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Regional or Minority Language Use before Judicial Authorities: Provisions and Facts

Valeria Cardi

Abstract

The aim of this article is to consider whether different levels of linguistic protection and promotion lead to different regional or minority language use patterns before judicial authorities. The analysis, carried out among those EU member states which have ratified the European Charter for Regional or Minority Languages (ECRML) and which have signed undertakings from Article 9, paragraph 1 at (i) and (ii) levels, shows that regional or minority languages have rarely if ever been used before courts, as they are perceived by their speakers as inadequate for the judicial domain. It also shows that, while one of the elements influencing the language choice of regional or minority language speakers, namely the lack of employees of the judiciary sufficiently competent in the relevant regional or minority language, has proved to vary according to the levels of linguistic protection implemented. Other factors (fear of delays in the proceedings, fear of being seen as ‘troublemakers’, lack of adequate terminology and lack of information) do not seem to depend on the different degrees of enforceability of the relevant linguistic provisions.

1. Introduction

The aim of this article is to consider whether higher levels of regional or minority language protection and promotion in the ‘legal’ domain are effective in terms of encouraging regional or minority language use.¹ Although legislation may be enacted that grants enforcing rights in relation to a minority language, does this influence the linguistic choice of the minority language speaker concerned?

The survey, conducted among nine EU member states, shows that regional and minority languages are seldom used before judicial authorities and this is, with one exception (the lack of members of the judiciary sufficiently competent in the relevant regional or minority language), irrespective of the degree of enforceability of the linguistic provisions enacted by the different states included in this research. The other elements influencing the language choice of regional or minority language speakers before courts result from an analysis of the ECRML reports and can be identified as follows: fear of delays in the proceedings, fear of being seen as a ‘troublemaker’, lack of adequate terminology and lack of information. The above-mentioned do not seem to vary, in fact, according to the different degrees of enforceability of the relevant linguistic provisions, whose ineffectiveness will in a further step be analysed through the concept of functional

¹ See François Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages* (Palgrave Macmillan, New York, 2003) for a critical discussion on language policy effectiveness.

transparency. Functional transparency refers to whether a language is perceived by its speakers as the most appropriate one to carry out the functions it is supposed to.

Sections 2.1, 2.2 and 2.3 of this study present the theoretical framework used for the analysis. Section 2.1 identifies different kinds of linguistic provisions. Section 2.2 underlines the difference between those legal instruments aimed at supporting regional or minority language use before judicial courts and those, as the International Covenant on Civil and Political Rights (CCPR), guaranteeing fair trial rights. Section 2.3 defines what a language domain is and what functional transparency means. All these concepts are then used in Section 3 to study the data gathered through the ECRML reports (states' reports, Committee of Experts' reports, and Committee of Ministers' reports).

2. Theoretical background

2.1 Linguistic Provisions

Human rights treaties provide the individual with certain guarantees against intrusions from the state. Once human rights are proclaimed and become binding legal principles, they are located beyond the power of disposition of state parties. When a state ratifies a human rights treaty, then, it agrees to a limitation of its sovereignty².

By contrast, the most substantive part of language rights is a matter that is inevitably linked to the political process within each society, as language rights do not stand as an unquestioned condition for a management of linguistic diversity that complies with human rights standards.³ Apart from certain basic guarantees (non-discrimination, non-assimilation, etc.), extensive areas of language law are not covered by international human rights law. Granting language rights to individuals implies assuming duties on the part of the government, which has to provide the personnel to facilitate linguistic services in administration, education, justice and so on. The possible options are many and politics become essential in accommodating linguistic diversity, defining language rights and managing linguistic conflicts. Constitutional provisions may then establish language protection, maintenance or promotion as a public policy goal, however, these provisions do not

² Joonbeom Pae, "Sovereignty, Power and Human Rights Treaties: An Economic Analysis", 5 *Journal of International Human Rights* (2007).

³ Allan Patten and Will Kymlicka, *Language Rights and Political Theory* (Oxford University Press, Oxford, 2003).

provide language rights, but policy guidelines⁴.

Constitutional provisions can be classified, according to their contents, in ten different groups:⁵ linguistic declarations (proclamation of the legal status of one or several languages), non-discrimination clauses (provisions including language in the reasons that prevent discrimination or proclaiming the equality of all individuals or citizens), knowledge requirements (norms expressing the requirements regarding the knowledge or the study of a specific language—the official one—that are compulsory for every citizen or for those that may hold some specific positions or develop some specific public functions), recognition of linguistic rights (provisions expressing the linguistic rights that some specific group of people or the individuals that belong to them must be granted), linguistic guarantees (clauses that foresee the need of linguistic assistance in the cases in which a prosecuted or arrested person does not know the language in which the lawsuit against him/her is brought), norms of institutional use (provisions in which the linguistic regime of a specific public institution is referred to), promotion and protection clauses (constitutional declarations in favour of linguistic pluralism or the protection and conservation of some specific linguistic realities), norms of competence distribution (provisions that define which is the institutional sphere that is fundamentally responsible for linguistic policy in relation to all or some of the languages spoken in the state), legislative references (regulation of the legal regime of languages or to some specific partial uses of them), and finally, other provisions related to linguistic issues which cannot be easily classified under any of the previous categories.

These kind of provisions have a ‘programmatic’ or directive character: they orient legislative action and proclaim values that should unite the state’s community. It is their implementation through legislation which, in some cases, can lead to the recognition of subjective linguistic rights. Two broad categories of language rights can be granted by law:⁶ on the one hand, the regime of linguistic tolerance, which includes rights that protect speakers of minority languages from discrimination and assimilation; on the other hand, the regime of linguistic promotion, which creates certain ‘positive’ rights to key public services, such as education, relationships with public power (government, courts, etc.) and public media, through the medium of minority

⁴ See François Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages*, 21-30, for details on the distinction between ‘politics’ and ‘policy’.

⁵ According to E.J. Ruiz Vieytez, "Official Languages and Minority Languages: Issues about their Legal Status through Comparative Law", II *Mercator International Symposium: Europe a new framework for all languages?* (2004). Available at <http://www.ciemex.org/mercator/pdf/simp-vieytez-ang.pdf>, 29/10/07.

⁶ Robert Dunbar, "Minority Language Rights in International Law", 50 *International and Comparative Law Quarterly* (2001), 90-120 at 96-98.

languages. Provisions dealing with positive rights have different degrees of ‘enforceability.’

The aim of this article is to analyse whether those different levels of linguistic protection and promotion lead to different regional or minority language use patterns before judicial courts.

2.2 *Linguistic Protection and Promotion Rights v. Fair Trial Rights*

Given that this study focuses on the use of regional or minority languages before judicial courts, it appears reasonable to clarify that the right of an accused person lacking proficiency in the usual language of the court to a court appointed interpreter does not belong either to the category of tolerance oriented rights or to the category of promotion oriented rights.

The right to free assistance of an interpreter if a person cannot understand or speak the language used in court is a well established human right which applies to anyone facing a criminal charge against her.⁷ This is guaranteed under Article 14(3)(f) of the CCPR, and applies equally to nationals and aliens, but cannot be demanded by a person who is sufficiently proficient in the language of the court.⁸

What then emerges from Article 14(3)(f) is that the right to an interpreter does not aim to afford tolerance, protection or promotion for any language or any linguistic identity. Its rationale lies somewhere else: in securing trial fairness. The sole objective of the right is effective communication; it does not independently value the language of the accused: if the accused can understand and be understood by using the court’s language, even if it is not his preferred language of expression, the law will hold that effective communication is adequately served by using the court’s language. This has been confirmed by the case *Dominique Guesdon v. France*.⁹ The case concerns a French citizen whose mother tongue was Breton who was charged with defacing road signs in French and tried in a French court. The accused requested that the court allow him and his witness to give their testimony in Breton. The court noted that the accused was

⁷ See Kristin Henrard, "Language and the Administration of Justice: The International Framework", 7 *International Journal on Minority and Group Rights* (2000), 75-108; David Weissbrodt, *The Right to a Fair Trial. Article 8, 10, 11 of the Universal Declaration of Human Rights* (The Hague, Martinus Nijhoff Publishers, 2002); Celia Brown-Blake, "Fair Trial, Language and the Right to Interpretation", 13 *International Journal on Minority and Group Rights* (2006), 391-412.

⁸ The text of the covenant is available at <http://www.ohchr.org/english/law/ccpr.htm>, (29/10/2007).

⁹ *Guesdon v. France*, Communication No. 219/1986, U.N. Doc. CCPR/C/39/219/1986 (1990). Available at <http://www1.umn.edu/humanrts/undocs/session39/219-1986.html>. (29/10/2007).

able to express himself in French and that his witnesses understood and spoke French, although they preferred to speak in Breton. The court denied the accused's request for an interpreter and to speak in Breton and conducted the trial in French. The accused alleged that denying him the right to express himself in his mother tongue violated his right to a fair trial. The Human Rights Committee noted that Article 14 ensures procedural equality and the equality of arms in criminal proceedings. It found that this provision, however, does not prevent a State from using one official court language. Under this provision a State is not obligated to provide an interpreter to a citizen whose mother tongue differs from the official court language. The State is obligated to provide an interpreter under Article 14(3)(f) if the accused and the defence witnesses have difficulty understanding or expressing themselves in the court language. The Human Rights Committee concluded that denying the accused the right to speak in Breton, when he understood and spoke French, did not violate, then, his right to a fair trial or his rights under Article 14(3)(f).

Completely different is the rationale behind those legally binding initiatives, on both national and international levels, aimed at the preservation of linguistic diversity, whose overriding purpose is cultural and which, under appropriate and legally established circumstances, guarantee the possibility of using regional or minority languages, irrespective of whether the party knows the language(s) of the court or not. This can clearly be exemplified by the recommendation made by the Committee of Experts of the ECRML in its first monitoring cycle report for Hungary, in which it encouraged the Hungarian authorities to modify Section 8 of the Act on Criminal Procedure in order to remove any uncertainty on the wording of Section 8 paragraph 1 of Act I (1973) on Criminal Procedure ("lack of command of the Hungarian language") as to the possibility to use a minority language before the courts.¹⁰ In the second monitoring cycle, Hungary implemented this recommendation: Section 9 paragraph 2 of Act I (2002) amending the new Act XIX (1998) on Criminal Procedure provides now that in "criminal proceedings, everyone may use, both in oral and in writing, their own mother tongue or a regional or minority language specified by an international treaty (...)".¹¹ Furthermore, Section 114 states that "during the proceedings, an interpreter shall be employed if the person whose mother tongue is other than the Hungarian language wishes to use his/her own mother tongue or regional or minority language (...)". Finally, Section 339 paragraph 2 stipulated that transaction and interpretation costs shall be borne by the state if they relate to the use of a regional or minority language.

¹⁰http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Hungary_1st_report.pdf, (29/10/2007).

¹¹http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Hungary_2nd_report.pdf, (29/10/2007).

2.3 *Relevance of Language Domains*

Over the last decade or so, a growing variety of books, scholarly articles and media reports have reported on an alarming decline in the number of languages.¹² The prospect of the loss of linguistic diversity on such a large scale has prompted a variety of responses ranging from those such as Malik¹³ who find it a cause for celebration to those who have argued for preserving, protecting and revitalizing threatened languages in various ways. However, whatever are the actions undertaken to prevent language loss and to safeguard language diversity, these will only be successful when meaningful contemporary roles for regional or minority languages can be established within the national as well as the international context. Meaningful contemporary roles include the use of these languages in all the domains of everyday life: education, public authorities, the arts and the media, etc.

Domains of language behaviour were identified by Schmidt-Rohr¹⁴ as a means of analysing the language behaviour of people living in multilingual settings in pre-World War Two. In 1932, Schmidt-Rohr called domains “spheres of activity.” In 1972, Fishman defined ‘domain’ as the “cluster of social situations typically constrained by a common set of behavioural rules”¹⁵.

The number of domains usually identified by different researchers varies. Mak¹⁶ used more domains than Schmidt-Rohr, but still overlooked the work domain. Frey¹⁷ used only three domains (home, school, church). In 1972, Mackey¹⁸ recommended using only five domains to investigate language use. More recent studies have continued to demonstrate the importance and

¹² See for example Mark Abley, *Spoken Here: Travels Among Threatened Languages* (Random House of Canada, Toronto, 2003); David Crystal, *Language Death* (Cambridge University Press, Cambridge, 2000); Andrew Dalby, *Language in Danger: The Loss of Linguistic Diversity and The Threat to Our Future* (Penguin Books, Harmondsworth, 2003); Michael Krauss, "The World's Languages in Crisis", 68 *Language* (1992), 4-10; Daniel Nettle and Suzanne Romaine, *Vanishing Voices: The Extinction of the World's Languages* (Oxford University Press, Oxford, 2000); Robert H. Robins and Eugenius Uhlenbeck (eds.) *Endangered Languages* (Berg, Oxford, 1991).

¹³ K. Malik, "Let Them Die", 57 *Prospect* (2000), 16-17.

¹⁴ Georg Schmidt-Rohr, *Die Sprache als Bildnerin der Völker. Eine Wesens- und Lebenskunde der Volkstümer* (Diedrichs, Jena, 1932).

¹⁵ J.A. Fishman, "Who speaks what language to whom and when?", 2 *Linguistique* (1972), 68-88, here: 80.

¹⁶ Wilhelm Mak, "Zweitsprachigkeit und Mischmundart in Oberschlesien", 7 *Schlesisches Jahrbuch für deutsche Kulturarbeit* (1935), 41-52, as cited by J.A. Fishman, "Who speaks what language..."(1972).

¹⁷ William J. Frey, "Amish 'triple talk'", *American Speech* (1945), 85-98, as cited by J.A. Fishman, "Who speaks what language..."(1972).

¹⁸ W.F. Mackey, *Bilingual Education in a Binational School* (Newbury House, Rowley, Massachusetts, 1972).

the utility of the domain construct¹⁹. However, domains themselves are not the only significant factor in code selection. Language selection within one domain is influenced by participants, setting, and topic: speakers and interlocutors are then not always in the position of being able to choose the code they prefer²⁰. This choice can be defined on the basis of two major features: the *functional load* of the language, and its *functional transparency* in the various domains of society²¹.

The concept of *functional load*, which has been borrowed from phonology, refers in this context to the ability of languages to successfully function in one or more social domains.²² The load is considered to be higher or lower on the basis of the number of domains it covers: the higher the number of domains, the higher the load.

The *functional transparency* feature is important in determining the degree of *functional load*.²³ In linguistics, it has been postulated that “occurrence or non-occurrence of certain formal devices in a given language may be attributed to the inherent limitations of these devices, the functional repercussions of these limitations, and the existence of other coding means in that language.”²⁴ Similarly, the use or non-use of a language in a given context depends on whether that language is perceived as the most appropriate one to carry out the functions it is supposed to. When that language is perceived by its speakers as the most appropriate one, it is then considered to be ‘transparent’ to the function. When the function is shared by other languages, the transparency is lowered and the *functional load* is also lowered.

¹⁹ Michael Clyne, *Multilingual Australia* (River Seine, Melbourne, 1982); A.F. Pauwels, "The Future of Ethnic Languages in Australia", 72 *International Journal of the Sociology of Language* (1986); A. Rubino, "Code-mixing and Code Control in Italo-Australian Children", Series S, 4 *Australian Review of Applied Linguistics* (1987), 127-152.

²⁰ See Dell Hymes, "The Ethnography of Speaking", in T. Gladwin and W. Sturtevant (eds.) *Anthropology and Human Behavior* (Anthropological Society of Washington, Washington, D.C., 1962); G. Sankoff and S. Poplack, "A formal Grammar for Code-switching", 8 *Centro Working Papers* (1979).

²¹ R.V. Pandharipande, "Minority Matters: Issues in Minority Languages in India", 4 *International Journal on Multicultural Societies* (2002), 213-234. Available at <http://unesdoc.unesco.org/images/0013/001387/138795E.pdf#page=68> (29/10/2007).

²² In phonology, functional load is the amount of work a phoneme (a unit of speech is considered a phoneme if replacing it in a word results in a change of meaning) does to distinguish one language utterance (usually a word) from another. If many words are distinguished on the basis of a given phonological element (phoneme, stress, or tone), that element has a high functional load. If only a few words or word pairs in a language contrast for the element in question, that element has a low functional load (Vachek 1976).

²³ The principle of functional transparency has been introduced by Franzyngier and Shay (2003) for describing language forms and functions through the description of relationships among lexicon, morphology, syntax and phonology.

²⁴ Zygmunt Frajzyngier and Erin Shay, *Explaining Language Structure through Systems Interaction* (John Benjamins, Amsterdam, Philadelphia), 2003, 2.

Summarizing, in its simplest terms, language shift may be thought of as a loss of speakers and domains of use, both of which are critical to the survival of a spoken language. The concept of *functional load* refers to the ability of languages to successfully function in one or more social domain, while the *functional transparency* feature is important in determining the degree of *functional load*.

As we shall see, the concept of *functional transparency* will help us in delineating what are the factors influencing regional or minority language speakers' language choices before judicial courts.

3. Regional or Minority Language Use Before Judicial Authorities

3.1 The European Charter for Regional or Minority Languages

Given the limited amount of data and research on the use of regional or minority languages before judicial courts, the availability of information in relevant documents such as the state periodical reports submitted by those countries that have signed and ratified the European Charter for Regional or Minority Languages (ECRML), the evaluation reports by the Committee of Experts of the Charter (ECRML) and the recommendations of the Committee of Ministers of the Council of Europe (CM) have contributed to the selection of the countries under study.

The starting point of the analysis, therefore, is the ECRML, a treaty of the Council of Europe. The importance of the ECRML in the field of minority language protection has been recognized by the European Parliament, which—in its *Resolution on Regional and Lesser used Languages* (2001)—calls on Member States which have not yet done so to sign and ratify the ECRML as the key instrument of its kind in Europe. The ECRML focuses on the protection of regional and minority languages and cultures as such: it does not grant any rights to speakers of certain languages, minority or otherwise, or to certain linguistic groups, but, concentrating on the languages themselves, it focuses on a recognition, protection and promotion of multilingualism. However, it cannot be denied that the substantive provisions of the ECRML are clearly important for linguistic minorities and their members by way of indirect protection²⁵ (Benoit-Rohmer 1998;

²⁵ Florence Benoit-Rohmer, "Le Conseil de l'Europe et les Minorités Nationales", in Katlijn Malfliet and Ria Laenen (eds.) *Minority Policy in Central and Eastern Europe: The Link Between Domestic Policy, Foreign Policy and European Integration* (Instituut voor Europees Beleid, Katholieke Universiteit Leuven, Garant, Leuven, 1998), 128-148; Klaus Schumann, "The Role of the Council of Europe" in Hugh Miall (ed.) *Minority Rights in Europe: The Scope for a Transnational Regime* (Royal Institute of International Affairs, Pinter, London), 87-98.

Schumann 1994).

The initiative for drafting the ECRML was taken by the Congress of Local and Regional Authorities (CLRAE) in 1984. The ECRML became a Council of Europe Treaty open for signature in 1992. After five member states had completed the ratification procedure, the EChRML came into effect in 1998.

So far, 33 member States of the Council of Europe have signed the ECRML, of which 22 States have ratified it. A three-yearly monitoring cycle forms part of the ECRML's ratification process. An independent Committee of Experts (Comex) is charged with the monitoring process. As part of the monitoring cycle, each treaty party compiles a periodic report on the implementation of its undertakings. The Comex is responsible for on-the-spot visits and evaluations reports compiled by the Comex itself.

The ECRML contains five parts, of which two (II and III) are particularly important: Part II sets down objectives and common principles for all states and all languages, and Part III describes concrete, specific undertakings which may vary from country to country and language to language. In both Part II and Part III, there are provisions and undertakings which states are required to put into effect in their legal system, depending on the particular protection policies they adopt. The two parts display a unity which itself reflects the ECRML's common aims. However, in Part II those aims are expressed in general terms, whereas in Part III, of which Art.9 'Judicial authorities' is the most important article for this study, they are embodied in more concrete measures, "no fewer than 68"²⁶, among which states choose a minimum of 35 in order to promote regional or minority languages.

As just mentioned, Article 9 deals especially with judicial authorities. It is composed of 3 subparagraphs but only the first one actually deals with language use in court proceedings.²⁷

²⁶ François Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages*, 64.

Article 9, paragraph 2 of the ECRML deals with the validity of legal documents drafted in a regional or minority language, while the third one mentions that "The Parties undertake to make available in the regional or minority language the most important national statutory texts and those relating particularly to users of these languages, unless they are otherwise provided". <http://conventions.coe.int/treaty/en/Treaties/Html/148.htm>, (29/10/2007).

It should be kept in mind that the state parties to the ECRML are not obliged to agree to be bound by more than one paragraph or subparagraph of Article 9. Consequently, they can choose a subparagraph of

Within the first paragraph, subparagraphs can be distinguished, one dealing with criminal proceedings, a second with civil proceeding, a third with proceedings concerning administrative matters, while the last one urges the state parties to take steps to ensure that any necessary use of interpreters and translations in civil and administrative proceedings would not involve extra expenses for the persons concerned. The alternatives enumerated in Article 9, paragraph 1 are preceded by a generally applicable statement which limits these alternative obligations to “those judicial districts in which number of residents using the regional or minority language justifies the measures specified”. Furthermore it is stated that the undertakings by the state parties will be “according to the situation of each of these languages” and also on “condition that the use of the facilities afforded by the present paragraph is not considered by the judge to hamper the proper administration of justice”.

The alternatives in paragraph 1 range from conducting the proceedings in the regional or minority language at the request of one of the parties, to allowing litigants to use their regional or minority language and the right to produce, on request, relevant legal documents in the regional or minority language. Regarding criminal proceedings, another alternative is offered, namely “to produce, on request, documents connected with legal proceedings in the relevant regional or minority language, if necessary by the use of interpreters and translations, involving no extra expenses for the persons concerned.”²⁸

3.2 *Country Selection and Relevant Legislations*

The corpus on which this study is based includes those EU member states which have ratified the EChRML and which have signed undertakings from Article 9, paragraph 1 at (i) and (ii) levels for those languages that have been designated for the protection under part III of the EChRML. Nine countries have been selected: Austria (Burgenland-Croatian, Slovenian, Hungarian), Finland (Sami, Swedish), Germany (Upper Sorbian, Lower Sorbian), Netherlands (Frisian), Slovakia (Romany, Hungarian, German, Ruthenian, Ukrainian, Czech, Bulgarian, Croatian, Polish), Slovenia (Hungarian, Italian), Spain (Catalan in Catalonia, Basque in Navarra, Basque in the Basque country, Catalan in Balearic Islands, Valencian, Galician), Sweden (Sami, Finnish,

paragraph 2 or paragraph 3, thus avoiding the progressive obligations regarding language use in court proceedings altogether.

²⁸ ECRML Article 9, paragraph 1, (1) (iv). <http://conventions.coe.int/treaty/en/Treaties/Html/148.htm>, (29/10/2007).

Meänkieli), United Kingdom (Welsh).

It was decided to exclude Cyprus because no languages have been designated by the authorities for protection under Part III of the ECRML;²⁹ the Czech Republic was excluded because no reports were available, the first being due in March 2008; Luxembourg declared that there are no regional or minority languages within its borders.³⁰ Hungary, though matching all the selection criteria, has not been included because, despite the recommendation of the Comex, it has not yet identified the territories in which the number of speakers justifies the effective implementation of Article 9. As concerns the range of alternatives, levels (iii) and (iv) were not included in the analysis because, they did not prove to be particularly problematic in their implementation.

The application of Part III of the ECRML is based on a territorial principle, as defined by Patten (2003, p. 297), for the following languages: Burgenland Croatian, Slovenian and Hungarian in Austria; Swedish and Sami in Finland;³¹ Upper and Lower Sorbian in Germany; Frisian in the Netherlands; Italian and Hungarian in Slovenia; Catalan (Catalonia, Balearic islands), Basque (Navarra, Basque countries), Valencian and Galician in Spain; Sami, Finnish and Meänkieli in Sweden; Welsh in the United Kingdom. On the contrary, Slovakia does not restrict its commitments under Part III to any territorial district.

Some languages, namely Burgenland Croatian, Slovenian and Hungarian in Austria, Swedish in Finland, Frisian in the Netherlands, Italian and Hungarian in Slovenia and Catalan (Catalonia, Balearic Islands), Basque (Navarra and Basque Countries), Valencian and Galician in Spain, enjoy the status of co-officiality.

What follows is a list of the main legislative provisions dealing with the use of regional or minority languages before judicial authorities in the nine countries considered in this study.

²⁹http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Cyprus_1st_report.pdf , (29/10/2007).

³⁰http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.2_States_Reports/Luxembourg_report1.pdf , (29/10/2007).

³¹ “According to the legal acts in force in Finland, the right to use Swedish is assured in private and in public life. The public use is, however, based on two fundamental principles: the principle of territoriality and the personal principle”, Council of Europe (2001), ECRML, Application of the Charter in Finland, available at

http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Finland_1st_report.pdf , (29/10/2007).

AUSTRIA

- Burgenland Croatian

According to Article 13ff of the Ethnic Groups Act in conjunction with the Ordinance regarding the Use of Croatian as an Official Language, Croatian is admissible as an official language in addition to German before the district courts of Eisenstadt, Güssing, Mattersburg, Neusiedl and See, Oberpullendorf and Oberwart as well as before the Eisenstadt Regional Court. Anyone may request to use Croatian as the official language in criminal and civil proceedings conducted against him/her before these courts.

Croatian is admitted as an additional official language before the Burgenland Independent Administrative Senate.

- Slovene

According to the Ordinance of the Federal Government of 1977, Slovene is admitted as an official language in addition to German before the district courts of Ferlach, Eisenkappel, and Bleiburg as well as before Klagenfurt Regional Court. A party may request to use Slovene in criminal and civil proceedings before these courts.

Slovene is admitted as an additional official language before the Carinthia Independent Administrative Senate by virtue of Articles 13ff of the Ethnic Groups Act and Article 4 of the Ordinance regarding the use of Slovene as an official language.

- Hungarian

The Ordinance regarding the use of Hungarian as an official language provides that Hungarian is to be admitted as an official language before the district courts of Oberpullendorf and Oberwart, as well as before the Eisenstadt Regional Court.

Hungarian is also admitted as an additional official language before the Burgenland Independent Administrative Senate.

FINLAND

- Swedish

The Language Act (423/2003) requires public bodies to treat Swedish as a national language in Finland with an obligation for the authorities to address Swedish-speakers systematically in Swedish.

The amendment of the District Court Act adopted in September 2005 (629/2005) makes it possible to establish, on linguistic grounds, special departments under district courts in those judicial districts which have both Finnish and Swedish speaking inhabitants. The amendment is intended to ensure that both language groups receive *de facto*, legal services in their own language on equal grounds.

The Language Act and the Act on the Knowledge of Languages Required of Personnel in Public Bodies (424/2003) contains provisions on the language competence required of personnel in state and municipal authorities, independent institutions under public law, parliamentary offices and the Office of the President of the Republic, and on proving this competence.

Section 23 of The Language Act provides that an authority shall ensure in its activity and on its own initiative that the linguistic rights of private individuals are secured in practice. Bilingual authorities shall demonstrate to the public, then, that they use both languages. This means, among other things, an authority's obligation to ensure that its boards, signposts and forms are written in both national languages. A court is bilingual to the new Language Act if its district covers at least one bilingual municipality.³²

- Sami

Section 12 of the Sami Language Act provides the right to use Sami before courts whose jurisdiction covers the municipalities in full or in part of Enontekiö, Inari, Sodankylä, and Utsjoki. According to Section 19 to 22, if the Sami language is being used in oral hearings the matter shall be assigned to an official with knowledge of the Sami language. If the authority does not have an official with knowledge of the Sami language, the authority shall arrange for interpretation.

³² Municipalities are either bilingual or monolingual as determined by the Finnish government every 10 years on the basis of official statistics.

Under Section 4, an authority must not restrict or refuse to enforce the linguistic rights provided in the Act on the grounds that the Sami speaker also knows another language, such as Finnish or Swedish.

GERMANY

- Upper Sorbian/Lower Sorbian

Provisions governing the use in court with regard to the Sorbian language are laid down in the Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity of 31 August 1990, which explicitly provides that the Sorbs shall—continue to—have the right to speak Sorbian in court in their home *Kreise*.

NETHERLANDS

- Frisian

Any party or witness in a case coming before the courts in the province of Fryslân may use the Frisian language. Documents may be drafted in Frisian. The statutory basis for this is sections 2 and 3 of the Use of Frisian Act: “In all cases in which a person present at a court hearing held in the province of Fryslân speaks in his official capacity, is required to undergo examination, or has the authority to speak, he shall be authorized to use the Frisian language.”

SLOVAKIA

- Romany, Hungarian, German, Ruthenian, Ukrainian, Czech, Bulgarian, Croatian, Polish

The Code of Criminal Procedure in its Section 2 sub-section 14 stipulates the following: “Every person shall have the right to use his mother tongue before the criminal justice authorities.”³³ “If there is a need to translate the content of a statement or a written document or if the accused declares that he does not have a command of the language of the proceedings, an interpreter shall

³³ In Article 47 of the Constitution concerning provisions for the use of a regional or minority language in proceedings before courts, based on the application of the law on national minority languages, regional or minority languages can be used in court proceedings even outside judicial districts complying with the 20% threshold of population representing a national minority.

be engaged; the interpreter may also act as the recorder.” If the defendant does not have a command of the language of the proceedings, the criminal justice authority is obliged, then, to engage an interpreter under section 28 of the Code of Criminal Procedure. “An interpreter must also be engaged if the accused claims that he/she does not have a command of the language of the proceedings.” This indicates that the engagement of an interpreter does not depend on the opinion of the criminal justice authorities whether and to what extent the accused has a command of the Slovak language.

The general provisions of the Code of Civil Judicial Procedure, including the right to use one’s mother tongue in proceedings before courts, analogously apply to proceedings before courts in civil and administrative matters.

SLOVENIA

- Hungarian and Italian

The use of the languages of the national communities in the operation of judicial authorities in Slovenia is clearly evident from the Court Act (Ur. I. RS, No. 19/94 ...73/2004), which in Article 5 stipulates that “in the areas in which the autochthonous Italian and Hungarian national communities live, the business of the court shall also be conducted in the Italian or Hungarian language if a party who lives on that territory uses the Italian or Hungarian language”. Article 62 provides that if the proceedings are conducted only in the Italian or Hungarian language, or if bilingual proceedings are conducted, the court communicates, during the proceedings, with parties to and others involved in the proceedings, in their mother tongue.

SPAIN

- Catalan (Catalonia, Balearic Islands), Basque (Navarra, Basque countries), Valencian and Galician

Article 35 d) of Law 4/1999 of 13 January provides that in the territories of the autonomous communities citizens have the right to use the co-official language in their dealings with the state administration and includes the administration of justice in this category.

SWEDEN

- Sami, Finnish and Meänkieli

According to Section 4 of the Act on the right to use Sami in administrative authorities and courts of law, anybody who is a party or alternate for a party in a judicial procedure in a court of law is entitled to use Sami in the proceedings, if the judicial procedure has a connection to the administrative district for Sami. This right applies to district and city courts, county administrative courts, certain special courts and to courts of appeal.

The same provisions apply to Finnish (Section 4 of the Act on the right to use Finnish in administrative authorities and courts of law) and Meänkieli (Section 4 of the Act on the right to use Meänkieli in administrative authorities and courts of law).

UNITED KINGDOM

- Welsh

Sections 22 (i) and 23 of the Welsh Language Act 1993 provide the right to use Welsh in any criminal, civil and administrative proceedings.

Documents in Welsh are permitted by court rules. Competence in Welsh is a requirement to be appointed as a district judge.

3.3 *Analysis*

The legal framework presented in the previous section shows that the right to use regional or minority languages before judicial authorities is, in all cases included in this study, legally guaranteed. However, it also shows that the level of linguistic protection and promotion differs and some countries offer stronger provisions than others:

- In Finland, for example, individuals need not claim their linguistic rights themselves. The judicial authorities shall ensure in their activities and on their own initiative that the linguistic rights of private individuals are secured in practice: as concerns the Swedish language for example, correspondence must be sent in the recipient's language, regardless of the language

of the proceedings.

- In Slovenia, before each proceeding, the court has an obligation to inform members of the Hungarian or Italian community about the possibility of using Hungarian or Italian, and non-compliance with this is considered a procedural flaw which invalidates subsequent proceedings. Additionally, regardless of whether the proceedings were monolingual or bilingual, in ethnically mixed areas, court decisions shall always be issued in the Slovene and Italian or Hungarian languages.
- In Catalonia and Galicia (Spain), individuals who decide to communicate in the respective co-official languages are not required to provide a translation.³⁴

Yet, when the ECRML's reports are analysed, these differences do not always appear to be particularly relevant:

- Burgenland-Croatian, Slovenian and Hungarian³⁵ in Austria³⁶, Upper and Lower Sorbian in Germany³⁷, Italian in Slovenia³⁸, Catalan, Basque, Valencian and Galician in Spain³⁹ are all hardly ever used before judicial authorities due to possible delays.
- The speakers of both Burgenland-Croatian in Austria and of Swedish in Finland⁴⁰ and of Italian in Slovenia affirm that they prefer to speak in the majority language to avoid being seen as 'troublemakers': they fear in fact that the use of regional or minority languages might negatively affect relations with the authorities.

³⁴ Article 13 of Law of Catalonia 1/1998 of 7 January. Article 7, Law 3/1983 of 15 June (Galicia)

³⁵ The Ordinance regarding the use of Hungarian as an official language only entered into force in 2000, so there is no established practice with respect to the use of Hungarian before judicial authorities.

³⁶ http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Austria_1st_report.pdf, (29/10/2007)

³⁷ http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Germany_1st_report.pdf, (29/10/2007).

³⁸ http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Slovenia_2nd_report.pdf, (29/10/2007).

³⁹ http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Spain_1st_report.pdf, (29/10/2007).

⁴⁰ http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Finland_2nd_report.pdf, (29/10/2007).

- In Germany, Finland, the Netherlands⁴¹ and Sweden⁴², the Comex's attention has also been drawn to the lack of legal terminology in, respectively, Upper and Lower Sorbian, Sami, Frisian, and Sami and Meänkieli.
- Additionally, it does not appear that parties to a proceeding either in Germany, or in the Netherlands, Spain and Sweden, are at any stage specifically informed of the possibility of using a regional or minority language, irrespective of whether the party knows the majority language or not.

There is only one element among the practical and organizational obstacles to the exercise of the right to use regional or minority languages in judicial proceedings, namely the lack of employees of the judiciary sufficiently competent in the relevant regional or minority languages, which proves to depend on the degree of enforceability of the legislative provisions directly related to it. Indeed, as shown by the Comex reports, the shortage just mentioned of judicial personnel with sufficient language skills appears to be crucial in Austria (particularly for Slovene and Hungarian), Finland, Germany, the Netherlands, Slovakia⁴³, Slovenia (this is especially true for the Hungarian language), Spain and Sweden⁴⁴, whereas in Wales⁴⁴, where competence in Welsh is a requirement to be appointed as a district judge, the administration of justice is good with regard to the Welsh language. It must be pointed out that Finland as well, with its Finnish Act on the Knowledge of Languages Required of Personnel in Public Bodies and its Sami Language Act⁴⁵, obligate authorities to ensure, by training and other personnel policy measures, that their employees have a sufficient knowledge of languages for the performance of the authorities' tasks. However, due to the recent coming into force of this Act, no data is yet available on the outcomes of these legislative provisions. The language requirement is also present in the Spanish

⁴¹http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Netherlands_2nd_report.pdf, (29/10/2007).

⁴²http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Sweden_2nd_report.pdf, (29/10/2007).

⁴³http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Slovakia_1st_report.pdf, (29/10/2007).

⁴⁴http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/UK_2nd_report.pdf, (29/10/2007).

⁴⁵http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.2_States_Reports/Finland_report3.pdf (29/10/2007).

Sections 14, 24, and 25 of the Sami Language Act, for example, contain special provisions regarding the knowledge of the Sami language and language requirements of the courts personnel: “the authority shall provide training or take other measures in order to ensure that the personnel have the necessary knowledge of the Sami language for the performance of the functions of the authority”.

legislation⁴⁶ which, in Article 32 of Act 38/1988 of 28 December on Judicial Organization, provides that the knowledge of a co-official language of an Autonomous Community is to be considered as an advantage for the appointment to the High Court of Justice of the Autonomous Community concerned, and it also provides that the said knowledge also counts as an extra six years of service for competitive examinations for posts located in the territories of the Autonomous Communities concerned. However, this agreement was, in fact overruled by the Supreme Court on 29 April 1995 (appeal 2525/91). The subsequent regulation, currently in force, provides that the oral and written knowledge of a co-official language will count as a preferential merit in the transfer process adding one, two or three years depending on whether the post applied for is an individual place for a judge, a magistrate or a collegiate position. Furthermore, the knowledge rewarded by the mentioned agreement corresponds to a level B certificate, therefore below the level C certificate which relates to a working knowledge. Consequently, as a matter of fact, few judges and staff members seem to be able to use the co-official languages as working languages in courts. Further data corroborating the link between regional or minority language skills of the judicial personnel, linguistic protection levels and regional or minority language use patterns before courts emerge from an evaluation of the language training courses for judicial staff set up, in the past years, by the Spanish⁴⁷ and the Dutch⁴⁸ governments. These, being not compulsory, did not prove to be effective: in 2000, for instance, the number of registrations for the Frisian language course was too low for the courses to continue.

Before going any further with the analysis, it must be pointed out that a thoroughly comprehensive evaluation of the impact of different degrees of linguistic protection and promotion on the actual use of regional or minority languages before judicial authorities would require a broader set of data and variables than the ones considered in this study. Among others: the size (in both absolute and relative terms) and the social behaviour of the minorities. However, some trends can still be identified.

The material available on the use of regional or minority languages before judicial courts (ECRMLs' state periodical reports, Comex's periodical reports, Committee of Ministers' recommendations) demonstrates that the regional and minority languages taken into consideration

⁴⁶http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Spain_1st_report.pdf, (29/10/2007).

⁴⁷http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.3_Committee_of_Experts%27_Reports/Spain_1st_report.pdf, (29/10/2007).

⁴⁸http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_monitoring/2.2_States_Reports/Netherlands_report2.pdf, (29/10/2007).

in this study have rarely, if ever, been used in practice before courts. It also shows, with one exception (the lack of employees of the judiciary sufficiently competent in the relevant regional or minority language), that higher levels of linguistic protection and promotion in the 'legal' domain are not effective in terms of encouraging regional and minority language use.

A possible interpretation of this phenomenon can be derived from the theoretical framework presented in Section 2.3 of this study, where the concepts of functional load and functional transparency have been introduced. As previously observed, the functional transparency of a language, and consequently the actual use of it, depends on whether the language is perceived, by its speakers, as the most appropriate one to carry out the functions it is supposed to in a given context. The data gathered through the ECRMLs' reports show that the speakers of the regional or minority languages considered in this analysis find their languages to be inappropriate (or not functional transparent) with respect to the judicial domain (because of fear of delays in the proceedings, fear of being seen as 'troublemakers', lack of adequate legal terminology, lack of information on the possibility of using a regional or minority language irrespective of the knowledge the party has of the majority language) and so, irrespectively of the degree of linguistic protection and promotion implemented by their respective countries, choose not to use them before courts.

4. **Conclusions**

The data collected through the EChRML reports of the countries considered in this study show that regional and minority languages are hardly ever used before judicial authorities for the following reasons: fear of delays in the proceedings, fear of being seen as 'troublemakers', lack of adequate legal terminology in the minority language, lack of information on the possibility of using a regional or minority language irrespective of the knowledge the party has of the majority language, and lack of employees of the judiciary sufficiently competent in the relevant regional or minority language.

Although further research, including a wider range of variables (among others: size, in absolute and relative terms, and social behaviour of the minority language groups under study), is necessary to get a deeper insight into the impact of different levels of linguistic protection and promotion on regional or minority language use patterns before judicial courts, some trends can still be identified. Indeed, from the data available, it emerges that there is only one factor, among

those previously listed, that has proved to vary according to different degrees of enforceability of the linguistic provisions enacted by the states considered in this analysis: the lack of employees of the judiciary sufficiently competent in the relevant regional or minority language. It is worth further examination to help answer the question of why this is so.

According to Grin, “three conditions must be met for them [the members of a language minority] to use their language – and hence for the language to be, in accordance with the aims of the Charter, a living element of linguistic diversity”⁴⁹. These conditions are *capacity*, *opportunity* and *desire* (or *willingness*). The latter appears to be particularly relevant for this study. As minority language speakers are typically bilingual, they can choose whether to carry out the judicial proceedings in which they are involved in the majority or in the minority language. However, “if there is a choice, one of the conditions for the choice to be made in favour of ‘doing things through the medium of the minority language’ is people’s *desire* (or *willingness*) to do so”⁵⁰. In turn, people’s *willingness* to do so depends, among other things, on whether they perceive their language as the most appropriate one to carry out that particular function or, in other words, whether their language can be considered ‘transparent to the function.’ If that is not the case, even the highest level of regional or minority language protection and promotion in the ‘legal’ domain would then fail to prove effective.

⁴⁹ François Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages*, 43.

⁵⁰ François Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages*, 44.

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