

Fifth Report-Complaint to the Council of Europe

Allegation sent to the European Committee for Regional or Minority Languages

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The Advisory Council of Lawyers for Asturian

Uviéu 2009

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The Advisory Council of Lawyers for Asturian, 2009

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Through two press statements published by various communications media on December 12th and 13th, 2008, El Aconceyamientu de Xuristes pol Asturianu (The Council of Lawyers for Asturian) demonstrated publicly its gratitude to the Council of Europe, as well as for the resolution by the Ministerial Committee, made on December 10th, 2008, regarding the application of the European Charter of Regional or Minority Languages in Spain, as well as for the report of the Expert Committee, dated April 2008, on which this is based. This recognition and gratitude we wish to express once more.

Furthermore, The Council of Lawyers for Asturian would like to ask the Expert Committee to read in greater depth the Instrument for the Ratification by Spain of the European Charter of Regional or Minority Languages, with a view to revising its initial resolution not to include the Asturian language in the analysis of the application of Part III of the Charter. The criterion applied in the first report of April 8th, 2005 (paragraphs 60 and 61) which is repeated in the second one of April 8th, 2008 (paragraphs 2, 10, 11 and 78) is prejudicial to the native and traditional language of the Autonomous Region of Asturias, spoken in some areas of Cantabria, Castilla-Leon and Extremadura, as well as in the neighbouring state of Portugal, where the District of Miranda del Duero enjoys the benefit of co-official language status.

With the intention of collaborating towards this end, the Council of Lawyers for Asturian has prepared the following study, which they ask you to give a fair hearing.

Fifth Report to the Council of Europe

THE INTERPRETATION OF THE INSTRUMENT OF RATIFICATION BY SPAIN OF THE EUROPEAN CHARTER OF REGIONAL OR MINORITY LANGUAGES

INTRODUCTION: THE REGIONAL LANGUAGES OF SPAIN.

In Spain, in addition to Castilian, the official language of the State, there are another four traditional languages of a regional character: Asturian, Catalan, Galician and the Basque language (euskera). These four are native and traditional to an historical region which presently covers at least one Autonomic Region, extending to others, and, apart from Galician, even to different European States. Thus, Asturian is spoken, apart from within the Autonomous Region of the Principality of Asturias, also in various districts of the Autonomous Regions of Cantabria, Castilla-Leon and Extremadura and in the Portuguese district of Miranda del Duero, where it has co-official status; Catalan is native to the Autonomous Regions of the Balearic Islands, Catalonia and Valencia, to a zone in Aragon and to Andorra and some areas of France; Galician, native to the Autonomous Region of Galicia, is used in areas of Castilla-Leon and Extremadura; and the Basque language is native to the Autonomic Regions of the Spanish Basque Country and to Navarra, as well as to the French Basque Country.

There are in addition other local languages like the Aragonese, spoken in some rural nuclei in the zone of the Pyrenees in the province of Huesca, the Galician-Asturian, spoken in the West of Asturias, between the rivers Navia and Eo, and the Aranese in the Catalanian valley of Aran. There are also foreign languages deeply rooted in Spain: Portuguese in Olivenza (Extremadura), Berber in Melilla, and Arabic in Ceuta. And a

minority language, spoken by part of an ethnic minority established in Spain for many years, Romany or Calo.

In the present report, we will be referring only to the regional Spanish languages (Asturian, Catalan, Galician and the Basque language) and to the different and discriminatory treatment which the Spanish government offers one of these, Asturian.

1. THE PART OF THE INTERPRETATION WITH WHICH THERE IS AGREEMENT.

Nobody would place in doubt that in the first two paragraphs of the declaration, the Instrument of Ratification by Spain of the European Charter of Regional or Minority languages (in the consecutive Charter) affirms that in its effects those same languages are those recognized as official in the Statutes of Autonomy of the Autonomous Regions of the Basque Country, Catalonia, the Balearic Islands, Galicia, Valencia and Navarra, and that the Autonomy Statutes protect and preserve them in the territories where they are spoken traditionally.

Out of all the content of Article 2.2 of the Charter, one has to emphasize that the Instrument of Ratification by Spain does not directly mention any language, but chose to use an indirect reference, by indicating the different Statutes of Autonomy.

On the other hand, Article 4 in the Public General Act 7/1981, by which the Statute of Autonomy of the Principality of Asturias was approved, declares in its numeral 1 the language spoken in Asturias (Bable or Asturian) to be the subject of protection (" Bable will enjoy protection"), such protection as agrees with the mandate of the Statute (Number 2 in Article 4 of the Statute: " An Act of the Principality will regulate the protection, use and promotion of Bable"). This Article was developed through the Act of the Principality of Asturias 1/1998, March 23d, on the Use and Promotion of Bable/Asturian , a norm which qualifies "Bable/Asturian, as the mandated traditional language of Asturias" (Article 1).

Consequently, it shows itself to be completely correct, and, as it appears to us, peaceful, to affirm that in agreement with the content of the Instrument of Ratification regarding the effects of applying the Charter in Spain:

1. Asturian is a language as deserving of protection as are Catalanian, Galician and the Basque language.
2. Asturian is as appropriate-indirectly through the reference to the Statute of Autonomy-, as Catalanian, Galician and the Basque language for the effects established in Article 2.2 in the Charter.

2. THE CONFLICTUAL PART OF THE INTERPRETATION.

Through the third and fourth paragraphs of the Declaration, the Instrument of Ratification of the Charter by the Spanish State shows that for the languages recognized as official in the respective Statutes of Autonomy "those dispositions will be applied which are indicated further on in Part III of the Charter"- sixty nine paragraphs and sections in total, while for those languages which their Statutes of Autonomy protect and

preserve, "all those dispositions of Part III of the Charter will be applied which can reasonably be applied"- ninety eight paragraphs and sections in all.

In the specific wording of both paragraphs something is also made clear, and, we believe it to be in agreement: the protection, through the means of the application of the Charter will not be the same for those regional languages which have recognized status as co-official (Catalan, Galician and the Basque language) as for the regional language which does not enjoy co-official recognition (Asturian).

The interpretive conflict arises at the moment of evaluating the meaning of a different protective treatment (sixty nine paragraphs and sections for those with co-official status and all that can be reasonably applied out of a total of ninety eight for those lacking co-official status) among regional languages which are given identical consideration and status in the norm which is to be interpreted, the Instrument of Ratification by Spain of the Charter.

To summarize matters, with paragraphs 3 and 4 of the Declaration contained in the Instrument of Ratification by Spain of the Charter, we find ourselves faced with an unequal treatment between subjects which finish by being declared legally equal in such effect (paragraphs 1 and 2 in the Declaration). This contradiction demands an interpretation which is reasonable and in concordance with the principles which inspire both Spanish law and the Council of Europe, beginning with the contents of the Preamble, the General Regulations and the Objectives of the Charter itself.

3. AN INADMISSIBLE INTERPRETATION.

Through the arguments which follow we will show that the interpretation attempted by the present Spanish authorities of their Instrument of Ratification of the Charter is legally inadmissible , in the sense of recognizing, for the three co-official regional languages, the application of the sixty nine paragraphs and sections there indicated, while for the other regional language, Asturian, none is recognized, giving to the sentence " To the languages mentioned in paragraph two all those regulations of Part III of the Charter will be applied which can reasonably be applied in keeping with the objectives and principles established in Article 7", a programmatic or simply rhetorical value. It circumscribes the protection of the Asturian language to the content of Part II of the Charter, as if it were dealing with a language unprotected by the Statute of Autonomy, and as a consequence, not indicated in the Instrument of Ratification, as is the case, for example with the Arabic in Ceuta, the Berber in Melilla and the Portuguese in Olivenza.

Lamentably, the Expert Committee of the Council of Europe, not without vacillations, approved initially that restrictive interpretation with regard to the Asturian language (paragraphs 60 and 61 of the Report of April 8th, 2005), maintaining it, without further analytic efforts, in the second Report of April 8th, 2008 (paragraphs 2, 10, 11 and 78).

It follows, however, that with such an interpretation, the Asturian language- protected by the Statute of Autonomy of the Principality of Asturias and as such as "indicated" as the others in the Instrument of Ratification by Spain of the Charter, and consequently, deserving of the protection established in its Article 2.2 - is being given the treatment

appropriate to a language "not indicated" in the Ratification, limiting its protection to the contents of Part II (Article 7), in a clear example of unjustified discrimination.

3.1. The Spanish constitution condemns negative discrimination among legally equal subjects, in a situation substantially similar.

In the present case, the legally equal subjects are Catalan, Galician, the Basque language and Asturian, where the first three as co-official languages and the fourth as protected by the Statute of Autonomy, possess as far as the effects established in the Instrument of Ratification of the Charter in Spain, the same consideration as "regional or minority languages".

The substantially similar situation arises given, among other circumstances, the following:

- a. The four differ from Castilian, the official language of the Spanish State, and are traditionally spoken in some zones within its territory and by its citizens, who constitute a group inferior to the rest of the population of the State. In consequence, they are "regional languages" within the meaning of Article 1 of the Charter.
- b. The four are indicated in the same indirect form (through reference to their respective Statutes of Autonomy) in the Instrument of Ratification by Spain of the Charter. Consequently, the same content of its Number 2, in Article 2 has to be applied to the four.

The only important difference between Catalan, Galician and the Basque language, on the one hand, and Asturian on the other, is that the former are recognized by the Spanish State as having co-official status in the territory in which they are traditionally spoken, a status which the same Spanish State is denying the Asturian language (because in agreement with Articles 81 and 87 of the Spanish constitution, the approval and reform of the Statute of Autonomy of the Principality of Asturias is the domain of the Spanish Parliament and the initiative lies with its government, among others). With this the same Spanish State closes a vicious and wicked circle: it does not grant the Asturian language co-official status because it does not want to, and it denies it almost all those measures of protection that it offers to other regional Spanish languages, because it does not enjoy co-official status.

The result is that Catalan, Galician and the Basque language have in the last thirty years been protected by Spanish internal legislation, while this same legislation denies Asturian the most elementary measures of protection, impeding its development, and condemning it, in short, to disappear (with regard to this, we remit the content of the four reports sent by the Council of Lawyers for Asturian in the years 2007 and 2008.)

In such conditions, the interpretation given by the Spanish authorities and allowed by the Expert Committee of the Council of Europe into the Instrument of Ratification by Spain of the Charter, in the extent to which it recognizes for the regional co-official languages, and for this reason more protected by Spanish legislation, the application of sixty nine paragraphs of Part III of the Charter while not applying a single paragraph of Part III of the Charter to the regional language not yet recognized as co-official, and

thereby hardly protected at all by internal legislation, leads directly to negative discrimination (to treating more poorly the one so that it will be more poorly treated). This is completely condemned by Articles 1.1, 3.3, 9.2, 10.2 and 14 of the Spanish constitution, because such negative discrimination among languages is, definitely, negative discrimination against those who speak the language discriminated against.

3.2 Negative discrimination (to treat a language more poorly which is treated more poorly by national legislation) is forbidden also by the Charter.

The Spanish constitution draws this condemnation of negative unequal treatment from the most important international legal instruments: The Universal Declaration of Human Rights (Article 21), The International Agreement on Civil and Political Rights (Articles 2.1, 26 and 27), The Framework Agreement for the protection of National Minorities, Number 157 of the Council of Europe (Articles 6.2 and 10.1). Above all else, the European Agreement for the Protection of Human Rights and Fundamental Freedoms (Article 14), origin and basis for the Charter, which also, in the Presentation of arguments and in Article 7, sections 1 and 2, condemns "all unjustified distinction, exclusion, restriction or preference with respect to the use of a regional or minority language, the objective of which is to discourage or place in danger its maintenance or development". The despondency of Asturian speakers who see their language being separated day by day, regulation after regulation, from the protective quotas enjoyed by the other regional Spanish languages, and the danger not only to its development but rather to its survival, because today in Asturias even the right to use in public life the language traditionally spoken in the country, is not only "a right which cannot be prescribed", in agreement with the spirit of the Council of Europe's Agreement for the Protection of Human Rights and Fundamental Freedoms (Introduction to the Charter) but rather, it simply is not a right which can be exercised in practice because (5.1) doing so is forbidden in front of the Administration and Public Services and the Court of Justice.

3.3 The discriminatory interpretation against the Asturian language is also incongruent with the very content of the Charter.

And because the Asturian language is thus being mentioned in the Instrument of Ratification, - albeit in an indirect way, as are all the others-, the Spanish State has accepted the promise to apply to it " a minimum of thirty five paragraphs and sections chosen from the provisions of Part III in the present Charter, of which at least three should be chosen from each one of Articles 8 and 12 and one from each of Articles 9,10,11 and 13".

Nevertheless, as the present Spanish authorities try to interpret the Instrument of Ratification, what happens is that the Asturian language is left outside of any analysis regarding the application of Part III, with the result that in the first two reports of the Expert Committee of the Council of Europe, that is allowed which clearly runs counter to the mandate of Article 2.2 of the Charter.

3.4 The same Spanish authorities come up against their own incongruence when they try to interpret the restrictive form of the Instrument of Ratification of the Charter by Spain.

Thus, in their second report, of 2006, they try to present as regional languages only those which are co-official (page 2 in their Introduction) - concealing the very existence of the Asturian language and bringing the discriminating treatment of Asturian to its final consequences (the disappearance of the language). This clashes with their first "Report on the Application in Spain to Regional or Minority Languages", of 2002, in which Bable or Asturian is fully recognized as a regional language, as far as the application of the Charter is concerned (Section 2, pages 16 and 17 in the Castilian version.)

In the same sense, in the Report of 2006, all reference to the Asturian language is omitted in questions related to the application of Part III of the Charter, while in the first it is included in section "IV. PART THREE: APPLICATION OF SELECTED PARAGRAPHS AND OPTIONS BY SPAIN", and, under the general heading of "Norms adopted by the Regional Government of the Principality of Asturias", an analysis is carried out corresponding to Articles 8 (pages 78 and 79, always referring to the Castilian version), 10 (pages 101,109,115, 120 and 121), 11 (pages 134,135 and 140) and 12 (pages 154 and 155).

3.5 The restrictive interpretation of the Instrument of Ratification by Spain of the Charter leads to the absurd.

Abandoning the application of all, some or none of the paragraphs and sections of Part III of the Charter to the whim of the Spanish State, constitutes what international doctrine and jurisprudence would call "a reservation against the purpose and end goal of the treaty itself". Nevertheless, the general standards of international law and even Article 19 c) of the Agreement Regarding the Law of Treaties (Vienna, May 23d, 1969) prevent this category of reservations.

In this sense, in agreement with the interpretation of the sentence by the European Court of Human Rights, on April 29th, 1988, *Belilos versus Switzerland* (et al.) and the General Observation No. 24 of the Committee for Human Rights of the United Nations International Agreement on Civil and Political Rights, the organ in control of the Charter is responsible also for examining the regularity of a reservation. Consequently, it would be the Expert Committee or the Committee of Ministers of Foreign Affairs who would be in charge of examining the question. Also, if they interpret the Instrument of Ratification of the Charter restrictively, they would arrive at a "reservation against the purpose and end goal of the treaty itself", which would oblige them next to be forced to consider such a reservation as completely null and void, or to interpret it, according to the doctrine of "a useful effect", that is to say, favouring the application of the provisions of the Charter which offer the most guarantees to the Asturian language, never the restriction of the same.

Definitely, the restrictive interpretation leads to the absurdity of the denial of itself, if not - a greater absurdity- to the nullity of the interpreted rules.

4. AN INTERPRETATION IN ACCORDANCE WITH THE SPANISH CONSTITUTION AND THE CHARTER.

While they reject negative discrimination completely, the Charter and the Spanish constitution not only permit positive discrimination, but in certain cases of historical discrimination, they consider it imperative within the very principle of equality. In this

sense, the content of the second paragraph of Article 7.2 of the Charter is eloquent: "The adoption of special measures favourable to regional or minority languages, which aim at promoting equality among those who speak these languages and the rest of the population and are aimed at keeping in mind their particular situations, will not be considered an act of discrimination against those who speak the most widespread languages".

In consequence, it is in this key of positive discrimination (permitted and even encouraged) and not in that of negative discrimination (prohibited) that one has to interpret the unequal treatment which the Instrument of Ratification of the Charter by Spain makes between the regional languages Catalan, Galician and the Basque language, favouring them for their recognized co-official status, and the fourth regional language of Spain, Asturian, which at the moment of signing the Treaty, and even today, does not have such recognition, which is the cause of a series of discriminatory acts (vide the four previous reports submitted by the Council of Lawyers for Asturian to the Council of Europe) which could well qualify as historical discrimination against the Asturian language and those who speak it.

It is this key which forces us to pose a question and suggest an inevitable interpretation.

The question is: What objective and reasonable justification is there, related to the protective finality of the languages and those who speak them- proclaimed by the Spanish constitution and the Charter- by which the Spanish State gives the Asturian language and those who speak it a worse treatment than is given to the Catalan, Galician and Basque languages and those who speak them? Since it is definitely the case that the Spanish government, according to the Instrument of Ratification of the Charter, was obliged to protect the Asturian language through "all those provisions of Part III of the Charter which they can reasonably apply", what objective and reasonable justification exists for not applying to the Asturian language each and every one of the sixty nine paragraphs of the Charter which the Spanish government applies to other regional languages?

The inevitable interpretation is that the Instrument of Ratification by Spain of the Charter, made in agreement with its mandates (Article 7.2) and the Spanish constitution (Articles 1.1,3.3,9.2,10.2 and 14), which prohibit negative discrimination and encourage the positive one, it cannot be but that the Spanish State promised to apply to the Asturian language- the regional one least protected because it does not yet have co-official status-the sixty nine paragraphs regarded as applicable to the other regional and co-official languages, and furthermore, all those others which form Part III of the Charter and " which can reasonably be applied".

5. CONCLUSION.

Therefore, since the Council of Lawyers for Asturian believe that the Spanish government's periodic reports should at least take note, paragraph by paragraph, of the application towards the protection of the Asturian language of the sixty nine paragraphs to which Spain has committed itself, and if not complying with all or some of them, to justify this in an objective and reasonable manner.

Thus, the next evaluative questionnaire as to the compliance with the Charter, which the Expert Committee presents to the Spanish authorities, should include questions related to their compliance in applying to our language and the speakers thereof the sixty nine provisions which follow and which the Spanish State in its Instrument of Ratification has undertaken to apply:

- Article 8:

Paragraph 1, sections a.i, b.i, d.i ,e.iii, f.i, g, h,i.

Paragraph 2.

- Article 9:

Paragraph 1, sections a.i, a.ii, a.iii, a.iv, b.i, b.ii, b.iii, c.i, c.ii, c.iii, d.

Paragraph 2, section a.

Paragraph 3.

- Article 10:

Paragraph 1, sections a.i, b, c.

Paragraph 2, sections a, b, c, d, e, f, g.

Paragraph 3, sections a, b.

Paragraph 4, sections a, b, c.

Paragraph 5.

- Article 11:

Paragraph 1, sections a.i, b.i, c.i, d, e.i, f.ii, g.

Paragraph 2.

Paragraph 3.

- Article 12:

Paragraph 1, sections a, b, c, d, e, f, g, h.

Paragraph 2.

Paragraph 3.

- Article 13

Paragraph 1, sections a, b, c, d.

Paragraph 2, sections a, b, c, d, e.

- Article 14

Section a.

Section b.

In addition, we believe that the Expert Committee should consider -if evidence of this is found, which will with absolute certainty be the case- the special gravity implied in the Spanish government's non-compliance with its most elementary obligations to protect the Asturian language, which are these " apply a minimum of thirty five paragraphs or sections chosen from the provisions of Part III of the Charter, of which, at least three should be selected from each one of Articles 8 and 12 and each one of Articles 9, 10, 11 and 13." This is because as we reasoned above- indirectly and according to the reference to the Statute of Autonomy - the Asturian language is as appropriate as Catalan, Galician and the Basque language for the actions established in Article 2.2 of the Charter, in the Instrument of its Ratification by Spain.

Oviedo/Uviéu, February fourteenth in the year two thousand and nine.