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Judicial Ethics and Professional Conduct

JUSTICE IN ANY LANGUAGE

**The criminal judge's role in
ensuring the right of an accused person
to interpretation and translation (Directive 2010/64/EU)**

Team Austria 4

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A. Introduction

Not understanding or speaking the language that is used in their surroundings is one of the greatest obstacles for people in everyday life. When a person accused of having committed a crime is not able to communicate in the official language of the criminal proceedings, his ability to effectively defend himself and therewith the fairness of the proceedings are at stake.¹ In such cases it becomes inevitable to provide for interpretation and/or translation services, in order for the accused or suspected person to understand the nature and cause of an accusation against him and to ensure his right to a fair trial.

The defendant's right to interpretation and translation applies from the time a person is first made aware of being suspected to have committed a crime, throughout the preliminary proceedings and the main trial until the conclusion of the criminal proceedings, which is understood to mean the final determination whether they have committed the crime.² The criminal judge responsible for the main criminal proceedings, i.e. from formal indictment to the judgement, bases his decision on the evidence provided at the main trial, including the oral hearing of the accused person. While in the preliminary phase of the criminal proceedings the accused person needs interpretation or translation assistance in order to efficiently prepare for the main trial, it is in the courtroom itself – the setting where matters of guilt and innocence are decided – that the accuracy of the interpreted communication is all the more significant.³

In Austria, 43 % of criminal proceedings involve accused persons who do not speak or understand German – the official language of proceedings⁴ – amounting to more than 65.000 proceedings every year where translation services and/or interpretation assistance are needed.⁵ Having to interact with parties unable to understand the official language of the proceedings – be it the accused person himself or a witness – is therefore part of a criminal judge's daily business.

1 Kadrić, Dolmetschung als Ausdruck staatlicher Fürsorgepflicht – neue Impulse durch die RL 2010/64/EU, *juridikum* 2012, 76.

2 Article 1 para 2 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to translation and interpretation in criminal proceedings, OJ L 280/1.

3 De Jongh, *From the Classroom to the Courtroom* (2012), 1.

4 Article 53 para 1 of the Rules of Procedure of the Courts of first and second instance.

5 Austrian Ministry of Justice, Financial consequences on the state budget of the Law Amending the Code for Criminal Procedure 2013, <https://www.justiz.gv.at/web2013/file/2c9484853e44f8f9013e7f441b5a4859.de.0/vorblatt.pdf>.

This paper will discuss the criminal judge's role in ensuring the right to interpretation and translation of an accused person from an ethical point of view, focussing on the phase of the main criminal proceedings. For this purpose, the legal basis of the right to interpretation and translation will be outlined, before it will be elaborated, based on literature and the results of a survey conducted among criminal judges on their experiences of working with interpreters and challenges related thereto, what a judge has to take into account in proceedings against a defendant who does not speak the language of the proceedings.

Traditionally, the role of a judge is to apply the law. As will be shown, there is a wide range of legal provisions in force at the international, the European as well as the national level, providing for a solid legal framework safeguarding the rights of accused persons who are unable to understand the official language of the proceedings. In applying these rules, however, the criminal judge is not only left with a relatively high discretionary power regarding the assessment of need of interpretation assistance as well as the method of interpretation to be used, but it is also within the judge's responsibility as the leader of the main trial to exercise control over the quality of the interpretation services provided.

Professional conduct of a criminal judge in accordance with ethical standards is therefore of particular importance when dealing with accused persons who do not speak the language of the proceedings, in order to effectively safeguard their rights to a fair trial.

B. The legal basis of the right to interpretation and translation

I. The legal basis at the international and supranational level

The main legal source of the right to interpretation of an accused person is the right to a fair trial, enshrined in Article 6 of the European Convention on Human Rights (ECHR). While Article 6 para 3 lit a provides for the right of everyone charged with a criminal offence “*to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him*”,⁶ lit e explicitly vests the accused with “*the right to free assistance of an interpreter if he cannot understand or speak the language used in court*”. Throughout the years these rights were interpreted and further specified by the European Court of Human Rights.

⁶ Article 6 para 3 lit a ECHR.

With regard to the scope and quality of the interpretation provided, the Court held that it must enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the Court his version of the events.⁷ Though stating that the Convention refers to “interpretation” and not “translation”, the Court ruled that the right applies not only to oral statements made at a trial hearing but also to certain documentary material. It continues, however, in clarifying that it does not go so far as to require a written translation of all items of written evidence or official documents in the procedure.⁸

The Court further stated that in view of the need for the right guaranteed by para 3 lit e to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.⁹ In this context, the Court has also underlined the pro-active role of courts with regard to the right to interpretation: In *Hermi v Italy* it held that the domestic courts are the ultimate guardians of the fairness of the proceedings, encompassing among other aspects the possible absence of translation or interpretation for a non-national defendant. Similarly, it emphasized in *Cuscani v the UK* the role of the trial judge who had been clearly apprised of the real difficulties, which the absence of interpretation might create for the applicant. It further observed that the domestic courts had already taken the view that in circumstances such as those in the instant case, judges are required to treat an accused's interest with “scrupulous care”.¹⁰

Within the European Union, the right to a fair trial, including the right to legal advice, representation and defence, is enshrined in Articles 47 and 48 of the EU Charter on Fundamental Rights. At the level of EU secondary law, the Council of the EU adopted a roadmap in 2009, which was integrated in the Stockholm Programme, in an effort to strengthen the procedural rights of suspected or accused persons in criminal proceedings.¹¹ The first measure of the above-mentioned roadmap is aimed at setting out common minimum

7 ECtHR, 24/2/2009, *Protopapa v TUR*, No 16084/90, § 80.

8 ECtHR, 19/12/1989, *Kamasinski v AUT*, No 9783/82 § 74; Grabenwarter, European Convention on Human Rights (2014), Article 6 § 152.

9 ECtHR, 19/12/1989, *Kamasinski v AUT*, No 9783/82 § 74.

10 ECtHR, 24/9/2002, *Cuscani v the UK*, No 32771/96, § 39; ECtHR, 18/10/2006, *Hermi v. ITA*, No 18114/02, § 72.

11 Council of the European Union, Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 30 November 2009, OJ C 295/1.

rules in the field of interpretation and translation in criminal proceedings, underlining the importance of this aspect of a fair trial within the European Union, not least with regard to facilitating the mutual recognition of judicial decisions in criminal matters.

On 20 October 2010 the Directive 2010/64/EU (hereafter “the Directive”) on the right to interpretation and translation in criminal proceedings was adopted. In line with the case-law of the European Court of Human Rights, the Directive obliges EU member states not only to provide for interpretation assistance from the time an accused person who does not speak or understand the official language is made aware of being accused until the end of the criminal proceedings,¹² but also for a written translation of essential documents (decision depriving them of liberty, charge or indictment, judgement).¹³ In exceptional cases and as long as the fairness of the proceedings is not compromised, these documents may – with the consent of the accused person - be translated orally as well.¹⁴ The accused person must further have the right to challenge a decision whereby interpretation or translation is refused as well as the right to complain about the quality of the provided interpretation or translation.¹⁵

With regard to the quality of the interpretation and translation provided, the Directive obliges member states – along the lines of the jurisdiction of the European Court of Human Rights – to ensure that accused persons have knowledge of the case against them and are able to exercise their right of defence.¹⁶ In an effort to achieve this quality standard the Directive requires member states to set up a register of independent and appropriately qualified interpreters and translators.¹⁷

Article 8 of the Directive contains a so-called non-regression clause, i.e. that nothing in the Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of the Fundamental Rights of the EU, other relevant provisions of international law or the law of any member state which provides a higher level of protection.

12 Article 2 of the Directive.

13 Article 3 paras 1 and 2 of the Directive.

14 Article 3 paras 7 and 8 of the Directive.

15 Article 2 para 5 of the Directive.

16 Article 5 para 1, referring to Articles 2 para 8 and 3 para 9 of the Directive.

17 Article 5 para 2 of the Directive.

The deadline for transposition of the Directive into national law was 27 October 2013. As of October 2014, 16 member states failed to transpose or notify their implementing rules under the Directive.¹⁸ In Austria, the 2013 Law amending the Code of Criminal Procedure,¹⁹ containing the necessary implementation measures, entered into force on 1 January 2014. During the interim period of 28 October to 31 December 2013 the Directive was applied directly.²⁰

II. The legal situation in Austria

In Austria, the right to interpretation and translation of an accused person is regulated in Article 56 of the Code of Criminal Procedure. Before the transposition of the Directive an accused person unable to understand the language of the proceedings was entitled to interpretation assistance, a right to written translation was, however, not explicitly mentioned. Nevertheless, the Austrian Supreme Court had acknowledged a right to written translation in certain circumstances, along the lines of the jurisdiction of the European Court on Human Rights.²¹

The major reform brought along by the transposition of the Directive in Austria was that para 3 of Article 56 in its current version now explicitly obliges the competent authority – therefore during the main proceedings the judge – to provide for written translations of certain documents. The documents listed in Article 56 correspond to those “essential documents” as foreseen in the Directive (decisions depriving a person of his liberty, any charge or indictment, any judgement), with the exception that the Austrian regulation does not require the translation of final judgements, i.e. where no further right of appeal is available.²² As an exception to that general rule, para 5 of Article 56 – in accordance with the Directive –

18 European Commission, 31st Annual Report on monitoring the application of EU Law, 1 October 2014, COM (2014) 612 final, 5.

19 Law Amending the Code of Criminal Procedure 2013, BGBl I 2013/195.

20 Higher Regional Court Linz, 27 January 2014, Decision 9 Bs 416/13k, legal synopsis RL0000141.

21 Austrian Supreme Court, 24 April 2013, Decision 15 Os 157/12w; but the right to interpretation assistance does not necessarily mean that all experts’ reports must be translated in writing, Austrian Supreme Court, legal synopsis RS0128872.

22 Dokalik/Weber, *Das Recht der Sachverständigen und Dolmetscher*³ (2013), § 56 Rz 8; Haißl, § 56 StPO, in Schmölzer/Mühlbacher, *StPO Strafprozessordnung Praktikerkommentar* (2014), arguing – with reference to Article 1 para 2 of the Directive – that the scope of the Directive ends with the final conclusion of a criminal proceeding and therefore a translation of the final verdict is not required, also not in light of an accused person’s right to defence.

provides for the possibility to waive the right to a written translation and receive an oral interpretation instead. Such a waiver must be recorded in the minutes of a hearing, after the accused person has received detailed information on his rights, and may only be used under the precondition that the fairness of the proceedings is not prejudiced.²³ Nevertheless, this regulation has caused critical reactions – in particular from defence lawyers – in Austria.²⁴

A change that has been positively received in Austria is that the right to interpretation assistance during the contact of an accused person with his lawyer is no longer limited to accused persons enjoying legal aid, but has been expanded to accused persons who are represented by a lawyer of their choice.²⁵

The requirement of the Directive to ensure the right of an accused person to challenge decisions on the need of interpretation or to complain about the quality of an interpretation provided was fulfilled in Austria without any further amendments of the existing law. According to Article 281 para 1 clause 4 and Article 345 para 1 clause 5 of the Austrian Code of Criminal Procedure, the accused person can file a nullity appeal, when a petition – e.g. to receive interpretation assistance or to change an interpreter – is either denied or not decided upon by the court during the main trial. Such nullity appeal, however, can only be successful if the Supreme Court not only agrees with the accused person on the infringement of procedural rules, but the procedural error has also influenced the verdict of the court to the detriment of the defendant. With regard to the quality of interpretation assistance, it will be hard for the Appellate Court to determine whether the interpretation provided was in fact sufficient or not in order to safeguard the fairness of the proceedings, because in most cases only written transcripts of the minutes of a hearing are available. Article 271a para 1 of the Austrian Code of Criminal Procedure provides for the possibility to record a hearing on tape or even videotape, when deemed necessary. However, there is no such obligation, so that in practice it will depend not only on the availability of the technical equipment, but also on the willingness of the judge, whether a tape of a hearing is available.²⁶

23 Article 56 paras 5 and 6 of the Austrian Code of Criminal Procedure.

24 Bockemühl, *Jeder ist Ausländer – fast überall: Zur Umsetzung des Anspruchs des Beschuldigten auf ein faires Verfahren durch § 56 StPO*, JSt 2014/3, 225f, emphasizing that a mere oral translation of these essential documents is hardly ever enough to guarantee the right to a fair trial.

25 Article 56 para 2 of the Austrian Code of Criminal Procedure; see also Article 2 para 2 of the Directive.

26 Danek, § 271a Rz 1, in Fuchs/Ratz, *Wiener Kommentar-StPO* (2009).

A register of independent and appropriately qualified interpreters and translators, as required by Article 5 para 2 of the Directive, was already in place in Austria before the adoption of the Directive. It was primarily from this list, that judges had to pick an interpreter or translator for criminal proceedings.²⁷ Whenever another person is appointed to interpret or translate in criminal proceedings – e.g. when an interpreter for a certain language is not available or the need for interpretation arises spontaneously – the person has to be informed on his rights and duties and formally sworn in.²⁸

What can be regarded as an Austrian particularity is the establishment of a special agency called Judicial Service Agency in 2011, providing *inter alia* for interpretation and translation services to courts. The judge only requests interpretation assistance in a certain language and then the actual selection of an interpreter is made by the agency. According to the current version of Article 126 para 2a of the Austrian Code of Criminal Procedure judges primarily have to make use of the Judicial Service Agency for interpretation services, whereby at the moment this service is still limited to the Regional Court for Criminal Matters in Vienna as well as to eight frequently used languages.²⁹ In all other cases, judges still appoint interpreters primarily from the register of certified interpreters and translators.

C. The right to interpretation and translation in practice

The provisions described above set a solid legal framework for the rights of accused persons who do not speak or understand the official language of the proceedings. In applying these provisions a wide range of decisions is nevertheless left to the discretion of the competent authority, therefore during main criminal proceedings the judge.

Once an indictment is filed, it is the judge responsible for the main proceedings, who decides on the need of interpretation assistance for the accused person. In cases where such assistance is needed, the judge generally also appoints an appropriate interpreter or translator. Whereas the legal provision in place foresee that certain documents are to be translated in writing, the

²⁷ Article 126 para 2 of the Austrian Code of Criminal Procedure (former version). Access to this list for interpreters and translators was restricted due to high quality standards and respective entrance exams, see Rabussay, Das Recht auf Übersetzungshilfe vor dem Hintergrund der RL 2010/64/EU und des Budgetbegleitgesetzes 2011, RZ 2011, 271f.

²⁸ Article 82 para 1 of the Rules of Procedure for the Courts of first and second instance.

²⁹ Serbo-Croatian, Polish, Romanian, Russian, Slovakian, Czech, Hungarian and English; see www.jba.gv.at.

method as well as the scope of oral interpretation provided during a hearing are not further specified. They therefore largely depend on the individual preference or estimation of the judge. Finally, it lies within the responsibility of the judge – as the leader of the proceedings – to verify the quality of an interpretation service provided and if need be, react to shortcomings.

It is also the judge's responsibility to guarantee the equal treatment of all parties³⁰ and, especially from an ethical point of view, to give the accused person the feeling that he is being listened to and to offer the possibility for the accused person to tell his version of events, even though he is unable to speak the official language of the proceedings.

In order to get an insight into how Austrian judges are dealing with these particular challenges related to proceedings involving defendants who do not speak German, we conducted a survey among criminal judges working at the five Regional Courts in Vienna, Lower Austria and Burgenland.³¹ The survey consisted of two parts: On the one hand, we sent an online questionnaire to 110 judges and received 43 responses, on the other hand we personally interviewed nine judges and discussed their experiences related to translation and interpretation during the main proceedings.³² Based on the results of the questionnaire as well as our research we have identified the following aspects a judge should pay special attention to when dealing with an accused person who does not speak the official language of the proceedings.

I. Assessment of need and selection of an interpreter or translator

When the trial judge first receives a new case, i.e. the Prosecution has filed an indictment, he has to decide upon the need of interpretation assistance for the main trial. In practice, the judge has not been in contact with the accused person at this stage of the proceedings, which is why he has to base his decision solely on the content of the files. In many cases the files consist exclusively of the police records, including the interrogation of the accused person by

30 Consultative Council of European Judges (CCJE), Opinion no. 3 to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, para 24.

31 In Austria, Regional Courts in Criminal Matters have jurisdiction over crimes and offences carrying a minimum prison term of 1 year. Whereas crimes and offences carrying a maximum prison term of up to 5 years are ruled by single judges, more serious crimes are ruled by a panel composed of professional and lay judges or a jury.

32 Although roughly half of the judges replied to our questionnaire, we do not claim our survey to be representative for all criminal judges in the region.

the police, and the indictment. Both documents usually contain information on the language skills of the accused person, insofar as an interpreter was already present during the police interrogation or the prosecution formally requested interpretation assistance in the indictment.

In the course of our interviews, the majority of judges pointed out that these indicators cannot be relied upon entirely. Concretely, they stated that they would differentiate between cases where only the police records are available and cases where the accused person was taken into custody and therefore formally interrogated by a judge as well.³³ Although the interrogating judge during preliminary proceedings must not be the same as the one who is responsible for the main trial, the questioned judges pointed out that if the accused person was interrogated by a judge before, the information on the need of an interpreter is more trustworthy than the information they receive from the police. In cases where the accused person was solely interrogated by the police, judges stated that they would decide on the need of an interpreter with particular care. Therefore, they also check the content of police interrogations that were conducted without interpretation assistance for possible signs of a weakness of the accused person to understand the language of the proceedings, e.g. very short responses to complex questions etc. Finally, all judges stated that in case of any doubts regarding the accused person's language skills, they would rather decide in favour of interpretation assistance than not.

When it comes to the selection of a particular interpreter, the majority of judges prefer to appoint interpreters they have worked with before and have made positive experiences with, stressing the importance of opting for a good interpreter given the limited possibilities to verify the quality of an interpretation into a language they themselves do not understand.³⁴ When asked what makes them 'trust' an interpreter, they named positive feedback from persons present in the courtroom, good German-language skills, good legal understanding, knowledge of cultural backgrounds or in general the fact, that they have not experienced problematic situations with that particular interpreter. Similarly, when they need interpretation assistance in a certain language for the first time, they rely on the experiences of other judges.

³³ Aside from the requirements of probable cause and a reason for arrest, custody can only be imposed after formal interrogation of the accused person by a judge, see Article 173 of the Austrian Code of Criminal Procedure.

³⁴ Cf Kadrić, *Dolmetschen bei Gericht* (2009), 93f.

As established before, in cases where the interpretation and/or translation services of the Judicial Service Agency are available, judges do no longer have the possibility to “choose” a particular interpreter, but have to work with the one that gets assigned by the Agency.

II. Method and scope of interpretation assistance

1. Written translation vs. oral interpretation of essential documents

Due to the recent changes of Article 56 of the Austrian Code of Criminal Procedure, criminal judges competent for the main trial of criminal proceedings, are in practice confronted with the decision, whether they arrange the newly introduced written translation of essential documents *ex officio* or rather opt for an oral interpretation in the oral hearing, provided that the accused person is willing to waive his right to a written translation and the fairness of the proceedings is not prejudiced. In the context of this paper this concerns in particular the written translation of the indictment. The results of our survey show that more than a third of the judges provide for a written translation of the indictment available to the accused person *ex officio*, whereas half of the judges stated that in most or all cases the accused person makes use of the possibility to waive his right to a written translation at the beginning of the oral hearing. The rest of the participants indicated that they handle the right to written translation differently and arrange written translations *ex officio* from time to time. One judge further explained that he always provides for a written translation of indictments concerning more severe crimes that fall within the jurisdiction of lay judges or a jury, but opts for an oral interpretation of indictments that fall within the competence of a single judge.

These results confirm in a way the critics of the possibility to waive the right to written translation, that the use of the waiver has not remained the exception in practice. This is alarming insofar as that a translation in writing not only enables the accused person to deal with the accusations brought against him in more detail, but also gives the translators more time to craft their work. On the other hand, one judge questioned the added value of a written translation of documents that are complex and difficult to understand for non-lawyers. An oral interpretation of an indictment automatically serves as an opportunity for the judge to explain the charges to the accused person in an appropriate manner. It would, of course, be desirable to provide the accused person – especially in cases where he is not represented by a lawyer – with an oral explanation of an indictment in addition to a written translation, if need be.

2. Consecutive vs. simultaneous interpretation during a hearing

Simultaneous interpretation is the method of transferring the source language message into the target language while the source language speaker is speaking.³⁵ The best way to perform simultaneous interpretation is to whisper into a microphone while listening to the source language message through headphones with an adjustable volume control. By using such interpreting equipment, the “intrusiveness” of an interpreter in courtroom proceedings can be minimized. Otherwise, the interpreters must be seated close enough to the person requiring their services to allow clear audibility of whisper interpreting, while at the same time not interfering with the proceedings.³⁶ An interpreter using the consecutive method of interpretation, on the other hand, waits until the source language speaker pauses to render the original meaning into the target language.³⁷

In Austria, the standard method is consecutive interpretation, which is mainly due to the lack of the necessary technical equipment.³⁸ Whisper interpreting would require the interpreter to change his seating position in the courtroom, which is usually next to the judge and not next to the defendant.³⁹ The use of the method of consecutive interpretation was once challenged by an accused person and the Supreme Court of Austria ruled that Article 56 of the Code of Criminal Procedure does not provide for a right to simultaneous or whisper interpreting.⁴⁰ At the same time, the judge is free to opt for whisper interpreting, if he deems it necessary or useful. However, the judges we interviewed were rather sceptical towards that method of interpretation, arguing that it would distract them. One underlined that when using the consecutive method of interpretation, it is possible to concentrate more on the facial expression and the gestures of the accused person while speaking. Another one pointed out that he would welcome the use of simultaneous interpretation, but the interpreters are frequently not trained to provide it.

35 Balaei, *Notwendigkeit der Professionalisierung von Dolmetschern im Justizwesen* (2004), 50; De Jongh, *From the Classroom to the Courtroom* (2012), 16; Di Meglio, *Dolmetschen bei Gericht* (2011), 16.

36 De Jongh, *From the Classroom to the Courtroom* (2012), 17.

37 Balaei, *Notwendigkeit der Professionalisierung von Dolmetschern im Justizwesen* (2004), 50; De Jongh, *From the Classroom to the Courtroom* (2012), 17; Di Meglio, *Dolmetschen bei Gericht* (2011), 16.

38 Di Meglio, *Dolmetschen bei Gericht* (2011), 18; Kadrić, *Dolmetschen bei Gericht* (2009), 89, 141.

39 Kadrić, *Dolmetschen bei Gericht* (2009), 137.

40 Austrian Supreme Court of Justice, 3 April 2012, Decision 14 Os 6/12g, legal synopsis RS0075092 [T2].

The method of interpretation chosen by a judge also influences the scope of the interpretation provided. As the consecutive method automatically prolongs the duration of a hearing, the risk that not all parts of a hearing are translated, namely other occurrences than the actual interrogation of the accused person, is considerably higher when this method is applied. According to a survey conducted in Austria in 1998/1999 among criminal judges of District Courts in Vienna, in only one third of the cases the interpretation assistance covered the whole hearing,⁴¹ a result that is in line with the responses we received in course of our survey as well as our own experience. In practice, the scope of interpretation often depends on the amount of information the judge considers relevant for his decision. As a consequence, sometimes only the interrogation of the accused person speaking a foreign language is extensively interpreted, while witness interrogations conducted in German are translated merely in a strongly summarizing manner. Furthermore, in frequent cases procedural remarks of the judge and the pleadings of the prosecutor and the defense counsel are not interpreted for the defendant.⁴²

While most judges underlined that they would let all essential parts of a hearing be interpreted for the accused person,⁴³ the primary reason for not translating the entire hearing is to save time.⁴⁴ Considering that the omission of interpretation assistance for certain parts of the hearing can lead to the accused person not being able to follow the proceedings or to effectively exert his right to question other persons (other accused persons, witnesses etc), the judge needs to be especially aware regarding a possible violation of the accused person's rights to a fair trial in such a situation.⁴⁵

An alternative to safeguard these rights by interpreting more extensively without prolonging the hearing would be to use the consecutive method of interpretation only for the interrogation of the accused person and to have the interpreter seated next to the defendant during the other parts of the hearing for whispered interpretation.⁴⁶

41 Kadrić, *Dolmetschen bei Gericht* (2009), 136; Kadrić, *Sichtbare Gerechtigkeit in gedolmetschten Verhandlungen*, *juridikum* 2004, 195; Scheiber, *Dolmetschen bei Gericht und Behörden*, *RZ* 2006, 262.

42 Kadrić, *Sichtbare Gerechtigkeit in gedolmetschten Verhandlungen*, *juridikum* 2004, 195.

43 Kadrić, *Dolmetschen bei Gericht* (2009), 136.

44 Kadrić, *Sichtbare Gerechtigkeit in gedolmetschten Verhandlungen*, *juridikum* 2004, 195.

45 Kadrić, *Sichtbare Gerechtigkeit in gedolmetschten Verhandlungen*, *juridikum* 2004, 195; Scheiber, *Dolmetschen bei Gericht und Behörden*, *RZ* 2006, 262.

46 Kadrić, *Sichtbare Gerechtigkeit in gedolmetschten Verhandlungen*, *juridikum* 2004, 195; Kadrić, *Dolmetschen bei Gericht* (2009), 141.

3. Oral interpretation sentence by sentence vs. section by section

When using the consecutive method of interpretation, the judge can either pause after every sentence to be translated or speak up to several minutes, before he stops for the translation.⁴⁷ While the clear advantage of an interpretation sentence by sentence is that it tends to be more accurate, the advantage of an interpretation section by section is that the flow of a statement may easily be disturbed, when the questioned person is interrupted too often for interpretation. This may have negative implications for the establishment of the truth.

The results of our survey have shown that only 20 percent of the judges request the interpreter to translate statements sentence by sentence and 80 percent prefer an interpretation section by section. However, most participating judges added that it would depend on the specific situation. For instance, the examination of the accused person or parts of the proceedings that are very important are more often translated sentence by sentence, whereas witness testimonies are generally summarized and interpreted at the end of an interrogation. Accused persons that are not represented by a lawyer usually receive more detailed interpretations.

What could also be derived from the survey as well as the interviews we made with judges is that interpreting is also strongly influenced by quality of the co-operation between judge and interpreter. Many interpreters interrupt the interrogation themselves at a certain point in order to translate what has been said so far.

4. Dissociating vs. confounding roles of the judge and the interpreter

In general, it is an interpreter's responsibility to act as an intermediary between the various parties of the proceedings by conveying messages into another language and thus enabling efficient communication.⁴⁸ However, our survey revealed that several judges tend to assign typically judicial tasks to interpreters. According to more than half of the participants, it is, for instance, part of an interpreter's duties to clarify vague statements by asking follow-up-questions without further instructions by the judge. Also, at least 38 percent of the participating judges expect an interpreter to autonomously summarise long-winded statements.

47 Balaei, *Notwendigkeit der Professionalisierung von Dolmetschern im Justizwesen* (2004), 50; Di Meglio, *Dolmetschen bei Gericht* (2011), 16.

48 Cf Kadrić, *Dolmetschen bei Gericht* (2009) 23, 47f.

Nearly 70 percent of the participants expect an interpreter to simplify or explain legal terms on his own. In course of a similar survey conducted in 1998/1999 among 133 judges of District Courts in Vienna, 72 percent of the participants stated that an interpreter should be able to make common legal explanations and instructions on his own as, for example, the caution to speak the truth.⁴⁹ Several of the judges interviewed agreed that they leave the making of cautions to interpreters, when the latter are already familiar with the procedures of a hearing or when they already know the interpreter well and have confidence in his abilities.

In the course of our survey, the participating judges were finally asked if, in case a non-German speaking defendant shall be informed about the content of a witness statement provided in German, they sum up the statement for the interpretation themselves or leave it to the interpreter to autonomously summarise the statement for the defendant. In general, around 40 percent of the judges reported to sum up themselves while around 60 percent assign this task to the interpreter. However, several participants stressed that their definite approach depends on the specific situation. Decisive factors are, on the one hand, the experience and the professional ability of the appointed interpreter, and, on the other hand, the length, the complexity and the significance of a statement. If a witness statement or parts of it are deemed crucial for the court's decision, judges tend to summarise the essential points themselves. One judge pointed out that in case the interpreter is summarising, she occasionally checks with the interpreter if certain important details of a statement have been interpreted.

Assigning some actual judicial tasks to the interpreter can be convenient and time-saving. Also, it is quite possible that interpreters on various occasions fulfil the assigned tasks in a satisfying manner. However, as several of the interviewed judges pointed out, it has to be kept in mind that by leaving judicial duties to an interpreter the judge in some kind of way gives up the ultimate control of the hearing. For this reason, these judges adhere to a close and exact interpretation of the defendant's as well as of their own statements, without autonomous summaries, clarifications and explanations. They want to hear everything the defendant states and be able to decide by themselves, which parts of a statement are essential for their decision. This may be the reason why only 18 percent of the participants in our survey agreed that an interpreter should abstain from interpreting peripheral parts of a statement to avoid a loss of time. Apart from that, an originally vague statement of the accused person may have implications for the consideration of evidence.

⁴⁹ Kadrić, *Dolmetschen bei Gericht* (2009), 129.

It is also to be mentioned under the aspect of the distribution of roles between judge and interpreter that it is very important for the judge to communicate with the accused person directly, even though they do not speak the same language, which includes looking at the accused person while questioning, addressing questions directly at the defendant rather than the interpreter and avoid speaking of the defendant in the 3rd person.

III. Verification of the quality of interpretation assistance provided

Most judges participating in our survey stated that it is generally not possible to verify the quality of an oral interpretation provided during the main proceedings unless the judge knows the language himself. However, when asked, whether they have ever been in a situation that caused serious doubts concerning the quality of interpretation, roughly 90 % answered in the affirmative.

They named several examples that made them doubt the quality of an interpretation, although they did not have profound knowledge of the language themselves:

- Other persons present in the courtroom point out discrepancies between the statement and the interpretation. Sometimes, employees of the court, such as trainees or secretaries, or spectators can speak both languages and be of help in this regard. Furthermore, several lawyers acting in Austrian courts have – in addition to German – profound knowledge of the language spoken by their clients. Of course, in such cases it has to be kept in mind that possible objections do not necessarily have to be legitimate, so the judge still has the obligation to further examine the objections.
- The interpreter himself does not have good knowledge of German and the judge feels that he was not capable of understanding the information to be interpreted and is therefore unable to pass on the entire information without shortening or distorting it. In particular, persons with weak knowledge of a language usually tend to have difficulties translating the necessary legal terms.
- The interpreter repeatedly asks either the judge or the accused person to repeat or clarify a phrase that should be interpreted.
- The duration of either the judge's question or the accused's statement does not fit the duration of the interpretation. For example, the accused person talks to the translator

for five minutes and in the end the translator tells the judge that the accused person could not answer the question.

- The answer of the accused person does not correspond at all to the question posed by the judge. However, judges underlined that a situation like this can also happen when the accused person speaks German fluently.
- The accused person obviously does not understand the interpreter or the other way around. Sometimes an interpreter points out that the communication does not work, for instance due to the fact that the accused person speaks a specific dialect. Other times, one can also tell from the facial expression of the accused person that he has problems understanding the interpreter. Finally, many accused persons have enough knowledge of German to understand a conversation, even if they are not capable to make a statement on their own, so they are able to point out discrepancies between their statement and the interpretation.
- Dates, names or places, which are often similar in both languages, are missing or differ in the interpreted version. Some judges pay particular attention to such terms in order to verify whether a statement is interpreted in its entirety or parts of it are missing.

Whenever such a situation occurs, it is within the judge's responsibility to react accordingly in order to safeguard the quality of the interpretation assistance and therewith the accused person's right to a fair trial. The judges who participated in our survey responded that they would exchange the interpreter in very severe cases, for example when it turns out that the accused person does not speak the same language as the interpreter or a specific dialect of that language. This is most likely to happen when the judge appoints the interpreter solely on the basis of the information provided in a police interrogation record.

Apart from the *ultima ratio* of exchanging the interpreter the judges named the repetition or simplification of questioning as well as the interpretation in shorter sections or even word-by-word as other countermeasures when doubts regarding the quality of an interpretation have arisen. Further ways for the judge to react to weaknesses of an interpreter is to summarize testimonies himself before the translation, instead of leaving that task to the interpreter. A possibility to react to deficiencies of an interpretation, that only turned out at the end of a hearing, is to at least record in the minutes of the hearing the fact, that possible discrepancies

of a statement could be due to problems with interpretation. Finally, some judges ask the interpreter to take notes during the hearing to ensure that no information gets lost in translation.

D. Conclusion

The example of ensuring the right to translation and interpretation in criminal proceedings shows that the role of a judge goes beyond simply applying laws. While criminal judges are bound to provide accused persons unable to understand the official language of the proceedings with translation and/or interpretation assistance, in order for them to have knowledge of the case brought against them and to defend themselves, many important matters such as the method or scope of assistance to be provided are not regulated in detail. This gives criminal judges a high discretionary power on the one hand, but also faces them with additional challenges in safeguarding fair proceedings on the other hand. In lack of detailed legal regulations and/or disciplinary consequences for a judge, the importance of judicial ethics and professional conduct of a judge becomes all the more apparent.

As established, with regard to the right to translation and interpretation it is not only difficult for the judge himself to verify the quality of an interpretation service provided, but the possibilities to challenge decisions related thereto are also limited. This is particularly true for oral interpretation services during the main trial. The criminal judge should therefore never rely entirely on the interpreter and always rest attentive to shortcomings regarding the interpretation service that could endanger a fair trial for the accused person.

From an ethical point of view it is also part of the judge's responsibility to give the accused person the feeling that his lack of language knowledge does not pose a burden for the court or could even have a negative impact on the final decision. Situations where a judge shows impatience towards an accused person who is in need of interpretation assistance or even pressures the accused person to waive his rights to translation in order to speed up proceedings should therefore occur under no circumstances.

The results of our survey have not only shown that the vast majority of judges is aware of the specific challenges related to interpretation and translation assistance during the main phase of criminal proceedings, but they are also willing to invest the extra work and time that is needed to ensure these rights. They further named several signs or situations that make them

aware of possible deficiencies of an interpretation and enable them to react in time, even though they themselves cannot speak the second language. These indicators reported by the judges are, however, mostly based on their personal experiences in the courtroom. The majority of the judges were not specifically trained to recognize weaknesses of interpretations, as only one third of the participants have attended seminars concerning the interaction between judge and interpreter during their career.

In Austria, for several years the aspect of “interpretation assistance” has been covered in the training phase for all candidate judges in the course of a seminar on fundamental rights, which has, in fact, inspired us to choose this topic. Considering the high number of criminal proceedings involving accused persons unable to understand the official language and the importance of high-quality interpretation in order to safeguard their essential procedural rights, a further expansion of on-the-job-training activities for judges with regard to the interaction with accused persons and interpreters would be highly desirable.⁵⁰

⁵⁰ Not least, Article 6 of the Directive explicitly refers to the particularities of communicating with the assistance of an interpreter and the need to integrate this aspect in the training curricula of the judiciary.

BIBLIOGRAPHY

Austrian Code of Criminal Procedure, BGBl Nr. 631/1975

Austrian Ministry of Justice, Financial consequences of the Law Amending the Code for Criminal Procedure 2013 on the state budget, <https://www.justiz.gv.at/web2013/file/2c9484853e44f8f9013e7f441b5a4859.de.0/vorblatt.pdf>

Balaei, Notwendigkeit der Professionalisierung von Dolmetschern im Justizwesen (2004)

Bockemühl, Jeder ist Ausländer – fast überall: Zur Umsetzung des Anspruchs des Beschuldigten auf ein faires Verfahren durch § 56 StPO, JSt 2014/3, 225

Consultative Council of European Judges (CCJE), Opinion no. 3 to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality

Council of the European Union, Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 30 November 2009, OJ C 295/1

Danek, § 271a Rz 1, in *Fuchs/Ratz*, Wiener Kommentar-StPO (2009)

De Jongh, From the Classroom to the Courtroom (2012)

Di Meglio, Dolmetschen bei Gericht (2011)

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to translation and interpretation in criminal proceedings, OJ L 280/1

Dokalik/Weber, Das Recht der Sachverständigen und Dolmetscher³ (2013)

European Commission, 31st Annual Report from the on monitoring the application of EU Law, 1 October 2014, COM (2014) 612 final, 5

Grabenwarter, European Convention on Human Rights (2014)

Haißl, § 56 StPO, in *Schmölzer/Mühlbacher*, StPO Strafprozessordnung Praktikerkommentar (2014)

Kadrić, Dolmetschung als Ausdruck staatlicher Fürsorgepflicht – neue Impulse durch die RL 2010/64/EU, *juridikum* 2012, 76

Kadrić, Dolmetschen bei Gericht (2009)

Kadrić, Sichtbare Gerechtigkeit in gedolmetschten Verhandlungen, *juridikum* 2004, 195

Law Amending the Code of Criminal Procedure 2013, BGBl I 2013/195

Rabussay, Das Recht auf Übersetzungshilfe vor dem Hintergrund der RL 2010/64/EU und des Budgetbegleitgesetzes 2011, *RZ* 2011, 263

Rules of Procedure of the Courts of first and second Instance, BGBl Nr. 264/1951

Scheiber, Dolmetschen bei Gericht und Behörden, *RZ* 2006, 262