THE RIGHT OF MINORITY LANGUAGES IN DOMESTIC COURTS – REALISABLE RIGHT OR ILLUSORY CONCEPT?

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A INTRODUCTION

Since the origins of modern International Human Rights Law, minorities and their protection have been a central issue. It was the mass death, mistreatment and displacement of many minority groups throughout Europe that jolted States into action by forming the United Nations and other regional human rights agencies. The realisation of the tragedy that befell so many minority groups during the Second World War highlighted the necessity to protect the most vulnerable and unrepresented societies. Despite attempts to address linguistic minority needs, there exists a fundamental flaw in the concept of 'nation states' as May describes, that renders linguistic minorities (and indeed most minorities) 'denied legitimate rights to their *existing* language' at the foundation of a state when the establishment of a 'civic language and culture is largely limited to, and representative of, the dominant ethnicity or Staatsvolk'.[1] There appears, as May details, an innate difference in the approach to linguistic minorities and religious minorities within the field of international human rights. Fishman notes that:

> Unlike 'human rights' which strike Western and Westernized intellectuals as fostering wider participation in general societal benefits and interactions, 'language rights' still are widely interpreted as 'regressive' since they would, most probably, prolong the existence of ethnolinguistic differences. The value of such differences and the right to value such differences have not yet generally been recognised by the modern sense of justice...[2]

A minority group can be recognised for a number of reasons, in fact what constitutes a minority can be such a broad concept, that few academics accept the challenge of defining the term 'minority'.[3] Religion, ethnicity, sexual orientation, nationality or language may all play a key role in one's identity as a minority. For the purposes of this paper, however, the focus will be on groups and individuals (regardless of whatever their State may regard as minority or ethnic groups) which have as a central part of their identity a language that is not the main language of the state in which they reside. Furthermore, this paper shall be focusing more so on traditional groups which often predate the foundation of their home nation and have a historic and cultural significance (newer languages which may be widely spoken in a state as a result of recent immigration will not be discussed).

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[1] Stephen May, Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language (Essex, Pearson Education Ltd 2001) 92.

[2] Joshua Fishman, Reversing Language Shift: Theoretical and Empirical Foundations of Assistance to Threatened Languages (Clevedon, Multilingual Matters 1991) 72.

[3] John Packer, 'On the Definition of Minorities' in John Packer and Kristian Myntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Åbo Akademi, Institute for Human Rights 1993) 23.

'It is clear from a whole set of declarations, recommendations and international treaties that respect for regional or minority languages implies that individuals who speak one of them must be able to use it in public as well as in private'.[4] The public element which will be described in this paper is the right (if one such exists) to use one's minority language within their national courts, and if so, to what extent does this right stretch and from where do such rights stem?

The use of minority languages in court systems is more than a mere vindication of an individual who wishes to use his or her mother tongue. 'Bringing regional and minority languages into government and justice is an essential factor in stimulating and modernising them, updating their terminology and developing their potential in these fields'.[5]

Through process of elimination I will discuss in turn the various European instruments which can claim relevance to linguistic protection and highlight how the European Charter for Regional or Minority Languages is the most relevant method of language protection through its provisions on the use of regional or minority languages in domestic courts, in an attempt to decipher whether or not the right to use one's language in court is in existence.

B SCOPE OF THE RIGHT TO BE HEARD IN DOMESTIC COURTS

Although it may seem that a right of use of a minority language within a domestic court would encompass only that specific element in order to adequately realise such a right, other rights and obligations of the state may come into play. For a complete and achievable right to use a regional or minority language within national courts, it is necessary first to discuss to what extent such a right may go.

For example, if the requirement is to provide for an interpreter when a party to the proceedings opts to use a regional or minority language (RML) and the other parties and/or the judges and legal professionals involved in the proceedings do not speak that language, then to whom ought the cost of the interpreter be apportioned? Similarly, in what circumstance might an interpreter be called for? Is it necessary for the RML speaker to have no command of the language of the court, or is it sufficient that he or she chooses to speak only the RML? Further, if the scope of such a right extends past mere interpretation and obligates the national court to conduct proceedings in a RML of the State, further issues are raised. In a criminal trial, must the judges and legal professionals be capable of conducting proceedings entirely in the RML? If so, is there an obligation on the State to ensure that legal training includes training in such a RML? Is there to be a quota of judges assigned to the bench who must have a workable knowledge of the RML? In civil cases, where parties disagree on the language to be used, how is a solution reached? Prior to court proceedings,

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[4] Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Strasbourg, Council of Europe Publishing 2005) 159. Woehrling refers to the Declaration on the Rights of Per sons belonging to National or Ethnic, Religious and Linguistic Minorities, as well as the Oslo recommendation of 20 September 1996 (under the OSCE Commissioner for National Minorities).

[5] ibid 161.

are legal documents and legislation necessary for trial available and legally binding in minority languages? If a RML is limited to a territory of the State, is there a possibility of appeal in a RML to a higher court?

It is necessary to describe the scope of this initial right to use a RML in court in order to highlight the challenges faced not only by individuals seeking to use their RML in domestic courts, but also those faced by the State in providing such a right and international organisations in their efforts to provide for clear, realisable rights and obligations. All of the above matters will be discussed in detail with regard to various international instruments and the rights and state obligations they provide.

Finally, there exists a need to broadly define what is meant by RML in the European sense. As alluded to most academics and indeed most international instruments will avoid providing a concrete definition. Rather than a massive oversight, this lack of a definition provides for a much more flexible application of laws and legal instruments to the plethora of languages that call themselves minority or regional in nature. Woehrling states that no two RMLs are alike and 'every language is actually a special case', thus their national situations are all nuanced and different.[6]

However, for the purpose of this paper, the term 'regional or minority language' will be based on the meaning contained within the European Charter for Regional or Minority Languages. The accompanying Explanatory Report highlights the fact that omitting a definition was indeed deliberate and defines the term RML in the following way:

> The adjective 'regional' denotes languages spoken in a limited part of the territory of a state, within which, moreover, they may be spoken by the majority of the citizens. The term 'minority' refers to situations in which either the language is spoken by persons who are not concentrated on a specific part of the territory of a state or it is spoken by a group of persons, which, though concentrated on part of the territory of the state, is numerically smaller than the population in this region which speaks the majority language of the state. [7]

Finally, it ought to be noted that the concept of RML does not include languages of recent migration into European territories and refers only to traditional languages that have a long and often culturally significant place within the state.[8]

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[6] Jean-Marie Woehrling, *Shaping Language Rights, Commentary on the European Charter for Regional or Minority Languages in Light of the Committee of Experts' Evaluation* (Strasbourg, Council of Europe Publishing 2012) 56.
[7] Council of Europe, Explanatory Report to the European Charter for Regional or Minority Languages (CETS No.148, 1992) para 18.
[8] ibid para 36.

C EXISTING PROVISIONS

It cannot be said that no rights at all exist for minority language speakers. In fact 'since the end of the Second World War' attempts have been made to 'integrate linguistic demands into conventional minority or human rights approaches'. [9] Even before the modern systems of human rights protections came into existence, the League of Nations 'appointed itself with the task [of] implementing minority rights in the constitutions of newly erected nation-states'.[10] Perhaps the turning point for the recognition of minority rights as being important and justiciable came with the United Nation's inception of the International Covenant on Civil and Political Rights (ICCPR) in 1966.[11] Article 27 reads:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Criticisms of the Article highlight that it is 'limited and resulted in a compromise that reflected state interests'.[12] Nevertheless, it paved the way for 'the creation of new measures' protecting minority rights. [13]

Prior to the United Nation's obvious recognition of minority language rights the European Convention on Human Rights 1953 (ECHR)[14] entered into force. Although it does not contain any rights similar to that of Article 27 of the ICCPR, as will be discussed below, it made certain references to language and the rights of RML speakers. I will now discuss the three main instruments within the Council of Europe which provide for the protection of RML and their usage in varying degrees within domestic courts with a view to concluding on the existence, or lack thereof, of such a right.

1 The ECHR

Within the main body of the European Convention on Human Rights, the word 'language' is mentioned only four times. Article 1 of Protocol 12 also mentions language. The rights involving language consist of the right to be informed of the reasons for arrest in a language which the detainee understands, the right to be informed of details of trial in a language the accused understands and the right to be provided with an interpreter where a person cannot

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[9] Woehrling (n 6) 12.
[10] Pieter Van der Plank, 'Minority Right Legislation in the Inter-War Period, as a Prologue to the European Charter of Minority Rights' in István Horváth, Tünde Székely and Márton Tonk (eds), *Minority Representation and Minority Language Rights* (Sapientia 2014) 388.
[11] Although only entering into force some ten years later.
[12] Alexandre Duchêne, Ideologies across Nations: The Construction of Linguistic Minorities at the United Nations (Berlin, Mouton de Gruyter 2008) 205.
[13] ibid.
[14] European Court of Human Rights, *European Convention on Human Rights* (2010) <www.echr.coe.int/Documents/Convention_ENG.pdf> accessed March 9th 2016.

understand the language of the court.[15] Furthermore, language is listed as a ground for discrimination under Article 14, although this is not a stand-alone right.[16]

The focus of this paper will be tailored toward those rights contained under Article 6, referring to rights of RML speakers within the judicial system of their state.

Article 6.3(e) states that anyone charged with a criminal offence has the right 'to have the free assistance of an interpreter if he cannot understand or speak the language used in court'. Clearly, the situation covered by this right refers to a unilingual defendant who has no command of the language of the court, and this has been reiterated time and again by the Strasbourg Organs. 'The Convention right to the assistance of an interpreter contained in Article 6, para 3(e) clearly only applies where the accused cannot understand or speak the language used in court'.[17] However, the Commission has also held that even where a defendant does not speak the language of the court adequately to understand fully the proceedings of court, there is no requirement to provide an interpreter.[18] It is thus impossible to claim that a RML speaker has a right to speak his or her language in court, where he or she has a command of the official language of the state.

With regard to the other methods of asserting language rights, such as indirectly under Article 9 (freedom of thought, conscience and religion) or Article 10 (freedom of expression), the Commission has recognised that 'these provisions do not guarantee 'linguistic freedom' as such. In particular, they do not guarantee the right to use the language of one's choice in administrative matters'.[19] Despite the fact that the ECHR is often viewed as one of the better instruments of international human rights protection and implementation, it 'does not recognise any independent right to minorities'.[20] Indeed, it may be said that internationally 'no effort has been made toward [creating] a comprehensive minority convention'.[21]

2 The Framework Convention

As alluded to above, the ECHR fails to acknowledge adequately the existence and indeed the need for protection that minority groups face throughout Europe, be they minorities of ethnic, religious, linguistic or other categories. In an effort to tackle this downfall in minority protection, the Council of Europe developed the Framework Convention for the Protection of National Minorities (Framework Convention) in 1994, which came into effect in 1998.

The Framework Convention's preamble makes direct reference to the above failures discussed when it states that 'the upheavals of European history have shown that the

[15] ECHR (n 14) Article 5.2, Article 6.3(a), Article 6.3(e) respectively.
[16] Article 14 must be asserted in conjunction with another right contained within the Convention or its Protocols.
[17] *K v. France* (1983) DR 35 para 8.
[18] *Lagerblom v Sweden* App no 26891/95 (ECtHR, 14 April 2003).
[19] *Fryske Basjonale Partij and Others v Netherlands* (1987) 9 EHRR CD 261 para 2.
[20] Abdulrahim P Vijapur, 'International Protection of Minority Rights' (2006) 43 International Studies 368, 372.
[21] European Centre for Minority Issues, Implementing the Framework Convention for the Protection of National Minorities (ECMI Report 3, 1999).

protection of national minorities is essential to stability, democratic security and peace'.[22] Given the timing of the Framework Convention, it is likely that the desire to protect national minorities through a specific international instrument within Europe was spurred by the atrocities of the former Yugoslavian states. With regard to minorities in general the Framework Convention is the 'the most advanced instrument on minority rights' at a regional level.[23]

The Framework Convention does, however, reference linguistic rights 'within the broader context of minority rights'.[24] In particular, Article 10 details the right of 'every person belonging to a national minority' to use his or her language in public and private, both orally and in writing 'freely and without interference'. The Article goes further in the second paragraph with reference to the right to use a minority language whilst communicating with public authorities:

> In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

The Framework Convention Explanatory Report highlights that although this provision does not cover all dealings with all public authorities, it is nonetheless to be interpreted 'broadly'.[25]

It has been suggested that 'The Framework Convention, in accordance with its Article 22 should provide for added value regarding minority protection' when read in conjunction with the ECHR. Thus it could be possible to 'read in' linguistic rights into the ECHR for those states who have signed and ratified the Framework Convention. [26]

However, for all its uniqueness and forward-thinking, the Framework Convention is still weak in the protection that it offers to national minorities, and as such, to linguistic minorities. The stark similarities between Article 10(3) and Article 6 of the ECHR means that there is a failure to create any further or stronger rights in this respect.[27] In addition, the wording of the protections in the Framework Convention, particularly in Article 10(1) and (2) are 'weak and vague'.[28] For example, the obligation on State Parties is to 'undertake to recognize' and to 'ensure, as far as possible'. The softness of these provisions provides States

[22] Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report (H (1995) 10) at Preamble.
[23] Vijapur (n 20) 382.
[24] Woehrling (n 6) 154.
[25] Framework Convention for the Protection of National Minorities and Explanatory Report (n 22) para 64.
[26] European Centre for Minority Issues (n 23) 14.
[27] Parry (n 24) 156.
[28] Vijapur (n 20) 382.

who have ratified the Framework Convention with an easy route of refusing to heighten the rights of minority language speakers.[29]

3 The European Charter for Regional or Minority Langauges

The European Charter for Regional or Minority Languages (ECRML or the Charter) signals a change in the way international instruments aim to tackle minority issues. As Grin says:

> The Charter is not about rights. It is not about standards. It is not about national minorities. It is not even about members of minorities ... The Charter is about *languages* – more precisely, the regional or minority languages of Europe – and about the measures required for safeguarding their existence in the long run.[30]

The origins of the Charter stem from a realisation in the 1980s that all attempts to protect linguistic minorities since the foundation of modern international organisations had failed.[31] By 1989, work began on creating an instrument based on minority languages of Europe and by 1992 the Charter was born, coming into force six years thereafter.[32] Since that time, the Charter has been signed and ratified by 25 Council of Europe States, solely signed by a further 8 States with 14 States yet to sign.[33]

Pla Boix states that a key element in the realisation of the aims of the Charter – mainly the protection and promotion of RMLs – is the use of such languages in the administration of justice.[34] As such, Article 9 of the Charter has provided for an extensive list of rights available to Contracting Parties. However, the implementation process of the Charter deserves some commentary given its unique structure. The Charter is broken up into parts, with each ratifying State bound by the provision in Part II and required to accept 35 paragraphs or subparagraphs minimum within Part III. Määttä critically analyses the effects of this *á la carte* method of selecting provisions:

> At least 3 out of these 35 paragraphs or subparagraphs must be among each of the Articles 8 and 12, and at least one from each of the Articles 9, 10, 11, and 13. However, the fact that the seven articles of Part III contain 98 subparagraphs guarantees that the member states can choose a minimum level of commitment to the protection of regional or minority languages.[35]

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[29] Article 10 (1) – (2).
[30] François Grin, Language Policy Evaluation and the European Charter for Regional or Minority Languages (Hampshire, Palgrave Macmillan 2003) 10 (emphasis added).
[31] Fishman (n 2) 23.
[32] ibid 24.
[33] Council of Europe, 'Chart of signatures and ratifications of Treaty 148' <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/signatures> accessed 7 June 2015.
[34] Woehrling (n 6) 303.
[35] Simo K Määttä, 'The European Charter for Regional or Minority Languages, French Language Laws, and National Identity' (2005) 4 Language Policy 167, 172.

Given the already weakened structures of many RMLs within Europe, this type of protection is somewhat disappointing. Furthermore just as Vijapur notes in relation to the Framework Charter, the wording of the protections within Part III (and indeed, throughout the Charter) such as 'facilitated', 'encouraged' and 'appropriate' are vague, and 'do not refer to concrete action'.[36]

Despite its criticisms, and the fact that it is not a rights bearing instrument, the Charter is nonetheless the best instrument and indeed the only specifically tailored instrument, to cater for the protection of minority languages. Gwynedd Parry describes how the Charter may inadvertently create rights for individuals who are speakers of RMLs:

[I]t is also possible that, by signing up to the Charter's obligations, states will consequently create laws which will then create legal rights for speakers of those languages.[37]

D STRENGTH OF PROVISIONS: RULES OR PRINCIPLES?

In order to discuss whether a right exists and the scope of any potential right, it is first necessary to discuss that which is meant by a 'right'. The above discussions regarding the three main European instruments which provide varying rights of language protection, specifically some forms of protection for the use of a RML in domestic courts, highlight some interesting aspects of the category of protection into which they fall.

Famously Dworkin spoke of the difference between a rule and a principle, the former being 'applicable in an all-or-nothing fashion'.[38] In a court of law, '[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision'.[39] Given the definitive nature of rights, we can assume that a rule can equate to a right on some level. Exceptions may exist, but such are stipulated and the nature of a right exists in an all or nothing fashion, provided circumstances meet the parameters of the right and do not fall into one of the exceptions to the right. A principle or perhaps more specifically as Dworkin describes, a policy, is a 'standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community'.[40]

When we apply Dworkin's logic to the aforementioned instruments, we see that the ECHR, specifically Article 6 is more of a rule since '[e]veryone charged with a criminal offence *has* the following minimum rights ...' Whereas Article 10 of the Framework Convention, playing host to the weakened language already mentioned, fits more readily into the category of policy; the recognition of minority languages. Finally, with regard to the Charter, Määttä opines that:

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[36] Parry (n 24).
[37] ibid 150.
[38] Ronald Dworkin, *Taking Rights Seriously* (Boston, Harvard University Press 1978) 25.
[39] ibid.
[40] Dworkin (n 38) 23.

> Parts I and II of the European Charter for Regional or Minority Languages are clearly principles [or policies]; Part III appears to give the rules, ie, the actual measures to be taken. However, since most of these 'rules' are not compulsory, the Charter as a whole is actually composed of [policies] rather than rules.[41]

Therefore, even the most fitting instrument of linguistic protection for RMLs in the domestic courts is weakly formed. It cannot and does not offer the same strength and individual protection for RML speakers that might be found under the ECHR if, for example, their right to freedom of religion was breached. The law in existence, at least at international level is altogether a soft form of law, with little or no protection, few avenues of pursuit for an individual and almost no methods of enforcement.[42] The strength of the 'rights' then, given to RML speakers within a state is wholly dependent on that state itself, the instruments (and indeed the parts of instruments) to which it is party and the strength of the domestic interpretations and provisions enforcing those instruments.[43]

This may seem to paint a bleak outlook for the possibility of ascertaining a right to use one's RML in domestic courts, but it appears to this observer that the policies in the European Charter for Regional or Minority Language Rights become rights (and as such, rules) with an international basis when they are implemented in the legal systems of contracting parties. In conclusion, a right may exist provided the state in question has implemented Article 9 within its domestic legislation. The extent to which Article 9 is implemented however must now be analysed in order to assess the scope of the right.

E APPLYING INTERNATIONAL PROVISIONS TO NATIONAL SITUATIONS

As detailed above, if RML speakers are to indeed have the right to use their language in domestic courts, then that right is best sought, ironically, through the non-rights bearing instrument of the Charter, when implemented in their own state. We may say to a degree that a right with an international basis (the Charter) exists to use one's RML in domestic courts. The obligations to provide for those paragraphs and subparagraphs of Article 9 which any given state has chosen to adhere to, however weak, provide more than any other instrument, a form of rights for an individual. Therefore, for the purpose of this section of the paper, the

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[41] Määttä (n 35) 173.

[42] Although the ECtHR is internationally renowned as an avenue of vindication for those whose rights have been violated, as stated above, no right of use of a RML in courts where the majority language is known by the accused has been found (n 12, 13). Furthermore, both the Framework Convention and the Charter avail of monitoring systems based on Contracting Party periodical reports, with no possibility of individuals submitting complaints.

[43] Many reports, particularly from the Committee of Experts from the Charter show that the practical application of domestic measures to facilitate the use of RMLs in domestic courts is 'formal' in nature only. See Committee of Experts Report, Finland 2001 para 145, 146: 'The Committee notes that in practice, Sami speakers only very seldom use their languages before the judicial authorities. This is due essentially, to the lack of language skills of these authorities and to the fact that Sami-speakers are bilingual and requests for documents in Sami languages may make the proceedings much longer...The Committee considers this undertaking only formally fulfilled, since there exist difficulties in its implementation.'

author shall focus mainly on the application of provisions within the Charter, in an attempt to explore the scope of the rights contained through ratification of relevant articles – it has been demonstrated that the ECHR is not a useful instrument to apply language rights for bilingual RML speakers.[44] The author will discuss domestic situations in relation to three aspects of RML usage in the judiciary: courts, legislation and education services.

1 Courts

Undoubtedly, the most obvious aspect of the availability of RML usage within national courts is the possibility of its implementation within court cases. Therefore, it is the most logical place to begin when discussing various language rights and Charter interpretations within the Council of Europe.

It is very prudent to note that within the Charter there is no requirement to provide for RML facilities within the courts 'except where there is a sufficiently large number of speakers of a regional or minority language to justify them'.[45] The Charter is punctured throughout with territorial restrictions on the scope of provisions, but issues may arise in relation to how territorial applicability of a right to use an RML in court may hinder the RML party.

First it is necessary to discuss in what way States have facilitated for the use of RMLs in courts. Article 9 of the Charter provides Contracting Parties with a number of methods for realising this provision, from providing that the courts, 'at the request of one of the parties, shall conduct the proceedings in the regional or minority languages ...'[46] to ensuring that evidence and requests shall not be considered inadmissible due to the fact that they are given in a RML.[47] The former provision would provide for a more complete administration of justice in a RML and give the most support and development to a struggling language, given that it would entail its usage in the 'whole of the proceedings – both the actual hearings and the various procedural steps'. We can see that Finland, in relation to Swedish, has provided for such a possibility. [48] The country is divided up into municipalities, some of which are bilingual, some of which are monolingual. Based on this assessment, the courts within a municipality will correspond as being bilingual or unilingual.[49] With regard to criminal trials the Language Act, 2003 states as follows:

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[44] Most RML speakers within Europe are bilingual at the very least, with few portions of RML groups being monolingual. As examples, see Colin Baker and Sylvia Prys Jones, *Encyclopedia of Bilingualism and Bilingual Education* (Bristol, Multilingual Matters 1998) 409 '[In Finland] Most Swedish speakers... are bilingual... [and] [m]ost of the Sámi living in Finland are bilingual in Sámi and Finnish [the majority language].' See also that Welsh speakers in UK are almost exclusively bilingual in Welsh and English, Baker, 'Bilingual Education in Wales' in Ofelia García and Colm Baker (eds), *Policy and Practice in Bilingual Education: A Reader Extending the Foundations* (Bristol, Multilingual Matters 1995). Monolingual Catalan speakers is also a rarity, most of whom are bilingual in Catalan and Spanish (see <http://lmp.ucla.edu/Profile.aspx?LangID=25&menu=004> accessed 18 July 2015).

[45] Woehrling (n 4) 162.

[46] The Charter, Article 9.1.a (i).

[47] Article 9.1.a (iv).

[48] Although not technically a RML in respect of the definition in the Charter (Swedish is a co-official language on par with Finnish under the Finnish Constitution and relevant legislation) it is still protected as a RML under Finland's ratification of the Charter.

[49] Language Act 2003, s 5.

> (1) The provisions of Section 12 on the language of proceedings in administrative matters apply to the language of proceedings in administrative judicial procedure.
> (2) In administrative litigation before a bilingual court in a matter where the parties are an authority and a private individual, the language of the private individual is used as the language of proceedings. If all the parties are authorities, the language of the authority that has initiated the matter is used, unless with regard to the rights and interests of the opposing party the use of the other language is justified.
> (3) In administrative litigation before a unilingual court the language of the district is used as the language of proceedings, unless with regard to the rights and interests of the parties the court selects the other language.[50]

Furthermore, the Finnish legislature also provides for similar equality with regard to civil cases.[51] Finland became a party to the Charter in March of 1998 however before this, it cannot be said that there were sub-par or lesser protections available to the Swedish language, given that the Language Act 1922 provided for similar protections.[52]

The Charter entered into force in the United Kingdom in 2001 and seven languages are protected therein, including Welsh.[53] Welsh has the most encompassing protection of any of the UK's protected RMLs, being subject to eight paragraphs and subparagraphs under Article 9.[54] A Welsh Language Act legislates domestically for the usage of Welsh in the legal systems of Wales:

> In any legal proceedings in Wales the Welsh language may be spoken by any party, witness or other person who desires to use it, subject in the case of proceedings in a court other than a magistrates' court to such prior notice as may be required by rules of court; and any necessary provision for interpretation shall be made accordingly.[55]

However, just like the Finnish legislation, the Welsh Language Act 1993 predates the Charter. It may be said that the Charter adds an extra layer of protection for the usage of RMLs in that the domestic legislation has an international significance now, however these statues cannot be said to have been influenced greatly by the Charter.

Furthermore, in the United Kingdom, the troublesome nature of territorial scope of the Charter rears its head in relation to the judicial structure of the common law. Consider, for

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[50] ibid s 14.
[51] Language Act (n 49) s 15.
[52] Language Act 1922, s 3. Furthermore, although mentioned in the 2003 Act four times and mentioned in the 1922 Act only once, the protection for the use of Sámi in the Courts has not greatly changed in domestic legislation either.
[53] Council of Europe, 'Languages Covered by the European Charter for Regional or Minority Languages' <www.coe.int/t/dg4/education/minlang/AboutCharter/LanguagesCovered.pdf> accessed 18 July 2015. See Cornish, Irish, Scots, Scots Gaelic, Ulster Scots and Welsh.
[54] Article 9.1.a (ii), 9.1.a (iii), 9.1.b (ii), 9.1.c (ii), 9.1.c (iii), 9.1.d and 9.2 (b).
[55] Welsh Language Act 1993, s 22(1).

example, a criminal trial to be held in Wales where the defendant seeks to be tried in Welsh. This is a possibility given in the above legislation. However, what if the defendant is found guilty of his crime and seeks an appeal? Given the nature of the English and Welsh legal systems, an appeal will be heard in a higher court. Such courts are generally located in London and therefore are not subject to the jurisdiction of Welsh Language Act. Catrin Fflur Huws describes the situation:

> In the context of judicial functions for example [...] first instance or appeal court facilities may be situated outside the minority language speaking region. Accordingly, if the state's obligations do not extend beyond the minority language-speaking region, the speaker cannot access those services [in Welsh].[56]

Furthermore, in *Williams v. Cowell,*[57] the Welsh Courts essentially struck down the notion that the appeal of a Welsh language case to be held outside Wales might also be heard in Welsh.[58]

In addition, it has been found in many Contracting Parties that the use of a RML can result in a lengthy delay rendering their usage in court not only a difficulty, but a hindrance to the desire to use a RML in courts.[59]

Lengthy delays are not the only issue faced by individuals who select a RML in the national courts. The decision of a defendant to do so is often treated with hostility and RML speakers are seen as 'troublemakers' in the eyes of the court. This was highlighted by the Committee of Experts in relation to Swedish speakers in Finland.[60] Furthermore a 'similar observation is found in the 2001 report on Hungary'[61] where the costly interpretation service mixed with a mostly bilingual RML speaking community, accused persons 'are afraid to be perceived as trouble-makers if they use their right to speak in the minority language before the court'.[62]

This notion is unfortunate as it mirrors the judicial attitude felt by many for some time in Ireland, a non-Contracting Party to the Charter. Irish is statistically[63] a minority language in Ireland but holds the curious position of being the 'first official language 'of the State. [64]

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[56] Fflur Huws, 'Chartering new territories in Welsh language judicial proceedings' in *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities* (Strasbourg, Council of Europe Publishing 2008) 240.
[57] [2001] 1 WLR 187.
[58] ibid 192. See also discussion Language Act 2003 (n 57) 241. Note however that Huws suggests the Charter may be used as a counter-argument to the idea that Welsh cases are limited to Wales at 244.
[59] Cardi, 'Regional or Minority Language Use before Judicial Authorities: Provisions and Facts' (2007) 6 Journal of Ethnopolotics and Minority Issues in Europe 1 16. See also Swedish speakers hindered by their choice of native language in Finnish courts where Swedish language cases can take much longer than their Finnish counterparts.
[60] Committee of Experts' Evaluation Report, *Application of the Charter in Finland* ECRML (2004) 7 para 76.
[61] Woehrling (n 6) 327.
[62] Committee of Experts' Evaluation Report, *Application of the Charter in Hungary* ECRML (2001) 4 para 46.
[63] Central Statistics Office, 'Census 2006 Volume 9 Irish Language' <www.cso.ie/en/census/census2006reports/census2006-volume9-irishlanguage/> accessed 10 July 2015.
[64] Constitution of Ireland 1937, Article 8.

However, the attitudes to Irish since the foundation of the State have been somewhat cold from many judges[65] and renowned academics where it is widely seen as an 'irrational irritant' as well as a 'situation pregnant with annoyance and timewasting for the Courts'.[66]

In conclusion, it is fair to say that in the discussed scenarios, the Charter has had little or no impact on the protections available to RMLs in courts. The well-working and encompassing measures, seem to predate the Charter and thus the ratification of corresponding Charter paragraphs was easy given that the Contracting Parties did not need to bring in new legislation or change legislation or systems in a major way (see UK and Finland). Despite the reports and recommendations by the Committees of the Charter, the practical realisation of access to the court in a RML for contracting parties is only available in theory, even with the existing rights, as described above.

2 Legislation

In order for a RML speaker to stand before a court using his or her language in complete fairness, it is necessary that not only the court makes such a service available in some manner, but also that the laws of the State make sense in that language. Translation of domestic legislation is therefore vital in States who wish to provide for courts in RMLs. As already alluded to, the usage of RMLs in public administrative services such as the legislature helps to further the language and keeps the lesser used language current and up to date.[67] As such, translated legislation not only aids in the realization of a right to use a RML in courts, but it also helps to create and develop its body of terminology.

Article 9.3 of the Charter makes reference to the onus on Contracting Parties to 'make available in the regional or minority languages the most important national statutory texts and those relating particularly to the users of these languages, unless they are otherwise provided'. Unfortunately, this particular section is the weakest paragraph of Article 9 and neither calls for outright translation of all pieces of legislation, nor does it state whether those legislative texts that are translated will have legal force or not. Furthermore, the Explanatory Report offers limited guidance on the scope of Article 9.3.[68] The UK has ratified this paragraph of Article 9 in relation to Irish in Northern Ireland, the only mention of the language anywhere in that Article[69] and the Committee of Experts noted that this is the lowest level of protection in relation to the administration of justice ...'[70]

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[65] *Attorney General v Coyne and Wallace* (1967) 101 ILTR 17, para 7.
[66] JM Kelly, 'The Irish Text of the Constitution' (1966) ISLR 7, 10.
[67] Woehrling (n 4) 161.
[68] Explanatory Report (n 7) para 99.
[69] It is curious that Irish, a language steeped in controversy and debate given Northern Ireland's rocky history is protected only once under Article 9 when Welsh has the benefit of seven paragraphs under that same Article. This is all in spite of the fact that in 2006 the St Andrews Agreement promised the introduction of an Irish Language Act in Northern Ireland and yet today the issue is still a bone of contention for Northern politics and at the time of writing, no bill had yet been drafted, despite heated debates on the matter. See Janet Muller, 'The European Charter for Regional or Minority Languages and the current legislative and policy contexts in the north of Ireland' in Robert Dunbar and Gwynedd Parry (eds), *The European Charter for Regional or Minority Languages: legal challenges and opportunities* (Strasbourg, Council of Europe Publishing, 2008) 221. See also

In Finland, as both Finnish and Swedish have the constitutional position of official languages, all legislation must be available in both languages. On drafting, the Finnish and Swedish versions of the draft bill are submitted to the Unit of Legislative Inspection at the Ministry of Justice for checking where special attention is also paid to the linguistic accuracy, comprehensibility, preciseness and consistency of the proposal.[71] Sámi Language Act, 2003 also states:

> Acts of primary concern to the Sámi, as well as other such statutes, treaties and other instruments and notifications published in the Statute Book of Finland, shall on the decision of the Government or the pertinent Ministry be published also as a Sámi translation. The same provision applies to orders, guidelines, decisions and notifications published in the document series of a Ministry or another State authority.[72]

However, many Contracting Parties who have ratified Article 9.3 have continued to fail in their obligations. The Committee of Experts has notices that 'some RMLs lack appropriate legal terminology, which hinders the implementation of the undertakings in Article 9 of the Charter'.[73] In Armenia, it has been noted that 'lack of proper terminology [making] it difficult to translate legislation'[74] and a similar lack of legal terminology in the Sámi language was noticed in Norway.[75] It is also interesting to note that in respect of certain languages, Contracting Parties are inconsistent in their protections granted to different languages. Taking for example the situation previously highlighted in Wales, legislation already in existence in Wales allows a party to speak Welsh in Court. However, the only language protected by the UK under Article 9.3 is Irish. This is curious given that an Irish language speaker in Northern Ireland (or indeed in any part of the UK) has no right to speak the Irish language in court.[76]

The common trend in relation to Article 9.3 is that it is not only the weakest form of protection a Contracting Party may afford to a language, it is also one which increasingly falls short of its requirements for political[77] or financial[78] reasons. As previously alluded to,

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<www.belfasttelegraph.co.uk/news/politics/irish-language-act-stormont-business-would-be-translated-and-courts-heard-in-irish-30980190.html> accessed 19 July 2015.

[70] Janet Muller, 'The European Charter for Regional or Minority Languages and the current legislative and policy contexts in the north of Ireland' in Robert Dunbar and Gwynedd Parry (eds), *The European Charter for Regional or Minority Languages: legal challenges and opportunities* (Strasbourg, Council of Europe Publishing, 2008) 231.

[71] <http://lainvalmistelu.finlex.fi/en/4-jatkovalmistelu/#esittely> accessed 8 May 2015.

[72] Sámi Language Act 2003, s 9.

[73] Woehrling (n 4) 327.

[74] Committee of Experts' Evaluation Report, *Application of the Charter in Armenia* ECRML 2009 6, para 146.

[75] Committee of Experts' Evaluation Report, *Application of the Charter in Norway* ECRML 2007 3, para 139.

[76] If in the unlikely event that the person in question was a unilingual Irish speaker then the right would arise under the ECHR as previously discussed.

[77] See Northern Ireland and its attempts to legislate for an Irish Language Act.

[78] Committee of Experts' Evaluation Report (n 74).

the legislative situation in Ireland requires by constitutional law[79] that all laws must be translated into Irish and Irish courts have stated that this is to be done without extended delay.[80] Furthermore, where disparities in translations appear in both the text of the Constitution and the text of legislation, the Irish versions are those with legally binding force.[81] Although the translation of legislation in Ireland has in recent years been slow and ineffective there still exists a greater right, given that the obligation on the State is to translate all legislation, not just those pieces most important or relevant to Irish.[82]

The right to use one's RML in court can be only fully realised where there are laws under which to prosecute the accused RML speaker – when the laws used in court do not match the language of the court, that language is lessened to little more than a symbolic gesture by the State.

3 Education

Educational matters are covered not by Article 9 of the Charter, but rather by Article 8. The possible protections span from the making available of pre-school education in a RML in areas where that language is spoken,[83] to the provision of university level education in a RML.[84]

It is important to discuss education when discussing the courts. In order to have a realisable prospect of judicial services in RMLs, it is necessary that a certain number of legal professionals, judges, translators and interpreters are trained in the RML in question. Domestic courts and legislation have already been discussed. And so to get to the point at which a court case may be carried out in a RML, whereby the offended legislation is also available in that language, education is key.

Certain Contracting Parties such as Finland, have made provisions for this. There is 'a special quota of 25 Swedish-speaking students at the Faculty of Law at the University of Helsinki. This quota is considered essential in order to guarantee Swedish-speaking judges within the Finnish courts of justice in the future'.[85] However, this is unlikely to have been influenced greatly by the ratification of the Charter, particularly given that similar requirements for training in legal Irish exist in Ireland without any input from the Charter.[86] Not only is there a

[79] Art 25.4.4, 'Where the President signs the text of a Bill in one only of the official languages, an official translation shall be issued in the other official language.'
[80] See McGuinness J in *O'Beoláin v. Fahy* [2001] IESC 26.
[81] Committee of Experts Report (n 80), Article 25.4.6: 'In case of conflict between the texts of a law enrolled under this section in both the official languages, the text in the national language shall prevail'.
[82] Of the forty four pieces of legislation passed in English in 2004, only four of those Acts are also available in Irish. The lack of an External Monitoring Body, such as the Committee of Experts Reports and the Committee of Ministers recommendations, means that the Irish State is left with no international accountability mechanism and therefore has no body to which to answer.
[83] Article 8.1.a.
[84] Article 8.1.e.
[85] Kristian Myntti, 'National Minorities and Minority Legislation in Finland' Packer (n 3) at 90.
[86] Sean Ó Conaill, 'The Irish language and the Irish legal system: 1922- present' (PHD thesis, School of Welsh Cardiff University 2013) 235.

constitutional and legislative burden to be satisfied in Ireland for the provision of legal professionals, but this need is mirrored in new third level education options with aims of producing competent legal linguist professionals.[87] Furthermore, at Kings Inns, the traditional training facility for barristers in Ireland, programs exist seeking 'to train lawyer linguists and legal translators in order to provide for the existing demand'.[88]

Not all Contracting Parties, however, can be said to have such positive educational facilities: some States Parties have been admonished by the Committee of Ministers for their failure to educated legal professionals in RMLs in order to execute Article 9 provisions. The Committee of Ministers has expressed this need in two separate recommendations for Spain. It advised the introduction of 'necessary legal and practical measures to ensure that an adequate portion of the judicial staff posted in the [RML speaking] communities concerned by the application of Article 9 of the Charter have a working knowledge of the relevant languages'.[89]

In fact, the irony of the situation regarding education of legal and translation professionals in respect of the Charter obligations is that of the five States that have ratified the obligation to provide for criminal trials in RMLs[90] only one of those States has also chosen to provide for university or higher-level education.[91] Thus, although Norway, Spain, Slovakia and Switzerland appear ready to provide for courts in RMLs, in reality, they have not made any promises to educate any legal professional or translators in order to make such a provision a realizable right.

To conclude on this matter, it is fair to suggest that the education of legal professional and legal linguists, a necessary aspect of the right to use a RML in court is taken less seriously by Contracting Parties than most sections of the Charter. Though in theory States may provide for court cases to be carried out in a RML, once again we witness the complete failure of all but one such promising party[92] to actually go about making legally trained linguists, and subsequently, the right to use an RML in court, a reality.

F CONCLUSION

[87] ibid 237-241, 251-253.
[88] ibid 261.
[89] Recommendations of the Committee of Ministers, *Application of the Charter in Spain*, Rec Ch L (2008) 5, para 1.
[90] Article 9.1.a (i). Finland in respect of Swedish, Norway in respect of Sámi, Spain in respect of Basque, Catalan, Valencian and Galician, Slovakia in respect of Italian and Hungarian and Switzerland in respect of Italian.
[91] Article 8.1.e (i). Four states have ratified this section, one of which cross-over with the above states: Finland in respect of Swedish, Germany in respect of Romani, Romania in respect of German and Hungarian and Slovakia, this time in respect of Hungarian, rather than Italian as above.
[92] Finland, in respect to Swedish.

The matter of minority language protection continues to be an issue of contention for many States, with a basis in politics, history and fear of secession. In fact, it can rarely be said that any two languages within any (or indeed within the same) State are identical in circumstance.[93] There are countless factors which influence language protection, national and international attitudes.

It is clear from this analysis that the level of protection offered from an international and regional network for RMLs is small. The rights that are given are done so primarily under the Charter and are purely subject to the will and determination of the implementing state – often pre-dating the implementation of the Charter, meaning that not positive action since adoption has had to be taken. Although the Charter offers further support for the protection and status of a language, the fact that the Charter itself is unequivocally a non-rights bearing instrument is testament to the international disregard for RMLs. There is no rigid form of accountability and no method of enforcing the rights created by a state under Article 9, given that the only vaguely relevant judicial body has, time and again, reiterated that no such right to use one's RML exists in court for bilinguals.[94]

In theory, the method of examination of circumstances in states through Committee of Experts' Evaluation Reports may be effective, but it shows a common trend that although states provide on Statute Books for the provisions they have implemented, in practice, the effectiveness of realizing a right to use a RML in court is burdensome, costly and in many cases, frowned upon. The ECtHR would most likely consider this, were the right to use a RML in court under the ECHR, a violation of such a right and find a State accountable to the offended individual, or group thereof. However, through the current methods of evaluation of the Charter, individuals have no place or opportunity to have their claims heard, only in domestic courts. This is certainly ironic, particularly if a person is complaining of a failure to implement a right, as created by legislating for Article 9, to use an RML in court. There is then no further avenue of pursuit, given the aforementioned denial of such a right in the ECtHR.

Certainly, the issue may be addressed in a state-report from the Committees of Experts and Ministers during state evaluation under the Charter, which the state may then rectify, but as we have seen, this is not always the case, and often states are repeatedly admonished for the same failures by both committees.

In conclusion, although a right may be established to use one's RML in domestic courts, the scope of that right, its implementation and its actual realization is purely down to the will of the state, without any room from individuals' concerns.

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[93] Woehrling (n 4).
[94] *K v France* (n 17).