Intercultural communication and the language of the law[*]

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Australia has had significant experience of language and culture issues in the courtroom and some of these have been studied in depth by scholars like Eades and Walsh on language in Australian legal practice, and by Gibbons on the language of the law. This article brings this research into the framework of the rapidly growing discipline of intercultural communication, with its wider perspective of intercultural differences. It surveys how these cultural factors interact with linguistic communication, and how both can affect the work of legal professionals, and considers the different possible roles of judges in multicultural courtrooms.

WORKING DEFINITION

By "culture" we understand a set of socially inherited, learnt practices which together underpin the social activity of a group of people and help to define them, and which provide a context for meaningful interactive behaviour.

INTRODUCTION: LANGUAGES AND CULTURES

In everyday communication a great deal remains tacit, assumed, background, covert, often unrealised. Miscommunications do occur, sometimes through misunderstanding the spoken or written word, often through a mismatch of intentions or assumptions between the speaker and the hearer. Such potentials for miscommunication or under-communication are magnified by differences in language behaviour and in culture – differences of which we are often unaware, particularly with speakers from cultures other than our own. There have been substantial investigations of such issues in the Australian legal system by scholars like Cooke, Eades and Walsh.[1] The goal of this article is to place these issues in a wider cultural context, and within the framework of intercultural communication.

There are published estimates by Mehrabian[2] that up to 93% of the emotional information in an utterance may be conveyed by channels other than the strict use of the forms of language (sounds, grammar, vocabulary). These figures rest on some not uncontroversial claims about how information can be defined and quantified. But Mehrabian's general position is confirmed by Dodd,[3] who claims

[1] Cooke M, "Interpreting in a cross-cultural examination: An Aboriginal case study" (1995) 113 Inter'l J of the Sociology of Language 99; Cooke M, "Understood by all concerned? Anglo/Aboriginal legal translation" in Morris M (ed), *Translation and the Law* (John Benjamins Publishing Co, 1995) p 37; Eades D, "The case for Condren: Aboriginal English, pragmatics and the law" (1993) 20(2) *Journal of Pragmatics* 141; Eades D, "A case of communicative clash: Aboriginal English and the legal system" in Gibbons J (ed), *Language and the Law* (Longman, 1994) p 234; Eades D (ed), *Language in Evidence: Issues confronting aboriginal and multicultural Australia* (UNSW Press, 1995); Eades D, "Legal recognition of cultural differences in communication: The case of Robyn Kina" (1996) 16(3) *Language and Communication* 215; Eades D, "I don't think it's an answer to the question: Silencing Aboriginal witnesses in court" (2000) 29(2) *Language in Society* 161; Walsh M, "Interactional styles in the courtroom: An example from northern Australia" in Gibbons J (ed), *Language and the Law* (Longman, 1994), p 217; Walsh M, "Interpreting for the transcript: problems in recording Aboriginal land claim proceedings in Northern Australia" (1999) 6(1) *Forensic Linguistics* 161.

[2] Mehrabian A, *Silent Messages* (Wadsworth, 1981).

[3] Dodd C, *Dynamics of Intercultural Communication* (McGraw Hill, 1998).

that 70% is a reasonable conservative estimate. Even at 70% the proportion of culturally-determined information is very substantial.

It is helpful to unpack this claim into its constituent categories. There are at least five dimensions to the meaning of an utterance which are relevant to the current discussion.

- *Formal, grammatical and semantic* – the meanings of the individual words and phrases.

- *Pragmatic* – they way we organise old and new information in phrases, sentences and texts; and how we manage the "speech acts" that we realise through different words and phrases, for instance, "order", "promise", "persuade" and many others.[4]

- *Metalinguistic* – aspects performed with the voice, but which are not part of the core structure of the forms/grammar/semantics or pragmatics of language. These phenomena include tone of voice, intonation, volume, speed or clarity of enunciation, and others.

- *Non-linguistic* – body language, gesture, facial and other expression, proximity, touching, eye-contact and others.

- *Contextual and cultural* – the factors of the physical and cultural environment.

In homogeneous linguistic and cultural communication all these five aspects work –more or less –in harmony. If there are mis-matches we can usually compensate or infer from other known facts: for instance, if an English-speaking teenager uses the word "gay" in an apparently general-derogatory way, without reference to sexual preference. This use is fairly recent, and is common in some high school students' speech, though only in some schools and only in some parts of Australia. Here, the fact that we may be unfamiliar with this use of "gay" is potentially not fatal to communication, since we can use the other information to work out what it probably means, from factors like the tone of voice and the general direction of the conversation. This is a miscommunication based on formal/grammatical/semantic and cultural meanings: for the teenager the word "gay" is used in a special sense which is typical of teenage speech cultures.

A misunderstanding based on pragmatics could occur if I say during a class, "goodness, it's getting cold quickly", and one of the students gets up and shuts the window, though I did not intend this to be an indirect request for action, but merely a meteorological statement. This difference relates to where the culture is situated on the overt/covert vector, according to which cultures differ in their expectations of how directly or indirectly one is to interpret apparent statements of fact.

Metalinguistic miscommunications may involve a phenomenon like "high rising tone", a rising intonation at the end of clauses now common among many Australians, especially those under 25 or so. To British or American visitors this can sound like indecisiveness or perpetual questioning, whereas it is now a normal, default intonation for statements in this segment of the Australian population, and is spreading.

Non-linguistic miscommunication could involve eye-contact: too little for an Anglo-Saxon speaker can suggest deviousness, shyness or embarrassment, but there are individuals who simply find sustained eye-contact uncomfortable, and avoid it.

And finally, contextual/cultural miscommunications are endemic in everyday life: serving meat to a devout Catholic on Friday, talking disparagingly about the *Tampa* incident to someone who turns out to be a fervent supporter of the detention of refugees, or using the Australian first-name convention to someone from Britain whose habits reserve first names for closer friends and family.

All of these miscommunications take part in English-speaking contexts. They are examples of what we may call the "hammer-thumb" phenomenon: we do not become consciously aware of how a system works until it goes wrong, just as we take the usefulness of the thumb for granted until it is rendered unusable by a wayward hammer.

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[4] Austin JE, *How to do Things with Words* (Harvard University Press, 1962).

In intra-cultural situations like this we can assume that the five different factors will tend to reinforce each other, and that a mis-match in one can usually be resolved by referring to the others: for instance, the occurrence of a linguistic/cultural faux-pas may be revealed by the interlocutor's body language and manner. Within the culture we can identify the relevant behaviours and their meanings: we know what to attend to; we know how to assess the behaviours, and to interpret inconsistencies, for instance when a witness's body-language is inconsistent with his or her words, suggesting that one or the other cannot be taken at face value.

But in inter-lingual and inter-cultural communication the match cannot be assumed. We cannot easily know how to perceive, let alone interpret, unfamiliar behaviours. We cannot even assume that what we think we are receiving is a coherent message. If the interlocutor is speaking a different language, we have a strong indicator of what may well be a different set of forms, meanings or pragmatic values. We are much less aware of cultural differences and their implications. And even if the interlocutor is speaking in English we may still be faced with a set of cultural practices which may or may not be consistent with what would, in the default case, be consistent with what we think we are hearing.

These scenarios occur in Australian legal processes, whether involving police or legal interviews or the work of the courts. They reveal a number of genuinely problematic issues which bear on the equity and transparency of interactions in the legal world.

CONDREN'S CASE AND ITS IMPLICATIONS

We begin with the case of Kelvin Condren, an Aboriginal man who was found guilty of murder in a complicated hearing in 1987. The case for the prosecution rested heavily on what the police produced as a "confession", claimed to be a verbatim record of Condren admitting his guilt. Condren protested his innocence. Defence counsel consulted an expert linguist in Aboriginal English, Dr Diana Eades. Dr Eades interviewed Condren and compared his use of English at interview and in the voir dire hearing to that in the written record of the "confession". She concluded that it was highly unlikely that Condren could have spoken as recorded in the "confession". Condren's English was inconsistent with the language of the "confession": it contained a number of typical Aboriginal features which made it difficult, if not impossible, for him to present a fair account of his actions in a regular English-language courtroom without additional support from culture and language experts.

The Aboriginal system of linguistic, sociolinguistic and cultural values and practice is sharply different from Anglophone norms. Among the many traits which present problems for the equitable practice of the law[5] are:

* "gratuitous concurrence" – the practice of Aborigines to agree with Anglo-Australians as the easiest way of avoiding stressful or unpleasant situations;[6]

* eye contact, especially sustained eye contact, often taken by Anglo-culturals as a confirmation of sincerity or truthfulness, but which in Aboriginal societies is considered rude and challenging;

* Aborigines do not usually impart valuable information on demand in confrontational situations; in addition, person-to-person face-to-face communication is only one of a series of modes of talking to other people, and other modes include a common and more "broadcast" approach where speech is offered for the consideration of all within earshot;

* responses like "I don't know" may not indicate a lack of knowledge of the issue, but rather a reaction like "This is not an appropriate way for me to provide information";

* silence is a regular part of Aboriginal conversations, and is accepted as a bona fide way of using time to assemble one's thoughts before speaking;

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[5] Eades, n 1 ("A case of communicative clash").

[6] Liberman K, "Understanding Aborigines in Australian courts of law" (1981) 40 *Human Understanding* 247.

• hesitations or dysfluencies, not recorded in court transcripts, can be a basic part of the presentation of information by Aborigines.

Dr Eades' evidence was presented in Condren's defence, but the judge did not admit the evidence as viable, and Condren was found guilty. The case was appealed, and was still waiting a decision when the National Party government was voted out of office in 1989. The new Attorney-General reviewed the case and quashed the conviction, allowing Condren's release.[7] Some years later a second person renewed his earlier confession[8] to the murder. Condren's "confession" had in fact not been a reliable written report of a verbal interchange, and Dr Eades' analysis was vindicated.

The case illustrates two important issues in the legal interpretation of language.

The first is the status of sociolinguistic analysis by an expert witness. Condren's case provided a catalyst, and materially prepared the way for the appeal of Robyn Kina, an Aboriginal woman, who, in the Supreme Court of Queensland in 1988 had been convicted of murder. In acquitting Kina, the Queensland Court of Criminal Appeal[9] set a precedent by accepting sociolinguistic evidence that Kina had not been able to present her true position in interviews with the police or at her trial. This was the same court that had refused to accept such evidence in Condren's case. The distance which the court had moved in seven years can be seen from the fact that on this occasion the Crown did not contest Dr Eades' written report, which was accepted by the court as presented, and Dr Eades was not called to give evidence.

The second, and more far-reaching problem for both linguists and legal professionals is the question of culture and communication within and between cultures. There are certain aspects of Aboriginal social use of language which create a largely hidden, but crucial, mis-match between their ethos and those of a western, English-language court of common law. Australian States and Territories now publish guidelines on the interpretation of Aboriginal cultural and linguistic behaviour.[10] But other languages and cultures do not share this benefit. Many language-cultures do not show such far-reaching contrasts as we find in Aboriginal culture to Anglophone practice, or features which pose such an apparently intractable interface with the exercise of common law. But the existence of such differences, their nature and extent, and especially the fact that they are not explicitly recognised, even when participants are speaking English, constitute a significant problem.

INTERCULTURAL COMMUNICATION

Condren's case shows several important issues of communication across cultural boundaries; and these occur within English-to-English communication. The language of Australian courts is English. Plaintiffs, defendants and witnesses who are not able to communicate in English are provided with interpreters, who are trained to transmit accurately the content of what is said in both directions.

This in itself is a contentious matter: what "content" constitutes can be far more than just the words uttered, which places the interpreter (strictly speaking a "translator" works with written materials) in a difficult position. And there is the question of special meanings, professional and conventional, which are placed on language by those who work in the legal profession.

FIRST AND SECOND LANGUAGES – FIRST AND SECOND CULTURES

The most favourable scenario for communication is when two people speak their first language, share the same first language, communicate in their first culture, and share the same culture.

Specifying "first" or "mother" tongue or culture is important. We commonly talk about "mother tongue", which we take to be the language we learn first and are most proficient in. There are many

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[7] *R v Condren; Ex parte Attorney-General (Qld)* [1991] 1 Qld R 574.
[8] See *R v Condren* (1987) 28 A Crim R 261.
[9] *R v Kina* [1993] QCA 480.
[10] Dept of Justice and Attorney-General (Qld), *Aboriginal English in the Courts* (Brisbane, 2000).

instances among bilinguals (around two thirds of the world's population, live in bilingual environments) where expertise in the chronologically first language may have been overtaken by expertise in a later learnt language. This happens often in Australia with people from Scandinavia or Holland, who may concentrate so much on using English that their original languages fall into a state of some disuse. But English is still a second language chronologically for these speakers, and will lack the continuous, homogeneous development and time-sequence which we find in a speaker who is competently using her or his first language.

There are many possible combinations of first and second languages, and first and second cultures, in intercultural contexts.

For example, if an English-speaking Australian man is conversing with a Japanese man who has learnt English, they are speaking the same language, but for the Australian, English is his first language, while for the Japanese, English is his second language. Some speakers have mastered a second language so well that they are virtually as fluent and as competent in it as someone speaking that same language as their first language. But however good the English of the Japanese participant, this will seldom if ever be wholly the same as the English of the Australian. The language of the Japanese may be close to approximating English, but only a tiny proportion (if any) of bilinguals will achieve equivalence with a native speaker.

It is a debatable point whether even balanced bilinguals (speakers with an equal command of two languages) ever really have totally equivalent competence in both languages, since in most cases one language will be stronger for some purposes, topics of conversation, or contexts.

But what of the culture component of our Australian/Japanese example? Here the Australian man is on familiar territory, operating with familiar practices in a familiar space: in other words, operating in his first culture. But for the Japanese man it is harder to determine just where he stands. Is he operating in the same culture? And how does this culture relate to his own first culture? In situations like this it can easily happen that the second-language speaker's command of the second culture is less secure than his or her command of the forms of the language.

This situation is common in second-language classrooms, where students may have learnt the forms of the language well – they may construct well-formed sentences and pronounce them with reasonable competence – but are effectively behaving as if they had never left their own culture. Australian students of French or Italian, for instance, tend to use body language and gestures which belong to their English habits, while enunciating acceptably in French or Italian. Australian students speaking Japanese may *under*-adapt to Japanese cultural patterns: Japanese is a well-known example of covert and under-stated cultural signals. It is easy to demonstrate this to language students by recording these intercultural encounters and then playing the tape back with the audio off: the mismatch of cultural practices, from macro to micro, is easily discernible.

Some features of interactions in Japan are visible but initially opaque, like ojigi or formal bowing. In ojigi there are four levels of formality, corresponding to levels of deference, and four levels of inclination of the upper body and head. There is also a complex set of conventions for who bows first, who initiates the end of bowing, how bowing may be done in a kneeling position, why the left hand of a woman should cover the right (which signifies self, and so is to be concealed), and more. But while we are excluded from understanding the meaning of the movements, we can, nonetheless, identify the behaviour as belonging to another set of cultural norms, so that while there may be non-communication, the chances of misunderstanding are at least slightly reduced.

We tend to assume, supported by the difference of language, that some features of culture may be taken to be shared, and that some form of respectful behaviour is being enacted. When we are in a country where we do not understand the language, we assume hopefully that smiling, pointing and such gestures will help us achieve some minimal communication as we bargain in a market, or look for food or a bus or a hotel, and so on. This assumption may often be false. In many Asian cultures smiling is a way of concealing embarrassment as well as of indicating happiness.

For the language teacher this situation, once understood, can be addressed pedagogically. We do understand quite a lot about the teaching of second cultures, and can move to add this cultural competence to the students' linguistic competence.[11] But in the courtroom the situation is more complex, more fraught, harder to read and harder still to remedy, especially on the fly, as is necessary in most inter-human interactions. Here the second-language speaker's linguistic competence may actually be potentially misleading. By appearing native-like, the linguistic competence may give a misleading impression of cultural competence as well.

We can illustrate this kind of situation with an example from French, a language related to English and culturally very close to it. In French the culturally conventional way of saying that you have backache is to say "j'ai mal aux reins", literally "I have a pain in the kidneys". Assume that a plaintiff in a work-related damages case speaks excellent English, and talks at length in English about a "pain in the kidneys". Is the plaintiff speaking English words in a French cultural context – that is, is this a matter of backache? Or is the plaintiff's English so good that he or she has translated the culture as well, and is indeed talking about kidneys?

It does not matter, from the point of view of the hearer, whether this is what is reported by the individual, or by an interpreter on behalf of the individual. If the hearer is not aware of the potential for misunderstanding, the statement will be taken literally, at face value. If the hearer is aware of the trans-cultural pitfall, there still remains the problem of clarifying the intention of the speaker. There are still around 6,800 extant languages,[12] many of which share common cultural practices. But on the other hand many languages cover more than one culture (religious, professional, generational, ethnic, gender-based and so on). No-one knows how many cultures there are, and we are only starting to develop a coherent understanding of the distinctive properties which distinguish them.

CULTURAL DISLOCATION

The range and complexity of the problem is illustrated by the following five examples:

* politeness;
* body language;
* power dynamics;
* metalinguistic factors; and
* individualistic and collectivistic cultures.

Some of the variables expressed in these five examples are commonplace in sociology and sociolinguistics, such as gender, age, education, socio-economic status, relative power and ethnicity. Others, however, extend considerably the range of operative factors that we need to take into account in understanding inter-cultural interchange.

Politeness

Politeness is one of the core domains of intercultural communication studies. It covers a wide range of behaviours involving considerate treatment of the interlocutor, from more passive features like attentiveness and a positive demeanour to active behaviours involving specific actions. Polite behaviour is sometimes interpreted as the avoidance of aggressive or hurtful words or actions. But in many cultures it involves explicit, sometimes elaborate formulaic behaviour and ritual. Gift-giving in Japan, for instance, is a highly structured practice. It occurs not only between family and friends, but also from students to teachers, and from workers to their supervisors. The Japanese observe the boundary between gift and bribe with exquisite delicacy. Everything about the gift has to be in accord with good taste, decorum and custom: the choice of gift, its value, and even the wrapping and the type of knot chosen for the package – all have an important symbolic meaning.

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[11] Liddicoat A and Crozet C (eds), *Teaching Languages, Teaching Cultures* (Applied Linguistics Assoc (Aust) and Language Australia, 2000).

[12] See http://www.ethnologue.com (viewed 12/7/04).

Brown and Levinson[13] have presented an extended interpretation of politeness in terms of "face", which takes two principal forms: "positive" face is one's wish to be well regarded by others; "negative" face is one's wish not to be imposed on by others. The degree to which one may respect or threaten another's face is central to polite and considerate behaviour, but is also highly relative in terms of culture. In Australia, for instance, using first names to comparative strangers is the norm; and surname use is seen as distancing and formal. But in Great Britain the move to first-name exchange takes much longer, and occurs in different sets of social circumstances. The premature use of a first name in Great Britain can intrude on the other person's "space", and so is impolite.

A further example involves negation or refusal. It is a truism, although somewhat over-simplified, that Japanese people find it difficult to say "no" to someone's face. They will instead find various ways of indicating indecision, or an intention to return to the matter later. In fact this feature is common in several south-east Asian cultures, and is part of a wider pattern of indirect discourse. It also complements the "gratuitous concurrence" seen in Aboriginal people (above).

Body language

As already mentioned, on some estimates over 70% of the informational content of our messages is contained in non-verbal media. This at first startling figure depends a great deal on how one defines "information", and then how the information is quantified in some objective fashion. But there is no doubt of the cultural prominence of body language in communicating situations.

Examples are legion. In Muslim cultures as a whole there is a strong taboo against left and the left hand: it would be an insult to hand a guest something with the left hand. In conservative Muslim cultures a man may not touch a woman unless they are related or married, which places constraints on the Anglo-Australian conventions of the handshake as a greeting. Many cultures in Asia are also low-touch cultures, especially in public, so that couples usually avoid kissing or holding hands in public in China or Vietnam; in Indonesia, in contrast, people of the same sex may well hold hands in public as a sign of friendship.

This extends to proxemics, the study of distance in conversation. While in general most cultures have about four distance zones – intimate, conversational, distanced and public – the ways in which each zone is selected and measured for specific social interactions may vary considerably. Slavs may grasp one by the shoulder or lapel, not as a threatening gesture, but as a means of including you in the warmth of the conversation. A comparable comfortable conversational zone for an Anglo-Saxon is more like one metre and without physical contact.

The shifting dynamics of personal space in the courtroom may well be disconcerting or worse for people from cultures unfamiliar with these spatial norms.

Power dynamics

Power dynamics may be expressed differently across cultures: by dress and uniform; by location and situation in an organisation; by employment; by caste (for example, in India); by ethnicity (for example, guest-workers in Germany); by variety of language (for example, upper-class accents); by domicile; by visible signs of wealth; by religion; and many more.

Some cultures are low power-distance cultures, where the language, social and cultural practices do not differ greatly between the vertical social extremes. As a consequence, modes of interaction, whether linguistic or cultural, tend to be rather similar across the community. Australia is such a country. On the other hand, highly hierarchical and stratified societies may have higher degrees of power separation. Many Asian societies follow this model, particularly within the professional workplace, where juniors are expected to defer to seniors in a structured and rigorous way. In many Asian cultures the power dynamic also affects the status of women, who are expected to adopt a subservient role in communication with males, whether spouses, acquaintances or professional associates.

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[13] Brown P and Levinson SC, *Politeness: Some Universals in Language Usage* (CUP, 1987).

Power separation, and the ways in which it imposes on social and conversational roles, have a major effect on who will be ready to say what, when, and to whom, and in what circumstances. It can also affect who will feel socially able to open a conversation, and the ways in which questions may be put and answered.

The standard interchange of discourse in the Australian courtroom often sits very uncomfortably with these other cultural norms.

Metalinguistic factors

Tone of voice is not a cultural universal. In Japan it is culturally appropriate for women to speak in a high pitch, which is regarded as a sign of femininity. In contrast, Thai women are trained to speak softly, in order not to appear over-assertive and un-feminine. Both practices may have different effects on a Western audience.

In most Western cultures silence is not welcomed. If we are together, except in a few formal situations like ANZAC Day services and funerals, we tend to talk. Ours is a wordy, noisy society, and words are the norm. We tend to fill silence with language, any language. Silence can be threatening. It can suggest discourtesy, boredom, constraint, embarrassment, rudeness: we talk to avoid the implications of the absence of speech. We talk early and often in our spoken interchanges with people that we meet. And we expect them to act similarly: a failure to take up their part of a conversation, or to respond promptly to a question, is likely to be interpreted as a rebuff or worse.[14]

This value which we put on silence is not a cultural universal. An extreme counter-example to Anglo-Western cultures is the Puliyanese, an ethnic group in southern India. Among the Puliyanese most adults fall silent by about the age of 40. They have, as it were, said what they want to say, or perhaps run out of thoughts which need to be verbalised, and so leave the talking to younger people. A less radical example comes from several North American indigenous peoples, where it is quite proper to sit down in silence with someone, and leave after a period of time without talking: you are experiencing the feel of their physical, not verbal, company. Aboriginals give silence a value which is affectively quite different from that of default Anglophone Australia.

Individualistic and collectivistic cultures

In the literature a standard distinction concerns individualistic versus collectivistic cultures.[15] The United States and Australia, among some others, value individualism highly, and promote the achievement of outstanding people at the expense of other considerations, though in Australia this is somewhat modified by the tall-poppy excision syndrome.

Asian countries, in contrast, tend to follow Confucian values and to be collectivistic: here the good feeling of the group is paramount, and one should not assert one's individuality at the expense of the benefit or the equanimity of one's company. One should not impose one's worries, complaints and fears on others, so as not to abuse their friendship and group-belonging. This approach is consistent with some North American Indian cultures, where it is the height of inconsiderate behaviour to "let your feelings out" as an approved social means of releasing your tension, frustration or anger. In these cultures one should first consider the feelings and happiness of others, whose sang-froid may well be unbalanced by your expression of unhappy emotions. One's social duty is to hide turmoil from others, for fear of imposing on them.

Stereotypes are very evident in all areas of intercultural communication, but particularly so here. There are Anglo-Australian individuals who behave in a more Confucian way in their treatment of their family and colleagues. There are others in Asia who act with a greater self-focus and selfishness than their cultural norms. The concept of "appropriate action", however, differs markedly in response

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[14] Gal S, "Between speech and silence: The problematics of research on language and gender" (1989) 3(1) IPrA Papers in Pragmatics 1; Jaworski A (ed), *Silence: Interdisciplinary Perspectives* (10 Studies in Anthropological Linguistics, Mouton de Gruyter, 1997); Tannen D and Saville-Troike M, *Perspectives on Silence* (Ablex Publishing, 1985).
[15] Hofstede G, *Culture's Consequences: International Differences in Work-Related Values* (Sage Publications, 1980).

to the individualistic/collectivistic dichotomy. It underlines many other cultural practices, for instance the Japanese disinclination to say "no" to one's face.

INTERPRETERS AND THE MULTILINGUAL COURTROOM: THE CULTURAL EQUALISER?

One way out of the problem of cultural differences and cultural communication/translation is to augment the Australian monolingual, Anglo-cultural courtroom with an enhanced level of knowledge about non-Anglo cultural practices. This augmentation can involve interpreters when we need them. But their task is problematic and in certain respects constrained by the principles of their profession.

According to the ethical principles of bodies like the Australian National Agency for the Accreditation of Translators and Interpreters, which mirror those of international interpreting practice, interpreters translate language but not culture. This specification is itself fraught with difficulties, which interpreters are forced to handle in real time. In terms of our taxonomy above, they may interpret the forms of language and at least part of pragmatics. If a polite request is conventionally rendered by the form of a question, as it is in English ("Would you like to sit down?"), the pragmatically appropriate forms will be chosen in the other language (in Russian for example, where it is the equivalent of "Please sit down", with a polite form of the imperative). But the metalinguistic (silence, tone of voice) and non-linguistic (body-language) aspects of the communication are not translated, and are left implicitly for those in the court to interpret as best they can, usually using English principles as a default. Cultural issues are often not translated at all.

One, at least partial remedy involves the so-called *Anunga* rules, which took their name from *R v Anunga* (1976) 11 ALR 412, where Forster J of the Northern Territory Supreme Court recommended a number of procedures to allow Aboriginal people to represent their position more equitably. These include special care in formulating questions in a way appropriate to Aboriginal discourse, and the presence of an interpreter, unless the Aboriginal person has a standard of English equivalent to that of an average white Anglo-Australian. The *Anunga* rules are not binding, but they provide a framework in which legal matters can be transacted in a more culturally appropriate way. They relate to Aborigines, a specific ethnic group, or set of sub-groups, comprising around 70 languages.

Belgium has taken this argument to its extreme, and has legislated that participants may use any language in court, supported where appropriate by interpreters.[16] This consistently relativistic cultural position is likely to be complicated and costly in practice. Will there be court-competent interpreters for all the languages brought into the court? Will they be sufficiently useful, not only in linguistic but also in cultural terms? And will this unreasonably slow the pace of judicial proceedings, or unreasonably increase their costs?

DISCUSSION

De facto and de jure, judges are already custodians of cultural equity in the courtroom. They mediate between those inside the professional circle of the law – counsel and other legal workers – and those outside it, whose ignorance may prejudice a fair hearing.

The five examples above reveal issues which are of central relevance to the courtroom. If knowledge is power, then counsel in possession of this information could use it to enhance their position, or to disadvantage an opponent: knowing the cultural orientation of a witness with relation to politeness, for instance, could suggest lines and styles of examination which could exploit the witness's disinclination to express a flat "no" face-to-face on a specific question. Avoidance of eye contact, while an obligatory polite gesture for the witness, may well appear devious to the jury in an Australian court.

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[16] Hertog E and van den Bosch Y, "Court interpreters and translators in Belgium: State of the problem; De gerechtstolk en vertaler in Belgie: Een status quaestionis" (2000) 34 *Linguistica Antverpiensia* 89.

If counsel need to be informed on cultural issues in order to exploit a witness or an argument, or to defend their client appropriately, then judges are even more urgently required to master this knowledge in order to preserve equity in the courtroom. In this instance intercultural knowledge is needed in order to control a situation where miscommunication or misinterpretation may result from a knowledge shortfall. How all this relates to the selection and direction of juries is an even more fraught question.

In the current internationalising world one tendency is towards globalisation, homogenisation and the propagation of Anglo-American cultural and linguistic values.[17] The counter tendency is towards ethnic self-determination and separatism, for example in contemporary Jugoslavia, which in some areas is tending towards a form or involuntary apartheid as the best way out of ethnic conflict. Such social changes pose questions for an evolving judiciary. Some English-speaking countries like the United States are moving away from multiculturalism towards a more Anglo-centric ethos in both language, culture and policy. The word "multicultural" has become politically tainted in the United States to the point where few politicians can afford to attach it to their manifestos.

In Australia the *Constitution* is silent on the question of language and culture, so the public standing of these issues is not clear. The Australian National Languages and Literacy Policy of 1991, however, and its subsequent implementation, have provided some precedent for non-English speaking background people to access and exercise their languages and cultures in Australia. In this country multiculturalism is a bipartisan policy direction, and we have had a strong international reputation for the implementation of inclusive cultural policies and their social implications. Australia has retreated somewhat from the advanced multicultural achievements of the 1980s and early 1990s, but it is still substantially pluralistic, both linguistically and culturally.

The question then is how we can ensure the effective, equitable operation of a court of law in terms of precedent and practice, in such a way as to respect linguistic and cultural diversity.

It seems that the judiciary is particularly well placed to address the social implications of multiculturalism, and in a way which would carry authority. There are three possible models. The first is monolingual and monocultural: the courts would transact their business in English and assume that participants would be operating in an Anglo-Australian cultural framework. This is what we originally had. But it is inconsistent with the policies relating to the rights of indigenous and immigre Australians.

Modifying the monolingual/monocultural policy in the direction of Aborigines is what approximates to the present situation. Some of this momentum stems from *Condren* and *Kina*, which have also established a legal precedent. Other approaches were already emerging, like the *Anunga* rules.

The problem with this second position is that it potentially disenfranchises people from other cultures. If Aboriginals are to be accorded special treatment, why not immigre communities? Some people from non-English-speaking backgrounds will be disadvantaged to different degrees by having to operate outside their own cultural and linguistic frameworks. Measuring that level of disadvantage is notoriously difficult. But should we then follow the Belgian position and allow any language to be used in court, with the issues of cultural policy that follow from this?

In Australia a compromise position could take several forms. One solution – the weaker version – of this change involves the need for enhanced intercultural awareness on the part of courtroom participants. It is arguable that a modern multicultural nation should be moving in this direction anyway, and the developments in multicultural policy in Australia over the last 30 years, including our language policy, made us – at least for a while – an international model of tolerance, vision and co-existence. Increased intercultural awareness requires us to learn a functional amount of the kinds of issues and behaviours in cross-cultural space which may be invisible or misinterpreted by Anglo-Australians.

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[17] Crystal D, *English as a Global Language* (CUP, 1998).

It is likely that this requirement for awareness needs to be matched by enhanced tolerance. On the whole Australians score well for laissez-faire on an international scale. We lack a powerful extreme right-wing phalanx, now visible in most European countries and in North America, together with its xenophobic rejection of non-"mainstream" cultural practices. But if our performance is to match our national aspirations, we need to do better, and the legal system is in a good position to provide an example. It may well be difficult for the legal system not to engage in this initiative. This issue needs to be scrutinised by specialists in constitutional law. Realising this goal of awareness would not be cheap in time or resources.

A second, stronger, version of the change would require not just awareness, but also enhanced levels of intercultural communicative competence. This implies not merely being aware of cross-cultural differences and their implications, as passive reactors, but becoming active, cross-culturally competent communicators. In one sense this is a very large demand. No-one is culturally competent in the practices of all cultures. But it should be possible to define a set of core cultural competencies for major cultures represented in the Australian population and so in the Australian courts.

The evidence and arguments presented here show that in intercultural contexts we cannot readily assume that we can understand what we are hearing or that we understand its cultural significance. Over 200 languages are regularly spoken in Australia. Even if we allow interpreters for the 200 languages, as we have seen above, we cannot assume that the presence of the interpreter will solve the problem of inter-cultural translation. One conclusion is that judges will need to know more about intercultural patterns in order to ensure equity for participants in trials. As we have argued, cultural knowledge can be an instrument of power. This means that courts and judges will need to become more sensitised to the parameters of cultural diversity, correspondence and translation.

Further reading

Following is a substantial listing of additional material related to the broad topic of this article, including select references on the language of the law, and from the literature on intercultural communication. Not all of these are directly relevant to the argument made here. But this is a complex, ill-defined interdisciplinary area, ranging across academic and professional journals and publishers.

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