# Úsáid na Gaeilge sna Cúirteanna i dTuaisceart na hÉireann

Tuairisc ar an ócáid
3 Nollaig 2010
Óstán Europa, Béal Feirste


# The Use of Irish in the Courts in the North of Ireland

Report of the event
3rd December 2010
Europa Hotel, Belfast

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*Tuairisc ar an ócáid*

Janet Muller
Príomhfheidhmeannach POBAL

# Dualgais an Stáit maidir le hÚsáid na Gaeilge sa Saol Poiblí i dTÉ

Is é Tuaisceart na hÉireann, go fóill féin, an t-aon chuid de na hoileáin seo gan cosaint dhlíthiúil don phríomhtheanga dhúchais, atá aitheanta mar theanga réigiúnach nó mhionlaigh. Ar ndóigh, tá tagairtí suntasacha don Ghaeilge i gComhaontú Aoine an Chéasta agus i gComhaontú Chill Rìmhinn, dhá chonradh idirnáisiúnta, dírithe, dar leis an dá rialtas a shínigh iad, ar réiteach na coimhlinte sa chuid seo den tír. Mar thoradh ar Chomhaontú Aoine an Chéasta, dhaingnigh rialtas na Breataine Cairt na hEorpa do Theangacha Réigiúnacha nó Mionlaigh. Tugadh aitheantas don Ghaeilge faoi Chuid III den Chairt.

I ndiaidh Chill Rìmhinn, áfach, agus mar is eol do chách, dhiúltaigh triúr Airí Cultúir ó thuaidh an tAcht Gaeilge a gealladh a thabhairt isteach agus tá teipthe orthu go sea an straitéis d'fhorbairt na Gaeilge a thabhairt chun cinn. Is ábhar an-mhór díomá agus imní é seo. Is é ár dtuairim go bhfuil an t-aire reatha ag loiceadh ar a chuid oibleagáidí faoi Chomhaontú Chill Rìmhinn, faoi Acht Chill Rìmhinn 2006 agus faoin Chairt.

In 2001, dheonaigh rialtas na Breataine cosaint don Ghaeilge faoi Chuid III de Chairt na hEorpa do Theangacha Réigiúnacha nó Mionlaigh. Rinneadh dhá theanga eile a chosaint faoi Chuid III den Chairt fosta, mar a bhí, an Bhreatnais sa Bhreatain Bheag agus an Ghaeilge in Albain.

I mbrollach na Cairte, leagtar oibleagáidí faoin

**Report of the event**

Janet Muller
CEO POBAL

# State Obligations in relation to the Use of Irish in Public Life in the North.

The North of Ireland remains the only place in these islands where there is no domestic legislative protection for the primary indigenous language recognised as a regional or minority language. Of course, there are significant references to the Irish language in the Good Friday Agreement and in the St Andrews' Agreement, two international treaties, intended, according to the two governments who signed them, to resolve the conflict in this part of the country. Arising from the Good Friday Agreement, the British government ratified the European Charter for Regional or Minority Languages up to Part III for Irish.

As we are all aware, however, following the St Andrews' Agreement, three Ministers for Culture in the North have refused to introduce the promised Irish language Act and have also failed to date to bring forward the strategy to develop the Irish language. This is a matter of great disappointment and concern. We believe that the current Minister is in default of his obligations under the St Andrews' Agreement, under the St Andrews' Act 2006 and under the Charter.

In 2001, the British government granted the Irish language protection under Part III of the European Charter for Regional or Minority Languages. Two other languages, Welsh in Wales and Gaelic in Scotland were also recognised under Part III.

Chairt go daingean taobh istigh de chomhaontuithe idirnáisiúnta ar Chearta Daonna:

> De bhrí gur ceart dosháraithe é, a chomhlíonann na prionsabail atá cuimsithe i gCúnant Idirnáisiúnta na Náisiún Aontaithe ar Chearta Sibhialta agus Polaitiúla, an ceart ar theanga réigiúnach nó mhionlaigh a úsáid sa saol príobháideach agus poiblí, agus de réir spiorad Choinbhinsiún Chomhairle na hEorpa chun Cearta an Duine agus Saoirsí Bunúsacha a Chosaint;
>
> De bhrí go gcuireann cosaint theangacha stairiúla réigiúnacha nó mionlaigh na hEorpa, cuid acu atá i gcontúirt a ndíothaithe faoi dheireadh, le caomhnú agus le forbairt shaibhreas cultúrtha agus thraidisiúin na hEorpa;

An Chairt a dhaingnigh Rialtas na Breataine, cuireann sí rialtas na Ríochta Aontaithe agus an Tionól cineachta faoi ghealltanas an Ghaeilge a chur chun cinn agus cosaint a thabhairt di más gá. Is léir go dteastaíonn reachtaíocht ón Ghaeilge lena cosaint, agus gur chóir go mbeadh san áireamh sa chosaint aisghairm dlí a choisceann a húsáid in achair sa saol poiblí ar nós na gcúirteanna.

Leagann Comhaontú Aoine an Chéasta agus an Chairt béim ar leith ar an ghá le haitheantas a thabhairt do luach dearfa na dteangacha mionlaigh mar chuid de shaibhreas cultúrtha na tíre. Cainteoirí Gaeilge i dTuaisceart na hÉireann, is amhlaidh a mhothaíonn siad gur beag luach a chuireann an stát ar an Ghaeilge mar chuid de shaibhreas cultúrtha agus de thraidisiúin Thuaisceart na hÉireann.

Déanann Coiste Saineolaithe na Cairte (COMEX) faireachán ar chur i bhfeidhm na Cairte ag na tíortha daingnithe. I dtuairisc na Saineolaithe, Aibreán 2010, dhearbhaigh COMEX an tábhacht a bheadh le bonn reachtach don Ghaeilge, mar dheis athmhuintearais i gcomhthéacs na coimhlinte polaitiúla. Ba é a mhol COMEX go gcuirfeadh údaráis na RA bonn cuí reachtach ar fáil do chosaint agus do chur chun cinn na Gaeilge i dTuaisceart na hÉireann. De na trí theanga réigiúnacha a chosnaítear faoi Chuid III den Chairt, (an Bhreatnais sa Bhreatain Bheag, Gaeilge na hAlban, an Ghaeilge i dTuaisceart na hÉireann), is í an Ghaeilge amháin atá gan cosaint reachtach. Sa tríú tuairisc s'acu, d'aibhsigh Coiste na Saineolaithe an aimhrialtacht seo i dtaca le reachtaíocht teanga de, i dtaca le reachtaíocht craoltóireachta na Ríochta Aontaithe de, agus i dtaca le húsáid na Gaeilge sna cúirteanna de.

Ar thorthaí ba thábhachtaí na tuarascála bhí:

> Iarrann Coiste na Saineolaithe ar údaráis na RA, ar bhonn práinne, bonn oiriúnach reachtach a sholáthar do chosaint agus do chur chun cinn na Gaeilge i dTuaisceart na hÉireann. (COMEX l. 6, mír 15)



The preamble to the Charter places the obligations under the Charter firmly within international agreements on Human Rights;

> Considering that the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights, and according to the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms;
>
> Considering that the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe's cultural wealth and traditions

The Charter ratified by the British government commits the UK government and the devolved Assembly to promote and provide protection where necessary for the Irish Language. It seems clear that the Irish language needs legislation for its protection, and that protection should include the repeal of a law which prohibits its use in areas of public life such as the courts.

Both the Good Friday Agreement and the Charter place particular emphasis on the need to recognise the positive contribution that minority languages bring to the cultural wealth of a country. Irish speakers in Northern Ireland get very little sense that within Northern Ireland Irish is seen by the state as contributing to our cultural wealth and traditions.

The Committee of Experts on the Charter (COMEX) oversee the application of the Charter by ratifying states. In its report of April 2010, the COMEX confirmed the importance of a legislative foundation for the Irish language in the context of the political conflict as an opportunity for reconciliation. The COMEX recommend that the UK authorities should provide an appropriate legislative basis in order to protect and promote the Irish language in the North of Ireland. Of the three languages recognised under Part III of the Charter, (Welsh in Wales, Gaelic in Scotland and Irish in the North) Irish alone has no domestic legislative protection. The COMEX highlight this anomaly in its third report in relation to language legislation, in relation to UK broadcasting legislation, and in relation to the use of Irish in the courts.

Among the most significant findings of the COMEX report is the following,

> The Committee of Experts urges the UK authorities to provide an appropriate legislative base for the protection and promotion of Irish in Northern Ireland. (COMEX p. 6, parag 15)

Níos moille, ba é an moladh seo ba bhonn le moladh Choiste na nAirí,

> ...go gcuirfeadh údaráis na Ríochta Aontaithe san áireamh tuairimí Choiste na Saineolaithe agus ar bhonn práinne...go ngabhfadh agus go bhfeidhmeodh siad polasaí cuimsitheach Gaeilge agus gurbh é ab fhearr é seo a dhéanamh trí reachtaíocht a ghabháil. (RecChL(2010)4)

Maidir le hAcht 1737 Riar na Córa (Teanga) (Éirinn), a chuireann cosc ar úsáid teanga ar bith seachas an Béarla sna cúirteanna, bhíodh reachtaíocht den chineál céanna i bhfeidhm in Albain, i Sasana agus sa Bhreatain Bheag. Aisghairmeadh an reachtaíocht i Sasana, sa Bhreatain Bheag agus in Albain in 1879. Aisghairmeadh reachtaíocht den saghas ceanna i ndeisceart na hÉireann i ndiaidh theacht i bhfeidhm na críochdheighilte. Ó thuaidh, áfach, tá Acht 1737 go fóill i bhfeidhm sa lá atá inniu ann.

Níl aon chúis réasúnach shoiléir go mbeadh gá le hAcht 1737 i gcomhair riar na gcúirteanna i dTuaisceart na hÉireann nuair is ríléir nach bhfuil aon ghá leis i gcúirteanna an deiscirt, Shasana, na hAlban agus na Breataine Bige. Is aimhrialtacht reachtach é a bhfuil éifeacht leanúnach leis i dTuaisceart na hÉireann.

Airteagal 7 (2) den Chairt, éilíonn sé ar an Ríocht Aontaithe deireadh a chur le,

> ...haon idirdhealú, eisiamh, srianadh nó tosaíocht éagórach a bhaineann le húsáid teanga réigiúnaí nó mhionlaigh agus ar cuspóir leis cothabháil nó forbairt na teanga a dhímholadh nó a chur i gcontúirt.

Sa tuarascáil is déanaí acu, Aibreán 2010, cháin COMEX Acht 1737 mar 'chosc éagórach ar an Ghaeilge a chuireann a forbairt i gcontúirt' agus d'iarr siad, ar bhonn práinne, ar údaráis na Ríochta Aontaithe an bac seo ar úsáid na Gaeilge a dhíchur.

Dar le COMEX,

> Is é éifeacht an Achta seo, mar sin de, úsáid na Gaeilge sa chúirt, a chosc agus is mar seo a míníodh agus a feidhmíodh é...píosa reachtaíochta a choisceann go gníomhach úsáid na teanga i limistéar tábhachtach cheann de na hAirteagail faoi Chuid III tá sé contrártha, dar le Coiste na Saineolaithe, le spiorad agus le cuspóirí na Cairte agus le gealltanas ginearálta údaráis na RA an Gaeilge a chosaint agus a chur chun cinn... Cosc gníomhach ar úsáid na Gaeilge sa chúirt, is srianadh é a bhaineann le húsáid na teanga. Níl léirithe ag údaráis na RA go bhfuil aon bhonn cirt leis an srianadh seo. Creideann Coiste na Saineolaithe go gcuireann an srianadh seo cothabháil agus forbairt na Gaeilge i gcontúirt. Bunaithe ar an eolas atá ar fáil, measann Coiste na Saineolaithe gur srianadh éagórach ar úsáid



Later, this finding underpins the Recommendation of the Committee of Ministers that,

> ...the authorities of the UK take account of all the observations of the Committee of Experts and as a matter of priority...adopt and implement a comprehensive Irish language policy, preferably through the adoption of legislation. (RecChL(2010)4)

In relation to the 1737 Administration of Justice (Language) Act (Ireland), which places a ban on the use of any language other than English in the courts, similar legislation was also in place in Scotland, in England, and in Wales. These acts were repealed in England, Wales and Scotland in 1879. The same kind of legislation was repealed in the south of Ireland after partition. In the North, however, it is still in force to this day.

There is no clear rational reason why the 1737 Act is necessary for the administration of the courts in Northern Ireland when it is clearly not necessary for the administration of the courts in England Scotland and Wales. It remains a legislative anomaly that the 1737 Act continues to have effect in the North.

Article 7 (2) of the Charter obliges the United Kingdom to eliminate,

> ...any unjustified distinction exclusion restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of the language.

In its most recent report of April 2010 the COMEX condemned the 1737 Act as, 'an unjustified prohibition on the Irish Language endangering its development' and encouraged the United Kingdom authorities to remove this obstacle to the use of Irish.

The COMEX said,

> The effect of this Act is consequently a prohibition of the use of Irish in court, and this is how it has been interpreted and implemented...a piece of legislation actively prohibiting the use of the language from an important field of one of the Articles under Part III is, in the view of the Committee of Experts, contrary to the spirit and objectives of the Charter and the general commitment of the UK authorities to protect and promote Irish...The active prohibition of the use of Irish in court is a restriction relating to the use of the language. The UK authorities have not provided any justification for this restriction. The Committee of Experts believes that this restriction endangers the maintenance and development of Irish. Based on the available

> na Gaeilge é cosc Acht 1737 ar úsáid na Gaeilge sa chúirt i dTuaisceart na hÉireann, agus go gcuireann sé forbairt na teanga i gcontúirt. (COMEX Aibreán 2010, l. 19, Ailt 117-121)

Scríobh POBAL chuig David Cameron, Nick Clegg, William Hague agus Owen Patterson agus d'fhiafraigh cad é a dhéanfadh siad le torthaí COMEX a chur i bhfeidhm. Scríobh muid chuig an Aire Dlí is Cirt abhus, David Ford, agus d'iarr cruinniú leis. Ar an drochuair, go dtí seo, is cosúil nach léir dó go mbaineann ceist úsáid na Gaeilge sna cúirteanna leis an ról s'aige. Beidh muid ag dul ar ais chuige faoi sin.

Is léir dúinn go gcaithfear Acht 1737 a aisghairm. Níor chóir d'urlabhraí ar bith rialtais, dlí ná polaitiúil cosaint a dhéanamh ar dhlí a bhfuil coiste saineolach neamhspleách de chuid Chomhairle na hEorpa a chur síos air mar 'shrianadh éagórach'. Chomh maith, chuirfeadh aisghairm Acht 1737 leis an athmhuintearas pobail sa mhéid gur comhartha a bheadh ann nach mbeadh aon ról ag cosc reachtúil ar úsáid na Gaeilge sna cúirteanna, cosc a bhfuil pionós coiriúil ag tacú leis, nach mbeadh aon ról aige feasta i saol Thuaisceart na hÉireann.

Ar ndóigh, ní chiallódh aisghairm Acht 1737 ann féin go dtiocfadh cúirt a reáchtáil i nGaeilge. Fiú agus é aisghairthe, bheadh gá le creatlach reachtaíochta le forbairt a dhéanamh ar sheirbhísí agus ar sholáthar. Is ábhar an-mhór díomá agus imní é gur dhiúltaigh an tAire Acht Gaeilge a thabhairt isteach agus gur theip air go sea an straitéis a gealladh a thabhairt chun cinn.



> information, the Committee of Experts considers that the prohibition of the use of Irish in court in Northern Ireland by the 1737 Act is an unjustified restriction relating to the use of Irish, endangering the development of the language. (COMEX April 2010, p.19, parag 117-121)

POBAL has written to British PMs, David Cameron and Nick Clegg, to Secretary of State for the UK Foreign Office, William Hague and to Secretary of State for NI, Owen Patterson to ask what they intend to do to put the COMEX findings into effect. We have written to David Ford, Justice Minister here and asked to meet him. Unfortunately, until now, he has failed to recognise that the use of Irish in the courts is a matter for his office. We shall contact him again.

It is clear to us that the 1737 Act must be repealed. It is not appropriate that any government, legal or political spokesperson would defend a law which has been described by an independent expert committee of the Council of Europe as 'an unjustified restriction.' The repeal of the 1737 Act would improve community relations, too, in that it would be a signal that legislative restrictions on the use of Irish in the courts, restrictions backed by criminal sanction, have no role to play in the future of the North of Ireland.

Of course, the repeal of the 1737 Act in itself would not mean that a court could be held in Irish. Even once repealed a legislative framework would be needed to develop services and provision. The fact that the Minister has refused to introduce an Irish Language Act and to date has failed to bring forward a promised strategy is a matter of enormous disappointment and concern.

An tUas John F Larkin, AB
An tArd-Aighne do Thuaisceart Éireann

Mr John F Larkin
The Attorney General for NI

# The Irish Language in the Courts of Northern Ireland

It is a great pleasure to be here today talking about the Irish language in the Courts of Northern Ireland although I know that for many of you there will be disappointment that I am not speaking to you in Irish. Please believe me when I tell you that it would be truly painful for you to have to listen to my mangled cúpla focal for more than about 30 seconds.

When we reflect as we do today on the Irish language in the Courts a proper point of departure I think is some consideration of what law can do and what it can't.

Speaking of the European Convention on Human Rights in Brown the late Lord Bingham said this:

> The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from "The heart-ache and the thousand natural shocks that flesh is heir to".

To which I would add that not only does the Convention not offer relief from this heart ache and thousand natural shocks nor too can litigation – of any sort – be expected to. I sometimes think that litigation can be like treating yourself for toothache: it's good to get rid of the rotten tooth but pulling it out with pliers makes you think about whether it will all be worth the pain and effort. And to extend the simile, if acting as your own dentist, you will tend only to pull out a tooth that is already very loose.

A large and early distinction has to be made in our discussion this morning between what litigation, particularly human rights litigation might be expected to do, and proper and predominant role for politics. Obviously I have nothing to do with the hammering out of a political agreement about the place of the Irish language in society but I think it is proper to note that one cannot expect litigation to bear the weight that is properly assumed by political responsibility.

What human rights or public interest litigation can do, I think, in the context of an area of considerable public controversy is to clear away obvious encumbrances and to create a proper space for the full range of policy choices to be explored.

In the context of the place of the Irish language in the Courts I think there is room for a further exploration of the human rights compatibility of aspects of the Administration of Justice (Language) Act 1737.

What I want to do now is say a little about the structure of that Act and to discuss the recent decisions of the Court of Appeal and the High Court dealing with it. The title and the preamble run as follows:

> An Act that all Proceedings in Courts of Justice within this Kingdom shall be in the English Language.Whereas many and great mischiefs do frequently happen to the subjects of this kingdom from the proceedings in courts of justice being in an unknown language; those who are summoned and impleaded having no knowledge or understanding of what is alledged for or against them in the pleadings of their lawyers and attorneys, who use a character not legible to any but persons practising the law.

The purpose of the preamble in early modern legislation is to set out the targets that the Act is aimed at. I know that there has been debate about the discriminatory purpose of the Act, whether it ought to be seen as forming part of the corpus of the infamous penal laws against Irish Catholics.

On balance while the 1737 Act had an obviously detrimental impact on the Irish language I don't think it was aimed that way. I say this for the following four reasons:

1. The Irish language had not been widely or probably at all used in the Higher Courts in Ireland before that date. It would not have been seen by the 18th century administration as in any way a problem or a threat.

2. Pleadings previously were often in Norman Law French or Latin – languages increasingly impenetrable to the English speaking population of Ireland. The first volume of common law reports in Ireland was produced by the Irish Attorney General for King James VI and I Sir John Davies. This appeared in its first two editions mostly in law French and was translated into English later in the 18th century.

3. A principal stated purpose of the Act was to reform the style of writing used in Court records. So called 'court hand' used during the 16th and 17th centuries is now virtually impossible to read without special training.

4. The Irish language is not in any way singled out in the Act for mention.

So much for the preamble to the Act, the first section (and I should add that the casting of the Act into sections is a modern device simply designed to facilitate reading: the Act was not originally so organised) provides as follows:

> [I.] To remedy those great mischiefs, and to protect the lives and fortunes of the subjects of

> this kingdom more effectually than heretofore from the peril of being ensnared, and brought into danger, by forms and proceedings in courts of justice in an unknown language[1], . . . all writs, process, and returns thereof, and proceedings thereon, and all pleadings, rules, orders, indictments, informations, inquisitions, presentments, verdicts, prohibitions, certificates, and all patents, charters, pardons, commissions, records, judgments, statutes, recognizances, bonds, rolls, entries, fines, and recoveries, and all proceedings relating thereunto, and all proceedings of courts-leet, courts-baron, and customary-courts, and all copies thereof, and all proceedings whatsoever in any courts of justice within this kingdom, and which concern the law and administration of justice, shall be in the English tongue and language, and not in Latin or French, or any other tongue or language whatsoever, and shall be written or printed in a common legible hand and character, and not in any hand commonly called Court-hand, with the like way of writing or printing, and with such abbreviations, as are now commonly used in the English language, and with the like manner of expressing numbers by figures as have been heretofore or are now commonly used in the said courts respectively; any law, custom, or usage, heretofore to the contrary thereof notwithstanding; and all and every person and persons, who shall write or print any of the proceedings, or other the matters or things above mentioned, in any hand commonly called Court-hand, or in any language except the English language, shall for every such offence forfeit and pay the sum of twenty pounds.

What this section does is to prohibit under criminal sanction (admittedly now rather a modest one of £20) anyone who writes or prints what can be compendiously called court documents, including judgements, in any language other than English. It does not prohibit, it seems to me, the use of spoken Irish in Court.

In *Re C (A Minor)* [2005] NIQB 63 Weatherup J had to consider judicial review challenges to school disciplinary measures by the Meanscoil. At the conclusion of his judgment he found that,

> [26] The school has failed to record the details of action taken, and to that extent has failed to comply with the Discipline Policy. Such failure does not otherwise impact on the procedures adopted or the conclusion reached in relation to C's suspension and does not warrant any interference by the Court with the suspension decision. As the applicants have not established any other grounds for Judicial Review the applications are dismissed. Na fíorais, an fhianaise agus na hargóintí atá thaca leis an forais, tá siad gan bhunús. Mar sin, tá an cás caite amach.

I remember thinking at the time of that judgment (and I still think) that Weatherup J was characteristically displaying a great sense of courtesy and sensitivity in delivering part of his judgment in Irish. I should also point out that under section 2 of the 1737 Act the time limit for criminal proceedings for breach of section 1 is three months.

In the MAC GIOLLA CATHAIN litigation in the High Court and Court of Appeal this year and last year there was a frontal challenge to the 1737 Act. I found the reading of both decisions – particularly that of the High Court – to evoke renewed feelings of admiration for the learning and energy of the lawyers involved.

Relying on two grounds of challenge the applicant argued firstly that the 1737 Act was incompatible with the European Charter for Regional and Minority Languages specifically Article 7(2), and as such is in breach of his legitimate expectation that the UK will act consistently with its international legal obligations under the Charter; and secondly that the prohibition under the 1737 Act of any language other than English in Courts breached his rights under the European Convention on Human Rights and Fundamental Freedoms (ECHR) and specifically Article 14 taken together with Article 6

The advantage that we all now have in the light of the decisions of the High Court and Court of Appeal is that these grounds have been comprehensively explored and rejected and that space has now been left for consideration of other ECHR grounds.

What I want to suggest is that those who wish to use the Irish language in Court proceedings do so not as a matter which sounds on the fairness or otherwise of proceedings but simply by virtue of who they are as human beings with a distinct linguistic culture and history, and who wish to give expression to that culture.

If that is right then it strikes me that the task for all of us who have an interest in the legal protection of cultural rights is a patient examination of Articles 8 and 10 of the European Convention on Human Rights as necessarily informed by the Regional and Minority Languages Charter.

It would, obviously, not be appropriate for me to express any concluded view even if I had arrived at one – which I have not. It does strike me, however, that what is specifically worthy of detailed examination is the question of whether or not the criminal offence created by section 1 of the 1737 Act can be considered proportionate in any weighing of Articles 8 and 10 ECHR viewed through the prism of the Charter.

Removal of that criminal offence would be by very many people here viewed only as a first step and a very modest first step at that. I make no comment on that. But it strikes me that any step which removes the least obstacle to judges expressing themselves with the sensitivity of Weatherup J should be very warmly welcomed.

1. http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=administration+of+justice+ireland&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFrom=0&parentActiveTextDocId=1473035&ActiveTextDocId=1473037&filesize=10278#887685#887685

*Tuairisc ar an ócáid*

Micheál Ó Flannagáin
Dlíodóir

# Acht 1737 agus Dúshlán na Cothromaíochta

Tá cuid mhór ábhar machnaimh i gcaint an Ard-Aighne agus tá mise, go pearsanta, fíorbhuíoch dó as a ionchur. Iarradh orm labhairt inniu ar mo chuid oibre mar dhlíodóir agus mar Ghaeilgeoir i gcomhthéacs Acht 1737.

D'oscail mé m'oifig ar Bhóthar na bhFál thart fá chúig bliana is fiche ó shin agus tá mé ag obair le pobal na Gaeilge ó shin i leith. Déarfainn nach dtéann seachtain thart nach ndéanaim gnó éigin fríd an Ghaeilge agus ní nach ionadh. Tá pobal mór Gaeilge i mBéal Feirste agus cosúil le pobal ar bith eile, ceannaíonn siad tithe, díolann siad iad agus ó am go chéile, bíonn taisme acu. San oifig, thig linn ár ngnó a dhéanamh i nGaeilge. Thig liom mo chuid nótaí féin a scríobh i nGaeilge, ach ag deireadh an lae, tá a fhios agam go gcaithfear na foirmeacha a bheith comhlíonta i mBéarla. Sin mar atá an saol. I dtaca leis na Gaeilgeoirí a dhéanann a gcuid gnó liom, tá súil agam go mbíonn taithí dhearfach acu. Ní bhíonn, ar an drochuair, an taithí dhearfach chéanna i gcónaí ag Gaeilgeoirí agus iad ag iarraidh rochtain a fháil ar an dlí. Is cuimhin liomsa an t-am, sna hochtóidí, a tógadh Breandán Ó Fiaich gur tugadh os comhair na cúirte é de bharr gur dhiúltaigh sé Béarla a labhairt. Cuireadh ina leith gur dhiúltaigh sé eolas a thabhairt a iarradh air. Bhí an t-eolas tugtha aige; bhí sé tugtha i nGaeilge. Díol suime é gur cheap an chúirt fear teanga agus go bhfuarthas Breandán neamhchiontach. Bhí go maith go dtí gur fhág sé an chúirt. Tógadh arís é, cuireadh cúiseamh úr ina leith agus fuarthas

**Report of the event**

Micheál Ó Flannagáin
Solicitor

# The 1737 Act and the Challenge of Equality

The Attorney General's talk has given us a lot to think about and I, personally, am very grateful for his contribution. I have been asked to speak today on my work as a solicitor and as an Irish speaker about and in the context of the 1737 Act.

I opened my office on the Falls Road about 20 years ago and have worked with the Irish language community since then. I would say that there's not a week goes by in which I don't do some of my business through Irish and that's not surprising. Belfast has a large Irish speaking community and like any other they sell houses, they buy them and from time to time they have accidents. In the office we are able to do our business through Irish. I write my own notes in Irish, but in the end I know that forms must be filled in English, that's just how it is. Regarding Irish speakers doing their business with me through Irish, I hope their experiences have been positive. Unfortunately the experience of Irish speakers with the law has not always been so positive. I remember the 1980's when Breandán Ó Fiaich was arrested and brought before the courts for refusing to speak English. He was charged with refusing to give information when requested. In fact he had given the information, the information was in Irish. Interestingly a translator was appointed and he was acquitted. That was fine until he left the court where he was rearrested and charged with a different offence and subsequently convicted. There are other examples since the Breandán Ó Fiaich case, from the case of Máire Nic an Bhaird

ciontach an iarraidh sin é. Tá samplaí eile ann, ó chás Bhreandáin Uí Fhiaich, go cás Mháire Nic an Bhaird, go cás Chaoimhín Mhic Giolla Chatháin.

Déarfainn gur bheag Gaeilgeoir anseo nár léigh, am éigin, *The Hidden Ireland* le Daniel Corkery. Nuair a bhí mise ag fás aníos, bhí sé chóir a bheith riachtanach é a léamh. Nuair a smaoiním ar an taithí atá orm mar Ghaeilgeoir a oibríonn leis an dlí, cuireann sé *The Hidden Ireland* go mór i gcuimhne dom; go dtig leat do ghnó a dhéanamh sa Ghaeilge ach go gcaithfidh tú é a choinneáil faoi cheilt. Tá cuid mhór Gaeilgeoirí ag dul ar aghaidh lena saol, ag déanamh a gcuid oibre, ag díol agus ag ceannach, ach bíonn leisce nó aiféaltas nó eagla fiú orthu Gaeilge a úsáid leis an Stáit, agus tá sin fíor i dtaca le cúrsaí dlí de go háirithe. Sin ceann de na fáthanna a gcuirim fáilte ar leith roimh an Ard-Aighne agus roimh an chaint atá tugtha aige inniu do phobal na Gaeilge.

Tá ceist na Gaeilge sna cúirteanna tábhachtach. I mo bharúil is litmus test é ar chothromas sna sé chontae. Níl sé ceart ná cóir gur cion coiriúil é an Ghaeilge a úsáid sna cúirteanna. Níl sé ceart ná cóir gur seo an t-aon chuid de na hoileáin seo nach bhfuil reachtaíocht ann a thugann cosaint do mhionteanga. Ach tá dúshlán eile roimh phobal na Gaeilge. Ní bréag a rá go bhfuil daoine ann atá naimhdeach don Ghaeilge. Ní chuirfeadh sé lá iontais orm dá mbeadh breitheamh nó dhó ina measc. B'fhéidir gur sin an dúshlán is mó atá romhainn: an naimhdeas sin a thuiscint, a láimhseáil agus a mhaolú ar dhóigh éigin.

Dhá bhliain ó shin, thóg mé cás ar son Chaoimhín Mhic Giolla Catháin in éadan Achta 1737. Thug muid ar an choróin teacht roimh an chúirt leis an dlí sin ó ré na bPéindlíthe a chosaint, rud a rinne siad. Bhain cuid de na pointí a rinne siad le cúlra an cháis, ach ar dhá argóint dhlíthiúla go háirithe a bhí siad ag brath:

- Ní chruthaíonn conradh idirnáisiúnta cearta in-fheidhmithe mura bhfuil sé comhtháite i reachtaíocht intíre
- Caillteár cearta teanga an duine a luaithe is atá Béarla foghlamtha aige

Chuaigh an dá phointe sin i bhfeidhm go mór ar an chúirt, agus ormsa chomh maith, agus má smaoiníonn tú orthu, is iad an dá argóint is láidre ar son Acht na Gaeilge a thig leat a dhéanamh. Níl Acht na Gaeilge againn go fóill. Ina ionad sin, tá straitéis teanga geallta dúinn. Tá an straitéis sin geallta ag trí aire DCAL i ndiaidh a chéile agus cosúil leis an Nollaig, tá sí ag teacht.

Mar fhocal scoir, ba mhaith liom buíochas a ghabháil leis an Ard-Aighne as ar dhúirt sé. Sílim go bhfuil tús curtha anois le comhrá agus níl a fhios cá háit a rachaidh an comhrá sin. Bhí an díospóireacht de dhíth le fada, ach más mall is mithid.



through to the Caoimhín Mhic Giolla Chatháin case.

I would say that there are few Irish speakers here who haven't read, at one time or another, *The Hidden Ireland* by Daniel Corkery. When I was growing up it was almost compulsory reading. When I think of my experience as an Irish speaker working with the law, I am very much reminded of *The Hidden Ireland*, in that you can do business through Irish as long as it is out of sight. Many Irish speakers get on with their lives, working, buying and selling, but they are reluctant, embarrassed or even frightened to use Irish with the State, and this is particularly true in relation to the law. This is one of the reasons why I particularly welcome the Attorney General and his address to the Irish language community.

The issue of Irish in the courts is an important one, in my view it is the litmus test for equality in the six counties. It is neither right nor just that using the Irish language in the courts should be a criminal offence. Neither is it right that this should be the only part of these islands where a minority language does not have legislative protection. These, however, are not the only challenges facing the Irish speaking community. Without doubt there are people who are hostile to the Irish Language. It would be no surprise if they include some judges. Maybe this is the biggest challenge facing Irish speakers; how to understand, handle and assuage that hostility.

Two years ago I accepted a case on behalf of Caoimhín Mac Giolla Cathain challenging the 1737 Act. In that challenge the Crown were required to come to court to defend this law from the penal law era, which they did. Some of the points they raised arose from the background to the case but in essence they relied upon two legal arguments:

- An international agreement creates no enforceable rights unless incorporated in domestic law
- That any language rights an individual may have are lost once they learn English

These two arguments had a significant impact on the court, and on me for that matter, but when you examine them, they are in fact the two strongest arguments for an Irish language Act that you can make. We do not presently have an Irish language Act. Instead we have been promised a language strategy. The same strategy has been promised by three successive DCAL ministers and like Christmas, it's on its way.

In conclusion, I would like to thank the Attorney General for his comments. I believe that this marks the start of a conversation and who knows where this discussion will lead. The conversation is overdue, but better late than never.

Mike Ritchie
Stiúrthóir
Director
Committee on the
Administration of Justice

# The 1737 Act and Legitimate Expectation

I'm delighted to be here supporting the work of POBAL in enhancing protection for the Irish language. The Committee on the Administration of Justice (CAJ) has been active on the need for protection of Irish as an indigenous minority language since the early 1990s. While CAJ is disappointed that the ban on the use of Irish in courts remains in force, it is important to note the progress that has been made compared to the early 1990s.

We were involved in the Human Rights Assembly that took place in London in 1992 examining the range of rights violations taking place in Northern Ireland at that time. I was looking at the report of the Assembly, Broken Covenants, and remembered that there was a session on the right to participate in cultural life where a number of difficulties were outlined, including:

- a ban on speaking Irish in Belfast City Council;
- inadequate funding for Irish medium education;
- the absence of Irish in the broadcast media;
- a ban on the use of Irish in prisons; and
- political vetting of Glór na nGael.

Of course the question of using Irish in the courts was mentioned; but other more pressing issues were to the fore.

Among the recommendations made by the Chair of the session, Dr Yvo Peeters was: that broadcasters begin to provide programmes in Irish; and that the Department of Education should establish a sufficiently-resourced unit to promote Irish medium education and that greater funding for Irish-medium schools be made available.

From this it can be seen that great strides have taken place. And of course the existence of POBAL has been an important indication of the advancement of the Irish language community. The use of Irish in courts is something that will come; it is to be hoped that it comes sooner rather than later. I would like to see further exploration of the way in which the courts could be used to press for it.

One issue which deserves to be considered in greater detail by the courts is the legal concept of legitimate expectation. This suggests that, where a particular policy objective has been flagged as adopted or imminent but has not yet been implemented, the courts do have a discretion to encourage the Executive to take action. The references to enhanced protection of Irish in relation to the Good Friday and St Andrews Agreements as well as the oft-stated commitments to an Irish Language Act and strategy have already been alluded to by others today.

More pointedly with regards to the courts, in March 2001, in the Review of the Criminal Justice System in Northern Ireland the Criminal Justice Review Group made the following comment at paragraph 8.56,

> We recommend that consideration of the use of the Irish language in courts be taken forward in the wider context of the development of policy on the use of Irish in public life generally.

The NIO accepted this recommendation in its Criminal Justice Review Implementation Plan in November 2001 as follows:

> Accepted: Lead Responsibility: Northern Ireland Court Service: The Northern Ireland Court Service, in consultation with other government departments, is considering the scope for use of Irish in courts in the context of developing policy on using Irish in public life generally. An Interdepartmental Group already exists to take forward implementation of those provisions of Part III of the European Charter on Regional or Minority Languages which apply to the Irish language following ratification of the Charter in March 2001. Timescale: Ongoing.

On the basis of these references, it is hard to argue that Gaeilgeoirí are unreasonable in having a legitimate expectation that this matter should have been dealt with by now. I was pleased that the Attorney General suggested earlier that the matter of 'legitimate expectation' may feature further in relation to the question of Irish in the courts.

Finally, I would like to refer you to the PILS Project (PILS, standing for Public Interest Litigation Support). This is a project promoted and established by CAJ to enable civil society organisations to litigate matters which are considered to be in the public interest. The project has been supported by Atlantic Philanthropies to provide legal and financial support for cases brought by organisations that are members of its Stakeholder Forum. POBAL is a member of the forum through which applications to the Board must be made.

The availability of this fund could allow for examination of a wider range to potential cases rather than having to find an applicant to the court who qualifies for legal aid. The PILS Project will need to see that applicants have tried to access support via the various statutory bodies (the Human Rights Commission, the Equality Commission and the Legal Services Commission). But if a strong case is identified that the PILS Project Board considers meets the public interest, it could provide support which would otherwise be unavailable.

This meeting has been an important event in imagining next steps in the campaign to allow the use of Irish in the courts and I look forward to continuing discussion of possible legal strategies.

Daniel Holder
Stiúrthóir Pholasaí i leith CETRM
Coimisiún Um Cearta an Duine TÉ
Policy Lead ECRML
NI Human Rights Commission

# Why the use of Irish in the Courts is Important

Before outlining the recent interventions of the Human Rights Commission in relation to the 1737 Administration of Justice (Language) (Ireland) Act, I will first turn to the question of why providing for Irish in the courts is important in human rights terms.

**Why is providing for Irish in the Courts important?**

Those who argue against providing for Irish in the Courts often assert that most people, Irish speakers or otherwise, are not in Court that often and their interface with other areas of the state is generally more frequent, so why the attention to this area? However, providing for indigenous languages in court is clearly important in human rights terms – it is one of only a few areas of public provision to actually have its 'own' Article under the European Charter for Regional and Minority Languages. A human rights-based approach indicates four reasons why this area is important:

**Historical reversal:** It is notable that the approach taken by instruments such as the Charter mirror-images and reverses the original patterns of suppression against indigenous languages. Historically, indigenous and minority languages across Europe and beyond have been suppressed by the national or colonial projects of the powerful nation states. Such political projects were often monocultural and had seen 'linguistic unity' in their official language, and hence the development of a unilingual state, as a prerequisite to the dominance of their state-building or 'civilising' mission. In addition to directly coercive measures, what followed was often a familiar pattern of, first, banning the indigenous language within state institutions such as public office and the courts, and, subsequently, other institutions into which the state had expanded, notably the education system. The post-Second World War settlement, with the 1948 Universal Declaration of Human Rights and 1950 European Convention on Human Rights, saw steps to stem such practices. However this was largely limited to the inclusion of provisions to ensure that persons were not discriminated against on the basis of language in the enjoyment of other human rights. This protection of minority language rights relied on a largely passive formulation, not far removed from the concept of tolerance, which has subsequently developed over time to a requirement that states undertake proactive, positive measures to protect and support minority languages within their own territories. The manner in which such positive obligations, such as those in the Charter, have been codified demonstrates that such instruments regard a reversal of historical practices as important to present-day safeguarding, protection and development of indigenous languages.

**Linguistic status:** The second rationale is that of the linguistic status of the indigenous language. It is the case that most persons are not in Court that often; however when they are, it is often not on the basis of choice, but is what could be termed an obligatory interaction with the state. A ban or restriction on using an indigenous language within the Courts is a powerful statement by that state that the language is not recognised as having any 'official' status within the constitutional framework of that state. Equally a state providing for the use of the indigenous language within the Court system is a powerful statement that the language is indeed recognised as having an 'official' status within its legal and constitutional framework.

**Maintain/redevelop full spectrum of vocabulary:** The third reason is that of terminological potential. If a language is prevented from being used in any aspect of public provision, and hence is relegated to the private sphere only on that topic, that endangers or prevents growth of a full spectrum of vocabulary within the language. In the case of the restrictions of the 1737 Act the full spectrum of legal vocabulary within the jurisdiction is prejudiced. This risk, along with the issue of linguistic status, is reflected in paragraph 101 of the Explanatory Report to the Charter as follows:

> …allowing the use of regional or minority languages in relations with [the] authorities is fundamental to the status of these languages and their development and also from a subjective standpoint. Clearly, if a language were to be completely barred from relations with the authorities, it would in fact be negated as such, for language is a means of public communication and cannot be reduced to the sphere of private relations alone. Furthermore, if a language is not given access to the political, legal or administrative sphere, it will gradually lose all its terminological potential in that field…

**Freedom of Expression:** the final reason is that of the core human rights concept of freedom of expression. The preamble to the Charter sets out that the right to use a minority language in private and public life is an inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights and the spirit of the European Convention on Human Rights. Freedom of expression, in a court or elsewhere, would be a fairly limited concept if it only permitted freedom of expression in English; its application and meaning are of course much broader. The codification of minority language rights into instruments such as the Charter can be seen as a logical extension of many core human rights concepts such as those set out in the European Convention on Human Rights relating to freedom of expression, non-discrimination and the right to private and family life.

**Human rights framework and indigenous languages**

Having set out these four reasons, I would like to further explore the human rights framework pertaining to indigenous languages. It is notable that the European Convention, in addition to the above provisions, made two other specific provisions on language in relation to persons arrested or before a court (Articles 5 and 6) who do not understand an official language. However neither are usually regarded as within the family of minority language rights per se but rather are procedural or 'access to justice' rights relating to due process of law. Also implicit in non-discrimination is, for example, language support to afford access to other essential public services to speakers of migrant languages and sign language users. Such duties are, above all, derived from protections against discrimination on grounds of ethnicity or disability.

Indigenous languages can be defined as the languages that were commonplace before the rise of what is now the dominant language (here, English). It is important to stress that the range of minority language rights protections for indigenous languages are over and above those for other languages, for example the languages of new migrant populations. A codification of this formulation is found in instruments such as the 1995 Framework Convention for National Minorities. That Convention for example provides for adequate opportunities to be taught minority languages in areas inhabited by national minorities 'traditionally or in substantial numbers', and hence disapplies the numbers qualification for indigenous languages (Article 14(2)).

There are good reasons for affording specific protections to indigenous languages as provided for in the Charter, most notably that the instrument is designed to safeguard and protect the languages themselves and the cultural patrimony associated with them, rather than afford direct protections to individual users of the languages. The need for a language itself to be safeguarded differentiates indigenous from most migrant languages; for example, Mandarin Chinese, as it is spoken by the best part of one billion people worldwide, is not endangered and does not need such protections.

There are also questions of linguistic heritage and representation by the state. For example, specific commitments are made for Irish under the Charter in relation to material bearing place names, most commonly found in signage; this is not surprising as many Northern Irish place names are English translations, or more commonly, transliterations, of the original in Irish. There are of course minority language rights which are shared across categories - suffering the indignity of being discouraged by state actors from allowing your children to learn your family language as well the dominant language is something that can be shared by new migrants and indigenous language speakers communities alike.

It is also notable that the most recent UN Convention – the Convention for the Rights of Persons with Disabilities - provides a minority language rights approach beyond non-discrimination in accessing services. It remains the case however that there are human rights protections that are particular and specific to indigenous languages such as Irish, and most importantly particular protections for indigenous languages taking into account their specific circumstances should not be withheld simply on the basis that the same protections are not being afforded to other languages: this would be a misinterpretation of duties.

**Non-discrimination on grounds of language**

The European Court of Human Rights has held that differential treatment on the grounds of language is only discriminatory when there is 'no objective or reasonable justification' that pursues a legitimate aim. The Charter provides a similar formula by prohibiting 'unjustified' distinctions. In effect, decisions concerning distinctions on the basis of language have related to questions of what it is reasonable and proportionate for a public authority to provide in particular circumstances. Within this formulation due weight should be given to the specific circumstances of indigenous languages. Where the differential treatment relates to another European Convention right, a public authority will need to objectively and reasonably justify a decision not to provide for a minority language, or it can be held to have discriminated. One domestic judgment in 2005 where this was the case was Conor Casey v Governor of Maghaberry which found that restrictions on Irish in prison handicrafts were a disproportionate interference in freedom of expression.

The 'rights of others' framework, explicit under the Charter, also protects non-Irish speakers against discrimination. But it is important to stress that this does not entail a 'right' for non-Irish speakers not to have to listen to or deal with documents in Irish. In this context the rights of English speakers in public authorities can be met through provision of interpreting and translation. Nor are positive action measures for Irish taking into account the particular circumstances of the language to be considered discrimination, this is also explicit under the Charter.

In relation to the historical debate as to whether a primary purpose of the 1737 Act was to restrict the use of Irish, as that is clearly its effect the Commission

has not dwelt on the question of motivation. Two observations though. First it is not the only legislative measure to exclude Irish through explicitly stating setting out an 'English only' policy – for example the Public Health and Local Government (Miscellaneous Provisions) Act (Northern Ireland) 1949 did precisely that in relation to street signs.

Secondly, whilst the post-war UN human rights framework set out in instruments such as the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD) abhors colonialism and the practices of discrimination associated with it, in 1737 this was the ideology prevalent throughout the political and judicial machinery of the state. It was not uncommon to regard indigenous peoples, and their languages, as uncivilised and without the rights of citizenship and, at an extreme, as effectively non-peoples. The assimilation of colonised peoples and a linguistic shift in favour of the language of the metropolis, assisted at times by measures to repress the indigenous language, was regarded as a positive and 'civilising' process. Hence the lack of explicit reference to Irish in the Act does not necessarily mean that the imposition of standard English in the Courts was not intended to disadvantage the indigenous language.

**The Commission's interventions**

The Commission's view is that prohibition of the use of Irish in the Courts is incompatible with minority language rights, including the frameworks provided for by the Convention, Charter and Belfast (Good Friday) Agreement.

In relation to recent interventions by the Commission, in April 2010 the Commission responded to the Courts and Tribunals Service consultation on Court interpreting policy. Within this we sought legal certainty from the Courts Service as to its interpretation of the 1737 Act, and the basis for it. It is possible to read the 1737 Act as permitting the oral use of Irish in court, yet this would not appear to be the policy and hence interpretation of the Courts and Tribunals Service to date, except in the improbable circumstance that the Irish speaker was not also able to understand and use English.

April of this year also saw both the Committee of Experts (COMEX) monitoring report into compliance with the Charter, and the devolution of justice powers. Given this the Commission wrote to the new Justice Minister, David Ford MLA, drawing attention to the COMEX finding that the 1737 Act was an unjustified distinction (i.e. was discriminatory) and accordingly seeking detail on how he intended to repeal the 1737 Act and provide for the use of Irish in the Courts, or alternatively to set out his 'objective and reasonable justification' for not doing so.

COMEX stated that the UK had offered no objective and reasonable justification for the ban. It is worth highlighting that in human rights terms concepts such as 'insufficient community consensus' for reform, or that it is somehow wrong to 'impose' positive measures, do not constitute an objective and reasonable justification. In relation to the Irish Language Act, 'lack of consensus' was the reason given to the Commission by the Culture Minister, Nelson McCausland MLA, for not legislating, and in recent weeks our correspondence with him was the subject of an Assembly debate and of Commission evidence to the Culture Committee. To be clear about the Commission's position, the problem with 'community consensus' in human rights terms is that it would make rights subject to 'permission' from the majority. This is contrary to human rights principles, including those established by the European Court of Human Rights in relation to minority rights.

The Justice Minister's response was that the matter would be dealt with under an Irish Language Strategy to be prepared for the Executive by the Department of Culture, Arts and Leisure (DCAL). The legal requirement for a Strategy is contained in the Northern Ireland (St Andrews Agreement) Act 2006, but several years on this duty still remains unfulfilled. The Commission's view, set out recently in our submission to the recent Justice Bill, in which we highlighted addressing the 1737 Act as one of a number of matters which could have been dealt with by the Bill but were not, is that reform of the Act is a matter which could be referenced in the strategy, but that it need not await one.

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