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Procedural rights of foreign nationals in Brazilian law: the flip side of the 'war on transnational crime'

There has been much discussion about the 'war on transnational crime'. It is considered sufficiently important to have a UN Convention dedicated to its cause: the beloved, hated and, sometimes, feared UN Palermo Convention (The United Nations Convention against Transnational Organized Crime). It is accepted that this international instrument seeks to enhance international cooperation in the above-mentioned war by attempting to harmonise national legislation worldwide.[1]

No region better exemplifies this than the European Union, which has a clear commitment to the cooperation of Member States when dealing with criminal matters. This increased cross-border cooperation has led to calls by many to balance things by giving more consideration to the protection of those brought into criminal justice systems by it. To date, no such balance has been achieved.[2]

The need to review current procedures relating to foreign nationals in the Brazilian criminal justice system has become more urgent. Globalisation and the resultant fall of national borders has led already to increased numbers of foreign national defendants passing through the courts; however, this has been further exaggerated by the contemporary policy of transnational cooperation in the detection of crime.

Unfortunately, what we have observed is that the Brazilian criminal justice system appears satisfied to fight transnational crime without 'paying the price' of guaranteeing foreign national defendants the same procedural rights as those guaranteed to national defendants. One fundamental 'price' that is not being paid is the right of a defendant to understand the nature of the charges and evidence against him or her and the procedures that will be used to prosecute him or her.

'When the right to a legal defense is guaranteed in the Constitution,' teaches Antonio Scarance Fernandes, 'it is understood that, for the purposes of this order, the protection derived from the constitutional clause must include the right to a technical defense during the entire process as well as the right to self-defense.'[3] This self-defence 'is that which is exercised by the defendant at fundamental moments during the proceedings, not those acts carried out by the attorney, when the defendant is in a criminal proceeding'.[4] The rights arising from this are the right to be present and the right to be heard in court, 'the right to personally present himself to the trial court in his defense,' which is done 'by way of defendants' statements'.[5]

To exercise these rights, foreign national defendants who do not understand the national language must be afforded not only the assistance of an interpreter when they come before national authorities, but, more importantly, they must also be guaranteed a translation of all material relevant to the case.

The American Convention on Human Rights (San José, Costa Rica), in article 8, no 2, 'a', establishes that there should be a minimum guarantee 'of the right of the defendant to be assisted, free-of-charge, by a translator or interpreter, if they do not understand or do not speak the language of the court'. The same rule can be found in the International Covenant on Civil and Political Rights, in article 14, 3, 'f'.[6]

'It should be noted,' according to Luis Flávio Gomes and Valerio Mazzuoli, 'that this right to an interpreter (for oral communication) or a translator (for written communication) is fundamentally relevant during the entire procedural process, from the time the defendant is summoned, through the interrogation, hearings, final sentencing etc. [...] The basic premise of the defense is information (and no valid information exists if it cannot be understood by the defendant).'[7]

The extent of this right has already been assessed by the Inter-American Court of

Human Rights in Advisory Opinion no 16/99, when the following principle was established: 'for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants', for that reason, 'an interpreter is provided when someone does not speak the language of the court, and is also why the foreign national is accorded the right to be promptly advised that he may have consular assistance. These measures enable the accused to fully exercise all rights enjoyed by everyone under the law. Those rights and these, which are inextricably inter-linked, form the body of procedural guarantees that ensures the due process of law.'[8]

In his concurring vote, Justice Sergio García Ramírez observed the following: 'Foreign nationals facing criminal prosecution, especially, although not exclusively, those who are incarcerated, must have the facilities that afford them true and full access to the courts. It is not sufficient to say that aliens are afforded the same rights that nationals of the State in which the trial is being conducted enjoy. Those rights must be combined with others that enable foreign nationals to stand before the bar on an equal footing with nationals, without the severe limitations posed by their lack of familiarity with the culture, language and environment and the other very real restrictions on their chances of defending themselves. If these limitations persist, without countervailing measures that establish realistic avenues to justice, then procedural guarantees become rights "in name only", mere normative formulas devoid of any real content. When that happens, access to justice becomes illusory.'[9]

The same guarantee is held in the European Convention on Human Rights, in article 6, section 3. The right to be assisted by an interpreter can be seen as a part of the right to be heard, according to Stefan Trechsel;[10] this is not restricted to the availability of an interpreter, but extends to the translation of documents: 'In fact, the European Court of Human Rights interpreted the norm as not only requesting interpretation during the oral trial – but also the translation of important documents.' The landmark decision that established that understanding was delivered in *Luedicke Belkacem and Koç v Germany*: 'Construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3 (e) (article 6-3-e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial.'[11]

Under the International Criminal Court, the above-mentioned rule is provided under article 67, para 1, letter 'f', of the Rome Statute,[12] proclaiming the right of the accused: 'To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks'. This right has already been the object of discussion and reaffirmation in at least two cases: *Prosecutor v Germain Katanga*[13] and *Prosecutor v Thomas Lubanga Dyilo.*[14]

The Brazilian Code of Criminal Procedure was enacted in the 1940s, long before the current levels of foreign national defendants and transnational cooperation became evident. As such, it is limited to guaranteeing an interpreter during defendants' statements where they do not speak the national language (article 193). It does not say anything about the translation of documents. However, the guarantee of an interpreter only during the giving of statements by defendants is insufficient. Since 2008, defendants' statements are taken at the end of the trial; the purpose of this is to allow defendants the opportunity to fully answer the allegations and challenge evidence adduced in court during the trial. However, clearly this is entirely unrealistic in the circumstances where foreign national defendants do not understand the full nature and detail of the evidence against them in the absence of an interpreter/translator.

It was therefore expected that these shortcomings of the Brazilian Criminal Procedural Code would be compensated by judicial interpretation in a modern context of article 193, thus taking into account the conventional norms mentioned above. Unfortunately, this is not what has been seen in the few cases brought before Brazilian courts. In fact, it was once held that the translation of the main procedural and evidentiary documents, even when used against the accused, was the responsibility of the defendant.[15]

This imbalance between national and foreign nationals relating to the most basic guarantees of due process demonstrates that the Brazilian criminal justice system is still unwilling to pay the price of fighting transnational crime by simultaneously ensuring the protection of internationally recognised procedural rights.

Notes

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1 See Maira Rocha Machado, *Internationalization of criminal law: the management of international problems through crime and punishment* (São Paulo: Editora 34, 2004).

2 See Bernd Schünemann (Ed), *Ein Gesamtkonzept für die europäische Strafrechtsplege – A Programme for European Criminal Justice* (Cologne-Berlin-Munich: Carl Heymanns, 2006), 344–361.

3 Antonio Scarance Fernandes, *Constitutional Criminal Procedure* (São Paulo: Revista dos Tribunais, 1999), 252.

4 *Ibid*, 263.

5 *Ibid*, 263.

6 Those conventions, as recognised by the Brazilian Supreme Court, have supra-legal status and override the provisions in the Code of Criminal Procedure. See STF, RE 349.703, Justice Gilmar Mendes, Plenary, DJe 05/06/2009, and RE 466.343, Justice Cezar Peluso, Plenary, DJe 05/06/2009.

7 Luiz Flávio Gomes and Valerio de Oliveira Mazzuoli, *Comments about the American Convention on Human Rights: Pact – San José, Costa Rica* (São Paulo: Revista dos Tribunais, 2008), 95.

8 Inter-American Court of Human Rights – Advisory Opinion 16/99 (available at **www.corteidh.or.cr/docs/opiniones/seriea_16_esp.pdf**). Advisory Opinion of the Inter-American Court of Human Rights, The right to information on consular assistance in the framework of the guarantees of the due process of law, (OC-16/99), 1 October 1999.

9 *Ibid.*

10 Stefan Trechsel, *Human rights in criminal procedings* (Oxford: Oxford University Press, 2005), 328.

11 Case of *Luedicke Belkacem and Koç v Germany*, Application no 6210/73; 6877/75; 7132/75, Judgment, Strasbourg, 28 November 1978.

12 Enacted in Brazil by Decree no 4.388, from 25 September 2002.

13 ICC-01/04-01/06.

14 ICC-01/04-01/07.

15 See Brazilian Regional Federal Court of the 3rd Region, HC 2007.03.00.102791-1, Second Chamber, 17 March 2009. The European Court of Human Rights has already examined the meaning of the expression 'free' in Article 6-3 of the Convention:

> '42. The Court notes that, for the purpose of ensuring a fair trial, paragraph 3 of Article 6 (art. 6-3) enumerates certain rights ("minimum rights"/"notamment") accorded to the accused (a person "charged with a criminal offence"). Nonetheless, it does not thereby follow, as far as sub-paragraph (e) is concerned, that the accused person may be required to pay the interpretation costs once he has been convicted. To read Article 6 para. 3 (e) (art. 6-3-e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article and in practice, as was rightly emphasised by the Delegates of the Commission, to denying that benefit to any accused person who is eventually convicted. Such an interpretation would deprive Article 6 para. 3 (e) (art. 6-3-e) of much of its effect, for it would leave in existence the disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language – these being the disadvantages that Article 6 para. 3 (e) (art. 6-3-e) is specifically designed to attenuate'.

(Case of *Luedicke Belkacem and Koç v Germany*, Application no 6210/73; 6877/75; 7132/75, Judgment, Strasbourg, 28 November 1978).