THE "RULE OF LAW", ORAL TEXTUALITY, AND JUSTICE IN CRIMINAL COURT PROCEEDINGS

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This ethnographic analysis seeks to understand how the Jurisprudence's notion of the "rule of law", with its norms of objectivity, neutrality and impartiality, is actualized in criminal courtroom hearings of a regional trial court in Metro Manila. It argues that the production of justice and oral textuality of law are precarious, subject to negotiation, and shaped by the power dynamics that takes place inside the courtroom, particularly through the disciplinary powers of language, interpretation, translation, and decision making. The analysis reveals the inadequacy of the Philippine judicial system to address the problems of subjectivism and partiality in deciding criminal cases.

INTRODUCTION

A 1993 nationwide survey conducted by the Social Weather Stations (SWS) found that 36 percent of the Filipino respondents who had filed a complaint or been charged in court, felt their cases were treated unjustly (Mangahas et al. 1996: 25). Another 1993 SWS nationwide survey, this time with judges as respondents, reported that 42 percent agreed that the rules of court were too cumbersome to apply to court proceedings (Ibid.:87). These difficulties in applying the rules of court were echoed by another SWS survey done in the National Capital Region (NCR) and three other provinces which showed 65 percent of the lawyer-respondents admitting that the decisions of judges are unpredictable (Ibid.:57). Judicial decisions, the lawyers claim, neither justify the evidence presented nor reflect what really took place during the proceedings. One wonders: How then is justice done inside the courtroom? How fair, neutral and impartial are the court proceedings or the decision of the judge?

The Bill of Rights of the 1987 Philippine Constitution provides that no one shall be deprived of life, liberty and property without due process of law (Section 1, Article III). As such, criminal trials are to be accorded the highest standard of justice render Philippine jurisprudence. As well, the evidence required to convict a person of crime under the revised rules of court must represent "proof beyond reasonable doubt" or must possess "moral certainty," meaning that the degree of proof "produces conviction in an unprejudiced mind" (Rule 133, Sec.2). To attain moral certainty of the guilt or innocence of the accused, lawyers and judges are expected to uphold the "rule of law," ensuring that the rules of criminal proceedings operate in accordance with the standards of "due process," and adhering to the norms of impartiality, neutrality, objectivity, and universality, which are inherent in this legal principle (Sarat and Kearns 1993:36-37).

In attempting to understand the rule of law one can follow the path of either jurisprudence or the sociology of law. Legal research on jurisprudence, being normative and formalist in nature, focuses on statutes and legal doctrine. It asks "what the law ought to be" in actual practice. By contrast, the sociology of law examines how statutes and legal doctrines — and beyond these, how social forces like culture, power and class — shape the actual operation of law in society. It asks "what law is" in everyday social practice.

This paper takes the sociological approach and seeks to understand how the "rule of law" — specifically how the norms of impartiality, neutrality and objectivity — are observed in criminal proceedings at the lower court level. It argues that the production of justice in the courtroom is precarious, subject to negotiation and various influences, and shaped by the power dynamics that take place inside the courtroom. Justice, according to this perspective, is thus produced through an active interplay of power and procedure in a courtroom drama.

THE SETTING

To provide data on actual court practice, I regularly visited one regional trial court in one of the major cities of Metro Manila. This city has four trial courts that hear criminal and civil cases: two municipal trial courts and two regional trial courts. Unlike the municipal trial courts, the two regional trial courts, according to an informant, were established only in 1996. These were formerly attached to a network of trial courts in a neighboring city in Metro Manila.

Their structure and location of these two regional trial courts were indicators that they were mere additions to the two already established municipal courts. The two regional trial courts were temporarily located on either side of the entrance to the justice building, directly along the road fronting the city plaza. Noise from vehicles, people, and music from an FM radio in the plaza could be heard inside the two courtrooms where the windows were kept open for lack of air-conditioning. These courts are also smaller than the municipal courts located in the inner part of the building.

The courtrooms of the regional trial courts measured only around 20 square meters, including their offices (see chart 1). The hearing area of the regional trial court that I observed measured around 5 meters by 20 meters. It had three benches that could accomodate 15 people. The front bench was usually reserved for the complainants, the middle bench for the relatives/friends of the accused, and the last bench near the entrance door, for the handcuffed prisoners and their jail guards.

Next to the benches were the chairs and tables for the prosecutors and defense lawyers, the court interpreter, and the court stenographer. There was no witness box or stand for witnesses. For lack of space, the witness usually sat in a chair that blocked the passage to the elevated area where the presiding judge sat.

Given the courtroom's noisy location and the absence of a microphone inside, people could sometimes not hear each other during the proceedings in court. At one time the judge ordered someone in his staff to inform the owner of the FM radio in the plaza outside to lower the volume of the music as it was disturbing the court. While these local conditions may look insignificant at first glance, they form part of local conditions Merry Sally referred to as "determinants" in the production of justice inside the courtroom (Lazarus-Black and Hirsh 1994).

In this study, I focused my analysis of power and the rule of law on three disciplines of criminal proceedings: the use of the English language in court, the interpretation and translation of court sessions, and the primary role played by the judge in handling a criminal case. For this purpose, I regularly attended the trials of criminal cases filed in the sala of one regional trial court in Metro Manila. I also conducted interviews with its presiding judge and court officers to validate and confirm the data I had gathered during the trial. With the judge's permission, I tape-recorded portions of the proceedings, especially the direct and cross-examinations of witnesses. Most of the excerpts of transcripts or translations cited in this ethnographic study were transcribed from the tape-recorded dialogues I gathered during court observations. To maintain the anonymity of the cases as well as the identities of the court and its players, I have used fictitious names or generic labels and descriptions in the course of description and analysis. I am grateful to the presiding judge, the court interpreter, the stenographer and other court personnel whose generosity made this study possible.

ORIENTATION

Legal positivists and scholars of jurisprudence, with their normative and idealist understanding of law, insist that the "rule of law" is the best guide in attaining justice in the settlement of disputes. People's aspirations for impartial, neutral and objective justice can only be achieved, these scholars claim, through the belief and application of this maxim (Sarat and Kearns 1993:36-37). Critics from social science disciplines, however, follow another assumption. They claim that legal rules and legal institutions fail to achieve the claimed aspirations of impartiality, neutrality, objectivity, and universality. They argue specifically that the supposedly impartial legal rules actually prefer some and disadvantage others. The rule of law that promises to treat everyone fairly actually neglects some poor litigants in the legal proceedings. Thus, while these critics believe that the goals of impartiality, neutrality, objectivity, and universality are still worthy, they are at best unfulfilled (Ibid.).

One hindrance to objectivity and impartiality in the rhetoric of the "rule of law" can be traced to the nature of the law itself. The major problem in attaining the truth in the legal arena stems from the hegemonic power of law to sideline other forms of knowledge. Carol Smart (1989) argues, for instance, that law disqualifies nonlegal knowledge. In the law, the everyday experiences of individuals are of little significance with regard to their meaning if these experiences are not translated into legal forms in order to become 'legal' issues and, thus, be processed in the legal system (Smart 1989:11). The parties in a case may be allowed to speak, but their voices must be turned into something that the law can digest and process; otherwise these accounts are disqualified.

Mary Jane Mossman (1986) extends this thought by identifying three main elements of the traditional legal method that tend to sideline nonlegal accounts in court cases. One of these is boundary definition, or the process whereby certain matters identified as political and moral in the circumstances of the case are excluded from the legal process. In criminal cases, only those alleged in the criminal information or complaint, and which have satisfied the requirements of a crime in the penal code, are included in the trial. Those sets of information which are not contained in the complaint, though they may have occurred, are deemed nonlegal issues and, therefore, excluded from the case. By the time an alleged crime is reported and recorded in the police station or in the public prosecutor's office, much of what has actually happened has already been "bracketed" and "tailored" as the sworn statements or affidavits of victims prepared by police investigators or public prosecutors out to satisfy the requirements of the penal law. The recall of witnesses and victims is influenced by the subtle suggestions they receive under questioning by a police officer or lawyer. In many cases, in an attempt to please their interrogators witnesses feel compelled to answer questions completely in spite of incomplete knowledge (Vago 1988: 79).

Another area of difficulty in applying the norms of impartiality, neutrality and objectivity can be found in the litigation process itself, particularly in the interpretation of meanings of what transpire inside the courtroom during criminal trials. In deciding a case, the judge normally uses the rationalist method in selecting which principle or legal concept to apply to a particular case. However, in its appreciation of evidence, in its elevation of the facts of experience as the arbiter in determining the correct decision, the court is primarily empiricist in its approach. It views objectivity as a function of reason which is opposed to the feelings, emotions or passions of the thinking subject (Kerruish 1991). What is true in the courtroom, as one lawyer would put it, is what can be perceived by the five senses, in accordance with the rules of court. To what extent, then, does this empiricist method of appreciating and weighing evidence effective in achieving impartial criminal justice?

Lazarus-Black et al. (1994) contend that local practices in handling disputes are influenced not only by the law but also by local conditions (Lazarus-Black and Hirsch 1994:38). One problem that disputants normally encounter in court, especially in the Philippine context, is the language used inside the courtroom. In the Philippines, English is the official language used in court and in the writing of decisions. The use of a language other than the local one can further influence the application of the norms of objectivity, neutrality and impartiality to court hearings. "[N]ot all languages seem to have been created equal. Some languages enjoy a more prestigious status than others" (Lefevere 1992:1). In the Philippines, English is the official language of the judiciary and it occupies a higher status than other local languages in the country. English is spoken mostly by professionals and those belonging to the affluent and educated classes of Philippine society. But despite the rhetoric that the Philippines is an English-speaking country, many Filipinos, especially among the lower classes, are not fluent in the language. This is why many see the use of English in litigation as a hindrance to access to the local courts for the poor and the uneducated. Raul Pertierra's (1988) ethnography of an Ilocano town revealed, among others, that people in rural villages often decide to settle their disputes through customary practices rather than through the more expensive, unpredictable and often alienating procedures in formal courts. Particularly cited as alienating were the use of English in court and the complex and incomprehensible rules of evidence and testimony (Pertierra 1988:185). By contrast, the settlement of dispute through customary procedures is done in a local language, facilitated by respected local mediators, and completed after exhaustive and unrestricted discussions by all interested parties (Ibid.).

Aside from language, another problem to be overcome by people in litigation is the accuracy of the interpretation and translation by the court of official statements done in the local language. In the trial court I observed, the male court interpreter acted as the "secretary," marking documents and exhibits, scheduling trial days, as well acting as the courts official interpreter and translator. As official interpreter and translator, he normally interpreted and/or translated any word or statement said in open court while the court stenographer transcribed these verbatim. This procedure raises questions. How accurate and objective is the official recording of the statements and testimonies in court? To what extent do they represent the facts of the case from the beginning of the court hearing (arraignment) to the decision of the judge?

Translation is not as easy as it seems. It is an arduous process and an act of interpretation in itself. A translator who is concerned with transferring the meaning will find that the receptor language has a way in which the desired meaning can be expressed, even though it may be very different from the language form" (Larson 1984:22). Translation relates to authority, legitimacy and ultimately power, which is why it has been, and continues to be, the subject of many acrimonious debates. Translation is not just a "window opened on another world," it is a channel opened, often without a certain reluctance, through which foreign influences can penetrate the native culture, challenge it and even contribute to its subversion (Lefevere 1992:2). Translation is also an exercise of official power. Every word or phrase used can affect the outcome of the case in some way. These words and phrases represent the official translation of the court proceedings, recorded by the court stenographer and forming part of the official records of the case.

Another local condition which can influence the outcome of a case is the disposition and attitude of the court officers and employees to the dispute at hand. Courts consist of people who decide whether or not to do anything about a problem. They decide who the troublemaker is and is not, which kinds of events are serious, which are trivial, and what principles of justice are most important. They also decide how to weigh conflicting stories, how far to allow a case to progress and when to eject it from the court (Lazarus-Black and Hirsch 1994:38). Thus, the position of impartiality in the face of the facts and issues of a court case greatly depends on the people who handle it, particularly the presiding judge who will make the final decision.

Power is not so much a property or possession of a dominant class, state or sovereign — the classical notion — but strategy, a "complex strategical situation," or a "multiplicity of force relations" (Smart 1985: 77). Moreover, power is not something that should be analyzed only from above; must also be examined from below. This notion draws from Michel Foucault (1977:16) whose "analytics of power" reconceptualizes power relations by inverting commonplace assumptions: power is exercised, not possessed; power is productive, not primarily repressive; and power should be analyzed from the bottom up, not the top down (Sawicki 1991:21). For Foucault (1977), the effects of domination associated with power arise from "manoeuvres, tactics, techniques, and functionings." With this reframing, he recommends the analysis of power at the micro level, at the periphery and in the disciplinary mechanisms of professionals in local settings, in school, in the workplace and the like. Feminists share this view. Asserting that the personal is political, feminists have also reconceptualized power to show how its dynamics play out in the home and in the bedroom, the factory line and the lunchroom, the legislature and the courtroom (Lazarus-Black & Hirsch 1994:3). At court hearings, the subject of power is exercised through the various "disciplinary technologies" of court procedures, trial techniques, speech, language, interpretation, translation, and stenography.

FINDINGS

This study's findings focus on three major areas which affect criminal court proceedings: the use of English, the problem of objectivity, and accuracy in court interpretation and translation, and the discretionary power of the judge in hearing and deciding criminal cases. The first part briefly traces the legal and historical context of the English policy in court, and show how this policy is applied in actual court practice. The second part deals with the interpretation and translation of oral court proceedings. Interest in this part lies in how interpretation and translation are done by the court interpreter and other actors in a lower court. It will also point out the problems inside and outside

the courtroom that affect the oral proceedings. In particular, excerpts from transcripts of the trial are analyzed linguistically to deal with the issue of objectivity and accuracy of interpretation and translation inside the courtroom. Moreover, performances in court of the interpreter, stenographer, and counsels are observed to understand how they apply the "rule of law" in actual court practice.

The last part will focus more on the role and attitude of the presiding judge in handling criminal court proceedings. Emphasis is given to how he exercises his discretionary powers in the actual trials and how such powers can affect the oral proceedings and ultimately the outcome of the criminal case.

THE ORAL TEXTUALITY OF LAW AND COURTROOM LANGUAGE

One feature that distinguishes the code of law from procedure is that the code exemplifies the principle of "textual publicity," appealing to a reading public on matters related to substantive law, while court practice, which is applied to the litigation of cases, depends on "oral publicity." In court, documentary evidence to prove or disprove the guilt of the accused must be supported by oral evidence. The tendency of law to seek consistency requires that documents presented in court, whether these be sworn statements or public or private documents, must be readily confirmed by the person making them. Direct, cross, re-direct, or re-cross examinations in criminal trials are procedures used to ascertain this consistency between documentary and oral evidence. Courts can, therefore, be considered sites of oral publicity where the contending parties in a criminal case present testimonies and oral arguments to convince the judge of the merits of their case. These are also means to examine the consistency between oral and textual evidence.

Oral publicity in court poses some problems in the production of truth inside the courtroom. One problem lies in the use of an official language other than the local language. In the Philippines, the English language has been adopted as the official language in the courts. Section 20 of the Administrative Code of 1987 explicitly states that in the interpretation of a law or in administrative issuances promulgated in all official languages, the English text shall control, unless otherwise specifically provided. This preference for English is also shown in the rules of statutory construction, particularly in the interpretation of laws, where the English language prevails over other languages (Alcantara 1997:112-113). The 1973 Philippine Constitution also recognizes the dominance of the English language over other languages in the interpretation of laws. The 1987 Philippine Constitution likewise provides that constitutional laws shall be written in English, aside from Filipino, and shall be translated into major regional languages, Arabic and Spanish (Art.XIV, Sec.8).

One major reason behind this preference for English is that the Philippine judicial system is largely patterned after the American judicial system. Thus, laws are written and interpreted in English. "[A] great bulk of Philippine laws originated from and are influenced by the American legal system, especially in the fields of labor and social legislation, political law, public finance, business and banking" (Gupit and Martinez 1995:323). Another reason, according to the late Chief Justice Marcelo Fernan (Aquino 1994:42), is rather pragmatic in nature. He said that the continued use of the English language minimizes the work of judges and justices in making court decisions. Authoritative references upon which justices and judges in resolving their cases are in English. Supreme Court decisions which they quote from the SCRA (*Supreme Court Reports Annotated*), *Philippine Reports*, *Official Gazette,* and the like are also in English. Translating them into Filipino not only means more work but also removes the "authoritativeness" of these texts (Ibid.).

In the 1993 SWS nationwide survey, a significant percentage of Filipinos expressed dissatisfaction with the use of English in the judicial system. Despite this dissatisfaction, the use of the English language in the conduct of trial and the writing of decisions remains a public policy of the judiciary. Other languages may be allowed inside the courtroom, depending on the discretion of the local judge, as long as translations can be done in court by the interpreter or by other translators (who normally come from embassies for foreign-language testimonies). For court officers, however, English as a medium of communication during court trials is a must. Court officers like the judge, lawyers and interpreter are expected to speak English during hearings.

The court hearings I have attended use the English language as the medium for the litigation of cases. Court officials — who include the presiding judge, the public and private prosecutors or defense lawyers and the court interpreter — are expected to use English as means of communication during the trials. The witnesses may, however, speak in the vernacular or in Filipino. But their statements are translated into English by the court interpreter in case the utterances are in Filipino or any local language. The translation is immediately done by the court interpreter after each oral description of the witness in court. At times the interpreter is also obliged to translate the questions of the public prosecutor or defense council to witnesses who are illiterate or have difficulty understanding English. Thus, the interpreter has the dual role of translating — or even interpreting — not only the testimony of the witnesses but also the questions raised to witnesses either by the judge or by the prosecution or defense lawyer.

One serious challenge to the use of English in Philippine courts is obviously translation, one language being basically different in structure from another. A distinct language is a unique relational structure, and the units which are identified in describing a particular language — sounds, words, meaning and the like — are but points in the structure or network of relations (Robey 1973:6). Two languages in translation are two systems of categorization which are incommensurate. When a person translates, s/he determines, as best as s/he can, how the objects events, and processes being referred to would be categorized in terms of a more or less similar but frequently incongruent system of distinctions and equivalences (Ibid.:10). If this is the case, language translation is not at all a trivial exercise, and word-for-word translation is generally unsatisfactory and frequently impossible.

This was not, however, the case in the lower court trials I observed. The court interpreter's translations seemed like a casual and trivial exercise. The interpreter translated the questions and testimonies from English to Tagalog, or vice-versa. But the interpreter did so literally, almost word for word. Idiomatic translation, which most translators deem adequate, is seldom observed in court. It is literalism that prevails instead, and sometimes it results in inaccuracy. In one case, the court interpreter translated the testimony of a police officer not only literally but also incorrectly. In the example below, the interpreter committed a grammatical erred in the translation and at the same time an error in transmitting the meaning of the original statement. When asked by the public prosecutor to describe the quantity and the manner in which the woman drug pusher handed the dangerous drug or "shabu" to him, the witness answered in Taglish:

> ***Witness**: "Two pieces. One piece, binigay niya kay Ka Omeng 'tapos binigay ni Ka Omeng sa akin at binigay ko sa kanya ang P500.00 pesos."*
>
> ***Court Interpreter**: "There were two pieces, one piece she gave to Ka Omeng which are (sic) Ka Omeng gave to me and I gave Ka Omeng the P500.00 pesos."*

This excerpt was transcribed from my tape recorder. The witness, as I observed him at the trial, had difficulty expressing himself in Tagalog, giving the impression that it was not his native tongue. The translation here, though not far from the original text, has slightly changed the meaning of the original utterance because of a grammatical error. The phrase "one piece she gave to Ka Omeng which are (sic) Ka Omeng gave to me" can confuse the reader or listener as to the number of pieces of shabu packs that Ka Omeng actually received from the pusher and gave to the witness. The word *are* should have been omitted from the transcript.

Court rules do not seem to allow translation coming from witnesses. In my observations, no witness ever offered an English translation for his/her own statement. One witness/complainant in a snatching case, for instance, was a public school teacher who was not asked to propose a correct translation for some of her statements. She probably had difficulty expressing herself in English. One indicator was the fact that she spoke in Taglish when asked by the prosecutor to describe in detail what happened inside the jeepney during the holdup. As a rule, a witness is not allowed to propose an English translation of his/her testimony or of some words or phrases in the vernacular which have been uttered in the course of direct or cross examination. This non-involvement of witnesses in the

production of discourses in the courtroom is consistent with the general rule that in a legal process litigants must be mute as much as possible to avoid inadvertently revealing something that has legal significance unknown to her/him (see Smart 1989:11). Moreover, the atmosphere in the courtroom where state representatives led by the judge dominate the proceedings may also inhibit any witness from interrupting the translation of her/his own testimony for the sake of clarity.

In some situations, when the questioning lawyer senses that the court interpreter is confused or is groping for the right words in translation, s/he will help the interpreter to interpret and translate words or statements uttered by a witness. The interpreter is oftentimes obliged to follow the suggested translations of the lawyer to expedite the trial. The presiding judge, given the number of cases he is expected to hear every day, seldom intervenes in the English translation of statements done in court. This practice only shows that the translation of statements made in open court is often left by the judge to the court officers, specifically to the consensus of the interpreter, the stenographer and the contending parties' lawyers, i.e., the public or private prosecutors and the defense counsels. This agreement seems to create an awkward situation for the judge since s/he is expected to render personal judgment on the case based on what s/he observed during the trial and on the transcripts where s/he was not an active participant in the translation of statements made.

Nor are the judges, given their case volumes, expected to recall the details of what actually transpired during the trial, or the demeanor of witnesses when they testified. Judges, thus, miss much vital information during their final deliberations on what actually took place during the trial, especially if the case drags for months or years. The judge has no other recourse but to rely heavily on what is written in the transcripts that, we know, are full of limitations. For this reason, the translation of the interpreter must aspire to be an objective representation of what actually happened during each session.

"UNDERTRANSLATION" AND "OVERTRANSLATION"

Translation is a complicated process. The translator must take time to study carefully the source language, provide semantic analysis and look for equivalent ways to express the right message in the receptor language. The translator must also seek to avoid literalism and provide an idiomatic and fairly objective translation (Larson 1984 :22). Considering the complexity of language structures between the English language and Filipino or other local languages, one wonders if a court interpreter can offer accurate translations of the court proceedings in such an unmeditated manner – and in the short time that the court allows.

In court, however, the measure of the accuracy of a translation seems to lie in consensus. If none of the contending parties or the presiding judge objects to or disagrees with the translation of the court interpreter, the latter is presumed correct and becomes a fair representation of reality. More than this, the rules of court state that "a transcript of the records of the proceedings made by the official stenographer, stenotypist or recorder and certified as correct by him shall be deemed *prima facie* a correct statement of such proceedings" (Sec.2, Rule 132). If one party receives a copy of the official transcript of records of the trials and finds some translations objectionable, the lawyer files a motion in court for correction. But, as one informant revealed, this is not done in court very often. The quest for accurate translation usually depends on the trial lawyer's conscientiousness in spotting erroneous translations. As a normal practice, transcripts are not examined by trial lawyers on a day-to-day basis, especially if the case does not involve a sensitive or heinous crime. Besides, the stenographer — unless there is an urgent request — transcribes his/her notes only days after the trial date owing to her/his heavy workload. And since parties as a rule are not allowed to record the proceedings privately, trial lawyers will need accurate recall to spot errors in translation. For these reasons, official transcripts generally remain unedited and are presumed to be correct. If errors in the transcripts are not detected by the court and the litigants during the trial, they will remain uncorrected even if the case reaches the Supreme Court for judicial review. In this instance, inaccuracies in official transcripts would pose a great disadvantage to both the accused and the victim as justices of the higher review courts would generally rely on these transcripts to ascertain guilt with finality.

The absence of disagreement between the defense and the prosecuting lawyer on a translation made by the interpreter during the court session does not, of course, automatically imply accuracy and objectivity. One limitation that court interpreters have in performing the dual role of interpreter and translator of oral testimonies is the lack of material time to comprehend and describe fully in words what he has just heard and seen from the witness, the lawyer, or the judge in the courtroom. Given the fast pace of court exchanges, much of what transpired in court can be misunderstood or omitted by the interpreter.

The quote below offers an example of an omission and mistranslation by the court interpreter owing to the fast and direct questioning of a witness by the public prosecutor. When the following translation was being done, the interpreter was also busy marking the exhibits related to the witness's testimony. The police witness was being interrogated by the public prosecutor on what preparations were being made before the buy-bust operation against the targeted drug pushers:

> ***Prosecutor**: Now, after you are (sic) handed by SPO3 Villanueva one five-hundred peso bill which you said will be used as a buy bust money, what other preparations would you have…?*
>
> ***Witness**: "Nagkaroon po kami ng kaunting briefing po tungkol po doon sa operation na 'yon.*
>
> ***Interpreter's translation**: "After short briefing, back to operation."*

Here, the interpreter's translation is totally different from the message of the witness's original statement (which, unedited, suffers from faulty usage and grammar). The witness obviously intended to convey that there was a short briefing on the aforementioned (buy-bust) operation and nothing more. However, the translation conveyed a different thing. It said that after the short briefing, the law enforcers resumed their operation. This is obviously incorrect since the prosecutor was only asking what preparations were made before the police operation, implying that the operation has not yet begun.

Two issues underlie oral translations. The first is comprehension, on the part of the interpreter, of whatever is to be recorded in court hearings. From what I observed, the oral translation is done very fast, and so comprehension of the original oral text may not be accurate. "Most writers on translation theory now agree that before embarking upon any translation, the translator should analyze the text comprehensively, since this appears to be the only way of ensuring that the source text … has been wholly and correctly understood" (Nord 1991:1). Thus, if the first requisite of a good and adequate translation is a careful analysis and understanding of the message of the source language, then oral translations in court, given the limited time, are highly susceptible to subjectivism and literalism. This, in my view, is what happens in court. The translations are not well thought out because of the time constraint. Though the interpreter is not prohibited by law from spending ample time to understand and translate the oral texts, s/he is nevertheless pressured by the court schedule to work expeditiously to reduce the court's caseload. The court follows a regular calendar of case trials. With the continuous trial system implemented by the Supreme Court throughout the country, judges are mandated to help deload the court by completing the trial of a criminal case within 180 days or six months from its start. This pace is too hectic for court interpreters to improve on their translations.

Another issue connected with accuracy is the omission of non-verbal signs in oral and written translation. For instance, the tone of voice, body movements and gestures are oftentimes unrecorded during direct examination or cross-examination. In a drug-pushing case, for instance, I noticed that the hands and fingers of the young forensic chemist shook slightly while he was testifying in front of the four accused. The gestures indicated fear, and thus, suggested his lack of experience in testifying in court, or his being intimidated while giving his testimony. Yet these movements were never described by the interpreter and recorded in the transcripts. Such exclusion of non-verbal evidence in oral translation ignores much of the witness's demeanor, which most judges consider crucial in evaluating the truthfulness of a testimony and ultimately in ascertaining the guilt of the accused in a criminal case. The ethnomethodologist Harold Garfinkel, using the concept of the "indexical nature"

of meaning, points out that tone of voice, facial expression, and the use of gestures all convey subtle cues that contribute to the meaning of a statement sometimes quite independently of the words used (Garfinkel 1967:9-11; Layder 1994:83). In other words, one cannot simply detach the non-verbal signs that accompany the actor's testimonies without altering much of the meaning that is being conveyed. However, in normal court procedure, the translator often disregards these signs as well as the so-called "emotive meaning," i.e., the meaning that conveys the emotion of the speaker in addition to the information s/he wishes to convey (Larson 1984 :32). Though the testimony was recorded on tape, the interpreter only translated words that he heard during the trial, making no reference to the emotional content of testimony. The stenographer confirmed this in a separate interview by saying that she only records verbatim what she hears from the court interpreter. She neither adds to nor subtracts from the interpreter's translation.

In one instance, a witness who was, a robbery-hold-up victim was asked by the prosecutor to identify the suspect in the courtroom. The witness pointed sharply at the person, an expression of anger on his face. But no mention of this expression was found in the official transcript of the trial. There was no reference to the fact that he stood up from the witness's chair while pointing to the accused, nor to the emotional tone of his voice. Here's an excerpt (I intentionally omitted the person's name. Take note, however, of the grammatical errors in the text, especially in the description):

> *Q: If you will again see any of that (sic) four (4) persons whom you referred to as the one who belongs to four (4) holduppers, will you be able to recognize him?*
>
> *A: Yes, sir.*
>
> *Q: Please look around and point to us if there is inside the courtroom any of the four persons who belong (sic) to the four holduppers?*
>
> THE WITNESS POINTED TO THE PERSON SEATED ON THE LAST BENCH WEARING ORANGE T-SHIRT AND WHEN ASKED HIS NAME IDENTIFY (sic) HIS NAME _____.

This excerpt was taken from the official transcript of the case. Notice that grammatical errors were uncorrected in this official record. There are missing punctuations and words, as well as confusing antecedents in the description. Finally, references to non-verbal or emotive signs are absent from the text.

Beyond these are the dangers of "under-translation" or "over-translation." In court hearings, "under-translation" or "over-translation" of the statements is likely to occur given the speed in which translation is done in court. Thus, it is likely that at times the interpreter omits some important details or words in his translation and sometimes adds words which are beyond the description given by the witness. In the following example, the interpreter omitted the word *"opisina"* in the witness's original statement and added a word or words that alter the intended meaning of the testimony. In this case, the addition of the word "when" actually changed the meaning of the original Taglish text. One should take note again of the grammatical errors both in the original text and in the translation:

> ***Prosecutor:*** *Were you the one who personally receive (sic) the report?*
>
> ***Witness:*** *No, Sir. SPO3 Baruga and SPO2 Jose.*
>
> ***Prosecutor:*** *How do (sic) you come to know that this information is (sic) filed by the informant (sic)?*
>
> ***Witness:*** *Ah…'yong nagbibigay po ng information ang confidential Informant sa opisina nandoroon po ako (sic).*
>
> ***Interpreter:*** *When the confidential informant was giving the information, I was at (sic) present.*

This excerpt was transcribed from my private recordings of the trial. With his Visayan accent which I recognized during the trial, I suspect that the witness, a policeman, had difficulty expressing himself in either Tagalog or English. This explains why he testified in Taglish and why the Tagalog

of his Taglish statement was incorrect. In my view, what he was actually telling the court in this testimony was that he was present when the information on the alleged drug-pushing activities of the suspects was filed at the police station. Moreover, the translation here is problematic. The translation of the word *"opisina"* is missing, and the addition of the preposition "at" violates standard usage.

Beyond the possibility of "under-translation" and "over-translation" is the problem of inadvertent omission, in the interpretation and translation of the court interpreter, of some significant gestures made by the witness. This omission stemmed partly from the position or spatial arrangement of the interpreter and the witness. In this court, the two did not face each other. The interpreter sat in the middle of the courtroom, his table facing the people present, while the witness is sat, in the absence of a witness stand, in a chair on, slightly behind the interpreter on the latter's left. To see the witness fully, the interpreter had to turn slightly to his left. This was difficult, however, if he was also marking documents on the table while the witness was giving his testimony. As a result, there were instances when witnesses would make hand gestures to stress a point or would add emotional impact to their testimonies, but the interpreter would not notice them, much less include them in his translation. Only hand gestures deemed by court practice to be relevant, such as pointing a finger at a suspect in court or to an artifact or object identified as evidence in a crime, are normally included in the interpreter's description and translation. What court practice deems "relevant" or "irrelevant" gestures is, however, unclear.

For example, in the holdup or jeepney robbery case, the interpreter missed describing an important gesture that a witness-complainant made while giving his testimony. Instead of describing vividly how the robber poked a knife at the side of the victim while the latter was sitting in the running passenger jeep, the interpreter instead settled for the less vivid phrase of "touched me" instead of "poked me with a knife." Note this excerpt of the official transcript (I have intentionally replaced the original name of the place or city with a fictitious one):

Q: While you were on board the passenger jeepney on your way home and passenger jeepney was somewhere at the bridge of San Jose, Los Pueblos City, do you recall of any unusual incident that transpired?
A: Yes, sir.
Q: What was the incident?
A: The person seated beside me was talking to the person seated in front of him and the person wearing short seated in front of me transferred beside me and touched me, sir.
Q: And when you were touched by that person who transferred beside you, what transpired next?
A: He said, this is hold-up.

The phrase "poked me with a knife, sir" would have been a better phrase or translation than "touched me, sir." The original Tagalog phrase was "tinutukan po ako, sir," said with a gesture of a hand holding a knife to refer to the robber's action.

THE STENOGRAPHER AS A *DE FACTO* COURT INTERPRETER AND TRANSLATOR

Another factor that can affect the accuracy of the translation, as well as the objectivity of the criminal proceedings, is the *de facto* or informal role sometimes performed by the court stenographer. The court I was observing had four stenographers who rotated their schedules weekly. As a rule, the stenographer's formal function is to transcribe verbatim the oral proceedings of the court case as well as to record the official interpretation and translations of the interpreter. The actual tasks, however, are different. Stenographers, according to one of them, also interpret and translate witnesses's statements that the interpreter may have missed. That inter-preters omit words or statements is not surprising because they also perform other duties such as marking exhibits and doing other "secretarial" work during the trial. In one drug case, for instance, the interpreter forgot to translate one line from the witness' statement. When I asked the stenographer about the omission after the one

court session, she answered that she had already translated the "missing" statement in her stenographic notes.

The stenographer at times not only, supplies missing translations in the stenographic notes but also "edits" them (at times in consultation with the interpreter) to make sense of some testimonies. With the help of her/his tape recorder and hand written stenographic notes, s/he reviews the recorded oral proceedings and decides then and there how the official stenographic notes will be composed. Thus, even if s/he is mandated only to transcribe verbatim the oral proceedings in the official transcripts, the stenographer also performs the *de facto* role of court interpreter and translator.

THE PRIMACY OF THE JUDGE

Despite attempts by the court interpreter and the stenographer to be impartial, neutral and objective in interpreting, translating and recording what actually transpires in the trial, litigants have to contend with another factor, the presiding judge. In an inquisitorial model like that adopted in the Philippine judicial system, the courtroom is set up to enhance the authority of the judge or the system of justice he upholds (Taylor 1993:11). This model confirms the saying that the "law is what the judges say it is" (Smart 1995:1). Here, the judge can personally question suspects and litigants, direct the investigation of evidence and assess the case based on his personal evaluation (Ibid.:6). Though judges have discretionary powers, they are still bound by law to evaluate cases accurately — that is, to follow the rules and to administer them in valid and impartial ways. How far this ideal corresponds with social reality is an empirical question worth investigating (see Friedman 1977:62-63).

The primacy of the judge is confirmed by court observations. The presiding judge of the court I visited intervened and asked clarificatory questions when witnesses testified on the stand. S/he also asked questions and gave suggestions to the prosecuting and defending counsels. In one interview, a judge revealed that he intentionally intervenes in the trial if he feels that the counsel's questioning or order of presentation is improper, or if he feels that the accused is innocent but her/his case was not competently handled by her/his lawyer. According to the judge, this is one of the strategies he uses to remedy a possibly unjust situation where a poor and innocent man facing a rich adversary in court may be sent to prison because his case was mishandled by his counsel.

The oral proceedings phase inside the courtroom is also heavily dictated by the judge. Though prosecutors and lawyers follow court and criminal procedures in arguing their cases, the judge has the discretion as to when and how to intervene, depending on his own assessments of the arguments. In sustaining and denying an objection to a lawyer's type of questioning, the judge is largely influenced, in my observation, by the linguistic fluency, argument, voice, and determination of the questioning lawyer.

In one heinous murder case, for instance, the prosecution hired a good private lawyer who was more fluent, confident and eloquent in the English language than the government-employed public attorney for the defense. In that session I attended, the private prosecutor was able to convince the judge, through his brilliant argument and presentation and over the objection of the public attorney, to allow a reenactment or demonstration of how the accused stabbed the victim with the original evidence, an already curved kitchen knife. He insisted on this demonstration to show that the accused, a poor man in his thirties, could not have acted in self-defense as alleged by the public attorney, based on the testimony of the medico-legal officer who examined the wounds on the fingers of the accused. The wound of the fifth digit, according to the prosecutor, indicated that the accused was holding the knife in killing the victim.

True or not, what is significant here is the attitude of the judge toward the argument. In my own assessment, there is a pattern in trials, which shows a judicial preference toward impassioned and eloquent presentation and questioning by good lawyers. In this case, I assumed that the private lawyer impressed the presiding judge with his eloquence because the judge overruled the objections of the defense attorney many times even if the latter invoked the incompatibility of the argument and line of questioning to the established rules of court. This only indicates that the power of the judge to interpret procedural rules, depending on his personal impression of the facts and issues presented in

court, is basically "hegemonic" and at times highly subjective. Thus, efforts by the court interpreter, stenographer and lawyers to achieve a higher level of objectivity in the interpretation and translation of the oral proceedings can easily be dismissed, given the judge's discretionary powers to control the entire trial.

CONCLUSION

Based on these observations, we can reasonably conclude that the "rule of law," specifically the application of the norms of impartiality, neutrality, and objectivity, are insufficiently satisfied in criminal court proceedings. Despite the Philippine Constitution's goal of protecting the innocent and punishing the criminal, justice remains an elusive dream for litigants who do not have the linguistic expertise or the means to hire people who can influence the linguistic proceedings in the courtroom. Given the present setup, where the production of knowledge inside the courtroom is subject to the workings of power embedded in the precarious conditions of language, interpretation, translation, and the judge's disposition, justice can still be determined by those who have the influence and expertise in trials, by those who have the necessary command of the language, experience in litigation and knowledge of procedure needed to win legal battles. They can more likely influence the course of the oral proceedings in court.

Having seen in one trial court now criminal cases are heard, I can conclude that the application of the rule of law in oral proceedings is far removed from the normative standards inscribed in jurisprudence. The attainment of justice in criminal cases remains subject to interpretation, negotiation and struggle among actors inside the courtroom. "Truth" in court is not a corpus of "objective" knowledge based on a detached assessment of facts and evidence, but one based largely on the active negotiation among actors in the courtroom through the disciplinary practices of speech, interpretation and translation. Each of these practices requires a personal decision and mastery of a linguistic technology on the part of the court actor, an exercise of power in the Foucaultian sense. This setup confirms Foucault's premise that power and knowledge in disciplinary societies imply each other; "that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations" (Smart 1985:76).

Seen sociologically, legal texts on the guilt or innocence of the accused in criminal cases as produced in the courtroom are constituted through various disciplinary technologies and techniques inside the courtroom. Ferreting out the "legal truth" in criminal court trials involves power relations. Litigants, through their lawyers and court personnel, contest one another to apply general legal rules to specific cases through the disciplinary technologies of interpretation, impression management, language, stenography, and translation. Contrary to the claim of rule of law in jurisprudence, subjectivism prevails among court officers in interpreting and applying criminal laws to specific facts of criminal cases. Criminal rules cannot account and specify all the legal significance of the facts in specific cases. They are always susceptible to unpredictable and conflicting interpretations of court litigants and personnel possessing varying levels of power in court. In theory, jurisprudence may be predictable and distributive, but in practice is often unpredictable and undistributive (Pertierra1988:187).

Furthermore, seeing that facts of criminal cases are processed through different levels of interpretation by various actors — from the reporting of a crime at the police station and the filing of a criminal complaint at the public prosecutor's office until the case is decided by the trial court and confirmed or disconfirmed with finality at the Supreme Court — one wonders how justice (seen in its normative sense) is produced in the textuality of judicial proceedings. At the trial stage, so many things fall under what Descombes (Silverman 1991:270) calls "interpretables," documents, actions, voice, choice of words, and the like uttered by the witness, the public or the private prosecutors, public attorneys or private defense lawyers, the court interpreter, the stenographer, the clerk of court, and the judge. And if one agrees with the hermeneutic assumption that the act of understanding is already an act of interpretation, one can only imagine the various interpretations, given the number of court actors evaluating volumes of documentary and verbal evidence to resolve a particular

criminal case. The judge's decision becomes her/his own reconstruction and interpretation of the various oral texts and "interpretative texts" (i.e. written texts that demand an interpretation like stenographic notes, affidavits and other documentary evidence) produced during the trial. This reconstruction by the judge may include an interpretation of the oral and documentary evidence and application of the substantive and procedural laws to the case. If the accused is satisfied with the outcome of the trial, the judge's decision becomes the "interpreting text," that is, a text, according to Descombes, that should not itself require an interpretation (Ibid.:273). However, this text becomes subject again to another interpretation — and thus, becomes another "interpretative text" — by the justices of the Court of Appeals and, if the accused elevates his case to the highest review court, by the justices of the Supreme Court who will issue the final "interpreting text." When one reads decisions by the Court of Appeals and the Supreme Court, one notices that the presentation of the facts of the case, normally found in the first part of the decision, is in summary form. Sometimes this presentation includes excerpts from the stenographic notes, chosen by the *ponente*, or the writer of the decision, for their relevance and materiality to the case at bar. One will also notice that this same presentation of facts is already in stylized and "tailored" form, a crystallization of all "interpretables" and "interpretative texts." Thus, if a criminal lawsuit that reaches the highest court is processed through a series of interpretations and reproductions of text, then judicial decisions with finality become the "supreme" or the "canonical text" — and part of case law. Thus, this text is not objectively and impartially constituted by criminal courts as jurisprudence would want people to believe, but is a power-laden text that is partially and subjectively reconstructed through a hierarchy of power relations embedded in the disciplinary technologies of the criminal justice system.

Given this setup, it is more likely that those who have the money, social connection and legal knowledge to influence the production of this "dominant, power-laden text" at various levels and phases of the criminal proceedings are more likely to win legal battles. The social status of litigants and their lawyers carry much weight in criminal proceedings. Unless structural reforms are undertaken by the Philippine state to protect those disadvantaged by the system, especially the poor and uneducated, the aim of the "rule of law" will remain a reality from a privileged law.

RECOMMENDATIONS

Improvements in the delivery of justice will take place when the state upgrades courtroom procedures in trial courts, particularly in areas of interpretation, translation and decision making on the part of the judge. If trial courts are privileged courts with regard to the assessment of facts, then Congress and the Supreme Court must do something to make court trials more objective and neutral, at least in the procedures. I suggest that the use of the local language, rather than English, be allowed in court. This study has shown that one hindrance to objectivity is the language barrier. Witnesses cannot express their thoughts fully because of a lack of fluency in English, and not only among less educated witnesses. Even lawyers and other court officers have difficulty expressing themselves in English, as shown in the grammatical errors in official transcripts of the court. It is time to reexamine the policy of using English as the only official medium of communication in the courtroom.

But this aspiration to use the local language in the courtroom must be approached realistically. The problem with using the local language is related to the problem of rendering the court proceedings in stenotype. Stenotyping in Filipino or any local language would cause delays in the proceedings and entail extra work for the stenographer. According to one informant, most stenographers have been trained to do shorthand only in English. Very few know shorthand in Tagalog, which was only recently introduced. Using local knowledge in court would mean inventing shorthand for various local languages and including this shorthand version in the curriculum of secretarial courses, especially for those aspiring to become court stenographers. The Supreme Court, as the highest supervisory court, can also offer such a special course to court stenographers. The national government led by the judiciary and the Commission on Higher Education (CHED), could make a structural adjustment, i.e. hire language experts to invent the stenography for at least the major local languages in the country and train both existing and future stenographers. The invention

of steno machines for these languages would be a big step toward attaining objectivity in the courtroom.

In the area of translation, I suggest that the court interpreter, as well as the stenographer (knowing that s/he too participates informally in interpretation and translation), be professionally trained, and once in the position, they should receive continuing education in this field. In the Philippines, court interpreters are not experts and specialists in translation and interpretation. According to one informant, any person who has a college degree and a civil service eligibility is qualified to apply as a court interpreter. I suggest that authorities propose stricter requirements in the hiring of interpreters. I also suggest that the Supreme Court, having administrative and supervisory powers over all courts in the country, require judges to read transcripts regularly before rendering judgment and require them further to base their decisions on the daily transcripts to avoid too much subjectivism. Specific rules must be laid down for the judge to follow in writing her/his decision. At the moment, there are no clear guidelines with regard to decision writing. A judge can write long or short decisions, depending on her/his discretion. Even the Supreme Court, in some cases, renders decisions in minute resolutions without explaining the reasons for them. If the Philippine government is serious about upholding the rule of law in criminal prosecutions, it must do something to improve the procedures in criminal courts. Otherwise, the crowning majesty of the law, the assurance that it dispenses justice equally to all women and men, will remain a mirage for many Filipinos.

REFERENCES

Alcantara, S. (1997) *Statutes*. Quezon City: The Philippine Labor Relations Journal.

Aquino, B. (ed.) (1994) *Administration of Justice in the Philippines.* Diliman, Q.C.: University of the Phils. Center for Integrative and Development Studies.

Dworkin, R. (1995) *Law's Empire*. Cambridge: Belknap Press.

Foucault, M. (1977) *Discipline and Punish*: The *Birth of the Prison London*: Penguin Press.

Garfinkel, H. (1967) *Studies in Ethnomethodology.* New Jersey: Prentice-Hall, Inc.

Gupit, F. Jr. and D. T. Martinez (1995) *Excerpts from A Guide to Philippine Legal Materials*. Manila: Rex Book Store.

Kerruish, V. (1991) *Jurisprudence as Ideology*. London: Routledge.

Larson, M. L. (1984) *Meaning-Based Translation*. New York: University Press of America.

Nord, C. (1991) *Text Analysis in Translation*. Amsterdam: Rodopi.

Layder, D. (1994) *Understanding Social Theory*. London: Sage Publications.

Lazarus-Black, M. and S. F. Hirsch (eds.) (1994) *Contested States, Law, Hegemony, and Resistance*. New York: Routledge.

Lefevere, A. (1992) *Translation/History/Culture*. London: Routledge.

Madison, G. B. (1991) "Beyond Seriousness and Frivolity: A Gadamerian Response to Deconstruction" in H. J. Silverman (ed.) *Continental Philosophy IV, Gadamer and Hermeneutics.* New York: Routledge.

Mangahas, M. et al. (1996) *Monitoring the State of the Judiciary and Legal Profession.* Quezon City: Social Weather Station.

Nolledo, J. N. (1993) *The Constitution of the Republic of the Philippines Explained.* Mandaluyong: National Book Store.

Pertierra, R. (1988) *Religion, Politics, and Rationality in a Phillipine Community*. Quezon City: Ateneo de Manila University Press.

Rex Editorial Staff (1999) *Revised Rules of Court of The Philippines*. Manila: Rex Book Store.

Robey, D. (ed.) (1973) *Structuralism, An Introduction*. Oxford: Clarendon Press.

Sarat, A. and T. R. Kearns (eds.) (1993) *The Fate of Law*. Ann Arbor: University of Michigan Press.

Sawicki, J. (1991) *Disciplining Foucault: Feminism, Power, and the Body*. New York: Routledge.

Silverman, H. J. (1991) "Interpreting the Interpretative Text" in *Continental Philosophy IV, Gadamer and Hermeneutics*. New York: Routledge.

Smart, B. (1985) *Key Sociologists, Michel Foucault*. London: Tavistock Publications.

Smart, C. (1989) *Feminism and the Power of Law*. London: Routledge.

Taylor, K. F. (1993) *In the Theater of Criminal Justice*. Princeton: Princeton University Press.

Vago, S. (1988) *Law and Society, Second Edition*. New Jersey: Prentice Hall.
Ward, S. C. (1995) "The Making of Serious Speech: A Social Theory of Professional Discourse" in B. Agger (ed), *Current Perspectives in Social Theory*. Vol.15. London: Jai Press Inc.
Woodiwiss, A. (1990) *Social Theory After Postmodernism, Rethinking Production, Law and Class*. London: Pluto Press.