

## Criminal proceedings and intercultural competences

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### SUMMARY

The author of the article discusses the issues associated with the specificity of the situations where procedural acts with foreigners are conducted in criminal proceedings. The author pays attention to participation of persons from other cultural environments. The article addresses some issues associated with such activities as search, interrogation, confrontations and so on. The author stresses a necessity of proper behaviour of officers in situations causing a conflict of values values shared by persons representing different cultures. Furthermore, the article analyses some problems which may occur at the level of verbal and non-verbal interpersonal communication during procedural actions with the participation of foreigners.

**Key words:** migration, intercultural encounter, intercultural competence, communication barriers, good practices.

The transitory nature of the geographical location of Poland determines the fact that it is increasingly becoming a place of criminal activity of foreigners. This activity also takes place within organised criminal groups of economic, drug and criminal nature. However, such a simple classification is not always possible, as some of the organised groups, by operating simultaneously in different areas of crime, are characterised by a multi-criminal nature. Police nomenclature identifies international organised groups composed of citizens of different countries, e.g. Poles

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and foreigners, foreigner (ethnic) groups composed exclusively of foreigners and Russian-speaking groups composed of citizens of former Soviet Union countries.

Illegal migration, which is conducive to the operation of organised crime groups, is a particularly dangerous phenomenon.

The scale of the phenomenon is evidenced by the fact that in 2016 a total of more than 7.5 thousand persons were detained who crossed or attempted to cross the state border in violation of the law, while in 2015 there were nearly 7 thousand such persons, and in 2014 – less than 5 thousand. At the same time, the number of third-country nationals who have crossed or attempted to cross the state border against the law is steadily increasing. In 2016, there were nearly 6.7 thousand such persons, in 2015 – slightly more than 6.2 thousand, while in 2014 – slightly more than 4.3 thousand. The largest number of persons detained in 2016, likewise in previous years, held the citizenship of Ukraine (nearly 4 thousand), followed by Russia, Belarus, Turkey, Vietnam and Syria. Foreigners most often tried to cross the border on the basis of a forged document or without documents.

The issue of human migration and organised crime is also quite strongly related to one of the most serious crimes that seriously violates fundamental human rights, i.e. human trafficking. In international law, the term “trafficking in persons” was specified only in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>1</sup>, supplementing the United Nations Convention against Transnational Organized Crime, adopted on 15 November 2000 by the United Nations General Assembly. However, the term “white slave trade” was used for the first time at the international conference in Paris addressing the problem of human trafficking, which took place from 15 to 25 July 1902. In the Polish legal system, in accordance with Article 115 § 22 of the Criminal Code, trafficking in people is recruiting, transporting, delivering, transferring, storing or accepting people by using determined methods or measures – in order to use them, even with their consent, in particular in prostitution, pornography or other forms of sexual exploitation, for forced work or services, for begging, for slavery or other forms of degrading human dignity, or for obtaining cells, tissues or organs contrary to the provisions of law. If the actions of the offender involve a minor, it constitutes trafficking even when not using the methods or measures referred to in the provision under discussion.

According to available data, in 2016, 163 people of Polish origin were recorded as victims of modern trafficking in the British Isles, 8 of whom were minors. The

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<sup>1</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children adopted on 15 November 2000 by the United Nations General Assembly is also known as the Palermo Protocol, Journal of Laws of 2005 no. 18, item 160

vast majority of these people were recruited to be exploited for labour. However, Poland also happens to be a destination for organisers of this procedure. Most victims are foreigners from Ukraine, Romania and Bulgaria, as well as Asian countries (e.g. Vietnam, Philippines, Sri Lanka). They are used for forced work, prostitution, begging, and sometimes they are also victims of domestic slavery and criminal exploitation. In order to provide adequate support to victims and potential victims of trafficking in people, the National Intervention and Consultation Centre is run, which aims to secure the needs of victims of human trafficking – Polish citizens, EU citizens or foreigners. In 2016, the Centre provided support to 200 victims and potential victims of human trafficking, including 96 Polish citizens and 104 foreigners (mainly citizens of Vietnam, Ukraine, Romania and Bulgaria).

Moreover, in 2016, in connection with human trafficking offences, the Police initiated 31 preparatory proceedings and 9 suspects were identified. On the other hand, the status of an aggrieved party was granted to 15 persons. In turn, the Border Guard initiated 15 such proceedings (which is more than double the number in the previous year) against 7 suspects, including: 4 Polish citizens and 3 Bulgarian citizens. In 2016 Border Guard revealed 104 potential victims of human trafficking, most of them from Ukraine – 99 persons.

There is no doubt that in the case of crimes committed by foreigners, in particular the most serious ones, the procedural authorities should pay special attention to developing cooperation both in domestic and international relations. Combating the most serious crime is complex and multifaceted, hence it is necessary not only to conduct specialised and coordinated activities, but also to be familiar with solutions applied in other countries, including familiarity with intercultural elements.

According to Article 3(2) of the Act of 12 December 2013 on foreigners<sup>2</sup>, “*a foreigner is anyone who does not hold Polish citizenship*”. The arrival of such persons in Poland is primarily related to migration, which has always occurred and was caused primarily by problems of economic and political origin. The mobility of the population, i.e. the propensity to change the place of residence, has varied significantly in different historical periods. At present, in Europe there is refugee-related migration at a very large scale. In every country where there is an increase in the number of foreigners, new phenomena of a social, economic or cultural nature appear, both positive and negative. The latter undoubtedly include an increase in crime and a change in its structure.

The negative effects of migration certainly include the development of crime among foreigners. This includes organised crime, of which human trafficking is

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<sup>2</sup> Act of 12 December 2013 on foreigners, Journal of Laws of 2017, item 1543.

a particularly dangerous form. Illegal migration is a phenomenon that poses significant threats, which may contribute to the growth of crime. This process favours the emergence of organised crime groups, as most illegal immigrants are assisted by them. It also encourages drug trafficking and can lead to an increased threat of terrorism, as well as to an increase in the general level of crime. The actual scale of illegal immigration is almost impossible to determine, as the stay of such immigrants on a given territory is not registered in record-keeping systems managed by the state.

As it results from the information presented above, law enforcement authorities and justice administration carry out and will carry out in the future more and more procedural actions in proceedings with the participation of foreigners, in particular those coming from different cultural backgrounds. Thus, they will have to face previously unknown problems, the sources of which undoubtedly have to be sought in the ground-breaking changes observed in Europe in connection with the opening of borders (Schengen Agreement), and in particular with large migration flows. This situation, in turn, implies the necessity to take a new look at the methodology of work of investigative bodies in order to ensure maximum effectiveness of investigations. Difficulties that may arise result from the fact that there is an intercultural encounter between a person carrying out procedural actions and a foreigner, which may generate a number of minor or major communication problems rooted in cultural differences. Despite that, there is no doubt that the Polish law in force does not differentiate the situation of the addressee of a legal norm based on the colour of the skin, language or specific cultural distinctions of the persons to whom the norms are to apply. In accordance with Article 7 of the Constitution<sup>3</sup>, public authorities are obliged to act on the basis and within the limits of the law, which in the case of investigators means detecting the perpetrator and holding them criminally liable under the provisions of criminal law. The so-called intercultural competence, which should be demonstrated in particular by those representatives of judiciary or law enforcement authorities who on a daily basis deal with foreigners coming into conflict with the law (e.g. cross-border crime), can significantly help to achieve this goal. Such competence means professionalism in dealing with people regardless of their nationality, skin colour or origin. Among many factors marking the area of intercultural competence useful to officers conducting investigations are: knowledge of forms of non-verbal communication, interest in other cultures, knowledge of foreign languages or a sense of when to act and when to wait so that necessary procedural actions can be carried

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<sup>3</sup> Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, no. 78, item 483.

out effectively. The persons conducting procedural actions with the participation of foreigners, especially those from Arab countries and regions of South-East Asia, should remember that apart from language, non-verbal communication plays an important role. Its meaning is strongly culturally conditioned and is characterized by ambiguity. One can indicate a different role attributed to gestures in different parts of the world. Therefore, a good strategy when performing procedural actions with foreigners is to restrain from using them until one becomes sure that they will be understood correctly. Also, communication between persons conducting procedural actions and foreigners is burdened with the risk of many misunderstandings, which may generate the so-called communication barriers, such as being guided by stereotypes. It should be emphasised that also foreigners are not free from stereotypical perceptions of our culture. Similar reactions may be triggered by the so-called ethnocentrism, i.e. a limited ability to perceive people from a perspective different from one's own cultural model. Considering numerous additional barriers and inconveniences that occur during proceedings with foreigners coming from various cultures, it is worth making efforts to minimise the unfavourable stimuli affecting the course of procedural actions. It would be advisable to take care of, for example, appropriate premises in the case of searching people and their clothes, the accuracy of statements or concentration in receiving messages. We should ask ourselves whether the regulations in force in the Polish legal system address the above-mentioned intercultural encounter? Due to the extensive scope of the issue, let us focus on the most crucial actions in the detection process, during which the so-called good practices emanating from intercultural competence should be applied. I would like to emphasise that the rationale for their application should be to increase the effectiveness of criminal proceedings.

Valuable guidance in the issue under consideration can be found in the judgment of the Supreme Court of 17 September 2014, case no. I CSK 439/13, by virtue of which the cassation appeal of a Sikh believer asked to take off his turban during security control at the airport was dismissed. Fully accepting the reasoning presented in the justification of the judgment, it needs to be stated that the competent authorities conducting procedural actions with the participation of foreigners are obliged to, first and foremost, carry out such actions effectively, and consequently, ensure security and legal order on the territory of the Republic of Poland. The correct application of the existing legal regulations makes it possible to achieve these goals without generating real or alleged problems resulting from cultural differences. It is indisputable that conflicts may arise in the event of a confrontation between values professed by persons representing particularly distant cultural circles and the need to enforce the law in Poland. Possible problems should be solved taking into account the following principles. Firstly, every person staying on the territory of our country

is subject to its law and is absolutely obliged to obey it. Secondly, the appropriate services conducting operations, also with participation of foreigners, must act on the basis and within the framework of the applicable legal order, which provides them with determined competences. Thirdly, the said services are obliged to ensure compliance with the legal order, including protection of life and health of citizens, even if that involves interference in personal goods of others, e.g. relating to the object of religious cult. For in this case the value of the protected good, i.e. safety of citizens, is objectively higher than the value of an individual good that competes with it. Foreigners in such cases cannot demand that exceptions be made for them on the grounds of their differing values. Instead, the arising tensions caused by an encounter between a procedural authority and a foreigner may be alleviated with the use of intercultural competences, mentioned at the beginning, focused on understanding the differences of other cultures. Many times they may effectively prevent unnecessary incidents leading to effective law enforcement in the interest of citizens.

Finally, it is worth recalling that the jurisprudence of international courts has repeatedly emphasised that ensuring public safety and legal order has priority over the need to respect other precious values, such as freedom of conscience, thought or religion. Examples are the cases such as *Phull v. France*<sup>4</sup> and *Mann Singh v. France*<sup>5</sup>.

A procedural action is a behaviour of a procedural authority or a participant of proceedings provided for by law and intended to produce determined legal effects<sup>6</sup>. In the following part of the article we will discuss the most frequent procedural actions carried out in the course of preparatory proceedings, in which an intercultural factor may also occur.

Detention is a procedural action consisting in depriving a person of liberty for a short period of time in order to apply a preventive measure or forcefully bring a suspect or an accused person before a procedural authority. The purpose of this procedural action is to ensure the proper course of criminal proceedings or to enforce the performance of procedural obligations. Detention may take place when there is a reasonable suspicion that a person has committed an offence, and therefore the “obviousness” of the offence is not required, which in turn must occur in the case of the right of forced arrest. A suspect may be detained when it is feared that he might escape, go into hiding, conceal traces of the offence or his identity cannot be established or the conditions are met which are required to order accelerated procedure with regard to this person.

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<sup>4</sup> Decision of the ECHR of 11 January 2005 in the case *Phull* against France, application no. 35753/03.

<sup>5</sup> Decision of the ECHR of 13 November 2008 on the refusal of the application in the case *Mann Singh* against France, application no. 24479/07.

<sup>6</sup> D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz do zmian 2016*, WK 2016, LEX, teza 2.

Also, a person may be detained if there are justified grounds to suspect that this person committed an offence with the use of violence against a member of his household and it is feared that such an offence may be repeated, especially if the suspected person is threatening to do so. A detained person, at his request, should be immediately allowed to contact an advocate or legal counsel in an available form and have a direct conversation with him. In exceptional cases, justified by particular circumstances, the detaining authority may reserve that it will be present during said conversation (Article 245 of the Code of Criminal Procedure). If the detained person is a foreigner, he/she should be allowed to contact the competent consular office or diplomatic representation.

It should be emphasised that detention should be carried out with discretion, avoiding unnecessary publicity and ostentation. Unfortunately, observation of the surrounding reality shows that the opposite is true, which should be met with a sharp reaction from those supervising the actions of detention. It is worth noting that the detention of a man of Arab origin should be carried out by male officers, because the presence of a female officer will be perceived as an additional humiliation and may provoke unplanned aggression. The problem may certainly arise in the case of detention of a person who is a representative of the so-called “third gender”. In such a situation, it seems appropriate to ask the detained person whether he/she feels female or male, or to ask the gender of the officer who should proceed with their detention. It may also be difficult to establish the age of a detained person, especially in the case of persons from South-East Asia. Attention should also be paid to the aspect of wearing religious symbols or clothes in public spaces. As an example, there are problems with taking signal photographs of persons wearing turbans or women wearing head and hair veils, as well as with using a service dog, since a dog is considered a “haram” animal in Muslim culture.

Detention of a foreigner in many cases involves the problem of mutual communication. In such a situation an interpreter plays an important role, being a kind of a link between the detained person and the authority conducting the proceedings. The appointment of a verified interpreter is of particular importance in the course of the entire proceedings, especially at the initial stage of the case, when evidence is collected and preliminary investigative hypotheses are formulated, which will further be discussed in the following part of the article.

A search is another procedural action carried out, as part of ongoing proceedings, based on the provisions of Articles 219–236 of the Code of Criminal Procedure. It should be mentioned that special regulations concerning searches are also included in the Act of 10 June 2016 on anti-terrorist activities<sup>7</sup>. The

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<sup>7</sup> Act of 10 June 2016 on anti-terrorist activities, *Journal of Laws* 2016, item 904.

purpose of a search is primarily: to detect, detain or forcibly arrest a suspected person, and also to find objects which might constitute evidence in a case or which are subject to seizure in criminal proceedings. In principle, a search may be conducted by the public prosecutor or by the Police, acting upon an order of the court or the public prosecutor and, in cases specified by the law, by another agency. In urgent cases, i.e. when the normal course of a search could result in the loss of evidence, the regulation of Article 220(3) of the Code of Criminal Procedure may be applied. When proceeding to search rooms, persons, clothes or other objects, such as e.g. suitcases, handbags, the procedural authority is obliged to comply with the directives for carrying out searches specified in Article 227 of the Code of Criminal Procedure. They oblige officers to conduct a search with moderation and respect for the dignity of persons participating in it. The point is therefore to use only such means which are necessary to achieve the purpose of the action in determined circumstances. It should be unequivocally stated that the above-mentioned procedural directives should be applied to all persons subjected to searches, irrespective of their country of origin, skin colour or religion. However, observing these rules in the case of foreigners will allow us to avoid possible accusations by persons from other cultural circles, who very often try to sabotage procedural actions under the pretext of allegedly discriminatory behaviour of the authorities carrying them out.

Undoubtedly, the provision of Article 223 of the Code of Criminal Procedure, under which a search of a person and his/her clothes should be carried out, if possible, by a person of the same sex, meets the above-mentioned intercultural encounter. Such a solution is particularly useful in relation to women from the Arab-Muslim culture, where the role of women is based on the status assigned to them, determined by the applicable rules of social functioning. It should be borne in mind that the above directive will not apply in urgent situations, where due to the circumstances of the case it is impossible that the actions be performed by a person of the same sex, e.g. a police officer detains the perpetrator of a crime while attempting to escape, who happens to be a woman, and there is a justified suspicion that she is in possession of a weapon which she used earlier. This is also the context in which the directives for conducting searches provided for in Article 227 of the Code of Criminal Procedure, should be interpreted, under which a search or seizure of items should be carried out in line with the purpose of the action, in a moderate manner and with respect for the dignity of the persons concerned and without causing unnecessary damage or inconvenience. When conducting a search with the participation of foreigners, the specific nature of their culture and religion, as well as related traditions and customs connected with wearing clothes and religious items should be taken into account.



In Muslim culture, the left hand is considered unclean and therefore cannot be used when eating or greeting. In this culture even more explicit is the prohibition of touching the Qur'an with the left hand. This rule is particularly important in the event of necessity to search or seize this book.

Security on property, pursuant to the provisions of Article 291 of the Code of Criminal Procedure may take place if the accused is charged with an offence liable to or in connection with which it is possible to order a fine, a monetary performance, a forfeiture, a compensatory measure, a return of a financial benefit or its equivalent. This coercive measure may be applied if there is a justified concern that without such a security the enforcement of the judgment as to the penalty or penal measures will be impossible or significantly hindered. Also, the execution of the judgment concerning court costs may also be secured ex officio on the property of the accused. Security on property is a criminal procedural institution which aims to ensure the enforcement of a future judgment. Consequently, it is justified to apply this coercive measure when the accused undertakes actions aimed at concealing, depleting or alienating his assets. The point is to prevent the accused from alienating his assets leading to thwarting the enforcement of the future judgment.

The provisions of the criminal procedure do not exclude the possibility of security on property in relation to foreigners. The general provisions of this institution apply here, thus the court or a prosecutor may apply security in a situation where a foreigner has been charged with a crime or has been interrogated as a suspect without having been charged with such a crime. In practice, security on property against a foreigner who does not have his/her permanent place of residence in Poland is most often done by securing his/her movable property (cash, jewellery, electronic equipment, etc.).

It is worth pointing out, as an example, that when seizing Thai money, it is important to remember that it is held in special esteem by Thai people, not only because of the nominal value of the money itself, but above all because all coins and notes bear the image of the king. In Thailand, the monarch is given the utmost respect and devotion. Even cinema shows begin with an anthem and a short film in honour of the king and his family. Stepping on money is considered a deep insult. That is why, when performing a procedural action, care should be taken not to drop coins on the ground or destroy banknotes.

The examination in criminal proceedings is one of the most important procedural actions which, in numerous situations, may make it possible to establish the facts which are the subject of the proceedings. This action reveals three means of evidence: explanations of the accused, testimony of a witness and expert opinion. The role of each of the participants who may be personal evidence sources is different, hence their rights and obligations in a criminal trial are somewhat different and

the rules under which they take part in the proceedings are different. Nevertheless, there are common general principles for the conduct of any examination. Such principles include freedom of expression as well as the rule that the person being interrogated must be allowed to express himself or herself freely within the limits set by the purpose of the act and only then may questions be asked to complete, clarify or verify his or her statement.

When examining foreigners, cultural differences should be taken into account, as this way the fundamental principle of the inherent dignity of a human being is respected and at the same time the efficiency of the procedural action is increased. The interrogation as a witness or a suspect of a man of Arab origin, e.g. from Algeria or Tunisia, should be carried out by a male officer, otherwise we may not obtain any information from the interrogated person. However, if the interrogator is a female officer, men should be present in the room where the action is carried out in order to ensure the safety of the interrogator (this may be justified by the foreigner's quick-tempered temperament related to cultural differences). When greeting a witness or suspect, only the right hand should be given; according to the custom in Arab countries, the left hand is considered unclean and therefore nothing should be given or taken with it. Before the interrogation, the interrogated person should be given the opportunity to speak about their situation in Poland and about their family. During the interrogation of a person of Arab origin one should not point at someone with a finger or a pen, because in the Arab culture this is viewed as a challenge and a threat. Arabs treat animals in such a way, by pointing at them with a finger or an object (e.g. a stick, a rod, a pen). It is necessary to maintain eye contact with the interrogated person, but this does not apply when the interrogated person is a woman, because then such eye contact may be perceived as offensive behaviour.

A married woman should – as far as possible – be interviewed in the presence of her husband or another male relative who has custody of her (e.g. the head of the family). The greeting of such an interrogated person must not be done by shaking hands. During any interrogation of persons of Arab origin, one should not be in a hurry, as this is unwelcome. During the interrogation, the interrogator should not look at his/her watch or behave as if he/she has little time for procedural actions. This is because “time” in Arab countries is much less scheduled than in European countries. During the interrogation of a foreigner from Arab countries one should also avoid pointing at something with a foot or showing the sole of a shoe, because in these countries the sole is the lowest and dirtiest part of the body. On the other hand, it goes without saying that the interrogator should not behave disrespectfully during an interrogation. Putting your feet up on the table or chair, swinging on the chair and keeping your hands in your pockets should be avoided.

If it is not possible to carry out the examination at the seat of the trial authority or in order to achieve the objectives of the proceedings, it should take place at the residence of the Arab man. In that case (if possible), shoes should be taken off before entering the house, because otherwise it will be interpreted as an affront to the head of the family who resides there. If a drink of tea or coffee is offered before the interrogation, it is advisable to drink it in peace while carrying on a conversation. The same is true if you are offered a meal before the action – it is appropriate to accept it, but not to eat everything from the plate. Leaving food out is a symbol of abundance and is a compliment to the person who is giving it to you. It is natural not to shout or raise your voice during an interrogation, as this may be considered offensive to the person being interrogated. If we happen to carry out the procedural actions on the premises of the mosque, we should remember that we should take off our shoes before entering the mosque, we should not pass directly in front of people praying, as well as we should not take photos of people in the mosque, especially women.

It should also be pointed out that during actions taking place in the open air (e.g. the first questioning), attention should be paid to where our shadow falls. It must not fall to a large extent (half or more of the body) on the person who will be examined, as this may be perceived as something unpleasant and humiliating. Some of the above rules will remain valid when interrogating Orthodox Israeli citizens, the Hasidim.

The participation of an interpreter pursuant to the provisions of Article 204 of the Code of Criminal Procedure is necessary if there is a need for the examination of a person who has no command of Polish or a need to translate a document drawn up in a foreign language into Polish or *vice versa* or to familiarise a party to the proceedings with the content of the evidence. In the situation where translation of a statement in a foreign language is impossible due to the unavailability of the interpreter, such translation may be done by translating the statement into the language of which the interpreter is present, and only then into Polish.<sup>8</sup>

In many cases, the gender of the interpreter may also play an important role. This is particularly the case when interrogating people from the Muslim culture or victims of human trafficking. In Arab cultures, the role of a woman is perceived in a different way and therefore, in order to ensure the proper course of the procedure, it is recommended that the interpreter be a man, otherwise the examination may not take place due to the refusal of the person being interrogated to make

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<sup>8</sup> Judgement of the Administrative Court in Cracow of 18 January 1996, case no. II AkR 343/95, Prok.i Pr.-wkl. 1996/6/19.

a statement. This is due to cultural and religious differences. The Qur'an emphasises the differences between the sexes, clearly defining women as inferior to men ("A woman is not capable of living independently without the help of a man: Men are superior to women because God has given them superiority over them and supports them through men (4:38)"). As a consequence, the proceedings are more effective with the assistance of a male interpreter (suspects are quicker to confess a criminal act and more willing to give an explanation). If the witness/suspected Arab citizen agrees to have a female interpreter, the positioning of the interpreter is important. The foreign female interpreter should be to the left of the interviewee and at such a distance that there is no touching or accidental rubbing. The best place for the female interpreter is away from the exit, e.g. by a window, because if the examined person wants to stop the interrogation and leave (e.g. to go to the toilet), physical contact between them will be avoided.

It is also worth emphasising that in many situations the appointment of a reliable interpreter may play an important role in assessing the reliability of statements made by participants in the proceedings. In practice, a case of a disloyal interpreter who was in agreement with suspects was recorded. In the course of procedural actions doubts arose as to the quality of his translation, so it was decided to verify the translation made by the disloyal procedural assistant using operational methods with the participation of another verified interpreter. It turned out that he assisted detainees and performed his duties unreliably. The reasons for such misbehaviour certainly include economic reasons, although in the case of foreigners also the concept of loyalty in collectivist societies, such as Guanxi in Far Eastern cultures should be remembered.

At the same time, it should be clearly emphasised that it will not always be possible to act in accordance with the above-mentioned principles. Everything, of course, depends on the specific facts, situation and circumstances in which the procedural actions take place.

When conducting procedural actions with the participation of foreigners, one should also remember that some countries have introduced a possibility to use the term "third gender" in documents. The term refers to the so-called social gender, which refers to persons who, either of their own free will or for cultural reasons, do not wish to be referred to as women or men. Such countries include, for example: Australia, India, Germany, Nepal. In Germany, it is possible to register a child without indicating its sex (an indeterminate gender) if this cannot be clearly determined on the basis of physical characteristics. In the future, this person can decide whether they want to be a woman or a man. However, in the event that a decision on gender is not taken, the person will remain of indetermined gender. The German Supreme Court has also recently acknowledged that official documents

should include a so-called third gender<sup>9</sup>. The solution adopted in Germany is part of a noticeable international trend towards the recognition of gender neutrality. Nepal has also introduced a possibility of using the term 'third gender' in the documents certifying citizenship, for persons who do not wish to define themselves as a woman or a man. The obligation to choose the female or male sex does not exist in Australia and Canada, where the letter 'X' can be written in the gender section of the passport. In Denmark, it is possible to change one's gender after reaching the age of majority. In India, on the other hand, according to a Supreme Court judgment, the state and federal authorities are planning to grant transgender people the same rights as other minorities in India. In India, a significant percentage of the population is composed of men who do not identify culturally or psychologically with the male sex, known as hijras. The increasingly common concept of the so-called third gender may cause problematic situations during the procedural actions carried out by the authorities. It seems that in such a case the authority should obtain a statement from the person concerned indicating the gender of the officer who should perform the intended procedural action, e.g. a search or a detention.

Another problem during procedural actions with the participation of foreigners may occur at the level of verbal and non-verbal interpersonal communication. It is important here to pay attention to linguistic diversity within one country, e.g. China, Arab countries or Sub-Saharan Africa. In addition, non-verbal signs play an equally important role in the message. The observation of a number of behaviours of the person with whom a procedural action is being carried out will in many situations make it possible to assess the truthfulness of their statements, as well as to interpret them correctly. Non-verbal communication related issues may also include the importance of physical distance, eye contact, smiling and gestures in different cultures. In our culture, it is normal to make eye contact during a conversation, the Arabs go even further as they believe that the eyes are the gateway to the soul, while in Asians it is a sign of good manners to avoid eye contact with a superior or older person. In the latter culture, laughing or giggling is a sign of fear, embarrassment or nervousness.

In most countries, a gesture of shaking the head means denial, disagreement, while nodding means agreement. However, the opposite is true in Bulgaria, Turkey or Iran. Due to the universality of many non-verbal signs, officers conducting proceedings with foreigners will undoubtedly come across such signs many times, so it is worth to remember about basic differences. An often-cited situation illustrating the not always universal character of the used non-verbal messages is an authentic

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<sup>9</sup> Judgement of the Federal Constitutional Court of 10 October 2017, case no. 1 BvR 2019/16.

case of a participant of the proceedings trying to justify his absence. A foreigner from an Asian country in the course of court proceedings explaining the reasons for his absence pointed to the gesture which in our country means being under the influence of alcohol, while he wanted to say that he did not appear when summoned due to unexpected loss of work.

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## Proces karny a kompetencje międzykulturowe

### STRESZCZENIE

W artykule poruszono kwestie związane ze specyfiką sytuacji w których toczą się czynności procesowe w postępowaniu karnym z udziałem cudzoziemców – osób z innych środowisk kulturowych. Autor omawia kolejno zagadnienia związane z takimi czynnościami jak poszukiwania, przesłuchania, konfrontacje itp. Autor podkreśla konieczność odpowiedniego zachowania funkcjonariuszy w sytuacjach powodujących konflikt wartości osób reprezentujących inne kultury. Ponadto artykuł zwraca uwagę na inny problem który może wystąpić podczas czynności procesowych z udziałem cudzoziemców, a mianowicie problem na poziomie werbalnej i niewerbalnej komunikacji interpersonalnej.

**Słowa kluczowe:** migracja, spotkanie międzykulturowe, kompetencje międzykulturowe, bariery komunikacyjne, dobre praktyki.