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# Language Rights in Criminal Proceedings and BREXIT: What have we got to lose?

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*In the wake of the result of the UK's referendum to leave the European Union, the All Party Parliamentary Group on Modern Languages has called for domestic legislation to replicate the provisions of the European Directive on the Right to Interpretation and Translation in Criminal Proceedings, which promotes compliance with Arts. 5 and 6 ECHR. This article examines the Directive's provisions and asks, does the Directive make a difference, and what would be lost if it ceased to have effect in the UK? It argues that although the Directive is unlikely to achieve procedural harmonisation, in part due to drafting flaws, it has value in that it encourages language rights in criminal proceedings, in the cause of trial fairness, to be taken seriously.*

## Introduction

Among the flurry of responses by the political community to the outcome of the referendum of 23<sup>rd</sup> June 2016 on Britain's membership of the European Union, one might have easily escaped the notice of most interested observers. The report of the All Party Parliamentary Group on Modern Languages on "Brexit and Languages", published on 17 October 2016, is a plea to the government to protect language skills in the UK, and lists specific objectives that should be safeguarded during the Brexit negotiations.<sup>1</sup> The report's conclusion is that there should be measures in place, in the field of education in particular, to ensure that the UK has sufficient linguists at its service that it can participate effectively in world trade and international relations. Also in the wish list is a call for the government, "to legislate to replicate the rights enshrined in the 2010 European Directive on the Right to Interpretation and Translation in Criminal Proceedings".

What is so special about this EU directive and what exactly are these rights that require replicating in domestic law? The European Union's (EU) *Directive on the Right to Interpretation and Translation in Criminal Proceedings* (henceforth referred to as the Directive) has sought to establish common standards in legal interpreting and translation in

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\* I am grateful to the Editor and the anonymous referee for their comments. Remaining errors are my own.

<sup>1</sup> All-Party Parliamentary Group on Modern Languages, *Brexit and Languages: A Checklist for Government Negotiators and Officials*, 17 October 2016. See: [https://www.britishcouncil.org/education/schools/support-for-languages/thought-leadership/appg/news/brexit-languages; appgmfl-mflbrexit\\_oct16](https://www.britishcouncil.org/education/schools/support-for-languages/thought-leadership/appg/news/brexit-languages; appgmfl-mflbrexit_oct16) [Accessed 21 January 2017].

criminal proceedings within the EU that will ensure consistent observation of the fair trial rights contained in Arts. 5 and 6 ECHR.<sup>2</sup> The Directive was adopted on 20 October 2010, and entered into force on 27 October 2013.<sup>3</sup> This article sets out the principal elements of the Directive and examines its significance in the broader context of international and European language rights jurisprudence. It also considers the recent judgements of the Court of Justice of the European Union (CJEU) in interpreting its provisions, judgements which underline the potential difficulties in achieving common standards of interpretation and translation in criminal proceedings throughout the EU. It asks, what would be lost if, as a result of Brexit, the Directive would cease to have effect in the UK?

## The Directive's Objectives

The Directive has two primary objectives. First of all, it is a contributor to the EU's agenda to promote mutual recognition and common standards in criminal proceedings.<sup>4</sup> Trans-jurisdictional cooperation in criminal proceedings within the EU is a key policy objective,<sup>5</sup> and a means of "strengthening mutual trust" between member states.<sup>6</sup> Without doubt, achieving procedural harmonisation and common safeguards in criminal proceedings within the entire EU zone is an ambitious goal.<sup>7</sup> The Directive's second objective is to implement the EU Council's roadmap<sup>8</sup> that aims to strengthen the procedural rights of suspected or accused persons in criminal proceedings in the interests of trial fairness.<sup>9</sup> The Directive addresses the objectives of measure A of the EU Council's roadmap.<sup>10</sup>

The Directive's provisions replicate the language rights protected by Arts. 5 and 6 ECHR, which provide the conceptual basis for the Directive's provisions.<sup>11</sup> Art. 5 ECHR guarantees the right of arrested persons to understand the reasons for arrest and any charge laid against them.<sup>12</sup> Art. 6 ensures that, where the suspect or accused does not speak the language of the proceedings, there will be an interpreter provided. Art. 6 guarantees the right

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<sup>2</sup> Directive 2010/64/EU, adopted on 20 October 2010 in accordance with Article 288 of the Treaty on the Functioning of the European Union.

<sup>3</sup> Although the Directive applies to interpreters for blind or deaf persons, the focus here will be on its linguistic aspects, as it was those which concerned the parliamentary group in its report. For general observations on the role and influence of court interpreters on the course of a criminal trial, see Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters and the Judicial Process* (University of Chicago Press, Chicago, 1990).

<sup>4</sup> Directive 2010/64/EU, preamble, para. 2.

<sup>5</sup> See *European Council, Presidency Conclusions*, Tampere, 15-16 October 1999.

<sup>6</sup> Directive 2010/64/EU, preamble, para 7.

<sup>7</sup> For commentary, see Jacqueline S. Hodgson, "Safeguarding Suspects' Rights in Europe: A Comparative Perspective" (2011) 14 (4) *New Criminal Law Review*, pp. 611-665.

<sup>8</sup> *Resolution of the EU Council on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings*, 30 November 2009 (2009/C 295/01). The procedural rights roadmap called for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communication with relatives, employers and consular authorities (measure D), and special safeguards for suspected or accused persons who are vulnerable (measure E).

<sup>9</sup> Directive 2010/64/EU, preamble, para 10.

<sup>10</sup> For commentary on the procedural safeguards in general, see Laurens Van Puyenbroeck and Gert Vermeulen "Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU" (2011) 60 (4) *I.C.L.Q.*, pp. 1017-1038.

<sup>11</sup> All EU member states are, of course, signatories to the ECHR, a requirement for any state who applies to join the EU. Conversely, membership of the EU is not a pre-requisite for being a signatory of the ECHR and a member of the Council of Europe. For example, Norway, Iceland and Switzerland are members of the Council of Europe, and have ratified the ECHR, yet are not members of the EU.

<sup>12</sup> ECHR, Art. 5(2).

of the individual charged with a criminal offence to be informed of the accusation in “a language which he understands”<sup>13</sup> and the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.<sup>14</sup> The European Court of Human Rights has emphasized the right to free assistance and that the suspect should not bear the cost of the interpreter’s services.<sup>15</sup>

The phrase “everyone charged with a criminal offence” in Art. 6 does not mean that the provisions of the article apply only after a charge has been laid. The article applies to the entire proceedings, including the early investigative stages, when the suspect has been arrested and questioned but not yet charged, and should be read conjunctively with Art. 5.<sup>16</sup> The European Court of Human Rights made some important findings with regard to the proper interpretation and application of Art. 6 in *Kamasinski v. Austria*.<sup>17</sup> In this case, it held that the courts have a responsibility to secure the attendance of the interpreter, and a duty to oversee the adequacy of the interpretation, so that the right guaranteed by Art. 6(3) (e) can be effective.<sup>18</sup> The Court also held that the right to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings.<sup>19</sup> Of particular relevance to this analysis is that a suspect has the right to:

“the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court’s language in order to have the benefit of a fair trial.”<sup>20</sup>

The court elaborated by stating that although this does not mean a written translation of all documents, it should be sufficient, “to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.”<sup>21</sup> The significance of this interpretation of Art. 6(3)(e) by the European Court of Human Rights in view of the recent judgements of the CJEU in connection with the Directive will become clearer later in this article.

### *The Directive and the Right to Interpretation*

Art. 2 of the Directive deals with a suspect or defendant’s right to interpretation.<sup>22</sup> It requires that when the suspected or accused person does not speak or understand the language of the proceedings, interpretation should be provided throughout the entire process.<sup>23</sup> This includes during police questioning, interim hearings and at trial.<sup>24</sup> Interpretation should also be

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<sup>13</sup> ECHR Art. 6 (3) (a).

<sup>14</sup> ECHR Art. 6 (3) (e).

<sup>15</sup> See, for example, *Luedicke, Belkacem and Koc v. Germany*, (1980) 2 E.H.R.R. 149.

<sup>16</sup> See *Engel and others v. Netherlands*, (1979-80) 1 E.H.R.R. 647.

<sup>17</sup> *Kamasinski v. Austria* [1989] ECHR 24, 9783/82; (1991) 13 E.H.R.R. 36

<sup>18</sup> *Kamasinski v. Austria*, para 79.

<sup>19</sup> *Kamasinski v. Austria*, para 74.

<sup>20</sup> *Kamasinski v. Austria*, para 74.

<sup>21</sup> *Kamasinski v. Austria*, para 74.

<sup>22</sup> Art. 2.7 states that, in connection with the execution of a European arrest warrant, arrested persons should be provided with interpretation.

<sup>23</sup> See, also, Directive 2010/64/EU, Art. 2.1.

<sup>24</sup> Directive 2010/64/EU, Art. 2.1.

available for lawyer-client meetings.<sup>25</sup> The right to interpretation thus encompasses the defendant's capability properly to mount his defence, and it includes information which the defendant wishes to impart to the relevant prosecuting authority.

In practice, the police and/or court service will bear responsibility for compliance with Art. 2.2.<sup>26</sup> Art. 2.4 requires mechanisms to establish the accused or suspect's linguistic proficiency and determine if an interpreter is required.<sup>27</sup> The Directive provides no guidance on the detail of such mechanisms, although establishing fluency in a language is not a simple matter. A suspect's grasp of what may be a second or third language will vary, and factors that can affect fluency include intelligence, aptitude, the stage in life when a language is learnt (with children having a greater propensity to master other languages)<sup>28</sup> and a host of socio-economic and cultural factors.<sup>29</sup> Even proficiency in a first language can be problematic for members of certain social groups, especially those from groups which are socially or economically disadvantaged.<sup>30</sup> Language difficulties for certain vulnerable individuals can be at their most acute in an intimidating or hostile environment, such as a police station or courtroom.<sup>31</sup> Assumptions that a person may be 'educated' or 'intelligent', and thus does not require any assistance from an interpreter or translator should be appropriately tested and measured.<sup>32</sup> As a further safeguard, Art. 2.5 requires that procedures must be in place whereby the suspect or accused can challenge any refusal to grant the assistance of an interpreter, or challenge the quality of the interpretation provided.<sup>33</sup> Yet, these difficult judgements, especially when made by an investigating police officer at the police station with little linguistic expertise, should not be underestimated or thought of as routine matters.

Of particular significance is Art. 5.3, which states that "Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive". The interpreter summoned by the police in order to facilitate effective questioning and evidence gathering, and the interpreter required by the suspect to communicate effectively with their legal advisor, play different roles within the criminal process. Whereas the former role is obviously one which calls for competence

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<sup>25</sup> Directive 2010/64/EU, Art. 2.2. "Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications".

<sup>26</sup> Directive 2010/64/EU, Art. 2.3 adds this: "The right to interpretation ...includes appropriate assistance for persons with hearing or speech impediments".

<sup>27</sup> Directive 2010/64/EU, Art. 2.4: "Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter".

<sup>28</sup> Even then, children can vary in their talent for language acquisition: "even when the social environment is the same, two children can differ in their acquisition of bilingual proficiency because of native ability"; see Barry McLaughlin, "The relationship between first and second languages: language proficiency and language aptitude", in Birgit Harley, Patrick Allen, Jim Cummins, Merrill Swain, Michael H. Long, Jack C. Richards, (eds.), *The Development of Second Language Proficiency* (Cambridge University Press, 1990), pp. 158-174, at p. 172.

<sup>29</sup> See, for example, John Archibald, "Second Language Acquisition" in W. O'Grady (ed.) *Contemporary Linguistics* (Longman, London, 1997), at pp. 503-539.

<sup>30</sup> See John Edwards, *Language and Disadvantage* (Arnold Publishers, London, 1989), at p. 126.

<sup>31</sup> See Ikuko Nakane "Problems in Communicating the Suspect's Rights in Interpreted Police Interviews" (2007) 28 (1) *Applied Linguistics*, pp. 87-112.

<sup>32</sup> *R. v. Merthyr Tydfil Justices, ex parte Jenkins* [1967] 1 All E.R. 636.

<sup>33</sup> Directive 2010/64/EU, Art. 2.5: Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

and independence, the latter also creates specific duties towards the suspect, not least of which is that of confidentiality. The duty of confidentiality, for it to have meaning and purpose, must be reinforced by the protection of legal professional privilege. This is not explicitly stated in Art. 5, which is a significant omission. However, this should not cause difficulties for the law of England and Wales. In *R. (on the application of Bozkurt) v Thames Magistrates Court*, it was held that an interpreter present at an interview between a client and his solicitor could rely on legal professional privilege to preserve the confidentiality of the discussions.<sup>34</sup> It is not clear whether or not this principle finds manifestation in the domestic laws of other member states. Clearly, the directive's failure to underline its importance may give rise to future challenges and may lay the ground for inconsistent practices.

Other, more practical provisions include Art. 2.6, which permits communication via video conferencing, telephone or the internet unless the physical presence of the interpreter is required in order to safeguard fairness. Although the use of technology to facilitate communication may at first glance appear uncontroversial, research on the use of video conferencing in legal contexts (compared with traditional interpreting where the interpreter is physically present) highlight a number of interpreting problems which could threaten the fairness of the proceedings.<sup>35</sup> These include "turn-taking problems (overlapping speech)"<sup>36</sup> and omissions (loss of information), especially when an interpreter relies on video conferencing to interpret material. Interpreters have been found not to be fully aware of the loss of information caused by overlapping speech (as when people talk at the same time due to technical lag). Interpreters seem to be aware that speech coordination is often an issue and realise the disruption which results from speech overlaps. Those with experience of the use of video conferencing as a means of holding meetings, especially when there are several participants at a number of different locations, will have some appreciation of the communication problems that can arise, and of the limits of current technology.

### *The Directive and the Right to Translation*

The criminal process is, of course, document based to a large extent, and Article 3 creates obligations with regard to the provision of written translation of documents used in connection with the proceedings. Although Art. 6 ECHR does not explicitly mention documents or translations thereof, European Court of Human Rights jurisprudence has upheld that the right of suspects and accused persons to an interpreter under Art. 6(3)(e) relates to both oral statements and to documents, especially in order to give effect to the rights contained in Art. 6.<sup>37</sup>

Art. 3 of the Directive states that suspects and accused persons, within a reasonable period of time, should be provided with translations of "all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings".<sup>38</sup> It also provides that, "there shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them."<sup>39</sup> Article 3.7 qualifies this by allowing

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<sup>34</sup> *R. (on the application of Bozkurt) v Thames Magistrates Court* [2001] EWHC Admin. 400; [2002] R.T.R. 15

<sup>35</sup> Sabine Braun, "Keep your Distance? Remote Interpreting in Legal Proceedings: A Critical Assessment of a Growing Practice" (2013) 15 (2) *Interpreting*, pp. 200-228.

<sup>36</sup> Braun, pp. 224-226.

<sup>37</sup> See *Kamasinski v. Austria* (1991) 13 E.H.R.R. 36; the right to written translations are implicit to give effect to the rights protected by Art. 6. (3) (a), (b), (d) and (e).

<sup>38</sup> Directive 2010/64/EU, Art. 3.1.

<sup>39</sup> Directive 2010/64/EU, Art. 3.4.

an oral translation or oral summary of essential documents, provided that this does not prejudice the fairness of the proceedings.<sup>40</sup>

This is potentially problematic, especially in the context of police disclosure of documents and in the assessment of what is “essential” and “relevant” for the individual to know the case against them. Experience of the domestic law of England and Wales with regard to disclosure rules in the Criminal Procedure and Investigations Act 1996 should serve as a warning of some of the difficulties can arise when tests of relevance are applied in practice in determining prosecution disclosure, even where there are no language difficulties.<sup>41</sup>

To add some further ambiguity to these provisions, Art. 3.2 states that, “essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment”.<sup>42</sup> There can be no doubt that these documents will be relevant for a suspect or defendant wishing to know the case against him, and will assist in his preparation of his defence (a judgment will be helpful for a convicted defendant wishing to prepare an appeal). But this is not an exhaustive list by any measure, and no mention is made of witness depositions or other evidence which may be essential for a defendant exercising his right of defence.

No doubt, the authors expect member-states to have means of determining what is “essential” and “relevant” for a defendant exercising his right of defence, and Art. 3.3 states that, “the competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.” Yet if promoting consistency of approach across the EU is the principle goal of the Directive, to leave matters in such an open-ended state can hardly be said to advance that objective. Would an appendix setting out a list of potentially “essential” documents have been too much to ask?

The tests of essential and relevancy in Art. 3 are potentially problematic, although the position appears to be partly mitigated by the requirements in Art. 3.5, which requires that suspects should have,

“...the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings”.<sup>43</sup>

In principle, this is plausible. In practice, a defendant would have to challenge the decision whilst not being able to access the document and its contents in the first place. We are left with a rather circuitous proposition to the effect that a suspect needs a translation before knowing whether or not a translation of the document is necessary. In truth, the safeguards can only be practical where the suspect has a legal advisor who can appreciate the document’s potential significance in the process and present the argument on his behalf. Furthermore, identifying or recognising poor quality translation and complaining about it may not be straightforward in the context of the police station. Accordingly, in practice, qualitative defects with interpreting and translation in the police station may only emerge much later in the process, if at all.

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<sup>40</sup> Directive 2010/64/EU, Art. 3.7.

<sup>41</sup> See J. Richardson (ed.), *Archbold Criminal Pleading, Evidence and Practice* (London: Sweet & Maxwell, 2017), paras. 12-45 to 12-122.

<sup>42</sup> Directive 2010/64/EU, Art. 3.2.

<sup>43</sup> Directive 2010/64/EU, Art. 3.5.

Art. 3.8 deals with the scenario where the suspect, on his own accord, waives the right to have a translation of an essential document. Again, the application of this provision requires care and caution, especially in the context of vulnerable suspects. Some protection is offered in that any waiver of the right to translation is subject to the requirement that legal advice has been received, “or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily”.<sup>44</sup> Art. 4 implements Art. 6(3)(e) ECHR in that “member states shall meet the costs of interpretation and translation resulting from the application of Art. 2 and Art. 3, irrespective of the outcome of the proceedings”.

The Directive also contains a number of obligations intended to provide quality-control mechanisms. Art. 5 maintains that the interpretation and translation must be of quality sufficient to safeguard the fairness of the proceedings and ensure that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.<sup>45</sup> As the Directive acknowledges, poor quality interpretation undermines the fairness of the proceedings and interferes with the individual’s understanding of the case against them and their capacity to mount their defence.<sup>46</sup> As a measure to ensure quality and professionalism, member-states are expected to draw up a register of qualified and independent legal interpreters and translators that is available to lawyers and relevant authorities.<sup>47</sup>

Art. 6 requires that in order to ensure efficient and effective implementation, the training of judges, prosecutors and judicial staff on the meaning and of the provisions of the Directive must be provided, with “special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication”.<sup>48</sup> This is to be welcomed, in principle, as past experience has shown that judges and prosecutors have failed to recognise defects in the interpreting process in criminal trials, defects which have led to unsafe convictions.<sup>49</sup>

## The Directive in Practice

The Court of Justice of the European Union (CJEU) was invited to rule on the provisions of the Directive for the first time in October 2015 in the case of *Covaci*.<sup>50</sup> The preliminary hearing arose in consequence of the experiences of a Romanian national who had been charged in Germany with driving without a valid motor insurance and having forged insurance documents. The matter was dealt with as a minor offence, and a penalty order was issued which gave the recipient two weeks within which to either accept the penalty or notify, in writing or orally, that he had an objection to it and thus require a trial.

During the process it became clear that German domestic law does not offer the service of a free translation of a written appeal against a penalty order when it is submitted in a language other than the official language of the court, even if the suspect does not speak the

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<sup>44</sup> Directive 2010/64/EU, Art. 3.8.

<sup>45</sup> Directive 2010/64/EU, Art. 5.1: “Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9)”.

<sup>46</sup> Directive 2010/64/EU, Art. 2.8.

<sup>47</sup> Directive 2010/64/EU, Art. 5.2.

<sup>48</sup> Directive 2010/64/EU, Art. 6.

<sup>49</sup> See *Cuscani v United Kingdom* (2003) 36 E.H.R.R., 2.

<sup>50</sup> Request for a preliminary ruling from the Amtsgericht Laufen (Germany) lodged on 30 April 2014 — Criminal proceedings against Gavril Covaci (Case C-216/14) 2014/C 253/22: see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CN0216> [Accessed 21 January 2017].



official language. The question for the CJEU therefore was, was this practice in conflict with the provisions of Directive 2010/64?<sup>51</sup>

The CJEU concluded that the fact that domestic law in this case required the appeal to be drafted in German, the official language of the court, and that no translation of appeals submitted in foreign languages was undertaken, did not fall foul of the provisions of the EU Directive.<sup>52</sup> It held that whereas Art. 3 of the Directive requires essential documents produced by the state to be translated into the suspect's language, there is no requirement that documents submitted by the suspect in his language should be translated by the court into the official language, unless they are regarded by the court, exercising its discretion, as essential documents.<sup>53</sup> According to the CJEU, Art. 3(2), which lists essential documents, is only concerned with documents produced by competent authorities, that is, the state prosecutors or the courts, and in Art. 3(4) the emphasis is on the accused having knowledge of the case against him.

This is in contrast with the provisions of Art. 2, which deal with the interpretation of oral statements, and require words to be interpreted in both directions, including the suspect's words into the language of the court.<sup>54</sup> The Advocate General's opinion pointed out this contradiction in the Directive, in that the suspect's appeal would have been interpreted, in accordance with Art. 2, had he submitted it orally.<sup>55</sup> As the Advocate General stated, Art. 2, "is applicable both in respect of statements or documents intended for the defence and in respect of statements or documents produced by the defence addressed to the competent judicial authorities".<sup>56</sup>

This undoubtedly highlights an inconsistency in the Directive, which on this interpretation makes an unprincipled and arbitrary distinction between oral and written submissions. To grant the assistance of an interpreter where the objection is oral but to refuse it when it is written is irrational. It also highlights a disparity between the jurisprudence of the European Court of Human Rights on the purpose and scope of Art. 6 ECHR, and that of the CJEU on Art. 3 of the Directive. Strasbourg jurisprudence supports the view that a fair trial requires the translation not only of essential prosecution documents but also the defence.<sup>57</sup> The right to the free assistance of an interpreter applies to both oral statements and documentary material, including the defence case and supporting evidence.<sup>58</sup> This is a disparity between the Directive and the ECHR which surely defeats the Directive's very purpose.

The CJEU attempted to offer some consolation by emphasizing that the Directive lays down minimum rules which member states can supplement with further safeguards by adding other documents to the list of essential documents not in the indicative list in Art 3(2).<sup>59</sup> Of course, Art. 3.3 allows accused persons or their legal counsel to submit a reasoned request for

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<sup>51</sup> The CJEU was also asked for guidance on the interpretation of Directive 2012/13/EU on the right to information in criminal proceedings. This paper is not concerned with that specific Directive and the issues that arose.

<sup>52</sup> See Judgment of the Court (First Chamber) of 15 October 2015 (request for a preliminary ruling from the Amtsgericht Laufen — Germany) Criminal proceedings against Gavril Covaci (Case C-216/14) (2015/C 406/06): see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CA0216> [Accessed 21 January 2017].

<sup>53</sup> Covaci (Case C-216/14), paras. 38 and 47.

<sup>54</sup> Covaci (Case C-216/14), paras. 30, 40 and 42.

<sup>55</sup> Opinion of Advocate General Bot, delivered on 7 May 2015: Case C-216/14 Criminal proceedings against Gavril Covaci: <http://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:62014CC0216&from=EN> [Accessed 21 January 2017].

<sup>56</sup> Opinion of Advocate General Bot, 07/05/15, para 62.

<sup>57</sup> *Kamasinski v. Austria* [1989] ECHR 24, 9783/82; (1991) 13 E.H.R.R. 36

<sup>58</sup> *Kamasinski v. Austria*, para 74.

<sup>59</sup> Covaci (Case C-216/14), paras. 48-50.

a document to be translated as an essential document. But, as has been already stated, such a “reasoned request” is in practice likely to be difficult to construct, and may not be practicable in circumstances where there is a short deadline in which to reply, and where legal assistance is neither provided nor sought.

Advocate General Bot proposed that the right to translation should also encompass documents produced by the defendant in his language as part of his defence.<sup>60</sup>

“In my view, there is no doubt that in so far as the assistance of an interpreter is guaranteed in an appeal brought orally at the registry of the competent court, such assistance must equally be guaranteed where the appeal is lodged in writing.”<sup>61</sup>

The Advocate General also criticised the minimalistic approach often taken by states in interpreting rights directives of this kind, which, after all, “ensure the application of and respect for fundamental rights which are the underlying shared values that make the European Union a system founded on the rule of law.”<sup>62</sup> Be that as it may. In these specific circumstances, only the elimination of any distinction between oral and written representations can satisfy the overriding objective of Article 3, which is to enable suspects to “exercise their right of defence and to safeguard the fairness of the proceedings”.<sup>63</sup>

The provisions of the Directive will, no doubt, be the subject of further referrals and appeals in the coming years. In the more recent case of *Balogh*, the Regional Court of Budapest (*Budapest Környéki Törvényszék*), made a reference to the CJEU for a preliminary ruling on the interpretation of Article 1(1) of the Directive.<sup>64</sup> The issue arose in consequence of Hungarian procedure for the recognition of a criminal judgment made by an Austrian court which had sentenced Balogh, a Hungarian national, to a prison sentence for burglary. The Hungarian Ministry of Justice required the Austrian judgment to be translated into Hungarian in order for it to be recognized as a foreign judgment. The question then arose, who should bear the cost of that translation?

Hungarian law indicated that the convicted person would have to bear the cost if he had been responsible for the cost of the main proceedings that led to his conviction. But would such a requirement be in breach of Directive 2010/64? Does the Directive, which states that the accused is not to bear the cost of interpreting or translating, apply to the procedures governing the recognition of foreign judgments?

The answer to the specific question regarding the scope and applicability of the Directive was that the right to interpretation and translation in criminal proceedings applies from the time the suspect is made aware that he is suspected or accused of having committed a criminal offence until the conclusion of the proceedings, meaning the final determination of guilt, including sentencing and appeal stages of the process.<sup>65</sup> The special procedure for the recognition of a judgement made in the court of another member state is after the final determination of those proceedings, and thus fall outside the provisions of the Directive.<sup>66</sup>

However, the CJEU took on board the opinion of Advocate General Bot,<sup>67</sup> who questioned the legality of the special process initiated by the Hungarian authorities on the

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<sup>60</sup> Opinion of Advocate General Bot, 07/05/15, paras. 81 and 119.

<sup>61</sup> Opinion of Advocate General Bot, 07/05/15, para 80.

<sup>62</sup> Opinion of Advocate General Bot, 07/05/15, para 32.

<sup>63</sup> Directive 2010/64/EU, Art. 3.1.

<sup>64</sup> C-25/15 – Balogh: Judgment of the Court (Fifth Chamber) of 9 June 2016: ECLI:EU:C:2016:423 <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-25/15> [Accessed 21 January 2017].

<sup>65</sup> C-25/15 – Balogh, para. 36.

<sup>66</sup> C-25/15 – Balogh, para 37.

<sup>67</sup> Opinion of Advocate General Bot, delivered on 20 January 2016, Case C-25/15: Criminal proceedings against István Balogh.

grounds that it was contrary to Council Framework Decision 2009/315 on the smooth and expeditious exchange of information on criminal records between Member States, and Council Decision 2009/316 on the establishment of the European Criminal Records Information System (ECRIS). In other words, the need for recourse to the recognition of foreign judgements special procedure was indicative of a failure by Hungary to implement properly the European Criminal Records Information System (ECRIS), and was contrary to other provisions governing the principle of mutual recognition.<sup>68</sup> Had the ECRIS mechanism been in place, an automatic translation would have provided sufficient detail for entering the conviction in the record of the convicted person's member state.<sup>69</sup>

There are aspects of the ruling in Balogh which are therefore *sui generis* and do not affect the application of Directive 2010/64 as such. That said, the ruling highlights the potential for certain elements of the criminal process to fall outside the ambit of the Directive. Would the Directive apply in proceedings reviewing the early release of prisoners, or reviewing minimum tariffs for prisoners serving custodial sentences, for example? Would it apply to post-sentencing proceedings dealing with seizure or forfeiture of assets or the proceedings of crime? Would proceedings that review miscarriages of justice which are held many years after the initial trial proceedings had concluded, fall within the ambit of the Directive? It may require a further referral to the CJEU for the answers to some of these questions to be made clear.

Although there have not been any referrals to the CJEU on the implementation of the Directive in the UK, its provisions are posing considerable challenges for effective implementation. The law of England and Wales recognised the right to translation and interpretation in a criminal trial in circumstances where a defendant does not speak English long before the advent of the Human Rights Act 1998.<sup>70</sup> But the practical and proper implementation of that right has proved to be more challenging, such as in *Cuscani v United Kingdom*,<sup>71</sup> where the European Court of Human Rights held that there had been a breach of Arts. 6(1) and 6(3) (e) when there had been a failure properly to assess the need for a competent interpreter by relying on the untested linguistic skills of the defendant's brother.<sup>72</sup> In *R. (on the application of Gashi) v Chief Adjudicator (Need for Competent Interpreter)*,<sup>73</sup> it was held that there is a duty on the judge to ensure both the competence of the interpreter and the quality of interpretation. But in *R v. Mihaly Ungvari*,<sup>74</sup> however, it was held that the interpreter need not be registered with the National Register of Public Service Interpreters provided that he was sufficiently competent.

These cases pre-date the Directive. When the Directive came into force, the PACE 1984 Codes of Practice, Code C specifically, were amended so that domestic law and practice could be compatible with it.<sup>75</sup> The required amendments, in principle, seemed to cause little or no consternation when they were introduced. Among them were provisions stating that chief police officers are responsible for ensuring that qualified and independent interpreters

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<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d53961fa4e3d404b3aae0792bff8f98833.e34KaxiLc3eQc40LaxqMbN4Pah0Re0?text=&docid=173624&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=101019> [Accessed 21 January 2017].

<sup>68</sup> C-25/15 – Balogh, paras 52 and 57.

<sup>69</sup> Opinion of Advocate General Bot, 20/01/16, paras. 62-3.

<sup>70</sup> See *R. v. Lee Kun* [1916] 1 K.B. 337; also *R. v. Iqbal Begum* (1989) 93 Cr. App. R. 96.

<sup>71</sup> (2003) 36 E.H.R.R., 2.

<sup>72</sup> See further commentary in [2003] Crim. L. R., 50.

<sup>73</sup> *R. (on the application of Gashi) v Chief Adjudicator (Need for Competent Interpreter)* [2001] EWCH Admin 916; *The Times* 12 November 2001

<sup>74</sup> *R v. Mihaly Ungvari* [2003] EWCA Crim 2346.

<sup>75</sup> See *Explanatory Memorandum to the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Codes A, B, C, E, F and H) Order 2013*: 2013 No. 2685, para 4.7.

are available for suspects or detained persons, and for providing translations of essential documents.<sup>76</sup> Other amendments ensured that there must be procedures in place to determine if the assistance of an interpreter is needed,<sup>77</sup> and to take appropriate action where the detained person complains about the quality of the interpretation or translation.<sup>78</sup>

Therefore, on the face of things, the Directive's provisions have already been embedded in the law of England and Wales. This makes the call in the report of the All Party Parliamentary Group on Modern Languages for legislation to replicate the Directive appear otiose, at least at first glance. However, shortly before and since the Directive came into force, there have been concerns with its effective implementation.<sup>79</sup> In particular, concerns with the quality of court interpretation and translation have been the subject of both public and professional disquiet, and even parliamentary scrutiny.<sup>80</sup> For example, the Ministry of Justice's outsourcing of interpreting and translation services to *Capita Translation and Interpreting Ltd* has been a source of political anxiety.<sup>81</sup> Even the attention of the higher courts has been engaged. Although in *R. v Applied Language Solutions Ltd (now Capita Translation and Interpreting Ltd)*,<sup>82</sup> the Court of Appeal held that Capita was not guilty of serious misconduct when it failed to provide an interpreter for a particular crown court sentencing hearing, it also emphasised that the provision of a competent interpreter where a witness or a defendant did not speak English was essential for a fair trial.

In July 2012 the House of Commons Justice Committee began an inquiry on the provision of interpreting and translation services in the courts.<sup>83</sup> It concluded in its published report that the Ministry of Justice had failed to procure an appropriate model for the delivery of the interpreting services required by the courts, and that the arrangements then in place were not fit for purpose.<sup>84</sup> There was an insufficient number of appropriately qualified interpreters to meet the demand. Court adjournments due to problems with court interpreting were commonplace.<sup>85</sup> This highlighted what was in the context of language rights in the criminal courts a schism between language rights in principle and their practical implementation, a schism between policy and delivery. Yet one should not underestimate the scale of the task. In the context of the same debate it was recognised that, "we are talking about a system with some 800 requests a day for such interpretation. In the first quarter of its operation there were 26,000 requests in 142 languages".<sup>86</sup>

The Justice Committee concluded its review with a recommendation that there should be an independent regulation of law interpreters in order to develop capacity, raise standards and ensure appropriate training and remuneration, also recommending "there should be a regulation system that is independently organised to select and classify interpreters for the

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<sup>76</sup> PACE 1984, Code C 13.1.

<sup>77</sup> PACE 1984, Code C, Note for Guidance 13B.

<sup>78</sup> PACE 1984, Code C 13.10A and 13.10C.

<sup>79</sup> See *The Guardian*, 4 May 2016.

<sup>80</sup> For comment, see R. Gwynedd Parry, "The Curse of Babel and the Criminal Process" [2014] *Crim. L. R.* 802.

<sup>81</sup> *Parliamentary Debates - House of Lords' Official Report of Proceedings* (Hansard), 9 July 2012, col. 908: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120709-0001.htm> [Accessed 21 January 2017].

<sup>82</sup> *R. v Applied Language Solutions Ltd (now Capita Translation and Interpreting Ltd)* [2013] EWCA Crim 326.

<sup>83</sup> House of Commons Justice Committee, *Interpreting and translation services and the Applied Language Solutions Contract*, HC 645, 6 February 2013 (T.S.O., London, 2013).

<sup>84</sup> House of Commons Justice Committee, *Interpreting and translation services and the Applied Language Solutions Contract*, p.79.

<sup>85</sup> See also a report in *The Guardian*, 4 May 2016.

<sup>86</sup> *Parliamentary Debates - House of Lords' Official Report of Proceedings* (Hansard), 9 July 2012, col. 908: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120709-0001.htm> [Accessed 21 January 2017].

appropriate level of court and tribunal work”.<sup>87</sup> This is a recommendation that has hitherto not been adopted, and the Ministry of Justice recently awarded the contract to an alternative service provider.<sup>88</sup> If Brexit leads to the loss of the Directive, it is most unlikely that this recommendation will be adopted at all. After all, the Directive’s provisions currently carry with them the threat of infringement proceedings before the CJEU where there is failure to comply. Without the Directive, there may be less of an incentive to raise standards and thus ensure that language rights in criminal proceedings are supported by a robust professional infrastructure.

## The Directive in Context

There are a number of international instruments that are, to varying degrees, concerned with the safeguarding of language rights, including language rights in criminal proceedings. To what extent are the Directive’s provisions distinctive? Is it the case that they are they replicated in other instruments? The issue here is the degree to which the Directive is indispensable.

On the global stage, the UN’s Universal Declaration of Human Rights is silent on the specific issue of language rights.<sup>89</sup> The UN International Covenant on Civil and Political Rights, which has legal force, declares that linguistic minorities should not be denied the right to use their own language. But the actual scope of that right is uncertain, and there is certainly no reference to criminal process specifically.<sup>90</sup> Less relevant to this paper, perhaps, because of its specific remit, is the UN Declaration on the Rights of Indigenous Peoples.<sup>91</sup> Among its provisions are language rights for indigenous peoples, and Art. 13 explicitly refers to linguistic rights, stating that, “indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures”. Art. 13 also declares that states shall “ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means”. Other UN instruments which uphold language rights either lack detail or legal force.<sup>92</sup> All in all, the UN is not a source of much substance on this subject.

We must therefore return towards the European context. In addition to the ECHR, there exists a range of European instruments which seek to promote language rights. It is not surprising that the EU is taking multilingualism seriously if its goal of full political and social harmonisation is to be realised.<sup>93</sup> The EU’s evolving language policy is the product of a combination of factors. The most obvious is its historical demography, in that the EU is composed of historical, organic nations with their own traditional languages.<sup>94</sup>

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<sup>87</sup> House of Commons Justice Committee, *Interpreting and translation services and the Applied Language Solutions contract*, p. 84.

<sup>88</sup> *The Law Society Gazette*, 16 August 2016.

<sup>89</sup> Compared with The Universal Declaration of Linguistic Rights, and instrument that has not been ratified by the UN General Assembly. Article 20 of the UDLR states that “everyone has the right, in all cases, to be tried in a language which he/she understands and can speak and to obtain the services of an interpreter free of charge”.

<sup>90</sup> ICCPR, Art. 27

<sup>91</sup> United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295.

<sup>92</sup> For example, the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities is devoted to protect the rights of minority cultures, including linguistic dimensions, but it lacks detail.

<sup>93</sup> See, further, Anne Lise Kjaer and Silvia Adamo (eds.), *Linguistic Diversity and European Democracy* (Ashgate, Farnham, 2011).

<sup>94</sup> The challenges of managing the demands of multilingualism in the context of criminal proceedings are, of course, global in extent. See, for example, D. Mildren, “Redressing the Imbalance: Aboriginal People in the

Multilingualism, of course, runs deeper than the inter-state level, and native or indigenous linguistic plurality is an internal cultural feature of almost all the sovereign member states.<sup>95</sup> Even member states with a tradition of promoting linguistic homogeneity have gradually, if reluctantly, acknowledged their inherent and historical multilingualism.<sup>96</sup> Of course, language law and policy which apply within the devolved nations of the UK can sometimes vary, with law providing that the Welsh language has official status in Wales and has equal status with English within the courts of law in Wales.<sup>97</sup>

But the multilingual EU is not merely the product of its more ancient historical and cultural legacy. It is also the legacy of recent colonial history and a century of immigration from former colonies. There is hardly a European state without well-established linguistic communities whose origins are in Asia or Africa and who were once subject to the authority of a European imperial power. Add to this the EU's own policies that have facilitated free movement of individuals within the union, which have also led to the creation of new, if sometimes temporary, linguistic communities across the EU.<sup>98</sup>

Protecting the linguistic rights of indigenous, immigrant and migrant citizens forms an objective of the European Charter of Fundamental Rights, which articulates the core values of the EU in a consolidating instrument.<sup>99</sup> Art. 21 of the Charter prevents discrimination on the grounds of language or where an individual is a member of a national minority. Art. 21.1 states that "any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". Art. 22 also states that, "the Union shall respect cultural, religious and linguistic diversity."

The Charter of Fundamental Rights thus protects linguistic minorities by preventing discriminatory behaviour against them, and to an extent is in the spirit of the ECHR. As an EU instrument, like the Directive, it potentially engages the jurisdiction of the CJEU in cases of discrimination. The Lisbon Treaty gives binding legal effect to the Charter of Fundamental Rights.<sup>100</sup> However, although the Charter of Fundamental Rights in Arts. 47-50 deals with criminal proceedings, it is silent on the matter of language rights in those proceedings. In short, it does not advance the specific cause of language rights in criminal proceedings. Art. 3 of the Treaty on European Union declares that the EU "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and

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Criminal Justice System" (1999) 6 (1) *Forensic Linguistics: the International Journal of Speech, Language and the Law*, pp. 137-160; J. Carroll, "The Use of Interpreters in Court" (1995) 2 (1) *Forensic Linguistics: the International Journal of Speech, Language and the Law*, pp. 65-73; C. Lane, K. McKenzie-Bridle And L. Curtis, "The Right to Interpreting and Translation Services in New Zealand Courts" (1999) 6 (1) *Forensic Linguistics: the International Journal of Speech, Language and the Law*, pp. 115-136.

<sup>95</sup> See Niamh Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (Kluwer, The Hague, 2002).

<sup>96</sup> The United Kingdom, for example, has made knowledge of Scots Gaelic, English or Welsh necessary to satisfy the linguistic test for British naturalisation: see British Nationality Act 1981, s. 6(1), Schedule 1, paragraph 1(C).

<sup>97</sup> See Welsh Language Act 1993, s.5 (2), s. 22: see also Welsh Language Measure (Wales) 2011, s.1.

<sup>98</sup> As the procedural rights roadmap which led to the creation of the Directive acknowledged: "...the removal of internal borders and the increasing exercise of the rights to freedom of movement and residence have, as an inevitable consequence, led to an increase in the number of people becoming involved in criminal proceedings in a Member State other than that of their residence. In those situations, the procedural rights of suspected or accused persons are particularly important in order to safeguard the right to a fair trial." *Resolution of the EU Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 30 November 2009 (2009/C 295/01), Preamble, para. 3.

<sup>99</sup> *Charter of Fundamental Rights of the European Union*, (2007/C 303/01).

<sup>100</sup> *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, 2007/C 306/01.

enhanced”. But the Treaty is short on detail and does not advance the cause of linguistic diversity in the courts of law.

Although there is increasing activity in the sphere of language rights on the part of the EU, it would be true to say that it is following a path already set by the Council of Europe in minority language promotion and protection. In addition to the ECHR’s provisions, the Council of Europe’s Framework Convention for the Protection of National Minorities (FCNM) protects individual language rights within the broader context of minority rights.<sup>101</sup> Art. 10(3) FCNM requires party states to guarantee the right of an individual to be informed in a language that he or she understands, the reasons for his or her arrest and the nature of the accusation, and to be able to defend himself or herself in that language (if necessary, with the assistance of an interpreter). But Art. 10(3) FCNM is no more than a paraphrase of Art. 6 ECHR, in that it guarantees the right to understand court proceedings, but does not promote language choice.<sup>102</sup> The FCNM is also limited in application to “national minorities”, whereas the ECHR is universal in application.<sup>103</sup>

Art. 6 ECHR guarantees the right to comprehension on the basis of linguistic necessity as part of the basic requirements of a fair trial. But it does not guarantee any right to language choice, or the right to a tribunal who speaks the defendant’s language.<sup>104</sup> It recognises a principle of linguistic necessity in the interests of trial fairness, no more, no less.<sup>105</sup> Another Council of Europe treaty, the European Charter for Regional or Minority Languages (ECRML), takes a different approach. It is exclusively concerned with linguistic rights, and requires states to implement various measures to promote the interests of minority languages in the fields of education, law, public administration, media, culture, and economic and social life.<sup>106</sup> Art. 9 ECRML requires states, in appropriate circumstances, to allow defendants, witnesses and all parties who speak the minority language to use it in court and tribunal hearings.<sup>107</sup>

More significantly, it contains provisions which, if adopted by states parties, require criminal courts, at the request of one of the parties, to conduct proceedings in the minority or regional language<sup>108</sup> and guarantee the accused the right to use his or her minority

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<sup>101</sup> For commentary, see Marc Weller (ed.), *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, 2005).

<sup>102</sup> For further commentary, see R. Gwynedd Parry, “The Languages of Evidence” [2004] Crim.L.R 1015.

<sup>103</sup> The expression “national minorities” is not defined by the Framework Convention: see Weller, *The Rights of Minorities: A Commentary on the European Framework Convention for the Protection of National Minorities*, at pp. 16-19, and 82-85.

<sup>104</sup> This was upheld in a number of European Court of Human Rights judgments; see, for example, *K. v. France* (1984) 35 D.R. 203.

<sup>105</sup> See *Fryske Nasjonale Partij and Others v. Netherlands* (1987) 9 E.H.R.R. C.D. 261.

<sup>106</sup> For detailed analysis, see, for example, Robert Dunbar, ‘The Council of Europe’s European Charter for Regional or Minority Languages’ in Kristin Henrard and Robert Dunbar (eds.), *Synergies in Minority Protection* (Cambridge University Press, 2008), pp. 155-185; Robert Dunbar and Gwynedd Parry (eds.), *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities* (Council of Europe Publishing, Strasbourg, 2008); Jean-Marie WOEHLING, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Council of Europe Publishing, Strasbourg, 2005); Tove Skutnabb-Kangas, ‘Linguistic Diversity, Human Rights and the Free Market’, in M. Kontra, R. Phillipson, T. Skutnabb-Kangas and T. Varady (eds.) *Language: A Right and a Resource* (CEU Press, Budapest, 1999) pp. 187-222; Alba Nogueira, Eduardo J. Ruiz Vieitez and Iñigo Urrutia (eds.), *Shaping Language Rights: a Commentary on the European Charter for Regional or Minority Languages in light of the Committee of Experts’ evaluation* (Council of Europe Publishing, Strasbourg, 2012).

<sup>107</sup> European Charter for Regional or Minority Languages, (ECRML), Part III, Art. 9.

<sup>108</sup> ECRML, Art. 9, para. 1 (a) (i).

language.<sup>109</sup> According to the ECRML, the use of the minority language is facilitated, if necessary, by the use of interpreters and translation.<sup>110</sup>

Art. 9 ECRML, if adopted by the signatory state, offers linguistic choice to the speaker of the minority language, and is not limited to the rights of suspects or defendants. But the ECRML is limited in application to “historical languages, that is to say languages which have been spoken over a long period in the state in question”.<sup>111</sup> Article 1 states that the languages to which the ECRML applies are those which are spoken by a minority, are traditionally used by part of the population of a state, and which are not official languages, languages of migrants, dialects or artificially created languages.<sup>112</sup>

Leaving aside some of the controversies surrounding the interpretation of these expressions, it is clear that the ECRML is designed to protect “the historical regional or minority languages of Europe”, and supports “the maintenance and development of Europe's cultural wealth and traditions”.<sup>113</sup> The languages of new linguistic communities or individuals who happen to be visiting another member state at the time of their arrest, for example, do not come under its remit.<sup>114</sup> The ECRML is an instrument which goes further than other fundamental rights instruments and offers a blueprint for citizen rights to those language groups which fall under its remit. But the fact that it applies only to specific languages, that states enjoy considerable discretion in adopting its provisions, and that it lacks legal bite means that its true impact may, in truth, be limited.<sup>115</sup> As a Council of Europe instrument, it is, of course, not impacted by Brexit.

When the international legal landscape is surveyed, we find that the language rights in criminal proceedings that are protected by the ECHR, and which the Directive seeks to implement, are not replicated in other instruments. We cannot turn to other, alternative legal sources for comparable provisions which carry the same universal application and legal force. An appreciation of this context is important as the future of the Directive's implementation in the UK is being considered.

## Conclusions

This article began by asking, what would be lost if the *Directive on the Right to Interpretation and Translation in Criminal Proceedings* was to cease to have effect in the UK? There are a number of observations that can be made in concluding.

As has been noted, the Directive does not introduce new standards or create further language rights over and above those contained in the ECHR. It certainly does not advance the case for linguistic choice in criminal proceedings. Then again, there are very few

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<sup>109</sup> ECRML, para. 1 (a) (ii).

<sup>110</sup> ECRML, Part I, Art. 1, para. (b).

<sup>111</sup> See ECRML, *Explanatory Report*, para 31.

<sup>112</sup> ECRML, Part I, Art. 1: ‘The term ‘regional or minority languages’ means languages that are, i. traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than rest of the State's population, and, ii. different from the official language(s) of that State; it does not include either dialects of the official language(s) of the State or the languages of migrants’.

<sup>113</sup> See ECRML, Preamble.

<sup>114</sup> ECRML, *Explanatory Report*, paras 10 and 15. The United Kingdom has ratified the Charter in respect of Welsh, Irish Gaelic, Scottish Gaelic, Scots, Ulster Scots and Cornish. For analysis, see Robert Dunbar, ‘Is there a Duty to Legislate for Linguistic Minorities?’ (2006) 33 (1) J.L.S., pp. 181-98.

<sup>115</sup> See Robert Dunbar, “Implications of the European Charter for Regional or Minority Languages for British Linguistic Minorities” (2000) 25 E.L.Rev. (Human Rights Survey), 46-69.



instruments which guarantee language choice, and those that do tend not to be in the tradition of universal human rights. The Directive is simply a tool to promote common practices within the EU in the observance of the fundamental language rights that are already protected under the ECHR. It is an attempt to set common standards and to embed language rights observance within the criminal justice processes of EU member states. It also provides guidance on interpreting the provisions of Arts. 5 and 6 ECHR, by setting out the practical measures required for the language rights to be fully and consistently implemented.

But there are definitional issues with the Directive, some of which have been exposed in the recent judgements of the CJEU. Its provisions, when subjected to close scrutiny have been shown to be unclear, inconsistent and inadequate. Indeed, in some respects it has been shown to fall short of the protection already offered in European Court of Human Rights jurisprudence. Even in its purported virtue, which is its practical checklist of measures to comply with ECHR principles, it falls short of what is required to actually achieve common practice. Too much scope for differing interpretations of its provisions and for latitude in application means that true harmonisation is, and probably always was, a tall order. Perhaps the Directive is justified in this regard on the grounds that it strives to ensure compliance with minimum standards without precluding state parties' capacity to offer more extensive levels of protection if they so choose.<sup>116</sup> But it remains the case that the Directive may ultimately not live up to expectations.

It is therefore arguable that the plea made by the All Party Parliamentary Group on Modern Languages for the Directive to be implemented into domestic law over-estimates the Directive's value and impact, and overlooks potential defects in its construction. It also overlooks the fact that, in any event, Code C of PACE 1984 replicates the same language rights as a result of having been amended to ensure its compatibility with the Directive. Significantly, since the Directive has come into force, there have been no referrals from the UK to the CJEU.

As the rights protected by the Directive are protected by the ECHR, some might also argue that an application to the European Court of Human Rights would remain a potential avenue of appeal in the event of violations. However, this is predicated on the UK continuing to remain a signatory to the ECHR, and the status of the ECHR in domestic law is conditional on the fact that the Human Rights Act 1998 does not become another one of the casualties of Brexit.<sup>117</sup> It must also be noted that the 1998 Act states that domestic courts are required to "take into account" any judgment, decision, declaration or opinion of the European Court of Human Rights, even though the "mirror principle" hitherto favoured by the Supreme Court has promoted a more deferential attitude to Strasbourg jurisprudence.<sup>118</sup> However, the judgments of the CJEU are binding on the domestic courts of EU members, and, accordingly, the Directive has potentially more direct legal clout. Of course, with Brexit, both the Directive and the ECHR's legal force may either be eliminated or significantly diminished.

Despite apparent compliance with the Directive in the PACE 1984 Codes of Practice, meeting the demands laid down by the Directive has posed challenges for the UK, in terms of resources, expertise and cost.<sup>119</sup> For language rights to be implemented properly, there must

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<sup>116</sup> Directive 2010/64/EU, Preamble para (32) "This Directive should set minimum rules. Member States should be able to extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the European Court of Human Rights or the Court of Justice of the European Union".

<sup>117</sup> The UK Government's plans to replace the Act with a Bill of Rights seems, for now, to be in abeyance: see *The Telegraph*, 22 August 2016.

<sup>118</sup> Human Rights Act 1998, s. 2(1); *R v. Special Adjudicator (Respondent) ex parte Ullah* [2004] UKHL 26.

<sup>119</sup> For difficulties in the United Kingdom, see R. Gwynedd Parry, "The Curse of Babel and the Criminal Process" [2014] *Crim.L.R.*, 802-816.

be a sufficient corps of qualified translators and interpreters. Therein lies the rub. If the Directive were to cease to have effect, despite its shortcomings, there would be one less weapon in the language rights armoury to put pressure on the government to take language rights seriously in the criminal courts by ensuring adequate funding and resources. Indeed, without the Directive, the UK government may in the future dilute, with impunity, the language rights currently protected in Code C of PACE 1984. Such a dilution would be a predictable reaction to the expense incurred in maintaining the necessary professional infrastructure, especially qualified and competent interpreters, to honour those rights.

In concluding, language rights would be less certain of their place in the criminal process without the Directive. An example of being damned by faint praise, perhaps, but this is probably the truest verdict.