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## THE RISKS OF INTERROGATION WITH THE HELP OF AN INTERPRETER IN THE CRIMINAL PROCEDURE

**Abstract.** During the criminal procedure, the process of verification includes the reconstruction of past events for the sake of establishing the statement of facts. When it comes to exploring the events in the past, great significance can be attributed to personal evidence. In order to prevent the influencing of the interrogated person, many provisions of guarantee had been established in the criminal procedure. In such an interrogatory situation, the most difficult practical problem is how to word the question so that the interrogation would aim at the exploration of the mind of the witness or accused, and at the helping of the recalling of the memories. During the criminal procedure however, interrogation with the assistance of an interpreter could also result in the communication of the statements of the accused or the witness about their perceptions and original knowledge with modified contents. Another significant factor at interpreter-assisted interrogations is to avoid the will of either the interrogator or the interpreter being projected on the interrogated person, as that would threaten with the witness, the accused, or the interrogated person giving a confession that is different from their original content of consciousness.

*Keywords:* interrogation, criminal procedure, personal evidence, court trial.

### **The exceptional significance of personal evidence, the role of the contradictory procedure, and the justifiability of the necessary guarantees**

In the criminal procedure, the task of the court is to establish a well-grounded statement of facts, and to make a decision based on that.

The Anglo-Saxon and the Continental legal systems are based on significantly different foundations, principles, and values, as far as the reaching of the goal of the criminal procedure is concerned. One of the most important principles of the Anglo-Saxon court procedure is the principle of directness in the following sense. It is known from previous case-law that

when guilt is questionable in a given procedure, conclusive witnesses have to confess in words, the accused has the right to question the statement of the witnesses of the prosecution during cross-questioning, and indirect evidence (e.g. hearsay evidence) cannot be used in the English penal procedure (R. Végvári, 2005: 207). In the Continental legal system, one may primarily analyze the active, trial-leading role of the judge during the process of verification, as opposed to the passive, rather inquisitorial nature of the judge of the Anglo-Saxon legal system. “The prosecution and the defense can participate in the verification, they may ask questions, may suggest the analysis of further evidence, however, their rights are restricted to such an extent, that their role is subordinate, and may often be limited to that of a well-trained audience to the actions of the judge” (Joachim, 1993: 298). The contradictory nature of the principle of directness – appearing with more or less success – and its advantages surface in the criminal procedure system of certain countries with different emphasis even inside the Continental system of law. In the German law, for example, although the principle of directness is similar to the prohibition of the English law on indirect verification, it has only a complementary, and not a disqualifying nature, it cannot prevent the judge from hearing a “hearsay” evidence. The Hungarian criminal procedure law does not enlist the principle among the primary provisions, but we may find references to it in the general rules of court procedure. Next, I shall analyze the role of the contradictory procedure in regard to the Hungarian criminal procedure law, and in a more narrow aspect therein.

A central part of the criminal procedure is the court trial. During the exploration of a well-grounded statement of facts, one can attribute, among the means of verification that formulate the rational conviction of the judge, great significance to confession, as personal evidence. In many cases, it is the principle of directness that allows for the proceeding judge to, for example, perceive a decline in the mental state of the accused that influences both the criminal procedure and the sentence, which information could get lost when an interpreter is mediating, due to and hiding behind different linguistic characteristics. The obtaining, and later, the evaluation of personal evidence demands great attention from the proceeding judge, as it could, by nature, easily mislead the process of verification. During interrogation and over its course, the execution of adequate supervision is required from the court, in order to guarantee the legal obtainment of evidence. Accordingly, the process of questioning (its manner, content and justifiability) – that influences the course of interrogation perhaps to the greatest extent – needs to be kept under appropriate control. The presiding judge must ensure that

the manner of questioning does not damage the human dignity of the interrogated person, that the question is not suitable to influence anyone, that it does not include the answer, that it refers to the case, that it is asked by the competent person, it does not hurt the authority of the trial, and it is not aimed again and again on the same fact. On failing to do so, the obtained personal evidence cannot be used as evidence during the procedure, according to procedural law (Act XIX of 1998 on Criminal Proceedings, Section 290 (2) and (3), Section 293 (2), Section 78 (4)).

In compliance with the principle of directness as our principle of procedural law, the court should base its conclusive decision on original sources of verification analyzed directly, on the grounds of its personal perception. A very significant element of the principle of directness is the requirement of a contradictory procedure, according to which the analysis of evidence has to take place with the participation of the prosecution and the defense, under the criticism of prosecution and the presence of defense. It is undoubtedly to the advantage of the exploration of a well-grounded statement of facts if the participants of the procedure have a chance to fully clarify what has been said with the help of the person giving the confession, based on what he or she said, and by directly reacting to it. Clarifying questions can have an exceptional significance, if one pays special attention to the word usage of the confessor, and to the occasionally perceivable disturbance in their presentation. Deciding over the necessity of all this in the procedure of the obtainment of personal evidence is not an exclusive right of the court, but also of the representative of the prosecution and the defense, striving for the fuller and fuller assertion of their procedural aims. Furthermore, the representatives of the different procedural roles possessing the knowledge of the art of expedient questioning serve fully the performing of their own procedural duties by the recognition of the admissibility or even deniability of the questions of each other, or of the answering of the same.

The most effective means for influencing in communication is the application of the appropriate type of question or questioning technique (Kövágó, 2009: 160). Certain questions are suitable to influence both subsequent remembering and the answers given based on that. Interrogation includes the reconstruction of past events, the presentation of things seen or perceived by the interrogated person via the reviving of memories about them. During questioning, the facilitation of this recalling process is allowed, however, questions of leading nature, questions that include the answer and qualify as suggestive cannot be asked during the procedure. Questions that can have a suggestive effect are, among others, assuming questions and expect-

ing questions, but declaratory statements given with a questioning tone can have a suggestive effect as well. In case of an assuming question, the need for a knowledge about a circumstance is worded in a way that at the same time, another circumstance, that assumes the establishment of the first one, is worded as being factual. (Has the lock on the gate become unusable?) The expecting question prepares a particular answer, which in many cases leads to the birth of an untruthful confession. The recognition of the appearance of these forbidden types of questions is difficult in practice, and it is reasonable to take many evaluating factors into consideration. It is quite difficult to ask a question that does not suggest the opinion of the interrogator. When using different types of questions and wording, one may expect different answers as well. Thus, certain questioning techniques have secondarily a controlling and leading function as well. According to other opinions however, this secondary function of questioning is applicable to all questioning, regardless of its content and linguistic structure. According to Lempp, a question always contains assumption and presumption in an implicit way, over which the participants cannot always have command at their free will (Lempp, 2002: 397). The procedural rules of guarantee regarding interrogation, when asserted, fundamentally serve the prevention of influencing. Influencing can even endanger the establishment of the objective truth (Elek, 2007: 142).

It is quite a demanding expectation of practice, to appropriately word a question. The interrogator is expected to possess the necessary knowledge regarding the questioning techniques and the different effects of the different types of questions. We can find an endless row of question types in studies of special literature: leading questions, test questions, loaded questions, control questions, questions with a focus on a conclusion, and the list goes on and on.

### **The right to use one's native language, the right to an interpreter in the criminal procedure**

One of the basic principles of the right to have a fair trial is the "legal presence" of the accused at the court, which presence, taken in a legal sense, assumes a "linguistic presence" as well (González, 1998: 53).

The development of human rights and language rights after the Second World War introduced the establishment of the right to interpretation or

translation as well. In the history of the declaration of the right to interpretation, the European Convention on Human Rights (1950) drafted by the Council of Europe can be considered a milestone, which records the following as part of a fair trial:

Everyone charged with a criminal offence has the following minimum rights:  
to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him. (Section 6, Point 3/a)  
to have the free assistance of an interpreter if he cannot understand or speak the language used in court. (Section 6, Point 3/e)

The same rights are established by the International Covenant of Civil and Political Rights (1966) drafted by the General Assembly of the United Nations.

The European Parliament accepted with great majority the Directive 2010/64/EU of the European Parliament and of the Council, which sets out the common minimum rules in the field of interpretation and translation in criminal proceedings, to improve mutual trust between European Union countries.

According to the Directive, cost-free and satisfactory linguistic assistance must be provided, to ensure the ability of the persons being suspected or accused of a criminal offense who do not speak or understand the language of the procedure to exercise their right to defense, and in defense of a fair trial.

Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings. (Section 2 (1))

It is important to emphasize what is established in Section 5 of the Directive, that discusses the quality of interpretation and translation to a great detail, emphasizing training and qualification. The practical background is a complaint often mentioned in the trade, namely, that court interpretation is provided by interpreters without proper training and court experience.

By November 2013, the Parliament of Hungary adapted the provisions of the directive into the national law (however, it does not include the requirement of the appropriate qualification of the interpreters employed during the criminal procedure).

In criminal proceedings all those involved may use, both verbally and in writing, their native language, or, pursuant to and within the scope of an international agreement promulgated by law, their regional or minority language, or – failing to command the Hungarian language – another language defined by the party concerned as a language spoken. (Act XIX of 1998, Section 9 (2))

If a person whose native language is not Hungarian, intends to use in the course of the proceedings their native language, or – pursuant to and within the scope of an international agreement promulgated by law – their regional or minority language, an interpreter shall be employed. (Act XIX of 1998, Section 114 (1))

As a summary, it can be said that every citizen of the European Union has a right to have an interpreter of their native language and translation during a criminal procedure against them. Interpretation and translation should be provided from the announcement of the fact of being charged until the very end of the proceedings, and their scope should include interrogation, the conversations with the lawyer, and also the court trial.

The employment of official interpreters with the suitable degree, qualification and skills ensures the following advantages for the state and its citizens:

1. legal safety
2. transparency of jurisdiction
3. assertion of the right of the persons involved in the procedure to a fair trial
4. protection of information
5. acceleration of proceedings, the elimination of obstructions resulting from not qualified interpretation

### **The mediation of the interpreter – the difficulty of the assertion of guarantees**

Court interpretation is an activity employed for the sake of the establishment and continuation of communication between those participants of the procedure who speak different languages. The collection and evaluation of the personal evidence prior to the application of the penal law sanction, and the possible exploration of the statement of facts depend on the interpreter proceeding appropriately in case the procedure has participants of different languages.

The court interpreter has an exceptional authority during procedures, and thus, during criminal proceedings as well, as he or she is the only person understanding all the remarks in the courtroom. However, avoiding even the

smallest change or modification during the presentation of the understood information is a very difficult task, the primary reasons of which I will discuss below.

The prominent significance of court interpretation comes from the specifics of the proceeding, namely, that human lives are at stake. Regarding the penal sanctions determined based on the statement of facts established during the procedure, and on the legal evaluation, we may consider, among others, the sentence of incarceration – which does not only greatly influence the future of the person accused, but also that of his or her closest family members' well-doing. We can also think of the alternative amount of a fine, that has a great influence on one's sustenance.

One of the most important basic principles of court interpretation is the principle of neutrality. All the parties at issue with each other expect that the interpreter will not modify the linguistic form of their presentation, or any small detail of what they have to say. It is important to mention, that the interpreter is not given any authority to decide over what has been said, his or her opinion cannot influence the outcome of the case. His or her duty consists only of the decryption of the intention of the presenter, the interpretation of the linguistic message and the creation of its target language counterpart (Horváth, 2012).

The basic principle of neutrality is closely connected to the principles of linguistic exactness and of accuracy in the reproduction of the text. For the sake of all this, the interpreters have to take an oath at the beginning of criminal proceedings that they would interpret faithfully, fully and accurately.

Other important basic principles of interpretation are discretion and professional behavior.

The task of the court interpreter is not only word-by-word translation, their role is to understand what is said, and to mediate on a linguistic level. During dynamic interpretation, the understanding and forwarding of the message of the speaker is sustainable in the possession of appropriate linguistic and non-linguistic background knowledge and of professional experience. Word-by-word interpretation is not expedient. Languages are rich in different expressions and collocations, and if loan translation is used for these, the original message will not be recognizable. The differences between the criminal proceedings, the legal systems and the different use of concepts also make the understanding and mediation between speakers of different languages complicated. This can aptly be described by the example of traffic. When arriving to a country from another one, the appearance of traffic signs is somewhat different, but they serve the same purpose. It seems to be

a more complicated task to get used to driving on the left lane in another country instead of the right, but this is not an insolvable problem either (Horváth, 2013: 31).

When an interpreter is mediating, the procedural guarantees mentioned above will not be asserted completely. Besides linguistic differences, interpretation is further complicated by differences in culture and legal systems (Horváth, 2013: 31).

### **A good command of the art of allowed questioning techniques**

Questioning can influence witnesses even when their native language is the same as of the interrogator. This influence can appear in any way, from the most innocent, almost imperceptible kind to the quite intimidating, inductive, thus, largely influential questions.

A question that is asked in front of everyone in the courtroom, and which is fully meeting the regulations, might transform into a forbidden question type, when conveyed by an interpreter who is less aware of the comprehensive knowledge on the questioning technique of the criminal proceedings. A question formulated by the court and hiding any subjective opinion might be conveyed with the expression of the interpreter's subjective train of thought when it is translated for the interrogator. Naturally, such influencing behavior of the interpreter, who is fundamentally not interested in the outcome of the case, happens usually involuntarily.

Regarding the interrogating mechanism of the criminal procedure and influencing, we can read the following statement: "The risk of influencing is greater with the questions asked by the parties, than with the questioning done by the court (Elek, 2007: 145)". In case of an interpreter assisting, this statement should be corrected as: the risk of influencing is significant in case of both questions asked by the parties, and questions asked by the court.

### **Difference between the resources of linguistic expressions**

The questioning technique built up by the court from consciously, intentionally picked words will have significantly less effect, as far as the possibilities coming from the questioning tactics are concerned, due to the mediatory

role of the interpreter – but more directly due to the different possibilities and significantly different resources of the way of linguistic expression.

As is well-known, the statement of facts in a criminal trial can be established by the very careful analysis and comparison of the words and expressions of those giving a confession.

During the interrogation of the accused/witness, speech and language has a central role in verification and even in the outcome of the penal proceeding.

Although without the support of exact numerical data, but it can be said, that Hungarian language belongs to the group of languages with richer vocabulary since very old times.

## **FACTS**

The interpreter is required to choose appropriate wording with the utmost caution, during his or her linguistic mediation both toward the interrogated participant of the procedure and toward the judge.

Hungarian language includes many polysemic words. When using our polysemic words, the interpreter has to go through the thought-process of exactly pinpointing the meaning relevant in the given context before translating it into another language. One needs to choose the word that corresponds the most from the vocabulary of the other language – which of course also offers the possibility to use many words with an identical, or synonymous meaning – after that. On the list compiled during the research with the aim of collecting those words of the Hungarian language with 25 or more meanings, one can find not only function words and verbs, but also adjectives (Papp, 1977: 157).

One is able to consider an especially extensive vocabulary, and as a result, a complex way of expression regarding every language. The diversity of our language enables us to richly describe what we want to say, in many cases without the smallest difference in meaning. However, one needs to pay close attention to the possible different meanings of words and expressions that are to be used. During the criminal procedure – which strives to establish the statement of facts that provides the basis for the court decision based fundamentally on past events presented subsequently and on the obtained evidence –, a difference in meaning that qualifies as a minor one in everyday word usage, might lead to the establishment of a significantly different statement of facts and of a different sanction. The assistance of an interpreter who serves the right course of investigation, and helps this investigation by carefully selecting the linguistic means and expressions is extremely important during the proceedings.

When establishing the statement of facts, defining the time of the perpetration as accurately as possible has a great importance. Hungarian language knows at least seven or eight synonymous words for describing the time of dawn (*hajnalodik*): *dereng*, *hajnallik*, *hajnalodik*, *pirkad*, *pitymallik*, *szürkül*, *virrad* (*megvirrad*). Daybreak does not happen in under a few seconds – in the summer it can last for more than an hour (Balassa, 1977: 186). Many languages, however, do not have such a diverse, continuous verb-system that is able to signify the exact period of the process of dawning. Thus, in intercultural communication, the information told by the parties speaking might be losing some of its accuracy due to the differences between the vocabulary of languages. The speaker, the mediator will gloss the exact meaning of information, if, instead of a carefully defined notion, he or she is forced to use a more generic phrase, due to linguistic characteristics. Apart from the generalization that leads to the blurring of information, the process is hindered further unfortunately by the involvement of the interpreter, a third person necessary because of the different linguistic knowledge of the speakers. The interpreter, as a person who is positioned outside of the process and willingness of providing and obtaining information, is forced during his or her work to mediate information between speakers of languages of quite different vocabularies without being aware of the exact intention, consciousness and aim of the parties. The third person, who enters the communication between the participants of the procedure residing on the two ends of the establishment of the statement of facts (namely, the exact interrogator and the person providing information) necessarily due to the difference in the linguistic knowledge, can modify the content of information in the communication to a significant extent.

### **Intercultural communication**

People who belong to different cultures do not only speak different languages, but – what is even more decisive – they also even perceive the world itself in a different way (Hall, 1987: 25).

Criminal procedure often also becomes a stage for intercultural communication. Intercultural communication is a type of communication, “during which the cultural comprehension and symbol systems of the people starting interaction with each other are different to such an extent that they modify the event of communication” (Samovar, 2007: 10). So in this form

of communication, verbal and non-verbal messages are exchanged between at least two people coming from different cultures.

Cultural and linguistic differences often greatly obstruct the full, or in many cases, even the partial understanding of the subjects of communication.

Words, expressions and symbols are formed among the circle of the members of different cultural communities as a result of a long historical development. Their use and purpose inside the given community is generally accepted and understandable. Beyond the denotative meaning of symbols, namely, beyond the lexical, literal meaning of the word, the connotative meaning – or its absence – can lead to the misunderstanding of the parties. Connotative meaning also includes the subjective associations of the user under the scope of the expressed thought. In order to present the layers of meaning of a symbol, one can mention the word “dog” as an example, the denotative meaning of which embodies a four-legged mammal basically. Regarding connotative meaning, differences appear between cultures. Certain cultures consider it a household pet, others, an unclean creature, and again others, food. To understand information during the meeting of different cultures, it is naturally very important to be aware of the denotative meanings, and it can be said that the lack of knowledge about the connotative meanings between cultures can lead to serious misunderstandings. (One good way to avoid such misunderstandings is to take into consideration, by ensuring the principle of directness, the direct perceptibility of the court and the perception of the non-verbal signs accompanying the presentation of the participant of the procedure giving confession, or presenting an answer.)

The different styles of presentation and speech in different cultures can also be a source of misunderstandings. We can differentiate between, among others, direct, indirect, vivid, subtle, complementary, informal, formal, personal, contextual, instrumental and affective styles.

In cultures using the direct way of speech (the United States, England, Germany), individuals express their intention openly, while the ones using the indirect way (Asian cultures) express their thoughts often in an ambiguous, easily misreadable fashion (Neuliep, 2006: 261).

The vivid style bases expression to a great extent on rhythm and the intensity of tone, the complementary style only shows the factual tone of the message alone, while the subtle style is characterized by an emotionally reserved delivery (Ting, 2005: 178).

Based on the length of speech and the difference of the applied volume, we can differentiate between refined, exact and concise styles. The refined

delivery of Middle-East is often colored by different metaphors, similes and attributes. The exact style is a characteristic of the Americans for example, while the concise style is usual in Japan and China, where silence has a great positive significance (Neuliep, 2006: 264).

The instrumental style (for example in the United States and Canada) is aim- and result-oriented via persuasion and influencing, and draws understanding into the speaker's own scope of responsibility, while the affective style (for example Japan, China) pays more attention to the process of communication itself, while sharing understanding between the speaking and the listening party (Neuliep, 2006: 268).

The silence used by the person giving confession requires different evaluation as well. A long silence has a rather negative meaning in Western cultures, whereas it is expressing respect and agreement. However, just to undermine the unanimity of interpretation, Eastern cultures also have a silence with a meaning of disapproval as well (Gudikunst, 2003: 61).

One of the greatest difficulties of the job of interpreters mediating in an intercultural communication is the use of idioms. Idioms are expressions, from the word-for-word translations of which one cannot draw any conclusions about their meaning, they are symbolic stock phrases with a figurative meaning. Every culture has its own specific, idiosyncratic idioms.

It must be noted however – which can make the understanding of the thoughts expressed by the subjects of communication even more difficult –, that the meaning of many used abstract notions can be varied by the personality and the experiences of the individual, and by many other factors. Thus, the personal meaning behind such abstract notions as *beauty* or *freedom* may differ even between individuals who belong to the same cultural community.

“For the successful mediation of communication, one must have a knowledge about the culture of the involved parties. Statements should not be transplanted to the language of another culture semantically, but according to the intention of the message.” As the aim is fundamentally to reach the same effect (Hidasi, 2004: 73).

### **Situation (gifts):**

*Ez egy nagyon finom vörösbor, állítólag Liszt Ferencnek ez volt a kedvence, remélem, hogy Önnek is megnyeri a tetszését.* – “This is a very fine red wine, allegedly the favorite of Ferenc Liszt, I hope You will like it as well.”

*This is a bottle of red wine, many people claim it to be a quite good one...* – English people do not approve of open praising, especially when it comes to gifts that are to be given.

Amari oishii mono dewa nai keredomo, o-kuchi ni awanai kamoshira-masenga... – “This is not a very tasty wine, I am afraid You will not even like it...” – Despite the same intention, the Japanese wording is almost the opposite of the Hungarian one.

We can see that an expression delivered with the same semantics would serve the expression of a significantly different intention.

Considering this, the court interpreter can basically act with full power (deviating from word-by-word translation) in the formulation of the sentences of questioning and confessing for the sake of the accurate mediation of intentions and messages, which activity is almost unverifiable by either the court, the prosecution or the defense, and thus, hinders the practical assertion of the principle of directness, of the contradictory process and of the direct conviction.

## Conclusions

We can see that in case of the involvement of an interpreter made necessary due to the different languages spoken by the participants of the procedure, how many diverse and also complex obstacles are there in the way of appropriately securing those criminal procedure guarantees – serving primarily the prevention of influencing, and thus, the establishment of the statement of facts – that need to be asserted during the obtaining of personal evidence and the interrogation. But this threat to the success of verification at interpreter-assisted interrogations is only amplified by the fact that neither the interrogator, nor the opposing party (prosecutor-defense) can express their objection against an ill-formed question due to a lack of linguistic knowledge. One of the components of the principle of directness, or, the requirement of the contradictory procedure – when the examination of the evidence and the obtaining of personal evidence happens in the crossfire of prosecution and defense – cannot be asserted in practice.

Thus, an interpreter-assisted interrogation can necessarily only provide personal evidence of lesser quality, as the principle of directness is asserted only indirectly and with a lesser quality.

The fact-finding activity of the court is an *ab ovo* indirect cognitive activity based on factual conclusions, as it is not directly perceiving the fact that is to be verified. Indirect verification means further mediation (transposition).<sup>1</sup> By citing the original question raised by János Neumann, Flórián Tremmel formulated the most fundamental question of verification, using the language of information theory. “How can one create a (practically)

fully reliable system based on not fully reliable elements – so for example, on indirect evidence that only provides a basis of probability implication? In other words: how can one reach sufficient total evidence or complete verification.”<sup>2</sup>

In case of having indirect evidence, the proceeding court undoubtedly faces a cognitive process, and an evaluating, and conviction-formulating process that is more complex and complicated. It is generally accepted in the literature of law that standalone indirect evidence is not actual evidence, and it can provide only the basis of probability implication.<sup>3</sup> The need for further wide-scale verification is formulated. Regarding the acceptability of indirect evidence, one needs to examine the factual and objective nature, logical closure and relevance.<sup>4</sup>

According to my view, the personal evidence of a lesser quality – due to the limited possibilities on asserting the procedural guarantees discussed above – acquired via interrogation mediated by an interpreter should fall under the same legal judgment as indirect evidence.

#### N O T E S

<sup>1</sup> Kúria Bhar.III.1.475/2011/8.

<sup>2</sup> Flórián Tremmel: Evidence in criminal procedure. Dialóg Campus, Budapest-Pécs, 2006. pg. 126

<sup>3</sup> Naturally, a sentencing cannot be put in force as per the general rule based on a direct evidence (confession of an accused), but the factual question that provides a basis can be decided on.

<sup>4</sup> Balázs Elek: Connections between judicial conviction and the statement of facts. In: Jura 2014 XX./1. pg. 40–50

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