The Slíbhín and the Créatúr: An Examination of the Lived Experiences of Regional or Minority Language Users within the Criminal Justice System

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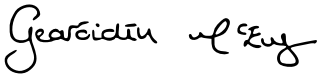
Signed: 

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Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994)

Human Rights Committee, General Comment 32, Article 14, Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007)

Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27): 08/04/94. CCPR/C/21/Rev.1/Add.5

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International Covenant on Civil and Political Rights (New York, 16 December 1966)

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Council of Europe Documents

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Other Regional Human Rights Documents

Organization of African Unity, *African Charter on Human and Peoples' Rights,* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Organization of American States, *American Convention on Human Rights,* (Costa Rica, 22 November 1969)

Irish Legislation and Statutory Instruments

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SI 658/2020 – *Irish Sign Language Act 2017 (Commencement) Order, 2020*

The Recognition of Irish Sign Language for the Deaf Community Bill, 2016 No 76 of 2016

Other Domestic Laws

Americans with Disabilities Act, 1990

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List of Abbreviations

ADA	Americans with Disabilities Act, 1990
ASL	American Sign Language
CJS	Criminal justice system
CDS	Centre for Deaf Studies
CODA	Child of a Deaf Adult
CPD	Continuous Professional Development
CRPD	Convention on the Rights of Persons with Disabilities
DCU	Dublin City University
ECHR	European Convention on Human Rights/Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FCNM	The Framework Convention on the Protection of National Minorities
GRU	Garda Research Office
HoH	Hard of Hearing
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
IRA	Irish Republican Army
ISL	Irish Sign Language
ISL Act	*Irish Sign Language Act, 2017*
ITIA	Irish Translators and Interpreters' Association
J	Justice/Judge
LPI	Legal Practice Irish
OLA	*Official Languages Act, 2003*
OSCE	Organization for Security and Co-Operation in Europe
REC	Research Ethics Committee
RML	Regional or minority language

S	Section
SLIS	Sign Language Interpreting Service
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States

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Abstract

The Slíbhín and the Créatúr: An Examination of the Lived Experiences of Regional or Minority Language Users within the Criminal Justice System – Gearóidín McEvoy

This thesis looks at how users of regional or minority languages engage with their right to a fair trial in the criminal justice system under the United Nations and Council of Europe systems of human rights. This is a socio-legal study of Irish speakers and Deaf, Irish Sign Language users in Ireland, investigating the lived experiences of those who have interacted with the criminal justice system.

Identity and identity perception are central to this project. Identity is both internally constructed and externally imposed on individuals. When the internally constructed identity is misunderstood, oversimplified or not visible to the majority or the authority, an othered minority can be treated with unfair bias and stereotyped. In the course of the research, two particular stereotypes or tropes arose, which Irish-speakers and Deaf people were faced with generally when they interacted with the criminal justice system. Firstly is the 'créatúr', coming from the Irish word meaning pitiful one, wretch or creature. It applied to Deaf people who were not seen as autonomous, competent beings, but rather as disabled and incapable of independent life. Secondly is the 'slíbhín' or the sneak or troublemaker. This narrative applied to both Irish speakers and Deaf people, but was most attributable to the former. The use of Irish was largely seen as malicious, and an attempt to frustrate the legal process, rather than an exercise in identity. The interviewed regional or minority language users were not seen in light of their true identities and this impacted their journeys through the criminal justice system.

This research explores beyond the limited impact of the minimum standards of the right to a fair trial, incorporating external factors that impact the right to a fair trial for RML-users, such as language stereotypes, police culture, and access to justice.

Chapter 1 – Introduction

1.1 Introduction

On the 15th December 1882, a man named Maolra Seoighe from county Galway,[1] Ireland, was hanged. Maolra was tried, convicted and sentenced to death for the murder of five people in Mám Trasna.[2] Maolra Seoighe did not speak English.[3] He spoke only Irish, and yet was represented by a barrister who did not speak Irish.[4] He was tried by an English speaking court.[5] There was no interpreter present to bridge the momentous gap in understanding for the accused.[6] Maolra Seoighe was in fact innocent, and had been convicted on the basis of perjured information.[7] And yet he sat, isolated and powerless in a court, unable to comprehend and unable to defend himself, only for the supreme power of the justice system to punish him with the ultimate price. In 2018, over 130 years after his unjust trial, wrongful conviction and wrongful execution, the President of Ireland issued a pardon to Maolra Seoighe.[8] This is a story of colonial rule, of outdated justice systems and power imbalance. But it is also a story of today. Linguistic discrimination and language as a barrier to accessing justice is still a reality in courts and criminal justice systems.

In 2016, a Deaf man and Irish Sign Language (ISL) user in Donegal, Ireland, was arrested and detained by An Garda Síochána (the police service in Ireland) and brought to court on charges of harassment.[9] John McGrotty, like Maolra Seoighe, did not speak English.[10] Like Maolra Seoighe, John McGrotty was subjected to an English speaking criminal justice system. And like Maolra Seoighe, John McGrotty was not provided with an interpreter.[11] Only when activists in the Deaf Community intervened was an ISL interpreter provided.[12] While the penalty in Mr

[1] Ó Cuirreáin *Éagóir: Maolra Seoighe agus dúnmharuithe Mhám Trasna* (Cois Life, 2017) at 112
[2] Kelleher ‘‘The shambles of Maamtrasna’: The case of Myles Joyce, hanged and pardoned’ *The Irish Times* (10 Nov 2018).
[3] *ibid.*
[4] Bairéad ‘Murdair Mhám Trasna’ (TG4, 4 April 2018).
[5] *ibid.*
[6] *supra* note 2.
[7] *supra* note 4.
[8] *supra* note 2.
[9] Harkin ‘Deaf man banned from Donegal for harassing family’ *The Irish Independent* (19 May 2016).
[10] Cradden ‘Deaf have human interpreter in court’ *Village Magazine* (9 June 2017).
[11] *ibid.*
[12] *ibid.*

McGrotty's case was not as severe as that in Maolra Seoighe's case,[13] the lack of access bears a striking resemblance. A man, engaging with the criminal justice system as an accused person, denied the opportunity to comprehend or participate. Both men epitomise a lack of awareness of, or a willingness to overlook, the risks associated when a language barrier is allowed to remain in the criminal justice system (CJS). Both men, I would argue, experienced injustice and a denial of their human rights.

Language is a core aspect of human life. It is through language that people find community and kinship. As stated in the Canadian Supreme Court in *Re Manitoba Language Rights*:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.[14]

Language allows us to understand the world around us, and to connect with others. In terms of the law, it is through language that laws are formed, that cases are heard and that matters are adjudicated. Not only a medium through which law operates, the two vignettes above show that language can be a contested issue in law, and pose a barrier to fairness and justice. In analysing their experiences, both Maolra Seoighe and John McGrotty represent minority language users, the focus of this thesis. In particular they are an Irish speaker and an ISL user respectively. English is the dominant, majority language in Ireland. It was the dominant language of power and authority in Ireland during Maolra Seoighe's time. These stories demonstrate how minority language usage can cause tension when it interacts with the organs of the state, and in particular, the CJS. Briefly, I will now contextualise Irish and ISL.

Irish is a Celtic language, native to Ireland. While once the vernacular language of Ireland, after colonisation by Britain, wherein laws were put in place which prevented the use of Irish,[15] Irish saw a steady decline in usage over the years, through deliberate efforts to circumvent the use of the language by the colonial powers, and through corresponding lack of opportunity associated with the use of Irish.[16] An Irish language revival movement at the

[13] In that Seoighe was sentenced to death.
[14] *Re Manitoba Language Rights,* [1985] 1 SCR 721 at para V.
[15] Phelan, *Irish Speakers, Interpreters, and the Courts, 1754 -1921* (Four Courts Press, 2019) at 19
[16] Crowley, *Wars of Words: The Politics of Language in Ireland, 1537-2004* (Oxford University Press 2005).

end of the 19th Century coincided with increased efforts for Irish independence.[17] This culminated the establishment of the Republic of Ireland in 1937, where Irish was given the primary constitutional status as the first official language of Ireland.[18] Learning Irish is a mandatory part of the Irish primary and secondary education systems, with certain exceptions.[19] This has not resulted in widespread resurgence of the language or a growth in fluency, but rather a general familiarity with the language.[20] In the most recent statistics, about 1.5% of the population in the Republic of Ireland are reported to speak Irish daily.[21] Irish is currently listed as 'definitely endangered' by the United Nations Educational, Scientific and Cultural Organization (UNESCO).[22]

Irish Sign Language is the indigenous language of Deaf people in Ireland.[23] At the outset the reader should note that ISL, like other signed languages is its own distinct language.[24] It is not a signed form or English or Irish.[25] The language is used by approximately 5000 Deaf people and an estimated 40,000 others.[26] Not all Deaf people have ISL as a language, and it should be noted that for generations in Ireland signed language usage was discouraged or banned in institutions which educated and housed Deaf people, based on the belief that signing was detrimental to the ability to acquire spoken language.[27] This policy, known as 'oralism' prioritised spoken language acquisition in Deaf people,[28] and discounted signed languages as actual languages.[29] This policy is similar in effect to the prohibitions on Irish-usage under colonial rule. As a result of this policy of oralism, many Deaf people experienced language deprivation,[30] being unable to acquire spoken language and being denied any opportunity to

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[17] O'Reilly, *Irish Language in Northern Ireland: The Politics of Culture and Identity* (Palgrave Macmillan 2014).
[18] Article 8, *Constitution of Ireland, 1937.*
[19] Notably for this research, Irish is not taught in Deaf schools to Deaf children.
[20] Romaine, 'Planning for the survival of linguistic diversity' (2006) Vol 5(4) Language Policy 443 at 456.
[21] See https://www.cso.ie/en/releasesandpublications/ep/p-cp10esil/p10esil/ilg/ [date accessed: 04 June 2021].
[22] http://www.unesco.org/languages-atlas/index.php [dated accessed: 04 June 2021].
[23] Rose and Conama 'Linguistic imperialism: still a valid construct in relation to language policy for Irish Sign Language' (2018) Vol 17(3) Language Policy 385.
[24] Leeson and Saeed, *Irish Sign Language: A Cognitive Linguistic Account* (Edinburgh University Press 2012)
[25] This is a common misconception about ISL. See Dermot and Dave Show 'Irish Sign Language Expert Shares Some Examples of ISL' *TodayFM* (05 March 2021), available at: https://www.todayfm.com/podcasts/dermot-dave/irish-sign-language-expert-shares-some-examples-of-isl [date accessed: 29 March 2021].
[26] https://www.irishdeafsociety.ie/irish-sign-language/ [date accessed: 04 June 2021].
[27] *supra* note 23.
[28] *ibid.*
[29] Gertz and Boudreault (eds), *The Sage Deaf Studies Encyclopedia* (SAGE,2016) at 117.
[30] Glickman and Hall, 'Introduction' in Glickman and Hall (eds) *Language Deprivation and Deaf Mental Health* (Routledge, 2018) at 2.

learn a signed language. ISL was recognised in legislation in Ireland in 2017.[31] There is no mandated learning of ISL in schools like that for Irish.

Both Irish and ISL are minority languages, indigenous to Ireland, where English is the majority language. In this work, I call both ISL and Irish regional or minority languages (RML). This term RML originates from the European Charter for Regional or Minority Languages (ECRML). The ECRML is a document offering protection for certain languages in the Council of Europe (CoE) which came into being in 1992. As it appears in the ECRML, the term refers to non-official,[32] minority languages which are traditionally located in a state.[33] Non-traditional, or migrant languages are not included in the ECRML definition. Throughout this research I will investigate the appropriateness of that distinction between traditional and non-traditional language users.

It ought to be noted that in the ECRML does not grant rights to individuals. As Grin notes:

> The Charter is not about rights. It is not about standards. It is not about national minorities. It is not even about members of minorities...The Charter is about languages – more precisely, the regional or minority languages of Europe – and about the measures required for safeguarding their existence in the long run.[34]

In this context, the individual cannot claim rights under the parameters of the ECRML. That being said, it is argued in the literature that the ECRML, through safeguarding of the languages under its protection, *de facto* creates rights for individuals. Ó Riagáin argues that:

> …every living language, by definition, has to have users. By conferring rights on regional or minority languages, the Charter, *inter alia* confers rights on those who use them.[35]

Parry notes that while the ECRML does not have legal force,

[31] Pursuant to the *Irish Sign Language Act, 2017.*

[32] While the ECRML does not apply to official languages, it has an applicability for 'less widely used' official languages. Swedish, despite being an official language in Finland, for example, has been protected under the ECRML by Finland. While Ireland is not a party to the ECRML, there is scope for Irish to be protected under the Charter. In addition, the ECRML refers only to spoken languages and at present, no state has protected a sign language under the ECRML.

[33] See Article 1 of the ECRML.

[34] Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages* (Palgrave Macmillan 2003) at 10.

[35] Ó Riagáin, 'The Importance of Linguistic Rights for Speakers of Lesser Used Languages' (1999) Vol 6 International Journal on Minority and Group Rights 289 at 293.

> it is also possible that, by signing up to the Charter's obligations, states will consequently create laws which then create legal rights for speakers of those languages.[36]

Woehrling also makes this claim, stating that

> The charter places obligations on states which accede to it. Those obligations require them to adopt the measures laid down in it, unless their domestic law already affords the same guarantees as in the charter. The obligations may result in rights for individuals.[37]

As such, while the text of the ECRML is clear that it protects languages, because languages must be used by people, it therefore creates *de facto* rights for individual RML users. This understanding of the ECRML will be applied throughout this thesis. Whether those rights are enforceable for individuals, however, will be a matter of contention. Additionally, it should be noted that Ireland is not a party to the ECRML. The ECRML offers protection to traditional, non-official languages. However, there is an exception in Article 3 for official langauges that are "less widely used". Irish was specifically considered in the creation of this provision, and so while it is an official language,[38] it is still understood as an RML in the meaning under the ECRML. Similarly, while no signed languages are presently protected under the ECRML, they still fall within the definition of RMLs provided,[39] and therefore within the parameters of this thesis, RML is used to refer to both Irish and ISL.

Briefly, it is important to discuss the development of the concept of a minority and to understand how minorities are constructed and understood.

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[36] Parry, 'Article 4: Existing Regimes of Protection' in *Shaping Language Rights: Commentary on the European Charter for Regional or Minority Languages in Light of the Committee of Experts' Evaluation* (Council of Europe Publishing, 2012) at 150.

[37] Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Council of Europe Publishing, 2005) at 31.

[38] Ruiz Vieytez, 'Article 1: Definitions' in *Shaping Language Rights* (Strasbourg: Council of Europe Publishing, 2012) at 73.

[39] It is acknowledged that the Charter refers to speech and speaking in its text, indicating perhaps a preference for spoken as opposed to signed languages. However, since the creation of the Charter, there has been greater understanding of the fact that signed languages are also langauges, and many countries have since acknowledged this. Therefore, it would be possible for states to protect signed languages under the ECRML. See https://wfdeaf.org/news/the-legal-recognition-of-national-sign-languages/ [date accessed: 30 August 2021].

1.2 Understanding a Minority

A minority necessarily exists as a contrast to a majority. The concept of a minority within a state, as we know it, coincides with the development of the nation-state. The idea of nation-states and nationhood began with the French Revolution. It was during this time that concept of "the equation nation = state = people"[40] came into being. Part of that equation included a recognition of homogeneity among the people who formed part of the state. The notion of one nation, one people and one language took hold, as May notes:

> …the model of the linguistically homogeneous nation-state…is actually only a relatively recent historical phenomenon, arising from the French Revolution of 1789 and the subsequent development of European nationalism. Previous forms of political organization had not required this degree of linguistic uniformity. For example, empires were quite happy for the most part to leave unmolested the plethora of cultures and languages subsumed within them – as long as taxes were paid, all was well. Nonetheless, in the subsequent politics of European nationalism – which, of course, was also to spread throughout the world – the idea of a single, common, "national" language…quickly became the leitmotif of modern social and political organization[41]

Hobsbawm also notes that in addition to its connection to geography and territory, nationhood was also inherently connected to language: "In a sense acquiring French was one of the conditions of full French citizenship (and therefore nationality) as acquiring English became from American citizenship."[42] This can be extrapolated to mean that as a people, the citizens of France were French-speaking. "French was essential to the concept of France."[43] The French Revolution, "through its democratic aspects, had a negative effect on regional minority cultures".[44] Since then, the "use of minority languages [in France] has…been perceived as anti-revolutionary, anti-republican and consequently, also anti-democratic."[45]

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[40] Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth and Reality,* 2nd ed. (Cambridge: Cambridge University Press, 1992) at 19.
[41] May, 'Language Policy and Minority Rights' in Ricento (ed), *An Introduction to Language Policy: Theory and Method,* (Blackwell Publishing, 2006) at 261.
[42] *supra* note 40 at 18.
[43] *ibid* at 60.
[44] Alcock, *A History of the Protection of Regional Cultural Minorities in Europe: From the Edict of Nantes to the Present Day,* (Macmillan Press Ltd., 2000) at 23.
[45] Trenz, 'Reconciling Diversity and Unity: Language Minorities and European Integration' (2007) Ethnicities, Vol 7, 157 at 162.

This negative effect manifested itself through attempts to "mould society into one culture", a mode of governance that became globally popular.[46]

Minority groups pose an opposition to the concept of a nation-state. They exist as counter to some or all aspects of nationalism and are thus treated as "*problems* for the nation-state."[47] The nation-state promotes ideals of sovereignty, unity and one-ness. The other is anything beyond that. As Hylland Eriksen states the "nation-state represents itself through nationalist ideology; that is, an ideology proclaiming the essential cultural unity of all its citizens."[48] In spite of this ideology, the idea that any nation is entirely homogenous in terms of race, religion, culture or language is wholly unsubstantiated in reality, "since most states contain minorities who do not define themselves as members of the group represented through state nationalism."[49] These groups may be indigenous, present in the territory long before the development of the state itself, descendants of colonial settlers, migrants to the state etc.. Therefore, there will necessarily be an objection to the *status quo* of a nation-state from the minority group who cannot fully identify with what is required of homogenous nationalism of their state. "Several rivalling nationalisms may exist within one nation-state; usually one of them is dominant and may refer to the others as 'ethnic', 'secessionist', 'regionalist', or even 'tribal'…".[50] The concept of nation-state then is rooted in a specific identity (the majority, homogenous, national identity) whereby a minority represents an othered, exceptional identity. By its make-up and definition:

> …the 'democratic' unity of a modern nation-state is nearly always parasitic on those whom it excludes from its unity – be they outsiders or insiders – or those who are compelled to join against their will.[51]

The minority groups who do not fit the mould are outsiders and the other. They are the ones who do not, cannot or will not conform to the unity of the nation and are therefore at risk of persecution or isolation as punishment. Coulmas as a result, describes "the nation-state as it has evolved since the French Revolution [as] the natural enemy of minorities".[52]

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[46] *supra* note 44.
[47] Hylland Eriksen, 'Linguistic Hegemony and Minority Resistance', (1992) Journal of Peace Research, Vol 29(3) 313 at 314.
[48] *ibid.*
[49] *ibid.*
[50] *ibid* at 315.
[51] *ibid* at 314.
[52] Coulmas, 'Language Rights: Interests of States, Language Groups and the Individual' (1998) Language Sciences 20, 63 at 67.

In discussing minority issues, it is important to address terminology. Defining a minority is somewhat of a contested term in the space.[53] At present, the UN Special Rapporteur on Minority Issues defines a minority as follows:

> An ethnic, religious or linguistic minority is any group of persons which constitutes less than half of the population in the entire territory of a State whose members share common characteristics of culture, religion or language, or a combination of any of these. A person can freely belong to an ethnic, religious or linguistic minority without any requirement of citizenship, residence, official recognition or any other status.[54]

It is reiterated that the main criteria for defining a minority under the Special Rapporteur's mandate is a numerical one, whereby the population constituting a minority must be less than that of the majority.[55]

Caportoti provided a well-known definition of minorities in 1977. This definition is described as the "best approximation of a generally applicable authoritative definition of minority".[56] Caportoti's definition differs from the above in the requirement that minorities do not hold a position of dominance in their state:

> …a group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity directed towards preserving their culture, traditions, religion or language.[57]

Caportoti links minority status to both population and power, therefore. Packer offers a far shorter definition, in explaining the concept of a minority as:

> …a group of people who freely associate for an establish purpose where their shared desire differs from that expressed by the majority rule.[58]

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[53] Packer, 'On the Definition of Minorities' in Packer and Myntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Institute for Human Rights, Åbo Akademi University, 1993) at 23.
[54] See https://www.ohchr.org/EN/Issues/Minorities/SRMinorities/Pages/ConceptMinority.aspx [date accessed: 10 April 2021].
[55] *ibid.*
[56] Jackson-Preece 'Beyond the (non) Definition of Minority' 2014 European Centre for Minority Issues, Issue Brief 30 at 5.
[57] Caportoti, 'The International Protection of Persons Belonging to Ethnic, Religious and Linguistic Minorities since 1919' (1977) United Nations Economic and Social Council at 96.
[58] *supra* note 53 at 45.

Packer positions minorities as defined by the majority, and their otherness to that majority. There is truth and accuracy in all of these definitions. In this research, I would err closer to that of Caportoti's definition, believing that a minority is not only defined by its numerically inferior status, but also by its lack of political power. However, in acknowledging that minority status is an identity, perception is also at the centre of understanding what constitutes a member of a minority group. Alfredsson notes in discussing minorities, where he states that there are "two poles: an individual decides that he/she is a member of a minority and a group accepts an individual as its member".[59] A minority must therefore involve an element of self and group determination, whereby an identity is assumed and that identity is accepted by others with that same identity as being legitimate.

1.3 The Right to a Fair Trial

To continue the discussion of Maolra Seoighe and John McGrotty, there were two major issues which emerge from the facts of both cases. Both men were RML-users as understood in this thesis. Both stories also centre around the CJS and issues of the right to a fair trial. Briefly, it is important to layout these issues in the context of this research.

The right to a fair trial is of basic importance and constitutes a fundamental right in many human rights documents. It is featured in the European Convention on Human Rights (ECHR) from the Council of Europe and the International Covenant on Civil and Political Rights (ICCPR) from the UN,[60] which are the focus of this thesis. It is part of the African Charter on Human and People's Rights,[61] the American Convention on Human Rights,[62] and the Charter of Fundamental Rights of the European Union.[63]

Under both the ICCPR and the ECHR, minimum standards are laid down. These minimum standards exist as safeguards for fairness because of the risks posed when a person stands

[59] Alfredsson, 'Emerging or newly restored democracies – Strengthening of democratic institutions and development' (1991) paper presented at Workshop I: Human rights, fundamental freedoms and the rights of minorities, essential components of democracy, Conference on Parliamentary Democracy, Council of Europe at 10.
[60] Articles 6 and 14 respectively.
[61] Article 7.
[62] Article 8.
[63] Article 47.

accused of a crime.[64] Primarily, an accused person faces the potential to be deprived of their liberty, but there is also the risk of fines, damage to their reputation, and the risk that a criminal conviction for certain crimes might impact their lives for years to come.[65]

The right to a fair trial seeks to safeguard against all of these risks, and ensure that a certain level of fairness is achieved in proceedings. The right to a fair trial encompasses a wide range of protections including the right to be free from undue delay, the right to communicate with counsel, the right to be present at trial and the right to an interpreter.

The minimum standards under the right to a fair trial in the ICCPR and the ECHR make specific protections for those who do not speak the language of the court. They ensure that an interpreter will be provided, free of charge,[66] and that the accused is informed of the charges against them in a language they understand.[67] These rights show a recognition in the ICCPR and the ECHR that language can pose a barrier to accessing fairness of trial, and that in ensuring fairness of trial, allowances for language need to be made. I am interested in exploring how the right to a fair trial is experienced for RML-users when they use their language, and whether their experiences are sufficiently protected by the minimum standards currently in place.

1.4 Access to Justice

Access to an interpreter was at issue for both Maolra Seoighe and John McGrotty. I would argue that on analysis of their cases, neither man could be said to have accessed justice. Access to justice is understood in this research as encompassing a holistic view of how a person experiences fairness within a justice system. It means that the barriers which exist in the justice system itself are removed. It also means that barriers which exist in society outside of the justice system, which nevertheless impact on a person's ability to arrive before the justice system, are removed. For John McGrotty and Maolra Seoighe, their languages and their identities as RML-users posed barriers too great for the CJS as it existed for both men.

[64] Council of Europe, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)* (30 April 2019).
[65] Convictions for certain crimes may bar a person from working in certain fields, and the impact of a criminal past can have a great impact on an individual's life, from job prospects to social and family life.
[66] Article 6.3(e) of the ECHR and Article 14.3(f) of the ICCPR.
[67] Article 6.3(a) of the ECHR and Article 14.3(a) of the ICCPR.

But also, we must look to the socio-economic and historic realities which surrounded their cases, and how these realities impacted their access to justice. Maolra Seoighe's trial took place under colonial rule, where Irish usage was oppressed and devalued for generations, by way of outlawing the use of Irish in courts, and banning Catholics (who were most likely to be Irish speakers) from working in the legal system.[68] John McGrotty's case came after generations of state-sanctioned language deprivation in the Deaf community,[69] before any legal recognition of ISL. In analysing their experiences, we must investigate what it means to have access to justice.

As it is understood in this research, access to justice is threefold.[70] It includes being able to participate in the justice systems which are already in place.[71] Neither John McGrotty nor Maolra Seoighe could participate as accused persons in the systems in place, because they were denied interpreters. But access to justice must also include laws and systems that were created with marginalised people in mind.[72] Neither Maolra Seoighe nor John McGrotty experienced a CJS that was built for them or for their needs as RML-users. Neither man had their language recognised in law, and so their needs went unknown to the CJS. Finally, access to justice must also include a wider, societal acceptance of a marginalised identity.[73] Where marginalise people are accepted and valued in society, then their needs are more likely to be understood and implemented into the systems built into society. Neither Maolra Seoighe nor John McGrotty lived in a society where their identities as RML-users were valued or included. When considering access to justice, we need to look beyond the four walls of the courtroom or the police station, and examine how they exist as RML-users in society. This research will examine the wider application of access to justice for RML-users, and investigate how their language and their identities impact that access to justice.

[68] Phelan, *Irish Speakers, Interpreters, and the Courts, 1754 -1921* (Four Courts Press, 2019) at 19.
[69] *supra* note 23.
[70] Bahdi, *Background Paper on Women's Access to Justice in the MENA Region* (International Development Research Centre (IDRC), Women's Rights and Citizenship Program (WRC) and the Middle East Regional Office (MERO), Middle East and North African (MENA) Regional Consultation, 9–11 December 2007, Cairo, Egypt).
[71] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 15.
[72] *ibid* at 14.
[73] *ibid* at 16.

1.5 Research Questions

This research looks at how RML-users access their right to a fair trial under the United Nations and Council of Europe systems of human rights. It is clear from the discussion thus far, that RML-usage can cause a tension in the CJS, as a disruption to the norm and a demonstration of othered behaviour by an accused. Where that tension manifests, there is a risk to the fairness of trial for an accused RML-user. This research is interested in investigating that tension.

The research is socio-legal in nature, conducting a case study by way of empirical research on individuals from two specific language groups: Irish speakers in Ireland and Irish Sign Language users in Ireland. Academic experts, members of the police service, lawyers who have worked with RML-users and RML-users who have experienced the criminal justice system first hand as suspects were interviewed for this research. In doing so, I aim to tackle the following research questions:

1. How do RML-users experience the right to a fair trial when using their language?
2. How do RML-users experience the criminal justice system (CJS) when using their language?
3. How do RML-users experience access to justice?

These questions will provide insight into how individual RML-users themselves engage with the justice system. They will provide a unique insight into the lived experiences of RML-users who have navigated the CJS, using their language.

In order to answer these questions, I conducted two case studies, one on Irish-speakers in Ireland and one on Deaf, ISL-users in Ireland. As minority groups in Ireland who use languages which are not the dominant language of the state, both groups fall within the understanding of RML-users in this research.

The right to a fair trial, as it exists under Article 14 of ICCPR and Article 6 of the ECHR is the focus of this thesis. Underpinning these rights is the principle of access to justice. I understand access to justice as it is articulated by Flynn,[74] Bahdi,[75] and Beqiraj et al.[76] In this literature, access to justice is understood as having three major components: procedural access;

[74] *ibid.*
[75] *supra* note 70.
[76] Beqiraj, McNamara and Wicks 'Access to justice for persons with disabilities: From international principles to practice' International Bar Association, October 2017.

substantive access and; symbolic access. Procedural access refers to a traditional view of access to justice and relates to "the process by which claims are adjudicated, generally in legal or administrative systems".[77] Substantive access "requires the development of laws and policies which promote substantive equality and stresses that this cannot usually be achieved without the involvement of the disadvantaged group".[78] Symbolic access, which is sometimes known as promotional access,[79] ensures that "individuals from marginalised communities are fully included and empowered to participate as equal citizens".[80] Seen this way, symbolic access ensures that marginalised people are empowered in society itself. The three aspects of access to justice underpin the right to a fair trial – without all of the aspects catered for, there is a lack of access to justice. If rights are provided for the benefit of all people, including the RML-users as it relates particularly to the right to a fair trial, then this furthers procedural access. If those laws are not created with RML-user input, with their specific needs and desired outcomes in mind, then substantive access is not achieved.[81] Additionally, if these laws exist but are gate-kept or impacted by wider societal barriers (such as stereotyping, biases, culture, etc) then there is a lack of symbolic access. Therefore the prevalence of stereotypes about identities, particularly minority identities, and the impact these stereotypes have on the individual's journey through the criminal justice system.[82] Without access to justice, the right to a fair trial remains theoretical and illusory.

It ought to be noted that while this research began initially as an exploration of human rights norms, and in particular, the right to an interpreter for accused RML-users, on collection and analysis of the data, it became clear that such a focus would be too narrow an approach to understand the lived experiences of those interviewed, and the a sociological understanding of their experiences would be necessary. As such, this thesis is socio-legal, with an emphasis on the holistic way in which RML-users experience the CJS and being accused persons, under the lens of access to justice, which in itself is a holistic view of fairness and human rights.

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[77] *supra* note 71 at 15.
[78] *ibid* at 14.
[79] *ibid* at 16 and *supra* note 70 at 3.
[80] *supra* note 71 at 16.
[81] See for example, the disparity in drafting between Article 27 of the ICCPR where minorities were generally depicted as an 'othered' problem for 'other states', versus the inclusive input from disabled people in the creation on the CRPD. See Thornberry, *International Law and the Rights of Minorities,* (Oxford: Clarendon Press, 1991) at 155 and *supra* note 71 at 14.
[82] See for example, literature on the overrepresentation of minorities in criminal justice systems.

At present, there is limited research on the lived experiences of RML-users under the right to a fair trial, the CJS and access to justice.[83] There is a vast body of research and evidence which shows that minority groups and minorities experience unfairness when they engage with the CJS. The state of the art at present tends to focus on racial minorities;[84] disabled people;[85] people with mental illness or;[86] indigenous minorities experiencing unfairness in engaging with the CJS across different jurisdictions.[87] The research in this thesis is unique in that it combines literature on identity and the self with literature on policing, the judiciary and with literature on access to justice in order to explore the experiences of RML-users as they navigate the CJS using their language. The multi-disciplinary approach will provide a richer understanding of how linguistic identity can inform how an individual is perceived in the CJS, how that perception will manifest in terms of the fairness of trial, and how their overall experience is underpinned by access to justice.

In terms of the two case studies, there exists some research on how Irish-speakers are perceived in society, or how the Irish language is viewed by the public. Irish is generally seen in a positive light in these studies.[88] However there is a lack of in-depth research on how those

[83] See Brennan and Brown *Equality Before the Law: Deaf People's Access to Justice* (Gloucestershire: Douglas McLean, 2004), where the experiences of Deaf people in the UK in the CJS are explored.

[84] Bergova, 'Trust in the State Courts: Hispanic and African American Communities' (2016) Vol 4(12) International Relations and Diplomacy 746, Hurwitz and Peffley, 'Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System' (2005) 67 The Journal of Politics 762, Rottman and Tomkins, 'Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges' (1999) Vol 36(3) Court Review: The Journal of the American Judges Association 24, Wortley and Owusu-Bempah, 'Unequal Before the Law: Immigrant and Racial Minority Perceptions of the Canadian Criminal Justice System' (2009) Vol 10 Journal of International Migration and Integration 447, Rich and Grey, 'Pathways to Recurrent Trauma Among Young Black Men: Traumatic Stress, Substance Use, and the "Code of the Street"' (2005) Vol 95 American Journal of Public Health 816.

[85] Richards and Ellem, 'Young People with Cognitive Disabilities and Overrepresentation in the Criminal Justice System: Service Provider Perspectives on Policing' (2019) Vol 20 Police Practice and Research 156, Riches et al 'Intellectual Disability and Mental Illness in the NSW Criminal Justice System' (2006) Vol 29 International Journal of Law and Psychiatry 386.

[86] Henderson, 'Gaols or De Facto Mental Institutions?: Why Individuals with a Mental Illness Are Over-Represented in the Criminal Justice System in New South Wales, Australia' (2007) Vol 45 Journal of Offender Rehabilitation 69, Brandt, 'Treatment of Persons With Mental Illness in the Criminal Justice System: A Literature Review' (2012) Vol 51 Journal of Offender Rehabilitation 541.

[87] Bowcott 'Ethnic Minorities get tougher sentences due to distrust in the courts' *The Guardian* (28 March 2017), Mincéirí or Irish Travellers are overrepresented in Irish prisons. See Holland 'Disproportionate numbers of Travellers in prison population' *The Irish Times* (20 Oct 2017), O'Brien 'Government wants to lower Māori prison stats but hasn't set specific target' *NewsHub* (21 August 2018), Australian Law Reform Commission, *Pathways to Justice – Inquiries into the incarceration rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2017).

[88] See Darmody and Daly 'Attitudes towards the Irish Language on the Island of Ireland' 2015 Foras na Gaeilge.

perceptions translate into the CJS, and how Irish language usage might impact an individual's engagement with their entitlements under the right to a fair trial and access to justice.

In respect of the Deaf community, Brennan and Brown have conducted research on how Deaf people in the UK experience access to justice.[89] While their research is ground breaking, it does not engage with the right to a fair trial, or human rights law generally, nor does it engage with identity literature, as this thesis does. Aside from Brennan and Brown's work, there is also research which focuses on how Deaf people experience being victims of crime.[90] This work shows to some level how Deaf people experience access to justice, but it is of course limited to those who are victims rather than suspects. Otherwise there is a general gap in knowledge that exists around how RML-users can be treated because of their language, and how their language might impact their experiences in the CJS.

This research aims to address that gap in knowledge. The work is original in that I combine literature on policing and the judiciary with literature on identity to understand how the duality of identity (the internal and the external, as will be addressed in the next chapter)[91] is likely to be experienced for RML-users in the CJS. In addition, to this point literature on access to justice has been used to explore how women in the Middle East,[92] disabled people,[93] and refugees and asylum seekers experience the justice system.[94] This research is original in that it expands on access to justice literature, by applying it to RML-users for the first time, representing an original contribution to the field. In addition, in conducting empirical research and interviewing RML-users about their experiences, this research centres the lived experiences of RML-users in order to engage with the research question. This research is unique in that it gives a space to those who have traditionally been marginalised to share their experiences and to learn from those experiences.

[89] *supra* note 83.
[90] Edwards et al, 'Access to Justice for People with Disabilities as Victims of Crime in Ireland.' (2012) National Disability Authority, Dublin.
[91] See Goffman, *The Presentation of Self in Everyday Life,* (London: Penguin Books, 1969) at 14.
[92] *supra* note 70.
[93] *supra* notes 71 and 76.
[94] Manhart, '"Backpack Refugee Rights Lawyering" in Greece – Access to Justice through Legal Empowerment' 2019 Vol 7(1) International Human Rights Internship Program Working Paper Series 38.

1.6 Thesis Parameters

At the outset, the parameters of the research should be borne in mind by the reader. Primarily, the research herein is not a representative study, and cannot speak to the experiences of all Irish-speakers, Deaf people or all RML-users who encounter the CJS. The research presents only the experiences of those who have been interviewed.

Additionally, the research focuses only on the right to a fair trial, rather than on rights relating to arrest and detention. While rights regarding arrest and detention could apply to many instances which are described in this work, the right to a fair trial encompasses these instances also, and so it has been the only human right analysed.

In terms of the literature informing the research, the work in this thesis is contextualised through literature on identity, with notable focus on the work of Erving Goffman. Undoubtedly it would have been possible to contextualise the work through engagement with other fields, such as linguistics, psychology or criminology. The focus here however is limited to a discussion on identity. As a result of the focus on identity, this research does not seek to define what it means to be a minority, or who is or is not a member of a specific minority. It is not the aim of this thesis to define what it means to be an Irish-speaker or a Deaf person.

For the methodology, I have looked at this research through the lens of hermeneutic phenomenology,[95] as I believed it would be the best way to engage with the research questions. In doing so, it should be noted that my own experiences as a researcher are relevant to how the research has been conducted and analysed. The reader should expect to encounter my identity throughout the work, in line with the chosen methodology. I discuss the decision making process around the methodology, and the methods used to conduct the work in Chapter 9.

Those who were interviewed for this work comprised of three categories of person only: Criminal Justice Subjects;[96] lawyers and experts. I have not interviewed judges, court clerks or interpreters in pursuit of the research questions. The reasoning behind this is discussed in Chapter 9.

In placing these parameters around the work, I have been able to more closely consider the research questions and provide more robust and well-rounded research.

[95] Heidegger et al, *Being and Time* (Harper Perennial/Modern Thought 2008).
[96] As will be defined in Chapter 9.

1.7 Thesis Structure

This research will be broken up into three parts: Part I: Identity; Part II: Human Rights and; Part III: Findings. Firstly, in Part I: Identity, I address literature on identity to engage with what is understood by RML user. In Chapter 2, I explore the construction of identity and the concept of the stigmatised other,[97] the duality of identity (both the external and an internal aspects of identity)[98] and the specific criminal justice context of identity.[99] In Chapter 3, I explore the specific construction of identity for RML-users and for both Irish-speakers and Deaf people specifically.

Secondly, Part II: Human Rights comprises of five chapters. Chapter 4 focuses on the three components of access to justice which underpin this work: procedural access; substantive access; and symbolic access as explained above. In Chapter 5, I explore the minimum standards of the right to a fair trial, with specific emphasis on the right to an interpreter as the central right which impacts other language users. Chapter 6 details those aspects of the right to a fair trial which can be impacted by language, the corresponding jurisprudence stemming from the UN Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) and the relevant literature. This discussion is underpinned by the concept of procedural access to justice. In Chapter 7, I discuss the issue of RML-usage in the CJS and the right to equality and non-discrimination. This is underpinned by a focus on procedural and substantive access. Then Chapter 8 discusses substantive and symbolic access in international law, with a discussion on the perceptions of minorities in international human rights law. I discuss how protections of minorities came to be, and how they are adjudicated today. In addition, I also provide a discussion on the specific protections for RML-users in the International Criminal Court (ICC) as compared to the HRC and the ECtHR.

In Part III: Findings, I engage with the data collected, combining the research in the Identity part and the Human Rights part with the qualitative data. Chapter 9 details the methodology and methods selected to pursue the research questions. In Chapter 10, I engage with procedural access and explore the instances where interviewees referenced the minimum

[97] Looking particularly at Goffman's work on stigma in *Stigma: Notes on the Management of Spoiled Identity* (New York: Simon and Schuster, 1963).
[98] *supra* note 91.
[99] Research on cop culture and judicial bias as it relates to minorities and RML users.

standards of the right to a fair trial.[100] This details how they experienced these rights in conjunction with their RML identity, exploring what rights were actually available to them. Chapter 11 looks at substantive access by exploring how RML-users are perceived and how their identities impact their progression through the criminal justice system. In Chapter 12, I engage with literature on 'cop culture'[101] and judicial bias,[102] as detailed in Chapter 2, to provide context for how the laws in place are experienced by the RML-users interviewed and how police and judicial attitudes affect symbolic access. Finally, in Chapter 13, I explore symbolic access and the interviewees experiences of being empowered (or lack thereof) within the criminal justice system. I will explore how their identities were respected and acknowledge throughout their experiences.

1.8 Conclusion

Language binds us to each other and to culture. It is through language that people can connect to a culture. According to Ríos, "the blueprint for a culture is embedded in language".[103] In respect of Maolra Seoighe and John McGrotty, both men were bound to their communities and to their selves by their languages. But both men experienced injustice because of their language and culture, and because of the CJS's failure to account for that language and culture. In this research, I aim to investigate experiences like those of Maolra Seoighe and John McGrotty and to shine a light on their experiences as they engage with the CJS.

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[100] Such as issues surrounding communication with counsel, delay, interpreter access and presence at trial.

[101] Reiner *The Politics of the Police,* 4th edition (Oxford: Oxford University Press, 2010). See also Loftus, *Police Culture in a Changing World,* (Oxford: Oxford University Press, 2009), Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge: Cambridge University Press, 1997); Bowling and Phillips 'Disproportionate and Discriminatory/ Reviewing the Evidence on Police Stop and Search' 2007 Vol 70(6) The Modern Law Review 936, Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* (New York: Russell Sage Foundation, 1981) at 196, Lopez 'Disorderly (mis)Conduct: The Problem with 'Contempt of Cop' Arrests' 2010 American Constitution Society for Law and Policy Issue Brief available at: http://cdn.ca9.uscourts.gov/datastore/library/2015/08/10/Velazquez_ContemptOfCop.pdf [date accessed: 08 July 2020].

[102] See Clair and Winter 'How judges think about racial disparities: situational decision-making in the criminal justice system' 2016 Vol 54(2) Criminology 332, Enright, McCandless and O'Donoghue, *Northern/Irish Feminist Judgments Project* (London: Hart Publishing, 2017), Cahillane 'Judicial Diversity in Ireland' 2016 Vol 6(1) Irish Journal of Legal Studies 1, Carroll-Mac Neill, *The Politics of Judicial Selection in Ireland,* (Dublin: Four Courts Press, 2016).

[103] The Vocal Fries Podcast 'Borderlands/La Frontera' (13 November 2017), https://vocalfriespod.com/2018/09/19/transcript-8-borderlands-la-frontera/ [date accessed: 03 May 2021].

Moving forward from this point, I begin to engage with the research questions, as posed above. Central to this research is the belief that languages are important cultural and identity markers, and their use in criminal law settings is significant. In using their language, RML-users are not just communicating with the CJS, but they are also communicating their identity and their self to the CJS. It is significant then how they are treated on the foot of that communication. This thesis aims to explore this phenomenon, beginning with a discussion on identity, before moving on to a discussion of the law and finally, an analysis of the data collected. Access to justice as it is understood herein will constitute the main lens through which these phenomena are understood.

These three aspects of access to justice are connected. If one aspect is lacking, then access to justice cannot be said to have been guaranteed, based on Bahdi and Flynn's descriptions of access to justice. If an RML-user has a right to use their language with police (procedural access), but no training has been provided to police to facilitate their ability to respond (substantive access), or the negative stereotypes which police may harbour about such RML-users (symbolic access) interfere, then there is a lack of access to justice. When viewing the right to a fair trial only in terms of purely procedural access, we fail to see the actual lived experiences and real-world access to justice. This research aims to provide a holistic view of the lived experiences of the right to a fair trial, in terms of access to justice for RML-users.

Part I: Identity

Chapter 2 – Identity Construction and the Criminal Justice System

2.1 Introduction

RML-users and their experiences are at the core of this research. It is through the lens of RML-users' experiences that the right to a fair trial and the CJS will be considered. As such, this thesis interrogates what it means to be an RML-user, as this meaning will shape their experience. Such close examination is necessary in order to understand what it means for people to be an RML-user. In doing so, I explore literature on identity and the self to understand how identity is constructed, how it exists and is communicated, allowing for a richer understanding of the experiences of specific RML-users.

This chapter and the next look at the identity of RML-users. In this chapter, I address literature on identity. Goffman's work on the self and stigma is addressed in detail to provide a foundational understanding of what identity means and how identity is constructed in society. Secondly, I engage with literature on policing to gain an understanding of how police view the world, and how in turn, they come to view RML-users. Third, I mirror this approach in respect of judges and explore literature on judicial bias in an effort to understand how judges might view RML-users as accused persons. While there are other actors in the CJS, the focus in this research is on police and judges, as the two main professions which arose as issues in interviews.

At the outset, it is acknowledged that Goffman's work is old at this point, and particularly as it relates to this work, contains outdated language to refer to and deal with marginalised groups, including Deaf people.[1] That being said, Goffman's work is still notable and central in sociological study. His work has been the basis for other work which is referred to in this

[1] Goffman cites instances of attempts to 'cure' Deaf people of being Deaf, for example, which is rejected in the Deaf community today. See Goffman *Stigma: Notes on the Management of the Spoiled Identity,* (Penguin Books, 1990) at 20.

chapter.[2] Goffman's work still holds great relevance and is the source of much of the sociological research contained herein. As such, I will be using Goffman and his theories on stigma, identity, known-aboutness and passing going forward.

The purpose of this chapter is to provide an understanding of the nature of identity construction and how othered identity is perceived in the CJS. It acts as a foundation for the following chapter, where the identity of both Deaf people and Irish-speakers is addressed. I now begin with a discussion on the construction of identity.

2.2 Identity: The Internal and the External

This section establishes what is generally understood by the term 'identity' within this research. Constructing a catch-all concept for identity is fraught with difficulty. Identity is both individual and collective. Riley explains that on:

> …the one hand, we use 'identity' to talk about what makes individuals just that, individual. What makes 'me' *me,* as opposed to all other individuals, the agent of my actions, the continuing locus of my thoughts and memories, separately embodied in a numerically and physically distinct organism…On the other hand, we use 'identity' to talk about what makes this individual like other individuals in terms of shared characteristics, memberships…[etc.][3]

Thus there is both an individual and a collective understanding to identity. Community and belonging are important elements of identity. As philosopher and psychologist William James noted in 1890, personal identity is the "consciousness of personal sameness."[4] This implies that identity requires a link to others who also subscribe to the same characteristics, establishing it as a group-based concept. Hogg refers to a social group as:

> …more than two people who share the same social identity. They identify and evaluate themselves in the same way and have the same definition of who they are, what attributes they have, and how they relate to and differ from people who are not in their group…[5]

[2] Newton, Butler, Cusack et al, Katz, Millen and Walker, etc.
[3] Riley, *Language, Culture and Identity: An Ethnolinguistic Perspective,* (Continuum, 2007) at 87, 88.
[4] James, *The Principles of Psychology, Volume 1,* (Dover, 1995) at 331.
[5] Hogg, 'Social Identity Theory' in *Contemporary Social Psychological Theories,* Burke ed., (Stanford, Stanford University Press: 2006) at 111.

In this way identity is about sameness. It is formulated through commonality and connection. But it is also fundamentally formulated though difference:

> Identity is always and everywhere formed in the dialogue with others, symbolic or real, who are different, whose difference from you and yours from them is made manifest in the claim for identity. In other words, the only fixity in the process of identification is the necessary connection, the relationship, with the other who is different.[6]

As people, we can only know what we are by comparison to what we are not. We find commonality with peers only through difference from others. Goffman refers to those in the majority or those who do not depart from societies expectation, as "the normals"[7] and those beyond that are in possession of an otherness or a stigma.[8] A stigma, an essential concept in this space, is a deviation from the anticipated norm. Goffman says that there are three different types of stigma: firstly, "abominations of the body" which are "physical deformities"[9]; secondly "blemishes of individual character" which denote weakness of will or "unnatural passions" such as addiction or criminality[10]; third, there is "tribal stigma" which constitutes inherited otherness, such as race, religion and nationality.[11] A minority group has a particular stigma or set of stigmas which sets them apart as different to the normal or the majority. They are identifiable through this otherness. However, what is understood by this otherness and differentiating factor or factors is subjective.

What this means is that a person's identity is both personal and public. There is an internal and an external element to identity. Famously, Goffman notes in *The Presentation of the Self in Everyday Life* that the individual "intentionally or unintentionally *expresses* himself, and the others will in turn have to be *impressed* in some way by him".[12] What individuals understand by their presentation of their self or their otherness, what meaning they seek to express to the world by their performance is not always aligned with what the world understands, or is impressed by, from that same performance. This is an important feature of this research.

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[6] Blot, *Language and Social Identity,* (Praeger, 2003) at 8. See also, Bucholtz and Hall, 'Language and Identity' in *A Companion to Linguistic Anthropology,* Vol 8, Duranti ed. (Blackwell Publishing, 2004) at 371.
[7] Goffman *Stigma: Notes on the Management of the Spoiled Identity,* (Penguin Books, 1990) at 15.
[8] *ibid.*
[9] *ibid* at 14.
[10] *ibid.*
[11] *ibid.*
[12] Goffman, *The Presentation of Self in Everyday Life,* (London: Penguin Books, 1969) at 14.

What an individual or minority group might see as a source of pride, identity and unity, the majority may see otherwise, potentially as destructive, deviant or undesirable.

This disconnect between what one internally perceives as their self and what is externally perceived is linked to what Goffman calls the "known-about-ness"[13] of a stigma. "Known-about-ness" is what society perceive of an othered person or group, based on the expression of their otherness, but also the previous knowledge that the observers had about the otherness. "Known-about-ness" may be "derived perhaps from gossip or a previous contact with the person when the stigma was visible".[14] As such, "known-about-ness" can be informed by stereotypes in society, or visible tropes about particular groups. If the major understanding of a group comes from an oversimplified, possibly derogatory trope dominant in society, this will inform the known-about-ness of that group.[15] Cusack et al. note that:

> …stigma is this gap between the virtual and the actual…one of the important features of Goffman's work is its emphasis on the way in which others make demands on us on the basis of our public image.[16]

This gap, which forms the basis for stigma, is the disconnect described above. An oversimplification or a generalisation of a particular group can mean that a person's language, religion, ethnicity, sexuality or race, etc. is misunderstood and subsequently a source of discrimination. Minority groups can then experience treatment which is informed by their known-aboutness, rather than by their true selves (and true needs).[17] In the context of criminal justice, it can lead to a situation whereby a marginalised, minority group is seen as deviant and troublesome at face value, and they are treated as such. This matter will be discussed below in respect of police and judges and their view of stigma and othered persons but it is also the core of the empirical work: to see the disconnect between how RML-users see themselves, and how they are treated by the CJS.

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[13] *supra* note 7 at 65.

[14] Katz, *Stigma: A Psychological Analysis,* (New York: Psychology Press, 1981) at 3.

[15] See for example, depictions of transgender people in television and film as sexually deviant, mentally ill or for comic effect in Feder 'Disclosure: Trans Lives on Screen' (Netflix, 19 June 2020).

[16] Cusack et al, 'Dancing with Discrimination: Managing Stigma and Identity' 2003 Vol 9(4) Culture and Organization 295 at 299.

[17] *supra* note 7 at 65.

2.2.1 Passing and Pride

In continuing the discussion on identity and stigma it is prudent to address how people with a stigma respond to that disconnect and manage that stigma in society. Those with a stigma may seek to hide their otherness in order to safely exist in society, free from the negative consequences of a visible otherness. "Passing" is one such a phenomenon where stigma is concealed and managed, and people "pass" as non-stigmatised people. Goffman describes passing as "the management of undisclosed discrediting information about self".[18] It is connected to the self as a performance and involves downplaying or "undercommunicating"[19] a stigma before a particular audience. It can be seen in the context of sexuality where queer people might seek to undercommunicate stereotypical queer characteristics and "pass" as heterosexual in order to live safely in a hostile environment. Leary refers to passing as a "cultural performance whereby one member of a defined social group masquerades as another".[20] It may be a conscious or subconscious performance or masquerade, with self-preservation at its core. Leary describes the situations where passing might occur:

> Passing occurs when there is perceived danger in disclosure. At its most extreme, it is a form of camouflage to sequester the self from expected trauma. It represents a form of self-protection that nevertheless usually disables, and sometimes destroys, the self it means to safeguard.[21]

Passing then can constitute behaviour that acknowledges the stigma associated with a particular identity, and seeks to hide that identity to avoid the stigma. But passing also damages the self, undermining the person's identity to the point of destruction. While passing may be about self-preservation in the moment, the effect of passing may ultimately cause damage to the self. Millen and Walker explain the phenomenon of passing as follows:

> …people adopt coping strategies generically called 'passing', that are a cluster of social interactions employed to protect themselves and their senses of self from detection by normal others and avoid the full weight of stigma.[22]

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[18] *ibid* at 42. See also Kanuha 'The Social Process of "Passing" to Manage Stigma: Acts of Internalized Oppression or Acts of Resistance?' (1999) Vol XXVI(4) Journal of Sociology and Social Welfare 27.
[19] *supra* note 12 at 87.
[20] Leary, 'Passing, Posing and Keeping it Real' 1999 Vol 6(1) Constellations 85 at 85.
[21] *ibid*.
[22] Millen and Walker,' Overcoming the stigma of chronic illness: strategies for normalisation of a "spoiled identity"' 2001 Vol 10(2) Health Sociology Review 89 at 92.

Passing is about navigation through the world, and about protecting oneself from the treatment associated with one's identity. There are spaces where overt communication of identity and stigma are welcome and safe endeavours, and there are those spaces where it is safer to pass. In her sociological study on drag queens or female impersonators, Newton encountered this navigation among "stage impersonators" or performing drag queens who all admitted to passing, and avoiding other stage impersonators in their off-stage life.[23] In their off-stage life, the performing drag queens tended to "look like bland, colorless men"[24] in contrast to their on-stage lives. The drag bar was a safe space to overtly communicate this aspect of their identity, whereas in the largely heterosexual, heteronormative society outside of this space, it was safer to pass.

Passing can be seen in RML communities also. Users of other languages may seek to disguise their accents when using the majority language so as to pass as a member of that linguistic community and conceal their otherness. A common feature within the Deaf community is a phenomenon known as the 'Deaf nod'. Vernon and Greenberg explain it as such:

> the deaf person will behave as a hearing person does when talking to a non-English-speaking person in a foreign country. Rather than appear stupid and continually ask the speaker to repeat or explain, the deaf person tends to smile, nod his/her head, and, in general, acquiesce.[25]

The Deaf nod is behaviour to facilitate passing in a hearing-dominant world. In the context of the CJS, if police or judges are unfamiliar with the Deaf nod, it can give rise to grave situations where Deaf people acquiesce to confessions, convictions or the waiving of certain rights without fully understanding the process.[26] For Irish speakers, passing can be a daily occurrence and even a necessity, where they speak English in public and when engaging with society,[27] rather than overtly displaying their identity as Irish speakers.

Since Goffman first wrote about stigma, there have been multiple, high profile movements from minority groups rejecting the expectation of shame and stigma, and responding to

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[23] Newton, *Mother Camp: Female Impersonators in America,* (Chicago: University of Chicago Press, 1972) at 15.
[24] *ibid* at 15.
[25] Vernon and Greenberg 'The Miranda Warnings and the Deaf Suspect' 1996 Vol 14 Behavioral Sciences and the Law 121 at 127. See also Shine 'Documenting current practices in the management of deaf suspects in the USA' (2019) Vol 42(3) Policing: An International Journal 347 at 350.
[26] Miller and Vernon 'Assessing Linguistic Diversity in Deaf Criminal Suspects' 2002 Vol 2(4) Sign Language Studies 380 at 386.
[27] While it is possible that there are some monoglot Irish speakers or speakers who do not have English, the vast majority of Irish speakers also speak English to native level and engage with English regularly.

expectations of stigma by embracing the othered identity. Civil rights movements among Black people in the USA, the Stonewall riots, disability rights movements, etc. have all contributed to minority groups taking ownership and pride in their alleged stigma. Hylland Erikson writes about a "revitalisation movement" amongst indigenous Sámi communities in Norway "reminiscent of the 'Black is beautiful' movement in the US".[28] Some Sami people, traditionally shamed and stigmatised for their ethnicity, have taken to embracing their ethnic identity.[29] So too have there been movements to encourage pride in Deaf identity;[30] disabled identity;[31] and minority language identity. Pride movements encourage acceptance of the alleged stigma. As with passing, embracing and communicating one's identity with pride is a method of stigma management, where the expectation of shame is rejected, and the othered identity is celebrated. That is not to say, however, that overt communication of pride in an identity is a constant. Depending on the arena, communication of certain aspects of identity will be more or less appropriate, as with Newton's example above.[32] In the context of this research, while an individual might be a proud member of their linguistic and cultural community, they may also favour passing as a member of the majority linguistic community before police or judges, lest they be met with the stigma (known-aboutness)[33] associated with that identity. There are a range of responses to stigma available to individuals which may be applied contextually in order to manage that stigma and navigate daily life.

The following sections addresses stereotypes and the external construction of minority identity which flow from the police and the judiciary.

2.3 Cop Culture and the External Identity

Identity is made up of two parts: the internal, true self, and the external, perceived self as discussed.[34] In the context of the CJS then, it is important to explore how operatives of the CJS might be likely to perceive othered persons and their external identity and whether this

[28] Hylland-Eriksen, *Ethnicity and Nationalism* (London: Pluto Press, 1994) at 36.
[29] *ibid* at 36.
[30] See Chapter 3 for a discussion on Deaf culture.
[31] See Martin 'Disability Identity – Disability Pride' 2012 Vol 16(1) Perspectives: Policy And Practice In Higher Education 14.
[32] *supra* note 23 at 15.
[33] *supra* note 7 at 65.
[34] *supra* note 12.

is occurs at an occupational, rather than individual, level. I look at police and the intersection of police culture with minorities and identity.

Reiner's research on "Cop Culture" provides a comprehensive breakdown of police behaviour. When we can understand how police operate, we can better understand how and why they perceive an individual or group in a certain way. Therefore, we can understand how a person's identity is likely to be treated by police and within the CJS itself. Reiner argues that the police have their own occupational culture or set of beliefs and values, which influences how they utilise their powers. There are common characteristics to be found in "cop culture",[35] which inform that use of police discretion. While discretion is a necessary aspect of policing to allow for specific situations and individual circumstances, it also leaves spaces for the potentially negative aspects of policing. Research has upheld the existence of this cop culture among police forces globally.[36] Reiner describes seven characteristics of police culture, which shape police perspectives and actions.

The first characteristic combines mission, action, cynicism and pessimism. The job of policing is viewed by police as more than just a job, but as a way of life, where they represent the thin blue line between order and chaos. Police have a thirst for action, which can be a fun game of wit and skill, where they represent the 'good guys'. Police also tend to develop bitterness, viewing "social trends in apocalyptic terms, with the police as a beleaguered minority about to be overrun by the forces of barbarism."[37] Second, Reiner talks about suspicion as a characteristic of cop culture. Inherent to policing is constant and unrelenting suspicion. Being constantly on the lookout for crime, however, leads to stereotyping. This stereotyping leads then to self-fulfilling prophecies, whereby groups suspected of criminality are over-policed which leads to a "vicious cycle of deviance amplification."[38] Isolation from those outside the police, and solidarity among police represents a third characteristic of cop culture where there is a tendency to close ranks against scrutiny. This isolation and solidarity against the outside gives rise to categorisation of people with whom the police interact. They include "good class villains"[39] or professional criminals who are worth police time; "police property"[40]

[35] Reiner *The Politics of the Police,* 4th edition (Oxford: Oxford University Press, 2010) at 115.
[36] See Loftus, *Police Culture in a Changing World,* (Oxford: Oxford University Press, 2009).
[37] *supra* note 35 at 120.
[38] *ibid* at 121.
[39] *ibid* at 123.
[40] *ibid* at 123, 124.

who are marginalised groups in society who pose a problem to the public; there is also rubbish;[41] challengers;[42] disarmers;[43] do-gooders[44] and politicians.[45] A fourth characteristic which Reiner talks about is pragmatism.[46] Police have a down-to-earth, anti-theoretical attitude in the carrying out of their duties. There is a preference for less paperwork, less convoluted course of action. Police will opt for the most straightforward option. Additionally, there is an aversion to innovation, experimentation or research due to this pragmatism. Other characteristics of police culture which Reiner describes are police conservatism,[47] machismo[48] and racial prejudice.[49]

Beyond Reiner's research, there is other work which informs us as to how police perceive the world around them and react in certain situations. In his work on police discretion, Brown refers to the idea that police will negatively react to others or othered behaviour. Brown refers to the process of identifying deviance as an 'attitude test' conducted by police:

> One of the most frequently used, though rarely acknowledged, criteria that a patrolman uses in making decisions is what has been euphemistically called the "attitude test." A rough but accurate definition of the attitude test is that the person confronted by police authority must exhibit acceptance of that authority and deference to the officer and his admonishments. It is rooted in two requirements of police work: the necessity of maintaining control on the street and the necessity of assessing an individual's willingness to mend his ways. These two requirements are not mutually exclusive and they are often combined; but circumstances may enhance the emphasis on one rather than the other.[50]

Where an individual fails the attitude test then, by failing to display appropriate deference to police authority, police can react negatively and this is an example of how the culture (specifically the characteristics of conservatism and stereotyping) can influence the use of

[41] People who are seen by police as messy and unworthy of police time. *ibid* at 124.
[42] Those who have access to police society beyond what is publicly visible, such as doctors, lawyers, social workers, researchers. *ibid* at 124.
[43] People who are hard to deal with because they are socially vulnerable. *ibid* at 125.
[44] People who are critical of the police. *ibid* at 125.
[45] *ibid* at 125.
[46] *ibid* at 131, 132.
[47] *ibid* at 126-128.
[48] *ibid* at 128.
[49] *ibid* at 128-131.
[50] Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* (New York: Russell Sage Foundation, 1981) at 196.

powers. Similarly, in 2010, Christy Lopez coined the term "contempt of cop"[51] to describe negative reaction from police to attitudes they perceive as deviant or malicious. "Contempt of cop" refers to the phenomenon whereby "in response to disrespect or non-cooperation, officers too often respond with verbal abuse, use of force and/or arrest"[52]. Excessive force, rather than de-escalation has been shown to be a reaction to "contempt of cop".[53]

To relate this research to language usage then, there are many reports under the ECRML showing that users of RMLs often fear that their linguistic identity will be interpreted as troublesome behaviour.[54] In her research, Chan also showed that non-English speaking groups were perceived as deviant by police in New South Wales in Australia.[55] Police are culturally predisposed to view others and othered language usage as deviant, troublesome or difficult behaviour. The characteristics of cynicism, suspicion, solidarity and isolation merge to permit this stereotype, stigma and otherness to emerge. This literature informs us on how police view RML-users' identities externally, and that these are not opinions derived from individual officers world views, but formed through a collectively shared culture. The literature shows how police externally perceive identity and their responses to that perception of identity. Based on that literature, it is possible to understand how RML-users might be perceived when encountering the police in the CJS. Remembering that identity is formed of both internal and external views, then in encounters with the police, cop culture can therefore shape how RML-users experience the CJS.

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[51] Lopez 'Disorderly (mis)Conduct: The Problem with 'Contempt of Cop' Arrests' 2010 American Constitution Society for Law and Policy Issue Brief available at: http://cdn.ca9.uscourts.gov/datastore/library/2015/08/10/Velazquez_ContemptOfCop.pdf [date accessed: 08 July 2020].

[52] Walker and Archbold *The New World of Police Accountability,* 3rd ed. (London: Thousand Oaks, 2019) at 86.

[53] *supra* note 51.

[54] Committee of Experts report, Finland 2001 at para 76, Committee of Experts report, Hungary 2001 at paras 16 and 46, Committee of Experts report, Norway 2001 at para 68, Committee of Experts report, Germany 2002 at para 442, Committee of Experts report, Norway 2003 at para 105, Committee of Experts report Sweden 2003 at para 102, Committee of Experts report, United Kingdom 2004 at para 135, Committee of Experts report Sweden 2011 at para 240, Committee of Experts report, Austria 2012 at para 207, Committee of Experts report, Romania 2012 at para 435 Committee of Experts report, Spain 2012 at para 536, Committee of Experts report, Bosnia and Herzegovina 2013 at para 125, Committee of Experts report, Slovenia 2014 at para 202, Committee of Experts report, Ukraine 2014 at para 131, Committee of Experts report, Croatia 2015 at para 96, Committee of Experts report, Czech Republic 2015 at paras 44, 68 and 111, Committee of Experts report, Bosnia and Herzegovina 2016 at para 159, Committee of Experts report, Ukraine 2017 at para 28, Committee of Experts report, Austria 2018 at para 31, Committee of Experts report, Croatia 2020 at para 48.

[55] Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge: Cambridge University Press, 1997) at 21.

2.4 Judicial Bias

In continuing the discussion on external perceptions of identity, I now address literature on how judges might perceive others and othered person.

Judicial benches tend to be made up from homogenous groups, who in turn, hold homogenous perspectives.[56] As Cahillane shows, the Irish judiciary consists of a demographic that is largely upper-class, white and male.[57] As such, it is understandable that the perspectives in Irish jurisprudence demonstrated by Enright reflect those of upper-class, white men.[58] The right to a fair trial will be discussed in greater detail later on. But for now it is enough to note that the right to a fair trial includes, *inter alia*, the right to a trial before an impartial judge.[59] Judges are human, and inherently susceptible to human conditions. While work has not been conducted to reflect on judicial culture in as coherent a way as with the police, we can consider how factors such as bias can be a feature of judicial decision making. In discussing judicial impartiality, Nugent has stated that:

> Judges are expected to be rigorous in excluding personal bias when making decisions; hence, there are few judges who would readily admit that they have biases which interfere with their impartiality. Indeed, judges are typically appalled if their impartiality is called into question. After all, most judges believe themselves to be consistently objective, impartial and fair. Judges generally believe that they have taken great strides to be equitable and that they have granted full latitude to each side in a controversy, allowing both sides the opportunity to fully present their case…But it is exactly through this blind faith in their impartiality that judges may gain a false sense of confidence in their decisions. They may fail to take into account the unavoidable influences we all experience as human beings and disregard the limits of human nature and the difficulty of bringing to the conscious level subjective motivations, beliefs and predilections.[60]

[56] Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 Current Legal Problems 119.
[57] See Cahillane 'Judicial Diversity in Ireland' 2016 Vol 6(1) Irish Journal of Legal Studies 1.
[58] Enright '"Involuntary Patriotism": Judgment, Women and National Identity on the Island of Ireland' in Enright, McCandless and O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing 2017) at 29.
[59] See Article 14.1 of the ICCPR and Article 6.1.
[60] Nugent 'Judicial Bias' 1994 Vol 42(1) Cleveland State Law Review 1 at 3 at 5.

Nugent points to a danger in a presumption that judges can always put aside their biases for the sake of objectivity. A blind faith that judges will always behave objectively is not necessarily based in reality. Enright refers to a similar perception that some judges believe "that law and its associated techniques of reasoning are largely autonomous from questions of identity."[61] Judges may perceive themselves to be without bias, uninfluenced by their identities or by society, but this is not necessarily the case. Enright shows that in particular, a Catholic ethos has informed and shaped judicial reasoning in Ireland and Northern Ireland, resulting in "a variety of serious consequences for women."[62] She shows how judicial decisions are informed by the dominant societal identity and judicial identities, and how those identities, imposed on law, can have negative consequences for marginalised people.[63] In addition to the harmful impact these identities and perspectives have on marginalised people, they also go unnoticed, because of the pervasive belief of objectivity among the judiciary.[64] Studies show that globally, marginalised people experience the CJS more harshly than the majority population. In the US, African Americans and Hispanic/Latinx people represent a disproportionate amount of the prison population.[65] Indigenous people in Canada,[66] Australia,[67] Ireland,[68] and New Zealand also make up a disproportionate amount of the prison

[61] *supra* note 58 at 29.
[62] *ibid* at 33.
[63] See, for example, Enright's discussion of the use of Catholic teachings in a number of prominent constitutional law cases in Ireland. *ibid* at 33.
[64] See Barrington J's comments as cited by Enright *ibid* at 29. See also GRECO 'Corruption prevention in respect of members of parliament, judges and prosecutor' Greco Eval IV Rep (2014) 3E at para 3. This is notwithstanding the recent scandal from Judge Séamus Wolfe who attended a golfing gala in Clifden while ongoing COVID-19 restrictions on movements were in place, which arguably has affected public confidence in this sect of the judiciary. See Keena ''Golfgate' has damaged public's view of Supreme Court, say legal academics' *The Irish Times* (08 October 2020).
[65] "Though African Americans and Hispanics make up approximately 32% of the US population, they comprised 56% of all incarcerated people in 2015." Available at: https://www.naacp.org/criminal-justice-fact-sheet/ [date accessed: 12 June 2020].
[66] In Canada, indigenous people in federal custody is over 30%. Indigenous people make up 5% of the population of Canada, according to a report from the Officer of the Correctional Investigator, available at: https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx [date accessed 12 June 2020].
[67] According to the Australian Law Reform Commission "Aboriginal and Torres Strait Islander peoples are disproportionately represented in Australian prison populations. In 2016, Aboriginal and Torres Strait Islander people constituted just 2% of the Australian adult population but comprised more than one quarter (27%) of the national adult prison population." Available at: https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/3-incidence/over-representation/ [date accessed 12 June 2020].
[68] Mincéirí or Irish Travellers are overrepresented in Irish prisons. See Holland 'Disproportionate numbers of Travellers in prison population' *The Irish Times* (20 Oct 2017). See also: https://www.bbc.com/news/world-europe-39135942 [date accessed: 30 August 2021]

populations.[69] While there are multifaceted reasons for such overrepresentations in CJSs, research shows that bias exists in among judiciaries and impacts on how othered people experience the CJS.[70]

Specific to language usage, Piller argues that linguistic discrimination or bias is inevitable among judges. Once a person speaks (or indeed, does not speak) in court, the justice system will be able to "form a view of the speaker's socioeconomic status, their level of education, their ethnicity, their gender, their age and their country of origin".[71] To connect to the research above, language immediately allows an observer – in this case a judge – to form an opinion about the language user, which can certainly be based on the known-aboutness of that language or its users.[72] And a judge is not just an observer, but an officially empowered person with a great deal of powers over that person.

Just as was argued with the police and the external aspect of identity, judges have been shown to have a biased attitude about othered people, including RML-users.[73] From this we can extrapolate that it could be possible to show a disconnect between the internal identity held by an RML-user and the external identity understood or likely to be understood by a judge.

2.5 Conclusion

This chapter has looked at external identity and it's forms in various contexts. Identity is a complicated notion. For the most part any attempts to define identity or a particular identity have been avoided. This is not done in an effort to confuse the reader but rather as an understanding that what might be an identity for one person does not necessarily match that of another, even when they form part of the same group.

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[69] Despite making up only 16% of the population, Māori people make up 51% of the prison population in New Zealand. See O'Brien 'Government wants to lower Māori prison stats but hasn't set specific target' *NewsHub* (21 August 2018).

[70] Bergova, 'Trust in the State Courts: Hispanic and African American Communities' (2016) Vol 4(12) International Relations and Diplomacy 746, Bowcott 'Ethnic Minorities get tougher sentences due to distrust in the courts' *The Guardian* (28 March 2017), Hurwitz and Peffley, 'Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System' (2005) 67 The Journal of Politics 762, Rottman and Tomkins, 'Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges' (1999) Vol 36(3) Court Review: The Journal of the American Judges Association 24.

[71] Piller, *Linguistic Diversity and Social Justice: An Introduction to Applied Sociolinguistics* (First edition, Oxford University Press 2016) at 4.

[72] *supra* note 7 at 65.

[73] *supra* note 71.

Identity is both a personal and a public performance. It is about how the player perceives their own performance, but also about how that performance is received by an audience.[74] This has been referred to as the internal and the external aspects of identity. Goffman states that what is perceived of the self is not necessarily what is perceived by society.[75] Communication of identity is constantly in flux. Depending on the audience, an individual may seek to conceal or communicate their identity.[76] Passing is a form of stigma management where the stigmatised identity is undercommunicated or concealed and it generally represents a form of self-preservation. Pride in the stigmatised self is a counter form of stigma management, whereby the othered identity is embraced and overcommunicated, denouncing the expectation of shame. Both are responses to stigma, where an individual seeks to manage and control how they are perceived.[77] The stigmatised self can be a source of pride and a source of shame, depending on the audience and the circumstances.

Literature detailing the actions and culture of actors in the CJS can help us to understand the possible external aspect of identity. Police culture or cop culture literature provides us with a detailed understandings of the traits which govern policing and police behaviour. In navigating the CJS, people who interact with the police must also navigate cop culture and the externally imposed perceptions about their identity which flow from it. Similarly, literature on the instances of judicial bias can indicate how we can expect judges to perceived othered and minority persons who appear before them. Evidence shows us that both police and judges can show suspicion and distrust of minorities and the other. This suspicion and distrust can then manifest as unfair treatment or bias, which then impacts how marginalised people will experience the CJS. If we can understand how RML-users might be perceived externally by police or judges, then we can understand how they might subsequently transition through the CJS.

In the following chapter, I extend this discussion on identity and explore the identity, grounded in research, which is held by the two groups which are at the centre of this research: Deaf people and Irish-speakers.

[74] *supra* note 12.
[75] *ibid* at 14.
[76] *supra* note 28 at 36.
[77] *supra* note 20 at 85.

Chapter 3 – Deaf and Irish Speaker Identity Construction

3.1 Introduction

Following on from the previous chapter, I now continue the discussion on identity. This chapter explores the identity of RML-users, and in particular the two case studies at the core of this research. This chapter discusses the construction of identity of these specific groups. Moving beyond how RML-users can be perceived in the CJS as presented in the previous chapter, this chapter explores both how Irish-speakers and Deaf people are viewed externally in society, and how they view themselves internally.

This chapter comprises three sections. First, I discuss identity as it is constructed for RML-users. I explore language as a cultural identity, and the intersection of language with other identities. Secondly, I outline discourse on Deaf identity, I explore the parameters of the community, and the concept of Deaf culture, as it is understood in literature. I discuss the historical and socio-economic realities of Deaf people generally and Deaf people in Ireland. Literature on disability and the intersection of Deaf studies and disability studies is then discussed, in the context of Deaf identity. Third, I present an overview of Irish-speaker or Gael identity. I discuss the various descriptors of speakers that exist within the community, and the perception of Irish speaking and Irish-speakers outside of the community. In doing so, I present an overview of the post-colonial landscape of Ireland which have contributed to this identity and its present construction.

I begin now with a discussion on RML identity.

3.2 Regional or Minority Language-User Identity

Defining a group or its identity necessitates getting into the business of exclusion. By putting a fence around what is meant by a specific identity, there will always be someone or a group of people who are left beyond the perimeter unfairly. In Chapter 1, I discussed the definition of RML as it is found in the ECRML. I noted how the ECRML refers to RMLs as being traditional languages, rather than non-traditional or migrant languages. This definition of RML as it stands in the ECRML is an example of such exclusion. In narrowly defining RML as applying

only to traditional languages, non-traditional languages are excluded from protections. This is irrespective of whether or not the experiences of traditional language users are the same or similar to those of non-traditional languages. In justifying this distinction, it has been alleged that traditional language users do not experience "problems of integration"[1] and therefore their experiences cannot be compared to those of non-traditional language users, who do experience such problems. In this chapter, however, I explore the identities of Irish-speakers and Deaf people, and their relationships to Irish society, investigating the veracity of this claim that they do not experience problems of integration into Irish society.

In keeping with the belief that defining a group involves exclusion as discussed in Chapter 2, no clear-cut definition of Irish-speaking or Deaf communities will be provided.[2] Doing so would inevitably exclude, but it would also position me as an authority on defining these communities, which I am not. Both of the groups studied herein are RML communities, as noted in Chapter 1. Their identity is constructed, in some way, in terms of their language and culture. Kramsch explains the connection between language, culture and identity as follows:

> …language is a system of signs that is seen as having itself a cultural value. Speakers identify themselves and others through the use of language; they view their language as a symbol of their social identity.[3]

This is true for both Irish-speakers and Deaf people. Their language forms an inherent part of that identity. In his book on colonialism and language, Ngũgĩ states that language is something that can be "central to a peoples' definition of themselves".[4] It can "symbolize group identity and become emblems of that identity, especially when there is contact with other groups whose ways of being are different".[5] It may also overlap, however, as an additional identifying factor for groups who are based in ethnicity, race, religion or, particularly, nationality.[6]

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[1] Woehrling, 'Introduction' in Lopez, Ruiz Vieytez and Urrutia Libarona (eds) *The European Charter for Regional or Minority Languages: A Critical Commentary,* (Council of Europe Publishing, 2005) at 22.

[2] As an outsider to the Deaf community, it is not for me to decide who is or is not part of a specific minority community. Although an insider in the Irish-speaking community, I will not place a boundary around my community as such a boundary risks excluding those who legitimately feel they belong.

[3] Kramsch, *Language and Culture,* (Oxford, Oxford University Press; 1998) at 3.

[4] Ngũgĩ, *Decolonizing the Mind: The Politics of Language in African Literature,* (Nairobi: East African Educational Publishers Ltd., 1986) at 4.

[5] Heller, *Language, Ethnicity and Politics in Quebec,* unpublished doctoral dissertation, University of California, Berkeley, 1982 at 3 cited in Hansen and Liu, 'Social Identity and Language; Theoretical and Methodological Issues', Teachers of English to Speakers of Other Languages Quarterly, Vol 31, No. 3, Language and Identity, (Autumn, 1997) 567 at 569.

[6] Caldas and Caron-Caldas, 'Language, Immersion and Cultural Identity: Conflicting Influences and Values' Language, Culture and Curriculum, Vol 12 No. 1, 1999, 42 at 42, citing Fishman, 'Language, Ethnicity and

Therefore, it needs to be maintained that although it can sometimes be the sameness over which a group connects, it may also be a bi-product or inherent part of another identifying factor.

No one person has a singular identity. People are multifaceted beings, and their identity is an intersection of characteristics and traits to formulate an individual or a group. Irish-speaking is not specific to ethnically Irish people, nor is being a Deaf person in Ireland who uses ISL. Crenshaw famously coined the term 'intersectionality' to describe the unique perspectives of Black women, who shared in and compounded the struggles of being both a woman in a patriarchy and a Black person in a racist society. Neither the singular identifiers of Black experience or women experiences encapsulated the lived realities of a Black woman.[7] Race, religion, disability, sexuality, language, political beliefs, etc. intersect to create layers to an individual's identity. Criminality is an identity marker too and is at the core of this research. Goffman's three types of stigma were mentioned in Chapter 2; "abominations of the body", "blemishes of individual character" and "tribal stigma".[8] Criminal behaviour would fall into the category of "blemishes of individual character".[9] A person who commits or is thought to have committed a crime can be ostracised from the community which they are part of. Goffman writes that:

> In general, the tendency for a stigma to spread from the stigmatized individual to his close connexions provides a reason why such relations tend either to be avoided or to be terminated, where existing.[10]

Their identity becomes spoiled by criminality, least they contaminate those who also share that identity. This is particularly relevant when it comes to smaller, minority groups and identities. As the focus of this research is RML-users who have interacted with the criminal justice system, it is important to bear in mind the complexity and intersectionality of identities at play. I now turn to exploring the concept of Deaf identity and Deaf culture.

Racism', in *The Rise and Fall of the Ethnic Revival: Perspectives on Language and Ethnicity,* Fishman et al (eds) (Berlin, Mouton Publishers, 1985) at 57. Note also that "[h]owever tightly they are bound up with national identities, languages are no less potent a force in constructing identities concurrent with and *often resistant* to the national." Joseph, *Language and Identity: National, Ethnic, Religious,* (Hampshire, Palgrave Macmillan: 2004) at 162. Emphasis added.

[7] Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' 1991 Vol 43 Stanford Law Review 1241.

[8] Goffman, *Stigma: Notes on the Management of the Spoiled Identity,* (London: Penguin Books, 1990) at 14.

[9] *ibid.*

[10] *ibid* at 43.

3.3 Deaf Identity

As with the parameters of any identity, understanding what is meant by a 'Deaf identity' or 'Deaf Culture' is a complex effort. At the outset it is important to note that for generations, discourse around Deaf people, sign language and Deaf culture has been articulated largely by hearing people, without input or consideration from Deaf people. As Ladd explains, it is "important for the lay reader to understand that virtually all discourses about Deaf people have been conceived, controlled and written by people who were not themselves Deaf."[11] I am hearing. I am not seeking to define or set parameters on who is or is not D/deaf.[12] Rather this section will look at some of the literature of which discusses Deaf identity and culture. This section seeks no more than to position in the mind of the reader that establishing a Deaf Community is complex. In 1978 Baker and Padden provide a helpful understanding of the Deaf Community, which can be applied to minority communities generally:

> The most basic factor determining who is a member of the deaf community seems to be what is called 'attitudinal deafness'. This occurs when a person identifies him/herself as a member of the deaf community, and other members accept that person as part of the community.[13]

A person belongs in a community when they themselves feel part of that community and they are recognised by the community itself, similar to the point of view held by Alfredsson, as detail in Chapter 1.[14] The Deaf Community in Ireland includes a multitude of people, from all backgrounds and walks of life. It includes, but is not limited to; ISL users; people with hearing aids or cochlear implants; those who are profoundly deaf; those with partial hearing; those who are hard of hearing (HoH); those who were born deaf; those who became deaf later in life; those who are Deaf; those who are deaf; those who come from a family of Deaf people; those who come from a family of hearing people; children of Deaf adults (CODAs); parents of deaf children; and interpreters.

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[11] Ladd, *Understanding Deaf Culture : In Search of Deafhood*, (Clevedon: Multilingual Matters, 2003) at 82.
[12] I will address the distinction of 'D/deaf' below.
[13] Baker and Padden, *American Sign Language: A Look at its Story and Structure,* (Silver Spring, Maryland: TJ Publishers, 1978) at 4. Ladd notes that this text predates the popular usage of 'big D' Deaf which will be described below. See also *supra* note 11 at 41, 42.
[14] Alfredsson, 'Emerging or newly restored democracies – Strengthening of democratic institutions and development' (1991) paper presented at Workshop I: Human rights, fundamental freedoms and the rights of minorities, essential components of democracy, Conference on Parliamentary Democracy, Council of Europe at 10.

Further, it is important to note that this research looks at the Deaf community as a cultural group, and users of ISL as a linguistic minority group. The emphasis is not on any medical aspect of deafness, nor is it on deafness as a disability *per se*. Disability and a Deaf identity is discussed in greater detail below in this chapter, but for now, note that Skelton and Valentine state that "there is an important discourse within Deaf Culture that being Deaf is not to be disabled, but rather to be part of a linguistic minority".[15] Ladd also alludes to this, noting that disability discourse inherently medicalises Deaf people, and positions being Deaf as an impairment, rather than as a culture.[16] Leigh et al explain the concept of being culturally Deaf as follows:

> …becoming culturally Deaf means using signed languages, being upfront as a Deaf person, being comfortable with other Deaf people, and wanting to interact with them.[17]

From this, being culturally Deaf means embracing one's community and identity as a Deaf person. Much of the literature positions the culturally Deaf identity as the antithesis of a purely medicalised notion of deafness. As for many minority communities, in explaining what Deaf culture is *not*, we can understand what it *is.*[18] Glickman and Hall explain being culturally Deaf as being distinct from those who are deaf and consider their deafness as a loss of hearing:

> …culturally Deaf people, most of whom became deaf early in life, are a relatively small subset of a larger group of people who have hearing loss but experienced it postlingually (i.e., largely as older adults)—thus, the distinction between deaf and Deaf is important to this work. We can talk about culturally Deaf people more positively not by saying they have "hearing loss" but that they have a visual orientation to life, a form of "Deaf gain"…The larger group of people with post-lingual hearing loss, however, do generally experience this as a loss of hearing and a disability.[19]

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[15] Skelton and Valentine, '"It feels like being Deaf is normal": an exploration into the complexities of defining D/deafness and young D/deaf people's identities' 2003 Vol 47(4) Canadian Geographer 451 at 453.
[16] *supra* note 11 at 15.
[17] Leigh et al, *Deaf Culture: Exploring Deaf Communities in the United States* (San Diego: Plural Publishing, 2018) at 8.
[18] Hylland-Eriksen, *Ethnicity and Nationalism* (London: Pluto Press, 1994) at 23.
[19] Glickman and Hall 'Introduction: Culture and Disability' in *Language Deprivation and Deaf Mental Health,* Glickman and Hall, eds. (New York: Routledge, 2019) at 2, citing Bauman and Murray, (Eds.). *Deaf gain: Raising the stakes for human diversity* (Minneapolis: University of Minnesota Press, 2014).

From this we can see that being culturally Deaf is distinct from being deaf, in that Deaf Culture is embraced and celebrated, whereas it is experienced as a loss by those who become deaf later in life (through old age, for example).[20] Not all people who are deaf are culturally Deaf. Similarly, those who are culturally Deaf are a diverse community of varied backgrounds, hearing levels and sign language competency and are not merely the "homogenous opposite of hearing", as explained by Leach Scully.[21]

Leach Scully also distinguishes the culturally Deaf community from disability communities:

> Deaf culture is not just about a peculiarity of language form; it refers to a rich background of distinctive social practices, a shared past and a network of social organizations ranging from schools for the deaf and D/deaf social clubs, to today's virtual D/deaf groups operating online and through video blogs. While similar institutions exist for other kinds of impairment, for example schools for the blind, claims to a distinct community or culture have never been made for these impairments in the way they have for Deaf people.[22]

Here we can see that there is a collectiveness in Deaf culture that is not limited to a lack of hearing. Being culturally Deaf is a culture and identity in itself, distinct from disability communities, based around community, social groups and practices and history which exists beyond merely being the opposite of hearing.

To this point, the reader may have noted the varied usage of a capitalised 'D' versus lowercase 'd' in spelling 'deaf'. Napier explains that:

> 'Deaf' people are those who identify themselves as members of the Deaf community and regard themselves as culturally Deaf, whereas 'deaf' people are those who do not sign and regard themselves as having a hearing impairment.[23]

Skelton and Valentine note that the use of Deaf versus deaf is commonly used to indicate the "two dominant discourses at play in definitions and identities of deafness", those being a social (indicated by the use of a capital 'D') and a medical model (indicated by the use of a lowercase 'd'), respectively.[24] Ladd says that:

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[20] *supra* note 11 at xvii.
[21] Leach Scully, 'Deaf Identities in Disability Studies: With Us or Without Us?' in Watson, Roulstone and Thomas (eds) *Routledge Handbook of Disability Studies* (London: Routledge, 2012) at 114.
[22] *ibid* at 111.
[23] Napier 'The D/deaf-H/hearing Debate' 2002 Vol 2(2) Sign Language Studies 141 at 141.
[24] *supra* note 15 at 454, 455.

> The lowercase 'deaf' refers to those for whom deafness is primarily and audiological experience. It is mainly used to describe those who lost some or all of their hearing or late in life and who do not usually wish to have contact with signing Deaf communities, preferring to try and retain their membership of the majority society in which they were socialised. 'Deaf' refers to those born Deaf or deafened in early (sometimes late) childhood, for whom the sign language, communities and their cultures of the Deaf collective represents their primary experience and allegiance, many of whom perceive their experience as essentially akin to other language minorities.[25]

It is also common to see the variation 'D/deaf' in literature when referring to people who identify as Deaf and people who identify as deaf. Skelton and Valentine prefer this variation, explaining that the "boundary between Deaf and deaf identities, meaning and construction can be fluid. At different times people may identify as Deaf or as deaf".[26] For the purposes of this research, however, I follow the understanding of Deaf and deaf laid down by Padden. She says:

> …the capitalized 'Deaf' is used when referring to cultural aspects , as in the culture of Deaf people. The lower case 'deaf', on the other hand, refers to non-cultural aspects such as the audiological condition of deafness.[27]

Being Deaf is inherently connected to an identity in one's Deafhood.[28] Ladd explains how the hearing world have understood 'being deaf' as something negative and a burden that one ought not wish on another:

> 'How dare you wish more Deaf children into the world?', they cry. To which the response is 'If by "deaf" you mean people who were born hearing but whose daily reality is now one of forever being condemned to live on the margins of existence, where, to adapt an old advertisement, "*the edge of a conversation is the loneliest place in the world";* who have to cling to the coat-tails of the hearing world and numbly accept being reduced to imbecilic status in the eyes of the media, by cartoonists and

[25] *supra* note 11 at xvii.
[26] *supra* note 15 at 455.
[27] Padden, 'The Deaf Community and the Culture of Deaf People' in Gregory and Hartley eds., *Constructing Deafness* (London: Pinter and the Open University, 1991) at 44.
[28] *supra* note 11 at xviii.

> comedians', yes indeed, who would wish that isolated and unhappy existence on anyone? [29]

Ladd is showing that externally, the known-aboutness of being deaf is viewed in terms of disability and stigma, and undesirable otherness.[30] This view of deaf people would indicate at least a problem of integration into society,[31] whereby society is built for hearing people, and deaf people are on the outside, exceptional to that society. However, Ladd goes on to demonstrate the difference between deaf as understood externally by hearing society and what being Deaf means internally to a vibrant and thriving Deaf Community:

> But if, like us, you mean 'Deaf' as a national and international community of people with their own beautiful languages, their own organisations, history, arts and humour, their own lifelong friends whom otherwise we would not have met, then perhaps you will understand our pride in what we have created, our desire to pass this on to future generations of Deaf children. And if you can comprehend this pride, then you will understand the longstanding Deaf belief that if societies learn these languages and become able to participate on what we have created, barriers can come own, and all may benefit from the unique skills of Deaf existence.[32]

When viewed outside the lens of a majority hearing perspective, Deaf identity can be a source of unity, togetherness and pride, as well as a linguistic identity, connected to sign languages. In discussing Deaf identity from this linguistic perspective, it is necessary to discuss some aspects of Deaf history.

In an Irish context, Rose and Conama note that ISL has a longstanding history as a language in Ireland, predating the introduction of Deaf schools.[33] The history of the Irish Deaf community is complex and painful. It is necessary at this juncture to highlight the prevalence of oralism and its effect on the Deaf Community and a collective Deaf Identity, as alluded to in Chapter

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[29] *ibid* at 37. Emphasis in original text.
[30] *supra* note 8 at 65.
[31] *supra* note 1.
[32] *supra* note 11 at 37.
[33] Rose and Conama 'Linguistic imperialism: still a valid construct in relation to language policy for Irish Sign Language' 2018 Vol 17(3) Language Policy 385 at 389, citing McDonnell, 'Vested interests in the development of special education in Ireland'1992 Reach 97, Leeson and Saeed, *Irish Sign Language* (Edinburgh: Edinburgh University Press, 2012) and Bauman, 'Introduction: Listening to deaf studies' in Bauman (Ed.), *Open your eyes: Deaf studies talking* (Minneapolis: University of Minnesota Press, 2008) at 1.

1. Rose and Conama explain how the policy of oralism in Irish schools impacted – and still impacts to this day – the education provided to Deaf children:

> Oralism refers to a system of teaching, where Deaf people are encouraged to communicate via the use of speech and lip-reading, rather than sign language. The philosophy was imported to Ireland from continental Europe, and was manifested in a range of measures within Irish schools from the methods of instruction in classrooms to the counselling of parents of Deaf children. A common practice of oralism was a blanket ban on children, who were deemed to have oral language potential, from using sign language in any context, and a deep intolerance for such children caught using ISL in school settings. The rationale behind the ban was an erroneous belief that using sign languages would hinder a child's ability to learn listening and speech skills. However no such research to date has supported this rationale.[34]

This shows how ISL was demonised in Ireland for many Deaf people. Under this policy of oralism, being Deaf was positioned as inferior to speech and spoken language. ISL usage was clandestine (see the description of children being 'caught' signing) and to be discouraged. Rose and Conama go on to show that even though an oralist method is no longer the educational policy for instructing Deaf children, it still remains an attitude present in Ireland.[35] There is still a prevailing perception that spoken language – and in particular, English – is superior to ISL, and consequently, that ISL is an inferior 'crutch' or language tool, rather than a complete language in itself. [36] This perception can be described as 'audism'. Humphries explains audism as a:

> …bias and prejudice of hearing people against deaf people. It is the bias and prejudice of some deaf people against other deaf people…It appears…in the form of people who continually judge deaf people's intelligence and success on the basis of their ability in the language of the hearing culture. It appears when the assumption is made that the deaf person's happiness depends on acquiring fluency in the language of the hearing culture. It appears when deaf people actively participate in the oppression of other deaf people by demanding them the same set of standards, behaviour and values that they demand of hearing people. It appears in the class structure of the deaf culture

[34] *ibid* Rose and Conama at 390.
[35] *ibid* at 393.
[36] *ibid*.

> when those at the top are those whose language is that of the hearing culture or closest to it. It appears when deaf people in positions of power keep that power by oppressing other deaf people.[37]

Audism therefore informs a known-about-ness of deaf people. But rather than just impacting the external, hearing view of Deaf people, audism can also be internalised by Deaf people. Gertz calls this "dysconscious audism" which is the:

> …acceptance of dominant hearing norms, privileges and cultural values by Deaf individuals, and the subsequent perception of hearing society as being more appropriate than Deaf society. Individuals who manifest dysconscious audist behaviour and beliefs have an awareness of the of the oppression facing themselves and other Deaf individuals, yet the still don't fully reject all forms of that oppression, nor do they develop their own Deaf consciousness and identity to its maximum potential. By internalizing dysconscious audism, Deaf people disempower themselves, and contribute to a continued perception that being Deaf and promoting the values and norms of Deaf Culture is an obstacle to success. They may believe the only way to succeed is to become "like hearing"[38]

This concept of dysconscious audism can feed into the idea that being Deaf is indeed the stigma that Goffman depicts and in order to thrive in society, one may need to pass as hearing.[39]

Finally, in discussing Deaf identities, it is necessary to explore literature on disability. It has been noted that internally, many Deaf people do not identify as disabled.[40] There are those who do identify as disabled, or who view the hearing world around us as disabling to Deaf people.[41] There are also those who acknowledge the benefit in externally presenting as disabled in order to gain better recognition and rights.[42] For example, the Convention on the

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[37] Humphries 'The making of a word: Audism' 2001 Unpublished article submitted for CLC2001 Readings at para 5, as cited in *ibid* at 394, 395.
[38] Gertz and Boudreault, *The SAGE Deaf Studies Encyclopaedia,* (Thousand Oaks: Sage Publications, 2016) at 64, 65.
[39] *supra* note 8 at 37 and 95.
[40] *supra* note 11 at 15.
[41] Atkinson 'Ouch! It's a disability thing' *BBC* (02 April 2008) available at http://www.bbc.co.uk/ouch/features/is_deafness_a_disability.shtml [date accessed: 29 April 2021]
[42] See Darach Ó Seaghdha, 'Motherfoclóir ISL Episode' (05 May 2021), available at https://www.youtube.com/watch?app=desktop&v=jsORJSesv48&feature=youtu.be [date accessed: 05 May 2021]. See also, the Americans with Disabilities Act, 1990 (ADA) is a particularly strong piece of US legislation

Rights of Persons with Disabilities (CRPD) provides rights for Deaf people through the lens of disability.[43] It is a useful document for ensuring rights and entitlements for the Deaf community, irrespective of their relationship to disability as an identity.

In the mainstream, deafness is widely acknowledged as a disability. Externally, Deaf identity can be perceived as disability identity. Therefore it is necessary to understand what is meant by 'disabled'. Often, there is a paternalistic association with disability. This association stems from what is known as the 'medical model' within disability studies. Degener explained how the medical operates in practice:

> [The medical model] regards disability as an impairment that needs to be treated, cured, fixed or at least rehabilitated. Disability is seen as a deviation from the normal health status. Exclusion of disabled persons from society is regarded as an individual problem and the reasons for exclusion are seen in the impairment. For example: Because a person is deaf and blind, it is assumed that she or he cannot participate in political or cultural life. Disability according to the medical model remains the exclusive realm of helping and medical disciplines: doctors, nurses, special education teachers, rehabilitation experts, etc.[44]

This perception sees disabled people as lacking capacity outright, and medicalises disability. For Deaf people, this would entail perceiving deafness purely as a medical problem (a lack of hearing) to be fixed, [45] via hearing aids or cochlear implants.[46]

Disability literature has moved on from this medical model, most notably towards a 'social model' developed in the 1970s in Britain,[47] which views disability as a social construct.[48] This view was explained by Charlton in attempting to define "disability" through the social model lens:

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under which deafness is considered a disability. While some Deaf people may not accept the label of 'disabled', the ADA is nevertheless a powerful tool for accessing rights and entitlements.

[43] Articles 24.2(b) and 24.2(c) provide for access to education for deaf people and deafblind people. Article 30.4 provides for the right to the recognition of cultural and linguistic identity, including deaf culture.

[44] Degener 'The Human Rights Model of Disability' in Blanck and Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2017) at 32, 33.

[45] *supra* note 11 at 15.

[46] Erard 'Why Sign Language Gloves Don't Help Deaf People' *The Atlantic* (09 November 2017).

[47] Lawson and Priestley 'The Social Model of Disability' in Blanck and Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (London: Routledge, 2017) at 6.

[48] Oliver, 'The Social Model in Action: If I had a Hammer' in Barnes and Mercer (eds) Implementing the Social Model of Disability: Theory and Research (Leeds: The Disability Press, 2004) at 21 .

> Disability is socially constructed. For example, if a particular culture treats a person as having a disability, the person has one. Second, the category "disability" includes people with socially defined functional limitations. For instance, deaf people are considered disabled although many deaf individuals insist they do not have a disability. People do not get to choose whether they have disabilities.[49]

This view sees the world around a disabled person as the disabling factor: a person in a wheelchair is disabled by a lack of ramps; a Deaf person is disabled when there is no access to Deaf education or sign language instruction.

Degener herself has contributed to an update in disability discourse. With the development of the UN Convention on the Rights of Persons with Disabilities (CRPD), a 'human rights model' emerged. "The human rights approach affirms that all people with disabilities are holders of rights and have the right to participate in all areas of society on an equal basis with others."[50] Degener states that the human rights model improves on the social model of disability, in that it acknowledges intersectionality of identity in a way that the social model has not done.[51] Disabled people can hold multiple identities (racial, religious, gender, sexuality, etc) which all intersect with the disabled identity and how their identities are experienced. The CRPD acknowledges these variations in how people experience disability in that there are specific rights for disabled children,[52] disabled women,[53] Deaf people,[54] etc. The human rights model is the foundation on which the CRPD is built.

It must be noted though, that in spite of the development of discourse on models of disability, the archaic medical model still persists in attitudes to disability among contracting states.[55] The attitude that disability is an inability to effectively participate in society is still largely

[49] Charlton *Nothing About Us Without Us: Disability Oppression and Empowerment,* (Los Angeles: University of California Press, 1999) at 8.

[50] McNamara 'The Criminal Investigation of Suspects with Disabilities: The Impact of the UN Convention on the Rights of Persons with Disabilities' (PhD thesis, Dublin City University, 2018).

[51] Degener 'A New Human Rights Model of Disability' in Cera R, Della Fina V and Palmisano G (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing: Imprint, 2017) at para 2.4.

[52] Article 7 of the CRPD.

[53] Article 6 of the CRPD.

[54] Article 30.4 of the CRPD.

[55] "The majority of States Parties' reports to the CRPD reveal an understanding of disability that follows the traditional medical model of disability." In *supra* note 51 at 42.

prevalent. The frequency of content which portrays 'fixing' or 'curing' deafness is evidence of this prevalence.[56]

Deaf identity is a complex formulation, encompassing internal struggles and painful historical oppression as well as external perceptions of paternalism and medicalisation. This research is inclusive of its understanding of Deaf people, Deaf culture, deafness and disability. A Deaf person can be both Deaf and deaf, abled and disabled. They can belong in both hearing and Deaf worlds, or feel that they do not belong in either. The Deaf/deaf experience is as varied as individual Deaf/deaf people themselves. This research will interrogate however, how Deaf people are perceived in the CJS and how the conflict between their internal and external identity impacts on their experiences in the CJS.

Next, I provided a discussion on the identity held by Irish-speakers in Ireland, and how this identity can be constructed both internally and externally.

3.4 Irish-speaker Identity

As with the discussion above, this research stops short of providing a catch-all definition of who is or in not an Irish speaker, and what identity as an Irish speaker means. Nevertheless, there is literature which seeks to define and categorise Irish speaker identity and this is discussed here, in order to understand the discourses about the language and its users. Irish-speakers are often broken into two general groups for distinction; new speakers and native or old speakers.[57] According to Brennan and O'Rourke:

> …the term 'new speaker' has come to be used as a lens for studying individuals who did not learn a (minority) language through family transmission in the home or through exposure to its use within their local community, but instead acquired it through the education system or as adult learners, often in the context of language revitalisation projects.[58]

Walsh et al expand on new speakers to include in their understanding of new speakers:

[56] See *supra* note 46, Marcus 'The Problem With 'Deaf Person Hears for the First Time' Videos' *The Atlantic* (28 March 2014).
[57] Brennan and O'Rourke, 'Commercialising the cúpla focal: New speakers, language ownership, and the promotion of Irish as a business resource' 2019 Vol 48(1) Language in Society 125 at 132.
[58] *ibid* at 132.

> …speakers who have active competence in Irish because it was spoken to them at home, or because both English and Irish were spoken to them, but Irish was not the language of the community in their vicinity i.e. people raised with Irish outside the Gaeltacht…[59]

These definitions show a broad application from people who did not have Irish in the home and learned it through education or other avenues, to those who had Irish in the home but not the community. They show the varied experiences of Irish-speakers and the varied understanding of terms associated with language competency.

The inverse of new speakers then is native or old speakers. Following Walsh et al, these people largely come from Gaeltacht (primary Irish-speaking region) areas, growing up in Irish speaking communities and environments where Irish is the vernacular. They might be described as *cainteoirí dúchais* (native speakers) or may also refer to themselves as people who have Irish as a *máthairtheanga* (mother tongue) or *príomh teanga* (first language). However, the divide between new speakers and old speakers is not necessarily clear cut. While terms such as 'native language', 'first language' and 'mother tongue' may all be considered to synonymously mean the language one acquires from infancy onwards, in fact they can be deeply complex.[60] Walsh at al state that:

> It is often impossible to easily create a distinction between new speakers and native speakers of Irish and we do not mean to imply that there is always a clear division between them.[61]

New speaker and native speaker may well be useful identifiers in some contexts, but they are not definitive categories within Irish-speaker identity.

Irish-speaker (both new speakers and native speakers) are sometimes referred to as 'Gaeilgeoirí'. The term is often used in English lexicon or media when referring to Irish-speakers, but it will not be used here. According to O'Rourke, the "gaelgeoir" can often be used in a derogatory sense to "describe learners of Irish and/or Irish language enthusiasts"[62] rather than as a catch-all term for people who speak Irish. Therefore, for the purposes of this

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[59] Walsh, O'Rourke and Rowland, 'Research Report on New Speakers of Irish' 2015 Foras na Gaeilge at 5.

[60] O'Reilly, 'Irish Language, Irish Identity: Northern Ireland and the Republic of Ireland in the European Union' in *Language, Ethnicity and the State. Volume I: Minority Languages in the European Union,* O'Reilly ed., (Hampshire: Palgrave, 2001) at 79.

[61] *supra* note 59 at 6.

[62] See O'Rourke 'Whose Language Is It? Struggles for Language Ownership in an Irish Language Classroom' 2011 Vol 10(5) Journal of Language, Identity and Education 327 at 336.

research, the broader term 'Irish speaker' or 'Gael' will be employed. These terms will refer to people who speak Irish and include: people who grew up speaking Irish in the home; people who learned Irish as a child outside the home; people who learned Irish outside the home later in life; people from the Gaeltacht; people from outside the Gaeltacht. To apply Padden and Baker's definition of 'attitudinal deafness' above, membership of the Irish-speaking community could be defined by 'attitudinal gael-ness' in that it occurs:

> …when a person identifies him/herself as a member of the [Irish-speaking] community, and other members accept that person as part of the community.[63]

A Gael or an Irish-speaker as they are understood in this research is a person who identifies as such, and who is accepted by the Irish-speaking community as a member.

In terms of the history, Irish and Irish-speaking has traditionally been linked to the national identity in Ireland. O'Reilly explains how independence movements from 1880-1920 adopted Irish into the struggle, driven mainly by the Gaelic League.[64] It was "during this period that an association between the Irish language and Irish cultural and political nationalism crystallized."[65] Brennan and O'Rourke say that the promotion of Irish, particularly in Gaeltacht areas has its origins:

> …in the Romantic nationalism that contributed to the movement for Irish independence: at end of the nineteenth and beginning of the twentieth century, cultural and then political nationalists in Ireland had constructed these peripheral areas in which Irish was still spoken as both a symbol and a repository of the unbroken linguistic heritage and the traditional culture that set the Irish nation apart.[66]

Gaeltacht regions would exist to preserve the Irish language and a traditional way of life. However, with this purpose comes an association that Irish exists only in this specific space (Gaeltacht area) and this specific time (the Ireland of old). The connotation gives rise to perceptions that "Irish is a dead language",[67] whereby it is argued that Irish no longer has significance, use or function in society. The external perception of Irish then, can be that it is a relic of old, rather than a functional language through which people conduct their lives.

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[63] *supra* note 13 at 4.
[64] *supra* note 60 at 79.
[65] *ibid*.
[66] *supra* note 57 at 128.
[67] Conradh na Gaeilge 'Myth #1: "Irish is a dead language"' (16 March 2017) https://www.youtube.com/watch?v=XCEjILUJvFc [dated accessed: 7 April 2021].

The known-aboutness of Irish also includes negative stereotypes about the language and its speakers.[68] Irish usage can be connected to violent republicanism,[69] most notably through the paramilitary organisation the Irish Republican Army (IRA), who popularised the slogan 'Tiocfaidh Ár Lá'[70] and the use of Irish in Long Kesh prison by IRA prisoners.[71] But there is also a multitude of more mundane, less political criticism about Irish, such as investment in the language being wasteful or that the language lacks functionality.[72]

Irish usage and Irish-speakers have been connected to perceptions of troublemaking has its origins in colonialism, as O'Higgins explains:

> Since the Tudors, the English government had pursued a generally hostile (though inconsistently executed) policy towards the Irish language. The overall effect – and purpose – of the seventeenth-century plantations had been to supplant troublemakers with orderly English speaking loyalists. By the mid eighteenth century in Britain, Anglo-Irish writers argued that the English language was essential for unifying the "nation" of Britain, comprising Scottish, Welsh, and Irish subjects, as well as the vast range of English dialect speakers.[73]

This perception of Irish as deviant and bad continued throughout the colonisation of Ireland such that at independence,[74] there was a concerted effort to reverse this perception and take ownership of the language once more through the revival movement. As shown below, a multitude of Irish organisations (many of which were founded around the time of Irish independence) have Irish language names. This reflected a desire to forge a distinct Irish identity in the post-colonial landscape.[75] Irish was encouraged in private[76] and public life.[77]

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[68] *supra* note 8 at 65.
[69] This association is perhaps stronger in Northern Ireland than in the Republic of Ireland.
[70] Translation: 'Our Day Will Come'.
[71] Mac Giolla Chríost, *Jailtacht: The Irish Language, Symbolic Power and Political Violence in Northern Ireland, 1972-2008* (University of Wales Press 2012).
[72] See below, footnotes 78-82.
[73] O'Higgins, '(In)Felix Paupertas: Scholarship of the Eighteenth Century Irish Poor' (2007) Vol 40(3) Arethusa 421 at 431.
[74] One Vibe TV 'Ngũgĩ Wa Thiong'o - Why Africans hate their own languages' (19 April 2019). Available at https://www.youtube.com/watch?v=tnF6XdOh5HY [date accessed: 04 May 2021].
[75] Ó Riagáin, *Language Policy and Social Reproduction: Ireland 1893-1993*, (Oxford: Clarendon Press, 1997) at 7.
[76] Foras na Gaeilge 'Buntús Cainte Ceacht 60 | Foras na Gaeilge X RTÉ Archives' (29 July 2020). Available at https://www.youtube.com/watch?v=gDlpH-QfLSE [date accessed: 30 April 2021].
[77] Proficiency in Irish has traditionally been encouraged in civil service positions.

Nevertheless, negative stereotypes about Irish persist.[78] Discussions about the cost of language services[79], the necessity[80] of Irish and allegations of elitism,[81] commonly feature on local and national media.[82] It must be noted that generally the public have positive attitudes towards Irish,[83] but there is a distinct dislike and distrust of Irish-speakers and Irish in relatively mainstream sects of society.

In terms of modern visibility of Irish, Brennan and O'Rourke refer to the phenomenon of the *cúpla focal* (a few words) where Irish is most visible. It sees Irish being used:

> …at the beginning of a speech and then often peppered throughout the following (otherwise English-only) oration, the *cúpla focal* has been characterised as a way of 'flavouring one's speech'.[84]

Seen in this way, Irish can be positioned in society as a language without function beyond ceremonial purposes. Post-colonialism plays an important role in the development of the *cúpla focal* in society. In an attempt to forge a distinct Irish identity, separate from British identity, emphasis was placed on the furtherance of Irish at the foundation of the Republic of Ireland. Under Article 8 of the Constitution of Ireland, Irish is the "national" and "first official language" of the state.[85] English is then "recognised as a second official language" under the constitution.[86] Attempts to put Irish forefront of communicating Irishness is common since the foundation of the state. But these attempts are often underpinned by the tokenism of the *cúpla focal.* It can be seen in the naming practices of state organisations and businesses in Ireland. It is common to see organisations (state bodies, semi-state bodies or former state

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[78] Boland 'Broadside: Can anybody truthfully say that Irish is a necessary language?' *The Irish Times* (30 May 2016).

[79] De Barra 'The case for ending state support of Irish language is littered with dubious "facts"' *TheJournal.ie* (04 February 2017). Available at: https://www.thejournal.ie/readme/fake-facts-irish-language-debate-3220676-Feb2017/ [date accessed: 04 May 2020].

[80] Walshe 'Irish lessons "are a waste of time"' *The Irish Independent* (02 July 2003). Delaney 'Irish language should not be compulsory, especially for struggling school children' *The Irish Independent* (12 August 2019). 'Irish Examiner View: Do we need Covid-19 booklets in both English and Irish?' *The Irish Examiner* (01 May 2020).

[81] Holden 'The rise of the gaelscoil - is this the new playground of the elite?' *The Irish Times* (17 April 2020). Fitzpatrick 'Tribes of modern Ireland: None of us are just Irish' *The Irish Independent* (28 May 2014).

[82] https://www.newstalk.com/podcasts/highlights-from-the-hard-shoulder/people-speak-irish-need-given-jobs [date accessed: 04 May 2020] https://www.newstalk.com/podcasts/between-the-lines-with-andrea-gilligan/the-irish-language [date accessed: 04 May 2020] https://www.todayfm.com/podcasts/the-last-word-with-matt-cooper/students-exempt-from-irish-are-studying-other-languages [date accessed: 04 May 2020].

[83] See Walsh, O'Rourke and Rowland, 'Research Report on New Speakers of Irish' 2015 Foras na Gaeilge.

[84] *supra* note 57 at 129.

[85] Article 8.1.

[86] Article 8.2.

bodies in particular) with Irish names, who largely do not conduct their affairs in Irish, or have historically not engaged with the public in Irish in spite of legislative requirements to do so and in spite of the constitutional position of supremacy held by Irish. An Garda Síochána is one example of this, where the name of the service is Irish (meaning 'guardians of the peace') but the working language of the service is English. In particular, An Garda Síochána have repeatedly been noted for their failure to comply with obligations to use Irish under the *Official Languages Act, 2003.*[87]

Examples of organisations with Irish names who largely do not conduct business in Irish include Fáilte Ireland,[88] the Irish tourism body; Bord Gáis Energy,[89] a supplier of gas and electricity; Bord Iasaigh Mhara,[90] the Irish marine fisheries organisation; An Post,[91] the Irish post office; Bord na Móna,[92] the body overseeing Irish peatlands; Bord Bia,[93] the body promoting Irish food; Aer Lingus,[94] the Irish national airline; Bus Éireann,[95] the national bus transportation company and; Raidió Teilifís Éireann,[96] the Irish national broadcasting company. The use of Irish language names in politics is also extremely common, where those naming practices do not reflect Irish language usage: The major Irish political parties are Fianna Fáil,[97] Fine Gael[98] and Sinn Féin;[99] The Irish Prime Minister is called the Taoiseach;[100] the deputy Prime Minister is the Tánaiste;[101] the Irish Parliament is called Dáil Éireann;[102] the Irish senate is called the Seanad Éireann[103] and; the legislature is called the Oireachtas.[104] It should be noted that for the most part, these bodies and organisations operate in English and have varying degrees of dedication to actually using Irish. These uses of Irish point to a

[87] Ó Caollaí 'Garda Síochána reported to Oireachtas over Gaeltacht service' *The Irish Times* (26 April 2021).
[88] Translation: 'Welcome Ireland'. Fáilte Ireland is a state body.
[89] Translation 'Gas Board Energy'. Bord Gáis Energy is a former state owned company.
[90] Translation: 'Se Fish Board'. Bord Iascaigh Mhara is a state body.
[91] Translation: 'The Post'. An Post is a state owned company.
[92] Translation: 'Peat Board'. Bord na Móna is a semi-state body.
[93] Translation: 'Food Board'. Bord Bia is a state body.
[94] Translation: 'Air Fleet'. Aer Lingus is a former state owned company.
[95] Translation: 'Irish Bus'. Bus Éireann is a subsidiary of Córas Iompair Éireann (Irish Transport System) which is a state body.
[96] Translation: 'Radio Television Ireland'. RTÉ is a semi-state body.
[97] Translation: 'Soldiers of Fortune'.
[98] Translation: 'Family of the Irish'.
[99] Translation: 'Ourselves'.
[100] Translation: 'Chief'.
[101] Translation: 'Second/Number two'.
[102] Translation: 'Assembly of Ireland'.
[103] Translation: 'Senate of Ireland'.
[104] Translation: 'Gathering'.

performativeness and tokenism,[105] where Irish could be said to demonstrate Irishness, but not to actually indicate the use of Irish as a working language. These examples are a common interaction that the majority English-speaking population has with the language. As such, the perception and known-aboutness of Irish is easily connected to this performativeness and tokenism.[106]

This tokenism is underpinned by statements from the judiciary in respect of Irish-speakers who attempt to use their language with the state. In *Ó Beoláin v Fahy,* Haridman J acknowledged that there is a difficulty associated with the use of Irish in the legal system. He argued that it would take a certain type of strong personality to cope with the pressures of that difficulty. He states that:

> If such a person seeks a statute in Irish from the official Government outlet he or she is more than likely to be told it is not available. There is no Irish version of the forms required to institute a simple claim in Irish in the District Court, nor of the forms to enable a person, for example, to summon a witness or commence an appeal. The practical experience of the cases cited in this judgment indicates that, very frequently, only litigation or the threat of litigation will produce these documents. *This state of affairs is a constant, officially tolerated, discouragement or actual preclusion from the conduct of legal business in the national language.*[107]

Here, Hardiman J points out that there is a practice of tolerating a negative attitude about Irish and alludes that it is difficult to conduct proceedings in Irish because of this negative attitude. In spite of the dominant position in the constitution, the use of Irish is actively discouraged. This furthers the notion that Irish – and its constitutional preference – is tokenistic among Irish society at large.[108]

Similarly, Ní Raifeartaigh J summerised the complexity of the external Irish speaker identity in Ireland in *Ó Cadhla v. Minister for Justice:*

> Ireland today has a peculiar and complex relationship with the Irish language…[among non-Irish-speakers] there are substantial numbers of people within the population who, while favourably disposed towards the language in a general sort of a way, have

[105] *supra* note 57 at 128.
[106] *ibid* at 128.
[107] *Ó Beoláin v Fahy,* [2001] 2 IR 279. Emphasis added.
[108] *supra* note 57 at 128.

> little fluency and no commitment to speaking it in their daily lives. There are also many people who are either indifferent to whether or not the language survives or, in some instances, (whether due to its compulsory educational status or, more likely, for other more complex reasons) are actually hostile to the language. The Irish-speaking minority in society sometimes faces surprising intolerance towards its rights from quarters usually more respectful of minority rights.[109]

Justice Ní Raifeartaigh highlights here that there exists an element of hostility from some in society towards Irish-speakers. That the mere act of speaking Irish can be met with intolerance and bigotry. In terms of "integration" there would seem to be an issue for Irish-speakers also, based on this evidence. Irish-speaking is often treated as extraordinary and faces intolerance, irrespective of its position as a traditional language in Ireland. Again, as with Deaf people, this attitude would point to a problem of integration, where Irish is not accepted in society.[110]

In this research, Irish-speakers refers to those people who define themselves as such and who are understood by the Irish speaking community to be part of that community. It is immaterial whether they are old or new speakers, or what specific label they apply to themselves. The internal identity is one of an Irish speaker or Gael. The external perception of Irish users is as twee or suspicious, or somewhere between these extremes. This concept of tokenism is something which I wish to explore in my research. I will interrogate whether the perception of the *cúpla focal* impacts on a person a person who seeks to conduct their affairs through Irish. If the external expectation of a *cúpla focal* does not match with the internal identity as an Irish speaker using their language, then conflict could potentially arise.

3.5 Conclusion

The groups considered for this research represent RML-using groups. They are the users of the othered languages and they are othered people. They are generally without any major political power and dominated by a larger language group. There may be pressure from the national, homogenous group to assimilate into that culture and the minority culture is deemed as a troublesome upstart that needs to be managed, rather than developed and

[109] *Ó Cadhla v The Minister for* Justice [2019] IEHC 503 at para 4.
[110] *supra* note 1.

promoted. The minority only becomes relevant when discussing the majority – it is only when one defines what a state ought to be, who the people are and what language they speak that we define and recognise those who fall beyond it. Both Irish-speakers and the Deaf Community have a long and complicated history with the Irish state, from the tokenistic use of Irish to the complete oppression of ISL. Both languages have their own distinctive communities and cultures and both groups have their own struggles to have their voices heard, as will be illustrated throughout this research. Both language communities have faced problems of integration, whereby they are not welcome parts of Irish society. Internal identity in both groups is complex and varied and informed by the historic, social and economic realities of the group.

The following chapters will discuss access to justice, the right to a fair trial and the right to an interpreter in depth. These sections will focus on the parameters of the legal provisions and case law. These chapters will be necessary to understand the current scope of rights as it relates to RML-users. Bringing this understanding of identity to bear on understanding the scope of human rights will allow an original and rich analysis.. While the right to a fair trial does not explicitly refer to identity, the conflict between the internal and the external aspect of identity are central. Law, and one's journey through a legal system does not exist in a vacuum. The realities of the individual and how they are perceived by the police or by judges will inevitably impact their experiences. So too, will past experiences have a bearing on the individual. In reading the law, we must simultaneously read in the lived realities of RML identity and how these people are likely to experience the CJS. Only then can we understand a holistic picture of the lived experiences of RML-users in the CJS

Part II: Human Rights

Chapter 4 – Access to Justice

4.1 Introduction

This part explores human rights law, the scope of the right to a fair trial and how RML-users are impacted by that right and its scope. I address the right to an interpreter in detail, as the most evidently relevant right under the right to a fair trial for RML-users. I then address the other relevant minimum standards of the right to a fair trial which have the potential to be impacted by language. Finally I discuss the creation of human rights for minorities. Before that, I discuss the meaning of access to justice, which is the lens through which the human rights research will be considered.

This chapter explores the concept of 'access to justice'. Access to justice is a central aspect of the right to a fair trial. The Human Rights Committee (HRC) has stated that the right to a fair trial:

> …encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice...A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of article 14, paragraph 1, first sentence.[1]

Seen in this way, access is built into the right to a fair trial. The first sentence of Article 14.1 of the ICCPR reads that "[a]ll persons shall be equal before the courts and tribunals" and the HRC has interpreted this to ensure access. While the HRC have focused on procedural issues, I will demonstrate in this thesis how this approach is too narrow to ensure actual access to justice.

[1] See Human Rights Committee, General Comment 32, Article 14, Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) at para II.

Access to justice is experienced differently by different people. As the previous two chapters showed, identity plays a role in how people are perceived and treated by in the CJS. The circumstances which guarantee access to justice for the abled, white, cis gendered male who speaks the language of the court do not guarantee access to justice for everyone. The experiences of othered persons in attempting to access justice need to be considered if we are to analyse effective access to justice. As such, I will rely on literature around women's rights and disability human rights, both which have engaged extensively with the concept of access to justice and what it means to provide access to marginalised people.

Going forward from this point, access to justice underpins the discussion on the right to a fair trial to follow, and the data analysis. As noted in Chapter 1, I rely on both Bahdi and Flynn for their detailed assessments of access to justice as having three distinctive aspects: substantive access, procedural access and symbolic access.[2] I address these three elements of access to justice, by exploring what is meant by each and how they relate to the right to a fair trial. Finally, I address how each aspect relates to the research at hand.

4.2 Aspects of Access to Justice:

Access to justice is frequently referred to in discussion on the right to a fair trial.[3] It generally refers to an accused's ability to go to court and access justice in a physical sense. In this research, access to justice is understood on a deeper level. Ortoleva actually states that the principle is not just relevant for the right to a fair trial, but that it "is intrinsic to all human rights treaties".[4] Francioni notes that it appears in a multitude of human rights treaties and documents (although the term 'access to justice' is not generally used),[5] and formulates part of customary international law.[6] The EU Agency for Fundamental Rights explains the intrinsic link between all human rights generally and access to justice:

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[2] Bahdi, *Background Paper on Women's Access to Justice in the MENA Region* (International Development Research Centre (IDRC), Women's Rights and Citizenship Program (WRC) and the Middle East Regional Office (MERO), Middle East and North African (MENA) Regional Consultation, 9–11 December 2007, Cairo, Egypt).

[3] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 21.

[4] Ortoleva 'Inaccessible Justice/Human Rights, Persons with Disabilities and the Legal System' 2011 Vol 17(2) ILSA Journal of International and Contemporary Law 281 at 292.

[5] Francioni 'The Rights of Access to Justice under Customary International Law' in Francioni (ed) *Access to Justice as a Human Right,* (Oxford: Oxford University Press, 2007) at 99.

[6] *ibid.*

> [t]he possibility of enforcing a right is central to making fundamental rights a reality. Access to justice is not just a right in itself but also an enabling and empowering right in so far as it allows individuals to enforce their rights and obtain redress. In this sense, it transforms fundamental rights from theory into practice.[7]

Thus, access to justice is more than just a stand-alone right: it is an underlying principle that ensures the realisability of rights. Defining what is understood by 'access to justice' can be a complicated task.[8] And in fact, it can mean a number of different things to a number of different people.[9] Quite commonly, it is used in reference to the right to seek a remedy before the court,[10] or the right to have legal representation.[11] According to Franciono, these views are restrictive.[12] They reference individual minimum standards, and do not encompass the accessibility of the justice system itself. It is necessary to take a broader view to understand access to justice as a principle which transforms right from theory into practice.[13] As Lord et al note, access to justice must be understood in this way:

> 'Access to justice' is a broad concept, encompassing people's effective access to the systems, procedures, information, and locations used in the administration of justice. Persons who feel wronged or mistreated in some way usually turn to their country's justice system. In addition, persons may be called upon to participate in the justice system, for example, as witnesses or as jurors in a trial.[14]

Access to justice is more than just the right of an accused, it is an encompassing concept. Literature on disability rights can be instructive here, noted above. This is largely because the first (and to date the only) acknowledgement of a right of access to justice – separate to it being a part of other rights, such as the right to a fair trial – appears in the CRPD. Therein, Article 13 reads that:

> 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-

[7] EU Agency for Fundamental Rights, *Access to Justice: An Overview of Challenges and Opportunities* (EU Agency for Fundamental Rights, 2011), foreword.
[8] Farrow, 'What is access to justice' 2014 Vol 51(3) Osgoode Hall Law Journal 957.
[9] See *supra* note 5 and *supra* note 8.
[10] *supra* note 5 *at* 59.
[11] *ibid* at 55.
[12] *ibid* at 59.
[13] *supra* note 7 .
[14] Lord, Guernsey, Balfe, Karr and Flowers (eds), *Human Rights: Yes! Action and Advocacy on the Rights of Persons with Disabilities* (Human Rights Resource Center, 2009) at para 12.1. See also *supra* note 4 at 284.

appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Access to justice literature, as a result, is often intrinsically intertwined with disability rights literature. This is the case with Beqiraj et al, who have explained access to justice in light of three components:

> [Article 13] reflects the general UN expanded notion of access to justice, which entails 'much more than improving an individual's access to courts... It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable'. Accordingly, it has been pointed out that the concept of access to justice encompasses not only *procedural* access (ie, effectively engaging in and using the established legal system), but also *substantive* access (ie, equitable and beneficial judicial outcomes) and *promotional* access (ie, promotion of citizens' belonging and empowerment)…[15]

In fact, Beqiraj et al are basing their understanding of access to justice on the work done by Bahdi on women's rights in the Middle East. She says that access to justice boils down to three components: substantive access, procedural access and symbolic access.[16] Flynn has built on Bahdi's work,[17] and so too have Bates et al who described access to justice in the following terms:

> …procedural access to justice (defined as an ability to invoke and participate in justice processes); substantive access to justice (defined as an ability to attain fair outcomes); and symbolic access to justice (defined as being accorded respect and recognition by the system as a whole)…[18]

[15] Beqiraj, McNamara and Wicks 'Access to justice for persons with disabilities: From international principles to practice' International Bar Association, October 2017 at 14. Citing United Nations Development Programme (UNDP), *Access to Justice: Practice Note*, 2004 at 3. Emphasis in text.
[16] *supra* note 2.
[17] *supra* note 3.
[18] Bates, Bond & Wiseman, "Troubling Signs: Mapping Access to Justice in Canada's Refugee System Reform" 2016 Vol 47(1) Ottawa Law Review 1 at 9, 10.

These three components work together to provide a holistic approach to access to justice which extends beyond the parameters of the court room or the police station interview room. I now explore these three aspects of access to justice in turn.

4.2.1 Procedural Access

Procedural access, according to Flynn, is closer to a more traditional concept of access to justice as it is "the process by which claims are adjudicated, generally in legal or administrative systems".[19] Larson defines procedural access as focusing:

> on both the processes that are available to help people enforce their rights and privileges under the law and the effectiveness of those processes. When one explores procedural access to justice, for example, one might examine access to the physical locations of justice administration (such as courthouses and police stations), individuals' ability to understand and participate in proceedings (such as court hearings, police interviews, and conversations with one's attorney), and due process of law.[20]

This mirrors what Flynn states, in that procedural access is the traditional understanding of access to justice: it focuses on the minimum standards of the right to a fair trial as they exist, the physical accessibility of locations in the CJS. If access to justice is a triangle (see *Fig. 3.1* below), procedural access represents the top-most layer, with a narrow application, proximate to the CJS as it currently exists.

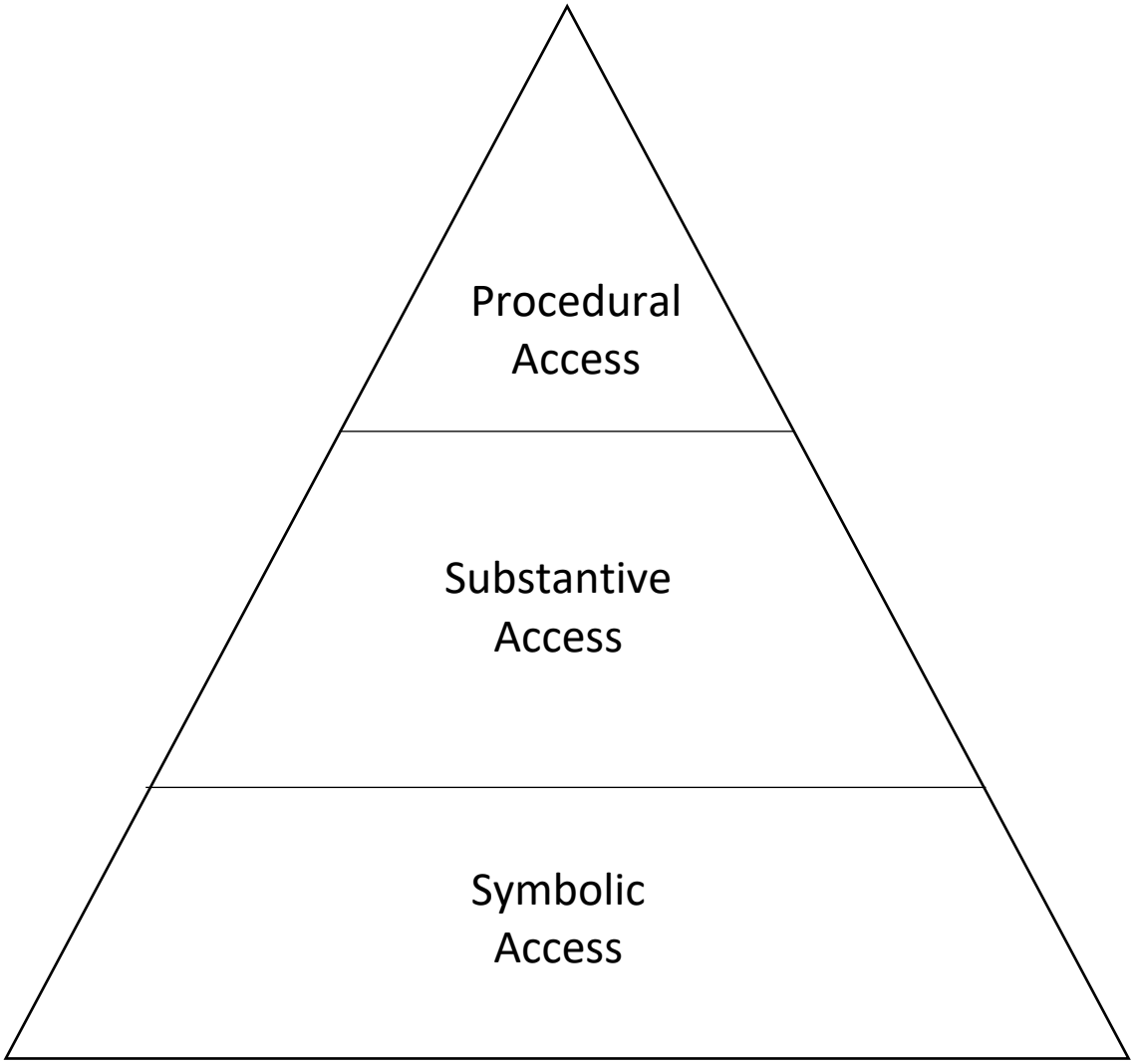
Flynn explains that procedural access does have an application beyond the parameters of the CJS:

> procedural access to justice requires the removal of barriers to bringing justice claims and the introduction of supports to enable people to participate effectively in proceedings designed to administer justice…the dismantling of these disabling barriers 'will demand that attention be given to structures which are outside the classic justice system (such as schools, residential establishments, social services and

[19] *supra* note 3 at 15.
[20] Larson, 'Access to Justice' in Backhaus (ed), *Encyclopaedia of Law and Economics* (Springer New York 2015) at 1.

the political sphere) which provide the context in which complaints or claims might first be voiced'… [21]

Fig. 4.1. Access to Justice Triangle



[21] *supra* note 3 at 15.

Therefore, in pursuing procedural access, people must be familiar with their rights and entitlements as they currently exist. In ensuring this, people must be able to learn about these rights and entitlements in schools, or raise such claims with social services, etc. to begin the process of accessing justice.

Bahdi states that procedural access needs to address the "opportunities and barriers to getting one's claim into court (or other dispute resolution forum)".[22] Even before an individual gets to court, there may be an array of barriers which prevent them from accessing justice which need to be addressed. Procedural access in this way is intertwined with substantive access[23] which is addressed below. Removing the barriers to access must tackle those other barriers which prevent marginalised people from partaking in the CJS as a whole, such as the associated costs,[24] access to information,[25] access to counsel,[26] etc.

Procedural access ensures that the wider societal context is taken into account when considering access to justice. Barriers within the system must be removed in order to ensure access for marginalised people. But so too must barriers beyond the system be removed. Flynn notes how this must necessarily include improvements in respect of representation, and removal of barriers that prevent marginalised people from partaking in the CJS, beyond just as parties to a trial. She states that in the context of disability:

> …procedural access to justice would require attention to be given to removing the barriers which prevent people with disabilities from participating in the justice system in a wide variety of roles, for example, as lawyers, witnesses, judges, jurors and observers.[27]

Flynn is showing the importance of visibility in ensuring access to justice: if an individual can see themselves as part of the system, as welcome in the system, then their being in the system (as a defendant or accused, for example) is less obscure. Procedural access must ensure participation beyond just participation as an accused. The barriers that exist to this wide participation need to be removed to ensure the "effective" engagement with an established legal system that Beqiraj et al call for.[28]

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[22] *supra* note 2 at 28.
[23] Genn, *Judging Civil Justice* (Cambridge University Press, 2010) at 4.
[24] *supra* note 2 at 33.
[25] *ibid* at 34.
[26] *ibid* at 33.
[27] *supra* note 3 at 16.
[28] *supra* note 15 at 14.

Lack of appropriate legal terminology in their language, for example, poses a major barrier to engaging with a legal system for RML-users.[29] Similarly a lack of appropriate training and regulation around the use of interpreters can act as a barrier for RML-users when engaging with the criminal justice systems. But in addition, RML-users can experience lack of access to appropriate education,[30] language deprivation[31] and poor representation in the CJS,[32] all of which will pose a problem for procedural access. Laws and policies which directly or indirectly prohibit RML-users from becoming police,[33] or serving on juries[34] need to be tackled in the interests of procedural access, so as to create a CJS environment that is accessible to marginalised people.

Procedural access, as it is described in the by Flynn and Bahdi, is concerned with the functioning of the CJS and the provision of minimum standards of the right to a fair trial as they currently exist. It is an important aspect of access to justice, but cannot be the sole focus. If society concerns itself only with the immediate and physical barriers to accessing justice, then it misses those instances where access to justice has been barred much earlier.

4.2.2 Substantive Access

Secondly, there is substantive access, which centres on the ability to achieve a fair outcome. Bahdi states that substantive access concerns "assessment of the rights claims that are available to those who seek a remedy".[35] Bahdi explains that substantive access needs an innate understanding of context.[36] She states that substantive access approaches must recognise:

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[29] See The Graz Recommendations on Access to Justice and National Minorities and Explanatory Note, 2017 OSCE, High Commissioner on National Minorities at 19.

[30] See *Nogueira López* 'Article 8.1 Education (I)' in Nogueira López, Ruiz Vieytez and Urrutia Libarona (eds) *Shaping Language Rights* (Strasbourg: Council of Europe Publishing, 2012) at 250.

[31] See Glickman and Hall (eds) *Language Deprivation and Deaf Mental Health*, (New York: Routledge, 2019)

[32] For example, applicants to join the Irish police force must display a good level of hearing, without the use of a hearing aid. As such, Deaf and Hard of Hearing people are excluded from joining the service. See *Competition for Selection of Garda Trainees 2019* at para 10. Available at https://www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/news-media/garda-trainee-2019-notes-for-applicants.pdf [date accessed: 16 November 2020].

[33] *ibid.*

[34] See Gallagher 'Galway woman makes history as first deaf person to deliberate on Irish jury' *The Irish Times* (05 October 2020).

[35] *supra* 2 at 3.

[36] *ibid* at 28.

> that patterns of disadvantage and oppression exist in society and requires that law makers and government officials take this into account in their actions. It examines the impact of law to make sure that it promotes full participation in society by everyone, regardless of personal characteristics or group membership. Substantive equality requires that rights be interpreted, and that policies and programs – through which rights are implemented – be designed in ways that take [marginalised people's] socially constructed disadvantage into account. In short, laws and policies must secure equal benefits for [marginalised people].[37]

Bahdi is highlighting that for laws and policies to effectively impact the lives of marginalised people, they must take into account their realities and lived experiences. Building on this, Flynn notes how it is essential to include affected persons in the decision making process and in the CJS generally. This is broader than procedural access in that it includes marginalised people in the decision making processes who then create the systems found in procedural access. Flynn states that including marginalised people in this way resonates deeply with the 'Nothing About Us Without Us' movements in disability activism.[38] She notes how such an approach resulted in the creation of the CRPD, which has been commended for its inclusivity during the drafting process.[39] The benefit of this inclusion through substantive access is articulated by Lawson and Flynn, again in the disability context:

> Without the active participation of people with disabilities, attempts to design laws and policies which will achieve disability equality and inclusion at domestic level are unlikely to succeed. There is a high risk that particular dimensions of the disadvantage and exclusion experienced by disabled people would go unnoticed or unaddressed...Substantive access to justice for disabled people can be achieved only by facilitating their entry into, and full participation in, the legal professions, the legislature and other public offices; and by involving disabled people's organizations in the design and delivery of laws, policies and services.[40]

Beyond the inclusion of marginalised people in rules which ensure procedural access, as noted above, substantive access ensures that they are included in the processes which design the

[37] *ibid* at 27.
[38] *supra* note 3 at 16.
[39] *ibid.*
[40] Lawson and Flynn, 'Disability and Access to Justice in the European Union: Implications of the UN Convention on the Rights of Persons with Disabilities' 2013 Vol 4 European Yearbook of Disability Law 7 at 15.

system itself. Measures ensuring access to justice for marginalised people are likely to be ineffective when they are not drawn up with the participation of marginalised people. By ensuring substantive justice, the effectiveness of provisions is ensured for minorities. The specific needs of marginalised people can only be properly taken into account during law-making,[41] when the marginalised people are listened to.[42] As an example of a failure of substantive access, Bahdi refers to laws which provide for no-fault divorce for women in Egypt.[43] In spite of the apparent improvement in the law on the surface, there was a failure to consider the socio-economic and cultural realities that existed for women availing of divorce in Egypt.[44] Laws created to improve the lives of marginalised people must actually provide these people with the power to enforce these laws. [45] As such, in interpreting substantive access to justice, we must ask who has been involved in the decision making process and if their lived experiences are being included in the decisions being made? If a provision or law was created for the benefit of a marginalised group, does it do so in reality? And has that marginalised group actually been consulted in bringing about these laws? And as Lawson and Flynn note, such involvement leads to better participation by those marginalised people in the legal system itself, not just as accused persons, but as lawyers, judges, jurors, clerks, etc. To continue the triangle analogy from above, substantive access represents the second level of the triangle: it is wider and more far reaching than procedural access (see *Fig. 3.1*) in that it alters the systems already in place and seeks to ensure marginalised people are included and involved and that their needs are heard and met.

Where the marginalised groups have been consulted in the policies which guide them through the CJS, the outcomes ought to have their experiences in mind. Thus the laws and policies created should reflect their needs substantively. Their experiences in the CJS will be coloured by whether or not their experiences have been catered for. It will be discussed later on in Chapter 5, but when considering the implementation of the right to an interpreter, there are no requirements that an interpreter be trained or qualified.[46] There are no defined

[41] Manhart, '"Backpack Refugee Rights Lawyering" in Greece – Access to Justice through Legal Empowerment' 38 at 12.
[42] *supra* note 3 at 14.
[43] *supra* note 2 at 26.
[44] *ibid* at 26, 27.
[45] *supra* note 41 at 16.
[46] Neither the HRC nor the ECtHR have mandated that the interpreter provided under the right to an interpreter be trained or qualified. See Chapter 5 for further details.

parameters for who is or is not entitled to an interpreter.[47] This is a lack of substantive access, but it has an effect on procedural access: an accused is not automatically entitled to an interpreter where their language differs from that of the court.[48] As will be shown, this can have a grave impact on the progression of the trial and can impact on the actual accessibility of the CJS for an RML-user. A right to an interpreter, without guaranteeing the right to quality interpretation renders the right ineffective.[49] And yet this reality has largely not been discussed by the HRC or the ECtHR.[50] Neither institution has connected the right to an interpreter to the need for that interpretation to be effective.[51] The failure to include this proviso in the provisions of the right to an interpreter show that the specific pitfalls of poor interpretation, and thereby the needs of RML-users were not considered.[52]

Substantive access must entail 'equitable and beneficial judicial outcomes'.[53] Yet equitable and beneficial outcome alone do not indicate substantive access. Where a system that must bend to accommodate a marginalised person in order to ensure equitable and beneficial outcomes, then there is no substantive access. Substantive access measures ensure that the specific needs of marginalised groups have been considered in the creation of the systems, laws and policy, so that the system does not need to bend to accommodate. While it is possible to obtain just outcomes in the absence of substantive access, doing so is through coincidence or exception, rather than being a built-in part of the system.

4.2.3 Symbolic Access

Finally, we move to symbolic access. Beqiraj et al refer to this as 'promotional access', where they describe it as promoting citizens' belonging and empowerment.[54] Flynn and Bahdi both refer to this aspect as "symbolic" access.[55] Bahdi says that this aspect steps outside the realm

[47] Similarly, the HRC and the ECtHR have repeatedly provided vague understandings of who is entitled to an interpreter.
[48] *supra* note 1 at para V.
[49] See Chapter 5 for further details.
[50] See *Michael and Brian Hill v. Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997). See also *Baytar v Turkey,* App no 45440/04 (ECtHR 14 October 2014).
[51] As will be shown in Chapter 5 the right to a "competent interpreter" is provided for under Article 67.1(f) of the Statute of Rome.
[52] In searching through the travaux préparatoires for both the ICCPR and the ECHR, I was unable to locate specific references to qualified interpreters or the needs of other language users in respect of Article 14 of the ICCPR or Article 6 of the ECHR.
[53] *supra* note 15 at 14.
[54] *supra* note 15 at 14.
[55] *supra* note 3 at 16 and *supra* 2 at 3.

of the justice system and asks how society itself promotes citizens' belonging and empowerment.[56] Flynn defines symbolic access as entailing a:

> …society in which, due in part at least to its laws and justice system, individuals from marginalised communities are fully included and empowered to participate as equal citizens…[57]

Flynn is showing how access to justice stems beyond the justice system itself. Where marginalised people are valued members of society, this lays the groundwork for them to be valued members of a CJS. It refers to a broad, societal understanding of access to justice, whereby individuals and groups are empowered, valued and active members of society. [58] Empowerment has been defined by Purkey, in the context of refugees:

> …as the process through which protracted refugee populations become able to use the law and legal mechanisms and services to protect and advance their rights and to acquire greater control over their lives, as well as the actual achievement of that increased control.[59]

This definition can be extrapolated for the research here: RML-using groups can be said to be empowered when they are able to use the law to protect themselves and their communities, to achieve their rights and to have control over their lives and their communities. This empowerment extends beyond merely the CJS, and in fact, it ought to be present in order to manifest itself in the form of access. When there is symbolic access, a group is included and accepted in society. They are confident and capable of asserting rights and freedoms. Again, using the triangle (see *Fig 4.1*), symbolic access is the bottom, foundational layer. It has a much broader application, going beyond the CJS entirely, applying to society at large. It is also the foundation, as true access to justice within the system is unlikely to occur without it.

Symbolic access is symbiotic in the sense that it needs to feature co-operation from the majority outside the group, and the minority group itself. It is insufficient if the minority group alone tries to assert itself in a society which is unwelcoming towards it. Known-aboutness therefore plays a role in the pursuit of symbolic access.[60] If a group are predominantly seen

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[56] *ibid* at 3.
[57] *supra* note 3 at 16.
[58] *supra* note 40 at 16.
[59] Purkey, "A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations" (2014) 27:2 Journal of Refugee Studies 260.
[60] Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New York: Simon and Schuster, 1963) at 65

in a negative light in society, or there is a persistent negative stereotype which attaches to that group, then it will impact on their attempts to become empowered, valued members of that society. Manhart refers to the growth in xenophobic rhetoric regarding refugees and asylum seekers arriving in Greece and how it impacts on symbolic access:

> Anti-migration rhetoric, populism, and xenophobia have created a political climate in Europe (and beyond) that rarely will grant symbolic access to justice to asylum seekers.[61]

The growth of anti-migrant rhetoric in society and in the political sphere inhibits symbolic access. Migrants cannot be truly valued and empowered when there is a dominant (or growing) known-aboutness that demonises their existence.

Symbolic access flows into the other two aspects of access to justice. Where individuals are empowered and valued, they can be involved in the assertion of their needs and in the creation of laws and policies which affect them (substantive access).[62] Where they are empowered and valued, they can assert their rights in the criminal justice system, removing the barriers to accessing justice (procedural access).[63] Symbolic access is symbiotic in this way, and so those administering justice (either politicians creating law, or Gardaí, judges, etc. administering law) perceive these people as empowered and valuable. Therefore those administering justice do not block procedural access in that they can perceive the barriers within the CJS as they exist for marginalised people, and remove them. Nor do they block substantive access in that they will welcome and seek the participation of interested parties. Flynn states that symbolic access aims to harness the power of law to encourage social change.[64] It can be difficult to measure whether symbolic access is inspired by substantive access, or vice versa.[65] Writing in the context of disabled people, Basser-Marks and Jones note that law does not always translate to social change:

> Lawyers have a tendency to believe that law will provide solutions to complex social and political problems. While there is clearly a place for well thought-out laws, and having appropriate law is, in fact, very important to disadvantaged or vulnerable

[61] *supra* note 41 at 14.
[62] *supra* note 2 at 3.
[63] *supra* note 3 at 15.
[64] *ibid* at 17.
[65] *supra* note 2 at 39.

> members of the society, law is at best only part of any strategy required to provide rights for people with disabilities[66]

There are complexities finding cause and effect relationships between social change and marginalised people participating in the justice system.[67] Nevertheless, an empowered people who are respected and valued in a society are more likely to be considered and have their concerns heard by law and policy makers, or even to be law and policy makers themselves. Where a group has the opportunities and tools to assert themselves and be heard through symbolic access, then they are in a better position to pursue substantive access for themselves, which will then lead to procedural access.

In recognising the need for symbolic justice, RML-users should be empowered to use and assert their language and identity. Biases and stigma surrounding their identity in wider society must be tackled to ensure symbolic access. For symbolic access to be achieved for RML-users, they must be given control over their own language, its instruction,[68] and given access to education in that language.[69] When RML-users are empowered in their language and identity, they can better engage with the criminal justice system in an empowered way, using their language and displaying their identity.

4.3 Conclusion:

Access to justice is a commonly used phrase in legal discourse. But it is a scarcely defined phrase. It seems that it is the concept which everyone knows, but which no one attempts to explain. The sociologist Pierre Bourdieu comes to mind here when he said that it "goes without saying because it comes without saying".[70] Generally, when access to justice is talked about, the focus is on a limited understanding of procedural access, the narrowest part of access to justice overall. Access to justice is referred to in terms of physical aspects of entering a court room or the administrative aspects of court or police stations.[71] Little attention is paid

[66] Jones and Basser-Marks, 'The Limitations on the use of Law to Promote Rights: An Assessment of the Disability Discrimination Act 1992', in Hauritz, et al (eds.), *Justice for People with Disabilities- Legal and Institutional Issues,* (Federation Press, 1998) at 3.
[67] *supra* note 2 at 39.
[68] See *supra* note 30 at 250.
[69] *ibid.*
[70] Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 2010) at 167
[71] LawUCC 'Maintaining Access to Justice in the Pandemic' (26 November 2020). https://www.youtube.com/watch?v=3bbyAvc-5PQ [date accessed: 27 November 2020].

to the individual person's wider experiences with the CJS, the justice system generally, or society overall.[72]

From this point, when I reference access to justice, I am referring to the three aspects discussed above. I mean access to justice in a holistic sense, including the removal of barriers that keep RML-users and marginalised people from accessing justice and the opportunity to participate in and benefit from the justice system (procedural justice); the inclusion of such people in the construction of laws and policies which affect them (substantive access); and their empowerment and inclusion in wider society as valued, active members of the community (symbolic access).

Access to justice is a core component of the right to a fair trial, and of human rights generally. When we consider access to justice, we must look beyond merely assessing whether or not an individual went to court and availed of a remedy. There a wide ranging, societal aspects which must be considered if true access to justice is to be ensured for marginalised groups. By combining this perspective on access to justice, with the concept of identity as outlined in Chapters 2 and 3, a deeper assessment of the effectiveness of human rights in this space can be achieved. Those rights will be the subject of the next Part of this thesis, where human rights law will be discussed in the context of identity and access to justice.

[72] *ibid*

Chapter 5 – The Right to an Interpreter and Procedural Access

5.1 Introduction

This chapter and the next focuses on language rights as they appear under the right to a fair trial in international human rights law. The focus is specifically on the ECHR and the ICCPR. In positioning language rights, we must understand that they are by no means part of a new era of human rights. In particular, when considering the right to a fair trial and language or RML-users, the right to interpretation immediately comes to mind. It constitutes one of the minimum standards guaranteed under the right to a fair trial. Interpretation is a central right in accessing a fair trial where language is at issue. It can underpin all other aspects of the right to a fair trial. An interpreter can act as the divide between justice and injustice for an accused who does not have the language of the court. The interpreter may be the bridge from inaccessibility to accessibility. In fact, the other minimum standards are often only achievable for the RML-user when an interpreter has been provided: an accused cannot enjoy the right to counsel where they cannot communicate with counsel,[1] they cannot be said to have availed of adequate time and facilities when there is no interpreter, etc.[2] As such, I discuss the right to an interpreter first here, before moving on in the next chapter to the other aspects of the right to a fair trial which are impacted by language, which include the right to trial without undue delay, the right to communicate with counsel and the right to be present at trial.

At the core of this chapter is procedural access to justice. As discussed in the previous chapter, procedural access references the structures within the CJS as they currently exist, including the minimum standards of the right to a fair trial. As such, procedural access covers the right to an interpreter. Procedural access ensures that the accused has the opportunity to

[1] Article 14.3(b) of the ICCPR and Article 6.3(c) of the ECHR.
[2] Article 14.3(b) of the ICCPR and Article 6.3(b) of the ECHR.

effectively engage in the proceedings against them.[3] It calls for the removal of barriers which block engagement for the accused.[4] Where language forms such a barrier, and it is not removed, there is a failure to ensure procedural access, and access to justice overall. The provision of an interpreter who is skilled and competent can be the key to ensuring an RML-using accused has procedural access to justice.

I focus on two main issues in this section. Firstly, I address entitlement to an interpreter. I explore the development of the jurisprudence on the right to an interpreter stemming from the HRC and the ECtHR as it relates to entitlement. In addressing this issue, I also analyse literature on language acquisition and comprehension, to add context to interpreter entitlement.

The second part of this section looks at the effective realisation of the right to an interpreter. I engage with literature describing the impact the quality of interpretation has on the fairness of trial. Again, I examine the jurisprudence of the HRC and the ECtHR, this time to investigate effective interpretation has been found as part of the right to an interpreter.

5.2 Entitlement to an interpreter

The right to an interpreter recognises that language may present an obstacle to the fairness of trial. It offers a solution to this problem in the form of interpretation. In providing for an interpreter, the barrier that language poses is lifted for the accused. Under Articles 14.3(f) and 6.3(e) of the ICCPR and the ECHR respectfully, the right entitles an accused to "the free assistance of an interpreter if he cannot understand or speak the language used in court". I address the scope of the right under the HRC and the ECtHR below.

5.2.1 UN Human Rights Committee

The HRC is the UN monitoring body which, *inter alia,* hears individual complaints alleging violations of rights under the ICCPR from Contracting Parties. The HRC also issues General Comments elaborating on the scope of rights under the ICCPR. The HRC has discussed on the scope of the right to an interpreter most notably in its General Comments. The HRC has stated

[3] Beqiraj, McNamara and Wicks 'Access to justice for persons with disabilities: From international principles to practice' International Bar Association, October 2017 at 14.

[4] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 15.

that the right to interpretation:

> …is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.[5]

Under this standard, an accused person is entitled to an interpreter when they are "ignorant" of the language of the court, or when they have "major" trouble understanding the language of the court. This standard is vague. 'Ignorant' is not defined in the commentary. It could be that ignorance is assessed as having no command whatsoever of the language or it could mean that accused is competent in some ways, but has difficulty understanding the language of the court. Similarly, what constitutes a 'major obstacle' is unclear.

In its individual complaints capacity, the HRC also engaged with the scope of Article 14.3(f). It held in its decision in *Guesdon v France:*

> …[T]he requirement of a fair hearing [does not] mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. Only if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.

The HRC states that there is no immediate right for the accused to have an interpreter when their mother tongue differs from that of the court's language. Where the accused does not speak the language of the court 'adequately' and where they have difficulty in understanding, then an interpreter must be provided. In addition, what the HRC means by having 'difficulty in understanding' is unclear in this case, particularly given that the HRC went on to say that in not providing an interpreter to Mr. Guesdon:

> …the French courts complied with their obligations under article 14, paragraph 1, in conjunction with paragraphs 3(e)and (f). The author has not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French. In this context, the Committee notes that the notion of a fair…does not imply that the accused be afforded the possibility to express himself in the

[5] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) at para 13.

language which he normally speaks or speaks with a maximum of ease.[6]

The Committee's logic here seems to be conflicting. Mr Guesdon's 'simple but adequate' command of French was deemed a sufficient standard to stand trial in the absence of an interpreter. Article 14.3 denotes the minimum guarantees that must be afforded. In assessing the *Guesdon* case, Cardi notes that:

> …the right to an interpreter does not aim to afford tolerance, protection or promotion for any language or any linguistic identity. Its rationale lies somewhere else: in securing trial fairness.[7]

While this may be true, it does not guarantee that the HRC actually secured fairness, in spite of their efforts. Again, if we are to hold access to justice and procedural access as central to fairness of trial, then we must ensure the accused is given the opportunity to effectively participate.[8] In respect of the US and use of other languages in court, Del Valle says that surely when an accused faces criminal charges,[9] one would want to give testimony with the most clarity and accuracy of intent (the language one speaks with "maximum ease"), rather than relying on the "simple but adequate" speech that satisfied the Committee in *Guesdon*.

The HRC again referred to the right to an interpreter in *Shukuru Juma v. Australia.*[10] The author in this case was a Tanzanian man who spoke Swahili as his first language. English, the language used at trial, was his fourth language, and he claimed that he was "unable to understand what was taking place during the court hearings and unable to understand the complexities of the legal process" and that in his lack of understanding, he merely agreed with the questions put to him.[11] Nevertheless, it was alleged that the applicant could express himself in 'reasonable' English. The HRC then found that there is no right to an interpreter under Article 14.3(f) where the accused is "capable of expressing himself adequately in the official language of the court".[12] Again, these standards of language competency are vague and potentially allow for an accused to be deprived of an interpreter where they need one.

In *Hill and Hill v. Spain,* where interpretation, *inter alia,* was at issue, Committee Member

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[6] *Guesdon v. France*, U. N. Doc. CCPR/C/39/D/219/1986 (1990).

[7] Cardi 'Regional or Minority Language Use before Judicial Authorities: Provisions and Facts' 2007 Vol 6(2) Journal on Ethnopolitics and Minority Issues in Europe 1 at 4.

[8] *supra* note 4 at 15.

[9] Del Valle, *Language Rights and the Law in the United States: Finding Our Voices* (Clevedon: Multilingual Matters Ltd., 2003) at 172.

[10] *Shukuru Juma v. Australia*, U.N. Doc. CCPR/C/78/D/984/2001 (2003).

[11] *ibid* at para 3.1.

[12] *ibid at* para 7.3. Emphasis added.

Eckhart Klein criticised the Committee for failing to elaborate on alleged violation of, *inter alia,* rights associated with language. He stated that just because

> …the Committee found a violation of the authors' right to a fair trial under article 14 regarding certain aspects…[it did] not release the Committee from its duty to examine whether other alleged violations of the rights enshrined in article 14.[13]

In its General Comment 32, the HRC did update its stance on the scope of the right to an interpreter where it is stated that under Article 14.3(f):

> …accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively…[14]

This development followed *Guesdon* in determining that no immediate entitlement to an interpreter existed where the accused's mother tongue differs from the court language.[15] The standard for being denied an interpreter under the ICCPR is set at a command of the language, sufficient enough to allow the accused to form an effective defence, pursuant to General Comment 23.[16] This development is a more accused centric approach and more reflective of procedural access. The standard is concerned with the accused's ability to form an effective defence not merely a categorisation of whether language poses a 'major obstacle'. The approach can be understood in terms of Flynn's description of procedural access in that it ensures that the accused can participate "effectively in proceedings designed to administer justice"[17] in respect of a linguistic barrier. Under this development, where the accused could not effectively form a defence because of language, they would be entitled to an interpreter. The HRC has since reiterated this stance in *Zeynalov v. Estonia.*[18] In *Zeynalov v Estonia* the accused was highly proficient in the language of court. In fact the request for an interpreter

[13] *Michael and Brian Hill v. Spain*, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997), B. Individual Opinion by Committee Member Ekart Klein.
[14] Human Rights Committee, General Comment 32, Article 14, Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) at para V.
[15] It should also be noted that there is no definition provided for what is understood by 'mother tongue'. One would assume it is used here to refer to the language an accused acquired first, or their home language, but this classification is not a hard and fast rule. For Deaf people, for example, their home language is unlikely to be an SL, given that approximately 90% of Deaf people are born into hearing families and therefore can often grow up without their SL used in the home.
[16] *supra* note 14 at para V.
[17] *supra* note 4 at 15.
[18] *Zeynalov v. Estonia* CCPR/C/115/D/2040/2011 at para 9.3.

largely related to a lawyer assisting Mr Zeynalov,[19] who did not speak Estonian. There was no dispute about Mr Zeynalov's abilities in Estonian. In denying his request for an interpreter, no violation of the right was found by the HRC and the HRC followed the understanding set in General Comment 32, whereby an accused is entiteled to an interpreter if they do not understand the language of the court sufficiently enough to defend themselves.[20] It would be interesting to see how the HRC would rule in a case where the author's capabilities in the language were not so obvious. If the HRC is to follow its own jurisprudence, then procedural access should prevail.

While the HRC has had a history of vagueness when considering the right to an interpreter, General Comment 32 shows that there is possibly a shift towards procedural access. They have moved forwards from requiring that language pose a 'major obstacle' to considering whether the accused can use the language sufficiently to defend themselves.[21]

5.2.2 The European Court of Human Rights

The ECHR is the primary document of the Council of Europe (CoE) setting out the fundamental rights and freedoms afforded to individuals under its jurisdiction. The ECtHR hears, *inter alia,* individual complains regarding alleged violations of rights under the ECHR. Like the HRC, the ECtHR has also discussed the scope of the right to an interpreter.

In the case of *Hermi v. Italy,*[22] the provision of an interpreter for Mr Hermi was addressed. The Court held that:

> …interpretation assistance provided should be such as 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.

The standard here is to have knowledge of the case, and to be able to put forward one's version of events. This view followed the jurisprudence seen in *Kamasinski v. Austria,*[23] *Lagerblom v. Sweden,*[24] and was followed again in 2014 in *Baytar v. Turkey.*[25] In connecting the right to an interpreter with having knowledge of the case against oneself, the Court has

[19] This individual, Mr Suleymanov was not the accused's legal representation.
[20] *supra* note 18 at para 9.3.
[21] *ibid.*
[22] *Hermi v. Italy,* App no 18114/02 (ECtHR 18 October 2006).
[23] *Kamasinski v Austria,* App no 9783/82 (ECtHR 19 December 1989) at para 74.
[24] *Lagerblom v. Sweden* App no 26891/95 (ECtHR 14 January 2003) at para 61.
[25] *Baytar v Turkey,* App no 45440/04 (ECtHR 14 October 2014) at para 49.

set the standard on the basis of the accused's needs. Nevertheless in *Hermi v Italy*, the Court went on to qualify this by saying:

> The Court has held that, in the context of the application of paragraph 3 (e), the issue of the defendant's linguistic knowledge is vital and that it must also examine the nature of the offence with which the defendant is charged and any communications addressed to him by the domestic authorities, in order to assess whether they are sufficiently complex to require a detailed knowledge of the language used in court…[26]

Based on this jurisprudence, access to an interpreter is only mandated where the case is 'sufficiently complex' to warrant that access. In *Sqman v Turkey,*[27] the Court followed this requirement for 'sufficient complexity'. In essence, the ECtHR found that the complexity of the case is directly related to the necessity of an interpreter. This raises certain questions. Court cases are complicated affairs, making use of specific language and conducted in a more formal register.[28] There is evidence to show that legal proceedings can be difficult to follow even when conducted in the accused's mother tongue.[29] It could easily be argued that all case are complex for an accused, particularly if they have a limited command of the language used in court.[30]

It must be noted that the ECtHR has updated its jurisprudence on the right to an interpreter. In 2018, the ECtHR held that having a basic understanding of the language of court is not sufficient to forego the use of an interpreter. The case, *Vizgirda v. Slovenia*[31] revolved around a Lithuanian man, residing in Slovenia, convicted of bank robbery. The applicant, Mr. Vizgirda, was provided with an interpreter who spoke Russian. However, Mr. Vizgirda attested to having a weak command of Russian.[32] His native language was Lithuanian and he complained that the State had made an assumption that he spoke Russian.[33] It is interesting to note that the State alleged that as the applicant had been born in Lithuania in 1980, then part of the Soviet Union where Russian was the official language until Lithuanian independence in 1990,

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[26] *supra* note 22 at para 71. See also *supra* note 23 at para 79.
[27] *Sqman v. Turkey* App no 35292/05 (ECtHR 5 April 2011) at para 31.
[28] Piatt, *Only English? Law and Language Policy in the United States*, (University of New Mexico Press, 1990) at 84.
[29] Hartley, 'Legal Ease and "Legalese"' 2000 Vol 6(1) Psychology, Crime & Law 1.
[30] *supra* note 28 at 84.
[31] *Vizgirda v. Slovenia* App no 59868/08 (ECtHR 28 August 2018).
[32] *ibid* at para 67.
[33] *ibid* at para 67.

he must have learned Russian at school,[34] thereby insinuating that the applicant *ought to have* knowledge of Russian. This outlook acted as a barrier for Mr. Vizgirda against his engagement in the process against him, and as such impacted procedural access.[35] He did not speak Russian sufficiently enough to benefit from an Russian interpreter, and therefore the language barrier was not removed. In coming to its conclusion, the ECtHR held that:

> …[the duty to provide an interpreter] is not confined to situations where the foreign defendant makes an explicit request for interpreting. In view of the prominent place held in a democratic society by the right to a fair trial…it arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings, for example if he or she is neither a national nor a resident of the country in which the proceedings are being conducted.[36]

The Court concluded here that it was not the duty of the accused to explicitly request an interpreter. The burden is placed on the State itself to ensure that fairness will still be protected in the absence of an interpreter. This development of jurisprudence puts the accused's proficiency in language at the heart of the right to an interpreter:

> [The Court] would add in this connection that the fact that the defendant has a basic command of the language of the proceedings or, as may be the case, a third language into which interpretation is readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understands sufficiently well to fully exercise his or her right to defence.[37]

Here the Court established the standard as being able to 'fully' exercise the right to defence. This line of reasoning is consistent with procedural access, putting the accused's ability to effectively participate in the proceedings at the forefront.[38] The Court elaborated on the command of language necessary to forego an interpreter in a way that has not been done before. In addition, in coming to its conclusion,[39] the ECtHR positively cited the EU Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings. The Directive provides, *inter alia,* for the provision of appropriate systems to ascertain the

[34] *ibid* at para 71.
[35] *supra* note 4 at 15.
[36] *supra* note 31 at para 81.
[37] *ibid* at para 83.
[38] *supra* note 4 at 15.
[39] *supra* note 31 at paras 82, 84, 86.

linguistic needs of accused persons,[40] systems of appeal against a decision that no interpreter is needed,[41] and assurance of quality of interpretation.[42] The Directive provides more detail to the provision of interpretation than is at present available under the CoE system of human rights. The ECtHR's positive citation of the Directive could possibly point to a European consensus on the Directive,[43] whereby this more detailed understanding of interpreter provision becomes part of the right to an interpreter under the ECHR, particularly given that of the 47 Council of Europe Member States, 26 members are also EU Member States.[44]

The ECtHR has shown development overtime in the jurisprudence in respect of the right to an interpreter. This development from the ECtHR is a promising shift towards a more accused centric approach, where procedural access is at the core.

5.2.3 Understanding 'understanding'

In continuing the discussion on the right to an interpreter under the minimum standards of the right to a fair trial, it is important to briefly discuss the parameters of the right. If the right to an interpreter is afforded to a person who does not *understand* the language of court, then we need to interrogate what it means to understand a language. Not understanding is the bar for having an interpreter. We need to understand who falls short of this bar, and what it means to be left behind.

There are various layers to language acquisition which vary from person to person.[45] One person's cognitive ability to acquire language may be greatly different to another.[46] A number of factors can also affect a person's competency in a language, such as language deprivation,[47]

[40] See Article 2.4.
[41] Article 2.5.
[42] Article 2.8.
[43] A European consensus constitutes a principle of judicial reasoning in the ECtHR which "favours the solution to a human rights issue which is adopted by the majority of the Contracting Parties." See Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) at 9.
[44] While the UK had adopted the Directive, it is no longer part of the EU. Denmark, an EU Member State, did not adopt the Directive.
[45] See Ellis *Understanding Second Language Acquisition,* (Oxford: Oxford University Press, 1985) at 4, and 99-126.
[46] See Piller *Linguistic Diversity and Social Justice: An Introduction to Applied Sociolinguistics* (New York: Oxford University Press, 2016) at 49.
[47] Glickman and Hall 'Introduction: Culture and Disability' in *Language Deprivation and Deaf Mental Health,* Glickman and Hall, eds. (New York: Routledge, 2019) at 2.

educational background,[48] age,[49] and disability.[50] Piatt references the high linguistic capacity needed when partaking in a trial when he states that "because of the sophisticated language level used in [c]ourts, it is necessary to have a minimum of fourteen years of education to understand what goes on in a criminal trial…"[51] The language used at trial is complex and difficult. It must also be noted that fluency is not a static state of being.[52] One is not simply 'fluent' and therefore competent in any arena in that language.[53] Fishman has referred to this phenomenon as 'domains' of language.[54] A domain of language is refers to the context in which it is used. Humans are competent in certain domains of language. Typical domains are 'family', 'school', 'place of recreation' and 'church'".[55] Berk-Seligson states that multilingual people will have a better command of their second language in the domain in which they learned that language.[56] She goes on to provide a helpful example of domain in action:

> …if you learned to play marbles in Spanish, but learned the rules of soccer in English, you probably will have difficulty describing marble game rules in English and similarly, you will have difficulty in describing the soccer game rules in Spanish[57]

Language learning and language competency are situational. It is unlikely for a person to be competent in every domain of language. This is particularly true in the legal context, as McCaffrey states:

> The problem of vocabulary becomes even more complex in legal interpreting if highly technical language is involved, such as medical, scientific or other specialized language.[58]

Legal settings can include an overlap of complexities, where one could conceivably require a

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[48] *supra* note 46 at 46.
[49] i*bid.*
[50] See for example, Schneider and Crombie *Dyslexia and Foreign Language Learning* (London: David Fulton Publishers, 2004).
[51] *supra* note 28 at 84. As cited in Del Valle, *Language Rights and the Law in the United States: Finding Our Voices,* (Clevedon: Multilingual Matters Ltd., 2003), Piatt carried out this study "on behalf of the Director of the Administrative Office of the United States Courts" at 169. See also, research on the difficulty in understanding fundamental aspects of the criminal justice system such as the police caution and the right to silence in Gudjonsson and Clare 'Understanding of the current police caution (England and Wales) Among Suspects in Police Detention' (2002) Vol 12 Journal of Applied Social Psychology 83.
[52] *supra* note 46 at 48.
[53] *ibid.*
[54] Fishman, *Sociolinguistics: A Brief Introduction* (Massachusetts: Newbury House, 1971) at 51-55.
[55] Berk-Seligson 'The Importance of Linguistics in Court Interpreting' 1988 Vol 2 La Raza Law Journal 14 at 17.
[56] *ibid*.
[57] *ibid.*
[58] McCaffrey '"Don't Get Lost in Translation/ Teaching Law Students to Work With Language Interpreters" 2000 Vol 6 Clinical Law Review 347 at 354.

familiarity with a legal domain and another specialised domain. As such, when the right to an interpreter is qualified by a language the accused 'understands', we must interrogate what the courts have understood by understanding. There have been positive shifts in the jurisprudence of both the HRC and the ECtHR in respect of access to an interpreter as shown. Both have shifted in recent judgments towards a more accused centric approach,[59] with procedural access at the core. But if the jurisprudence of the HRC and the ECtHR is to truly integrate access to justice, then consideration must be given to domain and individual competency. The text of the right guarantees an interpreter where the accused cannot understand or speak 'the language of the court'. The research above shows that the language used in court is a specific and complex domain. Therefore, if the focus is to be on the needs of the accused, then entitlement to an interpreter must consider domains and the accused's individual abilities. If the right to an interpreter is to be effective and ensure procedural access, then it needs to take account of both the ability and the domain of the accused.

It is worth taking time to discuss the issue of necessity and interpretation. From both the ICCPR and the ECHR, interpreters are granted to accused persons on being able to speak the language of court.[60] Allowance of an interpreter is based on linguistic need. As this section shows, language acquisition is complex and language comprehension in a legal setting can be even more complex.[61] In terms of the groups studied herein, it should be understood that for the most part, Irish-speakers also speak English with native capabilities.[62] So in terms of needing an interpreter under the parameters of the right to an interpreter for an accused person, there is often no right to an interpreter for an Irish speaker. However that does not mean there is no entitlement elsewhere to such an allowance.

In Ireland there is a right to use Irish in interactions with the State.[63] That right can be executed using an interpreter. In the CJS, where there is no Irish speaking CJS operative, an interpreter can work to satisfy the right to use Irish for an accused.[64] The domestic law right

[59] See *Zeynalov v. Estonia* CCPR/C/115/D/2040/2011 and *Vizgirda v. Slovenia* App no 59868/08 (ECtHR 28 August 2018) respectively.

[60] Recalling that both Article 14.3(f) and Article 6.3(e) state that an accused has the right to an interpreter where they do not 'understand or speak' the language of the court.

[61] Piatt, *Only English? Law and Language Policy in the United States*, (University of New Mexico Press, 1990) at 84.

[62] Kelly-Holmes 'Sex, lies and thematising Irish: New media, old discourses?' in Kelly-Holmes (ed), *Thematising Multilingualism in the Media* (John Benjamins Publishing Company 2013) at 45.

[63] Under both the Constitution and the *Official Languages Act, 2003*.

[64] Ó Cadhla v The Minister for Justice [2019] IEHC 503 at para 35.

is not contingent on necessity, or on capability in English, as it might be understood under the ICCPR and the ECHR.

It is worth interrogating, however, what the point of such a requirement is, when Irish-speakers can almost exclusively speak English with great competency.[65] Surely it is a waste of time and resources to provide an Irish speaking interpreter when all parties to an interaction share another language?[66] To address this issue, I return to literature on identity. Certainly, the Gael can speak English. But there is a question of identity to consider. In obliging a person to speak another language in order to engage with the CJS, particularly when their identity is so connected to their language, they are being forced to pass.[67] They are being forced to undercommunicate or hide who they truly are in order to avail of fairness.[68] When we recall what Leary says about passing,[69] the accused must engage in destroying the self they aim to protect at the behest of a powerful CJS. It should also be recalled that an accused person does not instigate engagement with the state, *per se.*[70] It is the State which requires an accused to participate in the CJS process. The accused is then required, not only to participate in a process which may result in the denial of their liberty by way of penalty, but also that they must alter their self and pass in order to do so.

It is beneficial then to interrogate what is understood by a 'need' or a 'necessity' to use a particular language, and for the state to provide for the use of that particular language. That necessity can be placed on linguistic ability, or on necessity of protecting the self and identity. In this thesis, I advocate for the latter, based on a understanding of the importance of identity and the damage that can be caused by passing.

5.3 Interpreter Standards

In continuing this discussion on the effectiveness of access to an interpreter, I now outline what is meant by the right to an interpreter, and what it entails. There is little within Articles

[65] Kelly-Holmes 'Sex, lies and thematising Irish: New media, old discourses?' in Kelly-Holmes (ed), *Thematising Multilingualism in the Media* (John Benjamins Publishing Company 2013) at 45.
[66] Ó Deá, 'We just want to speak our own language, in our own country' *TheJournal.ie* (12 September 2016).
[67] Goffman *Stigma: Notes on the Management of the Spoiled Identity,* (Penguin Books, 1990) at 42.
[68] Hylland-Eriksen, *Ethnicity and Nationalism* (London: Pluto Press, 1994) at 36.
[69] Leary, 'Passing, Posing, and "Keeping It Real"' (1999) 6 Constellations 85 at 85.
[70] Keeping in mind that it is possible to argue that if an accused person engages in criminal activity, then they are inviting engagement with the state, but also recalling that not all accused persons have actually engaged in criminal activity.

6.3(e) or 14.3(f), or the jurisprudence from the ECtHR or the HRC about who may act as an interpreter, levels of skill or ethical considerations. I address the entitlement to an interpreter at the International Criminal Court (ICC) in Chapter 8. For now it is sufficient to know that in comparison to the requirements under the right to an interpreter as contained in the ECHR and the ICCPR, interpreters under the provisions of the ICC are required to be "competent".[71] In order to work in the language sector of the ICC, it is required that interpreters have university degrees.[72] Consideration is given to the quality of interpretation in providing the right to an interpreter at the ICC. This focus on quality is absent from the ICCPR and the ECHR and their jurisprudences on the matter.

Central to this section is the impact that an interpreter can have on procedural access and how this impact, for the most part, goes unappreciated. Even more significant is the impact that unskilled or faulty interpretation can have on procedural access to justice and how it can have the potential to result in a grave miscarriage of justice. The Irish Translators and Interpreters Association (ITIA) have noted that a court interpreter:

> …has to be able to deal with complex legal language, ambiguous questions, slang and references to the media. Poor interpreting can obviously affect a court's perception of a defendant.[73]

The ITIA here are acknowledging the particularly damaging impact poor interpretation can have on a defendant when they give their own testimony in court. While giving testimony in court is not something a defendant is obligated to do in a criminal case, it can also have an impact on proceedings during the investigation phase. If the interpreter used during police interview with the accused is unskilled, the statement given can risk being inaccurate, misleading or falsely incriminatory.[74] Shepard notes that "an inaccurate translation can end a

[71] Article 67.1(f).

[72] Koomen, 'Language Work at International Criminal Courts' (2014) Vol 16(4) International Feminist Journal of Politics 581 at 585. Where no such accreditation is available, native speakers of certain languages are recruited and trained "in house as paraprofessional language assistants". See "Behind the Scenes: The Registry of the International Criminal Court" at 27. Available at https://www.icc-cpi.int/iccdocs/PIDS/docs/behindTheSce.pdf [date accessed: 11 July 2019].

[73] Submission from the Irish Translators' and Interpreters' Association to the Working Group on the Jurisdiction of the Courts, 2002, at 2.

[74] See discussion on *R v. MR* 2020 ONSC 408 (CanLII) below.

person's liberty or defeat an otherwise meritorious claim."[75] He goes on to cite examples in which an inaccurate interpretation[76] gave rise adverse outcomes:

> …[an] interpretation error resulted in a Cuban man's temporary loss of liberty. The Cuban defendant was convicted on drug charges for uttering the words, "¡Hombre, ni tengo diez kilos!" The defendant used these words in response to a request for a loan, and the words can be properly translated as "man, I don't even have ten cents." The interpreter, however, mistakenly translated the words as "man, I don't even have ten kilos." Fortunately for this defendant, this translation error was caught and the conviction overturned, but these errors often go unnoticed and unpreserved.[77]

There are two important points to take from this example: firstly, it demonstrates the impact that poor interpretation or misinterpretation can have on the progression of a cases. Secondly it represents an example where the poor interpretation was uncovered. Shulman notes that inaccuracies are not uncommon and that rather the unusual aspect of this case was that the error was actually caught.[78]

Interpretation that is unskilled can pose a significant barrier to an accused's participation in the process against them. If they are prevented from understanding, or misunderstand based on the poor interpretation, then they cannot be said to effectively participate. As such, procedural access is interrupted. I address issues relating to unskilled interpretation in the HRC and the ECtHR in turn below.

5.3.1 UN Human Rights Committee

The impact which unskilled interpretation can have on procedural access can be seen in *Hill and Hill v. Spain*.[79] In this case it was alleged that during the trial, inaccurate interpretation caused the trial judge to draw inferences that the defendants were lying because of a miscommunication about whether a campervan owned by the Hill brothers ran on petrol or

[75] Shepard, 'Access to Justice for People Who Do Not Speak English', 2007 Vol 40 Indiana Law Review 643 at 647.
[76] It is noteworthy that in his article, Shepard uses the terms 'interpretation' and 'translation' interchangeably, but in this context, his writing refers to interpretation of spoken testimony, rather than to translation.
[77] *supra* note 75 at 647, 648. See also Shulman, No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants.' 1993 Vol 46 Vanderbilt Law Review 175
[78] Shulman, *ibid* at 176.
[79] *Michael and Brian Hill v. Spain*, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997).

diesel.[80] Nevertheless it was submitted by the State party that the interpreters who was provided to the Hill brothers, were not:

> …selected ad hoc by the local police but a person designated by the Instituto Nacional de Empleo (INEM) upon agreement with the Ministry of Interior. Interpreters must have satisfied professional criteria before being employed by INEM.[81]

In spite of this claim from the State party, the Hill brothers claimed that the interpreters were insufficient. They further attested to relying on the aid of "two bilingual inmates"[82] in order to prepare themselves for trial. Brian and Michael Hill also requested the services of a "consular representative who could assist as an independent interpreter"[83] from the British Consulate.[84] Had the Hill brothers been provided with adequate interpreters and access to adequate interpreters, they would not have needed to resort to such measures. The person who was made available during the police interview of the Hill brothers was described as a "young, unqualified…student interpreter".[85] The HRC did not address this alleged violation of Article 14.3(f), however. This is disappointing as it misses an opportunity to shed light on the calibre of interpreter required to satisfy the right. Nevertheless, the Hill brothers complained of a violation of the right to an interpreter because of the multiple instances where the felt interpretation was poor and unsatisfactory. These allegations suggest a lack of procedural access.[86] As a result of the limited and poor interpretation, the Hill brothers were arguably prevented from fully participating in the proceedings against them (including consulting with their counsel and forming a defence).

Where an interpreter is provided, but that interpreter lacks the skill necessary to actually facilitate interpretation, then the right has been executed in name only. An accused cannot effectively engage in proceedings where their interpreter is not facilitating communication.[87] The jurisprudence of the HRC has not engaged in the specifics of interpreter provision, nor has it connected the right to an interpreter with the right to effective interpretation. In the

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[80] *ibid* at para 2.8.
[81] *ibid* at para 9.2.
[82] *ibid* at para 3.2.
[83] *ibid* at para 2.2.
[84] Although this request was denied, it also raises questions as to the type of interpreters which can be deemed acceptable. There is no further information available in respect of the person who was requested to help from the British Consulate, but it is notable that they are described as a "consular representative" who might "assist" in interpretation, rather than as 'an interpreter'.
[85] *supra* note 79 at para 2.2.
[86] *supra* note 4 at 15.
[87] *ibid* at 15.

following section, I explore how the ECtHR has engaged with these issues regarding the right to an interpreter.

5.3.2 The European Court of Human Rights

The issue of unskilled interpreters has arisen in the ECtHR also. In *Kamasinski v. Austria,* the accused was assisted by individuals who were not trained interpreters:

> During the [police] questioning on 15 October interpretation was provided by a prisoner who, however, had only a limited knowledge of English. The person who interpreted on 6 November, [date of subsequent police interrogation] whilst not a registered interpreter, was someone regularly asked to assist at police interviews when no registered interpreter was available. It cannot be established from the evidence adduced whether the person who provided interpretation on 16 December 1980 was a registered interpreter or not.[88]

Not only did authorities make use of an unregistered interpreter, but there was also a prisoner who had only 'limited knowledge' of English used as an interpreter. In addressing this, the ECtHR held that it was not at liberty to adjudicate on the interpretation system in place in a Member State.[89] If the right to an interpreter is to have any meaning and ensure procedural access, then a competent interpreter must be provided, who can actually carry out the job of interpretation. Otherwise the accused is not guaranteed procedural access and denied the ability to effectively participate.[90] The Court went to hold that during the pre-trial investigations the requirements under Article 6.3(e) had been met:

> …the Court, like the Commission, finds no indication in the evidence before it that the requirements of this provision were not met during Mr Kamasinski's pre-trial questioning by the police and the investigating judges. An interpreter was present on each occasion. It does not appear that Mr Kamasinski was unable to comprehend the questions put to him or to make himself understood in his replies.[91]

The Court essentially noted that the prisoner in custody, with limited English who acted as Mr Kamasinski's interpreter was an effective execution of the right to an interpretation. The mere

[88] *supra* note 23 at para 11.
[89] *ibid* at para 73.
[90] *supra* note 4 at 15.
[91] *supra* note 23 at para 77.

fact an 'interpreter' – irrespective of skill or professionalism – was provided has satisfied the requirement under Article 6.3(e) in the eyes of the Court. As discussed, the profession of interpreter is complex and highly skilled. There was no interrogation in this case of whether the provision of a prisoner in custody to act as an interpreter actually satisfy the complex and professional role of interpreter.

The issue of competency of interpreters arose again in *Hermi v. Italy.*[92] In this case the Court appeared to update its jurisprudence from *Kamasinski* by suggesting that States might be under some duty to assure the quality of interpreters in terms of assuring that the right to interpretation remains practical and effective:

> In view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided…[93]

The Court included the proviso that the right to an interpreter must be 'practical and effective', which is a step towards procedural access in that an interpreter is practical and effective when they allow an accused to effectively participate in the proceedings against them.[94] The Court added the qualification that the need for a state to be concerned about the quality of interpretation was related to "particular circumstances" and being "put on notice". They did not go as far as reading the right to an interpreter as including a general provision of competency or effectiveness.

Of particular concern relating to interpreter competency is the use of family members as interpreters for accused persons. In *Baytar v. Turkey,* the interpreter provided at trial was "simply a member of the applicant's family waiting in the corridor".[95] While it was not stated whether or not the family member used was competent or capable to act as interpreter, it was pointed out that the court "failed to verify [their] skills".[96] A family member as an interpreter was also at issue in *Cuscani v. UK.*[97] However, in both cases the Court failed to address the matter in its judgment.

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[92] *supra* note 22.
[93] *ibid* at para 70.
[94] *supra* note 4 at 15.
[95] *supra* note 25 at para 57.
[96] *ibid*.
[97] *Cuscani v The United Kingdom,* [2002] ECHR 625 at para 18

Additionally, and perhaps most worryingly, the issue itself that a family member was sought to provide interpretive aid was not addressed in either case. There was no indication given of concern for bias or a conflict of interest when a family member is charged with interpreting at court.[98] Interpreting for a family member who is being investigated by the police or standing trial and is no doubt an incredibly stressful situation. As Pawlosky notes, even where the family member is trying to interpret proceedings in "good faith" there is a risk that they could "subconsciously misrepresent certain testimony in an effort to shelter [a] loved one".[99] This can undoubtedly impact procedural access: if a family member is subconsciously shielding a loved one from procedures, then the accused is barred from effectively participating in proceedings. However, the ECtHR's decision in *Vizgirda v. Slovenia* possibly holds a silver lining. As noted above the ECtHR positively cited the EU Directive 2010/64/EU in its decision.[100] In considering the quality of interpretation, the Directive mandates that interpretation must be of:

> …quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.[101]

This can be read in terms of procedural access: That interpretation must provide the accused with an opportunity to effectively participate in the proceedings against them. This could mean that going forward the ECtHR could require interpreters to be of sufficient quality to safeguard the fairness of proceedings, as an inherent part of the right to an interpreter.

The effect that incompetent and unqualified interpreters can have on the realisation of a fair trial cannot be understated. Where a defendant is given an unskilled interpreter who cannot effectively follow proceedings, the accused is deprived of the realisation of their right to interpretation. They are not ensured procedural access to justice. Largely neither the ECtHR nor the HRC have addressed quality of interpretation as an aspect of the right to a fair trial and the right to an interpreter. Both institutions have stopped short of reading the right to an interpreter as imposing a duty on states to ensure quality and skilled interpretation.

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[98] See Pawlosky, 'When Justice is lost in the "Translation": Gonzalez v. United States and "Interpretation" of the Court Interpreters Act of 1978' (1996) DePaul Law Review, Vol 45(2) 435 at 485

[99] *ibid* note 98 at 486.

[100] *supra* note 31 at paras 82, 84, 86.

[101] Article 2.8 of the Directive.

5.4 Conclusion

The right to an interpreter is an integral part of the right to a fair trial. When considering language and RML-users, the right is the most evidently relevant minimum standard under the right to a fair trial. However, as this chapter has shown, the right to an interpreter is not always straightforward. The two major issues which I have addressed look at entitlement to an interpreter and the competency of an interpreter. Both of these issues are connected to procedural access to justice. Where an interpreter is needed and one is denied, the accused's ability to effectively participate in the proceedings against them is blocked. Similarly, if the accused is provided with an interpreter, but that interpreter is not sufficiently skilled to carry out their function, then the ability to effectively participate is again blocked. Procedural access is not guaranteed where either of these issues arise.

Under much of the jurisprudence of both the HRC and the ECtHR, the right to an interpreter is limited, and does not take into account the specific and individual needs of the accused. An accused is not entitled to an interpreter where they have an 'adequate' understanding of the language of the CJS, 'simple but adequate' command of the language of the CJS, or where the language of the CJS is not 'sufficiently complex' to warrant an interpreter. This of course shows a shift in the scope of the right to an interpreter under both institutions as of late. The ECtHR has made a shift towards a more accused centric approach to interpreter entitlement, with the accused's individual needs at the centre. These approaches are positive steps towards ensuring procedural access for an accused under the ECtHR.

In assessing interpreter entitlement, if the bar to being denied an interpreter in court is 'understanding' the language of court, there must be clarity on what it means to understand a language in this context. As the literature on language and domain shows, understanding a language is situational. Merely because a person can use a language in one domain or in many domains, does not mean that they will be capable of using that language in a court domain, which is particularly complex. Denying an interpreter to an accused who cannot understand the language of court interferes with their access to justice and is contrary to the purpose of the right to an interpreter itself.

In this chapter, I have also shown that interpretation is a highly skilled profession. Even the slightest deviation or mistranslation can have a grave impact on the course of proceedings in the CJS. And so it is essential that the interpreter is skilled and, where possible, trained and

qualified. However neither the ECtHR nor the HRC have made any movements to acknowledge this. Neither body has connected the right to an interpreter with the right to a *quality* interpreter, and a duty on states to ensure that the interpreters provided and available to work in the CJS are skilled. In fact, the HRC and the ECtHR have repeatedly tolerated instances where the interpretation was clearly poor quality. There has been no attempt to imply that poor quality interpretation risks impacting the fairness of trial. Nor has there been finding that the right to an interpreter cannot be truly vindicated where the interpretation is poor or the interpreter unskilled.

While the wording of the ECHR and the ICCPR does not match the standards at the ICC (as is explored in greater detail in Chapter 8), there is no reason why they cannot be read to encompass the same thing. The purpose of providing an interpreter is to grant the accused access to the trial against them. Therefore, when an accused is provided with an interpreter and that interpreter is unskilled, untrained or unqualified to the point that the accused cannot understand what is happening, or to the point that the accused's words are misrepresented, then access to justice has not been guaranteed. Both interpreter entitlement and interpreter standards can be understood in terms of procedural access in that they flow from the systems already in place. The right to an interpreter exists already under both the ICCPR and the ECHR. There is scope to understand those rights as encompassing an accused centric approach to interpreter entitlement and requiring a professional standard of interpreter to satisfy the right. This would ensure procedural access and the accused's ability to effectively participate, without the need for substantive access measures (such as changing the systems in place) or major changes in symbolic access societally.

The following section will continue this discussion of minimum standards under the right to a fair trial. I will address those minimum standards which arose in the data and are impacted by language. Underpinning these minimum standards in almost all instances is the right to an interpreter. Only through interpreter access, where one is needed, can the RML-using accused truly access their rights and can procedural access be guaranteed.

Chapter 6 – Minimum Standards of the Right To A Fair Trial and Procedural Access

6.1 Introduction

This chapter analyses the minimum standards of the right to a fair trial under Articles 6 and 14 of the ECHR and the ICCPR respectively. I focus on those rights, other than the right to an interpreter, which are impacted by language. Underpinning almost all of these rights for the other language or RML-user is access to an interpreter. Where language is at issue, without an interpreter it is impossible to fully realise the provisions under the right to a fair trial. As such, the content of the previous section must be borne in mind. The rights under the right to a fair are distinct, but also connected. Where one right is not vindicated, it can have a knock-on effect on other rights. For example, if an accused is not provided with an interpreter where they need one, they could be unable to communicate with counsel. Where they are unable to communicate with counsel, they will likely be unable to adequately prepare a defence and so on.

When considering the scope of the right to a fair trial, we must address them in light of access to justice, and once again, in terms of procedural access. If an accused is denied an interpreter, as discussed in the previous chapter, they are denied the ability to exercise other minimum standards, and as a result, prevented from effectively participating in the process. If there are barriers to effective engagement which are not removed, then there is no procedural access to justice.[1] In addition to the right to an interpreter, other minimum standards are impacted by language. It is necessary to consider these minimum standards in their own right, through this lens of access to justice. In this chapter, I interrogate how individual RML-using accused persons effectively engage with the CJS, where the engagement is theoretical or ineffective, procedural access is blocked.

[1] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 15.

Section 3 of both Article 14 and Article 6 refer to the minimum guarantees afforded to accused persons when the stand trial. It is those minimum guarantees which are most impacted by language and which most affect the RML-user that are being analysed herein. I address three minimum standards: the right to adequate time in contrast to the right to trial without undue delay; the right to communicate with counsel and; the right to be present at one's own trial in the context of language. First, however, I explain the reasoning behind the selection of these minimum standards, and their relevance to language usage.

6.2 Justifying the Selection of Minimum Standards

In this section, I discuss a selection of minimum standards under the right to a fair trial which have relevance to the research at hand. It is reasonable to question why I have curated a discussion around some minimum standards, but not others. Primarily, I discuss the specific minimum standards which arose in the data, and which have a linguistic element. Each of these minimum standards poses particular linguistic issues and therefore warrants discussion. In many cases, the minimum standard is made available or accessible through the provision of an interpreter. As such, they must be understood in light of the discussion in the previous section.

Language has an inherent impact on the length of time criminal proceedings take.[2] As will be seen in Chapter 10, a delay and time was an issue for a number of participants and in many cases, they connected the delay and time to their language usage. Accessing an interpreter,[3] providing translations and awaiting the interpretation itself can add to the duration.[4] Where time is at issue, there is a balance between two minimum standards; the right to adequate time and facilities;[5] and the right to trial without undue delay.[6] I will address both at the same time, to demonstrate the balancing between adequacy and undue delay when it comes to language. Secondly, I discuss communication with counsel.[7] When language is at issue, the accused's ability to communicate with their legal representation can be impacted. If the

[2] See Gaiba, *The Origins of Simultaneous Interpretation,* (Ottawa: University of Ottawa Press, 1998) at 29.
[3] Leeson and Venturi 'A Review of Literature and International Practice on National and Voluntary Registers for Sign Language Interpreters' March 2017, A report commissioned by Sign Language Interpreting Services at 27.
[4] Cao, *Translating Law,* (Clevedon: Multilingual Matters Ltd., 2007) at 92 and Gaiba, *The Origins of Simultaneous Interpretation: The Nuremberg Trial,* (Ottawa: University of Ottawa Press, 1998) at 29.
[5] Article 14.3(b) of the ICCPR and Article 6.3(b) of the ECHR.
[6] Article 14.3(c) of the ICCPR and Article 6.1 of the ECHR.
[7] Article 14.3(d) of the ICCPR and Article 6.3(c) of the ECHR.

accused and their counsel do not share a language, a barrier to communication exists. When this barrier is not alleviated, the accused is prevented from effectively engaging with their right to a fair trial. Finally, I tackle the right to be present at trial.[8] I will address this right in terms of an active right to participation.[9] The accused has a right to take part in the proceedings against them. This right, I will argue, includes the right to be actively present, and therefore, have the ability to participate.[10] Where language is a barrier and that barrier is not removed, the right to be present is interfered with.

There are minimum standards which will not be addressed, such as the right to be informed of the charge in a language the accused speaks,[11] the right of the accused not to be compelled to testify,[12] and the right to counsel of one's own choosing.[13] There may indeed be linguistic elements which could conceivably arise in respect of these other minimum standards. These minimum standards did not arise as part of the empirical research. As such, I have omitted them from discussion.

6.3 Time, Facilities and Delay

Articles 14.3(b) of the ICCPR and Articles 6.3(b) of the ECHR protect the right to adequate time and facilities to prepare a defence. The protections under the two instruments are worded similarly, ensuring the right to have adequate time and facilities for the preparation of his defence.[14] Directly connected to the right to adequate time and facilities is the right to trial without out undue delay. This right is contained in Article 14.3(c) of the ICCPR, where the accused is guaranteed the right to "trial without undue delay". The corresponding right under the ECHR is present in Article 6.1 where it is stated that "everyone is entitled to a fair and public hearing within a reasonable time". If the accused is to effectively engage with the process of a fair trial, that effectiveness must include adequate time. But it must not be so drawn out so as to encroach onto undue delay. Procedural access mandates effective participation in proceedings,[15] and the removal of barriers to that participation.[16] Where an

[8] Article 14.3(d) of the ICCPR and Article 6.3(c) of the ECHR.
[9] *Hermi v. Italy* App no 18114/02 (ECtHR, 18 October 2006) at para 59.
[10] *ibid.*
[11] Article 14.3(a) of the ICCPR and Article 6.3(a) of the ECHR.
[12] Article 14.3(g) of the ICCPR.
[13] Article 14.3(b) of the ICCPR and Article 6.3(c) of the ECHR.
[14] Article 14.3(b) of the ICCPR and Article 6.3(b) of the ECHR.
[15] *supra* note 1 at 15.
[16] *ibid.*

accused faces delay because of their language, and they are encouraged (either directly or indirectly) to forgo certain facilitations (such as interpreters) to avoid the delay, then the barriers to participation have not been removed.

Language usage can impact on the time it takes to prepare a defence for an accused. Use of another language can warrant more time and facilities through the procurement of an interpreter,[17] the translation of documents and evidence,[18] the use of an appropriate environment (such as a police interview room capable of video recording an SL interpreter).[19] The HRC has concluded that what is considered 'adequate' ought to be assessed on a case-by-case basis: "What is 'adequate time' depends on the circumstances of each case."[20] Similarly, it has also been held by the HRC that there is no standard time limit for what constitutes an undue delay:

> What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities.[21]

Undue delay in one instance may be adequate time in another. In *Berezhnoy v. Russia*, a juvenile detailed for over a year from the time of arrest to the time of trial was considered a breach of the right to trial without undue delay.[22] In *Fa'afete v. New Zealand,* a delay between a High Court judgment and a final Supreme Court judgment of almost ten years was not considered a breach of this right, based on the circumstances of the case.[23] The ECtHR has taken a similar stance to this. In *Frydlender v France,*[24] the Grand Chamber held that the concept of "'reasonableness' of the length of proceedings" under Article 6.1:

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[17] *supra* note 3 at 27.

[18] See *supra* note 4.

[19] As was garnered from interviews, however, this is not always facilitated and there is no mandate under the ICCPR or the ECHR to do so.

[20] Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994) at para 9.

[21] Human Rights Committee, General Comment 32, Article 14, Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007) at para V. See also the extensive list of Committee decisions emerging from Jamaica relating to those circumstances which may lawfully incur delay versus those which would be considered unreasonable in Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary,* Second ed., (Oxford: Oxford University Press, 2004) at paras 14.85-14.94.

[22] *Berezhnoy v. Russia* U.N. Doc. CCPR/C/118/D/2107/2011 at para 9.4.

[23] *Fa'afete v. New Zealand* U.N. Doc CCPR/C/114/D/1909/2009 (2015) at para 7.3.

[24] [2001] 31 EHRR 1152. See also *OAO Neftyanaya Kompaniya Yukos v. Russia,* [2014] ECHR 853 at para 540.

> …must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute…[25]

The specifics of the case will determine whether there has been an undue delay. Delay is subjective and dependent on the circumstances of each case.[26] From this we can see that there is no standard time where 'adequate' crosses the threshold to 'delay'. A subjective view of time, reasonableness and delay is necessary to determine fairness of individual cases.

To relate it back to the research at hand, there is to be a certain level of delay associated with translation or interpretation.[27] Namakula highlights the effect that language may have on the progression of a criminal trial: "The linguistic requirements of a trial contribute to how long it takes."[28] The process of interpretation consists of one person or a rotating team of persons who repeat the words of another in the target language.[29] It is oral or signed. It may be consecutive, where the interpreter waits until the speaker has finished speaking to interpret;[30] whispering, where the interpreter sits close to a person and whispers interpretation into their ear while the speaker speaks;[31] or simultaneous, where the interpreter sits in a soundproof booth and their words are heard via headsets.[32]

As such, the method of interpretation used may have an effect on time. Where consecutive interpretation is used, the case effectively takes "twice as long".[33] The court must hear the speaker first and then wait for the interpreter to repeat and it is a process described as "appallingly slow".[34] It could be considered that consecutive interpretation is considered part of the adequate time to be allocated to the accused, depending on the specifics of the case.

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[25] *ibid* at para 43. See also *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* (Council of Europe, updated 30 April 2019) at 54, 55. Available at https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf [last accessed 06 June 2019].

[26] *Boddaert v. Belgium,* App no 12919/87 (ECtHR, 12 October 1992) at para 36. See also *Dobbertin v. France,* App no. 13089/87 (ECtHR, 23 February 1992) at para 44.

[27] See *supra* note 4 and Gaiba, *The Origins of Simultaneous Interpretation,* (Ottawa: University of Ottawa Press, 1998) at 29.

[28] Namakula, 'Language Rights in the Minimum Guarantees of Fair Criminal Trial', (2012) Vol. 19(1) The International Journal of Speech, Language and the Law 73 at 84.

[29] Gaiba, *The Origins of Simultaneous Interpretation,* (Ottawa: University of Ottawa Press, 1998) at 16.

[30] *ibid* at 17.

[31] *ibid* at 16.

[32] This is the method first used at Nuremberg and used at the ICTY. The delay in this case is minimal. The interpreter is "only a few second behind the speaker" at http://www.icty.org/en/about/registry/translation-and-interpretation [date accessed: 16 June 2017].

[33] *US v Mayans* 17 F3d 11745 (9th Cir. 1999) at 1178.

[34] *supra* note 29 at 29.

Additional aspects to consider relate to domestic laws on arrest and detention periods. Under domestic legislation, there may be a time limit on the length of time an accused person can be detained after arrest.[35] When considering language elements, extra strain can be put on these limits. If there are limited interpreters for a specific language and a user is arrested in a rural or isolated area, it may not be possible to procure an interpreter under the time frame. This can be particularly true for minority languages. For example, there were 111 trained and registered ISL to English interpreters in Ireland and Northern Ireland as of 2016.[36] However, it is to be noted that:

> …many interpreters have left the field and some of those remaining work part time. The consequence of this is that the number of interpreters currently available for work on any given day is significantly less than 111.[37]

Some available interpreters may be unwilling or unable to interpret during a police interview setting.[38] If the interview is taking place late at night or in a remote location, there may be no interpreter available within the timeframe for detention.

It is not possible or desirable to have a standard time frame that each case can be concluded in a criminal matter – the facts and circumstances of each case are different and so what is too long a delay in one case may well be adequate time in another. In keeping with the underlying principle of access to justice, the goal of providing minimum rights under the right to a fair trial is to ensure that fairness is achieved. An individual's specific needs must be considered in the pursuit of access to justice. In the case of an RML-user, a balance must be found between ensuring they have appropriate facilities but that they are not subjected to unreasonable delay in awaiting facilitation of their linguistic needs.

6.4 Communication with Counsel

Access to a lawyer is an essential aspect of the right to a fair trial. The right to counsel is contained in Article 14.3(d) of the ICCPR which reads that an accused has the right to:

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[35] See, for example, Ireland's *Criminal Justice Act, 1984,* Section 4 where the standard detention period is six hours.

[36] *supra* note 3 at 28.

[37] *ibid* at 27.

[38] They may lack the appropriate experience or terminology or find Garda interviews too distressing. See Bacik 'Breaking the Language Barrier-Access to Justice in the New Ireland' 2007 Vol 10 Judicial Studies Institute Journal 109.

> …be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it…

Under Article 6.3(c) of the ECHR the accused has a right to:

> …to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require…

The importance of this right has been recognised by the ECtHR:

> The opportunity for an accused to confer with his defence counsel is fundamental to the preparation of his defence.[39]

The right to counsel needs to include the opportunity to prepare a defence and actually communicate with counsel.

When considering the right to legal assistance for an RML-user, particular consideration must be paid to communication and language. If an accused is represented by counsel with whom they do not share a language, it will pose a barrier to their ability communicate and therefore to construct an adequate defence. In respect of access to justice, an accused cannot be said to have effectively engaged in the process if they cannot discuss their defence or communicate with the person representing them.[40] In addition, part of procedural access involves identifying and removing barriers to the mechanisms of the justice system.[41] Where this barrier is not removed, an accused is not guaranteed procedural access to justice.

Under its jurisprudence, the ECtHR has held that mere provision of legal assistance does not alone satisfy the right to communicate with counsel:

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[39] *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb),* (Council of Europe, updated 30 April 2019) at para 392, citing *Bonzi v. Switzerland* 1978, Commission Decision and *Can v. Austria,* 1984, Report of the Commission at para 52. Available at https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf [last accessed 03 June 2019].

[40] *supra* note 1 at 15.

[41] *ibid.*

> [The] Convention is designed to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective' and that assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an accused…[42]

Merely appointing counsel in no way shirks the responsibility to provide for the right to legal representation. If it is to be practical and effective, then the right surely ought to include assurances that the accused and their counsel can understand each other and communicate. In *Harward v. Norway,*[43] the HRC demonstrate how interpretation can effectively realise the right to communicate with counsel and ensure access to justice. In that case, it was:

> …undisputed that an interpreter was available to the defence for all meetings between counsel and Mr. Harward and that simultaneous interpretation was provided during the court hearings.[44]

There existed no break in understanding and there were no complaints made as to the quality of the interpretation provided. The barriers to access which existed through the accused and counsel not sharing a language were removed by the provision of an interpreter.

The HRC changed its position on this issue after *Harward.* In *Hill and Hill v. Spain*[45] the applicants were appointed counsel with whom they did not share a language and were provided with an inadequate and poor-quality interpreter,[46] as discussed in the previous chapter. The Hill brothers argued that "confusion and misunderstandings were common" with their first lawyer.[47] They complained that legal aid later appointed to them did not speak English.[48] They stated this lawyer came to consult with them either in the presence of a poor interpreter or without any interpreter at all.[49] The brothers claimed *inter alia* that this unsatisfactory communication with their lawyer amounted to a violation of Article 14.3(b).[50] In spite of the arguments made by the Hill brothers, the Committee held that there was no violation of the right to communicate with a lawyer.[51]

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[42] *Öcalan v. Turkey,* App no 46221/99 (ECtHR, 12 May 2005).
[43] *Harward v. Norway*, U.N. Doc. CCPR/C/51/D/451/1991 (1994).
[44] *ibid* at para 9.2.
[45] *Michael and Brian Hill v. Spain*, U.N. Doc. CCPR/C/59/D/526/1993 (2 April 1997).
[46] *ibid* at paras 2.2, 2.8, 3.1, 3.2, 4.3, 10.2.
[47] *ibid* at para 2.8.
[48] *ibid* at papa 3.1.
[49] *ibid* at para 3.1.
[50] *ibid* at para 4.3.
[51] *ibid* at para 14.1.

There is an inconsistency in the jurisprudence visible here from the HRC. Where the accused does not share a language with their counsel, the right under Article 14.3(d) is not violated when an interpreter facilitates their communication, as occurred in *Harward.* But neither is the right under Article 14.3(d) violated when the accused does not share a language with their counsel and they are not facilitated by interpretation. That being said, in its General Comment 32, after *Harward* and *Hill and Hill,* the HRC stated in analysing the right communicate with counsel, that it must include access to an interpreter.[52] Reading the right in light of this development suggests a return to the *Harward* reasoning that the right to communicate with counsel must include an interpreter where necessary. This reasoning would align with the procedural access. At the centre of the right to communicate with counsel must be the ability of the accused to effectively participate in proceedings against them.[53]

6.5 Presence at Trial

Under both the ICCPR and the HRC, there is a right of an accused to be present at their own trial. Firstly, as seen above, the right to legal assistance includes the right of the accused to be "tried in his presence" under Article 14.3(d) of the ICCPR and "to defend himself in person" under Article 6.3(c) of the ECHR. Additionally, there is also a right of an accused to examine witnesses against him under Article 6.3(d) of the ECHR and 14.3(e) of the ICCPR. The right to be present at trial is fundamental to the fairness of trial.[54] An accused cannot be expected to highlight the court or their counsel to inconsistent evidence, points of information or generally have knowledge of the case against them when they are not permitted to be present. This is also relevant to procedural access in that if an accused is denied the right to be present at trial, then they are denied an opportunity to effectively engage in the proceedings.[55]

The ECtHR stated in the case of *Hermi v. Italy* that:

> Although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right

[52] *supra* note 21 at para V.
[53] *supra* note 1 at 15.
[54] This acknowledges that in some jurisdictions, such as France and Italy, trial *in absentia* is permissible.
[55] *supra* note 1 at 15.

> "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present[56]

This shows that the accused should be present in order to exercise their other rights under the minimum standards to fair trial. It also shows a dedication to procedural access as explained by Flynn,[57] by stating that the accused has the right to 'take part' in proceedings. The ECtHR held that "in the interests of a fair and just criminal process it is of capital importance that the accused should appear at his trial"[58] and that presence at one's trial "ranks as one of the essential requirements of Article 6"[59]. The ECtHR recognised here the central role that presence has on the vindication of other minimum standards in the right to a fair trial.

The HRC has shared this point of view, and positioned the right to be present as an essential element. The Committee stated that:

> …accused persons are entitled to be present during their trial and that proceedings in the absence of the accused are only permissible if this is in the interest of the proper administration of justice or when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present…[60]

In this vein, the right to be present at trial is not an absolute right and departures can be made under certain circumstances. The HRC has made allowances for trials *in absentia* where they are in the interests of justice.[61]

In connecting this to the research at hand, we must consider what it means to be 'present at trial' and what the purpose of that right it. If it meant to afford the accused the right to 'take part',[62] then there is an active element. I understand being present at trial in this active sense. In ensuring procedural access, the accused needs to be given the opportunity to effectively

[56] *Hermi v. Italy* App no 18114/02 (ECtHR, 18 October 2006) at para 59. Emphasis added.
[57] *supra* note 1 at 15.
[58] *supra* note 56 at para 58.
[59] *ibid* at para 58.
[60] *Tyan v. Kazakhstan* U.N. Doc CCPR/C/119/D/2125/2011 (2017) at para 9.3.
[61] *Benhadj v. Algeria* U.N. Doc. E/CN.4/2003/8/Add.1 at 32 (2001) at para 8.9.
[62] *supra* note 56 at para 59.

engage, to participate and to take part.[63] The right to be present is an active presence, not a passive presence. A person can be physically present, but have no access to the benefits of presence because of language barriers. If language is a barrier to taking part, and that barrier is not removed via an interpreter, then procedural access is not assured.[64] Therefore the right to be present is not vindicated based on an understanding of procedural access. This argument is demonstrated the US case *Negron v New York.*[65]

In that case, it was held that Mr. Negron was denied the right to be present at his own trial and to confront adverse witnesses because no interpreter was provided during his case.[66] Mr Negron testified that "I knew that I would have liked to [have known] what was happening but I did not know that they were supposed to tell me"[67]. Because of the lack of interpretation given to Mr. Negron, he was totally unaware of his rights and could not effectively engage in the trial process.[68] The Court held that it is:

> …imperative that every criminal defendant – if the right to be present [at trial] is to have meaning – possess 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'[69]

The Court deemed that in order for the right to be present at trial to be actually meaningful and in order to ensure basic "humaneness", the accused "deserved more than to sit in total incomprehension as the trial proceeded."[70] Mr Negron had no access to the case against him. He could not 'take part' in a meaningful way, which the court deemed infringed on his right to be present and to confront the evidence against him.[71] The circumstances had caused him to be a passive, oblivious on-looker in the trial against him.

In the absence of an interpreter where one is needed, an accused cannot 'take part' in the trial. As such, the right to an interpreter – and an effective interpreter – necessarily facilitates

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[63] *supra* note 1 at 15. See also Beqiraj, McNamara and Wicks 'Access to justice for persons with disabilities: From international principles to practice' International Bar Association, October 2017 at 14.
[64] *supra* note 1 at 15.
[65] *US ex rel Negron v. New York,* 434 F.2d 386 (2d Cir. 1970).
[66] *ibid.*
[67] *ibid* at 390.
[68] *ibid* at 389.
[69] *ibid*.
[70] *ibid* at 390.
[71] See Del Valle, *Language Rights and Law in the United States: Finding Our Voices* (Clevedon: Multilingual Matters, 2003). See also Salinas, and Martinez, 'Right to confrontation compromised: Monolingual jurists subjectively assessing the English-language abilities of Spanish-dominant accused' 2010 Vol 18(3) American University Journal of Gender, Social Policy & the Law 543.

the right to be present at trial. Without an interpreter where one is needed, the RML-user is rendered an observer to the trial against them. They are a passive onlooker, rather than an active participant. If procedural access is to be ensured, the accused must be given the opportunity to effectively participate or take part in the proceedings against them, should they so wish.

6.6 Conclusion

A defendant faces a particular risk when they appear before the CJS; the loss of their liberty; loss of their freedom; damage to their reputation and so on. Ensuring access to justice can ensure that these risks are mitigated by a fair procedure. When barriers remain in place, blocking fairness of procure for the accused, procedural access to justice is not guaranteed.

Each of the above sections demonstrate how language can intersect and interfere with the minimum standards under the right to a fair trial. In Chapter 2 and Chapter 3 I explored identity and the innate connection that people can have between their language and their identity. The content of this section must not be considered in isolation. An accused who is an RML-user has specific concerns related to their identity when they interact with the CJS. Already minoritised by their identity, they are further marginalised as a weakened player in the CJS. Procedural access must remove the barriers that exist for these marginalised people, so that they may also effectively engage in the proceedings against them. When "freedom [is] hanging in the balance",[72] when an accused's reputation and connection to the community in which they live is placed in jeopardy, when they must put their whole life on hold for the outcome of a trial, the necessity for access to justice is vital to the proper execution of the right to a fair trial for an RML-user.

I addressed the issue of undue delay as it relates to language usage. There is a balancing act to be done in any fair trial, between adequate time and undue delay. As shown, language will inevitably impact the length of time it takes to conduct proceedings. Accessing interpreters, awaiting interpretation itself, the procurement of translated materials (where allowed) will necessarily cause delay. Whether or not this delay is appropriate must be addressed on a case by case basis. However, it is possible that for RML-users, interpreters will be unavailable

[72] See Del Valle, *ibid* at 172.

within the detention time frame. This is problematic for the fairness of trial: if police go ahead with interviewing the suspect without an interpreter, they have been denied their right to an interpreter. If police wait until they can avail of an interpreter, there is the potential to infringe on the accused's right to trial without undue delay.

With respect to the right to communicate with counsel, I argue that the requirement that the appointment of counsel be practical and effective under the ECHR must include the opportunity to communicate with counsel. This approach aligns with procedural access to justice. However, from the decision in *Hill and Hill,* it is clear that the HRC has not perceived the impact language usage has on the right to communicate with counsel.

Presence at trial was also discussed, understood as a right to partake, based on the jurisprudence from the ECtHR.[73] It is a right to active presence, not only to passive presence. This right has a specific language element. Where an accused is denied linguistic access to the trial, they cannot effectively access their right to partake. Therefore their presence remains illusory and physical only. In *Negron*[74] we can see how an active presence is required for the accused to make full and actual use of their right to be present, and this can be facilitated through appropriate interpretation.

The take away from this chapter is that language has an effect on the right to a fair trial, beyond just the right to an interpreter. The language used by an RML-user can and does interact with the right to a fair trial. Language can act as a barrier to access to justice when it is left unchecked. This potential to impact and obstruct the fairness of trial and access to justice is often not seen by the ECtHR or the HRC in determining the rights under Articles 6 and 14 of the ECHR and ICCPR respectively. The result has the potential to infringe on fairness and obstruct access to justice for the RML-user.

As in the previous chapter, these issues relate to systems already in place, and therefore to procedural access. It is possible to include procedural access measures under the scope of the minimum standards discussed in this chapter if they are understood as ensuring the accused has the right to effectively participate in proceedings against them. In the following chapter, I will explore the rights of RML-users to use their language in terms of equality and non-discrimination under the ICCPR and the ECHR.

[73] *Hermi v. Italy* App no 18114/02 (ECtHR, 18 October 2006) at para 59.
[74] *US ex rel Negron v. New York,* 434 F.2d 386 (2d Cir. 1970).

Chapter 7 – Equality and Non-Discrimination for RML-users

7.1 Introduction

In continuing the discussion on human rights and the rights of RML users to use their language, it is important to also refer to protection from discrimination. It is possible to understand the othered treatment received by RML-users in their interactions with the state through the lens of discrimination. Discrimination is a basic aspect of the protection of human rights, according to the HRC's General Comment 18 on equality and non-discrimination:

> Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.[1]

Equality and non-discrimination can ensure that individuals experience fairness irrespective of their identities or socio-economic realities, etc. In terms of access to justice, if marginalised people are treated differently, to their detriment, there is likely a failure of access to justice, possibly stemming from procedural access, where there is a barrier in participating effectively in the process.[2] As demonstrated by the Office of the High Commissioner for Human Rights:

> Judges, prosecutors and lawyers naturally have an essential role to play in protecting persons against discrimination. Their task is to see to it that existing laws and regulations prohibiting discrimination are respected in legal practice. In some countries discrimination is forbidden de jure but the laws are not adequately enforced. Judges, prosecutors and lawyers play a crucial role in remedying these situations and ensuring that impunity for discriminatory acts is not tolerated, that such

[1] Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).
[2] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 15.

> acts are duly investigated and punished, and that the victims have effective remedies at their disposal.[3]

There are similarities to procedural access here, in that operatives of the CJS are tasked with enforcing non-discrimination and therefore, allowing people to effectively participate in the process against them.[4]

Substantive access, where the laws and policies created do not secure equal benefit for marginalised people,[5] can also affect equality and non-discrimination. As noted in Chapter 4, Lawson and Flynn explains that it is vital that marginalised people are involved in the creation of laws and policies which affect them:

> Without the active participation of [marginalised people], attempts to design laws and policies which will achieve…equality and inclusion at domestic level are unlikely to succeed. There is a high risk that particular dimensions of the disadvantage and exclusion experienced by [marginalised] people would go unnoticed or unaddressed.[6]

Laws and policies which are created for the benefit of marginalised people can have the effect of overlooking the instances of discrimination and inequality experienced by marginalised people when there is a failure to consider their lived realities or include them.

Discrimination can also impact beyond procedural access and substantive access, and feature in symbolic access, whereby it impedes how marginalised people are "empowered to participate as equal citizens".[7] As explained in *Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,* discrimination can feature in all walks of life:

> Discrimination is multifaceted and present not only in State or public structures but also in civil society in general. To a greater or lesser extent, discrimination may thus affect the way people are treated in all spheres of society such as politics, education,

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[3] 'The Right to Equality and Non-Discrimination in The Administration of Justice' in *Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,* Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association (United Nations, 2003) at para 1.2.

[4] *supra* note 2 at 15.

[5] Bahdi, *Background Paper on Women's Access to Justice in the MENA Region* (International Development Research Centre (IDRC), Women's Rights and Citizenship Program (WRC) and the Middle East Regional Office (MERO), Middle East and North African (MENA) Regional Consultation, 9–11 December 2007, Cairo, Egypt) at 27.

[6] Lawson and Flynn, 'Disability and Access to Justice in the European Union: Implications of the UN Convention on the Rights of Persons with Disabilities' 2013 Vol 4 European Yearbook of Disability Law 7 at 15.

[7] *supra* note 2 at 16.

> employment, social and medical services, housing, the penitentiary system, law enforcement and the administration of justice in general.[8]

Discrimination can be understood also in terms of symbolic access, flowing from the state and from society, and, for the purposes of this research, impact how marginalised people access fairness when dealing with the CJS.

I have thus far focused on the right to a fair trial, and the minimum standards therein. It is prudent to also examine how RML-users might experience discrimination when trying to use their language in the CJS. Again, I will examine this issue under both the ICCPR and the ECHR. Both instruments contain specific protections against discrimination.

In respect of this research, Dunbar states that protection from discrimination in central to the protection of language rights in a human rights context:

> Language rights as expressions of a regime of linguistic tolerance are most closely associated with instruments such as the ICCPR and the ECHR. The most basic means of protection for speakers of minority languages is the principle of non-discrimination.[9]

Language and linguistic identity can be a source of discrimination. When individuals are treated differently, and unfairly because of their language and language usage, they can be experiencing linguistic discrimination.

In this chapter, I first discuss the jurisprudence from the HRC in relation to Article 26 of the ICCPR and the protection against discrimination. I focus in particular on case law which relates to minority language use, as it is most relevant to the research at hand. The second part of this chapter includes a discussion of the ECtHR and Article 14 of the ECHR and Protocol 12 to the ECHR which combine to prohibit discrimination. I discuss the development of the prohibition on discrimination under the ECHR and the jurisprudence flowing from the ECtHR in respect of language rights and non-discrimination. Both of these sections are underpinned by access to justice, as explained in Chapter 4.

[8] *supra* note 3 at para 1.1.

[9] Dunbar, 'Minority Rights in International Law' (2001) 50 The International and Comparative Law Quarterly 90 at 100.

7.2 The HRC

In first addressing the ICCPR, Article 26 protects against discrimination. It reads:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 26 protects against discriminatory laws and guarantees equality for all persons. It must be noted that Article 2 of the ICCPR also recognises a right to equality:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[10]

In analysing the distinction between Article 2 and Article 26, MacNaughton notes that:

> Article 2 obligates states parties to provide legal protection against status-based discrimination with respect to the rights in the ICCPR. By comparison, the equality clauses in Article 26 are not limited to the rights in the ICCPR but extended beyond, to any field in which the government acts.[11]

As will be discussed below, Article 2 mirrors the original scope of Article 14 of the ECHR, prior to the acceptance of Protocol 12, whereby discrimination was linked to other rights in the ECHR. Discrimination could only apply in the pursuit of another protection under the ECHR.[12] Article 26 however, is a standalone right to be free from discrimination, as noted by the HRC in its General Comment 18 on the matter:

> [Article 26] provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely

[10] Article 2.1.

[11] MacNaughton, 'Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All' (2009) Vol 11(2) Health and Human Rights 47 at 50

[12] Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention (Council of Europe, 2020) at 6.

> duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.[13]

The HRC is careful to point out that the legislation created should be non-discriminatory in its operation. This can be linked to substantive access, whereby laws and policy created must be done so in a way that ensures equal benefit for marginalised people,[14] and created in a way that includes the marginalised people it aims to affect,[15] so as to prevent discrimination against such groups.

Discrimination is prohibited in all instances where the state operates, pursuant to Article 26. In defining discrimination itself, the HRC has stated that

> the Committee believes that the term "discrimination" as used in the [ICCPR] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[16]

Non-discrimination recognises that people can experience inequality and unfairness on the basis of their identity or identities, and works to place all persons on an equal playing field. It should be noted, however, that this protection from discrimination does not demand that all persons be treated the exact same at all times:[17]

> The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death

[13] *supra* note 1 para 12.
[14] *supra* note 5 at 27.
[15] *supra* note 6 at 15.
[16] *supra* note 1 para 7.
[17] *ibid* at para 8.

> sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.[18]

There is an acknowledgement that in the pursuit of equality, there is often the need for differential treatment.[19] There is a need to be conscious of the lived experiences of people when they access their rights. The experience of a poor, Deaf, Black transgender woman are not the experiences of a wealthy, hearing, white cisgendered man. Treating both persons the same, or affording both persons the same allowances will not necessarily ensure equality of outcome. Therefore, it can be read that there is both procedural access and substantive access concerns built into the prohibition against discrimination under the ICCPR. There is a consciousness of barriers in access, and the need to remove those barriers to ensure people can participate effectively in the process (procedural access).[20] Additionally, there is a need to consider "socially constructed disadvantage"[21] and to ensure that in that consideration, laws secure "equal benefits" for marginalised people (substantive access).[22]

In the context of this research specifically, General Comment 18 states that non-discrimination can also be found in the right to a fair trial:

> Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3.[23]

The provision of minimum standards under the right to a fair trial should be made available in a manner that is consistent with the principle of equality and non-discrimination.

In terms of its jurisprudence, there have been a number of cases before the HRC which refer to minority status and language as a ground for discrimination.

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[18] *ibid.*
[19] *ibid* at para 10.
[20] *supra* note 2.
[21] *supra* note 5 at 7,
[22] *ibid.*
[23] *supra* note 1 para 3.

In *Diergaardt et al. v. Namibia,*[24] the applicants alleged that they had been discriminated against by the state after there was a circular to state officials not to use Afrikaans in communications with individuals.[25] The applicants were successful in this claim and the HRC found that there was a violation of the right under Article 26, based on the circular barring the use of their language.[26] In respect of this decision, Morawa notes:

> The Committee's conclusion that the circular was deliberately targeting the Baster Community and their desire to use Afrikaans in their dealings with the public authorities may in part be seen as a reaction to the respondent state's stubborn silence when asked to explain the measure, but cannot be sustained as such in light of the facts. It appears that the circular was indeed aimed at ending a longstanding practice of treating Afrikaans-speakers favourably by letting them use their language while those speaking other regional and tribal languages were not permitted to do so. That, in itself, is not discriminatory, but a remedy against unjustified favourable treatment. In this respect, the reasoning of the views is flawed.[27]

Prior to the circular to bar the use of Afrikaans, there was a practice of state officials using Afrikaans, given that many were fluent in the language. As Afrikaans was not the official language, and no policy or legislation had been put in place for the officially mandated use of Afrikaans by state officials, the state sought to rectify this practice in line with the official language. As Morawa notes, in banning the use of Afrikaans and ending the practice of favourable treatment of Afrikaans, the state was placing all non-official languages on an equal level.

Language was also at issue in *Ballantyne v Canada,*[28] where English-speaking business owners in a predominantly French speaking region alleged a violation of Article 26.[29] The applicants had posted business signage in English only, which constituted an infraction of the Charter of the French Language.[30] In assessing the alleged violation of Article 26, the HRC found that the relevant legislation which the applicants were accused of infringing prohibited:

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[24] *Diergaardt et al. v. Namibia,* U.N. Doc. CCPR/C/69/D/760/1997.
[25] *ibid* at para 10.10.
[26] *ibid*.
[27] Morawa, 'Minority Languages and Public Administration A Comment on Issues Raised in Diergaardt et al. v. Namibia' (European Centre for Minority Issues, 2002) at 9.
[28] *Ballantyne v Canada,* CCPR/C/47/D/359/1989.
[29] *ibid* at 2.2.
[30] *ibid.*

> …the use of commercial advertising outdoors in other than the French language. This prohibition applies to French speakers as well as English speakers, so that a French speaking person wishing to advertise in English, in order to reach those of his or her clientele who are English speaking, may not do so. Accordingly, the Committee finds that the authors have not been discriminated against on the ground of their language, and concludes that there has been no violation of article 26 of the Covenant.

Because the provision did not single out English speakers themselves as being unable to use English, there was no discrimination directed at English speakers. The same provision applied to French speakers, or anyone in that region who wished to advertise exclusively in English. In its decision in *Ballantyne v Canada,* the HRC stated that in pursuit of non-discrimination:

> …[a] state may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice.

In analysing this particular statement, Paz states that the HRC defined a status quo where there is "no freedom of language choice in the public domain and cultural/linguistic autonomy in the unsubsidized private sphere."[31] She argues that in perceiving the facts in *Ballantyne v Canada* as non-discriminatory in nature, they have removed the onus on states to facilitate a choice of language use for individuals.

Language usage was not in issue in the case of *Waldman v Canada,*[32] but the HRC's decision nevertheless has consequences when considering minority language usage. In that case, the applicant alleged a violation of Article 26, in respect of his religion. In Ontario, Catholic schools were the only non-secular schools to receive full state support.[33] As a Jewish man, the applicant was forced to pay for private education in a Jewish school for his children.[34] He alleged that as this was not required for Catholic children, this amounted to discrimination.[35] In finding a violation of Article 26, the HRC stated that:

> …if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable

[31] Paz, 'The Failed Promise of Language Rights: A Critique of the International Language Rights Regime' (2013) Vol 54(1) Harvard International Law Journal 157 at 194.
[32] *Waldman v Canada,* CCPR/C/67/D/694/1996.
[33] *ibid* at para 1.2.
[34] *ibid* at para 3.2.
[35] *ibid* at para 3.4.

> and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.[36]

Without a reasonable justification for the favourable treatment of Catholic schools over any other religious denomination, discrimination had occurred. In concluding with this ruling, Committee Member Martin Scheinin compared the situation to the provision of minority language schools. He stated that:

> Providing for publicly funded education in minority languages for those who wish to receive such education is not as such discriminatory, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds. The same rule applies in relation to religious education in minority religions. In order to avoid discrimination in funding religious (or linguistic) education for some but not all minorities States may legitimately base themselves on whether there is a constant demand for such education.[37]

Committee Member Scheinin noted that in the provision of minority language, or religious minority schools, there ought to be a consideration of demand when assessing whether there is objective and reasonable grounds for providing (or choosing not to provide for) such services.

According to Edelenbos, however, the HRC is cautious when it comes to developing the jurisprudence of Article 26:

> The Committee, being aware of the financial consequences of its views, was careful not to throw any oil on the fire and has applied its interpretation of Article 26 as an autonomous right cautiously.[38]

Committee Member Scheinin's comments in *Waldman v Canada* allude, in a sense to this concern for financial consequences: were there an obligation under Article 26 to provide a designated school for every requested minority religion or minority language, irrespective of

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[36] *ibid* at para 10.6.

[37] *Waldman v Canada,* CCPR/C/67/D/694/1996, Individual opinion by Martin Scheinin at para 5.

[38] Edelenbos 'The Human Rights Committee Jurisprudence under Article 26 of the ICCPR: The Hidden Revolution' in Alfredsson et al, eds. *International Human Rights Monitoring Mechanisms,* 2nd edition (Nijhoff, 2009) at 79.

demand, there would likely be a significant financial burden on the state (among other concerns). As such, Schenin qualified his remarks with a requirement for demand for those services.

In addition, it should be noted that in the cases mentioned, the discrimination referenced existed in terms of procedural and substantive access. The discrimination was related to the existence of laws or policies, or in the case of *Diergaardt et al. v. Namibia,* the creation of policies which actively caused a barrier in accessing justice for marginalised people. The parameters of the jurisprudence in these case do not touch on symbolic access, and arguably Article 26 itself has limited scope over symbolic access.

As discussed in Chapter 4, symbolic access ensures a society wherein marginalised people are "fully included and empowered to participate as equal citizens".[39] Flynn notes that this inclusion and empowerment is only due "in part" to a state's laws.[40] Article 26 is primarily concerned with the operation of the law, equal protection from the law, and the law prohibiting discrimination. There is no focus on societal barriers to accessing justice and societal instances of discrimination that are not rooted in law, either directly or indirectly.

7.3 The ECHR

In moving on to a discussion of equality and non-discrimination under the ECHR, Article 14 of the ECHR protects against discrimination. It reads that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As alluded to above, this provision initially connected discrimination to specific rights under the ECHR.[41] There was no standalone prohibition against discrimination generally. However, with the addition of Protocol 12 to the ECHR, the prohibition against discrimination is no longer linked to the violation of other rights within the ECHR. Protocol 12 reads:

[39] *supra* note 2 at 16.
[40] *ibid.*
[41] *supra* note 12 at 6.

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Non-discrimination is thus a stand-alone right under Protocol 12.[42] In the interests of this research, it specifically notes language as a source for discrimination. In paragraph 2 the prohibition extend beyond discrimination found in laws, and protects against discrimination flowing from public authorities.[43]

In terms of language and non-discrimination in the jurisprudence of the ECtHR, perhaps most famously is the *Belgian Linguistics Case.*[44] The case related to French-speaking Belgian parents who wished for their children to be educated in French medium schools. The applicants lived in majority Dutch speaking regions, and therefore the Belgian state did not provide education in French in those regions. French medium education was available in other regions, which would require the families to engage in "scholastic emigration", which they alleged would entail "serious risks and hardships".[45] The applicants alleged they had been discriminated against, pursuant to Article 14 of the ECHR, in the pursuit of Article 2 of Protocol 2 to the ECHR, which guarantees the right to education.[46] At the time of the *Belgian Linguistics Case,* Protocol 12 had not yet been brought into force, and discrimination under Article 14 needed to be connected to the violation of another right in the ECHR.[47] Ultimately, the ECtHR decided that the differential treatment afforded to the French speakers in the Dutch speaking region was justified, as it would "not have been feasible to make teaching available in both

[42] *supra* note 3 at para 3.7.
[43] Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention (Council of Europe, 2020) at 10
[44] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits)* App no 1474/62 (ECtHR 23 July 1968). See also Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention (Council of Europe, 2020) at para 112.
[45] *Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits)* App no 1474/62 (ECtHR 23 July 1968).
[46] *ibid.*
[47] *ibid.*

languages"[48] and the "families were not prevented from making use of private education in French in Dutch-speaking regions".[49] The Court held that:

> …the duty of states to respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions in the exercise of any function which it assumes in relation to education would not imply that states have an obligation to accommodate the linguistic preferences of the parents.[50]

The ECtHR held that there was no right to have linguistic preference accommodated in terms of education provision.

The ECtHR has addressed language on other occasions in its jurisprudence related to Article 14. In the Council of Europe's Guide on Article 14, citing *Dmitrijevs v. Latvia*,[51] *Pahor v. Italy*,[52] *Association "Andecha Astur" v. Spain*,[53] *Fryske Nasjonale Partij and Others v. the Netherlands*,[54] and *Isop v. Austria*,[55] it is stated that case law subsequent to the *Belgian Linguistics Case* found that the ECHR:

> …did not guarantee linguistic freedom as such, and particularly the right to use the language of one's choice in an individual's relations with public institutions and to receive a reply in this language…[56]

Article 14 does not necessarily guarantee that a person's linguistic identity will be respected when engaging with the state, based on this jurisprudence. Along these lines and in respect of the right to a fair trial, Paz notes that:

> minority language is accommodated in the public domain only until successful assimilation eliminates the need for protection. Legal accommodation thus lasts only until the minority-language speakers complete their transition into the linguistic mainstream of society and its dominant cultural practice. After assimilation, a minority

[48] *supra* note 12 at para 112.
[49] *ibid.*
[50] Henrard, 'Relating Human Rights, Minority Rights and Self-Determination to Minority Protection' in Schneckener and Wolff (eds), *Managing and Settling Ethnic Conflicts: Perspectives on Successes and Failures in Europe, Africa, and Asia* (Palgrave Macmillan 2004) at 46
[51] *Dmitrijevs v. Latvia*, App no 49037/09 (ECtHR, 16 December 2014).
[52] *Pahor v. Italy,* App No 19927/92 (ECtHR, 29 June 1994).
[53] *Association "Andecha Astur" v. Spain,* App no 34184/96 (ECtHR, 07 July 1997).
[54] *Fryske Nasjonale Partij and Others v. the Netherlands*, App no 11107/84 (ECtHR, 12 December 1985).
[55] *Isop v. Austria,* App no 808/60 (ECtHR 08 March 1962).
[56] *supra* note 12 at para 113.

> can still maintain its language and culture, but on its own time and with its own funds.[57]

Paz notes, that where there is a choice, i.e., where an individual has acquired the majority language as well as an other language, their legal accommodations generally end. Paz argues that international case law has "consistently favoured linguistic assimilation rather than the robust protection of the linguistic diversity that is espoused."[58] Non-discrimination does not necessarily guarantee that an individual will have a right to use their language in all instances when dealing with the state, including when engaging with the right to a fair trial.

7.4 Conclusion

RML-users can experience discrimination, within the terms of discrimination under both the ICCPR and the ECHR. Both instruments acknowledge language as a specific ground for discrimination.

The HRC, although arguably cautious in finding discrimination under Article 26 of the ICCPR,[59] has found instances of linguistic discrimination in respect of a minority language community using their language with the state. *Diergaardt et al. v. Namibia* has shown that where a state actively suppresses or bans the use of a particular language, in the absence of any justification, discrimination has occurred. The jurisprudence of the ECHR has held that there is no guarantee of linguistic choice under non-discrimination. Paz argues that this amounts to a limited right to language use, that is nullified when RML-users assimilate and learn the majority language, and that it amounts to a lack of protection for linguistic culture and identity.[60]

In terms of access to justice, it is possible to view the jurisprudence of the ECtHR and the HRC in terms of procedural access and substantive access. In this vein, it is arguable that the focus on the state and how the state can cause discrimination by its laws or policies from the ECHR and the ICCPR overlooks symbolic access. Dunbar discusses the scope of language protection under both the ICCPR and the ECHR. Like Paz, he notes that there is limited focus on the process of language usage:

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[57] *supra* 31 at 163, 164.
[58] *ibid* at 164.
[59] *supra* note 38 at 79.
[60] *supra* 31 at 163, 164.

> …perhaps most fundamentally, even the positive rights are provided in such a way that a one-sided reliance on government is created, with limited community control and input into the process of language planning and policy design and implementation. The narrow focus on government obligations obscures extremely important questions about the manner in which minority language services are conceived and developed. There needs to be greater focus on process rather than outcome.[61]

This is relatable again to access to justice literature as discussed in Chapter 4, and as reiterated in this chapter. There is a reliance on government to ensure that procedural access is met. There is limited input from the community in the creation of substantive access (and thereby a lack of substantive access). Dunbar's remark that there needs to be "greater focus on process rather than outcome" can be linked to the idea that there is a need for greater focus on symbolic access than on substantive and procedural access. Equality and non-discrimination, when it is focused primarily on the operation of law and policy implemented by the state and state organs, overlooks the societal issues that can create inequality for marginalised people, whereby they are not empowered and valued as equal citizens.[62]

In the following chapter, I will explore how substantive and symbolic access can improve on rights and provide a legal landscape which is more receptive to procedural access concerns.

[61] *supra* note 9 at 120.
[62] *supra* note 2 at 16.

Chapter 8 – Substantive and Symbolic Access for Minorities in International Human Rights Law

8.1 Introduction

In Chapters 5 and 6, I discussed procedural access as it related to the minimum standards of the right to a fair trial. These issues relate to the narrow-most application of access to justice, as described in Chapter 4 (see *Fig. 4.1*). This discussion on procedural access showed how RML-users interact with their rights under the ECHR and the HRC under the current systems. In the previous chapter, I expanding the discussion to the right to equality and non-discrimination, focusing on procedural and substantive access However, it is also important to explore how those systems have come to be.

In this chapter, I focus on substantive and symbolic access in international human rights law, in respect of minority rights. Substantive access ensures that participants to the legal process receive "equitable and beneficial judicial outcomes".[1] These outcomes are not a coincidence, but rather as a result of a concerted effort to consider the needs of particular groups and to include those needs in the creation of law and policy. As Flynn notes, where there is no involvement from a marginalised group in the creation of laws and policies which purport to serve a marginalised group, then the laws and policies are "unlikely to succeed".[2] To recall, symbolic access then involves a:

[1] Beqiraj, McNamara and Wicks 'Access to justice for persons with disabilities: From international principles to practice' International Bar Association, October 2017 at 14.

[2] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 14.

> …society in which, due in part at least to its laws and justice system, individuals from marginalised communities are fully included and empowered to participate as equal citizens[3]

Substantive access and symbolic access ensure that marginalised people are included and valued in society and can participate fully in that society. This is applicable to the international community also. If a minoritised group are valued and empowered, then they are able to participate in the international community. Subsequently, they work towards ensuring substantive access through that empowerment and participation.[4]

As such, in this chapter I first discuss the development of human rights instruments, with focus on how marginalised people and their concerns were included in those processes and how they were viewed at the time. Secondly, I discuss Article 27 of the ICCPR, as the only 'minority provision' with legal force under international human rights law. I discuss how the provision came to be and how it has been interpreted by the HRC in individual complaints. Thirdly, I provide analysis of minority protections which arose from the 1990's onwards, with specific emphasis on substantive and symbolic access. Lastly, I provide a comparison between provision under the ICCPR and the ECHR and the Statute of Rome. I demonstrate how language and multilingual concerns were foundational at the creation of the ICC and show how substantive access can feature as part of international law and policymaking, informed and inspired by symbolic access.

The purpose of these discussions is to explore how access to justice measure have been considered (or indeed, have not been considered) in the creation and development of international human rights laws.

8.2 Minority Identity in a Human Rights Context

Minorities have always been a sticking point in international human rights law, as noted in Chapter 1. International human rights law is based on a homogenous idea of nation building and the nation state.[5] Yet minority groups represent an othered, anti-national sect of society.[6] The traditional nation-state promotes ideals of sovereignty, unity and one-ness. As noted in

[3] *ibid* at 16.
[4] See for example, how disabled people were empowered to partake in the creation of the CRPD in *ibid.*
[5] May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* 2nd ed (Routledge 2012) at 6, 7.
[6] *ibid* at 6

the Report of the Independent Expert on minority issues, Rita Izsák in 2013 "[m]inority and indigenous languages were often seen as backwards, a barrier to colonial hegemony".[7] What to do with minorities under a nation-state based system has traditionally been an issue of contention in international law.

For much of modern human rights law as we know it, World War II acted as the most poignant catalyst. Both the United Nations and the Council of Europe were founded in the post WWII landscape, to attempt to prevent similar atrocities and conflicts in the future. In terms of minority protections, as inherently anti-nation state in their being,[8] minorities posed a problem for the prevalent idea of the homogenous nation state within the UN in particular. Alcock notes:

> War provides the opportunity to pay off old scores. The Second World War and its immediate aftermath would see minorities massacred in or cleansed from their homelands as national majorities took revenge for the failure of minorities to become loyal citizens and their support for if not outright collaboration with the invading armies whether from kin states of not.[9]

Suspicion or distrust of the minority and other was evident at this time. Alcock also states that "consideration about what to do with minorities formed an inevitable part" of the formation of the United Nations.[10] There was much debate surrounding the best course of action for international human rights laws in dealing with the "problem of minorities"[11] within states at the formation of the United Nations.[12] Irrespective of this reality of 'settling of scores' against 'disloyal minorities' the outcome of the war saw heightened suspicions attached to minority groups, rather than a need to protect and defend them. There was a suspicion associated with some minority groups "owing to wartime complicity of certain minority leaders in Nazi aims in East-Central Europe".[13] It is difficult to envision how substantive access measures could

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[7] Report of the Independent Expert on minority issues, Rita Izsák, UN Doc A/HRC/22/49 at para 19

[8] *supra* note 5 at 6, 7.

[9] Alcock, *A History of the Protection of Regional Cultural Minorities in Europe: From the Edict of Nantes to the Present Day,* (Hampshire: Macmillan Press Ltd., 2000) at 88

[10] *ibid* at 94.

[11] Bagle, *General Principles and Problems in the International Protection of Minorities,* (Geneva: Imprimeries Popularies, 1950) at 9.

[12] Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 2000) at 269-280.

[13] Jackson Preece, 'Minority Rights in Europe: From Westphalia to Helsinki' (1997) Review of International Studies, Vol 23, 75 at 84. Jackson Preece continues that "[a]wareness of minority issues [were] only kept alive in the immediate postwar years by the fact that minorities were both victims of the war who required Allied

have prevailed at the drafting of international law when these perceptions of minorities prevailed. These perceptions point towards a lack of symbolic access at the time, whereby minorities were not valued and not empowered members of the international community.[14] De Varennes and Kuzborska note that international organisations "remained silent on rights pertaining to indigenous peoples"[15] which included silence on minority rights. The Universal Declaration of Human Rights (UDHR), for example, makes no explicit mention of minority rights. Morsink explains in great detail, however, the initial attempts to include a clause on minority rights, or to protect minorities in some way.[16] He shows there was opposition to the inclusion of a minority clause from a number of states: the US alleged that they did not have minority problem, thereby opposing the inclusion of such a provision.[17] The provision was also opposed as unnecessary by China, India and the United Kingdom,[18] and there was reference made to Hitler's use of German minorities in other states as a justification for interference, thereby linking minorities to nefarious purposes.[19] A preliminary draft of the UDHR proposed enshrining rights to minority educational, religious and cultural institutions as well as minority linguistic protection but, due to political opposition from many states, these provisions were omitted from the final version adopted by the UN General Assembly in 1948.[20] Similarly, during the drafting of the ECHR, a minority provision was mooted for inclusion but ultimately dropped.

> [A] proposal for including a minority provision in the ECHR had indeed been put forward but was eventually discarded. Instead, agreement was reached only to add "association with a national minority" as a prohibited ground of distinction in Article 14.[21]

assistance and also villains who were subjects of war crimes tribunals." See also the discussion of the drafting of the UDHR where this issue arose again in *supra* note 12 at 269-280.

[14] *supra* note 2 at 16.

[15] de Varennes and Kuzborska, 'Language, Rights and Opportunities: The Role of Language in the Inclusion and Exclusion of Indigenous Peoples' 2016 Vol. 23 International Journal on Minority and Group Rights 281 at 283.

[16] *supra* note 12 at 269-280.

[17] *ibid* at 272.

[18] *ibid* at 274.

[19] *ibid* at 274.

[20] Macklem, 'Minority Rights in International Law' 2008 University of Toronto Faculty of Law, Legal Studies Research Series, No. 08-19 at 6.

[21] Pentassuglia 'Minority Issues as a Challenge in the European Court of Human Rights:
A Comparison with the Case Law of the United Nations Human Rights Committee' (2003) Vol 46 German Yearbook of International Law 401 at 401.

In 1948 the General Assembly stressed that "the United Nations cannot remain indifferent to the fate of minorities".[22] Nevertheless, Bagley states that in making this Resolution, the General Assembly "thrust itself directly into one of the most complex and perplexing problems in the entire realm of international relations."[23] At this time "minority rights were considered contrary to international peace and security."[24] A perception of suspicion and distrust of minorities played itself out in weak or non-existent protections for these groups under the UN and Council of Europe systems of human rights. In addition to a lack of substantive access to justice, this is also evidence of a lack of symbolic access.[25] Minorities were not valued and were treated with suspicion and disdain.

There is one instance where the 'fate of minorities' as per the 1948 resolution was addressed head on. As part of the ICCPR, Article 27 refers to the rights of minorities and is a stand-alone right, contrary to Article 14 of the ECHR. I will address Article 27 of the ICCPR below, in terms of substantive access.

8.3 Article 27 of the ICCPR

In its early days, the UN went about establishing a number of documents to outline a common standard of human rights.[26] While early attempts were generally aspirational and "reminiscent of the early Western Bills of Rights"[27] in 1966 the ICCPR was adopted. Article 27 of the ICCPR is a global human right which protects *inter alia* RML-users' right to their language.[28] Article 27 reads:

> *In those States in which ethnic, religious or linguistic minorities exist*, persons belonging to such minorities *shall not be denied* the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own *language*.[29]

[22] Resolution Adopted by the General Assembly: Fate of Minorities, UN Doc/A/RES/3/217 C.
[23] *supra* note 11 at 9.
[24] *supra* note 13 at 84.
[25] *supra* note 2 at 16.
[26] The Charter of the United Nations and the Universal Declaration for Human Rights
[27] Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary,* 3rd ed. (Oxford: Oxford University Press, 2013) at para 1.09.
[28] Thornberry, *Is There a Phoenix in the Ashes? International Law and Minority Rights,* 1980 Texas International Law Journal Vol 15, 421 at 443.
[29] Emphasis added.

Article 27 established for the first time a recognition of minorities and minority rights on an international stage. That is not to say that Article 27 is without problems. The rights are qualified by the phrase "[i]n those States in which [minorities] exist". Thornberry stated that the phrase:

> …reflects the widely held view among 'countries of immigration' [the Americas]…that the classic 'minorities question' as applies mainly to Europe and has no relevance to their contemporary situation…[30]

Thornberry references changes made to the text of Article 27 by the Chilean delegation. The delegation sought to include this proviso 'in those States in which ethnic, religious or linguistic minorities exist…', wording which was ultimately accepted. The Chilean delegation denied outright the applicability of the Article, and the existence of minorities within their state. Other South and Central American States stated during the drafting that no minorities existed in their territories either.[31] This speaks to a lack of substantive access: were minorities included in the creation, then their needs would have disputed this position. But it also speaks to a lack of symbolic access, whereby minorities were so undervalued that they were not even perceived by the delegations of certain states.

In spite of this negative formulation and the intent of certain states to remain beyond its scope, the HRC has noted that:

> The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.[32]

It is not for the state itself to decide whether minorities 'exist' there or not. Nevertheless in practice, there appears to be a reluctance to engage with Article 27. At the time of writing, the HRC has found violations of the Article in five cases: *Poma Poma v Peru,*[33] *Lovelace v. Canada,*[34] *Lubicon Lake Band v. Canada,*[35] *Mavlonov v. Uzbekistan,*[36] and *Sanila-Aikio v*

[30] Thornberry, *International Law and the Rights of Minorities,* (Oxford: Clarendon Press, 1991) at 154 citing GAOR, 16th Session, 3rd Committee.
[31] Venezuela, Panama, Ecuador, Peru and Nicaragua. Note, however, that all states are parties to the ICCPR and none have entered any reservation against Article 27 as in the case with France. *supra* note 30 at 155.
[32] Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27): 08/04/94. CCPR/C/21/Rev.1/Add.5, at para 5.2.
[33] CCPR/C/95/D/1457/2006.
[34] CCPR/C/13/D/24/1977.
[35] CCPR/C/38/D/167/1984.
[36] *Mavlonov and Sa'di v Uzbekistan,* CCPR/C/95/D/1334/2004.

Finland.[37] It is worth noting that in these cases, the applicants all belonged to a distinct indigenous minority already recognised in their state.[38] These groups could be said to already have at least some level of symbolic access in their own states.[39] Thus the identification of rights for a member of those recognised minorities was relatively unproblematic. However it should be noted that the HRC is not mandated to consider every alleged violation in a complaint, and that not all states are party to the individual complaints mechanism under the First Optional Protocol to the ICCPR.[40] It is possible that there were other complaints to the HRC where Article 27 was violated, but where this provision was not considered. Further research would be needed to draw conclusions about trends from the HRC relating to allegations of violations of Article 27.

In discussing minority protections under the ICCPR, it should be noted that France has entered a reservation against Article 27, denying the existence of minority groups in the state,[41] based on an obligation to do so under French law.[42] This approach has its roots in the 1789 revolution and is:

> …based on the idea that the state should interact with the individual only, not communities or groups, on the absolute notion of equal treatment for all. Equality is seen as the best way to ensure integration of all citizens, to the benefit of both the state and the citizens themselves.[43]

Minority rights and recognition of minorities is seen as counter to the constitution, and deemed as counter to efforts to ensure equality for all.

[37] CCPR/C/124/D/2668/2015.
[38] Aymara, Maliseet, Lubicon Lake Band, Tajik and Sámi communities respectively.
[39] This acknowledges the reality that these minority groups are not without problems in their own states sufficient enough to go before the UN to assert a human rights violation visited upon them by the state.
[40] Optional Protocol to the International Covenant on Civil and Political Rights, 1966.
[41] The reservation states that "Since the basic principles of public law prohibit distinctions between citizens on grounds of origin, race or religion, France is a country in which there are no minorities and, as stated in the declaration made by France, article 27 is not applicable as far as the Republic is concerned." UN Doc. CCPR/C/46/Add.2.
[42] Report of the Independent Expert on Minority Issues: Mission to France, UN Doc. A/HRC/7/23/Add.2, (2008), at 3.
[43] Gilbert and Keane, 'Equality versus Fraternity? Rethinking France and Its Minorities' (2016) Vol 14(4) International Journal of Constitutional Law 883 at 888.

Nevertheless, out of all the communications alleging violations of Article 27 to the HRC, the majority are complaints against France.[44] The majority of these communications from France have been deemed inadmissible because of the reservation and French constitutional law:[45]

> As to the claim of a violation of article 27, the Committee reiterates that France's "declaration" made in respect of this provision is tantamount to a reservation and therefore precludes the Committee from considering complaints against France alleging violations of article 27 of the Covenant…[46]

In the decision in *Hopu and Bessert,* the HRC concluded that it "is not competent to consider complaints directed against France concerning alleged violations of article 27 of the Covenant"[47] due to France's declaration that Article 27 does not apply. The declaration itself gives the 'lack of minorities in France' as its justification. It should be noted that this does not prohibit in all instances minorities from redress. As noted by Gilbert and Keane, there is a "developed legal arsenal to fight discrimination in France"[48] but that this is:

> …based on the individual approach to equality, whereby each citizen can be protected against discrimination, but such discrimination is based on the individual right to equality, rather than racial, ethnic, religious, or linguistic group-belonging. Anti-discrimination measures are based solely on socio- economic criteria, such as the poor, young or old persons, or inhabitants of socially deprived areas, rather than racial, ethnic, or religious identity.[49]

Protection can be afforded to minorities, but through other means based on the individual's right to equality. It would be possible then, to offer protection to minorities in France under non-discrimination pursuant to Article 26, as explained in the previous chapter. However, by virtue of the declaration against Article 27, because of their constitutional interpretation, the HRC is prevented from addressing allegations of violations of minority rights made against France.

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[44] 10 of the 43 cases reviewed for this research.

[45] 6 of the 10 cases were deemed inadmissible: *SG v France,* CCPR/C/43/D/347/1988, *GB v France*, CCPR/C/43/D/348/1989, *CLD v France*, CCPR/C/43/D/439/1990, *TK v France*, CCPR/C/37/D/220/1987, *RLM v France*, CCPR/C/44/D/363/1989 and *MK v France*, CCPR/C/37/D/222/1987.

[46] *SG v France,* CCPR/C/43/D/347/1988 at para 5.3. Also, *GB v France*, CCPR/C/43/D/348/1989 at para 5.3, *RLM v France*, CCPR/C/44/D/363/1989 at para 5.3. Similar sentiment is also expressed in *TK v France*, CCPR/C/37/D/220/1987 at para 8.6.

[47] *Hopu and Bessert* CCPR/C/51/D/549/1993 at para 4.3

[48] *supra* note 43 at 892.

[49] *ibid.*

I now turn to an examination of other documents which specifically refer to minority rights and protections in terms of substantive and symbolic access.

Table 8.1 Minority Protection from 1990

Name	Year	Governing Body	Protections:	Legal Force?
Copenhagen Document	1990	OSCE	National minorities have the right to fully exercise their human rights. Special measures ought to be adopted where necessary to ensure their full equality	No
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities	1992	UN	Provision for members of national, ethnic, religious to enjoy their own culture, profess their own religion and use their own language free from discrimination.	No
Helsinki Document	1992	OSCE	Established the OSCE High Commissioner on National Minorities whose function is conflict prevention and issuing of recommendations	No
ECRML	1992	CoE	Comprehensive provisions for the protection and promotion of regional or minority languages.	No
Additional Protocol on the Rights of Minorities to the European Convention on Human Rights	1993	CoE	Human rights protections for national minorities with a particular emphasis on language minorities and their right to use and learn minority languages	No
Conclusion of Presidency, European Council	1993	EU	Declaration that 'respect for and protection of minorities' would be made a of the criteria for EU membership	N/A
Framework Convention for the Protection of National Minorities	1995	CoE	Various human rights protections for national minorities	No
Oslo Recommendations	1998	OSCE	A set of HCNM recommendations on the linguistic rights of national minorities.	No
Lund Recommendations	1999	OSCE	A set of High Commissioner on National Minorities Recommendations on the effective participation of national minorities in public life.	
Declaration on the Rights of Indigenous Peoples	2007	UN	Specific protections for indigenous people's rights with an emphasis on group rights.	No
Directive on the Right to Interpretation and Translation in Criminal Proceedings	2010	EU	Legislative instrument for the specific provision of interpreters and translations to accused persons in criminal trials.	Yes
Graz Recommendations	2017	OSCE	A set of OSCE High Commissioner on National Minorities Recommendations on access to justice and national minorities	No
Language Rights of Linguistic Minorities: A Practical Guide for Implementation	2017	UN	Guidelines for appropriate protection of the rights of linguistic minorities	No

8.4 Minority Rights from 1990-1999

In the 1990's, after a series of atrocities against minority groups, there was a growing concern for the fate of minorities. Kymlicka describes the events leading up to the move toward minority rights recognition as "violent ethnic conflicts [emerging] in the post-communist countries undermining the transition to liberal democracy."[50] A plethora of international documents relating to minority groups and their protection thus emerged from various human rights based and international organisation. These documents appeared generally between 1990-1999 (see *Table 8.1*).

In its construction, the ECRML offers protection to languages, rather than to language users themselves. Grin explains that the ECRML:

> …is not about rights. It is not about standards. It is not about national minorities. It is not even about members of minorities...The Charter is about languages – more precisely, the regional or minority languages of Europe – and about the measures required for safeguarding their existence in the long run.[51]

Thus we can understand that the ECRML applies to RMLs, rather than to individual RML-users or RML-using communities.

Table 8.1 depicts a period of ten years where significant steps were made to recognise the need for minority protections. That is not to say that developments during this time without fault and it would be remiss to overlook their significant deficiencies when it comes to the provision of realisable rights.

8.4.1 Substantive Access and Minority Protections in the 1990s

In viewing *Table 8.1* certain trends emerge. There was a distinctly European focus during this time, with most of the documents stemming from European or majority European-based organisations.[52] Additionally, their scope is further limited because none of these documents from 1990 to 1999 have legal force (see *Table 8.1*). These documents are generally

[50] Kymlicka, 'The Internationalization of Minority Rights', (2008) International Journal of Constitutional Law, Vol 6(1), 1 at 21.
[51] Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages*, (Hampshire: Palgrave Macmillan, 2003) at 10.
[52] While the OSCE does have many non-European states, the majority of member states are also members of the Council of Europe.

aspirational. While aspiring to protect minority rights must be commended, it is a long way from actual justiciable and realisable protections for individuals.

In respect of the ECRML specifically, it has been described as "excessively timid"[53] with wording careful not to create any binding legal duties. The wording does "not refer to concrete action".[54] This is perhaps best demonstrated with reference to the UK and protection for Irish under Article 9. Under Article 9.3 in respect of Irish, the UK has agreed "to make available [in the RML]…the most important national statutory texts and those relating particularly to users of these languages". However, at present, no UK or Northern Irish legislation is available in Irish. This includes an Irish Language Act which remains at the time of writing, a contested issue in Northern Ireland.[55] Despite their acceptance of Article 9.3, the UK has taken no action to implement legislation in Irish.[56] In terms of substantive access, this shows a lack of "equitable and beneficial judicial outcomes".[57]

As noted previously, the ECRML references languages, but has no reference to the people who use those languages. Woehrling calls this a 'language centric' as opposed to 'speaker-centric'[58] approach, which he argues is a positive aspect of the Charter:

> Although it does not create rights in the conventional sense, it does place legal obligations on the states which accede to it. Thus, most innovatively, instead of reinforcing the legal position of individuals or groups, the charter protects minority regional languages.[59]

However, in terms of access to justice, this too shows a lack of substantive access. The marginalised people who use these marginalised RMLs are not given protection themselves.

Under the ECRML, there is careful distinction between traditional and non-traditional languages. The focus is dependent on the historic connection that a language (rather than its

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[53] Woehrling, Jean-Marie, *The European Charter for Regional or Minority Languages: A Critical Commentary,* (Strasbourg: Council of Europe Publishing, 2005) at 34.

[54] Määttä, 'The European Charter for Regional or Minority Languages, French Language Laws, and National Identity', (2005) Vol 4 Language Policy 167 at 172.

[55] Cross 'Aiken: UUP do not support an Irish Language Act' *The Belfast Telegraph* (02 May 2021).

[56] Note that the UK is also bound to legislation for and Irish Language Act under the Belfast Agreement (The Good Friday Agreement) and the St Andrews Agreement.

[57] *supra* note 1.

[58] The ECRML protects languages and not the speakers of those languages.

[59] *supra* note 53 at 27. See also Gwynedd Parry, 'Article 4. Existing Regimes of Protection' in López, Ruiz Vieytez and Libarona (eds.) *Shaping Language Rights: Commentary on the European Charter for Regional or Minority Languages in Light of the Committee of Experts' Evaluation,* (Strasbourg: Council of Europe Publishing, 2012) at 150.

users) has to a country, rather than on the realities or needs of linguistic communities. Woehrling explains that distinction as follows:

> Owing to increased population mobility, especially recent immigration, many European regions now house new linguistic groups which are characterised by strong demographic expansion and efficiency in transmitting their language down the generations. The "strength" of these new linguistic communities contrasts with the frequent weakness of linguistic groups corresponding to traditional regional and minority languages.[60]

Woehrling goes on to state that the presence of migrant languages poses "serious problems"[61] for traditional languages, in that public authorities can use the existence of migrant language communities to undermine any attempts to protect traditional languages.[62] He argues that because migrants "chose"[63] to come to the state in which the reside, and because traditional language users have "no problems of integration"[64] then the experiences of traditional language users and migrant language users cannot be compared. This creates a distinction whereby those languages which traditionally belong in a state deserve protection, and those who do not belong and are unworthy of the same protection. In terms of symbolic access, I argue that this is an oversimplified understanding of how traditional minority language users experience being in society. In Chapter 3 I discussed the internal and external identities held by Irish-speakers and Deaf people. In both instances, it is fair to say that there are problems of integration, whereby their existence as minority language users in an English-speaking society is othered and exceptional.

Additionally, as noted above, the ECRML offers no protection to sign language users. When the ECRML came into existence, no CoE member state had yet recognised any sign language as an official language. However, over its lifetime there has been an increased number of states which have recognised specific sign languages.[65] Despite the focus on speaking, I

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[60] Woehrling, 'Introduction' in Lopez, Ruiz Vieytez and Urrutia Libarona (eds) *The European Charter for Regional or Minority Languages: A Critical Commentary,* (Council of Europe Publishing, 2005) at 22
[61] *ibid.*
[62] *ibid.*
[63] *ibid.*
[64] *ibid.*
[65] Austria, Belgium, Czech Republic, Denmark. Finland, Italy, Malta, Netherlands, North Macedonia, Norway, Portugal, Slovakia, Spain and the UK have all some level of sign language recognition in law. See https://www.eud.eu/news/sign-language-recognition-accross-eu/ [date accessed: 31 May 2021].

believe that there would be scope to expand the parameters of the ECRML to include protection for sign languages.

The Council of Europe's Framework Convention for the Protection of National Minorities (FCNM), which came about in 1995. It was the

> first international treaty which [was] exclusively devoted to the protection of national minorities and which [established] substantive legal principles and [incorporated] a minority mechanism under international law for their implementation.[66]

The preamble of the FCNM makes direct reference to the failed attempts at minority protection in Europe (the Balkan wars) in the past: "the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace".[67]

The FCNM is dedicated to the protection 'national minorities'. A definition of 'national minorities' was deliberately omitted from the FCNM because "it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States"[68]. Rönquist assures that this omission means that States would not be at liberty to define whether or not a minority exists in their territory. He says that the General Comment 23 of the HRC ought to be relied upon and that the existence of a national minority would be dependent on objective criteria.[69]

Ringelheim, however, notes that many states have made qualifying declarations in respect of the applicability of the FCNM.[70] Denmark and the Netherlands have noted that the FCNM has only a regional application within their territory.[71] Liechenstein and Malta, despite being parties to the FCNM, have then asserted that no 'national minorities' exist within their states and so the FCNM does not apply.[72] Portugal took the line in its first State Report that the

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[66] Rönquist, 'The Council of Europe Framework Convention for the Protection of National Minorities' 1995 Vol 6 Helsinki Monitor 38 at 38.
[67] The Framework Convention for the Protection of National Minorities, Preamble. ETS 157
[68] FCNM Explanatory Report at para 12.
[69] Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27): 08/04/94. CCPR/C/21/Rev.1/Add.5, at para 5.2.
[70] Ringelheim, 'Minority Rights in a Time of Multiculturalism--The Evolving Scope of the Framework Convention on the Protection of National Minorities' (2010) Vol 10 Human Rights Law Review 99 at 112.
[71] *ibid* at 113.
[72] *ibid.*

intention of the FCNM was quite remote for their concerns, but nevertheless, they stood in solidarity with the intent:

> [While] Portugal is geographically quite remote from the countries for which the Convention is intended and has a very different historical, social, cultural and legal background, the Portuguese Republic has, in an act of political solidarity, signed and ratified the Framework Convention, which came into force in respect of Portugal on 1 September 2002.[73]

The FCNM Advisory Committee did note that for a national minority to exist within a state there is no requirement for a "formal recognition"[74] by the state. However, the Advisory Committee also accepted that states had a margin of appreciation, provided they executed this margin within the confines of international law. This is perhaps some way to Rönquist's hopes that the existence of a national minority would dovetail with the existence of minorities under Article 27. But the margin of appreciation allows states to be selective in their identification of minorities and therefore, Rönquist's argument cannot hold totally true. This is evident in Portugal's repeated[75] refusal to recognise the existence of any 'nation minority' in the state (including the Roma community[76]). Portugal has repeatedly acknowledged that their participation to the FCNM was merely out of solidarity with other nations.[77]

The qualifier of 'national' in identifying minorities presumably narrows the understanding somewhat and allows states to be even more selective in their margin of appreciation. A

[73] Section 1, Report Submitted by Portugal in Accordance with Article 25 Paragraph 1 of The Framework Convention for the Protection of National Minorities, 15 December 2004.
[74] Advisory Committee on The Framework Convention for the Protection of National Minorities: Opinion on Portugal, 6 October 2006, ACFC/OP/I(2006)002 at para 20.
[75] At the time of writing, all of Portugal's Reports to the Advisory Committee of the FCNM in some way stated that there existed no 'national minorities' within their state. See 2004 First Report Portugal at 2, 2009 Second Report Portugal at para 1 and 2013 Third Report Portugal at para 1. Note in particular in their Third Report, Portugal states that it is perhaps "the only country in Europe whose frontiers as a State and as a Nation have been perfectly and securely coincident in the last 800 years" at para 3.
[76] While in the Second Report, Portugal recognises the existence of a Roma minority, they are clear to distinguish the Roma as an "ethnic minority" and not a 'national minority'. See Second Report Portugal at para 1.
[77] Section 1, Report Submitted by Portugal in Accordance with Article 25 Paragraph 1 of The Framework Convention for the Protection of National Minorities, 15 December 2004. Section 1, Second Report Submitted by Portugal Pursuant to Article 25, Paragraph 1 of The Framework Convention for the Protection Of National Minorities, 14 January 2009, ACFC/SR/II(2009)001. Third Report Submitted by Portugal Pursuant to Article 25, Paragraph 1 of The Framework Convention for the Protection Of National Minorities, 24 September 2013, ACFC/SR/III(2013)002 at para 1. Portugal's 4th Report to the Council of Europe under the Framework Convention for the Protection of National Minorities, 8 October 2018, ACFC/SR/IV(2018)002, Foreword.

minority group may be living in a country for generations but come from immigrant origins, such as Roma in many European states. The fact that these people are not 'traditionally' located in the region, or that they are not an indigenous group may allow the state in question to use the margin of appreciation to exclude them from the FCNM's protection. In spite of the Advisory Committee "consistently encourage[ing]" States to apply the protections to other minority groups, there seems to be no change to states like Portugal.[78]

In critiquing the FCNM, Gál argues that although the FCNM is "far from being wholly satisfactory" it is "probably the best" one could hope for.[79] Rönquist notes that although the FCNM is without legal force, this ought not to be "over-emphasized".[80] He notes that what "matters above all is that states feel committed to the principles and that they be implemented and internationally supervised."[81] However this has not been the case. I have already detailed Portugal's repeated failure to acknowledge the existence of 'national minorities' within its state. The UK has also repeatedly failed to provide for an Irish Language Act despite encouragement from the Advisory Committee to do so.[82] Again, I would argue that the issue at hand is that the FCNM is formulated as soft law. There is no individual complaints mechanism available under the FCNM. However, there is a monitoring procedure, similar to that of the ECRML, whereby states are required to submit to periodic reports. For the individual minority language user, there is no mechanism to adjudicate individual allegations of violations of rights under the FCNM. Gál notes that the FCNM allows for "rather flexible interpretations as to what persons belonging to national minorities are entitled to and what governments should do."[83] I argue that this has the potential to render the FCNM effective in those states which are culturally and traditionally accustomed to protecting the rights of minorities and with the potential to be ineffective in those states most in need of a minority protection instrument.

[78] See also State Reports from San Marino.
[79] Gál, 'The Council of Europe Framework Convention for the Protection of National Minorities and Its Impact on Central and Eastern Europe' (2000) Journal of Ethnopolitics and Minority Issues in Europe 1 at 2.
[80] *supra* note 66 at 39, 40.
[81] *ibid* at 40.
[82] See FCNM Advisory Commission Second Report United Kingdom at para 190, Third Report United Kingdom at para 146 and Forth Report United Kingdom at para 103.
[83] *supra* note 79 at 2.

Briefly, it is important to note that Article 10 of the FCNM is of relevance to this research. Article 10.1 reads that:

> The Parties undertake to recognise that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing…

In particular, it is of importance that right here is not linked to necessity or linguistic ability, but rather that people have the right to use their language in private and public

Article 10.3 reads that:

> …Parties undertake to guarantee the right of every person belonging to a national minority to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter.

In respect of this article, the Advisory Committee's comments on Sámi speakers in Finland are of interest. In 2011 the Advisory Committee makes the suggestion that interpreters ought to be provided to Sámi speakers irrespective of whether or not the speak Finnish.[84] Therefore shifting the onus from the apparent linguistic abilities of the accused when considering the entitlement to an interpreter.

More recently, in 2017, the office of the UN Special Rapporteur on Minority Issues produced a guide on language rights for RML-users, called *Language Rights of Linguistic Minorities: A Practical Guide for Implementation.*[85] The guide provides a breakdown of issues related to language rights, the benefits of securing language rights for minority language users, recommendations for how certain language rights ought to be implemented, and examples of good practice of such implementation.

In the guide, linguistic rights are defined as follows:

[84] The Advisory Committee critiques the apparent "reluctance within public offices to provide Sami language service to citizens who may also speak Finnish" which is perhaps suggestive that they ought to be provided with court services (including interpreters) where they seek it, not where they merely cannot speak Finnish. See Third Opinion by the Advisory Committee (Finland) 2011 at para 120.

[85] *Language Rights of Linguistic Minorities: A Practical Guide for Implementation,* Handbook by the United Nations Special Rapporteur on minority issues (Geneva, 2017).

> Linguistic rights can be described as a series of obligations on state authorities to either use certain languages in a number of contexts, or not interfere with the linguistic choices and expressions of private parties.[86]

The guide is careful to reiterate throughout that language rights are to be implemented "following the proportionality principle"[87] whereby a certain portion of the population would demand the provision of services in their language before there is an obligation on the state to do so. This mirrors Scheinin's remarks in *Waldman v. Canada*,[88] as discussed in the previous chapter. The guide states in this vein that, in respect of the use of minority language in administrative and public services ought to be made available:

> …only languages where the number and concentration of speakers make it reasonable and justified, in application of the principle of proportionality. Where minorities are concentrated above a certain percentage in a given territory, region or local administration, they have the right to use their language in administrative and other public service areas to an appropriate and proportionate degree. The more serious the potential consequences are of not using minority languages in a particular area of administrative or other public services, the more responsive policymakers should be to addressing effective service delivery and communication with this segment of the public through an appropriate degree of use of the relevant languages…[89]

The guide here links seriousness of consequences to the elevated need for services in minority languages. Based on this assessment, it would seem that given the seriousness of consequences that are at stake for an accused person (deprivation of liberty, damage to reputation and relationships, financial burdens etc.), this elevated need for services would apply.

However when addressing the use of language in the CJS, the guide places an emphasis on understanding, like that found under the right to a fair trial in the ICCPR and the ECHR, as discussed earlier:

> The consequences of not using a language that is *understood by individuals in the justice system are extremely serious*. This appears in particular with respect to the right

[86] *ibid* at 5.
[87] *Waldman v Canada,* Communication No. 694/1996.
[88] *ibid*, Individual opinion by Martin Scheinin at para 5
[89] *supra* note 85 at 25.

> to fair trial as enshrined in international law, where in criminal and similar proceedings there must always be a minimum and adequate level of free interpretation and translation in place for accused or detained individuals who do not understand the language used by judicial or law enforcement officials so that they may exercise their right to a defence and to safeguard the fairness of proceedings.[90]

While the guide does recognise the seriousness of consequences for accused persons here, the caveat of 'understanding' possibly gives rise to a situation as described by Paz in the previous section:[91] The more assimilated an RML-using group, the less entitled to services they become.[92] It must be noted though, that the guide is based on existing international law, and so this emphasis on understanding stems from, *inter alia,* the wording of the ICCPR and the ECHR.[93]

As can be seen from the analysis here and from *Table 8.1* the focus of these documents, particularly from European documents, is almost exclusively on national, or traditional minorities. Those groups at the core of the successful applications to the HRC alleging violations of Article 27 might all be considered traditional minorities, or national minorities, although further investigation would be needed to make conclusions about any potential trends in the jurisprudence. In terms of language, it would seem that care was taken in some of the documents from 1990-1999 to protect indigenous and traditional languages and to offer no similar protection to migrant languages. In recalling symbolic access, this division shows that value may have been attributed to only one group (traditional minorities) at the expense of depriving it from another group (non-traditional minorities).

The documents in *Table 7.1* show carrots that states are encouraged follow and protect the rights of the politically, socially, economically and culturally disenfranchised without any sticks of obligation. There is a lack of substantive access in that there is a lack of "equitable and beneficial judicial outcomes".[94] There is no remedy for failed groups or persons under these documents. There are no individual complaint mechanisms whereby minorities can

[90] *ibid* at 29. Emphasis added.
[91] Paz, 'The Failed Promise of Language Rights: A Critique of the International Language Rights Regime' (2013) Vol 54(1) Harvard International Law Journal 157.
[92] *ibid* at 163, 164.
[93] *supra* note 85 at 29.
[94] *supra* note 1.

pursue failures to implement protections. They are suggestions for good behaviour, providing little to nothing by way of concrete solutions for minority groups in need.

As noted in Chapter 5, by contrast to the access to justice measures found in other human rights documents (the ECHR and the ICCPR specifically), the Statute of Rome offers an interesting comparator, which I will now consider.

8.5 The Rome Statute of the International Criminal Court

I was unable to find evidence of substantive or symbolic access from creation of ICCPR or the ECHR, or in their outcomes. It does not appear that minoritised people were considered or involved in the drafting processes,[95] or that their specific needs were understood and accommodated.[96] It is suggested rather that there was a lack of symbolic access in how minorities were perceived, thus impeding any chance of substantive access. In Chapter 5, I referenced the ICC and the requirement for competent interpreters. In this section, I further explore the make-up of the ICC, in terms of substantive and symbolic access, as it is compared to the ECtHR and the HRC.

The ICC is built on a foundation of substantive access as it relates to multilingualism. Multilingualism has been an expectation of the ICC since its institution, bearing in mind that the ICC came into being after a number of temporary international criminal tribunals, where multilingualism was an everyday feature.[97] In fact, simultaneous interpretation as a process has its origins in the Nuremburg Trials, where it was used as a way to seamlessly ensure communication between German, English, Russian and French.[98] During the development of the process, actors were conscious of the impact language could have on delay and the detrimental risks of injustice stemming from misinterpretation.[99] As such, simultaneous interpretation was used, where a team of skilled,[100] trained interpreters were recorded and

[95] *supra* note 30 at 154.
[96] *supra* note 9 at 88.
[97] Bearing in mind that the introduction of the Statute of Rome came after a number of international tribunals where multilingualism formed a major part of proceedings.
[98] See https://1trial-4languages.org [date accessed: 15 April 2021].
[99] Gaiba, *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (University of Ottawa Press 1998) at 95.
[100] *ibid* at 49.

monitored to ensure accuracy.[101] Multilingualism has been a consideration at international criminal tribunals as we know them for the entirety of their history. In developing a programme for best-practice for interpretation and translation, the ICC facilitated input from language experts who worked on, *inter alia*, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Court of Justice.[102] It was understood that the ICC would inevitably be a multilingual environment and therefore solutions for multilingualism were facilitated and included in the creation of the ICC. This is evidence of substantive access, but also of symbolic access. The ICC acknowledged and included the concerns of multilingualism (and therefore the concerns of RML-users) at the formation of its law and policy, showing that marginalised people would be valued and empowered to participate fully in the process.

The Rome Statute of the International Criminal Court itself offers an interesting comparison to both the ICCPR and the ECHR in terms of substantive access. Article 67.1(f) of the Statute of Rome reads that an accused shall

> …have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused *fully understands and speaks*.[103]

Two main aspects feature in the Statute of Rome that are not present in the wording of the text of both the ICCPR and the ECHR: the requirement that an interpreter be 'competent' and; the proviso that the accused must 'fully understand and speak' the language of the court in order to be denied an interpreter. The requirement of competency was addressed in the previous Chapter 5, but to reiterate, the interpreters working for the ICC must have university degrees.[104]

In respect then of what is meant by an accused "fully" understanding and speaking, the (ICC) itself has then elaborated that:

> An accused fully understands and speaks a language when he or she is completely

[101] *ibid* at 95, 99.
[102] See "Behind the Scenes: The Registry of the International Criminal Court" at 27. Available at https://www.icc-cpi.int/iccdocs/PIDS/docs/behindTheSce.pdf [date accessed: 11 July 2019].
[103] At para 13. Emphasis added.
[104] Koomen, 'Language Work at International Criminal Courts' (2014) Vol 16(4) International Feminist Journal of Politics 581 at 585. Where no such accreditation is available, native speakers of certain languages are recruited and trained "in house as paraprofessional language assistants". See also *supra* note 102.

> fluent in the language in ordinary, non-technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer. If there is any doubt as to whether the person fully understands and speaks the language of the Court, the language being requested by the person should be accommodated.[105]

Where there is a doubt about the accused's ability, the ICC errs on the side of providing an interpreter. This necessity of complete comprehension is absent in the ICCPR and the ECHR. The ICC highlighted this point and distinguished the wording of the Rome Statute from various other international instruments, including Article 14.3(f)[106] and Article 6.3(e)[107]

> There seems to have been an intention to grant to the accused before the [ICC], rights of a higher degree than in other courts referred to. There must be a difference between an entitlement to a language one understands or speaks (or simply understands) and a language one fully understands and speaks.[108]

The ICC here stats that the term 'fully' means that the accused must completely understand language of the court. It demonstrates an accused-centric understanding of the right to interpretation, with the accused's abilities and needs at the core. This is evidence of substantive access, as from the outset the concerns of language were at the heart of development of the ICC. Consideration has been given to what it means to avail of an interpreter and the risks, so that only when the accused 'fully' understands the language is there a justification for not having an interpreter. And on this point, the ICC errs on the side of caution:

> …unless it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court and is abusing his or her right under article 67 of the Statute.[109]

Only when it is 'absolutely clear' that no interpreter is needed, may the right be waived. The wording in the Rome Statute therefore grants express language rights to an accused which are based on the accused's understanding and competency of a language, rather than on

[105] *Prosecutor v. Katanga* No. 01/04-01/07(OA3), Judgment on Appeal of Katanga against the Decision of Pre Trial Chamber 1 entitled 'Decision on the Defence Request Concerning Languages', 27 May 2008 at para 3.
[106] *ibid* at para 43.
[107] *ibid* at para 44.
[108] *ibid* at para 49.
[109] *ibid* at para 61.

whether or not they have some of the language or the perception from the court of what their competency ought to be.

The ICC is subject to particular scrutiny. It is common that actors and defendants question the legitimacy of international criminal tribunals.[110] And so it is unsurprising that particular effort was made at the foundation of the ICC to ensure fairness. It also shows an understanding of the needs of accused persons and marginalised people who engage with the ICC. It demonstrates a dedication to including these needs in the formation of the institution, law and policy, to ensure equitable and beneficial outcomes as a guarantee. It also shows that marginalised people are valued and empowered to participate on an equal level – irrespective of their language. This shows that both substantive access and symbolic access are at the core of the ICC and its development and that where there is substantive and symbolic access provisions look very different.

8.6 Conclusion

Substantive access measures are lacking from both the ECHR and the ICCPR. It does not seem that minoritised people were included in the creation of either document, given the almost complete lack of reference to minorities. Even in the Article 27 itself, it was created with exclusion in mind. There are limited instances of a finding of a violation of Article 27, although this is not necessarily an indictment on the views of the HRC, but possibly an indication of the procedure of hearing complaints. Where France's law interprets minority protection as counter to equality, it is still noteworthy that the majority of complaints under Article 27 have come from France. Further research would be needed to explore this issue, and its relevance to access to justice for minoritised people. A lack of substantive access can be seen across an array of human rights documents from 1990 onwards, where there is division between traditional and non-traditional minorities, where the latter are unworthy of protection.

A lack of substantive access for minority language users in the ECtHR and the HRC is particularly evident when compared to the ICC, as discussed. The ICC was built on a foundation of substantive access in terms of multilingualism, inspired by the substantive access provided in earlier international criminal tribunals. This substantive access shown in

[110] Niang, 'Africa and the Legitimacy of the ICC in Question' 2017 Vol 17 International Criminal Law Review 615.

previous international criminal tribunals created an environment where RML-users were valued and empowered to fully participate in the process, therefore ensuring symbolic access. There is an understanding of the needs of RML-users in the ICC that is noticeably absent from the ECtHR and the HRC. There is an understanding of the risks posed by a lack of an interpreter, and of a poor interpreter, and so these risks have been mitigated by the Statute of Rome and the ICC itself from the outset. Therefore, equitable and beneficial outcomes are safeguarded for users of all languages at the ICC, not only those who satisfy certain criteria.

What can be seen in this chapter, and particularly from the perception of minorities during the post-World War II creation of human rights law, is a lack of symbolic access. This discourse of distrust as described above by Alcock shows how minorities were viewed as problematic outsiders to be managed and controlled, rather than as valued and empowered citizens. This discourse, I argue, could never have fostered the inclusivity necessary to facilitate substantive access. Substantive access requires an openness from policy and lawmakers to hear and include marginalised people. Such openness cannot be truly achieved where marginalised people lack symbolic access, whereby they are unempowered and unvalued members of society. In order for their concerns to be heard and for their representatives to be involved in the decision making, symbolic access is necessary.

The research presented thus far stops short of exploring the lived experiences of RML-users. In the following part of this thesis, I present the collected and analysed data on Irish-speakers and Deaf people. In doing so, I attempt to fill the gap in knowledge between the theoretical understanding of literature on identity and human rights law as discussed in Part I and here in Part II with the lived experiences of RML-users as they navigate the right to a fair trial, the CJS and access to justice.

Part III: Findings

Chapter 9 – Methodology

9.1 Introduction

In this chapter I outline the methodology used for this research. First I provide a breakdown of hermeneutic phenomenology, the overarching methodology used for this research, and discuss how it informed and structured the data collection and analysis. Following this, I provide a discussion on the specific methods used to conduct the research; namely semi-structure interviews, feminist methods, and open questioning, and explain how these methods are underpinned in the methodology.

Twenty-three people were interviewed. I explain the process of recruiting these participants, the justification for selecting the specific categories of participants, and the ethical considerations given to the interview process. I analysed the data myself, using the principles of hermeneutic phenomenology and I will discuss this process herein. Finally, I discuss the benefits of the methodology and methods used, and also the limitations to this work, and what I would have changed, if given the opportunity.

9.2 Methodology

As addressed in Chapter 1, I aimed to explore three research questions:

1. How do RML-users experience the right to a fair trial when using their language?
2. How do RML-users experience the criminal justice system (CJS) when using their language?
3. How do RML-users experience access to justice?

These research questions pointed towards an interest in the lived experiences of RML-users under the right to a fair trial and access to justice. I sought a methodology which would reflect that focus on the lived experiences of RML-users.

In devising that methodology, I took methodology classes at DCU,[1] began communicating ideas with my supervisors, and started researching the groups I intended to study. In

[1] Research Design LG600 (2016), Qualitative Methods LG603 (2017), Quantitative Methods LG602 (2017). I also took two training classes provided by QDATRAINING Ltd through DCU on learning to use the qualitative data analysis software NVivo, as will be addressed in greater detail below.

particular, my engagement with Deaf Studies was eye-opening in respect of the dominance of research conducted by hearing people without input from Deaf people.[2] I was conscious that I wanted to engage in research that would centre the experiences of the people who I had collected data from. Additionally, I was aware of the biases and preconceived ideas that I would bring to the project, as a member of the Irish-speaking community. In consultation with my supervisors I decided that hermeneutic phenomenology would best fit the parameters of my intended research, as it encourages participant-centred research where the researcher's lived experiences are embraced as an important aspect of the methodology. I now outline what such an approach involves, and address some primary concerns of mine; those of the insider/outside status and bias.

9.2.1 Hermeneutic Phenomenology

Hermeneutic phenomenology is a methodology developed by Martin Heidegger.[3] It revolves around the idea that consciousness cannot be separated from the world, and that our world views are formulated by our lived experiences.[4] Hermeneutic phenomenology is described by Dibley et al as being:

> …concerned with the life world or human experience as it is lived. The focus is toward illuminating details and seemingly trivial aspects within experience that may be taken for granted in our lives, with a goal of creating meaning and achieving a sense of understanding…[5]

Miles et al explain that:

> Heidegger's hermeneutic phenomenological thinking is based on the concept of being-in-the-world, which includes humans relating to and within the whole context of their world, within the milieu of relationships, rituals, symbols and languages that constitute their shared meanings. He expresses how 'Dasein' or 'there-being' exists and how humans come to know their world through experiences in relation with other entities, things or humans in the world.[6]

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[2] Ladd, *Understanding Deaf Culture: In Search of Deafhood*, (Clevedon: Multilingual Matters, 2003) at 82.
[3] Heidegger, Macquarrie and Robinson, *Being and Time* (Harper Perennial/Modern Thought 2008).
[4] Laverty 'Hermeneutic Phenomenology and Phenomenology: A Comparison of Historical and Methodological Considerations' 2003 Vol 2(3) International Journal of Qualitative Methods 20 at 24.
[5] *ibid.*
[6] Miles et al, 'Hermeneutic Phenomenology: A Methodology of Choice for Midwives: Hermeneutic Phenomenology Methodology' (2013) 19 International Journal of Nursing Practice 409 at 410.

As humans, we relate our understandings of phenomena through our own world views, based on our own life experiences. This concept of 'Dasein' is our being in the world, and the lens through which researchers using hermeneutic phenomenology view the phenomena being researched.[7]

Heidegger's philosophy was built on a foundation of phenomenology,[8] as developed by Husserl.[9] There is an important distinction between phenomenology and hermeneutic phenomenology. Phenomenology advises that the researcher separate themselves or 'bracket' themselves and their biases from the research, so that they do not affect the objectivity of the research.[10] Heidegger believed that it was not possible for humans to separate themselves from their realities in this way.[11] As humans:

> …we have a pre-understanding of our social situation and cannot separate ourselves from that world. Neither do we ask participants in our research to divorce themselves from their realities and everyday experiences.[12]

There is an inherent subjectivity in the process.[13] The subjectivity which the researcher brings to a project is considered an asset, and "can bring huge benefits [to the research] in terms of the ability to uncover meaning".[14] Instead of attempting to isolate these experiences of the researcher, hermeneutic phenomenology embraces them, acknowledging that the understanding of text is unique to them and their life experience. To relate this back to my research questions, hermeneutic phenomenology is apt for this research, as it is concerned with lived experiences, and making sense of those lived experiences.

Using hermeneutic phenomenology would allow for the recognition of my own experiences as an Irish-speaker to inform the research into the lived experiences of other RML-users. Of particular interest is the insider/outsider dynamic which is a feature of hermeneutic phenomenology.

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[7] Dibley et al, *Doing Hermeneutic Phenomenology Research: A Practical Guide* (1st ed, SAGE Publications 2020) at 17.
[8] *supra* note 6 at 409.
[9] *supra* note 7 at 95.
[10] *supra* note 4 at 23.
[11] *supra* note 7 at 17.
[12] *ibid* at 28.
[13] *ibid* at 17.
[14] *ibid* at 73.

9.2.2 Insider/Outsider Dynamic

It follows then that hermeneutic phenomenology considers the researcher's relationship to the phenomenon being studied. Dibley et al explain the concepts of insider vs outsider as such:

> Insider research indicates your 'skin in the game', whilst, in outsider research, potential participants are not informed if you have any relationship with the topic at hand, or there is no relationship[15]

An insider therefore has a relationship to the phenomenon being studied, whereas the outsider has no prior relationship. Davis explains the insider vs outsider dichotomy similarly, where she says that an insider is:

> …a researcher who has a personal and historical connection to the population or phenomenon being studied. My definition of *outsider* in the research context is a researcher who does not have a personal connection to the population or phenomenon being studied.[16]

The 'skin in the game' which I have, or the connection to the phenomenon is that I am an Irish-speaker and a member of the Irish-speaking community. With the Deaf community, I was mostly unknown to members, without a personal connection to the culture and community and, thus, I am an outsider. Through this work, I have made efforts to engage with the Deaf community and have taken ISL classes.[17] However, I had no relationship to the community prior to this research, and am still an outsider. I am what Davis describes as both an insider and an outsider in the context of the current work.[18] I have personal and longstanding connections to the Irish-speaking community, and am an insider. But for the Deaf community, I am an outsider in that I am not Deaf and have not come from a Deaf background.

An insider to a community may find it easier to gain access and build a rapport with members of the community being studied.[19] While there is a legitimate concern that being an insider

[15] *ibid* at 73.
[16] Davis, *Contesting Intersex: The Dubious Diagnosis* (New York University Press 2015) at 15
[17] Weekly QQI level 3 (beginners) ISL classes at the Irish Deaf Society from January-June 2018
[18] *supra* note 16 at 15.
[19] *supra* note 7 at 74.

can affect the researcher's objectivity,[20] as discussed above, this is not necessarily a drawback for hermeneutic phenomenology, where "subjectivity is the point".[21]

It was important to examine and recognise bias that come with both an insider and an outsider perspective for the research. In engaging with a wide scope of literature around identity, policing, law and both the Irish-speaking and the Deaf community, I was able to recognise and examine the biases that I held and develop my pre-existing understandings, which I now discuss.

9.2.3 Bias

Hermeneutic phenomenology does not require the researcher to set aside their biases, encouraging, instead, that we engage with and recognise them. Dibley et al describe this process:

> Instead of 'bracketing out' our pre-existing knowledge gleaned from experience and literature, hermeneutic phenomenologists recognise and call forth the assumptions and pre-understandings they bring to the work, continually checking their interpretations against the text and among the team. By engaging with the literature in an open, reflexive manner, we bring to the fore our own suppositions, opinions and biases, and adopt an open, accepting attitude toward the possibilities of experience which we seek to explore. This engagement is in itself hermeneutic, as we move back and forth between our existing understanding and the newly identified literature which then informs our approach to and understanding of our topic of interest.[22]

The research therefore can benefit from engagement with and acknowledgement of biases, making for more informed, robust work. As such, it was important to interrogate and understand where I had biases, so that I could account for them in the research.

As an insider to the Irish-speaking community,[23] I had several biases going into this work about the community, the people to be interviewed, my place in the community, and about the way the outside world perceives the community. Confronting these biases was a difficult process, which involved near-constant reflection, soul searching, and difficult conversations with my

[20] *supra* note 7 at 73.
[21] *ibid.*
[22] *ibid* at 42.
[23] *supra* note 16 at 15.

supervisors. It was often tough to acknowledge my biases and know when they were clouding my judgment.

I had a bias in that I was very defensive about Irish and Irish-speakers, and the discussion of Irish language rights. It was affecting how I conducted analysis in that I was in some instances centring myself and my own realities in the testimony of Gael participants, as opposed to pursuing the research questions and centring the experiences of the participants. This bias would often arise in discussion with my supervisors about the research, and about what I anticipated would be my eventual findings. My supervisors were always quick to alert me to these instances when they arose in discussion and in writing, which helped me to confront the bias, and account for it in my work. In terms of the bias I experienced in analysing the data, my supervisors encouraged me to return to the data numerous times in order to look again and ensure that I was not allowing unconscious bias to overpower the work.

Oftentimes when discussing the type of people who would be interviewed, I showed a bias, particularly in respect of Irish-speakers. I had often a biased perception that people would choose to use Irish in order to be malicious and devious. I expected these people to be tedious to interview and that their behaviours were detrimental to the external identity of Irish-speakers, therefore undermining genuine instances of injustice. Again, my supervisors were quick to identify this bias and not allow it to cloud my judgment of people.

I also had internal biases about my role in the community, since I am not a native speaker. I was conscious that I would be perceived by native-speaking participants or those with 'better Irish' than me as a fraud, or as an outsider to the community. In addressing this bias, it was helpful that my supervisor Dr Ní Mhuirthile is a native Irish-speaker. We had many discussions about our respective biases, and Dr Ní Mhuirthile shared that she also felt similarly, worried that she would be seen as a fraud compared to my 'university' Irish.[24] This helped me to realise the imposter syndrome I was experiencing when it came to my position in the community and my abilities as an Irish-speaker.[25]

I also had to interrogate the unconscious biases I had around Deaf people and disability. Initially, I was hesitant to engage in research around disability, because I felt that there was

[24] I have an undergraduate degree in Law and Irish.

[25] Lanford and Clance, 'The Imposter Phenomenon: Recent Research Findings Regarding Dynamics, Personality and Family Patters and Their Implications for Treatment' Vol 30 Psychotherapy: Theory, Research, Practice, Training 495.

an overemphasis in mainstream society on Deaf people as being disabled,[26] when I wished to view being Deaf from a cultural and linguistic perspective.[27] I felt that engaging with disability literature might be disrespectful to the Deaf community, who, from what I could tell, largely seemed to reject the disability label.[28] In fact, it became evident that ignoring discourse on disability would actually limit my understanding of Deaf identity, particularly as it related to the external identity of Deaf people,[29] which is often situated in disability discourse.

I held a particular bias around what I anticipated from interviews with Gardaí. I was initially hesitant to conduct such interviews, as I felt that I would be stonewalled or that members of An Garda Síochána would be reluctant to be open during an interview.[30] Again, it was evident that I was prejudging the interviews and the interviewees' experiences before having ever spoken to them. On realising this after consultation with my supervisors, I changed my mindset and approached the interviews in an open way, knowing that I could not anticipate what would be said (as had been the case with all of the interviews prior to these two).

Recognising my unconscious bias was a difficult and often painful process. It continued throughout the research. My supervisors regularly pointed out my biases and encouraged me to investigate whether I was making statements based on biases alone, rather than on the research before me. I am confident that in recognising and interrogating my biases, I have been able to account for those biases in the work rather than bracketing them off and that they have not unfairly impacted my finding. Rather they have been worked into the project in terms of hermeneutic phenomenology.

9.3 Methods

Having engaged with the methodology and engaging with my status as an insider/outsider and engaging with bias, it was important to investigate which methods would suit the

[26] *supra* note 2 at 15.
[27] Skelton and Valentine, '"It feels like being Deaf is normal": an exploration into the complexities of defining D/deafness and young D/deaf people's identities' 2003 Vol 47(4) Canadian Geographer 451 at 453.
[28] *supra* note 2 at 15. See also Darach Ó Seaghdha, 'Motherfoclóir ISL Episode' (05 May 2021), available at https://www.youtube.com/watch?app=desktop&v=jsORJSesv48&feature=youtu.be [date accessed: 05 May 2021].
[29] Goffman, *The Presentation of Self in Everyday Life,* (London: Penguin Books, 1969) at 14.
[30] Being aware of the concept of a 'blue wall of silence' which is an informal but prevalent code of silence among police. See Kleinig and Philosophy Documentation Center, 'The Blue Wall of Silence: An Ethical Analysis' 2001 Vol 15(1) International Journal of Applied Philosophy 1.

research best. I decided that interviews with a selection of participants would be the best way to engage with my research questions. Interviewing people about their lived experiences would give the best an understanding of how RML-users actually experience the right to a fair trial and access justice.[31] Having completed the relevant courses, I decided that to best address my research questions and the methodology I would conduct semi-structured interviews, making use of open questions while using feminist interview methods.

9.3.1 Semi-structured Interviews

In combining lived experience research with hermeneutic phenomenology,[32] semi-structured interviews were chosen for this research. By contrast, other methods such as standardised interviews,[33] surveys,[34] etc., would likely have been too limited to investigate the real lived experiences and could have limited my findings.[35] In addition, being aware of my biases, I was concerned that structuring interview or creating surveys would allow me to pre-emptively influence what participants would discuss and limit their ability to provide more in-depth discussions about their experiences.[36]

Semi-structured interviews were chosen because they represent a compromise between interviewer led and interviewee led communication and allow for a more conversation-type interview than structured interviews.[37] This would allow me to direct the conversation through open-ended questions, but ensure the interviewee could have the freedom to present their own narrative on their lived experiences.[38] To access lived experiences, it was necessary to allow participants the space to control what they wanted to discuss and focus on the issues that were most important to them.[39] This method would put the interviewee at

[31] See Ellis and Flaherty (eds), *Investigating Subjectivity: Research on Lived Experience* (Sage Publications 1992).
[32] *supra* note 4 at 24.
[33] Marshall and Rossman, *Designing Qualitative Research,* 6th ed (SAGE 2016) at 288.
[34] Newcomer and Triplett 'Using Surveys' in in Newcomer, Hatry and Wholey (eds), *Handbook of Practical Program Evaluation* 4th ed., (Jossey-Bass & Pfeiffer Imprints, Wiley 2015) at 344.
[35] *supra* note 33.
[36] *ibid* at 288.
[37] See King and Wincup 'The Process of Criminological Research' in King and Wincup (eds) *Doing Research on Crime and Justice* 2nd ed., (Oxford University Press, 2008) at 32.
[38] *supra* note 7 at 97.
[39] *ibid.*

ease,[40] particularly when discussing potentially traumatic experiences, aiding in rapport building and ultimately allowing for lived experience research to take place.[41]

Additionally, semi-structured interviews were chosen as they allow for the interviewee's comments and responses to lead the flow of the interview.[42] As noted above, I was conscious of centring the participants as much as possible in this work,[43] because of the interest in their own lived experiences. This approach gives scope to explore *how* RML-users experienced the right to a fair trial, access to justice and the CJS. Semi-structured interviews give the appropriate latitude to interviewees to share their "independent thoughts"[44] and their own experiences.

Semi-structured interviews utilised open questioning (as opposed to closed questions which prompt monosyllabic answers) which Laverty describes as:

> Participants are generally asked to describe in detail their experience of the topic being investigated. The specific question asked is generally very open in nature, with follow up discussion being led not so much by the researcher, but by the participant.[45]

This tool of interviewing is therefore appropriate for the work. Dibley et al also explain that open-ended questions facilitate hermeneutic phenomenology:

> Open-ended questions and possible interrogatives, rather than concrete questions, provide the general direction the hermeneutic conversation will take, but the participant often leads in the telling of the experience in question…The interview schedule provides a set of guiding questions to facilitate the interaction in a loose agenda. This may, and in many cases does, change once the interview is under way. In a thoughtful interview, the researcher must remain an active listener to allow for deep engagement in the concerns of the participant. At times, this may lead to unexpected turns that provide valuable learning. [46]

There are a number of points here. Firstly, this method allows for the interviewee to have some control over the direction of the interview. Again, this makes use of the non-

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[40] *supra* note 33 at 245. See also *supra* note 37 at 32.
[41] *ibid.*
[42] Adams 'Conducting Sem-structured Interviews' in *supra* note 34 at 493, 494.
[43] *supra* note 2 at 82.
[44] *supra* note 42 at 494.
[45] *supra* note 4 at 29. Citing Koch 'Implementation of a hermeneutic inquiry in nursing: Philosophy, rigor and representation' (1996) Vol 24 Journal of Advanced Nursing 174 and Geertz, *The interpretation of cultures* (New York: Basic Books, 1973).
[46] *supra* note 7 at 97.

hierarchical, feminist method as described below. Secondly the 'loose agenda' would also aid in the pursuit of an informal, non-hierarchical environment for the interview. Third, this method also allows for deviation 'once the interview is under way'. More direct, closed questioning could then be resorted to for clarification, some follow up questioning, or in circumstances where the participant was particularly unresponsive to open questioning (as will be discussed below). I now discuss how and why I underpinned this with a feminist approach.

9.3.2 Feminist Interviews

A feminist method would complement the aims of semi-structured interviews through open questioning, as described by Laverty above.[47] Feminist interviewing methods allow for the participant's experiences to be the central focus, where the researcher is restrained and listens to the participant.[48] This would work toward the central concern of lived experiences, as outlined in the research questions.

In addition, if I expected participants to reveal personal details and share lived experiences with me, then it would be necessary for them to feel that they could trust me.[49] Oakley describes feminist interview methods as one where the relationship between "the interviewer and interviewee is non-hierarchical and [where] the interviewer is prepared to invest his or her own personal identity in the relationship",[50] which aids in establishing trust and rapport with the interviewee. Dibley et al state that interviews using hermeneutic phenomenology should resemble a "conversation in which the interviewer's emphasis is deep listening and openness, allowing the participant to recount their life experiences."[51] I believed that a feminist method would facilitate this aim and encourage rapport.

For the most part these methods worked to pursue my aims of investigating the lived experiences of RML-users and engaging with the research questions. Below, I discuss the specifics of the interviews and some of the drawbacks from the methods used.

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[47] *supra* note 4.
[48] Reinharz *Feminist Methodologies in Social Research,* (Oxford University Press, 1992) at 21.
[49] *supra* note 33 at 245.
[50] Oakley, 'Interviewing women: a contradiction in terms' in Roberts (ed), *Doing Feminist Research* (Routledge 1988) at 41.
[51] *supra* note 7 at 96.

9.4 Breakdown of Participants

I interviewed three categories of participants. They were as follows:

9.4.1 Criminal Justice Subjects

This was a category of persons who used either Irish or ISL and had interactions with the criminal justice system. Their lived experiences would be crucial to answering the research questions. They were the RML-users who had experienced the CJS first hand. Largely these people had interactions with An Garda Síochána, but some experienced the court system. For the most part, participants were suspected of a crime. In one instance a participant was a victim of a crime. They were interviewed about their identities, their experiences as an RML-user and about their interactions with the CJS.

These participants were considered vulnerable, as they were sharing information of a private and sensitive nature, possibly related to criminal behaviour.[52] It was also possible that interviewees would recount traumatic experiences or disclose information which would be beyond the limits of confidentiality.[53] Despite their vulnerabilities, it would not have been possible to access the first-hand, lived experiences of RML-users who interacted with the CJS without speaking to these people. The academic field is lacking a concrete assessment of the lived experiences of such people and these accounts were necessary to inform the effectiveness or ineffectiveness of the current interpretation of international human rights law norms. These accounts helped to create a better understanding of how RML-users can and do experience the CJS.

9.4.2 Lawyers

These participants were solicitors and barristers who have worked or specialise in working with either the Irish-speaking community or the Deaf community. While they were not the subject of the CJS in that they were not being interviewed about being suspects of crime, they nevertheless had valuable lived-experiences of the CJS for RML-users. These participants

[52] This would constitute 'vulnerability' in terms of the Research Ethics Committee at DCU, as described below. See also *supra* note 33 at 241.

[53] The ethical considerations of these issues are discussed below.

provided insight into the legal and professional difficulties that arise when a client seeks to use their RML.

For lawyers, I did not anticipate any vulnerabilities. These participants were not speaking about personal experiences. They were not asked about their professional interactions with the CJS and RML-users.

9.4.3 Experts

Experts consisted of academics and employees of An Garda Síochána. These participants were interviewed to add context to the lived experiences garnered from the interviews with the above two groups.

These interviewees constituted 'elites' as described by Marshall and Rossman:

> …considered to be influential, prominent, and/or well informed in an organization or community; they are selected for interviews on the basis of their expertise in areas relevant to the research and for their perspectives on, for example, an organization, a community, or specialized fields.[54]

They provided expert insight on the identity of Deaf people and Irish-speakers, and discuss their own expert evidence on how RML-users can experiences the CJS. As Marshall and Rossman go on to note:

> Elites often respond well to inquiries about broad areas of content and to open-ended questions that allow them the freedom to use their knowledge and imagination.[55]

As such, I did not think it necessary to alter my interview methods as it functioned well with these participants.

I did not perceive any vulnerabilities among expert participants, as they were interviewed in their professional capacities about their expertise in how RML-users interacted with the CJS.

9.4.4 Participant numbers

I conducted 23 interviews: thirteen within the Irish-speaking "group" and ten within the Deaf "group". A group refers to people who are in some way connected to either linguistic community, either as a member of that community or as an expert or both.

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[54] *supra* note 33 at 304.
[55] *ibid* at 305.

The table below (*Fig. 9.1*) shows the participants to the research under their respective groupings:

Fig. 9.1 Breakdown of Participants Table

	Irish Group	ISL/Deaf Group
Criminal Justice Subjects	Gael1	Deaf1
	Gael2	Deaf2
	Gael3	Deaf3
	Gael4	Deaf4
	Gael5	Deaf5
	Gael6	
	Gael7	
	Gael8	
Lawyers	Dlíodóir1	Lawyer1
	Dlíodóir2	Lawyer2
Experts	Dr Seán Ó Conaill (SÓC)	Prof. Lorraine Leeson (LL)
	Dr Mary Phelan (MP)	Dr John-Bosco Conama (JBC)
	AGS1	AGS2

Initially I had intended to conduct interviews with 16 Criminal Justice Subjects (eight from each group), four lawyers (two from each group) and four experts (two from each group). As this research was not attempting to present representative data,[56] it was neither necessary nor feasible to conduct a large number of in-depth interviews with participants,[57] following the research methods chosen. In discussion with my supervisors, it was decided that these numbers would be achievable and provide rich data.

Possibly because of my insider status, I was able to secure interviews with Irish-speaking Criminal Justice Subjects with relative ease. As an outsider to the Deaf community, it was more difficult (as will be discussed below). After several months of attempting to secure

[56] *supra* note 42 at 493.

[57] The communities are small, and I lacked the resources to carry out a multitude of interviews.

interviews, conscious of the need to move forward with the project and in consultation with my supervisors, I was satisfied with interviewing five Deaf Criminal Justice Subjects.

I had not intended to interview anyone from An Garda Síochána initially. After the interviews began, it became clear that most participants experienced interactions with Gardaí. After consultation with my supervisors, I decided to investigate the possibility of expanding my research to include Gardaí.

Initially, I had also intended to conduct research among two groups in Finland; Swedish-speaking Finns and Sámi people. When I began interviews, it soon became evident that it was not possible to obtain the necessary access into both communities. In particular, it was not possible to obtain access to the Criminal Justice Subject category. I could locate only one person willing to be interviewed in this category in the Swedish-speaking Finn group and I could not find anyone from the Sámi group. As such, this line of research was abandoned after consultation with my supervisors.

9.5 Ethical Considerations

For this project, ethical approval was sought and acquired (see Appendix K) through DCU's Research Ethics Committee (REC).[58] A full committee review was required, because of the vulnerable nature of the interview participants and the topics to be discussed. According to the REC:

> Full committee review is intended for research that involves risks to participants which are greater than those found in everyday life. These may be of a physiological, psychological or social nature. Most projects involving vulnerable groups of participants will be included here[59]

In applying for ethical approval, there were a number of risks to consider, which I now consider along with the risk mitigation efforts.

[58] See https://www.dcu.ie/researchsupport/research-ethics [date accessed: 03 May 2021].
[59] See https://www.dcu.ie/researchsupport/research-ethics [date accessed: 03 May 2021].

9.5.1 Participant Risks and Mitigation:

CONFIDENTIALITY:

Maintaining confidentiality was a concern. I decided that participants' identities would be protected (except for academic experts who consented to being named) as far as practicable, but it was not possible to guarantee in all circumstances that they would remain completely anonymous.[60] As Saunders et al explain:

> Concealing identities can sometimes be virtually impossible. Anyone closely tied to a particular research setting will likely be able to recognise participants and places…[61]

Therefore, a person reading this work who was familiar with the details of a participant's experiences might find that they know who the participant is, in spite of the attempts to anonymise their information. I was conscious that a breach in confidentiality could be detrimental to participants. Where participants had been tried for a crime of sexual assault or a crime involving children, their experiences would not usually widely known in the communities in which they live.[62] It was also possible that I would interview participants who never made it to trial, who were merely investigated or whose charges were dropped etc. In such cases, participants would be extremely vulnerable in respect of confidentiality, as a breach had the potential to irrevocably damage their reputation within their community. It must also be noted that the Irish-speaking and Deaf communities are quite small, and therefore it may be easy to connect the objective findings of an interview with the subject even without stating their details.[63] Additionally, there were stated limits to confidentiality. Criminality as such a limit is discussed below, but there was also a concern that it would be necessary to limit confidentiality in respect of a suspicious interpretation, where an interpreter was used in the interview. A 'suspicious' interpretation would consist of an instance where there appeared to be strange or inconsistent interpretations given, or where there was some reason to suspect that a misinterpretation had occurred. I would have needed

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[60] Saunders, Kitzinger and Kitzinger, 'Anonymising Interview Data: Challenges and Compromise in Practice' 2015 Vol 15 Qualitative Research 616.
[61] *ibid.*
[62] In such crimes in Ireland, only when the victim(s) have given permission for their identity to be revealed can the identity of the accused also be revealed.
[63] *supra* note 60 at 617.

to check any suspect interpretations with another interpreter, who may have been able to identify the individual.

In mitigating these concerns, I anonymised the data as much as possible for inclusion in this work, by applying a generic pseudonym to all anonymous participants (*Fig. 8.*1) and excluding identifying details such as addresses, detailed employment information, family structures, etc. [64] It has not been possible to exclude the details of the cases for which they were involved in the CJS as the nature of the offence was often central to their experience. While this is not foolproof, and it is possible that individuals with knowledge of specific facts might be able to identify participants, this risk was made known to participants in the consent forms and plain language statements (see Appendices A-J) and reiterated them before beginning each interview. I decided that if a suspect interpretation needed to be checked, I would use a trained, professional interpreter and ensure they sign a confidentiality agreement. Ultimately, all interpreters used were trained and professional, and no suspicious interpretations arose.

INFORMED CONSENT:

I was concerned that participants might misunderstand the purpose of partaking in this study. They could have been of the assumption that my research on the right to a fair trial, was aimed at somehow overturning their convictions or clearing their names,[65] which would have impacted on how free and informed their consent was. In mitigating this risk, the consent form and plain language statement clarified that this research would not be for the purposes of overturning convictions (Appendices A-J). In addition, I only interviewed participants whose interactions with the CJS had concluded, so as not to interfere with any ongoing investigations.

Secondly, I was aware of the impact that language deprivation can have on the cognitive development of people,[66] and the prevalence of language deprivation in parts of the Irish Deaf community.[67] I was aware of a number of Deaf people who had had experiences with the CJS, but who possibly lacked capacity to provide informed consent because of their

[64] *ibid* at 617.

[65] Given that my research is on the right to a fair trial, there could have been an assumption that they had been unfairly treated and that my work was intended to exonerate them.

[66] See Glickman and Hall (eds), *Language Deprivation and Deaf Mental Health* (Routledge 2018).

[67] Rose and Conama 'Linguistic imperialism: still a valid construct in relation to language policy for Irish Sign Language' 2018 Vol 17(3) Language Policy 385.

language deprivation. After consultation with Dr Elizabeth Matthews of in the School of Inclusive and Special Education at DCU in respect of my concerns about consent,[68] I decided not to pursue interviews with persons where there was any doubt about their ability to safely provide informed consent.

CRIMINAL ACTIVITY AND CONFIDENTIALITY:

There was a risk that participants may disclose crimes to me which would warrant a disclosure to authorities. This would be where a participant admits to a crime involving children which was ongoing, or which they intend to commit/have committed or where they admit to intending to harm another person.[69] It would also have been necessary to breach confidentiality where participants admitted to intending to harm themselves, to ensure their safety.[70]

These circumstances requiring disclosure to authorities were communicated to participants in advance. They were informed of the limits to confidentiality in the consent forms, the plain language forms (see Appendices A-J) and I reiterated these limits before each interview. No such disclosures occurred in the interviews.

LANGUAGE:

Language use could also pose a risk to participants and raise ethical concerns. I conducted interviews with most Irish language users in Irish. Four interviewees used ISL for their interviews and so an interpreter was used to facilitate, as my command of ISL is limited to basic conversation. I was also concerned that there may be certain vulnerabilities associated with participants' language, such as language deprivation described above.[71]

In mitigating these concerns, trained, professional interpreters were used where participants conducted their interview in ISL, thus minimizing the risk of misunderstanding. Interviewees were asked of their preference for interpreter, and where they had a preference, that request

[68] https://www.dcu.ie/researchsupport/research-profile?PERSON_ID=1888095 [date accessed: 21 April 2021]
[69] It was agreed in consultation with my supervisors that it would be unethical to maintain confidentiality in such cases.
[70] Gibson et al, 'Talking about Suicide: Confidentiality and Anonymity in Qualitative Research' (2013) 20 Nursing Ethics 18.
[71] *supra* note 66.

was honoured. Where they did not have a preference, they were told who the interpreter would be ahead of time and they were asked if they were satisfied with the choice.

INTERPRETERS:

I was concerned that having an interpreter in the room could pose a risk to the quality of the research.[72] I was concerned that their presence would impact my potential to build rapport with the participants.[73] I also worried about interpreters' potential to affect how freely participants recounted their experiences, particularly if they were concerned about the possibility of a breach of confidentiality that the interpreters posed.

In mitigating these concerns, I honoured interpreter preference and all interpreters were trained.[74] I had no concerns about their professionalism and their presence did not seem to impact my ability to build rapport. I also made use of my own ISL to show to participants that I was Deaf aware.[75] I chatted with participants at the start, engaging in small talk about the weather or about the traffic or journey to get to the location using ISL and asked participants had they any questions about the research in ISL myself.

9.5.2 Interviewer Risks and Mitigation

I considered a number of potential risks to my own safety while conducting this research. I have listed them below:

RESEARCHER SAFETY:

Whilst there were no particular concerns about any participants, the fact that I was interviewing Criminal Justice Suspects – a young woman interviewing mostly men – inherently demanded attention to safety.[76] It was possible that some interviews would take place in

[72] Kosny et al, 'Another Person in the Room: Using Interpreters During Interviews With Immigrant Workers' (2014) 24 Qualitative Health Research 837.
[73] *ibid.*
[74] With professional degrees through the Centre for Deaf Studies at Trinity College Dublin, registered with the Sign Language Interpreting Service.
[75] Being Deaf aware includes being aware of the realities of Deaf people, and showing an openness to Deaf culture, such as waving to attract attention (rather than using one's voice), ensuring the Deaf person's line of vision is not obstructed, eye contact, etc. See https://www.ai-media.tv/tips-for-being-deaf-aware-part-1/ [date accessed: 09 May 2021].
[76] See Pashea and Kochel, 'Face-to-Face Surveys in High Crime Areas: Balancing Respondent Cooperation and Interviewer Safety' (2016) 27 Journal of Criminal Justice Education 95. See also Lee, 'Interviewing Men: Vulnerabilities and Dilemmas' (1997) 20 Women's Studies International Forum 553.

isolated areas, possibly with poor mobile phone service. This could have been be a risk as I would be far away from support if a problem had arisen. Additionally, I conducted two interviews in participants' own homes.[77] There was a concern that I would be vulnerable in such a location, as I would not have the same control over my surroundings in such a location that I would have in a neutral environment.

In minimising the risk to my safety, I started a group WhatsApp chat with my supervisors. I informed my supervisors prior to an interview taking place, of the time and location. There is a 'delete message for all' function on WhatsApp, so when interviews took place in participant's homes, I would send the address and then delete the message once the interview was over. I messaged the group chat once the interview was over to inform my supervisors that I was safe and briefly how the interview had gone. In fact there were no incidents where I feared for my safety or felt unsafe or uneasy in interviews. None of the interviews took place in isolated areas and I had adequate phone service at all times.

VICARIOUS TRAUMA:

There was risk to my own mental health if the accounts that were relayed to me in interviews were harrowing or traumatic, possibly causing me to experience vicarious trauma.[78]

Managing stress throughout my research, inclusive of these interviews was important. I have maintained a good working relationship with my supervisors throughout the process. They would have been my port of call if I was feeling overwhelmed by the content of the interviews. Thankfully this did not occur.

Having considered the ethical risks and arrange appropriate mitigation for those risks, I was able to begin the process of participant recruitment, which I discuss below.

9.6 Participant Recruitment

Participant recruitment occurred in a number of different ways, and varied by the type of participant and the language group. I now discuss how I utilised social media, pre-existing contacts and snowballing to recruit participants.

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[77] Lee, *ibid.*

[78] Eriksen, 'Research Ethics, Trauma and Self-Care: Reflections on Disaster Geographies' (2017) 48 Australian Geographer 273.

9.6.1 Media and Social Media

Media and social media were the main way I recruited participants to my research. With the Irish-speaking community, I already had access as an insider in the community. Additionally, I have somewhat of a platform within the community as co-host of the podcast Motherfoclóir, which discusses Irish language issues. I made a call for participants to my research via a podcast episode.[79] After this call, a feature was published in Nós,[80] an online Irish language publication, calling for participants. I was then invited on Raidió na Gaeltachta (Irish language national radio) to speak about my research and call for Irish-speaking participants.[81] I also posted a call for participants to my Twitter account using the graphic as depicted in *Fig 9.2.* Irish-speaking Criminal Justice Subjects contacted me predominantly through email but also via direct messaging on Twitter. In one instance, a participant was accessed because a family member saw my tweets and put them in contact with me, knowing that they had experiences which would be relevant to the research.

For the Deaf community, I initially posted a notice on Twitter seeking participants using the graphic featured in *Fig. 9.3*. I also reached out to potential participants via direct messaging on social media after seeing a post alluding to interactions with the CJS. Largely the posts on Twitter were not successful in accessing Criminal Justice Subjects from the Deaf community. With help from Dr Elizabeth Mathews and Valerie Mahon in the School of Inclusive and Special Education, DCU, I made a video in ISL calling for participants. I was part of a large, private Facebook group for communication in ISL.[82] Being a member of this group gave me access to a predominantly Irish Deaf online space. I subtitled my video call for participants and posted

[79] McEvoy, 'Midlands Mayhem: Motherfoclóir at Electric Picnic' Motherfoclóir (Headstuff, 07 September 2018) available at https://www.headstuff.org/motherfocloir/54-midlands-mayhem-motherfocloir-at-electric-picnic/ [date accessed: 09 August 2019].

[80] 'Gaeil a dhéileáil leis na póilíní i nGaeilge á lorg: Taighde ar bun faoi chearta teanga' (Nós, 15 October 2018) https://nos.ie/gniomhaiochas/gaeil-a-dheileail-leis-na-poilini-i-ngaeilge-a-lorg/ [date accessed: 09 August 2019].

[81] PléScéal (Raidió na Gaeltachta, 16 October 2018).

[82] The group is called 'Irish Sign Language (ISL) Vlogs and Films' and only videos posted in ISL are permitted by the administrators. I joined this group circa 2017 when I began taking ISL classes at the Irish Deaf Society and used it as a tool to learn ISL and to keep up to date with specific issues within the Deaf community. Members post videos with information, questions, stories and jokes. Comments and replies to videos are permitted in written English, but often members will reply with videos using ISL.

it to the Facebook group (see *Fig 9.4*), YouTube and Twitter account.[83] This was effective in securing contacts, as well as interpreters who offered their services to help.[84]

Media and social media was used to recruit Criminal Justice Subjects, lawyers and AGS2.

Fig. 9.2 Call for Gael Participants

Á Gaeilgeoirí a bhfuil taithí leis an gCóras Cirt Coiriúil acu:

An cainteoir Gaeilge thú?

An raibh gá duit dealáil riamh lena nGardaí nó lena gCúirteanna?

An mbeifeá sásta páirt a ghlacadh i staidéar ar úsáideoirí mionteangacha agus iad á fháil a gceart chun triail chothrom a rochtain?

Is iarrthoir PhD mé in Ollscoil Chathair Bhaile Átha Claith ag an Scoil Rialtais agus Dlí. Táim á dhéanamh taighde ar na slíthe ina dteann úsáideoirí mionteangacha isteach ar an gcóras cirt. Tá suim agam i do chuid taithí as a bheith á dealáil lena nGardaí nó lena gCúirteanna. Bheadh suim agam do chuid idirghníomhaíocht leis an gcóras cirt coiriúil nó aon do thaithí ar bhaic cumarsáide a cheistiú. Dá m'beadfá, nó dá mbeadh duine eile oiriúnach don staidéar seo, le do thoil, tar i dteagmháil liom chun páirt a ghacadh ann. Cabhróidh do chuid páirtíocht le taighde ar Gaeilgeoirí agus iad á dul I ngleic leis an gcóras cirt coiriúil. Dá mbeadh aon ceisteanna agat, seol rphoist chugam gan mhoill.

gearoidin.mcevoy4@mail.dcu.ie

[83] See Gearóidín McEvoy 'ISL Call for Research Participants' (11 April 2019), available at: https://www.youtube.com/watch?v=vWyrd-rkx4M [date accessed: 21 April 2021] and https://twitter.com/GaRoDean/status/1116409982528966657?s=20 [date accessed: 21 April 2021].

[84] See below for a more in depth discussion of interpreter usage.

Fig. 9.3 Call for Deaf Participants

Calling Deaf ISL Users who have experienced the Criminal Justice System:

Are you a member of the Deaf Community who uses ISL?

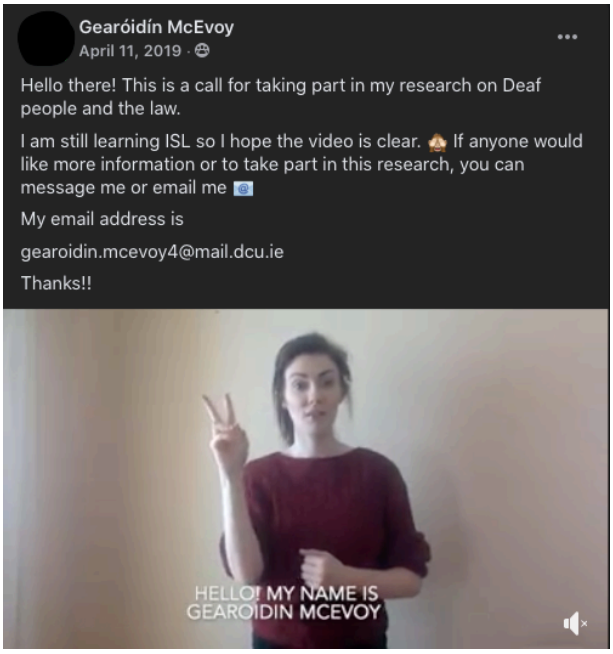
Have you ever had to deal with the Gardaí or Courts for a criminal matter?

Would you be willing to participate in a study on how users of minority languages access the right to a fair trial?

I am a PhD candidate at Dublin City University, at the School of Law and Government. I am researching how users of minority languages access justice. I am interested in your experiences as an ISL user who has had to deal with the Gardaí or the Courts. I would be interested to learn about your use of interpreter, your interaction with the criminal justice system and any barriers to communication that you may have experienced. If you, or someone you know fits this profile, please consider contacting me for participation. Your participation will help to research into how Deaf ISL users access their right to a fair trial. If you would like more detail or wish to ask any questions, please do not hesitate to contact me.

gearoidin.mcevoy4@mail.dcu.ie

Fig. 9.4 Video Call for Deaf Participants



9.6.2 Preestablished Contacts

I had preestablished relationships of varying degrees with all of the academic contributors. Dr Mary Phelan is a lecturer at Dublin City University in the School of Applied Language and Intercultural Studies[85] where she is director of the Centre for Translation and Textual Studies in DCU. She is also the chairperson of the Irish Translators' and Interpreters' Association and editor of its journal *Translation Ireland*.[86] Dr Phelan consented to being named in the work. I had a prior relationship to Dr Phelan before coming to this research.

Dr Seán Ó Conaill is a lecturer in the School of Law at University College Cork where his research interests focus includes minority language rights, language law and Irish studies generally.[87] Dr Ó Conaill consented to being named in the work. I had a prior relationship with Dr Ó Conaill before coming to this research.

Prof. Lorraine Leeson is a professor of Deaf Studies at the Centre for Deaf Studies at Trinity College Dublin. Presently, Prof. Leeson is an

[85] https://www.dcu.ie/salis/people/mary-phelan [date accessed: 12 February 2021].
[86] *ibid.*
[87] http://research.ucc.ie/profiles/B012/soconaill [date accessed: 12 February 2021].

ISL interpreter and a longstanding member of the Deaf community in Ireland. Prof. Leeson consented to being named in the work. I had a prior relationship to Prof. Leeson before coming to this research.

Dr John-Bosco Conama is the Director of the Centre for Deaf Studies at Trinity College Dublin and a former chair of the Irish Deaf Society.[88] Dr Conama consented to being named in the work. I had a prior relationship with Dr Conama before coming to this research.

I was able to email all of these interviewees and organise interviews with them with relative ease. In some cases, the academic contributors were gatekeepers to other participants (both lawyers and Criminal Justice Subjects). Dibley et al explain how gatekeepers can establish an outsider to a community or a phenomenon and help to build rapport between the interviewer and interviewee:

> Gatekeepers' trust in us, as people and researchers, is critical from the outset because it passes on from them to the participant. It is the first step towards creating 'safety' in the research space for the participant when one of their caregivers is willing to vouch personally for us as people/researchers, and for the research study.[89]

In many cases, the academic experts were established figures in their communities Their participation added legitimacy to my work, particularly when they put me in touch with other participants. Being referred to others by these pillars of the community vouched for me and legitimised my work to a degree. Preestablished contact was used to recruit Criminal Justice Subjects, lawyers and experts.

9.6.3 Snowballing

In a number of instances, participants were recruited through snowballing. Snowball sampling is a type of chain-referral where further participants are accessed from current participants.[90] Participants suggested to others in their network to contact me in order to be interviewed. Snowballing is a technique that is found in hermeneutic phenomenology, as explained by Dibley et al:

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[88] https://www.tcd.ie/slscs/staff/comamaj [date accessed: 12 February 2021].

[89] *supra* note 7 at 80.

[90] Noy 'Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research' 2008 Vol 11(4) International Journal of Social Research Methodology 327 at 330.

> The advantage of snowball or chain-referral sampling is that hidden populations can be accessed for research, but the concern is that a person's social group tends to reflect their own life view, and the sample can become very similar. However, the hermeneutic researcher recognises participants' Dasein as integral to their experience and is not trying to produce generalisable data or a definitive truth, but rather reveal the meaning of experience amongst a given group of participants[91]

With this approach, the sample populations are connected and therefore, possibly likeminded.[92] However, as this research is not attempting to make general claims about either the Deaf or the Irish-speaking communities, snowballing was a suitable technique. Snowballing provided me with access to other, "hidden" participants.[93] Through snowballing, I contacted participants who may not have been as au fait with media, technology or social media and were therefore inaccessible via those outreach methods.

Snowballing was a particularly useful technique among the Gael Criminal Justice Subjects. After securing contact via media and social media, many initial participants encouraged friends and acquaintances to contact me, or provided me with names and details of others. Snowballing was used to recruit Criminal Justice Subjects, lawyers and AGS1.

9.6.4 Garda Recruitment

Having been contacted by AGS1 and AGS2 about their interest to participate, I acquired consent from a superior to of AGS2 to conduct this research, as was required. I sent a letter to this superior to ask for permission, and they duly provided that permission. I then provided both AGS1 and AGS2 with consent forms and plain language statements.

Several months after I had conducted the interviews, while in consultation with the Garda Research Unit (GRU) in respect of another matter, I was informed that I needed to acquire permission from the GRU to conduct interviews with AGS1 and AGS2. I was retroactively granted permission by the GRU.

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[91] *supra* note 7 at 55.

[92] *ibid.*

[93] See Frank and Snijders, 'Estimating the Size of Hidden Populations using snowball sampling' 1994 Vol 10(1) Journal of Official Statistics 53 at 53, 54. See also *supra* note 90 at 330.

9.7 Interview preparation

As noted above, I took classes at DCU on methods, and familiarised myself with literature on qualitative methods. I also researched literature on the specifics of interviewing suspects of crime, and on interviewing vulnerable people.[94] In preparation for the interviews, I performed mock interviews with my supervisors, and worked on my presentation, body language and questioning style. During this time, I also acted as a research assistant to a project run by my supervisor, Dr Vicky Conway. The SUPRALAT project trained criminal defence solicitors to sit in and assist their clients during police interviews.[95] Part of the SUPRALAT training involved simulations of client consultations and Garda interviews, as well as training on establishing rapport and using open questioning. It was an extremely helpful exercise in engaging with people who have experience of the criminal justice process, and with the potential situations that interviewees might have experienced.

After the potential interviewees made contact, a time and location to meet was organised, and interpreters organised as required. Prior to the interview, participants were emailed the consent forms and plain language statement.[96] Irish-speakers were sent a copy of these forms in both Irish and English (Appendices A-J). Participants were encouraged to read the forms in advance and ask any questions they might have. I provided hard copies of the forms at the interview for signature. Interviews took place in a variety of locations, which were decided in advance with the participants. Location of interviews is discussed below, but it should be noted that participant preference was the key factor in organising location.

In preparing for interviews the use of interpreters was of particular concern.

9.7.1 Interpreters

ISL interpreters were used for four interviews. I had a prior relationship to the first interpreter requested, and so I contacted them directly by phone about participation, after a participant requested them. Being familiar with my work and noting their dedication to the community, the interpreter insisted on working free of charge. I would speculate that this interpreter also informed the other interpreters who helped me about my work, as none of the other

[94] *supra* note33 at 241.
[95] 'Strengthening suspects' rights in pre-trial proceedings through practice-oriented training for lawyers'. See http://www.salduzlawyer.eu [date accessed: 03 May 2021].
[96] See Appendices A-J.

interpreters would take payment. They all mentioned something similar, about the importance of research to the Deaf community, and their desire to help in whatever way they could. I would have liked to have paid the interpreters, not only because I am aware of the skill and professionalism required for their work, but also because I felt it might have added legitimacy to have an officially contracted interpreter through their appropriate agencies.[97] However, I did not have any funding for an interpreter, and so I was grateful to have their services without charge. All of the interpreters were professionals who worked through the Sign Language Interpreter Service (SLIS). Having arranged and prepared for the interviews, I then went on to actually carry out the empirical data collection.

9.8 The Interview

Interviews took place in a variety of locations, from conference rooms, participants' homes, participants' offices, offices, restaurants and hotel lobbies. Quiet, private locations were preferrable,[98] particularly when participants were discussing their lived experiences of the CJS. Those interviews which took place in louder and more public spaces were at the insistence of the interviewees. In any case, it was possible to find a quiet, more secluded spot in the restaurant/hotel lobby locations which aided communication, and I did not feel that participants were nervous to be in public and discussing such matters.

Two interviews took place over the phone at the request of the participants. I was aware that rapport building can be limited when interviews are done over the phone and I was attempting to counter this.[99] Ultimately I felt the participant was very open and happy to discuss their lived experiences and that the interview was not hampered by the use of the phone.

Interviews varied in length from 30 minutes to 90 minutes. Interviews were recorded for the most part.[100] I felt it important to record the interviewee's source language in interviews, and

[97] Sign Language Interpreter Service.
[98] Gill et al, 'Methods of Data Collection in Qualitative Research: Interviews and Focus Groups' (2008) 204 British Dental Journal 291.
[99] Weller, 'Using Internet Video Calls in Qualitative (Longitudinal) Interviews: Some Implications for Rapport' 2017 Vol 20 International Journal of Social Research Methodology 613.
[100] Berazneva, 'Audio Recording of Household Interviews to Ensure Data Quality' 2014 Vol 26 Journal of International Development 290.

not just the interpretation. ISL is a visual language.[101] To only record the interpreter's voice rather than the original signs from the interviewee would have potentially given more weight to the spoken language than to ISL. If clarification was needed later, with the permission of the interviewee, I would have relied on the source language, not just the audio. As noted above, no such clarification was needed. Where it was permitted, I audio recorded the spoken language interviews on a Dictaphone and video recorded the ISL interviews on my phone. Recording was permitted in all but one interview (Deaf4). I also clarified with participants once more that they were happy to be recorded and informed them that I would be taking notes. Before beginning our interview, I went through the parameters of the consent forms again, asked participants to read them and sign them, and asked if they had any questions. When participants were happy to begin the interview, I started recording (with the exception of Deaf4 who did not consent to recording). Generally the first question was a variation of "tell me about your involvement in your community" or "tell me about being Deaf/an Irish-speaker?" As per the methodology, open questioning like this was preferrable. However I realised in some instances I needed to alter the question style when interviewing Deaf people. Deaf culture is quite direct and so in some instances participants were confused by open questioning and sought specific clarification on what question I was asking. The below interaction shows an example of this:

GM: "If you could talk to me maybe about some of the problems that you might have when you are trying to us ISL in your daily life, maybe not with your friends and family, but outside that."

Deaf2: Like for using communication or [interpreter clarifies] so you want, for me it's my friends and outside of work?

GM: "Yes, outside of those things"

Deaf2: So myself, how do I communicate? [interpreter clarifies]

GM: "So maybe if you had to go to the post office, or get on a bus, or go to a café, or something like that, if you have problems."

I found that my questioning was too vague and needed to be more specific. The semi-structured interview method, using open questioning does allow for more specific questions where necessary for the purposes of clarification.[102] I needed to apply this clarification

[101] https://www.irishdeafsociety.ie/irish-sign-language/ [date accessed: 13 May 2021].
[102] *supra* note 4.

method of questions on a few occasions with Deaf participants. I found that more direct, but still open questions were better in those instances. For example:

> GM: "You had an experience [redacted] with a car accident? And you had to deal with the Gardaí – if you could tell me about that and what happened?"

I was able to draw participants to a specific issue (in this case, the car accident where Gardaí were involved) but still give them space to control what they wanted to focus on ("tell me about that").

The interview progressed as per the interview schedule, with the semi-structured format permitting deviation and follow up questions. At the end of the interview, participants were asked if they had anything else they wished to add or contribute and in some instances, this lead to further conversation and to exploring other issues. Once participants were happy with what they had contributed, the recording mechanisms were switched off.

9.9 Data Analysis

The data analysis phase of my research began during transcription. I transcribed all of the interviews myself using Microsoft Word. Each interview was transcribed into one Word document with identifying data redacted. I did not use transcription software as it would not have been possible to transcribe the Irish language interviews.[103] I was also concerned that an outsider transcriber could make participants feel uneasy about disclosing certain information to me, particularly in a small community, where the transcriber might be known to the participant.[104] Additionally, I did not have funds for transcription. Interviews which took place in Irish were transcribed in Irish and all other interviews were transcribed in English.

Transcription was a tedious and slow process, but provided me with valuable opportunities to familiarise myself with the data and begin to consider the themes therein. Once all of the interviews were transcribed, I imported the Word Documents to a qualitative data analysis software called NVivo.[105]

I had previously attended two training classes provided by QDATRAINING Ltd through DCU on a introduction to NVivo and an intermediate use of NVivo. As such I was familiar with NVivo

[103] I am not aware of any software that offers this service .
[104] I would have had to use a human transcriber for Irish language interviews.
[105] See https://www.qsrinternational.com/nvivo-qualitative-data-analysis-software/home [date accessed: 04 May 2021].

as a programme and had experience using the software. NVivo is described by Bazeley and Jackson as a software developed to help efficiently manage data in order to provide the research with a better view of their data.[106] "Nodes" can be created to categorise data for ease of analysis. Every node operates as a "container for everything that is known about one particular concept or category."[107] NVivo was available to me for free through DCU, and following my attendance at the QDATRAINING Ltd training courses, NVivo support and troubleshooting was made available to me throughout my research.

In NVivo, I went through the documents, one at a time and added the appropriate nodes reflecting the theme and sub-themes which arose. I analysed the entire dataset (all 23 interviews) three times in NVivo.

After the data was coded, I exported particular extracts to Microsoft Excel sheets for organisation and translation where necessary, for ease of insertion into the work. I translated the Irish language interviews myself, as I am a Irish language trained translator.[108]

9.10 Working with the Data

The reader will notice when encountering the data herein that some interview extracts are italicised, some are not, some extracts are enclosed in quotation marks and some are not. The key to these variations for interview data is as follows:

No italics:	Indicates that the text being presented is in the source language of the interview.
Italics:	Indicates that the text being presented is an interpretation or a translation from a source language into a target language (English).
"Quotation marks":	Indicates that the interview has been transcribed from a recording.
No quotation marks:	Indicates that the interview was not recorded and the extract is being provided from fieldnotes.

[106] Bazeley and Jackson, *Qualitative Data Analysis with NVivo* 2nd ed. (SAGE, 2013) at 2.
[107] *ibid* at 17.
[108] My undergraduate degree was focused on Irish language legal translation and I worked in 2012 and 2014 as a translator at Fiontar, DCU on their translation projects www.tearma.ie, www.ainm.ie, www.logainm.ie and www.duchas.ie.

The reader should note that interview extract can involve a combination of these factors. Text which is in quotation marks and italicised would indicate that the interview was recorded and the text is a translation or an interpretation. Interview extracts from participants in the Deaf group which are italicised indicate an ISL interpreter was present for the interview. Interview extracts from participants in the Irish-speaking group which are italicised indicate that I have translated the Irish text into English. Deaf4's interview extracts are fieldnotes only. Nevertheless in some instances I have added fieldnotes alongside the data to provide necessary context.

9.11 Benefits

Overall I was pleased with the methodology chosen, and felt that it worked well in pursuing the research questions. In particular, I am confident that participants, particularly Criminal Justice Subjects, felt comfortable being interviewed, and that they could trust me, which I attribute to the research methods, and in particular the feminist interview methods.

In conducting this research, although it was a difficult and painful process at times, I feel that examining my own biases has made for robust research. Hermeneutic phenomenology calls for such analysis, as described above. As an insider, I was so close to the research topic that it would not have been possible to avoid biases. In recognising my biases, I was able to account for them, and ensure that I was not making conclusions based on unconscious biases or bracketing them. While I am generally pleased with the research and the methodology and methods used, there are a number of limitations to this study. Also, there are a number of issues which I would have addressed, given the opportunity.

9.12 Limitations

In terms of limitations, firstly, this study is not representative of the experiences of all or most Irish-speakers, Deaf people, or RML-users in engaging with the CJS.[109] It can only attest to the experiences of those individuals interviewed. If the study were to have been representative, it would have been unlikely to have taken the current form. Surveys would have been a more useful method to ascertain representativeness,[110] but this would have come at the detriment of the lived experiences which were revealed in interviews. As my initial goal and research

[109] *supra* note 42 at 493.

[110] Nardi, *Doing Survey Research: A Guide to Quantitative Methods* (Fourth edition, Routledge 2018) at 16.

question was to interrogate the lived experiences of RML-users who interacted with the CJS, representativeness was a sacrifice I felt was justified. Further, written surveys/online surveys could have posed a problem for Deaf participants who struggled with English or had experienced language deprivation. Nevertheless I acknowledge that the research herein is limited to the experiences of those interviewed.

The project needed to be reorganised several times. Initially, I had planned to interview Irish-speakers and Deaf people in Ireland, Swedish-speaking Finns in Finland,[111] and members of the Blackfeet Nation in Montana, USA.[112] After meeting an elder in the Blackfeet Nation, it appeared that I had overestimated the extent of speakers of Blackfoot remaining in Montana. As such, I then shifted my focus to the Navajo Nation in South Western USA, and the population of Diné-speakers.[113] I attempted to make connections to the Navajo community, and reached out to several universities in the area, to no avail. At the time, it was also becoming evident that the financial burden of travelling to the US to conduct research would be too great. After consultation with my supervisors, I abandoned these research plans.

While still intending to do a project that included a comparative element, I focused on researching Finnish minority language communities, in conjunction with Irish communities. As noted above, I had set out to interview members of the Finnish Sámi community and Swedish-speaking Finns. Once I began attempting to recruit participants, it became evident that the two groups were inaccessible to me for the most part. I was able to interview experts in these areas, and made attempts to build connections with members of the Swedish-speaking Finn and Sámi communities, but ultimately I did not make any headway in finding Criminal Justice Subjects who were interested in participating in my research. After spending several months in Finland and attempting to make contact, through consultation with my supervisors, I eventually decided it was best to abandon this part of the research. It was disappointing and I had initially hoped to present a two-country study. I suspect that my outsider status was too far removed in order to gain access to the community. Additionally, I find the Finnish people to be a particularly private people,[114] and speaking about taboo

[111] Known as 'finlandsvenskar' in Swedish. This is the population of Swedish-speakers in Finland, where Swedish is an official language.
[112] https://blackfeetnation.com [date accessed: 01 May 2021].
[113] http://www.courts.navajo-nsn.gov/publicguide.htm [date accessed: 01 May 2021].
[114] Carbaugh and Berry, *Reporting Cultures on 60 Minutes: Missing the Finnish Line in an American Newscast* (Routledge, 2016)

subject of criminal behaviour with an outsider was possibly another reason why this part of the project did not work. Thus the project was limited to experiences in a single country. It would be important to conduct further work looking at other countries to be confidence that these are not nation/culture specific findings.

In terms of the methods used, open questioning was not always a useful method. In particular, it was necessary to be more direct in questioning some Deaf participants as described above. Deaf people are direct, and directness is a feature of Deaf culture. Open questioning did not always lend itself to this culture, and there were instances where Deaf interviewees were confused by the open question techniques. I had to adjust my interview techniques to engage in more 'Deaf friendly' questions at times. I had not foreseen this as a potential flaw in the methodology, as I had not encountered any research detailing the use of open questioning with Deaf people, facilitated by an interpreter.

Were I to carry out this research again, I likely would have engaged with disability studies much sooner, as it ultimately provided me with a much stronger understanding of the experiences of Deaf people and a deeper appreciation for access to justice literature. I allowed my unconscious bias about disability to cloud my judgment for some time. This ended up delaying the project once I realised the benefit in engaging with the literature.

9.13 Conclusion

This chapter aims to catalogue the process of data collection, analysis and the theoretical underpinning of the empirical research. While the following chapters demonstrate the data findings and combine them with the legal research conducted thus far, it is pertinent to explain and how and why this data was collected.

From the very outset, this project has been conducted with a basis in hermeneutic phenomenology. The lived experiences of participants is the most significant aspect of this research – their experiences give meaning to the way in which laws and policy operate in reality. My position as an insider/outsider has had an impact, both on the accessibility of the communities that I interviewed, and on the biases which I held. In doing this research I constantly examined my biases, uncovering instances of unconscious bias in order to strengthen the research. This does not take from the validity of the research. Rather in

realising my own positions, biases and world view, I have been able to account for them within the research.

The methods chosen for the research complemented the methodology and overall worked to effectively engage with the research questions. In the following chapters, the collected and analysed data is presented in terms of the right to a fair trial, and access to justice for RML-users. This allows an original analysis that answers the research questions of this project.

Chapter 10 – Procedural Access and The Right to a Fair Trial

10.1 Introduction

Up to this point, the focus of this research has been the law as to the right to a fair trial and the RML-user. In particular, the second part of this thesis focused on the minimum standards of the right to a fair trial. It is important to understand the law as it currently stands and the consideration that the ECtHR and the HRC have given to language and minority language users when they appear in applications.

In this chapter, data collected in interviews is presented in the context of the minimum standards of the right to a fair trial. This data will be used to assess how the minimum standards of the right to a fair trial arose in participants' lived experiences. As noted in Chapter 4, procedural access concerns the removal of barriers to accessing justice in the established justice system, and ensures that people can effectively participate in the process against them.[1] Procedural access is the major access to justice concern when discussing the minimum standards of the right to a fair trial, and is the focus of this chapter.

This chapter addresses four minimum standards of the right to a fair trial beginning with the right to a trial without undue delay. Access to interpreters and the availability of police and judges with competency in an RML will be tackled, with reference to the data collected. Secondly, I discuss the right to be present at trial. Interview data is presented to illustrate the problems in accessing the language of court as well as being heard by the court. Third, the issue of access to counsel will be discussed, as it arose in interviews in respect of access to interpreters and concerns about the risk to lawyer/client confidentiality that interpreters may pose. Finally, the right to an interpreter is addressed. The major concerns that interviewees expressed relate to the availability of interpreters, working conditions and pay for interpreters, interpreter training and entitlement to interpreters.

[1] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 15.

This chapter argues that procedural access was not made available to interview participants, based on an analysis of their lived experiences.

10.2 The Right to Trial without Undue Delay

The right to a fair trial includes both the right to have time and facilities to adequately prepare for a case, and also to be tried without undue delay, as discussed in Chapter 6. While there indeed may be more time required to hear a case involving an RML-user, there is also the risk that this would lead to unacceptable delay from a rights-based perspective. The availability of interpreters, miscommunication between parties about the need for linguistic services and general disorganisation are all factors that can impact the length of time an accused must wait for their trial to be heard.

Delay consistently arose as an issue for participants in this study. Interviewees commented on delays awaiting interpreters, cases being pushed back to a later date to await an Irish-speaking judge, or awaiting a Garda who could facilitate their language. Interviewees often linked delay to the use of their language. The specific forms of delay recounted by interviews will now be considered in turn: access to interpreters and availability of Gardaí and judges with Irish.

10.2.1 Accessing Interpreters

As alluded to in Chapter 5 the availability of interpreters willing and able to work in legal settings may be very low for some languages. This is particularly true of RMLs and it can result in delays. Recall that there is about 111 trained, ISL interpreters working in Ireland.[2] This is for an estimated population of about 5000 Deaf and Hard of Hearing people in Ireland,[3] although not all are ISL users. By comparison, Australia has a population of approximately 6,500 Deaf Auslan (Sign Language of Australia) users and over 1000 registered Auslan interpreters.[4] When a Deaf ISL user is party to criminal proceedings, delays will be exacerbated by the lack of availability of appropriate interpreters.

[2] As noted in Chapter 6. See Leeson and Venturi 'A Review of Literature and International Practice on National and Voluntary Registers for Sign Language Interpreters' 2017 Report commissioned by the Sign Language Interpreting Service.
[3] See https://www.irishdeafsociety.ie/about/press-information/ [date accessed: 06 April 2020].
[4] *supra* note 2 at 46 and 47.

Prof. Lorraine Leeson and AGS2 both highlighted that the hundred or so available ISL interpreters are unevenly distributed across the country which affects availability:

> LL: "…to my knowledge there might be maybe one or two interpreters in Donegal, in that general area. I think there is maybe one in Sligo, in that general area, there's maybe two in Galway, there's a cluster down in Kerry [redacted], there's a little cluster down in Cork for sure. I think there's one in Waterford, there's loads in Dublin – most of them are in Dublin. And then there's like a sprinkling across here [midlands] and then there's a couple up around Drogheda. But you know when you look at it there really is this whole gap. Like Monaghan? Best of luck. Cavan? Best of luck. Westmeath or somewhere like that? Best of luck. So those [counties] are very poorly serviced. Sort of midlands and Wicklow, there's very few people. So you do tend to get the clustering around the cities but also around where the Deaf communities are heavily based. But that leaves huge gaps."

Leeson is highlighting the lack of ISL interpreters in rural areas (with the exception of Kerry) and noting that interpreters tend to be localised in cities and towns.

> AGS2: "That's the biggest difficulty, as we all know, in the Deaf community, there can be a scarcity of interpreters in certain parts of the country."

Both Leeson and AGS2 suggested that access to interpreters is a postcode lottery for Deaf people who need an interpreter. While Lesson did note that the distribution of ISL interpreters can correspond with a density of the Deaf population (for example, there is an active Deaf community in Kerry and Cabra in Dublin, where the Irish Deaf Society is located and Deaf people have congregated), not all Deaf people are facilitated. Deaf people are not necessarily born into or reside in areas where other Deaf people live and as such, can be isolated from ISL interpreters. This is even more concerning when recalling that of these approximately 111 interpreters,[5] they do not all necessarily work in legal settings. This has an impact on delay. If a Deaf person is arrested certain rural areas, as Leeson suggests, they will necessarily have to wait for an appropriate, available interpreter to arrive, which could mean hours of travel time. This has an impact on the custody rights, as AGS2 noted:

> AGS2: "Geographically, it's impossible sometimes to get [an ISL interpreter] to arrive in the station within the timeframe. And you are looking at the clock...It doesn't say

[5] *ibid.*

> anything in Section 4 of the Criminal Justice Act [about interpreters arriving in the detention timeframe] If you couldn't, that's your fault. The solicitor is going to make mincemeat of you if you took six hours for the interpreter to come and your first six hours has gone, you are detaining this person – that's your fault. That's the criminal justice system's fault. That's not the suspect's fault, if you couldn't get the person in.

Here, AGS2 is referring to regulations on the length of time a suspect can be detained at a Garda Station under the *Criminal Justice Act, 1984*. The fear of delay here was depicted as a solicitor making 'mincemeat' of a Garda later on when the issue gets to court if there is delay in accessing interpreters. AGS2 noted that such a delay is seen as the Garda's 'fault'. While they did go on to note how this can impact on the individual Deaf person in custody, their immediate concern was how this would affect Gardaí and their ability to secure conviction at trial. The primary concern was not the realisation of the detainees rights.

A consequence of this delay is that while it may be possible to organise interpreters in advance for certain aspects of trial process, acquiring an interpreter for a last minute situation may be an impossibility. This was descried by Deaf3:

> Deaf3: *"And there is not – in terms of interpreting, there's not a lot of interpreters. It's very hard to gain access, you know, you have to book in in advance and that can be quite difficult. To get an emergency interpreter last minute is very difficult."*

Deaf3 pointed out that there is delay associated with acquiring an interpreter. Even when 'booking in advance' is done, it can still be 'difficult'. There is a concern that instead of enduring such difficulty, Gardaí may decide to go ahead with an interview without an interpreter, possibly in an attempt to satisfy custody time limits. Time constraints may override a detainees rights in the making of such a decision. This concern was raised by AGS2, Prof. Leeson and Lawyer2 in their interviews. In circumventing the risk of delay because of lack of interpreters, authorities may forego interpreters altogether, as happened in the McGrotty case described in Chapter 1.[6] The human rights implications of this failure to provide an interpreter were raised by AGS2:

> AGS2: "We have both seen the chronicle of the issue last year with that poor Deaf man who was arrested, charged and brought before the court without an interpreter. Again, that's a breach of human rights, no matter what way anyone looks at that."

[6] Cradden 'Deaf have human interpreter in court' *Village Magazine* (9 June 2017).

AGS2 was referring to the McGrotty case, where the suspect was not given access to an interpreter. AGS2 demonstrated the consequences of avoiding delay: violating the human rights of a person entitled to an interpreter. This was experienced by participants: only two Deaf people (Deaf3 and Lawyer1's client) were provided with an interpreter in their interactions with Gardaí. In both of those cases, the interview was prearranged in order to organise an interpreter because of the knowledge that sourcing an interpreter would cause a delay. This raises a question as to whether this concern about delay in accessing an interpreter was a reason why all the other Deaf participants were not provided with an interpreter.

Delay in accessing interpreters was also experienced by some Irish-speaking participants. While Gael7 acknowledged multiple causes for their delay, they were clear that the repeated rescheduling of court dates was impacted by the availability of an Irish language interpreter:

> Gael7: "*I think, if I remember correctly, some of it[delay], there wouldn't have been an interpreter available, there wouldn't have been, it was after being said to the court clerk that the case would be held, and then we would be waiting around and then suddenly the judge that we were supposed to have for the day wouldn't have Irish. It took a long while actually to get everything correct on the day*"

Gael7 described needing an interpreter, a court clerk and a judge all with Irish and the difficulty in aligning their schedules. While it is acknowledged that delay is a common aspect of the criminal process,[7] it must also be noted that Gael7 saw Irish – and the court's unpreparedness to cope with Irish language cases – as a cause of the delay they experienced. Their attempt to assert their minority language right actively slowed down the process considerably, bringing with it all of the negative consequences of delay which have been identified in previous research such as anxiety,[8] stress and apprehension,[9] as well as the risk of violating the right against undue delay itself.

Most interviewees were made to go forward with Garda interactions without an interpreter. The difficulty in accessing interpreters was such that for the most part, participants did not actually have an interpreter at all. This is shown in following table:

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[7] Waterhouse, *Ireland's District Court: Language, Immigration and Consequences for Justice* (Manchester University Press 2014) at 48.

[8] Fielding 'Lay people in court: the experience of defendants, eyewitnesses and victims' 2013 Vol 64(2) The British Journal of Sociology 287 at 290, 291.

[9] Ezendam and Wheldon 'Recognition of Victims' Rights Through EU Action: Latest Development and Challenges' in *Justice for Victims: Perspectives on rights, transition and reconciliation*, Vanfraechem, Pemberton and Mukwiza Ndahinda (eds) at 61.

Table 10.1 Interpreter Usage with Gardaí Table

Use of Interpreters in Criminal Justice Subjects' Interactions with Gardaí			
Name	No interpreter	Garda as interpreter	Other
Gael1		✓	
Gael2	✓		
Gael3	✓		
Gael4			Garda spoke some phrases in Irish
Gael5		Garda tried to speak English when left alone	
Gael6	✓		
Gael7	✓		
Gael 8	✓		
Deaf1	✓		
Deaf2	✓		
Deaf3			Interpreter provided after arrangement but was unskilled
Deaf4	✓		
Deaf5	✓		

In terms of delay, it could indicate that Gardaí are more concerned with avoiding delay (see AGS2's focus on a solicitor 'making mincemeat' of a Garda in court because of delay) than ensuring access to justice for the accused persons. This, of course, relates to procedural access. Failure to address the specific problems associated with the availability of interpreters results in delay or in forgoing an interpreter entirely. The accused is left then without the opportunity to effectively engage in the proceedings, and lacks procedural access. There is also a substantive access issue to consider, in that Garda Custody Regulations mandate the questioning of a suspect who is "deaf or [where] there is doubt about his hearing ability" then must in the presence of an interpreter "if one is reasonably available".[10] Given the lack of

[10] SI 119/1987 – *Criminal Justice Act, 1984 Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987,* S. 8(a).

availability of interpreters, as discussed, it is 'reasonable' to anticipate that one may not be available. Where an interpreter is not 'reasonably' available, then the Garda Custody Regulations mandate that questions should be put to the accused Deaf person in writing. In terms of substantive access, the Custody Regulations have not taken into account the realities of Irish Deaf people, whereby literacy is low and not always guaranteed,[11] meaning that for many Deaf people, being questioned by Garda in written English is not a possibility. The Custody Regulations therefore lack consideration of the specific needs of Deaf people, and the realities of Deaf people, and therefore, lack substantive access.[12]

From the data, the risk of delay infringing on the rights of the accused seemed to mostly supersede the right to an interpreter.

10.2.2 Availability of Police, Lawyers and Judges with Irish

In addition to the linguistic rights under the ECHR and the ICCPR, there are also constitutional rights related to the use of Irish in a criminal justice context. All Gardaí, solicitors and barristers go through mandatory Irish language training. It is a legislative requirement,[13] based on the constitutional position of Irish, that such services be offered in Irish.[14] However, the level of training is quite limited. There is a small number of barristers,[15] solicitors,[16] Gardaí and judges capable of providing an Irish language service equal to the English language service.[17] Due to this, finding an individual capable of communicating in Irish was generally the delay that Irish-speakers referred to.

Generally participants did not report delay in awaiting Irish-speaking Gardaí. Gael1 recalled waiting a short time for a Garda with Irish to attend the scene and deal with them in Irish. Gael5 reported waiting approximately one hour for an Irish-speaking Garda to arrive at the

[11] Cradden, 'Sign of the times for deaf education' *Irish Times* (14 May 2002).
[12] Manhart, '"Backpack Refugee Rights Lawyering" in Greece – Access to Justice through Legal Empowerment' 38 at 12.
[13] *Official Languages Act, 2003.* See also *Legal Practitioners (Irish Language) Act, 2008*, S.2.
[14] Irish is the first official language in Ireland under Article 8 of the *Constitution of Ireland, 1937.*
[15] See the list of Irish-speaking barristers at https://www.lawlibrary.ie/members/results.aspx?fname=&sname=&DPA=0&language=Irish+(Fluent)&circuit=All+Circuits&areas=All+Areas&status=Either&specialisation=All+Areas [date accessed: 07 May 2021].
[16] See the list of Irish-speaking solicitors at https://www.lawsociety.ie/globalassets/documents/findasolicitor/clar/clarnagaeilge-irishlanguageregister.pdf [date accessed: 07 May 2021].
[17] This was alluded to by AGS1 and Dr Seán Ó Conaill. Note also that the researcher teaches Legal Practice Irish to trainee solicitors in the Law Society of Ireland .

station. However the Garda who arrived could not actually speak Irish sufficiently. In effect they were not provided with an Irish-speaking Garda at all. This is the major finding from Gael participants' interviews: for the most part Gael participants did not deal with Irish-speaking Gardaí (see *Table 10.1*).

When it came to judges, Dr Ó Conaill stated that there are sometimes years of delay to be expected:

> SÓC: "But we know that you can't deal with it, we know that if you go in and say 'Gaeilge judge' the first thing the judge will do is adjourn it. And then get the DPP to try and engage and see what's going on. You come back again, they'll adjourn it again. It's a good way to delay things! Eventually they will get some Irish speaking counsel in, they'll try to get an Irish-speaking judge – but we're talking at least two years down the line"

Dr Ó Conaill unequivocally stated that using Irish at court will immediately incur delay. A two-year starting point of delay because of the assertion of a right is deeply problematic in terms of procedural access. It is presenting a barrier to having one's case heard.[18] Many of the interviewees alluded to the repeated rescheduling and uncertainty about when exactly their case would go ahead, which was largely connected to the use of Irish and locating appropriate Irish-speaking persons:

> Gael5: *"The first day in the [redacted] District Court, the judge didn't have Irish, so it was put back to another date"*

Gael5 had their court date rescheduled when they arrived and there was no judge available to conduct proceedings in Irish.

> Gael6: *"I was taken to court a few times. Every time, it was put back. In the end I knew the counsel for the state – because they always appointed the woman with Irish. My case would come up, she would go down to the court – she would say to the registrar of the judge 'push it back' and the judge would say 'we are not going ahead with this'. A few times I was a bit frustrated by this."*

[18] Bahdi, *Background Paper on Women's Access to Justice in the MENA Region* (International Development Research Centre (IDRC), Women's Rights and Citizenship Program (WRC) and the Middle East Regional Office (MERO), Middle East and North African (MENA) Regional Consultation, 9–11 December 2007, Cairo, Egypt at 28.

Similarly, Gael6 experienced their day in court being rescheduled in order to find an Irish-speaking judge 'every time'.

> Gael7: *"We got permission to appeal to the High Court [redacted] - I don't know how many times it was put back. It was put back often. [redacted. Case continued to be put back for a number of years]"*

Again, this experience was shared by Gael7, who lost count of the amount of times their case was rescheduled. In these three instances, interviewees saw the availability of judges with Irish as being one of the causes for delay. It was evident from their interviews that Gael5, Gael6 and Gael7 all experienced uncertainty about when their cases would finally be heard. According to Zhang, the purpose of the right to be tried without undue delay includes avoiding prolonged periods of uncertainty for the accused person.[19] Nevertheless, interviewees endured this uncertainty, which they linked to their language usage. It should be noted that in these instances, the expectation that there would be Irish-speaking members of the CJS seems to have taken preference, irrespective of the delay, over the use of interpreters to facilitate being heard by an otherwise English-speaking court.

Availability of appropriate judges to hear Irish language cases was discussed by Dlíodóir2:

> Dlíodóir2: *"There is a lack of judges available anyway. There used to be a time that maybe 6 of the judges in the High Court had Irish. Now, only 3 of them speak it. Including the president. And one of them, the [judge] is involved in matters of family law for the most part."*

Similar to the availability of ISL interpreters as described above, having a limited number of judges capable of conducting proceedings in Irish causes delay. When Irish language cases are listed, they will need to fit around the schedule of these judges, who of course, are not strictly reserved for Irish language duties and have other cases to hear. This might explain the two year delay which Dr Ó Conaill referred to in his interview. This wait can result in pressure to conduct proceedings in English, as it would seem that being heard via an interpreter is not always possible. This may be because it is thought that using an interpreter would render Irish the same as any other non-English language, in tension with its constitutional standing and the entitlement to have proceedings conducted in Irish. Training in Irish is mandatory for all legal professionals, as will be addressed in the following chapter. This training, in theory,

[19] See Zhang 'Fair Trial Rights in the ICCPR' 2009 Vol 2(4) Journal of Politics and Law 39 at 41.

would create the assumption that Irish-speaking professionals are available in the CJS and so there is no need to resort to the use of interpreters.

Dlíodóir1 explained that the prospect of a delay in accessing justice can act as a deterrent from using Irish at trial:

> Dlíodóir1: *"At first [client] wished to conduct [their] trial in Irish, but [they] would have to come back another day to get another judge. [Client] wanted to stand trial and finish it on that day. So [they] conducted it in English. But this is a [person] who would be very dedicated to Irish. It was easier to conduct the case in English on the first day. If [they] had a desire to conduct it in Irish, we would have to get an interpreter, the case would be put back to the next day, a lawyer with Irish would need to be gotten, a judge with Irish."*

This demonstrates that the anticipation of delay when using Irish is enough to cause Irish-speakers to use English, when they otherwise would not have done so. The uncertainty of delay – which can cause psychological and financial stress, as noted by Zhang[20] – can pressure an individual to forego their right to use their language in favour of a speedier trial. There is a lack of procedural access here on two levels. Not only is there a lack of "supports to enable people to participate effectively in proceedings designed to administer justice"[21] for Irish-speakers but there is also "barriers to bringing justice claims"[22] in that when using one's language, one experiences delay. It is a finding of this research that users of Irish reported experiencing delays due to the lack of available Irish-speakers in the CJS. It is not possible to state categorically whether the delay's experienced were undue delays. However, it was evident that for several participants, the delay experienced was attributable to their language usage and was a major cause of strife.

10.3.The Right to be Present at One's Own Trial

As discussed in Chapter 5, being present at trial is an important right as it allows the accused to participate in their defence, either through their counsel or alone. The line of reasoning used in *Negron,*[23] as described, constitutes the lens through which the right to be present is

[20] *ibid.*
[21] *supra* note 1 at 15.
[22] *ibid.*
[23] *US ex rel Negron v. New York,* 434 F.2d 386 (2d Cir. 1970)

analysed. That is, if the accused is present in body, but has no access to the court by virtue of language, they cannot be said to have been present. A language barrier poses a barrier for an accused in accessing their right to be present, therefore impacting procedural access.[24] This section will address the right to be present at trial among the lived experiences of interviewees in terms of such access.

In facilitating the right to be present physically, it is essential to ensure that the accused can be present cognitively and linguistically. Lawyer2 spoke of the delay in acquiring interpreters and how this had a grave impact on their Deaf client's access to their case:

> Lawyer2: "It's just that it took so long for [client] to be able to sit down with people who were able to communicate properly with [them]. So when [they] did understand, [they] broke down. It wasn't that [they] had a level of – it wasn't – it was that nobody had been capable before the interpreters to explain it to [client]…"

The client here had limited access to the details of their case and as a result did not comprehend the gravity of the situation until an interpreter was provided. Through this, they were not given the opportunity to effectively participate in the proceedings against them, and therefore procedural access was interrupted.[25] The delay here was delay in access for the client. Proceedings progressed, but the client was not accompanying that progression in any reasonable, cognitive way. They were delayed in accessing their right to be present.

Deaf4 also recalled issues with the right to be present at trial:

> Deaf4: On the day of their court hearing, Deaf4's solicitor never told them when their case was heard – Deaf4 had arrived early to the court, at 9am and sat all day until 4pm. It wasn't until then that someone came to tell them that their case had been heard that morning at around 9:15am.

Deaf4 had no access to the court They were not provided with an interpreter and so they could not access the language of the court. As such, they were completely unaware that their case was heard in their presence, but without their knowledge. They were present in body only, much like the experiences of Maolra Seoighe,[26] John McGrotty[27] or Rogelio Nieves

[24] *supra* note 1 at 15.
[25] *ibid.*
[26] Ó Cuirreáin, *Éagóir: Maolra Seoighe agus dúnmharuithe Mhám Trasna* (Cois Life, 2017).
[27] *supra* note 6.

Negron.[28] Based on their account, Deaf4 was barred from accessing their right to be present at trial, by virtue of the lack of an interpreter.

In the following extract, Gael5 expressed their doubt about whether the judge was capable of following the case in Irish and therefore, whether they could be actually heard at their court hearing:

> Gael5: *"Anyway, the judge, the judge with Irish, I was in great doubt about whether he had enough Irish. It's certain that if he were listening to what I have been saying here, that there would be loads and loads of words that he would not understand. And this isn't a technical conversation. It's a general legal conversation. He wouldn't be so good in a general conversation even. I'd say that he would have a basic understanding. Sure he had some level of Irish – but [counsel] spoke in Irish only. It's certain that the judge didn't understand exactly what was going on."*

Gael5 showed a doubt about whether they were even heard and understood by the judge. If the purpose of the right to be present is to participate in the trial, then the right must include the opportunity to be heard by a judge. Where a judge is unable to understand the case before them, then the right to be present is not fully vindicated, because that presence is ignored. While the interviewee was physically present and capable of communicating with their counsel, Gael5 alleged that the judge could not be communicated with, and so their case could not be heard.

Dr Mary Phelan acknowledged the impact that access and being present at trial can have on an accused and on the vindication of human rights in her interview:

> MP: "Well I think it's really, really important because for people to understand what's going on. I mean it's a bit Kafkaesque if people are standing there and they don't know what's being said and they don't understand what the other, what the charge is, they don't understand what the solicitors are saying, what the judge is saying what witnesses are saying. It's really, really, it's vital for them to understand what's being said in court and also if they're being questioned it's really, really important that the information is conveyed correctly. So yeah, it's essential…I think that it's essential that anybody on trial should understand what's being said in court. You can't get more basic than that. So I don't see how it can possibly be a fair trial if the person doesn't

[28] *supra* note 23.

understand what's being said in court. Because that's the whole point, isn't it? To hear the evidence against you and to be able to refute it if necessary. And for your own voice to be heard, if you are speaking."

Dr Phelan highlighted the fundamental nature of the right as an underlying principle of the right to be present. She pointed out the essential aspect: access to the court. The right to be present includes being heard but also a judge or jury who can listen and carry out their function in the facilitation of justice.

The right to be present ensures the right to communicate a defence. If a person is present at their trial and incapable of, or prevented from communicating, their presence is pointless and purely physical. Thus they are denied procedural access.[29] As shown, there were instances in the data where people experienced this lack of procedural access, by being denied the benefits associated with the right to be present. As a consequence, they are barred from effectively engaging in the proceedings against them. Communication cannot be one sided. An accused must be able to communicate with the court (either first hand or via their counsel)[30] in order to actually benefit from the right to be present. If no interpreter is provided when one is needed, the accused cannot communicate, the accused can neither listen nor be listened to.

10.4. The Right to Access to Counsel

Communication with counsel is an essential aspect of the right to a fair trial for an accused person. In the absence of appropriate linguistic facilities, vindication of the right becomes complex or unachievable. This section will discuss access to counsel as the issue arose in the data: firstly, in terms of the ability to accurately communicate with counsel and; secondly in terms of lawyer/client confidentiality and interpreter ethics.

10.4.1 Formulating a Defence

Formulating the best possible defence for their client is the role of defence counsel. Under their professional guidelines, they are duty bound to put forward "every technical defence

[29] *supra* note 1 at 15.
[30] See the discussion of this issue in Chapter 6.

which is available to the defendant".[31] The ability to do so is hindered where there is a barrier to communication and this barrier is not overcome. This was concern raised by some of the lawyers interviewed for this research. Both the lawyers dealing with Deaf clients spoke of communication barriers with their clients. The Irish-speaking solicitors did not share this experience as they both spoke Irish and were likely hired by clients because of their dedication to the language in their work.

Lawyer1 expressed concern for a Deaf client who appeared to have trouble appreciating the gravity of the situation when they were being interviewed by Gardaí. In this case, the client was an ISL user and there was an interpreter present:

> Lawyer1: "I had advised [my client] to say nothing…But I don't think [they] appreciated at the time what a culture shock it was. [My client] didn't know what [they were] facing…But the client simply didn't appreciate the seriousness of what [they were] facing. Maybe it's because of [their] marginalisation from society…[They] didn't expect this and [they] didn't know how to deal with it. Me being there helped [the client], but only to a certain extent. What happened was – as the interview progressed, [my client] began to very much incriminate [themselves] – in spite of me telling [them] very clearly, 'If this comes up, you say nothing – you're entitled to say nothing, you exercise your entitlement to say nothing.'"

There are a number of issues of concern in this extract. Firstly, Lawyer1 alluded to a difficulty in communicating vital information and legal advice to their client, even in the presence of an interpreter. Secondly, they suggested the breakdown in communication could be related to the marginalisation experienced by their client.[32] This could raise issues about competency and the vulnerability of the client. It is impossible to say for certain what was the cause for the breakdown in communication. It may have been that the client struggled to comprehend the concepts; it may have been poor communication skills on the part of the lawyer; it may have been the fault of the interpreter. It may have been a combination of all three. In this instance, the client may have benefited from a team of interpreters, one Deaf and one hearing to better facilitate communication and ensure the client understood the situation given their

[31] *A Guide to Good Professional Conduct for Solicitors,* 3rd ed. (Dublin: The Law Society of Ireland, 2013) at 43.
[32] See Glickman and Hall (eds) *Language Deprivation and Deaf Mental Health*, (New York: Routledge, 2019).

social marginalisation.[33] As noted above,[34] the lack of available professionals may well have deemed this an impossibility. The issue here is that Lawyer1 named a difficulty in communicating with their client, and particularly in communicating advices for a Garda interview. This difficulty then resulted in a detriment to Lawyer1's client, who began to make incriminatory statements. This showed that there was some difficulty in communication between Lawyer1 and their client. Therefore there was an apparent barrier in accessing the right to communicate with counsel for the accused.

Lawyer2 noted the difficulty in communicating with their Deaf client during consultation in preparation for court. They described how the use of a relative as an interpreter complicated their ability to communicate with their client directly:[35]

> Lawyer2: "Yes, [client] found it very stressful – the length of time it took to be able to consult with [client] properly – now we were doing it properly, but we were consulting with [client] with the aid of [their sibling]. They have a typical [sibling] relationship. [Sibling] is the older [one] and we'd even find when we'd be saying something to [sibling] and [they'd] be doing the interpreting, if [sibling] didn't think [client] needed to know, [sibling] didn't interpret it. Not on purpose. [Sibling] didn't know [they were] doing it. And [client] might be trying to say something to us – and it would be pretty obvious that [client] would be trying to say something to us – but [sibling] might turn and continue talking. And [sibling] didn't know [they were] doing it. But for our purposes, we would have to say 'what is [client] saying to you?'"

For Lawyer2 the lack of availability of interpreters meant that there was no other option for interpretation in during consultations. As discussed earlier, using a relative who is not an interpreter to act as one is clearly problematic.[36]

These clients experienced limited access to their counsel. In Lawyer2's case, a team of trained interpreters were eventually sourced and made available before and during court and so the client was eventually given access.[37] But in Lawyer1's instance, there was no improvement in

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[33] Boudreault 'Deaf interpreters' in Janzen (ed.) *Topics in signed language interpretation*. (Philadelphia: Benjamins, 2005) at 331-333.

[34] *supra* note 2 at 28.

[35] Use of relatives as interpreters is somewhat common in interactions with Deaf suspects, as described in Brennan and Brown *Equality Before the Law: Deaf People's Access to Justice* (Gloucestershire: Douglas McLean, 2004) at 83.

[36] Pawlosky, 'When Justice is lost in the "Translation": Gonzalez v. United States and "Interpretation" of the Court Interpreters Act of 1978' (1996) DePaul Law Review, Vol 45(2) 435.

[37] Although as detailed above, it is understood that this delay is a major concern.

communication reported, although charges were later dropped and the client did not have to attend trial. Participants thus experienced limited communication with their counsel, impacting on the ability to build a defence. this is a procedural access concern. Where there is a lack of communication, or limited and stunted communication between a client and their legal representative, accused persons cannot effectively engage with the proceedings against them. They are barred from participating "effectively in proceedings designed to administer justice"[38] and therefore denied procedural access.

10.4.2 Interpreter Ethics and Confidentiality

Confidentiality and privilege are major aspects of lawyer/client relationships, and concern about these issues arose in the data. If effective communication with counsel is to be facilitated, a client ought to feel safe in their disclosures.[39] Assurance of privacy constitutes well founded practice that defines the lawyer/client relationship. In the context of this research, these practices do not extend to interpreters in the same way.[40] The interpreter used in Garda interviews or in court can often be the same interpreter used in client consultations,[41] which may be particularly problematic given that the interpreter is not bound by a requirement to assure confidentiality when they are facilitating a privilege communication. At present there is no legislation dealing with the issue and thus no legal requirements or express rights to privilege extended to interpreters.

Lawyer2 expressed their concern about this risk:

> Lawyer2:"But I do know the last time I was in an interview I know I was sent away and the interpreter was kept inside in the Garda station for a chat for half an hour afterwards. So I don't know does that meant that all my advices are relayed to the Gardaí?...So you have to be very careful what you say in front of the interpreter."
>
> GM: "Which must be difficult then to relay advice to your client."

[38] *supra* note 1 at 15.
[39] *supra* note 31 at 95. See also Lynch 'Rights and Privileges' *Law Society Gazette* (October 2016) .
[40] In Ireland there is no mandated code of ethics for interpreters, monitoring or professional body, no oversight mechanisms, no required oath of office, etc. Only ISL interpreters, as addressed earlier are mandated to have professional training under the ISL Act.
[41] *supra* note 7 at 106, 107.

> Lawyer2: "Now we are only thinking they shouldn't be [discussing with the Gardaí] They are not bound by confidentiality. What's stopping them telling the Gardaí what we have discussed?"

Thus Lawyer2 did not have confidence that confidentiality could be maintained which is extremely worrying in the context of the right to a fair trial. Their worry was compounded by the relationship that an interpreter appeared to have with Gardaí (the interpreter stayed back after the interview to chat with Gardaí).

Lawyer1 was also concerned with the use of the same interpreter for their consultation and for the Garda interview with their client:

> Lawyer1: "One thing that strikes me as I go, is that there was one interpreter brought by the state, which is fine – but when it came to me having a consultation with the client, there was still one interpreter and I am pretty sure it was the same one"
>
> GM: "Yeah, I was about to ask"
>
> Lawyer1: "Rightly there should be a separate independent person and I think it's obvious why – you should be allowed to consult with someone in private, go to an interview with the guards and have a different interpreter, and then go back to your private setting. That was an obvious flaw in the process"

The concern here was about confidentiality. Lawyer1 worried that the interpreter used in the 'private setting' where privileged communication could occur would contaminate the confidentiality (an 'obvious flaw').

There is no way to know for certain whether the interpreters in Lawyer2 and Lawyer1's accounts did disclose content from the lawyer/client consultations Gardaí. Yet the fear and worry that it is a possibility is important in terms of ensuring the client believes they are being treated fairly and justly. This fear may also exist for the client and impact their ability to speak freely with their counsel if there is a concern about confidentiality and the interpreter. Both lawyers expressed a worry about the safety of their communication with their client. The examples demonstrate that lawyers exercise caution when communicating with clients, possibly impacting on the right to communicate with counsel. This poses a procedural access concern in that it can impede the accused person from effectively engaging with the process.[42]

[42] *supra* note 1 at 15.

It should also be noted that this issue also represents a lack of substantive access. Lack of regulation or legislation in the field of interpretation means that there is nothing to prevent an interpreter being called as a witness or sharing information with Gardaí.[43] Nevertheless, the impact that an interpreter can have on the right to communicate with counsel was expressed by both of the participating lawyers who reported using interpreters to communicate with clients.

10.5 The Right to an Interpreter

For the RML-using accused, the provision of an interpreter can be the key to removing barriers to accessing justice. The following section explores the instances of the right to an interpreter as expressed by participants. In turn I discuss the availability of interpreters, working conditions, interpreter training and entitlement to an interpreter.

10.5.1 Availability of Interpreters

Availability of interpreters was addressed above in the context of delay, but it can also mean that an accused is left without an interpreter entirely. As such, it is important to discuss the availability of interpreters in the context of the right to an interpreter itself.

Prof. Leeson in her interview referred to the estimated number of legal ISL interpreters:

> LL: "…of a pool of maybe 100 interpreters who are operating, maybe ten were working in legal settings."

Not all who work as interpreters work in legal context, which intensifies availability issues. Availability and barriers to accessing interpreters was noted also by Deaf3, Gael7 and AGS2.

Interpreter availability and its impact on proper procedure was a concern for Lawyer2 in respect of their client's access to court:

> Lawyer2: "Just if the matter had went to trial, the realities – I don't know if they would have been able to proceed because I don't know if they would have found a second set of interpreters. They would have needed three sets of interpreters in an ideal world – and [client] would have had to give, in order to proceed, [they] would have

[43] See *supra* note 7 at 94. See also, in its Code of Ethics for Community Interpreters the ITIA states that "nothing said in [a] session will be communicated outside the session" by interpreters in the association, the exception being where "either party is in immediate danger" at https://www.translatorsassociation.ie/wp-content/uploads/2017/03/Code-of-Ethics-for-Community-Interpreters.pdf [date accessed: 25 March 2020] However this is not a binding code of ethics and there are no regulations to mandate this practice.

had to compromise. I am sure [client] probably would have compromised but [they] shouldn't have to compromise. [Client] would have said 'We'll do it with two sets or one'"

Lawyer2 recounted their worry and doubt about how feasible it would have been to actually go forward to trial with their Deaf client who needed both a hearing and Deaf interpreter. Note that for some Deaf people, it is necessary to have two interpreters, one who is hearing and one who is Deaf, working together to offer chain interpretation. Deaf people can often experience language deprivation which can result in what Glickman and Hall call 'dysfluent language', which they explain as "language that native users would easily recognize to be unclear, poorly developed, and substandard for everyday conversational purposes…"[44] Wattman explains that Deaf interpreters can act to bridge the gap that might exist in Deaf people with dysfluent language and hearing interpreters who use standardised American Sign Language (ASL):

> As native users of ASL steeped in Deaf culture, but also widely experienced in the hearing world, Deaf interpreters can often intuit what a deaf client is attempting to say and understand what obstacles are preventing clear receptive or expressive communication. ASL-English interpreters may lack this "gut sense" of the deaf client's worldview, frame of reference, and linguistic style.[45]

As such, Deaf and hearing interpreters can work together to provide a better interpretation service for Deaf people with dysfluent language. The Deaf person's signs are understood by the native Sign Language using Deaf interpreter. The Deaf interpreter interprets into standardised Sign Language for the hearing interpreter, who then renders the content into spoken language. Prof. Leeson noted in her interviews that there is an extremely limited number of Deaf interpreters working in Ireland, which affects availability then for Deaf people like Lawyer2's client. While they did not end up on trial in the end, Lawyer2 nevertheless acknowledged that it would have inevitably meant 'compromise' for their client. Had they gone forward to trial, their client would have had to accept a lesser standard of interpretation service, because of the limited amount of Deaf interpreters available.

In this research, most participants reported having no interpreter, either in interacting with Gardaí or the courts (see *Table 9.1*). Only Gael4, Gael5 and Deaf3 has interpreters for their

[44] *supra* note 32 at 2.

[45] Wattman 'Interpreting for Deaf People with Dysfluent Language in Forensic Setting' in *ibid* at 220.

interactions (although both Gael5 and Deaf3 reported complaints about the interpreter's abilities). It is unclear in all situations whether failure to provide an interpreter related to availability or some other circumstance. But as Lawyer2's concerns show, even where interpreters are clearly needed, availability can be a major stumbling block. The circumstances that may be causing the shortage of available, skilled interpreters are discussed below. Availability is impacting on the right to an interpreter for an accused person, obstructing their access to procedural access, and limiting their ability to participate in the process.[46]

10.5.2 Working Conditions for Interpreters

Interpreters' working conditions may contribute to the low number of interpreters and thus the vindication of the right to an interpreter. Remuneration for legal interpreters can be incredibly low. The Irish Translators and Interpreters Association reports that interpreters can sometimes be paid as little as €5.50 per hour for their work,[47] which is far below minimum wage in Ireland.[48]

Remuneration of interpreters was a concern raised by Lawyer2:

> Lawyer2: "[Trying to recuperate interpreter's pay was] absolutely shocking. I did an awful lot of appealing the decisions with the Legal Aid Board to pay their fees – that would have been a worry. I know the interpreters said from the start 'we'll take whatever they give us, try your best, we'll take whatever, we are not going to come after the client for the money'. We would be worried that we could be found liable – if someone wasn't willing to waive the fees and take whatever. But they did get their full fees, we managed to sort that."

Here, Lawyer2 recounted an expectation on the part of the interpreters of uncertainty of pay. This could suggest that poor or uncertain pay is a common occurrence for these interpreters

[46] *supra* note 1 at 15.
[47] 'ITIA Bulletin: April 2013' Irish Translators and Interpreters Association, available at https://www.translatorsassociation.ie/wp-content/uploads/2017/10/ITIA-Bulletin-APR2013.x75335.pdf at 3 [date accessed: 02 January 2020].
[48] In 2013 when this report was published, minimum wage in Ireland was €8.65 per hour. See https://www.eurofound.europa.eu/publications/report/2016/eu-member-states/statutory-minimum-wages-in-the-eu-2016 [date accessed: 9 April 2020]. At the time of writing, minimum wage stands at €10.10 per hour. See https://www.citizensinformation.ie/en/employment/employment_rights_and_conditions/pay_and_employment/pay_inc_min_wage.html [date accessed: 9 April 2020].

and it would concur with some of the interview data collected from experts.[49] Additionally, Lawyer2 commented on the difficulty they had in securing payment for interpreters. The interpreter must be reimbursed for their services through the Legal Aid Board (because the client is entitled to free interpretation and does not pay for the service). Nevertheless, the process was extremely difficult, and one that Lawyer2 worried could result in liability on their part for non-payment of interpreter fees.

Lawyer2 went on to note the disparity in payment for interpreters who work with the defence and those who work for the prosecution:

> Lawyer2: "…if they are employed by the court, they get a higher rate, but if we as solicitors employ them, they don't. There is huge differences between what the Court Service will pay and what they get paid if they are employed by the solicitors"

This concern mirrors what the ITIA stated in 2013, that when working through private interpreter agencies, interpreters are paid significantly less than those contracted by the Court's Service.[50] Offering a significantly lowered rate of pay for working with defence may well impact on the already scarce availability of interpreters who perhaps couldn't or wouldn't accept such poor remuneration.

The work of a legal interpreter itself can be extremely stressful,[51] beyond concerns about pay. Prof. Leeson commented on the work environments that legal ISL interpreters must often face:

> LL: "You know [an ISL interpreter would say] 'I'm trying to do my best, I'm here on my own, it's three in the morning and this isn't a dialect that I'm particularly comfortable with but they [the Gardaí] are not letting me go because they're saying that we have somebody here and the clock is ticking' so you've got so many competing demands."

Leeson shows that the pressure put on interpreters to work in difficult situations is compounded by the interest of Gardaí in avoiding undue delay. It is also notable that in this instance, Leeson is describing an interpreter who is struggling to carry out their duties. The interpreter can find themselves in an impossible situation, unable to leave on account of

[49] Recall from Chapter 9 that none of the interpreters who facilitated the interviews for this research would accept payment, due to their understanding of the importance of research for the Deaf community and because of their dedication to the community.

[50] *supra* note 47.

[51] See Knodel, 'Coping with Vicarious Trauma in Mental Health Interpreting' 2018 Vol 26(1) Journal of Interpretation 1.

pressure from Gardaí, but cognisant of their own shortcomings and the potential to negatively impact the fairness of procedure. From the perspective of a Deaf suspect reliant on such an interpreter, these circumstances have the potential to jeopardise the fairness of procedure. An interpreter ill-equipped to facilitate a police interview has the potential to prejudice or misinterpret the Deaf person's intent, which may have disastrous consequences.[52]

In terms of court interpretation, Dr Mary Phelan noted in her interview that there is no practice of interpreters working in pairs, or being afforded breaks:

> MP: "Well there's no relief for interpreters in the Irish legal system. No. Zero. So an interpreter's expected to interpret all day, basically. Yeah. Which is crazy."

Interpreters are thus under intense pressure, sometimes working hours on end without relief. It is unsurprising then that burnout is common among interpreters,[53] affecting their availability.

Keeping the right to interpretation in mind, an overworked and underpaid interpreter is likely to impact on the standard of interpretation. Interpreters who suffer from burnout are unlikely to maintain high standards in performance. There are reasons to be concerned that this is happening in Ireland. Ultimately, this puts the accused who is reliant on interpretation for access to justice at risk of being denied procedural access and the opportunity to effectively engage with the proceedings.[54] Where an interpreter underperforms, buckles to pressure or where none can be located, the accused is denied a right to participate in the proceedings and ultimately, denied procedural access.

10.5.3 Interpreter Training

Competency in language is in no way equivalent to being an interpreter. It should be noted that this is not meant as a criticism of those who are working as interpreters without training. Globally, there are little to no interpreter training courses or professional qualifications available.[55] There are little to no requirements for qualifications for people to act as interpreters.[56] In Ireland, individual interpretation companies may indeed provide training

[52] Shepard 'Access to justice for people who do not speak English' 2007 Vol 40 Indiana Law Review 643 at 647.
[53] *supra* note 51 at 2.
[54] *supra* note 1 at 15.
[55] *supra* note 2 at 37.
[56] Under Article 2.8 of the EU Directive on the Right to Interpretation and Translation in Criminal Proceedings interpreters in criminal justice contexts "shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against

days for staff, but there is no requirement to do so. In the latest request for tenders for court interpreters from the Courts Service, three levels of interpreter skill were sought from competing interpretation agencies:

> **Level 1**: There is objectively verifiable evidence that the person is competent to interpret spoken words…fully accurate so as to meet the standard of quality necessary to satisfy the requirements of due process…
>
> **Level 2**: The person is a Native Speaker of the language concerned and can be shown meet the above Level 1 competency standard regarding English, OR is a Native Speaker of English and can be shown to be competent in the language concerned.
>
> **Level 3**: The person is a Native Speaker of English with a Third Level Qualification in the language concerned, OR a Native Speaker of the language concerned with a Third Level Qualification in English.[57]

Notably, none of the three levels of interpreters requested require specific third level/professional qualification in interpretation. While the lowest level, Level 1 is qualified by the need for 'objectively verifiable evidence' that an interpreter 'is competent to interpret spoken words', without a testing or quality control system in place, it is not possible to ascertain such evidence in the absence of testing, as noted by the ITIA.[58]

Some interviewees reported problems with poorly trained or untrained interpreters. Although the *Irish Sign Language Act, 2017* (ISL Act) now mandates that all ISL interpreters be trained,[59] all participants were interviewed before the entry into force of the ISL Act.[60] As such, Deaf3's experience here was not overshadowed by any legislative requirements for trained interpreters:

> Deaf3: *"I was called in just to make a statement…And there was an interpreter for that and I was surprised. I had never seen the interpreter before. I asked who [interpreter was] and [they told me their name]. I had never heard of [them] before, I had never seen [them] before…So we went through the interview with the Gardaí. And the interpreting was ok. There was some signs that were wrong, some confused numbers*

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them and are able to exercise their right of defence." However this requirement has not necessarily altered or introduced national legislation or regulation for interpreters. For example, Ireland is party to this Directive and complies with Article 2.8 without any introduction of regulated training for legal interpreters

[57] *supra* note 47 at 3.

[58] *ibid.*

[59] S.7 of the *Irish Sign Language Act, 2017.*

[60] The ISL Act came into force in December 2020.

like 17 and 12. For me, that put extra pressure on me to be alert to the communication. Because this is a statement in relation to the [incident]. And then this was obviously through the interpreter, the Garda asked me 'do you want to read back through the statement through the interpreter or do you want to read it yourself?' And I said I'd read it myself. And luckily enough I can read. But what about other Deaf people who don't have good literacy skills? I was lucky. I was able to read it over myself. And to be fair, most of it was ok. I still wasn't comfortable with the idea of having an interpreter I wasn't sure of. Their qualifications and who they were, and I thought about it more [and Deaf3 subsequently found out that the interpreter] never finished the course [at the Centre for Deaf Studies] [They weren't] qualified, [they] had only done one year and left. And I am horrified to think that [they are] interpreting in a Garda station."

It was evident that this was a distressing experience for Deaf3. Their role switched from interviewee to quality control for an untrained interpreter. And while the interpretation was 'ok' in the end, there were still fundamental mistakes, impacting the quality of evidence being secured in an investigation.[61] Deaf3 was aware of the gravity of the situation and took it upon themselves to ensure accuracy. It is relevant that they noted their own literacy skills too, and the commonality of a lack of literacy among Deaf people.[62] They acknowledged that they were 'lucky' to be literate, and to be able to correct mistakes. This 'luck' is not guaranteed for all Deaf people. Deaf3 was 'horrified' at the thought of an unqualified interpreter working in a Garda station, because of the potential negative impact they could have on an 'unlucky' Deaf person.

Deaf3's experienced was mirrored by Dr Phelan in respect of spoken language interpreters:

> MP: "the people who are working as interpreters in Garda stations or in the courts, I guess they're doing their best, but they haven't actually been trained, they haven't been tested in any way to ensure they're competent, so I think they're in a very difficult position…I am convinced that there are cases where everybody believes that the interpreter is doing a good job and they're not doing a good job. It has to be happening. It has to be happening. And they're the ones that are just missed basically,

[61] Note that the handshapes for 12 and 17 are formulated in a similar way, but numbers are a very basic level part of ISL learning. Learning to count is covered in the beginner ISL classes offered by the Irish Deaf Society (Quality and Qualifications Ireland Level 3).

[62] *supra* note 11.

you know everybody assumes that they're doing a good job because everybody's checking is one party speaking for really long and the other party is just saying very little, you know, what is going on. They're the obvious things that jump out in every situation but there have to be others where it looks as if the interpreter is interpreting and doing a good job but they're not."

Phelan here connected the lack of training to the grave potential for miscarriages of justice to occur. [63] As noted in Chapter 5, Shulman also held a similar view, stating that interpreter errors were common and actually identifying those errors was rare.[64]

Because interpreters lack training and the process lacks oversight mechanisms, there is a real danger that poor interpretation is producing unfairness or potentially giving rise to miscarriages of justice.

Dr Phelan also raised an alarming concern that where interpreters are untrained, they may also be unfamiliar with what their role is in the CJS:

MP: "But you don't know I mean when people aren't trained they may well feel that their job is to ensure that there is conviction."

This issue mirrors the fears from lawyers that interpreters could be relaying their advices to Gardaí as discussed above. Those fears are realised where the interpreter believes they are 'on the same side' as the police or judiciary, and that they possibly have a role in securing confessions or convictions.

An interpreter is there to facilitate communication between parties who do not share a language. They ought to bridge the gap and level the inequality experienced because of language. When interpreters are untrained and ill-equipped to deal with the technical or ethical considerations of the job of a legal interpreter, the gap in communication is not bridged. Whether through lack of linguistic competency or misconceptions about ethical considerations, untrained interpreters risk blocking an accused from participating fairly in the trial against them.

[63] See for example the recent Canadian case where poor interpretation negatively impacted the proceedings: *R v MR*, 2020 ONSC 408 at para 25.

[64] Shulman, No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants.' 1993 Vol 46 Vanderbilt Law Review 175

10.5.4 Interpreter Entitlement

Finally, it is important to address interpreter entitlement. This issue has been discussed on some level in Chapter 5. Judges or the Gardaí can act as gatekeepers for accessing a free interpreter.[65] If either is in doubt about the need for an interpreter, they may block access and refuse to sanction or call an interpreter.[66]

In respect of interpreters in court, Dr Mary Phelan noted that judges have denied requests for interpreters on many occasions:

> MP: "So that happens quite a bit in the courts, some of the courts, in a district court level for example some judges will say, you know, how long have you been living here, you've been living here, it might be 3 years, 5 years, 10 years, you've had plenty of time to learn English, you know, what do you mean you need an interpreter? I'm not going to sanction one."

This discourse directly connects entitlement to merit and shows bias against those who do not meet these arbitrary sense of merit. It should be noted that Dr Phelan is referring to what might be called non-traditional language users, in the context of the ECRML. This attitude shows an expectation that people should acquire language in a certain, unspecified time. Waterhouse also shows evidence of this in her work.[67] This attitude is a fundamental misunderstanding of the intricacies involved in language learning, as noted by Pillar. There is no standard time associated with learning a language.[68] Language acquisition depends on a multitude of factors, including race, gender, socioeconomic status, age and sheer luck.[69]

Nevertheless, this expectation is common, as Phelan notes in research on this subject:

> The misconception that a person who can reply to simple questions is also able to understand complex language, is still prevalent among some members of the Garda, lawyers and judiciary and is probably associated with the absence of training in this area…[70]

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[65] *supra* note35 at 99.
[66] As noted in Shulman 'No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants' 1993 Vol 46 Vanderbilt Law Review 175 at 179.
[67] *supra* note 7 at 105.
[68] Piller *Linguistic Diversity and Social Justice: An Introduction to Applied Sociolinguistics* (New York: Oxford University Press, 2016) at 49.
[69] *ibid* at 48, 49.
[70] Phelan 'Legal Interpreters in the news in Ireland' 2011 Translating and Interpreting available at https://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=274790866 [date accessed 02 October 2019].

Not only does this attitude fundamentally oversimplify the process of language acquisition, it also shows an expectation of assimilation: immigrants are expected to learn the language of the state, and learn it quickly.[71] Undoubtedly, this would point to the problems of integration that migrant language users experience, as discussed in Chapter 8,[72] but the same attitude can be seen in respect of Irish-speakers.

Gael4 recounted getting permission from the judge to have an Irish language interpreter. They recalled their satisfaction having been granted an interpreter "both ways". Gael4 was aware of several Irish-speakers who had previously appeared in court and been granted only "one way" interpretation. To Gael4's satisfaction, the judge had given permission for an interpreter to appear in court and interpret Irish speech to English and also English speech to Irish. Gael4's interpreter rendered English speech into Irish for Gael4, and Irish speech into English for the English-speaking court. This is how standard court interpretation works. Effectively, Gael4 was led to believe that they had been given special allowances, when in fact they has been granted a standard court interpreter. The "one-way" interpreter they referred to was where an interpreter was only allowed to interpret Irish speech into English, and not render English speech to Irish for the Irish-speaking accused. Irish-speakers who appeared before Gael4 were possibly offered "one-way" interpretation as lip-service, or a tick-box execution of their right to an interpreter based off of assumptions about their "need" for an interpreter. The issues in granting interpreters to Irish-speakers was evident from Gael4's interview, particularly in how relieved they had been to be given proper interpretation. Similar to Phelan's comments above, this experience could also point to problems of integration for Irish-speakers who are not deemed to need interpreters.

Language competency is highly situational.[73] Where the gatekeepers of interpreter access do not believe that an accused needs or should need an interpreter, the accused may be denied procedural access. An accused who needs an interpreter, but is perceived to not need one is at an immediate disadvantage in that they are prevented from fully participating in the proceedings against them.

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[71] *supra* note 68 at 49.

[72] Woehrling, 'Introduction' in Lopez, Ruiz Vieytez and Urrutia Libarona (eds) *The European Charter for Regional or Minority Languages: A Critical Commentary,* (Council of Europe Publishing, 2005) at 22.

[73] See Berk-Seligson 'The Importance of Linguistics in Court Interpreting' 1988 Vol 2 La Raza Law Journal 14 at 17.

10.6 Conclusion

In this chapter, I explored how the minimum standards of the right to a fair trial arose in interviews, and how procedural access was affected. In respect to the right to trial without delay, delay did appear in respect of the availability of interpreters and the availability of Gardaí or judges with Irish to facilitate Irish language interactions. A limited availability of professionals in the CJS to facilitate the use of ISL or Irish was experienced by interviewees, which incurred delay in some instances. Cumulatively, it is a finding of this research that this poses barriers for the Irish-speaker and the Deaf person in engaging in the process against them. I found that the legal system's failure to accommodate their language and identity results in an interruption of procedural access.

The right to be present at trial was also an issue. From the data collected, it can be seen that impact on the right manifested in two ways: firstly, interviewees attested to failures to provide interpreters outright, limiting or blocking access to proceedings. Secondly, Irish-speaking interviewees also reported the failure to be heard by a Garda or judge who could understand the accused's language. As such, their voices could not be heard. Interviewees reported physical presence, but there was no cognitive of linguistic presence guaranteed. This is undoubtedly a barrier to procedural access in that it is a barrier to the actual participation in the process. When individuals cannot be heard and cannot access the language of court, they can neither be said to be truly present, nor can they be said to have participated.

Lawyers who participated in this research recounted problems in communicating with clients and the lack of available interpreters to help rectify their situation. This related to lawyers with Deaf clients who had concerns about their ability to carry out their function effectively and by extension, the right of an accused person to have access to counsel. There was also a particular concern from these lawyers about the sanctity of the lawyer/client relationship being compromised through lack of regulation and training for interpreters. Again, being prevented from communicating with counsel, whether through lack of interpreters or because of a fear of the breach of confidentiality poses a barrier to effective participation in the CJS for clients.

Finally, concerns regarding the right to an interpreter arose for participants. The right is underpinned by a number of issues. Participants reported struggling with the poor availability of interpreters. Availability manifested in the form of delay; the provision of unskilled

interpreters or; no interpreter provision at all. This is not the fault of interpreters individually. Without attractive and regulated working conditions and higher pay, availability of interpreters is likely to remain low, thus impacting availability and quality. Without adequate training, interpreters cannot be expected to be of a standard to ensure uninterrupted participation for accused persons in the CJS. Entitlement to interpretation itself was also discussed. Gardaí and judges can gatekeep access to interpreters and where misconceptions about language acquisition persist, those in need of interpretation can be denied access.

In this chapter I have added to the existing body of literature on access to justice by exploring how procedural access was experienced by RML-users, in accessing the minimum standards of the right to a fair trial. In response to the procedural access concerns which I uncovered, there are often relatively straightforward solutions which could be proposed; increasing the number of working interpreters in legal fields; more comprehensive Irish language instruction for Gardaí and judges; provision of interpreters where one is needed in Garda interviews, lawyer/client consultations and courts; regulations and training to ensure the confidentiality from interpreters; adequate remuneration and working conditions for interpreters; proper training for interpreters. However, these issues cannot be tackled with a procedural access mindset alone. Improving the availability of interpreters, their working conditions, etc. necessarily requires the introduction of law and policy to do so. And as such, it requires a substantive access approach. In the following chapter, I will address substantive access as it arose in the data, and as it already exists, in an effort to deepen the understanding of access to justice for Irish-speakers and Deaf people in the CJS.

Chapter 11 – Substantive Access and Legislation, Training and Inclusion

11.1 Introduction

In the previous section, I explored how procedural access arose in the data in respect of the minimum standards of the right to a fair trial. In this section I explore the instances of substantive access which arose in the data. In doing so, I will be focusing on the laws and the policies which address Irish and ISL usage in the CJS and how these laws impacted the interviewees.

To reiterate, substantive access aims to ensure the realities of marginalised groups are taken into account in the laws and policies which impact those groups.[1] A key aim of substantive access is participation from affected groups in the creation of those laws and policies.[2] The specific needs of a group can included in policy or legislation from the start where there has been involvement from that group. In that vein, substantive access also ensures equitable and beneficial judicial outcomes for marginalised people.[3] Substantive access measures ensure that when interacting with the legal system, the structures in place have been created with consideration of the lived realities of marginalised people and this is reflected in the ability to obtain fair outcomes.

In this chapter, I discuss the specific substantive access issues which arose in the data, and the effectiveness of these measures in reality. In doing so, I focus on two areas. Firstly, I address legislation, specifically the *Irish Sign Language Act, 2017* and the *Official Languages*

[1] Bahdi, *Background Paper on Women's Access to Justice in the MENA Region* (International Development Research Centre (IDRC), Women's Rights and Citizenship Program (WRC) and the Middle East Regional Office (MERO), Middle East and North African (MENA) Regional Consultation, 9–11 December 2007, Cairo, Egypt at 27.

[2] Lawson and Flynn, 'Disability and Access to Justice in the European Union: Implications of the UN Convention on the Rights of Persons with Disabilities' 2013 Vol 4 European Yearbook of Disability Law 7 at 15.

[3] Beqiraj, McNamara and Wicks 'Access to justice for persons with disabilities: From international principles to practice' International Bar Association, October 2017 at 14. Citing United Nations Development Programme (UNDP), *Access to Justice: Practice Note*, 2004 at 3.

Act, 2003. I present data which both directly and indirectly demonstrates the limitations of these acts and how ultimately, they have lacked substantive access. Secondly, I discuss policy and training, focusing on the training given to Gardaí and to judges in respect of Irish-speakers and Deaf people. I show that through the training in place, substantive access has not been ensured and the specific needs of Irish-speakers and Deaf people are not created and carried out with their needs in mind.

11.2 Legislation

Two major pieces of legislation must be considered in addressing substantive access for Irish-speakers and ISL-users: The *Official Languages Act, 2003* (OLA) and the *Irish Sign Language Act, 2017* (ISL Act). Both pieces of legislation operate to provide regulations and laws surrounding the rights of RML-users to use their specific languages with the State. In both, there is specific reference to the right to use Irish or ISL respectively before the courts and within the CJS. Now I examine how participants discussed the legislation, taking them in turn.

11.2.1 *The Irish Sign Language Act, 2017*

The ISL Act came into force in December 2020.[4] Interviews with Deaf participants took place after it was signed into law in December 2017, but before that law came into force. As such, no interviewee's experience was directly impacted by that law. Therefore it is difficult to assess whether the ISL Act has brought about equitable and beneficial outcomes.[5] Nevertheless, participant were aware of the ISL Act and it is possible to discuss substantive access from the perspective of Deaf involvement in the creation of the ISL Act.[6]

The Act itself formally recognises

> the right of Irish Sign Language users to use Irish Sign Language as their native language and the corresponding duty on all public bodies to provide Irish Sign Language users with free interpretation when availing of or seeking to access statutory entitlements and services.[7]

[4] SI 658/2020 *Irish Sign Language Act, 2017 (Commencement) Order 2020.*
[5] *supra* note 3 at 3.
[6] *supra* note 1 at 27.
[7] S.3(1) of the ISL Act.

The ISL Act also provides specifically for ISL usage in legal proceedings.[8] The right to use ISL in court is qualified under S.4(2) which states that:

> Every court has, in any proceedings before it, the duty to do all that is reasonable to ensure that any person competent in Irish Sign Language and who cannot hear or understand English or Irish appearing in or giving evidence before it may be heard in that language, if that is his or her choice, and that in being so heard the person will not be placed at any disadvantage.[9]

It is interesting to note that this provision qualifies the right to use ISL in court by mandating courts "do all that is reasonable", particularly when considering the socio-economic realities of Deaf people in Ireland as alluded to throughout this work, and the likelihood of social disadvantage that Deaf people experience. The construction leaves space to wonder what are the limits of reasonableness, and why this qualification was necessary, particularly when the outcome would place a Deaf person at a disadvantage. However, as of the time of writing, there is no evidence to show how this provision of Act is operating.[10]

The ISL Act came into being after thirty years of activism from the Deaf community.[11] The Deaf community collaborated with Senator Mark Daly in the first major moves to introduce an ISL Act.[12] Conama notes that "Senator Daly engaged a legislative draftsman to draw up the Bill, in consultation with [Irish Deaf Society] representatives".[13] This step shows the positive inclusion of concerned parties in the creation of laws which govern their affairs: it exemplifies substantive access. However, this substantive access was maintained only during initial drafting, and the Bill which was subsequently passed into law lacked the initial elements of positive inclusion.[14] In her interview, Prof. Leeson noted that significant compromise on the initial needs of the Deaf community needed to be made in order to pass the legislation:

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[8] S.4 of the ISL Act.
[9] S.4(2) of the ISL Act.
[10] It should also be noted that since the coming into force of the Act, the COVID-19 pandemic remains ongoing and has impacted how the courts and police stations function. It is at present unclear how the necessity of social distancing and remote working has impacted the provision of interpretation and the experiences of Deaf people in the CJS.
[11] Conama '"Ah, that's not necessary, you can read English instead": Analysis of State Language Policy Concerning ISL and its Effects' in de Meulder, Murray and McKee (eds.) *The Legal Recognition of Sign Languages: Advocacy and Outcomes Around the World* (Bristol: Multilingual Matters, 2019) at 21.
[12] See https://senatormarkdaly.org/ [date accessed: 27 January 2021].
[13] *supra* note 11 at 24.
[14] *ibid* at 25.

> LL: "Well, [the passing of the legislation] was very hard won. And definitely there was a great deal of compromise that had to go in – it doesn't reflect all of the issues that the Irish Deaf Society and all others that were involved in proposals wanted to see in there for sure… [the Act] should be stronger, it should be stronger. It really did become about 'what can we get over the line?'"

Leeson is saying that ultimately, the ISL Act needed to be scaled back significantly in order for it to be passed into law. Conama also refers to this in his work, stating that the initial inclusive measures were "severely curtailed" in the final legislative process.[15]

In fact the ISL Act is significantly less detailed than the initial Irish Sign Language Bill,[16] with the Bill containing 30 sections and the ISL Act containing only 11 sections. As example of the dilution of the content of what would eventually become the ISL Act, in the early version of the Bill there were details on the specific entitlements to ISL interpretation. The Bill stated that by 2016, a person would be entitled to up to 120 hours of interpretation per year.[17] S.7.2 detailed the maximum allocation of ISL interpretation in education. These provisions would be in addition to the provision of ISL interpretation for members of the Deaf community in accessing medical services, education and legal proceedings.[18] The Bill also aimed to establish an Irish Sign Language Council,[19] with the purpose of promoting and developing ISL;[20] regulate teaching of ISL;[21] regulate the provision of ISL interpretation;[22] regulate the provision of deaf interpretation services[23] and; to promote the continued education and professional development of ISL teachers.[24] In the final ISL Act the establishment of the Irish Sign Language Council is not provided and there is no corresponding detail on the entitlement to ISL interpreter hours, reflecting what Leeson and Conama both stated above that the ISL Act represents a dilution of the substantive access measures secured in the initial drafting process.

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[15] *ibid* at 25.
[16] *The Recognition of Irish Sign Language for the Deaf Community Bill, 2016* No 76 of 2016.
[17] S.7.1(b).
[18] S.7.3.
[19] S.12.
[20] S.13(a).
[21] S.13(b).
[22] S.13(c).
[23] S.13(d).
[24] S.13(e).

In discussing the specific problems with the ISL Act, Prof. Leeson highlighted the overemphasis on disability:

> LL: "But, I think fundamentally there are problems around Irish Sign Language – even though it's called the Irish Sign Language Act – Irish Sign Language being seen as a tool used to support a disability."

Prof. Leeson is pointing out here a particular problem whereby ISL (and sign languages generally) are often not seen as languages, but rather as tools to aid the disabled in communication. As noted earlier, this can be problematic for the Deaf community when disability discourse is understood in context of the medical model and their identity as Deaf people becomes paternalised.[25] This can be seen in the parliamentary debates discussing the ISL Bill. While the debates are generally positive, there is a significant emphasis on disability in the language used. While this in itself is not a negative, it is not always clear what is meant by the term 'disability' when it was used. There was more emphasis on disability than on culture in the debates: during a Seanad debate on 19th October 2016, there were 37 references to 'disability' or 'disabled' and only five references to 'culture' or 'cultural'.[26] In a Seanad debate on 17th October 2017, there were significantly more references to 'culture' in respect of the Bill, but these references mostly related to an amendment to actually remove reference to 'deaf culture' from the Bill as it was deemed inappropriate for the legislator to have any say over what does or does not constitute a culture.[27] Throughout the process, there is repeated use of the term 'hearing impaired', including from the then Minister of State for Disability Issues, Finian McGrath.[28] This term is generally viewed negatively in the Deaf community and is indicative of a medicalisation of deafness,[29] through focus on the 'impairment' that is being deaf or hard of hearing. While many Deaf people welcome the disability identity, this is not the only identity to be considered, as discussed in Chapter 3.[30] The overemphasis on medicalisation and disability presents a narrow and paternalistic view

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[25] Ladd, *Understanding Deaf Culture: In Search of Deafhood*, (Clevedon: Multilingual Matters, 2003) at 15

[26] Seanad Debate 19 October 2016, vol 247 no 13. Senators Lynne Ruane and Alice-Mary Higgins were the only two senators to mention culture.

[27] Seanad Debate 17 October 2017, vol 253 no 12. The amendment in question was Amendment No. 11 and it passed with support from Minister Finian McGrath and Senator Mark Daly.

[28] *supra* note 26 (Senator John O'Mahony, Senator Gabrielle McFadden and Deputy Finian McGrath), *ibid* (Senator Trevor Ó Clochartaigh, Senator Colette Kelleher and Deputy Finian McGrath), Dáil Debate 14 December 2017, vol 963, no 3 (Deputy Michéal Martin).

[29] See https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/ [date accessed: 28 January 2021].

[30] *supra* note 25.

of Deaf people from the Oireachtas,[31] which implied that the Bill was being passed for Deaf people, rather than with or on behalf of them. It also undermines the substantive access measures initially shown: in spite of the involvement of Deaf Organisations, harmful stereotypes have persisted in the drafting proves, and found their way into the finalised ISL Act, according to Leeson. This is demonstrative of a lack of substantive access, as the specific needs of Deaf people and their identity as Deaf people have been overshadowed by the dominance of a paternalised view of deafness as a medicalised disability.

The use of this language in the drafting of legislation to provide rights and recognition for ISL and the Deaf community shows the importance of symbolic access also. Where there has been a lack of symbolic access, and a failure to tackle the societal barriers that obstruct the empowerment of Deaf people, these attitudes can seep into the legislative process. Ultimately, the result is as Leeson described above: the ISL Act views ISL as a tool for disability, or through a medical model lens.

11.2.2 *The Official Languages Act, 2003*

As for Irish-speakers, the *Official Languages Act, 2003* (OLA) regulates the states obligations to use Irish and codifies the entitlements of Irish-speakers. The OLA sets out the duties of public bodies to *inter alia*; engage with individuals in Irish;[32] to publish certain documents in Irish;[33] and to display the Irish language on official signage and stationary.[34] Included in 'public bodies' is An Garda Síochána and the Courts Service.[35] Specific to this research, the OLA also states that a "person may use either of the official languages in, or in any pleading in or document issuing from, any court."[36]

It also states that:

> Every court has, in any proceedings before it, the duty to ensure that any person appearing in or giving evidence before it may be heard in the official language of his or her choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.

[31] See Lane *The Mask of Benevolence: Disabling the deaf community* (San Diego: Dawn Sign Press, 1992) at 7. See also Charlton *Nothing About Us Without Us* (Berkley: University of California Press, 2000) at 53.
[32] S.11 of the OLA.
[33] S.10 of the OLA.
[34] S.9 of the OLA.
[35] See the First Schedule to the OLA.
[36] S.8(1) of the OLA.

Specifically, this section ensures that there will be equality in treatment of Irish language users in the courts, that individuals will not be disadvantaged by their use of Irish.

The OLA itself was brought into force under then Minister for Community, Rural and Gaeltacht Affairs Éamon Ó Cuív.[37] Ó Cuív is a longstanding, notable member of the Irish language community.[38] There was also involvement from Irish language organisations in the legislative process suggesting substantive access.[39] However, just as can be seen with the ISL Act, some of the comments from legislators during the drafting of the OLA show that stereotypes about Irish-speakers persisted in the legislative process.

One senator stated that "it would be a good idea if those who spoke Irish were more friendly to those who try to speak it",[40] displaying a perception of Irish-speakers as rude or unwelcoming. Again, I would compare this attitude to a problem of integration,[41] whereby Irish-speakers should alter their behaviour (deemed as rude) in order to appease an English-speaking majority. That same senator, Dr Henry, began her Seanad remarks in Irish,[42] stating "Níl mé ábalta caint as Gaeilge anois ach fadó, fadó bhí fáinne agam",[43] before delivering the rest of her lengthy speech in English.[44] This is an example of the tokenism of Irish described by Brennan and O'Rourke, whereby Irish is only used for niceties at the beginning of a speech, before switching to English for the actual content.[45] Dr Henry's remarks tell us two things: Irish-speakers can be perceived as rude and unwelcoming; and that Irish is a decorative flourish, rather than a functional language. This discourse featured throughout the legislative process. The inclusion of the community in the legislative process (right up to the role of the governing Minister) was not sufficient to prevent the persistence of harmful stereotypes

[37] Seanad Debate 04 July 2003 Vol 173 No 19.
[38] See http://www.eamonocuiv.ie/ga/aboutme/ [date accessed: 20 January 2021].
[39] Ó Laighin, *Acht na Gaeilge – Acht ar Strae,* (Coiscéim, 2003).
[40] Seanad Debate 24 April 2002 Vol 169 No 21.
[41] Woehrling, 'Introduction' in Lopez, Ruiz Vieytez and Urrutia Libarona (eds) *The European Charter for Regional or Minority Languages: A Critical Commentary,* (Council of Europe Publishing, 2005) at 22.
[42] *supra* note 40.
[43] Translation: 'I am not able to speak Irish now, but long, long ago, I had a fáinne' wherein a 'fáinne' is a small ring-shaped pin often worn by Irish speakers to indicate to others that they can speak Irish. The pins are available to purchase and are supposed to depict the level of Irish a wearer has, where silver (fáinne airgid) shows a basic level of spoken Irish and gold (fáinne óir) shows fluency in Irish. See https://cnag.ie/en/schools/school-resources/fainne.html [date accessed: 20 January 2021].
[44] *supra* note 44.
[45] See Brennan and O'Rourke, 'Commercialising the *cúpla focal*: New speakers, language ownership, and the promotion of Irish as a business resource' 2019 Vol 48(1) Language in Society 125 at 129.

about Irish-speakers and Irish during the drafting of legislation intended to protect and promote the language and its users.

The OLA set out the provision for creating an Irish language Commissioner (Coimisinéir Teanga) to act as an Ombudsman of sorts over issues related to the provision under the OLA.[46] There has been controversy in the operation of the Office of the Coimisinéir Teanga. The first Commissioner stepped down from the role because of failure by the government provide Irish language services.[47] This controversy shows a failure to take seriously the concerns of Irish-speakers and a minimisation of their identity, in spite of constitutional and legislative requirements. Dr Seán Ó Conaill referenced the issue of the Coimisinéir Teanga stepping down and the overall the effectiveness of the OLA:

> SÓC: "I suppose the Official Languages Act was a great idea. And it still is – to be honest, I support the vast majority of it. Again, it goes down to the actual implementation of it. There is the theory and the practice. It's unbelievable. When someone as astute, as learned as Seán Ó Cuirréain [first Coimisinéir Teanga] steps down from the office because he says he's not getting anywhere – you know you've a problem. And the problem he had is getting government departments to respond to actual issues that he was highlighting with the Act. And they just ignored him. Which is unbelievable."

Dr Ó Conaill's comments here show that there is a disconnect between the provisions of the OLA and how those provisions are actually implemented. And this is mirrored in the experiences of other participants: there was a disconnect between what the OLA should provide and what participants experienced when trying to use their language with state bodies. Gael1, Gael2, Gael3 and Gael5 all experienced being penalised for using Irish with Gardaí, even though the OLA mandates that An Garda Síochána must engage with people in Irish:

> Gael1: *[Gael1 offered a witness account of a fight in Irish to a Garda on the scene] "And he said "none of that now". And I said 'Well I am not willing to give you an account of the fight if you are not willing to hear it in Irish'. And the thing he accused me of was "obstructing the course of justice" or "perverting the course of justice" or something*

[46] S.20 of the OLA.

[47] Whereby the first Commissioner resigned over lack of support from the government. See Ó Caollaí 'Commissioner resigns over Government failures on Irish' *The Irish Times* (4 December 2013).

like that because he know that I was not willing to share it with him [in English], or "withholding" or one of those crimes. Disrupting the legal process in a way. I can't remember exactly what he charged me with. But he became angry as well – which then made me angry. And he put me, we went down to [the station] and I spent the rest of the night [in the station] He put me in a cell."

Gael1 connected the penalty the received with their use of Irish. Gael2 encountered even more abrupt hostility:

> Gael2: *"…he [Garda] said something like* 'I don't have the time to be dealing with your leprechaun bullshit. Can you just give me your address [in English]?'"

Gael2 was subsequently arrested and connected that arrest to their use of Irish.

> Gael3: *"Because he [Garda] said that line that was just bad, '*I was going to caution you at the side of the road but you seem to be playing a bit with me [by speaking Irish] so I'm just going to send a ticket out to you*'"*

Gael3 stated that they were fined because their use of Irish annoyed the on-scene Garda.

> Gael5: "*[Gardaí were saying] insulting things like* 'who does he think he is, he's absolutely stupid speaking Irish. He's going to get put off the road for years now'. *Things like that"*

Gael5 recalled being arrested and intimidated by Gardaí because of their use of Irish. These examples all demonstrate how the provisions of the OLA are not effectively translating to how Irish-speakers experience using Irish with An Garda Síochána. They show that in spite of legislative requirements to provide services in Irish, not only are those services unavailable, but interviewees were penalised for seeking them. In these circumstances, there was a lack of beneficial outcomes flowing from the OLA.[48] This is also in spite of the existence of an information card for Gardaí with useful Irish language phrases. The card is produced by An Garda Síochána (see *Fig. 10.1* below). On the front page of the wallet-sized card, it states that

> An Garda Síochána recognises the right of citizens to conduct their business in Irish and is committed to the full implementation of the *Official Languages Act, 2003*

These information cards are supposed to be made available to members of the service to improve their engagement with Irish-speakers. In spite of the reminder of An Garda

[48] *supra* note 3 at 3.

Síochána's obligations and dedication under the OLA, interviewees still experienced discriminatory attitudes from Gardaí as shown.

Dr Seán Ó Conaill, in addressing this disconnect between 'theory and practice' of the OLA stated:

> SÓC: "Maybe that's the ultimate flaw in the Act...You know, if you look at it, there's a criminal offence in the Official Languages Act of not cooperating with an investigation, when the Commissioner has started an investigation. So there is one criminal offence, and there's a few others connected to that. But actually, ignoring the provisions of the Act has no criminal penalty! [laughing] As long as you cooperate when we're doing it. Ok, that's that then! The Minister can set a fine, but it's the government that you are fining. It's a bit silly. There is nothing to say that you couldn't be fined a euro for not cooperating. As long as you cooperate, but tell the Coimisinéir 'well we're not going to do any of that, sorry we don't have time or resources, or we just couldn't be bothered' so be it. It's a bit of a farce in that sense."

Ultimately, from Dr Ó Conaill's assessment, we can see that the OLA lacks teeth to actually be enforceable or impactful on organisations. The needs of Irish-speakers have not been translated into concrete action, and this is evidenced by the stepping down of the Commissioner, and the data from Gael1, Gael2, Gael3 and Dr Ó Conaill.

There is a disconnect between what the OLA can provide in theory and what it can provide in practice. What this tells us, is that even where there has been engagement with concerned parties, substantive access is not guaranteed. The experiences from the data do not point towards beneficial outcomes for Irish-speakers when they engage with the state using their language.

Further, the attitudes about Irish language users shown in the Dáil debates while drafting the OLA, suggest that there is also a lack of symbolic access. Attitudes towards Irish-speakers can often be hostile in Irish society, as explained by Ní Raifertaigh J in *Ó Cadhla v. The Minister for Justice.*[49] Media reports about Irish regularly position Irish as limited in its function, a waste of time or a waste of state resources.[50] This issue will be discussed in greater detail in the

[49] *Ó Cadhla v The Minister for Justice* [2019] IEHC 503 at para 4.

[50] See Boland 'Broadside: Can anybody truthfully say that Irish is a necessary language?' *The Irish Times* (30 May 2016), De Barra 'The case for ending state support of Irish language is littered with dubious "facts"' *TheJournal.ie* (04 February 2017). Available at: https://www.thejournal.ie/readme/fake-facts-irish-language-debate-3220676-Feb2017/ [date accessed: 04 May 2020], Walshe 'Irish lessons "are a waste of time"' *The Irish*

following chapters, but for now it is notable that substantive access and those tasked with law and policymaking to ensure substantive access are impacted by symbolic access. Where marginalised groups are not valued in society,[51] then it can impact on their ability to secure substantive access.

In spite of substantive access measures, the negative societal perceptions of Irish-speakers persist and these attitudes become pervasive among state bodies (including the CJS).[52]

In respect of access to justice, ensuring that affected groups are involved in the drafting is essential. It is not possible to fully comprehend the needs of a specific group where they have not been consulted about their lived experiences. The data collected shows that even where there has been substantive access, the associated benefits can be undermined by a lack of symbolic access. This will be discussed in greater detail in the next two chapters. For now it is sufficient to state that where there has been no effort to tackle the harmful stereotypes which hinder progress for marginalised communities, substantive access measures can be undermined and rendered obsolete. For access to justice to be achieved, all three aspects of access to justice must be ensured.

11.3 Training

Training and training policies for CJS operatives is another area where substantive access can make a difference. As Bahdi notes, "policies and programmes – through which rights are implemented" must be designed in a way that considers the lived reality of those affected in order to pursue substantive access.[53] Maintaining substantive access in the creation of policy and training will ensure that the needs of concerned parties are factored into that policy and training. If the substantive access measures are successful, then the people in the CJS carrying

Independent (02 July 2003). Delaney 'Irish language should not be compulsory, especially for struggling school children' *The Irish Independent* (12 August 2019). 'Irish Examiner View: Do we need Covid-19 booklets in both English and Irish?' *The Irish Examiner* (01 May 2020), Holden 'The rise of the gaelscoil - is this the new playground of the elite?' *The Irish Times* (17 April 2020). Fitzpatrick 'Tribes of modern Ireland: None of us are just Irish' *The Irish Independent* (28 May 2014), https://www.newstalk.com/podcasts/highlights-from-the-hard-shoulder/people-speak-irish-need-given-jobs [date accessed: 04 May 2020], https://www.newstalk.com/podcasts/between-the-lines-with-andrea-gilligan/the-irish-language [date accessed: 04 May 2020] https://www.todayfm.com/podcasts/the-last-word-with-matt-cooper/students-exempt-from-irish-are-studying-other-languages [date accessed: 04 May 2020].

[51] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 16.

[52] *supra* note 50.

[53] *supra* note 1 at 27.

out policy or executing legislation will do so with the interests of the marginalised groups in mind. Where this has happened, the outcomes of these policies will be equitable and beneficial to those marginalised groups.[54]

In this section, I discuss the training of Gardaí and judges in turn. All Garda recruits are trained at the Garda Training College before they become Gardaí. Similarly, solicitors and barristers must complete professional training at the Law Society of Ireland and Kings Inns respectively,[55] a requisite qualification for appointment as a judge. Part of the training for both includes mandatory Irish language training, where facilitation of Irish-speaking members of the public or clients is the aim. In both instances, it is uncertain who has been involved in the creation of the syllabi and so it is not possible to say with certainty whether substantive access measures were taken. However, it is possible to look at the syllabi or teaching models and examine them to see if they show substantive access measures in their construction.

At present there is no mandatory training in any other languages for Gardaí recruits, trainee solicitors or barristers.[56] As such, there is limited data from interviews pertaining to ISL training of or usage by Gardaí or judges: most of the data relates to Irish usage. Nevertheless, this data still speaks to how RMLs and RML-users can be treated when they engage with the CJS in respect of substantive access.

11.3.1 Garda Training Practices

Training for all Gardaí in Ireland involves three phases of training, the first of which mandates recruits attend and reside at the Garda Training College in Templemore for a period of 34 weeks.[57] In that time, they attend classes, of which "Irish language and Physical Fitness are mandatory parts of the various modules and programme".[58] It is no longer a requirement that recruits hold a qualification in Irish or English to join An Garda Síochána, pursuant to efforts to increase ethnic diversity in the service.[59] Included in the list of modules studied by Garda

[54] *supra* note 3 at 3.

[55] Note that in order to be appointed as a judge in Ireland, a person must have been a practicing solicitor or barrister for at minimum, 10 years. See https://aji.ie/the-judiciary/appointment-to-judicial-office/ [date accessed: 07 May 2020] There is no additional training mandated for work as a judge

[56] Note that an entry requirement for An Garda Síochána includes competency in two languages, one of which is English or Irish.

[57] See https://www.garda.ie/en/careers/why-should-i-join-an-garda-siochana-/what-does-the-training-involve-.html [date accessed: 11 March 2021].

[58] *ibid.*

[59] 'Irish no longer a requirement to join An Garda' *The Irish Times* (07 September 2005).

recruits is "Foundations of Policing including Irish".[60] The training is underpinned by the requirements under the OLA as described above. An Garda Síochána provide mandatory basic Irish language training to all recruits in order to facilitate their legislative and constitutional obligations.[61]

AGS1 discussed the Irish language training mandated at the Garda Training College:

> AGS1: "At the moment [trainee Gardaí] do Irish in two different modules which is Foundations and Traffic…Obviously dates, ages, numbers, times and stuff like that are hugely important. That would be done in the Foundations. And then in the Traffic the two modules or roleplays are focused on checkpoint and drink driving…"

From the interview, it was clear that the syllabus has a focus on traffic when teaching Irish: two teaching modules are dedicated to traffic.[62] This is not surprising in one sense as traffic related incidents provide frequent interactions between Gardaí and the public.[63] AGS1 went on to justify the emphasis on traffic-related terminology as follows:

> AGS1: "And the reality is that anybody who is engaging with An Garda Síochána and especially if they are trying to report a missing person – they are not going to stand on the language right. They are going to communicate in the language that is best going to help the organisation and help themselves. So in that case, we can kind of – and I am not saying limit what we cover – but be more realistic about what we cover so that we cover it better…We say in worst case scenario, if somebody is charged with murder and they are trying to defend themselves – if it were me am I going 'I can be principled and I have the right to do this through Irish, I might. But I think maybe they'll understand me better' – I think if the nature of something is so serious, you are going to go with the language that best defends you, best puts your case forward. I don't know if that's a personal decision or if that's – because I want to use Irish with the Gardaí doesn't mean I have to either. The important thing is that it's my choice. And that the choice is mine – not because of inefficiency on behalf of the organisation."

[60] *supra* note 57.

[61] Under the OLA and by virtue of Irish being the first official language of Ireland under Article 8.1 of the constitution.

[62] It was unclear how many hours of teaching this involved.

[63] Checkpoints on roads to carry out spot checks of tax and insurance or to breathalyse drivers are common. Garda will also carry out speed checks on roads, direct traffic following a collision or for traffic management purposes.

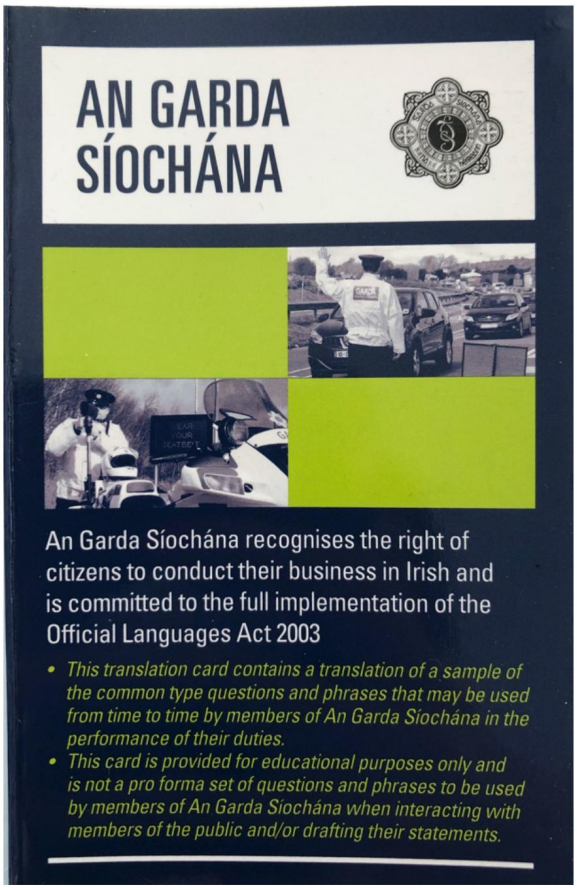
There are a number of issues to consider here. Firstly, limiting focus to traffic terminology can possibly create a perception that it is only in these circumstances that a person would use Irish. Encountering a speaker outside of these scenarios (such as in reporting a missing person) is not likely to be anticipated. Secondly, this outlook mirrors Brennan and O'Rourke's work,[64] as outlined above in that Irish is tokenistic and used for the less serious instances of road checkpoints or drunk driving, but not for serious crimes such as 'murder' or 'missing persons', the individual will undoubtedly resort to English. Third, while traffic concerns can undoubtedly be serious, AGS1 makes a note that for 'serious' issues (such as murder or missing persons), people are unlikely to resort to using Irish: "I think if the nature of something is so serious, you are going to go with the language that best defends you, best puts your case forward". This implies that Irish is for use in less serious interactions, that using it in serious instances is not putting one's best case forward. It implies that English is the language one ought to use if they wish to effectively engage with An Garda Síochána, directly contravening the provisions of the OLA.[65] Fourth, AGS1 directly linked the use of Irish to a choice. As will be discussed in greater detail in the following section, this binary of choice of language is not how language usage was experienced by interviewees. To describe interviewees' language usage as a mere choice is to trivialise their experiences and their identities.

The emphasis on traffic was also evident from an information card given to Gardaí, which AGS1 kindly provided. The card (see *Fig 11.1*) lists translations of useful phrases, many of which are related to traffic incidents.

[64] *supra* note 45 at 129.

[65] Where 'public bodies' are required to respond to requests in Irish in that language and An Garda Síochána constitutes a public body under the provisions of the OLA.

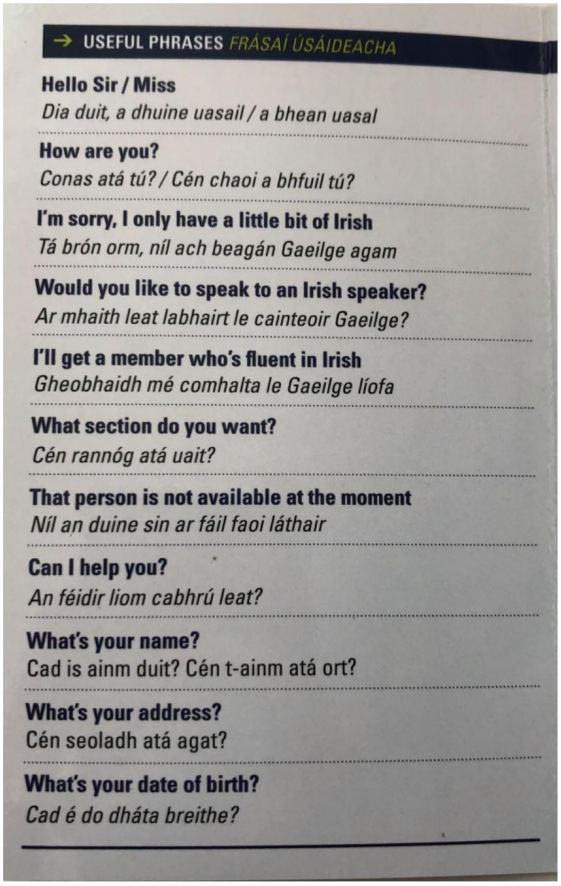
Fig. 11.1 Garda Síochána Irish Card



AN GARDA SÍOCHÁNA

An Garda Síochána recognises the right of citizens to conduct their business in Irish and is committed to the full implementation of the Official Languages Act 2003

- *This translation card contains a translation of a sample of the common type questions and phrases that may be used from time to time by members of An Garda Síochána in the performance of their duties.*
- *This card is provided for educational purposes only and is not a pro forma set of questions and phrases to be used by members of An Garda Síochána when interacting with members of the public and/or drafting their statements.*



→ USEFUL PHRASES *FRÁSAÍ ÚSÁIDEACHA*

Hello Sir / Miss
Dia duit, a dhuine uasail / a bhean uasal

How are you?
Conas atá tú? / Cén chaoi a bhfuil tú?

I'm sorry, I only have a little bit of Irish
Tá brón orm, níl ach beagán Gaeilge agam

Would you like to speak to an Irish speaker?
Ar mhaith leat labhairt le cainteoir Gaeilge?

I'll get a member who's fluent in Irish
Gheobhaidh mé comhalta le Gaeilge líofa

What section do you want?
Cén rannóg atá uait?

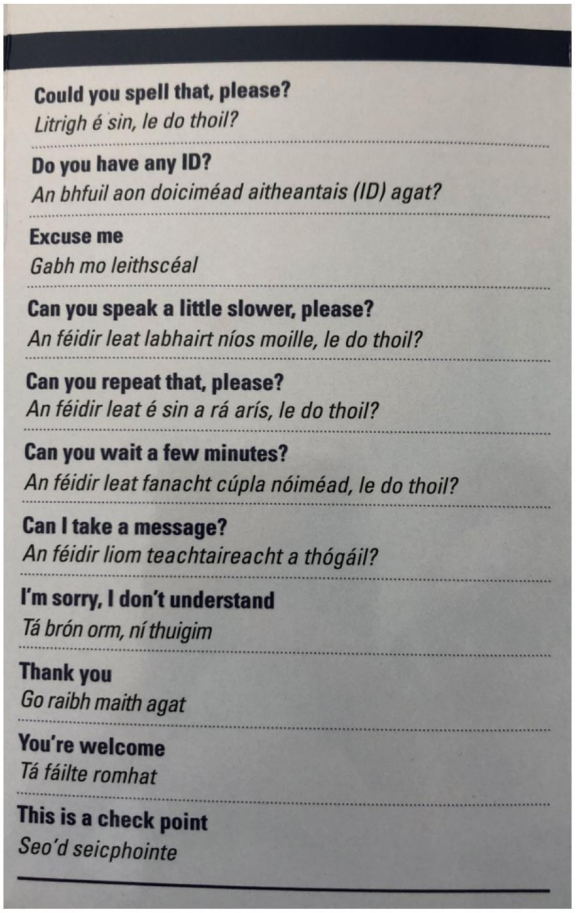
That person is not available at the moment
Níl an duine sin ar fáil faoi láthair

Can I help you?
An féidir liom cabhrú leat?

What's your name?
Cad is ainm duit? Cén t-ainm atá ort?

What's your address?
Cén seoladh atá agat?

What's your date of birth?
Cad é do dháta breithe?



Could you spell that, please?
Litrigh é sin, le do thoil?

Do you have any ID?
An bhfuil aon doiciméad aitheantais (ID) agat?

Excuse me
Gabh mo leithscéal

Can you speak a little slower, please?
An féidir leat labhairt níos moille, le do thoil?

Can you repeat that, please?
An féidir leat é sin a rá arís, le do thoil?

Can you wait a few minutes?
An féidir leat fanacht cúpla nóiméad, le do thoil?

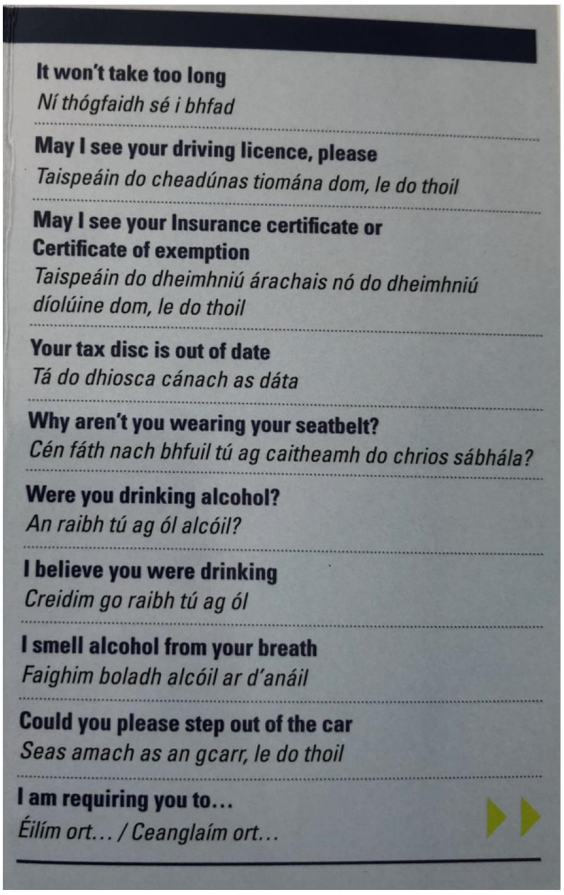
Can I take a message?
An féidir liom teachtaireacht a thógáil?

I'm sorry, I don't understand
Tá brón orm, ní thuigim

Thank you
Go raibh maith agat

You're welcome
Tá fáilte romhat

This is a check point
Seo'd seicphointe



It won't take too long
Ní thógfaidh sé i bhfad

May I see your driving licence, please
Taispeáin do cheadúnas tiomána dom, le do thoil

May I see your Insurance certificate or Certificate of exemption
Taispeáin do dheimhniú árachais nó do dheimhniú díolúine dom, le do thoil

Your tax disc is out of date
Tá do dhiosca cánach as dáta

Why aren't you wearing your seatbelt?
Cén fáth nach bhfuil tú ag caitheamh do chrios sábhála?

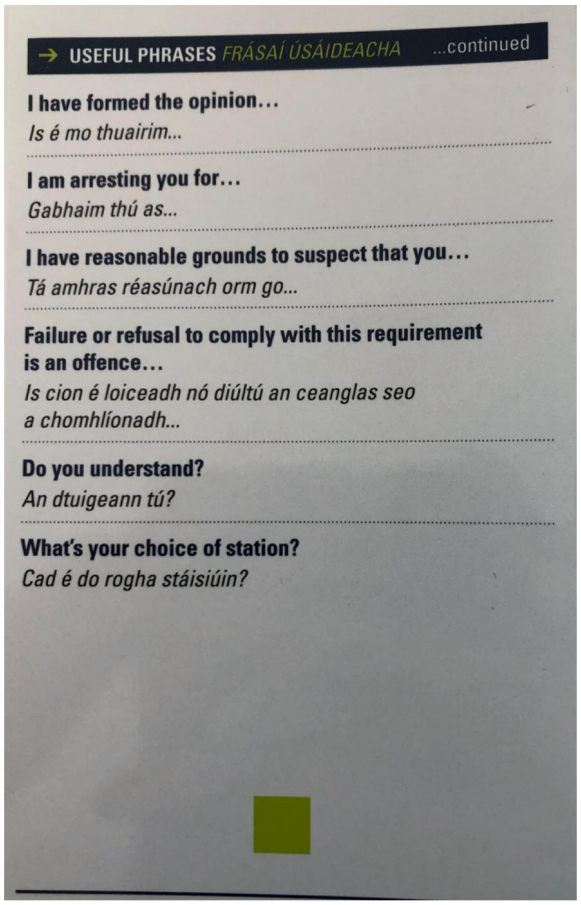
Were you drinking alcohol?
An raibh tú ag ól alcóil?

I believe you were drinking
Creidim go raibh tú ag ól

I smell alcohol from your breath
Faighim boladh alcóil ar d'anáil

Could you please step out of the car
Seas amach as an gcarr, le do thoil

I am requiring you to…
Éilím ort… / Ceanglaím ort…



→ USEFUL PHRASES *FRÁSAÍ ÚSÁIDEACHA* ...continued

I have formed the opinion…
Is é mo thuairim…

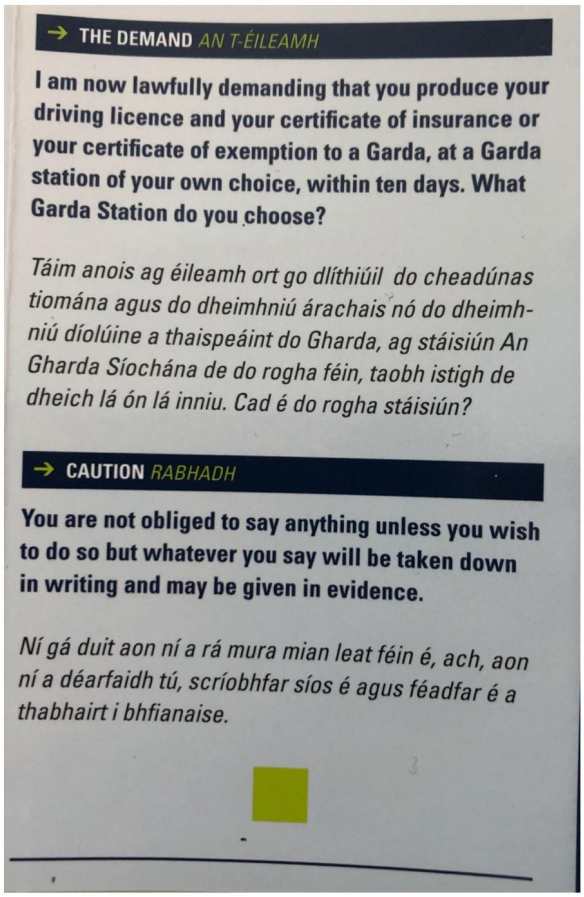
I am arresting you for…
Gabhaim thú as…

I have reasonable grounds to suspect that you…
Tá amhras réasúnach orm go…

Failure or refusal to comply with this requirement is an offence…
Is cion é loiceadh nó diúltú an ceanglas seo a chomhlíonadh…

Do you understand?
An dtuigeann tú?

What's your choice of station?
Cad é do rogha stáisiúin?



→ THE DEMAND *AN T-ÉILEAMH*

I am now lawfully demanding that you produce your driving licence and your certificate of insurance or your certificate of exemption to a Garda, at a Garda station of your own choice, within ten days. What Garda Station do you choose?

Táim anois ag éileamh ort go dlíthiúil do cheadúnas tiomána agus do dheimhniú árachais nó do dheimhniú díolúine a thaispeáint do Gharda, ag stáisiún An Gharda Síochána de do rogha féin, taobh istigh de dheich lá ón lá inniu. Cad é do rogha stáisiún?

→ CAUTION *RABHADH*

You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.

Ní gá duit aon ní a rá mura mian leat féin é, ach, aon ní a déarfaidh tú, scríobhfar síos é agus féadfar é a thabhairt i bhfianaise.

There seems to be some doubt about the prevelance of these cards in use. It should be noted that the presence of the caution is full, is to be commended.

It is worth noting that Gael1, Gael3, Gael5, Gael6 and Gael7 all interacted with Garda on issues related to traffic. Despite the evident emphasis on traffic related terminology in training and on the information card, interviewees recalled a general unpreparedness and hostility from Gardaí when Irish was used at traffic stops.

In their interview, AGS1 shed light on attitudes to the mandatory Irish language training that many recruits hold when at the Garda Training College, which might explain why Gael3 and Gael5 experienced negativity when they used Irish:

> AGS1: "they didn't join the Gardaí to study Irish. It's a great source of angst for some of them."

AGS1 made this statement in the context that trainees are generally not enthusiastic about taking Irish classes, and that it was understandable, because learning Irish was not the reason why they joined the Gardaí. Irish language training is put in place to ensure Gardaí can fulfil

their duties and facilitate an Irish-speaking public.[66] It has both a legislative and constitutional basis.[67] In the same way that carrying out powers of arrest or interviewing suspects is part of the job, so too dealing with people in Irish. Irish being a source of angst does not nullify the fact that it is part of the job, and indeed, ought to be an anticipated part of the job. To recall Reiner's cop culture as discussed in Chapter 2, it is possible that learning Irish is counter to the sense of action that is a feature of cop culture,[68] and manifests as 'angst', such as that experienced by Gael1, Gael2, Gael3, Gael5 and Gael7.

In terms of access to justice, the description of the way Irish is taught to Garda recruits, and the experiences interviewees have had when using Irish with Gardaí point to a lack of substantive access. From the data shown, the policies for training Gardaí do not take into account the "patterns of disadvantage and oppression"[69] of Irish-speakers and have not been "designed in ways that take [their] socially constructed disadvantage into account."[70]

In respect of ISL or Deaf Awareness training, no specific or dedicated training could be found. In recent years there have been instances of members of An Garda Síochána learning ISL and there have been initiatives to ensure the Deaf people are provided better access to Garda services.[71] However, this training is *ad hoc* and so the potential effectiveness of these measures is limited to those who have received training. AGS2 highlighted that there is a lack of general awareness within the service about Deaf issues. They went on to note that there was a lack of any formalised policy for engaging with Deaf people within the organisation:

> AGS2: "I do believe An Garda Síochána is sadly lacking in its disability awareness and that's not through lack of effort of the members, but just having concrete, written policies and learning practice."

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[66] See the Garda Information Card (*Fig 9.1*).
[67] The OLA and Article 8.1 of the constitution.
[68] Reiner *The Politics of the Police,* 4th edition (Oxford: Oxford University Press, 2010) at 120
[69] *supra* note 1 at 27.
[70] *ibid.*
[71] See Irish Deaf Society 'Blanchardstown/Cabra Gardaí learn ISL' (*Twitter* 08 June 2018) https://twitter.com/IrishDeafSoc/status/1005049893751226368 [date accessed 08 May 2020]. See also Kiernan 'Gardaí play their part in helping to make Portlaoise Ireland's first deaf friendly town' *The Leinster Express* (04 June 2019). See also 'Deaf people can deal with police using sign language' *The Law Society Gazette* (20 November 2019). See also 'Collaboration with An Garda Síochána and Trinity College Dublin to Pilot new service for Deaf community' available at https://interesourcegroup.com/2019/03/15/collaboration-with-an-garda-siochana-and-trinity-college-dublin-to-pilot-new-service-for-deaf-community/ [date accessed: 08 May 2020].

Here, while AGS2 expresses it from a disability perspective, they are stating that An Garda Síochána is not adequately prepared to interact with Deaf people. This could be garnered from the testimony of many Deaf interviewees. As will be explored shortly, Deaf4 stated that in their experience, Gardaí perceive Deaf people as 'stupid' and did not interact with Deaf people. It is possible that the lack of training and policies which AGS2 mentions has enabled the treatment that Deaf4 recounted.

In terms of substantive access, there is an interesting point to be raised from AGS2's words here. AGS2 is engaged in the creation of policy and practices for Deaf people interacting with An Garda Síochána. AGS2 favoured disability language to refer to the Deaf community. They explained their choice of wording as follows:

> AGS2: "The Deaf community – it's about definition. Is it disabled, is it a different culture? Well that's up to the Deaf community to decide. The Deaf community would probably get better access to human rights if it was defined as disabled."

AGS2 generally conflated being Deaf with being disabled throughout their interview and then justified this use of language this way. They favoured this language because they believed that disability constituted a more robust way for the Deaf community to get rights. This point of view is of course held within the Deaf community: that the language of disability is better for accessing human rights.[72] As discussed, many Deaf people identify as disabled. Yet a disability narrative is not favoured by all members of the Deaf community, and it is not the only identity that Deaf people have. No Deaf participant to this research identified as disabled, for example. For the police to suggest that a group should define their culture strategically, rather than in terms of expressing their internal identity, compounds rather than resolving the issue of misunderstanding identity. The overrepresentation of only one Deaf identity amongst those charged with creating policy has the potential to filter down and manifest in the paternalism experienced by Deaf3 and Deaf4:

> Deaf3: *"When the Garda arrived and realised that I was Deaf, there was no communication at all. He was chatting with the car in front and the people who had run into the back of me. He just gave me a pen and a piece of paper and said write down your name and address and never asked me what happened. He spoke to the*

[72] Darach Ó Séadhgha 'Motherfoclóir ISL Episode' (05 May 2021). https://www.youtube.com/watch?v=jsORJSesv48&t=1175s [date accessed: 05 May 2021].

people on either end but didn't speak to me at all. And for me, on that day, I was upset."

Deaf4: Gardaí think [Deaf people] are stupid, they see through you. They don't see you as an individual – they will speak to the hearing person that is with you.

Both Deaf3 and Deaf4 experienced being paternalised when their identity as Deaf was made known. I explore these instances of paternalism in greater detail in the next chapter, but for now it is notable to connect the emphasis from AGS2 on disability discourses and the paternalism that both Deaf3 and Deaf4 recounted. When there is a dominant disability narrative used to describe Deaf people within An Garda Síochána, there is the potential that 'disability' will be understood in the medical model context,[73] resulting in a paternalised view of Deaf people among members of the service.[74] AGS2 acknowledged in their interview that they have encountered outdated and harmful perceptions of Deaf people within An Garda Síochána. However an emphasis on disability language – even when that language is using a social or human rights model of disability[75] – can medicalise Deaf people according to Ladd,[76] bringing their identity back to a lack of hearing,[77] rather than a culture.[78] This has an effect on substantive access. While the Centre For Deaf Studies have been engaged with An Garda Síochána in developing policy, ultimately those in charge of policies are Gardaí. Deaf people are not permitted to become Gardaí.[79] And so there is no possibility of Deaf people actually being decision makers in this context.

Prof. Lorraine Leeson spoke of this work that the Centre For Deaf Studies at Trinity College Dublin has done in her interview:

LL: "We spent a full day down in [Garda Training College] with senior detectives and people from their law and policy unit, going through a mock witness statement, using their new protocols…They were so open. It's not the first time that we've done

[73] Degener 'The Human Rights Model of Disability' in Blanck and Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (London: Routledge, 2017) at 32, 33.
[74] *ibid.*
[75] Charlton *Nothing About Us Without Us: Disability Oppression and Empowerment,* (Los Angeles: University of California Press, 1999) at 8.
[76] *supra* note 25 at 15.
[77] *supra* note 31 at 53.
[78] *supra* note 25.
[79] Part of the entry requirements for An Garda Síochána includes a physical fitness test, which entail potential recruits listening for various sounds and conducting corresponding actions to those sounds. See *supra* note 57.

> something like that with Guards. But it's about how do you – they were very senior people, they were very experienced interviewers, they were very open to feedback. But how do you get it from that elite cohort if you like to your average person in a police station in…Donegal or West Cork. These are actually the places where you're more likely to see these stories [of ill-treatment of Deaf people] coming out."[80]

Here Leeson touches on a particular point of interest as it relates to police culture, as discussed in Chapter 2. In Reiner's assessment, pragmatism governs how police perceive innovation and changes to laws and policies. Among 'rank and file' offers, there is a "pragmatic, concrete, down-to-earth, anti-theoretical"[81] approach to policing. In this approach, Reiner notes that there is commonly a reluctance to "contemplate innovation, experimentation or research."[82] He references the "gulf" between "management cops" and "street wise" officers in terms of the isolation and solidarity as a feature of cop culture.[83] While upper levels of management may introduce or encourage policy changes, the belief in these changes does not always filter through to police on the ground. This is precisely the point Leeson makes – while upper management – the 'elite cohort' – at the Garda Training College were extremely receptive to their work, there is a disconnect with what is understood in 'rural stations' where the 'average person' interacts with police most often.

It is possible to map the literature on access to justice onto Leeson's assessment and cop culture literature. Substantive access measures among upper management which might include input from Deaf Organisations is met with reluctance from police pragmatism. That pragmatism is fuelled by a failure to tackle the societal perceptions of Deaf people as something deeper than 'disabled' because of the predisposition to stereotyping and the prevailing societal power structures which support this view[84] including those coming from Gardaí themselves (see AGS2). For Deaf people then, the attempts to achieve substantive access measures among the 'elite cohort' are rendered obsolete when they do not filter down to field officers who are most likely to encounter Deaf people in society.

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[80] Note that Leeson is referring to the Justisigns project, an EU research project aimed to explore issues related to Sign Language usage in legal settings. See http://www.justisigns.com/JUSTISIGNS_Project/About.html [date accessed: 15 January 2021].
[81] *supra* note 68 at 131.
[82] *ibid* at 132.
[83] *ibid* at 122.
[84] *ibid* at 121.

11.3.2 Judicial Training Practices

In continuing this discussion of substantive access in training practices, I am now addressing how judges are trained to interact with RML-users, and Irish-speakers and Deaf people in particular.

Firstly, there is no specific training that is provided to people who are appointed as judges in Ireland beyond annual, one-day conferences.[85] As such, there is no specific language training that is provided to new judges. Judges are appointed from the legal profession, either solicitors or barristers. During training to become a solicitor or a barrister, trainees complete mandatory Irish language classes,[86] just as with Garda recruits. Similarly, there is no other mandatory training provided in any other language. Those appointed as judges in Ireland must have worked for at minimum, ten years as either a barrister or a solicitor.[87] Therefore, the only mandated language training received by judges is that which is carried out at Kings Inns or the Law Society of Ireland when training as a barrister or solicitor, and this training will have occurred at minimum ten years prior to judicial appointment. The training in both institutions is explained as follows:

> The course in each case has the aim of enabling the identification through the medium of Irish of a legal service that is required and where appropriate facilitating the referral to a practitioner who is competent to conduct the case through the Irish language. The course provided by each body is not to be subject to examination. [88]

Two points emerge here. Firstly, these courses are not subject to examination. It is unusual that a required element of the training of a solicitor or barrister would not be subject to any type of assessment to determine competency or sufficiency. There is no way to ensure that the training has resulted in any level of competency in the absence of assessment and it shows that the training represents lip service, or box ticking, rather than actually ensuring that lawyers (and subsequent judges) actually have Irish. Secondly, there is acknowledgement that part of the training includes facilitating a referral to a more capable practitioner. This may be a useful skill, but there is also the possibility that it is preparing trainee lawyers to 'pass off'

[85] See https://aji.ie/supports/judicial-education/ [date accessed: 08 May 2020].
[86] Forde and Leonard, *Constitutional Law of Ireland* 3rd edition (Dublin: Bloomsbury, 2013) at para 3.30. See also https://www.kingsinns.ie/education/barristeratlaw-degree [date accessed: 08 May 2020].
[87] *supra* note 55. There is no additional training mandated for work as a judge.
[88] *supra* note 86.

or not deal with Irish-speaking clients. It does not instill a requirement that they be prepared to deal with cases in Irish.

This concern is compounded by consideration of the Law Society of Ireland Professional Practice Course I 2019: Legal Practice Irish Handbook.[89] Via this course, trainee solicitors learn basic terms and phrases to facilitate menial conversations in Irish. Legal Practice Irish is compulsory for all Professional Practice Course 1 (PPC 1) trainees,[90] irrespective of prior knowledge of Irish or lack thereof.[91] In each week of the classes, trainees are given a scenario to work with on various tasks (listening, answering questions, terminology, etc).[92] There are six specific scenarios,[93] focused on a different area of law.[94] In each scenario, trainees are presented with facts and a script detailing an interaction with a client who seeks to conduct their business in Irish. Of particular interest is the scenario in week one (see *Fig 10.2*)

In the Week 1 Scenario depicted in *Fig. 10.2*, a client who is a Jehovah's Witness (Ms. K) attends a solicitor's (aturnae) office. The client was given an emergency blood transfusion during childbirth and is seeking a remedy.[95] In the script, Ms K wishes to use Irish with the aturnae.[96] The aturnae is unable to provide a service in Irish.[97] Of particular interest is the line from Ms K is in response to the aturnae stating that their office does not provide Irish language services: 'Nach bhfuil ceart bunreachtúil agam mo chás a chur i nGaeilge?/*Don't I have a constitutional right to pursue my case in Irish?*'. Ms K then says 'Brón orm as mo ghlór a ardú/*I am sorry for raising my voice'* indicating anger about not being provided with an Irish-language service. Ms K arrives at the offices of the aturnae, demanding to have her constitutional right to speak Irish ahead of a serious infringement on their bodily autonomy and religious freedom. She is 'standing on the language right' as AGS1 noted above.

[89] Cited with permission from the Law Society of Ireland. Note that Gearóidín McEvoy has been an LPI teacher with the Law Society of Ireland since 2017.
[90] *Legal Practitioners (Irish Language) Act 2008*, S.2.
[91] Law Society of Ireland Professional Practice Course I 2019: Legal Practice Irish Handbook at 5.
[92] *ibid.*
[93] *ibid.*
[94] Including human rights, civil/criminal law, family law and conveyance, business and EU law, probate and tax and employment law.
[95] "I mí Mheán Fómhair 2006, tar éis ordú cúirte, tugadh aistriú fola do Ms K/*In September 2006, after a court order, Ms K was given a blood transfusion".*
[96] Translation: solicitor.
[97] "Tá faitíos orm nach ndéanann an oifig seo aon obair trí Gaeilge/I am afraid that this office does not do any work in Irish".

Fig. 11.2 Law Society Legal Practice Irish Training

Creatlach Scéil Seachtaine 1 (Week 1 Scenario)
Cás Choimhlint Cearta (A Rights Dispute Case)

I mí Mheán Fómhair 2006, tar éis ordú cúirte, tugadh aistriú fola do Ms. K, tar éis di thart ar 80% dá cuid fola a chailleadh i mbreith a páiste in Ospidéal na mBan sa Chom i mBaile Átha Cliath. Tamall roimhe sin chuir sí in aghaidh aistriú fola a fháil ó tharla go raibh sé in aghaidh a creidimh mar Fhinné Iáivé. Mar sin féin, d'éirigh leis an Ospidéal ordú cúirte éigeandála a fháil, a cheadaigh dóibh aistriú fola a thabhairt don bhean seo. Chuir said an argóint chun tosaigh go bhfaigheadh an bhean bás mura dtabharfaí aistriú fola di.

Sa chás seo, deir an t-ospidéal go bhfuil sé de chúram orthu cearta saoil na mná a chosaint, i ngeall ar an gcosaint a thugtar do chearta saoil sa Bhunreacht. Tá an argóint á dhéanamh freisin go bhfuil sé de chúram ar an Stát cearta saoil theaghlaigh na mná agus a páiste a chosaint.

Deir Ms. K go ndeachaigh an t-aistriú fola in aghaidh a cuid cearta faoin ECHR agus nár ghlac an t-ospidéal lena cearta chun diúltú do leigheas. Ar an ábhar sin creideann sí go ndearna an t-ospidéal ionsaí agus foghail ar a cuid cearta agus dá bhrí sin tá sí i dteideal cúitimh. Tagann Ms. K chuig do ghnólacht agus tugann do rúnaí isteach chuig d'oifig í.

Script:

Aturnae: Dia duit, tá an-fháilte romhat.

Ms. K: Go raibh maith agat as mé a fheiceáil chomh luath seo

Aturnae: Ná habair é. Fuair mé do litir ag tagairt do gach a tharla san Ospidéal Máithreachais. Céard ba mhaith leat a dhéanfainn?

Ms. K: Ba mhaith liom go gcuirfeá an dlí orthu as ionsaí agus foghail a dhéanamh orm agus táim ag iarraidh go gcloisfear an cás i nGaeilge.

Aturnae: Tá faitíos orm nach ndéanann an oifig seo aon obair trí Ghaeilge.

Ms K: Nach bhfuil ceart bunreachtúil agam mo chás a chur i nGaeilge?

Aturnae: Tá go deimhin! Ar mhaith leat go gcuirfinn i dteagmháil thú le haturnae atá in ann cás a dhéanamh i nGaeilge.

Ms. K: Ba mhaith go deimhin. Brón orm as mo ghlór a ardú – tá an-strus orm faoi láthair agus ní fhaigheann an páiste mórán codlata.

Aturnae: Ceart go leor. Tabharfaidh mé sonraí Kevin O'Hara & Co. duit Tá a chárta gnó agam anseo.

Ms. K: Go raibh míle maith agat.

Aturnae: Fáilte romhat. Tá súil agam go n-éireoidh leat. Go raibh maith agat as teacht.

Ms. K: Slán.

Aturnae: Slán.

She begins to shout for their rights when the aturnae simply admits their inability to conduct a case in Irish. This particular interaction creates a picture of a cantankerous Gael who stubbornly demands service in their language. The only antidote to this cantankerous Irish-speaker in this scenario is to pass them off onto a more capable colleague, but only where the passing-off is done *in* Irish. In fact, the major focus in this curriculum is on referral in Irish to another, more fitting colleague. Of the six weekly scenarios in the LPI Handbook 2019, five[98] involve a referral to another colleague or law firm better suited to the case. These referrals are done in Irish. This fulfils one element of S.2(d) of the *Legal Practitioners (Irish Language) Act 2008*. The Law Society has interpreted this requirement to train students to refer clients to more suitable lawyers as an obligation to provide a referral *in* Irish, even when the solicitor does not actually speak Irish, rather than just facilitate a referral in English. I argue that this training furthers a negative perception of Irish-speakers: Trainees must learn how to refer a client to an Irish-speaking colleague in Irish – even when they do not speak Irish or practice in it – because the angry, cantankerous Irish-speaker will not accept being spoken to in English. It must be noted that there is a more in-depth Irish language training course available at the Law Society: Advanced Legal Practice Irish. This course is not compulsory and available for trainees who wish to be certified to practice in Irish.[99] Qualified solicitors are then added to the Irish Language Register.[100] There is no requirement that judges, or that any judge, appointed in Ireland come from this list, or the corresponding list of barristers competent to conduct business in Irish.[101] Thus between the distance since language training and the lack of additional training there is no guarantee that judges will be competent to conduct proceedings in Irish.

In respect of the level of competency in Irish among judges, there was conflicting attitudes from Dlíodóir1 and Dlíodóir2. Dlíodóir1 was confident that Irish usage was commonplace within the Courts:

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[98] Week 1 Scenario (cited above), Week 2 Scenario (related to civil/criminal law), Week 3 Scenario (a family law and conveyance issue), Week 4 Scenario (a business and EU law issue) and Week 6 Scenario (an employment law issue).

[99] See https://www.lawsociety.ie/Find-a-Solicitor/Clar-na-Gaeilge/Ardchursa-Cleachtadh-Dli-as-Gaeilge/ [date accessed: 15 March 2021]. Note that I am also involved in the teaching of this module.

[100] Available at: https://www.lawsociety.ie/globalassets/documents/findasolicitor/clar/clarnagaeilge-irishlanguageregister.pdf [date accessed: 01 July 2020].

[101] Included on the Law Library of Ireland's website is a 'Find a Barrister' search database where it is possible to search for barristers based on language. 'Irish (fluent)' is included in the dropdown menu for 'Additional Languages' as a search criteria. See https://www.lawlibrary.ie/members/search.aspx [date accessed: 24 March 2021].

Dlíodóir1: *"Every day that I am in the court, I meet people and I speak in Irish - maybe there is not a lot of cases happening through Irish, but every day I meet with practitioners, lawyers, barristers, judges. It would surprise you. Every day in the court, I speak in Irish."*

By comparison, Dlíodóir2 was more pessimistic about the availability of judges with Irish:

Dlíodóir2: *"There is a lack of judges available anyway. There used to be a time where maybe 6 of the judges in the High Court had Irish. Now, only 3 of them speak it. Including the President. And one of them, the [judge] is involved in matters of family law for the most part."*

It is unclear from these two accounts, whether there is availability of judges competent in Irish or not. As noted in Chapter 10, Gael5 also recalled doubt about the judge's capacity to comprehend their proceedings. Gael5 was confident that the judge appointed to oversee their case could not speak Irish. This example shows that in spite of laws compelling the courts to provide for an accused to be heard in Irish, the practical application of that right is lacking.[102] This was the reason that the first Coimisinéir Teanga stepped down from his role. As argued above, the basic Irish language training for solicitors presents Irish-speakers in a negative, cantankerous light. The training cannot be said to take the interests Irish-speakers into account effectively,[103] and so there is a lack of substantive access.

As for other languages or Deaf awareness, no information could be found about specific and mandated training for other language or minority groups for legal practitioners, or judges. There is no such legislative requirement for training in ISL or Deaf Awareness.[104] That being said, the Law Society of Ireland recently provided pilot training of basic ISL to trainees,[105] as well as a Continuous Professional Development (CPD) training course on "Irish Sign Language in a Legal Setting",[106] both on an optional basis. This training appears to operate in conjunction with the Deaf community,[107] and so there has been an effort to meet substantive access measures. For the CPD course, it is stated that in addition to learning basic ISL,

[102] The OLA and *Legal Practitioners (Irish Language) Act, 2008,* S.2.
[103] *supra* note 1 at 27.
[104] There is no requirement under the ISL Act that those in the CJS be trained in ISL.
[105] 'Sign language course a first for Law School' *Law Society Gazette* (05 August 2020).
[106] Available at https://www.lawsociety.ie/globalassets/documents/lspt/2020/s2059_brochure_isl-in-the-legal-profession-an-introduction.pdf [date accessed: 19 January 2021].
[107] Where the training for both courses is offered by Patrick Matthews of the Centre for Deaf Studies at Trinity College Dublin.

participants will also learn "about the Deaf community, Deaf culture and Deaf people as a linguistic minority group."[108] It would seem that there is potentially a symbolic access element here, to at least equip availing solicitors with an understanding of the socio-economic realities of Deaf people and the societal barriers which they face.

11.4 Conclusion

Substantive access must ensure that laws and policies which affect marginalised people are mindful of the realities of those people. As such, a key goal of substantive access measures is that marginalised people be involved in the creation of laws and policies which affect them. From this chapter, I have found that legislative and training and policy measures, designed to serve the Irish-speaking and Deaf Communities do not effectively reflect the needs of those communities. Again, the research presented in this chapter represents a new contribution to the field of access to justice scholarship, in expanding its application to RML-users and their experiences of substantive access in the CJS and the right to a fair trial.

The ISL Act, while not in force long enough to have been tested effectively at the time of writing, lacks substantive access. Although there was initial involvement from the Deaf community, the final version of the Act was "severely curtailed"[109] and constituted "a great deal of compromise"[110] on the measures that were initially important to the Deaf community. Similarly, the OLA lacks teeth to actually hold effective and enforceable rights for Irish-speakers. This has played out in the resignation of the Coimisinéir Teanga and the failure of the OLA to actually impact the experiences with Gardaí which Gael participants relayed.

In terms of teaching policies, again, inclusion of affected groups has either not been sought in the creation of syllabi, or diluted to such a degree that it has not resulted in substantive access. I have found that this has allowed for the perpetration of harmful stereotypes – such as a medicalised deaf person or a cantankerous Gael – which will be explored further in the next two chapters.

Ultimately the failure of substantive access measures to actually deliver substantive access can be rooted back to a lack of symbolic access. I argue that law and policy makers cannot

[108] Available at https://www.lawsociety.ie/globalassets/documents/lspt/2020/s2059_brochure_isl-in-the-legal-profession-an-introduction.pdf [date accessed: 19 January 2021].
[109] *supra* note 11 at 25.
[110] Prof. Lorraine Leeson interview, above.

provide effective substantive access when they lack the understanding of the realities of marginalised people which accompanies symbolic access. Substantive access examples herein, such as including organisations in law and policy making have all been diluted down and eventually been rendered ineffective and tokenistic. I will discuss this reality in the next two chapters. The first of these considers how participants experienced their perceived or external identity as they went through the CJS and the second considers how this fit with their internal identity. Through this analysis the issues of symbolic access will be addressed.

Chapter 12 – Symbolic Access and the External Identity: The Slíbhín and the Créatúr

12.1 Introduction

In the previous chapters I explored how Irish-speaking and Deaf participants experienced procedural and substantive access in the CJS.[1] I discussed participants' experiences under the minimum standards of the right to a fair trial. These experiences are of concern, and affected the participants in their interactions with the CJS.

It was clear from the research that a strict view of how participants experienced the minimum standards of the right to a fair trial would ineffectively tell their stories. In most cases, the issues of contention for participants went beyond the right to a fair trial. The major concerns went beyond substantive access and procedural access. As such, in this chapter and the next, I discuss how participants' experiences related to symbolic access.[2] Such was the volume of instances which related to symbolic access, that it has been necessary to divide the discussion into two chapters. To reiterate, symbolic access, according to Flynn, includes a:

> …society in which, due in part at least to its laws and justice system, individuals from marginalised communities are fully included and empowered to participate as equal citizens…[3]

[1] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 15 and Bahdi, *Background Paper on Women's Access to Justice in the MENA Region* (International Development Research Centre (IDRC), Women's Rights and Citizenship Program (WRC) and the Middle East Regional Office (MERO), Middle East and North African (MENA) Regional Consultation, 9–11 December 2007, Cairo, Egypt at 27.

[2] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 16.

[3] *Ibid.*

In this chapter, I explore the external identity of the research participants,[4] as it was made known to them by operatives in the CJS. This external perception of identity adds a layer of understanding to how RML-users can be perceived in the CJS, how they experience the CJS and how their identities and language impact their experiences.

I have identified two tropes from the data experienced by participants which fundamentally shape their experiences. I present these tropes in this section. Exploring these tropes provides context for how participants interacted with the CJS. These tropes are the "créatúr" and the "slíbhín", both which are explained in detail in this chapter. The créatúr is applicable to Deaf people and represents an outdated, paternalistic view of Deaf people when they appear before the CJS. The slíbhín is applicable both to Irish-speakers and Deaf people and represents a view of an RML-user as a malicious troublemaker. I identified and named two further sub-tropes to provide context for Irish-speakers under the slíbhín trope: the "Good Gael", the "Bad Gael". They show how RML-users can be viewed when they interact with the CJS and how this view can impact access to justice.

In this section I first discuss the meaning of the "créatúr" and the "slíbhín" tropes as I have developed and defined them. I then present the tropes as they appeared in interviews with participants, and show how these tropes impacted their engagement with the CJS. In turn, I then explore how these tropes relate to, and interact with, existing scholarship on identity, cop culture and judicial bias. Combining these strands of literature deepens the understanding of how those subject to these tropes can face barriers to accessing justice. Finally, I position these tropes in the context of access to justice, and show how their existence in the interactions interviewees had with the CJS is indicative of a lack of symbolic access.[5]

12.2 What is a Trope?

Firstly, it is important to highlight what I mean by a 'trope'. In its ordinary meaning, a trope represents a recurring theme or motif. Discussions of tropes are commonly used in media

[4] Goffman, *The Presentation of Self in Everyday Life,* (London: Penguin Books, 1969) at 14.
[5] *supra* note 2.

such as film,[6] literature,[7] and television,[8] but can also have a wider, societal application. In media, characters' identities can be written or depicted in terms of a trope, such as the damsel in distress,[9] the chosen one,[10] or the anti-hero.[11] Such tropes can also perpetuate harmful stereotypes, particularly when attached to marginalised people. These tropes are not limited to pop culture or media, and often appear as a known-aboutness about a certain group in society.[12] For example, tropes about Black people can perpetuate racial stereotypes, such as the 'angry Black woman'[13] and tropes about transgender people as predators can add to harmful known-aboutness of these groups.[14] As I understand them, tropes can be a known-aboutness or named stereotype about a marginalised group. In this research, a trope represents a common, recurring external identity perceived about interviewees.[15] I define the two tropes (the créatúr and the slíbhín) now, before discussing the two sub-tropes (the "Good Gael" and the "Bad Gael") as they applied to Gael participants. These tropes represent an original contribution of this work which enables deeper understanding of how the CJS is experienced by RML-users.

12.3 Tropes: Defining the "Créatúr" Trope

The first trope I developed is the 'créatúr'. This trope was applicable to Deaf participants and is rooted in paternalism and the medical model of disability.[16] As discussed earlier, the term 'disability' has developed over the years and can have different meanings.[17] The medical model of disability presents disability in a paternalised, medicalised lens where disability constitutes an ailment to be fixed.[18] The social model is the view that disability is a product of society, where disabled people are negatively impacted by a world which fails to adapt to

[6] See https://www.nfi.edu/movie-tropes/ [date accessed: 04 May 2021].
[7] Cuddon and Preston, *The Penguin Dictionary of Literary Terms and Literary Theory* 4th ed (Penguin Books 1999).
[8] Pincus-Roth 'TV Tropes identifies where you've seen it all before' *Los Angeles Times* (28 February 2010).
[9] https://tvtropes.org/pmwiki/pmwiki.php/Main/DamselInDistress [date accessed: 11 May 2021].
[10] https://tvtropes.org/pmwiki/pmwiki.php/Main/TheChosenOne [date accessed: 11 May 2021].
[11] https://tvtropes.org/pmwiki/pmwiki.php/Main/AntiHero [date accessed: 11 May 2021].
[12] Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New York: Simon and Schuster, 1963) at 65
[13] Harris-Perry, *Sister Citizen: Shame, Stereotypes, and Black Women in America* (Yale University Press, 2011)
[14] See Feder 'Disclosure: Trans Lives on Screen' (Netflix, 19 June 2020). See also Levi and Barry, 'Transgender Tropes and Constitutional Review' (2019) 37 Yale Law and Policy Review 589
[15] *supra* note 4 at 14.
[16] Degener 'The Human Rights Model of Disability' in Blanck and Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (London: Routledge, 2017) at 32, 33
[17] See Chapter 3.
[18] *supra* note 16 at 32, 33.

their needs.[19] And there is the human rights model, where disabled people are positioned as holders of rights and ought to be placed on an equal footing with others.[20] Because of the varied understandings which can be attributed to the word 'disabled', there is no one meaning immediately evident.

Therefore, I use the term "créatúr" to describe participants' experiences being viewed through a paternalised, medicalised lens. Créatúr is an Irish term, but also appears in Hiberno-English. The *Ó Dónaill Foclóir Gaeilge-Béarla* Irish to English dictionary lists créatúr as the following:

> **créatúr**, *m*, (*gs*.& *npl*. **úir**, *gpl*. ~).Creature. **1.** Created thing. **Guí ar gach** ~, to pray for all creatures. **Mar atá Dia lena chréatúir**, as God is to His creatures. **2.** (As expression of sympathy) **An ~, an ~ bocht**, the poor thing. **Na créatúir atá inamhuinín**, the unfortunate people who depend on him. **Ba mhaith é, an ~**, he was good, the poor fellow. **3.** (Contemptuously) **Níl ann ach ~(gan mhaith),** he is only a(good-for-nothing) creature. (*Var*:**créatúir** *m, pl.* **créatúireacha**)[21]

The term is inherently paternalistic in its usage. That same paternalism can be seen on the online dictionary search engine focloir.ie, where the entry for créatúr includes the following definitions; bleeder; bugger; creature; critter; lamb; thing; unfortunate; wretch.[22] The phrase 'créatúr bocht soineanta é' is translated as 'he is only a babe' on focloir.ie,[23] but it might be more directly translated to 'he is a poor innocent creature/wretch'.[24] The term is also found in Hiberno-English, where it is used to similar effect. *A Dictionary of Hiberno-English: The Irish Use of English* has entries for both 'créatúr' and 'creature'. Both are defined as "a term of endearment", with "Come here you poor little créatúr, who did that to you?" and "The poor creature, she's all alone now" used as example sentences in both instances.[25]

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[19] Charlton *Nothing About Us Without Us: Disability Oppression and Empowerment,* (Los Angeles: University of California Press, 1999) at 8.

[20] McNamara 'The Criminal Investigation of Suspects with Disabilities: The Impact of the UN Convention on the Rights of Persons with Disabilities' (PhD thesis, Dublin City University, 2018).

[21] Available at https://www.teanglann.ie/en/fgb/créatúr [date accessed: 09 September 2020]. Emphasis in original.

[22] Available at https://www.focloir.ie/en/dictionary/ei/créatúr [date accessed: 09 September 2020].

[23] *ibid.*

[24] Where the word 'bocht' means 'poor', 'impoverished' or 'pitiful' and 'soineanta' means 'innocent', 'sheltered' or 'naïve'. See https://www.focloir.ie [date accessed: 09 September 2020].

[25] Dolan (ed) *A Dictionary of Hiberno-English: The Irish Use of English* 2nd ed. (Dublin: Gill and Macmillan, 2004) at 66.

There is a distinct element of pity and paternalism present in the term 'créatúr'. In a sense, the medical model of disability is effectively captured by 'créatúr' because it is inherently paternalistic. 'Créatúr' has not had the same evolution or reclamation that 'disabled' has had in English: instead it remains rooted in paternalistic notions of some poor wretch and the medical model of disability. For this research, I have developed and defined 'créatúr' as follows:

> **Definition:**
> Créatúr, *noun, singular/*créatúir, *noun, plural*: a description referring to individuals who are seen as pitiful because of their apparent affliction. They are viewed through a paternalistic lens. They are observed as lacking capacity, childlike and cannot be held accountable for their actions.

Aspects of the créatúr trope can be seen in literature on Deaf Studies, as alluded to in Chapter 3. Lane writes specifically about the perception of deafness as a disability or an infirmity: "In the hearing stereotype, deafness is the lack of something, not the presence of anything. Silence is emptiness."[26] Here, he is noting that for most hearing people, being Deaf is seen as an affliction, rather than a cultural identity.[27] A sense of pride in being Deaf is inconsistent with this trope, as deafness is a stigma to be overcome.[28] As discussed not all deaf people perceive themselves and their community in light of disability discourse.[29] However, the more dominant hearing world views Deaf people as créatúir. The trope is more visible than Deaf internal identities. Charlton refers to this dominant paternalism in his work on disability:

> Paternalism lies at the center of the oppression of people with disabilities. Paternalism starts with the notion of superiority: We must and can take control of these "subjects" in spite of themselves, in spite of their individual will, or culture and tradition, or their sovereignty. The savages need to be civilized (for their own good). The cripples need to be cared for (for their own good). The pagans need to be saved (for their own good). Paternalism is often subtle in that it casts the oppressor as benign, as protector. The

[26] Lane *The Mask of Benevolence: Disabling the deaf community* (San Diego: Dawn Sign Press, 1992) at 7.
[27] See Chapter 3, and in particular, Ladd, *Understanding Deaf Culture : In Search of Deafhood*, (Clevedon: Multilingual Matters, 2003).
[28] *ibid* at 37.
[29] *Ibid.*

relation between ideology and power is expressed as natural to justify relations of oppression.[30]

The subject to be saved and cared for here, is the poor, deaf créatúr, underpinned by a sense of paternalism. I now explore how this trope was evident in the experience of participants.

12.3.1 The "Créatúr" Trope in Operation

While generally describing the experiences of Deaf people, Deaf4 stated that harmful perceptions of deafness still exist in society. In demonstrating the existence of the créatúr trope in the CJS, Deaf4 reference how Deaf people are generally perceived by police:

> Deaf4: Gardaí think [Deaf people] are stupid, they see through you. They don't see you as an individual – they will speak to the hearing person that is with you…You can see it in their [Gardaí] body language – Deaf people are really good at reading body language. They [Gardaí] talk about you like you are not in the room. There is a lack of common decency.

There are two issues which point towards the créatúr trope here. Firstly, Deaf4 was adamant that Gardaí think Deaf people are "stupid". They perceived that for police, deafness was connected to intelligence, or lack thereof. Secondly, Deaf4 noted that Gardaí devalue Deaf people's autonomy, preferring to ignore them or defer to a hearing person present. Deaf4 presented both of these issues as a 'lack of common decency'. They showed that because they are Deaf, they have been paternalised in interactions with police, indicating the créatúr trope.

Deaf3 recalled a distressing road traffic incident. When a Garda arrived on the scene, the interviewee was upset by the limited communication:

> Deaf3: *"When the Garda arrived and realised that I was Deaf, there was no communication at all. He was chatting with the car in front and the people who had run into the back of me. He just gave me a pen and a piece of paper and said write down your name and address and never asked me what happened. He spoke to the people on either end but didn't speak to me at all. And for me, on that day, I was upset."*

[30] *supra* note 19 at 53.

From their account, the créatúr trope positioned Deaf3 as someone who could not be communicated with, and whose witness account was not valued. Additionally, the differential treatment which Deaf3 received was jarring and evident and left them feeling upset. The Garda did not treat them the same as the other participants to the incident. The realisation that Deaf3 was Deaf was what triggered the lack of communication (*"When the Garda arrived and realised that I was Deaf, there was no communication at all"*). Deaf3 connected the negative experience they had to the communication of their identity, and how that identity was subsequently perceived externally by the Garda.

The créatúr trope is also present in Deaf5's experience. For Deaf5, rather than being ignored they were granted discretion which they suspected was connected to paternalism:

> Deaf5: "…but he [Garda] turned around and said 'Do you realise your engine doesn't sound good?!' And I said 'No, I am Deaf, I wear two hearing aids!' [Laughter] And so he said 'Oh! Ok!' So I don't know if he felt sorry for me and he didn't process [the fine] – I don't know! But I do know, at the time, I was – I knew I was wrong [knew they were evidently breaking the law]"
>
> *Fieldnotes:* In imitating the Garda, Deaf5 initially showed that the Garda was serious and solemn in their words: 'Do you realise your engine doesn't sound good?!' However, their tone changed to surprise, losing that seriousness when imitating the realisation that Deaf5 was Deaf: 'Oh! Ok!'

Here, Deaf5 reported that the Garda used their discretion and did not issue a fine. It was alluded to that the Garda's tone and mood changed once they realised that Deaf5 was Deaf. The use of discretion may well be an exercise in paternalism as Deaf5 suggested, that the Garda took pity on them and did not pursue a fine. Deaf5 was of course pleased with this outcome as they did not incur a fine or penalty. But if the Garda used his discretion because they pitied Deaf5, or did not see them as an autonomous person capable of committing crime, then they have undermined Deaf5's autonomy. The view of Deaf5 as créatúr and worthy of pity hindered their ability to fairly police a situation which would have warranted a penalty were Deaf5 hearing/not a créatúr.

As shown in Chapter 11, in discussing the Deaf community, AGS2 repeatedly referred to the Deaf people in terms of disability and 'special needs', favouring this language over that of

culture and identity. This view is shared by some members of the Deaf community.[31] It shows the necessity to compromise the internal, culturally Deaf identity as discussed in Chapter 3,[32] in favour of the external identity.[33] In addition this language can have a negative impact on those who are only familiar with a medical model of disability.[34] AGS2 was not implying a créatúr trope in their language. In fact, it was clear that AGS2 was inferring empowerment, and possibly the human rights model in their use of 'disability'.[35] However that this empowered understanding of disability was not necessarily received by other members of the service:

> AGS2: "I sometimes have come across the misuse of words and poor use of words around deafness and disability [within the Gardaí]."

AGS2 stated that they had experienced members of An Garda Síochána using the term 'deaf and dumb' to describe Deaf people. This language comes from an inherently medicalised view of Deaf people, where their deafness is perceived as an impairment to be corrected.[36] They showed that the harmful créatúr trope persists among members of An Garda Síochána and is applied to Deaf people.

The créatúr trope appeared frequently in the data. It showed how Deaf participants were frequently met with outdated, harmful perceptions, and how those perceptions coloured their interactions with the CJS (specifically with the police). Though there have been developments in disability discourse, those developments were not experienced by participants. The participants' experiences mirrored the literature which shows that being Deaf is seen as a stigma, rather than as an empowered identity.[37]

In terms of symbolic access then, the persistence of these perceptions within the CJS show that there is still progress to be made in terms of access to justice. Where Deaf people are paternalised and stigmatised because of their cultural and linguistic identity, they are blocked

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[31] Darach Ó Séadhgha 'Motherfoclóir ISL Episode' (05 May 2021) https://www.youtube.com/watch?v=jsORJSesv48&t=1175s [date accessed: 05 May 2021]
[32] Leigh, et al, *Deaf Culture: Exploring Deaf Communities in the United States* (San Diego: Plural Publishing, 2018) at 8.
[33] *supra* note 4 at 14.
[34] *supra* note 16 at 32, 33.
[35] Degener 'A New Human Rights Model of Disability' in Cera R, Della Fina V and Palmisano G (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing: Imprint, 2017) at para 2.4.
[36] *supra* note 26 at 7.
[37] *supra* note 27 at 37.

from being empowered, valued members of society and prevented from fully participating in the process.[38]

12.4 Defining the "Slíbhín" Trope

The second trope which I developed from interviews related to perceptions of deviance and troublemaking. This trope stems from a perception of the other as deviant or malicious, as discussed in the Chapter 2.[39] Othered individuals, and people or groups displaying their othered characteristics are often perceived negatively.[40] Language usage can constitute this othered behaviour.[41]

I am calling this trope the "slíbhín". Again, I am using an Irish/Hiberno-English term, which I found more accurately fit the trope inferred. *Ó Dónaill Foclóir Gaeilge-Béarla* defines 'slíbhín' as follows:

> *m.* (*gs.* **~,** *pl.* **~í**). Sly person."[42] Focloir.ie defines 'slíbhín' as 'serpent' or 'sneak' and provides the phrase 'the sly dog' as a translation for 'an slíbhín'.[43]

Just as with 'créatúr', 'slíbhín' has entered Hiberno-English lexicon. In *A Dictionary of Hiberno-English: The Irish Use of English,* the anglicised spelling 'sleveen' and 'sleeveen' are provided. 'Slíbhín' is also given. It is defined therein as "a sly person; a trickster; a smooth-tongued rogue; a toady; a crooked person". An example sentence is given as "Keep away from that sleveen!"[44] The term is distinctively negative, conjuring an image of untrustworthiness, deviance and malice. For this research, I developed and defined the 'slíbhín' as follows:

Definition:
Slíbhín, *noun, singular*/slíbhíní, *noun, plural:* a descriptor which indicates a sneaky, troublemaking and untrustworthy person. The slíbhín is a sly person who delights in causing problems and making mischief. Their behaviour/language use is disingenuous and an attempt to evade justice.

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[38] *supra* note 2 at 16.
[39] See Jefferson 'The Racism of Criminalization: Policing and the Reproduction of the Criminal Order' in Gelsthorpe (ed) *Ethnic Minorities and the Criminal Justice System: 21st Corporal Roundtable Conference, 1992* (Cambridge: Cambridge Institute of Criminology, 1993) at 19
[40] Leary, 'Passing, Posing and Keeping it Real' 1999 Vol 6(1) Constellations 85 at 85
[41] Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge: Cambridge University Press, 1997) at 21
[42] Available at https://www.teanglann.ie/en/fgb/sl%C3%ADbh%C3%ADn [date accessed: 09 September 2020]
[43] With the singular definite article 'an'. Available at https://www.focloir.ie/en/dictionary/ei/sl%C3%ADbh%C3%ADn [date accessed: 09 September 2020]
[44] *supra* note 25 at 251.

A multitude of reports under the ECRML show that using othered languages is perceived as deviant, or slíbhín behaviour. In a 2001 report from the Committee of Experts for the ECRML, it was noted that Swedish-speaking Finns can experience damaging tropes in their engagement with the justice system:[45]

> [Swedish-speaking Finns who engage with the court] felt constrained to give up using Swedish, or requesting to use Swedish, because it created an atmosphere which is not always very positive in judicial proceedings, the individual having the feeling that he or she may be considered as a 'trouble maker'[46]

The Committee of Experts has found evidence of this perceived deviance in Germany,[47] Slovenia,[48] Austria,[49] Ukraine,[50] Bulgaria,[51] Croatia,[52] Czech Republic,[53] Romania,[54] and Spain.[55] García-Sánchez and Nazimova note in their research that a display of multilingualism in a typically monolingual space can give rise to a presumption of deviance.[56] This slíbhín trope can also be seen in discourses where language and a national or regional identity are intertwined, particularly where those national identities represent secessionist views. Irish-speaking in Northern Ireland is inherently connected to Nationalist politics,[57] which is then

[45] A minority language group in Finland.
[46] European Charter for Regional or Minority Languages Report of the Committee of Experts on Finland, ECRML (2001)3 at para 76.
[47] European Charter for Regional or Minority Languages Report of the Committee of Experts on Germany, ECRML (2006)1 at para 16.
[48] European Charter for Regional or Minority Languages Report of the Committee of Experts on Slovenia, ECRML (2014)5 at para 202.
[49] European Charter for Regional or Minority Languages Report of the Committee of Experts on Austria, ECRML (2018)38 at para 31.
[50] European Charter for Regional or Minority Languages Report of the Committee of Experts on Ukraine, ECRML (2017)97 at para 28.
[51] European Charter for Regional or Minority Languages Report of the Committee of Experts on Bulgaria, ECRML (2016)3 at para 159.
[52] European Charter for Regional or Minority Languages Report of the Committee of Experts on Croatia, ECRML (2019)18 at para 48.
[53] European Charter for Regional or Minority Languages Report of the Committee of Experts on Czech Republic, ECRML (2015)6 at paras 44, 68, 111.
[54] European Charter for Regional or Minority Languages Report of the Committee of Experts on Romania, ECRML (2012)3 at para 435.
[55] European Charter for Regional or Minority Languages Report of the Committee of Experts on Spain, ECRML (2012)5 at para 536.
[56] García-Sánchez and Nazimova, 'Language Socialization and Immigration in Europe' in Duff PA, *Language Socialization* 3rd ed. (Springer Berlin Heidelberg, 2017) at 447.
[57] O'Reilly 'Irish language, Irish Identity: Northern Ireland and the Republic of Ireland in the European Union' in O'Reilly (ed) *Language Ethnicity and the State. Volume 1: Minority Languages in the European Union,* (Hampshire: Palgrave, 2001).

often demonised.[58] Spanish-speakers in the US were repeatedly construed as deviant and dangerous by former President Trump.[59] Language is often used in these context as a proxy for other forms of bias: racial, gendered, cultural, socio-economic, political or ethnic bias, for example.[60] As noted in Chapter 10, both Phelan and Waterhouse have discussed biases from the court in respect of non-traditional language users .[61] Recall that in her interview, Dr Phelan referenced non-traditional language users being disbelieved about their need for an interpreter for court, and the assumption that a request for an interpreter was rooted in malice and deviance. Deviance, it would seem, can be the external identity imposed on both traditional and non-traditional language users.

The slíbhín trope is visible in literature on policing too. Chan states that the troublemaker trope is a relatively common practice in policing.[62] Police often view othered persons as beyond normal, and therefore, troublesome: "those who deviate from society's images of middle-class respectability and conformity are often considered by police as 'trouble'".[63] In the context of this research, the deviation from what is standard or "normal" constitutes a person who uses another language. Reiner states that suspicion is another characteristic of policing.[64] It is a constant aspect of a police officer's job and something "that cannot be readily switched off."[65] I am arguing that through this suspicion, the slíbhín trope emerges. When

[58] Ní Aodh 'Arlene Foster on Sinn Féin: "If you feed a crocodile it will keep coming back for more"' *TheJournal.ie* (06 February 2017). Available at: https://www.thejournal.ie/arlene-foster-gerry-adams-3225834-Feb2017/ [date accessed: 08 April 2020].

[59] Mendoza-Denton 'We Latin Americans Know a Messianic Autocrat When We See One' in McIntosh and Mendoza-Denton (eds), *Language in the Trump Era: Scandals and Emergencies* (Cambridge University Press 2020) at 250.

[60] See The Vocal Fries Podcast 'Borderlands/La Frontera' (13 November 2017), comments by Dr Megan Figueroa. Transcript available at https://vocalfriespod.com/2018/09/14/transcript-6-rez-english/ [date accessed: 22 January 2020]. See also The Vocal Fries Podcast 'Rez English' (2 October 2017), comments by Dr Megan Figueroa. Transcript available at https://vocalfriespod.com/2018/09/14/transcript-6-rez-english/ [date accessed: 22 January 2020]. Dr Figueroa states that language is often used for other forms of discrimination, such as racism, xenophobia etc. Similarly in Dr Carrie Gillon says that language discrimination can also be used as a proxy for sexism by judging speech characteristics commonly attributed to women in The Vocal Fries Podcast 'Uppity Women' (15 July 2017), comments by Dr Carrie Gillon. Transcript available at https://vocalfriespod.com/2018/09/10/transcript-1-uppity-women/ [date accessed: 22 January 2020].

[61] See Phelan 'Legal Interpreters in the news in Ireland' 2011 Translating and Interpreting available at https://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=274790866 [date accessed 02 October 2019] and Waterhouse, *Ireland's District Court: Language, Immigration and Consequences for Justice* (Manchester University Press 2014) at 48.

[62] *supra* note 41 at 41.

[63] *ibid.*

[64] Reiner *The Politics of the Police,* 4th edition (Oxford: Oxford University Press, 2010) at 121, 122.

[65] *ibid* at 121.

police are suspicious of the individual's language usage, having not initially anticipated it,[66] they perceive it – and the individual using that language – to be deviant or troublesome.

The slíbhín trope can be applied to Irish-speakers, ISL users, or other non-English language users,[67] which I address now. However, I also have broken down this slíbhín trope further in respect of specific sub-tropes which arose in interviews with Irish-speakers. I define the "Good Gael" and the "Bad Gael" below. These sub-tropes reflect broader societal attitudes of what it means to speak Irish and how speakers are perceived in different contexts.

12.4.1 The "Slíbhín" Trope in Operation

Deaf1's experience with Gardaí demonstrates the perception of the "Slíbhín" in action:

> Deaf1: "*[the Garda] took me and put my arms behind my back and I couldn't, I was saying 'I'm Deaf, I'm Deaf!' and he took me and he was kind of [interpreter clarifies if interviewee means they were walking or in the car] So he had me like this, with my arm squeezed behind my back and was going to bring me to the station. And then [he] pushed my head up against a fence as well. And I wasn't saying anything and he started doing this to me [motions lightly tapping the chin, in a condescending way] patronisingly like [he was] saying 'come on, talk!' and I was saying 'I'm Deaf! I'm Deaf, I can't talk'…"*
>
> *Fieldnotes*: Deaf1 indicates that the Garda was sceptical about their deafness and that they were being mocked in this interaction.

Deaf1's account suggested that the Garda either did not believe they were Deaf or did not understand the realities of being Deaf. The Garda was patronising and incited Deaf1 to speak. This was a particularly violent encounter, where physical force was used on Deaf1. In addition to the violence itself, this also had the effect of gagging Deaf1, impacting their ability to sign and communicate. Deaf1 was not treated with dignity. Their account shows that the Garda possibly perceived them as a slíbhín, unworthy of respect. The possible perception that Deaf1 was pretending to be Deaf was sufficient to allow the Garda to apply the slíbhín trope and use force as a result. This indicates a possible failure of the attitude test,[68] mentioned in Chapter

[66] *supra* note 39 at 19.
[67] *supra* note 41 at 21.
[68] Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* (New York: Russell Sage Foundation, 1981) at 196.

2, whereby Deaf1 did not behave in a way that the Garda anticipated,[69] or that was disrespectful,[70] and they were duly punished for that behaviour. Police property was also explored as a concept in Chapter 2 and it is suggested that this interaction indicates that the slíbhín may constitute police property.[71]

Disbelieving Deaf people about being Deaf arose in other interviews too:

> Deaf5: "People find that very hard to believe because I speak very well."

Deaf5 noted generally that they were often disbelieved about being Deaf. The connection to speaking 'very well' possibly indicates a known-aboutness of Deaf people that anticipates that they do not speak,[72] or at least that they do not speak 'very well'. In contradicting this known-aboutness, Deaf5 is met with disbelief, which has the potential to engage the slíbhín trope as their external identity.[73]

> Lawyer2: "[it was suggested] that 'your client understands everything. [The client is] lip reading from across the room' All of this sort of stuff."

In this instance, there was a suggestion to Lawyer2 that their Deaf client was faking being unable to comprehend proceedings in order to game the system. Lawyer2 did note that their client looked like a 'normal'[74] person, with no distinguishing characteristics that might indicate that they were Deaf, and that this was likely the cause for such allegations. Again, there is a known-aboutness element here for consideration.[75] Lawyer2 indicated that there was an expectation that being Deaf would be visible or evident in some way, and when their client did not match that expectation, their deafness was called into question. Again, this is similar to the experiences described by Phelan and Waterhouse,[76] in respect of non-traditional language users in Irish courts, which would suggest that a distinction between traditional and non-traditional language users (as per the ECRML) in terms of their interactions with the CJS is possibly arbitrary.

Deaf people were not believed about being Deaf and this gave rise to an assumption that there was malice in their claims about being Deaf. The slíbhín trope was applied to them when

[69] *supra* note 39 at 19.
[70] *supra* note 68 at 196.
[71] *supra* note 64 at 123, 124.
[72] *supra* note 12 at 65.
[73] *supra* note 4 at 14.
[74] *supra* note 12 at 15.
[75] *ibid* at 65.
[76] *supra* note 61.

their external identity did not match the known-aboutness of being Deaf. This shows a lack of understanding of Deaf identity, and a lack of symbolic access. The slíbhín trope, when applied, showed that Deaf people were neither valued nor empowered to fully participate in the process.[77]

As shown, Deaf participants experienced the slíbhín trope, but it more frequently appeared in interviews with Irish-speakers. Such was the volume of the slíbhín trope which arose in interviews with Irish-speakers, further sub-categories of the slíbhín trope arose. As such, I developed the "Good Gael" and "Bad Gael" sub-tropes.

12.4.2 Defining the "Good Gael" Trope

I have called the first of the Irish-speaker sub-tropes the "Good Gael". This sub-trope represents the ideal notion of an Irish-speaker. It represents an idealised version of an Irish-speaker who is good and honest in their use of the language. The "Good Gael" represents a performance by Irish-speakers to avoid being labelled as the troublesome slíbhín.[78]

For this research, the "Good Gael"[79] is a display of language usage in a non-threatening, non-offensive way. Irish usage is often presented as a performance of culture and heritage for an observer, rather an as a functional language or an internal identity. O'Reilly refers to this phenomenon in her work on language, ethnicity, nationalism and Northern Ireland.[80] In respect of the perception of Irish in the Republic of Ireland:

> Cultural discourse…includes similar phrases such as 'beautiful language', 'heritage' or 'Gaelic/Celtic heritage' and 'tradition'. A connection is sometimes made between a person's interest in the language, and history songs and literature in Irish. There is often a distancing from nationalism or any possible political implications of an interest in the language. Speaking Irish is generally seen as a cultural activity, and may be considered a hobby or a pastime.[81]

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[77] *supra* note 2 at 16.
[78] *supra* note 4 at 14.
[79] Note that a reference is made to a "Good Gael" in an article by McKibben analysing the book *An Béal Bocht.* McKibben writes that the "good Gael should cleave to his pure Gaelic with undying fervor". McKibben's reference is more reflective of what I have called a "True Gael", in the following chapter. See McKibben 'The Poor Mouth: A Parody of (Post)Colonial Irish Manhood' 2003 Vol 34(4) Research in African Literatures 94
[80] *supra* note 57.
[81] *ibid* at 91.

Irish as a 'hobby' rather than a serious and functional language is central to the 'Good Gael' trope. Irish is anticipated in arenas which facilitate culture or performative displays of tradition and heritage, but not in other areas where serious business occurs.[82] Brennan and O'Rourke also refer to this perception of Irish in their explanation the 'cúpla focal'[83] as alluded to in Chapter 2. As discussed, Irish is often used as a flavour or garnish for communication, but it is not perceived as the sole means of communication outside of private and familiar interactions. The use of the 'cúpla focal' and the nod towards Irish heritage can be seen throughout Irish society.[84] This was shown in respect of the multitude of Irish language named organisations in Ireland which do not operate in Irish, in spite of a requirement to do so. Irish is relegated to a performance of Irish-ness, rather than a functional language in this context. The "Good Gael" then reflects this perfomativeness. I developed and define the "Good Gael" as follows:

Definition:
Good Gael, *noun, singular*/Good Gaels, *noun, plural:* a person who used Irish in private, among friends, in a non-invasive manner. They switch to English in the presence of English speakers to ensure their comfort. They use Irish, or a 'cúpla focal' [translation: a couple of words] for ceremonial purposes, such as in greetings and at the beginning of speeches but they conduct business in English. They do not use their language to insult, demean or evade culpability.

They are "good" because they neither impose a language or ideology on others. They do not expose a lack of Irish in those who are required to have some working knowledge of the language, as discussed in Chapter 11, nor do they utilise the language strategically or to achieve some personal advantage.

Below I show how this sub-trope manifested itself in interviews, and how many Irish-speaking participants showed a consciousness of this trope, and internalised the behaviour of the "Good Gael" in interactions with the CJS.

[82] Such as in the CJS.
[83] See Brennan and O'Rourke, 'Commercialising the *cúpla focal*: New speakers, language ownership, and the promotion of Irish as a business resource' 2019 Vol 48(1) Language in Society 125 at 129.
[84] See for example, reaction to the greeting "A Uachtaráin agus a chairde" by British Queen Elizabeth at a 2011 State Dinner held in Ireland: Reilly "'A Úachtaráin, agus a chairde" – Queen offers "sincere sympathy" to victims of Anglo-Irish conflict' *TheJournal.ie* (18 May 2011) available at: https://www.thejournal.ie/"a-uachtarain-agus-a-chairde"-–-queen-offers-"sincere-sympathy"-to-victims-of-anglo-irish-conflict-139244-May2011/ [date accessed: 25 February 2020].

12.4.3 The "Good Gael" Trope in Operation

Many participants described actively trying to be perceived as the amenable "Good Gael", to circumvent any risk of being perceived negatively, as the slíbhín or "Bad Gael". Gael4 made a point to note that they never used Irish to be "rude" to people:

> Gael 4: "*But one of the basic rules I have is not to ever be rude when using Irish. Because I don't think that helps anybody at all…[to persist in using Irish where it is known that the other person doesn't have Irish] would be bad mannered…And life is difficult enough – everyday life is difficult enough – without bringing more trouble down upon yourself."*

> Gael4: "*I never use Irish to be rude or bad mannered to people around me."*

Gael4 endeavoured to ensure politeness and good behaviour in their use of Irish. They also alluded to the use of Irish as being troublesome and that its use might incite trouble. They were aware that negativity could be attached to the use of Irish, with the inference of the "Bad Gael" (as is addressed below) and so they made a conscious effort to counter this, to be the "Good Gael".

Gael8 and Gael7 also alluded to the "Good Gael" in identifying themselves as well-mannered and amenable:

> Gael8: *"The thing is, I am a polite person. I don't like to argue or to be rude to people and I was very nice to the Garda…I suppose for me it would have been easier to say 'I want a doctor who speaks Irish' because if I'd have said that, they would have had to go and get a doctor with Irish and maybe the drink would have been gone [out of my system] by then…"*

Gael8 connected their refusal to use Irish with politeness, even in the belief that it would have benefited them in the scenario.

> Gael8: *"I am not the type of person who if the service isn't available in Irish, that I am going to give out about it, or that I am going to argue about it because in my experience when the service isn't there, I want the less complicated life."*

Here, Gael8 noted that pursuing the use of Irish would be detrimental and 'complicated'.

Gael7: "*I am not one of those people who is negative without a reason. It's not that I would be discussing things with the Gardaí or with an office of government or whatever, and I would refuse, it's not that I have the decision made 'I am not going to speak any English to the legal profession or to the state service.'"*

Gael7 referred to 'those people' who would seek to be difficult in their use of Irish, making a point to differentiate themselves from such people.

Gael7: "*I am not the sort of person who forces Irish on people who do not have Irish."*

Gael7 here went further, indicating their distinction from people who 'force' Irish on those who do not have it.

These extracts show an awareness of how Irish is perceived generally, and in the CJS. These participants made an effort to distance themselves from deviant or 'rude' behaviour, or from 'forcing' Irish on people, by adhering to the "Good Gael" sub-trope. It must be noted that Gael4, Gael7 and Gael8 all recalled being penalised or discriminated against because of their use of Irish in the CJS. What this shows is that even after a conscious attempt to appear as the amiable "Good Gael", they were nevertheless penalised for their use of Irish.

It should be noted that there was no evidence of the "Good Gael" sub-trope being specifically applied to the participants by outsiders. Rather their experiences reflect an understanding of the negative associations and stereotypes attached to Irish-speakers, and performance to navigate that stigma,[85] through managing the way that they were externally perceived.

12.4.4 Defining the "Bad Gael" Trope

As a contrast to the "Good Gael" sub-trope, I identified the "Bad Gael" sub-trope. These sub-tropes are antagonistic: the "Good Gael" exists as a counter to the "Bad Gael". The "Bad Gael" sub-trope is rooted in the perception of the other as deviant and malicious. It is closely connected to the slíbhín as defined, but represents a specific perception of Irish-speaker.

How Irish usage can be perceived as performative, ceremonial and tokenistic was described above. As discussed in Chapter 3, Irish has a complex position in Irish society, where it is often associated with negative stereotypes, including paramilitary activity. As noted in Chapter 3, O'Higgins states that Irish has a long, colonial history of being perceived as troublesome.[86]

[85] *supra* note 12 at 42.

[86] O'Higgins, '(In)Felix Paupertas: Scholarship of the Eighteenth Century Irish Poor' (2007) Vol 40(3) Arethusa 421 at 431

Negative perceptions about language, heritage and culture which were enforced by colonialism are, to some degree, internalised in a post-colonial society.[87]

The "Bad Gael" is not only an externally imposed identity on certain Irish-speakers. It also represents a deviant outsider for Irish-speakers themselves. "Bad Gaels" damage the reputation of Irish-speakers when they use Irish to annoy authority figures, as will be shown. Members of a community making efforts to disassociate themselves from deviance within their social group like this is not uncommon. Becker explained this phenomenon in *Outsiders,*[88] his influential book on sociology and deviance. He stated that disassociation from the deviant, stigma-worthy member of a particular group is a common practice:

> …social groups create deviance by making the rules whose infraction constitutes deviance, and by applying these rules to particular people and labelling them as outsiders.[89]

The "rules" broken here, refer to the "Bad Gael": the Gael who uses Irish to be troublesome and to irritate the authorities is deviant. They have the potential to damage the reputation of other Gaels and as such they are outsiders to the community.[90]

In terms of defining "Bad Gael", other than a reference to sports fans,[91] I have been unable to find other instances of "Bad Gael" as a term, and none which reflect the specific meaning I have attributed to the sub-trope which arose in the data. Thus, I am defining the "Bad Gael" sub-trope as follows:

Definition:
Bad Gael, *noun, singular*/Bad Gaels, *noun, plural:* a person who uses Irish to be a slíbhín. They choose to use Irish to be an annoyance and to frustrate proceedings. They do not necessarily even speak Irish and will use what little Irish they have to attempt to evade justice. They may use Irish to cover up criminal behaviour. They insist on all services being available in Irish and they continue to drain resources, despite being fully capable of doing business in English. They refuse to switch to English because they are being malicious and deviant.

[87] Ngũgĩ Wa Thiong'o *Decolonizing the Mind: The Politics of Language in African Literature* (Currey, 2005)
[88] Becker, *Outsiders: Studies in the Sociology of Deviance,* (New York: Free Press, 1963).
[89] *ibid* at 9.
[90] See Bradley, 'Girlfriends, Wives, and Strippers: Managing Stigma in Exotic Dancer Romantic Relationships' (2007) 28 Deviant Behavior 379.
[91] Stafford, 'Only a true Gael could name these 10 players based on their Wikipedia entry' available at https://www.sportsjoe.ie/gaa/true-gael-name-10-players-based-wikipedia-entry-122523?cmpredirect [date accessed: 01 Mar 2021]; Humphries, 'How to chat up a true Gael' *The Irish Times,* (22 May 2000.)

The "Bad Gael" represents someone who is overtly behaving in an othered way, by using Irish. Internally in the Irish-speaking community, they are people who use Irish as a means to annoy law enforcement. They are deviant outsiders and "Good Gaels" do not use their Irish in this way. Externally, they are also viewed by those in law enforcement as deviant. Their use of Irish is malicious and a failure to show respect or deference to authority.[92]

12.4.5 The "Bad Gael" Trope in Operation

The "Bad Gael" sub-trope arose for many interviewees in their interactions with the CJS. Gael1, Gael2, Gael3, Gael5 and Gael7 all recalled negative Garda reaction when they used Irish in the CJS. Gael4, Gael6 and Gael8 experienced negative reaction from the judiciary because of Irish. Irish was perceived as malicious or deviant and they were accordingly punished. In particular, the treatment participants received from Gardaí when they used Irish stood out.

Interviewees recalled Gardaí specifically connecting their use of Irish to elevated punishment:

> Gael1: *[Gael1 offered a witness account of a fight in Irish to a Garda on the scene] "And he said "none of that now". And I said 'Well I am not willing to give you an account of the fight if you are not willing to hear it in Irish'. And the thing he accused me of was "obstructing the course of justice" or "perverting the course of justice" or something like that because he knew that I was not willing to share it with him [in English], or "withholding" or one of those crimes. Disrupting the legal process in a way. I can't remember exactly what he charged me with. But he became angry as well – which then made me angry. And he put me, we went down to [the station] and I spent the rest of the night [in the station] He put me in a cell."*

Gael1 connected their punishment (a night in a police station cell) with the Garda's reaction to their use of Irish, which was categorised as obstructing justice. It must be noted that Gael1 was assisting Gardaí by providing a witness account of a crime and they did not report being initially suspected of crime.

> Gael2: *"…he [Garda] said something like* 'I don't have the time to be dealing with your leprechaun bullshit. Can you just give me your address [in English]?'"

[92] *supra* note 68 at 196.

Similar to Gael1, Gael2 reported assisting Gardaí with providing a witness statement for an incident of crime. Gael2 reported that they were not initially a suspect of that crime. They provided Gardaí with their name and address, which were in the Irish langauge. They reported being intimidated to provide these details in the anglicised versions and when Gael2 refused, they were arrested and spent the night in a Garda station cell.

> Gael3: *"Because he [Garda] said that line that was just bad, '*I was going to caution you at the side of the road but you seem to be playing a bit with me [by speaking Irish] so I'm just going to send a ticket out to you.*'"*

Gael3 reported a Garda admitting to elevating their punishment because their use of Irish was perceived as 'playing' where playing here referred to troublemaking.

> Gael5: "*And he said something like* 'If you'd just spoken English to us, we just would have said "Go on your way" but you're trying to be thick' *or something*."

Similarly, Gael5 reported that Gardaí admitted that they had only detained Gael5 because they spoke Irish.

> Gael5: "*[Gardaí were saying] insulting things like* 'who does [Gael5] think [they are], [they are] absolutely stupid speaking Irish. [They are] going to get put off the road for years now'. *Things like that."*

During their detention, Gael5 reported being taunted and insulted for speaking Irish, with Gardaí insinuating they would receive extreme punishment (a lengthy driving ban) if they did not switch to English.

> Gael7: *"He continued to be rude, ignorant, so I made the decision at that point, 'Well, I am not going to deal with this man.' I spoke Irish to him. If you like, I made the decision to do business in Irish now. At that point, he said to me that he was going to take proceedings against me, basically."*

Gael7 connected their use of Irish with Gardaí with the punishment they received. It should be noted, that Gael7 had been apprehended for the minor crime on multiple occasions prior and they reported speaking English in all of those occasions. It was only after they spoke Irish to a Garda that they were ultimately punished and brought before the courts.

In these examples, the use of Irish was perceived as deviant and criminal; perverting the course of justice; leprechaun bullshit; playing; being thick and an aggravating factor in sentencing. In all of these instances, participants recounted being punished for their use of Irish, ranging from being detained overnight in a Garda station (Gael1, Gael2), fined (Gael3),

brought before a court (Gael7) or detained, fined and brought before a court (Gael5). Irish usage was met with hostility initially, and then with further hostility at Garda stations, ultimately impacting the fairness of trail.

Both Gael2 and Gael7 were treated with hostility when they started to use Irish in the interaction with Gardaí, having begun the interaction using English: for Gael2, this was when they gave their name (an Irish language name) and address in Irish, and; for Gael7 this was when they switched to Irish after the Garda had shown mocking and disrespect to the Irish language.

There were stark beliefs among interviewees that Garda held negative attitudes about Irish-speakers:

> Gael2: *"But I believe that if you were to do a survey among the Gardaí, that 90% of them would say* 'the only reason people want to speak Irish is to try get out of things or to try and undermine things or this, that or the other.'"

Gael2 was adamant that Gardaí perceived Irish speaking as deviant.

> Gael3: "*With the Gardaí, I'd say there would be a figure of around 20% of my [Irish language] interactions with the Gardaí are positive and 80% are negative. With the first person I meet. But after that, they always provide the service after that and it's a positive experience then. But still, I don't know what they say, yeah but the first person I meet, most of the time it's negative from the Gardaí.*"

Gael3 frequently worked with and encountered An Garda Síochána. From those experiences, they were confident of a negativity towards Irish and Irish users from the service. This was even acknowledged by AGS1:

> AGS1: "In the introductory lecture, I'd very often just have a chat with them [recruits] about do they know why they are doing Irish? And then you'd always get the one answer 'In case anybody is trying to be awkward and trying to get out of something.'"

Many participants were certain that they would experience negative reactions to the use of Irish. In addition to Gael2 and Gael3's statements here, Gael1 stated that they had anticipated that their car would be impounded as soon as they encountered Gardaí, knowing they would be using Irish. Gael5 noted that they also anticipated being arrested or taken to a Garda station if they used Irish, and would have to evaluate whether they could factor the time delay into their day before using Irish. There was an evident expectation of negative reaction from

Gardaí on using Irish. Clearly participants believed that they would be perceived as this "Bad Gael" and accordingly punished.

Additionally, in Gael4's description of being arrested by Gardaí there was an assumption that Gael4 would be presenting themselves as the "Bad Gael". Four Gardaí arrived at Gael4's home to carry out the arrest, which Gael4 perceived as excessive.[93] When arresting Gael4, the Garda inquired "will you be coming easy?". Gael4 was known to be an activist for the Irish language, and in fact, the cause of their arrest was connected to Irish language activism. Their arrest was connected to a relatively minor, non-violent crime and was somewhat bureaucratic in nature. This inquiry of "will you be coming easy", coupled with the fact that four Gardaí were sent to arrest Gael4, suggests an anticipation at least that Gael4 might not be 'coming easy' and that they would be likely to cause trouble. The nature of their crimes represented a protest of the state and the status quo, which Gardaí are designed to protect.[94] Protesting the status quo represents deviant behaviour, which is possibly the reason for the heavy-handedness of the circumstances of the arrest. Such heavy-handed responses to relatively peaceful protests can be a feature of policing.[95] Gardaí had shown that they were prepared for Gael4 to act as the "Bad Gael", because of their awareness of Gael4's activism. Similarly, Gael5 was handcuffed while being arrested, in spite of an admission from Gardaí that they were behaving 'passively'.[96] Irrespective of their behaviour, they were treated as troublesome and worthy of a use of force. Like Gael4, the anticipation of trouble or deviance arose out of the display of their identity and the perception of that identity in Gardaí.

It is worth noting that the "Bad Gael" sub-trope was not exclusively externally held. Insiders to the community also referenced the existence of a "Bad Gael" whose behaviour damaged the reputation of the Irish-speaking community generally.

> Gael1: "*…there are the people, when they are stopped on the road by Gardaí, who speak Irish,* like just *to annoy the Gardaí."*

[93] A search engine search of arrests for this particular offence would indicate that it indeed was excessive.
[94] See Vicky Conway 'Policed: Animal Rights' (04 Feb 2021), available at https://tortoiseshack.ie/17-policed-animal-rights/ [date accessed: 15 February 2021].
[95] See for example, McCarthy 'Police criticized over heavy-handed response to peaceful protests across US' *The Guardian* (02 June 2020); 'Police to look into who gave order to pepper spray Helsinki protesters' *YLE* (04 Oct 2020]; Dodd and Grierson 'Sarah Everard vigil report strongly defends police's use of force' *The Guardian* (30 March 2021); 'Hong Kong: Heavy-handed police response to protest unacceptable' *Amnesty International* (27 July 2019).
[96] See a 2012 investigation into An Garda Síochána by the Coimisinéir Teanga. Available at: https://www.coimisineir.ie/userfiles/files/2012_An_Garda__Siochana_english_version.pdf [date accessed: 07 July 2017].

Gael5: "*Sometimes when people are drunk and such, they try to plead [with Gardaí] in Irish. And they [Gardaí] think 'These are just* chancers' *That's a very common thing."*

Both interviewees are alluding to a particular type of person, who possibly fits the descriptor provided by AGS1 above: a person who will use Irish to "be awkward and [try] to get out of something". This perception of the "Bad Gael" from Gael participants can also be seen in the extract above which discussed the "Good Gael". Participants who were adamant not to be 'rude' in their use of Irish are acknowledging that there are those who would be rude in their use of Irish. But although Gael participants acknowledged the "Bad Gael", no participant actually admitted (or alluded) to being a "Bad Gael" or to using Irish for malicious purposes.

The "Bad Gael" sub-trope was prevalent in discussions with Gael participants. While not named as such, it was evident that they felt they were perceived, in particular by Gardaí, as deviant troublemakers when they communicated their identity.[97] It was also evident that participants made steps not to be seen as the "Bad Gael", acknowledging the existence of the "Bad Gael" who would use Irish to be deviant. In terms of access to justice, again, it can be seen that the existence of this trope, points to a lack of symbolic access. While being perceived in this light, there is a lack of understanding of the true identity held by Irish-speakers (as will be discussed in the following chapter). Participants showed that they were not valued or empowered to participate fully as their true selves in the process, therefore indicating a lack of symbolic access.[98]

12.5 Conclusion

In this research I found that the way participants were perceived when they interacted with the CJS and the way they were treated based on that perception was a major source of concern. The negotiation of a marginalised identity in the CJS was something which affected all participants who engaged as Criminal Justice Subjects. I found that the external perceptions of participant's identity could be seen in light of the créatúr and slíbhín tropes, and the "Bad Gael" sub-trope, where the "Good Gael" sub-trope represented a performance to avoid the negative perception of the "Bad Gael". These tropes and sub-tropes represent

[97] Hylland-Eriksen, *Ethnicity and Nationalism* (London: Pluto Press, 1994) at 36.
[98] *supra* note 2 at 16.

an original concept which can help to add context to how Irish-speakers and Deaf-people experience the CJS.

In respect of access to justice, the appearance of the créatúr and the slíbhín tropes as external identities suggest that there is, at least in the experiences of the research participants, a lack of understanding and value in the true identities held by Irish-speakers and Deaf people. In the following chapter, I discuss the internal identities of participants, as they arose in the data, and why it matters that for the most part, these internal identities were not understood. In light of what has been shown in this chapter, I explore why in order to ensure symbolic access to justice, it is necessary for the internal, true identities of marginalised people to be seen and valued. Where the identities of such people are confined to harmful, stereotypical tropes shown in this chapter, the real needs of marginalised people will go unheard and their experiences in the CJS will be clouded by that reality.

Chapter 13 – Symbolic Access and Recognising Internal Identity

13.1 Introduction

In the previous chapter, I looked at how Criminal Justice Subjects were perceived when they interacted with the CJS. This discussion focused on how they were externally perceived by actors in the CJS,[1] such as police and judges. The external perceptions could be catalogued under two main tropes; the créatúr and the slíbhín, where Irish-speaking participants could be further understood in light of two sub-tropes: the "Good Gael" and the "Bad Gael".

In this chapter, I explore what is missed when Irish-speakers and Deaf people are viewed only in terms of the slíbhín and the créatúr. Relying on literature on identity and stigma management, in this section I explore the internal identity held by participants,[2] and how that identity was received by actors in the CJS and in society generally. When we do not understand the true identity of a person, then their true needs are also not understood, and symbolic access cannot be ensured.[3] Therefore, their true needs cannot be served.

This chapter tackles three major issues. Firstly, I explore the true, internal identity of both Irish-speakers and Deaf people, as it immerged in the interviews, and how that relates to existing literature. I show how these identities appear in literature and how they arose in the data. For Deaf people, I will discuss the culturally Deaf identity, which has a long-standing basis in Deaf studies literature. For Irish-speakers, I have called the true identity held by participants the "True Gael". Secondly, I highlight the consequences that arose for Irish-speakers and Deaf people when their internal identity was not perceived. Participants had two main options, to either conceal their identity and pass,[4] or to communicate their identity

[1] Goffman, *The Presentation of Self in Everyday Life,* (London: Penguin Books, 1969) at 14.
[2] *ibid.*
[3] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 16.
[4] Leary, 'Passing, Posing and Keeping it Real' 1999 Vol 6(1) Constellations 85 at 85.

and accept the corresponding punishment.[5] I connect back to the literature on identity and stigma management to provide context for participants' experiences. Third, I explore the underlying access to justice reasons for why the internal identity is not perceived, and why Deaf people and Irish-speakers must face a 'passing or punishment' as a consequence of their identities in the CJS. I examine the known-aboutness of the Deaf and Irish-speaker identity. [6] In doing so, this shows how there is a lack of symbolic access for these two groups,[7] who are still seen societally in terms of the harmful external perceptions. I argue that because of the lack of symbolic access, access to justice cannot be achieved.

13.2. Culturally Deaf

The participants to the research largely exhibited holding a 'culturally Deaf' identity, as described in Chapter 3. This identity is established in literature, and to recall, is rooted in the cultural aspects of the Deaf community,[8] rather than in any medical diagnosis.[9] Again, Leigh et al define the process of being culturally Deaf as "using signed languages, being upfront as a Deaf person, being comfortable with other Deaf people, and wanting to interact with them."[10] This internal identity contrasts then with the external, créatúr trope as I discussed in Chapter 12. The créatúr trope is rooted in external pity for deaf people, where deafness is viewed as a deficit and deaf people are paternalised.[11]

This culturally Deaf identity was internally held by participants, but clashed/conflicted with the créatúr trope, which was the external view of a medicalised and paternalised view of Deaf people.[12] I present those instances of conflict now.

13.2.1 Being Culturally Deaf

In discussing their identity as Deaf people, there was a particular focus on the Deaf community and a sense of belonging in that community form participants:

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[5] Hylland-Eriksen, *Ethnicity and Nationalism* (London: Pluto Press, 1994) at 36.
[6] Goffman *Stigma: Notes on the Management of the Spoiled Identity,* (London: Penguin Books, 1990) at 65.
[7] *supra* note 3 at 16.
[8] Leach Scully, 'Deaf Identities in Disability Studies: With Us or Without Us?' in Watson, Roulstone and Thomas (eds) *Routledge Handbook of Disability Studies* (London: Routledge, 2012) at 111.
[9] Ladd, *Understanding Deaf Culture : In Search of Deafhood*, (Clevedon: Multilingual Matters, 2003) at 15
[10] Leigh et al, *Deaf Culture: Exploring Deaf Communities in the United States* (San Diego: Plural Publishing, 2018) at 8.
[11] Lane *The Mask of Benevolence: Disabling the deaf community* (San Diego: Dawn Sign Press, 1992) at 7.
[12] *supra* note 1 at 14.

GM: "Do you feel that you belong in both communities [Deaf and hearing]?"

Deaf2: "[interpreter clarifies] *Yes I can – I fit in. The sign for fit is the two arms together, but with the Deaf community I am using my own language*."

Here, Deaf2 was referencing that they exist in both the hearing community and the Deaf community for various aspects of their life, but that in the Deaf community, they are connected by language in a way that they are not in the hearing community (Deaf2 lipreads in the hearing community to communicate which is not always a reliable method of communication).[13] Even though they 'can' fit into the hearing community, it is on a different scale to that of their position in the Deaf community. Fitting in in the hearing community is something they are able to do through positive actions – lip-reading and gesturing and facilitating hearing people who only have spoken languages. But the way that they fit into the Deaf community is more natural – 'two arms together' – because there they can use their own language.

Deaf3: *"I have always been involved in the Deaf community…I don't have any family members who sign. I don't have any hearing friends as such – I suppose my [siblings] they would have kind of their own hearing friends at home in the hearing community, but my friends would be Deaf."*

Deaf3 noted that they existed in the personal and professional life almost entirely within the Deaf community. It was evident from their interview that the Deaf community was a central part of their life and that they embraced being Deaf.

Deaf4: Deaf4 noted that there is a resilience in the Deaf community – a togetherness through the common struggle. Deaf4 stated that they find the community and the identity of being Deaf comforting. There you find people who are the same.

Like Deaf3, it was evident from Deaf4's interview that the Deaf community was an extremely important part of their life. Similar to Deaf2, Deaf4 co-existed in hearing communities but they felt a better sense of belonging in the Deaf community. Deaf4 connected their sense of belonging in the Deaf community to a unified understanding of the particular Deaf struggle. The sense of togetherness and community among participants with the Deaf community is mirrored in the literature on Deaf culture above. The Deaf culture they possessed was rooted in a sense of belonging in the Deaf community. No participant connected their belonging to

[13] Vernon et al, 'Forensic Pretrial Police Interviews of Deaf Suspects Avoiding Legal Pitfalls' 2001 Vol 24 International Journal of Law and Psychiatry 43 at 47.

the Deaf community with their level of hearing. Rather their discussions about the Deaf community related to friendships, togetherness and fitting-in.

Diversity in the community was evident from interviews. Participants referenced their varied upbringings and relationships to the Deaf community. Some had arrived to the Deaf community as children, whereas some had arrived later in life. Participants had varied views on the Deaf community too, where Deaf4 explicitly identified as Big D Deaf, whereas Deaf5 rejected the D/deaf dichotomy discussed in Chapter 3,[14] as they felt it was exclusionary. Dr John Bosco Conama referenced the varied understandings of the Deaf community and Deaf identity in his interview

> JBC: *"There is not just one Deaf community per se. There's a lot of different paths that you can talk about in the Deaf community."*

Dr Conama explained that it is difficult to define the Deaf community, and that there are many different ways to make up that community. This mirrors what both Leach Scully and Leigh et al have said in relation to the diverse make-up of the Deaf community: there are multiple perceptions of the Deaf community.[15] Ultimately, as noted in Chapter 3, Deaf identity can be defined in terms of 'attitudinal deafness', whereby a person identifies as Deaf and the Deaf community accept them as such and as part of the community.[16]

In terms of internal identity and being culturally Deaf, Deaf3 specifically demonstrated a pride in their identity as a Deaf person:

> Deaf3: *"I am happy to be Deaf – if you were to ask me if I wanted to be hearing tomorrow, I'd tell you no. I am very content with who I am."*

Here, it is evident that for Deaf3, being Deaf was more than being not hearing, it is their identity. This contrasts starkly with the commonly held view of Deaf people that hearing communities have, as described by Lane and Ladd in particular,[17] where being Deaf is seen as a pitiful deficit. Being Deaf is a central aspect of their sense of self, which they are proud of, which they would not change, even if given a chance. This mirrors what Ladd describes in his work, particularly the dichotomy between what is seen of the Deaf community externally,

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[14] *supra* note 9 at xvii.

[15] *supra* note 8 at 8.

[16] Baker and Padden, *American Sign Language: A Look at its Story and Structure,* (Silver Spring, Maryland: TJ Publishers, 1978) at 4. Ladd notes that this text predates the popular usage of 'big D' Deaf which will be described below. See Ladd, *Understanding Deaf Culture : In Search of Deafhood*, (Clevedon: Multilingual Matters, 2003) at 41, 42.

[17] *supra* note 11 at 7 and *supra* note 9 at 15.

where they are "forever being condemned to live on the margins of existence"[18] and what is the experience of the Deaf community internally where they constitute a "community of people with their own beautiful languages, their own organisations, history, arts and humour, their own lifelong friends."[19]

That is not to say that culturally Deaf people do not experience struggles:

> Deaf3: *"I suppose in relation to the Deaf community specifically, I don't feel like we are on a par with hearing society. I think we are very much still behind the times in terms of equality in that sense"*

Deaf3 was clear that Deaf people are not treated equally, not just in the CJS, but in society generally. This sentiment was shared by Deaf1 and Deaf4 in their interviews. Part of the connection that Deaf4 felt to the Deaf community was the collective understanding of struggle. In referencing this struggle, Deaf4 went on to noted that the struggles of the culturally Deaf community are not encapsulated by a disability discourse:

> Deaf4: Deaf4 notes that Deaf people don't see themselves as disabled. Where there are a percentage of jobs reserved for disabled people, Deaf people can face a crisis of identity – they are not disabled but are largely perceived as such. For example, the needs of a wheelchair user are vastly different to the needs of a Deaf person. A wheelchair user can hear, they can work in customer service. There are variances between the Deaf and hearing. You cannot place Deaf people on the same pedestal as hearing people. There are differences: psychologically, emotionally and developmentally. Deaf people are not the same as hearing people.

The specific needs of Deaf people are not understood when viewed solely in the context of disability. As noted in Chapter 3, this view of disability as being an inappropriate lens through which to solely view Deaf culture is mirrored in the literature. Leach Scully states that Deaf communities have challenged disability discourses, and that it is ineffective to capture Deaf experience and Deaf culture.[20] Ladd also shares this view.[21] When Deaf people are viewed exclusively in terms of disability, even when a social model of disability is used, they are inherently medicalised and viewed through their lack of hearing.[22] Their specific identities as

[18] *supra* note 9 at 37.
[19] *ibid.*
[20] *supra* note 8 at 111.
[21] *supra* note 9 at 15, 16.
[22] *ibid.*

culturally Deaf and the corresponding needs of a cultural minority then go unseen. The lack of understanding of the culturally Deaf identity can result in Deaf people being medicalised and paternalised.[23]

Below, I discuss how the failure to externally perceive the true, internal identity impacts the individual within the CJS. First, however, I explore the true identity of Irish-speakers.

13.3 The True Gael

In continuing the discussion of true, internal identities, I am now focusing on the Irish-speaker identity which arose in the research. I have called this identity the 'True Gael' identity and it represents the internal identity held by Irish-speaking participants to the research.

The term 'true Gael' has been used on occasion, although there does not seem to be one specific meaning for it. Maume, for example uses it to refer to an idealised version of an Irish person who is pro-independence, exhibiting nationalism;[24] Gallagher uses 'true Gael' to reference the impoverished Irish-speakers from Corca Dorcha in Flann O'Brien's satirical novel *An Béal Bocht*;[25] and there are instances of the term being used to define a fan of traditional Irish sports, hurling and Gaelic football.[26] However, in my research, I am using "True Gael" to represent the internally held perception of the self that Gael participants had. Unlike the culturally Deaf identity, there is no real established concept for what I have identified as the "True Gael" within literature. As such, I am defining the term, as it applies to this research, as follows:

> **Definition:**
> True Gael, *noun, singular*/True Gaels, *noun, plural:* the linguistic identity held by Irish-speaking participants to this research. Irish and speaking Irish is directly connected to their sense of self. There is no choice made about what language they would use when interacting with the state. It is not a conscious decision that is made in the moment, but the natural way they would respond in any scenario where they could use their language.

[23] *supra* note 11 at 7.
[24] See Maume, 'Nationalism and Partition: The Political Thought of Arthur Clery' (1998) Vol 31 Irish Historical Studies 222 at 226.
[25] Gallagher, '"The Poor Mouth": Flann O'Brien and the Gaeltacht' (1983) Vol 72 Studies: An Irish Quarterly Review 231.
[26] Stafford, 'Only a true Gael could name these 10 players based on their Wikipedia entry' available at https://www.sportsjoe.ie/gaa/true-gael-name-10-players-based-wikipedia-entry-122523?cmpredirect [date accessed: 01 Mar 2021]; Humphries, 'How to chat up a true Gael' *The Irish Times,* (22 May 2000).

Previously I explored how Irish-speaking can be perceived as either a twee "pastime" [27] or as a deviance, by way of the "Good Gael" and the "Bad Gael" sub-tropes. Importantly, neither represented an internal identity that participants referred to holding. The "Good Gael" sub-trope was a performance and the "Bad Gael" sub-trope was an external identity imposed on participants, or which they imposed on other. By contrast, the "True Gael" is an internal identity which participants showed. It is a rejection of the societal perception of Irish.

The "True Gael" identity is visible in O'Reilly's findings from her research in Northern Ireland in the 1990s.[28] She found that for many Irish users in Northern Ireland "language [was] the single most important element of [their] national identity".[29] The language was the focal point of their identities. This ownership of a specific identity or characteristic is visible in Pride movements, as discussed in Chapter 2.[30]

Just as detailed above with the culturally Deaf identity, below I show how the "True Gael" identity arose in the data.

13.3.1 Being the True Gael

All Gael participants showed signs the "True Gael" identity in interviews: Irish was more than a language, but rather a deep part of their sense of self.

Gael2 noted that they had a "*spiritual connection*" to the language. This connection was referred to also by Gael1 in a follow up correspondence, who referred to the language as somewhat of a lifelong commitment, similar to a marriage:

> Gael1: "*A phrase from English came to me which explains my outlook on Irish:* to have and to hold in sickness and in health!"

Irish would be the language Gael1 used at all times. Dr Seán Ó Conaill also referred to this deep connection to the language in his interview:

> SÓC: "As corny as it sounds, it's sort of teanga m'anam – the language of your soul kind of."

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[27] See above O'Reilly 'Irish language, Irish Identity: Northern Ireland and the Republic of Ireland in the European Union' in O'Reilly (ed) *Language Ethnicity and the State. Volume 1: Minority Languages in the European Union,* (Hampshire: Palgrave, 2001) at 91.

[28] O'Reilly 'The Irish Language – Litmus Test for Equality? Competing Discourses of Identity, Parity of Esteem and the Peace Process' 1996 Vol 6 The Journal of Sociology 154.

[29] *ibid* at 158.

[30] *supra* note 5 at 36.

The participants acknowledged a deep connection to Irish, and to their sense of being. Their use of Irish was more than a means of communication, but rather an expression of their identity.

This expression of identity was often counter to what might be considered the best interests of participants. Gael4, Gael6 and Gael7 participated in civil disobedience in the pursuit of Irish language rights, with the knowledge that their participation would likely result in criminal sanctions. Their dedication to Irish superseded their own personal interests. Rather than a willingness to avoid punishment, these participants had a willingness to suffer punishment to further their cause and pursue language rights.

For Gael1, Gael3 and Gael5, though not part of any organised campaign, there was an acknowledgment that their use of Irish exacerbated their situations. If they had used English, then they would have avoided the negative reaction. And yet they all used Irish, irrespective of this knowledge. It was clear from the interviews that the use of Irish was more than a simple binary choice: Irish or English? There was an evident dedication to their language and identity as Irish speakers that was greater than any desire for self-preservation:

> Gael1: "But I didn't switch to English. I knew when he [Garda] approached 'he is going to take the car'. But he said 'you can speak English now if you want' And I was 'no, take the car like.'"

Gael1 reported that the on-scene Garda taunted Gael1 to speak English to avoid punishment (by way of impounding the car) but Gael1 refused to renege on the display of their identity.

> GM: "*And at any time did you think to yourself* 'I'm just going to speak English'?"
>
> Gael5: "No…*Once I had said 'I would like you to deal with me in Irish' I wouldn't backpedal on that at all."*

Similarly, Gael5 noted their devotion to the display of their identity and a refusal to 'backpedal' once they made their identity known.

In speaking about their relationship to their identity, Gael1 referred to their dedication to Irish in contrast to those would use Irish only to benefit themselves:

> Gael1: *"…do you know the concept of cultural appropriation,* cultural appropriation? Now it's a bit of a roundabout way to it*, but my understanding of it, cultural appropriation is when you make use of an aspect of culture which you personally like without doing anything to benefit that culture that you have taken from. So I think that*

it's people who speak Irish for beneficial things or to make things easier for themselves, without being happy to speak it in order to help the language. Yeah?"

They noted that their relationship with Irish required taking the good and the bad part of using their language, because it is who they are. Their usage of Irish was not limited to how it might further or benefit them. Such behaviour amounted to cultural appropriation. Cultural appropriation can be understood as:

> Any instance in which a group borrows or imitates the strategies of another—even when the tactic is not intended to deconstruct or distort the other's meanings and experiences—thus would constitute appropriation.[31]

There is also an exploitative aspect of cultural appropriation,[32] and often a connotation of 'borrowing' or 'taking' of strategies from one culture to further the interests of another, who does not belong to that culture or group.[33] Gael1 was suggesting that casual or performative use of Irish, only when it is beneficial to the speaker is appropriating from an Irish-speaking, "True Gael" identity. The person who would use Irish only when it would reap rewards is taking from the culture, when a "True Gael" is punished for displaying that identity. Irish was never a matter of choice for Gael1, rather it was the only way they would communicate with the state. A person who culturally appropriates the language chooses the moments to use Irish.

Ultimately, the "True Gael" was the misunderstood, internal identity held by Gael participants. For the most part, their identities were misconstrued and participants were seen as deviant for using their language, as is shown in the previous chapter. However, there was one instance where a participant recounted their internal identity being perceived: Gael4 was very struck by an incident where a Garda appeared to understand their internal, "True Gael" identity. Gael4 was to be taken to prison by a number of Gardaí. When Gardaí arrived to

[31] Shugart 'Counterhegemonic acts: Appropriation as a feminist rhetorical strategy' 1997 Vol 83 Quarterly Journal of Speech 210 at 210, 211.

[32] Rogers 'From Cultural Exchange to Transculturation: A Review and Reconceptualization of Cultural Appropriation' 2006 Vol 16 Communication Theory 474.

[33] Cultural appropriation of by white people protective hairstyles for Black hair is relevant here. Where Black people (particularly women) are penalised in society for wearing natural hair or traditional hairstyles, those same styles are often lauded and deemed fashionable when worn by white, influential people. See Abdul-Jabbar 'Cornrows and Cultural Appropriation: The Truth About Racial Identity Theft' *Time Magazine* (26 August 2015), Smith 'Cultural Appropriation is Everywhere. But Is It Always Wrong?' *Time Magazine* (21 September 2016), Friedman 'Kim Kardashian West and the Kimono Controversy' *The New York Times* (27 June 2019).

escort Gael4, one Garda explained the process and this led to a particularly touching moment for Gael4:

> Gael4: "[the Garda said] 'Just remember when you are crossing that prison yard, there will be a statute there of Kevin Barry' and he said 'remember,' he said 'you're in good company' [pause, Gael4 takes a moment to compose themselves] So *he was saying that he understood what I was doing and that I should have courage. So I thought that that was very nice to say."*
>
> *Fieldnotes:* Gael4 was visibly emotional in recounting this interaction. It was evident that the Garda's words, the compassion and kindness shown had an deep impact on their experience.

It is poignant how impacted Gael4 was by the understanding and compassion they were shown. Kevin Barry was a young man who was executed by the British forces during the struggle for Irish independence in 1920.[34] In this context, Barry symbolises the struggle for Irish and a righteous fight for Irish identity. Gael4 recounted that the Garda showed an understanding of their fight for their cultural identity, comparing it to that of Kevin Barry. It was evidently an experience that remained with Gael4 and they showed an appreciation for the understanding that the Garda showed, particularly when there was largely no other instance of understanding of their cause from any other member of the CJS.

Otherwise, most interviewees showed that their identity as "True Gaels" was not understood externally:

> Gael5: *"There is no understanding – they [Gardaí] did not believe that I was speaking Irish all day. They didn't understand that they were officers of the state, stopping a person who had been speaking Irish all day and telling them to speak English. They don't understand – like a lot of Irish people – that Gaeilgeoirí exist."*

Gael5 believed that Gardaí did not believe that Irish-speakers existed. As discussed in the previous chapter, Gael5 reported that they were perceived as the "Bad Gael" when they used Irish and were punished for doing so. Externally, their identity consisted of the "Bad Gael" sub-trope while their internal "True Gael" identity was not perceived at all. In Gael1's experience, as cited above, the Garda on the scene expected them to switch to English once their car had been taken. That account shows a Garda who did not understand that the use

[34] McElhatton, 'Kevin Barry: What really happned' *RTÉ* (01 Nov 2020). Available at: https://www.rte.ie/news/2020/1101/1174753-kevin-barry/ [date accessed: 09 Feb 2021].

of Irish was anything but a performance that would be ended once the threat of punishment was made.

> Gael5: "*[the Garda] said something like* [whispering] 'Go on, just tell me what happened in English' *I sort of had pity for him, because it was clear that he didn't understand – [he thought that] when we were left on our own that I would speak English*"

Similarly Gael5 reported that the Garda believed they would speak Irish when not observed by others. Their identity was misunderstood as a performance.

All participants exhibited signs of being "True Gaels" during interviews. Nevertheless, there was a variation in the way they expressed their identity during interactions with the CJS. The interview with me was a safe space to use Irish. All Irish-speaking Criminal Justice Subject participants conducted their interviews in Irish. Yet out in the world, Irish and the "True Gael" identity were acknowledged stigmas that needed to be managed and navigated, or overcommunicated in spite of the inevitable negative consequences.[35] Some "True Gaels" were bold and overt in their display of their identity. They acknowledged the negative consequences and duly accepted them, for the greater good of their language, identity and community. When the "True Gael" identity was understood, it had an extremely positive impact. Those who had experienced compassion and understanding from a member of the CJS found comfort in this approach, probably because of the commonality of negative reactions they had come to anticipate. I address these issues of overcommunication and passing in the next, in respect of the "True Gael" and the culturally Deaf identities.

13.4 RML Identity Interacting with the CJS – Pass or Punish

When the internal identities are not understood or perceived, harmful, stereotyped external perceptions can dominate, and individuals' needs are not effectively met. As a consequence of this mismatch, two very clear pathways for Irish-speakers and Deaf people arose in the data. Either they passed,[36] underplaying or hiding their identity entirely, in order to navigate their way through the CJS, or they overcommunicated and displayed their identity,[37] and

[35] *supra* note 5 at 36.
[36] *supra* note 4.
[37] *supra* note 5 at 36.

accepted the negative consequences which they anticipated. As a way of stigma management, they either passed or were punished. They could never be themselves and be respected/treated with dignity.

13.4.1 Passing

Many participants referred to passing and navigating their stigmatised external identity in their interviews.[38] As noted in Chapter 2, passing is "the management of undisclosed discrediting information about self" according to Goffman.[39] It involves downplaying or "undercommunicating"[40] a stigma before a particular audience, with self-preservation at the core.[41] Recall also how Leary explains that passing "represents a form of self-protection that nevertheless usually disables, and sometimes destroys, the self it means to safeguard."[42] In the context of the data, participants understood the stigma attached to the external perceptions of their identity. And as a result, there was attempts made to pass, or undercommunicate their identity, in order to evade that treatment.[43]

Passing features in Deaf Culture, perhaps most predominantly in the form of the Deaf Nod, as mentioned in Chapter 3. Deaf people will mimic common body language to feign understanding and communication so as not to expose their stigma.[44] Lawyer2 referenced the Deaf Nod in their interview:

> Lawyer2: "It was only because the interpreters explained to us that just because someone nods doesn't mean they understand. It's an appeasing gesture. But we didn't know that. We thought that if someone nods, they are showing understanding."

In this instance, Lawyer2 and their colleagues were appeased by the client's passing. The nodding indicated to Lawyer2 that the client understood what was happening. It transpired that the client did not understand and it was only when appropriate interpretation was

[38] See Chapter 2.
[39] *supra* note 6 at 42. See also Kanuha 'The Social Process of "Passing" to Manage Stigma: Acts of Internalized Oppression or Acts of Resistance?' (1999) Vol XXVI(4) Journal of Sociology and Social Welfare 27.
[40] *supra* note 1 at 87
[41] *supra* note 4 at 85.
[42] *ibid.*
[43] *Ibid.*
[44] Vernon, et al, 'The Miranda Warnings and the Deaf Suspect' 1996 Vol 14 Behavioral Sciences and the Law 121 at 127. See also Shine 'Documenting current practices in the management of deaf suspects in the USA' (2019) Vol 42(3) Policing: An International Journal 347 at 350.

provided that they were given access to the information. In avoiding 'appearing stupid', the client engaged in passing during their interaction with the CJS.

Similarly, Deaf4 and Deaf5 also engaged in passing. Deaf4 recalled sitting in the court, having no idea what was going on. The environment of a court was not conducive to lip-reading or their hearing aid (a loud, crowded place with many people and distraction, the speakers not facing Deaf4, the distance from Deaf4 to the speaker, etc).[45] In managing their stigma through passing, Deaf4's action were detrimental to the self they were trying to protect, as Leary states.[46] They were disabled by concealing their stigma. By protecting themselves from exposing that they were Deaf, Deaf4 was disadvantaged and could not access the court.

In Deaf5's case, throughout their interaction with Gardaí, they communicated with a Garda using spoken English. They passed as a hearing person. It was only when they revealed their identity as a Deaf person, that their otherness was exposed:

> Deaf5: "And I said 'No, I am Deaf, I wear two hearing aids!'"

In Deaf5's account, the Garda was surprised by this and their hostile attitude changed once Deaf5 revealed that they were Deaf. This mirrors findings in literature on passing. For those who effectively pass, only when their stigma has been exposed are they treated differently.[47] For Deaf5, the external aspect of their identity changed through the interaction. At first they were a hearing person who had broken the law. Once Deaf5 exposed their stigma the illusion was shattered and they no longer passed as hearing.

Passing was also a way to manage stigma used by Irish speaking participants. Gael5 stated that where they did not have time to be brought to a Garda station or detained, they would pass as an English speaker:

> Gael5: *"If I am under pressure, or if there is someone in the car with me, I can't speak Irish because I wouldn't want the car to be taken and they would be left. If I am by myself and if I didn't have anything else to do for the day... I'd think about it [using Irish]"*

Gael5 noted that they 'can't' speak Irish where they do not have the time to be detained, showing that they perceived detention because of using Irish as an inevitability, and therefore

[45] *ibid,* Vernon et al.
[46] *supra* note 4 at 85.
[47] *supra* note 6 at 114. See also Poindexter and Shippy, 'HIV Diagnosis Disclosure: Stigma Management and Stigma Resistance' 2010 Vol 53 Journal of Gerontological Social Work 366.

passing to avoid this treatment was necessary. Gael6 admitted that they no longer engaged with An Garda Síochána in Irish, and therefore passed as a non-Irish speaker.

> Gael6: "*I said to myself, 'Feck it, I don't want the stress. I don't want to be* stressed out.' *So in recent times, I decided* 'just play it by ear'"

Gael6's life experience had made them alter the way they presented their identity to the world. While in younger years, they had attested to always communicating their identity as an Irish-speaker, years of negative response had altered their stigma management. Now, they admitted to passing to avoid the negative response, and to engage in self-preservation against the external response to their identity. Again, as Leary notes, passing can have the effect of damaging the self that is intended to be protected.[48] In protecting the "True Gael" self, they need to contradict the very essence of the "True Gael" self.

Gael7 shared this approach. They no longer engaged with Gardaí in Irish, due to their experiences in the past with the service. However, they specifically pointed out that they made efforts to engage with other official organisations (specifically the Motor Tax Office) in Irish, or to select Irish language services where they were otherwise available. The passing that they engaged in was particular to the Gardaí.

Gael8's experience also speaks to passing. They did not use Irish in their interactions with Gardaí and in their subsequent court interaction. Nevertheless, their name exposed their stigma and identity as an Irish speaker, and the judge displayed prejudice, in spite of Gael8's attempt to pass:

> Gael8: *"The judge said when my name was called out in Irish, he asked the lawyer I had – he was* sneering *when he said* 'I suppose [their] name just happens to be in Irish now and [they] are looking to have [their] case heard in Irish?'"

Their name alone exposed their otherness, even though they were engaging in passing behaviour, concealing and undercommunicating their identity (by not speaking Irish). Goffman references similar incidents in his work

> …individuals excluded from some hotels on the basis of their ethnicity may have been ethnically identified through their names, so that here, too, an item of personal biography is exploited for categoric reasons.[49]

[48] *supra* note 4 at 85.
[49] *supra* note 6 at 79.

Information about a person's ethnicity and identity are garnered from their name, and they can then be excluded based on the perception of that ethnicity or identity. In Gael8's case, their name meant that they could not pass and so their identity as an Irish speaker was exposed.

Hylland-Erikson refers to instances whereby Sami people in Norway sought to conceal their identity as Sami,[50] undercommunicating their stigmatised identity and overcommunicating their more values Norwegian-ness. This is an exercise in self-preservation:[51] passing was used to protect individuals or groups from the negative perception of their identity. Goffman gives examples of homeless people in New York pretending to wait for an evening train so as not to have their true selves exposed and then be punished for their homelessness.[52] Leary references Anatole Broyard, a Black American writer who passed as a white person until his death.[53] Similarities can be seen in the research. Deaf4, Deaf5, Gael5, Gael6 and Gael8 undercommunicated their identity, passing as hearing or English-speakers as best they could to avoid a negative response to their identity. Their identity as Irish speakers and Deaf people posed a risk when engaging with the CJS, as it would be perceived as negative and accordingly punished. In passing, they avoided the disadvantages which imminently flowed from their true selves.

In many instances participants did not seek to pass, rather overcommunicating their identity, and they were subsequently punished, as I now discuss.

13.4.2 Punish

If participants did not pass, or if they were unsuccessful in passing (see Gael8's experience, for example) then they were almost exclusively punished for their stigma. Again, Goffman's work is relevant here. In *Stigma,* he shows how otherness and stigmatised identities are penalised in society, through shame and ostracisation.[54] The display of an othered identity in certain environments can result in punishment for the othered individual.[55] When referring

[50] Hylland-Eriksen, *Ethnicity and Nationalism* (London: Pluto Press, 1994) at 36.
[51] *supra* note 4 at 85.
[52] *supra* note 6 at 60.
[53] *supra* note 4 at 85, 86.
[54] *supra* note 6.
[55] Jefferson 'The Racism of Criminalization: Policing and the Reproduction of the Criminal Order' in Gelsthorpe (ed) *Ethnic Minorities and the Criminal Justice System: 21st Corporal Roundtable Conference, 1992* (Cambridge: Cambridge Institute of Criminology, 1993) at 19.

to 'punishment', I am referring to punishments such as fines, penalties, arrests, detentions, the use of force, convictions and prison sentences etc., but also to paternalisation. When participants were paternalised, rather than being treated as independent, autonomous individuals, the effect was indeed punishing, as the treatment was unfair and rooted in inequality.

As shown above, Deaf4 and Deaf3 were paternalised in their interactions with Gardaí, because their Deaf identity was communicated. Deaf4 complained that in general, Gardaí think Deaf people are stupid, and Deaf3 experienced a Garda ignoring them once they communicated their identity. Both Deaf4 and Deaf3 specifically referenced hearing people present who were treated differently, who were communicated with. Thus the differential treatment they received because they were Deaf was evident to both Deaf4 and Deaf3. It was easy to compare the punishment they received when their identity was made known to the experiences of hearing people they observed.

Gael participants were also punished, where that punishment varied from; arrest and detention; fines; court proceedings. As noted in Chapter 12, Gael1 and Gael2 was arrested and detained when they refused to give a witness account in English or their name and address in English respectively. Both Gael1 and Gael2 attributed their punishment (a night in a police station cell) with the Garda's reaction to their use of Irish. As cited in Chapter 12, Gael3 and Gael5 reported Gardaí admitting to elevating punishment they received as a result of their use of Irish. Also in Chapter 12, Gael7 suspected that the Garda who attended the scene had elevated their punishment because they had used Irish, noting the numerous previous instances where they had been shown discretion. In all of these instances participants presented their identity to Gardaí, and they reported that the observance of identity was punished.

As demonstrated in the Chapter 2, there is a myriad of research showing how police punish stigma. Indigenous minorities,[56] racial minorities,[57] sexual minorities,[58] those with mental

[56] Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge: Cambridge University Press, 1997) at 11.
[57] Reiner *The Politics of the Police,* 4th edition (Oxford: Oxford University Press, 2010) at 128-131.
[58] *ibid* at 123, 124.

illness,[59] and the poor,[60] all experience being over-policed.[61] While the reasoning behind the punishment of stigma by police has been discussed in the Chapter 2, ultimately, what occurs is a punishment for exposed stigma. An identity which is associated with deviance or otherness is punishable. This was evident in the data, as discussed in the previous chapter. What is clear so far is that the display of the self in the data resulted in punishment, when that self is an othered identity.

13.5 Known-Aboutness and Symbolic Access

In considering these research findings, in light of access to justice, the pass or punish dichotomy is a multifaceted problem. There is obviously procedural access concerns at play,[62] whereby there is a lack of facilities for dealing with RML-users impacting on how these people experience the CJS. There is also a substantive access issue,[63] whereby laws and policies do not exist, or are not strong enough and therefore lack substantive access to protect RML-users in the CJS. But there is also a lack of symbolic access, where symbolic access ensures that "individuals from marginalised communities are fully included and empowered to participate as equal citizens."[64] The known-aboutness of Irish-speakers and Deaf people in society is limited. As discussed in the Chapter 2, known-aboutness refers to how an individual or identity is observed by society.[65] The individual's otherness will be understood in light of what the observer sees but also in terms of what they have previously known about the identity or stigma. This perception be "derived perhaps from gossip or a previous contact with the person when the stigma was visible".[66] When an individual's otherness becomes visible to an observer, what they understand about that otherness will be dependant not only on what they see, but also on what they have been exposed to before, and what is known about that stigma. A society can have a known-aboutness for a particular group based on

[59] Brooker et al, 'Mental Health Services and Prisoners: A Review' 2002 Commissioned by Prison Health, the Department of Health.
[60] *supra* note 57 at 123, 124.
[61] Kushnick, '"Over Policed and under Protected": Stephen Lawrence, Institutional and Police Practices' 1999 Vol 4 Sociological Research Online 156.
[62] *supra* note 3 at 15.
[63] Beqiraj, McNamara and Wicks 'Access to justice for persons with disabilities: From international principles to practice' International Bar Association, October 2017 at 14. Citing United Nations Development Programme (UNDP), *Access to Justice: Practice Note*, 2004 at 3.
[64] *supra* note 3 at 16.
[65] *supra* note 6 at 65.
[66] Katz, *Stigma: A Psychological Analysis,* (New York: Psychology Press, 1981) at 3.

stereotypes which exist about that group. For example, Goffman refers to "stigma symbols" which convey information about a stigmatised individual to observers, such as "wrist markings which disclose that an individual has attempted suicide"[67] or "the arm pock marks of drug addicts".[68] When society sees these stigma symbols, people will be treated in light of what is known about that stigma. The person with the pock marks will likely be treated as a stigmatised other, as an undesirable drug user to be avoided. The known-aboutness can often be harmful stereotypes that oversimplify or overrepresent just one aspect of the identity. And the effect is that when Irish-speakers and Deaf people present themselves as their True Gael and culturally Deaf selves, they do not match the known-aboutness attributed to them and are accordingly punished.

For Irish-speakers, the perception that Irish is limited in its function, ceremonial and often a waste of time or resources persists, as alluded to in Chapter 11.[69] The 'cúpla focal' usage of Irish as described by Brennan and O'Rourke is a regular feature of Irish life, and as shown.[70] Gael5 stated bluntly in their interview "*They don't understand – like a lot of Irish people – that Gaeilgeoirí exist."* They acknowledged that societally, the known-aboutness of Irish-speakers and Irish speaking does not perceive the "True Gael" identity. Rather they are perceived in light of deviance, and assumed that when they do not play the "Good Gael" (passing) they are the "Bad Gael" who is a slíbhín and deviant (punishment). The known-aboutness of Irish is associated with tokenism and flourish,[71] and the lived experiences of participants show that they are perceived as deviant when they do not match this known-aboutness.

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[67] *supra* note 6 at 61.
[68] *ibid.*
[69] See Boland 'Broadside: Can anybody truthfully say that Irish is a necessary language?' *The Irish Times* (30 May 2016), De Barra 'The case for ending state support of Irish language is littered with dubious "facts"' *TheJournal.ie* (04 February 2017). Available at: https://www.thejournal.ie/readme/fake-facts-irish-language-debate-3220676-Feb2017/ [date accessed: 04 May 2020], Walshe 'Irish lessons "are a waste of time"' *The Irish Independent* (02 July 2003). Delaney 'Irish language should not be compulsory, especially for struggling school children' *The Irish Independent* (12 August 2019). 'Irish Examiner View: Do we need Covid-19 booklets in both English and Irish?' *The Irish Examiner* (01 May 2020), Holden 'The rise of the gaelscoil - is this the new playground of the elite?' *The Irish Times* (17 April 2020). Fitzpatrick 'Tribes of modern Ireland: None of us are just Irish' *The Irish Independent* (28 May 2014), https://www.newstalk.com/podcasts/highlights-from-the-hard-shoulder/people-speak-irish-need-given-jobs [date accessed: 04 May 2020], https://www.newstalk.com/podcasts/between-the-lines-with-andrea-gilligan/the-irish-language [date accessed: 04 May 2020] https://www.todayfm.com/podcasts/the-last-word-with-matt-cooper/students-exempt-from-irish-are-studying-other-languages [date accessed: 04 May 2020].
[70] Brennan and O'Rourke, 'Commercialising the *cúpla focal*: New speakers, language ownership, and the promotion of Irish as a business resource' 2019 Vol 48(1) Language in Society 125 at 129.
[71] *ibid* at 127.

For Deaf people, the known-aboutness of a Deaf identity is largely linked to a paternalised view of Deaf people and the créatúr trope.[72] As shown in Chapter 11, Deaf people were often discussed using disability language during the debating of the ISL Act in the Dáil. As discussed in Chapter 3, this type of language does not necessarily differentiate between models of disability,[73] which can cause Deaf people to be seen in light of what they lack,[74] rather than in terms of who they are.[75] Deaf4 in particular, noted the common perception that Deaf people face where they are medicalised and paternalised.

The persistence of the general known-aboutness of Irish-speakers and Deaf people, above a nuanced understanding of the true identities points to a lack of symbolic access. When known-aboutness of Irish-speakers and Deaf people remains harmful, stereotypical external identities, then they are prevented from being treated as their true selves and being "fully included and empowered to participate as equal citizens".[76] Symbolic access is absent. This was specifically noted by participants that their groups were not treated equally in society. As mentioned earlier Deaf3 did not feel they were 'on a par with hearing society'. Deaf4 alluded to a similar sentiment:

> Deaf4: The Deaf community is a minority adapting to the majority. Deaf4 has felt like a second-class citizen.

Deaf4 was strong in their perception of the inequality in society that Deaf people experience.

> Gael1: *"When I was young, I didn't understand the negativity that there was about [Irish and Irish speakers] because I wasn't reading the English language newspapers…When I got older, I suppose I started to understand"*

Gael1 is referring to negative stereotypes of Irish speakers which are common features in national media.[77]

> Gael6: *"Well in terms of the state service, the state does not welcome us. As an Irish person, I am a foreigner in my own country in terms of langugae."*

Gael6 is strong in their words, attesting that as an Irish speaker, they feel unwelcome in Irish society. It is important to once again recall the distinction used in the ECRML betweeen

[72] *supra* note 11 at 7.
[73] Medical, social or human rights models of disability. See Chapter 3.
[74] *supra* note9 at 82.
[75] Glickman and Hall 'Introduction: Culture and Disability' in *Language Deprivation and Deaf Mental Health,* Glickman and Hall, eds. (New York: Routledge, 2019) at 2.
[76] *supra* note 3 at 16.
[77] *supra* note 69.

traditional and non-traditional language users, and in particualr, Woehrling's justification that traditional language users do not experience "problems of integration".[78] However from Gael6's testimony it is clear that they did not feel any different from "foreigners" or those who would use non-traditional langauges. Their experiences were that of an outsider, where their language and their identity were perceived as exceptional to the normal. They felt a kinship with non-traditional language users in the treatment they received. Their problems could be said to be a lack of integration into society, where society does not accept their identity and symbolic access is denied.

These extracts show that participants acknowledged their lack of symbolic access.[79] They show that their langauges and their identities are not "fully included and empowered" and that they are not treated as "equal citizens".[80] This acknowledgement was not limited to discussions of the CJS. Deaf3, Deaf4, Gael1 and Gael6 were referring generally to treatment of Deaf people and Irish-speakers in society. But many participants also had specific complaints about certain sectors demonstrating the inequality they experience in society. These experiences included problems with banks (Deaf1, Gael2); the social welfare office (Dr John-Bosco Conama); the revenue office (Gael6); the Motor Tax Office (Gael1, Gael7); and transportation services (Deaf1, Gael6). These instances demonstrated that Irish-speakers and Deaf people were an afterthought, or not thought about at all, and ultimately, that their identities were not valued enough to be considered. This added to the general sense from interviews that Irish-speakers and Deaf people were not fully empowered and equal citizens in society. [81]

The findings of this research suggest that where there is no symbolic access, the benefits that substantive and procedural access can have in ensuring access to justice are limited. As can be seen from the Chapter 11, actual substantive access measures are diluted and rendered unsubstantive where there is a failure to also ensure symbolic access. Legislative debates for both the OLA and the ISL Act showed the persistence of harmful, stereotypical known-aboutness of Irish speakers and Deaf people, rendering the substantive access measures obsolete. This shows that in spite of efforts to include affected parties in laws and policies

[78] Woehrling, 'Introduction' in Lopez, Ruiz Vieytez and Urrutia Libarona (eds) *The European Charter for Regional or Minority Languages: A Critical Commentary,* (Council of Europe Publishing, 2005) at 22.
[79] *supra* note 3 at 16.
[80] *ibid.*
[81] *ibid*

which affect them, they are undermined by the harmful societal perceptions that persist about said parties. Similarly, procedural access is also affected by symbolic access. Measures may be in place to remove barriers to access to justice for marginalised people. But those measures can only be effective when they are underpinned by symbolic access. If the Garda or the judge or the solicitor or the social worker enforcing the law perceives the Irish-speaker or the Deaf person only in terms of the harmful, stereotypical perceptions, and not in terms of their lived reality and true identity,[82] then procedural access measures are also pointless.

If the societal known-aboutness of marginalised groups persists as a harmful, stereotypical external perceptions, the true identity of these groups is not understood. And when that true identity of these groups is not understood, this research's findings suggest that substantive and procedural access measures cannot match the appropriate needs of those groups. Without symbolic access, providing a more nuanced and accurate known-aboutness of marginalised people, true access to justice cannot be achieved.

13.6 Conclusion

The research in this chapter is novel. Not only have I continued to expand on the field of access to justice, by exploring symbolic access as it exists for RML-users, but I have also mapped access to justice literature onto identity literature, in order to offer a deeper understanding of how the CJS was experienced by those interviewed in light of their linguistic identity.

From the data presented in this chapter, a number of findings are clear. Firstly, the internal identity of Irish-speakers and Deaf people does not match how they are externally perceived. A culturally Deaf identity, visible in the literature, was held by participants. Irish-speakers demonstrated a "True Gael" identity, where their langauge represented a core part of their identity and often superceeded their need for self-preservation. The deep connection that participants showed to their langauge, community and culture was evident. However, this did not match how they were perceived in the CJS or the general known-aboutness of Deaf people and Irish-speakers societally. Only one participant (Gael4) recounted their true

[82] *ibid* at 15.

identity being externally observed. All other participants noted being misunderstood, or misconstrued in light of the créatúr or the slíbhín tropes, as discussed in Chapter 12.

Secondly, as a consequence of the dominance of the harmful external identities, participants were left to manage their stigma by either passing or being punished. Knowing their identity would pose a problem, and represented a deviant, punishable other,[83] interviewees needed to either undercommunicate their identities,[84] or face the punishment head on as methods of stigma managemment. Because their internal idenity was not perceived, then they would not be treated in the CJS in light of the needs of their internal identity.

Third, this is linked to the lack of symbolic access and known-aboutness. The known-aboutness of both groups in society is largely limited to harmful, stereotypical perceptions of the créatúr and the slíbhín. This shows that there has not been adequate symbolic access underpinning access to justice measures for the groups. The persistence of these negative perceptions in the CJS and in society shows that Irish-speakers and Deaf people are not empowered, valued members of society. I have found that until the perception of these groups shifts from the external, harmful stereotypes to the internal, true idenities, then access to justice cannot be truly achieved. The needs of Irish speakers and Deaf people in the CJS and in society cannot be met unless we first perceive what actually it is to be an Irish-speaker or a Deaf person in the CJS and in society.

[83] *supra* note 55 at 19.
[84] *supra* note 1 at 87.

Chapter 14 – Concluding Remarks

14.1 Introduction

In this final chapter, I draw together the findings for this research, and return to the research questions posed in Chapter 1. The research has been an illuminating process, which sheds light on how RML-users can experience engaging with the CJS and using their language in Ireland. Using hermeneutic phenomenology to underpin the collection and analysis of empirical data, I have been able to engage with the research questions and explore the lived experiences of RML-users who use their language in the CJS. The research has shown how impactful language use can be and how central identity is to how an individual experiences the right to a fair trial, the CJS and access to justice.

I address the research questions in turn below, drawing to mind the data and findings which I have concluded.

14.2 How do RML-users Experience the Right to a Fair Trial?

First, I address the question of how RML-users experience the right to a fair trial. I have found that language played a role in how Deaf people and Irish speakers experienced the right to a fair trial. The use of their language had an impact of course on the minimum standards of the right to a fair trial. In particular, the right to trial without undue delay was impacted. It cannot be said for certain whether any of the interviewees or their testimonies were evidence of individuals actually experiencing undue delay. It is clear that delay was a concern. That delay was rooted in both the availability of interpreters and in the availability of Gardaí or judges with appropriate Irish (in respect of Irish speakers). I have also found that where an individual is facing delay attributed to their linguistic needs, there may be a temptation to forgo those needs in order to avoid delay. The risk then is that although delay has been avoided, the individual is not given access as they are truly entitled to it. In forgoing linguistic needs to avoid delay, the fairness of trial is impacted.

I found that the right to be present at trial was also impacted. Physically, there were no instances of interviewees reporting being denied access to the court. However, there were issues around cognitive presence and the right to be *actively* present at trial. In being denied linguistic facilitations (interpreters or Irish speaking CJS operative) individuals are unable to

access the right to be present in practice. The benefits that come with being present – being able to understand the case against oneself, being able to participate, being able to hear the evidence against oneself – are unattainable. The findings of this research suggest that only when language is facilitated effectively, through appropriate interpretation or CJS operatives proficient in the language in question, can RML-users actually access the right to be present.

Connected to this is the right to communicate with counsel. Where counsel and the accused do not share a language, they cannot access their right to communicate without effective measures being put in place to bridge the language gap. What could be seen in the data is that interpreters were not always available, particularly outside of the formal court structures. For example, in police interviews and in consultations, interpreters were not always available. This of course impacted the ability to effectively form a defence with counsel. Additionally, there were instances where interviewees reported no interpreter aid at all, therefore rendering communication with counsel disjointed or impossible. For lawyers, I found that there was also the concern that their communications with clients would be affected by a lack of interpreter ethics. Lawyer-client privilege does not necessarily extend to interpreters and so lawyers showed concern that their presence would impact and undermine how they communicated with their clients and the quality of that communication.

Finally, interpretation was an underlying issue for many interviewees. Availability of interpreters was of course a concern. The right to an interpreter is undermined where there are insufficient interpreters to facilitate demand. There are multiple issues underpinning this lack of availability. Poor working conditions for interpreters were evident, where there is poor pay, long hours and a lack of appropriate and specialised training needed to interpret in legal context. In Ireland, interpretation is largely an unregulated field where there is no legislative oversight or regulatory monitoring. The poor working conditions then can have a direct impact on how RML-users will experience their right to an interpreter. Where the interpreters are poorly paid, over worked and undertrained with no oversight, these conditions can give rise to poor quality interpretations and ultimately to unfairness at trial. There is also an issue of entitlement, where interpreter access is gatekept by judges or Gardaí. There are no evident criteria for granting an interpreter and there is evidence to suggest that arbitrary decisions can be made based on an assumption that the accused is being deviant in their request for an interpreter, or on the belief that they *should* have a command of the court's language, irrespective of whether they do in fact.

In concluding this part, it must be noted that legal issues and minimum standards of the right to a fair trial formed only part of the lived experiences recounted by participants. In fact, I found that largely the minimum standards were not where participants had most issues or concerns. In recognising this finding, it was evident that experiencing the right to a fair trial is not limited to the minimum standards of the right to a fair trial. A broader look at the fair trial process was necessary to create a fuller picture of the lived experience of RML-users.

14.3 How do RML-users Experience the CJS?

Secondly, I turn to addressing the question of how RML-users experience the CJS. I found through the research that language and linguistic identity impacted how RML-users experienced the CJS. For the most part I found that Irish-speakers and Deaf people were not perceived in light of their internal identities when they interacted with the CJS. This had mostly negative effects, whereby simplified, harmful external identities were applied to Irish-speakers and Deaf people. I found that the were perceived in light of what I have called the créatúr or slíbhín tropes, which are underpinned by societal known-aboutness of the two groups. In addition, what I have called the "Good Gael" is a sub-trope which was a performance used by Irish speakers, largely in an attempt to avoid what I have called "Bad Gael" sub-trope, a harmful external identity applied to Irish speakers.

For Deaf people, there was evidence to suggest that many had been treated in light of the créatúr trope. They were paternalised, treated as disabled in a medical model context and their autonomy as individuals was undermined. No Deaf person interviewed for this research identified as disabled, in any context of the term.[1] There was also evidence of Deaf people being treated as the slíbhín, when they did not match the known-aboutness of Deaf people. There was also evidence of Deaf people being disbelieved about their identity as Deaf people. I found that the internal culturally Deaf identity which was held by participants was not perceived externally. Their internal identities were undermined by the créatúr and slíbhín tropes as external identities and they were treated on the bases of those tropes when they interacted with the CJS.

[1] Be it a medical model, social model or a human rights model of disability.

Similarly, with the exception of one incident reported by Gael4, I found that Irish-speaking participants were not understood in light of their internal, "True Gael" identities. Where they were perceived in light of their identities as Irish-speakers, that external identity took the form of the slíbhín trope and the "Bad Gael" sub-trope. In attempts to avoid the "Bad Gael" external identity, and the associated punishments, Gael participants also alluded to performing the "Good Gael" sub-trope, whereby they did not use Irish to be 'rude' or did not 'force' Irish on someone. This finding reflects the known-aboutness that Irish is a hobby language and not for actual communication.[2] This attempt to perform as the "Good Gael" sub-trope was not always successful, and some participants were nevertheless perceived as the Bad Gael" sub-trope and accordingly treated.

In response to the conflict between the internal culturally Deaf and "True Gael" identities and the externally perceived identity as the slíbhín and créatúr tropes, I found that Deaf people and Irish-speakers managed their stigma by passing and concealing their true selves, or by overcommunicating their identity and be accordingly punished for that communication of identity. This placed Deaf people and Irish speakers in a difficult position in the CJS: to either pass and conceal their true selves,[3] risking later exposure and the corresponding punishment, or suffer the consequences of concealing their identity, such as a lack of access to the language of the court; or to express that identity and be treated in light of the créatúr or the slíbhín tropes, whereby they are paternalised or treated as devious troublemakers respectively.

This understanding of how RML-users experienced the CJS is underpinned by access to justice, which is concluded below.

14.4 How RML-Users Experience Access to Justice?

Finally, I address the third research question, exploring how RML-users experienced access to justice. Access to justice has been the central focus of this thesis, through which the data is

[2] O'Reilly 'Irish language, Irish Identity: Northern Ireland and the Republic of Ireland in the European Union' in O'Reilly (ed) *Language Ethnicity and the State. Volume 1: Minority Languages in the European Union,* (Hampshire: Palgrave, 2001) at 91 and Brennan and O'Rourke, 'Commercialising the cúpla focal: New speakers, language ownership, and the promotion of Irish as a business resource' 2019 Vol 48(1) Language in Society 125 at 132.

[3] Goffman, *The Presentation of Self in Everyday Life,* (London: Penguin Books, 1969) at 87.

situated. It became clear from the data collected that a strict focus on the minimum standards of the right to a fair trial would only partially touch on the concerns that were expressed in interviews and the themes which arose therein.

In coming to this finding, access to justice scholarship provides an important lens through which to view the data. The experiences of participants where multifaceted, and understanding them needs a multifaceted approach.

I found that procedural access issues arose for participants in respect of their minimum standards under the right to a fair trial. As noted above, their linguistic identity posed a barrier to procedural access in some instances. There was evidence of Irish-speakers and Deaf people being blocked from effectively engaging in the process against them, because of the CJS's reaction to their language or because of the lack of facilities in place. As addressed above, delays were common, participants' experienced difficulty in accessing their counsel, in accessing the benefits of the right to be present and in accessing an interpreter. These issues point to a lack of procedural access for marginalised RML-users. Again, these issues marked the narrowest part of the triangle for participants. These concerns, although impactful on the process of accessing the right to a fair trial in the CJS, represented the outcome of other access to justice concerns.

Substantive access issues were one such concern. In spite of initial attempts to include Irish-speakers and Deaf people in the creation of laws and policies which affect them, the ultimate result is one of compromise and tokenism. The legislative solutions do not point towards beneficial or equitable outcomes for the marginalised people they are designed for. In respect of training, where there is training for engagement of CJS operative with RML-users, that training can be wrought with harmful stereotypes and tropes, which reinforce the negative créatúr and slíbhín external identities, as shown above. It should be noted, that in the creation of laws and policies for Irish-speakers and Deaf people, these negative, harmful tropes can also be seen by policymakers. This is possibly indicative of an overall lack of symbolic access. Recall that symbolic access, according to Flynn, ensures that "individuals from marginalised communities are fully included and empowered to participate as equal citizens…"[4] The lack of symbolic access in wider society was indicated by the presence of harmful stereotypes which dominate the known-aboutness of Irish-speakers and Deaf people. The findings of the

[4] Flynn *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (New York: Routledge, 2016) at 16.

research suggest that Irish-speakers and Deaf people experienced a lack of symbolic access in their interactions with society at large, not just in respect of the CJS. That lack of symbolic access manifested in the CJS as the slíbhín and the créatúr tropes. Were they valued, empowered and fully included citizens, they would have been perceived in light of their true selves. When the known-aboutness of a marginalised group persists as a negative trope such as the slíbhín or the créatúr, it indicates that there is a lack of understanding of the true needs and true identities of that group, and therefore a lack of symbolic access.

This lack of symbolic access, I believe, has underpinned a lack of substantive access, which has then underpinned a lack of procedural access. Where marginalised people are not valued and empowered, they are less likely to have a seat at the table when it comes to making laws and policy. It is less likely that their concerns will be heard by those who do make law and policy. Where their concerns have not been considered in the creation of law and policy, beneficial and equitable judicial outcomes are not provided for. Their concerns have not been built into the CJS. Their existence in the CJS is an exception. In being exceptional, they face barriers. They must either fight to remove those barriers (often experiencing punishment for such movement) or accept that they will not be treated equal (and conceal or pass their need for barriers to be removed.) Without a basis in symbolic access, substantive and procedural access are limited or absent outright.

14.5 Conclusion

I began this thesis with a discussion of the cases of Maolra Seoighe and of John McGrotty; men, over 100 years apart, whose experiences of the CJS were heavily impacted by their languages and their linguistic identities. In both cases, it is possible to observe a failure of access to justice. Both men experienced barriers to their effective participation in proceedings against them. Both men experienced a system, built on laws which did not perceive them, or consider them in the creation of beneficial and equitable outcomes. Both men were tried and convicted in societies which did not value them as empowered citizens. Both men experienced a lack of access to justice. In writing this thesis, I have not fixed the wrongs visited upon Maolra or John. I have not fixed the feelings of injustice, unfairness or discrimination which arose in interviews. What I have done, however, is highlight how language and identity are central to how RML-users experience the right to a fair trial, the CJS and access to justice

in a way that is original. What I have shown, is that in ensuring that RML-users are treated with equality, we must look beyond merely the narrow focus of the four walls of the court, or the police station interview room. I have provided an original contribution to research, by engaging with literature on identity, policing, human rights law and access to justice, and expanding on their scope to offer an understanding of the lived experiences of RML-users who engaged with the CJS. I have shown for the first time how individual Irish-speakers and Deaf ISL users in Ireland experienced using their language while engaging with their right to a fair trial in the CJS.

I have also raised questions with this work. In particular, I am not confident that there is value in substantiating a difference between traditional and non-traditional languages under the scope of much of international law as it exists and in particular in the ECRML's definition of an RML. I suspect that the differentiation between the two is an attempt to divide marginalised groups from unifying in a common struggle, by creating an arbitrary distinction. In positioning one marginalised group (migrant language users) as a threat to the recognition of rights for another marginalised group (traditional or indigenous language users), the focus shifts from the majority in power which consistently denies rights and protections to both. Further work would be needed to investigate this hypothesis, however.

In concluding this work, in order to move forward and ensure that RML-users experience access to justice when they engage with the CJS we must look beyond the laws and policy which exist presently to help these marginalised groups. We must look at how these law and policies have been informed by societal known-aboutness of these marginalised groups, and how they in turn have built the walls of the court and the police station. We must first look to how these marginalised people – Deaf people and Irish-speakers – are perceived in the world and treated on the back of that perception. It is only when we can see, accept, value and appreciate the true identities of these groups that we can start to build a system fit for purpose, based on the principles of access to justice.

Bibliography

Books

Alcock, *A History of the Protection of Regional Cultural Minorities in Europe: From the Edict of Nantes to the Present Day* (Macmillan Press Ltd., 2000)

Allen and Xanthaki, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011)

Bagley, *General Principles and Problems in the International Protection of Minorities* (Imprimeries Populaires, 1950)

Baker and Padden, *American Sign Language: A Look at its Story and Structure* (TJ Publishers, 1978)

Bangura and Stavenhagen, *Racism and Public Policy* (Palgrave Macmillan, 2005)

Bazeley and Jackson, *Qualitative Data Analysis with NVivo* 2nd ed. (SAGE, 2013)

Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press, 1963)

Beetham, *The Legitimation of Power* (Macmillan, 2002)

Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* 2nd ed. (The University of Chicago Press, 2017)

Biber and Conrad, *Register, Genre, and Style* (Cambridge University Press, 2009)

Blot, *Language and Social Identity* (Praeger, 2003)

Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 2010)

Brennan and Brown, *Equality Before the Law: Deaf People's Access to Justice* (Douglas McLean, 2004)

Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* (Russell Sage Foundation, 1988)

Butler, *Undoing Gender* (Routledge, 2004)

Cameron, *Verbal Hygiene* (Routledge, 2012)

Cao, *Translating Law* (Multilingual Matters Ltd., 2007)

Carbaugh and Berry, *Reporting Cultures on 60 Minutes: Missing the Finnish Line in an American Newscast* (Routledge, 2016)

Carroll-Mac Neill, *The Politics of Judicial Selection in Ireland* (Four Courts Press, 2016)

Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge University Press, 1997)

Charlton *Nothing About Us Without Us* (University of California Press, 2000)

Chow, *Not like a Native Speaker: On Languaging as a Postcolonial Experience* (Columbia University Press, 2014)

Conway and Walsh , *The Blue Wall of Silence: The Morris Tribunal and Police Accountability in Ireland* (Irish Academic Press, 2010)

Crowley, *Wars of Words: The Politics of Language in Ireland, 1537-2004* (Oxford University Press 2005)

Cuddon and Preston, *The Penguin Dictionary of Literary Terms and Literary Theory* 4th ed (Penguin Books, 1999)

Davis, *Contesting Intersex: The Dubious Diagnosis* (New York University Press, 2015)

Del Valle S, *Language Rights and the Law in the United States: Finding Our Voices* (Multilingual Matters, 2003)

Dibley, Dickerson, Duffy and Vandermause, *Doing Hermeneutic Phenomenology Research: A Practical Guide* (SAGE Publications, 2020)

Duff, *Language Socialization* 3rd ed. (Springer Berlin Heidelberg, 2017)

Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015)

Ellis *Understanding Second Language Acquisition* (Oxford: Oxford University Press, 1985)

Eriksen, *Ethnicity and Nationalism: Anthropological Perspectives* 3rd ed. (Pluto Press, 2010)

Farías, Margolis and Rockmore, *Heidegger and Nazism* (Temple University Press, 1989)

Fishman, *Language and Nationalism: Two Integrative Essays* (Newbury House Publishers, 1973)

Fishman, *Sociolinguistics: A Brief Introduction* (Newbury House, 1971)

Fitzgerald O'Reilly, *Uses and Consequences of a Criminal Conviction: Going on the Record of an Offender* (Palgrave Macmillan UK, 2018)

Flynn, *Disabled Justice: Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Routledge, 2016)

Forde and Leonard, *Constitutional Law of Ireland* 3rd ed. (Bloomsbury, 2013)

Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books, 1995)

Gaiba, *The Origins of Simultaneous Interpretation* (University of Ottawa Press, 1998)

Geertz, *The interpretation of cultures* (Basic Books, 1973)

Genn, *Judging Civil Justice* (Cambridge University Press, 2010)

Gertz and Boudreault, *The SAGE Deaf Studies Encyclopaedia* (Sage Publications, 2016)

Goffman *Stigma: Notes on the Management of Spoiled Identity* (Simon and Schuster, 1963)

Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1990)

Goffman, *Behavior in Public Places: Notes on the Social Organization of Gatherings* (The Free Press ,1966)

Goffman, *The Presentation of Self in Everyday Life* (Penguin Books, 1969)

Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages*, (Palgrave Macmillan, 2003)

Hale, *The Discourse of Court Interpreting: Discourse Practices of the Law, the Witness, and the Interpreter* (J Benjamins Pub Co, 2004)

Harris-Perry, *Sister Citizen: Shame, Stereotypes, and Black Women in America* (Yale University Press, 2011)

Heidegger, Macquarrie and Robinson, *Being and Time* (Harper Perennial/Modern Thought, 2008)

Helleiner, *Irish Travellers: Racism and the Politics of Culture* (University of Toronto Press, 2000)

Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association (United Nations, 2003)

Hylland-Eriksen, *Ethnicity and Nationalism* (Pluto Press, 1994)

Jagger, *Judith Butler: Sexual Politics, Social Change and the Power of the Performative* (Routledge, 2008)

James, *The Principles of Psychology, Volume 1* (Dover, 1995)

Joseph, *Language and Identity: National, Ethnic, Religious,* (Palgrave Macmillan, 2004)

Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 2nd ed. (Oxford University Press, 2004)

Katz, *Stigma: A Psychological Analysis* (Psychology Press, 1981)

Kramsch, *Language and Culture* (Oxford University Press, 1998)

Kvale, *Doing Interviews* (SAGE Publications, Ltd, 2007)

Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 2003)

Ladd, *Understanding Deaf Culture: In Search of Deafhood* (Multilingual Matters, 2003)

Lane, Hoffmeister and Bahan, *A Journey into the Deaf-World* (Dawn Sign Press, 1996)

Lane, *The Mask of Benevolence: Disabling the deaf community* (Dawn Sign Press, 1992)

Leanza and Pridal, *The Right to a Fair Trial: Article 6 of the European Convention on Human Rights* (Wolters Kluwer Law & Business: Kluwer Law International, 2014)

Leeson and Saeed, *Irish Sign Language* (Edinburgh University Press, 2012)

Lehtola, *The Sámi People: Traditions in Transition* 2nd ed. (University of Alaska Press 2004)

Leigh, Andrews and Harris, *Deaf Culture: Exploring Deaf Communities in the United States* (Plural Publishing, 2018)

Loftus, *Police Culture in a Changing World* (Oxford University Press, 2009)

Mac Giolla Chríost, *Jailtacht: The Irish Language, Symbolic Power and Political Violence in Northern Ireland, 1972-2008* (University of Wales Press, 2012)

Marshall and Rossman, *Designing Qualitative Research* 6th ed. (SAGE, 2016)

Mason, *Courtroom Interpreting* (University Press of America, 2008)

May, *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language* 2nd ed. (Routledge, 2012)

McQueen, *Subjectivity, Gender and the Struggle for Recognition* (Palgrave Macmillan UK, 2015)

Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 2000)

Mowbray, *Linguistic Justice: International Law and Language Policy* (Oxford University Press, 2012)

Mulayim, Lai and Norma, *Police Investigative Interviews and Interpreting: Context, Challenges, and Strategies* (CRC Press, 2014)

Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (University of Chicago Press ,2000)

Nardi, *Doing Survey Research: A Guide to Quantitative Methods,* 4th ed. (Routledge, 2018)

Newton, *Mother Camp: Female Impersonators in America* (University of Chicago Press, 1972)

Ngũgĩ, *Decolonizing the Mind: The Politics of Language in African Literature* (East African Educational Publishers Ltd., 1986)
Ó Cearúil and Ó Murchú, *Bunreacht Na hÉireann: A Study of the Irish Text* (Oifig an tSoláthair, 1999)
Ó Cuirreáin, *Éagóir: Maolra Seoighe agus dúnmharuithe Mhám Trasna* (Cois Life, 2017)
Ó Laighin, *Acht Na Gaeilge – Acht Ar Strae* (Coiscéim, 2003)
Ó Riagáin, *Language Policy and Social Reproduction: Ireland 1893-1993* (Clarendon Press, 1997)
O'Reilly, *Irish Language in Northern Ireland: The Politics of Culture and Identity* (Palgrave Macmillan 2014)
Orange, *Police Powers in Ireland* (Bloomsbury Professional, 2014)
Parker, Scott and Geddes, *Snowball Sampling* (Sage Publications, 2020)
Phelan, *Irish Speakers, Interpreters, and the Courts, 1754 -1921* (Four Courts Press, 2019)
Piatt, *Only English? Law and Language Policy in the United States* (University of New Mexico Press, 1990)
Piller *Linguistic Diversity and Social Justice: An Introduction to Applied Sociolinguistics* (Oxford University Press, 2016)
Reiner, *The Politics of the Police* 4th ed. (Oxford University Press, 2010)
Reinharz and Davidman, *Feminist Methodologies in Social Research,* (Oxford University Press, 1992)
Riley, *Language, Culture and Identity: An Ethnolinguistic Perspective* (Continuum, 2007)
Schneider and Crombie *Dyslexia and Foreign Language Learning* (David Fulton Publishers, 2004)
Sweeney, *Arrest, Detention and Questioning: Law and Practice* (Claurus Press, 2019)
Thornberry, *International Law and the Rights of Minorities,* (Clarendon Press, 1991)
Tidyman, *Dummy* (Little Brown, 1974)
Travers, *Qualitative Research through Case Studies* (SAGE, 2001)
Tyler and Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation, 2002)
Vaughan and Kilcommins, *Terrorism, Rights and the Rule of Law* (Willan 2013)
Walker and Archbold *The New World of Police Accountability* 3rd ed. (Thousand Oaks, 2019)

Walsh, *The Irish Police: A Legal and Constitutional Perspective* (Round Hall Sweet & Maxwell 1998)

Waterhouse, *Ireland's District Court: Language, Immigration and Consequences for Justice* (Manchester University Press, 2014)

Wheatley and Pabsch, *Sign Language Legislation in the European Union* 2nd ed. (European Union of the Deaf, 2012)

Woehrling, The European Charter for Regional or Minority Languages: A Critical Commentary, (Strasbourg: Council of Europe Publishing, 2005)

Edited Volumes

Alfredsson, Grimheden and Ramcharan (eds), *International Human Rights Monitoring Mechanisms* (Brill Nijhoff 2009)

Backhaus (ed), *Encyclopedia of Law and Economics* (Springer New York, 2015)

Barnes and Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (The Disability Press, 2004)

Bauman (ed), *Open your eyes: Deaf studies talking* (University of Minnesota Press, 2008)

Blanck and Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge, 2017)

Burke (ed), *Contemporary Social Psychological Theories,* (Stanford University Press, 2006)

Cassese, Gaeta and Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002)

Cera, Della Fina and Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer International Publishing, 2017)

Creutzfeldt, Mason and McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 2020)

Cribb (ed), *Imagined Commonwealths* (Palgrave Macmillan UK, 1999)

de Meulder, Murray and McKee (eds), *The Legal Recognition of Sign Languages: Advocacy and Outcomes Around the World* (Multilingual Matters, 2019)

Dolan (ed), *A Dictionary of Hiberno-English: The Irish Use of English* 2nd ed. (Gill and Macmillan, 2004)

Duranti (ed), *A Companion to Linguistic Anthropology,* Vol 8, (Blackwell Publishing, 2004)

Ellis and Flaherty (eds), *Investigating Subjectivity: Research on Lived Experience* (Sage, 1992)
Enright, McCandless and O'Donoghue (eds), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017)
Fishman (ed), *Handbook of Language & Ethnic Identity* (Oxford University Press, 1999)
Fishman, Gernter, Lowy and Milán (eds), *The Rise and Fall of the Ethnic Revival: Perspectives on Language and Ethnicity* (Mouton Publishers, 1985)
Francioni (ed), *Access to Justice as a Human Right* (Oxford University Press, 2007)
Francioni and Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff Publishers, 2008)
Gelsthorpe (ed), *Ethnic Minorities and the Criminal Justice System: 21st Corporal Roundtable Conference, 1992* (Cambridge Institute of Criminology, 1993)
Glickman and Hall (eds), *Language Deprivation and Deaf Mental Health* (Routledge, 2019)
Gregory and Hartley (eds), *Constructing Deafness* (Pinter and the Open University, 1991)
Hauritz, Sampford, and Blencowe (eds), *Justice for People with Disabilities- Legal and Institutional Issues* (Federation Press, 1998)
Janzen (ed), *Topics in signed language interpretation*. (Benjamins, 2005)
King and Wincup (eds), *Doing Research on Crime and Justice* 2nd ed, (Oxford University Press, 2008)
Krause and Scheinin (eds), *International Protection of Human Rights: A Textbook* 2nd ed. (Institute for Human Rights, Åbo Akademi University, 2012)
Lemert and Branaman (eds), *The Goffman Reader* (Blackwell, 1997)
Liimatainen, Nurmi, Kivilehto, Salmi, Viljanmaa and Wallace (eds) *Legal Translation and Court Interpreting Ethical Values, Quality, Competence Training* (Frank and Timme, 2018)
Lindholm, Durham, and Tahzib-Lie (eds), *Facilitating Freedom of Religion or Belief: A Deskbook* (Martinus Nijhoff Publishers, 2004)
Lord, Guernsey, Balfe, Karr and Flowers (eds), *Human Rights: Yes! Action and Advocacy on the Rights of Persons with Disabilities* (Human Rights Resource Center, 2009)
McIntosh and Mendoza-Denton (eds), *Language in the Trump Era: Scandals and Emergencies* (Cambridge University Press, 2020)
Newcomer, Hatry and Wholey (eds), *Handbook of Practical Program Evaluation* 4th ed, (Jossey-Bass & Pfeiffer Imprints, Wiley 2015)
Nic Pháidín and Ó Cearnaigh (eds), *A New View of the Irish Language* (Cois Life, 2008)

Nogueira López, Ruiz Vieytez and Urrutia Libarona (eds), *Shaping Language Rights* (Council of Europe Publishing, 2012)
O'Reilly (ed), *Language Ethnicity and the State. Volume 1: Minority Languages in the European Union* (Palgrave, 2001)
Packer, Myntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Institute for Human Rights, Åbo Akademi University, 1993)
Ricento (ed), *An Introduction to Language Policy: Theory and Method* (Blackwell Pub, 2006)
Roberts (ed), *Doing Feminist Research* (Routledge, 1988)
Rolston (ed), *The Media and Northern Ireland* (Palgrave Macmillan UK, 1991)
Singh and Schmidt (eds), *Postcolonial Theory and the United States: Race, Ethnicity, and Literature* (University Press of Mississippi, 2000)
Vanfraechem, Pemberton and Mukwiza Ndahinda (eds), *Justice for Victims: Perspectives on rights, transition and reconciliation*, (Routledge, 2016)
Wadensjö, Englund Dimitrova and Nilsson (eds), *The Critical Link 4: Professionalisation of Interpreting in the Community: Selected Papers from the 4th International Conference on Interpreting in Legal, Health and Social Service Settings, Stockholm, Sweden, 20-23 May 2004* (John Benjamins Pub Co, 2007)
Watson, Roulstone and Thomas (eds), *Routledge Handbook of Disability Studies* (London: Routledge, 2012)

Reports and press releases

An Garda Síochána, *Competition for Selection of Garda Trainees 2019.* Available at https://www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/news-media/garda-trainee-2019-notes-for-applicants.pdf
Australian Law Reform Commission, *Pathways to Justice – Inquiries into the incarceration rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2017)
Bahdi, *Background Paper on Women's Access to Justice in the MENA Region* (International Development Research Centre (IDRC), Women's Rights and Citizenship Program (WRC) and the Middle East Regional Office (MERO), Middle East and North African (MENA) Regional Consultation, 9–11 December 2007, Cairo, Egypt)

Beqiraj, McNamara and Wicks ‘Access to justice for persons with disabilities: From international principles to practice’ International Bar Association, October 2017
Brooker, Repper, Beverley, Ferriter and Brewer, ‘Mental Health Services and Prisoners: A Review’ 2002 Commissioned by Prison Health, the Department of Health
Council of Europe, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Criminal Limb)* (30 April 2019)
Council of Europe, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention* (31 August 2021)
Darmody and Daly ‘Attitudes towards the Irish Language on the Island of Ireland’ (2015) Foras na Gaeilge
Edwards, Harold and Kilcommins, ‘Access to Justice for People with Disabilities as Victims of Crime in Ireland.’ (2012) National Disability Authority, Dublin.
EU Agency for Fundamental Rights, *Access to Justice: An Overview of Challenges and Opportunities* (EU Agency for Fundamental Rights, 2011), foreword
European Charter for Regional or Minority Languages Report of the Committee of Experts on Austria, ECRML (2012)7
European Charter for Regional or Minority Languages Report of the Committee of Experts on Bosnia and Herzegovina, ECRML (2013)5
European Charter for Regional or Minority Languages Report of the Committee of Experts on Bosnia and Herzegovina, ECRML (2016)3
European Charter for Regional or Minority Languages Report of the Committee of Experts on Croatia, ECRML (2015)2
European Charter for Regional or Minority Languages Report of the Committee of Experts on Germany, ECRML (2002)1
European Charter for Regional or Minority Languages Report of the Committee of Experts on Finland, ECRML (2001)3
European Charter for Regional or Minority Languages Report of the Committee of Experts on Hungary, ECRML (2001)4
European Charter for Regional or Minority Languages Report of the Committee of Experts on Sweden, ECRML (2003)1
European Charter for Regional or Minority Languages Report of the Committee of Experts on Sweden, ECRML (2011)4

European Charter for Regional or Minority Languages Report of the Committee of Experts on Germany, ECRML (2006)1
European Charter for Regional or Minority Languages Report of the Committee of Experts on Slovenia, ECRML (2014)5
European Charter for Regional or Minority Languages Report of the Committee of Experts on Austria, ECRML (2018)38
European Charter for Regional or Minority Languages Report of the Committee of Experts on Ukraine, ECRML (2017)97
European Charter for Regional or Minority Languages Report of the Committee of Experts on Bulgaria, ECRML (2016)3
European Charter for Regional or Minority Languages Report of the Committee of Experts on Croatia, ECRML (2019)18
European Charter for Regional or Minority Languages Report of the Committee of Experts on Czech Republic, ECRML (2015)6
European Charter for Regional or Minority Languages Report of the Committee of Experts on Romania, ECRML (2012)3
European Charter for Regional or Minority Languages Report of the Committee of Experts on Spain, ECRML (2012)5
European Charter for Regional or Minority Languages Report of the Committee of Experts on Norway, ECRML (2001)6
European Charter for Regional or Minority Languages Report of the Committee of Experts on Norway, ECRML (2003)2
European Charter for Regional or Minority Languages Report of the Committee of Experts on Ukraine, ECRML (2014)3
European Charter for Regional or Minority Languages Report of the Committee of Experts on United Kingdom, ECRML (2004)1
European Foundation for the Improvement of Living and Working Conditions, *Statutory Minimum Wages in the EU 2016,* (29 January 2016).
Government of Canada, Office of the Correctional Investigator, *Indigenous People in Federal Custody Surpasses 30% Correctional Investigator Issues Statement and Challenge* (21 January 2020)

GRECO 'Corruption prevention in respect of members of parliament, judges and prosecutor' Greco Eval IV Rep (2014)

International Criminal Court, *Behind the Scenes: The Registry of the International Criminal Court*. Available at https://www.icc-cpi.int/iccdocs/PIDS/docs/behindTheSce.pdf

Intersource Group, 'Collaboration with An Garda Síochána and Trinity College Dublin to Pilot new service for Deaf community' (15 March 2019)

Irish Translators and Interpreters Association, *Code of Ethics for Community Interpreters.* Available at: https://www.translatorsassociation.ie/wp-content/uploads/2017/03/Code-of-Ethics-for-Community-Interpreters.pdf

Irish Translators and Interpreters Association, *ITIA Bulletin,* (2017) Vol 3

Leeson and Venturi A Review of Literature and International Practice on National and Voluntary Registers for Sign Language Interpreters' (2017) Commissioned by Sign Language Interpreting Services

The Law Society of Ireland. *A Guide to Good Professional Conduct for Solicitors,* 3rd ed (2013)

Walsh, O'Rourke and Rowland, 'Research Report on New Speakers of Irish' (2015) Foras na Gaeilge

Journal Articles

Abbe and Brandon, 'Building and Maintaining Rapport in Investigative Interviews' (2014) 15 Police Practice and Research 207

Abel and Suh, 'Use of Police Services by Battered Women' (1987) Vol 32 Social Work 526

Allard, Mortimer, Gallo, Link and Wortham, 'Immigrant Spanish as Liability or Asset? Generational Diversity in Language Ideologies at School' 20

Andrews and Henshaw, 'The Irish and Welsh Languages in the Courts a Comparative Study' (1983) Vol 18 Irish Jurist 1

Bacik 'Breaking the Language Barrier-Access to Justice in the New Ireland' (2007) Vol 10 Judicial Studies Institute Journal 109

Barry, 'Irish Language Self-Efficacy Beliefs and the Official Languages Act 2003' (2020) Vol 27 TEANGA, the Journal of the Irish Association for Applied Linguistics

Bates, Bond & Wiseman, "Troubling Signs: Mapping Access to Justice in Canada's Refugee System Reform" (2016) Vol 47(1) Ottawa Law Review 1

Berazneva, ‘Audio Recording of Household Interviews to Ensure Data Quality’ (2014) Vol 26 Journal of International Development 290
Berbrier, ‘Making Minorities: Cultural Space, Stigma Transformation Frames, and the Categorical Status Claims of Deaf, Gay, and White Supremacist Activists in Late Twentieth Century America’ (2002) Vol 17 Sociological Forum 553
Bergova, ‘Trust in the State Courts: Hispanic and African American Communities’ (2016) Vol 4(12) International Relations and Diplomacy 746
Berk-Seligson ‘The Importance of Linguistics in Court Interpreting’ (1988) Vol 2 La Raza Law Journal 14
Berman, ‘Treaty “Interpretation” in a Judicial Context’ (2004) Vol 29 Yale Journal of International Law 291
Bowling and Phillips ‘Disproportionate and Discriminatory/ Reviewing the Evidence on Police Stop and Search’ (2007) Vol 70(6) The Modern Law Review 936
Boyle, ‘A Consideration of the Eligibility of Blind or Deaf People for Jury Service in Ireland’ (2011) Vol 10(1) Hibernian Law Journal 1
Bradley, ‘Girlfriends, Wives, and Strippers: Managing Stigma in Exotic Dancer Romantic Relationships’ (2007) Vol 28 Deviant Behavior 379
Brandt, ‘Treatment of Persons With Mental Illness in the Criminal Justice System: A Literature Review’ (2012) Vol 51 Journal of Offender Rehabilitation 541
Brekoulakis, ‘Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making’ (2013) Vol 4 Journal of International Dispute Settlement 553
Brennan and O’Rourke, ‘Commercialising the cúpla focal: New speakers, language ownership, and the promotion of Irish as a business resource’ (2019) Vol 48(1) Language in Society 125
Brown-Blake, ‘Fair Trial, Language and the Right to Interpretation’ (2006) Vol 13 International Journal on Minority and Group Rights 391
Brunson, ‘Your Case Will Now Be Heard: Sign Language Interpreters as Problematic Accommodations in Legal Interactions’ (2007) Vol 13 Journal of Deaf Studies and Deaf Education 77
Cahillane ‘Judicial Diversity in Ireland’ (2016) Vol 6(1) Irish Journal of Legal Studies 1
Caldas and Caron-Caldas, ‘Language, Immersion and Cultural Identity: Conflicting Influences and Values’ (1999) Vol 12(1) Language, Culture and Curriculum 42

Cardi 'Regional or Minority Language Use before Judicial Authorities: Provisions and Facts' 2007 Vol 6(2) Journal on Ethnopolitics and Minority Issues in Europe 1
Carey, 'Criminal Trials and Language Rights' (2003) Vol 13 Irish Criminal Law Journal 15
Cassim, 'The Accused's Right to Be Present: A Key to Meaningful Participation in the Criminal Process' (2005) Vol 38(2) The Comparative and International Journal of Southern Africa 28
Clair and Winter 'How judges think about racial disparities: situational decision-making in the criminal justice system' (2016) Vol 54(2) Criminology 332
Clarke, Milne and Bull, 'Interviewing Suspects of Crime: The Impact of PEACE Training, Supervision and the Presence of a Legal Advisor: Interviewing Suspects' (2011) Vol 8 Journal of Investigative Psychology and Offender Profiling 149
Coombe, 'The Properties of Culture and the Politics of Possessing Identity' (1993) Vol 6(20 Canadian Journal of Law and Jurisprudence 249
Coulmas, 'Language rights: interest of states, language groups and the individual' (1998) Vol 20 Language Sciences 63
Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Colour' (1991) Vol 43 Stanford Law Review 1241
Cusack, Jack and Kavanagh 'Dancing with Discrimination: Managing Stigma and Identity' (2003) Vol 9(4) Culture and Organization 295
de Varennes 'Language Rights as an integral part of human rights' (2001) Vol 3 International Journal of Multicultural Studies 15
de Varennes and Kuzborska, 'Language, Rights and Opportunities: The Role of Language in the Inclusion and Exclusion of Indigenous Peoples' (2016) Vol 23 International Journal on Minority and Group Rights 281
Dehaghani, 'He's Just Not That Vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody' (2016) Vol 55 The Howard Journal of Crime and Justice 396
Dehaghani, 'Interrogating Vulnerability: Reframing the Vulnerable Suspect in Police Custody' (2020) Vol 30(1) Social & Legal Studies 251
Devault, 'Talking and Listening from Women's Standpoint: Feminist Strategies for Interviewing and Analysis' 21

Devine, Forscher, Austin and Cox, ‘Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention’ (2012) Vol 48 Journal of Experimental Social Psychology 1267

Elliot, ‘The Milan Congress and the Future of the Education of the Deaf and Dumb’ (1882) Vol 27 Gallaudet University Press 146

Dunbar, ‘Minority Rights in International Law’ (2001) 50 The International and Comparative Law Quarterly 90

Elosua, ‘Minority Language Revitalization and Educational Assessment: Do Language-related Factors Impact Performance?’ (2016) Vol 20 Journal of Sociolinguistics 212

Eriksen, ‘Research Ethics, Trauma and Self-Care: Reflections on Disaster Geographies’ (2017) Vol 48 Australian Geographer 273

Faigman, Kang, Bennett, Carbado and Casey, ‘Implicit Bias in the Courtroom’ (2012) Vol 59 UCLA Law Review 1124

Farrow, ‘What is access to justice’ (2014) Vol 51(3) Osgoode Hall Law Journal 957

Fenner, Gudjonsson and Clare, ‘Understanding of the Current Police Caution (England and Wales) among Suspects in Police Detention’ (2002) Journal of Community and Applied Social Psychology 12

Fielding ‘Lay people in court: the experience of defendants, eyewitnesses and victims’ 2013 Vol 64(2) The British Journal of Sociology 287

Fielding, ‘Lay People in Court: The Experience of Defendants, Eyewitnesses and Victims: Lay People in Court’ (2013) Vol 64 The British Journal of Sociology 287

Flynn and Lawson, ‘Disability and Access to Justice in the European Union: Implication of the United Nations Convention on the Rights of Persons with Disabilities’ (2013) Vol 4 European Yearbook of Disability Law 7

Frank and Snijders, ‘Estimating the Size of Hidden Populations using snowball sampling’ (1994) Vol 10(1) Journal of Official Statistics 53

Friedrich, ‘English for Peace: Toward a Framework of Peace Sociolinguistics’ (2007) Vol 26 World Englishes 72

Gaeta, ‘To Be (Present) or Not To Be (Present): Trials In Absentia before the Special Tribunal for Lebanon’ (2007) Vol 5 Journal of International Criminal Justice 1165

Gallagher, ‘“The Poor Mouth”: Flann O’Brien and the Gaeltacht’ (1983) Vol 72 Studies: An Irish Quarterly Review 231

Gibson, Benson and Brand, 'Talking about Suicide: Confidentiality and Anonymity in Qualitative Research' (2013) Vol 20 Nursing Ethics 18
Gilbert and Keane, 'Equality versus Fraternity? Rethinking France and Its Minorities' (2016) Vol 14 International Journal of Constitutional Law 883
Gill, Stewart, Treasure and Chadwick, 'Methods of Data Collection in Qualitative Research: Interviews and Focus Groups' (2008) Vol 204 British Dental Journal 291
Giorgi, 'Journal of Phenomenological Psychology' (1978) Vol 18 Journal of Humanistic Psychology 62
Goodwin, Jasper and Khattra, 'Caught in a Winding, Snarling Vine: The Structural Bias of Political Process Theory' (1992) Vol 14(1) Sociological Forum 27
Gudjonsson and Clare 'Understanding of the current police caution (England and Wales) Among Suspects in Police Detention' (2002) Vol 12 Journal of Applied Social Psychology 83
Hale, Goodman-Delahunty and Martschuk, 'Interpreter Performance in Police Interviews. Differences between Trained Interpreters and Untrained Bilinguals' (2019) Vol 13 The Interpreter and Translator Trainer 107
Hall, Hall and Caselli, 'Deaf Children Need Language, Not (Just) Speech' (2019) Vol 39 First Language 367
Hansen and Liu, 'Social Identity and Language; Theoretical and Methodological Issues' (Autumn, 1997) Vol 31(3) Teachers of English to Speakers of Other Languages Quarterly 567
Hao, Su and Chan, 'Do Deaf Adults with Limited Language Have Advanced Theory of Mind?' (2010) Vol 31 Research in Developmental Disabilities 1491
Hartley, 'Legal Ease and "Legalese"' (2000) Vol 6(1) Psychology, Crime & Law 1
Henderson, 'Gaols or De Facto Mental Institutions?: Why Individuals with a Mental Illness Are Over-Represented in the Criminal Justice System in New South Wales, Australia' (2007) Vol 45 Journal of Offender Rehabilitation 69
Holmberg, 'Discretionary Leniency and Typological Guilt: Results from a Danish Study of Police Discretion' (2000) Vol 1 Journal of Scandinavian Studies in Criminology and Crime Prevention 179
Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) Vol 68 Current Legal Problems 119
Hurwitz and Peffley, 'Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System' (2005) Vol 67 The Journal of Politics 762

Hutchison, ‘Oralism: A Sign of the Times? The Contest for Deaf Communication in Education Provision in Late Nineteenth-Century Scotland’ (2007) Vol 14 European Review of History: Revue europeenne d’histoire 481

Jackson Preece, ‘Minority Rights in Europe: From Westphalia to Helsinki’ (1997) Vol 23 Review of International Studies 75

Johnson, ‘Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution’ (2017) Vol 44 Pepperdine Law Review 61

Jonas DS and Saunders TN, ‘The Object and Purpose of a Treaty: Three Interpretive Methods’ 46

Kafle, ‘Hermeneutic Phenomenological Research Method Simplified’ (2013) Vol 5 Bodhi: An Interdisciplinary Journal 181

Kanuha ‘The Social Process of “Passing” to Manage Stigma: Acts of Internalized Oppression or Acts of Resistance?’ (1999) Vol XXVI(4) Journal of Sociology and Social Welfare 27

Kassin, Appleby and Perillo, ‘Interviewing Suspects: Practice, Science, and Future Directions’ (2010) Vol 15 Legal and Criminological Psychology 39

Kelman HC, ‘Negotiating National Identity and Self-Determination in Ethnic Conflicts: The Choice Between Pluralism and Ethnic Cleansing’ (1997) 13 Negotiation Journal 327

Kleinig and Philosophy Documentation Center, ‘The Blue Wall of Silence: An Ethical Analysis’ (2001) Vol 15(1) International Journal of Applied Philosophy 1

Knodel, ‘Coping with Vicarious Trauma in Mental Health Interpreting’ Vol 26 Journal of Interpretation 25

Koch 'Implementation of a hermeneutic inquiry in nursing: Philosophy, rigor and representation’ (1996) Vol 24 Journal of Advanced Nursing 174

Koomen, ‘Language Work at International Criminal Courts’ (2014) Vol 16(4) International Feminist Journal of Politics 581

Kosny, MacEachen, Lifshen and Smith ‘Another Person in the Room: Using Interpreters During Interviews With Immigrant Workers’ (2014) Vol 24 Qualitative Health Research 837

Kuijer, ‘The Right to a Fair Trial and the Council of Europe’s Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings’ (2013) Vol 13 Human Rights Law Review 777

Kushnick, ‘“Over Policed and under Protected”: Stephen Lawrence, Institutional and Police Practices’ (1999) Vol 4 Sociological Research Online 156

Kymlicka, ‘The Internationalization of Minority Rights’, (2008) Vol 6(1) International Journal of Constitutional Law 1
Landman, ‘Getting Quality in Qualitative Research: A Short Introduction to Feminist Methodology and Methods’ (2006) Vol 65 Proceedings of the Nutrition Society 429
Lanford and Clance, ‘The Imposter Phenomenon: Recent Research Findings Regarding Dynamics, Personality and Family Patters and Their Implications for Treatment’ 1993 Vol 30(3) Psychotherapy: Theory, Research, Practice, Training 495
Lanford and Clance, ‘The Imposter Phenomenon: Recent Research Findings Regarding Dynamics, Personality and Family Patters and Their Implications for Treatment’ Vol 30 Psychotherapy: Theory, Research, Practice, Training 495
Laukaitis, ‘The Politics of Language and National School Reform: The Gaelic League’s Call for an Irish Ireland 1893-1922’ (2010) Vol 37(1) American Educational History Journal
Laverty ‘Hermeneutic Phenomenology and Phenomenology: A Comparison of Historical and Methodological Considerations’ (2003) Vol 2(3) International Journal of Qualitative Methods 20
Lawrence, ‘The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism’ (1987) 39 Stanford Law Review 317
Leary, ‘Passing, Posing and Keeping it Real’ (1999) Vol 6(1) Constellations 85
Lee, ‘Interviewing Men: Vulnerabilities and Dilemmas’ (1997) Vol 20 Women’s Studies International Forum 553
Leeson, Flynn, Lynch and Sheikh, ‘You Have the Right to Remain Signing: Deaf People and the Irish Justice System’ (2020) 11 TEANGA, the Journal of the Irish Association for Applied Linguistics
Levi and Barry ‘Transgender Tropes and Constitutional Review’ (2019) Vol 37 Yale Law and Policy Review 589
Lippi-Green, ‘Accent, Standard Language Ideology, and Discriminatory Pretext in the Courts’ (1994) Vol 23 Language in Society 163
Loftus, ‘Police Occupational Culture: Classic Themes, Altered Times’ (2010) Vol 20 Policing and Society 1
Lopez ‘Disorderly (mis)Conduct: The Problem with ‘Contempt of Cop’ Arrests’ (2010) American Constitution Society for Law and Policy Issue Brief

Macklem, ‘Minority Rights in International Law’ 2008 University of Toronto Faculty of Law, Legal Studies Research Series
MacNaughton, ‘Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All’ (2009) Vol 11 Health and Human Rights 47
Mahoney, ‘Right to a Fair Trial in Criminal Matters Under Article 6 ECHR’ (2004) Vol 4(2) Judicial studies Institute Journal 107
Major B and O’Brien LT, ‘The Social Psychology of Stigma’ (2005) 56 Annual Review of Psychology 393
Manhart, ‘“Backpack Refugee Rights Lawyering” in Greece – Access to Justice through Legal Empowerment’ 2019 Vol 7(1) International Human Rights Internship Program Working Paper Series 38
Martin ‘Disability Identity – Disability Pride’ (2012) Vol 16(1) Perspectives: Policy And Practice In Higher Education 14
Massey ‘Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings’ (2001) 36 Urban Affairs Review 452
Massey and Lundy, ‘Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings’ (2001) Vol 36 Urban Affairs Review 452
Maume, ‘Nationalism and Partition: The Political Thought of Arthur Cleary’ (1998) Vol 31 Irish Historical Studies 222
May, ‘Uncommon Languages: The Challenges and Possibilities of Minority Language Rights’ (2000) Vol 21 Journal of Multilingual and Multicultural Development 366
McCaffrey ‘”Don't Get Lost in Translation/ Teaching Law Students to Work With Language Interpreters” (2000) Vol 6 Clinical Law Review 347
McCay, Raifman, Greenberg and Monterio, ‘Forensic Pretrial Police Interviews of Deaf Suspects Avoiding Legal Pitfalls’ (2001) Vol 24 International Journal of Law and Psychiatry 43
McDonnell, ‘Vested interests in the development of special education in Ireland’ (1992) Reach 97
McKibben ‘The Poor Mouth: A Parody of (Post)Colonial Irish Manhood’ 2003 Vol 34(4) Research in African Literatures 94
Miles, Francis, Chapman and Tayor, ‘Hermeneutic Phenomenology: A Methodology of Choice for Midwives: Hermeneutic Phenomenology Methodology’ (2013) Vol 19 International Journal of Nursing Practice 409

Millen and Walker, ‘Overcoming the Stigma of Chronic Illness: Strategies for Normalisation of a “Spoiled Identity”’ (2001) Vol 10 Health Sociology Review 89
Miller and Vernon 'Assessing Linguistic Diversity in Deaf Criminal Suspects' (2002) Vol 2(4) Sign Language Studies 380
Miller, ‘Linguistic Diversity in Deaf Defendants and Due Process Rights’ (2001) Vol 6 Journal of Deaf Studies and Deaf Education 226
Morawa , ‘Minority Languages and Public Administration A Comment on Issues Raised in Diergaardt et al. v. Namibia’ (European Centre for Minority Issues, 2002)
Määttä, ‘The European Charter for Regional or Minority Languages, French Language Laws, and National Identity’, (2005) Vol 4 Language Policy 167
Määttä, ‘Interpreting the Discourse of Reporting: The Case of Screening Interviews with Asylum Seekers and Police Interviews in Finland’ (2015) Vol 7(3) The International Journal of Translating and Interpreting 15
Nakane, ‘Problems in Communicating the Suspect’s Rights in Interpreted Police Interviews’ (2007) Vol 28 Applied Linguistics 87
Nakane, ‘The Role of Silence in Interpreted Police Interviews’ (2011) Vol 43 Journal of Pragmatics 2317
Namakula, ‘Language Rights in the Minimum Guarantees of Fair Criminal Trial’, (2012) Vol 19(1) The International Journal of Speech, Language and the Law 73
Napier ‘The D/deaf-H/hearing Debate’ (2002) Vol 2(2) Sign Language Studies 141
Natapoff , ‘Anatomy of a Debate: Intersectionality and Equality for Deaf Children from Non-English Speaking Homes’ (1995) Vol 24(2) Journal of Law and Education 271
Niang, ‘Africa and the Legitimacy of the ICC in Question’ (2017) Vol 17 International Criminal Law Review 615
Nicolazzo, ‘“It’s a Hard Line to Walk”: Black Non-Binary Trans* Collegians’ Perspectives on Passing, Realness, and Trans*-Normativity’ (2016) Vol 29 International Journal of Qualitative Studies in Education 1173
Noy ‘Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research’ 2008 Vol 11(4) International Journal of Social Research Methodology 327
Nugent ‘Judicial Bias’ (1994) Vol 42(1) Cleveland State Law Review 1

O'Connell and Deegan, '"Behind the Teacher's Back": An Ethnographic Study of Deaf People's Schooling Experiences in the Republic of Ireland' (2014) Vol 33 Irish Educational Studies 229
O'Flaherty, 'The Reporting Obligation under Article 40 of the International Covenant on Civil and Political Rights: Lessons to Be Learned from Consideration by the Human Rights Committee of Ireland's First Report' (1994) Vol 16 Human Rights Quarterly 515
O'Higgins, '(In)Felix Paupertas: Scholarship of the Eighteenth Century Irish Poor' (2007) Vol 40(3) Arethusa 421
O'Higgins, '(In)Felix Paupertas: Scholarship of the Eighteenth-Century Irish Poor' (2007) Vol 40 Arethusa 421
O'Reilly 'The Irish Language – Litmus Test for Equality? Competing Discourses of Identity, Parity of Esteem and the Peace Process' (1996) Vol 6 The Journal of Sociology 154
O'Rourke 'Whose Language Is It? Struggles for Language Ownership in an Irish Language Classroom' (2011) Vol 10(5) Journal of Language, Identity and Education 327
Oaks, 'Legal History in the High Court: Habeas Corpus' (1966) Vol 64 Michigan Law Review 451
Ojo, 'The Nigeria Police and the Search for Integrity In the Midst of Diverse Challenges: An Effective Police Management Approach' (2016) Vol 16(2) International Journal of Police Science and Management 87
Ortoleva 'Inaccessible Justice/Human Rights, Persons with Disabilities and the Legal System' (2011) Vol 17(2) ILSA Journal of International and Contemporary Law 281
Oxburgh, Walsh and Milne, 'The Importance of Applied Research in Investigative Interviewing: A Real-Life Perspective: The Importance of Applied Research' (2011) 8 Journal of Investigative Psychology and Offender Profiling 105
Paoline, 'Taking Stock: Toward a Richer Understanding of Police Culture' (2003) Vol 31 Journal of Criminal Justice 199
Pashea and Kochel, 'Face-to-Face Surveys in High Crime Areas: Balancing Respondent Cooperation and Interviewer Safety' (2016) Vol 27 Journal of Criminal Justice Education 95
Pawlosky, 'When Justice is lost in the "Translation": Gonzalez v. United States and "Interpretation" of the Court Interpreters Act of 1978' (1996) Vol 45(2) DePaul Law Review 435

Paz, ‘The Failed Promise of Language Rights: A Critique of the International Language Rights Regime’ (2013) Vol 54(1) Harvard International Law Journal 157
Pejic, ‘Minority Rights in International Law’ (1997) Vol 19 Human Rights Quarterly 666
Pentassuglia ‘Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee’ (2003) Vol 46 German Yearbook of International Law 401
Peterson CC and Siegal M, ‘Insights into Theory of Mind from Deafness and Autism’ (2000) Vol 15 Mind and Language 123
Phelan ‘Legal Interpreters in the news in Ireland’ (2011) Vol 3(1) Translating and Interpreting 76
Phelan, ‘Literary Portrayals of Court Interpreters and Irish Speakers in the Long Nineteenth Century’ (2020) Vol 13 Translation Studies 153
Poindexter CC and Shippy RA, ‘HIV Diagnosis Disclosure: Stigma Management and Stigma Resistance’ (2010) 53 Journal of Gerontological Social Work 366
Purkey, “A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations” (2014) Vol 27(2) Journal of Refugee Studies 260
Rachlinski, Johnson, Wistrich and Guthriet, ‘Does Unconscious Racial Bias Affect Trial Judges?’ (2009) Vol 84(3) Notre Dame Law Review 53
Rezende, ‘Stereotypes and National Identity: Experiencing the “Emotional Brazilian”’ (2008) Vol 15 Identities 103
Rich and Grey, ‘Pathways to Recurrent Trauma Among Young Black Men: Traumatic Stress, Substance Use, and the “Code of the Street”’ (2005) Vol 95 American Journal of Public Health 816
Richards and Ellem, ‘Young People with Cognitive Disabilities and Overrepresentation in the Criminal Justice System: Service Provider Perspectives on Policing’ (2019) Vol 20 Police Practice and Research 156
Riches, Parmenter, Wiese and Stancliffe ‘Intellectual Disability and Mental Illness in the NSW Criminal Justice System’ (2006) Vol 29 International Journal of Law and Psychiatry 386
Ringelheim, ‘Minority Rights in a Time of Multiculturalism--The Evolving Scope of the Framework Convention on the Protection of National Minorities’ (2010) Vol 10 Human Rights Law Review 99

Robinson, ‘Sampling in Interview-Based Qualitative Research: A Theoretical and Practical Guide’ (2014) Vol 11 Qualitative Research in Psychology
Rogers ‘From Cultural Exchange to Transculturation: A Review and Reconceptualization of Cultural Appropriation’ (2006) Vol 16 Communication Theory 474
Romaine, ‘Planning for the survival of linguistic diversity’ (2006) Vol 5(4) Language Policy 443
Rose and Conama ‘Linguistic imperialism: still a valid construct in relation to language policy for Irish Sign Language’ (2018) Vol 17(3) Language Policy 385
Rottman and Tomkins, ‘Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges’ (1999) Vol 36(3) The Journal of American Judges Association 24
Rush, ‘Equal Protection Analogies- Identity And "Passing: Race And Sexual Orientation’ (1997) Vol 13 Harvard Blackletter Law Journal 65
Rönquist, ‘The Council of Europe Framework Convention for the Protection of National Minorities’ 1995 Vol 6 Helsinki Monitor 38
Salinas, and Martinez, ‘Right to confrontation compromised: Monolingual jurists subjectively assessing the English-language abilities of Spanish-dominant accused’ (2010) Vol 18(3) American University Journal of Gender, Social Policy & the Law 543
Saunders, Kitzinger and Kitzinger, ‘Anonymising Interview Data: Challenges and Compromise in Practice’ (2015) Vol 15 Qualitative Research 616
Schwarz, ‘The Legacy of the Kenyatta Case: Trials in Absentia at the International Criminal Court and Their Compatibility with Human Rights’ (2016) Vol 16 African Human Rights Law Journal 99
Shepard, ‘Access to Justice for People Who Do Not Speak English’, (2007) Vol 40 Indiana Law Review
Shine ‘Documenting current practices in the management of deaf suspects in the USA’ (2019) Vol 42(3) Policing: An International Journal 347
Shugart ‘Counterhegemonic acts: Appropriation as a feminist rhetorical strategy’ (1997) Vol 83 Quarterly Journal of Speech 210
Shulman ‘No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants’ (1993) Vol 46 Vanderbilt Law Review 175

Skelton and Valentine, '"It feels like being Deaf is normal": an exploration into the complexities of defining D/deafness and young D/deaf people's identities' (2003) Vol 47(4) Canadian Geographer 451
Snowball and Weatherburn, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) Vol 40 Australian & New Zealand Journal of Criminology 272
Sunshine and Tyler, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) Vol 37(3) Law and Society Review 513
Sutton, 'Structural Bias in the Sentencing of Felony Defendants' (2013) 42 Social Science Research 1207
Thornberry 'Is There a Phoenix in the Ashes? International Law and Minority Rights', (1980) Texas International Law Journal Vol 15, 421
Thornberry, 'Self-Determination, Minorities, Human Rights: A Review Of International Instruments' Vol 38 International and Comparative Law Quarterly 24
Tomura, 'A Prostitute's Lived Experiences of Stigma' (2009) Vol 40 Journal of Phenomenological Psychology 51
Tuskowsk, 'Criminal Procedure - Spain v. Rushen: Shackles or Show Time? A Defendant's Right to See and Be Seen' (1990) Vol 20 Golden Gate University Law Review 175
Tyler 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) Vol 30 Crime and Justice 283
Tyler, 'Legitimacy in Corrections' (2010) Vol 9(1) Criminology and Public Policy 127
Tyler, 'Restorative Justice and Procedural Justice: Dealing with Rule Breaking' (2006) Vol 62 Journal of Social Issues 307
Tyler, 'The Psychological Consequences Of Judicial Procedures: Implications For Civil Commitment Hearings' (1993) Vol 46(2) SMU Law Review 16
Tyler, 'What Is Procedural Justice?: Criteria Used By Citizens To Assess The Fairness Of Legal Procedures' (1988) Vol 22(1) Law and Society Review 103
van Evera , 'Hypotheses on Nationalism and War' (1994) Vol 18 International Security 5
Vernon and Miller, 'Obstacles Faced by Deaf People in the Criminal Justice System' (2005) Vol 150 American Annals of the Deaf 283
Vernon, Raifman and Greenberg 'The Miranda Warnings and the Deaf Suspect' (1996) Vol 14 Behavioral Sciences and the Law 121

Vuolajärvi, 'Governing in the Name of Caring—the Nordic Model of Prostitution and Its Punitive Consequences for Migrants Who Sell Sex' (2019) Vol 16 Sexuality Research and Social Policy 151

Walker, 'Questioning Young Children in Court: A Linguistic Case Study.' (1993) Vol 17 Law and Human Behavior 59

Walsh, 'Enactments Concerning the Irish Language, 1922 - 2016' (2016) Vol 39 Dublin University Law Journal 449

Weller, 'Using Internet Video Calls in Qualitative (Longitudinal) Interviews: Some Implications for Rapport' (2017) Vol 20 International Journal of Social Research Methodology 613

Whittle, 'The Trans-Cyberian Mail Way' (1998) Vol 7(3) Social and Legal Studies 389

Wood, 'Protecting Deaf Suspects' Right to Understand Criminal Proceedings' (1984) Vol 75 The Journal of Criminal Law and Criminology 166

Wortley and Owusu-Bempah, 'Unequal Before the Law: Immigrant and Racial Minority Perceptions of the Canadian Criminal Justice System' (2009) Vol 10 Journal of International Migration and Integration / Revue de l'integration et de la migration internationale 447

Zenker, 'Linguistic Relativity and Dialectical Idiomatization: Language Ideologies and Second Language Acquisition in the Irish Language Revival of Northern Ireland: Linguistic Relativity and Dialectical Idiomatization' (2014) Vol 24 Journal of Linguistic Anthropology 63

Zhang 'Fair Trial Rights in the ICCPR' 2009 Vol 2(4) Journal of Politics and Law 39

Media Sources

'Deaf people can deal with police using sign language' *The Law Society Gazette* (20 November 2019).

'Gaeil a dhéileáil leis na póilíní i nGaeilge á lorg: Taighde ar bun faoi chearta teanga' *Nós*, (15 October 2018) https://nos.ie/gniomhaiochas/gaeil-a-dheileail-leis-na-poilini-i-ngaeilge-a-lorg/

'Hong Kong: Heavy-handed police response to protest unacceptable' *Amnesty International* (27 July 2019)

'Irish Examiner View: Do we need Covid-19 booklets in both English and Irish?' *The Irish Examiner* (01 May 2020),

‘Irish no longer a requirement to join An Garda’ *The Irish Times* (07 September 2005)

‘Police to look into who gave order to pepper spray Helsinki protesters’ *YLE* (04 October 2020];

‘Sign language course a first for Law School’ *Law Society Gazette* (05 August 2020)

Abdul-Jabbar ‘Cornrows and Cultural Appropriation: The Truth About Racial Identity Theft’ *Time Magazine* (26 August 2015),

Atkinson ‘Ouch! It’s a disability thing’ *BBC* (02 April 2008) available at http://www.bbc.co.uk/ouch/features/is_deafness_a_disability.shtml

Boland ‘Broadside: Can anybody truthfully say that Irish is a necessary language?’ *The Irish Times* (30 May 2016),

Bowcott 'Ethnic Minorities get tougher sentences due to distrust in the courts' *The Guardian* (28 March 2017)

Cradden ‘Deaf have human interpreter in court’ *Village Magazine* (9 June 2017)

Cradden, ‘Sign of the times for deaf education’ *Irish Times* (14 May 2002)

Cross ‘Aiken: UUP do not support an Irish Language Act’ *The Belfast Telegraph* (02 May 2021)

De Barra ‘The case for ending state support of Irish language is littered with dubious “facts”’ *TheJournal.ie* (04 February 2017). Available at: https://www.thejournal.ie/readme/fake-facts-irish-language-debate-3220676-Feb2017/

Delaney ‘Irish language should not be compulsory, especially for struggling school children’ *The Irish Independent* (12 August 2019).

Dodd and Grierson ‘Sarah Everard vigil report strongly defends police's use of force’ *The Guardian* (30 March 2021)

Erard ‘Why Sign Language Gloves Don’t Help Deaf People’ *The Atlantic* (09 November 2017)

Fitzpatrick ‘Tribes of modern Ireland: None of us are just Irish’ *The Irish Independent* (28 May 2014)

Friedman ‘Kim Kardashian West and the Kimono Controversy’ *The New York Times* (27 June 2019)

Gallagher ‘Galway woman makes history as first deaf person to deliberate on Irish jury’ *The Irish Times* (05 October 2020)

Harkin ‘Deaf man banned from Donegal for harassing family’ *The Irish Independent* (19 May 2016)

Harkin, 'Drink-drive deaf man wins appeal over lack of interpreter' *Irish Independent* (07 May 2017)

Holden 'The rise of the gaelscoil - is this the new playground of the elite?' *The Irish Times* (17 April 2020)

Holland 'Disproportionate numbers of Travellers in prison population' *The Irish Times* (20 October 2017)

Humphries, 'How to chat up a true Gael' *The Irish Times,* (22 May 2000)

Keena ''Golfgate' has damaged public's view of Supreme Court, say legal academics' *The Irish Times* (08 October 2020)

Kelleher ''The shambles of Maamtrasna': The case of Myles Joyce, hanged and pardoned' *The Irish Times* (10 November 2018)

Kiernan 'Gardaí play their part in helping to make Portlaoise Ireland's first deaf friendly town' *The Leinster Express* (04 June 2019)

Lynch 'Rights and Privileges' *Law Society Gazette* (October 2016)

McCarthy 'Police criticized over heavy-handed response to peaceful protests across US' *The Guardian* (02 June 2020);

McElhatton, 'Kevin Barry: What really happened' *RTÉ* (01 November 2020). Available at: https://www.rte.ie/news/2020/1101/1174753-kevin-barry/

Ní Aodh 'Arlene Foster on Sinn Féin: "If you feed a crocodile it will keep coming back for more"' *TheJournal.ie* (06 February 2017). Available at: https://www.thejournal.ie/arlene-foster-gerry-adams-3225834-Feb2017/

Ó Caollaí 'Commissioner resigns over Government failures on Irish' *The Irish Times* (4 December 2013)

Ó Caollaí 'Garda Síochána reported to Oireachtas over Gaeltacht service' *The Irish Times* (26 April 2021)

O'Brien 'Government wants to lower Māori prison stats but hasn't set specific target' *NewsHub* (21 August 2018)

Pincus-Roth 'TV Tropes identifies where you've seen it all before' *Los Angeles Times* (28 February 2010)

Reilly '"A Úachtaráin, agus a chairde" – Queen offers "sincere sympathy" to victims of Anglo-Irish conflict' *TheJournal.ie* (18 May 2011). Available at: https://www.thejournal.ie/"a-

uachtarain-agus-a-chairde”-–-queen-offers-“sincere-sympathy”-to-victims-of-anglo-irish-conflict-139244-May2011/

Smith ‘Cultural Appropriation is Everywhere. But Is It Always Wrong?’ *Time Magazine* (21 September 2016)

Stafford ‘Only a true Gael could name these 10 players based on their Wikipedia entry’ *Sports Joe* https://www.sportsjoe.ie/gaa/true-gael-name-10-players-based-wikipedia-entry-122523?cmpredirect

Walshe ‘Irish lessons “are a waste of time”’ *The Irish Independent* (02 July 2003)

Hyperlinks

http://research.ucc.ie/profiles/B012/soconaill

http://www.courts.navajo-nsn.gov/publicguide.htm

http://www.eamonocuiv.ie/ga/aboutme/

http://www.icty.org/en/about/registry/translation-and-interpretation

http://www.justisigns.com/JUSTISIGNS_Project/About.html

http://www.salduzlawyer.eu

http://www.unesco.org/languages-atlas/index.php

https://1trial-4languages.org

https://aji.ie

https://blackfeetnation.com

https://cnag.ie/en/schools/school-resources/fainne.html

https://senatormarkdaly.org/

https://tvtropes.org

https://www.ai-media.tv/tips-for-being-deaf-aware-part-1/

https://www.ainm.ie/

https://www.citizensinformation.ie/

https://www.cso.ie/en/releasesandpublications/ep/p-cp10esil/p10esil/ilg/

https://www.dcu.ie/researchsupport/research-ethics

https://www.dcu.ie/salis/people/mary-phelan

https://www.deafvillageireland.ie

https://www.duchas.ie/ga

https://www.eud.eu/news/sign-language-recognition-accross-eu/

https://www.focloir.ie

https://www.garda.ie/en/

https://www.irishdeafsociety.ie

https://www.irishdeafsociety.ie/irish-sign-language/

https://www.kingsinns.ie

https://www.lawlibrary.ie/Home.aspx

https://www.lawsociety.ie

https://www.logainm.ie/ga/

https://www.naacp.org/criminal-justice-fact-sheet/

https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/

https://www.nfi.edu/movie-tropes/

https://www.qsrinternational.com

https://www.tcd.ie/slscs/staff/comamaj

https://www.teanglann.ie/en/

https://www.tearma.ie

Videos and Podcasts

Bairéad 'Murdair Mhám Trasna' *TG4* (4 April 2018)

Between the Lines with Andrea Gilligan, 'The Irish Language' *Newstalk* (25 January 2019) https://www.newstalk.com/podcasts/between-the-lines-with-andrea-gilligan/the-irish-language

Conradh na Gaeilge 'Myth #1: "Irish is a dead language"' (16 March 2017) https://www.youtube.com/watch?v=XCEjILUJvFc

Darach Ó Seaghdha, 'Motherfoclóir ISL Episode' (05 May 2021) https://www.youtube.com/watch?app=desktop&v=jsORJSesv48&feature=youtu.be

Dermot and Dave Show 'Irish Sign Language Expert Shares 'Some Examples of ISL' *TodayFM* (05 March 2021), https://www.todayfm.com/podcasts/dermot-dave/irish-sign-language-expert-shares-some-examples-of-isl

Feder 'Disclosure: Trans Lives on Screen' *Netflix* (19 June 2020)

Foras na Gaeilge 'Buntús Cainte Ceacht 60 | Foras na Gaeilge X RTÉ Archives' (29 July 2020) https://www.youtube.com/watch?v=gDlpH-QfLSE

Gearóidín McEvoy 'ISL Call for Research Participants' (11 April 2019) https://www.youtube.com/watch?v=vWyrd-rkx4M

LawUCC 'Maintaining Access to Justice in the Pandemic' (26 November 2020) https://www.youtube.com/watch?v=3bbyAvc-5PQ

Motherfoclóir, 'Midlands Mayhem: Motherfoclóir at Electric Picnic' Motherfoclóir (Headstuff, 07 September 2018) https://www.headstuff.org/motherfocloir/54-midlands-mayhem-motherfocloir-at-electric-picnic/

One Vibe TV 'Ngũgĩ Wa Thiong'o - Why Africans hate their own languages' (19 April 2019) https://www.youtube.com/watch?v=tnF6XdOh5HY

The Hard Shoulder, 'People who speak Irish need to be given jobs!' *Newstalk* (11 December 2019) https://www.newstalk.com/podcasts/highlights-from-the-hard-shoulder/people-speak-irish-need-given-jobs

The Last Word with Matt Cooper, 'Students exempt from Irish are studying other languages' *TodayFM* (14 June 2018) https://www.todayfm.com/podcasts/the-last-word-with-matt-cooper/students-exempt-from-irish-are-studying-other-languages

The Vocal Fries Podcast 'Borderlands/La Frontera' (13 November 2017), https://vocalfriespod.com/2018/09/19/transcript-8-borderlands-la-frontera/

The Vocal Fries Podcast 'Rez English' (2 October 2017) https://vocalfriespod.com/2018/09/14/transcript-6-rez-english/

The Vocal Fries Podcast 'Uppity Women' (15 July 2017) https://vocalfriespod.com/2018/09/10/transcript-1-uppity-women/

Vicky Conway 'Policed: Animal Rights' (04 February 2021), https://tortoiseshack.ie/17-policed-animal-rights/

Other

Coimisinéir Teanga 2012 Investigation: An Garda Síochána. Available at: https://www.coimisineir.ie/userfiles/files/2012_An_Garda__Siochana_english_version.pdf

Law Society of Ireland Professional Practice Course I 2019: Legal Practice Irish Handbook

McNamara ‘The Criminal Investigation of Suspects with Disabilities: The Impact of the UN Convention on the Rights of Persons with Disabilities’ (PhD thesis, Dublin City University, 2018)

Submission from the Irish Translators’ and Interpreters’ Association to the Working Group on the Jurisdiction of the Courts, 2002

Parliamentary Debates

Seanad Debate 24 April 2002 Vol 169 No 21

Seanad Debate 24 April 2002, vol 169 no 21

Seanad Debate 04 July 2003 Vol 173 No 19

Seanad Debate 19 October 2016, vol 247 no 13

Seanad Debate 17 October 2017, vol 253 no 12

Dáil Debate 14 December 2017, vol 963, no 3

Appendix A: Consent Form for Criminal Justice Subject Participants (English)

Consent Form: Gearóidín McEvoy, Research on Regional Or Minority Language Users

Consent Form:

I. Research Study Title

Accessing the right to a fair trial for regional or minority language speakers under the United Nations and Council of Europe systems of human rights

II. Clarification of the purpose of the research

The purpose of this research is to assess the impact on the vindication of the right to a fair trial by effective or ineffective interpretation for speakers of regional or minority languages. This research will enhance the legal research to date on this topic by bringing the lived experiences of RML-speakers within the criminal justice system to the fore in the wider arguments made within the project. The purpose of this aspect of the project is to give a voice to the people who are and have been directly affected by their language while attempting to access the right to a fair trial.

III. Confirmation of particular requirements as highlighted in the Plain Language Statement

If I consent to this study I would be required to carry out the following:

Meet with Gearóidín McEvoy and discuss the issues surrounding my experiences with the criminal justice system.

Participant – please complete the following (Circle Yes or No for each question)

I have read the Plain Language Statement (or had it read to me)	Yes/No
I understand the information provided	Yes/No
I have had an opportunity to ask questions and discuss this study	Yes/No
I have received satisfactory answers to all my questions	Yes/No
I am agreeing to my interview being audio/video recorded	Yes/No

IV. Confirmation that involvement in the Research Study is voluntary

Agreeing to take part in this study is totally voluntary. If I wish to stop participating in the study, I am free to do so, at any time during the study. I will not be forced or coerced to continue taking part.

V. Advice as to arrangements to be made to protect confidentiality of data, including that confidentiality of information provided is subject to legal limitations

My identity will be kept completely confidential outside of this research. Keeping my identity confidential means not only that Gearóidín McEvoy will not reveal my name to anyone, but also that she will not reveal identifying factors about me or what I have told her.

<u>However, please note that there are limits to the confidentiality that I have.</u>

It may be necessary to report to relevant authorities where it is disclosed to Gearóidín McEvoy that

i. **I have disclosed to Gearóidín McEvoy that I intend to harm another person**
ii. **I have disclosed to Gearóidín McEvoy that I intend to harm themselves**
iii. **I have disclosed to Gearóidín McEvoy that I have committed, intend to commit or are currently engaged in criminal activity involving children.**

The standard for reporting such disclosures will be based on three criteria:

1. **Is there clear evidence that someone is at risk of harm or abuse from the admission? If so, a disclosure to the Gardaí/police will be made**
2. **Am I likely to suffer harm from a breach of confidentiality? Where I am likely to suffer harm, this must be balanced with**
    a) **The seriousness of risk or harm to another person where one has been disclosed**
    b) **The nature of the disclosure or criminal activity disclosed**
    c) **The likely outcome of the breach of confidentiality for all relevant parties, including potential victims and myself. (Note that a criminal charge against me is not considered in isolation as 'harm' to me.)**
3. **Does the public benefit of the disclosure override my right to confidentiality?**

<u>In signing this consent form, I am consenting to Gearóidín McEvoy informing the relevant authorities of any information which I tell her that passes this test.</u>

VI. Any other relevant information

- I will not be interviewed about any crimes that I may have been accused of or the facts of my case. The focus is purely what my experiences were during the criminal justice system. This

means any of the processes from arrest/charge or investigation up to and after my court case or trial.

- Interpreters will be offered to all participants. While Gearóidín McEvoy speaks Irish and English fluently enough to carry out interviews, if I do not speak either of these languages with confidence or would nevertheless like to have an interpreter, one will be provided. Gearóidín McEvoy will hire an interpreter from a trusted interpretation agency.
- Gearóidín McEvoy's two supervisors (named Dr. Tanya Ní Mhuirthile and Dr. Vicky Conway) will have access to the information I provide in order to help analyse the data. However, they will not be told my name or identity.
- Gearóidín McEvoy can be contacted by email at gearoidin.mcevoy4@mail.dcu.ie

VII. Signature:

I have read and understood the information in this form. My questions and concerns have been answered by the researchers, and I have a copy of this consent form. Therefore, I consent to take part in this research project

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

VIII. Audio Recording:

I consent to my voice being recorded by Gearóidín McEvoy during this interview. I understand that the voice recording may be kept by Gearoidin McEvoy before being destroyed once it has been analysed. The voice recording may not be played for anyone apart from Gearoidín McEvoy, Dr. Tanya Ní Mhuirthile and Dr. Vicky Conway) without my permission. This consent does not amount to permission to play the voice recording for a secondary interpreter. Such consent must be sought from me if it is necessary.

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

VIII. <u>Audio/Visual Recording:</u> (FOR ISL USING PARTICIPANTS ONLY)

I consent to my interview being video recorded by Gearóidín McEvoy during this interview. I understand that the video recording may be kept by Gearoidin McEvoy before being destroyed once it has been analysed. The video recording may not be played for anyone apart from Gearoidín McEvoy, Dr Tanya Ní Mhuirthile and Dr Vicky Conway) without my permission. This consent does not amount to permission to play the video recording for a secondary interpreter. Such consent must be sought from me if it is necessary.

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

Appendix B: Consent Form for Criminal Justice Subject Participants (Irish)

Foirm Toilithe: Gearóidín McEvoy, Taighde ar Theangacha Réigiúnacha nó Mionlaigh

Foirm Toilithe

I. Tidil an Taighde:

Conas a fhaigheann cainteoirí teangacha réigiúnacha nó mionlaigh (TRM) a gceart chun trialach cothroime faoi córas cearta daoine na na Náisiúin Aontaithe agus Comhairle na hEorpa .

II. Ag Soiléiriú Aidhme an Taighde

Is í aidhm an taighde seo ná measúnú a dhéanamh ar tionchar atá ag ateangaire éifeachtach nó mí-éifeachtach do chainteoirí teangacha réigiúnacha nó mionlaigh ar an ceart chun trialach cothroime. Feabhsóidh an taighde seo an taighde dlíthiúil atá againn faoi láthair ar an ábhar seo trí taithí saoil cainteoirí TRM sa chóras an dlí choiriúil a thabhairt chun tosaigh sna hargóintí atá le fáil sa tionscadal. Is í aidhm na gné seo sa tionscadal ná guth a thabhairt ar dhaoine ar a raibh tionchar díreach ar chúis a dteanga agus iad á fáil an ceart chun trialach cothroime

III. Deimhniú na riachtanas ar leith mar atá le fáil sa Ráiteas Gnáth-Theanga

Má toilím páirt a ghlacadh sa taighde seo, chaithfinn an méid seo a leanas a dhéanamh:

Buail le Gearóidín McEvoy agus mo taithí leis an gcóras an dlí choiriúil a phlé léi

<u>Rannpháirtí – le do thoill, críochnaigh an méid seo a leanas: (Ciorclaigh freagra ar gach abairt)</u>

Léigh mé an Ráiteas Gnáth-Theanga (nó léigh duine éile é dom)	Léigh/Níor léigh
Tuigim an eolas a cuireadh ós mo gcomhair	Tuigim/Ní thuigim
Bhí seans agam ceisteanna a chuir agus an staidéar seo a phlé	Bhí/Ní raibh
Fuair mé freagraí sásúla ar mo cheisteanna ar fad	Fuair/Ní bhfuair
Aontaim leis an agallamh seo a bheith fuaimthaifeadadh	Aontaim/Ní aontaim

IV. Deimhniú go bhfuil rannpháirtíocht sa staidéar seo go deonach

Tá rannpháirtíocht sa staidéar seo go hiomlán deonach. Más mian liom mo chuid rannpháirtíocht a stopadh, táim saor chun é a stopadh, ag aon am ar bith i rith an staidéir. Ní gcuirfidh aon brú nó iallach orm chun fanacht i mo rannpháirtí.

V. Comhairle mar gheall ar shocraithe atá le déanamh chun rúndacht a chosaint, agus go mbíonn teorannaithe dlíthiúil ag baint leis an eolais a dtugtar san áireamh.

Coimeádfar m'aitheantas faoi rún taobh amuigh don taighde seo. Ní chiallaítear a bheith ag coimeád m'aitheantas faoi rún ach amháin nach nochtfaidh Gearóidín McEvoy m'ainm le haon duine, áfach ina measc, nach nochfaidh sí aon eolas aitheantais fúmsa nó faoi aon rúd a dúirt mé léi i rith an agallamh.

Áfach, tabhair aire go bhfuil teorannaithe ag baint leis an rúndacht atá agam.

B'fheidir go mbeidh sé riachtanah do Gearóidín McEvoy na húdaráis cuí a tuairisciú nuair a nochtar di:

i. **Go bhfuil sé mar intinn agam dochar a dhéanamh ar dhuine eile**
ii. **Go bhfuil sé mar intinn agam dochar a dhéanamh dom fhéin**
iii. **Go dhearna mé coir, go bhfuil sé mar intinn agam coir a dhéanamh nó go bhfuilim faoi láthair ag glacadh páirt i gcoir, ar fad a bhaineann le pháistí.**

Beidh caighdeán tuairiscithe an eolais seo ag breathnú ar trí critéir:

1. **An bhfuil fianise soiléir go bhfuil duine i mbaol dochair nó mí-úsáid ann? Má tá, nochtfar an t-eolais lena nGardaí**
2. **An bhfuil seans maith ann go bhfulaingeoidh mé dochar ó bhriseadh an rúndachta? Nuair atá seans maith an go bhfulaingeoidh mé dochar, caithfear an fulaingt seo a chothromú le**
    a) **Dáiríreacht an bhaoil dhochair ar dhuine eile, nuair a nochtadh baol.**
    b) **Cineál an nochtadh nó an gníomhaíocht choiriúil a nochtadh**
    c) **An toradh dóchúil a bhainfeadh le briseadh an rúndachta ar na bpáirtithe cuí, mé féin agus íospartaigh féideartha ina measc. (Tabhair aire nach meastar cúisimh coiriúil i m'aghaidh amháin mar 'dochar' domsa)**
3. **An ngabhann búntaiste don phobail treis ar mo cheart rúndachta?**

Agus mé á síniú an fhoirm toilithe seo, táim á tabhairt cead ar Gearóidín McEvoy aon eolas a eiríonn sa scrúdú seo a nochtadh chuig na húdaráis cuí.

VI. Eolas Breise

- Ní chuirfear orm faoi cheist mar gheall ar aon coir a cuireadh i mo leith nó fíricí mo chás. Is é díriú amháin an agallaimh seo ná mo chuid taithí le córas an dlí choiriúil. Ciallaíonn an méid seo aon rud ó ghabháil nó imscrúdú go dtí agus tar éis mo chás cúirte nó an triail.
- Ofráilfar atheangairí le gach rannphártaí. Fiú go labhraíonn Gearóidín McEvoy Gaeilge agus Béarla go líofa agus gur féidir í na hagallaimh a dhéanamh sna teangacha seo, múna bhfuilim líofa nó muna bhfuil féinmhuinín agam sna teangacha seo, nó má tá atheangaire uaim, gheobhaidh mé ceann. Fostóidh Gearóidín McEvoy atheangaire domsa ó ngníomhaireacht dílis neamhsplách.
- Beidh stiúrthóirí Gearóidín (Dr. Tanya Ní Mhuirthile agus Dr. Vicky Conway) in ann teach ar an eolais a nochtaim chun cabhair a thabhair don anailís. Áfach, ní nochtfar m'ainm nó m'aitheantas dóibh.
- Is féidir teacht i dteagmháil le Gearóidín McEvoy trí ríomhphost ag gearoidin.mcevoy4@mail.dcu.ie

VII. Síniú:

Léigh mé agus thuig mé an eolas sa foirm seo. Freagraíodh mo cheisteanna agus m'imní agus fuair mé cóip don fhoirm toilithe seo. Mar sin, toilím páirt a glachadh sa tionscadal taighde seo.

Síniú an rannphártaí: _____

Ainm i mbloclitreacha: _____

Dáta: _____

VIII. Fuaimthaifeadadh:

Toilím mo chead ar Gearóidín McEvoy chun fuaimthaifeadadh a dhéanamh san agallamh seo. Tuigim gur féidir Gearóidín McEvoy an fuaimthaifeadadh a coimeád riamh a bheith scríosta nuar atá anailís déanta air. Ní ceadófar an fuaimthaifeadadh a seinm le haon duine, seachas Gearóidín McEvoy, Dr. Vicky Conway agus Dr. Tanya Ní Mhuirthile gan mo chuid ceadúnas fhéin. Ní ceadúnas é seo an fuaimthaifeadadh a seinm le atheangaire tánaisteach. Caithfear an ceadúnas seo a fháil asam más gá.

Síniú an rannphártaí: _____

Ainm i mbloclitreacha: _____

Dáta: _____

Appendix C: Consent Form for Lawyers (English)

Consent Form: Gearóidín McEvoy, Research on Regional Or Minority Language Users

Consent Form:

I. Research Study Title

Accessing the right to a fair trial for regional or minority language speakers under the United Nations and Council of Europe systems of human rights

II. Clarification of the purpose of the research

The purpose of this research is to assess the impact on the vindication of the right to a fair trial by effective or ineffective interpretation for speakers of regional or minority languages. This research will enhance the legal research to date on this topic by bringing the lived experiences of RML-speakers within the criminal justice system to the fore in the wider arguments made within the project. The purpose of this aspect of the project is to give a voice to the people who are and have been directly affected by their language while attempting to access the right to a fair trial.

III. Confirmation of particular requirements as highlighted in the Plain Language Statement

If I consent to this study I would be required to carry out the following:

Meet with Gearóidín McEvoy and discuss the issues surrounding my experiences with the criminal justice system.

Participant – please complete the following (Circle Yes or No for each question)

I have read the Plain Language Statement (or had it read to me)	Yes/No
I understand the information provided	Yes/No
I have had an opportunity to ask questions and discuss this study	Yes/No
I have received satisfactory answers to all my questions	Yes/No
I am agreeing to my interview being audio/video recorded	Yes/No

IV. Confirmation that involvement in the Research Study is voluntary

Agreeing to take part in this study is totally voluntary. If I wish to stop participating in the study, I am free to do so, at any time during the study. I will not be forced or coerced to continue taking part.

V. Advice as to arrangements to be made to protect confidentiality of data, including that confidentiality of information provided is subject to legal limitations

My identity will be kept completely confidential outside of this research. Keeping my identity confidential means not only that Gearóidín McEvoy will not reveal my name to anyone, but also that she will not reveal identifying factors about me or what I have told her.

<u>However, please note that there are limits to the confidentiality that I have.</u>

It may be necessary to report to relevant authorities where it is disclosed to Gearóidín McEvoy that

i. **I have disclosed to Gearóidín McEvoy that I intend to harm another person**
ii. **I have disclosed to Gearóidín McEvoy that I intend to harm themselves**
iii. **I have disclosed to Gearóidín McEvoy that I have committed, intend to commit or are currently engaged in criminal activity involving children.**

The standard for reporting such disclosures will be based on three criteria:

1. **Is there clear evidence that someone is at risk of harm or abuse from the admission? If so, a disclosure to the police will be made**
2. **Am I likely to suffer harm from a breach of confidentiality? Where I am likely to suffer harm, this must be balanced with**
    a) **The seriousness of risk or harm to another person where one has been disclosed**
    b) **The nature of the disclosure or criminal activity disclosed**
    c) **The likely outcome of the breach of confidentiality for all relevant parties, including potential victims and myself. (Note that a criminal charge against me is not considered in isolation as 'harm' to me.)**
3. **Does the public benefit of the disclosure override my right to confidentiality?**

<u>In signing this consent form, I am consenting to Gearóidín McEvoy informing the relevant authorities of any information which I tell her that passes this test.</u>

VI. Any other relevant information

- I will not be interviewed about any crimes that I may have been accused of or the facts of my case. The focus is purely what my experiences were during the criminal justice system. This

means any of the processes about arrest/charge or investigation up to and after a court case or trial.

- Interpreters will be offered to all participants. While Gearóidín McEvoy speaks Irish and English fluently enough to carry out interviews, if I do not speak either of these languages with confidence or would nevertheless like to have an interpreter, one will be provided. Gearóidín McEvoy will hire an interpreter from a trusted interpretation agency.
- Gearóidín McEvoy's two supervisors (named Dr. Tanya Ní Mhuirthile and Dr. Vicky Conway) will have access to the information I provide in order to help analyse the data. However, they will not be told my name or identity.
- Gearóidín McEvoy can be contacted by email at gearoidin.mcevoy4@mail.dcu.ie

VII. Signature:

I have read and understood the information in this form. My questions and concerns have been answered by the researchers, and I have a copy of this consent form. Therefore, I consent to take part in this research project

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

VIII. Audio Recording:

I consent to my voice being recorded by Gearóidín McEvoy during this interview. I understand that the voice recording may be kept by Gearoidin McEvoy before being destroyed once it has been analysed. The voice recording may not be played for anyone apart from Gearoidín McEvoy, Dr. Tanya Ní Mhuirthile and Dr. Vicky Conway) without my permission. This consent does not amount to permission to play the voice recording for a secondary interpreter. Such consent must be sought from me if it is necessary.

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

VIII. <u>Audio/Visual Recording:</u> (FOR ISL USING PARTICIPANTS ONLY)

I consent to my interview being video recorded by Gearóidín McEvoy during this interview. I understand that the video recording may be kept by Gearoidin McEvoy before being destroyed once it has been analysed. The video recording may not be played for anyone apart from Gearoidín McEvoy, Dr Tanya Ní Mhuirthile and Dr Vicky Conway) without my permission. This consent does not amount to permission to play the video recording for a secondary interpreter. Such consent must be sought from me if it is necessary.

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

Appendix D: Consent Form for Lawyers (Irish)

Foirm Toilithe: Gearóidín McEvoy, Taighde ar Theangacha Réigiúnacha nó Mionlaigh

Foirm Toilithe

I. Tidil an Taighde:

Conas a fhaigheann cainteoirí teangacha réigiúnacha nó mionlaigh (TRM) a gceart chun trialach cothroime faoi córas cearta daoine na na Náisiúin Aontaithe agus Comhairle na hEorpa .

II. Ag Soiléiriú Aidhme an Taighde

Is í aidhm an taighde seo ná measúnú a dhéanamh ar tionchar atá ag ateangaire éifeachtach nó mí-éifeachtach do chainteoirí teangacha réigiúnacha nó mionlaigh ar an ceart chun trialach cothroime. Feabhsóidh an taighde seo an taighde dlíthiúil atá againn faoi láthair ar an ábhar seo trí taithí saoil cainteoirí TRM sa chóras an dlí choiriúil a thabhairt chun tosaigh sna hargóintí atá le fáil sa tionscadal. Is í aidhm na gné seo sa tionscadal ná guth a thabhairt ar dhaoine ar a raibh tionchar díreach ar chúis a dteanga agus iad á fáil an ceart chun trialach cothroime

III. Deimhniú na riachtanas ar leith mar atá le fáil sa Ráiteas Gnáth-Theanga

Má toilím páirt a ghlacadh sa taighde seo, chaithfinn an méid seo a leanas a dhéanamh:

Buail le Gearóidín McEvoy agus mo taithí leis an gcóras an dlí choiriúil a phlé léi

<u>Rannpháirtí – le do thoill, críochnaigh an méid seo a leanas: (Ciorclaigh freagra ar gach abairt)</u>

Léigh mé an Ráiteas Gnáth-Theanga (nó léigh duine éile é dom)	Léigh/Níor léigh
Tuigim an eolas a cuireadh ós mo gcomhair	Tuigim/Ní thuigim
Bhí seans agam ceisteanna a chuir agus an staidéar seo a phlé	Bhí/Ní raibh
Fuair mé freagraí sásúla ar mo cheisteanna ar fad	Fuair/Ní bhfuair
Aontaim leis an agallamh seo a bheith fuaimthaifeadadh	Aontaim/Ní aontaim

IV. Deimhniú go bhfuil rannpháirtíocht sa staidéar seo go deonach

Tá rannpháirtíocht sa staidéar seo go hiomlán deonach. Más mian liom mo chuid rannpháirtíocht a stopadh, táim saor chun é a stopadh, ag aon am ar bith i rith an staidéir. Ní gcuirfidh aon brú nó iallach orm chun fanacht i mo rannpháirtí.

V. Comhairle mar gheall ar shocraithe atá le déanamh chun rúndacht a chosaint, agus go mbíonn teorannaithe dlíthiúil ag baint leis an eolais a dtugtar san áireamh.

Coimeádfar m'aitheantas faoi rún taobh amuigh don taighde seo. Ní chiallaítear a bheith ag coimeád m'aitheantas faoi rún ach amháin nach nochtfaidh Gearóidín McEvoy m'ainm le haon duine, áfach ina measc, nach nochfaidh sí aon eolas aitheantais fúmsa nó faoi aon rúd a dúirt mé léi i rith an agallamh.

<u>Áfach, tabhair aire go bhfuil teorannaithe ag baint leis an rúndacht atá agam.</u>

B'fheidir go mbeidh sé riachtanah do Gearóidín McEvoy na húdaráis cuí a tuairisciú nuair a nochtar di:

i. **Go bhfuil sé mar intinn agam dochar a dhéanamh ar dhuine eile**
ii. **Go bhfuil sé mar intinn agam dochar a dhéanamh dom fhéin**
iii. **Go dhearna mé coir, go bhfuil sé mar intinn agam coir a dhéanamh nó go bhfuilim faoi láthair ag glacadh páirt i gcoir, ar fad a bhaineann le pháistí.**

Beidh caighdeán tuairiscithe an eolais seo ag breathnú ar trí critéir:

1. **An bhfuil fianise soiléir go bhfuil duine i mbaol dochair nó mí-úsáid ann? Má tá, nochtfar an t-eolais lena nGardaí**
2. **An bhfuil seans maith ann go bhfulaingeoidh mé dochar ó bhriseadh an rúndachta? Nuair atá seans maith an go bhfulaingeoidh mé dochar, caithfear an fulaingt seo a chothromú le**
    a) **Dáiríreacht an bhaoil dhochair ar dhuine eile, nuair a nochtadh baol.**
    b) **Cineál an nochtadh nó an gníomhaíocht choiriúil a nochtadh**
    c) **An toradh dóchúil a bhainfeadh le briseadh an rúndachta ar na bpáirtithe cuí, mé féin agus íospartaigh féideartha ina measc. (Tabhair aire nach meastar cúisimh coiriúil i m'aghaidh amháin mar 'dochar' domsa)**
3. **An ngabhann búntaiste don phobail treis ar mo cheart rúndachta?**

<u>Agus mé á síniú an fhoirm toilithe seo, táim á tabhairt cead ar Gearóidín McEvoy aon eolas a eiríonn sa scrúdú seo a nochtadh chuig na húdaráis cuí.</u>

VI. Eolas Breise

- Ní chuirfear orm faoi cheist mar gheall ar aon coir a cuireadh i mo leith nó fíricí mo chás. Is é díriú amháin an agallaimh seo ná mo chuid taithí le córas an dlí choiriúil. Ciallaíonn an méid seo aon rud ó ghabháil nó imscrúdú go dtí agus tar éis mo chás cúirte nó an triail.
- Ofráilfar atheangairí le gach rannphártaí. Fiú go labhraíonn Gearóidín McEvoy Gaeilge agus Béarla go líofa agus gur féidir í na hagallaimh a dhéanamh sna teangacha seo, múna bhfuilim líofa nó muna bhfuil féinmhuinín agam sna teangacha seo, nó má tá atheangaire uaim, gheobhaidh mé ceann. Fostóidh Gearóidín McEvoy atheangaire domsa ó ngníomhaireacht dílis neamhsplách.
- Beidh stiúrthóirí Gearóidín (Dr. Tanya Ní Mhuirthile agus Dr. Vicky Conway) in ann teach ar an eolais a nochtaim chun cabhair a thabhair don anailís. Áfach, ní nochtfar m'ainm nó m'aitheantas dóibh.
- Is féidir teacht i dteagmháil le Gearóidín McEvoy trí ríomhphost ag gearoidin.mcevoy4@mail.dcu.ie

VII. Síniú:

Léigh mé agus thuig mé an eolas sa foirm seo. Freagraíodh mo cheisteanna agus m'imní agus fuair mé cóip don fhoirm toilithe seo. Mar sin, toilím páirt a glachadh sa tionscadal taighde seo.

Síniú an rannphártaí: _____

Ainm i mbloclitreacha: _____

Dáta: _____

VIII. Fuaimthaifeadadh:

Toilím mo chead ar Gearóidín McEvoy chun fuaimthaifeadadh a dhéanamh san agallamh seo. Tuigim gur féidir Gearóidín McEvoy an fuaimthaifeadadh a coimeád riamh a bheith scríosta nuar atá anailís déanta air. Ní ceadófar an fuaimthaifeadadh a seinm le haon duine, seachas Gearóidín McEvoy, Dr. Vicky Conway agus Dr. Tanya Ní Mhuirthile gan mo chuid ceadúnas fhéin. Ní ceadúnas é seo an fuaimthaifeadadh a seinm le atheangaire tánaisteach. Caithfear an ceadúnas seo a fháil asam más gá.

Síniú an rannphártaí: _____

Ainm i mbloclitreacha: _____

Dáta: _____

Appendix E: Consent Form for Experts

Consent Form: Gearóidín McEvoy, Research on Regional Or Minority Language Users

CONSENT FORM:

I. Research Study Title

Accessing the right to a fair trial for regional or minority language speakers under the United Nations and Council of Europe systems of human rights

II. Clarification of the purpose of the research

The purpose of this research is to assess the impact on the vindication of the right to a fair trial by effective or ineffective interpretation for speakers of regional or minority languages. This research will enhance the legal research to date on this topic by bringing the lived experiences of RML-speakers within the criminal justice system to the fore in the wider arguments made within the project. The purpose of this aspect of the project is to give a voice to the people who are and have been directly affected by their language while attempting to access the right to a fair trial.

III. Confirmation of particular requirements as highlighted in the Plain Language Statement

If I consent to this study I would be required to carry out the following:

Meet with Gearóidín McEvoy and discuss the issues surrounding my experiences with the criminal justice system.

Participant – please complete the following (Circle Yes or No for each question)

I have read the Plain Language Statement (or had it read to me)	Yes/No
I understand the information provided	Yes/No
I have had an opportunity to ask questions and discuss this study	Yes/No
I have received satisfactory answers to all my questions	Yes/No
I am agreeing to my interview being audio/video recorded	Yes/No
I wish for my identity to be kept anonymous in this study	Yes/No

IV. Confirmation that involvement in the Research Study is voluntary

Agreeing to take part in this study is totally voluntary. If I wish to stop participating in the study, I am free to do so, at any time during the study. I will not be forced or coerced to continue taking part.

V. Advice as to arrangements to be made to protect confidentiality of data, including that confidentiality of information provided is subject to legal limitations

Where I have requested it, my identity will be kept completely confidential outside of this research. Keeping my identity confidential means not only that Gearóidín McEvoy will not reveal my name to anyone, but also that she will not reveal identifying factors about me or what I have told her.

However, please note that there are limits to the confidentiality that I have.

It may be necessary to report to relevant authorities where it is disclosed to Gearóidín McEvoy that

i. **I have disclosed to Gearóidín McEvoy that I intend to harm another person**
ii. **I have disclosed to Gearóidín McEvoy that I intend to harm themselves**
iii. **I have disclosed to Gearóidín McEvoy that I have committed, intend to commit or are currently engaged in criminal activity involving children.**

The standard for reporting such disclosures will be based on three criteria:

1. **Is there clear evidence that someone is at risk of harm or abuse from the admission? If so, a disclosure to the Gardaí/police will be made**
2. **Am I likely to suffer harm from a breach of confidentiality? Where I am likely to suffer harm, this must be balanced with**
    a) **The seriousness of risk or harm to another person where one has been disclosed**
    b) **The nature of the disclosure or criminal activity disclosed**
    c) **The likely outcome of the breach of confidentiality for all relevant parties, including potential victims and myself. (Note that a criminal charge against me is not considered in isolation as 'harm' to me.)**
3. **Does the public benefit of the disclosure override my right to confidentiality?**

In signing this consent form, I am consenting to Gearóidín McEvoy informing the relevant authorities of any information which I tell her that passes this test.

VI. Any other relevant information

- I will not be interviewed about any crimes that I may have been accused of or the facts of my case. The focus is purely what my experiences were during the criminal justice system. This means any of the processes from arrest/charge or investigation up to and after my court case or trial.
- Interpreters will be offered to all participants. While Gearóidín McEvoy speaks Irish and English fluently enough to carry out interviews, if I do not speak either of these languages with confidence or would nevertheless like to have an interpreter, one will be provided. Gearóidín McEvoy will hire an interpreter from a trusted interpretation agency.
- Gearóidín McEvoy's two supervisors (named Dr. Tanya Ní Mhuirthile and Dr. Vicky Conway) will have access to the information I provide in order to help analyse the data. However, they will not be told my name or identity where I have requested confidentiality.
- Gearóidín McEvoy can be contacted by email at gearoidin.mcevoy4@mail.dcu.ie

VII. Signature:

I have read and understood the information in this form. My questions and concerns have been answered by the researchers, and I have a copy of this consent form. Therefore, I consent to take part in this research project

Participants Signature: _____

Name in Block Capitals: _____

Witness: _____

Date: _____

VIII. Audio Recording:

I consent to my voice being recorded by Gearóidín McEvoy during this interview. I understand that the voice recording may be kept by Gearoidin McEvoy before being destroyed once it has been analysed. The voice recording may not be played for anyone apart from Gearoidín McEvoy, Dr. Tanya Ní Mhuirthile and Dr. Vicky Conway) without my permission. This consent does not amount to permission to play the voice recording for a secondary interpreter. Such consent must be sought from me if it is necessary.

Participants Signature: _____

Name in Block Capitals: _____

Witness: _____

Date: _____

VIII. <u>Audio/Visual Recording:</u> (FOR ISL USING PARTICIPANTS ONLY)

I consent to my interview being video recorded by Gearóidín McEvoy during this interview. I understand that the video recording may be kept by Gearoidin McEvoy before being destroyed once it has been analysed. The video recording may not be played for anyone apart from Gearoidín McEvoy, Dr Tanya Ní Mhuirthile and Dr Vicky Conway) without my permission. This consent does not amount to permission to play the video recording for a secondary interpreter. Such consent must be sought from me if it is necessary.

Participants Signature: _____

Name in Block Capitals: _____

Witness: _____

Date: _____

Appendix F: Consent Form for Members of An Garda Síochána

Consent Form: Gearóidín McEvoy, Research on Regional Or Minority Language Users

CONSENT FORM:

I. Research Study Title

Accessing the right to a fair trial for regional or minority language speakers under the United Nations and Council of Europe systems of human rights

II. Clarification of the purpose of the research

The purpose of this research is to assess the impact on the vindication of the right to a fair trial by effective or ineffective interpretation for speakers of regional or minority languages. This research will enhance the legal research to date on this topic by bringing the lived experiences of RML-speakers within the criminal justice system to the fore in the wider arguments made within the project. The purpose of this aspect of the project is to give a voice to the people who are and have been directly affected by their language while attempting to access the right to a fair trial.

III. Confirmation of particular requirements as highlighted in the Plain Language Statement

If I consent to this study I would be required to carry out the following:

Meet with Gearóidín McEvoy and discuss my expertise with the criminal justice system.

Participant – please complete the following (Circle Yes or No for each question)

I have read the Plain Language Statement (or had it read to me)	Yes/No
I understand the information provided	Yes/No
I have had an opportunity to ask questions and discuss this study	Yes/No
I have received satisfactory answers to all my questions	Yes/No
I am agreeing to my interview being audio/video recorded	Yes/No
I wish for my identity to be kept anonymous in this study	Yes/No
I am happy to be identified by my rank	Yes/No

IV. Confirmation that involvement in the Research Study is voluntary

Agreeing to take part in this study is totally voluntary. If I wish to stop participating in the study, I am free to do so, at any time during the study. I will not be forced or coerced to continue taking part.

V. Advice as to arrangements to be made to protect confidentiality of data, including that confidentiality of information provided is subject to legal limitations

Where I have requested it, my identity will be kept completely confidential outside of this research. Keeping my identity confidential means not only that Gearóidín McEvoy will not reveal my name to anyone, but also that she will not reveal identifying factors about me or what I have told her.

However, please note that there are limits to the confidentiality that I have.

It may be necessary to report to relevant authorities where it is disclosed to Gearóidín McEvoy that

i. **I have disclosed to Gearóidín McEvoy that I intend to harm another person**
ii. **I have disclosed to Gearóidín McEvoy that I intend to harm themselves**
iii. **I have disclosed to Gearóidín McEvoy that I have committed, intend to commit or are currently engaged in criminal activity involving children.**

The standard for reporting such disclosures will be based on three criteria:

1. **Is there clear evidence that someone is at risk of harm or abuse from the admission? If so, a disclosure to the Gardaí/police will be made**
2. **Am I likely to suffer harm from a breach of confidentiality? Where I am likely to suffer harm, this must be balanced with**
    a) **The seriousness of risk or harm to another person where one has been disclosed**
    b) **The nature of the disclosure or criminal activity disclosed**
    c) **The likely outcome of the breach of confidentiality for all relevant parties, including potential victims and myself.**
3. **Does the public benefit of the disclosure override my right to confidentiality?**

In signing this consent form, I am consenting to Gearóidín McEvoy informing the relevant authorities of any information which I tell her that passes this test.

VI. Any other relevant information

- The focus of this research interview is purely what my experiences are with the criminal justice system.
- Gearóidín McEvoy's two supervisors (named Dr. Tanya Ní Mhuirthile and Dr. Vicky Conway) will have access to the information I provide in order to help analyse the data. However, they will not be told my name or identity where I have requested confidentiality.
- Gearóidín McEvoy can be contacted by email at gearoidin.mcevoy4@mail.dcu.ie

VII. Signature:

I have read and understood the information in this form. My questions and concerns have been answered by the researchers, and I have a copy of this consent form. Therefore, I consent to take part in this research project

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

VIII. Audio Recording:

I consent to my voice being recorded by Gearóidín McEvoy during this interview. I understand that the voice recording may be kept by Gearoidin McEvoy before being destroyed once it has been analysed. The voice recording may not be played for anyone apart from Gearoidín McEvoy, Dr. Tanya Ní Mhuirthile and Dr. Vicky Conway) without my permission. This consent does not amount to permission to play the voice recording for a secondary interpreter. Such consent must be sought from me if it is necessary.

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

VIII. <u>Audio/Visual Recording:</u> (FOR ISL USING PARTICIPANTS ONLY)

I consent to my interview being video recorded by Gearóidín McEvoy during this interview. I understand that the video recording may be kept by Gearoidin McEvoy before being destroyed once it has been analysed. The video recording may not be played for anyone apart from Gearoidín McEvoy, Dr Tanya Ní Mhuirthile and Dr Vicky Conway) without my permission. This consent does not amount to permission to play the video recording for a secondary interpreter. Such consent must be sought from me if it is necessary.

Participants Signature: _____

Name in Block Capitals: _____

Date: _____

Appendix G: Plain Language Statement for Criminal Justice Subjects and Lawyers (English)

Plain Language Statement: Gearóidín McEvoy, Research on Regional Or Minority Language Users

PLAIN LANGUAGE STATEMENT

I. Introduction to the Research Study

This research looks at the experience of regional or minority language speakers who have been tried or charged with a crime in their country. I, Gearóidín McEvoy will be the principle investigator on this project. My supervisors Dr. Vicky Conway and Dr. Tanya Ní Mhuirthile will be advising me on the project. They will not know the name of any person who is interviewed. I am carrying out my research as part of Dublin City University's School of Law and Government.

I can be contacted at the following:

Email: gearoidin.mcevoy4@mail.dcu.ie

II. Details of what involvement in the Research Study will require

Taking part in this study will mostly mean taking part in an interview or interviews where we discuss your experiences with the criminal law procedure in your country. The interviews will be carried out by me (Gearóidín McEvoy).

Where you would like to have an interpreter for the interview, one will be provided for you through an agency. The interpreter will sign a confidentiality agreement meaning that they must keep secret anything you or I talk about in the interview.

You will be asked if you consent to being voice recorded but you do not have to agree to this. You will not be recorded if you don't want to be.

III. Potential risks to participants from involvement in the Research Study (if greater than that encountered in everyday life)

It is possible that the experiences you tell me about were distressing to you and that speaking about them may make you upset or sad.

I will make every effort to make sure that your identity is protected in this research. However it is impossible to guarantee that no one would ever be able to identify you from the study. If a close friend, for example, read the study, they might be able to tell it was you who spoke to me because they are familiar with your life. This may affect your relationships or cause you to feel upset or sad. However, as I said, I will make sure to hide your identity as much as possible in the study so that you will be protected.

There is a risk that I might misunderstand what you are saying where we do not speak the same language. If we don't speak the same language or if you are uncomfortable speaking in English or

Irish, you will be given a trained interpreter. This will help to make sure we do not misunderstand each other.

If you tell me that

a) you intend to harm someone else;
b) that you are or intend to carry out a crime involving children, or;
c) if you intend to harm yourself,

then I am obliged to inform relevant authorities. Please see your Consent Form for further details.

IV. Benefits (direct or indirect) to participants from involvement in the Research Study

It is possible that talking about your experience with the police and or courts might make you feel good.
It is possible that you may find that the interview has lifted a weight off your shoulders and given you the chance to talk about a time in your life that you usually do not speak about.
Also, I am using this research as a starting point for more research into the effect that language has on human rights. The information that you give me might be the first step on a journey to changing language laws in countries and communities like yours. Down the line, this research could be good for your community and people in your community.

V. Advice as to arrangements to be made to protect confidentiality of data, including that confidentiality of information provided is subject to legal limitations

Your identity will not be told to anyone. I will be the only one who knows who you are, unless you need an interpreter. Where you have asked for an interpreter, the interpreter will come from a trusted agency. The interpreter will sign a confidentiality agreement and can never tell anyone who you are.

Protecting your identity means never telling anyone your name and also not telling anyone any identifying factors about you. Identifying factors means that like your age, the area that you live or the exact reason that you had to deal with the police or courts. The aim is that it would be almost impossible for anyone know who had spoken to me when looking at my research.

If you have allowed me to make a voice recording of your interview and if you have used an interpreter, I might need to double-check some of the things that you said. If I am worried that the interpreter has made a mistake in the interview, I might need to check what you have said. If this happens, I will ask a second interpreter to listen to the recording to check. The second interpreter who is double checking will be made to sign a confidentiality agreement. They will not know your name.

Your recording will only be checked like this where you give your permission. If I am worried that there was a mistake, I will ask you if it is ok to have a second interpreter to listen to the recording. You do not have to agree to this.

What you say in our interview is private and confidential. However, if you tell me about criminal activity which is not known to the police, I might be required to report this to the police. This is only where you tell me that you intend to harm someone else or if you are involved in a crime that includes children.

Please read Section V of the Consent Form carefully to ensure you understand what I cannot keep confidential or secret.

VI. Statement that involvement in the Research Study is voluntary

Taking part in this project is completely voluntary. You are under no obligation to take part and are totally free to refuse to take part or withdraw your participation at any time during the study. You will not be pressured in any way to continue to take part in the project after you have chosen to end your participation.

VII. Other relevant information

- I will not be interviewing you about any crimes which might have been accused of. My interest is purely about your experiences when dealing with the police or courts.
- You will be offered an interpreter. While I speak Irish and English fluently enough to carry out interviews, if you do not speak either of these languages or would still like to have an interpreter, you can have one. I will hire an interpreter from a trusted interpretation agency where they exist. Where there are no interpreting service or where I cannot find a trained interpreter in your language, we can agree upon who may act as an interpreter.
- This study is in no way connected to your case. It is not intended to reopen your case or overturn any conviction that you might have. I have no connection to any criminal justice organisations. I am connected only with Dublin City University. This study will not help in any legal action you may be taking or intending to take.

If participants have concerns about this study and wish to contact an independent person, please contact:

The Secretary, Dublin City University Research Ethics Committee, c/o Research and Innovation Support, Dublin City University, Dublin 9, Ireland. Tel +353 (0)1 7008000, email **rec@dcu.ie**

Appendix H: Plain Language Statement for Criminal Justice Subjects and Lawyers (Irish)

Ráiteas Gnáth-Theanga: Gearóidín McEvoy, Taighde ar Chainterorí Theangacha Réigiúnacha nó Mionlaigh

Ráiteas Gnáth-Theanga

I. Reamhrá an Staidéar

Imscrúdaíonn an taighde seo tathaí chainteoirí theangacha réigiúnacha nó mionlaigh (TRM) a raibh cúisithe, nó curtha os gcomhair na cúirte ina dtír fhéin. Beidh mise, Gearóidín McEvoy mar príomh imscrúdaitheoir ar an tionscadal seo. Beidh mo stiúrthóirí Dr Vicky Conway agus Dr. Tanya Ní Mhuirthile á tabhairt comhairle dom. Ní bheidh fhois acu ainm ag aon duine a ghlacann páirt in agallamh. Táim á dhéanamh an taighde seo mar páirt don Scoil Dlí agus an Rialtas in Ollscoil Chathair Bhaile Átha Cliath.

Is féidir teacht i dteagmháil liom ar:

Rphost: gearoidin.mcevoy4@mail.dcu.ie

II. Sonraí ar cad is brí le páirt a ghlacadh sa staidéar seo

Ciallaíonn páirt a ghlacadh sa staidéar seo ná agallamh nó agallaimh a dhéanamh, á phlé do chuid taithí leis an gcóras dlí choiriúil i do thír féin. Déanfaidh mé (Gearóidín McEvoy) na hagallaimh.

Má tá ateangaire uait, gheobhaidh tú ceann trí gníomhaireacht. Síneoidh an ateangaire comhaontú rúndachta. Caithfaidh siad gach rud a gcloiseann siad san agallamh a coimeád faoi rún.

Iarrfar do chead chun fuaimthaifeadadh a dhéanamh. Ní gá duit do cead a thabhairt don fhuaimthaifeadadh. Ní thaifeadfar ort múna mhiste leat.

III. Baol féideartha ar rannpháirtithe as a bheith ag glacadh páirt sa staidéar (má tá an baol níos mó nó an baol an baineann le gnáthshaol)

B'fhéidir go mbeadh brón ort nó go bheifeá trína chéile tar éis na rudaí coscrach a tharla a insint dom

Déanaim gach iarracht d'aitheantas a chosaint sa staidéar seo. Áfach, ní féidir go huile is go hiomlán dearbhú a thabhairt duit nach aithneoidh aon duine ort ón staidéar. Mar shampla, má léann do clúchairde an staidéar, b'fhéidir go n-aithneodh sé leat toisc go bhfuil sonraí do shaoil ar eolas aige cheana féin. B'fhéidir go mbeidh tionchar ar do gaol ina dhiadh sin nó go dtiocfaidh brón ort.

Áfach, mar a dúirt mé, déanfaidh mé gach iarracht d'aitheantas a chosaint comh fada agus is féidir.

Tá baol ann go mbainfinn míbhrí as an méid is a déir tú múna labhraímid an teanga ceana. Múna labhraímid an teanga ceana, nó má tá tú míchompordach ag labhairt Béarla nó Gaeilge gheobhaidh tú ateangaire oilte. Cabhróidh an méid sin aon míbhrí eadrainn a sheachaint .

Má insíonn tu dom go bhfuil

a) Sé mar intinn agat dochar a dhéanamh ar dhuine éile;
b) Sé mar intinn agat coir a dhéanamh a bhaineann le pháistí nó go bhfuil tú ag déanamh coir faoi láthair a bhaineann le pháistín nó;
c) Sé mar intinn agat dochar a dhéanamh ort féin,

Inseoidh mé na húdaráis cuí. Tabhair aire ag an Foirm Toilithe chun sonraí breise a fháil.

IV. Buntáistí (díreach nó indíreach) ar rannphairtí as a bheith ag glacadh páirt sa staidéar seo.

B'fhéidir go mhothófá go maith tar éis a bheith ag labhairt mar gheall ar do thaithí lena gcúirteanna nó lena nGardaí.
B'fhéidir go laghdaíonn an agallamh an t-ualach asat toisc nach mbíonn seans agat labhairt faoi do thaithí de gnáth.
Comh maith, táim á úsáid an taighde seo chun tosú le taighde eile níos deanaí atá bunaithe ar thionchar teangacha ar chearta daonna. B'fhéidir go mbeidh d'eolas práinneach don taighde sa todhchaí. Sa todhchaí, b'fhéidir go mbeadh tionchar ag an taighde seo ar do phobal.

V. Comhairle ar eagraithe atá á dhéanamh chun rúndacht eolais, agus ina measc, go mbíonn teorannaithe dlíthiúl ar an eolas.

Ní nochtfar d'aitheantas le haon duine. Beidh mé an t-aon duine ar a mbheidh eolas ar d'aitheantas, seachtas, má tá ateangaire uait. Nuair atá ateangaire uait, tiocfaidh an ateangaire ó údarás iontafa. Síneoidh an ateangaire comhaontú rúndacht agus níl cead aige d'aitheantas a insint le haon duine.

Ciallaíonn a bheith á chosaint d'aitheantas ná gan a bheith ag insint d'ainm le haon duine agus gan a bheith ag insint le haon duine aon sonraí aitheantais fút féin. Ciallaíonn 'sonraí aitheantas' ná d'ainm, d'aois, d'áit cónaithe, nó a fáth go raibh tú ag déaláil lena gcúirteanna nó lena nGardaí, mar shampla. Is í aidhm ná aitheantas na ndaoine a ghlacann páirt sa staidéar seo a choisaint ó aon duine a léann é.

Dá má rud é gur thug tú cead dom fuaimthaifeadadh a dhéanamh agus dá bhain tú úsáid as ateangaire, b'fhéidir go mbeadh gá dom rud éigin a dúirt tú a seicéail. Dá mbeinn buartha go bhfuil botún déanta ag an ateangaire, gheobhaidh mé ateangaire éile chun é a seiceáil. Síneoidh an dara ateangaire comhaontú rúndacht. Ní bheidh d'ainm ar eolas aige.

Caithfear do chead a fháil riamh aon seiceálil a dhéanamh. Dá mbeinn buartha go bhfuil botún ann, rachaidh mé á lorg do chead chun ateangaire éile a fháil. Níl gá duit aontú leis an méid sin.

Fánfaidh an méid eolas a tugann tú dom faoi rún. Áfach, má nochtaíonn tú aon gníomhaíocht choiriúil dom, b'fhéidir go mbeidh gá dom é sin a instint dos na Gardaí. Ní inseoidh mé na Gardaí

ach amháin nuair a nochtaíonn tú go bhfuil sé mar intinn agat dochar a dhéanamh ar duine éile nó má tá tú ag déanamh coir a bhaineann le pháistí.

Le do thoill, léigh an Páirt V san Fhoirm Toilithe go cúramach chun a bheith cinnte go dtuigeann tú an méid nach féidir liom a coiméad faoi rún.

VI. Ráiteas a rá go bhfuil rannpháirtíocht an staidéir seo toilteanach

Tá rannpháirtíocht an staidéir seo go huile is go hiomlán toilteanach. Níl aon gá ar bith ort páirt a ghlacadh ann agus is féidir leat diúltaigh le rannpháiríocht nó éirí as an staidéar ag aon uair i rith an staidéar. Ní bheidh aon brú ort páirt a ghlacadh sa staidéar tar éis éirí as.

VII. Eolas Breise

- Ní bheidh mé á chur ort faoi agallamh mar gheall ar aon choir a chúisíodh tusa. Sé mo suim amháin ná do thaithí ag dul i ngleic leis an gcóras dlí choiriúil.
- Cuirfear ateangaire ar fáil duit más maith leat. Tá Gaeilge agus Béarla agam. Áfach múna bhfuil Gaeilge nó Béarla agat nó má tá ateangaire uait fós, gheobhaidh tú ceann. Fostóidh mé ateangaire duit ó údarás iontafa nuair atáid le fáil. Múna bhfuil seirbhís ateangaire le fáil, tiocfaimid ar comhaontú ar cé atá sásúil chun obair mar ateangaire.
- Níl aon baint ar bith ag an staidéar seo ar do chás fhéin. Níl an staidéar seo ag iarraidh do chás a athoscailt nó do chinneadh a aisiompaigh. Níl baint ar bith agam le haon eagraíocht dlí choiriúil. Nílim ach amháin bainteach le hOllscoil Cháthair Bhaile Átha Cliath. Ní cabhraíodh an staidéar seo le haon caingean dlí atá á tógaint agat nó atá ar intinn agat.

Má tá aon imní ort faoin staidéar seo agus má tá tú ag iarraidh labhairt le duine neamhsplách, le do thoil, bí i dteagmháil le: (NB: As Béarla amháin)

The Secretary, Dublin City University Research Ethics Committee, c/o Research and Innovation Support, Dublin City University, Dublin 9, Ireland. Tel +353 (0)1 7008000, email **rec@dcu.ie**

Appendix I: Plain Language Statement for Experts

Plain Language Statement: Gearóidín McEvoy, Research on Regional Or Minority Language Users

PLAIN LANGUAGE STATEMENT

I. Introduction to the Research Study

This research looks at the experience of regional or minority language speakers who have been tried or charged with a crime in their country. I, Gearóidín McEvoy will be the principle investigator on this project. My supervisors Dr. Vicky Conway and Dr. Tanya Ní Mhuirthile will be advising me on the project. If you ask for your identity to be kept a secret, they will not know the name of any person who is interviewed. I am carrying out my research as part of Dublin City University's School of Law and Government.

I can be contacted at the following:

Email: gearoidin.mcevoy4@mail.dcu.ie

II. Details of what involvement in the Research Study will require

Taking part in this study will mostly mean taking part in an interview or interviews where we discuss your experiences with the criminal law procedure in your country. The interviews will be carried out by me (Gearóidín McEvoy).

Where you would like to have an interpreter for the interview, one will be provided for you through an agency. The interpreter will sign a confidentiality agreement meaning that they must keep secret anything you or I talk about in the interview.

You will be asked if you consent to being voice recorded but you do not have to agree to this. You will not be recorded if you don't want to be. You will be asked if you want your identity to be kept a secret. Your identity will be protected if you want it to be.

III. Potential risks to participants from involvement in the Research Study (if greater than that encountered in everyday life)

It is possible that the experiences you tell me about were distressing to you and that speaking about them may make you upset or sad.

Where you request it, I will make every effort to make sure that your identity is protected in this research. However it is impossible to guarantee that no one would ever be able to identify you from the study. If a close friend, for example, read the study, they might be able to tell it was you who spoke to me because they are familiar with your life. This may affect your relationships or cause you to feel upset or sad. However, as I said, I will make sure to hide your identity as much as possible in the study so that you will be protected.

There is a risk that I might misunderstand what you are saying where we do not speak the same language. If we don't speak the same language or if you are uncomfortable speaking in English or Irish, you will be given a trained interpreter. This will help to make sure we do not misunderstand each other.

If you tell me that

a) you intend to harm someone else;
b) that you are or intend to carry out a crime involving children, or;
c) if you intend to harm yourself,

then I am obliged to inform relevant authorities. Please see your Consent Form for further details.

IV. Benefits (direct or indirect) to participants from involvement in the Research Study

It is possible that talking about your experience with the police and or courts might make you feel good.
It is possible that you may find that the interview has lifted a weight off your shoulders and given you the chance to talk about a time in your life that you usually do not speak about.
Also, I am using this research as a starting point for more research into the effect that language has on human rights. The information that you give me might be the first step on a journey to changing language laws in countries and communities like yours. Down the line, this research could be good for your community and people in your community.

V. Advice as to arrangements to be made to protect confidentiality of data, including that confidentiality of information provided is subject to legal limitations

Where you request to remain anonymous, your identity will not be told to anyone. I will be the only one who knows who you are, unless you need an interpreter. Where you have asked for an interpreter, the interpreter will come from a trusted agency. The interpreter will sign a confidentiality agreement and can never tell anyone who you are.

Protecting your identity means never telling anyone your name and also not telling anyone any identifying factors about you. Identifying factors means that like your age, the area that you live or the exact reason that you had to deal with the police or courts. The aim is that it would be almost impossible for anyone know who had spoken to me when looking at my research.

If you have allowed me to make a voice recording of your interview and if you have used an interpreter, I might need to double-check some of the things that you said. If I am worried that the interpreter has made a mistake in the interview, I might need to check what you have said. If this happens, I will ask a second interpreter to listen to the recording to check. The second interpreter who is double checking will be made to sign a confidentiality agreement. They will not know your name.

Your recording will only be checked like this where you give your permission. If I am worried that there was a mistake, I will ask you if it is ok to have a second interpreter to listen to the recording. You do not have to agree to this.

What you say in our interview is private and confidential. However, if you tell me about criminal activity which is not known to the police, I might be required to report this to the police. This is only where you tell me that you intend to harm someone else or if you are involved in a crime that includes children.

Please read Section V of the Consent Form carefully to ensure you understand what I cannot keep confidential or secret.

VI. Statement that involvement in the Research Study is voluntary

Taking part in this project is completely voluntary. You are under no obligation to take part and are totally free to refuse to take part or withdraw your participation at any time during the study. You will not be pressured in any way to continue to take part in the project after you have chosen to end your participation.

VII. Other relevant information

- I will not be interviewing you about any crimes which might have been accused of. My interest is purely about your expertise and experiences when dealing with the police or courts or interpretation systems.
- You will be offered an interpreter. While I speak Irish and English fluently enough to carry out interviews, if you do not speak either of these languages or would still like to have an interpreter, you can have one. I will hire an interpreter from a trusted interpretation agency where they exist. Where there are no interpreting services or where I cannot find a trained interpreter in your language, we can agree upon who may act as an interpreter.
- I have no connection to any criminal justice organisations. I am connected only with Dublin City University. This study will not help in any legal action you may be taking or intending to take.

If participants have concerns about this study and wish to contact an independent person, please contact:

The Secretary, Dublin City University Research Ethics Committee, c/o Research and Innovation Support, Dublin City University, Dublin 9, Ireland. Tel +353 (0)1 7008000, email **rec@dcu.ie**

Appendix J: Plain Language Statement for Members of An Garda Síochána

Plain Language Statement: Gearóidín McEvoy, Research on Regional Or Minority Language Users

PLAIN LANGUAGE STATEMENT

I. Introduction to the Research Study

This research looks at the experience of regional or minority language speakers who have been tried or charged with a crime in their country. I, Gearóidín McEvoy will be the principle investigator on this project. My supervisors Dr. Vicky Conway and Dr. Tanya Ní Mhuirthile will be advising me on the project. If you ask for your identity to be kept a secret, they will not know the name of any person who is interviewed. I am carrying out my research as part of Dublin City University's School of Law and Government.

I can be contacted at the following:

Email: gearoidin.mcevoy4@mail.dcu.ie

II. Details of what involvement in the Research Study will require

Taking part in this study will mean taking part in an interview or interviews where we discuss your experiences with the criminal law procedure in your country. The interviews will be carried out by me (Gearóidín McEvoy).

You will be asked if you consent to being voice recorded but you do not have to agree to this. You will not be recorded if you don't want to be. You will be asked if you want your identity to be kept a secret. Your identity will be protected if you want it to be.

III. Potential risks to participants from involvement in the Research Study (if greater than that encountered in everyday life)

It is possible that the experiences you tell me about were distressing to you and that speaking about them may make you upset or sad.

Where you request it, I will make every effort to make sure that your identity is protected in this research. However it is impossible to guarantee that no one would ever be able to identify you from the study. If a close friend, for example, read the study, they might be able to tell it was you who spoke to me because they are familiar with your life. This may affect your relationships or cause you to feel upset or sad. However, as I said, I will make sure to hide your identity as much as possible in the study so that you will be protected.

If you tell me that

a) you intend to harm someone else;
b) that you are or intend to carry out a crime involving children, or;
c) if you intend to harm yourself,

then I am obliged to inform relevant authorities. Please see your Consent Form for further details.

IV. Benefits (direct or indirect) to participants from involvement in the Research Study

It is possible that talking about your experience with the police and or courts might make you feel good.

It is possible that you may find that the interview has lifted a weight off your shoulders and given you the chance to talk something that you usually do not speak about.

Also, I am using this research as a starting point for more research into the effect that language has on human rights. The information that you give me might be the first step on a journey to changing language laws in countries and communities. Down the line, this research could be good for language communities and people in language community.

V. Advice as to arrangements to be made to protect confidentiality of data, including that confidentiality of information provided is subject to legal limitations

Where you request to remain anonymous, your identity will not be told to anyone. I will be the only one who knows who you are.

Protecting your identity means never telling anyone your name and also not telling anyone any identifying factors about you. Identifying factors mean things like your age, the area that you live or the exact role you hold. The aim is that it would be almost impossible for anyone know who had spoken to me when looking at my research.

If you have allowed me to make a voice recording of your interview and if you have used an interpreter, I might need to double-check some of the things that you said.

Where you have requested it, whatever you say in our interview is private and confidential. However, if you tell me about criminal activity which is not known to the Gardaí, or about an intent to harm yourself I might be required to report this information.

Please read Section V of the Consent Form carefully to ensure you understand what I cannot keep confidential or secret.

VI. Statement that involvement in the Research Study is voluntary

Taking part in this project is completely voluntary. You are under no obligation to take part and are totally free to refuse to take part or withdraw your participation at any time during the study. You will not be pressured in any way to continue to take part in the project after you have chosen to end your participation.

VII. Other relevant information

- My interest for this research is purely about your expertise and experiences when dealing with the criminal justice system.
- I have no connection to any criminal justice organisations. I am connected only with Dublin City University.

If participants have concerns about this study and wish to contact an independent person, please contact:

The Secretary, Dublin City University Research Ethics Committee, c/o Research and Innovation Support, Dublin City University, Dublin 9, Ireland. Tel +353 (0)1 7008000, email **rec@dcu.ie**

Appendix K: Declaration of Ethical Approval

Ollscoil Chathair Bhaile Átha Cliath
Dublin City University

DCU

Ms Gearóidín McEvoy

School of Law and Government

1st May 2018

REC Reference: **DCUREC/2018/016**

Proposal Title: **How speakers of regional or minority languages (RMLs) access the right to a fair trial**

Applicant(s): **Ms Gearóidín McEvoy**

Dear Gearóidín,

Further to full committee review, the DCU Research Ethics Committee approves this research proposal.

Materials used to recruit participants should note that ethical approval for this project has been obtained from the Dublin City University Research Ethics Committee.

Should substantial modifications to the research protocol be required at a later stage, a further amendment submission should be made to the REC.

Yours sincerely,

Donal O Gorman

Dr Dónal O'Gorman
Chairperson
DCU Research Ethics Committee

DCU
Research & Innovation

Taighde & Nuálaíocht Tacaíocht
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