

THE RIGHT TO USE NATIVE TONGUE IN CIVIL PROCEEDINGS

Abstract: *The use of language in civil proceedings is a very important legal-political, political, and social issue, which is of specific importance in multiethnic countries. The right to use one's native tongue in the course of proceedings before courts and other state authorities is one of the most significant instruments for realization of the right to legal protection¹ - a public subjective right broadly guaranteed by the constitution to all legal subjects. This paper presents a critical analysis of Serbian regulations pertaining to the use of languages in civil proceedings, aiming at identifying the shortcomings therein, as well as suggesting possible solutions to the identified problems. Serbian legislation's flaws relate, above all, to parties' right to submit filings written in their native tongues, to their right to receive court documents translated into their native tongues before delivery, and to the regime of bearing costs of translation and interpretation.*

Key words: *Language rights, right to legal protection, official language, national minority, citizens, language of proceedings, court writings, filings, translation, interpretation, costs of translation and interpretation.*

¹ On the right to legal protection, see: Stankovic, G, *Građansko procesno pravo*, Pravni fakultet Niš, 1998, pp. 18 - 21.

INTRODUCTION

Language is a symbolic system of communication and a universal cultural category, which is not innate to human beings, but the product of social dynamics and the form of expression of common historical and cultural heritage within a given social group.² In the context of the omnipresent multiethnicity of the states, aiming to support the interest of preserving national uniqueness and cultural diversity of different groups as proven catalysts of the nation's convergence and general prosperity,³ most countries, by virtue of their Constitutions, grant to all the citizens the general right to sustain and develop their respective cultural features,⁴ of which language is one of the most important.

With respect to its origins and development, language is a cultural phenomenon inherent to social groups characterized by organic ties between their members. However, even though the practice of constitutional declaration of most of the countries in the world as universal citizens' phenomena is prevailing worldwide, languages belonging to only one portion of their citizens remain the distinctive attributes of their international identity, as well as the instruments of communication on all levels of their functioning.⁵

2 Sociology defines language as "any symbolical operational system" and in narrower sense as "articulated symbolical structure of vocal manifestations (phonemes)" see: Boganac, M., Mandić, O., Petković, S.: *Rječnik sociologije i socijalne psihologije*, Informator Zagreb, 1977, p. 267. Language is also "The capacity of social communication, immanent to mankind, through articulated system of verbal signs, which enable shaping of the mind content and their transmission as sensible speaking messages", see: *Sociološki leksikon*, Savremena administracija, Beograd, 1982, p. 252.

3 On the importance of national diversity in the United States of America, see: *America, Land of Diversity: Race, Ethnicity, and Class in the United States*, see: <http://www.historyalive.com/essays/haus/topic05.asp>, access April 30, 2004.

4 The constitutions of large number of countries guarantee national and religious rights as well as freedom of expression of national and cultural belonging. See: *The Constitution of the Republic of Serbia*, The Official Gazette RS, No 98/2006, where article 18 grants and human and minority rights, while article 47 guarantees freedom of expression of nationality.

5 Etiologically, language is "universal social phenomenon, type of behavior, which is not innate, but a part of social existence and a result of the social practice, instrumentally derived", see: Boganac, M., Mandić, O., Petković, S.: *Rječnik sociologije i socijalne psihologije*, Informator Zagreb, 1977, p. 267.

1. LANGUAGE AND THE RIGHT TO LEGAL PROTECTION

One of the important functions of the Legal State is the function of providing legal protection to all subjects in need. The right to legal protection is an autonomous public subjective right, which is guaranteed to all legal subjects by the constitution. This is the right to protect and realize subjective rights, before the courts and other state authorities, which can be effectuated by demanding legal protection whenever there is a need for it. The grantees of this right are all legal subjects, irrespective of their nationality and citizenship, and the state bears a constitutional duty to provide for equal conditions for its realization. The enforcement of the right to legal protection is performed by the state in the interest of the grantees of this right, and, at the same time, in its own interest, which is reflected in the realization of its legal, political and social objectives.

The use of a certain official language as a communication media between citizens and bearers of the duty to provide legal protection leaves an open door for the possibility that differences between the native tongues of the parties pose an obstacle to the equal realization of the right to legal protection. This danger of discrimination between the grantees of the right to legal protection is immanent especially to the situations where the native tongue of one of the parties is the official language of the court, and that of another party is not.⁶

Aiming to create equal conditions for the realization of the right to legal protection, the Constitution of Serbia as well as the statutes thereof provide for a wide range of applicable measures. Hence, in article 199.2, the Constitution of the Republic of Serbia explicitly provides that “the unfamiliarity with the language of the proceedings may not be the obstacle to realization of rights and interests of the citizens”. At the same time, paragraph 1 of the same article states that each person is guaranteed the right to use his/her own language as well as the right to be acquainted with the facts in that language in the course of proceedings before the courts and other state authorities. By these provisions, the supreme legal act of Serbia has principally set the grounds for the equal realization of

⁶ The Serbian Constitution (art. 21) provides that all the citizens are constitutionally equal, and that any discrimination based race, gender, birth, language, nationality, confession, political or other belief, education, social origin, wealth or any mental or physical impairment is strictly forbidden.

Serbian citizens' right to use their mother tongues in the proceedings in which legal protection is being provided. By institutionalizing the prohibition of discrimination among citizens based on language differences, the Constitution of Serbia has limited the legislature's freedom in regulating the use of language in civil proceedings, and set the direction for statutory concretization of the principle of equality of citizens in this field.

The statute on Official use of Languages and Alphabets,⁷ states that on the territories of the Republic of Serbia inhabited by the members of national minorities, their native tongues, in addition to the Serbian language, are in official use⁸. This statute provides that the first instance administrative, criminal, civil, and other proceedings may be conducted in the language of the national minority, which is in official use in the body that conducts the proceedings.⁹

Similar provisions are contained in the Statute on Protection of Rights and Freedom of National Minorities,¹⁰ which also prescribes the possibility that on the territory of local self-government, traditionally inhabited by the members of national minorities, their languages be in official use (article 11).

2. THE USE OF LANGUAGES ACCORDING TO THE STATUTE ON LITIGATION PROCEDURE

The Statute on Litigation Procedure, in its general provision on the use of languages contained in article 6, stipulates that litigation is to be conducted in the Serbian language, that the official alphabet in the courts is to be Cyrillic, and that Latin alphabet is to be used in the courts only in accordance with the Constitution and the Law pertaining thereto. This statute leaves the possibility of conducting litigation proceedings in the language of a certain national minority on the territories where that language is in official use according to the law.¹¹

⁷ The Statute on Official use of Languages and Alphabets, Official Gazette RS, No. 45/91, 53/93, 67/93, 48/94, 101/2005 and 30/2010.

⁸ Art 1. 3 of the Statute on Official Use of Languages and Alphabets.

⁹ Art.12. 2 of the Statute on Official Use of Languages and Alphabets

¹⁰ Statute on Protection of Rights and Freedom of National Minorities, Official Gazette of Federal Republic of Yugoslavia, No. 11/02 and 72/2009.

¹¹ The Statute on Official Use of Languages and Alphabets, in article 11, stipulates that languages of national minorities, to be in official use in a certain municipality or autonomous province should be determined by the statute of that municipality or province,

2.1. The Participants' Right to Use Their Native Tongues in the Proceedings

Beside parties to the litigation proceedings, the participants thereto are also representatives of the parties, interveners, witnesses, expert witnesses, translators, interpreters, and others.

In Section VI of the Statute on Litigation Procedure, titled *The Language of Proceedings*, the legislature has empowered all participants, irrespective of their citizenship, to use their mother tongue in the course of proceedings, which is being conducted in some other language (article 96). For that matter, the statute has imposed on the courts the duty to provide oral translation of the entire content of hearings, as well as the written translations of all writings used as evidence therein. The court shall inform parties and other participants of their right to follow oral proceedings in their own language through an interpreter. The fact that the parties have been informed of this right, as well as their pleadings on the language they will use in the course of proceedings, shall be put on the official record. When deciding about the language they will use, the participants may renounce their right to use their own language, which also has to be recorded officially.

According to the Statute on Litigation Procedure, breaches of language rules are sanctioned by the possibility of annulment of the awards in remedial proceedings. These breaches can be constituted by the court's omission to inform parties on their language rights, by the courts omission to put the fact that the parties have been informed of their rights about the use of language or their pleadings thereon on the record, or by the court's denial of the parties' claim to use their own language in the proceedings.

As breaches pertaining to making a record are not contained in article 361 par. 2 of the Statute on Litigation Procedure, where all the breaches relevant by virtue of the law are exhaustively enumerated, it is clear that the court's omission to put abovementioned facts on the record represents the breach relevant by virtue of the court's assessment, meaning that in any case of such breach the court has to assess whether the respective breach

while Statute on Protection of Rights and Freedom of National Minorities, also in article 11 provides that "the local self-government unit shall introduce to equal official use the language and alphabet of the national minority, provided the percentage of its members reaches 15 % of the population..."

has or could have influenced the lawfulness of the award (article 361. 2).

The court's denial of the parties' claim to use their language in the proceedings is considered a more severe breach of the procedural law - relevant by virtue of the law itself (article 361 par. 2.8), and therefore, the court need not assess its causal relations with the lawfulness of the award¹² prior to annulment of the award. Although in Serbian legal theory and jurisprudence a different opinion is prevailing,¹³ the author of this paper holds that the breach relevant by virtue of law also exists in cases of the court's failure to inform the parties of their right to use their language in the proceedings, since in that way court deprives them (at least partially) of their procedural right to argue their case before the court, which represents the breach relevant by virtue of law, listed in article 354 (par. 2. 7).

2.2. The Language of Court Writings

With respect to court writings, which are subject to delivery to the parties and other participants, article 97 par. 1 of the Statute on Litigation Procedure provides that the summons, awards and other court writings are to be delivered to the parties and other participants written in the Serbian language.¹⁴ However, paragraph 2 of the same article stipulates that court writings shall be delivered to parties and other participants in one of the minority languages provided the addressees belong to that minority, they use that language in the pending proceedings, and that language is in official use in the court. However, the Statute leaves the addressees the possibility to opt for delivery of writings in the language of the proceedings, irrespective of the language they use therein.

By the provisions contained in the article 97 of the Statute on Litigation Procedure, the legislature has undoubtedly put the members of minorities whose language is not in official use in the court in an unequal position, and deprived them of the right to be acquainted with the contents

¹² See: Stanković, G., op. cit. p. 242. and Janevski, A., *Upotreba jezika u postupku pred sudom u parničnom postupku u Republici Makedoniji*, *Pravni život* br. 12/2002, p. 120.

¹³ *Id.* and Supreme Court of Vojvodina decision, where court's omission to inform parties of their language rights is considered breach relevant by virtue of law. See: Supreme Court of Vojvodina, Decision - Gzz-14/86.

¹⁴ Court writings subject to being served on parties are summons, warrants, decisions and excerpts from the record.

of court writings in their native tongue, even if they had expressly opted for that language to be the one they would use in the proceedings.

2.3. The Language of Filings

On the other hand, in the course of written communication between parties and the court, the problems related to the use of language are considerably mitigated, since participants in the litigation proceedings, according to the article 98 of the Statute on Litigation Procedure, can file actions, appeals, complaints, and other filings in the language which is in the official use in court, as well as in a non-official language, if that is in accordance with the law.

However, the problem of the language of procedural communication between the litigants through the court reappears when the issue of the language in which a party to litigation should receive the adversary party's filings is raised. The issue is whether the court should provide for the translation of such filings to the languages the addressee uses in the proceedings. As these filings are neither considered court writings to which the rule of article 97 could be applied, nor does the article 98 provide for the solution, Serbian jurisprudence as well as legal theory¹⁵ has come to the holding that courts should provide translation only to Serbian language, and only if the original filing was written in the language of a national minority the addressee does not belong to. If the filing was written in Serbian language, its delivery to the adversary of the party who has filed it is deemed acceptable, disregarding the language that the addressee uses in the course of proceedings.¹⁶

This practice creates obvious preference for the Serbian language over all others, including the languages which are in the official use in courts, and even the language of the proceedings – if different from Serbian.

Since the common denominator of delivery problems relating to both - the court's writings and the parties' filings is the right of the addressees to be acquainted with the contents of those documents in their own language, the solutions should be looked for in the same direction – the direction

¹⁵ See: Stanković, G., op. cit. 246.

¹⁶ See: Triva-Belajec-Dika, Građansko parnično procesno pravo, Narodne Novine, Zagreb, 1986, p. 290. and Stanković, G., op. cit. p.246.

pointing to true equality regarding the use of the language of the participants in civil proceedings. Therefore, the law should require mandatory pre-delivery translation of all documents written in some other language to the language the addressee has chosen to use in the course of proceedings. By doing so, the legislature would directly contribute to creation of the necessary preconditions for equal exercise of the rights of participants to civil proceedings to use their native tongues before the courts, and indirectly, to the equal realization of the right to legal protection.

3. THE EXPENSES OF TRANSLATION

The principle of equality of citizens, which is, through different means of concretization, enshrined in all the segments of civil procedure, requires that participants to litigation who use a language different from the language of the proceedings not be burdened with additional expenses for that reason. The duty to pay for expenses which may result from the participation of the translator or the interpreter¹⁷ may lead to the parties' renunciation of the language rights, even though that party is not sufficiently knowledgeable of the language of the proceedings to be capable of equal partaking and following the course of the proceedings with full understanding. In order to prevent the possibility of such situations occurring and, at the same time, to enable the realization of the purpose of constitutional and statutory provisions referring to the use of language, whose *ratio legis* is the equalization of citizens with respect to their right to legal protection, the legislature has provided for expenses of translation to languages of national minorities, which result from the application of the constitutional and statutory provision on the right of minority members to use their languages, to be born by the court (i.e. state).¹⁸

¹⁷ The translator is the one who expresses meaning of speech or writing in a different language, and the Interpreter is one whose job is to translate what somebody is saying into another language. See: Oxford Advanced Learner's Dictionary of Current English, 6 Ed, Oxford University Press, 2000 (pp. 680 and 1382).

¹⁸ On the legislature's intention to achieve equality of citizens through allocating the expenses of translation to the court see: Janevski, op. cit. p. 120. and Janković, Ž. Janković, H. Karamarković, D. i Petrović, D, Komentar Zakona o parničnom postupku, Privredna štampa, Belgrade, 1977, p. 147.

However, taking into account the provisions of all the legal sources relevant to this matter, one can come to conclusion that the provision of article 99, which states that “expenses of translation to minority language, which resulted from the application of Constitution and this Statute... are to be born by the courts”, does not provide for equal conditions for exercising the right to use the native tongue for all citizens. Conversely, its reach extends only to members of those national communities to whom the formal status of national minority has been granted by the law. Namely, according to the law applicable in Serbia – The Statute on Protection of Rights and Freedoms of National Minorities, the national minority is only that “group of citizens..., which, sufficiently representative by number, although representing a minority in the territory of the Republic of Serbia, belongs to some of the groups of population which are in long-term and tight connections with the territory of Republic of Serbia”. Bearing in mind article 99 of the Statute on Litigation Procedure alongside this provision, it is clear that a certain number of Serbian citizens have been left out of the domain of the protection the legislature has provided with respect to the use of language in civil procedure. In spite of the fact that the right to use the native tongue before the courts is constitutionally guaranteed to all persons irrespective of their nationality and citizenship, the legislature has failed to insure the equal condition for realization of this right, even for all Serbian citizens, since it has been provided only for the expenses of translation or interpretation to languages of formally recognized national minorities to be covered by the state. And while such treatment of foreign citizens seem, to some extent, understandable (having in mind other countries’ practice),¹⁹ that same treatment of Serbian citizens, whose misfortune is to belong to groups insufficiently representative to be granted national minority status, is unjustified and contrary to the many-times-mentioned equality principle - the guiding principle and the focal point of law-making not only in the field of civil procedure, but also in all other fields of social life.²⁰

19 See: The Statute on Litigation Procedure of the Republic of Macedonia, Official Gazette RM, No 33/98., The Statute on Litigation Procedure of Slovenia, Uradni list RS, No. 26/99. and Statute on Civil Procedure of Bulgaria, The Official Gazette of the Republic of Bulgaria, No. 12/52.

20 Even in ancient Greece the notion of justice was connected with the notion of equality, and Perelman determines his “Rule of Justice” as equal treatment of sufficiently

Instead of insisting on using the term “national minority,” which is limited by statutory criteria, the legislature should insure equality of all citizens in realization of their language rights on universal basis by using the broader term “citizens.” In that sense, provision of the article on the burden of cost-bearing regarding the application of translation and interpretation should be broadened in such a way that it encompasses all the citizens of Serbia irrespective of their nationality and the legal status of the national group they belong to.

The regime of translation cost-bearing in the Republic of Macedonia could serve as a model for resolving this problem in Serbian legislation. The Statute on Amendments and Supplements of the Statute on Litigation of the Republic of Macedonia²¹ has insured equal treatment in this respect for all citizens disregarding the formal status of the national group they belong to. This statute provides that “the expenses of translation for parties and other litigation participants who are Macedonian citizens, which result from the application of this law’s provisions on the right to use their languages and alphabets, are to be born by the court” (article 94-d). *Argumentum a contrario*, foreign parties should bear themselves the expenses of the translation and interpretation resulting from the use of their languages. In this way, the legislature has relieved all Macedonian citizens from duty to cover the expenses which result from the exercise of their right to use their native languages in the proceedings and has insured the full realization of the principle of equality of citizens in this respect on a universal basis.

4. CLOSING REMARKS

The right to use the native tongue in civil proceedings represents the means of realization of the constitutional principle of legal equality of citizens, which is, due to its anti-discriminatory nature and character, of gross importance especially in multiethnic states. By creating necessary preconditions for the full realization of this right, each country expresses its commitment to the ideas of equality as well as respect for cultural diversity of its citizens.

similar beings. See: Perelman, H., *Pravo, Moral i filozofija*, Nolit, Belgrade, 1983, pp. 16 – 18.

21 The Statute on Amendments and Supplements of the Statute on Litigation of the Republic of Macedonia, Official Gazzette RM, No 44/2002. Statute on Litigation Procedure was enacted in 1998, and came into force on July 19, 1998. See Official Gazette RM, No 33/98.

The legal regime pertaining to language rights in civil procedure in Serbia still has its weak points to which this paper aims to draw attention. At the same time, some possible solutions for their overcoming are suggested. Although the suggested solutions considerably differ, their common denominator and guiding principle is the idea of equalization of all the citizens with regards to the use of languages, irrespective of whether their language is in official use in the proceeding court or not, and disregarding the formal status of national community they belong to. These solutions could, to some negligible extent, increase the overall procedural cost to be covered by the state, but on the other hand, they would definitely significantly contribute to the fuller realization of the constitutional principle of equality of citizens, the principle which most legal scholars put on the throne of each legal system as the ultimate legal norm.

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ПРАВО НА УПОТРЕБУ МАТЕРЊЕГ ЈЕЗИКА У ПАРНИЧНОМ ПОСТУПКУ

Резиме

Овај рад представља критичку анализу законских решења која се односе на употребу матерњих језика различитих националних група у грађанском судском поступку у Србији. Различитост матерњих језика у мултинационалним државама као што је Србија може бити узрок великом броју проблема који се односе на остварење права на правну заштиту у грађанском судском поступку. Из овог разлога српско законодавство предвиђа низ мера усмерених ка превенирању неједнакости у погледу остваривања овог јавног, субјективног и Уставом загарантованог права. Међутим, законска решења нашег права имају одређене недостатке, од којих је један од најочигледнијих тај што се заштита језичких права ограничава на националне заједнице којима је формално признат статус националних мањина. Претензија овог рада, поред идентификације постојећих проблема у овој материји, је и предлагање могућих решења за њихово превазилажење. Заједнички именитељ свих сугерисаних решења јесте тежња ка успостављању правне једнакости свих грађана Србије без обзира на то који им је језик матерњи.

Кључне речи: Језичка права, право на правну заштиту, службени језик, национална мањина, грађани, језик поступка, судска писмена, поднесци, превођење, тумачење, трошкови превођења и тумачења.