

## THIRD STUDY COMMISSION QUESTIONNAIRE 2020 COSTA RICA

### A. Interpretation in criminal courts

1. What criteria must be met for an interpreter to be appointed? Does this differ if it is for a party to the case, or a witness?

An interpreter is defined in the Austrian Code of Criminal Procedure as a person who because of special skills is in a position to translate from the language in which the proceedings are conducted into another language or translate from another language into the language in which the proceedings are conducted. Further than that the law does not set any specific criteria, so there is also no difference for whom the interpreter is appointed.

2. Is the interpretation limited to certain languages?

No, which makes it difficult in certain cases to find a suitable person.

3. Who appoints the interpreter?

Interpreters must be appointed when a person is questioned who is not familiar with the language in which the proceedings are conducted or when documents essential to the investigation need to be translated into the language in which the proceedings are conducted.

To ensure interpretation assistance by the criminal investigation authority (i.e. the police), this authority has to appoint a suitable person provided by the Federal Ministry of the Interior or by a contractor on behalf of the Ministry.

The prosecution authority or the court should appoint as interpreter a suitable person provided by the so called Court Support Agency on behalf of the Federal Ministry of Justice. At the Court Support Agency, a few interpreters are employed for the most common languages, which means they have certain working hours, in which they are available and for which they get a predefined salary.

If no suitable person can be provided or cannot be provided in a timely manner by the Court Support Agency, another suitable person may be appointed as interpreter. Priority must then be given to persons registered in the expert witness and interpreter list maintained by the court. The presidents of the regional courts maintain a list of expert witnesses and interpreters, who are sworn in and certified by the court. Based on this procedure there are (as of 23.4.2021) 743 interpreters currently registered.

If other persons are appointed, they must first be informed about their principal rights and duties. When choosing interpreters and when determining the extent of their work, the

principles of parsimony, economy, and expediency need to be considered.

#### 4. Are there standard requirements for the quality of the interpretation or qualifications of the Interpreter?

If so, how does the judge ensure compliance?

In any event, how does the judge ensure that the interpretation is accurate and meets good standards?

There are no standard requirements, but the prosecutor/the judge can rely on the quality of the interpreters of the Court Support Agency and the interpreters, who are certified by the court because both undergo regular and thorough checks. It becomes problematic however, when there are no suitable persons from those lists available. While this is rarely the case with the most common languages, it rather often occurs with languages, where fewer interpreters are available. This situation gets even worse, if there is a peak in suspects from a certain nationality. As of 23.4.2021 there is for example only one interpreter for Dari and Pashto, the most common languages spoken in Afghanistan, registered in the expert witness and interpreter list maintained by the court.

In those cases the prosecutor/the judge has to rely on interpreters from private agencies or on persons who have earned a good reputation with other authorities, in particular in asylum procedures or with the police. This results in a pool of interpreters, which are usually appointed by all judges of one court district, because of their reputation. In those cases it is rather difficult to ensure that the interpretation is accurate and meets good standards, which is definitely a cause of concern.

The official representation of the interpreters certified by the court (ÖVGD) has recently pointed out, that the number of certified court interpreters has fallen dramatically (since 2006 halved) and that the average age is over 60. According to the ÖVGD this is because of the current hourly wage of around € 25,- gross (of which after tax and social insurance remains about half) which is not enough to get qualified interpreters. The tariffs under the Fees Claims Act 1975 have not been elevated since 2007. This unattractive financial situation leads to less interpreters who are inclined to complete the demanding certification exam to be included in the court interpreter list. The result is the increased use of untrained interpreters in court procedures.

#### 5. Are there legal obligations for court interpreters?

The conflict of interest grounds of criminal investigation authority and prosecution authority apply, mutatis mutandis, to interpreters. Insofar as they have a conflict of interest or insofar as their expertise is in doubt they must be discharged from their role by the prosecution authority, or by the court if they were appointed by the court, ex officio or because of objections raised.

In the main proceedings, the mere fact that an interpreter was already involved in the investigation proceedings does not provide grounds for a conflict of interest.

Interpreters outside the Court Support Agency are entitled to be paid pursuant to the Fees Claims Act 1975. Unless particular reasons to the contrary exist, expert witnesses and interpreters are allowed to be present during questioning and to gain access to files to the extent necessary. They have a duty to adhere to official secrecy.

Interpreters must translate to the best of their knowledge and belief, must adhere to summons by the prosecution authority and the court, and must answer any questions asked during trial, questioning, and re-enactments of the crime.

If interpreters significantly exceed the deadline set for them to provide their translation despite a reminder, they may be discharged from their role. Furthermore, the court may impose a fine of up to 10,000 Euro if the expert witness or interpreter is at fault for the delay.

6. For the main hearing of the case is the translation for the whole hearing or only part of the hearing? If it is only part, which parts, and why is the whole hearing not translated?

The translation is for the whole hearing.

## **B. The importance of good interpretation and good communication for the verdict?**

7. Assuming that the quality of interpretation could affect the outcome of a case:

7.1 Do you consider this applies more in certain types of cases than others and, if so, what types of cases?

There seems to be no certain types of cases, where the quality of interpretation could affect the outcome more than in other cases, because in all cases, circumstances are conceivable, where a bad interpretation could have massive effects.

7.2 Is it a problem that can be remedied, or a problem that the judiciary must live with? And if yes, how do we secure that no one is wrongfully convicted?

First of all, we should by no means accept it as immutable. There are a number of ways to secure a sufficient quality of interpretation, but of course financial resources are required. Also modern technology is very helpful to solve the problem. In Austria interpreting via video is being tried out, which looks promising and has the great advantage that the interpreter is available nationwide in the shortest possible time.

8. Is there a risk that people who have difficulty explaining themselves, possibly due to low intelligence or poor education, suffer disadvantages at the court? If yes, what remedies exist?

There is not only a risk, it is for sure and maybe most likely comparable to the situation of

minors. But unlike minors, adults with poor intellectual abilities that do not qualify as a disability do not automatically receive special protection and to determine the exact degree of intellectual limitation from which special support would be advisable is hardly possible. So the best way would be to strengthen the rights of everyone involved as much as possible and secure high minimum standards for each party to the proceedings.

9. Is intercultural communication a subject of training for judges or part of the instruction of juries?

Judges have the possibility to attend a voluntary training in intercultural communication, but it is far from institutionalized. As a part of the instruction of juries it would be a bit too specific and there is a danger that the juries would focus too much on (supposed) cultural peculiarities than would be useful.

**C. Nonverbal communication in the courtroom**

10. Can the body language of accused persons, victims or witnesses influence the outcome of a case?

According to the Austrian Code of Criminal Procedure the court has to decide whether facts can be established as proven on the basis of the evidence according to its free conviction. That the law also requires a judge's "conviction" for the result of the free assessment of evidence expresses the fact that an objectively verifiable high probability of certain facts is not sufficient, but that the judge must add a personal evaluation factor. As the final decision is based on the personal conviction of the judge, this does not mean an arbitrary formation of an opinion, but the perception-psychological consideration that people consciously and unconsciously perceive much more than they can subsequently reproduce and formulate. All of these perceptions are formed into a "gut feeling", which is not accessible to comprehensible, rational explanations and which cannot be justified by memorable content. With the ultimately decisive personal conviction (which must be based on an objectively verifiable high probability), the totality of the conscious and unconscious judicial perceptions (in the main hearing) should also be made usable and incorporated into the evaluation of the evidence. That said, of course the body language of a party to the proceedings can influence the outcome of a case.

11. Is nonverbal communication a subject of training for judges or part of the instruction of juries?

It is a compulsory part of the training for candidate judges and voluntary seminars for fully trained judges are also offered. As a part of the instruction of juries it would again be a bit too specific and there is a danger that the juries would focus too much on the body language of the parties to the proceedings and what it could mean.