensively educated, as are lawyers and judges, who can cut things fine in their language

This is certainly a tall order but the fundamental question is: has the South African Police Service reached this level of sophistication in terms of infrastructure and human resources? The general evaluation of the judgement suggests a rather negative response to this enquiry.

In dealing with objectivity, defined by Hussain (2011:26) as '...prevailing by insuring that the interpreter [*transpreter*] has no personal interest in the outcome of the case or is biased with or against the speaker', within the workings of the law enforcement agency,

> **Extract 3.**, *...much cross examination was directed at contradictions in police statement. Some of the police witnesses were heavily criticised for the*

> *manner they recorded the statement and the lack of detail in those statements. While some statements lacked clarity and precision it cannot be said that the police witnesses deliberately set out to mislead the court...There was simply no reason for the policemen to fudge their evidence or to falsely implicate the accused* (2012: 40)
> **Extract3.1**.*Police statements and statements obtained from witnesses by the police, are notoriously lacking in detail, are inaccurate and often incomplete...It would be absurd to expect a witness to say exactly in his statement what he will eventually say in court* (2012: 41)

Taking a closer look at the recording and formation of sworn statements, in his research, Braz (2010: 10) presents some background in relation to police interrogation and interviews. He asserts that 'In Police interrogation, the police goal is to obtain information from the suspect that ultimately will help the investigation of a crime'. In order to achieve this exercise, the *transpreters* who are in the capacity of authority status make use of linguistic strategies that may restrain the suspect's contribution to the interaction (*ibid*). Eades (2010:165) asserts a somewhat similar view by referring to Berk-Seligson(2009) that, 'the potential for miscarriage of justice rises substantially when the suspects being investigated are not fully proficient in English, and rises even higher when the police officials who themselves are not fluent in the language of the detainee conduct interrogations in that language'. Over and above this so called inherent power and control, conflict of interest is essentially inevitable in the practice of *transpreters* in which allegiance, loyalty and sense of duty is automatically placed more or solely on the system rather than on the members of the public, who in most cases, are accused persons or witnesses. With these formidable arguments, against questionable opinions contained in the judgment, it stands to reason that the notion of objectivity as supposedly upheld by *transpreters* in the ET trial is also questionable.

## 6.9 ASYMMETRY IN THE POLICE INTERACTION

In dealing with the notion of asymmetry in the police interaction, van Charldop's (2011:16-17) investigation of the issue is quite interesting. Apart from considering a contradictory setting in which the *transpreters* and the suspect who have different roles to accomplish, she outlines various instances of asymmetries that are worthy of note. One, that the police officer has a commitment and responsibility to further the interests of the criminal law process against the suspect who is the lay person and thus responsible to himself. Two, that the police officer is privileged to have access to a body of knowledge about the suspect whereas the suspect has little or no information about the police officer. Three, that the setting of the interrogation room displays an asymmetry that entitles the officer to be in control of resources through which information is acquired, whereas the suspect has no entitlement whatsoever. Four, on the one hand, that the institutional setting is organised in such a way that the police officer takes control of the interaction through asking questions and

formulate the record from the spoken interrogation. On the other hand, the suspect is expected to provide answers to such questions. Five, the suspect is under arrest and may be in custody, s/he may have rights but limited. This, according to van Charldop (*ibid*), is the biggest asymmetry of all.

What seems to be missing in van Charldop'sconceptualisation, which I find equally imperative to her biggest asymmetry, is the notion of Gratuitous concurrence which tends to run through most of the sections of the ET judgement. In deconstructing the notion of Gratuitous concurrence as it relates to the ET judgment, Eades (2000:14) states that, 'Gratuitous concurrence is the tendency to agree with the questioner, regardless of whether or not you actually agree with, or even understand'. Furthermore, she points out that the concept is particularly common where the questioner is in position of authority, and when the questioner asks a series of yes/no questions. The problem with this type of communication pattern is that it draws witnesses into giving illogical evidence (*ibid*). Reference is made, through the following extracts, to judgment:

> **Extract 4.**, *...he asked the accused whether they would be willing to provide the clothes they were wearing for DNA purposes and both agreed. Cons. Modise stated that the accused spoke freely and voluntarily to him without being influenced. They were in their sound and sober senses. He spoke in Setswana to the two accused and there* was no room for misunderstanding (2010: 9).
> **Extract 4.1.***He read the full contents of the pointing out statement into the record. According to the statement accused 1 admitted his direct involvement in the robbing and killing of the deceased. I should mention that after a trial within a trial, I ruled that the pointing out statement made by accused 1 was admissible*(2010: 14).
> **Extract 4.2.***He readily led the police to the scene of the crime. He declared his involvement in the killing of the deceased to anyone who cared to listen...* (2010:16).
> **Extract 4.3**. *At no stage did either accused 2 or his mother complain that they did not understand him or that they did not understand the proceedings. Indeed, the mother told Lt Col Jacobs and Reserve/ConstMtembu that she understood Afrikaans well* (2010: 26).
> **Extract 4.4.***The test really is: Did accused 2 and his mother understand the proceedings as interpreted? They both confirmed verbally and in writing that they did, accused 2 by signing the document and his mother by placing her thumb print on the document* (2010: 27).
> **Extract 4.5**. *He informed them of their constitutional rights and they both indicated that they understood* (2010: 27).

It is my submission that some of the patterns of language use and communication within the circles of the judiciary and the criminal justice system are not only culturally and linguistically biased but they are uncompromisingly colonial, and as such tends to alienate those whose English and Afrikaans proficiency is low or non-existent from the mainstream justice. Central and reinforcing

this reality, among others, is the asymmetry in the police interaction which is structured to entrench some level of control and power. Precisely, the over-willingness of the accused person or witness to concur with the questioner, as it has been shown in the ET judgment, who is in the capacity of authority status, even though comprehensibility is thin or nil. The ET trial is a classic example of this situation. Safe to say that from the initial stage this may seem to be a spare me from the embarrassment of stupidity, yet eventually it may bear some potential for adversarial consequences on the part of the accused person or witness.

In terms of the South African experience, with specific reference to the ET trial and judgment, it could be argued that Gratuitous concurrence is one of the important communication pattern and powerful instruments meant to disadvantage the accused persons or witnesses. Its potential to violate the structure of thinking and create deliberate confusion seems to be its primary goal, and poor South Africans who end up embroiled in the criminal justice, whose English or Afrikaans proficiency is low or non-existent, bare particularly susceptible to this confrontation.

## 6.10 CONCLUSION

The focus of this paper on the call for the recognition of linguist and cultural issues, along with the rethinking of the process of the reconstruction of police record of sworn statements from a broad Sociolinguistics perspective, should not be perceived as completely excluding the subtle racial and political undertones surrounding the ET trial and judgement. Somewhat contrary to the Judge's opinion that, 'There is no evidence that the deceased was killed because of his political affiliation or his alleged dislike of black people', (S v Mahlangu and Ndlovu 2010 (2) SA CC70), Kaschula&Anthonissen (1995:94) shed some important insight in this regard when they point out that, 'The world view of the Judge is clearly different from that of the plaintiff. Judges (who are mostly of European descent in South Africa) interpret the law which is clearly based on Western perception and principles'.

Also, while the paper has elected to utilise a single case as its unit of analysis, taking into account fundamental issue such language rights, communicative competence of *transpreters* and the asymmetry of police interaction, the paper has revealed overwhelming evidence that the transformation of the Criminal Justice System in South Africa remains a lip service. And this is nicely put by NgugiWaThiong'o (2012:2) when he states that, 'Lip service without material service leaves service hanging on the lips'. Furthermore, a broader analytical view of the judgment of EugenTerreblanche's trial within a trial has shown not only the linguistic challenges associated with

bias and paucity of access to justice but it has also hinted on the practical implications that relate to human costs particularly when speakers of African languages whose English proficiency is low or non-existent are embroiled in criminal activities.

Finally and more importantly, apart from its general academic contribution, the paper is also concerned with key additional academic areas such as forensic linguistics, translation studies and interpreting studies which provide traction in terms of demonstrating the significance of an interdisciplinary approach towards initiating interest of linguists and legal minds in addressing and understanding language, culture and record construction related challenges within the judiciary and the law enforcement agency.

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# CHAPTER 7

## 7.1 CONCLUSION AND RECOMMENDATIONS

In this study, several issues have been unveiled in relation to police record construction, and these reflect broader aspects that are in line with the research problem, questions and study objectives. They include but are not limited to:

(a) performance and competence of *transpreters*;
(b) credentials and levels of literacy on the part of both the *transpreters* and complainants;
(c) asymmetry of power, which is informed by the high status levels of *transpreters* versus the low status levels of complainants;
(d) the unequal status of languages influenced by the *de facto* languages of record;
(e) the current model of *transpretation*; and
(f) institutional norms and conventions which inform the seeking and obtaining of information from complainants, witnesses, etc.

All of these challenges overlap and further exacerbate what is not only a significant constitution of the administration of justice, but a somewhat complex language event in which the issues of translation, language, law, crime, narratives, ideology of power, etc. are inextricably intertwined.

Furthermore, through the use of the research articles, this study has attempted to address the general and broader research questions which were posed at the beginning of this research expedition. The first research question was intended to deal with the nature and intricacies involved in the *transpreted* language event in the South Africa police system. The study has established that the *transpreted* language event is filled with intricacies, and that its demanding scope requires expertise of professional translators as *transpreters* who, in this study, have been shown to be lacking both in competence and performance in as far as the translation function is concerned. The translation activity has proven to be a very complex exercise: it commences with the pre-statement taking sessions, and culminates in sworn statements that ultimately constitute evidence presented in courtroom proceedings at a different venue. As an example of this, across the papers in which cases have been exemplified and analysed in depth (that is, papers two and three), it has been found that complainants' information has been distorted, whether consciously or unconsciously. This severe deformation has been evidenced through a comparative analysis of pre-statements and actual statements – with the former constituting the ST and the latter comprising the TT. As a result of

that, major inconsistencies, inaccuracies, omissions and additions are some of the factors that not only corrupt the record, but bring into question its legal status, as well as the evidentiality of the actual sworn statements insofar as they affect the administration of justice.

The second research question has addressed the issue of the extent to which the system of *transpreted* statements represents the complainant's own words. This has been better handled in the context of voice and discursive presence in both the primary phase (that is, "the first opportunity for the witness to tell the story as part of a legal process", in Jarmolowska's (2011:36) terms), as well as in the secondary phase (that is, the real criminal process which forms part of the court proceedings). The *transpretation* activity undergoes various forms of sequential transformation or recontextualisation, and this is exemplified, first, by the complainant's' telling of the original narrative in his or her own language (isiXhosa) – during an initial collaborative process (that is, in a pre-statement session). The subsequent unfolding process relates to visualising and reconstructing the 'told' narrative – a process that is led by the *transprete*r. The systematic translation or, in some cases, framing, as a result of retelling and rewriting of the complainant's narrative, is considered as the final mode of representing the other in a future environment. A closer look at this entire process reveals that the 'retelling' or 'rewriting' of sworn statements is not only the result of the complainant's or witness's contribution, but rather of a collaborative process in which the *transpreter* enjoys the most powerful voice and discursive presence in both phases of the record construction. This is attributed to, amongst others, institutional norms and conventions which inform the seeking and obtaining of information from complainants and witnesses, as well as power discrepancies and asymmetry – each of which is informed by the high status levels of *transpreters* versus the low status levels of complainants.

The third research question deals directly with the implications of this type of language event for the notion of access to justice in South Africa. The study has further established that there are potential problems with regard to translations of sworn statements. In fact, the current model is filled with flaws, and thus open to manipulation by the *transpreter*; and the resulting manipulation of the text may have some effect on the designated readership (i.e., magistrates, judges, and prosecutors), let alone unintended consequences for the witness, as the translation could be viewed as containing a somewhat different message from that of the original. Further exacerbating these problems is the fact that the police system does not employ a contemporary or electronic recording system that could be used to validate the authenticity of the original record when the need arises. The fact that the complainant's (or witness's) verbatim story that is told in the language that she or he understands does not have any form of 'visible presence' in the official record has proven to

have serious implications for the notions of access to justice and social justice. The implications are huge for ordinary South Africans, particularly for those whose English or Afrikaans proficiency is low or non-existent, as they tend to be on the receiving end in the delivery of justice. Apart from attributing this unjust situation to the lack of recognition of linguistics and cultural diversity in the criminal justice system, the unequal status of languages, which is influenced by the de facto languages of record, has proven to reinforce the threat to the principle of justice.

Based on the researcher's observation and findings, some recommendations are worthy of note. Firstly, the South African criminal justice system requires a complete overhaul in as far as the question of language policy and its implementation is concerned. Otherwise, under the current circumstances, the notion of protecting and promoting the 'right to language' and a 'right of a language' – as prescribed in the constitution – remains a myth and, as such, the chances of justice prevailing are quite thin.

Secondly, there is an urgent need to apply leverage to the justice system to implement contemporary technology, particularly recording systems. With the current system, the entire issue of evidentiality rests on handwritten, translated (mostly from African languages into English) sworn statements by *transpreters*. For this reason, this study has proposed the necessity of introducing audio-recordings and other forms of technological devices that could be used for record management. Embracing such an advancement in the police record construction system is bound to be an important transformation step, as judges or magistrates will have the liberty to consult this 'live' evidence, should legal disputes subsequently occur.

Thirdly, the recognition of African languages in the judiciary is a constitutional provision and, as such, it should be enforced. Important spin-offs are attached to this developmental initiative, one being the full acknowledgement of linguistic and cultural diversity across the criminal justice system.

Fourthly, and finally, apart from the need to address the issues of social context, i.e., that *transpreters* are there to serve the local communities, intensive training in the domain of record construction cannot be over emphasised. Translation is a profession, so *transpreters* need to have a profound understanding of the function of the translation of a legal text, and to be well versed, not only in terms of translation competence, but also in relation to the goal of a sworn statement and the impact that this has on the outcome of a legal process. Some of these goals are well defined by Heaton-Amstrong and Wolchover:

> … chief among their functions is the preservation of original accounts and this will have three uses. First, they provide a narrative form from which witnesses can refresh their memories. Secondly, they furnish a text against which consistency can be checked during the trial. Thirdly, they provide a documentary narrative which can be read at trial in lieu of live evidence in exceptional circumstances (1999: 224).

Put differently, issues of ethics and social responsibility are not just prerequisites, but are equally crucial considerations in the police record construction process. Currently, there seems to be a serious knowledge gap on the part of *transpreters* in as far as these considerations are concerned.

## 7.2 CONTRUBUTION TO KNOWLWDGE

Apart from providing a general overview relating to the current state of the nation's language setup with specific reference to the right to a language, and rights of a language, this investigation is intended to give insights into the best methods and mechanisms aimed at dealing with translation and other related issues which can support and advocate for the language rights of African languages – at least within the South African criminal justice system.

Secondly, the research site in which the study was conducted represents a natural environment, or real world environment, and therefore its stands to reason that the findings of this study carry the potential of being applicable in other real world environments in this country. For this reason, further study and analysis of the rich, authentic and empirical data could provide results that might be generalisable (or hold true) for other parts of the country where language distribution may be different.

Thirdly, the relevance and scholarly contribution of this study in the field of translation – from the perspective of language and the law – is immense. Its interdisciplinary, innovative and problem solving nature may well be of interest to a wide variety of academic audiences from an array of backgrounds, ranging from law, sociolinguistics, linguistic human rights, to forensic linguistics.

Fourthly and finally, the field itself with its associated literature is (to the best of my knowledge and experience) virtually unknown to South African scholars who study language issues. Therefore, a study of this nature is not only destined to close serious gaps of knowledge in that direction, but its significance will also be evidenced by its promise and potential to introduce a new trend of academic research in the empirical and theoretical issues concerning translation and the law.

## 7.3 FUTURE RESEARCH

In terms of future research, firstly, a study that could deal with a sequential approach to data collection and data analysis in this field would be ideal. Precisely, this would involve a phased approach in which the collection of data commences with pre-statement sessions and actual sworn statements, and analysis within the context of police record construction. Phase two subsequently would follow with the analysis of the courtroom outcomes or judgment of the same cases (pre-statement sessions and actual sworn statements, as they were initially reported at charge offices). Perhaps a study of this nature could generate findings that corroborate (or do not necessarily support) those of the current case study.

Secondly, the current study has mainly focused attention on the police translation of complainants' narratives into sworn statements. As far as the researcher knows, no previous research has been directed at translations of an accused person's narratives into sworn statements by the police in the South African context. The focus of a related research project could be used to test issues related to the level of manipulation of the process of record construction, as well as insinuations of coercion, insofar as obtaining and seeking information from concerned witnesses.

Thirdly, knowledge gaps and possible contextual applications of such knowledge in police record construction have been identified in this study. These include, but are not limited to, linguistic competence, translation competence, etc. For this reason, a collaborative research project with *transpreters*, based on a natural record construction setting, is necessary. This will not only assist in developing relevant training material but will also help in outlining the actual training meant to improve the system.

Fourthly and finally, in Chapter one (section 1.3), a passing mention of methodological constraints has been made. An interdisciplinary and multimethod approach that could take into account elements of sociolinguistics, conversational analysis, critical discourse analysis and other possible research instruments might yield results that could further support or close some of the gaps that are found in the current study.

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## APPENDICES:

For reasons of confidentiality, continuous pagination and layout required throughout the thesis, appendices containing the raw and transcribed data, published works and information note by both the offices of the National and Provincial Commissioners have not been inserted in the printed version of the dissertation .