New technologies in the court: Remote hearings and hybrid interpreting during the pandemic

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ABSTRACT

Fair trial is the cornerstone of all judicial proceedings and a fundamental right guaranteeing, among other things, the right to interpreting to those who do not understand and speak the language of the court. With the outbreak of the COVID pandemic, courts around the world struggled to continue adjudication, turning to the solution of remote hearings and hybrid interpreting to comply with requirements of both health policy and the right to linguistic presence in judicial proceedings. This paper describes the solutions applied in domestic, international and EU courts, shedding light on the shortcomings of remote hearings and their possible detrimental effects on interpreting and fair trial.

KEYWORDS

fair trial, digitalization, court interpreting, remote interpreting, hybrid interpreting

1. INTRODUCTION

Interpreting, and in particular, court interpreting has long been a subject of intense research by those active in the field translations studies (Dueñas González, Vásquez, & Mikkelsen, 1991; Fowler, 2016; Gamal, 2009; Snell-Hornby, 2006). Owing to digitalization efforts kick-started all over the world, different functions of the judiciary were rendered more efficient by introducing

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for example e-portals for submitting applications and supporting documents, remote hearings and speech to text tools to replace dictation recorders and typing. As such, it is safe to say that the turn towards digitalization took place before the outbreak of the COVID-pandemic and thus laid a solid foundation in numerous courts for adapting to the requirements under the new regime.

In what follows, I will present the use of new technologies in the court affecting court interpreting. To underpin the legal requirement of court interpreting, I shall first discuss the fundamental right to fair trial and the requirements flowing therefrom. These include the right to interpretation for those, who do not understand or speak the language of the court, rendering the proceedings a multilingual event. I then turn to the concept of court interpreting in general, and the specific cases of interpreting before national courts, the CJEU and the International Criminal Court. I will then discuss the changes in the organization of work and interpreting in national and international courts during the pandemic, giving a definition of hybrid court interpreting. Finally, I consider the benefits and potential risks of remote hearings and hybrid interpreting. For reasons of personal, linguistic and scientific access, in my analysis I draw heavily on Hungarian scholarly literature, examples from Hungarian court interpreting and surveys and interviews conducted with Hungarian interpreters and legal professionals.

### 2. FAIR TRIAL RIGHTS AS THE BASIS FOR THE RIGHT TO INTERPRETATION IN COURT

#### 2.1. The overarching right to a fair trial

The purpose of the judicial system is to operate courts which are to render binding decisions in legal disputes and to decide on criminal charges. Since the decision of the court is binding and affects the rights and legal interests of the individuals concerned, it is a fundamental right and rule of law requirement that judicial proceedings be conducted fairly. The right to a fair trial is of utmost importance, since the enforcement of most of the other fundamental rights is dependent upon the fairness of the trial. Therefore, global and regional international documents, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), European Union law, the Charter of Fundamental Rights and national constitutions respectively, enshrine the constitutional right to a fair trial.

The right to a fair trial is an overarching right to judicial proceedings being conducted fairly and justly. These shall be carried out in compliance with the relevant procedural norms by an impartial judge, while fully guaranteeing defendants’ rights of defence. Thus, fair trial includes requirements regarding the person of the judge (no conflict of interest, independence from the state and political parties, etc.), the conduct of proceedings (it must be conducted in accordance with the applicable procedural norms) and the parties or the accused must be able to exercise their right of defense (such as being present at the trial, the ‘equality of arms’, including being able to access documents necessary for mounting a defense or pleading their case). The latter group of rights includes the right to interpretation for those who do not understand or speak the language of the court (Hati, 2016; Vogiatzis, 2022).
2.2. The right to interpretation as an element of fair trial

Although court interpreting does not appear exclusively in criminal proceedings, due to the nature of the fundamental rights involved and the severity of the sanctions threatened, criminal proceedings are those where the accused must be afforded interpreting. Accordingly, if the accused does not understand the language of the proceedings, they have the right to interpretation in their mother tongue or in a language they understand.

Article 14 (3) (f) of the 1966 International Covenant on Civil and Political Rights (ICCPR) provides that a defendant in criminal proceedings has the right to “have the free assistance of an interpreter if he cannot understand or speak the language used in court”. Similarly, Article 6 (3) (e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) ensures that the suspect is “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”. The right to fair trial is laid down in Article 47 of the Charter of Fundamental Rights of the EU and numerous national constitutions, without explicitly mentioning the right to interpretation. Nevertheless, this element of fair trial is foreseen in EU secondary law, such as Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, and national procedural laws guaranteeing this right in criminal proceedings.

The right to interpretation, as part of a fair trial, ensures that the accused understands the charges brought against them so that they are able to prepare for their defense. Thus, the accused must be put in the position where they are not at a disadvantage just because they do not speak or understand the language of the court. Accordingly, denying the accused their right to interpretation amounts to a violation of due process (Brown-Blake, 2006).

But what does the right to interpretation entail? Does it suffice to provide the accused with an interpreter during the trial? The relevant case law of the European Court of Human Rights (ECtHR) further refines this element of fair trial guaranteed under Article 6 ECHR. In Kamasinski v. Austria, the ECtHR stated that in order for the rights enshrined in Article 6 § 3 of the Convention to be effective, the obligation of the proceeding court is not limited to appointing an interpreter. Instead, it must also check the adequacy of the interpretation (ECtHR, 19 December 1989, Kamasinski v. Austria, no. 9783/82, § 74). According to the Kamasinski decision, therefore, the right to a fair trial requires states to ensure that interpreters involved in criminal proceedings provide adequate services to the accused. The purpose of this is to allow the accused to be ‘linguistically present’, that is, to actually participate in the trial. In other words, the physical presence of the accused is not enough; legal presence also requires that the accused understand the proceedings and be able to effectively communicate (Chang & Araujo, 1975).

It is worth noting that in the context of a fair procedure, additional requirements may arise which are not expressly provided for under international treaties. As Dingfelder Stone points out, a situation is conceivable where the presence of an interpreter is necessary to ensure the full right to a fair trial. For example, when the accused requests the summoning of a witness, who does not speak the language of the court (Dingfelder Stone, 2018). Accordingly, court interpreting may include not only interpretation for the accused, but also interpreting for the benefit of the accused so that his rights to defense are fully realized. In what follows, I turn to the concept

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and characteristics of court interpreting, that is, the exercise of the right to interpretation in the context of judicial proceedings.

3. WHAT IS COURT INTERPRETING?

3.1. The concept and characteristics of court interpreting

In her work, The Turns of Translation Studies, Snell-Hornby dates the emergence of court interpreting as a separate field of research to the 1980s. While some researchers consider court interpreting to be a part of community (administrative, immigration, police, judicial) interpreting, in most European countries it is treated as a separate field with its own professional organizations (Snell-Hornby, 2006).

Gamal defines court interpreting as a form of legal interpretation. Further specifying the notion of court interpreting, Dueñas González et al. define legal interpreting performed outside the courtroom but related to legal proceedings as quasi-court interpreting (Dueñas González, Vásquez, & Mikkelson, 1991).

According to Fowler, court interpreting is normally done using consecutive or chuchotage techniques, often alternating between the two methods: the interpreter interprets for the client using the chuchotage method, interpreting all other participants in the procedure with the consecutive/liaison technique (Fowler, 2016; Stern, 2004). Fowler points out that switching between these two techniques requires serious professional knowledge on the part of the interpreter, as the interpreter not only changes the volume of the interpretation, but also works in a consecutive technique and in a simultaneous method in chuchotage (Fowler, 2016).

While court interpreting has a number of important characteristics, such as inherent power (Carstensen & Dahlberg, 2017; Csörgő, 2013) and linguistic asymmetry and the underlying cultural differences between the interpreter’s client and other participants of the case (Bassnett, 2011; Morris, 1999), in what follows I shall only elaborate on what is of importance from the perspective of our broader topic: the introduction of new technologies to enable remote hearings and hybrid interpreting at the courts.

In the more than half a century since the ECHR and the ICCPR were adopted, globalization and with it, trade relations and immigration have reached unprecedented levels. As a result, there is an increasing need for interpretation in the courts. Court interpreters are typically hired on a case-by-case basis by clients or, where necessary, assigned by the courts, as proceedings before national courts are usually conducted in (one of) the official languages of the state. Interpreting remains the exception in national judicial proceedings, where one or more of the parties, or the accused does not understand the language of the court (Alsamara, Abbaci, & Farouk, 2021). Accordingly, it is not typical for the courts to have an interpretation unit with permanent staff. Court interpreting is therefore carried out with the help of freelance, mostly qualified interpreters (except occasionally for ‘lesser used’, ‘smaller’ languages, where qualified interpreters are difficult to come by).

3.2. Requirements of court interpreting

According to Stern, the context of the courtroom, legal language and the expectations of the judiciary places high demands on the court interpreter (Stern, 2011, p. 22). The court interpreter
must interpret accurately, have a good knowledge of languages, be familiar with the legal system and be able to switch between the different types of interpretation. The interpreter must also be aware of the strategic use of languages in the courtroom, presupposing pragmatic competence on the part of the interpreter (Eades, Hale, & Cooke, 1999).

An essential requirement for court interpreting is text fidelity, i.e. the interpreter must also pass on redundancies. The reason for this is that the judge must also be able to establish the mental condition and credibility of the accused, the witnesses and other participants, which is only possible through the complete and accurate rendering of what has been said. The requirement for textual fidelity thus includes erroneous starts, repetitions, bad grammatical structures, intonation, missed language register, and so on (Gamal, 2009; Hale, 2007).

A related issue is the role of the interpreter as a cultural mediator. Carstensen and Dahlberg emphasize that court practice and professional standards suggest that an interpreter is expected to refrain from explaining cultural differences (Carstensen & Dahlberg, 2017). However, this may fly in the face of the court’s expectation to be able to form a real picture of the person being interpreted, their truthfulness and emotional cues (Morris, 1999).

Finally, the interpreter is obliged to keep confidential the information provided during the assignment or the information that comes to his knowledge. Although this requirement is not limited to court interpreting, maintaining the confidentiality of procedural information is the reason why in many cases court interpreters do not have prior access to the file (Gamal, 2009).

### 3.3. Changes in court interpreting as a result of the pandemic

Puklus conducted research on the changes owing to the digitalization of court proceedings in Hungary (Puklus, 2021). She reports that the digitalization process was launched in 2018 and completed by 2019 as a result of which remote hearings and audio-visual protocols were introduced. All Hungarian courts were equipped with the so-called video conference infrastructure (VIKI), which includes the equipment necessary to conduct remote hearings. VIKI connects the Hungarian courts with international bodies, domestic institutions and other courts. According to Puklus, the VIKI system is easy to use, it does not require any special skills on the side of the users, while at the same time saving time and money (Puklus, 2021).

The purpose of this digitalization process was to speed up judicial work by replacing traditional protocols requiring dictation and typing and to ensure the safety of the participants of the proceedings, since the transport of the accused bears many risks. Although remote hearings were introduced primarily for the purpose of the efficient conduct of criminal proceedings, they are increasingly used in civil proceedings as well. In fact, while 2019 saw 6,426 remote hearings, the number of remote hearings tripled by 2020 and continues to grow. Meanwhile, Puklus cites the President of the National Office for the Judiciary, who claims that without the pandemic, the Hungarian courts would not have made use of remote hearings to such a degree as they do today.

How does remote hearing work? It is organized as a form of hybrid interpreting where one or several of the parties is not present before the court. The interpreter is typically in the courtroom with the judge, following the proceedings on a screen, speaking into a microphone. In this setting, there is no possibility for employing the chuchotage technique, instead, the interpreter must rely on liaison or consecutive methods (Puklus, 2021). Simultaneous interpretation is not possible, since the necessary technology is not available in VIKI.
Puklus indicates that simultaneous court interpreting with the help of so-called tour guide technology is also catching on in Germany. This is not a new technology, but has been used extensively by guides and to a lesser extent, by interpreters. This technology allows for the interpreter to remain in the courtroom, however, during the pandemic, social distancing and mask wearing rules can render this method inefficient, with incoming sound quality declining with distance and outgoing interpreting being obstructed by the personal protective equipment (Puklus, 2021).

What are the consequences of court digitalization and the emerging remote hearings and hybrid court interpreting? These solutions save time and money, mitigating contagion risks. However, remote hearings are – as of yet – not fully digitalized, that is, the interpreter must be present at the side of the judge or the accused/parties. As such, the hearing is not completely rid of spatial constraints, and the risk of contagion is not completely eliminated.

If the purpose of hearings is to have direct access to the accused to hear their version of events, read from their facial expressions, body language and enforce their right to interpretation so that they can meaningfully participate and be linguistically present, then remote hearings may not fully replace hearings held with the participants present. In fact, sound may be distorted, emotional cues may be difficult to read on the screen, with body language presented as incomplete since the screen does not show the whole body of the accused and other parties. In addition, where several participants are heard remotely, the judge and interpreter do not have an overview of the ‘mood’, sounds and movements in court. This may lead to difficulties in interpretation and ‘reading’ the witnesses, the accused and their testimonies. All in all, losing these sources of information may be to the detriment of fair trial rights.

4. INTERPRETING AT THE INTERNATIONAL CRIMINAL COURT

4.1. The purpose and multilingual nature of international criminal proceedings

International criminal tribunals and courts have been set up to bring the perpetrators of the most heinous crimes to justice. Their purpose is to prosecute those accused of genocide, aggression, war crimes and crimes against humanity (Kovács, 2018). As Sántha summed up, international crimes amount to a breach of fundamental human values and an extremely serious violation of human dignity (Sántha, 2008). According to the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY), crimes against humanity are serious acts of violence that harm human beings by attacking what is most important to them: their lives, their freedom, their physical well-being, their health and their dignity.

While due to universal jurisdiction, any court of any state may prosecute these crimes, irrespective of where they had been committed, the perpetrators of these crimes can often be prosecuted objectively and most effectively by an international court (Karton, 2008), as the perpetrator’s state may not have an interest in prosecuting and less impartiality is expected on the part of the victims’ state. Cases before international criminal tribunals are of great social significance, since these proceedings are meant to bring perpetrators to justice, restore social justice and help reconciliation.

The international composition of international criminal tribunals is a good illustration of the global commitment to accountability for such heinous crimes, ensuring impartiality (Namakula, 2014). With the languages of the judges, witnesses and the accused, a multilingual situation arises, which must be resolved through interpreting (Bowen & Bowen, 1985; Kovács, 2019).
In order to demonstrate the challenges of interpreting at an international criminal court, I have focused on the International Criminal Court (ICC) in the Hague, which operated also after the COVID outbreak. I made an interview with judge Kovács of the court to gain some insight into the organization of remote hearings and interpretation during the pandemic.

4.2. Characteristics of international Criminal Court interpreting

While ICC interpretation may be considered a form of court interpreting, it also has a number of specific features that set it apart from interpreting at domestic courts. International criminal courts and tribunals are real courts, as they apply the law in adversarial proceedings, follow procedural norms, and make binding decisions. Accordingly, the accused before the ICC are entitled to a fair trial, and consequently, to interpretation in case they do not understand and speak the languages of the court. In contrast to domestic courts, the ICC has two working languages: French and English (Alsamara et al., 2021) with an occasional Arabic pivot. Thus, proceedings will involve a minimum of three languages, into and from which interpreting must be ensured. Language services are provided by the Judicial Interpretation and Translation Unit (STIC) of the ICC, ensuring consecutive and simultaneous interpretation at court hearings and press conferences, in addition to the translation, proofreading and the editing of court documents.

The ICC has regularly heard witnesses remotely, from its regional hubs, for example Bangui, the capital of the Central African Republic. Thus, the ICC had gathered experiences with the management of remote hearings even before the pandemic. Nevertheless, the accused are typically held in the Hague and present before the ICC during their trial (except for incumbent presidents).

Based on the interview conducted with judge Péter Kovács of the ICC on 28 May 2022, the ICC first went into lockdown after the outbreak of the pandemic. Somewhat later, work was restarted with social distancing, PPE requirements and Plexiglas walls. To comply with social distancing rules, interpreters no longer shared a booth but were placed in separate booths. This led to some confusion in boothwork: interpreters had a difficult time handing over and cooperating under the new circumstances. Remote hearings suffered where power outages occurred and hearings had to be delayed or where the internet was not stable. Minor delays in hearing the voice of the witness in remote hearings led to confusion in interpreting, owing to the fact that those outside the court could not see or hear whether the interpretation had finished and started speaking before the interpreter finished.

Judges and interpreters saw and heard the witness clearly, while observers and other participants could only see their blurred image and distorted voice. However, as in the case of court interpreting, the problem may arise that the judges do not gain a full picture of what is communicated by a witness who is not present before the court, entailing the risk that the judge’s impression may not be accurate.

5. INTERPRETING BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

5.1. The purpose and multilingual proceedings of the CJEU

The Court of Justice of the European Union (CJEU) ensures respect for EU law through the authentic interpretation of EU law and deciding direct actions falling within its jurisdiction.
Parties to proceedings may request that a hearing be held, and subject to prior registration anyone can join the audience at the hearing. While multilingualism applies in all stages of the CJEU’s proceedings, the need for interpretation arises only during the oral phase of the proceedings: the hearing.

While the CJEU is not unlike domestic courts and the ICC, the right to interpretation here does not arise due to the rights and interests of the accused, but much rather owing to the privileges of the Member States and the fair trial rights of private persons turning to the CJEU seeking judicial protection. An important difference between national courts, the ICC and the CJEU is that the latter does not have an official language. While French is considered to be the working language of the CJEU for its deliberations, the language of the case, in which all documents must be prepared and in which the judgment is issued could be any of the official languages of the Union (except Irish). In order to ensure compliance with the rules of multilingualism in the CJEU’s proceedings, it operates a Directorate-General for Multilingualism, composed of so-called lawyer-linguists (translators) and interpreters. While lawyer-linguists at the CJEU must hold a law degree, interpreters working at the hearings typically do not have a law degree. In total, about 45% of the CJEU’s staff provide translation and interpretation services to the institution (Seresi & Láncos, 2017). In contrast with court interpreting at the domestic level, CJEU hearings always involve simultaneous interpretation in built-in interpreting booths.

5.2. Changes in CJEU interpretation during the pandemic

Work at the CJEU did not stop during the pandemic and the institution introduced a number of measures to ensure the safety of staff and representatives of the parties. While most of the staff could work from home with electronic access to documents, hearings were not conducted entirely remotely. Since a number of Member States introduced travel restrictions and mandatory quarantine rules, the CJEU was faced with the situation that the legal representatives of Member States and other parties could not travel to the Court, with the risk that hearings had to be put off indefinitely. Consequently, as of May 2020, the CJEU arranged remote hearings through the Cisco system, but only for the representatives of governments and government agencies. Hearings therefore involved hybrid interpreting, with the legal representatives of some parties taking part remotely and the Commission and some other parties’ representatives appearing in person before the Court. Although interpreters were also subject to travel restrictions, they could only work at the CJEU in person, meaning that any remote interpretation solution was excluded.

Besides social distancing and PPE requirements, interpreters were faced with the challenge of having to work separately in the booths, placed side by side, obstructing cooperation strategies between them. On the day of the hearing, on-site technicians conducted a sound and visual check to ensure the audibility and visibility of the parties and interpreters through the Cisco system. During the test, technicians ask for feedback from legal representatives participating remotely, as well as interpreters, on the sound quality. The Cisco system broadcasts only four channels, allowing for a maximum of 4 parties to attend the hearing remotely, and only three different languages are managed by the system. This means that those participating remotely may only speak or listen in one of three languages. Therefore, compared with in-person hearings, remote hearings put restrictions both on the number of participants and languages that could be heard remotely (Láncos, 2021).
Owing to the technical solution of remote hearings, the sound and picture quality are not optimal in all cases, despite the sound check. This is, of course, a great challenge for the interpreters. Sound checks have shown that due to Cisco system settings, the voices of speakers with a higher pitch — typically women — are difficult to understand and therefore difficult to interpret. In fact, in my experience, often the sound was grainy, which made interpreting difficult or near impossible. Sometimes a high-pitched voice blocked the sound. With up to four legal representatives participating remotely, it is difficult to see the facial expressions on the smallish screen of those not present at the hearing. Interpreters working also from visual cues miss this type of input.

As a further technical problem, it was not a rarity that one of the representatives participating remotely ‘dropped out’ of the hearing. This meant that the order of the speakers had to be changed ‘on the fly’ in order to continue the hearing. Indeed, once it was up to the interpreter who spoke the language of the representative who dropped out of the hearing, to read out the pleadings sent over by the representative. In case the participant could not reconnect, they could not answer the judges’ and the Advocate General’s questions or hold their closing reply.

5.3. Survey of CJEU interpreters and interview with Hungarian legal representative on the remote hearing solution

I surveyed the experiences of interpreters working at the CJEU with a short questionnaire. I sent the questionnaire specifically to EU officials and freelance colleagues working for the CJEU on a regular basis (16 in total) using the Survey Monkey online questionnaire program for data collection.

I asked the interpreters whether they experienced any difficulties due to the measures taken by the Court in relation to COVID. While most noted that the challenges could be overcome by experienced interpreters, the answers detailing the difficulties included:

“"It is difficult to see the judges, the Registrar, the Advocate General."

“"It is hard to see the legal representatives participating remotely."

“"The pre-trial sound check is strenuous."

“"Grainy’ incoming sound when those participating remotely speak."

On 28 January, 2021 I interviewed a legal representative asking whether he was satisfied with the system of remote hearing and the quality of hybrid interpreting. The legal representative interviewed described the remote hearing as an ordeal. Although the system had the clear benefit that one does not have to travel to Luxembourg during a pandemic, and parties save time, in many cases there were problems with sound quality which could not be completely eliminated notwithstanding the regular sound checks. A typical problem is that when the internet connection is weak, the party concerned is thrown out of the system and may miss an important point in the trial: not hearing relevant questions or even missing their own pleadings or reply. The visibility of the courtroom is also poor, everything is small, facial expressions of the participants are unrecognizable. Participants could only follow the proceedings in the language in which they plead, which meant that they could not listen to the parties, the judges and the Advocate General in their original language even if they understood these languages (Láncos, 2021).

Meanwhile, the CJEU judge I interviewed on the same day stated that remote hearings are working well, and it is fortunate that the CJEU has found a solution to conduct the hearings...
during the pandemic. The hearing still serves its purpose, and no problems were identified with the interpretation (Láncos, 2021). The difference between the experiences of the interpreters, the legal representative and the judge clearly shows that the various participants focus on different elements of the proceedings.

6. SUMMARY

Based on the international, European Union and national law, the fundamental right to a fair trial includes the right to participate meaningfully in court proceedings, entailing a fundamental right to court interpreting. In my paper, I gave a brief overview of the concept and characteristics of court interpreting, followed by a short analysis of court interpreting at national courts, international criminal tribunals, and in particular, the ICC and finally, the CJEU. While digitalization has reached most courts under scrutiny, the pandemic kickstarted or proliferated remote hearings, making the use of hybrid interpreting solutions necessary. Although the solutions implemented at the different courts, such as VIKI, the Cisco system and the ICC remote hearings through regional hubs allowed for continuing adjudication during the pandemic, new problems threatening the right to a fair trial emerge. These problems centre around the sound and visibility of the accused, witnesses or other participants of the proceedings, posing new challenges for both judges and interpreters. Future developments in the digitalization of court proceedings and court interpreting should focus on affording judges’, interpreters’ and participants’ full access to the audio and visual substance of the proceedings to reach the standards of a fair trial achieved in proceedings held with the participants present.

REFERENCES


