

# STATEMENT ANALYSIS IN COURTS AND ASYLUM CASES

## A BRIEF REPORT

Statement analysis in criminal cases and asylum procedures

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## **Abstract**

The purpose of this report is to provide an overview of the criteria used by legal decision makers for assessing the reliability of statements by plaintiffs and asylum applicants. The criteria are employed within these legal settings in several countries, and have been developed by lawyers through practise. The criteria currently lack scientific support. The most commonly used criteria are listed and discussed through a psycho-legal perspective. It is argued that the criteria probably suffer a low interrater reliability; due to this and the lack of scientific support it is possible that the criteria pose a serious threat to the legal security. The urgent need for scientific evaluation of the criteria is highlighted and suggestions for such research are made.

## STATEMENT ANALYSIS IN COURTS AND ASYLUM CASES

### Statement analysis in criminal cases and asylum procedures

In some types of criminal cases as well as in refugee status determination statements have a particular important role to play: plaintiffs' statements tend to be the key evidence in sexual assault cases and domestic violence (Schelin, 2007), refugee status can be determined solely on the applicant's account (Kagan, 2003), and statements are frequently key evidence in international criminal courts (May & Wierda, 2002).

Due to the central role of the statements, credibility assessments (in which statement analysis is one part) have become a core procedure in these cases. The legal decisions are to a large extent based on the statement from the plaintiff or asylum applicant and the decision makers therefore want to investigate whether the statement is truthful. However, the technique for statement analysis that is practised by judicial decision makers is not supported by scientific research (Willén & Strömwall, in press).

Statement analysis in asylum cases is considered important in order to reach a balance between the right of the individual to seek and gain protection in a foreign country (in line with the 1951 Geneva Convention on the Status of Refugees) and the rights of nations to a restrictive immigration policy (Kagan, 2003). Statement analysis in criminal cases on the other hand is considered important for other but similar reasons: One need to reach a balance between the crime victims' rights to protection and justice and the defendants' rights to a fair trial (Schelin, 2007). A conviction can be based almost solely on the accounts in sexual assault cases since it otherwise rarely would be possible to offer justice to these victims. However, in order to protect the defendants' rights, statement analysis must be a core procedure (Gregow, 1996).

The similarities between criminal law and asylum justice should not be overstated, but some of the criteria used for assessing the credibility of a plaintiff and an asylum applicant

seem to be the same (Baillot, Cowan, & Munro, 2009). In addition, the criteria have in criminal law as well as in asylum justice been developed by lawyers through practise (M. Kagan, personal communication, July 6, 2010; Schelin, 2007), and according to Schelin there is reason to believe that the development has been influenced by psychological criteria-based techniques (e.g., Criteria-Based Content Analysis; Undeutsch, 1982) for assessing truthfulness. However, the legal decision makers have not been properly trained in how to apply such methods despite the fact that they are practising a very complex psychological technique (Diesen, 2008). Furthermore, as stated above, the technique lacks scientific support (Strömwall, 2010).

The aim of this report is to provide an overview of the lawyers' criteria through a psycho-legal perspective; focusing on the credibility criteria as tools for distinguishing truthful and deceptive statements.

### **The lawyers' criteria**

The criteria used by criminal courts and asylum adjudicators are not a fixed set of criteria as in psychological techniques for assessing truthfulness (Strömwall, 2010). Schelin (2007) investigated rulings made by the Swedish Supreme Court in sexual assault cases and a number of credibility criteria were thereby identified (for a summary in English of Schelin's work, see Strömwall, 2010). According to the Swedish Supreme Court, truthful statements should be, for instance, *long, coherent* (e.g., not contain contradictions), *lucid*, and *detailed*. Several statements by the same person should be *consistent* (i.e., not contradict each other). In addition, truthful accounts are assumed to give a *credible impression* and an *impression of self-experience*, and not contain *difficult-to-explain points* (e.g., exaggerations or incorrect information). Furthermore, a truthful plaintiff *reveals all key facts early* and should be able to *explain weaknesses* in the account. Unexplained weaknesses and proven incorrectness in parts of the statement can lower the credibility of the whole statement (*the contamination effect*).

This effect can also work in the opposite direction: explained weaknesses and proven correctness in parts of the account can increase the credibility as a whole. The Swedish Supreme Court also regards the plaintiff's *demeanour*. The plaintiff's credibility can be strengthened by, for instance, a grave or confident manner. In contrast, the credibility can be lowered by an insecure manner or evasive answers (Schelin, 2007). Similar criteria as those found by Schelin are employed in sexual assault cases also in other countries, for example in UK and US (see e.g. Baillot et al., 2009; Ellison, 2005; Ellison & Munro, 2009).

Kagan (2003) investigated national and international guidelines for refugee status determination as well as asylum decisions from several countries. He identified similar criteria as Schelin (2007). According to Kagan's findings, a truthful applicant's account should be *detailed, consistent* between statements, *plausible*, and not contain *contradictions*. The truthful applicant *reveals all key facts early*, and can *explain weaknesses* in the statement. Despite explicit cautions from authorities and the United Nations (UN), Kagan found that the applicant's *demeanour* still plays an important role in the credibility assessments. In addition, both Schelin and Kagan have found that truthful accounts are assumed to be told in *chronological order*. Yet a criteria used in rape cases as well as in refugee status determination is that the plaintiff/applicant should use her *own words* (Baillot et al., 2009). This was found also in Sweden but only when it concerned children's accounts (Schelin, 2007).

Thus, as Baillot et al. (2009) points out, the criteria used for assessing credibility in criminal courts and asylum procedures seem to be quite alike in several aspects.

### **How the criteria are used in practise**

The District Courts in Sweden are bound to follow the rulings made by the Swedish Supreme Court. Schelin (2007) investigated rulings made by Swedish District Courts in sexual assault cases between the years 1994 and 2003. She found that the courts had referred to at least one

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of the credibility criteria in 60% of the investigated cases. For instance, it was common to refer to richness in *detail* or lack of details (42% of the cases), *coherence* or lack thereof (17% of the cases), *lucidness* or lack thereof (14% of the cases), and *consistency* or lack thereof (14% of the cases). It was also commonly referred to the occurrence or absence of *difficult-to-explain points*, as well as the plaintiff's *demeanour*, *credible impression* and *impression of self-experience*. In addition, Sutorius and Kaldal (2003) have noticed a trend among the Swedish District Courts to more frequently over the last decade refer to one or more of the criteria in their rulings.

Unfortunately, research of this kind is lacking in asylum cases. This may be because reasons for rejections often are kept secret even from the applicant and her or his legal representative (Kagan, 2003). No need to say this could hindrance research. Kagan (2003) do however summarise results from a study in which he reviewed all asylum decisions made by UNHCR Regional Office in Cairo, Egypt, during 11 weeks in 2002. The Regional Office in Cairo has the largest caseload of individual asylum cases of all UNHCR offices. Kagan found that almost 77% of the investigated rejections were due to 'lack of credibility'. Kagan (2003) also refers to studies in other countries showing similar patterns. Thus, there is reason to expect that the use of credibility criteria in asylum cases is even more common in asylum cases than in criminal cases.

A weakness of statement analytic techniques developed and refined within psychological research is that there are no instructions on how to weigh the individual criteria (Vrij, 2008). Are all criteria really of the same importance? If a statement is, for instance, very detailed in certain aspects (fulfilled criteria) but at the same time is rather illogic or unclear (unfulfilled criterion), how to judge the veracity of the account? This is a weakness in criminal courts (Schelin, 2007) as well as in asylum procedures (Kagan, 2003). In fact, adjudicators are encouraged to not strictly follow their own method. According to Schelin and Kagan, the

criteria are a supply of credibility factors from which adjudicators can choose one or several criteria that seems suitable for the case they have at hand. There are, however, no guidelines for how the selection of criteria shall be made (Kagan, 2003; Schelin, 2007).

### **Discriminative ability**

Can the lawyers' criteria distinguish between truthful and deceptive statements? Willén and Strömwall (in press) analysed the discriminative ability of seven of the lawyer's criteria that are practised by Swedish courts. The purpose was to investigate whether the criteria was useful in distinguishing truths and lies. Their results showed, in accordance with the lawyers' expectations, that truthful accounts indeed were more *lucid* (clear) than deceptive accounts. However, this was the only criterion in the study that significantly differentiated between truths and lies. Hence, except from *lucidity*, the criteria as they are formulated by the lawyers did not receive support.

Additional research that has evaluated the lawyers' criteria seems to be lacking and the discriminative ability of the criteria is therefore currently unknown. However, deception research in general provides support to some of the criteria: Truthful statements do tend to be *longer* (Sporer & Schwandt, 2006) more *detailed* (Vrij, 2008), and more clear<sup>1</sup> (Masip, Sporer, Garrido, & Herrero, 2005) than deceptive statements. Other criteria have in previous research shown to not be useful when trying to detect deception: *demeanour* (DePaulo et al., 2003), *consistency* between statements (Granhag, Strömwall, & Jonsson, 2003), *telling in chronological order*, and *coherence* (Vrij, 2008). *Difficult-to-explain points* have still not been evaluated except from in the study by Willén and Strömwall (in press), who found that it did not distinguish the true from the false.

Hence, those of the lawyers' criteria that have been scientifically evaluated did not fill their purpose very well, while other have not at all been tested. It can be concluded that the lawyers' criteria presently lack scientific support and certainly need further evaluation.

### **Interrater reliability**

A recurrent and important term within the area of psychology is interrater agreement, also called interrater reliability. If two or more decision makers interpret a criterion in the same way independent of each other, then the interrater agreement can be considered high and the decisions rather objective. In contrast, if they make different interpretations of the same criterion, the interrater agreement is low and the decisions highly subjective. Thus, a high interrater agreement is fundamental within the judicial system in order to protect the legal security and avoid arbitrary judgements.

As mentioned above, there are no guidelines in criminal courts or asylum procedures on how the selection of credibility criteria should be made by the adjudicators (Kagan, 2003; Schelin, 2007). Because of this, different adjudicators may choose different criteria if they handled the same case and their decisions would then not rest on the same grounds. As a consequence they may come to different conclusions about the veracity of the account, making the procedure arbitrary.

Another reason why the lawyer's criteria might suffer from low interrater reliability is that there is no clear definition of the criteria. What is a detailed, lucid or coherent statement? What is credible and what is not? Willén and Strömwall (in press) evaluated some of the criteria used by the Swedish Supreme Court and found that the interrater reliability was low and that this probably was due to the lack of definitions.

Other criteria-based techniques that are supported by research are to some extent similar to the lawyer's criteria, but in contrast they are (more precisely) defined and officially listed in a more or less fixed list (Strömwall, 2010). Previous research on criteria-based techniques might therefore not be applicable; not with regard to interrater agreement and not with regard to the criteria's discriminative ability between truths and lies.



The interrater agreement among asylum adjudicators seems to not yet have been evaluated. Though, perhaps not too surprisingly, Kagan (2003) do mention that adjudicators have been reported to at least sometimes make very different decisions based on the same information when employing the credibility criteria in asylum cases.

The low interrater agreements reported by Willén and Strömwall (in press) are disturbing if replicated. This could pose a serious threat to the legal security. Interrater agreements of psychological statement analytic techniques are in general satisfactory (for Reality Monitoring, see Sporer, 2004; for Criteria-Based Content Analysis, see Vrij, 2005). This shows that statement analysis does not have to be an arbitrary procedure. It is of fundamental importance to further evaluate the criteria developed by lawyers and to explore the interrater figures.

### **Need for research**

The practise of credibility criteria should increase the accuracy among decision makers. That is, one should become better in separating truths from lies when applying the criteria compared to when using common sense and gut feeling. The criteria should therefore not be used if they turn out to not improve the accuracy of decision makers' veracity assessments. The first step for researchers must therefore be to evaluate the discriminative ability of the criteria. In addition, the interrater reliability needs to be further evaluated as well as how the criteria are applied by practitioners in the individual cases (e.g., which criteria are applied when and if there are some criteria that are used more or less often).

Because there is no fixed list of criteria (Strömwall, 2010) it would also be of value to investigate whether legal practitioners are familiar with all of the existing criteria or only some of them. It is possible that only a few of them are commonly known among the practitioners while others are rarely heard of. For instance, the criterion *length* was found in

rulings by the Supreme Court of Sweden but not once referred to by the District Courts (Schelin, 2007).

Baillet et al. (2009) calls for cross-disciplinary research on the topic of credibility criteria used by legal decision makers. Scientific evaluation of the lawyers' criteria is crucial since the use of them affect many people in great need of protection, especially when it concerns refugee status determination. A great body of psychological research has already evaluated criteria-based techniques for deception detection but this research may not be applicable since the lawyers' criteria are suffering from insufficient definitions and unstructured usage.

A technique for credibility assessments in courts and asylum cases is needed. In many sexual assault cases it would not be possible to make a conviction without a proper way to analyse the plaintiff's statement (Gregow, 1996). Inaccurate veracity decisions in asylum cases can in worst case lead to torture and death. Credibility assessments are therefore needed as long as nations have the right to a restrictive immigration policy (Kagan, 2003, p. 381): *"If refugee protection is to have any meaning in the system that exists, refugees must be distinguishable from other migrants."* Hence, it is crucial to explore and advise alternatives if the criteria are found not to increase the accuracy of veracity assessments.

### **Conclusions**

Legal decision makers around the world are currently applying a technique for credibility assessments that lacks scientific support. This technique is applied in criminal courts as well as in asylum cases. The practise among asylum adjudicators is especially noteworthy since the consequences of a wrongful decision in those cases can be very extreme. Hence, the use of the criteria is questionable and the need for research urgent.

**Footnote**

<sup>1</sup> *Clarity* and *lucidity* is not the exact same criterion since *lucidity* is not further defined by the Swedish Supreme Court. *Clarity* is a defined criterion included in a specific technique that was evaluated by Masip et al. (2005).

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