

# **Due Process and Legal Interpreting: Communicating Suspects' Rights to Silence and Counsel across Languages**

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*Under international law, criminal suspects and defendants who do not understand or speak the language used in the legal procedure are entitled to free assistance by interpreters (e.g., Article 14(3)(1) of the International Covenant on Civil and Political Rights, Articles 5 and 6 of the 1950 European Convention on Human Rights). They should be informed about their right to remain silent and right to counsel through the interpreter before the investigative interview starts. Providing them with adequate interpretation by competent interpreters is critical. If an incompetent interpreter is engaged in the legal process, the rights of criminal suspects and defendants may be undermined as a result of inaccurate interpretation. Drawing on a case study of an interpreter-mediated prosecutor's interview of suspects, this paper demonstrates that engaging competent interpreters is pivotal to due process of law, and the findings also indicate both the complexity of communicating a suspect's rights through interpreters and the opportunity for improvement in the administration of Miranda rights. The results suggest that both interpreters and criminal investigators need to employ extra caution and receive training on effectively administering Miranda warnings to suspects from diverse linguistic backgrounds.*

**Key Words : criminal suspects' rights, right to silence, right to counsel,  
due process, interpreting**

## **1. Introduction**

Criminal suspects and defendants who do not understand and speak the language used in a host country's legal procedures are entitled to free assistance from an interpreter (e.g., Article 14(3)(1) of the International Covenant on Civil and Political Rights,

Articles 5 and 6 of the 1950 European Convention on Human Rights). By removing the language barrier and enabling suspects and defendants to understand the charges against them and speak for themselves, the interpreter plays a pivotal role in protecting suspects' rights in the criminal process (Lee 2012: 15; Lee 2017a). In other words, provision of an interpreter is crucial to ensure due process of law when non-Korean speakers are involved.<sup>1)</sup>

Although a suspect or defendant's right to an interpreter is not stipulated in South Korean laws, under the principle of due process of law, interpreting is provided during criminal proceedings in cases when a suspect or defendant does not understand Korean (Lee and Chang 2016). However, no legal provision sets forth the scope and methods of providing interpreting or the qualifications for interpreters in the South Korean legal process (Lee and Chang 2016: 261-262). Because no legal interpreter accreditation system or proper training is in place (Lee 2012, 2014, 2015), the quality of interpreting in the criminal procedure is open to question. However, there is no quality assurance in place to ensure that adequate interpreting is provided to non-Korean speakers through the criminal procedure. Given that inaccurate legal interpreting may lead to inefficiency in criminal proceedings, appeals and retrials, infringement of human rights, and even wrongful conviction (Lee 2012a, 2017b), engaging competent interpreters from criminal investigation to trials is very important.

To date, discourse studies on legal interpreting have revealed a gap between the ideal and the reality of legal interpreting by shedding light on deviations from the norms of accuracy in interpreting and the interpreter's ethical roles (e.g., Lee 2010, 2012, 2014, 2015). Most of the research in the South Korean context deals with interpreting in courtrooms, with few studies addressing the issue of interpreting during criminal investigation, mainly because of the limited data availability. As criminal investigation is the initial stage of a criminal procedure, working with competent interpreters in cases involving speakers with limited language proficiency is vital for police and prosecutors in order to understand exactly what suspects, victims, or witnesses from non-Korean speaking backgrounds say and for those individuals to understand what police and investigators say to them.

Unfortunately, previous studies on police interpreting indicate that a large number of police interpreters are untrained, unprofessional interpreters who may lack interpreting skills as well as an understanding of the norms in legal interpreting (e.g., Lee 2014,

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1) Due process of law is of paramount importance to protect human rights and constitutional rights. This principle permits the infringement of a citizen's life, freedom and property rights only through a legitimate process, which has been incorporated into the 9th Amendment of the Constitution of South Korea (Hoh 2000).

2015, 2017a). Lee (2017a) provides an illustrative example of police interpreting that demonstrates how an interpreter may negatively influence the process of witness statement taking, often mistranslating statements and occasionally assuming an investigator's role. Despite frequent communication problems and grievous interpreting errors, the interpreter failed to alert police officers about such interpreting difficulties, and police interviewers seemed to allow the interpreter go beyond the role of an interpreter, overlooking long side conversations between the interpreter and the witness in a foreign language that the police interviewers did not understand. Worse yet, the mistranslated witness statement was later accepted as incriminating evidence by the court, which highlighted the importance of quality interpreting during investigative interviews (Lee 2017a).

## 2. Rights to silence and counsel

Suspects' rights to remain silent and to have the assistance of counsel are constitutionally protected rights (Geum 2012),<sup>2</sup> and the rights are specified in the revised Criminal Procedure Act (the Act).<sup>3</sup> The revised Act stipulates the suspect's rights and has introduced a procedural safeguard to ensure that their rights are communicated at the time of arrest and before investigative interviews proceed (Article 244-3 of the Act).<sup>4</sup> Based on Article 244-3 of the Act, police and prosecutors must communicate suspects' rights to silence and counsel to the suspects before the interview proceeds as follows. The following four sentences have been inserted in the official record for suspect interviews (English translation by the author):

You may not make any statement or refuse to answer any of the questions.

Even if you refuse to make any statement, you will not face any disadvantages. If you waive your right to remain silent and make a statement, it may be used as

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- 2) Article 12(2) No citizen shall be tortured or be compelled to testify against himself in criminal case s... Article 12 (4) Any person who is arrested or detained shall have the right to prompt assistance of counsel. When a criminal defendant is unable to secure counsel by his own efforts, the State shall assign counsel for the defendant as prescribed by Act.
  - 3) The revision of the Criminal Procedure Act (the Act) in 2007, which aimed to enhance the transparency of criminal procedure and protection of suspects' rights, has brought about major changes including the people's participatory trial system and audio- and video-recording of investigative interviews.
  - 4) In this paper, the terms interview and interrogation are used interchangeably.

evidence against you in the court of law. You can exercise your right to counsel by having him present during the interview.

In accordance with the law, prosecutors and police officers must inform suspects of their rights and follow the process required by the law, enabling suspects to indicate that they have been informed and whether they wish exercise or waive the rights in writing (Yu and Kim 2008: 489). If a suspect is not informed of such rights in a timely manner, a subsequent statement, even a confession given willingly is considered illegally obtained evidence and thus is not admissible in court (Lee S 2011).

Before the revision of the Act, studies revealed that in many cases, Korean police had not delivered Miranda warnings fully upon arrest or before interrogation (Shin and Kang 2002; Shin et al. 2007). Researchers also noted a lack of consistency in police Miranda warnings in terms of contents, timing and manner (Shin and Kang 2002). Since these studies were conducted prior to the revision of the Criminal Procedure Act, any improvements in the police practice of Miranda administration have not yet been observed.

It is crucial that suspects are informed of their rights in the language they understand and that they are able to understand and exercise their rights accordingly. However, communication problems are not uncommon in the administration of Miranda warnings, both in monolingual and bilingual interviews. First, comprehensibility is an issue. Miranda warnings are not written in simple language, which could hamper comprehension<sup>5</sup>) Miranda warnings in English speaking countries such as the U.S., U.K, and Australia have been studied for decades, and they are considered complex because of convoluted structure and vague expressions (Shuy 1997; Solan and Tiersma 2005; Rock 2007; Berk-Seligson 2010; Ainsworth 2010). Moreover, Miranda warnings are not standardized in many jurisdictions in the U.S. and U.K. (see Ainsworth 2010; Cotterill 2000; Rock 2007): more than 500 variations of Miranda warnings are in use in state and federal jurisdictions across the U.S. (Rogers et al. 2007).

Korean scholars have also raised similar concerns about the lack of comprehensibility of Korean Miranda warnings (Park 2013). Surveys point to low comprehension levels of police Miranda warnings among prisoners (Shin and Kang 2002), juvenile delinquents (Cha 2006), high school students and university students (Kim and Pi 2014). These findings suggest that untrained interpreters may not understand the Miranda wordings and may lack the ability to express them in the appropriate target language.

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5) Informing suspects of their rights to silence and counsel is referred to as Miranda warnings in this paper. Although right to counsel is distinct from right to silence, it is included in Miranda warnings by both American and South Korean police.

Moreover, Miranda warnings are often delivered in a perfunctory manner by police officers without properly checking the recipients' comprehension to ensure that suspects can make a voluntary, intelligent, and valid waiver (Ainsworth 2010). Although officers may assume that average adults would have no problem understanding Miranda warnings, this is not true. Regardless of age, race, or intelligence, a criminal suspect's basic rights must be understood and either exercised or waived with full understanding of the consequences, but studies have demonstrated that vulnerable groups of people, such as juvenile delinquents and suspects with mental disorders or mental retardation are less likely to understand the warnings sufficiently in order to exercise or waive their rights than people with average intelligence and those without mental disorders (Solan and Tiersma 200; Ainsworth 2010).

While monolingual communication of a suspect's rights is not simple, bilingual or inter-lingual communication may become more complicated with interpreting. Suspects with limited language abilities are vulnerable because they have to rely on translation or interpreting. If the quality of interpreted Miranda warnings is dubious, it jeopardizes due process for suspects from diverse linguistic backgrounds. While inadequate translation and interpreting may arise from an interpreter's lack of comprehension or interpreting skills, studies have shown that other problems may also influence the accuracy of interpreted Miranda warnings. For example, turn-taking between police officers and interpreters in the administration of Miranda warnings puts the accuracy of interpreting Miranda warnings at risk (Russell 2000; Nakane 2007). Arbitrary turn yielding, i.e., short chunking or overly long chunking of utterances containing complex legalese, posed difficulties for interpreters attempting to accurately interpret the suspects' rights into the language they understand (Nakane 2007). The findings strongly suggest that police interviewers need to understand the interpreting process and learn how to work with interpreters in cases involving suspects from non-English speaking backgrounds.

Given the lack of empirical research investigating how suspects' rights are orally administered to non-Korean speakers through interpreters prior to investigative interviews, this paper seeks to shed some light onto the challenges posed when communicating suspects' rights across languages by drawing on a case study of interpreter-mediated prosecutor's interviews.

### **3. Communicating suspects' rights in interpreter-mediated interviews**

The data consist of two video-recorded prosecutor's interviews of a non-Korean suspect charged with a murder and aggravated assaults. Because the suspect spoke Russian, she relied on an interpreter. Prior to interviewing the suspect, the prosecutor asked the interpreter about his qualifications, which is a routine process in legal proceedings. According to the interpreter, he majored in Russian at university, completed an MA in Linguistics at a Russian university, and has worked for police, prosecution and the local government in the region. However, the data revealed that his interpreting competence was insufficient to undertake legal interpreting.

As shown in the extracts below, his Russian speaking ability is limited and shows linguistic disfluency, including frequent hesitations. The data suggest that the current practice of engaging interpreters in investigative interviews needs to change, and skill assessments should be introduced (e.g., Lee 2015, 2017). Although courts, police, and prosecutors in South Korea look for language majors, overseas experience and interpreting experience as the criteria to assess interpreting competence (Lee 2014, 2015), these factors are not good indicators of one's interpreting competence. Nevertheless, this paper does not dwell on this untrained interpreter's lack of interpreting competence but rather seeks to highlight the complexities in communicating a suspect's rights across languages through the medium of an interpreter.

Extract 1 is taken from the first interview with the suspect at the local prosecutor's office. A prosecutor, a prosecution investigator, an interpreter and the suspect were present in the interview room. In the extract, 'Pro' indicates prosecutor, 'Sus' suspect, 'Int' interpreter, and 'Inv' prosecution investigator.

#### Extract 1

- 1 Pro: 진술거부권하고 변호인 선임권을 행사할 수 있어요. (You can exercise your right to remain silent and appoint counsel.)
- 2 Int: Вы можете отказать в вашем показании и можете нанять своего адвоката. (You can give up your testimony and you can hire your attorney.)
- 3 Pro: 귀하는 일체의 진술을 하지 아니하거나 개개의 질문에 대하여 진술을 하지 아니하실 수 있다. (You may not make any statement or refuse to answer any of the questions.)
- 4 Int: Вы можете отказать в вашем показании. Вы можете... правона молчание, правона молчание. (You can give up your statement. You can...right to silence right, right to silence.)
- 5 Pro: 귀하가 진술을 하지 아니하더라도 불이익을 받지 아니합니다. (Even if you refuse to make any statement, you shall not be disadvantaged.)
- 6 Int: Если вы не отвечаете на этот вопрос, вы...вам не выгодно. Вам понятно? (If you don't answer this question, you, to you it is not beneficial. Do you understand?)

- 7 Sus: Я п о н и м а ю. (I understand.)
- 8 Int: 이해하고 있습니다. (I understand/she understands.)
- 9 Pros: 귀하가 진술을 거부할 권리를 포기하고 행한 진술은 법정에서 유죄의 증거로 사용될 수 있습니다. (If you waive your right to remain silent and make a statement, it may be used as evidence against you in the court of law.)
- 10 Int: Сегоднявашеслово, вашответ, всеэтомом, послеэтого...уликаулик а...показатель. Понимаете? (Today your word, your reply, all of these afterwards, after that in court, this... proof, proof...showing. Do you understand?)
- 11 Sus: Непонимаю. (I don't understand.)

As required by the law, the interviewer informs the suspect of her rights (turns 1, 3, 5, 9). The first utterance is the gist of the suspect's rights and is followed by details of the rights, using wordings based on the Act. Since the prosecutor stops after every sentence, turn-taking itself does not seem to pose a problem in interpreting. In addition to limited interpreting competence, unfamiliarity with the legal discourse may have created difficulties in interpreting the procedure into Russian. The interpreted renditions contain numerous linguistic disfluencies and distortions of meaning (turns 2, 4, 6, 10).

The interpretation of the prosecutor's first utterance contains target language problems in terms of register, although the overall meaning has been conveyed. The following interpretations reveal serious misinterpretations of the suspect's rights. The right to remain silent and, more specifically, the right to refuse to answer any of the questions during interrogation was lost in translation (see turns 3 and 4). Given that this detailed information was inserted in the revised Act, the interpreted rendition did not convey the meaning of the right to remain silent to the suspect. Although the prosecutor states that the suspect should not be subject to disadvantage even if she exercises her right to remain silent, the interpreter states the inverse (see turns 5 and 6). This is a serious breach of due process from the legal perspective because it goes against the rationale of Miranda rights, preventing suspects from making coercive confessions. Perhaps being conscious of his less than adequate interpreting, the interpreter asks the suspect if she understands (see turns 6 and 7). The suspect responds positively and the interpreter conveys it to the prosecutor (turn 8).

In turn 9, the prosecutor speaks about the consequence of waiving the right to remain silent, but the expression, 'evidence of guilt' in Korean, which is equivalent to 'evidence against the suspect' or 'incriminating evidence' is not accurately translated into Russian. The severe linguistic disfluencies suggest that the interpreter simply lacked the linguistic ability to express the legal concepts and was not familiar with the Miranda administration, although he said that he had some years of experience in legal

interpreting. It is not clear whether the interpreter himself understood what it meant (see turn 10). Maybe aware of the inadequacy of his interpretation, the interpreter again checks for the suspect's understanding and she answers negatively (turns 10 and 11).

### Extract 2

12 Int: Непонимаете, да? Сейчас вы...сегодня ваше слово, отвечать, да? все сегодня мы записываем все. Поэтому вот это диск у нас. Вот это диск это улика. После того в суде, в суде можно это он и суд понимают это улика, доказательство, доказательство. Понимаете? (You don't understand, right? Today you... today your word, to answer, right? Today we write everything down. This is why we have this disk. This disk is the proof. After that in court, in court it is possible they... court, they understand that this is a proof, a proof, a proof. Do you understand? Yes?)

13 Sus: Да. (Yes.)

14 Int: 이해하고 있습니다. (I understand.)

15 Pros: 귀하는 이와 같은 권리들이 있음을 고지 받았나요? (Have you been informed of these rights?)

16 Int: Только что я вам это сказал, да? Об этом вы слушали, да? (I just told you this, right. You heard about it, right?)

17 Sus: Да. (Yes.)

18 Int: Yes, that's right.

Extract 2 continues from Extract 1. As Extract 2 shows, instead of interpreting exactly what the suspect says or disclosing her comprehension problems, the interpreter attempts to explain in his own terms, which is not only inappropriate but also incorrect, and finishes by asking a checking question again (turn 12). Prompted by the interpreter (see 'yes?' in turn 12), the suspect concedes by saying yes (turn 13). Then, the interpreter confirms her understanding for the prosecutor (turn 14).

In order to ensure that the suspect was informed of her rights prior to the interview, the prosecutor continues to ask if she was informed of her rights, which is also required in the criminal procedure (turn 15). However, it is noteworthy that this checking question served no purpose in this miscommunication situation partly because of the wording used by the prosecutor and inaccurate interpreting. The prosecutor used a somewhat inexplicit expression such as 'these rights (literally, 'rights such as these') to refer to the rights explained so far. However, the interpreter interpreted 'these rights' into 'this' using a tag question. The concept of 'rights' is thus lost in the interpretation



(see ‘I just told you this, right. You heard about it, right?’ in turn 15). The suspect’s response indicates that she was informed of Miranda rights (see turns 17 and 18).

On the surface, the legal process of informing the suspect’s rights has been completed, but in fact it has not, which raises questions about due process of law from the suspect’s perspective. In fact, a moment later, although the data is not provided here, when the suspect was asked to sign that she was informed of her rights to remain silent and counsel, which was a part of the official interview record, she refused to give her signature, saying that she would not sign the Korean document because she could not read Korean. Despite repeated checking by the prosecutor and the interpreter she was reluctant to sign and the interview proceeded nevertheless.

The suspect was not informed of her rights according to the law because of defective interpreting, which may have led her to believe that refusal to make a statement could hurt her (see turn 6). Although the interpreter checked the suspect’s comprehension three times and the prosecutor once, these checks did not ensure that the suspect correctly understood her rights. The data support the findings that checking understanding by simply asking ‘do you understand’ is not effective in Miranda administration (Solan and Tiersma 2005; Ainsworth 2010; Eades 2010).

Because the suspect’s rights are so important, this process of conveying the suspect’s rights to remain silent and to obtain counsel have to be repeated each day when the investigative interview is resumed. The following extract, Extract 3, is taken from the second day of interview that occurred ten days after the first interview. The data reveals that mere accumulation of experience may not help to enhance the interpreter’s interpreting competence. Although this is the second administration of Miranda rights, the data reveals that the accuracy of his interpretation of the suspect’s rights has not improved at all.

### Extract 3

- 1 PRO: 귀하는 일체의 진술을 하지 아니하거나 개개의 질문에 대하여 진술을  
아니 할 수 있습니다. (You may not make any statement or refuse to  
answer any of the questions.)
- 2 INT: **Выможетеотказатьсявашепоказание.** (You can give up your testimony.)
- 3 PRO: 귀하가 진술을 하지 아니하더라도 불이익을 받지 아니합니다. (Even if  
you refuse to make any statement, you will not face any disadvantages.)
- 4 INT: **Есливыотказываетесь, тогдаможно.** [만약 당신이 거부하면, 가능합  
니다.] (If you refuse, it’s possible.)
- 5 PRO: 귀하가 진술을 거부하거나 거부할 권리를 포기하고 행한 진술은 법정에서 유죄의 증거로 사용될 수 있습니다. (If you refuse to make a

statement, if you waiver your right to remain silent, your statement will be used as evidence against in the court of law.)

- 6 INT: *Если вы...* (If you...) 이 부분에서 그렇게 이야기 해주니까 이해를 잘 못하거든요. (I said but she does not understand what I said.)
- 7 INV: 이번에 이야기 한 것은 유죄 증거로 사용될 수 있다, 이렇게 이야기를 해주면 되거든요. (You can tell her what she's telling us now can be used as evidence against her.)
- 8 INT: *Сегоднявашепоказание, да? Потом в будущее в судеэтодоказательство, этодоказательство. Понимаете?* (Today your statement, later in the court evidence, this is evidence. Do you understand?)
- 9 PRO: 귀하가 신문을 받을 때에는 변호인을 참여하게 하는 등 변호인의 조력권을 행사할 수 있습니다. (You can exercise your right to counsel by having him present during the interview.)
- 10 INT: : *Выможетепригласитьсвоегоадвоката* (You can invite your lawyer.)
- 11 PRO: 귀하는 이와 같은 권리가 있음을 고지 받았나요? (Have you been informed that you have these right?)
- 12 INT: *Обэтомслышали, да?* (Have you heard about this?)
- 13 INT: 예, 그렇습니다. (Yes, I have.)

In Extract 3, the prosecutor begins by stating the first part of Miranda rights (turn 1). The interpreted renditions are not faithful to the original utterances (see turns 2 to 4). Following the prosecutor's turn containing the expression, 'evidence against her', the interpreter stops interpreting to say to the prosecutor that the suspect does not understand the interpretation (turns 5 and 6). The interpreter appears to attribute his interpreting problem to the suspect's comprehension problem, thereby avoiding interpreting the utterance. This may also be viewed as the interpreter's indirect request for the prosecutor to paraphrase it, but his attempt does not succeed in leading the interviewer to paraphrase it. The prosecution investigator intervenes to help by simplifying the original a bit, but stands by the expression 'evidence against her' (turn 7). The interpreted rendition (turn 8) indicates that he did not understand what it meant or did not know how to state it in the target language. Unlike Extract 1, with respect to a right to counsel, the prosecutor uses an expression directly quoted from the law. Previously, he simply mentioned 'a right to appoint counsel', but now he specifically says 'a right to have the assistance of the counsel, having them present during the interview'. However, this detailed utterance is simply interpreted into 'You can invite your lawyer.' in Russian (see turns 9 and 10). In this extract, the interpreter did not repeatedly ask checking questions as he did during the previous interview.

At the final stage of communicating the suspect's rights, the prosecutor uses the same

formulaic question, asking if the suspect was informed of these rights. The interpreter again replaces the original expression with simply ‘this’ leaving the reference slightly inexplicit and the concept of right is lost in the interpreted rendition (turns 11 and 12). Although she responds positively, indicating to the prosecutor that she was informed of her rights and understood, it is unlikely that she was fully informed of her rights and understood them.

#### 4. Conclusions

This paper has examined issues in communicating the suspect’s rights through an interpreter. This stage is critical to ensuring a suspect’s rights during a criminal procedure, but the data analysis indicates that due process in a criminal procedure may be jeopardized by inadequate interpreting and that the mere provision of interpreting does not remove language barriers for suspects. One may argue that the lack of legal interpreter accreditation and a quality assurance system for legal interpreting thus may undermine the rights of non-Korean speaking suspects, protected by the Constitution and laws.

Although the interpreter should not undertake interpreting assignments beyond his or her competence, under the current circumstances, an untrained, incompetent interpreter who lacks an understanding of the implications of inadequate interpreting and the professional ethics of legal interpreting may be allowed to interpret in legal settings. Therefore, the interpreter is not to be solely blamed for this type of communication problem in the administration of Miranda rights. Furthermore, communicating in a manner that is conducive to a valid and intelligent waiver or exercise of suspect’s rights is not a simple task. The method of communicating suspects’ rights to a lay person and the wording itself should be carefully considered by legal professionals. Prosecutors and police officers need to understand that comprehension problems may occur in interviewing suspects, both Koreans and non-Koreans, so they should make extra efforts to communicate a suspect’s rights clearly to suspects from diverse linguistic and cultural backgrounds.

Although the data are limited to a single case involving an untrained interpreter, this may not be an isolated case given the current practices for recruiting interpreters in legal settings (see Lee 2012, 2014, 2015). The results strongly suggest that only competent and trained interpreters should be engaged in the legal process to ensure the due process

of law. Given the large number of untrained interpreters working in the field of legal interpreting, training opportunities for them and endeavors to enhance the quality of communication in the legal process should be offered. The findings support the need for legal interpreter certification in order to advance human rights in criminal procedures that increasingly involve criminal suspects and defendants with foreign nationalities. Police, prosecutors and the court should screen interpreters based on skill assessments rather than interpreting experience in cooperation with interpreting experts and language specialists. In the meantime, standard Miranda Warnings in a variety of languages should be provided in order to avoid this kind of miscommunication problem (Lee 2017b).

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