

IMMIGRATION, PERSONAL LIBERTY, FUNDAMENTAL RIGHTS

edited by
MARIA GRAZIA COPPETTA

with the assistance of
LORENZO BERNARDINI



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FOREIGN DEFENDANT AND CONSTITUTIONAL RIGHTS

NICOLA PASCUCCI

TABLE OF CONTENTS: 1. Equal treatment of Italian and foreign defendant. – 2. The right to an interpreter under Article 111(3) of the Italian Constitution. – 3. Right of defence and trusted language assistant: the intervention of the Italian Constitutional Court and the prolonged reluctance of the legislator.

1. Equal treatment of Italian and foreign defendant

It is well known that Article 3(1) of the Italian Constitution prohibits all discrimination, including those based on ‘race’ and ‘language’. The provision only concerns citizens, but it can also be extended to foreigners. Since the 1960s, the Italian Constitutional Court has read the principle of equality in conjunction with Article 2 of the Constitution, stating that it applies ‘to foreigners when it comes to the protection of inviolable human rights, which are also granted to foreigners also in accordance with international law’.¹ Even legal scholars, with various arguments, propose interpretations that go beyond the letter of the provision.²

¹ Const. Court, 26th June 1969, no. 104; similarly, Const. Court, 23th November 1967, no. 120. Some scholars are puzzled by the distinction between the ‘inviolable rights of man’ and the other ‘constitutionally guaranteed positions’: M. CUNIBERTI, *La cittadinanza. Libertà dell’uomo e libertà del cittadino nella costituzione italiana*, Cedam, 1997, p. 161 ff., according to whom the constitutional text does not make any distinction and it is difficult to draw a line ‘between what is “fundamental” and what is not’; moreover, this distinction seems to the Author to be insufficient ‘to explain all the possible differences in treatment between citizens and non-citizens’ in the Italian legal system.

² For all, see L. PALADIN, *Il principio costituzionale d’eguaglianza*, Giuffrè, 1965, p. 205 ff.; G. SILVESTRI, *L’art. 3 della Costituzione*, in *Commentario*, in *lamagistratura.it*, 3rd May 2022, who argues that ‘the generalisation of the personalist principle induces us not to restrict the field only to those who possess the *status* of citizenship, with the sole exception of political rights’; A.S. AGRÒ,

The total equalisation between Italian and foreign defendants can be inferred from the constitutional system: Article 24 of the Italian Constitution defines the right of defence as ‘inviolable’ at ‘every stage and level of the proceedings’ and does not make any distinctions, attributing the right to all. Thus, the foreigner, like the citizen, is entitled to all the rights and faculties of defence. Likewise, personal liberty is ‘inviolable’ and Article 13 of the Italian Constitution does not distinguish between Italian citizens and foreigners, subjecting them to the same treatment and limitations.³

However, it is apparent that the foreign suspect or accused person, much more often than the Italian one, may find him/herself in a situation where he/she is unable to exercise these rights properly, in particular due to a lack of knowledge of the Italian language. Indeed, the ability of the suspect or the accused person to understand the charges and the acts carried out in the hearings, as well as the possibility to actively defend himself/herself, presupposes a good knowledge of the language of the proceedings, or at least the provision of tools capable of overcoming a possible state of linguistic incommunicability.

2. The right to an interpreter under Article 111(3) of the Italian Constitution

Even before the reform of Article 111(3) of the Italian Constitution by Constitutional Law of 23rd November 1999, No. 2, the Constitutional Court considered the right to an interpreter to be an ‘ineliminable part of the right of defence’ and defined it as an ‘individual right of the accused person’, aimed at enabling him or her to ‘consciously participate to the proceedings’.⁴

Subsequently, the reformulated Article 111(3) of the Italian Constitution has explicitly granted the ‘defendant’ in a ‘criminal

Commento all’art. 3, 1° comma, in G. BRANCA (Ed.), *Commentario della Costituzione, Principi fondamentali. Art. 1-12*, Zanichelli-Soc. ed. del Foro italiano, 1975, p. 127. Differently, see C. ESPOSITO, *La Costituzione italiana. Saggi*, Cedam, 1954, p. 24 f., esp. footnote 19, who circumscribes the principle of equality to citizens, but also observes how ‘individual proclamations of the Constitution’ apply to both citizens and foreigners. Furthermore, according to the Author, the law can extend to foreigners a right that the Italian Constitution attributes to citizens and this extension can also be configured in the silence of the law, so that only in specific cases this is not possible.

³ The only explicit reference to the addressees of Article 13 of the Italian Constitution is contained in its para. 4, which refers in general terms to ‘persons’, in order to prohibit any ‘physical and moral violence’ during the ‘restrictions of freedom’.

⁴ Const. Court, 19th January 1993, no. 10.

trial’ the right to be assisted by an interpreter if he or she ‘does not understand or speak the language used in the trial’ and gave the law the task of implementing this provision.

The mere reference to an ‘interpreter’ is a legacy of the past: before Directive 2010/64/EU and Legislative Decrees No. 32 of 2014 and No. 129 of 2016, there was no distinction in criminal proceedings between the interpreter, appointed for oral acts, and the translator, appointed to transpose written acts. Nevertheless, even before Constitutional Law No. 2 of 1999, the Constitutional Court held that the right to an interpreter existed ‘whenever the defendant’ needed the transposition ‘into the language he/she knows with regard to all acts addressed to him/her, whether written or oral’.⁵

The constitutional provision incorporates, albeit with important variations,⁶ Article 14(3)(f) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6(3)(e) of the European Convention on Human Rights (ECHR).⁷ It safeguards the defence rights of individuals, either foreigners or Italian citizens,⁸ although cases of linguistic ignorance are obviously more frequent in relation to foreigners.

A first difference with the ECHR concerns the extension of the guarantee. Article 6(3)(e) ECHR uses two different expressions in the official English and French versions: ‘language used in court’ and ‘*langue employée à l’audience*’ respectively. The term ‘criminal trial’ in Article 111(3) of the Italian Constitution—interpreted in a non-technical sense, in order to also include preliminary investigations⁹—seems to encompass a broader notion of ‘*audience*’ and to be similar to that of ‘court’, at least in the extensive meaning indicated by the Strasbourg Court, which applies fair trial rights to investigations, from the notification of the charge to the accused person¹⁰ or, in any event, from the moment he/she is subjected to

⁵ Ibid.

⁶ See M. CHIAVARIO, *Così il «vizio assurdo» degli equilibrismi condiziona il difficile cammino delle riforme*, in *Guida dir.*, 1999(27), p. 10, who would have preferred a rigorous transposition.

⁷ Legal scholars approve the inclusion of the right to an interpreter in the Italian Constitution, despite the ‘serious *défaillances*’ in the wording adopted: M. GIALUZ, *L’assistenza linguistica nel processo penale. Un meta-diritto tra paradigma europeo e prassi italiana*, Wolters Kluwer-Cedam, 2018, p. 284.

⁸ Therefore, the provision in itself is not aimed at the protection of ethnic minorities. In this respect, see M. CHIAVARIO, *Giusto processo – II) Processo penale*, in *Enc. giur.*, vol. XV, Supplement, Istituto della Enciclopedia italiana, 2001, p. 13 f.

⁹ P. FERRUA, *Il ‘giusto processo’*, 3^a ed., Zanichelli, 2012, p. 126.

¹⁰ The notice of investigation is sufficient (*De Blasiis v. Italia*, App. no. 33969/96 (ECtHR, 14th December 1999), paras. 7 and 17).

acts which are symptomatic of an accusation and which determine significant and detrimental consequences in his or her life, such as an arrest.¹¹

The above-mentioned constitutional provision poses another problem: it is silent on the free provision of interpreter's services. Nevertheless, this gap can be filled precisely thanks to Article 6(3)(e) ECHR – an “interposed norm” under Article 117(1) of the Italian Constitution – which explicitly mentions it.¹²

For what is of interest here, there is another difference between Article 111(3) of the Italian Constitution and the corresponding provisions of the ECHR: the constitutional rule enshrines the right of an accused person to be, ‘in the shortest possible time, confidentially informed of the nature and cause of the accusation’ against him/her,¹³ but it does not specify that the communication must be in a language which he/she understands. However, this specification is contained in Article 6(3)(a) ECHR.¹⁴ Here too, the gap in the constitutional text is filled by the latter provision, as an “interposed norm” within the meaning of Article 117(1) of the Italian Constitution. On the other hand, as noted above, the Constitutional Court considered the information on the accusation in a known

¹¹ *Maj v. Italia*, App. no. 13087/87 (ECtHR, 19th February 1991), para. 13; *Corigliano v. Italia*, App. no. 8304/78 (ECtHR, 10th December 1982), para. 34.

For a reflection about the different terminology used in English and French versions of the ECHR, see D. CURTOTTI, *Il diritto all'interprete: dal dato normativo all'applicazione concreta*, in *Riv. it. dir. proc. pen.*, 1997 (2), p. 474 footnote 44, who interprets the term ‘court’ as ‘proceeding judicial office’; in similar terms, P.P. RIVELLO, *La traduzione degli atti*, in G. ILLUMINATI-L. GIULIANI (Eds.), *Trattato teorico pratico di diritto processuale penale*, vol. II, edited by P.P. Rivello, Giappichelli, 2018, p. 224.

¹² In relation to gratuitousness, also in the light of European and domestic legislation, see *infra*, Part III, N. PASCUCCI, *Linguistic assistance to foreigners in criminal proceedings: nature of the service and access requirements*.

¹³ The words ‘nature’ and ‘cause’ indicate the profiles “in law” and “in fact” respectively: M. CHIAVARIO, *supra* note 8, p. 12.

In this case, too, the terms ‘accused person’ and ‘accusation’ have a broad meaning which also covers preliminary investigations, in line with the meaning adopted by Strasbourg Court. Otherwise, ‘the guaranteeing function of the provision would be substantially lost’: E. MARZADURI, *Art. 1 legge cost. 23 novembre 1999, n. 2 (“Giusto processo”)*, in *Leg. pen.*, 2000, p. 776 f., who also observes that, if the rule applied only to the person whose charge was formally contested, the adverb ‘confidentially’ and the expression ‘in the shortest possible time’ would make little sense. Similarly, see P. FERRUA, *supra* note 9, p. 121. On this point, see F. CORDERO, *Procedura penale*, 9th ed., Giuffrè, 2012, p. 1296 f.

¹⁴ The English version provides that the accused must be informed ‘in a language which he understands’, in the French version ‘dans une langue qu’il comprend’. Article 14(3)(a) ICCPR contains a similar provision.

language to be a fundamental expression of the right of defence, even before the reform of Article 111 of the Constitution.¹⁵

3. Right of defence and trusted language assistant: the intervention of the Italian Constitutional Court and the prolonged reluctance of the legislator

Art. 111(3) of the Italian Constitution concerns the right to an interpreter appointed by the proceeding authority, but not the right to an interpreter appointed by the defence, i.e. the trusted linguistic expert.

Despite the legislative silence, the practice has long recognised the possibility of appointing a trusted expert chosen by the defendant to supervise the work of the *ex officio* language assistant, chosen by the judicial authority.¹⁶ The trusted expert has sometimes been essential in proving the innocence of the accused person. For example, in the case of a Bengali woman accused of murdering her husband and acquitted after a long pre-trial detention, the trusted expert pointed out the glaring errors in the linguistic transcription made by the court interpreter.¹⁷ However, until the constitutional ruling of 2007 that resulted from this case, the expert's fee was paid

¹⁵ Const. Court, 19th January 1993, no. 10. Some scholars remedy the constitutional omission through interpretation, in the light of the reference to the 'interpreter' in Article 6(3)(e) ECHR and of the guidance provided by the aforementioned judgment of the Italian Constitutional Court, in relation to Article 143 of the Code of Criminal Procedure (CCP): M. GIALUZ, *Commento all'art. 111 Cost.*, in S. BARTOLE-R. BIN (Eds.), *Commentario breve alla Costituzione*, 2nd ed., Cedam, 2008, p. 984 f.; P. FERRUA, *supra* note 9, p. 122.

¹⁶ According to Italian Supreme Court (*Corte di Cassazione*), Joint Criminal Chambers, 26th June 2008, Akimenko, in *Cass. pen.*, 2009(2), p. 483, the trusted linguistic expert may be appointed, 'for example, to acquire full knowledge of the procedural acts, to verify the accuracy of the official translation, to draft written pleadings, to interact with lawyers, technical consultants, investigators'. Following the transposition of Directive 2010/64/EU, some of these tasks will also be attributed to the linguistic expert appointed by the proceeding authority, but other activities will necessarily remain the exclusive responsibility of the trusted expert. See, among others, M. CHIAVARIO, *La tutela linguistica dello straniero nel nuovo processo penale italiano*, in *Studi in memoria di Pietro Nuvolone*, vol. III, Giuffrè, 1991, p. 126 f.; R.E. KOSTORIS, *La rappresentanza dell'imputato*, Giuffrè, 1986, p. 313 ff.

¹⁷ In this regard, see C.J. GARWOOD, *Court interpreting in Italy. The daily violation of a fundamental human right*, in *The Interpreter's Newsletter*, 2012(17), p. 182 ff.; C. FALBO, *La comunicazione interlinguistica in ambito giuridico*, Eut, 2013, p. 88; L. FARAON, *Diritto di difesa dello straniero e interprete*, in *www.diritto.it*, July 2006.

exclusively by the defendant, even if he or she was indigent. It was not included in the cost of free legal aid.¹⁸ Obviously, the problem is of paramount importance when the defendant is a foreigner with a low income who cannot afford the costs of the expert.

In this judgment, the Italian Constitutional Court reaffirmed the importance of this professional figure for the exercise of the right of defence, distinguishing him/her from both the linguistic assistant appointed by the judicial authority and the technical adviser.¹⁹ Consequently, the Court has declared Article 102 of Presidential Decree 30th May 2002, No. 115 (Consolidated Law on costs of justice), relating to technical consultants, to be incompatible with the Constitution ‘in so far as it does not provide for the possibility for a foreigner who is admitted to free legal aid and who does not know the Italian language’ to appoint his/her own interpreter at the expense of the State, provided that he/she meets the relevant income requirements. However, the Court did not specify the *criteria* to be followed: thus, a trusted linguistic expert paid by the State could potentially be used for all the acts of the proceedings. Nevertheless, the constitutional judges hoped for a legislative intervention to better define the rules.

However, the legislator has never intervened, not even with the linguistic assistance reforms of Legislative Decrees No. 32 of 2014 and No. 129 of 2016, which transposed Directive 2010/64/EU. Consequently, according to some scholars, the judgement no. 254 of 2007 would be outdated, because these reforms have significantly extended the application of *ex officio* linguistic assistance and the new rules have eminently defensive purposes. They therefore consider that, in the absence of a specific legislative innovation, access to legal aid at the expense of the State would no longer be permitted in relation to the cost for the trusted interpreter.²⁰

This approach does not seem acceptable: the aforementioned constitutional judgement mentions, in turn, the ruling no. 10 of 1993

¹⁸ Legal scholars considered the cost of the trusted interpreter to be indirectly reimbursable in the case of access to legal aid at State expense, if advanced by the lawyer: D. CURTOTTI NAPPI, *La spinta garantista della Corte costituzionale verso la difesa dello straniero non abbiente*, in *Cass. pen.*, 2007(12), p. 4443.

¹⁹ Const. Court, 6th July 2007, no. 254. About this aspect, see, for all, D. CURTOTTI NAPPI, *supra* note 18, p. 4442 ff.

²⁰ M. GIALUZ, *L'assistenza linguistica*, cit., p. 311 ff., according to whom, pending a reform defining the boundaries of application of the institution, the figure of the state-paid language expert is “frozen” and completely absorbed in into that of the court interpreter/translator’. *Contra* S. SAU, *Commento all’art. 143 c.p.p.*, in G. ILLUMINATI-L. GIULIANI (Eds.), *Commentario breve al Codice di Procedura Penale*, 3rd ed., Cedam, 2020, p. 513.

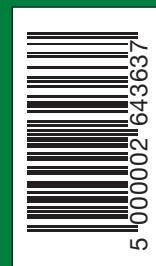
on court interpreters and states that the right to an interpreter is functional to the conscious participation of the foreign defendant in the proceedings, which is considered a ‘fundamental part of the right of defence’. The accused, if indigent, has the right to free legal aid in relation to the fee of a trusted linguistic assistant, whenever it is actually necessary for his self-defence.²¹

Still, it is clear that the vagueness of the requirements of this right leaves a wide margin of discretion to the judge. Legislative reform is therefore essential in order to regulate the figure of the trusted linguistic assistant paid for by the state.

²¹ For more details, see N. PASCUCCI, *La persona alloglotta sottoposta alle indagini e la traduzione degli atti*, Giappichelli, 2022, p. 187 ff.

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.

Maria Grazia Coppetta, Associate Professor of Criminal Procedure at the University of Urbino ‘Carlo Bo’, has published *‘La riparazione per ingiusta detenzione’* (CEDAM) and many minor writings on the right to personal liberty in criminal proceedings, criminal execution and juvenile criminal justice.



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