



The right to free access to interpretation and translation in criminal proceedings: Spanish panorama

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Summary

- Preliminaries
- Legal regulation
 - Spanish Constitution (CE)
 - Organic Law on the Judiciary (LOPJ)
 - Criminal Procedural Act (LECrim)
- Jurisprudential interpretation:
 - By the Constitutional Court (TC)
 - By the Supreme Court (TS)
- Final considerations

Preliminaries

- Importance of the right to interpretation and translation -free, where necessary- due to growing phenomenon of globalization: for that, greater presence of international and foreign elements in the process
- Also European Union institutions are concerned and for that:
 - Funding of interesting European projects bringing together the research work of lawyers and linguists, e.g., Aequitas (<http://www.agisproject.com>)
 - Legislative policy of the European Commission: recent Proposal for a Council Framework Decision (FWD) on the right to interpretation and to translation in criminal proceedings, 8 July 2009, COM(2009) 338 final
- The right to an interpreter (and or translator) is raised as fundamental right at national, international and European level within the wider framework of the right of defence
- Correspondent state's obligation and particularly by the Justice Administration for providing the access to accused to suitable professionals in interpretation and translation, for free if necessary
- Most complex issue is practical application of such right in majority of EU member states due to logistical and budgetary difficulties

Legal regulation

- International texts recognizes the access to interpretation and translation for free if necessary in all procedural stages, that is, not only along oral hearing but also in investigative period:
 - Arts.13.3.a) and 14.3.f) International Covenant on Civil and Political Rights (ICCPR) signed in New York on 19 December 1966:
 - Arts. 55.1.c) and 67.1 Statute of the International Criminal Court (ICC) signed in Rome on 17 July 1988
- Also European texts as:
 - European Convention of Human Rights (ECHR), Rome, 4 Nov. 1950:
 - In relation with right to liberty and security: Art.5.2 (police arrest)
 - In relation with the right to a fair trial: twice in Arts.6.3.a) and 6.3.e)
 - Not explicit in EU Charter of Fundamental Rights except remote reference to the principal of non discrimination by language (Art.21.1)
 - Explicit in another European texts, e.g., FWD on European Arrest Warrant, 13 June 2002 (Art.11.2)

Spanish Constitution

- Not expressly set out in the list of rights contemplated in Art.24.2 Spanish Constitution of 27 December 1978 (*Constitución española* or CE), e.g., right to the defence and assistance of a lawyer ...
- But Spanish constitutional jurisprudence has undoubtedly recognised it on a continuous basis on the grounds of the whole Art.24 CE:
 - Protection against any infringement of the right of defence as part of the right to ‘effective protection of judges and courts’ (Art.24.1)
 - Right to a trial ‘with full guarantees’ what it is known as the right to ‘due process of law’ (Art.24.2)
- In sum the right to an interpreter and translator is included in the treatment of the right of defence in widest sense
- Also provision for free access to both professionals as much as free justice is contemplated in Art.119 CE

Organic Law on the Judiciary

- Organic Law 6/1985, of 1 July, on the Judiciary (*Ley Orgánica del Poder Judicial* or LOPJ) translated to English by the Spanish General Council of Judiciary Branch (*Consejo General del Poder Judicial* or CGPJ)
- Sole reference to regulation of the right to an interpreter in relation with official language to be employed in Spanish procedure contemplated in Art.231 LOPJ
- Art.231.5 LOPJ declares: 'In oral proceedings, the Judge or Court may authorise any person knowing that language as an interpreter, having previously been sworn in or taken oath'
- Recent modification of such precept in general amendment of LOPJ by Organic Law 1/2009, 3 Nov., in order to introduce the new judicial office (*oficina judicial*), which extends clerk's competences: only the prior mention to judge or court is abolished in new Art.231.5 LOPJ, which implies that the authorization for the interpreter shall be done henceforth by the clerk of the judicial office and not by the judges

Criminal Procedural Act

- Major legal regulation in Spanish Criminal Procedural Act (*Ley de Enjuiciamiento Criminal* or LECrim), 14 September 1882
- **Pre-procedural phase**, when the accused has still the legal standing of an arrested person
 - Art.520.2.e) LECrim contemplates the ‘right to be freely assisted by an interpreter, when it is question of a foreigner who does not understand or speak Castilian language’
 - This right forms part of the Letter of Rights, the information on which has to be read by the police in the presence of the suspect
- **Procedural phase**: different regulation according two different criminal ordinary proceedings in Spain:
 - Ordinary proceeding (*procedimiento ordinario*)
 - Abbreviated proceeding (*procedimiento abreviado*)

Spanish criminal proceedings

Ordinary proceeding:

- Pre-trial phase or investigative period, called 'summary phase' (*sumario*): Art.398 LECrim expressly indicates that 'whether the accused does not know the Spanish language or if he were deaf and dumb, the provisions in Arts.440,441 and 442 will be observed', that is, following provisions related to witness statements
- Trial phase: Art.711 LECrim reproduces former provision but only for witness statements and with exception of translation in writing provided in Art.441 LECrim in order to not interrupt the trial
- **Abbreviated proceeding:** Art.762.8 LECrim: legal remission to former Arts.398, 440 and 441 in relation to defendants and witness, who do not speak or understand the Spanish language along pre-trial and trial phases with explicit mention in this case that *it is not necessary that the appointed interpreter has an official qualification (!)*

Provisions on Arts.440 and ff

- Assistance of an interpreter for witnesses (and also defendants) 'who do not understand or speak the Spanish language' in their declarations to the judicial authorities, either during the instruction phase or oral hearings in criminal proceedings
- Previous oath (now also promise) is required as far as interpreter is also a third person in criminal proceeding like witnesses and experts
- Consecutive and not simultaneous interpretation is foreseen; textually, the questions will be put to the witness through an interpreter and the replies (that he may make also through the interpreter) will be heard
- Appointment of an interpreter varies:
 - 'From among those who hold such qualifications, were there any available'
 - Otherwise a person who has correspondent degree (*maestro*)
 - Lastly, any person who has knowledge of the language (!)
- As final recourse the mechanism derives in the attribution of the translation of the questions and replies to an official body as it is the Office for the Interpretation of Languages of the Ministry of State (*Oficina de Interpretación de Lenguas del Ministerio de Estado*)
- Special provisions for deaf witnesses: name of a sign-language interpreter, who also must swear the charge before the questioning

Constitutional Court

- Judgment (STC) n. 74/1987, May 25, as a consequence of an appeal on the grounds of unconstitutionality lodged by the Basque Government extends the right to an interpreter provided in previous Art.520.2.e) LECrim *also* to 'Spanish citizens, who do not have sufficient knowledge of Castilian Spanish'; the Constitutional Court gave priority to the right of defence itself over the duty of all Spanish citizens to speak Castilian as official language in whole Spanish state (Art.3.1 CE)
- Judgment (STC) n. 71/1988, April 19, extends the right to an interpreter to the 'private' communication between defendant and defence lawyer according to European Human Rights Court (ECtHR) as much as such communication is preparatory of further oral hearing
- Another constitutional precedents:
 - Judgment (STC) n. 30/1980, Feb. 7 in provision of interpreter for deaf-mute
 - Judgment (STC) n. 188/1991 considering the interpreter adds a guarantee of 'objectivity' to criminal proceeding
 - Judgment (STC) n. 181/1994 foresees the right to interpreted related to understanding and not to nationality of the defendant or witness
- Constitutional Court extends same premises to the translation of documents as compulsory task by the state: Order (ATC) n. 166/2005, April 19

Supreme Court

- Right to an interpreter is considered as falling the generic right of defence despite the absence of specific constitutional mention, eg, judgments (SSTS) n. 874/1999 May 27 and 867/2000, May 23
- Judgment (STS) n. 705/2001, April 30, declares the inexistence of any right to appoint an interpreter *ex parte*; interpreter is not an expertise but a professional of 'neutral' character and for that he or she is judicially nominated
- Another jurisprudence according constitutional precedents:
 - Judgment (STS) n. 813/2004, July 21, recognition of the right to an interpreter for communication between client and counsel, which can take place in detention centre in order to prepare the hearing
 - Judgment (STS) n. 901/2005, July 7: no connection between the right of an interpreter and the status of foreigner but connection to understanding of the language. **Also recently judgment (STS) n. 1850/2009, July 13**

Judicial practice

■ Procedural acts, which require the assistance of interpreter according to judicial practice:

- Summons to enter the courtroom, eg, judgment by the Provincial Court of Girona (SAP) 11 November 2004
- Medical examination, eg, judgment by the Supreme Court (STS) 3 October 2005
- Listening to taped conversations, eg, judgments by Supreme Court (SSTS) 2 February 2004, 2 February 2006, 11 April 2006 ...
- Not for house searches, eg, Order by Supreme Court (ATS) 2 November 2006 and, more recently, judgment also by Supreme Court (STS) n.182/2008, April 21
- It must be applied by similarity the special protective measures provided for witnesses and experts contained in Organic Law 19/1994, December 23, e.g., Supreme Court judgment (STS) of 28 July 2001
- Important differences between Spanish regions (*Comunidades Autónomas* or CC.AA.) and even judicial bodies in relation with qualification level of court interpreters and translators as well as management, e.g., permanent or temporary staff, private agencies, (*free-lance*); also big differences in salary. In general deficient conditions

Final considerations

- At the moment existing Proposal for a Council FWD on the right to interpretation and to translation in criminal proceedings, 8 July 2009, in substitution of failed Proposal for a Council FWD on certain procedural rights in criminal proceedings throughout the European Union, 28 April 2004, COM (2004) 328 final
- Unfortunately some references included in former FWD Proposal have been lost in new text, e.g., the accuracy of the translation and interpretation in order to obligate member states to ensure that translators and interpreters employed are 'sufficiently qualified' as well as their replacement if necessary and -less important- the recording of proceedings; in the meantime the EU Commission, DG Translation, has launched the European Master's in Translation (EMT) project (http://ec.europa.eu/dgs/translation/programmes/emt/index_en.htm)
- Recommendations for effective application of the right to interpretation and/or translation in criminal proceedings:
 - Consequence of the infringement of such right must be the nullification of the criminal proceeding as far as it is the violation of fundamental right
 - Guarantee of a better quality of professional services in provision of an accurate interpretation/translation
 - Improvement of professional conditions for court interpreters and translators, eg, salary, training, ethical code (eg, *Federal Court Interpreters Act* in USA)
 - Minimum linguistic training also for judges and courts, eg, legal degree
- EU-LTA Conference Right to interpretation and translation in Spain
- Future body of judicial professionals to be included in Art.475.b) LOPJ?

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