IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI

Wolters Kluwer

CEDAM

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LANGUAGE ASSISTANCE TO FOREIGNERS INVOLVED IN CRIMINAL PROCEEDINGS: NATURE OF THE SERVICE AND ACCESS REQUIREMENTS

NICOLA PASCUCCI

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1. Evolution and general coordinates of linguistic assistance to foreign accused who does not know the language of the proceedings

Language assistance is a heterogeneous set of activities, requiring different skills depending on the act in question. The first and fundamental distinction to be drawn is between interpretation, which concerns oral acts, and translation, concerning written acts. This distinction was first provided in the Italian legal system by Legislative Decrees No. 32 of 2014 and No. 129 of 2016, which transposed Directive 2010/64/EU on interpretation and translation in criminal proceedings. Until then, the Italian Code of Criminal Procedure ('CCP') had referred only to the interpreter, thus creating an undue overlapping between the two figures.

As mentioned above, these are different activities: the interpreter assists the accused person in acts that take place orally (e.g. hearings, questionings and meetings with his/her lawyer), whereas the translator transposes written acts that are essential for the exercise of defence rights (e.g. notices of investigation and about the

right of defence, notice on the conclusion of investigations, judgements).

With the adoption of the new Italian Code of Criminal Procedure in 1988, the concept of the linguistic expert underwent a radical change: in addition to its traditional role as assistant to the proceeding authority, appointed to cooperate with the latter in the investigation and establishment of the facts, it was given the additional role of collaborating with the defence, in order to enable the suspect or accused person to fully exercise his/her rights and ability to defend himself/herself. [1] Even the Italian Constitutional Court, since judgement No. 10 of 1993, [2] has acknowledged that the access to an interpreter laid down in Article 143 CCP [3] is an individual right of the accused, which must be interpreted extensively, on the basis of international provisions and Article 24(2) of the Constitution. Article 143(5) CCP is emblematic of this change of perspective: it provides that the linguistic expert shall also be appointed even if the proceeding authority (judge, public prosecutor or criminal police officer) personally knows the language or the dialect used by the accused person.

The provisions are contained in Articles 143-147 CCP—which are, in turn, embodied in Title IV of Book II, entitled 'Translation of acts'—and in the implementing provisions of the Code. However, this title is misleading: it would be appropriate to refer to both 'interpretation and translation of acts and documents' and not only to translation. [4]

These two services, although different, are crucial for non-native speakers to be able to exercise their right of the defence: they are the fundamental prerequisite for the accused person (but also for the victim) to consciously participate in the proceedings. Without them,

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[1] On this subject, *ex multis*, see M. CHIAVARIO, *La riforma del processo penale. Appunti sul nuovo codice*, 2nd ed., Utet, 1990, p. 112; P.P. RIVELLO, *La struttura, la documentazione e la traduzione degli atti*, Giuffrè, 1999, p. 219 f.; D. VIGONI, *Minoranze, stranieri e processo penale*, in M. CHIAVARIO (Ed.), *Protagonisti e comprimari del processo penale*, Utet, 1995, p. 356 f.; A. ZAPPULLA, *Giustizia penale e stranieri: il processo è uguale per tutti?*, in C. CESARI (Ed.), *Stranieri in Italia. Una riflessione a più voci. Atti del Convegno. Macerata, 25 novembre 2021*, Wolters Kluwer-Cedam, 2022, p. 195 ff.

[2] Const. Court, 19th January 1993, no. 10.

[3] At that time, as mentioned, the Italian Code of Criminal Procedure did not distinguish between translator and interpreter, referring exclusively to the latter.

[4] The inadequacy of the current reference is also noted, for example, by M. GIALUZ, *È scaduta la direttiva sull'assistenza linguistica. Spunti per una trasposizione ritardata, ma (almeno) meditata*, in *Dir. pen. cont.*, 4th November 2013, p. 10, note 26, who, even before Legislative Decree No. 32 of 2014, proposed to change the title to 'interpretation and translation of acts'.

his/her presence would represent a "mere 'appearance'", as authoritative doctrine stated several decades ago.[5] In fact, the accused is unaware of the proceedings and is unable to defend him/herself should he/she be unable to communicate with his/her lawyer, with the judicial authority and with other operators, or when such an individual cannot understand what is said in hearings or the content of the written documents he/she receives. Accordingly, linguistic assistance can be defined as a 'second-degree' fundamental right[6] or a 'fundamental meta-right',[7] without which the other prerogatives and faculties related to defence rights could not be effectively exercised.[8]

2. The free of charge linguistic assistance for the accused person

One of the main characteristics of linguistic assistance derives from its nature as a "second-degree" right: the fact that it is free of charge. Indeed, the costs of the linguistic expert cannot be borne by the accused person who does not know the language, precisely because this service is an indispensable condition for the conscious participation in the proceedings. Language assistance logically precedes the legal assistance provided by a lawyer and this is the fundamental difference between them. Notably, the defence counsel's services, as a rule, are not free of charge,[9] except in cases where the income requirements for legal aid at the expense of the State are met,[10] in line with the minimal guarantee enshrined in Article 24(3) of the Italian Constitution, which ensures that 'indigent persons are

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[5] G. Giostra, *Il diritto dell'imputato straniero all'interprete*, in *Riv. it. dir. proc. pen.*, 1978, p. 441.

[6] N. Pascucci, *La persona alloglotta sottoposta alle indagini e la traduzione degli atti*, Giappichelli, 2022, p. 27.

[7] M. Gialuz, *L'assistenza linguistica nel processo penale. Un meta-diritto tra paradigma europeo e prassi italiana*, Wolters Kluwer-Cedam, 2018, *passim*, spec. p. 138 ff.

[8] In general, for the concept of 'second-degree' right or 'meta-right', that is a "right concerning rights", see R. Guastini, *Filosofia del diritto positivo. Lezioni*, edited by V. Velluzzi, Giappichelli, 2017, p. 81 f.

[9] This is without prejudice to the possibility of requesting, under certain conditions, the reimbursement of legal costs from the complainant (Articles 427 and 542 CCP), the *partie civile* (Article 541 CCP) or the State (Article 1(1015) *et seq.* of Law No. 178 of 2020 and Ministerial Decree 20th December 2021).

[10] M. Gialuz, *supra* note 7, p. 181 f. For a different perspective, see L. Parlato, *La rifusione delle spese legali sostenute dall'assolto. Un problema aperto*, Cedam, 2018, p. 93 s., according to whom this diversification between the assistance of linguistic experts and that of defence counsels is a systematic inconsistency.

entitled by law, through appropriate legal tools, to act and defend themselves in all courts'.

Art. 111(3) of the Constitution does not mention the free nature of linguistic assistance, [11] perhaps because of concerns about the high cost of the service itself. It simply enshrines the right of an accused person to be 'assisted by an interpreter if he does not understand or speak the language used in the proceedings'. [12] However, this feature has been acknowledged by both Article 6(3)(e) ECHR [13]—which, in Italian legal framework, holds a higher rank than ordinary law, on the basis of Article 117(1) of the Italian Constitution—and by Italian law, following the amendments made by Legislative Decree No. 32 of 2014. [14]

Notably, for several decades now, the European Court of Human Rights ('ECtHR') has rightly interpreted the guarantee in question by following the common meaning of these expressions, which indicate an absolute impossibility of recovering the costs of language assistance from the accused person who does not know the language of the proceedings, even if he/she is subsequently convicted. According to the Court, the term 'free' indicates a definitive exemption and not a 'conditional remission', a 'temporary exemption' or a 'suspension' of payment. In the view of the ECtHR, the very prospect of having to reimburse the fees in the event of conviction could, *inter alia*, influence the accused person's behaviour: it induces him/her to adopt an attitude of renunciation or to conceal his/her linguistic ignorance in order to avoid the appointment of an expert, thereby jeopardising his/her right to participate in the criminal proceedings. [15]

Similarly, M. CHIAVARIO, *Giusto Processo – II) Processo penale*, in *Enc. giur.*, vol. XV, Supplement, Istituto della Enciclopedia italiana, 2001, p. 14, who considers, in principle, more appropriate to apply the same rule to both kinds of assistance.

[11] In this regard, see M. BARGIS, *Studi di diritto processuale penale*, vol. I, Giappichelli, 2002, p. 44 f.

[12] According to some scholars, this omission is deliberate, due to State's concerns about service costs: see M. CHIAVARIO, *supra* note 10, p. 14; M. BARGIS, *L'assistenza linguistica per l'imputato: dalla direttiva europea 64/2010 nuovi* inputs *alla tutela fra teoria e prassi*, in M. BARGIS (Ed.), *Studi in ricordo di Maria Gabriella Aimonetto*, Giuffrè, 2013, p. 117; A. ZAPPULLA, *Giustizia penale e stranieri*, cit., p. 202.

[13] This provision uses the terms 'free' and '*gratuitement*' in the official English and French versions respectively.

[14] According to P. FERRUA, *Il 'giusto processo'*, 3rd ed., Zanichelli, 2012, p. 126, it is not understandable why Article 111(3) of the Italian Constitution unlike the ECHR makes no reference to gratuitousness. However, in his opinion, "it would be arbitrary to attribute to silence the meaning of a deliberate deviation from the choice made by the ECHR, *a fortiori* in view of the fact that the CCP also provides for such a feature.

[15] *Luedicke, Belkacem and Koç v. Germany*, App. nos. 6210/73, 6877/75, 7132/75 (ECtHR, 28th November 1978), para. 40 ff. In this regard, see D. CURTOTTI NAPPI, *Il problema delle lingue nel processo penale*, Giuffrè, 2002, p. 264.

Following this reasonable approach, Article 4 of Directive 2010/64/EU explicitly provides that 'Member States shall meet the costs of interpretation and translation [...], irrespective of the outcome of the proceedings'. This solution is indirectly confirmed by the general non-regression clause laid in Article 8 thereof, according to which the Directive may not be interpreted in such a way as to limit or derogate from the standard of rights and guarantees enshrined in the ECHR.

Article 143 CCP already provided for a free service before Legislative Decree No. 32 of 2014. However, a widespread restrictive approach allowed the State to obtain reimbursement of the costs of language assistance in the event of a conviction, in clear contradiction with the ECtHR's settled case-law and Article 4 of the aforementioned Directive. [16]

In light of this, Legislative Decree No. 32 of 2014 amended Article 143 CCP in a more precise manner. Specifically, Article 143(1) CCP, which concerns the right to interpretation, provides for a free-of-charge service 'regardless of the outcome of proceedings'; Article 143(3) CCP, which concerns the right to translation of acts considered essential by the judge on a case-by-case basis, provides for assistance free of charge. [17] However, in this case too, the normative drafting reveals significant shortcomings: the sentence 'regardless of the outcome of proceedings' does not appear in the paragraphs devoted to translation, and the fact this service is free of charge is not mentioned in paragraph 2, which concerns the mandatory translation of the acts listed therein. This scant attention to translation activity is perhaps the legacy of an outdated approach that almost entirely circumscribed the guarantees to the interpreting activity and paid little attention to translation. Nevertheless, the general and unconditional provision of free linguistic assistance to the accused persons who do not know the language of the proceedings cannot be called into question, even if the trial results in a final conviction. It would be manifestly unreasonable to distinguish between 'interpretation' and 'translation', as well as to foresee the cost-free characterisation of the assistance solely for certain fundamental written acts or documents. Even a reading in line with Article 4 of Directive 2010/64/EU upholds the absolute and general free-of-charge nature of language assistance.

In support of this approach from a teleological and systematic

[16] In this regard, see M. Gialuz, *supra* note 7, p. 349.

[17] D. Curtotti, *La normativa in tema di assistenza linguistica tra direttiva europea e nuove prassi applicative*, in *Proc. pen. giust.*, 2014(5), p. 125.

point of view, it is noteworthy that Legislative Decree No. 32 of 2014 also intervened in Article 5(1)(d) of the Consolidated Text on Legal costs—i.e. Italian Presidential Decree 30th May 2002, No. 115—by introducing an exception to the rule on the reimbursement to the State of the fees, expenses and travel allowances of the magistrate's assistants: the reform expressly excludes interpreters and translators appointed on the basis of Article 143 CCP. This amendment definitively overcomes the aforementioned restrictive orientation and it is therefore to be welcomed. [18] However, even in this case, the legislative technique opens the way to hermeneutical problems. First of all, as critically noted by some legal scholars, [19] the provision in question, together with Article 3(1)(n) Presidential Decree No. 115 of 2002, includes the linguistic expert among the assistants, which is contrary to the notion of "judicial assistant" derived from the Italian Code of Criminal Procedure and generally accepted by the relevant case-law, which circumscribes the figure to the staff of Public Prosecutor's Clerk's Office and Court Registry. [20] Such provisions, if misinterpreted, could be used to reaffirm the primacy of the traditional role of linguistic assistants, as an auxiliary of the proceeding authorities, to the detriment of the role of defence assistants, now established by the new Code of Procedure. It is then necessary to consider whether the term 'judicial assistant' in the Presidential Decree No. 115 of 2002 can also include the language expert appointed by the judiciary police. The literal wording would exclude him/her. This would give the State an unreasonably justification to ask the suspect for reimbursement of the costs for linguistic assistance, if the expert was appointed by a police officer. In any case, such a practical result should be avoided, taking into account both Article 143 CCP—which, as mentioned, enshrines a free service—and an ECHR-based interpretation of the relevant domestic legal framework, also in line with Directive 2010/64/EU.

[18] See, in this regard, D. CURTOTTI, *supra* note 17, p. 125; M. GIALUZ, *supra* note 7, p. 350.

[19] S. SAU, *Lingua, traduzione e interprete*, in G. SPANGHER-A. MARANDOLA-G. GARUTI-L. KALB (Ed.), *Procedura penale. Teoria e pratica del processo*, vol. I, edited by G. Spangher, Utet, 2015, p. 472.

[20] Among others, see Italian Court of Cassation (*Corte di Cassazione*, hereinafter: 'Cass.'), 7th February 2020, in *C.e.d.*, no. 279175-02; Cass., 28th May 2014, in *C.e.d.*, no. 259691.

3. Identifying the beneficiaries: the assessment of linguistic proficiency

The linguistic guarantees are ensured to the accused person 'who does not know the Italian language', pursuant to Article 143(1) CCP, to which the following paragraph 2 also refers. The expression is rather generic, since the relevant abilities are different depending on whether the act is written or oral, and whether it has to be translated from Italian into the idiom used by the defendant (the most frequent hypothesis) or *vice versa*. In fact, it is necessary to focus, from time to time, on oral comprehension or production skills, or on written comprehension or production skills. According to some scholars, the presence of the expert is usually superfluous when the language proficiency is good, i.e. at a medium level.[21] In this way, there is a very wide margin of discretion in assessing when this level is actually met. In fact, the CEFR descriptors formulated within the Council of Europe could help to better define such a nuanced concept.[22] Moreover, it is the Italian Constitutional Court itself[23] that points out the close link between Article 143 CCP and the safeguards offered by the Council of Europe in Article 6(3) ECHR.[24]

Moreover, Article 143(4) CCP requires the judicial authority (i.e. the Public Prosecutor and the judge) to verify the knowledge of the Italian language if the accused is a foreigner. In spite of some resistances in the case law, this provision should overcome the previous orientations of the Italian Supreme Court, which, focusing only on the efficiency of the proceedings, considered it legitimate to refuse assistance if the lack of knowledge of the language did not emerge from the case file. This approach required an active behaviour on the part of the accused person, who had to inform the

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[21] *Ex plurimis*, see G. DI TROCCHIO, *Traduzione dell'estratto contumaciale ed imputato straniero*, in *Giur. it.*, 1982, II, c. 403; D. CURTOTTI NAPPI, *supra* note 15, p. 351 f. On the other hand, certain judgements revealed that, for this purpose, the Supreme Court is satisfied with a 'discrete understanding of Italian language': Court of Palermo, 24th September 2001, No. 1431, in *Dir. pen. proc.*, 2002, p. 77.

[22] V. COUNCIL OF EUROPE, *Common European Framework of Reference for Languages: Learning, Teaching, Assessment. Companion volume*, Council of Europe, 2020, *passim*.

[23] Const. Court, 19th January 1993, No. 10.

[24] In this regard, see N. PASCUCCI, *supra* note 6, p. 128 ff., who, with specific regard to translation, identifies the threshold at which linguistic assistance is normally unnecessary in level B2, that is the "vantage level" proper to an autonomous user. In some cases, this threshold could be at B1 or C1 level. On the contrary, with regard to linguistic assistance in general, see M. GIALUZ, *supra* note 7, p. 387, who states that B1 is usually sufficient, although the Author does not exclude the need for a B2 level for some acts.

authorities of his/her linguistic situation.[25] The inconsistency of this approach is evident: it is unreasonable to expect a person who does not understand the language of the proceedings to promptly disclose his/her own linguistic ignorance. He/she may not even understand what is happening around him/her. Not only does he/she lack the communicative tools to report his/her situation, but the latter may not even realise that is required to do so.[26] Therefore, Article 143(4) CCP should specifically overcome this issue by imposing on the judicial authority the obligation to verify, as soon as possible and also *ex officio*, the suspect/accused person's lack of knowledge of the language. The law does not specify the methods of this assessment, therefore the authority can use—albeit with the necessary caution and distinguishing among the different linguistic abilities[27]—all the information available in the case file (such as the time spent in Italy, the attestation by the accused that he/she knows Italian language, the socio-cultural environment, the work tasks, the answers given to the criminal police).[28] In doubtful cases, technical consultancy or an expert evidence may be requested. Once the insufficient knowledge of Italian language has been established, the proceeding authority must identify the mother tongue of the suspect/accused person in order to appoint the appropriate linguistic assistant. Unlike the assessment of ignorance of the Italian language

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[25] Among others, see Cass., 9th October 2012, in *C.e.d.*, no. 253841; Cass., 6th February 1992, in *C.e.d.*, no. 189475. The majority of legal scholars disagreed with this interpretation and considered that the assessment should be made *ex officio*: for all, see M. CHIAVARIO, *La tutela linguistica dello straniero nel nuovo processo penale italiano*, in *Riv. dir. proc.*, 1991, p. 353; D. VIGONI, *supra* note 1, p. 380 ff.

[26] On this point, in the case where a person who does not know the language finds him/herself "catapulted into the trial" after the direct trial, see C. CALUBINI, *"Svista" della Suprema Corte: negato al difensore il diritto di eccepire la violazione dell'art. 143 c.p.p.*, in *Proc. pen. giust.*, 2012(3), p. 73.

This approach is maintained even if the accused person has Italian citizenship but does not have a sufficient command of Italian language, since Article 143(4) of the Code of Criminal Procedure expressly establishes a presumption of linguistic knowledge, which may be rebutted by the accused person's active conduct.

[27] Often the distinction between the different skills is not properly considered by proceeding authorities: see, for example, CORTE DI APPELLO DI MILANO-TRIBUNALE DI MILANO, *D.Lgs. 4 marzo 2014 n. 32 in materia di interpretazione e traduzione nei procedimenti penali: prassi applicative*, in *www.corteappello.milano.it*, 12th June 2014, p. 1, where different elements that can be inferred from acts are enunciated without distinguishing between oral comprehension and production, and written comprehension and production.

[28] These elements are also emphasized by ECtHR's settled case-law. See, *inter alia*, *Hermi v. Italy* [GC], App. no. 18114/02 (ECtHR, 18th October 2006), para. 90; *Kajolli v. Italy*, App. no. 17494/07 (ECtHR, 29th April 2008); *Katritsch v. France*, App. no. 22575/08 (ECtHR, 4th November 2010), para. 45.

– in which the criminal police can only assist the judicial authority, to which the Code of Criminal Procedure reserves the decision – the verification of the language used by the suspect/accused person is not expressly regulated by the Code. In the legislative silence, it can also be carried out by the judiciary police officer.[29]

Another aspect that is not strictly regulated by the law concerns the hypothesis that the proceeding authority cannot find an expert because a certain language is not widely used. The habitual language or dialect should be preferred,[30] but the appointment of an interpreter or translator in a *lingua franca*—i.e. an internationally spoken language such as English, French and Spanish—is possible, as there is no legislative prohibition. However, the person must have a good command of such a language in order to be able to exercise his/her defence rights effectively.[31]

4. General features of language assistance

Article 143(1) CCP is devoted to interpretation and it provides, in its first sentence, that the accused person who does not understand the language of the proceedings has the right 'to be assisted by an interpreter' in order to 'understand the charges against him' and 'the acts and hearings in which he participates'. The second sentence establishes the right to an interpreter to communicate with the defence counsel for the purpose of questioning or for the purpose of submitting motions or pleadings.[32] This provision should be read in

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[29] For further details, see N. Pascucci, *supra* note 6, p. 168.

[30] *Contra* M. Chiavario, *supra* note 25, p. 354, who reverses the perspective: he considers that first the knowledge of internationally widespread languages should be assessed and then, if the person concerned does not master these languages, an expert in his mother tongue can be appointed. This would avoid 'the tiresome search for (often mediocre) 'practitioners''.

[31] In the absence of express legal prohibitions, the technique known as "relay" is practicable. With this method, the authority appoints several experts: one from Italian into a *lingua franca* and the other from the latter into the language used by the person, and *vice versa*. It must be used as a last resort, as it involves considerable risks for the authenticity of the message. On *linguae francae* and relay interpreting, see, for all, M. Gialuz, *supra* note 7, p. 319 f., 340 s.

[32] The notions of 'motions' and 'pleadings' are debated. Some legal scholars consider it in a broad sense, including appellate remedies. See D. Curtotti, *supra* note 17, p. 126; M. Gialuz, *La riforma dell'assistenza linguistica: novità e difetti del nuovo assetto codicistico*, in *Leg. pen.*, 2014, p. 195. For a different systematic interpretation, see N. Pascucci, *supra* note 6, p. 149, who argues, on the basis of Article 121 CCP, that the notion of "motions" and "pleadings" cannot also include appellate remedies.

conjunction with Article 51a(1) of the rules for the implementation of the CCP, which limits the right to a single consultation for each of these situations, except for 'special facts or circumstances' for the 'exercise of the right of defence'.

Article 143(2) and (3) CCP are instead devoted to the translation of written acts that are essential for the exercise of the right of defence. There are two categories, along the lines of Article 3(2) and (3) of Directive 2010/64/EU – Article 143(2) CCP sets out the types of acts for which there is an absolute presumption of essentiality, which must always be translated within a reasonable period of time 'such as to allow the exercise of the rights and faculties of the defence': notices of investigation and of the right to defence, decisions applying personal precautionary measures, notice on the conclusion of investigations, decrees ordering preliminary hearings, decrees of summons for trial, judgements and *inaudito reo* penalty orders. On the other hand, according to Article 143(3) CCP the judge—*ex officio* or at the request of a party—orders the free translation of other documents, if they are considered essential for the defence. The judge's reasoned order may be appealed with the judgment.

However, there are differences between the documents listed in Article 143(2) CCP and those listed in Article 3(2) of Directive 2010/64/EU, according to which 'essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment'. First of all, Article 143(2) CCP broadens the obligation to translate decisions ordering precautionary measures: not only those depriving a person of personal liberty (i.e., in particular, house arrest and pre-trial detention), but all decisions ordering personal precautionary measures. The vagueness of the provision also raises doubts as to whether the category also includes orders revoking, modifying and replacing measures: in the light of Article 3(2) of Directive 2010/64/EU, which refers in general terms to decisions depriving a person of his/her liberty, it would seem appropriate to include at least modifying and replacing measures, even if they are issued following an appellate remedy. [33] However, the list in Article 143(2) CCP does not include orders confirming arrest and temporary detention, which legitimise a deprivation of

[33] Similarly, see S. SAU, *Commento all'art. 143*, in G. ILLUMINATI-L. GIULIANI (Eds.), *Commentario breve al Codice di Procedura Penale*, 3rd ed., Cedam, 2020, p. 520, according to whom, however, decisions about lifting of measures should also be included. Differently, for a restrictive solution, see S. RECCHIONE, *L'impatto della direttiva 2010/64/UE sulla giurisdizione penale: problemi, percorsi interpretativi, prospettive*, in *Dir. pen. cont.*, 15th July 2014, p. 9.

liberty *ex tunc*: [34] this is probably a legislative oversight that can be remedied by an interpretation that includes them among the essential acts and documents on the basis of Article 143(3) CCP.

Moreover, the concept of 'charge' in Article 3(2) of Directive 2010/64/EU should be understood in a broad sense, as it should also include provisional charges formulated during preliminary investigations: this is why Article 143(2) CCP includes the notices of investigation and on the right to defence (Articles 369 and 369a CCP) and the notice on the closure of preliminary investigations. [35] The fact that judgments are also included in the list should overcome the previous inconsistency in case-law regarding the need to translate them. [36]

The translation of acts pursuant to Article 143(2) CCP shall be complete. Partial translation, that is, limited only to certain parts of the document at stake, is not allowed: in this regard, the national legislation deviates from Article 3(4) of Directive 2010/64/EU.

In addition to the acts foreseen in Article 143(2) CCP, there are other acts and documents, for which the law provides for translation in any case if the addressee does not know Italian: the first notification to the accused person abroad pursuant to Articles 169 CCP and 63 of the rules for the implementation of the CCP, and the so-called letters of rights to be delivered to persons under arrest, temporary detention, house arrest and pre-trial detention, as per to Articles 386 and 293 CCP.

As mentioned above, acts which are not listed in Article 143(2) CCP, but which are essential for the defence, must be translated in

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[34] On this subject, see D. CURTOTTI, *supra* note 17, p. 128.

[35] On this point, see M. GIALUZ, *supra* note 7, p. 232. The implicit reference is to the broad notion of 'charge' as elaborated by the Strasbourg Court, which includes not only the notification of the formal charge, but also the notification of the provisional charge or, in any case, the acts likely to make the accused person aware of the criminal charge against him/her.

[36] According to the settled case-law, translation was not necessary. See, *ex multis*, Cass., 18th March 2011, in *C.e.d.*, no. 250636; Cass., 31st March 2010, in *C.e.d.*, no. 247760. *Contra* Cass., 23rd November 2006, in *C.e.d.*, no. 236409.

However, even after the Legislative Decree No. 32 of 2014, some legal scholars, unacceptably straining the text of the provision, continued to limit it: see R. BRICCHETTI-L. PISTORELLI, *Atti fondamentali scritti nella lingua dell'imputato*, in *Guida dir.*, 2014(16), p. 66, who limit the obligation to translate judgements to cases where the accused has 'abstractly the right (and perhaps even concretely the interest) to appeal them'; G.P. VOENA, *Atti*, in M. BARGIS (Ed.), *Compendio di procedura penale*, 10th ed., Cedam, 2020, p. 210, according to whom it is not compulsory to translate judgements of acquittal where the offence did not occur or the accused person has not committed it, since there is no interest in appealing against them 'even in the abstract'.

accordance with paragraph 3. The assessment of essentiality pursuant to Article 143(3) CCP must be made on the basis of the concrete situation in individual proceedings: the same act could be essential in one proceeding and not essential in another, depending on the particular circumstances. For example, the decision ordering a precautionary measure in respect of property may be defined as essential, and therefore to be translated, in a very large number of hypotheses, given the economic interests often underlying it.[37] However, there may be a case where the act does not reach the threshold of essentiality, perhaps because of the low value of the property seized.

Article 143(3) CCP, unlike Article 143(2) CCP, also allows the partial translation of acts, i.e. limited to the parts that are essential for defence purposes. In fact, Article 3(4) of Directive 2010/64/EU allows partial translation even more broadly than the Italian legislator, permitting it for all essential written acts, including acts depriving a person of his/her liberty, those containing charges and judgements. Nevertheless, the legislator's choice to limit the scope of partial translation is acceptable, as it circumscribes the discretionary power of the proceeding authority.

5. Oral translation or oral summary translation and use of remote communication technologies

Initially, Italian Legislative Decree No. 32 of 2014, in transposing Directive 2010/64/EU, did not provide for an oral translation or an oral summary translation, although this possibility was granted by the Directive itself. However, Legislative Decree No. 129 of 2016, faced with the concrete difficulties arising from the mandatory obligation of a written translation, introduced it in paragraphs 2, 3 and 4 of Article 51a of the rules for the implementation of the CCP. According to the aforementioned Article 51a(2), it is possible to orally translate, even in summary form, one of the written acts in the list of Article 143(2) CCP, provided that two grounds are met: there must be 'particular reasons of urgency' and the oral translation must prejudice 'the accused person's right of defence'. In any case, under Article 51a(4) of the rules for the implementation of the CCP, the oral translation must be documented by means of an audio recording. This guarantee

[37] On this subject, see D. CURTOTTI, *supra* note 17, p. 128, according to whom 'there is no explanation for the exclusion of precautionary measures relating to property' from the list in Article 143(2) CCP, given that their afflictive character is often greater than that of personal measures.

represents a higher standard than that of Article 7 of Directive 2010/64/EU, which merely prescribes the recording 'in accordance with the law of the Member State concerned'. This procedure is intended in particular for decisions ordering precautionary measures, given the very tight timeframe for their translation, which must in any case take place before to the so-called *interrogatorio di garanzia* (i.e., the questioning of the person subject to a personal precautionary measure). Yet, according to some scholars, decisions ordering personal precautionary measures may not be orally translated (let alone in summary form). They consider that the rights of the defence would be hampered. In fact, a written translation is very different from a sight translation: only the former allows the suspect/accused person to reflect deeply on every single expression used by the judge, and thus to understand the content of the act in a much more thoughtful manner.[38] Even the linguistic expert may, in the case of a written translation, be better able to reflect on the choice of terms than if he/she had to perform an oral translation "on the spur of the moment". However, the assessment of the above-mentioned requirements must be made in the light of the concrete situation. Consequently, it cannot be ruled out *a priori* than an oral translation (provided it is not summarised) of decisions ordering personal precautionary measures with a very simple content is sufficient.[39]

Unlike the EU legislator, the Italian one does not allow the defendant to completely waive the translation of essential documents altogether, but only the written translation. However, in the event of a waiver, an oral translation or an oral summary will be made, with the obligation of audio recording. The waiver must be made expressly and in full knowledge of the facts, 'also having consulted the defence counsel for this purpose', pursuant to Article 51a(3) of the rules for the implementation of the CCP.

In order to facilitate the search for an interpreter, in particular where the person concerned knows only an uncommon language or dialect, Article 51a(5) of the aforementioned provisions allows the use of remote communication technologies, provided that this is not likely to cause a 'concrete prejudice to the right of defence'. This provision should be read in conjunction with Article 146(2a) CCP, which, if the linguistic expert resides in another district, allows the proceeding authority to ask the Preliminary Investigations Judge in that place to appoint the interpreter or the translator. This allows for remote assistance, e.g., by means of a remote connection, is possible.

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[38] See M. Gialuz, *supra* note 7, p. 434, 450.
[39] For further details, see N. Pascucci, *supra* note 6, p. 213 f.

Article 51a(5) of the rules for the implementation of the CCP expressly refers only to interpreter, but the provision should be coordinated with the aforementioned Article 146 CCP. It refers to both the interpreter and the translator, not only because of the explicit mention of those professionals in its paragraph 2a, but also because of the extension of the rules for interpreters to translators under Article 143(6) CCP. In addition, the aforementioned Article 146 provides that, once the task has been assigned, the authority will ask the expert 'to provide his services': if the appointment is made at a distance – i.e., in a district other than that in which the proceeding authority is located – it is necessary to employ the appropriate technologies, with the limits imposed by respect for the right of defence, as enshrined in Article 51a of the rules for the implementation of the CCP. [40]

6. Nullity for insufficient or lack of linguistic assistance of the foreign accused who does not know the language of the proceedings

With regard to sanctions, Italian law mostly leaves the regulation of the consequences of omitted or poor quality interpretation or translation to general provisions. [41] The breaches of Article 143 CCP often relate to the participation and assistance of the accused person and therefore fall within the scope of the intermediate nullity (*nullità a regime intermedio*) pursuant to Article 178(1)(c) CCP: [42] a

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[40] Instead, some legal scholars consider that the aforementioned Article 51a(5) does not apply to the translator, even though he or she may also use 'technological devices in support of transposition' (M. GIALUZ, *supra* note 7, p. 447).

[41] The provision on the appealability of the judicial decision under Article 143(3) of the Code of Criminal Procedure does not seem to provide any significant additional protection, since the ordinary rules about regularisation of nullities may be applied. On the contrary, it raises further problems of interpretation: for more details, see N. PASCUCCI, *supra* note 6, p. 257 f.

[42] Among legal scholars, see, for all, G. BIONDI, *La tutela processuale dell'imputato alloglotta alla luce della direttiva 2010/64/UE: prime osservazioni*, in *Cass. pen.*, 2011, p. 2425; D. CURTOTTI NAPPI, *supra* note 15, p. 397, who traces the provisions on the appointment of the language expert to the notion of "assistance"; M. GIALUZ, *supra* note 7, p. 414 f., who frames the discipline at stake in the concept of "participation"; P.P. RIVELLO, *supra* note 1, p. 253 f.; S. SAU, *Le garanzie linguistiche nel processo penale. Diritto all'interprete e tutela delle minoranze riconosciute,* Cedam, 2010, p. 219; G. UBERTIS, *Commento all'art. 143*, in E. AMODIO-O. DOMINIONI (Ed.), *Commentario del nuovo codice di procedura penale*, vol. II, Giuffrè, 1989, p. 149. In case-law, see, among others, Cass., Joint Criminal Chambers (*Sezioni Unite Penali*), 24th September 2003, in *Cass. pen.*, 2004, p. 1563 ff.

According to some scholars, the omission of a translation of the summons to appear in court causes an absolute nullity of that summons. They equate the omitted

procedural sanction which, as is well known, has little dissuasive effect because of its regularisation provisions (so-called *deducibilità* and *sanatorie*) which are often broadly interpreted by the courts in accordance with an efficiency-based approach, and are intended to prevent the procedure from reverting to the stage at which the invalid act was performed in order to renew it. The fact that the waiver of a written translation must be explicit, according to Article 51a(3) of the rules for the implementation of the CCP, does not seem to create any exceptions to Articles 182(2), 183(1)(a) second part, 183(1)(b), 184 and 438(6a) CCP.[43] They operate at different levels: Article 51a(3) CCP outlines the modalities and conditions for waiving written translation, whereas the other norms, being part of the rules on non-absolute nullity, deal with the consequences of infringement of specific categories of provisions.[44]

Overall, the legislator has therefore made little effort to ensure the effectiveness and quality of linguistic assistance, aspects to which, on the contrary, Directive 2010/64/EU devotes particular attention.

With regard to translation, the case-law adopts an "eclectic" approach:[45] it considers that the untranslated act is not null and void, but ineffective, so that, in the case of decisions on precautionary measures and judgments, the accused person may lodge an appeal even after a long period, since the time limit has not yet expired.[46]

7. Other cases of appointment of interpreters and translators

Interpreters and translators are appointed not only to enable suspects and accused persons who do not understand the language of the proceedings to fully exercise their defence rights. To complete the framework concerning the cases of appointment of interpreters and translators, it is necessary to mention two other fundamental

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translation with its absence, as it is completely unsuitable 'to communicate to the addressee the essential elements' for his/her 'conscious presence in court': G. UBERTIS, *supra* note 42, p. 149; in the same sense, for all, see D. CURTOTTI NAPPI, *supra* note 15, p. 397 s.

[43] *Contra*, see D. POTETTI, *Commento al nuovo art. 51*-bis *disp. att. c.p.p., in tema di traduzione degli atti*, in *Cass. pen.*, 2017, p. 1537 ff.; M. GIALUZ, *supra* note 7, p. 462.

[44] For more details, see N. PASCUCCI, *supra* note 6, p. 271 ff.

[45] A. ZIROLDI, *Commento all'art. 143*, in A. GIARDA-G. SPANGHER (Eds.), *Codice di procedura penale commentato,* 3rd ed., t. I, Wolters Kluwer, 2017, p. 1532.

[46] In this way, such pronouncements aim to avoid the expiry of time limits for appealing decisions against decisions on precautionary measures and judgements. Among others, see Cass., 14th April 2017, in *C.e.d.*, no. 270318; Cass., Joint Criminal Chambers, 26th June 2008, in *C.e.d.*, no. 240507.

figures: the expert appointed for the needs of the proceeding authority and the linguistic assistant of the victim, whose main discipline in both cases is contained in Article 143a CCP, introduced by Legislative Decree 15th December 2015, No. 212.

The traditional function of interpreters and translators as collaborators of the proceeding authority has been maintained in Article 143a(1) CCP, which reproduces the content of the former Article 143(2) CCP, according to which the latter appoints 'an interpreter' in two cases: 'when it is necessary to translate a document written in a foreign language or in a dialect that is not easily intelligible' and 'when the person who wishes or is required to make a statement does not know the Italian language'. This provision should be read in conjunction with Article 242(1) CCP, which provides that the judge shall order the translation of a document written in a language other than Italian 'if this is necessary for its comprehension'. The provision uses very imprecise terms, as it refers to the 'interpreter' also to include the translator. [47] In this case, the service is not free of charge: the State may obtain the reimbursement after a subsequent conviction, as it is not, in itself, functional to the intervention and assistance of the accused person. Moreover, Article 143a(1) CCP does not mention the free of charge nature of the assistance, nor does Article 5 of Presidential Decree No. 115 of 2002 contemplate such cases. [48]

Victims who do not understand the language of the proceedings are now also entitled to receive a linguistic assistance: Legislative Decree No. 212 of 2015, which transposed Directive 2012/29/EU on the rights of victims, has regulated it in paragraphs 2, 3 and 4 of Article 143a CCP. Further provisions are contained in Articles 90a CCP and 107b of the rules for the implementation of the CCP. Article 90a contains a series of information to be provided to the victim 'from the first contact with the proceeding authority' in a 'language that he understands'. The aforementioned Article 107b provides for the possibility of submitting a report or a complaint in a language known to the person him/herself and for the right to receive, upon request, a certificate of receipt of the translated report or complaint. The right to an interpreter is enshrined in Article 143a(2) CCP when a victim who does not know the language of the proceedings is to be examined and, upon request, when that person wishes to participate in a hearing. Even in this case, remote

[47] For a general treatment, see S. SAU, *Commento all'art. 143*-bis, in G. ILLUMINATI-L. GIULIANI (Eds.), *supra* note 33, p. 523 ff.

[48] Similarly, see M. GIALUZ, *supra* note 7, p. 350 f.

communication technologies may be used, provided that his/her rights are not thereby compromised (Article 143a(3) CCP). Paragraph 4 of Article 143a CCP establishes the right to a full or partial translation of acts, containing 'useful information for the exercise of his rights'. Both oral and summary oral translations are allowed, on condition that they do not affect his/her rights. [49] The criterion used by the Italian legislator to determine which acts must be translated is questionable, as it is broader than that of Article 7 of Directive 2012/29/EU. Article 143a(4) CCP provides for the translation of acts that are 'useful' for the exercise of the victim's rights, whereas Article 7 Directive 2012/29/EU speaks of 'essential documents'. The mere "usefulness" of an act or a document also diverges from its "essentiality", which, as noted, is instead the parameter used *vis-à-vis* the accused person. [50]

Although Article 7 of Directive 2012/29/EU provides that the service shall be free of charge, para. 2 *et seq.* of Article 143a CCP are unclear: they say nothing about the interpreter, while they speak fleetingly of about the free nature of the translator without further specification, unlike Article 143 CCP in relation to the accused person. Even Presidential Decree No. 115 of 2002 does not contain any specific provision in this respect, so that, at first sight, it might appear that the State may recover these costs. [51] However, the very concept of "free of charge" excludes this interpretation, considering that its nature is unconditional and independent of the outcome of proceedings.

There are almost no procedural sanctions for breaches of the rules on the victim's linguistic assistance: the rules do not fall within the nullities of Article 178(1)(c) CCP, as the victim is not considered a party in Italian criminal proceedings. Only the failure to translate the summons to the trial can lead to a nullity on the basis of this provision. [52]

8. The meagre legislative interventions on quality of service

There is a fundamental difference between Directive 2010/64/EU

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[49] Article 143(4)-(5)-(6) of the Code of Criminal Procedure can also be considered applicable to the victim, as the provisions on victims were designed to be supplemented by Article 143 CCP. In this regard, see M. Gialuz, *supra* note 7, p. 472 note 32.

[50] In this regard, see V. Bonini, *L'assistenza linguistica della vittima*, in *Leg. pen.*, 4th July 2016, p. 46 ff.

[51] Legal scholars highlight the disparity between the discipline of the victims and the discipline of accused persons, who do not know the language of the proceedings, as regards the gratuitousness of the service: V. Bonini, *supra* note 50, p. 45 f.

[52] On this point, S. Sau, *supra* note 47, p. 526.

and Italian Legislative Decrees No. 32 of 2014 and No. 129 of 2016, which indicates a formalistic and, ultimately, deficient internal transposition: the Directive is very diligent in enhancing the quality of the linguistic assistance for the accused person, while the domestic Legislative Decrees pay little attention to it.[53] The only profile explicitly regulated concerns a specific aspect of the expert's specialisation: the inclusion of a special section for interpreters and translators in the district registers of experts, pursuant to Article 67(2) of the rules for the implementation of the CCP[54] and the creation of a national list of interpreters and translators under the following Article 67a,[55] in which those registered in the local sections are included. The latter must be made available to lawyers and the judiciary police through the institutional website of the Ministry of Justice. However, years later, the national list is still not operational, due to the lack of the Ministerial Decree that should regulate the methods of consultation, on the basis of Article 67a (2) of the rules for the implementation of the CCP.

Another worrying element, which in practice does not make it possible to create the conditions for a high-quality service in Italy, is the linguistic expert's fee. At present, it is little more than symbolic: according to Law No. 319 of 1980 and Ministerial Decree 30th May 2002, the fee is EUR 14,68 for the first period of service (*vacazione*), which is equivalent to two hours, and then EUR 8,15 for subsequent periods, up to a maximum of four periods (eight hours) per day.[56] This is an issue that the Italian legislator needs to resolve urgently, because without a decent remuneration, any reform aimed at improving the quality of services is doomed to failure.

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[53] It would have been appropriate—in the light of Articles 2(5)-(8), 3(5)-(9) and 5, Directive 2010/64/EU—to intervene at a legislative level in order to enhance the impartiality, objectivity and professionalism of experts, also through a deep review of Articles 144 and 145 CCP on the grounds of incapacity and incompatibility and on the cases of abstention and recusal. These provisions reflect the outdated concept of the linguistic assistant as a mere tool for translating a message from one language to another, underestimating the margin of appreciation that characterises the service.

[54] The paragraph was amended, as already said, by Legislative Decree No. 32 of 2014.

[55] Article introduced by Legislative Decree No. 129 of 2016.

[56] Legal scholars are very critical of the meagreness of the sums: see M. BOUCHARD, *Osservazioni allo schema di decreto legislativo di attuazione della delega normativa conferita al governo dalla l. 6 agosto 2013, n. 96 con particolare riferimento alla Direttiva dell'Unione europea 2012/29/UE che istituisce norme minime in materia di diritti, assistenza e protezione delle vittime di reato*, in *www.giustizia.it*, p. 6.

This volume brings together the contributions of the participants in the research project 'Immigration, personal freedom and fundamental rights', sponsored by the Faculty of Law of the University of Urbino 'Carlo Bo'. The discipline of fundamental rights for immigrants, which is extremely broad and fragmented, is the subject of reflection from different perspectives. Firstly, the research focuses on European legislation, in particular the European Convention on Human Rights (as interpreted by the European Court of Human Rights), the EU Charter of Fundamental Rights (as interpreted by the Court of Justice of the European Union) and the relevant EU directives. From the European legal framework, the study moves to the Italian legal system, starting with an analysis of the Italian Constitution. The Constitution guarantees non-citizens rights similar to those of citizens in criminal and judicial matters, particularly in terms of individual liberty, access to justice and legal representation, including the right to language assistance, which is the focus of this research. However, it is the domestic legislation that presents a worrying scenario, both because of its lack of conformity with the European framework and because of significant shortcomings, particularly in relation to individual liberty. In particular, administrative detention of foreigners is a measure that falls outside the criminal justice system, is often characterised by inadequate legal safeguards and is used as a means of controlling and reducing migration. In light of the problematic legal framework examined by the Authors, interpretive solutions are proposed and recommendations for reform are made to ensure greater respect for the fundamental rights of all individuals.

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