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LIMITED ENGLISH PROFICIENT (LEP) IMMIGRANTS IN IRELAND'S DISTRICT CRIMINAL COURT

A thesis submitted for the award of
Doctor of Philosophy

KATHRYN WATERHOUSE

Supervisor: Dr. Eoin O'Sullivan
School of Social Work and Social Policy
October 2010

Declaration

I hereby declare that this thesis has not been submitted as an exercise for a degree at this or any other University and that it is entirely my own work.

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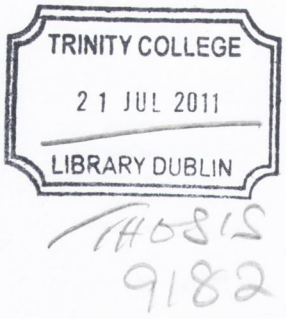

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Summary of methods and findings

The methodology used is exploratory, and involves a triangulation of four research methods. The first method is ethnographic non-participant observation; over the course of seven months hundreds of cases were observed in a number of courts in and outside of Dublin. The choice of this methodology was based on the need to address the speculative and anecdotal nature of what is known about court interpreting. Complementing this method was a series of eighteen semi-structured interviews carried out with interpreters and solicitors/barristers; the style of interview supported the exploratory nature of the research.

The third method involved a legal analysis of the right to an interpreter in Ireland using the case-law of relevant instruments, courts and bodies. Irish cases that ruled or commented on interpreting were also analysed to understand the extent to which interpreting issues have arisen and the language ideology of judges. The fourth and final method involved a review of existing reports, publications, studies and articles, as well as a qualitative content analysis of newspaper articles in two mainstream newspapers from 2000 to 2010. These sources, not previously exploited, enabled a broad picture to be painted of how interpreting was being portrayed in official reports, by the press, and in the reports of other interested bodies.

This thesis finds a distinct ideological division in how the issue of interpreting is represented by various sources; the 'official' view portrays the 'positive and proactive' reaction of the Courts Service in providing quality interpreting services in courts, while the 'alternative' view considers interpreting problems to be of such magnitude as to represent a genuine impediment to justice for LEP defendants. Adhering to the former ideology, the Irish Independent has consistently featured headlines with sensational claims of 'soaring' costs and huge sums being 'forked' out and 'lost in translation', and money emerged as a contentious theme throughout: from the contracting of a sole agency to provide services on the basis of cost-effectiveness, to the EU Commission taking the Irish Government to court over the allegedly illegal tender process; from the perception of interpreters earning more than senior counsel in some circumstances, to reports of 'cowboy' agencies taking the bulk of profits.

The 'alternative' view involves concern about the quality of interpreting, and this thesis finds that the number and prevalence of factors acting as barriers to interpretation in the District Court reduces the likelihood of quality interpretation taking place; it was found that certain

factors consistently affect the interpretation of information like the facts, bail conditions and the sentence; factors include the 'insider' nature of District Court language; communicative interference; poor understanding of interpreting processes; and poor interpretation. It is also found that the language of the District Court is structured in such a way as to exclude outsiders; not through complex legal language or argument, but mainly through the omission from speech of key words, phrases, and grammar, and through the use of District Court jargon.

The right to an interpreter is not directly protected in Ireland, but it is accepted as part of natural justice and due process, and requests for interpreters are routinely granted in courts. However, anything beyond provision is a grey area. There is a lack of protocol and consistency with regard to court procedures; ethically questionable issues, such as interpreters acting as advocates, go unnoticed or are tolerated; and communication through an interpreter can become unwieldy due to the court's preference for the voice of the legal representative. A casual approach to prior consultation also means that consultations regularly take place during proceedings, which prevents the actual proceedings from being interpreted.

Overall, predominant and dual concerns emerge about the money being spent on interpreting services and the quality and reliability of services being provided in return, but limited concern is found for the impact of poor services on the District Court in terms of access to justice. Having created a theoretical framework using Garland's Culture of Control, this thesis finds little evidence that the implementation of interpreting services is affected by such a culture of control; while certain trends that have affected other parts of the criminal justice system are also evident in the provision of services, services and access to justice are most affected by the characteristics of the District Court, by the language ideology of Irish judges, and, potentially, by increasing European protection of the right to an interpreter.

However, it is found that there is a differential in the processing of LEP defendants; certain parts of the case are routinely not interpreted, and poor interpreting, inefficient court practices, and not being Irish may disproportionately impact on particular parts of the case, such as the bail process, and affect how a defendant is perceived by the court. Although it is difficult to say whether or how this impacts on the sentence or the granting of bail, this thesis finds that a case can be made linking language and interpreting issues, at least on some level, with the growing number of non-Irish committals to Irish prisons.

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At the top of a long list, I would like to express sincere gratitude to my supervisor, Dr. Eoin O'Sullivan, for his patience, support, suggestions and help over the last three years; he provided excellent advice and direction, and his belief in the research, as well as his support and encouragement of the work in progress, is much appreciated; without his feedback and support, the thesis could not have come to fruition. In his capacity as Director of Postgraduate Teaching and Learning, I also owe him thanks for the forums he organised, where mutual support was encouraged, problems were discussed, and the PhD process was de-mystified.

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Table of contents

Declaration ii

Summary of methods and findings iii

Acknowledgments v

Table of contents vii

Introduction 1

Chapter One: Controlling Crime and Punishment 13

Chapter Two: Legal Language and Court Interpreting 43

Chapter Three: The Right to an Interpreter in Ireland 76

Chapter Four: Interpreting Services in Ireland 108

Chapter Five: Research Design and Methodology 127

Chapter Six: The Language of the District Court 157

Chapter Seven: Interpreting in the District Court 197

Chapter Eight: The Impact of Interpreting and the LEP Defendant 235

Conclusion 270

References 287

Appendix A: District Court jargon 313

Appendix B: Unrepresented French defendant 322

Appendix C: Dismissal of Polish interpreter 326

Appendix D: Table of fieldwork participants 337

Introduction

"Come, come -English. Swear him to know whether he does not understand English. Can you speak English, fellow?"

"Not a word, plase your honour."[1]

Taken from the Irish novel 'The Collegians', the scene is an early 19th century Irish court in which Phil Naughten, an Irish speaker, feigns ignorance of English and frustrates the court with his halting words and simple demeanour. Not a theme confined to fiction, Waldron documents the murder trial of five members of a family in Maamtrasna, Co. Mayo, for which Myles Joyce was tried and hanged. One of the key witnesses "would not answer when asked did he speak English – a well-known ploy in courtrooms. Many non-English speakers could understand it adequately, but to think out their replies while the interpreter was translating, they feigned total ignorance".[2] MacCabe's study of Mayo petty sessions in the early 19th century found magistrates growing impatient with such ploys, and notes that after the early 1830s interpreters were used grudgingly to hear prosecutions through Irish, if at all.[3]

Eanna Hickey, who analysed these examples as well as a range of anecdotes, oral stories, travel books, fiction and popular sayings, found two opposing stereotypes of those using Irish language interpreters in courts under British rule, the first being one of downtrodden peasants oppressed by laws of which they were ignorant and suffering the 'crippling handicap' of lacking fluency in the English language.[4] While this stereotype was often evident in Irish nationalist history and literature, some judges also simply accepted that the language of the court presented difficulties for Irish speakers. In *R. v. Burke*[5] a key defence witness was sworn in and examined through an interpreter; though he claimed not to speak English, this was challenged by two witnesses who said he had spoken to them and sung a song – both in English. Of seven judges, four deemed the evidence inadmissible, with the leading judgment stating:

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[1] G. Griffin, The collegians (New York/London: Garland, 1979) at 379-80
[2] J. Waldron, Maamstrasna: The murders and the mystery (Dublin: Edmund Burke Publisher, 1993)
[3] D. McCabe, *Magistrates, peasants and the petty sessions courts: Mayo 1823-50,* V Cathair na Mart 45 (1985) at 49
[4] E. Hickey, Irish law and lawyers in modern folk tradition (Cork: Four Courts Press in association with The Irish Legal History Society, 1999) at 20-21 citing Leon Uris, Trinity (London: Deutsch, 1976)
[5] *R. v Burke* [1858] 8 Cox C.C. 44

> "I apprehend it is perfectly possible that the witness was actuated by an honest motive in wishing to be examined in Irish. He may have wished to express himself in the language which he knew best, in which he could most clearly express his thoughts, (...) and certainly if every lady who sings an Italian song is to be taken on that account to have a perfect knowledge of the Italian language, I can only say that a great number of ladies may very easily find themselves placed in a very unpleasant position indeed."

The second stereotype was one of fearless, manipulative peasants with a passion for the court and an innate understanding of how to exploit the system; 'extrovert' witnesses who avoided direct answers in a "whelter of rhetoric and skilful wordplay", and 'introvert' witnesses who said nothing or very little as "[i]gnorance of law and language was easily feigned and could form a most effective, if less entertaining, barrier between the court and the truth."[6] Having to find interpreters caused delays and the confusion between interpreter, witness, lawyers and judge created "windows of ambiguity which might be profitably exploited without the risk of damning one's soul in perjury."[7] Ní Dhonnachadha has found that interpreters were present at a great number of important trials throughout Irish history, and that while defendants or witnesses tended to consider interpreters an asset, judges traditionally viewed them as rogues who would not obey their oath but who did not have any outright effect on proceedings.[8]

Many issues described here broadly represent common themes in the current literature on court interpreting, including distrust of interpreters and of claims to need interpreters, the language barrier for non-native speakers, and interpreting as intrusive but of no great consequence. In fact Ní Dhonnachadha's latter observation mirrors the popular current theory that courts tend to perceive interpreters as a 'necessary evil', while for defendants they often represent a 'saviour'.[9] However, although interpreters have clearly played an important and perhaps emotive part in the history of courts in Ireland, we know little about court interpreting in the courts of today. There is a body of Irish case-law related to the rights of Irish speakers to use that language in court, and debate has largely centred on the implications of Article 8 of the Constitution (that either Irish or English can be used for official purposes).

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[6] E. Hickey, Irish law and lawyers in modern folk tradition (1999) at 94

[7] E. Hickey, Irish law and lawyers in modern folk tradition (1999) at 95

[8] M. ní Dhonnachadha, *Irish language interpreting in the courts since the 1850s*, Unpublished MA Thesis, DCU (2000)

[9] 'Necessary evil' was used by J. Herbert in Manual de l'interprète (The Interpreter's Handbook)(Geneva: Librairie de l'Université, 1952) while R. Morris has written widely about this and the opposing perception of the defendant; see e.g. The gum syndrome, 6(1) Forensic Linguistics 6 (1999). Discussed in Chapter Two

However, the immigration trends of the last fifteen years or so have changed the linguistic landscape of the courts system, and as significant numbers of defendants with limited English proficiency (LEP) – and almost certainly no Irish language skills – appear before the courts, the issues of language and interpreting that Irish courts have to deal with are on a far greater and more complex scale than ever before.

In terms of immigration, between 2000 and 2007 approximately 600,000 people are recorded as having immigrated to Ireland. The 2006 census recorded 419,733 people from 188 different countries living in Ireland, making up around 11% of the population.[10] While no statistics are available for the numbers of LEP defendants appearing in court, in 2007 Riordan, a judge in the District Court, estimated that up to 20% of daily appearances involved 'foreign offenders'.[11] The sudden and exponential growth in spending by the Courts Service on translation and interpreting services is another indication of this growth; this rose from €103,000 in 2000 to around €2.7m in 2007.[12] The diversity of immigration is reflected in the numbers of different languages and dialects requested and provided in courts: up until 2007 the Courts Service put this at 210, though the official figures given by the contracted interpreting agency in 2007 and 2008 were 75 and 71 languages respectively; in 2008 – the last year for which any information on interpreting is available from the Courts service - 10,000 requests were made for an interpreter, and Polish, Romanian, Lithuanian, Russian, Mandarin Chinese, Latvian, Portuguese and French, Czech and Arabic were the languages most often requested.

It is unclear from the seemingly drastic drop in the number of languages being requested at the peak of the immigration trend whether the number of languages was originally over-estimated, the heterogeneity of immigrants suddenly decreased, dialects were omitted from latter counts, or whether some languages and dialects were perhaps catered for by different agencies. The number of requests also fails to tell us much; many courts had (and have) interpreters for the most common languages present throughout all sittings, and interpreters requested for one case are likely to interpret for one or a number of other cases while at court, meaning that in many cases an interpreter is present without having been requested. It also fails to tell us how many LEP defendants were in court *without* interpreters. The few available statistics, then, tell us very little, and their vague nature is indicative of the little that

[10] 82% of these were from ten countries: China, Germany, Latvia, Lithuania, Nigeria, Poland, UK, USA. Information from CSO, Census 2006: Non-Irish nationals living in Ireland, available at http://www.cso.ie/census/documents/PART%201%20NON%20IRISH%20NATIONALS%20LIVING%20IN%20IRELAND.pdf

[11] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007)

[12] Irish Translators and Interpreters Bulletin, January 2008

is known about the topic more generally. Consider that newspaper articles have variously reported the number of languages being interpreted in courts as 120 (a misprint?),[13] 67 (an agency),[14] 175 (another misprint?)[15] and the 167 or 200 languages used in the Republic,[16] and the confusion increases, in part due to apparent carelessness with the little information that *is* available.

Research on LEP defendants in Ireland

In academic terms, only two articles have looked at the issue of LEP defendants in Irish courts; Bacik's "Breaking the Language Barrier: Access to Justice in the New Ireland" and Riordan's "Immigrants in the Criminal Courts", both from 2007. Riordan provides us with a personal and somewhat negative perspective on how the increased numbers of immigrants and LEP immigrants are impacting on the system; changes include longer sittings, higher costs due to interpreting, delays caused by an alleged reluctance of 'foreign offenders' to plead guilty, and the court's 'persistent dilemma' in deciding when an interpreter is necessary.[17] Equally, he points to the strong possibility that non-English speaking defendants are subject to a sentencing differential due to real or perceived language barriers.[18] Bacik also looks at language barriers but from the perspective of the defendant's right to access justice; she discusses the importance of trained and professional interpreters, and looks at the international, regional and developing EU framework of the right to an interpreter before considering Irish law and practice, where she identifies a number of key defects in an 'unsatisfactory' system.

Both articles were written at the peak of the immigration flow, and as the Courts Service had just contracted out all translation and interpreting to a sole service provider, Lionbridge. Bacik found it unacceptable that services were being fully delegated to a private agency with no public accountability, she identified potentially serious flaws in the tender and the privatisation more generally, and found the lack of attention being paid to an issue of such importance "inexcusable",[19] yet interest in and comment on the issue since then has remained almost exclusively the reserve of the Irish Translators and Interpreters Association (ITIA), with

[13] T. Felle, *€550,000 payout for court interpreters*, Irish Independent, 17 August 2005
[14] R. Riegel, *Translator shortage causes havoc in court schedules*, Irish Independent, 14 May 2001
[15] M. Tighe, *Interpreters in court pay row*, Irish Times, 29 March 2009
[16] C. O'Brien, *Are we lost in translation?*, Irish Times, 4 April 2006; M. Tighe, *Interpreters in court pay row* (2009)
[17] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007)
[18] European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(2), Nov. 4, 1950, 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953) [henceforth ECHR]
[19] I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 109 (2007)

sporadic contributions by the media. The two academic articles identify important aspects of the current system of court interpreting, and highlight not only the impact on the criminal justice system and barriers to justice for defendants with limited English proficiency, but also the almost complete lack of interest in the area and the fact that much of what is known is anecdotal and speculative.

Aims and objectives

The aim of this thesis is to address the gap in what is known about LEP defendants in Irish courts. Specifically it looks at the District Court; as the court that deals with the vast majority of criminal offences, it must also be the court that deals with the largest number of LEP defendants. The point of departure of the thesis is three-pronged:

- It has been demonstrated that interpreting can have a significant impact on court proceedings, yet the importance and complexity of the interpreting process is rarely acknowledged. In the worst case scenario, serious miscarriages of justice can occur as, for example, in the seminal English case, Iqbal Begum:[20] in 1991 Mrs. Begum, having killed her husband from an arranged marriage after years of abuse, pleaded guilty to murder without understanding or appreciating the difference between this and manslaughter, and then sat silently throughout her trial. The reason: she did not understand the interpreter, who did not speak the same language as her. Although years later it was pronounced "beyond the understanding" of the appeal court that this possibility had never occurred to anybody and her conviction was quashed, Mrs. Begum later killed herself.

- Every person charged with a criminal offence has the right to a fair trial, and anybody that cannot speak or understand the language of the court has the right to an interpreter. It was held in Begum, and on several occasions by the European Court of Human Rights (ECtHR),[21] that the interpreter should also be competent, and in general the right involves more than simple provision.

[20] *Iqbal Begum* [1991] 93 Cr. App. R. 96 at 101

[21] See *Cuscani v UK*, App. No. 32771/96, 36 E.H.R.R. 2 (Sep. 24, 2002); *Brozicek v Italy,* App. No. 10964/84, 23 Eur. Ct. H. R. (Dec. 19, 1989); *Kamasinski v Austria,* App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989); *Güngör v Germany (dec.),* App. No. 31540/96, (May 17, 2001); *Hermi v Italy*, App. No. 18114/02 (Oct. 18, 2006)

- A large number of LEP defendants are and have been appearing before the Irish District Court, yet the preliminary evidence provided by Bacik, the ITIA and some media reports suggests that there are some very serious flaws in the current system. Anecdotally, for example, reports have emerged of interpreters going on dates with murder suspects and later interpreting for witnesses at trial;[22] illegal immigrants interpreting for the Gardaí;[23] judges refusing to provide interpreters;[24] interpreters lacking basic vocabulary;[25] and interpreters failing to convey vital information to suspects.[26] Many more systemic problems have also been identified, such as the lack of qualifications and training among court interpreters, and the absence of guidelines, accreditation, ethical codes, monitoring and policy.

It is thus asserted that despite the lack of interest the topic has engendered, this is an increasingly important area with implications for the workload and procedures of courts, for access to justice and due process rights, and for the criminal justice system more broadly, as the statistics provided by the Irish Prison Service suggest a consistently high presence of non-Irish nationals in Irish prisons. Like the immigration trend, this peaked in 2007 when one third of all those committed were non-Irish; this fell to just under 30% in 2008 and to 24% in 2009, but removing those committed under immigration laws (37% in 2007, 22% in 2009), the number of non-Irish persons committed to prison under sentence or on remand actually *increased* in 2009, and remains comparable with 2007.[27] There is no way of knowing how many of those committed would have needed an interpreter in court, but 90% of non-Irish nationals, or 22% of all those committed to prison in 2009, for example, were from non-English speaking countries;[28] statistics are based on nationality and grouped in broad categories, so do not allow identification of those from Anglophone countries, or non-English speakers from English-speaking countries, but a very broad estimate of those committed with potentially limited English proficiency might be somewhere between 15 and 20%.

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[22] C. Coulter, *The trials of foreigners translate into a difficulty*, 10 March 2003

[23] C. Lally, *Interpreter system poor – GRA*, Irish Times, 29 April 2009

[24] *Judge refuses to appoint translator for man accused of handling stolen phone*, Irish Independent, 28 July 2005; Galway Advertiser, 11 January 2007 IN ITIA Submission on the Courts Service Statement of Strategy 2008-2011 (2008) at 11

[25] *Judge dismisses 'incompetent' Polish translators*, Irish Examiner, 12 October 2007

[26] C. Coulter, *Time to look at Garda rules for non-nationals*, Irish Times, 4 March 2003; Galway Advertiser, 2 May 2008 IN ITIA Submission on the Courts Service Statement of Strategy 2008-2011 (2008) at 3

[27] 20% in 2007, and 19% in 2009; recent reports do not provide a breakdown of committals by sentence and remand for non-Irish people

[28] English-speaking countries being defined as the UK, the US, Australasia as per these statistics. This includes those committed under immigration laws as the statistics only provide a break-down by nationality for persons committed, and not for immigration offences.

However, if interest in the topic was limited at the height of immigration (and of spending on interpreting and translation services), it seems now to have disappeared from the agenda; the 2008-2011 Strategic Plan and the 2009 Annual Report of the Courts Service fail to make any reference to interpreting services; the previous Strategic Plan made a (minimum) commitment to continue to provide interpreters in courts, and Annuals Reports since 2002 have included (minimal) information on interpreting costs, demand for services, languages requested, and usually some (minimal) commentary acknowledging that courts are dealing with increased diversity. The absence of commentary in the 2009 report is therefore conspicuous, and its implications unclear. An impression is created that interpreting is no longer an issue for the courts, and this ties in with the prevalent perception that immigrants are 'going home' in ever increasing numbers; an image fuelled at least in part by media coverage of a 'huge exodus', 'sharp drops', and plunging numbers of immigrants driven away by the recession.[29]

CSO estimates and other sources, however, suggest that while the makeup of the immigrant population may have changed, it has not disappeared. In 2009 Ireland became a country of net emigration again for the first time since 1995 as immigration levels fell substantially[30] and non-Irish emigration rose.[31] In 2010 overall emigration levels increased again but fewer non-Irish people left, and although the non-Irish population has fallen slightly since its highest point in 2008, it remained, in April 2010, at an estimated 487,933 or almost 11% of the population, just slightly less than the 11% in 2007 and 11.7% in 2008. The downturn in immigration clearly does not equate to the disappearance of immigrant groups, and the Immigrant Council of Ireland, for example, has recently said that despite the prevalence of a 'going home' rhetoric, demand for their services has remained consistently high, demonstrating that many migrants have made a home in Ireland.[32]

The recent accession states[33] have contributed most highly to the growth in immigration, as well as to the emigration trends of non-Irish people, yet there has also been a net growth in the population of this group. Looking specifically at the situation of Polish migrants in Post-Celtic Tiger Ireland, Krings et al. find that in spite of the impression promulgated by the media

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[29] F. Black, *Immigrants leaving in thousands: applications for PPS numbers by foreign nationals plunge*, Irish Independent, 24 December 2009; K. Doyle, *100,000 workers leave Ireland as pressure on jobs grows*, Herald.ie, 29 December 2008

[30] 109,500 in 2007, 30,800 in 2010; year ending April, CSO, Population and Migration Estimates, April 2010

[31] From 29,100 in 2007 to 46,700 in 2009; CSO, Population and Migration Estimates, April 2010

[32] Immigrant Council of Ireland, Press Release: Level of callers to ICI does not support rhetoric of migrants 'going home', 16 July 2010

[33] 2004 Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia; 2007 Bulgaria and Romania

that immigrations from these states "are on their way out", the situation involves more than simple economics.[34] Their assertion is that, although it is too early for definite conclusions, while some migrants are likely to leave - particularly those hit by the recession and who saw employment in Ireland as temporary, many others have reason to, and are likely to remain. While the future may be uncertain, many remain employed, and welfare entitlements insulate these migrants against destitution in the case of job loss. Finally, there is evidence that social networks have started to become more important than (economic) push and pull factors as migrants reach later stages of the migration process. Interestingly, they suggest that those likely to stay will have acquired relevant work experience and 'sufficient' English proficiency.[35]

Indeed, not all immigrants will have difficulties speaking English; for example, the UK and the US represented two of the ten biggest non-Irish groups in the 2006 census, and is also to be supposed that other immigrants, like Krings et al. suggest, will have acquired varying degrees of proficiency in English. Nothing is really known, however, about the language proficiency of immigrants currently in Ireland, and it is widely acknowledged that the English 'sufficient' to survive in day-to-day life or, for example, in low-level service industry jobs, is not sufficient to understand and participate in court if charged with a criminal offence. The Courts Service acknowledges that for ordinary members of the public the language of the legal system is an "obvious block" to understanding the "rules that dictate the practice and procedure of all courts";[36] the challenge to those with limited English and little or no understanding of how the justice system functions must be far greater. The Law Society of Ireland has noted that the right to an interpreter is gaining importance "as the population of non-nationals residing in Ireland is growing",[37] and Riordan considers that changes resulting from the increased immigrant and LEP presence involve a 'permanent shift' in how the District Court is run. Perhaps most significantly, O'Malley's 2009 'The Criminal Process' contains a full chapter dedicated to language issues, the first half of which looks at the right to an interpreter in Irish courts for those without fluency in English or Irish, while the second part focuses on the Irish language.

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[34] *Up to 1,300 Poles leaving Ireland every week*, Irish Independent, 8 December 2008; *3,000 Poles leave Ireland every month*, Sunday Tribune, 18 January 2009

[35] T. Krings, A. Bobek, E. Moriarty, J. Salamonska & J. Wickham, *Migration and recession: Polish migrants in post-Celtic Tiger Ireland*, 14 (2) Sociological Research Online (2009)

[36] Courts Service Annual Report 2005

[37] Law Society of Ireland human rights law manual (B. Moriarty & A. Mooney Cotter, eds.)(Oxford: Oxford University Press, 2004)

The Research Questions and Design

The objective of the thesis is to address the gap in knowledge around limited English proficient defendants in the District Court.

- The first objective is to find out and describe what happens when an LEP defendant comes before the District Court: while there has been some comment on the services being provided generally, little is known about courtroom procedure and protocol in processing LEP defendants.

- The second question is whether or not LEP defendants are able to access justice fairly and on an equal basis with English speakers: what does the right to an interpreter entail beyond mere provision, and how is it understood and implemented in Irish courts?

- The third question asks what the impact of the increase in LEP defendants is and has been on the District Court: Riordan's comments suggest that the experience has been a negative one that has put additional strain on the system; the lack of commentary by the Courts Service suggests that interpreting may no longer be considered an issue or relevant; and Prison Service statistics suggest non-Irish people may be imprisoned disproportionately.

As there is little existing empirical research on the topic, and little is known in relation to the research questions being posed, the research design of this study is necessarily exploratory, and a number of methods are used in an effort to answer the questions as fully and reliably as possible.

First, ethnographic non-participant observation was carried out in a number of District courts inside and outside Dublin; over the course of seven months hundreds of interpreted (and monolingual) cases were observed and qualitatively analysed in an effort to address the speculative and anecdotal nature of what is known about interpreting in Irish courts. The observation was supplemented with eighteen semi-structured interviews carried out with key participants in the interpreted District Court case: interpreters and solicitors/barristers. The interviews addressed a range of issues including the experiences of working with interpreters/in court/with LEP defendants; perceptions of the interpreter's role, interpreting

standards and quality; challenges faced in LEP cases; and attitudes towards LEP defendants. Both methods supported the exploratory nature of the research; the semi-structured nature of the interviews led to the introduction of issues not previously identified as relevant, while the observation led to a widening of the data collection to include the language of the District Court more generally, as it was found to be intrinsic to understanding interpreting matters, and connections were also identified between interpreting and other District Court characteristics that had not been anticipated.

A legal analysis of the right to an interpreter is also carried out: relevant case-law in Ireland as well as the comments and judgments of the Human Rights Committee, the European Court of Human Rights, and a number of leading common-law judgments are considered in an effort to understand what an LEP defendant in an Irish court may be entitled to. Specific consideration is given to entitlement, payment, quality and competence, content to be interpreted, as well as the new EU Directive on the right to interpretation and translation in criminal proceedings. Irish cases are explored more broadly to assess the extent to which interpreting issues have been addressed by courts, and to discern the attitudes of judges to issues that have arisen.

Finally, a review of relevant, existing documentation is undertaken; there is a significant amount of information contained in the reports of various bodies, and a small number of relevant studies in the field have been carried out. These, and the articles mentioned above, are analysed in conjunction with a qualitative content analysis of newspaper articles that appeared in two mainstream newspapers (the Irish Times and the Irish Independent) between 2000 and 2010. This methodology consolidates existing documentation for the first time to form a picture of what is known - or alleged - about interpreting services in Irish courts.

Layout of the thesis

This thesis begins with a review of relevant criminological literature. As the research topic is located in the criminal justice system and addresses wider criminological issues, Garland's 'The culture of control: crime and social order in contemporary society'[38] is taken as a starting point from which to consider various trends identified as relating to modern criminal justice systems, and the extent to which these developments can be said to apply in the Irish context. The aim is to create a framework through which to consider the position of an LEP defendant

[38] D. Garland, The culture of control: crime and social order in contemporary society (Oxford: Oxford University Press, 2001)

in the system, and to explore how and if a culture of control impacts on one aspect of the criminal justice system: the provision of interpreting services in court. As such, the chapter considers five specific trends that represent, or are deduced from the indices of change identified in Garland's Culture of Control, and these are: increased punitiveness and control, the changing nature of the criminal justice system, the politicization and populism of crime, decreasing concern for due process, and 'otherness' in the system.

A review of literature on legal language and court interpreting follows, the aim of which is to explore what is known about the structure of legal language, its role in courtroom proceedings, and its potential impact on the outcome of court proceedings. Interpreting literature, heavily based on studies of language more generally, is then reviewed with a particular focus on how assessment of the need for interpreters and assigning them is dealt with; the interpreter's role in criminal proceedings and how interpreters are perceived by courts; and finally how studies have found interpreting to impact on, influence and alter courtroom proceedings.

Chapter Three contains the legal analysis of the right an interpreter in Ireland; sources of the right, including an analysis of the number of Irish cases containing the term 'interpreter', are considered in the first section, while the second section looks at the substance of the right, including the issues of payment, entitlement to an interpreter, what should be interpreted, quality and competence, and the new EU Directive on the rights to interpretation and translation in criminal proceedings.

Chapter Four contains the review of documentation and media content analysis; it looks at how various sources have documented the provision and quality of, and the need for interpreting services since 2001. The research design and methodology is outlined, described and explained in detail in Chapter Five. The first part of the chapter deals with the preliminary details of the study: choice of terminology, choice of the District Court as the research context, the multi-disciplinary framework of the study and the research questions. The second part details the research design and explains the choice of methodology, while the third part explains the preparation phase of the fieldwork: ethical issues, how the District Courts were chosen and how interviewees were sourced. The fourth section describes the data collection phase including its challenges and limitations, while data analysis is outlined in the final section.

The final three chapters discuss the findings of the ethnographic observation and interviews, providing a detailed account of language and interpreting in Ireland's District Court. Chapter Six looks at District Court language: its principal characteristics, how language is used by participants, and language in action, for which a set of linguistic units is created that largely parallel the process by which a case moves through the system. Chapter Seven describes interpreting processes in the District Court: firstly exploring how the court assesses language proficiency and assigns interpreters, and secondly considering the work of the interpreter, including their role and the challenges they face; in addition, a typology is created that identifies five different types of interpreters working in the District Court according to their work patterns. Chapter Eight considers from a practical perspective how interpreting impacts on the District Court and the LEP defendant's ability to access justice. In the first part it considers attitudes to interpreters and their place in court, delays caused by interpreting, and the relevance of the solicitor/barrister in an interpreted case. The second part of the chapter revisits the linguistic units of the case and considers how these differ (or don't) in an interpreted/LEP case. At the end of these three chapters, and preceding the Conclusion, a final section will use the analysis of interpreting in Irish courts to consider the right to an interpreter from a practical perspective and in light of the new EU Directive on the rights to translation and interpretation in criminal proceedings.

In the final chapter I conclude my thesis. A summary of findings considers how my research makes an original and appreciable contribution to knowledge, which is followed by a discussion of the methodological and theoretical contributions of the thesis.

Chapter One: Controlling Crime and Punishment

Introduction

Justice is not a static concept, nor are the concepts of crime and punishment. The criminal justice system does not exist in a vacuum, and its values, aims and objectives change over time and according to the social, economic, cultural political and, increasingly, technological developments of a society. Over the last forty years, dramatic changes to the criminological landscape have been identified, although there isn't always agreement on what these changes entail, where they are relevant, or what their causes and implications are. In Garland's (2001) seminal work 'The culture of control: crime and social order in contemporary society',[1] he examines the evolving field of criminal justice in the UK and the US in an attempt to develop a "critical understanding of practices and discourses of crime control";[2] he examines the history and forces behind changing assumptions in procedural and substantive justice from the 1970s onwards and which are continuing to evolve today. Garland theorizes a 'complex and contradictory' field of crime control where increasingly punitive attitudes to crime and punishment arise from and are perpetuated by major social and economic upheavals, new technologies and the rise of the mass media, the politicization of crime, the rise of the victim and public protection, and a new focus on risk assessment and cost-effectiveness, and where rehabilitative impulses are replaced by incapacitory and deterrent tendencies in the search to control what society perceives – or is led to perceive – as increasing chaos and disorder.

Critics of Garland's theory have suggested alternatives to explain 'mass imprisonment' in the US, and many have submitted that explanations of penal practices are necessarily dependent on the local, rather than being explainable through global developments. Tonry, for example, argues that "the insuperable difficulty" of Garland's claim is that while the 'causal' developments he identifies can be generalised across western countries, policy trends and imprisonment rates cannot be explained by general forces of globalization or the conditions/crises of late modernity; acknowledging the value of analyses in areas of income inequality, welfare, government structures and trust, and so on, Tonry suggests four inter-connected factors which "go a long way" to explaining current penal policies in the US: a 'paranoid style' of politics where things are absolutely good or absolutely evil and which

[1] D. Garland, The culture of control: crime and social order in contemporary society (Oxford: Oxford University Press, 2001)
[2] D. Garland, The culture of control: crime and social order in contemporary society (2001) at 160

Republic rhetoric (re-)made mainstream in the 1970s; Protestant fundamentalism and intolerance which has culminated in a modern moralistic crusade against drugs and crime; a Constitutional structure which is outdated and acts as a buffer for "short-term emotion and popular sentiment"; and the recent use of crime and violence as code words for race to ensure the continuation of the historical racial divide.[3] Other critics have taken issue with particular aspects of the theory, such as the basic notion of 'punitiveness', arguing that it lacks credible definition and is based on speculative claims that obscure the reality of modern crime control;[4] or with neglect of, for example, a more focussed gender- or race-based approach[5], a neglect of the role of politics[6], or insufficient consideration of 'tempering' factors such as human rights that are vital to understanding difference in current penal and criminological policy.[7]

As Garland himself has acknowledged, this criticism has proved useful in evolving, refining and adding to the debate, but recognising that "each national pattern will of course be unique" and that in every context there are influential, restrictive forces, he also has also reiterated the usefulness of using the Culture of Control to conduct further investigation,[8] and the concepts and indices of change that he identifies can be usefully applied in such an undertaking, bearing in mind relevant criticisms and developments (since 2001 many of the contexts identified by Garland have evolved considerably). If, taken as a whole, his concepts do not wholly explain rising US incarceration levels, and if he does not make explicit every relevant social and economic development, and neglects or underplays the significance of some perspectives, the Culture of Control nonetheless remains a valid and credible heuristic instrument by which to examine – with due precaution – the Irish criminological landscape.

From being a low-crime country where in 1958 only 369 people were being held in Irish prisons and prisons were being closed down, Ireland has become a country with a prison

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[3] M. Tonry, *Explanations of American punishment policies,* 11(3) Punishment and Society 377 (2009)
[4] See e.g. R. Matthews, *The myth of punitiveness,* 9 Theoretical Criminology 175 (2005)
[5] See e.g. L. Gelsthorpe, *Back to basics in crime control: weaving in women* 7(2) Critical Review of International Social and Political Philosophy 73 (2004); B. Western, Punishment and inequality in America (New York: R. Sage Foundation, 2006)
[6] L. Loader & R. Sparks, *For a historical sociology of crime policy in England and Wales since 1968*, 7(2) Critical Review of International Social and Political Philosophy 5 (2004)
[7] S. Snacken, *Resisting punitiveness in Europe?,* 14 Theoretical Criminology 273 (2010); J.Q Whitman, Harsh Justice: criminal punishment and the widening divide between America and Europe (Oxford: Oxford University Press, 2003)
[8] D. Garland, *Beyond the culture of control*, 7(2) Critical Review of International Social and Political Philosophy 160 (2004)

population comparable to many of its European neighbours;[9] with 4,491[10] in prison in July 2010 (or 93 per 100,000 of the population), the prison population is at an all-time high and continuing to rise, and prisons are operating at or above full capacity.[11] Although patchy, incomplete and inconsistent criminal justice statistics make precision difficult, it has become clear that Ireland's growing prison population cannot be explained solely by increases in crime rates. Kilcommins et al. use Garland's culture of control theory as an heuristic device to examine 'crime, punishment and the search for order in Ireland'[12]; although they find a culture of control to be in a stuttering state overall in Ireland, some evidence of a crime complex and Garland's indices of change were identified. This chapter draws on Garland's and Kilcommins et al.'s explorations of a culture of control to inform the consideration of limited English proficient (LEP) immigrants in the Irish criminal justice system.

Essentially, we know very little about non-Irish people in the system whether in terms of how many there are, why they are there, or what happens to them, though prison statistics reveal that they appear to be overrepresented in Irish prisons. In five areas that are considered particularly relevant to the position of LEP immigrants, current trends are analysed in an effort to create a framework through which to contextualise, and from which to begin a discussion of the LEP defendant and the provision of interpreting services in Irish courts. In each area an overview of the trends identified by Garland will be followed by a consideration of the Irish context.

- The first area is 'control and punitiveness', where broad consideration is given to the rise of a crime complex and punitive ideals.
- The second area is 'the changing nature of the criminal justice system', including new management and the desire for cost-effectiveness, an area of particular interest for consideration of interpreting service provision.
- The third area deals with 'the new emotions of crime' including the role of the media and politicians in influencing public opinion, which may inform the later discussion on representations of LEP immigrants and interpreting provision.

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[9] Such as France and the Netherlands; it is higher than the prison population in Germany. Statistics as of August 2010; World Prison Population Rates per 100,000 of the national population, available at http://chartsbin.com/view/eqq

[10] Plus 784 on temporary release

[11] Irish Prison Service Report 2009

[12] S. Kilcommins, I. O'Donnell, E. O' Sullivan, B. Vaughan, Crime, punishment and the search for order in Ireland (Dublin: Institute of Public Administration, 2004)

- The fourth area looks at 'relaxation of concern around due process/human rights', of particular interest in relation to the LEP immigrant's due process rights, including the right to an interpreter.
- The fifth and final area uses Garland's 'criminologies of essentialized differences' to examine the implications of a culture of control for minority and immigrant groups.

Increased punitiveness and control[13]

Garland describes the turbulent and unpredictable changes that have occurred in penal policy and practice since the 1970s in the US and the UK, when a sustained attack was begun on the "faulty, discriminatory and inconsistent" ideals of penal welfarism, and rehabilitation as an aim of the criminal justice system.[14] As these – and the criminal justice system more generally – were perceived to be failing, a 'crisis' of penal modernism developed where the belief that 'nothing works' pervaded. A new field of crime control began to take shape that Garland considers to have been profoundly influenced by a range of social, economic, political and cultural changes including economic recession and unemployment, new political leadership, and the rise of mass media; as images of riots, demonstrations, other violence and street crimes were televised to the public, society felt – or part of it was led to feel - increasingly under threat, insecure and defensive, thus necessitating order and control of the chaos.

Garland argues that the perception of crime began to change: while in the era of penal welfarism crime had been conceived of as a social problem, the social causes of which needed to be tackled, it came to be viewed once again as a threat to society, something that was committed rationally by wicked, opportunistic individuals lacking discipline and self control. Response to crime became correspondingly more punitive, and retributive and deterrent ideals replaced rehabilitative ones to bring about increased convictions and more severe sentences. Repressive tendencies, the open expression of punitive sentiments, and draconian legislation became acceptable and the norm, with policies such as 'zero tolerance' and 'three strikes' part of the everyday rhetoric of crime policy. As the belief re-emerges that 'prison works' to reduce and prevent crime, exclusionary and get tough attitudes have become an

[13] From Garland's (2001) decline of the rehabilitative ideal; rise in punitiveness and expressive justice; return of presumption that prison works, changing criminological thought towards theories of control; 'crisis of penal modernism' - theoretical failure of the justice system: Kilcommins et al. (2004) demise of rehabilitation - rise of punitiveness; primacy of imprisonment

[14] D. Garland, The Culture of Control: Crime and Social Order in Contemporary Society (Oxford: Oxford University Press, 2001) at 55

integral part of contemporary penality;[15] prison has been redefined as a mechanism of exclusion and control, while probation often involves much more demanding conditions of supervision and is seen more as 'punishment in the community' than rehabilitation.[16] Prison, probation and parole officers have reshaped their roles to emphasise monitoring, control and risk management over treatment, as tougher policies of deterrence, incapacitation and predictive restraint have led to "expressive, exemplary sentencing and mass imprisonment".[17] In the US, 748 per 100,000 of the population is in prison, and the figure in England and Wales is 154.

The fact that in many other countries incarceration trends continue to grow without the crime trends to justify such growth means that penalization has become "a hot issue in contemporary criminology",[18] but also a complex one; while certain trends can be generalised, the local also inevitably influences crime policy,[19] and complexity appears to be increasing as insecurity and the 'crisis of modernity' is influenced by new and greater risk factors including terrorism and contemporary counter-terrorism frameworks, religious and nationalist fundamentalism, and global warming, amongst other factors.[20]

In Ireland, despite a crisis in public financing and rising building costs, there is ongoing commitment to expanding the prison system.[21] In fact, Ireland is undergoing what O'Donnell calls "the most extensive prison-building programme in the history of the state",[22] and it is an area, he submits, that seems "insulated from considerations of cost-effectiveness".[23] Whether this increase in imprisonment in the Irish context can be explained by the fall in welfarism and rehabilitative ideals is questionable, however; Kilcommins et al. note that Ireland only began to embrace the principles of rehabilitation as they began to decline elsewhere, and the ideals of rehabilitation still remain a part of the criminal justice system's rhetoric, at least to some extent, though financial and political commitment to the ideal is considered to be

[15] B. Hudson, Understanding justice: an introduction to ideas, perspectives and controversies in modern penal theory (Buckingham: Open University Press, 2003)
[16] B. Hudson, Understanding justice (2003) at 42
[17] B. Hudson, Understanding justice (2003) at 156
[18] W. de Koster, J. van der Waal, P. Achterberg & D. Houtman, *The rise of the penal state: neo-liberalization or new political culture?* 48 British Journal of Criminology 720 (2008)
[19] For a discussion on how and why policy is transferred, see e.g. T. Newburn & R. Sparks, *Criminal justice and political cultures* IN Criminal justice and political cultures: national and international dimensions of crime control (T. Newburn & R. Sparks, eds.)(Oregon, USA: Willan Publishing, 2004); T. Jones & T. Newburn, Policy transfer and criminal justice: exploring US influence over British crime control policy (Maidenhead: Open University Press, 2007)
[20] S. Walklate & G. Mythen, *How scared are we?* 48 British Journal of Criminology 209 (2007)
[21] Irish Prison Service Report 2009; see also S. Kilcommins, I. O'Donnell, E. O' Sullivan, B. Vaughan, Crime, punishment and the search for order in Ireland (Dublin: Institute of Public Administration, 2004)
[22] I. O'Donnell, *Crime and justice in the Republic of Ireland,* 2(1) European Journal of Criminology 99 (2005) at 107
[23] I. O'Donnell, *Crime and justice in the Republic of Ireland* (2005)

inconsistent.[24] The welfare state also only emerged in the 1960s with the decline of non-state penal institutions like psychiatric hospitals and homes for unmarried mothers, which had 'far-reaching control functions', and were part of a 'complementary and interdependent structure of control'. In terms of imprisonment representing increased control, it has in fact been suggested that when punitiveness is conceptualised more broadly as 'coercive confinement', eight times more people were confined in 1951 than in 2002 which suggests a decrease rather than an increase in control with modernity.[25]

An increasing orientation towards custody and the primacy of prison is nonetheless identified in the sentencing patterns of Irish courts; O'Donnell points out that imprisonment is used more often than probation and community service together,[26] and while fines are still commonly used as punishment, there has been considerable concern over the imprisonment of fine defaulters, though legislation has been introduced to tackle this issue.[27] At the same time, consideration of growth in the prison population must take into account those being held in prisons but who have not been convicted of criminal offences; the numbers being held on remand have increased enormously since the 1996 Constitutional amendment widening the circumstances under which bail could be denied, which conflates the figures significantly; and those detained under immigration laws have become an integral element of the system, although these have fallen significantly in the last number of years. Taking these categories into consideration, O'Donnell suggests that "the pressure to expand is not coming from within the criminal justice system."[28] In addition, although O'Malley points out that while those serving long sentences make up most of the prison population at any given time, most of those committed to prisons are for short sentences:[29] for example those committed for periods of under 3 months more than doubled between 2007 and 2009.[30] These sentences, it is generally accepted, are ineffective both as deterrents and in terms of rehabilitation. While an increasing use of prison is in evidence, it is unclear if, how and to what extent this relates to punitiveness or deterrence.

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[24] Kilcommins et al. (2004); The Katherine Howard Foundation and the Irish Penal Reform Trust, (2007) The Whitaker Committee 20 Years On: lessons learned or lessons forgotten?

[25] E. O'Sullivan & I. O'Donnell, *Coercive confinement in Ireland: the waning of a culture of control, punishment and society*, 9(1) The International Journal of Penology (2007); Kilcommins et al. (2004) at 76 - 87

[26] I. O'Donnell, *Crime and justice in the Republic of Ireland* (2005) at 120

[27] L. Campbell, *The culture of control in Ireland: theorising recent developments in criminal justice*, 1 Web Journal of Current Legal Issues (2008)

[28] I. O'Donnell, *Stagnation and change in Irish penal policy*, 47(2) The Howard Journal 121 (2008) at 129

[29] This changed little in December 2009, except the latter category rose to 27% (Irish Prison Service Report 2009) & T. O'Malley, *Time served: the impact of sentencing and parole decisions on the prison population*, Paper delivered to Irish Penal Reform Trust, Morrison Hotel, Dublin, June 28, 2010

[30] 2,293 to 5,750, Irish Prison Service Reports

However, Kilcommins et al. detail a move towards a conceptualisation of crime as rational and normal and a focus on the offence rather the offender, and Campbell identifies a shift in the conceptualisation of offenders; instead of being perceived of as people who have suffered hardships and been deprived, increasingly offenders are portrayed as "avaricious and rapacious predators or career criminals, or feckless youths".[31] A study by Healy and O'Donnell, which analysed 538 cases as reported in local newspapers in 2002 and 2008, also finds that judges tend to believe defendants in control of their behaviour, and that they engage in "minimal rehabilitative intervention, believing that defendants [are] responsible for managing their own reform."[32]

Changing nature of criminal justice system: the community, managerialism and cost-effectiveness[33]

Some of the responses identified by Garland to the 'new' crime problem involve changes in the nature of the criminal justice system. One major change is the partial relocation of crime control from sole control of the state into the community where a 'responsibilization strategy', Garland submits, creates a sense of duty for ordinary people to play their part. 'The new criminologies of everyday life' are everyday precautions that involve anticipating crime, calculating risks and helping to prevent crime, such as replacing cash with credit cards, TV cameras on the streets, night buses and car park attendants. Responses can be seen at the levels of the individual (revised daily routines to minimize victimization; firearms), the household (insurance and community devices; locks and bolts, intruder alarms) and the community (neighbourhood watch; gated communities; residential associations). Self-policing is encouraged, and 'community policing' moves the focus of crime prevention from the police to increased agency and local community involvement.[34] This has signalled the growth of the security *industry* as opposed to the security sector, but it is has also led to the commodification of security which can be used for profit by 'fear entrepreneurs'.[35] The idea of a pervasive fear of crime, which Garland suggested has not only become a fact of everyday life

[31] L. Campbell, *The culture of control in Ireland: theorising recent developments in criminal justice* (2008)
[32] D. Healy & I. O'Donnell, Crime, consequences and court reports, 20(1) Irish Criminal Law Journal 2 (2010)
[33] From Garland's (2001): expanding infrastructure of crime prevention; commercialisation of crime control; new management and working practices throughout system - emphasis on cost-effective management of risks and resources: From Kilcommins et al. (2004) diffusion of crime control; efficiency of the criminal justice system
[34] H. Kemshall, *Crime and risk* IN Risk in social science (P. Taylor-Gooby & J. Zinn, eds.)(Oxford: Oxford University Press, 2006); J. Wood & C. Shearing, Imagining security (Cullompton: Willan, 2007)
[35] F. Füredi, The politics of fear (London: Continuum, 2005)

but a cause of anxiety for some (while others adapt seamlessly), is a highly researched topic,[36] though Walklate and Mythen point out that little is known about how this has actually affected people on a day-to-day basis, and how responsibilized people have become in reality,[37] and some studies suggest that the fear of crime as affecting the public is exaggerated.[38]

Crime control has thus been partly relocated to the community, while there has also been a move towards privatisation and the outsourcing of parts of the criminal justice system. Justice has been further professionalized and rationalised, as management styles and working practices have changed; instead of a crime-fighting force delivering 'law and order', police forces now mandate themselves as a 'responsive public service' and promise to deal with complaints and apply punishments "in a just, efficient and cost-effective way."[39] Feeley and Simon refer to an actuarial style of criminal justice, where precaution has become as important as response to damage already done,[40] while rehabilitation – where it remains - has been redefined as targeted intervention to protect the public, manage risk and enhance efficient social control,[41] and as an ideal more generally replaced by the management of risks and resources. However, Vaughan notes that risk in 'actuarial justice has not had as dominant a reign as feared, or not in the same way; in dealing with the supervision of sexual and violent offenders, for example, Kemshall and Maguire have found that risk-classification may be used as a primary step, but the views and assessment of individual professionals continue to play a vital role.[42]

While economics as a purpose and function of the criminal justice system cannot be considered entirely new - Bentham, for example, considered that accuracy, expedience and lack of undue expense were among the main objectives of criminal justice procedure – a social

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[36] For a comprehensive review see S. Walklate & G. Mythen, *How scared are we?* 48 British Journal of Criminology 209 (2007)

[37] S. Walklate & G. Mythen, *How scared are we?* (2007) at 212

[38] Jackson and Gray find, for example, that fear of crime as a social problem has been exaggerated; a London-based survey showed around a quarter of the sample to be worried on any level about crime; a quarter of these felt safer through taking precautions and did not feel their quality of life was affected (functional fear); those affected by *dysfunctional* fear that affected their quality of life generally had a connection with victimization. J. Jackson & E. Gray, *Functional fear and public insecurities about crime*, 50 British Journal of Criminology 1 (2010)

[39] D. Garland, The culture of control (2001) at 120

[40] M.M. Feeley & J. Simon, *The new penology: notes on the emerging strategy of corrections and its implications*, 30 Criminology 449 (1992)

[41] D. Garland, The culture of control (2001) at 176

[42] B. Vaughan, *The potential dangers of risk analysis for the criminal justice system*, 12(3) Irish Criminal Law Journal 3 (2002) citing H. Kemshall & M. Maguire, *Public protection, partnership and risk penality: the multi-agency risk management of sexual and violent offenders* IN Criminal justice, mental health and the politics of risk (N. Gray, J. Laing & L. Noaks, eds.)(London: Cavendish Publishing Ltd, 2002)

mentality and lexicon has been replaced by an economic one, where finances are at centre-stage in policy decisions, and policy and practice is increasingly viewed and expressed in terms of economics and commercialisation. Terms like 'risk factors', 'incentive structures', 'supply and demand', 'crime costing' and 'penalty pricing' are commonly used in reference to the justice system, where cost-effectiveness, efficiency and public accountability have become paramount and are measured and made available through performance indicators, reports and strategic plans.[43] The trend is further marked by a move towards 'consumerism' whereby the opinion of services users – overwhelmingly victims – are sought.

In the Irish context, Kilcommins et al. find that communities and private citizens and organisations are increasingly encouraged to participate in crime control – through Neighbourhood Watch schemes and private security measures - as the Gardaí focus on 'serious' crime and the consequences of crime,[44] and while Rogan considers that Ireland has been slow to adopt techniques of situational crime control, there appears to be growing interest among policy makers as part of what she sees as a re-orientation of the role of criminal law and the State in criminal justice matters.[45] In 2003, commercialization in crime control was considered to be in its infancy and the idea of preventative partnership relatively underexplored.[46] More recently, Campbell has noted that while there has still been no privatisation of prisons, it has been recommended by the Inspector of Prisons, while privatization of prison escorts has also been discussed.[47] In addition, the increasing use of external regulatory agents operating with substantial prosecutorial powers outside the conventional criminal justice system – or the "rise of the regulatory impulse" - has been identified as a major shift in the Irish criminal justice.[48]

In terms of changes within the system, there has been a shift in the focus of the criminal justice system towards maximising efficiency and control, and reducing risk;[49] Vaughan identifies "clear signs that the discourse of risk is beginning to infiltrate", particularly with regard to sex offenders, parole and probation, but he also points to the critical scrutiny

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[43] A.E. Bottoms, *The philosophy and politics of punishment and sentencing* IN The politics of sentencing reform (C. Clarkson & R. Morgan, eds.)(Oxford: Clarendon Press, 1995)
[44] Kilcommins et al. (2004)
[45] M. Rogan, *Crime control without the criminal law? Perspectives on emerging strategies of dealing with crime—Part I,* 25 Irish Law Times 23 (2007)
[46] I. O'Donnell & E. O'Sullivan, *The politics of intolerance - Irish style*, 43(1) British Journal of Criminology 41 (2003)
[47] L. Campbell, *The culture of control in Ireland: theorising recent developments in criminal justice* (2008)
[48] B. Vaughan, *The Maginot line of Irish criminology part I: The rise of the regulatory impulse*, 19(2) Irish Criminal Law Journal 34 (2009); L. Campbell, *The culture of control in Ireland: theorising recent developments in criminal justice* (2008)
[49] Kilcommins et al. (2004)

currently being applied to actuarial justice and the prediction of future offending on an international level.[50] It has been found that management structures have undergone alteration and that the annual reports and plans of various criminal justice agencies increasingly employ the language of managerialism, but that an emphasis on cost-effectiveness, auditing, performance and monitoring is not greatly reflected in practice.[51]

In practice also, organisation and efficiency appear to be issues of concern; there is a backlog of cases in the system leading to long periods of delay such that complaints about delayed trials are common and costs are enormous.[52] In addition, O'Malley points out that trials, once begun, can be – and are - adjourned at any time, for any reason considered appropriate and for long periods.[53] O'Mahony submits that the system is inadequate and inefficient, and that it has "infrastructural, practical problems that severely inhibit the system",[54] while O'Donnell notes that the computer systems of the police, courts, prisons and probation service are separate and not configured to share details.[55] Jackson and Doran conclude from their study of the criminal courts that "[f]urther investigation should be conducted into the factors that cause delay in the processing of cases in the District Court".[56]

The new emotions of crime: politicization, media and populism[57]

The influence of the media is an important element of Garland's culture of control. As television became more popular, the public was increasingly influenced by media portrayal of crime and other forms of unrest; this impacted on public perceptions of crime and contributed to rising public insecurity and calls for control of the chaos.[58] The rise of the mass media and new technologies have created powerful tools by which public opinion can be moulded and solidified on issues of crime and punishment, while at the same time providing a platform for

[50] B. Vaughan, *The potential dangers of risk analysis for the criminal justice system*, 12(3) Irish Criminal Law Journal 3 (2002)
[51] I. O'Donnell, *Crime and justice in the Republic of Ireland* at 120, Kilcommins et al. (2004)
[52] F. de Londras, *Kow towing to the twin gods of time and money: the guilty plea discount*, 14(1) Irish Criminal Law Journal 14 (2004)
[53] T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009) at 15.12 or 571
[54] P. O'Mahony, *The Courts: introduction* IN Criminal justice in Ireland (P. O'Mahony, ed.)(Dublin: Institute of Public Administration, 2002) at 331
[55] I. O'Donnell, E. P. Baumer & N. Hughes, *Recidivism in the Republic of Ireland*, 8 Criminology and Criminal Justice 123 (2008) at 124
[56] J. Jackson & S. Doran, *A study of the jurisdiction of the criminal courts in Ireland*, Report to the Working Group on the Jurisdiction of the Courts (Courts Service, 2003) at 83
[57] From Garland's (2001) Change in the emotional tone of crime policy; politicization and populism of crime; From Kilcommins et al. (2004) politicisation of penal policy
[58] D. Garland, The culture of control (2001)

the voice of a public that increasingly wants its say in a changing society.[59] How crime is presented to the public has changed over time: quantitatively, coverage of crime had increased hugely as public interest remains high, while the qualitative nature of reporting and analysis has altered to become more personalized and focussed on the experiences of ordinary people and crime victims, instead of the abstract or expert point of view.[60] Pratt asserts that reliance on personal accounts 'destatisticalizes' how the reality of crime is understood; crime statistics are the least memorable source of information about crime and often seem to contradict what the public 'knows' to be true, such that they become only one source of information used.[61]

Pratt also suggests that reporting has become more glamourized, as crime 'shows' (instead of documentaries) increasingly blur the distinction between public affairs and pop culture, and issues of crime and punishment are increasingly exaggerated and dramatized. Media reporting also tends to be highly selective, favouring "the surprising or frightening or outrageous",[62] including violent and sexual crimes. As it creates awareness among the public of risk issues, it has "arguably encouraged feelings of uncertainty and fear";[63] Cohen's 'moral panics' are largely based on the use of media to demonize offenders and spread fear among the public, and Füredi talks about a 'culture of fear' created by the mass media's encouragement of people to make every situation one of safety.[64] Part of the media representation of crime is its use of sound bite political statements: in an era of 'globalization and sloganization',[65] these statements such as 'three strikes and you're out', 'truth in sentencing', 'tough on crime', 'zero tolerance' and so on, have spread and become the highly-charged currency of politicians for whom crime and law and order is now a staple element of political and electoral discourse.[66]

Political actors use crime and crime policy to gain support, and political speech on the subject has become more populist and emotive.[67] Public opinion – rather than evidence and the views of experts – has increasingly come to influence policy making and legislative changes, and

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[59] J. Pratt, Penal populism (London: Routledge, 2007)
[60] J. Pratt, Penal populism (London: Routledge, 2007)
[61] J. Pratt, Penal populism (London: Routledge, 2007)
[62] A. Ashworth & M. Hough, *Sentencing and the climate of opinion*, Criminal Law Review 776 (1996) at 779
[63] S. Walklate & G. Mythen, *How scared are we?* 48 British Journal of Criminology 209 (2007) at 211
[64] F. Füredi, Culture of fear (London: Continuum, 2002); F. Füredi, The politics of fear (London: Continuum, 2006); F. Füredi, *The only thing we have to fear is the culture of fear itself*, (2007) available at www.spiked-online.com/index.php?/site/article/3053 (last accessed 13 October 2010)
[65] J. Pratt, Penal populism (London: Routledge, 2007) at 89
[66] W.M. Oliver & N.E. Marion, *Political party platforms: symbolic politics and criminal justice policy,* 19(4) Criminal Justice Review 397 (2008)
[67] D. Garland, The culture of control (2001)

Pratt submits that certain types of offending have "come under the populist spotlight" for harsher treatment: sex criminals in the US and Britain have become "iconic emblems of evil"; juvenile courts, the last to resist punitive rhetoric and behaviour, have come under pressure to assert greater control over youth crime following the emergence of some well-known cases of "exceptional wickedness and malevolence" in recent years; recidivists and cumulative offences are viewed more seriously; and there has been a clampdown on minor criminality including 'anti-social behaviour'. In Britain minor deviations such as littering or inconsiderate parking are becoming priority targets of quality of life policing, while in the US, zero tolerance is being applied to trespassing and loitering, jay walking and public drinking.[68] This sort of disorderly conduct is seen as detrimental to an orderly community and its law-abiding citizenry, and Garland also suggests that the cost-effective management of resource and risk necessitates selectivity in response to crime and offending, which leads to particular targeting of crime 'hot spots'.[69]

Jones and Newburn[70] identify drugs and race as the two most important issues that have emerged from this political rhetoric; the 'war on drugs', starting with Reagan in 1982 and heightened during the Bush era, involved an attitude of zero tolerance and a huge budget for drug law enforcement. Pratt makes the point that 'penal populism' has localised differences, and argues that drugs have been a much less visible element of penal populism in Britain and New Zealand, for example, than in Sweden, Denmark and the Netherlands, where the presence of drug addicts has become a "symbol of misplaced welfarism and tolerance"[71] against which penal populism is reacting. He submits that an important element of crime control policy steered by penal populism is that it is targeted at 'others', and not ordinary people; he suggests that the 'war against drugs' in the US was not a reaction to the voice of the actual public, but to politicians speaking on behalf of the 'silent majority'; the public is no longer silent, and because soft drug use has become normalised for many people, the focus of crime control policy has shifted away from this 'war'. To illustrate this point he uses the example of the voting in of mandatory treatment and rehabilitation for drug offenders in California - the "first inroads" into the three strikes policy.

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[68] J. Pratt, Penal populism (London: Routledge, 2007)
[69] D. Garland, The Culture of Control (2001)
[70] T. Jones and T. Newburn, Policy transfer and criminal justice: exploring US influence over British crime control policy (Maidenhead: Open University Press, 2007)
[71] J. Pratt, Penal populism (London: Routledge, 2007) at 95

In Ireland, 1996 is generally recognised as marking the beginning of major changes in criminal justice policy and legislation, as well as the increase in the Irish prison population, and the period since then constitutes the "contemporary (i.e. post-1996) period."[72] In 1996 a number of criminal justice 'crises'[73] profoundly affected the psyche of the Irish public; these included three rural murders involving particularly dramatic circumstances and suggesting that the hitherto virtually undisturbed rural safety was in peril,[74] the murder of Garda detective Jerry McCabe, and the murder of journalist Veronica Guerin. Prior to this, the public had demonstrated little interest in, or concern about crime; various surveys show that in 1980 only 7% of the population considered crime to be the most important issue facing the government, that 2% put crime at the top of this list in 1988, and 3% in 1994; in July 1996, however, some 50% of Irish people considered law and order to be the most critical issue facing the government, and 88% thought "the government was losing the fight against crime."[75]

The media and political reactions to the series of events around 1996 have been identified as a classic case of 'moral panic';[76] heated and emotive debate around law and order, election promises to wage and win a relentless war on crime and introduce 'zero tolerance' policies, and the depictions of and associations with gangsterdom, 'untouchability', and intimidation. The legislative response was a wide-ranging 'anti-crime package'[77] which included the Drug Trafficking Act, 1996 creating greater powers of detention and allowing negative inference to be drawn from silence under particular circumstances, the bail referendum which limited when bail could be granted to those charged with serious offences, and the establishment of a Criminal Assets Bureau and a witness protection programme. Yet, analysis has shown that this emotive reaction and public fear of crime more generally does not coincide with recorded crime trends; crime began to increase significantly in Ireland in the 1960s and, aside from a falling trend between 1983 and 1987, grew until 1995; following this, however, crime rates declined sharply until 1999, with indictable crimes decreasing by 21%.[78]

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[72] V. Conway & M. Mulqueen, *The 2009 anti-gangland package: Ireland's New Security Blanket?*, 19(4) Irish Criminal Law Journal 106 (2009)
[73] P. O'Mahony, *Criminal chaos: seven crises in Irish criminal justice* (Dublin: Round Hall Sweet & Maxwell, 1996)
[74] I. O'Donnell, *Crime and justice in the Republic of Ireland,* 2(1) European Journal of Criminology 99 (2005) at 105
[75] I. O'Donnell, *Crime and justice in the Republic of Ireland* (2005)
[76] The term, coined by S. Cohen in Folk devils and moral panics (London: Routledge, 1972) refers to a media-induced social over-reaction in the face of an apparent threat or behaviour. See e.g. C. Hamilton, The presumption of innocence and Irish criminal law (Dublin: Irish Academic Press, 2007) at 100- 102 or Kilcommins et al. (2004) for an overview of the media coverage
[77] C. Hamilton, The presumption of innocence and Irish criminal law (2007)
[78] Kilcommins et al. (2004)

This suggests that the politicization of crime and how it is represented in the media has seriously impacted on public perceptions, and indeed an empirical study of Irish newspapers found a connection between the media's distortion of the reality of crime, and public perception of law and order; the study showed that papers gave disproportionate coverage to extreme and violent offences– for example the proportion of newspaper accounts of murder was 3075 times higher than the official murder statistics; it also showed that coverage particularly emphasised vulnerable victims, and that references to crime were notably pessimistic and contained "strong themes of moral mini-panics".[79] Kilcommins et al. considered, in the early 2000s, that the 'crisis' tone following 1996 had waned,[80] but there is some evidence of a more recent renewed panic.

Campbell documents dramatic political statements comparing gangland murders and violent crimes to Bogota, and pronouncing the reign of gangland law, growing ungovernability and terror among the people.[81] Conway and Mulqueen document another possible "moral panic" that has arisen from the extensive and emotive political and media discourse on gangland crime, and particularly on a number of murders that did not involve gang members but members of the public – one in a case of mistaken identity and another whose relative had given evidence against a member of a gang. They argue that a discourse of anger and fear has surrounded these issues, even leading to public rallies and marches.[82] Again, there has been a swift and expansive legislative reaction; "the 2009 package of measures" involved six bills apparently necessitated by the out-of-control gangland issue and the inadequacy of existing legislation. Aside from these very dramatic and specific 'panics', a huge number of legislative changes and other criminal justice developments have taken place over the last number of years which many commentators consider to have stemmed from political and public reactions to the perceived need to fight crime, rather than from professional research findings or informed debate;[83] trends have included a decrease in judicial discretion with wide provisions on mandatory and presumptive sentencing, a more severe attitude towards bail, confiscation of the proceeds of crime, the introduction of numerous provisions on drug offences and sentencing; and the recruitment of prison officers and increasing police funding.

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[79] M. O'Connell, *Is Irish public opinion towards crime distorted by media bias?,* 14(2) European Journal of Communication 191 (1999). The period of analysis was December 1993 – January 1994

[80] I. O'Donnell & E. O'Sullivan, *The politics of intolerance - Irish style*, 43(1) British Journal of Criminology 41 (2003)

[81] L. Campbell, *The culture of control in Ireland: theorising recent developments in criminal justice*, 1 Web Journal of Current Legal Issues (2008)

[82] V. Conway & M. Mulqueen, *The 2009 anti-gangland package: Ireland's New Security Blanket?*, 19(4) Irish Criminal Law Journal 106 (2009)

[83] See e.g. I. O'Donnell, *Crime and justice in the Republic of Ireland* (2005) at 103; L. Campbell, *The Criminal Justice Act 2007 - a theoretical perspective*, 17(2) Irish Criminal Law Journal 8 (2007)

O'Donnell considers that "developments have always been expensive, sometimes manifestly unnecessary and occasionally retrograde."[84]

Relaxation of concern around due process/human rights[85]

Garland identifies a major shift in the legitimisation of the justice system in terms of the victim; once the "forgotten man of the criminal justice system",[86] victims play increasingly prominent roles in the criminal process. Priority is often given to the victim's perspective on the crime and punishment, and victim impact statements are increasingly admitted in court. Victim Charters have been introduced and a series of other changes in policy and legislation have addressed the needs of the victim,[87] while in some cases laws are formally or informally called after the victim who 'inspired' them.[88] Garland submits further that where once there were victimless crimes, the community has now come to represent the 'collective, all-purpose victim', and protection of the public has become a central concern.[89] Pratt suggests that the harming of a victim by the "malevolent and irredeemable" 'other' is equated with harm to society.[90]

While rights-based language is sometimes used to describe the victim's role in the criminal process, Ashworth distinguishes between "service rights" and "procedural rights", asserting that while victims are entitled to be treated sympathetically and with respect, receive support and information, facilities, and compensation where appropriate, they should not influence sentencing decisions.[91] A recent report by the House of Commons Justice Committee in the UK raised concerns about the false expectations created by rhetoric describing the victims as "at the heart" of the criminal justice system, and the extent to which prosecutors may be seen as 'champions' of the victim;[92] the report stresses that the prosecution must maintain its

[84] I. O'Donnell, *Crime and justice in the Republic of Ireland,* 2(1) European Journal of Criminology 99 (2005) at 101

[85] From Garland's (2001) increased concern for the victim; overriding importance of public protection; Kilcommins et al. (2004) affirmation and protection of victims

[86] J. Shapland, J. Willmore & P. Duff, Victims in the criminal justice system (Aldershot: Gower, 1985) at 3

[87] M. Hall, *The relationship between victims and prosecutors: defending victims' rights?* 1 Criminal Law Review 31 (2010)

[88] For example 'Megan's Law' in the US and 'Sarah's Law' in the UK: introduced following the murders of young girls, they require information about convicted sex offenders to be made available

[89] D. Garland, The culture of control (2001) at 181

[90] J. Pratt, Penal populism (London: Routledge, 2007) at 86

[91] A. Ashworth, *Criminal justice and the criminal process,* 28(2) British Journal of Criminology 111 (1988) & A. Ashworth, *Victims' rights, defendants' rights and criminal procedure* IN Integrating a victim perspective within criminal justice: international debates (A. Crawford & J. Goodey, eds.)(Aldershot: Ashgate, 2000)

[92] House of Commons Justice Committee, The Crown Prosecution Service: gatekeeper of the criminal justice system, Ninth Report of Session 2008-09, HC 186 (2009). See also Home Office, Justice for All, CM 5563 (2002); I. Edwards, *An ambiguous participant: the crime victim and criminal justice decision-making,* 44 British Journal of Criminology 967 (2004)

traditional separation from the victim in the interests of fairness, impartiality, and respect for the rights of the defendant, and Hall submits that although victims can expect more services than ever, their procedural role in the criminal process is still limited; prosecutors retain their discretion, and victims "should not expect to dictate prosecution decisions or, in all circumstances, have their wishes adhered to".[93] He raises the question of whether rhetoric to the contrary may, in fact, be damaging the public perception of the criminal justice system, and recognises the tension between those advocating greater participatory rights for victims and "those supporting a more rigid due process model of criminal justice."[94]

Packer's well-known "Two Models of the Criminal Process" informs the idea of crime control and due process as distinct and separate models of criminal procedure; the latter emphasising a system of checks on the power of the state and the criminal law, a focus on protecting the rights of the accused, and a preference for allowing some guilty to go free over the imprisonment of the innocent; the former primarily concerned with efficiency and results, accepting that the imprisonment of innocent individuals may be necessary to control crime and protect society. While for some a dual or multi-purpose justice system does not necessarily imply conflict,[95] and others criticize the simplicity of such a split and observe that theoretical models ignore the gaps between rhetoric, rules and reality,[96] the acknowledgment that tensions may exist between a focus on crime control and a concern for due process raises questions as to whether the rise of the victim is part of a 'zero sum game' in which there is a corresponding fall in the defendant's relative position, or where victim prioritisation causes a 'pendulum swing' from the rights of the offender to those of the victim.[97] Garland posits that rising levels of fear and insecurity have made people complacent around the increasing repressive and coercive powers of the State and the criminal justice system,[98] while Pratt and Hudson consider that the state's preoccupation with protecting the honest citizen creates a

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[93] M. Hall, *The relationship between victims and prosecutors: defending victims' rights?* 1 Criminal Law Review 31 (2010) at 39

[94] M. Hall, *The relationship between victims and prosecutors: defending victims' rights?* (2010) at 45

[95] See e.g. Stephens that the purpose of the justice system is four-fold; to convict the guilty, to acquit the innocent, to protect the public from crime, and to compensate victims [M. Stephens, Crime and social policy: the police and criminal justice system (Eastbourne: Gildredge Press, 2000) at 42-5]

[96] A. Ashworth, *Criminal justice and the criminal process,* 28(2) British Journal of Criminology 111 (1988); A. Sanders and R. Young, *From suspect to trial* IN Oxford handbook of criminology (Oxford: Oxford University Press, 2002); N. Lacey, *Legal constructions of crime* IN The Oxford handbook of criminology (M. Maguire, R. Morgan & R. Reiner, eds.)(Oxford: Oxford University Press, 2002); A. Bottomley, Decisions in the penal process (London: Robertson, 1973); A. Bottoms & J.D. MacClean, Defendants in the criminal process (London: Routledge & K. Paul, 1976); J. Griffiths, *Ideology in criminal procedure or a third 'model' of the criminal process*, 79 Yale Law Journal 359 (1970)

[97] Kilcommins et al. (2004)

[98] D. Garland, The culture of control (2001)

tension between rights and risk, where rights are available only to those who behave responsibly, and those who put society at risk may forfeit them.[99]

Aside from concern for the victim as an individual, Garland suggested that the growing importance of public and community protection has led to a relaxation of concern for civil liberties and rights; this has been particularly influenced in recent years by growing concerns with terrorism and counter-terrorism measures, which, Hudson submits, have dealt justice "some heavy blows".[100] It has been suggested that criminological trends like the calculation of risk and the wars on crime and drugs have influenced the counter-terrorism framework, and it is also argued that the notion of national security, used in the fight against terrorism, is being integrated into criminal justice, and that in the post 9-11 context *national* security is being pursued through the criminal justice system, though there are certain tensions between the impartiality ideals of criminal justice and the politically-charged notion of national security.[101] McCulloch and Pickering suggest that one element of this national security agenda has involved the increasing use of pre-crime measures; while crime prevention measures are non-punitive in nature and aim at decreasing opportunities for crimes, pre-crime, while justified on the basis of preventing crimes, involves "imaginary future harms" where those believed to be going to commit them are criminalized.[102] They suggest that the emergence of a US global carceral complex in the context of counter-terrorism[103] might be seen from a criminological perspective as an extension of mass imprisonment and punitive policy.[104]

Whether in the name of protecting victims or the interests of society against crime, serious crime, organised crime or terrorism, numerous legislative inroads into fundamental rights and the basic principles of due process are considered to have damaged, eroded or endangered the presumption of innocence, the right to silence, presumption in favour of bail, and the right to a fair trial, amongst many other rights.

In Ireland, notable characteristics of the many legislative changes that have been introduced include the facts that they have been brought in at speed and without much public debate,

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[99] J. Pratt, Penal populism (London: Routledge, 2007); B. Hudson, Understanding justice: an introduction to ideas, perspectives and controversies in modern penal theory (Buckingham: Open University Press, 2003)
[100] B. Hudson, *Justice in a time of terror*, 49 British Journal of criminology 702 (2009)
[101] J. McCulloch & S. Pickering, *Pre-crime and counter-terrorism: imagining future crime in the 'war on terror'*, 49(5) British Journal of Criminology 628 (2009) at 638
[102] J. McCulloch & S. Pickering, *Pre-crime and counter-terrorism* at 629
[103] A. Gordon, *Abu Ghraib: imprisonment and the war on terror*, 48 Race and Class 42 (2006)
[104] J. McCulloch & S. Pickering, *Pre-crime and counter-terrorism* (2009) at 639

that they have been brought in on a piecemeal basis so that their impact is difficult to assess, and that a number of them are geared, at least rhetorically, towards victims of crime and public protection. Kilcommins et al. identify, like Garland in the UK and the US, a growing concern for victims and a need to involve them in the criminal justice process,[105] and a number of specific developments attest to the more centralised role and rising status of victims. These developments include the provision of increased support for victims or what Ashworth might call 'service rights', such as the establishment of Victim Support (1985), a Commission for the Support of Victims of Crime (2005), and a Crime Victims Helpline (2008). There have also been numerous procedural developments in terms of evidence being permitted in court via live television link where the court believes the witness may be fearful or subject to intimidation,[106] protection of victim identity in sexual offences cases, and the admissibility of victim impact statements.[107] In the 1999 Victim's Charter, the Gardaí commit to keeping the victim informed of case progress, and the DPP to "have regard to any views expressed by you (the victim)"[108] in prosecution decisions, and as well as to give reasons when not proceeding with cases where a crime has resulted in death. How much these developments actually do for victims in terms of affording them meaningful rights as protected in European and international law has been questioned by Duffy who submits that in the current debate about 'balance' in the criminal justice system, "the defendant is being pitted against the victim" in the move to uphold the rights of crime victims, but that the measures being taken are actually more likely to harm the right to a fair trial than to improve the victim's position.[109]

In the preface to his 2009 textbook on the criminal process, O'Malley writes that "[c]rime control is indisputably the predominant concern of our present era", and that while each of the many changes in legislation over the last number of years has been presented as vital in the fight against serious crime, "[o]nce enacted, it transpires that it is not so adequate after all and we are then solemnly informed that further rights-abridging measures are urgently needed."[110] Walsh uses Packer's models to argue that the 2006 Criminal Justice Act was "the culmination of a sustained and successful attack on due process values by a dominant control ideology over the past 22 years",[111] removing the Irish criminal justice system from its

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[105] Kilcommins et al. (2004)
[106] Criminal Justice Act 1999, No. 10/1999
[107] Criminal Justice Act 1993, No. 6/1993
[108] Victims' Charter and Guide to the Criminal Justice System, Department of Justice, Equality and Law Reform, 1999
[109] D. Duffy, *"Balance" in the criminal justice system: misrepresenting the relationship between the rights of victims and defendants*, 19(1) ICLJ 2 (2009)
[110] T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009) Preface
[111] D. Walsh, *The Criminal Justice Act, 2006: A crushing defeat for due process values?* 1 Judicial Institute Studies Journal 44 (2007) at 44

previously 'firm' position in the due process model. He considers that the combined effect of the measures being introduced may prove to be a "crushing defeat for due process values".[112] Campbell also uses Packer's models to consider legislative changes and finds that changes in procedural rights throughout the criminal process have amplified the state's crime control scope,[113] while on "the 2009 package of measures", Conway and Mulqueen posit that it is less likely to prevent the occurrence of organised crime than to drag others into the system who are involved in less serious crime, and to breach the fundamental rights of citizens.[114]

Some of the serious inroads into procedural rights in Ireland include the right to silence which has suffered a "series of statutory encroachments"[115] allowing adverse inferences to be drawn from the silence of suspects in increasingly wide circumstances;[116] the widening of the circumstances under which bail can be refused,[117] and the increased regulation of bail conditions.[118] Kilcommins et al. also discuss a lack of recognition of the accused's right to confront their accuser in court, and a complacent attitude towards the right of a detained person to have access to a lawyer,[119] while Hamilton details growing complacency around the presumption of innocence.[120] In addition, Gardaí powers have been greatly widened; in addition to powers of detention, entry and search, Gardaí have increasingly broad discretionary powers to deal with public behaviour that Walsh submits "was not, is not, and probably never will be, criminal"; he further submits that as key issues of liberty, privacy and property become the domain of the Gardaí, decision-making is moving to the "closed, secret offices and cells of the Garda station".[121] The increasing regulatory nature of criminal behaviour has also been recognised as prejudicial to a rights-based system: as crime control increasingly bypasses the criminal justice system, authorities can bypass accountability and function within a far less robust set of protections for the accused. Sanctions imposed in private, contractual or civil law settings do not have to meet the same safeguards, they are

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[112] D. Walsh, *The Criminal Justice Act, 2006* (2007)
[113] M. Rogan, *Crime control without the criminal law? Perspectives on emerging strategies of dealing with crime*, 25 Irish Law Times 23 (2007) & 25 Irish Law Times 42 (2007
[114] V. Conway & M. Mulqueen, *The 2009 anti-gangland package: Ireland's new security blanket?* (2009)
[115] Law Society of Ireland human rights law manual (B. Moriarty & A. Mooney Cotter)(Oxford: Oxford University Press, 2004) at 125
[116] A. Ryan, *The Criminal Justice (Drug Trafficking) Act 1996: decline and fall of the right to silence?*, Irish Criminal Law Journal 22 (1997); R. Coen, *The decline of due process and the right to silence's demise*, 18(1) Irish Criminal Law Journal 10 (2008); Criminal Justice (Drug Trafficking) Act 1996, No. 29/1996; Criminal Justice Act 2007, No. 29/2007; Criminal Justice (Amendment) Act 2009, No. 45/2009
[117] Bail Act 1997, No. 16/1997
[118] Criminal Justice Act 2007 allows for electronic monitoring of those released on bail
[119] Kilcommins et al. (2004)
[120] C. Hamilton, The presumption of innocence and Irish criminal law (Dublin: Irish Academic Press, 2007)
[121] D. Walsh, *The Criminal Justice Act, 2006: A crushing defeat for due process values?* 2007) at 45 & 57

less visible, and they are not subject to basic principles of the criminal law, such as guilt, responsibility, burden of proof and *mens rea*.[122]

Another element that arises is the enmeshing of crime and organised crime with terrorism and national security. Kilcommins et al. discuss the Gardaí's ability to switch without impediment from ordinary procedures of detention to extraordinary powers designed to be used against terrorism and allowing for longer periods of detention without charge, and they associate a shift in the burden of proof within the domain of terrorism.[123] Kilcommins and Vaughan identify a metaphoric path between terrorism and ordinary crime, describing a trickling down to the normal criminal justice system of emergency laws from Ireland's history and an increasing use of extraordinary provisions to deal with 'folk devil' criminals.[124] They also assign to the nature of our troubled history the ease with which the public has accepted strikingly repressive measures. In the 2009 package Conway and Mulqueen identify a "discreet but unmistakable erosion of the boundaries between organised crime and national security", representing another move away from a rights-based regime.[125]

On the other hand, arguing that crime control is not as stable or pessimistic a framework as it is sometimes believed or portrayed to be, and that 'countervailing forces' temper the growth of punitiveness and modern crime control, Vaughan and Kilcommins build on O'Malley's dispute of the accuracy of what he terms 'criminologies of catastrophe'[126] in submitting that amongst the forces operating above and below the national government of Ireland, the European Union (EU) and 'sub-national governance'[127] in the form of victims' lobby groups or social-issue networks "have inserted themselves into the state's narrative of justice'".[128] They also argue that human rights have the potential to temper Ireland's shift towards a repressive model of criminal justice, particularly as a result of the Europeanization of human rights.[129] In terms of the EU, they assert that the security agenda prevalent in Europe since 9/11 is

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[122] M. Rogan, *Crime control without the criminal law? Perspectives on emerging strategies of dealing with crime—Part I,* 25 Irish Law Times 23 (2007) & *Part II,* 25 Irish Law Times 42 (2007); B. Vaughan, *The Maginot line of Irish criminology Part I: The rise of the regulatory impulse*, 19(2) Irish Criminal Law Journal 34 (2009)

[123] Kilcommins et al (2004); Proceeds of Crime (Amendment) Bill 2003, No. 27/2003

[124] S. Kilcommins & B. Vaughan, *A perpetual state of emergency: subverting the rule of law in Ireland*, 35 Cambrian Law Review 55 (2004)

[125] V. Conway & M. Mulqueen, *The 2009 anti-gangland package: Ireland's new security blanket?*, 19(4) Irish Criminal Law Journal 106 (2009)

[126] P. O'Malley, *Penal policies and contemporary politics* IN The Blackwell companion to criminology (C. Sumner, ed.)(Oxford: Blackwell Publishing, 2003);

[127] Multi-level governance (I. Bache & M. Flinders, eds.)(Oxford: Oxford University Press, 2004)

[128] B. Vaughan & S. Kilcommins, *The governance of crime and the negotiation of justice*, 10 Criminology and Criminal Justice 59 (2010)

[129] S. Kilcommins & Barry Vaughan, *The Europeanisation of human rights: an obstacle to authoritarian policing in Ireland*, 4(4) European Journal of Criminology 437 (2007)

challenged by the growing prominence of the EU in matters of criminal justice, including the steps being taken towards a set of EU-wide procedural rights, though they do not make specific reference to the first of those steps which made history in becoming the first ever EU measure in the creation of common minimum standards for the rights of the defence in criminal matters in October 2010: the right to interpretation and translation in criminal proceedings in the EU.[130]

Criminologies of essentialized differences: 'otherness' in the criminal justice system

Garland submitted that as justice has changed over time, contemporary conceptions of justice which exist side by side may be contradictory.[131] One such contradiction is that while crime is seen as rational, normal and part of everyday life ('criminologies of the self'), those who commit crimes are seen as different to the average, honest citizen: the criminal is demonised as a 'threatening outcast' or a 'fearsome stranger' ('criminology of the other'). In addition, a person or group of people may be cast as an 'alien other' and moulded as a suitable enemy by playing on public fears and media bias ('criminology of essentialized differences').[132] It has been suggested that populist responses tend to be presaged around the 'other', or a common enemy, and Pratt considers that policy is most likely to be influenced when this is the case.[133] Accepting that the issue of race and ethnicity is complex, not least due to the contested nature of the terms,[134] and that immigrants and asylum seekers or refugees in any country are highly heterogeneous groups that cannot be generalised, it is increasingly argued that a culture of control and populist policies disproportionately affect such groups, as political pressure and biased media coverage leads to targeting and effective criminalization of some groups,[135] as "friend" is distinguished from "foe".[136]

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[130] See Chapter Three

[131] D. Garland, Punishment and modern society: a study in social theory (Oxford: Clarendon, 1990)

[132] D. Garland, The culture of control: crime and social order in contemporary society (Oxford: Oxford University Press, 2001)

[133] J. Pratt, Penal populism (London: Routledge, 2007)

[134] The term 'race' is generally accepted not to be real, and Heaven and Hudson (2005) refer to it as a socio-political construct [O. Heaven & B. Hudson, Race, ''ethnicity'' and crime' IN Criminology (C. Hale, K. Hayward, A. Wahidin and & E. Wincup, eds.)(Oxford: Oxford University Press, 2005)]; the term 'ethnicity' has no agreed definition, and as such it is highly complex, and has been 'roundly rejected as a theoretically or politically valuable concept'

[135] See e.g. B. Bowling & C. Phillips, Racism, crime and justice (Harlow: Longman, 2002); O. Heaven & B. Hudson, Race, ''ethnicity'' and crime' IN Criminology (2005)

[136] Crime, inequality and the state: a reader (M.E. Vogel, ed.)(London: Routledge, 2007)

'Race' and imprisonment is a vast area of study in the US, as studies attempt to explain the disproportionate numbers of Black and, increasingly Hispanic people – usually males - in prisons. Strong connections have been made between the emotive tone of political rhetoric and race; and between the perpetuation by the media of African-American criminality, the "highly racialized strategies" of the 'wars' on drugs and crime and the imprisonment of huge numbers of African Americans and large numbers of Hispanics.[137] In the UK, an enormous literature has documented the disproportionate imprisonment of Blacks, much of which has focussed on discrimination in the criminal justice system.[138] As immigration trends have created a much more diverse 'other', it has been suggested that newer immigrants groups, including white ones, are likely to displace Blacks as the "folk devils of the future".[139] Fitzgerald highlights a recent trend of media focus on Polish criminals,[140] and Bosworth and Guild discuss how British legislation and policy has constructed 'unknown' foreigners as a crime risk, and suggest that crime control policies deepen the divide between non-citizens and citizens.[141]

Negative rhetoric about the threat posed by immigrants is becoming more common as xenophobia and political sensitivity to crime and immigration increase,[142] and it is suggested that this association with risk trickles easily into the policing of ethnic minority citizens.[143] Growing hostility towards foreigners across Europe has been associated with the rise of radical political parties such as those in Austria, France and Germany, and de Koster et al. suggest that the political agendas of such parties (the "quest for national unity and national identity" and repression of other identities, the need to re-establish order and re-establish traditional mores) may be directly affecting incarceration rates; they draw heavily on crime-fighting in

[137] After the war on crime: race, democracy, and a new reconstruction (M.L. Frampton, I. Haney López, & J. Simon, eds.)(New York/London: New York University Press, 2008) Introduction; see also T. Jones & T. Newburn, Policy transfer and criminal justice: exploring US influence over British crime control policy (Maidenhead: Open University Press, 2007)

[138] B. Bowling & C. Phillips, Racism, crime and justice (Harlow: Longman, 2002)

[139] M. Fitzgerald, 'Race', ethnicity, and crime IN Criminology (C. Hale, K. Hayward, A. Wahidin & E. Wincup, eds.)(Oxford: Oxford University Press, 2009) at 423

[140] M. Fitzgerald, 'Race', ethnicity, and crime IN Criminology (2009)

[141] M. Bosworth & M. Guild, *Governing through migration control: security and citizenship in Britain,* 48 British Journal of Criminology 705 (2008)

[142] H. Singh Bhui, *Foreign national prisoners: issues and debates* IN Race and criminal justice (H.S. Bhui, ed.)(London: Sage, 2008)

[143] M. Bosworth & M. Guild, *Governing through migration control: security and citizenship in Britain* (2008)

their push for order,[144] and in a study of 16 countries, de Koster et al. found incarceration rates were highest in countries with, and during the periods of, new-rightist prominence.[145]

Criminalisation of asylum seekers in particular has also become a vast area of research, and it has been widely suggested that much of the immigration debate in the UK portrays asylum seekers and refugees as criminal, deviant and harmful to the 'British people', and that they are increasingly criminalised by the media through their association with gangs, drugs, people trafficking, corruption, and being labelled 'illegal' and 'bogus'.[146] The extension of a culture of control to continental Europe in terms of the detention and criminalisation of asylum seekers has also been identified, and Welch and Schuster submit that the 'war on terror' has increased fears of the 'other', which has resulted in greater immigration controls.[147] In general, terrorism and the 'war on terror' has added another dimension to constructions of an 'enemy within', and the state targeting of non-citizens (particularly Muslims and Arabs) has been a cause for concern;[148] it has been submitted that in this context the term 'suspect community', introduced by Hillyard to describe targeting of the Irish community in Britain,[149] "is now common currency in relation to the treatment of Muslims."[150] However, it has also been suggested that fears have been diffused to include all non-citizens who are linked by a "single discourse on border control".[151] Walklate and Mythen point out that in practice the 'stop and search' measures of anti-terrorist legislation are unevenly used, and it is not just individuals, but communities that are under surveillance.[152] Hudson suggests that "[t]errorism confronts

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[144] J.W.P Veugelers, *Right-wing extremism in contemporary France: a "silent counterrevolution"?*, 41 Sociological Quarterly 19 (2000); P. Ignazi, *The silent counter-revolution: hypotheses on the emergence of extreme right-wing parties in Europe*, 22 European Journal of Political Research 3 (1992) & P. Ignazi, Extreme right parties in Western Europe (Oxford: Oxford University Press, 2003)

[145] W. de Koster, J. van der Waal, P. Achterberg & D. Houtman, *The rise of the penal state: neo-liberalization or new political culture?* 48 British Journal of Criminology 720 (2008) at 729

[146] C. Cooper, *Refugees, asylum seekers, and criminal justice* IN Race and criminal justice (H. Singh Bhui, ed.)(London: Sage, 2008); M. Malloch & E. Stanley, *The detention of asylum seekers in the UK: representing risk, managing the dangerous*, 7(1) Punishment and Society 54 (2005); J. Banks, *The criminalization of asylum seekers and asylum policy,* 175 Prison Service Journal 43 (2008)

[147] M. Welch & L. Schuster, *Detention of asylum seekers in the US, UK, France, Germany, and Italy: a critical view of the globalizing culture of control*, 5 Criminal Justice 331 (2005)

[148] J. Fitzpatrick, *Speaking law to power: the war against terrorism and human rights*, 14(2) European Journal of International Law 241 (2003)

[149] P. Hillyard, Suspect community: people's experience of the Prevention of Terrorism Acts in Britain (London : Pluto Press in association with Liberty, 1993)

[150] C. Pantazis & S. Pemberton, *From the 'old' to the 'new' suspect community: examining the impacts of recent UK counter-terrorism legislation*, 49 British Journal of Criminology 646 (2009); B. Spalek, R. Lambert & A.H. Baker, *Minority Muslim communities and criminal justice: stigmatized UK faith identities post 9/11 and 7/7* IN Race and criminal justice (H. Singh Bhui, ed.)(London: Sage, 2008)

[151] M. Bosworth & M. Guild, *Governing through migration control: Security and citizenship in Britain,* 48 British Journal of Criminology 705 (2008)

[152] S. Walklate & G. Mythen, *How scared are we?* 48 British Journal of Criminology 209 (2007) at 218

us with an other who appears irreducibly and incomprehensibly different", the reaction to which is driven more by hatred and vengeance than a concern for justice.[153]

Kilcommins et al. concur with Garland that recent tough provisions in criminal justice are often "justified and re-enforced by archaic images of 'otherness'".[154] The focus on community and public protection creates a danger of majoritarianism, where individuals and minority groups can be neglected;[155] where the interests of the victim are aligned with those of society, but the rights of the accused are not. 'Otherness' is a vague concept that is dangerously subjective and open to interpretation; in this context the 'other' could be the person who commits a crime, who comes from a 'criminal' neighbourhood, who is likely to commit a crime, or who is simply somehow different from those enforcing the laws of the criminal justice system. The 'other' of the Irish prison population has been relatively well documented: similar to most developed countries, prisoners "tend to be young, urban, undereducated males from the lower socio-economic classes and the so-called underclass."[156]

Many prisoners are alcohol or drug dependent, have unstable family backgrounds, and mental health issues,[157] although the type of prisoner varies according to the prison.[158] In a study on recidivism, O'Donnell et al. found that those being released from prison were overwhelmingly male, unmarried and young, many had low levels of formal education, and just over half were unemployed before being imprisoned.[159] Nearly half of those released were reimprisoned within four years, and it was found that recidivism rates were significantly higher for males, younger people, those with less formal education, and unemployed and illiterate persons.[160] Rates were also found to be significantly higher among those who were held on remand as part of their confinement, and for those having a recent prior prison committal. O'Sullivan submits that the class-based imprisonment in Ireland is not as visible or conspicuous as race, but it may be that "for the small sector of the Irish population that appears predestined to fill our prisons, the odds stacked against them are even greater than for the socially excluded

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[153] B. Hudson, *Justice in a time of terror*, 49 British Journal of Criminology 702 (2009)
[154] S. Kilcommins, I. O'Donnell, E. O' Sullivan, B. Vaughan, Crime, punishment and the search for order in Ireland (Dublin: Institute of Public Administration, 2004) at 148 & 154
[155] L. Campbell, *From due process to crime control: the decline of liberalism in the Irish criminal justice system*, 25 Irish Law Times 281 (2007)
[156] P. O'Mahony, *Punishing poverty and personal adversity*, 7(2) Irish Criminal Law Journal 152 (1997)
[157] P. O'Mahony, Mountjoy prisoners: a sociological and criminological profile (Dublin: Stationery Office, 1997)
[158] I. O'Donnell, *Who gets punished?* IN Crime and poverty (I. Bacik & M. O'Connell, eds.)(Dublin: Round Hall Sweet & Maxwell, 1998)
[159] I. O'Donnell, E.P. Baumer & N. Hughes, *Recidivism in the Republic of Ireland*, 8 Criminology and Criminal Justice 123 (2008)
[160] I. O'Donnell, E.P. Baumer & N. Hughes, *Recidivism in the Republic of Ireland* (2008) at 134

Afro-American."[161] What is clear is that the strong link between crime and deprivation points to the type of crime being punished by prison, and not that crime or immoral conduct is related to deprivation, and conversely that those being sent to prison are not the only ones committing crimes; "the population of the punished becomes distinct from the population of offenders".[162]

The idea that in a culture of control those who are seen as deviant are more likely to be punished, and that the perception of deviance can change according to what is considered 'normal' for the general public is perhaps well illustrated in the recent signing into law of the Fines Bill. The high numbers of fine defaulters being imprisoned in Ireland has long been recognised as a serious issue; in 1993, more than one third of adults committed to prison were in default of fines, and although the numbers committed had grown enormously by 2009 (1880 in 1993 to 4806 in 2009), the percentage of committals for fine defaulting was comparable at just over 30 per cent. The Bill was drafted with a view to ending a situation of people routinely being imprisoned for the failure to pay a fine: judges may set the fine according to a person's ability to pay, facilitate payment in instalments, allow for the seizure of goods to pay a fine instead of prison, and impose community service instead of prison. This inspires the question: is this the result of ten years of campaigning[163] or is this the result of a new social acceptability of the inability to pay fines? Could the fact that fine defaulters can no longer be conceived of as the 'other' have influenced this measure?

It is also acknowledged that in general those appearing before the District Court on criminal charges are not typical of the general population at large, but a study by Bacik et al. found the degree of difference to be even greater than expected. In their study, appearance was heavily biased towards males, young people and people living in economically deprived areas (73.3% of defendants in the study had addresses in economically deprived areas) to the point, it was submitted, that "one might be forgiven for suggesting ... that the Dublin District Court system appears to be there *for* people from deprived areas."[164] In addition, the study found that more males and more people from deprived areas were given custodial sentences, suggesting that the backgrounds of those appearing and of those adjudicating may have an impact on

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[161] E. O'Sullivan, *Punishing poverty and personal adversity* IN Crime and poverty (I. Bacik & M. O'Connell, eds.)(Dublin: Round Hall Sweet & Maxwell, 1998) at 61

[162] I. O'Donnell, *Who gets punished?* IN Crime and poverty (1998) at 33

[163] *Fines Bill*, Irish Times, 16 March 2010

[164] I. Bacik, A. Kelly, M. O'Connell, H. Sinclair, *Crime and poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity*, 7 Irish Criminal Law Journal 104 (1997)

sentencing; judges and lawyers tend to come from middle class backgrounds,[165] which suggests a "*de facto* bias against the poor."[166] This suggests that defendants are not only different from the general population, but that in their social and economic backgrounds and education, they contrast sharply with those 'processing' them.

There is a new 'other' in Ireland's criminal justice system that has been paid almost no attention: the immigrant. As part of their analysis of the culture of control in Ireland, Kilcommins et al. recognised that a fair and principled framework of justice is particularly important in increasing contacts with "foreign racial and ethnic minorities",[167] while O'Donnell predicts that race will become a more important issue and that "the composition of the prison population will change as members of minority groups begin to appear before the courts on criminal charges".[168] He suggests that the area would benefit from examination as it is not at present clear why the make-up of committals to Irish prisons is suddenly changing; whether it is due to police targeting, differential patterns of offending, or the changing population.

Riordan has suggested, in fact, that there may be a differential in sentencing when dealing with certain immigrant groups; courts may be reluctant to put non-English speakers on probation due to difficulties, or perceived difficulties, in engaging and communicating through an interpreter, and community service may be "even less viable a penalty" for this reason, particularly where a scheme involves a group of five or six offenders.[169] Riordan suggests that LEP offenders may be more likely, therefore, to be given sentences of fines or imprisonment. He also highlights an issue with guilty pleas, alleging "a marked reluctance to plead guilty" among those from immigrant communities, even for easily proven charges and with the assistance of an interpreter and solicitor, and he suggests that this creates delays and can mean the loss of substantial discounts in sentencing.[170] In the District Court where the guilty plea has long been established as guaranteeing a discount in sentencing, and where it is also

[165] P.C. Bartholomew, The Irish judiciary (Dublin: Institute of Public Administration, 1971) cited in I. Bacik, A. Kelly, M. O'Connell, H. Sinclair, *Crime and poverty in Dublin* (1997): nearly two-thirds of Irish judges were from upper middle class backgrounds, the remainder was middle class; most of the judges' fathers were lawyers
[166] I. Bacik, A. Kelly, M. O'Connell, H. Sinclair, *Crime and poverty in Dublin* (1997)
[167] Kilcommins et al. (2004) at 179
[168] I. O'Donnell, *Crime and justice in the Republic of Ireland,* 2(1) European Journal of Criminology 99 (2005) at 119
[169] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007) at 105-7
[170] Judge D. Riordan, *Immigrants in the criminal courts* (2007) at 103

alleged to improve efficiency, these are serious considerations in the sentencing of non-Irish defendants.[171]

'Otherness' is a subjective quality that seems to apply to devious criminals and vicious gang members in common rhetoric and policy-making, but to the poor, the unemployed, the uneducated and the underclasses in sentencing and imprisonment. The non-English speaking non-Irish defendant and offender is a new 'other' in the Irish criminal justice system that the experience of other countries suggests requires special attention. However, almost nothing is known about them in the Irish context except that there are increasing numbers in Irish prisons, and that sentencing differentials may apply to them for a variety of reasons.

Conclusion

Incarceration levels are rising in many countries, including in Ireland. Over the last thirty years or so, even as crime has in many cases fallen or remained stable, the media and politicians have adopted crime as a staple agenda; dramatic national headlines have become commonplace, crime 'shows' have been glamourised, and tough on crime rhetoric has replaced the rehabilitative ideal. The public, no longer mere spectators, participate increasingly in the discussion of crime and demand an influence over crime policy, while professional and statistical analyses make way increasingly for the personalised accounts of the victim. In severe cases 'moral panics' have ensued where the public imagination has been caught by coverage of particularly heinous crimes or crimes that threaten the 'status quo' of crime; in Ireland, the public reacted in 1996 when crime was seen as coming to the countryside and when neither the Gardaí nor the freedom of speech was safe, while a renewed moral panic in 2009 followed more gangland murders, this time involving innocent members of the public (as opposed to other gang members). The public – influenced by the media – asserts an increased pressure on politicians to get tough on crime, and many legislative changes are made in response to individual incidents. In the wake of Ireland's 'moral panics' a plethora of wide-ranging legislation was introduced, while ongoing 'mini moral-panics' have led to a constant stream of measures being taken to combat crime, organised crime and terrorism.

[171] F. de Londras, *Kow towing to the twin gods of time and money: the guilty plea discount*, 14(1) Irish Criminal Law Journal 14 (2004). She also argues that unfair pressure is put on defendants to plead guilty, and that the guilty plea does not necessarily achieve these aims

The victim's role in the criminal process has also undergone a shift: no longer silent or invisible, greater consideration is given to the treatment of the victim and the victim's voice is increasingly heard at various stages of the process; in Ireland the Victim's Charter and the admission of victim impact statements have changed the status of the victim. Society has been equated with a collective victim, and protection of the public and of the community has become paramount; fighting crime is often couched in terms of protecting the victim and being in the public interest. Increasingly in an age of terrorism, national security is invoked. The protection of victims, society and national security, however, permits a wide berth in the measures taken – morally, philosophically and sometimes legally, though the extent to which many of these measures will actually achieve their aim in reducing various types of crime and recognising the place of the victim is met with the question of how much damage will be caused by legislation brought in quickly, in a piecemeal fashion and without informed debate. The rise of the victim has sometimes been seen as the fall of the defendant and due process rights; the rise of society as a collective victim as the relaxation of concern for civil liberties and the increase in control of 'deviant' behaviour, and the rise of national security as the targeting of possible future terrorists – sometimes whole communities. In Ireland the increasing powers of the Gardaí and regulatory agencies bring criminal control outside the traditional transparency of criminal justice and permit the application of punishment without recourse to due process, while within the criminal justice system, damage to traditional due process values, particularly the right to silence and the presumption of innocence, are widely documented.

Offenders are increasingly seen and classified as evil and morally aberrant, as different from ordinary honest citizens, and as wholly responsible for their actions. Attitudes have become recognised as more punitive, and incapacitory and deterrent penalties are used with greater frequency than rehabilitative ones: even probation has been re-modelled as punishment in the community. Prison has become – once again – a mechanism for exclusion and control where 'others' are kept away from normal society, and a new rhetoric of 'actuarial justice' is in evidence; performance indicators measure the 'success' of police forces, prisons and other criminal justice agencies, where new management systems and risk assessment are intended to increase cost-effectiveness and effectivity. In Ireland, some evidence has been found that judges treat offenders as rational and responsible for their own actions, and that sentencing has become more oriented towards custody, but it has also been argued that the ideals of rehabilitation are still present, if only in rhetoric. Similarly managerialism and actuarial ideals

have become a vital part of the rhetoric in reports and strategies of criminal justice agencies, but are less evident in practice.

The indices of change used by Garland in his depiction and analysis of a culture of control have become well established in discussions of modern penology and criminology, and although criticisms may be made of his neglect of certain areas and exaggeration of others, they provide a credible framework for the analysis of trends in Irish criminal justice. Kilcommins et al. found in 2004 that a culture of control was in a stuttering state in Ireland; since then the media obsession with organised crime, renewed moral panics, and ensuing legislation have led salience to the notion that punitiveness is rising, the rehabilitative ideal is declining and that traditional due process values have taken a back seat in the new crime control model of criminal justice.

At the same time it has been suggested that punitiveness as a concept is underexplored and does not represent a consistent theorisation of criminal justice developments,[172] and that 'criminologies of catastrophe' fail to consider other political, social and legal developments that act as countervailing forces, such as the 'Europeanization' of human rights, including the increasingly prominent role of the EU in criminal matters and rights in criminal proceedings, and sub-national forces like advocacy groups that can lobby successfully on particular issues. There is also evidence that on a practical level, 'control' responses are only one part of a wider professional approach (risk assessment in probation), and that the ideology of traditional roles in the criminal process is maintained and has due process at its core (re-assertion of the prosecution and the victim in the UK). The judiciary in Ireland has asserted its independence, for example, through the non-application of mandatory minimum sentences, and growing movements call for a re-consideration of prison expansionism and a social justice agenda that recognises the reality of an underprivileged prison population. While the prison population continues to grow dramatically in Ireland, the evidence and conviction necessary to attribute this fully to rising punitiveness and a culture of control are missing.

To the extent that there is evidence of a culture of control in Ireland, it is unknown the extent to which this impacts on immigrants and non-English speaking people; evidence from elsewhere would suggest that minority and immigrant groups are most likely to be targeted and affected, and Prison Service statistics suggest that non-Irish people are overrepresented in

[172] R. Matthews, *The myth of punitiveness,* 9 Theoretical Criminology 175 (2005)

committals to Irish prisons. It is also known that the provision of interpreting and translation services, unlike other services within the criminal justice system, has been privatised, and that the media has covered details of the rise in court interpreting in Ireland. It is known that the right to an interpreter is accepted in Irish courts as a right of due process, but the extent to which, and how this is observed is not known. The analysis of Garland's Culture of Control provides a framework within which to consider these developments in the Irish criminal justice system.

Chapter Two: Legal Language and Court Interpreting

Introduction

This chapter aims to explore why the fact that someone does not speak or understand the language of the court should be a problem. The answer goes beyond an instinctual feeling that it *must* be more difficult, and looks at how and why legal language or language of the legal system is different to everyday language and why this language is difficult to understand. It also looks at the language used by defendants and witnesses in the courtroom, and how their use of language impacts on the court. The second part of the chapter will consider how the linguistic barrier is overcome by a person who doesn't speak the language of the court – by way of interpreting - and the numerous issues that are implicated in the use of such a service, including understanding the role of the interpreter, court attitudes towards, and the ideology of interpreting, the practicalities of assessing language need and assigning interpreters, and finally how interpreting can affect or impact on the court and case outcome. This chapter introduces the language of the criminal justice system, particularly that of the courts, as well as the theory and practice of court interpreting, information that will allow a practical consideration in the next chapter of how the right to an interpreter has been interpreted by courts.

Section A: Legal language

Legal language in its various forms has existed as long as law has, and the intrinsic connection between them has long been recognised; Mattila writes that in Ancient Greece the science of rhetoric and the endeavours of advocates in the courtroom were closely linked,[1] and in Plato's Gorgias, rhetoric was described as a means of convincing people of justice and injustice in the state's public arena.[2] More recently the law has been described as "an overwhelmingly linguistic institution"[3], "a rhetorical activity",[4] a "profession of words"[5], and as "the language

[1] H.E.S. Mattila, Comparative legal linguistics (Aldershot, UK: Ashgate, 2006) at 7
[2] Cited in J.B. White, *Law as rhetoric, rhetoric as law: the arts of cultural and communal life* IN Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000) at 55
[3] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 1
[4] Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000) at 55
[5] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 15

of time-honoured tradition"[6]. The criminal process has also been described in terms of being made up of language events from beginning to end; the charge made against the defendant, police questioning, consultations with lawyers, and the trial all exist through and are fundamentally connected with language.[7]

In spite of the connection between language and law, however, "there has never been a time since the Norman Conquest when the English of the law has been in tune with common usage".[8] The current language of the law[9] is heavily influenced by its history, principally the fact that English was not always the language of the law; the common law system originated in the Germanic invasions of Britain at end of Roman rule, although Maley considers that law in its current form dates from the Norman Conquest of Britain, after which Latin, the lingua franca of Europe and the Ecclesiastical Courts, became the main written language of the law, and by the 14th century French was the principal language in Year Books and statutes.[10] Through the centuries, attempts were made to make English the language of the law, such as the 1362 Statute of Pleading, which although written in French itself, deplored the use of French for pleas in court proceedings because of "the great mischiefs which have happened" as a result of the French tongue being used in law but little known in the realm.[11] It was, according to Melinkoff, so ineffective that French became thereafter the standard language of statutes, while the language of record remained Latin. It was against vociferous arguments from the legal profession that English was finally made the language of the courts in England by means of the 1731 Courts of Justice Act:[12]

> "Whereas many and great mischiefs do frequently happen to the subjects of this kingdom, from the proceedings in courts of justice being in an unknown language, those who are summoned and impleaded having no knowledge or understanding of what is alleged for or against them (...) To remedy these great mischiefs, and to protect the lives and fortunes of the

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[6] P. Goodrich, Legal discourse: studies in linguistics, rhetoric and legal analysis (London: Macmillan, 1987)

[7] See e.g. L. Solan & P.M. Tiersma, Speaking of crime: the language of criminal justice (Chicago: University of Chicago Press, 2005)

[8] Y. Maley, *The language of the law* IN Language and the law (Gibbons, ed.)(London: Longman, 1994) at 11-12

[9] Much of the research on the language of law has been done on common law countries and in the English language, and it is often or generally described in generic terms as pertaining to all common-law legal systems using the English language, with implicit or explicit acknowledgment that countries have developed their own specificities of legal language. The discussion is thus nonspecific and relates to 'English' legal language generally.

[10] Y. Maley, *The language of the law* IN Language and the law (Gibbons, ed.)(London: Longman, 1994) at 12

[11] Statute of Pleading, 1362, 36 Edw. 3 [Stat. 1] Ch. 15 [England]

[12] R. Morris, *Great mischiefs: an historical look at language legislation in Britain* IN Language legislation and linguistic rights (D.A. Kibbee, ed.)(John Benjamins Publishing Company: Amsterdam/Philadelphia, 1998) at 32-4 & D. Mellinkoff, The language of the law (Boston: Little, Brown & Company, 1963)

> subjects of that part of Great Britain called England (...) from the peril of being ensnared or brought in danger, (...) all proceedings (...) which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever."[13]

According to Maley, by this time "a host of Old English, Latin, Norman-French and Middle English terms had become fixed in the vocabulary of lawyers",[14] and although much of the vocabulary has been anglicised over time, the influence remains.[15] This multilingual genesis is perhaps most apparent in a feature of legal language where synonyms of different origins are coupled to create commonly-used terms:

acknowledge and confess	(Old English/French)
act and deed	(French-Latin/Old English)
breaking and entering	(Old English/French)[16]

It is ironic to consider that while many members of the legal profession argued against abandoning the traditional language of the law, English would later become the language used in the courts of British colonies on arguments that native languages were inappropriate vehicles of the law; they lacked the requisite textbooks and terminology in the vernacular, drawing up law reports in a foreign language was complex and inaccuracies would result through mistranslation, certain materials needed to be quoted verbatim, or in other words, the argument that only English can serve as the language of the law.[17] Many legal professionals have also traditionally argued against changing or simplifying legal English for public consumption on the basis that its distinctive characteristics are vital to ensuring precision, accuracy and consistent interpretation by legal professionals. For example, Philips submits that the use of plain language in law may increase comprehension but "at the expense

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[13] Courts of Justice Act 1731, 4 Geo. 2, Ch. 26 [England] (emphasis in original)

[14] Y. Maley, *The language of the law* IN Language and the law (Gibbons, ed.)(London: Longman, 1994) at 12

[15] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 7-8

[16] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 20

[17] See R. Morris, *Great mischiefs: an historical look at language legislation in Britain* IN Language legislation and linguistic rights (D.A. Kibbee, ed.)(John Benjamins Publishing Company: Amsterdam/Philadelphia, 1998) at 32-4 & D. Mellinkoff, The language of the law (Boston: Little, Brown & Company, 1963)

of functionally valuable features of legal language, such as precision and internal consistency."[18]

However, there is an equally "long and robust tradition"[19] of criticising the language of the law; it has been condemned by non-lawyers for centuries,[20] and mocked by writers throughout history as "a paradigm of linguistic inaccessibility".[21] It was not until the 1970s, however, that the first attempts were made to understand, describe and categorize the functioning of legal language. A lawyer, Mellinkoff, provided the first major description of legal language which is still widely-regarded and influential;[22] it focused mainly on written language at the lexical level and its origins, while later accounts established that legal language is more than "an esoteric vocabulary",[23] but is also distinctive at the grammatical and discourse levels. 'Legalese' and 'legal jargon' are the terms that are probably most often used to refer to legal language, labels that are in themselves implicative of the divergence from ordinary language; legalese is commonly associated with written legal language (legislation, judgments or contracts[24]), but it is also sometimes used to describe legal language in oral settings such as in the courtroom or during police questioning.[25] Legal jargon may be considered the most superficial level of legal language and is usually understood as referring to technical, legal vocabulary or to the lexical level of legal language. In its difference and distinction from everyday language, legal language has been variously labelled a distinct dialect, a separate register[26] and a sublanguage.[27]

From the accounts available[28] we know that legal jargon is distinct in its use of words from Old and Middle English, Latin and Norman French; common words with specialized meanings

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[18] A. Philipps, Lawyer's language (London: Routledge, 2003) at 37

[19] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003)

[20] V.R. Charrow, *Linguistic theory and the study of legal and bureaucratic language* IN Exceptional language and linguistics (L.K. Obler & L. Menn, eds.)(New York: Academic Press, 1982) at 84

[21] Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000) at xi

[22] D. Mellinkoff, The language of the law (Boston: Little, Brown & Company, 1963)

[23] R.P. Charrow & V.R. Charrow, M*aking legal language understandable: a psycholinguistic study of jury instructions*, 79(7) Columbia Law Review 1306 (1979) at 1359

[24] See e.g. P. Tiersma, Legal language (Chicago/London: University of Chicago Press, 1999) who distinguishes operative documents (legislation, judgments, contracts); expository documents (that explain law e.g. letter/educational material) and persuasive documents (submissions to persuade a court)

[25] See e.g. W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 13-23

[26] B. Danet, *Language in the legal process*, 14(3) Law & Society Review 445 (1980) at 474 that it is a matter of politics and how LE is viewed in society, while others have put forth that it cannot be called a separate register.

[27] R.P. Charrow & V.R. Charrow, M*aking legal language understandable: a psycholinguistic study of jury instructions*, 79(7) Columbia Law Review 1306 (1979) at 1359

[28] Description mainly based on D. Mellinkoff, The language of the law (Boston: Little, Brown & Company, 1963); Y. Maley, *The language of the law* IN Language and the law (Gibbons, ed.)(London: Longman, 1994); H.E.S. Mattila,

('action' for lawsuit); technical terms as well as formal words and expressions; words and expressions with flexible meanings (adequate; promptly), polysyllabic words and professional argot or words used for in-group communication (damages, due care). In addition to this, abbreviations such as acronyms or referring to statutes by number may be common in spoken legal language.[29] Grammatically, written legal language can feature long, complex sentences with many prepositional phrases and unusual sentence structures[30] as well as a lack of linkage *between* sentences; it may use an impersonal tone including the passive voice, or be abstract and hypothetical through use of the conditional tense; it often uses negatives and multiple negatives, repetition, nominalizations (nouns made from verbs) and unique determiners ('such', 'said' + nouns, e.g. in any such event). Legal texts often contain numerous definitions, lists or rules; some texts or parts of texts can be vague, wordy and lack cohesion, while others are extremely precise; they can appear pompous and dull, or sophisticated and elegant. Legalese has also been described as solemn and ceremonial, or even ritualistic.

Its complex nature poses little difficulty for legal professionals, initiated into the language of the law in university or law school,[31] and who have spent entire working lives "immersed in the complexities of the law".[32] Goodrich submits that a large part of learning the law is learning its "highly technical and frequently archaic vocabulary".[33] In fact most lawyers and judges not only master the specificities of legal language, but tend to be excellent language users.[34] Maley talks, for example, about the honed argumentation skills of judges and their "mastery of the specialised vocabulary".[35] However the same cannot be said for the average lay person; Hood's 2003 study on perceptions of fairness found that 'posh' language and legal jargon created difficulties for defendants, many of whom did not fully understand the sentencing comments of judges and magistrates: 60% of respondents said the language used in court had put them at a disadvantage.[36] Legalese and legal jargon have been described as

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Comparative legal linguistics (Aldershot, UK: Ashgate, 2006); R.P. Charrow & V.R. Charrow, *making legal language understandable: a psycholinguistic study of jury instructions*, 79(7) Columbia Law Review 1306 (1979) and B. Danet, *Language in the legal process*, 14(3) Law & Society Review 445 (1980)

[29] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 45

[30] E.g. pronoun anaphora, 'whiz' deletion, and phenomena such as misplaced phrases see B. Danet, *Language in the legal process*, 14(3) Law & Society Review 445 (1980)

[31] J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005)

[32] H. Mikkelson, Introduction to court interpreting (Manchester: St. Jerome Publishing, 2000) at 106

[33] P. Goodrich, Legal discourse: studies in linguistics, rhetoric and legal analysis (London: Macmillan, 1987) at 176

[34] P.M. Tiersma, *The judge as linguist*, 27 Loyola of Los Angeles Law Review 269 (1993)

[35] Y. Maley, *The language of the law* IN Language and the law (Gibbons, ed.)(London: Longman, 1994) at 42-3

[36] R. Hood, S. Shute & F. Seemungal, Ethnic minorities in the criminal courts: perceptions of fairness and equality of treatment (London: Lord Chancellor's Department, 2003)

"often incomprehensible",[37] "a completely foreign language to the layperson-juror",[38] and a "rather distant cousin of everyday language",[39] and Danet says that even well-educated speakers often have difficulty understanding the language of court[40] while O'Barr opines that almost everyone has some degree of trouble with it.[41] While lawyers have argued that comprehension difficulties stem from the complexity of legal concepts, studies by linguists have rejected this contention, and demonstrate that the ability to understand legal discourse is determined by its "grammatical, semantic, and contextual complexity", or most of the features of legal language described above.[42] Serious concerns have thus been raised at the idea that criminal defendants are often unable to understand their own trial.[43]

Two basic principles of justice have been recognised as paradoxical or imperilled based on the impenetrability of legal language. The first is that justice should not only be done but should also be seen to be done; Philips considers that this implies a requirement for obvious fairness in court proceedings, but says that this is compromised by the fact that "the hypothetical observer of open justice finds his view obstructed by the Chinese wall of an alien and alienating language."[44] The second principle is *ignorantia juris non excusat* or *ignorantia juris neminem excusat*; ignorance of the law excuseth not or excuseth no-one; the law's presumption that the person who committed the unlawful act knew that it was a crime. Philips considers this a 'bizarre' expectation,[45] Gibbons calls it a 'logical absurdity'[46] and Morawetz finds it paradoxical that where transparency of language is most desirable it is unlikely to be found.[47] Goodrich goes a step further and refers to the 'major paradox of contemporary legal culture' that although it is incumbent on us all to know the law, the structure of legal language and practice prevent any other than a 'highly trained elite of specialists' from acquiring this knowledge.[48]

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[37] S. Schane, Language and the law (London: Continuum, 2006) at 2

[38] A. Elwork, B.D. Sales & J.J. Alfini, *Juridic decisions: in ignorance of the law or in light of It?*, 1 Law and Human Behavior 163 (1977) at 165

[39] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 20

[40] B. Danet, *Language in the legal process*, 14(3) Law & Society Review 445 (1980)

[41] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 39

[42] B.D. Sales, A. Elwork & J.J. Alfini, *Improving comprehension for jury instructions* IN Perspectives in law and psychology: the criminal justice system (B.D. Sales, ed.)(New York: Plenum, 1977) at 165 & R.P. Charrow & V.R. Charrow, *Making legal language understandable: a psycholinguistic study of jury instructions*, 79(7) Columbia Law Review 1306 (1979) at 1318-9; they found that sentence length unexpectedly did not affect comprehension

[43] See e.g. B. Danet, *Language in the legal process*, 14(3) Law & Society Review 445 (1980) at 467-8

[44] A. Philipps, Lawyer's language (London: Routledge, 2003) at 28

[45] A. Philipps, Lawyer's language (London: Routledge, 2003) at 29

[46] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 162

[47] Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000) at xi

[48] P. Goodrich, Legal discourse: studies in linguistics, rhetoric and legal analysis (London: Macmillan, 1987) at 7

In fact much of the literature on legal language is concerned with elitism and exclusion. Mellinkoff suggested that the reason for the historical divergence of legal language from that of common usage was the urge of those in the legal profession for their own, secret language, and Maley supports this view, asserting that there is a strong historical and cultural pattern of powerful and elite groups having their own, special language that served to identify them socially and perpetuate their power "by depriving the less powerful classes of access to its mysteries".[49] Carey argues that although the modern lawyer is unlikely to admit to deliberate exclusion or confusion of the public, the obscurity of legal language nonetheless serves to protect the law from scrutiny. He also opines that the nature of legal language makes it one of expertise and a professional language, and because it is exclusive and widely inaccessible, those who use it are "a professional elite".[50] Legal language is thus frequently viewed as a membership marker of the prestigious elite group to which lawyers and judges belong, and as strengthening professional solidarity.[51]

Legal language is further frequently depicted as an instrument of authority, power and control.[52] Sociolegal research has long been concerned with the idea that in practice, the law does not meet its own ideal of fairness, and Conley and O'Barr consider that in the courtroom one is immediately struck by the feeling "that the law's power is more accessible to some people than to others."[53] Saville-Troike says that social control is greater in situations where speech events are formalised,[54] and in the courtroom, "a highly ritualized linguistic setting"[55] where strict rules govern what can be said, when and by whom, power belongs to those most entitled to speak and to choose and control topics;[56] while witnesses have some degree of control, at the top of the hierarchy with the greatest linguistic power are attorneys and judges.[57] From this perspective it is a short step to viewing language as a weapon wielded by

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[49] Y. Maley, *The language of the law* IN Language and the law (Gibbons, ed.)(London: Longman, 1994) at 12
[50] G. Carey, *Towards simpler legal language*, 18 Irish Law Times 177 (2008)
[51] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 37 & H.E.S. Mattila, Comparative legal linguistics (Aldershot, UK: Ashgate, 2006) at 51
[52] See e.g. H.E.S. Mattila, Comparative legal linguistics (Aldershot, UK: Ashgate, 2006) at 40; S.U. Philips, Ideology in the language of judges: how judges practice law, politics, and courtroom control (New York; Oxford: Oxford University Press, 1998) at 11; P. Goodrich, Legal discourse: studies in linguistics, rhetoric and legal analysis (London: Macmillan, 1987) at 177; J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005) at 129
[53] J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005) at 3
[54] M. Saville-Troike, The ethnography of communication: an introduction (Oxford: Blackwell, 2003) at 35
[55] S. Berk-Seligson, *Bilingual court proceedings: the role of the court interpreter* IN Language in the judicial process (J.N. Levi & A. Graffam Walker, eds.)(New York/London: Plenum Press, 1990) at 155
[56] Y. Maley, *The language of the law* IN Language and the law (Gibbons, ed.)(London: Longman, 1994) at 33-4
[57] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 22

language professionals, or as a lawyer's most basic, powerful and manipulative tool[58] that can be used in court to mislead, confuse, annoy, trap, intimidate or obtain an advantage over less sophisticated users of language.[59] Considering the position of vulnerable witnesses in the adversarial system, Ellison describes how techniques such as questions, vigorous objections, warnings, repetition of questions and insistence on proper answers, as well as speech rate, eye contact, physical gestures and facial expressions can be used to establish linguistic dominance.[60]

Much of the research and literature on legal language has as a central concern the adversarial nature of the trial and the central and essential role of witness examination. The trial has been likened to a "ritualized battle",[61] a "verbal duel";[62] a "joust or a battle" fought with words in "an arena of opposition and drama";[63] "a war of words" where "dramatic tension is at its height when the defendant is being cross-examined".[64] The trial has also been conceived of as a process of story-telling, whereby different versions of the truth are presented to the judge or jury who, in deciding who and what to believe, interpret what is said and create their own version of what happened. While generally considered to be the establishing of fact, all versions of the truth are selective, such that the final, accepted version has been described as a 'constructed reality'.[65] Maley suggests that some groups, such as certain ethnic groups, may find this procedure confusing and upsetting, and may be "unable to exploit the opportunities offered them to tell their story."[66] He distinguishes two dialogic models of trial discourse: the first is combative and adversarial where lawyers basically attempt to undermine the other side's story, and Berk-Seligson describes how lawyers use verbal strategies to make witnesses for the opposing side appear dishonest, unreliable, and incompetent.[67] The other model is cooperative and supportive; lawyers support their version of events and try to make their own

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[58] H.E.S. Mattila, Comparative legal linguistics (Aldershot, UK: Ashgate, 2006) at 19

[59] See e.g. D. Eades, *Evidence given in unequivocal terms: gaining consent of Aboriginal young people in court*, IN Language in the legal process (J. Cotterill, ed.)(Basingstoke: Palgrave Macmillan, 2002); J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 21

[60] L. Ellison, The adversarial process and the vulnerable witness (New York: Oxford University press, 2001) at 96-102

[61] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 6

[62] J.M. Conley & W.M. O'Barr, Behavioral analysis of the American criminal courtroom (Durham, N.C.: Duke University Law and Language Project (Research Report 4), 1977)

[63] Y. Maley, *The language of the law* IN Language and the law (J. Gibbons, ed.)(London: Longman, 1994) at 35-6

[64] B. Danet & B. Bogoch, *Fixed fight or free-for-all? An empirical study of combatitiveness in the adversary system of justice*, 7(1) British Journal of Law & Society 36 (1980) at 37

[65] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 11; Bennet and Feldman's 1981 study coined this metaphor cited in Y. Maley, *The language of the law* IN Language and the law (J. Gibbons, ed.)(London: Longman, 1994) at 34 & 37

[66] Y. Maley, *The language of the law* IN Language and the law (Gibbons, ed.)(London: Longman, 1994) at 40

[67] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 20

witnesses "look credible, sincere, and competent".[68] Here lexical and grammatical choices can play a role in mitigating or obfuscating guilt; Danet has analysed, for example, how the prosecution and defence in a manslaughter trial over a late abortion used different words to describe the incident; the prosecution referred to a *baby* or a *child*, while the defence used the terms *fetus* and *products of conception* to mitigate culpability.[69] Matoesian in his seminal work on language, power, and domination in rape trials finds that rape trials, like other adversarial trials, are ultimately not about truth or falsity, but winning and losing.[70]

A basic principle transcends the use of language to inculpate or mitigate; that "*[h]ow* things are said in court (...) may be much more important that *what* is actually said."[71] Possibly the most cited experiment to illustrate this principle is that of Loftus and Palmer[72] in which a film with a car-crash was shown to two subject groups; while one set of subjects was asked to estimate how fast cars were going when they "smashed" into each other, the other set was asked to estimate the same thing when the cars "collided", "bumped", "hit" and "contacted". Loftus and Palmer found that when the term "smash" was used, subjects estimated the speed of the car as being significantly higher than when the other terms were used. In addition, when the subjects were re-called a week later, 32% of the "smash" group claimed that there had been broken glass at the scene, while only 14% of the "hit" group claimed this. There was no broken glass. Having considered some of the comprehension issues that legalese poses, this principle lays the foundation for consideration of how defendants and witnesses communicate in the courtroom, and whether a layperson's use of language can affect the outcome of a trial. Relevant research has considered how juries evaluate the speech of witnesses, and how linguistic differences in litigants' presentation of cases can affect their success.

Through their study of language in American courtrooms, O'Barr et al. revealed that, while previous descriptions of legal language had conveyed an impression of legalese as a homogenous entity, there was actually a range of language varieties to be heard in the courtroom, each of which could be considered a separate register of court talk. They identified

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[68] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process (2002) at 20

[69] B. Danet, *'Baby' or fetus'? Language and the construction of reality in a manslaughter trial*, 32(3-4) Semiotica 187 (1980)

[70] G.M. Matoesian, Reproducing rape: domination through talk in the courtroom (Cambridge: Polity Press, 1993) at 32

[71] W.M. O'Barr & J.M. Conley, *Subtleties of speech can tilt the scales of justice: when a juror watches a lawyer,* 3 Barrister 8 (1976)

[72] E.F. Loftus & J.C. Palmer, *Reconstruction of automobile destruction: an example of the interaction between language and memory*, 13(5) Journal of Verbal Learning and Verbal Behavior 585 (1974)

four such registers and observed that most speakers moved between them, though none used all four:[73]

- Formal legal language: closest to written legal language; used by judges to instruct the jury, pass judgment, speak "to the record"; used by lawyers to address court, make requests
- Standard English: correct English, more formal than everyday language; used by lawyers and most witnesses
- Colloquial English: closer to everyday English; some lawyers and some witnesses use it
- Subcultural varieties: includes Black English and dialects of poorly educated whites

A person's speech can provide clues about their social class and social status, such as level of education, age group, gender, occupation or origin.[74] It also affects how a person is perceived. A number of studies have explored the use and impact of speech styles in the courtroom on this basis, including that of Conley et al. in which the aim was to discover how juries perceive and evaluate certain speech styles of witnesses. One such style is the use of 'powerful' and 'powerless' speech.[75] 'Powerless' speech means speech "characterized by the frequent use of words and expressions that convey a lack of forcefulness in speaking",[76] something often associated with women,[77] though Conley et al. suggested the distinction may relate to social power rather than gender. Studying presentational styles in the courtroom, they found that the language of witnesses with a higher social status (e.g. well-educated, white collar men; male and female expert witnesses) involves fewer incidences of powerless speech.[78] Their statistical analysis was unambivalent in its finding that those who used a powerful style of speech were evaluated more positively in terms of credibility and the veracity of their testimony; they were considered to be more competent, more intelligent, and more trustworthy. Conley et al. concluded from their experiment that both female and male

[73] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 25

[74] R. Mesthrie, *Clearing the ground: basic issues, concepts and approaches* IN Introducing sociolinguistics (R. Mesthrie, J. Swann, A. Deumert, W.L. Leap, eds.)(Edinburgh: Edinburgh University Press, 2000) at 6. Also W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (1982) at 4

[75] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (1982) at 88

[76] J.M. Conley, W.M. O'Barr & E.A. Lind, *The power of language: presentational style in the courtroom*, 6 Duke Law Journal 1375 (1978); Features include hedges ("I think"; "It seems like"); modifiers ("kinda"; "sort of"); hesitation forms ("uh"; "um"; "well"); polite forms ("sir"; "please"); intensifiers ("very"; "definitely")

[77] Lakoff calls it "woman's language"; R.T. Lakoff, Language and woman's place (New York/London: Harper and Row, 1975)

[78] J.M. Conley, W.M. O'Barr & E.A. Lind, *The power of language: presentational style in the courtroom* (1978)

witnesses are consistently evaluated more positively when they use the powerful style of speech.[79]

Solan and Tiersma link the 'powerless' style of speaking to having one's right to counsel satisfied; US courts have often ruled that indirect statements like "I think I'd like a lawyer" do not constitute legitimate requests or a valid invocation of the right to counsel; as the less empowered are more likely to make indirect requests than the better-educated and more well-off, they are less likely to have their right to a lawyer respected.[80] They also associate this speech style with the police getting confessions, and point out that children, people with learning disabilities and those who have limited English skills and/or knowledge of the system are among those at risk of signing false confessions; they submit that this "no doubt this has some effect on the demographics of the prison system."[81]

Another style evident in the courtroom is 'hypercorrect' speech; in the intimidating and formal setting of the trial court, this is the effect of witnesses trying to use a more formal style of language than they normally would, but as a result making "frequent errors in grammar and vocabulary" which actually has the effect of rendering their speech "stilted and unnatural".[82] Conley et al. found that juries also evaluate this style of speech negatively; it is equated with low social status or a desire to ingratiate, and those using it were considered less convincing, less competent, less qualified and less intelligent than those using the formal style of speech correctly.[83]

Wodak-Engel undertook a study to determine how courtroom factors affect the linguistic behaviour of defendants, and the extent to which the linguistic behaviour of defendants influences the outcome of their case. She hypothesised that because of the institutional nature of the speech setting, only those defendants who were aware of courtroom norms and could express their knowledge "in spontaneous interaction" would be successful in their linguistic strategies.[84] Having divided defendants into Working class (WC), Lower middle-class (LMC) and Middle class (MC), she found that those in the WC group came to court with almost

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[79] J.M. Conley, W.M. O'Barr & E.A. Lind, *The power of language: presentational style in the courtroom* (1978)
[80] *People v Kendricks,* 459 N.E. 2d 1137, 1139 (Illinois Appeal Court, 1984) cited in L. Solan & P.M. Tiersma, Speaking of crime: the language of criminal justice (Chicago: University of Chicago Press, 2005) at 53
[81] L. Solan & P.M. Tiersma, Speaking of crime (2005) at 59-60
[82] J.M. Conley, W.M. O'Barr & E.A. Lind, *The power of language: presentational style in the courtroom* (1978)
[83] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 87
[84] R. Wodak-Engel, *Determination of guilt: discourse in the courtroom* IN Language and power (C. Kramarae, M. Schulz & W.M. O'Barr, eds.)(1984) at 93-97

no story, their behaviour reinforced certain stereotypes of the judge who behaved in a hostile manner, and these defendants received higher sentences although less responsible; they were unable to adopt successful strategies as they were unaware of what to expect. LMC defendants, on the other hand, were capable of linguistic behaviour positively evaluated by the judge, but because of not pleading guilty were unsuccessful in achieving a positive image. Both the WC and LMC defendants were given more severe sentences than those in the MC group who, being familiar with the strategies and norms of court interaction, pleaded guilty and were able to construct a valid and consistent story using technical vocabulary; this ensured plausibility and an image valued by the court. Having acquired the speech norms used in the courtroom, MC defendants were able to succeed in court.

Wodak-Engel thus submits that the ability to create a certain image in court is important; the judge wants a quick trial and thus values defendants who enter a guilty plea, offer a reasonable explanation and a credible story, don't argue, and are well-presented. Interestingly, she also considers the behaviour of those with previous convictions (PC), finding that these treat the court appearance as a sort of game; they are "competent and comfortable" in court, and capable of manipulating procedure, and their manner of speaking clearly evinces their knowledge of courtroom procedure, leading Wodak-Engel to find that even if these defendants are from a working-class background, their court experience acts in their favour making them more capable in court.[85] Although her sample is very small (15 defendants), her findings are supportive of and supported by those of Conley, O'Barr and Lind.

Conley and O'Barr carried out a study of how ordinary, self-represented American lay people in small claims disputes identify and analyse legal problems, and how they approach and respond to the justice system.[86] They found that lay and legal people approach the system very differently, to the point that they seem to speak different languages. They label the dichotomy 'rules versus relationships', where rule-oriented accounts are presented in a framework that corresponds more to official discourse; a discourse which is primarily concerned with rules and the law, and to the sense of logic analogous with the court and the law more generally; and where relational accounts are presented in relation to their social context and social relations. The latter approach, used by most lay people, is typically treated as being filled with irrelevant and inappropriate information, and can be compared to the

[85] R. Wodak-Engel, *Determination of guilt: discourse in the courtroom* (1984) at 93

[86] J.M. Conley & W.M. O'Barr, *Rules versus relationships in small claims disputes* IN Conflict talk: sociolinguistic investigations of arguments in conversation (A. Day Grimshaw, ed.)(Cambridge: Cambridge University Press, 1990) at 178-193

'powerless' style of testifying. Where judges give the litigant the chance to speak, they are "unable to comprehend what they are trying to say", as their speech is not conforming to the conventions of legal discourse. Rule-oriented accounts, on the other hand, are presented in a framework recognizable to the court and the judge, who are better able to deal with the discourse as a result. In their study, only some self-represented litigants presented rule-oriented accounts, and Conley and O'Barr consider that people with experience in business or law may be more inclined to present such accounts. Conley and O'Barr find that accounts are transformed through the use of legal language and, more subtly, by the process of 'thinking like a lawyer', or identifying those aspects that judges and legal professionals will consider relevant. They say that lawyers thus conceptualise disputes in a different way.[87]

While it may be somewhat overzealous to suggest that judges, recognised as competent users of language, are unable to understand relational accounts, the findings are relevant in highlighting that some court users are better able to interact successfully with the court by engaging in appropriate use of language and by presenting 'facts' in ways that the court can relate to more easily and more quickly. It also suggests more generally that a represented defendant, whose lawyer can present the account (or the 'facts') in an appropriate framework and with appropriate language, is at an advantage in the courtroom; the right to counsel is therefore also important for linguistic reasons. These studies reveal a pattern and provide an empirical basis for what might be considered an instinctual conclusion based on the formality, sophistication and exclusive nature of legal language: that defendants with a higher level of education are more likely to understand legal language, that defendants with a higher social status who use 'powerful' speech are more positively evaluated, and that those with experience in business or law (probably well educated and/or of high social status or possibly repeat offenders) are more able to produce accounts that are readily acceptable to the court. The studies therefore strongly suggest that defendants with high levels of education, high social status and/or previous court experience are more likely to be able to understand what happens in court, and to interact successfully. This leads us to the discussion of the position of defendants with little or no English language skills.

[87] J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005) at 134

Section B: Court Interpreting

Due to the nature of legal language, the concepts of interpreting and translation are inherent in legal proceedings, even without the addition of a foreign language. Most basically 'interpretation' in the legal context involves deciding the exact meaning of a legal text, but the dichotomy between legal language and ordinary language is often considered to necessitate a process of translation,[88] which has even been described as being at "[t]he heart of the law."[89] Charrow and Charrow explain that those who are not familiar with a specific field will have difficulty understanding and will need a translation, which in a way "is what lawyers do by explaining to suspects what they are being investigated for or charged with",[90] and Danet compares the role of a lawyer to that of an interpreter for those who cannot understand the language of the court.[91] O'Barr sets out a number of ways in which interpretation is a central element in the courtroom: various versions of the truth are interpreted to decide who wins; witnesses interpret their memories of what happened; lawyers interpret the situation in their opening remarks and their closings; and the jury interprets in order to give a verdict.[92]

The Need for Interpreters

When a defendant who does not speak English appears in court, an interpreter permits "judges, attorneys, court reporters, and other key courtroom personnel to understand the testimony."[93] Wadensjö submits that interpreters fulfil a role in the "institutional system of control, by seeing to it that interaction continues, that a certain agenda is kept."[94] It has been asserted that those working in the legal system have a right to dependable interpretation so they can work to appropriate legal and professional standards,[95] and Storey talks about the right of the general public to have crimes investigated, and to have the perpetrators tried and convicted; to this end the evidence of the non-English speaker must be available to the

[88] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 21

[89] J.B. White, *Law as rhetoric, rhetoric as law: the arts of cultural and communal life* IN Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000) at 63

[90] R.P. Charrow & V.R. Charrow, M*aking legal language understandable: a psycholinguistic study of jury instructions*, 79(7) Columbia Law Review 1306 (1979) at 1312

[91] B. Danet, *Language in the legal process*, 14(3) Law & Society Review 445 (1980) at 470

[92] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York; London: Academic Press, 1982)

[93] E.M. de Jongh, *Foreign language interpreters in the courtroom: the case for linguistic and cultural proficiency*, 75(3) The Modern Language Journal 285 (1991) at 288

[94] C. Wadensjö, Interpreting in interaction (New York: Addison Wesley Longman, 1998) at 13

[95] Aequitas: Access to justice across language and culture in the EU (E. Hertog, ed.)(Antwerp: Lessius Hogeschool, 2001); C. Wadensjö, Interpreting in interaction (New York: Addison Wesley Longman, 1998)

court.[96] A significant point of departure of the Nuffield study on court interpreting in England and Wales was that court interpreters were necessary to facilitate communication for the court which "needs to be able to conduct its business efficiently and equitably and follow testimony fully and accurately."[97] They consider that this perspective has not been given as much consideration as the need of the non-English speaker for interpretation, nor has much attention been paid to tensions between the latter and the court's expectations and requirements.[98] Although their study does not necessarily do anything to correct this, their point is accurate in that the majority –thought certainly not the totality - of literature concerned with court interpreting focuses on the language-disadvantaged defendant.

The linguistic and socio-cultural barriers described in the first part of this chapter are even more difficult to overcome for those without fluency in the language of the criminal justice system or familiarity with its principles and procedures. For their study on participation in the justice system, Bottoms and McClean created a typology of defendants and non-English speakers, not being the focus of the study, fell into the category of 'other types'. It was found that their lack of command of the language "dominated all aspects of the case",[99] and while they do not explain how language issues arose or whether they had (problems with) interpreters, their description of the impact of limited English proficiency in court is unequivocal. Gibbons suggests that when a person does not have *any* command of the language spoken in the legal system "it is difficult to find a rational argument to deny access to an interpreter/translator", as without one the defendant is unable to understand the process or communicate their version of events.[100] However, the complexity of court language and procedure means that a high level of fluency is required for this, and the intimidating and stressful nature of the court setting can also impact on performance in the acquired

[96] K. Storey, *The linguistic rights of non-English speaking suspects, witnesses, victims and defendants* IN Language legislation and linguistic rights (D.A. Kibbee, ed.)(Amsterdam/Philadelphia: John Benjamins Publishing Company, 1998) at 30

[97] I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992) at 3

[98] I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (1992) at 3, citing R. Morris, The impact of court interpretation on legal proceedings, M.A. Thesis; Hebrew University of Jerusalem (unpublished, 1989) and J. Bainbridge Stafford, *No comprendo: the non-English speaking defendant and the criminal process*, 68(1) Journal of Criminal Law and Criminology 15 (1977)

[99] A. Bottoms & J.D. MacClean, Defendants in the criminal process (London: Routledge & K. Paul, 1976) at 71

[100] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 232

language,[101] such that interpreters may also be considered necessary for defendants with limited English proficiency.[102]

The US Supreme Court has described as "meaningless",[103] "incomprehensible ritual",[104] "invective against an insensible object"[105], "guarantee[d] confusion"[106] and "Kafka-like"[107] the application of criminal justice to those without fluency in English, and the literature on interpreting usually conceives of the interpreter as facilitating access to justice, mitigating the disadvantage of such defendants and correcting imbalances, and helping immigrant and other 'powerless' groups. The right to an interpreter is often cited as a justification for interest and research in the area, as is the fact that minority, ethnic and immigrant groups are often massively overrepresented in prisons and the question of whether, how and to what extent language issues may contribute to this. While finding a definitive answer to these questions seems unlikely at present, a review of the existing literature on court interpreting presents a number of relevant insights. Broadly, the remainder of this section will consider the role(s) of an interpreter; court attitudes; practical issues; language assessment and assigning an interpreter, and the impact and potential consequences of interpreting on the court process.

The Interpreter's Role

Berk-Seligson points out that there is an important distinction between a bilingual person and a professional court interpreter,[108] and de Jongh submits that being fluent in two languages is only the beginning of an interpreter's training.[109] Ideally, on a practical level, an interpreter should have good hearing, a clear speaking voice, physical stamina and a confident manner, and the sensitivity of the role favours diplomacy, tolerance, the ability to build a rapport, objectivity and social, cultural and political awareness, as well as a thorough awareness of

[101] J.J. Gumperz, *Fact and inference in courtroom testimony* IN Language and social identity (J.J. Gumperz, ed.)(Cambridge: Cambridge University Press, 1982) at 182
[102] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (2003) at 211 & 232
[103] *State v Fa'afiti*, 54 Haw. 637, 513 P.2d 697 (1973)
[104] *United States v Carrion*, 488 F.2d 12, 14 (1st Cir.1973), cert. denied, 416 U.S. 907 (1974)
[105] *State v Rios*, 12 Ariz. 143, 144 539 P.2d 900, 901 (1975)
[106] *United States v Mayans*, 17 F.3d 1174, 1179-80 (9th Cir. 1994)
[107] *United States v Desist*, 384 F.2d 889, 901-02 (2d Cir.1967), aff'd, 394 U.S. 244 (1969). In Kafka's *The Trial*, Josef K, an innocent man, is arrested, tried, charged and punished without understanding the procedures involved or how to defend himself [F. Kafka, The trial (Harmondsworth: Penguin, 1953)]
[108] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 42
[109] E.M. de Jongh, *Foreign language interpreters in the courtroom: the case for linguistic and cultural proficiency*, 75(3) The Modern Language Journal 285 (1991) at 285

professional ethics.[110] From a more technical perspective a good interpreter will be highly proficient in both languages, be able to hear, analyse and repeat a message, and have good general knowledge as well as specific knowledge of certain subject matters, countries, groups or cultures. As familiarity with a particular field greatly facilitates comprehension,[111] the court or legal interpreter should also have knowledge of the legal system and legal language as well as an awareness of differences between systems; legal concepts can exist in one and not in another, and some terms and concepts of English law may be "incomprehensible for a foreigner",[112] posing a technical difficulty for interpretation. Familiarity with other types of language used in the courtroom and relevant discourse conventions is also important;[113] it is clear from Conley and O'Barr's descriptions of the registers used in court that the interpreter should be able to use both of their languages at various levels, from the technical and formal speech of legal professionals and expert witnesses to non-standard or colloquial speech and slang.[114]

Colin and Morris point out that because legal argument is particularly difficult to follow – and lawyers do not modify their speech for the benefit of laypeople - the interpreter needs considerable expertise for such material. It is important that defendants understand what is going on so that they may instruct their lawyer if necessary, and for this reason they consider that an intelligible summary is appropriate if simultaneous interpretation is not possible.[115] Berk-Seligson agrees that summary interpreting is appropriate where very technical legal language is being used that even native speakers would have difficulty following.[116] However, the view taken in Aequitas is that summarizing is not the same as interpreting, and interpreters are obliged to interpret everything that is said; summarizing involves prioritisation of specific details by the interpreter, decisions which are not within the ambit of the interpreter's role and which would compromise the interpreter's neutrality (see below); for

[110] See e.g. E. Granger & M. Baker, *The role and experience of interpreters* IN Working with interpreters in mental health (R. Tribe & H. Raval, eds.)(Hove: Brunner/Routledge, 2003); J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996); J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 243-4

[111] See e.g. I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992) at 4

[112] H.E.S. Mattila, Comparative legal linguistics (Aldershot, UK: Ashgate, 2006) at 221

[113] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 241

[114] A.B. Edwards, The practice of court interpreting (Amsterdam/Philadelphia: John Benjamins Publishing Company, 1995) at 91-92

[115] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 95. There are a number of modes, techniques or methods of interpreting including simultaneous (where the interpreter listens and speaks almost concurrently); consecutive (the speaker pauses at intervals to allow interpretation); summary; and sight translation (oral rendition of written material written on sight)

[116] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 38-9

these reasons summaries should be given only in exceptional circumstances and where there is consent.[117]

The interpreter's aim is essentially to "convey precisely, accurately, and completely in the target language the information contained in the source language".[118] In order to avoid miscommunication the message should be conveyed "with its entire semantic, emotional and aesthetic baggage",[119] a task that requires attention to nuance, style, register, formality, tone, and gestures.[120] The previous section explored the importance of *how* something is said and ideally the interpreter should maintain the way the witness/defendant speaks, conveying "the same impression in English that the witness would have given to a lawyer examining directly."[121] The difficulty of realizing such an aim is significant for a number of reasons: first, court interpreting happens instantly without time for reflection or consultation. In addition, from a technical perspective, languages are not directly equivalent: grammars are structured differently; etymologically similarly words may have very different meanings across languages; and cultural concepts or basic perspectives may be at variance. If language is understood according to Halliday's theory as "a system of meanings" that "reflects and transmits the values and relationships of a society",[122] then the concept attached to a specific word or phrase in one language will not be directly equivalent to that word or phrase in another, if it exists at all; this means that to avoid literal and meaningless translation, interpreters, in a sense, also act as cross-cultural communicators.

Morris points out that these interlingual issues are particularly salient in judicial contexts.[123] It has been mentioned that legal systems vary greatly, such that literal translation from one legal system to another may cause confusion;[124] as Hyland says "the legal system cannot overcome the particularity of the language in which it is formulated".[125] González et al. highlight, for example, the fact that for Navajo Indians the concept of individual guilt does not exist, and

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[117] Aequitas: Access to justice across language and culture in the EU (E. Hertog, ed.)(Antwerp: Lessius Hogeschool, 2001) at 28

[118] E.M. de Jongh, *Foreign language interpreters in the courtroom: the case for linguistic and cultural proficiency*, 75(3) The Modern Language Journal 285 (1991) at 288

[119] E.M. de Jongh, *Foreign language interpreters in the courtroom* (1991) at 288

[120] E.M. de Jongh, *Foreign language interpreters in the courtroom* (1991) at 292

[121] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 91

[122] R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 7

[123] R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 7

[124] See A.B. Edwards, The practice of court interpreting (Amsterdam/Philadelphia: John Benjamins Publishing Company, 1995) at 94-95

[125] R. Hyland, *Babel: A She'ur*, 11 Cardozo Law Review 1585 (1990) reprinted in Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000) at 39

that there is no word for 'guilty' in their language;[126] and de Jongh explains that looking at the floor is a respectful gesture in Haitian and many Hispanic cultures, while in Anglo-American culture it is often interpreted as a sign of guilt.[127] That legal language often employs commonly-used words in a technical sense can create difficulties for the interpreter, as can the fact that terms that appear similar across languages may actually represent different legal entities.[128] However, while legal jargon is often considered by interpreters to be the biggest challenge in court, research has shown that most issues arising from the interpretation of courtroom discourse are pragmatic in nature, or stem from trying to maintain the 'how' of how a person speaks.[129] Evaluation of the interpreters in Berk-Seligson's study found them to be largely unaware of pragmatics and inattentive to the relevant aspects of speech; their interpretation thus inevitably caused "a skewing of intended meaning and tone".[130]

We have seen that judges and lawyers tend to be adept users of language, but this sophisticated use of language does not necessarily imply understanding of the mechanics underlying language or its function in particular situations,[131] and Tiersma submits that courts can possess 'surprising linguistic acumen' in some respects, while at the same time exhibiting 'woeful disregard for how language operates in real life situations'.[132] This may be partly explained by the suggestion that people don't always have good intuitions about linguistic phenomena.[133] O'Barr & Conley set out to investigate the reliability of some aspects of court ideology on language; they found that when lawyers were asked to discuss their presentational styles in court, what they said "often bore little relation to what we had observed,"[134] leading them to conclude that legal professionals are not sufficiently aware of discourse dynamics.[135] They also analysed the contents of trial practice manuals and found that the views and suggestions they contained were of questionable dependability, and had no

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[126] R. Dueñas González, V.F. Vasquez & H. Mikkelson, Fundamentals of court interpreting: theory, policy and practice (Durham, NC: Carolina Academic Press, 1991)

[127] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 234

[128] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 243

[129] S. Hale, *Interpreters' treatment of discourse markers in courtroom questions*, 6(1) Forensic Linguistics 57 (1999) at 57

[130] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 2-5

[131] L. Solan & P.M. Tiersma, Speaking of crime: the language of criminal justice (Chicago: University of Chicago Press, 2005) at 10

[132] P.M. Tiersma, *The judge as linguist*, 27 Loyola of Los Angeles Law Review 269 (1993)

[133] L. Solan & P.M. Tiersma, Speaking of crime (2005) at 1 & 104

[134] W.M. O'Barr & J.M. Conley, *Subtleties of speech can tilt the scales of justice: when a juror watches a lawyer,* 3 Barrister 8 (1976)

[135] J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005) at 134

empirical basis.[136] From their own study, Charrow et al. observed that many lawyers have views on language and legal language that differ "substantially from what legal analyses reveal".[137] O'Barr consequently asserts that linguistic assumptions are made at every stage in the legal system "which by the standards of social science are frequently unfounded or unwarranted",[138] and Solan and Tiersma submit that the criminal justice system adheres to "deeply entrenched notions about language, many of which we now know are wrong".[139]

One such notion is the 'verbatim' theory of interpreting, or the requirement in many legal systems that interpreting be 'word-for-word' or 'literal'.[140] Dueñas Gonzáles et al. describe the verbatim standard by which US court interpreters are bound as interpretation "without editing, summarizing, deleting, or adding while conserving the language level, style, tone, and intent of the speaker".[141] Based on the nature of language and interpreting it is unsurprising that they suggest "a truly verbatim interpretation is literally impossible".[142] Morris suggests, in fact, that lawyers consider 'interpretation' to be a legal activity performed only by lawyers, and that they will thus instruct court interpreters not to interpret but to translate, "a term which is defined, sometimes expressly and sometimes by implication, as rendering the speaker's words verbatim."[143] Aside from the questionable possibility of producing verbatim translation, its desirability has also been questioned. Berk-Seligson reflects that while mistakes made by lawyers or judges should theoretically be interpreted, an interpreter that does so risks looking incompetent as it may be the interpretation that appears faulty.[144] Similarly it is possible that an interpretation may come across as mockery if it echoes a speaker's 'flowery expressions' too closely, though if left out this could be considered editing or summarising.[145] Morris carried out an analysis of interpretation in the Demjanjuk trial in Israel, and found that those interpreting into Hebrew routinely left out the expressions of courtesy and deference

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[136] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 36

[137] V. Charrow, J. Crandall & R. Charrow, *Characteristics and functions of legal language* IN Sublanguage: studies of language in restricted semantic domains (R. Kittredge & J. Lehrberger, eds.)(Berlin, New York: Walter de Gruyter, 1982)

[138] W.M. O'Barr, Linguistic evidence (1982) at 31

[139] L. Solan & P.M. Tiersma, Speaking of crime: the language of criminal justice (Chicago: University of Chicago Press, 2005) at 1 & 104

[140] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 247

[141] R. Dueñas González, V.F. Vasquez & H. Mikkelson, Fundamentals of court interpreting: theory, policy and practice (Durham, NC: Carolina Academic Press, 1991) at 16

[142] R. Dueñas González, V.F. Vasquez & H. Mikkelson, Fundamentals of court interpreting (1991) at 17

[143] R. Morris, *The moral dilemmas of court interpreting*, 1(1) The Translator 25 (1995) and J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 22

[144] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 65-6

[145] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 22

used by the US defence lawyers "because a faithful reproduction of such formulae would have had a farcical effect in Hebrew.[146] Although a violation of the 'rules', this was done to facilitate efficient communication and avoid "the undesirable consequences of inappropriate usage". The attitude of the judge and trial dynamics led this interpreter to take on a role of "a gatekeeper, an editor, and a mediator."[147]

However, impartiality and neutrality are essential and central elements of the interpreter's role. Researchers in the Nuffield study found that neutrality and unobtrusiveness were considered important attributes of a good interpreter by court staff,[148] and the Aequitas publication advises that interpreters must not introduce any bias through their choice of 'language, emphasis, intonation or body language',[149] but acknowledge that there are two schools of thought on *how* neutral an interpreter should be; the traditional one insists on a neutral tone at all times, while it is increasingly recognised that complete neutrality is difficult and 'may lack credibility'.[150] It is generally accepted that interpreters should resist giving legal advice or advocating,[151] although Wadensjö believes that the division between 'translation' and 'mediation' is largely an academic construct, indistinguishable in practice.[152] Like the interpreter in the Demjanjuk trial, Granger and Baker have found interpreters to have conflicting perceptions of their role due to the complexity of interpreting contexts, and most considered it part of their job to be a cultural broker, technical explainer and advocate.[153] The Nuffield study found the interpreter's role open to interpretation, and to be shaped by the interpreter's experience, as well as the court's familiarity with, and perception of, interpreters,[154] while Schlesinger concurs that very few legal systems provide relevant guidelines.[155] Interestingly, Morris finds that where a defendant is unrepresented, both the

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[146] M. Shlesinger, *Interpreter latitude vs. due process: simultaneous and consecutive interpretation in multilingual trials* IN Empirical research in translation and intercultural studies (S. Tirkkonen-Condit, ed.)(Tübingen: Gunter Narr, 1991) at 151

[147] R. Morris, *Taking liberties? Duplicity or the dynamics of court interpreting* IN Interpreting in legal settings (D. Russell & S. Hale, eds.)(Washington, D.C.: Gallaudet University Press, 2008) at 14

[148] I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992) at 7

[149] Aequitas: Access to justice across language and culture in the EU (E. Hertog, ed.)(Antwerp: Lessius Hogeschool, 2001) at 28

[150] Aequitas: Access to justice across language and culture in the EU at 28

[151] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 22-3

[152] C. Wadensjö, Interpreting in interaction (New York: Addison Wesley Longman, 1998)

[153] E. Granger & M. Baker, *The role and experience of interpreters* IN Working with interpreters in mental health (R. Tribe & H. Raval, eds.)(Hove: Brunner/Routledge, 2003)

[154] I. Butler & L. Noaks, Silence in court? (1992) at 7

[155] M. Shlesinger, *Interpreter latitude vs. due process: simultaneous and consecutive interpretation in multilingual trials* IN Empirical research in translation and intercultural studies (S. Tirkkonen-Condit, ed.)(Tübingen: Gunter Narr, 1991) at 153

defendant and courtroom personnel use language difficulties as an excuse to pass the advocate's responsibility to the interpreter.[156]

Interpreters: "violent opponents of soap and sunlight"[157]

The unrealistic expectations and mismatched perceptions of the interpreter held by courts, legal professionals and defendants are commonly referred to in literature on court interpreting.[158] Morris presents evidence that US courts view the interpreter as having a purely 'verbatim', technical function in which he or she acts "as a phonograph; a transmission belt; transmission wire or telephone; a court reporter; a bilingual transmitter; a translating machine; a medium and conduit of an accurate and colourless transmission of questions to and answers from the witnesses; a mere cipher; an organ conveying sentiments or information; a mouthpiece; and a means of communication."[159] This view contrasts and is in tension with the tendency of defendants to consider the interpreter, who speaks their language and may be of the same nationality, as a 'saviour' or the 'Shangri-La of communication',[160] although Tribe also recognises that defendants who depend on interpreters to convey their words may feel more vulnerable and as having 'lost their voice'.[161] Defendants, particularly when unrepresented, may expect interpreters to be on their side and ask them questions, or for advice, and the resulting predicament is well described by an interpreter-turned-barrister:[162]

> "(...) there is almost inevitably a strange, transient intimacy between interpreter and defendant (...) exacerbated by the fact that the interpreter stands alongside the accused in the dock and on the witness stand and repeats his words as they are uttered, using the first person singular. The

[156] R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 12

[157] H. Montgomery Hyde, Norman Birkett: The life of Lord Birkett of Ulverston (London: Hamish Hamilton, 1964) cited in R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 9

[158] See e.g J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 247; S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 2; R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 6-7

[159] R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 8 citing in order: *Gregory v Chicago,* R. I. & P. R. Co. 124 NW 797 (1910); *United States v Anguloa* 598 F 2d 1182 (1979) at 1186; *People v Resendes* 210 Cal Rptr 609 (1985) at 612.13; *Gaio v R.* [1960] 104 CLR 419; *Gaio v R.* at 431; *State v Chyo Chiagk* 92 Mo 395, 4 SW 704 (1887) at 704; *R. v Attard* [1958] 43 Cr App R 90 at 91; *Du Barré v Livette* (1791) 170 ER 96 (Peake 108); *Gaio v R.* at 429 & 432

[160] R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 6-7 and 9

[161] R. Tribe, *Working with interpreters* IN Race, culture, psychology and law (K. Holt Barrett & W.H. George, eds.)(Thousand Oaks, California; London: Sage, 2005)

[162] D. Morgan, *The life of a court interpreter*, 86 Graya 51(2) (1982) at 51

> result is a curious identification with the defendant (...). The accused, for his part, nearly always responds warmly, regarding the interpreter more as a friend and ally than as a person paid by the prosecution to do a job. After all, in many cases the interpreter is the only person around with whom he can hold a direct conversation! It is sometimes hard for him to accept that the interpreter's role is other than friend and mentor."

The possibility that an interpreter will fulfil the saviour role instead of remaining impartial may be a source of distrust for the court. It has been suggested that the court may evince an element of distrust towards foreign language speakers generally,[163] and that this may extend to the interpreter. Indeed distrust may simply be created by the fact that an interpretation, by its very nature, may involve more or fewer words than the original utterance.[164] In his 1952 interpreters' handbook Herbert used the phrase 'necessary evil' to describe the attitude of the court to the presence of an interpreter[165], and it has been widely employed since then to represent a certain lack of enthusiasm around interpreter participation in trials. While much interpreting literature implicitly or explicitly accepts this perception of judicial attitudes, it is perhaps taken to extremes by Morris who frequently refers to 'hapless' interpreters, often treated as traitors, charged with 'treason or duplicity', and demonised by a judicial system where 'the prevailing ethos' encourages distrust of them.[166] She refers to the traditionally negative attitudes of lawyers towards interpreters, and quotes Norman Birkett of the Nuremberg War Crimes Tribunal Bench as calling 'translators' "touchy, vain, unaccountable, full of vagaries, puffed up with self-importance of the most explosive kind, inexpressibly egotistical, and, as a rule, violent opponents of soap and sunlight."[167]

On the whole, judicial attitudes towards interpreting are portrayed negatively in the literature which, aside from the aforementioned reasons, may be explained by the fact that bilingual cases can take up to twice as long as other trials and cause frustration by their cumbersome nature; the interpreting process could be viewed as advantageous to defendants with some knowledge of the court language in providing extra thinking time; and it creates difficulties in

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[163] P. Goodrich, Legal discourse: studies in linguistics, rhetoric and legal analysis (London: Macmillan, 1987)

[164] R. Tribe, *Working with interpreters* IN Race, culture, psychology and law (K. Holt Barrett & W.H. George, eds.)(Thousand Oaks, California; London: Sage, 2005)

[165] J. Herbert in Manuel de l'i , 1952)

[166] R. Morris, *Taking liberties? Duplicity or the dynamics of court interpreting* IN Interpreting in legal settings (D. Russell & S. Hale, eds.)(Washington, D.C.: Gallaudet University Press, 2008) at 1 & 4

[167] H. Montgomery Hyde, Norman Birkett: The life of Lord Birkett of Ulverston (London: Hamish Hamilton, 1964) cited in R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 9

gauging witness credibility.[168] Some of these tensions are well illustrated in a report of the Australian Attorney-General's Department which looks at some of the beliefs about interpreters that contribute to their under-use.[169]

- An interpreter will give a second language speaker with some knowledge of the language the advantage of extra time for thinking and developing a response
- It is difficult to gauge the credibility of witnesses, as non-verbal information is altered
- Interpreters may modify content and not interpret literally
- Interpreters may take an active role and intervene in interaction
- A right to an interpreter affects judicial discretion in deciding whether one is needed[170]

Morris makes a very relevant observation, setting aside the demonizing terminology, that there is a paradox in treating interpreters with mistrust and apprehension while at the same time not only expecting 'verbatim' translation, but assuming that interpreters can and *do* perform perfectly,[171] an assumption that is particularly apparent in the US court tradition of instructing bilingual jury members to disregard evidence in the original language, and pay attention only to the interpreted version that will appear on record.[172]

Naturally, interpreters are not immune to negative attitudes towards them. In a study on interpreting in Scottish courts, the respondent interpreters reported that the court atmosphere was stressful, pressurized and unwelcoming; they did not feel that they were treated as professionals, and their work was hindered by the court's failure to understand their role or use a consistent approach. They had difficulties with legal terminology and sometimes the language/dialect of witnesses, and reported that participants would speak without consideration of their presence, whispering and using long sentences. These are common complaints across the literature, where other difficulties include unpredictable employment and low pay; intimidation through exposure to public scrutiny; feelings of

[168] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003); I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992) at 9

[169] Australia Attorney-General's Department, Review of Commonwealth Criminal Law (Australia) (Canberra: Australian Govt. Pub. Service, 1991) at Chapter 3, cited in J. Gibbons, Forensic linguistics: an introduction to language in the justice system (2003) at 233

[170] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (2003) at 233

[171] R. Morris, *Taking liberties? Duplicity or the dynamics of court interpreting* IN Interpreting in legal settings (D. Russell & S. Hale, eds.)(Washington, D.C.: Gallaudet University Press, 2008) at 1-2

[172] See e.g. J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005) at 150; S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 163; A.B. Edwards, The practice of court interpreting (Amsterdam/Philadelphia: John Benjamins Publishing Company, 1995) at 70

isolation and not quite fitting into the court team; a lack of respect and appreciation; emotionally draining work, lack of training and support, and difficult physical conditions such as poor acoustics and external noise. As the language of the courtroom is already quite complex, comprehension and therefore quality is adversely affected where participants mumble or speak at high speed, where acoustics or amplification is poor, where there is a lot of background noise, or where there are physical barriers between the interpreter and the person speaking, such as glass panels separating the defendant.[173]

Assigning Interpreters

Considering the judicial attitudes described, it is not too surprising that in the 1970s and early 1980s, failure to provide interpretation was the most common interpreting-relating grounds for appeal in the US, and it remains a problem.[174] Another recurrent and related issue described in the literature is that of allowing friends, relatives or even counsel to interpret where interpreters are not permitted or provided, a less than desirable solution in view of the complexity of the interpreting process. One of the central concerns of the literature in this regard relates to how language ability is assessed by the court, and who is assigned an interpreter; it was mentioned that while the case may be clear for a defendant with no command of the court's language, it is less so when a person has some knowledge; at what point should interpreting be provided? If an accused says they do not need or want an interpreter, does this guarantee they will be able to participate fully in the case?

A clear starting point is that if legal language and court discourse is difficult for the average lay person, it must be more so for a non-native speaker. Barrett indicates that "[f]or an immigrant to be considered bilingual in legal proceedings, the party's language level should be at the 12th grade level in both languages."[175] The US Federal Court Interpreters' Act provides that to qualify for an interpreter the defendant's English language comprehension must be sufficiently 'inhibited',[176] but this is not defined further and while Solan and Tiersma suggest that courts

[173] See e.g. J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 18

[174] V. Benmaman, *Interpreter issues on appeal*, Proteus: Newsletter of the National Association of Judiciary Interpreters and Translators Volume IX No. 4 (Fall 2000)

[175] K. Holt Barrett, *Guidelines and suggestions for conducting successful cross-cultural evaluations for the courts* IN Race, culture, psychology and law (K. Holt Barrett & W.H. George, eds.)(Thousand Oaks, California; London: Sage, 2005) at 113

[176] J.A. Radmann, Do you speak English?: A study on English language proficiency testing of Hispanic defendants in U.S. criminal courts (M.A. Thesis, Louisiana State University, 2005)

sometimes allow linguistic experts to resolve questions of proficiency,[177] the decision is generally at the discretion of the judge. In light of the foregoing allegations of questionable linguistic reasoning by courts, how judges do this is and whether or not they are qualified to do so is of concern.[178]

In Radmann's survey of how judges assess the English proficiency of Hispanic defendants in US criminal courts, 50% of respondents say they wait for the defendant or his counsel to request one; 31% ask the defendant directly, and 22% assess the need for an interpreter by means of a short series of questions and answers, leading her to conclude that judges generally avoid assessing language proficiency.[179] If, as per this survey, interpreters are often provided on a request basis, the question of whether courts hold silence to be a waiver is particularly relevant, and although Berk-Seligson suggests that in the US this is the case, in the next chapter it will be shown that at common-law it has been held that there is no automatic right of waiver.[180] With regard to asking the defendant, the literature stresses that a defendant is not the best person to assess their own language ability; amongst other reasons they may fear being judged negatively,[181] they may be trying to cooperate,[182] might genuinely think one unnecessary, want to go home quickly, or not wish others from their language community to know about their court appearance.[183] Benmaman considers that decisions on assigning interpreters are often arbitrary and based on perception and that even where a judge carries out an assessment of language skills, it usually involves simple questions requiring "monosyllabic answers, which provide little insight into the comprehension or communication ability of a minimal English speaker."[184] While some jurisdictions have rating scales to ascertain proficiency,[185] it is suggested that otherwise judges should ask open-ended questions not satisfied by one-word answers and be aware of clues indicating proficiency problems such as

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[177] L. Solan & P.M. Tiersma, Speaking of crime: the language of criminal justice (Chicago: University of Chicago Press, 2005) at 27

[178] See e.g. S. del Valle, Language rights and the law in the United States: finding our voices (Clevedon, England/Buffalo NY: Multilingual Matters, Ltd., 2003) at 165 - 180

[179] J.A. Radmann, Do you speak English? (2005) at 70-81. The study involved judges in 4 US states

[180] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 32

[181] K. Holt Barrett, *Guidelines and suggestions for conducting successful cross-cultural evaluations (*2005) at 113

[182] L. Solan & P.M. Tiersma, Speaking of crime (2005) at 83

[183] K. Storey, *The linguistic rights of non-English speaking suspects, witnesses, victims and defendants* IN Language legislation and linguistic rights (D.A. Kibbee, ed.)(Amsterdam/Philadelphia: John Benjamins Publishing Company, 1998) at 28

[184] V. Benmaman, *Interpreter issues on appeal*, Proteus: Newsletter of the National Association of Judiciary Interpreters and Translators Volume IX No. 4 (Fall 2000)

[185] E.g. The International Second Language Proficiency Ratings (ISLPR, formerly the Australian Second Language Proficiency Ratings)

repeated vocabulary, grammar and syntax errors,[186] the defendant apologising or asking what to say, not replying or responding inappropriately, overtly stating incomprehension or repeating the same question.[187]

Impact of the Interpreter/Interpreting

In an exploratory US study on access to justice for immigrants who are victimized, 47% of respondents named language as a barrier. It was revealed that "although officials believed that interpreters assisted immigrants in being understood by court personnel, they noted that immigrants were often unable to understand court proceedings conducted in English".[188] The study is not specifically concerned with language issues, which are named as just one of many barriers, and it does not seek to discover why immigrants could not understand court proceedings if they were being interpreted, but this finding would seem to call into question the quality of the interpreting being provided. A defendant unable to follow proceedings is one possible result of poor interpreting, and it is one of the most easily identifiable as it involves a breakdown in communication. While courts may assume interpreter competence, it is by no means the case that all those employed as interpreters are skilled, experienced or fully competent, and Berk-Seligson also challenges the prevalent belief that interpreted proceedings do not differ in any from monolingual proceeding and that the interpreter does not impact on how a judicial event proceeds; she demonstrates – as have other studies - that interpreters, interpreting and particularly unskilled interpreting can impact very seriously on court proceedings.[189]

Berk-Seligson's seminal court interpreting study began from the premise that "in an ideal world, the American legal system would (...) have the court interpreter physically invisible and vocally silent, if at all possible".[190] She finds that in fact attention is constantly being drawn to the interpreter from the moment she takes the oath swearing to interpret accurately and to the best of her ability which, she says, in itself suggests that interpretation may not be accurate. She also raises the point that "[n]o amount of oath-swearing can guarantee high-

[186] J.I. Moore & R.A. Mamiya, *Interpreters in court proceedings* IN Immigrants in courts (J. Moore & M. Fisher, eds.)(Seattle; London: University of Washington Press, 1999) at 33

[187] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 211 & 218-9

[188] R.C. Davis, E. Erez & N. Avitabile, *Access to justice for immigrants victimized by crime: the perspectives of police and prosecutors*, 12 Criminal Justice Policy Review 183 (2001)

[189] S. Berk-Seligson, *Bilingual court proceedings: the role of the court interpreter* IN Language in the judicial process (J. N. Levi & A. Graffam Walker, eds.)(New York/London: Plenum Press, 1990)

[190] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 54

quality interpreting from an interpreter who does not have the necessary competency."[191] The interpreter's presence is highlighted during the voir dire, whenever the accuracy of the interpreting is challenged, and when the interpreter herself asks for clarification or permission to explain something. While the standard rule in interpreted conversation is to use the first and second person as if the speaker and listener were conversing without a third party, lawyers will often ask the *interpreter* the question intended for the defendant and defendants or witnesses commonly address the interpreter personally, drawing further attention to the interpreter and possibly creating an impression of a private conversation.[192]

More significantly, Berk-Seligson found the impact on legal proceedings to be far greater than supposed, and the interpreter an intrusive element that manipulated language and altered the flow of courtroom discourse, albeit unconsciously. Firstly, the interpreter tends to alter the speech style of defendants (or witnesses) by lengthening testimony and thereby adding features of 'powerless' speech, and by converting speech to a narrative style which is also a more 'powerless' style. Both of these shifts render the defendant's speech more likely to be negatively evaluated by juries. The interpreter also alters politeness and formality, which can affect evaluation of the defendant's competence and intelligence, and she can influence sympathy towards the defendant by shifting the blame structures in discourse.[193] Interpreters can thus have a considerable influence on how a jury evaluates a non-English testifying defendant or witness. Further to this, Berk-Seligson found that interpreters often interfere with the questions asked by lawyers in witness examination by altering the pragmatic intent of the speaker; in later studies she also found that they reduce the coerciveness of leading questions, thus basically finding that interpreters can weaken the control of lawyers over testimony.[194] Essentially Berk-Seligson has demonstrated that interpretation in courtroom proceedings is not necessarily faithful to the original speech; the interpreter can influence a jury's perception of a defendant or witness positively or negatively, can reduce the coerciveness or control of lawyers, and is far more verbally active than generally realised, which strongly affects the court's power relations.

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[191] S. Berk-Seligson, The bilingual courtroom (2002) at 204

[192] Also J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 23

[193] S. Berk-Seligson, The bilingual courtroom (2002)

[194] S. Berk-Seligson, The bilingual courtroom (2002) at 25 & S. Berk-Seligson, *Bilingual court proceedings: the role of the court interpreter* IN Language in the judicial process (J.N. Levi & A.G. Walker, eds.)(New York: Plenum 1990) at 156-9

As Tribe puts it, "working with an interpreter is a qualitatively different experience from working without one"[195], and many further interpreting studies have concerned themselves with the impact of interpreting on the adversarial nature of the trial, and on control and power relations in the courtroom, with a particular focus on the question and answer process of witness examination. Rigney finds, for example, that interpreters alter the control of attorneys over testifying witnesses by changing the aspect of questions,[196] and Hale demonstrates how Spanish/English interpreters systematically leave out or incorrectly translate discourse markers, thus altering the speaker's intentions.[197] Hale and Gibbons find that interpreters consistently change the tenor of questions and render indirect questions as direct ones, thereby reducing politeness and impacting the relationship between the attorney and the witness.[198]

Many studies conclude that their findings have serious implications for "lawyers engaged in hostile cross-examination",[199] and that interpreters alter the flow of cross-examination, making it less adversarial and reducing the lawyer's ability to destroy witness credibility.[200] Wadensjö submits that although interpreters have been shown to alter the judicial process, this transformation is not recognised in practice.[201] The complexity of the interpreting process and the legal setting create multiple possibilities for erroneous, incomplete or misleading interpretation that can also prejudice perceptions of the defendant,[202] yet the quality of interpreting is allegedly "almost consistently ignored by all but language professionals".[203] In the Nuffield study, for example, it was found that in English and Welsh courts an interpreter who is "plainly incompetent" will be replaced, but there is no systematic quality assurance and interpretation is generally carried out by amateurs.[204]

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[195] R. Tribe, *Working with interpreters* IN Race, culture, psychology and law (K. Holt Barrett & W.H. George, eds.)(Thousand Oaks, California; London: Sage, 2005) at 169

[196] A.C. Rigney, *Questioning in Interpreted testimony*, 6 Forensic Linguistics 83 (1999)

[197] S. Hale, *How faithfully do court interpreters render the style of non-English speaking witnesses's testimonies? A data based study of Spanish-English bilingual proceedings,* 4(1) Discourse Studies 25 (2002)

[198] S. Hale & J. Gibbons, *Varying realities: patterned changes in the interpreter's representation of courtroom and external realities*, 20 Applied Linguistics 203 (1999)

[199] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 224

[200] L. Ellison, The adversarial process and the vulnerable witness (New York: Oxford University press, 2001); I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992) at 9

[201] C. Wadensjö, Interpreting in interaction (New York: Addison Wesley Longman, 1998)

[202] See J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996); A.B. Edwards, The practice of court interpreting (Amsterdam/Philadelphia: John Benjamins Publishing Company, 1995)

[203] R. Morris, *Great mischiefs: an historical look at language legislation in Britain* IN Language legislation and linguistic rights (D.A. Kibbee, ed.)(John Benjamins Publishing Company: Amsterdam/Philadelphia, 1998) at 39-40

[204] I. Butler & L. Noaks, Silence in court? (1992) at 20 & 43

The concern in the interpreting literature with justice and due process means that a lack of quality in interpreting is often equated with denying equal access to justice or due process. While competent interpreters can "put the language-handicapped participant on a nearly identical footing with the native speaker of the language of the legal proceedings",[205] engaging unskilled people "means building a weak link into the legal process".[206] O'Malley submits that inaccurate interpreting can affect the fairness of a trial and result in serious injustice, as the court or jury might not be able to fully understand the case being made by one or both parties,[207] while de Jongh considers that unless interpreters are skilled and competent "the right to due process is rendered meaningless".[208] Indeed, González et al. assert that the due process rights of many US citizens have been abridged due to "unqualified, untested, and untrained" interpreters being used.[209] The Nuffield project equates quality interpreting with ensuring justice and equity for linguistically disadvantaged individuals in court, and concludes that only official interpreters should be used.[210] Berk-Seligson considers that justice will be served when all parties can fully understand proceedings and make themselves understood, and when the crucial role of the court interpreter is recognised by the justice system.[211] Enumerating the benefits of quality interpreting for the criminal justice system is less common, though Colin and Morris suggest that competent interpreting enhances the efficiency of proceedings, as experienced interpreters can ensure that things progress speedily, thus saving time, resources and money, and that it reduces the likelihood of costly interpreting-related appeals.[212]

In an analysis of appeals based on claims of poor interpreting in the US, Berk-Seligson found that appellate judges consistently rejected claims of unfairly conducted trials based on errors of interpretation or translation. This mainly resulted from the fact that no concrete proof could be provided as proceedings were transcribed only in English.[213] Judges commonly argued, however, that they would accept as evidence a court record showing the interpreter's answers to be "unresponsive, confusing or unintelligible", or a record of attorney/defendant

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[205] R. Morris, *Interpreters and the legal process*, 146(6759) New Law Journal 1310 (1996)
[206] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 70
[207] T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009) at 210-211
[208] E.M. de Jongh, *Foreign language interpreters in the courtroom: the case for linguistic and cultural proficiency*, 75(3) The Modern Language Journal 285 (1991) at 293
[209] R. Dueñas González, V.F. Vasquez & H. Mikkelson, Fundamentals of court interpreting: theory, policy and practice (Durham, NC: Carolina Academic Press, 1991) at 5
[210] I. Butler & L. Noaks, Silence in court? (1992) at 60 & 68
[211] S. Berk-Seligson, The bilingual courtroom (2002) at 237
[212] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 24
[213] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 199-200

objections to the interpreting at trial.[214] Berk-Seligson naturally points out that firstly, the interpreter could be completely changing the testimony where it would still make sense to the court, and secondly, that the absence of objection is flawed: the defendant might have no or very little comprehension of English and would not be able to detect even 'grossly inaccurate interpreting'. Defendants are provided with an interpreter precisely because they do not understand the language of the court, so it would be difficult for them to pinpoint inaccuracies.[215] Morris identifies another basic difficulty in the fact that lawyers are frequently unaware of interpreting problems, but because the LEP defendant is reliant on the interpreter for communication with the lawyer and a sub-standard interpreter may not pass on any such comments, "such motions are unlikely to be made during the proceedings."[216] If it is an 'exotic' language, it is also unlikely that anyone in court will understand.[217]

On the question of who should assess quality, O'Malley says that ensuring that the interpreting is competent "rests with the appropriate agencies of the state" and that the court should satisfy itself as to the competence of the interpreter,[218] though Morris points out that the trial judge might not be well placed to assess issues of quality as they often lack "the requisite language skills to objectively judge the interpreter's performance."[219]

Conclusion

This chapter aimed to explore in detail the reasons why legal language or court discourse pose difficulties for those who are not legal professionals, to consider how this affects a person with no or limited fluency in the court's language, and to analyse the impact of, and issues raised by court interpreting where this is provided. It was found that legal language has historically diverged from the language of everyday use and that current legal language is also shaped by its historical linguistic roots. Legal jargon and legalese were found to be complex, technical, formal and often archaic, and these characteristics, among others, render legal language extremely difficult to understand for the average layperson. This complexity has raised the potentially paradoxical nature of some basic principles of justice including the requirement

[214] S. Berk-Seligson, The bilingual courtroom (2002) at 199-200
[215] See e.g. S. del Valle, Language rights and the law in the United States: finding our voices (Clevedon, England; Buffalo NY: Multilingual Matters, Ltd., 2003) and V. Benmaman, *Interpreter issues on appeal*, Proteus: Newsletter of the National Association of Judiciary Interpreters and Translators Volume IX No. 4 (Fall 2000)
[216] R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999) at 11
[217] S. Berk-Seligson, The bilingual courtroom (2002) at 202-3
[218] T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009) at 210-211
[219] R. Morris, *The face of justice: historical aspects of court interpreting*, 4(1) Interpreting 97 (1999) at 10

that justice should be seen to be done – legal language obscures the view – and that ignorance of the law is no excuse; if the law cannot be understood, how can it be known?

Legal language is often associated with elitism, exclusion, control and power; lawyers and judges form an elite, professional group that legal language serves to mark and protect, and in the courtroom legal professionals, through their control of language, have the greatest power over discourse. Language is considered a weapon of the lawyer that can be used to disadvantage those with less linguistic prowess, or to mitigate culpability of the side the lawyer is representing, and the adversarial trial has been likened to a battle of words as well as a story-telling process where the average defendant is at a disadvantage, particularly if he or she is unfamiliar with the nature of proceedings. Aside from comprehension issues, research has shown that some court users are more successful in their interaction with the law precisely because they can adopt appropriate language and have the ability to 'think like a lawyer' and transform 'facts' into a framework that corresponds to that of the law and the court. These court users are more likely to have a higher level of education, have possible experience in business or law, and be of higher social status. It is possible that repeat court users (or offenders) may also be able to interact more successfully, regardless of social status. The research strongly implies that from a linguistic perspective a defendant, particularly one with low levels of education or low social status, is at a serious disadvantage without legal representation, and that immigrant, ethnic or foreign groups are presented with serious challenges from the perspective both of language and procedure.

The provision of interpreters is often linked with justice and due process, or the need to ensure that defendants can understand and participate in their trial. It is also a means by which the court and court personnel can understand testimony, carry out their duties efficiently, conduct business, and effectively prosecute crime. While the non-provision of interpreters is one issue, another is the process by which judges decide on whether an interpreter is needed, and concerns have been raised that this is not effectively done. The literature suggests that the interpreter's task is complex and requires a multitude of skills, fluency in two languages being the most basic but only the starting point. It was also found that courts often have expectations of the interpreter that can create difficulties and are based on incorrect linguistic assumptions, such as the requirement of some legal systems for 'verbatim' interpreting; the notion that all interpreters can and will produce perfect interpretations; and the belief that a bilingual trial is effectively the same as a monolingual

one, and that the interpreter acts merely as a mouthpiece and does not have any effect on proceedings. While interpreters are generally expected to be impartial, defendants often consider them to be on their side, a 'saviour' figure, which can put the interpreter in a difficult position. They are also expected to be neutral, but in practice this is sometimes found to be difficult and many interpreters consider their role to include aspects of mediation and advocacy. The literature suggests that courts and legal professionals have traditionally displayed very negative attitudes towards interpreters, who in turn have often found their treatment by courts to be less than satisfactory.

It has been demonstrated that, far from not having any effect on the trial, the interpretation of proceedings often significantly alters its flow and style; interpreters tend to render the speech of defendants as more 'powerless' than it was originally, thus making it more probable that the defendant will be negatively perceived in terms of competence, intelligence and credibility. Interpreting also alters the speech of lawyers, and in the context of witness examination has been held to lessen the coerciveness of questions and impact the relationship between the lawyer and the witness, amongst other influences. A lack of quality in interpreting has been held to impact seriously on the fairness of trials and access to justice, but has rarely been successfully challenged, at least in US courts of appeal. A central concern raised in this regard is that an LEP defendant is not in a position to recognise poor interpreting quality, lawyers are often unaware of interpreting difficulties, and judges might not be in a position to assess quality. The possible implications are that quality should be ensured through training and the certification of interpreters, while monitoring of interpreter quality should be carried out independently.

Chapter Three: The Right to an Interpreter in Ireland

Section A: Sources of the right to an interpreter

The Irish legal system is based on the English common law tradition; the "hundreds of thousands of decisions which have been delivered by courts over the centuries" which the doctrine of precedent makes binding.[1] Taking precedence over common law is legislation, and superseding both is the 1937 Irish Constitution. European Community law takes precedence over national law, and Ireland takes a dualist approach to international law[2], such that unless the instrument is incorporated into Irish law it is not enforceable domestically, though it may have persuasive value as "Irish courts will interpret domestic law in light of the State's international obligations".[3]

The two most important international instruments for the purposes of understanding the right to an interpreter in Ireland are the European Convention on Human Rights[4] [ECHR] and the International Covenant on Civil and Political Rights[5] [ICCPR]; Ireland has ratified both and should ensure that its law and practice is consistent with the rights protected therein.[6] Individuals may use the complaints mechanisms of the European Court of Human Rights [ECrtHR] and the Human Rights Committee [HRC] in claiming violation of rights,[7] and the case-

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[1] R. Byrne & J.P. McCutcheon, The Irish legal system (Dublin: Butterworths, 1996)

[2] Irish Constitution 1937, Article 29.6; for a discussion of the political 'externalisation' of international human rights obligation see D. O'Connell, *Watched kettles boil (slowly): the impact of the ECHR Act 2003* IN ECHR and Irish Law (U. Kilkelly, ed.)(Bristol: Jordans, 2009) and D. O'Connell, S. Cummiskey, E. Meeneghan & P. O'Connell, ECHR Act 2003: a preliminary assessment of impact (Dublin : Dublin Solicitors Bar Association ; Law Society of Ireland, 2006)

[3] *Ó Domhnaill v Merrick* [1984] I.R. 151

[4] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953)

[5] International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171, (entered into force Mar. 23, 1976)

[6] The HRC has expressed concern about the status of the ICCPR in Irish law and has cautioned the Irish government against focussing on European mechanisms to the exclusion of other international mechanisms in the area of rights protection; Concluding Observations of the Human Rights Committee on Ireland's state report, 3 August 1993, UN Doc. CCPR/C/79/Add.21; Concluding Observations of the Human Rights Committee on Ireland's state report, 19 July 2000, UN Doc CCPR/C/SR 848

[7] ICCPR: the Optional Protocol allowing individual communications must be ratified (Ireland has); only Covenant rights can be adjudicated; admissibility criteria must be met (the complaint cannot be under consideration by another international body; all domestic remedies must have been exhausted). Views of the HRC are not binding. For the complaints process see e.g. D. Fottrell, *Reporting to the UN Human Rights Committee—A ruse by any other name? Lessons for international human rights supervision from recent Irish experiences,* 19 Irish Law Times 61 (2001); for ECtHR see Law Society of Ireland human rights law manual (B, Moriarty & A. Mooney Cotter, eds.)(Oxford: Oxford University Press, 2004) at 73-4

law of both bodies, along with the HRC's General Comments, are important in interpreting the right to an interpreter. The European Convention on Human Rights Act 2003[8] incorporates the EHCR into Irish law at a sub-constitutional level, giving it 'further effect': Section 4 requires that judicial notice be taken of Convention provisions and ECtHR judgments, advisory opinions and decisions, and Byrne and McCutcheon submit that the jurisprudence of the ECtHR is increasingly being relied on in Irish courts, particularly in areas related to equality, housing, immigration and criminal procedure.[9] O'Connell notes that the ECHR and ECtHR case-law are increasingly referenced in judgments "to bolster the reasoning of Irish courts",[10] and O'Connell et al. suggest that they are routinely invoked in judicial review,[11] while O'Donnell submits that this is most notable at superior court level and often in judicial reviews of the asylum process, while in the lower courts the Convention is not being raised "with any great conviction" or at all.[12]

As part of the right to a fair trial, the ECHR and the ICCPR provide that everybody charged with a criminal offence has the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court."[13] Fairness, equality before the court and the law, and equal access to justice are at the core of the right; international law holds all persons "equal before the courts and tribunals" and "entitled to a fair and public hearing"[14] when charged with a criminal offence, and the right to an interpreter essentially derives from the fact that this means not just to be present but also to be able to hear and follow proceedings.[15] The Human Rights Committee also links the right to an effective guarantee of access to the administration of justice,[16] and O'Malley clarifies that where a person is unable to understand or meaningfully participate due to linguistic difficulties, they "cannot be said to be present at trial in a genuine sense."[17] He finds that Ireland has an obligation arising from

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[8] European Convention On Human Rights Act 2003, No. 20/2003

[9] R. Byrne & J.P McCutcheon, The Irish legal system (Dublin: Bloomsbury Professional, 2009) at 812

[10] D. O'Connell, *Watched kettles boil (slowly): the impact of the ECHR Act 2003* IN ECHR and Irish Law (U. Kilkelly, ed.)(Bristol: Jordans, 2009) at 5

[11] D. O'Connell, S. Cummiskey, E. Meeneghan & P. O'Connell, ECHR Act 2003: a preliminary assessment of impact (Dublin : Dublin Solicitors Bar Association ; Law Society of Ireland, 2006)

[12] Judge T.E. O'Donnell, *The Constitution, The European Convention on Human Rights Act 2003 and the District Court – a personal view from a judicial perspective*, 1 Judicial Studies Institute Journal 137 (2007) at 147

[13] ECHR art. 6(3)(e); ICCPR art. 14(3)(f). The right first appeared without any apparent controversy in the thirteenth draft of the ECHR at the end of the fifth session of the former Commission on Human Rights [the Commission] see S. Trechsel, Human rights in criminal proceedings (Oxford: Oxford University Press, 2005) at 328

[14] ICCPR art. 14 & ECHR art. 6(1)

[15] *Roos v Sweden*, App. No. 19798/92 (April 6, 1994); *Stanford v United Kingdom*, App. No. 16757/90 (Series A, No. 282-A)(Feb. 23, 1994); *Colozza v Italy*, App. No. 9024/80, 7 E.H.R.R. 516 (February 12, 1985)

[16] 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)

[17] T. O'Malley, The Criminal Process (Dublin: Round Hall - Thomson Reuters, 2009) at 113-4 on *Kunnath v State* [1993] 1 W.L.R 1315, [1993] 4 All E.R. 30, 98 Cr. App. R. 455

the international legal framework of Irish law and practice to "within reason, accommodate the cultural and linguistic diversity of the population."[18]

All EU Member States have ratified the ECHR; the Treaty on the European Union provides for the protection of ECHR rights,[19] and the EU Charter of Fundamental Rights explicitly protects the rights of criminal procedure, specifically that of a fair trial and the rights of the defence.[20] An important aim of the EU is judicial cooperation and the principle of mutual recognition between Member States,[21] but based on European Commission research and the large volume of ECtHR cases indicating inconsistent observation of procedural safeguards across Member States, the Commission decided that EU action was justified[22] and a Green Paper on procedural safeguards in 2003[23] was followed by a Proposal for a Framework Decision (FD) on certain Procedural rights in Criminal Proceedings in 2004.[24] The proposed FD focussed on five areas of procedure, one of which was free interpretation and translation, but it failed to garner unanimous approval and was abandoned in 2007. A step-by-step approach to establishing common minimum procedural rights was adopted,[25] and because the right to free legal interpreting and translation had been the least controversial of the proposed rights, this became the first step; a proposed FD was adopted in July 2009[26] but became obsolete with the entry into force of the Lisbon Treaty.[27] A proposed Directive, similar to and replacing the proposed FD, was adopted by the European Parliament in June 2010 with some amendments, and the final text of the Directive was adopted by the Council of the European Union in October 2010; it sets out common minimal rules for the right to interpretation and translation

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[18] T. O'Malley, The Criminal Process (Dublin: Round Hall - Thomson Reuters, 2009) at 207

[19] Treaty on European Union [TEU, Maastricht Treaty], 1992 O.J.C. 191/01, Feb. 7, 1992 (entered into force Nov. 1, 1993)

[20] EU Charter of Fundamental Rights arts. 47 & 48, 2000 O.J.C. 364/1, proclaimed in Nice Dec. 7, 2000. Art. 48 is considered to have "the same meaning and scope" as ECHR arts. 6(2)&(3) [Explanations relating to the Charter, Nov. 10, 2000] The Charter was given binding legal effect by the Treaty of Lisbon [amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 2007 O.J.C. 306/01, Dec. 13, 2007 (entered into force Dec. 1, 2009)]

[21] The Tampere European Council (Presidency Conclusions) Oct. 15-6, 1999, Conclusion 33; Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, 2001 O.J.C. 12/02, Jan. 15, 2001

[22] T. Spronken & M. Attinger, *Freedom, security and justice- procedural rights in criminal proceedings: existing level of safeguards in the European Union*. European Commission, 12 December 2005, at http://arno.unimaas.nl/show.cgi?fid=3891 (last accessed 8 September 2010) at 6

[23] European Commission Green Paper, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, COM (2003) 75, Feb. 19, 2003

[24] Proposal for Council Framework Decision on certain Procedural rights in Criminal Proceedings throughout the European Union, Brussels, 28 April 2004, COM (2004) 328 final, 2004/0113 (CNS)

[25] Council of the European Union, Resolution on a Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, O.J.C. 295/01, Dec. 4, 2009; European Council made Roadmap part of Stockholm programme, adopted on 10 December 2009

[26] Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings, COM (2009) 338 final 2009/0101 (CNS), July 9, 2009

[27] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 2007 O.J.C. 306/01, Dec. 13, 2007 (entered into force Dec. 1, 2009)

in criminal proceedings.[28] The new Directive will be considered in detail at the end of this chapter.

Ireland chose to opt in to this legislation, which is interesting in light of its vigorous opposition to the 2004 proposed FD on the basis that Ireland already "has a comprehensive set of procedural rights in place which exceed those in the current proposal."[29] However, although there is an entitlement to conduct a case through either Irish or English,[30] there is no specific constitutional or statutory right to an interpreter in Ireland. Some cases dating back to the Free State courts consider the Irish language issue from the perspective of a constitutional right, while the reasoning used in others is based on principles of natural justice including the right to understand one's trial,[31] a distinction which makes the latter rulings particularly relevant for LEP defendants. The Irish Constitution makes all citizens, as human persons, equal before the law, and provides that anyone charged with a criminal offence must be tried in due course of law; this equates to and includes due process of law and basic principles of justice.[32] In 1929 Kennedy C.J. recognised that should the language of the defendant differ from that of the court, "means of interpreting (...) should be provided";[33] Sullivan C.J held in 1936 that not interpreting evidence for the defendant contravened "one of the fundamental principles of the administration of justice";[34] and in *O'Monachain v An Taoiseach*[35] the Supreme Court stated that "[i]t is a fundamental principle of law - part of natural justice which is not

[28] Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, PE-CONS 27/10, Sep. 24, 2010 (not yet published in the Official Journal); Member States will have three years to implement the Directive into national law

[29] Dáil Debates, Volume 638: Written answers – EU Directives, Brian Lenihan, Minister for Justice, Equality and Law Reform, Sep. 26, 2007. It was also opposed to the FD on the basis of the EU's lack of competence to legislate in the area of procedural safeguards; under the Lisbon Treaty Ireland can opt in or out of any legislation that falls under Title V: Area of Freedom, Justice and Security, which includes all areas of criminal law. See also D. O'Connell, *Watched kettles boil (slowly): the impact of the ECHR Act 2003* IN ECHR and Irish Law (U. Kilkelly, ed.)(Bristol: Jordans, 2009) on

[30] Irish Constitution 1937 art. 8: Irish and English equal for official purposes; Official Languages Act 2003, Section 8 makes the right explicit; see also N. Nic Shuibhne, *State duty and the Irish language*, 4(1) Dublin University Law Journal 33 (1997) who points out that the court first recognised this as a right in *An Stát (Mac Fhearraigh) v Mac Gamhna,* unreported, High Court, July 1, 1983. Other relevant cases include *O'Coleain v D.J. Crotty* [1927] 61 I.L.T.R. 81, *The State (Buchan) v Coyne* [1936] 70 I.L.T.R. 185, *O'Monachain v An Taoiseach*, unreported, Supreme Court, July 16, 1982

[31] N. Nic Shuibhne, *The Constitution, the courts and the Irish language* IN Ireland's evolving Constitution: 1937-1997: Collected essays (T. Murphy & P. Twomey, eds.)(Oxford: Hart Publishing, 1998)

[32] Irish Constitution 1937 art. 38.1; *Conroy v Attorney General* [1965] I.R. 411 *per* Kenny J; *State (Healy) v Donoghue* [1976] I.R. 325 *per* Gannon J

[33] *Attorney General v Joyce and Walsh,* [1929] I.R. 526, at 531

[34] *State (Buchan) v Coyne*, (1936) 70 I.L.T.R. 185, at 186. See further Ivana Bacik, *Breaking the Language Barrier: Access to Justice in the New Ireland*, 2 Judicial Studies Institute Journal 109 (2007) at 116

[35] [1986] I.L.R.M. 660

permitted to be set aside - that it is neither just nor lawful to hear a case in any language" that the defendant does not understand.[36]

Interpreting issues have also arisen and been addressed in Irish courts in more recent years in relation to LEP defendants. To consider the extent to which Irish cases have dealt with court interpreting matters, the following table summarises 97 cases found to contain the term 'interpreter'.[37]

	Not Relevant	Relevant	TOTAL
Not Relevant	68		
Asylum/judicial review		20	
Criminal/other		9	
TOTAL	**68**	**29**	**97**

'Relevant' cases are those that comment in some way on court interpreting, above and beyond simply containing the term. Most cases are not relevant; many asylum/judicial review cases mention that an interpreter was used, needed or requested during proceedings; some reference the refugee application process,[38] a number involve interpreting issues specific to the asylum process,[39] and there are sundry references to statutory interpretation, the European Arrest Warrant, and Christ as an interpreter of morality. 70% of relevant cases are (mainly High court) judicial review proceedings of the asylum process. These are civil in nature, and as such may not demand the same procedural standards as are required in criminal cases; they are principally included for their insight into the relevant ideology of Irish judges. Of the remaining 9 cases, one is an Irish language case, another involves an LEP plaintiff, and one is a civil case. Only six are criminal cases with LEP defendants; two comment on interpreting without referencing whether or how interpreting is related to the grounds for appeal, while

[36] On Irish language in courts, in G. Carey, *Criminal Trials and Language Rights*, 13(1) Irish Criminal Law Journal 15 (2003)

[37] Main source: Westlaw.ie supplemented by Courts Service judgments. Cases date from 1999 to August 2010

[38] Refugee Act 1996, No. 17/1996, Section 11(2); that interviews will be conducted through an interpreter "where necessary and possible"; the 'Information Guide for Applicants for Refugee Status' that access to facilities will be provided including "where available, to an interpreter" (now Information Leaflet for Applicants for Refugee Status in Ireland); and letters from the Minister for Justice, that a 'competent' interpreter could be provided for interviews

[39] Particularly *A.A. v The Minister for Justice, Equality and Law Reform & Olive Brennan sitting as The Refugee Appeals Tribunal* [2010] I.E.H.C. 143 on language analysis testing; *M.M.A. v The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal,* unreported, High Court, Clark J., May 12, 2009 where problems with spelling and language translation caused failed asylum application and leave to apply for judicial review was granted. On interpreting and credibility see Conclusion.

the final four cases are criminal appeals that are clearly based, at least in part, on interpreting issues.

Irish courts also draw, and have long drawn, on the case-law of other common-law jurisdictions from which there are a number of authoritative judgments on the right to interpreting at trial. As early as 1909 the failure to provide 'translation' was found in *R. v Kwok Leung and Others*,[40] according to O'Malley often considered the seminal case on the matter, to be contrary to the "fundamental and elemental principles of justice".[41] In *R. v Lee Kun*[42] in the English Court of Criminal Appeal the right was also linked to the right to confront witnesses, and in *United States ex rel. Negron*,[43] the 2nd U.S. Circuit Court of Appeals held that interpreters should be provided "as a matter of simple humaneness". O'Malley considers the decision of the Supreme Court of Canada in *R. v Tran*[44] to be a leading modern authority on interpreting which, although primarily concerned with Section 14 of the Canadian Charter of Rights and Freedoms, can be usefully applied in Ireland;[45] here the right to interpreting was associated with Canada's claim to be multicultural, but more relevantly with "basic notions of justice, including the appearance of fairness" and the assurance that a person on a criminal charge "hears the case against him or her and is given a full opportunity to answer it."[46] Similarly in *R. West London Youth Court, Ex p. N*[47] Simon Brown L.J. held that it is an essential element of a fair trial that the defendant can understand the case against him and the nature of proceedings, and that he can advance his case by giving evidence that the court can understand.

The legitimacy of providing an interpreter for someone who does not speak or understand the language of court and who has been charged with a criminal offence is based on broadly similar ideas of fairness, equality and justice. However the analysis of the previous chapter suggested that provision is only a starting point in ensuring equal access to justice, and the EHCR and ICCPR specify that the right to an interpreter is a *minimum* right; the following section thus provides a more detailed analysis of the right, and considers how various sources

[40] [1909] Hong Kong L.R. 161; Hong Kong Criminal Court
[41] *R. v Kwok Leung and Others* [1909] Hong Kong L.R. 161; T. O'Malley, The Criminal Process (Dublin: Round Hall - Thomson Reuters, 2009) at 205
[42] *R. v Lee Kun* [1915] 11 Cr. App. R. *293* also cited in *Attorney-General v Joyce and Walsh* [1929] I.R. 526
[43] *United States ex rel. Negron v the State of New York*, 310 F. Supp. 1304 (1970) and 434 F.2d 386 (1970) cited in R. Morris, *The Face of Justice: Historical Aspects of Court Interpreting,* 4(1) International Journal of Research and Practice in Interpreting 97 (1999) at 117
[44] [1994] 2 S.C.R. 951
[45] T. O'Malley, The Criminal Process (Dublin: Round Hall - Thomson Reuters, 2009) at 206
[46] *R v Tran* [1994] 2 S.C.R. 951
[47] [2000] 1 W.L.R. 2368, [2000] 1 All E.R. 823 cited in T. O'Malley, The Criminal Process (2009) at 206

of law have dealt with issues of payment, entitlement to the right, what is to be interpreted, and interpreter competence.

Section B: The Substance of the right to an interpreter

Who Pays?

The right, as per the ECHR and the ICCPR, is for "the free assistance" of an interpreter; provision should be based on linguistic necessity and is unrelated to the defendant's financial position, the principle being that the cost of hiring an interpreter could influence the accused's decision to do so, which in turn could affect the fairness of the trial. The position was confirmed by the ECtHR in *Luedicke, Belkacem & Koç v Germany*[48] and again in *Öztürk v Germany*[49] in its conclusion that, in light of their context as well as their object and purpose, the words "free"/"gratuitement" could not be otherwise interpreted than as having "the unqualified meaning they ordinarily have in both of the Court's official languages" which is "neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration."[50] It was further specified that charges for interpreting services may not be made after the conclusion of the case, and the HRC in its original General Comment 13 stated that this applies regardless of the outcome of the case,[51] though General Comment 32 replacing General Comment 13 did not re-assert this.

Two other landmark ECtHR cases have dealt with the issue; in *Işyar v Bulgaria*[52] a violation of article 6(3)(e) was found where the applicant, found guilty of drug trafficking by a Bulgarian District Court, incurred full costs at District Court level, and interpreting costs when the case later came to the Supreme Court. However in *Abkingöl v Germany*[53] the ECtHR held that costs *can* be awarded for translations not necessary for the accused's defence; the applicant had been found guilty of being active in illegal Turkish organisations based largely on phone conversations tapped during the investigation which had been translated into German from Kurdish and Turkish. The applicant was ordered to pay costs, including the translation costs;

[48] *Luedicke, Belkacem & Koç v Germany*, 2 E.H.R.R. 149 (Ser. A No. 29) (Nov. 28, 1978) § 42
[49] 6 E.H.R.R. 409 (Ser. A No. 73) (Feb. 21, 1984)
[50] *Luedicke, Belkacem & Koç v Germany* § 40
[51] Human Rights Committee General Comment No. 13, 8, April 13, 1984, *Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14),* (21st Session, 1984), Compilation of General Comments & General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994)
[52] App. No. 391/03 (Nov. 20, 2008), referring to the Vienna Convention on the Law of Treaties arts. 31-33, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)
[53] App. No. 74235/01 (Nov. 18, 2004)

the Bavarian Court of Appeal upheld this, finding it did *not* violate the applicant's ECHR rights as the translation was for the investigation, not the defence, and that costs were thus excluded from Article 6(3)(e). The ECtHR agreed that the translation was necessary for the criminal investigation but not the defence as the applicant already knew the content of the conversations, and that it did not therefore fall under the protection of Article 6(3)(e).

Who is entitled to an interpreter?

The ECHR provision states that "everyone" charged with a criminal offence is entitled to an interpreter,[54] and the ICCPR provides for "full equality" in accessing procedural guarantees.[55] HRC General Comment 32 specifies that the right of access to courts is "not limited to citizens of States parties" but applies to all individuals in or subject to the jurisdiction of the State Party "regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons".[56]

The right is specified as applying to those charged with a *criminal* offence, which HRC General Comment 32 defines as an act "declared to be punishable under domestic criminal law", though it clarifies that it may also apply where acts are not so qualified, but are criminal in nature with sanctions that "must be regarded as penal because of their purpose, character or severity". As different legal systems have different classifications of what constitutes a criminal offence, this is clearly intended to ensure as wide a degree of protection as possible, and to include some minor offences decriminalised under domestic legislation. One such ECtHR case, *Öztürk v Germany*[57], involved a person charged with a minor traffic violation in a German District Court where this no longer constituted a criminal, but a regulatory offence; the ECtHR held that the right to an interpreter free of charge applied, as despite having been decriminalised in legislation and only constituting a minor offence with a relatively small penalty, the traffic violation still had a criminal character.

In analysing *Öztürk*, Kidd notes that this conclusion was based on the common denominator approach: assessing criminal nature by comparing the criminal law of other Convention States,

[54] Art. 6(3)
[55] Art. 14(3)
[56] HRC General Comment No. 32; certain groups, including children and women are also specifically protected by other international instruments including the Convention on the Rights of the Child art. 40(2)(6), Nov. 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (entered into force Sep. 2, 1990); Convention on the Elimination of All Forms of Discrimination against Women art. 15(2), Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (entered into force Sep. 3, 1981)
[57] 6 E.H.R.R. 409 (Ser. A No. 73) (Feb. 21, 1984)

and submits as a logical assumption that increasing decriminalisation of minor offences will make these less likely to be considered criminal within the meaning of the ECHR.[58] He sees this as a positive development and asserts that in this case the Convention may have been taken "too far into relatively trifling matters", supporting the dissenting judgment of Judge Bernhardt who commented: "...can it really be said that the object and purpose of Article 6 of the Convention require the same guarantees (including the free assistance of an interpreter) for small traffic offences and similar petty offences, guarantees which are absolutely necessary in genuine criminal cases? I do not think so."[59] The HRC further stipulates that the principle of equality also applies to civil proceedings, such that "[i]n exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined".[60]

Language

The provision of free interpretation is based solely on linguistic necessity and is aimed at defendants who "cannot understand or speak the language" of the court.[61] The ECtHR has held that "it must be clear that the defendant has genuine difficulty in understanding or speaking the language used in court".[62] In *Cuscani v UK*[63], the ECtHR found that the trial judge, as the 'ultimate guardian of fairness', is responsible for ensuring that interpreting is provided where needed;[64] where none is provided, it is for the judicial authorities to prove that the defendant is adequately fluent, and not for the defendant to demonstrate that he is not.[65] However in *Santa Cruz Ruiz v UK*[66] the defendant having lived in the country for 15 years was accepted as sufficient guarantee of fluency despite the applicant's claim to the contrary, suggesting that assessment may be based on objective facts rather than competence; the ECtHR has shown itself willing to accept the conclusions of domestic authorities that have conducted 'serious examinations'.[67]

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[58] C.J.F. Kidd, *Disciplinary proceedings and the right to a fair criminal trial under the European Convention on Human Rights*, 36 International & Comparative Law Quarterly 856 (1987)
[59] *Öztürk v Germany*, 6 E.H.R.R. 409 (Ser. A No. 73) (Feb. 21, 1984) at 438
[60] HRC General Comment No. 32; Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007)
[61] ECHR art. 6(3)(e) & ICCPR 14(3)(f)
[62] *Luedicke, Belkacem & Koç v Germany,* 2 E.H.R.R. 149 (Ser. A No. 29) (Nov. 28, 1978)
[63] App. No. 32771/96, 36 E.H.R.R. 2 (Sep. 24, 2002)
[64] *Cuscani v UK*, App. No. 32771/96, 36 E.H.R.R. 2 (Sep. 24, 2002) §§ 38-40
[65] *Brozicek v Italy*, App. No. 10964/84, 23 Eur. Ct. H. R. (Dec. 19, 1989)
[66] App. No. 26109/95 (Oct. 22, 1997)(unreported)
[67] *SEK v Switzerland,* App. No. 18595/91 (Jan. 12, 1994)(unreported)

In *Hermi v Italy*,[68] it was further held by the ECtHR that the nature of the offence should be considered in assessing whether complexity is such as to "require a detailed knowledge of the language used in court",[69] and this was upheld in *Amer v Turkey*[70] where both the defendant's linguistic knowledge *and* the nature of the offence were considered before finding a violation of Article 6(1) taken in conjunction with Article 6(3)(e);[71] no interpreter had been provided during police questioning, but serious accusations had been made during this time that were "crucial and heavily relied on" in the trial court's conviction, and although the applicant spoke some Turkish, this was insufficient in the circumstances.

What is absolutely clear is that the right is strictly one of procedural fairness; it does not address problems or needs of linguistic minorities[72] and it is not a right to use one's mother tongue or a language of choice.[73] In *Dominique Guesdon v France*[74], for example, the HRC upheld the refusal of the French Tribunal Correctionnel to allow the defendant and his twelve witnesses address the court and testify in Breton through an interpreter as the parties had not demonstrated an inability to communicate in French, the court's official language,[75] and General Comment 32 states that "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." The principle has been re-iterated by the ECtHR in *Bideault v France*[76], *K v France*[77], and *Isop v Austria*,[78] among other cases, and Trechsel submits that authorities are entitled to charge for interpreting expenses incurred by defendants who *would* have been able to communicate in the language of the court, and that insisting on an interpreter for reasons other than language ability is an abuse of the right.[79]

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[68] App. No. 18114/02 (Oct. 18, 2006)
[69] *Hermi v Italy,* App. No. 18114/02 (Oct. 18, 2006) § 71 citing *Güngör v Germany* (dec.), App. No. 31540/96, (May 17, 2001); affirmed in *Protopapa v Turkey*, App. No. 16084/90 (Feb. 24, 2009) § 81
[70] App. No. 25720/02 (Jan. 13, 2009)
[71] *Amer v Turkey*, App. No. 25720/02 (Jan. 13, 2009) § 83
[72] *Zana v Turkey*, App. No. 18954/91, 94 Eur. Ct. H. R. (Nov. 25, 1997), HRC: *Yves Cadoret and Hervé Le Bihan v France*, Communication No. 221/1987, U.N. Doc. CCPR/C/41/D/221/1987 at 43 (1991) § 5.6; *Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v Georgia*, Communications Nos. 623/1995, 624/1995, 626/1995, 627/1995, U.N. Docs. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995 (1998); *Shukuru Juma v Australia*, Communication No 984/2001, U.N. Doc. CCPR/C/78/D/984/2001 (2003)
[73] HRC General Comment No. 23, *The Rights of Minorities (Art. 27),* April 8, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5 at para. 5.3
[74] Communication No. 219/1986, U. N. Doc. CCPR/C/39/D/219/1986 (1990)
[75] *Dominique Guesdon v France* Communication No. 219/1986, U. N. Doc. CCPR/C/39/D/219/1986 (1990) § 10.2
[76] App. No. 11261/84, 48 DR 232 (1986)
[77] 35 DR 203 (1983)
[78] App. 808/60, 5 YB 108 (1962)
[79] S. Trechsel, Human rights in criminal proceedings (Oxford: Oxford University Press, 2005) at 328

O'Malley points out that at common law the right is also functional; "[t]he key question is always whether the accused person or witness actually needs an interpreter."[80] In *Andre Mercure v Attorney General for Saskatchewan*[81] the Supreme Court of Canada found that "[t]he right to be understood is not a language right" but a requirement of due process,[82] and this case has been cited in Irish courts.[83] The Court further held in *R v Tran*[84] that "it must be clear that the accused was actually in need of interpreter assistance...",[85] but also held, unlike the ECtHR, that if no interpreter is provided it is for the *complainant* to establish that one was needed. However common law jurisprudence also suggests that there is no automatic right to waive the right to interpretation, and that there is an onus on the judge to provide interpretation where appropriate, even where this has been declined or no request has been made;[86] in the English Court of Criminal Appeal case, *R. v Lee Kun*,[87] it was held that evidence should be interpreted to a 'foreigner accused' unless a wish is expressed to dispense with it *and* the "judge thinks fit to permit the omission", which he should only do if confident that the accused understands proceedings.[88] O'Malley submits that courts should be cautious about accepting a waiver as it goes beyond individual justice to the "maintenance of public confidence in the justice system", and a waiver must not be permitted if the result will be an unconstitutionally run trial,[89] and he adds that as assessment of competence can be complex courts should proceed with care.[90]

In a number of Irish High Court cases, leave for judicial review has been refused where no clear need for an interpreter was shown, suggesting that Irish courts, too, consider the right to be a functional one. One ground for the judicial review application in *Fuwa Oladale Olawale v ORAC & Anor*[91] was that an interpreter had not been supplied by the Office of the Refugee Applications Commissioner (ORAC). Smyth J. considered this a baseless claim as the applicant had explicitly stated he was happy to be questioned in English, had signed a form stating that

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[80] T. O'Malley, The Criminal Process (Dublin: Round Hall - Thomson Reuters, 2009) at 209
[81] [1988] S.C.R. 234
[82] *Andre Mercure v Attorney General for Saskatchewan* [1988] S.C.R. 234, at 237
[83] *MacCarthaigh v Ireland* [1999] 1 I.R. 200; *MacCarthaigh v Minister for Justice, Equality and Law Reform* [2002] 6 I.C.L.M.D. 70
[84] [1994] 2 S.C.R. 951
[85] *R v Tran* [1994] 2 S.C.R. 951
[86] T. O'Malley, The Criminal Process at 205
[87] [1915] 11 Cr. App. R. 293
[88] *R. v Lee Kun* [1915] 11 Cr. App. R. 293 at 300
[89] T. O'Malley, The Criminal Process at 205 at 211 citing e.g. *R v Dow* [2009] Q.C.C.A. 478 (Quebec Court of Appeal)
[90] T. O'Malley, The Criminal Process at 205
[91] *Fuwa Oladale Olawale v The Office of the Refugee Applications Commissioner, The Minister for Justice, Equality and Law Reform,* unreported, High Court, Smyth J., October 3, 2002

his language was English, and had signed a receipt for interview notes specifying that an interpreter was not needed; the Judge held that "[s]eeking to advance such a ground is spurious science." Similarly, in *S.O.A. v MJELR & Anor*,[92] the applicant claimed that her interview with ORAC had been difficult as there was no interpreter; when asked if she had requested one, she replied "I can't remember" and "No-one asked me", contradictory responses that were considered by Clark J. to undermine her credibility along with the facts that her first language was English, that she had completed the ORAC questionnaire in this language herself, and that her "educated hand and the comprehensive and fluent answers" indicated no language difficulty.

The genuine nature of the claim to need an interpreter was questioned by Smyth J. in *Youssef Benderare v MJELR & Anor*[93], where one of the grounds for seeking judicial review was a lack of fair procedures at the appeals level; the Judge noted that there had been much discussion about whether the applicant "would understand Berber or Algerian or Arabic with an Algerian accent" and that he had claimed after the interview not to have understood the interpreter very well, yet the applicant had been able to travel to, and organise himself upon arrival in Ireland. The Judge further noted that the Tribunal had taken possible problems with the interpreter into account and disregarded inconsistencies in the application which may otherwise have gone to credibility; any disadvantage resulting from defective interpretation, whether "real or imaginary", was therefore irrelevant.

Irish judges have thus condemned claiming a right to an interpreter when none is needed. In the same vein, in *D.P.P. v Ismet Ceka*[94] before the Court of Criminal Appeal, Fennelly J. was also sceptical about a claim that the trial leading to a murder conviction was unfair as, among other things, "the judge failed to give sufficient weight to the fact that the accused was a foreign national with poor knowledge of English". The argument was rejected on the grounds that it had been obvious to the jury that the accused was unable to speak English; he had given evidence through an interpreter, and the prosecution had made every allowance for, and referred to the difficulties created by this several times.

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[92] *S.O.A. v The Minister for Justice, Equality and Law Reform and Judy Blake, Sitting as the Refugee Appeals Tribunal,* unreported, High Court, Clark J., March 24, 2009

[93] *Youssef Benderare v The Minister for Justice Equality and Law Reform, Conor Bowman sitting as The Appeals Authority*, unreported, High Court, Smyth J., October 2, 2002

[94] *D.P.P. v Ismet Ceka* [2004] I.E.C.C.A. 25

On the other hand, a small number of cases in the Court of Criminal Appeal have explicitly recognised the difficulties that can arise when the accused is not Irish or an English speaker; in *The People (at the Suit of the D.P.P.) v Stanislaus Stokowski*[95] Finnegan J. notes the need to take into account that the applicant "is a non-national and that his English is not perfect and indeed he has required an interpreter even for this hearing". In *The People (at the Suit of the D.P.P.) v Vasile Vardoshilli*[96] Finnegan J. suspended the final two years of a ten year sentence for rape, false imprisonment and assault causing harm;[97] two reasons for this were that the trial judge had not taken into account his lack of fluency in English and dependence on an interpreter, and that his ethnic and cultural background would "cause additional hardship to someone who is in prison". However, the decision was also based on a Victim Impact Statement and the victim's "express wish that the applicant should not be subjected to a lengthy period of imprisonment", which makes it less clear the extent to which the language issue influenced the outcome. Cooke J. in the High Court has also recognised that those claiming asylum – and possibly LEP individuals in general by extension – who have been "translated to this jurisdiction from a remote land and an entirely different culture and society" may find proceedings stressful, thereby creating a duty "to ensure that, so far as possible, the fair presentation of the case at a hearing is not, either deliberately or inadvertently, hampered by problems of interpretation, communication, or other difficulties."[98]

What must be interpreted?

Documentation

The right provided by the ECHR and the ICCPR is for an 'interpreter' as opposed to a translator, but case law from the ECtHR shows that the right is not confined to oral proceedings; in *Luedicke, Belkacem & Koç v Germany*[99] the accused's right to an interpreter was held to include all that "which it is necessary for him to understand in order to have the benefit of a

[95] *The People (at the Suit of the D.P.P.) v Stanislaus Stokowski*, unreported, Court of Criminal Appeal, Finnegan J., December 17, 2009

[96] *The People (at the Suit of the D.P.P.) v Vasile Vardoshilli*, unreported, Court of Criminal Appeal, Finnegan J., February 9, 2009

[97] The third factor was the Victim Impact Statement in which the victim expressed the wish that the applicant not be given to a long prison sentence

[98] *M.A.W. v Refugee Appeals Tribunal and The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 330 (unreported, High Court, Cooke J., July 8, 2009). Leave to appeal on grounds of communication difficulties was refused

[99] 2 E.H.R.R. 149 (Ser. A No. 29) (Nov. 28, 1978)

fair trial", including all documentary evidence against him.[100] In *Kamasinski v Austria*[101] it was held to include "documentary material and the pre-trial proceedings", specifically those documents necessary to have knowledge of the case and be able to defend oneself by putting one's own version of events before the court.[102] However more recently in *Hermi v Italy*,[103] the Court noted that because the provision refers to an 'interpreter' and not a 'translator', "oral linguistic assistance may satisfy the requirements of the Convention."[104] In *Amer v Turkey*[105] the court, citing *Luedicke*, more explicitly states that the right is for "the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the criminal proceedings which it is necessary for him or her in order to understand or to have rendered into the court's language".[106]

In the HRC's view, the accused should have access to documentary evidence in the pre-trial period, but the translation of relevant documents is not essential if his lawyer can communicate the necessary details.[107] It has also found that the right applies only during the court hearing and in first instance procedures; it does not address the matter of appeals or other remedies.[108]

Pre-trial proceedings

Any person arrested and/or charged with a criminal offence also has the right to be informed of the reason for arrest and/or any charges against him in a language he understands.[109] In *Brozicek v Italy*[110] before the ECtHR, the accused was unable to speak the language in which the accusation was made, yet on making this known was not provided with a translation; a violation of the ECHR (art. 6) was found as the accused had not been properly summonsed or heard on the charges. In *Kamasinski v Austria*,[111] on the other hand, the Court concluded that

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[100] *Luedicke, Belkacem & Koç v Germany,* 2 E.H.R.R. 149 (Ser. A No. 29) (Nov. 28, 1978) § 48
[101] App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989)
[102] *Kamasinski v Austria*, App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989) § 74
[103] App. No. 18114/02 (Oct. 18, 2006)
[104] *Hermi v Italy,* App. No. 18114/02 (Oct. 18, 2006) § 70
[105] App. No. 25720/02 (Jan. 13, 2009)
[106] *Amer v Turkey*, App. No. 25720/02 (Jan. 13, 2009) § 77
[107] *Harward v Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991 (1994) § 9.5; Harward had taken the same case previously, it had been declared 'manifestly ill-founded' on same grounds
[108] *Nallaratnam Singarasa v Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004) § 7.2
[109] ECHR arts. 5(2) & 6(3)(a), ICCPR art 14(3)(a). See also the non legally binding Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Dec. 9, 1988, G.A. Res. 43/173, U.N. Doc. A/43/49 and Advisory Council of Jurists, *Reference on Torture* - Final Report, Ulaanbaatar, Mongolia, 24-26 August 2005, Part B: Commentary on Minimum Interrogation Standards
[110] *Brozicek v Italy* 12 E.H.R.R. 371 (Ser. A No. 167) (Feb. 14, 1989)
[111] App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989)

in spite of no formal translation being provided, the applicant had been sufficiently informed of the charge, suggesting that the most important factor is not the provision of translation or interpreting, but whether the charge has been understood. The ECtHR held – in more detail – in *Čonka v Belgium*[112] that "any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness", but while the information should be conveyed 'promptly',[113] "it need not be related in its entirety by the arresting officer at the very moment of the arrest"; content and promptness are each to be assessed on their own merits.[114] The same principle was upheld by the ECtHR in *Ladent v Poland*[115] where a violation of article 5 was found as Ladent was neither informed on arrest nor during a ten-day detention in a language he understood of the reason for his arrest, but was furnished with a translation of same on his release.

In Ireland it is "well established that a person must be informed of the reason for his arrest",[116] it was held in *Christie v Leachinsky*[117] that a person does not have to be informed of the reason where "circumstances are such that he must know the general nature of the alleged offence for which he is detained", and that in giving the reason for arrest precise, technical language is not necessary. The 1987 Custody Regulations oblige the member in charge of the station to let the arrested person know "in ordinary language" why he has been arrested, and they provide foreign nationals with a right to consular assistance on arrest, but they do not specify the right to an explanation in a language the suspect understands or the right to an interpreter.[118] In his article on the Human Rights Act 2003, O'Donnell discusses the recent prosecution of a foreign national for drunk-driving in which the only defence involved Article 5(2) of the ECHR, the right to be informed of a charge in a language one understands; he states enigmatically that "[w]hile there was an interpreter in court absolutely no case law was advanced in support of the purported defence", seeming to consider invocation of the Convention insufficient and somehow linking this to the presence of an interpreter; he adds that "[m]atters also took a

[112] App. No. 51564/99 (Feb. 5, 2002)
[113] French: "*dans le plus court délai*"
[114] *Čonka v Belgium*, App. No. 51564/99 (Feb. 5, 2002) § 50
[115] App. No. 11036/03 (March 18, 2008)
[116] A. Ryan, *Arrest and detention: a review of the law*, 10(1) Irish Criminal Law Journal 2 (2000)
[117] [1947] AC 573
[118] The Criminal Justice Act 1984 (Treatment of Persons in Garda Síochána Stations) Regulations 1987, S.I. No. 119/1987, Regulation 8(1)(a) & & 14; Bacik finds this 'extraordinary'. She also looks at specific provisions within the asylum and refugee process; I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 109 (2007)

turn for the worse when the accused kept answering the questions put to him in perfect English!",[119] perhaps a better indication of the invalidity of the defence.

In *The People (at the Suit of the D.P.P.) v Valdas Valiukas*[120] in the Court of Criminal Appeal, one of the principal grounds for appeal was the delay between the time of arrest and when the applicant was informed through an interpreter "in his own language" of his rights and the reason for his detention. Kearns J took a "practical" approach to the matter, saying that "[w]here three foreign nationals from Lithuania arrive into a rural garda station at eight o'clock in the evening it inevitably gives rise to certain practical problems"; the Judge notes that while the delay was not ideal, he was satisfied that "if there was any breach of the regulations it was one of a minor nature" that did not render the detention unlawful or affect the validity of admissions. It seems clear that, as per *Čonka v Belgium*,[121] this would not constitute a violation of the ECHR requirement under Article 5(2) that details be given promptly.

Communication with Counsel

While the ECHR and the ICCPR ensure the right of the accused to "adequate time and facilities (...) to communicate with counsel of his own choosing",[122] in *X v Austria*[123] it was found that the right to an interpreter under the ECHR applied only to communication between the applicant and the judge. In *Lagerblom v Sweden,*[124] the applicant complained that his lawyer only spoke Swedish, but the ECtHR could not "find that he was so handicapped that he could not at all communicate with H. or understand him". While this suggested that there was no automatic right under the ECHR to the interpretation of communication between the accused and his counsel, in a more recent case, *Diallo v Sweden*,[125] the ECtHR noted that the investigation stage is crucial in the preparation of criminal proceedings as the evidence obtained at this stage determines how the offence will be considered; to safeguard against ill-treatment and to avoid incriminating statements being made that are later used in conviction, "as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police" unless there is compelling reason to do otherwise. Vitally, the Court held that "[i]n

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[119] Judge T. E. O'Donnell, *The Constitution, The European Convention on Human Rights Act 2003 and the District Court – a personal view from a judicial perspective*, 1 Judicial Studies Institute Journal 137 (2007) at 151
[120] *The People (at the Suit of the D.P.P.) v Valdas Valiukas*, unreported, Court of Criminal Appeal, Kearns J., April 27, 2009
[121] App. No. 51564/99 (Feb. 5, 2002)
[122] ECHR arts. 3(b) & (c) & ICCPR art. 14(3)(b)
[123] App. No. 6185/73, 2 DR 68 (1975)
[124] *Lagerblom v Sweden*, App. No. 26891/95 (Jan. 14, 2003)
[125] App. No. 13205/07 (Jan. 5, 2010)

the same line of reasoning, the assistance of an interpreter should be provided during the investigating stage" unless compelling reasons can be shown to restrict the right.[126]

In Ireland there is a constitutional right of access to a solicitor on arrest where one has been requested, and there is a legal right to be informed of the right to a lawyer,[127] but while the member in charge must inform the detainee of his right to consult a solicitor, there is no obligation to make sure that the information has been understood; "all that is required is that the relevant information is given to the accused, and the relevant notice is handed to him".[128] The defendant has the right to be represented at trial, they must be given enough time and facilities to prepare their defence, and representation must be effective; although the State does not generally take responsibility for legal aid lawyers, there may be an obligation to intervene where representation is manifestly ineffective and this is brought to their attention.[129] Walsh submits that if representation is so defective as to impede equality of arms, the accused would be denied a fair trial,[130] but he notes that a conviction has never been set aside on the grounds of inadequate legal representation. There is no explicit right to the interpretation of consultations with counsel in Ireland, but where the language barrier is so great as to impede communication, it may be impossible to prepare a full defence or ensure effective representation without an interpreter.

The Speech of Witnesses

In the courtroom, the EHCR and the ICCPR guarantee the right of the accused to examine and to have examined the witnesses against him, and to have witnesses in his defence attend and be examined under the same conditions.[131] In the ECtHR case *Kamasinski v Austria*,[132] however, the complaint that questions directed at witnesses had not been translated was found in and of itself insufficient to establish a violation of art. 6(3)(d) or (e),[133] implying that the onus is on the applicant to show that *not* translating the evidence of witnesses hinders the course of justice.

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[126] *Diallo v Sweden*, App. No. 13205/07 (Jan. 5, 2010) §§ 24-5

[127] Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, S.I. No. 119/1987 Article 8

[128] *D.P.P. v Ivan O'Kelly,* unreported, February 10, 1999

[129] Law Society of Ireland human rights law manual (B. Moriarty & A. Mooney Cotter, eds.)(Oxford: Oxford University Press, 2004) at 127

[130] D. Walsh, Criminal procedure (Dublin: Thomson Round Hall, 2002) at 575

[131] ECHR art. 6(3)(d) & ICCPR art. 14(3)(e)

[132] App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989)

[133] *Kamasinski v Austria,* App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989) § 83

Does the interpreter have to be competent? Defining and appealing competence and responsibilities

The ECHR and ICCPR right is for 'an interpreter', as opposed to a qualified or competent interpreter and, although the adjective 'qualified' is often included by the ECtHR in comments on admissibility,[134] it has been held that the interpreter need not be certified or qualified.[135] In terms of the effective administration of justice, Trechsel considers this reasonable; it may be difficult to find anyone to serve as interpreter for rarer languages, let alone someone with formal qualifications.[136] The interpreter should, however, be competent[137] and the interpreting adequate and 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 events.[138]

In *Baka v Romania*,[139] the ECtHR found no violation of the right to an interpreter where the applicant, who had initially agreed to have a Hungarian-speaking court clerk interpret for him, later claimed that no interpreter had been present and that the clerk's interpreting had been insufficient;[140] according to the ECtHR the applicant had agreed to it, there was no evidence that the interpreting was faulty, and that which the applicant claimed was not interpreted by the clerk was repeated at a later hearing where an interpreter was present. Similarly, in *Diallo v Sweden*[141] the ECtHR found that "sufficient linguistic assistance" was provided to the applicant during pre-trial questioning by a Swedish customs officer who "considered herself sufficiently skilled ... in French, which she had learned at school" as well as having lived in a "French-speaking home for eight years". These cases set a clear precedent for accepting the competence of people without any interpreting training or demonstrated competence in the area - other than basic bilingualism - to interpret in criminal proceedings.

Appeals, burden of proof, and obligations on authorities to ensure effective interpreting

[134] "Everything in the trial was interpreted during the proceedings by qualified translators/interpreters": e.g. *Tasos Asproftas v Turkey*, App. No.16079/90, Eur. Crt. H.R. (Sep. 26, 2002), *Despo Andreou Papi v Turkey*, App. No. 16094/90, (Sep. 26, 2002), *Costas Strati v Turkey*, App. No. 16082/90, (Sep. 26, 2002)
[135] *Kamasinski v Austria* App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989) § 38
[136] S. Trechsel, Human rights in criminal proceedings (Oxford: Oxford University Press, 2005) at 339
[137] *Cuscani v UK*, App. No. 32771/96, 36 E.H.R.R. 2 (Sep. 24, 2002) §§ 38-40
[138] *Brozicek v Italy,* App. No. 10964/84, 23 Eur. Ct. H. R. (Dec. 19, 1989); *Kamasinski v Austria*; *Güngör v Germany (dec.),* App. No. 31540/96, (May 17, 2001); *Hermi v Italy*, App. No. 18114/02 (Oct. 18, 2006)
[139] App. No. 30400/02 (July 16, 2009)
[140] "médiocre et fausse", *Baka v Romania*, App. No. 30400/02 (July 16, 2009) §§ 71 & 76
[141] App. No. 13205/07 (Jan. 5, 2010)

Aside from the obligation to provide an interpreter, the ECtHR in *Kamasinski v Austria*[142] found that there may be an obligation on authorities to exercise some control "over the adequacy of the interpretation provided", though it specified that this was conditional upon the court having been "put on notice in the particular circumstances", and that challenges based on inadequate interpreting could reasonably be limited "to those where a motion was brought at the trial."[143] It is unclear whose obligation it is to inform the court of inadequacies in the interpretation, but in *Eleni Vrahimi v Turkey*[144] the ECtHR stated that "it does not appear that she challenged the quality of the interpretation before the trial judge, requested the replacement of the interpreter or asked for clarification concerning the nature and cause of the accusation",[145] suggesting that it may be for the defendant to highlight any problems. However, as interpreters are only to be provided in the case of genuine linguistic barriers to understanding the court, the defendant may be in a poor position to do so. A further barrier to interpreting appeals is highlighted by in *Kamasinski v Austria*[146] where the applicant claimed that 'loud complaints' made at trial about the interpreting were not recorded. Additionally, as court records tend to be kept only in the official language of the court, there is often no record of the interpreting and therefore no means of verifying its adequacy or otherwise.

Although alleged violations of the right to an interpreter are often based on the fact that a 'qualified interpreter' was not provided, or that interpretation was inadequate and led to an unfair verdict,[147] Trechsel correctly points out that it is rare for complaints about the quality of interpreting to be investigated in detail; claims are often deemed unsubstantiated (e.g. HRC: "the author has not substantiated, for purposes of admissibility that article 14, paragraph 3 (f) was violated due to the limitations on, and the insufficient quality of, interpretation provided"[148]); or where a violation is found in another regard it may be considered unnecessary to consider the issue of quality (e.g. HRC: "[g]iven the Committee's conclusion that the authors' right to a fair trial under article 14 was violated, it need not deal with their

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[142] App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989)
[143] *Kamasinski v Austria,* App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989) § 74
[144] App. No. 16078/90, (Sep. 26, 2002)
[145] *Eleni Vrahimi v Turkey*, App. No. 16078/90, (Sep. 26, 2002) §83, emphasis added
[146] App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989)
[147] Some quite recent examples of HRC jurisprudence include *Safarmo Kurbanova v Tajikistan*, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002 (2003) § 3.6 ("nor was he offered a qualified interpreter during the trial"), *Nallaratnam Singarasa v Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004) § 3.2 ("He claims ... he was not provided with a qualified and external interpreter when he was questioned by the police."); *Michael and Brian Hill v Spain*, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997) § 2.2 ("a young, unqualified interpreter, a student interpreter, was called to assist in the interrogation ... the interpreter's English was very poor. As a result, serious misunderstandings allegedly arose")
[148] E.g. *Safarmo Kurbanova v Tajikistan* (2002) § 6.6

specific allegations relating to (...) the competence of the interpreters."[149]) Nonetheless, this suggests that although the ECHR and the ICCPR do not require the interpreter to be qualified or certified, should a lack of qualification or competence be proven to impact on the fairness of proceedings, a violation of the right to an interpreter could be found.

Morris finds, similarly, that in common law cases, appeals based on incomplete or inaccurate interpreting often fail, and she suggests that fears of financial and administrative consequences are behind this.[150] Of course not all appeals based on interpreting fail; in the defining case of *R v Iqbal Begum*[151] in the Court of Appeal of England and Wales, a murder conviction was quashed on the basis that the charge had not been understood and a proper plea had therefore not been made, and at the trial relevant mitigating circumstances had not been brought to light due to the incompetence of the interpreter. In the same vein as the ECtHR, the court stated that precautions should be taken to ensure the interpreter provided is "fully competent ... by which we mean is fluent in the language which that person is best able to understand."[152] It has been shown that fluency in a language does not equate to competence in interpreting, yet Simon Brown L.J., writing for the Queen's Bench Division in *R. West London Youth Court, Ex p. N*,[153] similarly stated that to ensure quality "a defendant should be provided with an interpreter fluent in his own language or in another language in which he is himself fluent" and that the court should ensure that interpreter and defendant "properly understand each other".[154]

As was suggested in the previous chapter, that a defendant and interpreter understand *each other* is not necessarily indicative of accurate interpreting. However, the Supreme Court of New South Wales in *Gradidge v Grace Bros. Pty. Ltd* ,[155] found that it is the court's responsibility to ensure that a party understands *what is going on*, as did the Canadian Supreme Court in *R. v Tran*,[156] which further found that the court was responsible for ensuring that the defendant is understood. Interestingly, in *Kunnath v The State*,[157] the Privy Council

[149] *Michael and Brian Hill v Spain* (1997) § 14
[150] R. Morris, *The face of justice: historical aspects of court interpreting,* 4(1) International Journal of Research and Practice in Interpreting 97 (1999) at 29
[151] [1991] 93 Cr. App. R. 96
[152] *R v Iqbal Begum* [1991] 93 Cr. App. R. 96 at 101
[153] [2000] 1 W.L.R. 2368, [2000] 1 All E.R. 823
[154] R. West London Youth Court, Ex p. N [2000] 1 W.L.R. 2368, [2000] 1 All E.R. 823 cited in T. O'Malley, The Criminal Process (Dublin: Round Hall - Thomson Reuters, 2009) at 206
[155] *Gradidge v Grace Bros. Pty. Ltd.* [1988] 93 FLR 414
[156] *R. v Tran* [1994] 2 S.C.R. 951 at 985 - 991
[157] [1993] 4 All ER 30, [1993] 1 WLR 1315, 98 Cr App Rep 455, [1994] Crim LR 937. Privy Council on appeal from the Court of Criminal Appeal of Mauritius

found the judge to have a duty to ensure "effective use" of the interpreter; in the Court of Criminal Appeal of Mauritius the interpreter had translated only the charge, an amendment and the accused's statements but "not a word of the evidence", as he believed his duty was to interpret only when given instructions to; the Council considered that the judge must have been aware that the interpreter – who had sworn an oath - was *not* translating the evidence, and the appellant had also stated that he had not understood the witnesses. This suggests that the judge has a responsibility to oversee the interpreter and intervene where there are obvious omissions.

In *R. v Tran*[158] a three-step process was outlined that would constitute a satisfactory substantiation of an alleged violation of the right to an interpreter, the burden of proof being on the applicant and the standard of proof being a balance of probabilities.[159] First, where no interpreter was provided, it must be shown that one was needed. Second, in challenging the quality of interpreting it is accepted that it need not be perfect, but it should be, at a minimum, continuous (no breaks, interruptions or summaries), precise (word-for-word and idea-for-idea, as far as possible), impartial (objective and unbiased), competent (to ensure "justice is done and seen to be done"), and contemporaneous (accurate timing - consecutive favoured over simultaneous interpreting), the question being whether the accused may not have understood a part of the proceedings due to a language difficulty. Thirdly the applicant must show any such lapse to have been during proceedings rather than at a stage "extrinsic or collateral to the advancement of the case."

Quality and standards of interpreting in Irish courts

Irish courts have dealt with interpreting quality on a number of levels. Mode of interpreting was discussed at length by the High Court in *MacCarthaigh v Ireland*;[160] after his claim to an Irish-speaking jury was rejected by the Supreme Court,[161] MacCarthaigh claimed a right to a satisfactory recording system and/or an effective simultaneous translation system. The High Court held that there was now a recording system in place in the Circuit Criminal Court[162] and found no entitlement to simultaneous interpreting. When the appeal reached the Supreme

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[158] [1994] 2 S.C.R. 951

[159] Bearing in mind that this refers to Section 14 of Canada's Charter of Rights and Freedoms as mentioned previously

[160] *MacCarthaigh v Ireland* [1999] 1 I.R. 200; *MacCarthaigh v Minister for Justice, Equality and Law Reform* [2002] 6 I.C.L.M.D. 70; and *MacCárthaigh v An tAire Dlí agus Cirt, ex tempore* March 6, 2008

[161] *MacCarthaigh v Ireland* [1999] 1 I.R. 200

[162] *MacCarthaigh v Minister for Justice, Equality and Law Reform* [2002] 6 I.C.L.M.D. 70; the 'Lanier system', digital recording in Circuit and Central Criminal Courts and High Court Family Law Court since 2008

Court in 2008 it made national headlines for being the first time simultaneous interpreting was used in Ireland's Supreme Court;[163] as the Official Languages Act had by now come into force under which the court may decide which mode of interpreting to use,[164] the applicant was granted leave to re-apply to the Circuit Criminal Court for simultaneous translation at trial.[165] Though the case relates to the Irish language, its more general discussion on the impact of interpreting is of interest.

In the High Court MacCarthaigh argued that the conventional system of 'sequential translation' (consecutive interpreting) used by Irish courts was disruptive to the flow of proceedings and contravened his rights.[166] Schulman was cited as saying that "non English speaking defendants are not judged on their own words, and the words attributed to the defendant are those of the interpreter; no matter how accurate the interpretation is, the words are not the defendants', nor is the style, syntax or the emotion",[167] and that the typical situation whereby defendants are judged on the interpreter's words as if these were exactly those of the defendant is unfair, as even the smallest nuance of language or emotion can influence determination of guilt or innocence. Hamilton J accepted this as "true enough", but said there was no better solution available. While MacCarthaigh made a case for using simultaneous interpreting, the court was not satisfied that this would better serve the interests of justice; it was noted that while this could save time, time was not the primary concern as certain defects were involved, notably that the judge or jury may associate facial or bodily expressions with the evidence being translated rather than the evidence being given due to the delay between speaking and translation, that it was difficult to revise what was said and assess accuracy, and that simultaneous interpreting would require the advance furnishing of relevant papers and possibly skeleton arguments, inappropriate in a criminal trial where a defendant is entitled to reserve his position. Ultimately the High Court correctly found the emphasis of international research to be on accuracy and interpreter training over method, such that the discussion on interpreting modes is of less interest than the recognition that interpreting can affect how the defendant is perceived by the jury, that nuances of language

[163] M. Carolan, *Irish translation sought in criminal trial*, Irish Times, 7 March 2008. Related, in a judicial review case *Wei Sung Jiang v D.P.P.,* unreported, High Court, Peart J., November 16, 2005, the decision implicitly accepts that police questioning can be carried out via a telephone interpreter; "I am also satisfied that the applicant, who had available to him the services of an interpreter, albeit by telephone..."

[164] Official Languages Act 2003, No. 32/2003, Article 8(3)

[165] *MaCárthaigh v An tAire Dlí agus Cirt, ex tempore,* March 6 2008

[166] *MacCarthaigh v Ireland* [1999] 1 I.R. 200

[167] M.B. Shulman, *No hablo ingles: court interpretation as a major obstacle to fairness for non-English speaking defendants*, 46 Vanderbilt Law Review (1993)

can affect the outcome of a case, and that delays caused by interpreting are secondary to the interpreting itself.

Despite these pronouncements, however, it was concluded in *D.P.P. v Adriano Martins Costa & Jose Claudio Batista*[168] before the Court of Criminal Appeal that "complaints about the role of interpreters and translators do not amount to more than matters of inconvenience and delay experienced during the course of the trial itself: they do not in any way go to the safety or reliability of the conviction",[169] and in the Court of Criminal Appeal in *D.P.P. v Yu Jie*,[170] McCracken J notes that although there were "certain omissions in the translation ... this is bound to occur in any situation involving an interpreter", raising the question of at what point omissions might be found to be prejudicial. The issue of interpreter impartiality was the primary basis of this leave to appeal a murder conviction; after being questioned by the police, the applicant had learned that his interpreter was a Chinese police officer seconded to Interpol. McCracken J. noted that the objection was based primarily on the realisation of who the interpreter was, especially as there is no right to silence under questioning in China, but he agreed with the trial judge, who had viewed a recording of the questioning, that the relationship between accused and interpreter appeared trusting; the interpreter acted "professionally and in a detached way...and, if anything, acted with a certain affinity and sympathy towards the accused." He found nothing to suggest that the interpreter was biased, had acted from improper motive, or had intimidated the applicant, and while the applicant may not have been aware of the interpreter's background, evidence suggested that his solicitor had been aware of it and raised no objection. It is interesting that in a ruling on interpreter partiality, the Court appears to approve of the interpreter's perceived empathy with the accused.

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[168] *D.P.P. v Adriano Martins Costa & Jose Claudio Batista* [2008] I.E.C.C.A. 1; judgment by Kearns J. Hedigan J. Birmingham J.

[169] That interpreting causes delay arose in a number of asylum-related cases; *Grace Edobar v John S. Ryan as Chairperson of the Refugee Appeals Tribunal* [2005] 1 I.L.R.M. 113 (Supreme Court), that the availability of interpreters "and any number of other banal daily circumstances" can slow down the work of the Refugee Appeals Tribunal. *Nadya Zabolotnaya, Vladimir Zabolotnaya v Minister for Justice, Equality and Law reform, Refugee Appeals Tribunal, Refugee Applications Commissioner, Ireland and the Attorney General,* unreported, High Court, November 1, 2004; extension of the time for asylum application was requested with language issues as possible grounds, referencing *G.K. v Minister for Justice, Equality and Law Reform* [2002] 1 I.L.R.M. 81 that language difficulties and difficulties obtaining an interpreter were relevant in deciding to allow an extension of the deadline for applications of judicial review as per the Illegal Immigrants (Trafficking) Bill. The case was unsuccessful. *Benson v Minister for Justice, Equality and Law Reform* [High Court, unreported, 2 April 2001] that language difficulties or difficulties obtaining an interpreter should be considered in deciding to extend time allowed to challenge a deportation order

[170] *D.P.P. v Yu Jie* [2005] I.E.C.C.A. 95

In *Fitzpatrick & Anor v K. & Anor*[171] before the High Court, interpreting first arose as an issue in hospital when the plaintiff Ms. K. was given a blood transfusion against her will, but with court approval. Ms. F. – a friend whose native language was Portuguese and who had 'a level of proficiency' in French, English and Lingala - acted as her interpreter. At trial, Ms. F. admitted she was not a professional interpreter and said her English proficiency did not extend to medical terminology, but Laffoy J. accepted her evidence that she had no problems translating what the medical personnel asked her to. The defendants, claiming Ms. K. may not have been *compos mentis* when refusing the transfusion, highlighted among other factors the communication difficulties caused by reliance on interpreting; one doctor testified that they were not getting appropriate responses to indicate that she was making an informed refusal of the transfusion. Ms. K. testified in French and Laffoy J. noted that "[e]ven with a professional interpreter the process was difficult. On occasions during her cross-examination it was difficult to determine whether she was being evasive or whether she genuinely did not understand what was being put to her". He was satisfied the hospital had done everything possible to test the validity of the refusal, and that it had been hampered by communication difficulties not limited to linguistic ones. Like the ECtHR, this sets a precedent in Irish courts for accepting the competence of interpreters who are not professional; in this case Ms. F was not even fluent and her English was, by her own admission, insufficient to cope with the situation.

A number of High Court applications for judicial review of asylum applications have also been based on interpreting standards: in *Omaar Aly Sherif v Refugee Appeals Tribunal*[172] a 'qualified interpreter' is referred to; in *Naomitsu Kanaya v MJELR*[173] Roderick Murphy J. implies that evidence given through an interpreter may not always be reliable: "[w]hile the applicant's evidence was given via a Japanese interpreter, I am satisfied from his evidence ...", and similarly in *T.D. v Refugee Appeals Tribunal & Anor*[174] Cooke J comments: "It is perhaps prudent to bear in mind that the applicant gave her evidence through an interpreter". In *Skender Memishi v The Refugee Appeals Tribunal & Ors*[175] the US case *Diaz-Marroquin v Immigration and Naturalization Service*[176] was referenced wherein one explanation for inconsistencies in evidence was that it had been communicated through an interpreter, the

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[171] [2006] I.E.H.C. 392

[172] *Omaar Aly Sherif v Refugee Appeals Tribunal*, unreported, High Court, Herbert J., November 16, 2006

[173] *Naomitsu Kanaya v Minister for Justice, Equality and Law Reform,* [2000] 2 I.L.R.M. 503

[174] *T.D. v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* , [2010] I.E.H.C. 125 (unreported, High Court, Cooke J., April 28, 2010)

[175] *Skender Memishi v The Refugee Appeals Tribunal, Rory McCabe, The Minister for Justice, Equality and Law Reform, The Attorney-General, and Ireland*, unreported, High Court, Peart J., June 25, 2003

[176] [2001] U.S Court of Appeals for the Ninth Circuit, U.S. App. Lexis 2352

implication being that interpreting is fallible; this argument was rejected by Irvine J. in the context of Memishi's case.[177]

In fact, in *F. & Anor v Refugee Appeals Tribunal*[178] Clark J. considered that, among other things, the applicant's attempts to blame the interpreter for discrepancies undermined his credibility, and in *S.I.M. v Refugee Appeals Tribunal & Ors*[179] Cooke J. upheld refusal of the asylum application, accepting the Tribunal member's view that "the applicant's ... apportioning blame on the interpreter [is] disingenuous and wholly lacking in credibility".[180] Similarly, in *A.Z.N. v Refugee Appeals Tribunal & Anor*[181] Clark J. upheld the findings of the Refugee Appeal Tribunal that if claims about translation inaccuracies at the hearing had been genuine the matter could have been resolved earlier, and that the "applicant's attempt at undermining the procedure goes to his credibility";[182] the Tribunal member had been "singularly unimpressed" with the submission, and Clark J., finding no substance in it, described it as "an effort at the eleventh hour to blame the interpreter". In *M.A.W. v Refugee Appeals Tribunal & Anor*,[183] the applicant claimed to have been so unhappy with the interpretation that he had abandoned it and continued in English; he asserted that the difficulty "must have been obvious to everyone in the room", yet the decision rejecting his application for refugee status had described him as "well able to communicate through his interpreter to make himself clearly understood".[184] Cooke J. in the High Court refused leave to appeal, finding that the applicant's legal representatives had not considered the difficulties so obvious as to necessitate intervention; he considered that if the problems had been such as to hinder a fair hearing they should have been raised at the time, and further noted that the applicant had successfully testified in English.

Courts have also found that fair procedures *can* be breached by poor interpreting; in *Petrea Stefan v MJELR & Ors*[185] leave had been granted to apply for judicial review as omissions in the English translation of the asylum application had meant that one question was incomplete; in

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[177] See also Conclusion for interpreting and credibility issues in judicial review proceedings

[178] *F. & Anor v Refugee Appeals* Tribuna,l [2010] I.E.H.C. 134

[179] [2009] I.E.H.C. 323 (unreported, High Court, Cooke J., July 3, 2009)

[180] *S.I.M. v Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform and Human Rights Commission* §§ 13 & 24

[181] [2009] I.E.H.C. 432

[182] *A.Z.N. v Refugee Appeals Tribunal & Anor* [2009] I.E.H.C. 432 § 2

[183] [2009] I.E.H.C. 330 (unreported, High Court, Cooke J., July 8, 2009)

[184] *M.A.W. v Refugee Appeals Tribunal and The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 330 (unreported, High Court, Cooke J., July 8, 2009) § 21

[185] *Petrea Stefan v Minister for Justice, Equality and Law Reform, the Refugee Appeals Authority Ireland and the Attorney General,* [2002] 2 I.L.R.M. 134 (Supreme Court)

the Supreme Court, Denham J. (McGuinness and Hardiman JJ concurring) dismissed the appeal of the respondents, finding that "[t]here may well be many instances where omissions in translation occur but which are not such as to render the proceedings unfair", but this omission was considered to breach fair procedures such that even a full rehearing through the Tribunal would be unsatisfactory. Feeney J. in the High Court has also acknowledged that it may be difficult for LEPs to recognise deficient interpreting: in *Daud Abdilahi Gilingil v Refugee Appeals Tribunal & Ors*[186] the applicant, who did not understand English, had relied on another Somali to complete the refugee application questionnaire. In the report rejecting the asylum application it was stated to be the applicant's responsibility to ensure the accuracy and truthfulness of information provided, but that "a serious credibility issue" arose from the fact that inaccuracies in the application had not been highlighted in the eight months before interview. Feeney J. accepted it was the responsibility of the applicant to ensure accuracy, but remarked that "how the Applicant was to be cognisant of any inaccuracies given his lack of English is not detailed".

The EU Directive on the Rights to Interpretation and Translation in Criminal Proceedings

The new EU Directive on the right to interpretation and translation in criminal proceedings aims to strengthen the right to an interpreter,[187] and the provisions of the final text will now be examined in relation to the above analysis of the current right to interpreting in Ireland.[188]

Extent of the right: what must be interpreted?

The right to an interpreter applies to criminal proceedings, though under the ICCPR it may apply in unspecified, exceptional circumstances to civil matters; an offence may be considered criminal under the ECHR regardless of its position in domestic legislation, though whether the object and purpose of Article 6 requires the same guarantees in petty offences has been questioned. The Directive applies only to criminal proceedings, and clarifies that where minor offences, such as traffic offences, are dealt with by an authority other than a court having

[186] *Daud Abdilahi Gilingil v Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Attorney General Ireland; Human Rights Commission*, unreported, High Court, Feeney J., June 1, 2006

[187] As the study focuses on interpreting, translation will only be considered where relevant; Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, PE-CONS 27/10, Sep. 24, 2010 (not yet published in the Official Journal)

[188] Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, PE-CONS 27/10, Sep. 24, 2010 (not yet published in the Official Journal)

jurisdiction in criminal matters, and where it is possible to appeal the sanction imposed by that authority in a court, the Directive will apply only to the court proceedings.[189]

The basic right to interpretation is enumerated in Article 2(1):

> "Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings"

Under the Directive, the right applies from the moment a person is made aware that they are suspected or accused of having committed a criminal offence until proceedings have concluded, including during sentencing and appeals where applicable.[190] Where necessary to safeguard the fairness of proceedings, interpretation must also be made available for communication with legal counsel in direct connection with questioning, hearings, appeals, or other procedural applications such as bail;[191] the suspected or accused person should be able to explain his version of events, highlight statements he does not agree with, and inform his lawyer of facts relevant to his defence.[192] This confirms and makes more explicit the most recent position taken by the ECtHR on the matter, though it does not necessarily contradict the position taken in *R. v Tran*[193] that an appeal based on interpreting must show that any lapse in interpreting occurred when a vital interest of the accused was at stake.

Under the ECHR the right to an interpreter extends to pre-trial proceedings and necessary documentary evidence, though there is no obligation to provide *translations*, and the right applies only to that which is necessary for the defence. The Directive guarantees the right to the quality translation of all essential documents, which includes, but is not confined to, decisions depriving a person of his liberty, any charge/indictment, and judgments.[194] Passages within these documents that are not relevant to understanding the case against the accused do not have to be translated, and an oral translation or summary may be provided if this does

[189] Paragraph 16 & Article 1(3)
[190] Article 1(2)
[191] Article 2(2) & explanatory paragraph 20
[192] Explanatory paragraph 19
[193] *R v Tran* [1994] 2 S.C.R. 951
[194] Article 3(1)-(3)

not prejudice fairness;[195] this also basically consolidates the existing position of the ECHR. Under the ECHR, a person accused of a criminal offence has the right to be informed of that charge in a language, and in simple non-technical language, that he understands, though again the provision of interpretation is not strictly required. The information should be provided 'promptly' so as to enable the accused to challenge the arrest if necessary, but the reasonableness of delay must be measured on a case-by-case basis; in Ireland this has been done on a practical basis. The Directive obligates Member States to provide interpretation 'without delay',[196] but similarly provides that delays might not infringe the accused's right if these are 'reasonable in the circumstances.'[197]

Payment

Under the ECHR and the ICCPR, and implicitly accepted in Irish case law, interpretation must be provided free of charge regardless of the financial circumstances of the defendant or the outcome of the case, though this only applies to that which is necessary for the defence. The proposed Directive also specifies that Member States must bear the costs of interpreting regardless of the outcome of proceedings;[198] however, the scope of the Directive is greater than that of the ECHR or the ICCPR, which would suggest that the costs of ensuring the provision of interpreters under the Directive could be considerably higher than under present obligations.

Entitlement to an interpreter

This analysis has found that the right to an interpreter applies regardless of citizenship, immigration status, age, gender and so on, but also that as a purely functional right it is available only to defendants who actually need an interpreter; there is no express right to use one's mother tongue or a language of choice. The Directive confirms that interpreting or translation may be provided in the suspect/accused's native language or any other language that he speaks or understands as long as this allows him to fully exercise the right to defend himself and safeguards the fairness of proceedings.[199]

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[195] Article 3(7)
[196] Article 2(1)
[197] Explanatory paragraph 18
[198] Article 4
[199] European Parliament, Position Paper at 22

In establishing whether an interpreter is needed, the ECtHR will accept States' findings where serious examinations have been conducted, and appears willing to accept objective criteria such as the time spent in a country. It has further been held that the complexity of the case should be a consideration. At common law, there is no automatic right to waive the right and the judge has a duty to ensure that interpreting is provided where necessary, even when it is not desired. It is commonly agreed that the trial judge is responsible for ensuring fair proceedings, but while EHCR case-law puts the burden of proof on judicial authorities in appeals based on the non-provision of an interpreter to show that one was *not* needed, a leading Canadian Supreme Court judgment has held the burden of proof to be on the complainant. In Irish courts the practice of requesting interpreters where not genuinely needed has been frowned upon, and unfounded claims of insufficient attention being paid to language difficulties have also been treated with scepticism. However, courts have also explicitly recognised that specific difficulties may arise when the accused is not Irish or an English speaker.

Under the EU Directive, the right to *translation* cannot be validly waived unless the suspected or accused person has had prior legal advice or has learned the consequences of waiving the right from another source, the waiver is unequivocal, and it is given voluntarily;[200] waiver of the right to an interpreter is not mentioned. The Directive introduces an unusual provision in requiring Member States to have a procedure available whereby it can be ascertained if the suspected or accused person understands and speaks the language of proceedings, as well as a procedure to challenge negative findings,[201] though the explanatory notes clarify that any appropriate manner can be used "including by consulting the suspected or accused person concerned".[202]

Quality, competence and standards

Perhaps the most complex area is that of interpreter competence and the quality of interpreting. Essentially under the ECHR an interpreter need not be qualified, but interpretation should be of sufficient quality to allow the defendant to partake fully in their case. Authorities may also bear some responsibility for control of interpretation quality where problems are brought to the attention of the court, though an Irish court has posed the question of how a non-English speaker should be cognisant of errors in a language he or she

[200] Article 3(8)
[201] Article 2(4)&(5)
[202] European Parliament, Position Paper at 21 & 25

does not understand. Nonetheless it seems that under the ECHR, in order to appeal successfully on the grounds of deficient interpreting, a motion to that effect would have to have been raised at trial, and it is widely agreed that courts tend not to deal with appeals based on interpreting quality beyond a superficial level if at all, and that they are rarely successful. A common law judgment has held that a judge may be responsible for ensuring that an interpreter who is present is actually interpreting and may be obliged to intervene where omissions are observed, though another judgment found that in an appeal the burden of proof would be on the complainant, and the proof would have to involve a vital interest of the defendant; it would be insufficient to suggest that something collateral was not interpreted.

Interestingly the majority of judicial commentary (particularly judicial review cases) on interpreting in Ireland relates to quality, though firm conclusions are elusive as courts have been inconsistent in their views. Most notably there is a major disparity in the acceptance of the High Court that interpreting can impact on the jury's perception of the defendant and the outcome of case, and the view of the Court of Criminal Appeal that the impact of interpreting amounts to no more than an inconvenience. Irish courts have held that any situation involving an interpreter involves omissions in translation, and that some will lead to breach of fair procedure while others may not. A court has accepted that a non-professional interpreter without the necessary fluency or vocabulary was competent to interpret in a crisis medical situation, creating a worrying precedent for the type of interpreter who may be acceptable in court, and in a ruling on interpreter impartiality, the court appeared to approve of the interpreter's perceived empathy with the accused, another apparently contradictory position. Irish and Canadian courts have expressed a preference for the consecutive mode of interpreting.

The Directive concretises the case-law of the ECHR in requiring the quality of interpreting to be sufficient to safeguard the fairness of criminal 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";[203] the explanatory notes clarify that it should be possible for authorities to exercise control over the adequacy of interpreting if put on notice in a particular case, and to replace the interpreter if the standard is considered insufficient to ensure a fair

[203] Article 2(8)

trial.[204] Very interestingly, the Directive creates an obligation for Member States to take 'concrete measures' to ensure that the interpreting provided meets this standard, in particular by establishing a register of appropriately qualified independent translators and interpreters, and it stipulates that Member States must ensure interpreters and translators are required to observe confidentiality.[205] The Directive adds another unusual and innovative provision suggesting that Member States request those responsible for training judges, prosecutors and the judicial staff of criminal proceedings "to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication";[206] this is carefully couched in language non-prejudicial to judicial independence and organisational differences across the EU.

Very few Irish criminal cases have dealt with language issues; of the six relevant criminal cases involving LEP defendants, only four are appeals based at least partly on interpreting issues. Three of these failed,[207] and in the final case the decision of the Court of Criminal Appeal to reduce the applicant's sentence was partly based on language difficulties but also partly on the wishes of the victim.[208] Language and interpreting issues are extremely common in judicial reviews of the asylum process, predominantly in relation to credibility findings, and although this goes to another area of research, courts seem to regard claims of poor interpreting negatively overall; notably it has been found that a decision on credibility subjected to judicial review "must be read as a whole and the court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination ....",[209] and this has been relied on directly and indirectly in the rejection of claims of faulty interpreting in numerous judicial review cases.[210]

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[204] Explanatory paragraphs 24&26

[205] Article 5(2)&(3)

[206] Article 5

[207] *D.P.P. v Yu Jie* [2005] I.E.C.C.A. 95; *The People (at the Suit of the D.P.P.) v Valdas Valiukas*, unreported, Court of Criminal Appeal, Kearns J., April 27, 2009; *D.P.P. v Ismet Ceka* [2004] I.E.C.C.A. 25

[208] *The People (at the Suit of the D.P.P.) v Vasile Vardoshilli*, unreported, Court of Criminal Appeal, Finnegan J., February 9, 2009

[209] *Radzuik v The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* unreported , High Court , Cooke J., July 24, 2009 cited in *M.U.Z. v The Refugee Appeals Tribunal (Tribunal Member, Elizabeth O'Brien) and the Minister for Justice, Equality and Law Reform* [2007] 1412 J.R. (unreported, High Court, Edwards J., February 12, 2010)

[210] *M.U.Z. v The Refugee Appeals Tribunal (Tribunal Member, Elizabeth O'Brien) and the Minister for Justice, Equality and Law Reform* [2007] 1412 J.R. (unreported, High Court, Edwards J., February 12, 2010) finding that the applicant, who submitted that corrections of mis-translations had not been taken into consideration and had led to negative credibility findings, was simply taking "issue with the choice of words used by the Tribunal Member and that no significance can be placed on this choice". See also *T. M. A. v The Minister for Justice, Equality & Law Reform and the Refugee Appeals Tribunal* [2009] I.E.H.C. 606 (unreported, High Court, Cooke J., December 9, 2009) where the applicant "blamed the interpreter" for discrepancies leading to a finding of negative credibility – but the court found that "the central thrust of the ... finding as to lack of credibility is sufficiently well grounded"; *T.D. v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2010] I.E.H.C. 125 (unreported, High Court,

Conclusion

In Ireland there is no constitutional or statutory right to an interpreter; the right is derived primarily from the constitutional requirement that anyone charged with a criminal offence be tried in due course of law according to the basic principles of justice. Judicial notice must be taken of ECtHR provisions and case-law, the ICCPR right has persuasive value in Irish courts, and the right has been widely recognised at common law more generally, with relevant cases from other jurisdictions having been drawn on by Irish courts. Some of these sources have conflicting views on certain aspects of the right, and in some cases have seemed to qualify the right rather than endorse or add to its protection. The strength of the new Directive is that it makes certain aspects of the right to an interpreter more explicit; in doing so, it draws heavily on, and consolidates the sometimes contradictory and erratic case-law of the ECtHR. Its provisions are very clearly influenced by the participation of interpreters and translators in its drafting, though the final text has 'watered down' some provisions of earlier drafts that appeared less concerned with practicability and judicial independence, and more focussed on 'ideals' of best practice in interpreting.[211] The Directive has considerable potential to streamline the right to an interpreter across the EU, and to strengthen the right as it stands in Ireland, although it would be unrealistic to expect that, even if fully observed, all problems related to interpreting in the courtroom would disappear, or that adjudication on interpreting issues would become completely consistent; while the right to interpreting applies to the appeal process, its nature as an EU Directive does not permit it to define how a breach of the right to interpretation should be adjudicated.

Cooke J., April 28, 2010) where the court found that "The Tribunal Member's view that there was a lack of concordance may read too much into the interpreter's use of "confiscation" but held that "[t]he credibility of the account as a whole does not appear to be affected."

[211] See European Commission, Proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, COM (2010) 82 final, 2010/0050 (COD), March 9, 2010

Chapter Four: Interpreting Services in Ireland

Introduction

Rocketing demand, havoc in court schedules, trying times for courts, incompetent translators, appalling standards, soaring costs, slashing of pay rates, proceedings lost in translation; these are just some of the references to court interpreting that have appeared in mainstream newspapers over the last ten years. The media provides an interesting lens through which to consider the topic, particularly as there has been little academic interest in the area, though its reliability as a source cannot be considered absolute. In fact, the media does not present a united front on the issue and there has been a distinctly different focus in what has been reported by the Irish Times [Times] and the Irish Independent [Independent]; the table below considers 31 of the most relevant articles that appeared in these newspapers between 2001 and 2010 in an effort to create an idea of how the issue has been reported. Three main categories are used (organisation and standards; immigration and access to justice; and money), and articles are classified according to their principal focus, though many touch on more than one category in reality.[1]

<table>
<tr><th colspan="4">ORGANISATION & STANDARDS</th></tr>
<tr><td>havoc & delay</td><td>3 - Independent</td><td rowspan="2">need to improve system concern for standards</td><td rowspan="2">6
(5 - Times;
1 - Independent)</td></tr>
<tr><td>complaints about standards</td><td>1 -Independent</td></tr>
<tr><th colspan="4">IMMIGRATION & ACCESS TO JUSTICE</th></tr>
<tr><td rowspan="2">scepticism about providing services for immigrants</td><td rowspan="2">1 - Independent[2]</td><td>focus on immigrants & access to justice</td><td>6 - Times</td></tr>
<tr><td>EU developments on interpreting rights</td><td>2 - Times</td></tr>
<tr><th colspan="4">MONEY</th></tr>
<tr><td rowspan="2">huge cost to system/taxpayer</td><td rowspan="2">7 - Independent</td><td>poorly paid interpreters</td><td>2 - Times</td></tr>
<tr><td>illegal tender process</td><td>3 – Times</td></tr>
<tr><td>TOTAL</td><td>12</td><td>TOTAL</td><td>19</td></tr>
</table>

[1] Related articles on medical, Garda, Irish/sign language and asylum/refugee interpreting are omitted unless directly relevant, as are letters from the ITIA as their content is considered through ITIA documentation. Nonetheless these letters made up a large proportion of media coverage: the Times printed five letters from the ITIA and one from M. Phelan (PRO of the ITIA, but wrote this letter in her capacity as lecturer in the School of Applied Language and Intercultural Studies, DCU), and the Independent printed one. Finally, other articles referencing court interpreting without direct comment are left out; these include for example an article about interpreting as a career and an interview with an agency owner as entrepreneur

[2] This is an area that seems to feature highly in the reports of local newspapers

The Irish Independent is Ireland's biggest selling broadsheet; it has tended to adhere to what might be considered the 'official' view of court interpreting services; one that claims the language needs of LEP defendants are being dealt with in a more than satisfactory manner. This view is that put forth by the Courts Service (CS), and it is also embodied in some relevant government comments on the topic. The Times – Ireland's 'quality newspaper' or paper of record - on the other hand, has tended to focus on an alternative view of things; an unsatisfactory and inadequate system in urgent need of reform. The Irish Translators and Interpreters Association (ITIA)[3] has perhaps been the strongest champion of this cause, but it has been well supported by a number of other sources including relevant studies and academic articles on the topic.

As little is known about the provision of court interpreting services, this chapter analyses documentation from available sources with the aim of building a credible picture and an understanding of some of the trials, tribulations, failures and successes that have accompanied the rise and rise of language needs in Irish courts. It will look at how the organisation and provision of services has developed, the quality of services being provided, and if and how this changed after the Lionbridge interpreting contract; how the need for interpreters is perceived and the conflicting media foci on money and the rights of the accused, as well as the link with immigration.

Organisation and the Provision of Services

Translator shortage causes havoc in court schedules[4]

As immigration began to increase from the mid 1990s and particularly after 2001, more and more LEP defendants were appearing before the courts and the need for interpreters was growing exponentially. Demand has generally been measured by the number of languages being interpreted/translated and the amount of money spent on interpreting/translating services, though it is interesting to note that early references are often to 'translators' and 'translation services', and that while the terms 'court interpreters' or 'interpreting and translation services' are later more in use, some sources continue to mistake interpreters for

[3] The ITIA was set up in 1986 as a not-for profit organisation working for the interests of translators and interpreters and promoting standards in these professions amongst other objectives
[4] R. Riegel, Irish Independent, 14 May 2001

translators.[5] Much documentation refers to 210 dialects and languages, a figure that was provided by a Courts Service spokesperson and that has been cited frequently over the years, but a more diverse range of figures has appeared between in various sources and it is unclear which, if any, are accurate; at least one article refers to 120 languages and dialects,[6] others to the 167 or 200 languages used in the Republic;[7] in another an agency is reported as providing services in 67 languages;[8] statistics later put the figure at 75[9] while another article interprets this as 175.[10] The most commonly interpreted languages have most recently been cited as Polish, Lithuanian, Romanian, Russian, Mandarin Chinese, Latvian, Portuguese, French, Czech and Arabic.[11] In terms of costs, the following table illustrates how these have risen:[12]

1998	€95,000
1999	€95,146
2000	€130,829
2001	€294,344
2002	€461,000
2003	€631,000
2004	€554,000
2005	€1,257,000
2006	€2 million+
2007	€2 - €2.7 million[13]
2008	€2.5 million?

As demand grew, a large number of individuals and agencies were involved with meeting it; in 2004, for example, 55 different companies or persons provided interpreting and translation services to the courts.[14] The same year, Barrister Sean Guerin's paper for the Bar Council conference on Criminal Procedure noted that "it would not be unreasonable to expect that an officially bilingual state would have had sufficient experience of the difficulties that arise in multilingual court proceedings, and would have devoted sufficient effort to resolving those difficulties, to be able to cope with the challenge of an increasingly multi-cultural and

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[5] Again, as this study is focussed on interpreting, it will not necessarily include references to translation

[6] T. Felle, *€550,000 payout for court interpreters*, Irish Independent, 17 August 2005

[7] C. O'Brien, *Are we lost in translation?*, Irish Times, 4 April 2006; M. Tighe, *Interpreters in court pay row*, Irish Times, 29 March 2009

[8] R. Riegel, *Translator shortage causes havoc in court schedules*, Irish Independent, 14 May 2001

[9] Courts Service Annual Report 2007 at 37

[10] M. Tighe, *Interpreters in court pay row*, Irish Times, 29 March 2009

[11] Courts Service Annual Reports 2007 & 2008

[12] Figures taken from Courts Service Annual Report 2005; *Interpreters keep the message clear*, Courts Service News, July 2008

[13] *Interpreters keep the message clear*, Courts Service News, July 2008 at 11; *FG line on interpreters breaches human rights*, Irish Examiner, 5 January 2008

[14] T. Felle, *€550,000 payout for court interpreters*, Irish Independent, 17 August 2005

multilingual society. Sadly, this is not so."[15] The Independent reported that the shortage of translators was creating 'legal log-jams' and causing chaos in courts,[16] and that the increased demand for translation services was making for 'trying times'.[17] The Times talked about the haphazard, disorganised and patchy nature of service provision[18] and reported that mechanisms for providing services were "partial, inadequate and lacking a sense of long-term purpose".[19] Judge Riordan in Cork District Court talked about the *ad hoc* arrangements that occasionally fell "far short of the standard required to administer justice openly and fairly",[20] but the CS in its reports merely recognised that Ireland's increasing ethnic diversity and the growing demand for interpreting services posed a challenge and in its 2005-2008 Strategic Plan undertook to "continue to provide interpreters in court".[21]

In a submission to the Working Group on the Jurisdiction of the Courts in 2002 the ITIA suggested that it would be preferable for the CS to establish an interpreting section and a national register of accredited interpreters "rather than working through agencies".[22] Such registers are considered best practice in the EU as they allow control over the interpreters approved to interpret in courts and safeguard the interests of all parties;[23] in the UK, for example, there is a National Register of Public Service Interpreters whose interpreters are bound by a Code of Conduct and subject to Disciplinary Procedures.[24] A national register was also recommended by the NCCRI and it was taken up by the Independent and later the Times.[25] Bacik (2007) points out that the privatisation of interpreting and translating services can create unacceptable conflicts of interests that may threaten the right to a fair trial, but that where private agencies are used they must adhere to national standards; otherwise she

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[15] S. Guerin, *Criminal practice: the use of interpreters and translators in the Irish courts*, Bar Council conference on Criminal Procedure, Dublin (2004)
[16] R. Riegel, *Translator shortage causes havoc in court schedules*, Irish Independent, 14 May 2001
[17] K. Donaghy, *Trying times for courts as translation costs soar*, Irish Independent, 3 May 2004
[18] *Concern at judge's call for foreigners to pay interpreters*, Irish Times, 14 May 2005; C. O'Brien, *Are we lost in translation?*, Irish Times, 4 April 2006
[19] *Growing demand exposes poor translation service*, Irish Times, 27 April 2007
[20] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007) at 101-2
[21] Courts Service Annual Reports 2002 & 2004; Courts Service Strategic Plan 2005-2008 at 14
[22] Irish Translators' and Interpreters' Association (ITIA), Submission to the Working Group on the Jurisdiction of the Courts (2002)
[23] Aequitas: Access to justice across language and culture in the EU (E. Hertog, ed.)(Antwerp: Lessius Hogeschool, 2001)
[24] National Register of Public Service Interpreters (http://www.nrpsi.co.uk) cited in National Consultative Committee on Racism and Interculturalism, *Interpreting, translation and public bodies in Ireland: the need for policy and training*, Advocacy Paper 5 (2007)
[25] B. Heffernan, *Recruitment of court interpreters is put in the dock!,* Irish Independent, 6 June 2006; C. O'Brien, *No quality controls laid down for courts and Garda translators,* The Irish Times, 7 June 2010

warns that "difficult issues will continue to arise for practitioners and judges when dealing with litigants, witnesses or defendants through interpreters".[26]

However, when the CS finally recognised that the growing need for interpreters necessitated a "re-evaluation of interpretation and translation services", its "rationalisation of the management of interpretation services" involved the engagement of a single service provider to provide an improved, managed service and improved quality.[27] A request to tender was put out in 2005, a contract was signed by Lionbridge in 2006 and provision of services by a single agency began in March 2007.[28]

Despite reservations over privatisation, there was a certain expectation that the new service provider would bring improvements. Riordan, for example, wrote that the new contract would ensure minimum standards and quality control;[29] the ITIA expressed hopes that things would improve, and Bacik talked about changes to the current unsatisfactory system.[30] At the same time some flaws in the tender were highlighted, principally the system of language qualification levels which focussed on language competence to the exclusion of interpreting competence, and which did not guarantee that interpreters at the highest level would be available for languages other than the most commonly used.[31] Indeed, the Lionbridge contract later proved controversial when a rival company claimed that the rules of competition had been illegally changed during the tender process, and the European Commission announced its intention to take the Irish Government to the European Court of Justice for neglecting "its obligations under the principles of equal treatment and transparency".[32]

On a practical level it remained to be seen whether the contracted agency would improve the quality and management of interpreting as intended, or whether the flaws in the contract and the move towards privatisation of services would have negative consequences.

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[26] I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 109 (2007) at 122

[27] *Highlighting Ireland's ethnic diversity*, Courts Service Annual Report 2005 at 38

[28] There is only one interpreting contract, i.e. with Lionbridge, but when an assignment cannot be filled by this agency, other agencies may be called upon.

[29] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007) at 102

[30] I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 109 (2007)

[31] I. Bacik, *Breaking the language barrier: access to justice in the new Ireland* (2007); M. Phelan, *The Courts Service Interpreting Tender*, ITIA Bulletin June 2005 at 6; B. Heffernan, *Recruitment of court interpreters is put in the dock!*, Irish Independent, 6 June 2006

[32] J. Smith, *European Commission threatens Irish State with legal action over Lionbridge contract*, Irish Times, 20 September 2008; C. Taylor, *Ireland brought to court over contract*, Irish Times, 14 April 2009

A single service provider continued to be engaged to deal with the increasing need for interpreters[33]

The Courts Service reported in 2007 that interpreters had been provided in all courts, and that the increasing need for interpreters was being dealt with effectively. It repeated this verbatim in 2008, and in its July newsletter referred to the "positive and proactive way" in which the demands created by ethnic diversity have been met. It pointed to a satisfaction rating of over 99.5% with interpreting services, and said that the few complaints made were "primarily due to teething issues".[34] Perhaps in keeping with the idea that the issue was being adequately dealt with, the 2008-2011 Strategic Plan and the 2009 Annual Report make no reference to interpreting.

ITIA members observed, however, that "the provision of interpreters is not working" and that there were still regular problems with the booking system. [35] In October 2007 the Donegal Democrat reported on a case where no interpreter turned up to court, leading Judge Zaidan to criticise strongly "the company who supplies interpreters to the courts service"; he noted that this was not the first time it had happened and threatened that if the interpreter did not appear on the next occasion "I will be asking the state to supply me with a Polish dictionary and I will go ahead with the case."[36] In January 2009 a murder case in Galway District Court had to be postponed as the interpreter was a "no-show"; Judge Fahy commented that "this is the most serious charge a District Court can have and the interpreter has not appeared."[37] On a similar note, a 2008 article in the Independent reported:

> "It had been a difficult morning yesterday, the clock ticking on towards midday and beyond with no sign of the proceedings commencing. A witness hadn't materialised ... and then, finally, the real reason – the court was waiting for an interpreter. ... Collins sat patiently by until, at 12.20pm, the weary Judge summonsed the equally weary jury to inform them of the hiccup. "We're waiting for an Albanian interpreter to arrive," he tersely

[33] Courts Service Annual Reports 2007 & 2008
[34] *Interpreters keep the message clear*, Courts Service News, July 2008 at 11
[35] M. Phelan, *Court interpreters in the news (for the wrong reasons)*, ITIA Bulletin October 2007
[36] *Donegal Democrat reports on lack of court interpreters* [Donegal Democrat 25 October 2007] IN ITIA Bulletin October 2007
[37] M. Nee, *Murder case postponed for interpreter no-show*, Galway Advertiser, 8 January 2009

explained ... . At two o'clock, the interpreter took the affirmation in hesitant English and as barristers exchanged glances of alarm, the jury were again dismissed."[38]

The Quality of Interpreting Services

Growing Demand Exposes Poor Translation Service[39]

An EU study by Spronken and Attinger on the compliance of Member States with the minimum standards of the EU's 2004 proposed Framework Decision [FD] on Procedural Rights in Criminal Proceedings, mentioned in Chapter Three, found that rights were implemented very differently across the EU, and the Irish response from the Department of Justice, Equality and Law Reform Department suggested that Ireland met only one of the minimum standards in ensuring the right to interpretation fully - the provision of interpreters, and confirmed that no qualifications were necessary to act as a legal interpreter in Irish courts.[40] A second EU Study on provisions in legal interpreting and translation across the EU looked at an array of issues, including those relating to quality. Almost all Irish responses to the distributed questionnaire were from those working in the area of interpreting: the majority said that the profession was unregulated, and while some indicated that some agencies test standards and have internal guidelines, most agreed that in practice there is no monitoring of quality or testing of standards, no requirement for competence or proficiency, no guidelines, and no national register of interpreters.[41] In a study on interpreting in Irish courtrooms carried out as early as 2000, Perez found that there were no interpreting standards to be met, there was no system to monitor interpreting quality in court, and that interpreters lacked adequate training and guidelines for their work.[42]

Since its inception in 2002, the ITIA has expressed concerns about the quality of interpreting being provided in Irish courts. In a 2002 submission to the Working Group on the Jurisdiction

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[38] N. Anderson, *The clock ticked on towards two before the legal sparring began*, Irish Independent, 20 November 2008

[39] *Growing demand exposes poor translation service*, Irish Times, 27 April 2007

[40] T. Spronken & M. Attinger, *Freedom, security and justice- procedural rights in criminal proceedings: existing level of safeguards in the European Union*. European Commission, 12 December 2005. Data is from 2002

[41] E. Hertog & J. van Gucht, *Executive summary: Status quaestionis*, available at www.agisproject.com/Documents/status%20 Quaesionis%20Summary.pdf (AGIS Project JLS/2006/AGIS/052)

[42] A.B. Pérez, *Interpreting in the Irish courtrooms: the impact of lack of regularisation on the quality of the interpreter's performance,* Unpublished MA Thesis, DCU (2000)

of the Courts, it called the lack of testing and training for interpreters a "fundamental flaw" in the system and advised that many interpreters in the Irish courts "do not have any sort of knowledge of the law or of legal terminology".[43] In her article on the topic, Bacik also points out the lack of guidelines, training, quality control and testing and says that "current practice is clearly unsatisfactory".[44] She refers to the fact that the Dublin City University Graduate Certificate in Community Interpreting is the only available training course in Ireland, and compares this with the situation in the UK where the Chartered Institute of Linguistics runs a Diploma in Public Service Interpreting that is rigorously tested at the end; the significance of this is put in perspective by the fact that of those that take the Institute of Linguists test, only one third pass it.[45] The equivalent exam in the US, the Federal Court Interpreter Certification Exam, has a failure rate of 96%[46] and similar results from other countries affirm the challenging nature of interpreting as a profession.

In the pre-Lionbridge era, the Independent reported on complaints by judges about the "appalling" standards of translators,[47] and numerous Times articles discussed the need to improve the system, focussing on the lack of quality standards, qualifications, and training.[48] There were reports of dubious recruitment practices by agencies alleged to be handing out fliers in ethnic restaurants and recruiting anybody who claimed to speak two languages,[49] and it was reported that agencies were telling their interpreters "to be seen talking" at all costs in court as the judge would only notice a problem if they remained silent.[50]

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[43] ITIA Submission to the Working Group on the Jurisdiction of the Courts (2002)
[44] I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 109 (2007) at 119
[45] *Growing demand exposes poor translation service*, Irish Times, 27 April 2007
[46] M. Phelan, *Interpreting in the courts,* Letter to the Irish Times, 9 June 2006
[47] *Judge attacks low standards of translators*, Irish Independent, 28 January 2004
[48] See e.g. C. Coulter, *The trials of foreigners translate into a difficulty*, 10 March 2003; K. Holmquist, *Act now, while times are good*, Irish Times, 14 March 2006; C. O'Brien, Are we lost in translation?, Irish Times, 4 April 2006; *Growing demand exposes poor translation service*, Irish Times, 27 April 2007
[49] C. Coulter, *The trials of foreigners translate into a difficulty*, 10 March 2003; B. Heffernan, *Recruitment of court interpreters is put in the dock!,* Irish Independent, 6 June 2006
[50] B. Heffernan, *Recruitment of court interpreters is put in the dock!,* Irish Independent, 6 June 2006

Lionbridge Job Advertisement

Interpreters' knowledge of ethics was questioned: it was reported that defendants sometimes asked their interpreter for guidance on how to plead and the ITIA pointed out that because there was no code of ethics, interpreters "do not know how to behave if they make a mistake".[51] In 2003 the Times reported that a 'translator', who had aided the Gardaí in taking a witness statement from a Chinese man accused of two murders, later went on a date with the accused after the Gardaí gave the man her phone number.[52] In fact, the criminal record of interpreters themselves has been a source of concern; the Garda Representative Association reported how a Chinese interpreter, hired to assist in an interview, turned out to be an illegal immigrant himself. It revealed that while interpreters are vetted for a criminal record in Ireland, the record in their country of origin is not checked, and it said it "could not rule out the possibility that foreign gangs operating here had "planted" its own members to work as interpreters so they could intimidate people into silence if they were arrested or had agreed to be witnesses in prosecutions".[53]

The Media Relations Adviser of the Courts Service acknowledged that it was not always easy to find "interpreters of suitable experience", but said that in spite of this, few problems of understanding had arisen in court, and that any such problems had been resolved:

> "Considering the number of occasions in which an interpreter is used, frequently at very short notice, there have been few issues or problems in the understanding of the court process by those involved. Where an issue

[51] ITIA Submission to the Working Group on the Jurisdiction of the Courts (2002)
[52] Irish Times article, 5 March 2003 cited in National Consultative Committee on Racism and Interculturalism, *Interpreting, translation and public bodies in Ireland: the need for policy and training*, Advocacy Paper 5 (2007)
[53] C. Lally, *Interpreter system poor – GRA*, Irish Times, 29 April 2009

of understanding arises, the dynamic of the court setting tends to make this apparent. On these rare occasions the interpreter is replaced."[54]

This statement, cited repeatedly over the years, somewhat embodies the ongoing tendency of the CS to say little about interpreting services, but to say it repeatedly, although in this case as early as 2002 the ITIA had pointed out the erroneous nature of the claim, referring to the numerous studies that have shown such problems can easily remain undetected with potentially serious consequences.[55]

Judge dismisses 'incompetent' Polish translators[56]

However, if the expectation was that quality would improve with the new service provider, the CS claimed in 2007 and 2008 to have *continued* "to provide quality interpretation services to the courts during the year".[57] The 2008 Annual report referred to a review of the quality and cost of interpretation services that was underway, but its findings were not mentioned in the CS 2009 Annual Report. The conclusion of the government-funded study commissioned by the NCCRI, having taken into consideration the views of government service providers, NGOs, representative bodies of people in need of these services and suppliers of interpreting and translation services, was that where interpreting services were being provided, the "lack of quality checking, or the means to do it" was a "key issue of concern", and other key weaknesses included the lack of coherent policy, quality control, appropriate staff training, a lack of awareness, costs and delays.[58] The report strongly recommended developing a national policy framework for interpreting and translation services, as well as a code of practice, accredited training and standards, and a register of accredited interpreters and translators.[59]

Another submission by the ITIA to the CS in 2008 pointed out that there was still no system in place to ensure that interpreters were "qualified, adequately trained and competent" and they suggested that the time had now come to improve the situation, stating that:

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[54] *From Irish to Urdu,* Courts Service News, June 2006
[55] ITIA Submission to the Working Group on the Jurisdiction of the Courts (2002)
[56] *Judge dismisses 'incompetent' Polish translators*, Irish Examiner, 12 October 2007
[57] Courts Service Annual Reports 2007 & 2008
[58] National Consultative Committee on Racism and Interculturalism & Office of the Minister for Integration, Developing quality, cost-effective interpreting and translating services for Government service providers in Ireland (2008) at xi & xiv
[59] NCCRI & Office of the Minister for Integration, Developing Quality, Cost-Effective Interpreting (2008) at iv

> "[t]here are far too many people working as interpreters in our courts who have no background in translation or interpreting, no knowledge of legal terminology or interpreting techniques and a doubtful knowledge of ethical issues."[60]

In fact, the point was made in one ITIA Bulletin that the reputation of all interpreters was being jeopardized by the fact that "[i]ncompetent, unqualified bilingual people (I hesitate to call them interpreters) are being employed to do work that should be reserved for professionals."[61] Problems were still also being reported in the media. The headline above appeared in October 2007 when Judge Con O'Leary in Cork District Court asked two Polish interpreters to define the word 'ambiguous'; when they could not do so to his satisfaction he dismissed them and was cited as saying that this was "another example of Lionbridge sending incompetent interpreters." In May 2008 Judge Fahy in Galway District Court would not certify for the payment of a Lionbridge interpreter who she believed was not translating everything that was said for the accused.[62] In 2010 two articles in the Times reported nearly the same things as were being reported as early as 2003; interpreters without qualifications, agencies not testing interpreter competence or proficiency, no quality control; interpreters with poor English and so on.[63] Little seemed to have changed, yet Lionbridge was reported as saying "it was proud of the high levels of quality it provided"; that it had a 'stringent recruitment and qualification process' and regularly received positive feedback from its clients."[64]

Guerin made the point in 2004 that: "It is easier to be appointed to act as interpreter for an accused person facing a serious criminal charge than it is to get a licence to drive a taxi." [65] This still seems to be the case.

The Need for Interpreters

It has been acknowledged by the CS that for ordinary members of the public the language of the legal system is an "obvious block" to understanding the "rules that dictate the practice and

[60] Irish Translators' and Interpreters' Association (ITIA), Submission on the Courts Service Statement of Strategy 2008-2011 (2008) at 5
[61] E. Hayes, *Editorial*, ITIA Bulletin October 2007
[62] Galway Advertiser, 2 May 2008 cited in C. O'Brien, *No quality controls laid down for courts and Garda translators,* Irish Times, 7 June 2010
[63] C. O'Brien, *No quality controls laid down for courts and Garda translators,* Irish Times, 7 June 2010; C. O'Brien, *Hundreds of court, Garda interpreters have no qualification,* Irish Times, 7 June 2010
[64] C. O'Brien, *Hundreds of court, Garda interpreters have no qualification,* Irish Times, 7 June 2010
[65] S. Guerin, *Criminal practice: the use of interpreters and translators in the Irish courts*, Bar Council conference on Criminal Procedure, Dublin (2004)

procedure of all courts".[66] Guerin asserts that "[t]he language of the law is of critical importance".[67] The Times has talked about the "often arcane legal terminology" [68] of the legal system which has "its own language, and even a person quite competent in English could find some of the terms difficult to understand".[69] In discussing sentencing rationale in Irish District Courts, Hamilton interestingly remarks that the "reasons for a decision made in the noisy, pressurised environment of the District Court will only be obvious to someone who is familiar with the unspoken language of the court",[70] and Carey points out that legal language is a particular hurdle for the unrepresented defendant; he suggests that legal professionals should be made aware of, and be sensitive to "the exclusionary operation of legal language for unrepresented accused and inarticulate supporting witnesses".[71]

The trials of foreigners translate into a difficulty[72]

The CS has more explicitly recognised that for people "for whom English is not their first language, the court process can be difficult and sometimes unintelligible".[73] In Ireland such people are inevitably linked with foreignness and immigration, and almost every newspaper article on the issue has used one or more of the following terms: non-nationals, foreign nationals, foreigners, foreign defendants, immigrants and foreign immigrants. An early article in the Independent even refers to the "huge surge on crime with overseas links".[74] One article, however, uses a more integrative discourse on "Ireland's linguistic diversity", "the prospect of a polyglot population" and "our increasingly multilingual community",[75] and the CS also employs a rhetoric of "increased ethnic diversity"[76], "the increasingly diverse ethnic makeup of the population"[77]; "the increasing diversity of court users"[78]; "the diverse nature of the population appearing before the courts" and so on.[79] It is for these users, and to facilitate

[66] Courts Service Annual Report 2005
[67] S. Guerin, *Criminal practice: the use of interpreters and translators in the Irish courts* (2004)
[68] C. O'Brien, *Are we lost in translation?,* Irish Times, 4 April 2006
[69] C. Coulter, *Time to look at Garda rules for non-nationals*, Irish Times, 4 March 2003
[70] C. Hamilton, *Sentencing in the District Court: "Here be dragons"*, 15(3) Irish Criminal Law Journal 9 (2005)
[71] G. Carey, *Trial courts and legal language*, 17 Irish Law Times 134 (1999)
[72] C. Coulter, *The trials of foreigners translate into a difficulty*, Irish Times, 10 March 2003
[73] Courts Service Annual Report 2005
[74] R. Riegel, *Translator shortage causes havoc in court schedules*, Irish Independent, 14 May 2001
[75] C. O'Brien, *Are we lost in translation?,* Irish Times, 4 April 2006
[76] Probably the most commonly used: see e.g. *From Irish to Urdu,* Courts Service News, June 2006
[77] See e.g. Courts Service Annual Report 2005 at 38
[78] Courts Service Annual Report 2006
[79] *Changing Ireland,* Courts Service News, June 2006

access to justice that the CS is ensuring an interpreting service[80] that assists "with the efficient management of cases".[81]

It is notable that the Times, concerned with the need to improve the system, focuses on interpreting services as necessary to facilitate justice and ensure fair trials for those who do not speak English, while the focus of the largest number of Independent articles is on the soaring costs to the taxpayer, leading one commentator to remark: "One has to wonder if this continued focus on the cost of language service stems from a veiled anti-immigration standpoint."[82] She makes the point that the amounts in question are not, in fact, huge, but that "[t]hey are paying for a service that guarantees the human rights of all people in this country, regardless of their origins." There is a clear dichotomy in the focal points of coverage, even if the conclusions sometimes coincide.

Coulter in the Times reported in 2003 that correctness of procedure could not be assured because the "provision of adequate translation at every stage of the criminal process is now becoming a serious problem", and unless universal standards and controls were put in place it would only be "a matter of a time before it leads to a serious miscarriage of justice."[83] Also in the Times, Philip Watt of the (then) NCCRI was quoted as saying that the actions of interpreters could "literally mean the difference between life and death or between a one-year and a 10-year prison sentence",[84] and another article talked about interpreting matters as "basic issues of access to justice."[85] The Times also covered Ireland's leading position in resisting the 2004 proposed FD discussed in Chapter Three, warning of the consequent risk of Irish citizens being exposed to a lack of procedural rights abroad, and citing Professor Spronken as disputing Ireland's claim to having sufficient procedural rights in place;[86] it further describes the 2009 EU Directive on interpreting and translating as a "proposal to bolster defendants' rights to interpretation", which is "designed to help people to get a fair trial anywhere in EU."[87] In 2010 in the Times, O'Brien reports that unless interpreting services are improved "the rich potential for error, breach of fair procedures and miscarriages of justice will remain."[88]

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[80] Courts Service Annual Reports 2007 & 2008
[81] Courts Service Annual Report 2005
[82] E. Hayes, *Interpreting services cost courts €2m*, ITIA Bulletin August 2007
[83] C. Coulter, *The trials of foreigners translate into a difficulty*, Irish Times, 10 March 2003
[84] K. Holmquist, *Act now, while times are good*, Irish Times, 14 March 2006
[85] *Concern at judge's call for foreigners to pay interpreters*, Irish Times, 14 May 2005
[86] *Irish lead resistance to draft EU law on suspects' rights*, Irish Times, 12 June 2007
[87] *Proposal to bolster defendants' rights to interpretation*, Irish Times, 15 March 2010
[88] C. O'Brien, *No quality controls laid down for courts and Garda translators*, Irish Times, 7 June 2010

Costs are soaring as more interpret in court[89]

This focus contrasts starkly with headlines in the Independent:

Trying times for courts as translation costs soar	May 2004
Courts are set to spend €750,000 on languages service	July 2004
€550,000 payout for court interpreters	August 2005
€15m is lost in translation by the courts	January 2006
Costs are soaring as more interpret in court	November 2006
Translation firm sees business head for €1m	September 2006
Courts body to fork out £2m on interpreters as demand rises	July 2007

These headlines coincide with the years of highest immigration, between 2004 and its peak in 2007, the year the Lionbridge contract began; they are sensational in their financial explicitness, sometimes grossly inaccurate (€15m changes to €1.5m in the text), and many have distinctly negative connotations; costs are *soaring* instead of rising; the money is '*lost* in translation' instead of invested in interpreting and translation services; courts are *forking out* instead of paying this money; interpreters are getting a *payout* instead of a wage. The content of these articles covers financial statistics (spending has increased by 600% in five years; the CS will spend 20 times more this year than in 2000; spend has increased 14-fold since 1999); is linked with the increase in foreign nationals (large increase in foreign nationals before the courts; growing immigrant population) and language statistics (interpreting in 210 different languages and dialects); and sometimes comments on the proactivity of the CS. Some articles also focus on the high earnings and increases in income of specific agencies.[90]

The comments of some District Court judges on the waste of taxpayers' money and/or abuse of the system have also been reported. In May 2005, a Midlands judge was reported to have complained about the use of taxpayers' money to finance interpreting services for foreign defendants who were not prepared to learn English, allegedly stating that "[n]ot one of them is prepared to attend any of the classes available to assist them with having a command of the

[89] G. Deegan, *Costs are soaring as more interpret in court*, Irish Independent, 22 November 2006
[90] T. Felle, *€550,000 payout for court interpreters*, Irish Independent, 17 August 2005; *Translation firm sees business head for €1m, Irish Independent,1 September 2006*

English language. That strikes me forcibly."[91] In 2009 the Independent reported a judge in Blanchardstown District Court as asking why a particular asylum seeker needed a court 'translator' if he was able to swear at the Gardaí in English in an article entitled "No English, just foul language";[92] a judge in Galway District Court was reported in 2007 to have refused certification for an interpreter on the basis that it was "absolutely ridiculous" that a person could not speak English having lived here for five years,[93] and in 2005 a judge in Enniscorthy District Court reportedly refused to appoint an interpreter for two Romanian co-accused where "[a] show of being unable to understand English cut no ice".[94]

Academic sources tend to focus on interpreting as a necessity for justice and a right; Bacik's article is based on the idea of interpreters and translators facilitating access to justice, and she considers interpretation in the context of the right to a fair trial;[95] Judge Riordan looks at interpreting and understanding proceedings in terms of "constitutional and natural justice" and the ECHR; Guerin asserts that the interpreting system in place challenges "the integrity and safety of the Irish criminal process", and calls into doubt the State's ability to guarantee a fair trial for all 'non-national residents of the State'.[96] In various submissions to the CS, the ITIA also links the provision of interpreting services with the right to an interpreter and access to justice, exploring the ECHR, the Human Rights Act 2003 and relevant case-law,[97] and incorporating a joint discourse of human rights and natural justice:

> "Interpreters are provided to ensure that the defendant with limited English will be in the same position as an English speaking defendant. If an interpreter cannot interpret all the evidence, the defendant will be excluded from part of the proceedings. This is a breach of natural justice."[98]

Phelan also poignantly asks in an ITIA bulletin: "Do we really have to wait for a miscarriage of justice for the situation to change?"[99] However, the submissions of the ITIA to the CS also

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[91] *Concern at judge's call for foreigners to pay interpreters*, Irish Times, 14 May 2005
[92] A. Phelan, *No English, just foul language*, Irish Independent, 15 January 2009
[93] Galway Advertiser, 11 January 2007 IN ITIA Submission on the Courts Service Statement of Strategy 2008-2011 (2008) at 11
[94] *Judge refuses to appoint translator for man accused of handling stolen phone*, Irish Independent, 28 July 2005
[95] I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 109 (2007)
[96] S. Guerin, *Criminal practice: the use of interpreters and translators in the Irish courts*, Bar Council conference on Criminal Procedure, Dublin (2004)
[97] ITIA Submission to the Working Group on the Jurisdiction of the Courts 2002
[98] ITIA Submission on the Courts Service Statement of Strategy 2008-2011 (2008) at 3
[99] M. Phelan, *Court interpreters in the news (for the wrong reasons)*, ITIA Bulletin October 2007

outline the cost-effectiveness of providing better interpreting services. In the 2008 Submission, for example, it states that nearly €3 million had been spent on services in 2007, a considerable amount to spend without any monitoring of interpreters and quality which, they say, "would help to improve the overall quality and therefore cost-effectiveness of interpreting in the courts".[100]

Interpreters in court pay row[101]

Concerns have also been raised in this context about decreasing pay rates for interpreters. In July 2007 the Independent cited the CS spokesperson as saying that they pay €46 an hour for interpreting services,[102] while in October the ITIA reported that rates paid to interpreters had been "slashed" in "an alarming development"; interpreters, whose rates were already relatively low, "never expected reductions like these", and while Lionbridge continued to receive €46, interpreters were now being paid between €15 and €25.[103] These rates were considered inadequate considering that many interpreters have spent years in their study of language, translation and interpreting,[104] and one commentator wondered what kept interpreters going; "It can't be the money, it certainly can't be professional recognition, never mind job security", and she compared the situation to cowboys and Indians, "where the cowboys are those who make the biggest profits at the lowest possible cost and the indians are those who facilitate the cowboys." [105] The Times reports the complaint of a Garda of the Garda Representative Association that "while the agencies providing the interpreters are earning considerable profits the individual interpreters are "being paid buttons".[106]

In 2009 the Times reported that while the CS had sought an 8% reduction in fees from Lionbridge, the hourly rate for interpreters was to be cut by a further 28%, thus creating an increase in Lionbridge's take per hour, and rendering rates for interpreters among the lowest in Europe.[107] The fear was expressed that such low rates would fail to attract quality interpreters, reduce competitiveness, and thus create "a dearth of cover in the future".[108]

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[100] ITIA Submission on the Courts Service Statement of Strategy 2008-2011 (2008)
[101] M. Tighe, *Interpreters in court pay row*, Irish Times, 29 March 2009
[102] J. O'Brien, *Courts body to fork out £2m on interpreters as demand rises*, Irish Independent, July 2007
[103] M. Phelan, *Court interpreters in the news (for the wrong reasons)*, ITIA Bulletin October 2007 at 4
[104] M. Phelan, *Lost in translation: many court interpreters fail test*, Letter to Irish Examiner
[105] U. Fuehrer, *Cowboys and Indians,* ITIA Bulletin February 2008
[106] C. Lally, *Interpreter system poor – GRA*, Irish Times, 29 April 2009
[107] M. Tighe, *Interpreters in court pay row*, Irish Times, 29 March 2009
[108] M. Tighe, *Interpreters in court pay row*, Irish Times, 29 March 2009 & F. Gartland, *Professional fees for criminal legal aid work cut by 8%*, Irish Times, 27 March 2010

Morris, in her recent monograph on court interpreting, finds in Ireland a 'cautionary' tale as a system where because of a "poorly designed and poorly managed outsourcing system" standards are dropping and well-qualified interpreters are likely to leave the profession on the basis that they cannot make a living, "leaving only the inexperienced and incompetent to service the justice system."[109]

Conclusion

While there may not have been a great deal of academic interest in the area of court interpreting in Ireland, a degree of press coverage, extensive documentation by the ITIA, a small number of studies, the reports of the Courts Service and the few academic articles that have been written allow a picture to be built of how the provision of interpreting services has developed, how quality is perceived, and the context in which the need for interpreters has been portrayed. The picture that emerges reveals a number of areas of concern: interpreting remains unregulated and there are no recruitment or quality standards; interpreters are not required to have qualifications, training or competence and there are no official guidelines for interpreters or those working with them; there is no monitoring of performance or official code of conduct/ethics; there is no accreditation of qualifications or register of accredited interpreters; organisation of services is mixed, recruitment practices dubious, and the criminal background of interpreters unchecked. At the same time, the Courts Service insists that a quality service is being provided, that there is a high rate of satisfaction, and that those needing interpreters rarely have any problems understanding what happens in court, and where this happens it is quickly rectified. Lionbridge is proud of the quality services it provides, its stringent recruitment process and its positive feedback from clients.

These views represent the two opposing ideologies that emerged from the various sources that were analysed: the 'official' view that a positive and proactive approach has successfully been taken to the provision of interpreting for LEP defendants, and the 'alternative' view that chronic problems with the existing system are putting the LEP defendant's right to access justice at risk. Perhaps most positively, sources suggest that the need for providing interpreters is widely accepted, and that interpreters are generally provided in courts. If we compare the situation to the US, for example, the 'explosion' in foreign language interpreting took place there in the 1960s, yet Berk-Seligson reports that appeals based on the failure of

[109] R. Morris, Court interpreting 2009: an undervalued and misunderstood profession? Or: will justice speak? (Monographs on Translation and Interpreting, MonTI 2: 47-79)(2010). She applies this concern equally to parts of England and Wales, and Scotland

the court to provide an interpreter are even now highly frequent;[110] this is also in a context where 92% of interpreting at the federal level is Spanish-English, compared to a wider variety of commonly interpreted languages here.[111] It is also the case that Ireland is not the only country to have outsourced the provision of interpreting services with not very positive results; Morris notes that the "new millennium has brought a marked trend" towards outsourcing; she points out, for example, that although there is a national register of interpreters in Britain, outsourcing is increasingly popular and the Register has been "acquired" by some commercial agencies.[112] In fact, it was announced in August 2010 that all language services in the justice sector of England and Wales are to be outsourced to commercial intermediaries, which is causing concern in light of claims that a similar move in Scotland the previous year has led to "a mass exodus of professional interpreters"; and to poor interpreting quality, delays, abandoned trials, "and quite possibly miscarriages of justice."[113]

Having experienced immigration growth years and decades after other countries such as the UK, the US, Australia and many European countries, Ireland was uniquely positioned to exploit the experiences of these countries, and to adopt well-informed best practice; almost since its inception the ITIA has been furnishing the Courts Service with such information. The lack of policy in the area is thus all the more striking; the Courts Service appears content to put absolute faith in one agency, and seems unconcerned that even a State-funded study on quality and cost-effectiveness found the lack of policy and quality checks to be of serious concern.[114] Considering that courts appear for the most part well disposed to the provision of interpreters and that this provision is consistently linked to the rights of the accused and access to justice; and considering that the Courts Service is willing to spend – and has spent – the necessary amounts to ensure interpreting services are provided, it seems incongruent to accept that these funds be invested in a service that is clearly flawed.

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[110] S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002) at 199

[111] J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996) at 152

[112] R. Morris, Court interpreting 2009: an undervalued and misunderstood profession? Or: will justice speak? (Monographs on Translation and Interpreting, MonTI 2: 47-79)(2010)

[113] UK Association of Police and Court Interpreters (APCI), Position Paper: Outsourcing of language services in England and Wales (2010) available at http://www.eulita.eu/sites/default/files/APCI_position_summary.pdf

[114] National Consultative Committee on Racism and Interculturalism & Office of the Minister for Integration, Developing quality, cost-effective interpreting and translating services for Government service providers in Ireland (2008)

The Courts Service, in so far as it has discussed interpreting at all, has framed the contract with Lionbridge in terms of the "rationalisation and management of interpreting services",[115] and has stressed how this will contribute to the "efficient management of cases" and thereby improve organisation and quality; this managerial lexicon has been found to be typical of the annual reports and plans of criminal justice agencies in Ireland.[116] However, it has also been found that such reports rarely involve more than rhetoric, and the evidence with regard to interpreting services suggests that the same is true in this context; although a strong concern for, and heavy focus on money emerges, particularly in Independent newspaper articles, there seems to be less concern with ensuring cost-effectiveness and value for money in terms of interpreting agencies delivering the quality and organisation they are mandated to.

[115] *Highlighting Ireland's ethnic diversity*, Courts Service Annual Report 2005

[116] S. Kilcommins, I. O'Donnell, E. O' Sullivan, B. Vaughan, Crime, punishment and the search for order in Ireland (Dublin: Institute of Public Administration, 2004)

Chapter Five: Research Design and Methodology

The initial section of this chapter outlines the aims of the research, the use of certain terminology and the choice of the research setting. In addition it describes the development of the research questions and a conceptual and theoretical framework. The second section looks at how the research was designed, the choice of methodology - ethnographic observation and semi-structured interviews - and the reasons these methods were chosen, with reference to previous research studies and theory. Thirdly, the pre-fieldwork phase is detailed: ethical issues that were encountered, the choice of courts and access, the interviewee groups and how they were selected and contacted. The fourth segment of the chapter describes the process of data collection and includes quantitative details on court participation, as well as qualitative details on barriers encountered, impressions of the courts, contact with registrars and judges, and a shift in data collection. In addition, the development of interview schedules and some reflections on the interviewing process are explored, before some of the principal limitations of the methods used are outlined. The final component of the chapter consists of an overview of how data was recorded and analysed.

The Study

The basic objective of this thesis is to understand how the Irish District Court has dealt with and is dealing with the growing numbers of limited English proficient (and non-Irish speaking) individuals coming before it; is there an adequate system to ensure non-English speaking defendants are getting interpreters, is the system efficient, and how is the court affected? In answering these questions, the study aims to analyse whether or not limited-English proficient defendants can access justice on an equal basis with Irish (English-speaking) defendants from a language perspective.

Why 'LEP'?

The term 'limited English proficient' (LEP) is intended to depict defendants with limited or no English language skills. The term is used by Vera, a US criminal justice organisation, in its research and publications on immigrants without fluent English in the US justice system, and it is increasingly used in academic literature. Although the term 'non-English speaker' was used

in two major UK studies on interpreting,[1] 'LEP' is used here to avoid omitting a potentially large category of defendants: those who may be able to hold a basic conversation in English, but who could not be considered sufficiently fluent in the language of the court to participate fully. This term is also used in preference to other terms that appear in documentation and the literature including linguistic or ethnic minorities (most LEPs in Irish courts are immigrants); 'non-nationals' (used by the Prison Service among others, but controversial due to connotations of lacking any nationality[2]); 'non Irish nationals' (more common, but also not necessarily accurate as LEP defendants may hold Irish nationality); and 'foreign offenders' or 'foreign suspects' (the concern here is with those *accused* of crimes, and 'foreign' people may be fluent English speakers).

In terms of the relationship with immigration, the study makes no effort to categorise why defendants are in Ireland – whether for a holiday, as immigrants or asylum-seekers, and so on – and neither do the statistics of the justice system. Nonetheless there is a direct connection with immigration, as this is the direct cause of rising levels of LEP defendants. As such, links with immigration are made, and 'LEP immigrants' are sometimes referred to, while acknowledging that not all those in question are necessarily immigrants.

Why the District Court?

The thesis is based on court procedure, rather than looking at any other part of the criminal justice system. The presence of the LEP defendant in Irish criminal justice is by no means limited to the courts, nor is the impact on the system of the LEP defendant or their ability to access justice, and arguments can be made that the pre-trial process is just as determinative in the fate of the accused as a court appearance, and that what happens after conviction is just as deserving of attention; as Ashworth observes, "the adversary element in criminal justice will remain as the tip of the iceberg"[3], while Martens wonders how a poor knowledge of the language influences the interaction between various elements of the justice system,[4] and in the Irish context, for example, courts have recognised that prison is a particular challenge for

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[1] I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992); MVA Consultancy, Foreign language interpreters in the Scottish criminal courts (Edinburgh: Scottish Office Central Research Unit, 1996)

[2] For a discussion on the advent and use of this term see B. Fanning & F. Mutwarasibo, *Nationals/non-nationals: immigration, citizenship and politics in the Republic of Ireland*, 30(3) Ethnic and Racial Studies 439 (2007) at 449

[3] A. Ashworth, *Criminal justice and the criminal process,* 28(2) British Journal of Criminology 111 (1988)

[4] P.L. Martens, *Immigrants, crime, and criminal justice in Sweden*, 21 Crime and Justice 183 (1997) at 246

those that don't speak English.[5] The choice of the courtroom context is principally influenced by how other, similar studies have approached the matter and by issues of access.

The majority of research into legal language and interpreting has been carried out in the courtroom setting, possibly due the fact that recorded data is available and the forum is open to the public,[6] and due to perceptions of the courtroom as an important and interesting setting. Butler and Noaks justify choosing to study interpreting in English and Welsh courts by suggesting that several strands of the justice system meet in the courts, and that the issue of interpreting is 'at its most sensitive' here, though they also acknowledge that confining the study to the courts and carrying it out through English creates a one-dimensional view.[7] Although it necessarily involves neglecting other aspects of the criminal justice system, it nonetheless seems logical for an initial and exploratory study of interpreting in the criminal justice system to begin in the courts which are publicly accessible,[8] and which have clear connections with and relevance for other parts of the justice system.

Within the courts system, the choice of the District Court was based on a number of factors. Unlike this research, the majority of language-based interpreting studies and court studies more generally are carried out in higher courts; as Mileski points out, "[o]ur understanding of courts does not reflect court volume since accumulated knowledge disproportionately pertains to the higher courts."[9] The choice of higher courts for researchers may be based on the fact that the stakes are higher and it is logistically easier to observe, analyse and record proceedings. For Bacik et al., the District Court was an attractive choice for a study on sentencing, precisely because of the lack of attention that has been paid to it.[10] There are four other main reasons why the District Court was chosen for this research setting: the first is its quantitative significance, the second is its sentencing potential, the third its growing contribution to prison committals, and the last is the fact that the Irish District Court has a number of distinguishing features that suggest any findings of interpreting in higher courts are unlikely to be wholly applicable to it, or in other words, as most interpreting research is carried

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[5] *The People (at the Suit of the D.P.P.) v Vasile Vardoshilli*, unreported, Court of Criminal Appeal, Finnegan J., February 9, 2009

[6] S. Hale, Community Interpreting (Basingstoke: Palgrave Macmillan, 2007) at 90

[7] I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992)

[8] Irish Constitution 1937 Art. 34.1 that justice must be administered in public, in courts established by law; access is limited only when cases are held *in camera*

[9] M. Mileski, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 Law and Society Review 473 (1971) at 477

[10] I. Bacik, A. Kelly, M. O'Connell, H. Sinclair, *Crime and Poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity* 7(2) Irish Criminal Law Journal 104 (1997)

out in the higher courts, very little is known about how interpreting functions at the level of the lower court.

1. The quantitative significance of the District Court

In the Irish (ordinary) courts system, the District Court is lowest in order of importance after the Supreme Court, the High Court and the Circuit Court. However it is also the busiest of all courts and it processes the "vast majority of criminal cases in the system", which may also make it, as Byrne and McCutcheon suggest, the most significant criminal court.[11] Although it is not known how many LEP defendants appear in the District Court, it follows that the bulk of interpreted criminal cases will also be heard here: Riordan, a judge in the District Court, gave a personal estimate that immigrants in 2007 made up about 10-20% of the daily caseload.[12]

2. The nature of District Court offences, penalties/sentencing and committals

A criminal case can come to trial either by summons or indictment; the latter usually involves more serious offences and leads to a trial on indictment which has traditionally meant trial by jury, while a summons leads to a summary trial.[13] The District Court is a court of summary jurisdiction where "[a]ll questions of law and fact" are decided by the presiding judge and there is no jury; the right to be tried by jury applies unless the offence is a minor one.[14] The District Court has jurisdiction to deal with minor criminal offences,[15] and in defining a case as such two factors are relevant: moral quality and authorised punishment.[16] Byrne and McCutcheon identify "the general 'rule of thumb'" to be that a minor offence can carry a

[11] R. Byrne & J.P McCutcheon, The Irish legal system (Dublin: Bloomsbury Professional, 2009) at 223. The District Court also deals with civil matters. The following table shows the cases tried by the District Court in 2009 as per the Courts Service Annual Report 2009

All cases disposed of	2009
Road traffic offences	333,161
Public order/assault	64,748
Theft	31,711
Drugs	17,620
Sexual offences	1,352
Other*	72,466
Total	521,058

* 'Other' includes breach of bail, litter offences, street trading and offences prosecuted by Government Departments and State agencies.

[12] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007) at 104; an alternative estimate appears on page 100 of 15-20%

[13] R. Byrne & J.P McCutcheon, The Irish legal system (Dublin: Bloomsbury Professional, 2009) at 268

[14] Irish Constitution 1937 Article 38

[15] Irish Constitution 1937 Article 38.2

[16] *Melling v Ó Mathghamhna* [1962] I.R. 1; *Conroy v Attorney General* [1965] I.R. 411

maximum prison sentence of 12 months, and fines of up to €5000,[17] although an aggregate custodial sentence of up to two years can be imposed for two or more offences.[18] The District Court can also try some indictable offences summarily under certain conditions;[19] the District Court judge must accept jurisdiction, having satisfied him or herself that it is a minor offence and fit to be tried summarily; an informed waiver of the right to trial by jury and election of trial at the District Court is required of the defendant; and some cases require the consent of the Director of Public Prosecutions (DPP). The District Court further processes indictable offences for which the District Court can impose sentence in the event of a guilty plea, as well as cases that cannot be tried summarily, which it sends forward for trial; in this situation the District Court acts as a 'clearing house', dealing with issues of bail and the service of the book of evidence.[20]

There is a perception that the District Court deals only with minor offences, but it is clear that LEP defendants who commit serious crimes will also appear before the District Court and need an interpreter. In addition, the sentencing potential of the District Court in terms of fines and custodial sentence is actually quite severe and contrary to the notion that appearance before it does not pose a threat to a person's liberty. There have long been concerns about fines becoming custodial sentences in default of payment; in a study by the Irish Penal Reform Trust (IPRT), a solicitor described as "disquieting" the situation whereby homeless people are effectively being given a custodial sentence when fined by the court,[21] and as mentioned in Chapter One, one third of committals under sentence in 2009 was for fine defaulting, although this is expected to change with the new Fines Bill 2009.[22]

The numbers of those committed on remand is also a serious issue as these have increased enormously since the 1996 Constitutional amendment widening the circumstances under

[17] R. Byrne & J.P McCutcheon, The Irish legal system (Dublin: Bloomsbury Professional, 2009) at 223

[18] Criminal Justice Act, 1951 Section 5 as amended by Criminal Justice Act, 1984 Section 12, T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009) at 9.01 & 9.08

[19] These are known as indictable offences triable summarily, hybrid, or 'either-way' offences; they are specified in the Schedule to Criminal Justice Act, 1951 which has been amended by: Criminal Procedure Act 1967, Criminal Law (Jurisdiction) Act 1976, Criminal Law Act 1997

[20] R. Byrne & J.P McCutcheon, The Irish legal system (2009) at 225; T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009) at 9.10. The table shows how cases in 2009 were dealt with (Courts Service Annual Report 2009)

Summary offences disposed of	451,280
Indictable offences dealt with summarily	69,778
[Sent forward for trial	11,772]

[21] C. Hamilton, *Sentencing in the District Court: "Here be dragons"*, 15(3) Irish Criminal Law Journal 9 (2005)

[22] Irish Prison Service Report, 2009

which bail can be denied; for example in 2009 nearly 30% of all committals were on remand. The majority of short sentences are imposed by the District Court, and in 2009, for example, 53% (5,750) of committals under sentence to Irish prisons were for sentences of three months or less;[23] custodial sentences were imposed by the District Court in 17,289 cases, and as O'Malley explains, it is difficult to estimate how many actually go to prison as a result of this decision though the high number of committals suggest that a "very considerable number of offenders sentenced in the District Court actually went to prison".[24]

It is recognised that while hugely expensive, short prison sentences do not serve either a rehabilitative or a deterrent function; while such prisoners cannot take advantage of education or other programmes in prisons, they suffer the same negative impacts: stigmatisation, disrupted ties with families, employers and their community, and the likelihood is increased that the offender will continue on a criminal path.[25] Appearing before a District Court, therefore, can have potentially far-reaching consequences, which is a concept difficult to reconcile with the trivial image through which a lower court's role in the criminal justice system is sometimes portrayed, and with the relative lack of research into how the District Court functions.

3. The District Court as an arena of ritualized linguistic battles[26] or a place of tedium, dullness and commonality?[27]

Many interpreting studies approach court interpreting from the perspective that the adversarial nature of proceedings and particularly cross-examination - a 'ritualized linguistic battle' - can be deeply affected by the interpreter. Studies of the lower criminal courts in other jurisdictions, on the other hand, have led researchers to question whether proceedings at this level can be said to be adversarial at all. Some of the known characteristics of the Irish District Court would suggest that proceedings at this level will differ significantly from those at a higher level, and thus have consequences for the type of interpreting that takes place. While the potentially serious consequences of a District Court appearance have been discussed, it is

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[23] Irish Prison Service Report, 2009

[24] T. O'Malley, *Time served: the impact of sentencing and parole decisions on the prison population*, Paper delivered to Irish Penal Reform Trust, Morrison Hotel, Dublin, June 28, 2010: O'Malley's figures pertained to 2008, but there were significantly more committals under sentence in 2009, and custodial sentences imposed by District Court also increased.

[25] See e.g. I. O'Donnell, *Challenging the punitive obsession*, 8(1) Irish Criminal Law Journal 51 (1998)

[26] J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 6

[27] A. Bottoms & J.D. MacClean, Defendants in the criminal process (London: Routledge & K. Paul, 1976)

also the case that a huge number of minor or petty offences are processed, and O'Donnell notes that in the District Court there is a perception that in day-to-day dealings "it's better not to involve the Constitution and simply to proceed on the evidence and facts alone, and leave any questions of law for higher courts to resolve."[28] In addition, most criminal cases are not only investigated but also prosecuted by the Garda Síochána, and the investigating Garda or the local Garda Superintendent will usually act as the prosecutor in court.[29] Carey has suggested that the word of the Garda will invariably be taken over that of the accused in court, and he quotes Michael McDowell talking from the perspective of parliamentarian and that of Senior Counsel:

> "there is a natural tendency ... not to disbelieve a policeman in his account of an altercation with a civilian. After many years on the bench dealing with local Gardaí on a day-to-day basis, the [district] judges are not sufficiently objective to conduct a trial where people they know, with whom they have regular dealings, are swearing the details of an incident with an ordinary member of the public."[30]

While Byrne and McCutcheon suggest that it is unusual for defendants in criminal cases to represent themselves "owing perhaps to the long-standing availability of state-funded legal aid",[31] and Riordan notes that most LEP defendants usually get "independent legal advice from a legal aid solicitor",[32] another feature of the lower court is the guilty plea. There are no definitive statistics on guilty pleas in Ireland, and sentencing research has been hindered by the fact that pleas are often not entered into court records,[33] but it is generally accepted that a high percentage of suspects and defendants plead guilty.[34]

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[28] Judge T. E. O'Donnell, *The Constitution, the European Convention on Human Rights Act 2003 and the District Court – a personal view from a judicial perspective*, 1 Judicial Studies Institute Journal 137 (2007)

[29] R. Byrne & J.P McCutcheon, The Irish legal system (Dublin: Bloomsbury Professional, 2009) at 269; P. Dwyer, *The Garda as prosecuting advocate in the District Court*, 9 Irish Law Times 89 (1991)

[30] Vol. 433 Dáil Debates col. 1046 cited in G. Carey, *Trial courts and legal language*, 17 Irish Law Times 134 (1999)

[31] R. Byrne & J.P McCutcheon, The Irish legal system (Dublin: Bloomsbury Professional, 2009) at 354

[32] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007) at 104

[33] in Bacik et al.'s study out of 1,603 cases, 50.5% involved guilty pleas, 28.7% not guilty pleas, and in the remaining 20.1% of cases, a plea had not been clearly recorded [I. Bacik, A. Kelly, M. O'Connell, H. Sinclair, *Crime and poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity*, 7 Irish Criminal Law Journal 104 (1997)]; in their study, Jackson and Doran also found that in at least 25% of cases there was no record of a plea, and it was thus not possible to obtain complete figures on guilty and not guilty pleas [J. Jackson & S. Doran, *A study of the jurisdiction of the criminal courts in Ireland*, Report to the Working Group on the Jurisdiction of the Courts (Courts Service, 2003) at 29]

[34] See e.g. T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009) at 117

This snapshot of the District Court suggests that law is not raised a great deal; that the Gardaí (and not lawyers) generally conduct the prosecution; that judges tend to believe the Gardaí's version of events where there is a dispute; and that a high percentage of cases proceed on a plea of guilty. At the same time it is important to note that while summary cases can be processed with "some degree of expedition and informality", according to Gannon J., their validity "depends first and foremost on compliance with the principles of natural justice", [35] and Keane C.J. has held that in courts, including the District Court, according to the Constitution and the law, "natural justice and fair procedures must at all times be observed in the administration of justice".[36] The High Court has further stated that the District Court must "act constitutionally" and "in such a manner as to preserve an individual's constitutional rights".[37] The District Court thus presents as a fascinating research context where little is known about how it functions on a daily basis, and almost nothing is known about how interpreting takes place; it can be deduced that the type of interpreting will not correspond to that in many existing studies, but it also seems clear that the right to an interpreter will also apply at District Court level as a matter of fair procedure and natural justice.

The research questions and the theoretical framework

A three-pronged approach to the analysis of LEP defendants in the District Court is taken to include consideration of their linguistic status as LEP individuals, their legal status in terms of their rights of access to the justice system from a language perspective, and the broader criminological context in which they are situated as participants in the criminal justice system. As such, three different fields are drawn on in forming and answering the research questions: linguistic, legal and criminological:

1. **Language/interpreting:** ***Why should this be a problem?***

   How is the language of the court different to everyday language? How are interpreting services dealt with by the justice system, and what is the impact on criminal trials?

2. **Legal:** ***What rights/protection does a person in this situation have?***

   What does the right to an interpreter entail and how is this understood and practised in the Irish context?

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[35] *Clune v D.P.P. and Clifford* [1981] I.L.R.M. 17; T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009) at 15.01 or 563

[36] *Orange Communications Ltd v Director of Telecoms (No.2)* [2000] 4 I.R. 159 at 189

[37] *Coughlan v Patwell* [1993] 1 I.R. 31 at 37 *per* Denham J.

3. **Criminological**: ***How does the criminal justice system deal with the LEP defendant and the provision of interpreting services?***

   How do criminological trends affect the justice system's treatment of offenders and the provision of services?

This broad approach is taken based on the fact that the nature of the issue itself is multi-faceted, but also because of the desire to analyse, consolidate and make full use of the little existing research and documentation on the topic in Ireland within a framework that takes account of the context in which the issues are developing; existing information is limited to a small number of academic articles, book chapters and unpublished MA dissertations, two EU surveys, some newspaper articles, limited case-law and other isolated reports and documents (mainly from the Irish Translators and Interpreters Association and the Courts Service).

The broad framework also draws on relevant literature from differing disciplines that have not traditionally interacted, but which are equally relevant to the topic; for example, many language and interpreting studies have been carried out in the court settings, justified by unchallenged assumptions about the legal and criminological context in terms of rights, justice and so on,[38] while narrow linguistic perspectives often render their work technical and inaccessible; many studies researching barriers to justice and the law for immigrants and ethnic minorities have all but ignored language; and legal discussions on the right to an interpreter are often erratic in their consideration of the linguistic aspects of that right. Although the interdisciplinary nature of court interpreting has often been recognised, in practice it is rarely dealt with. For these reasons the theoretical framework of the study is built on a review of relevant criminological literature; literature on legal language and court interpreting; and an analysis of the right to an interpreter in international, regional and domestic law and consideration of more general judicial attitudes towards interpreting in Irish case-law.

The Research Design

As this is the first study of its kind in Ireland an exploratory approach is taken. Butler and Noaks, who undertook an exploratory and descriptive study of interpreting in England and

[38] P. Jansen, *The role of the interpreter in Dutch courtroom interaction: the impact of the situation on translational norms* IN Topics in interpreting research (J. Tommola, ed.)(Turku: University of Turku, Centre for Translation and Interpreting, 1995) at 12: Jansen insists that "the work of the translator or interpreter has to be studied in its social and historical context"

Wales, consider this type of research important for the review of established practice "even when it raises more questions than it answers."[39] The concern is with understanding *what* happens when an LEP defendant appears in court, and *how* the process affects, is perceived, and is influenced by those involved; a qualitative approach is taken that permits the necessary flexibility of data collection for an exploratory study. Another strength of adopting a qualitative approach to this topic is the fact that data are collected directly from where the interpreting is taking place and from those directly involved in the processes, allowing an insider perspective on something that has only been reported on in the abstract to date; while existing accounts are largely based on speculation and anecdotes, qualitative techniques embrace the complexity of the process and allow it to be detailed in an holistic and descriptive manner.

In order to obtain a more nuanced perspective and a more complete set of data, as well as to ensure the greatest possible credibility of the research, a triangulation of research methods is employed.[40] Studies that aim to collect data in courts, including studies of language or interpreting in courts, very often use a triangulation of research methods, and most use observation as "the logical starting point".[41] Similarly, this study uses ethnographic non-participant observation of the courtroom, as well as a series of semi-structured interviews.

Ethnographic non-participant observation

In Ireland, "the absence of empirical research on the operation of our criminal justice system" has often been highlighted,[42] and relatively few studies have involved observation in a courtroom setting. As the aim of the research was to discover and document how the system of interpreting operates in the court, presence in the courtroom and observation of the system in process was a vital and fundamental aspect of the study's exploratory and qualitative nature. Non-participant observational research allows the researcher to address the question of *what happens* and to provide a description of what is done, rather than depending on a report or a second-hand description, and it permits the study of behaviour

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[39] I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992)

[40] E.G. Guba, *The Context of Emergent Paradigm Research* IN Organization theory and inquiry: the paradigm revolution (Beverley Hills, Calif.: Sage, 1985); E.G. Guba & Y.S. Lincoln, *Competing paradigms in qualitative research* IN Handbook of qualitative research (N.K. Denzin & Y.S. Lincoln, eds.)(Thousand Oaks, Calif./London: Sage, 1994)

[41] P. Jansen, *The Role of the Interpreter in Dutch Courtroom Interaction: the Impact of the Situation on Translational Norms* IN Topics in interpreting research (J. Tommola, ed.)(Turku: University of Turku, Centre for Translation and Interpreting, 1995) at 12

[42] T. O'Malley, The Criminal Process (Dublin: Round Hall - Thomson Reuters, 2009), Preface

within its natural setting.[43] In his studies on language in the court, for example, O'Barr found that assumptions made by the legal system about the nature of language and communication are rarely articulated; instead they are implicit in courtroom procedure and "may be discovered through detailed observation of courts in action."[44]

Hammersley explains that distinguishing between participant and non-participant observation highlights the variation in observer roles,[45] and in the context of observing interpreting in the court, an observational role involving limited interaction with other participants in the setting was considered the most appropriate; it was hypothesised that participants who were aware – not of the presence of a researcher, but of the precise nature of the research would become conscious of their behaviour with regard to the interpreting issue, and could consciously or otherwise alter their normal behaviour.

A number of problems are associated this method; how one interprets what one observes can be subjective, as can the manner in which fieldnotes are processed, and a person's values can be influential in the process.[46] It is therefore important to remain self-aware and to be conscious of potential bias. As Conley and O'Barr recognised with regard to their own accounts of language in the courtroom; "[t]he reader must put a great deal of trust in the ethnographer".[47]

Semi-structured interviews

Complementing the observational phase was a series of semi-structured interviews that were undertaken with members of two key groups involved in court language processes; interpreters who work/have worked with LEP immigrants in court and solicitors/barristers that work/have worked with interpreters and LEP immigrants. When conducting semi-structured interviews, the researcher generally has reasonably specific topics in mind or questions to ask, but the interviewee has a lot of freedom in how they answer; an interview schedule can guide

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[43] C. Barner-Barry, *An introduction to nonparticipant observational research techniques*, 5(1) Politics and the Life Sciences 139 (1986)
[44] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982) at 36-7
[45] M. Hammersley, *Observation, participant and non-participant* IN Encyclopedia of sociology (G. Ritzer, ed.)(Thousand Oaks: Sage, 2007)
[46] M.B. Miles & A.M. Huberman, Qualitative data analysis: an expanded sourcebook (Thousand Oaks, Calif./London: Sage, 1994)
[47] J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005) at 101

the interview, but questions may be added or altered throughout.[48] The key advantage in using this type of interview for this research is its flexibility; considering the exploratory nature of the research, initial interview guides would necessarily be based on hypothesising how the findings of studies elsewhere would apply to Ireland, such that latitude in the interviewing process was key. At the same time, semi-structured interviews will generally involve asking the same questions with similar wording from one interviewee to the next which allows for continuity.[49]

Many studies that use observational methods also use interviews; interviewing participants in the research setting not only provides perspective and can help to counteract potential bias on the part of the observer, but it is also a means of supplementing contextual details and facts. In the context of this research, solicitors/barristers are professionals with a huge amount of legal expertise and experience, while many interpreters are also professional with a great deal of knowledge about language and interpreting issues. While not necessarily a disadvantage, the data obtained through interviewing can be subjective, factually incorrect or misleading, and unrepresentative. Interviewers also have responsibilities in the interview process which, if not observed, could affect the answers given, such as careful, specific wording, remaining clear, not 'leading' the interviewee, and listening to what the interviewee is actually saying.[50]

Preparing for the Fieldwork

Ethics

Having decided on the methodologies to be used, ethical approval from the ethics committee of the School of Social Work and Social Policy was mandatory, but also useful for reflection on the ethical issues involved in the research, and for refining the information and consent form to be used for interviewees. An ethical approval form was submitted in January 2009. With regard to the vulnerability of the research subjects, the English/Irish language ability of participants was of particular relevance; while the defendants to be observed would not all be English/Irish-speaking, there would be no direct contact with them, and while the interpreters to be interviewed would also not have English/Irish as their first language, their job requires

[48] A. Bryman, Social research methods (Oxford: Oxford University Press, 2008)
[49] A. Bryman, Social research methods (Oxford: Oxford University Press, 2008)
[50] See e.g. J. Mason, *Qualitative interviewing: asking, listening, interpreting* IN Qualitative research in action (T. May, ed.)(London: Sage, 2002); H. J. Rubin & I.S. Rubin, Qualitative interviewing: the art of hearing data (Thousand Oaks, Calif.: Sage Publications, 2005)

fluency in English such that no vulnerability or ethical difficulty was anticipated. The issues of consent, data protection, confidentiality and the anonymity of participants also had to be dealt with as issues of importance considering the relatively sensitive nature of the research; it was considered that solicitors/barristers would be unlikely to discuss their opinions on the matter freely – particularly if they were negative - if names were involved, while interpreters could potentially be risking their jobs and livelihoods if certain comments or opinions appeared in their name. These questions were dealt with in a combined information sheet and consent form which was to be given to each participant and which was also submitted to the ethics committee. The committee did not approve the first submission of the ethical approval form, two of the reasons being based on issues with this consent form; a more detailed explanation was required of participant anonymity and confidentiality, and clarification was requested on what details would be recorded and whether data would be collected and stored digitally.

The form was modified and the final version contained contact details for myself and my supervisor, it explained the purpose and aims of the research as well as what was being requested of the interviewee - to participate in a semi-structured interview, and it clarified that the interview would be digitally recorded only with the interviewee's consent. Recorded interviews would later be transcribed, and interviewees could request a transcript; in all other cases hand-written notes would be taken and a report written afterwards. The information and consent form noted that the interview would take between 30 and 90 minutes and that the location was subject to mutual agreement. It was particularly stressed that participation was wholly voluntary, and that the participant could decline to take part, withdraw or refuse to answer any question at any time and without explanation. Participants and potential participants were assured that identifying information would be removed and remain confidential, and that all names would be changed to preserve anonymity. To protect the identity of participants and the security of notes, interview notes and recordings would be stored on a personal computer without identifying information and numbered anonymously, while the list with corresponding identifying information would be kept separately in a locked drawer.

The second submission was also not approved: the Committee's objection was based on the fact that according to the information provided, participants being observed in the District Court would not be giving informed consent; it was suggested that advice be sought from the

court clerk in relation to informing legal advocates and interpreters about the research. Although it had been noted on the original form that the research setting was a public access courtroom where observation by any member of the public is possible, that it would be logistically impossible to gain individual consent to observation, and that permission was to be requested from the President of the District court to carry out this research, a re-submission of the ethics approval form was made.

The Committee was requested to reconsider their condition on the basis that any member of the public is free to attend court and there are no privacy restrictions on what is publicly said in public court sittings, nor is there any expectation of privacy by those involved in court, or any requirement to inform those attending court or working in courtrooms of the presence of any member of the public, journalist, or researcher. Reference was made to the Irish Constitution[51] and the general recognition of the desirability of open and transparent justice system, and the fact that the research would not involve cases held *in camera* and not open to the public. Further reference was made to the right of the defendant to have his case heard in an open and transparent system;[52] to the Statement of Principles of Ethical Research Practice by the UK Socio-Legal Studies Association that when data is gathered in public there is no need for consent from those observed;[53] to the principles compiled by the Office of the Irish Press Ombudsman specifying that the right to privacy "should not prevent publication of matters of public record or in the public interest",[54] to the Freedom of Information Act allowing public access to public records including records of court cases; and to the message on Courts Service website that "[t]he public are welcome to enter all courts except those displaying the 'in camera' sign".

The submission was intended to demonstrate that there was nothing unethical about sitting in a public courtroom or about making notes there, and that permission to attend court as an observer was not needed. It was made clear that permission was nonetheless being sought

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[51] Article 34(1): "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public"

[52] Universal Declaration of Human Rights, Article 10 (Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal ...); International Covenant on Civil and Political Rights, Article 14(1) (...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal....); Article 6(1) of the European Convention on Human Rights (...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press ....)

[53] http://www.kent.ac.uk/nslsa/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf

[54] http://www.presscouncil.ie/v2/pressombudsman/portal.php?content=_includes/codeofpractice.php

from the President of the District Court, and that should information regarding the research be sought by the court clerk, judge, interpreter, solicitor or any other party those details would be furnished. On this basis the Committee approved the submission.

Non-participant observation in the District Court

In her case study of a US District Court Mileski draws attention to the limitations of her data collection arising from the fact that only one court was represented, and the concern for how representative this would be of all lower criminal courts.[55] Bearing such a concern in mind it was decided to observe in a number of District Courts: two in the Dublin area and one outside of the Dublin area. It was hypothesised that varying circumstances and logistics between courts, where some have duty interpreters while in others interpreters are assigned for particular cases, may have an effect on processes and procedures.

It was also considered that due to the wide discretion practiced by Irish judges, observing multiple judges was necessary in order to get a more representative picture of the relevant processes and issues. Bacik et al. point out that despite the limitations on sentencing in the District Court, "the District Court judge has perhaps more discretion at this level than at any other within the criminal justice system",[56] Hamilton has described sentencing as a "geographical lottery",[57] and O'Malley compares the situation to the story a judge in Texas who handed down a life sentence for the theft of a horse followed by a suspended sentence for a manslaughter conviction, and who explained this to a journalist saying; "Well, down here there is some men that need killin', but there ain't no horses that need stealin'".[58] Essentially concerns about how judges use their power and about the appropriateness and consistency of sentencing emerge very strongly from literature on the District Court;[59] it seems reasonable to anticipate that the attitudes and approaches of judges may also vary widely with regard to interpreting processes, particularly as there are no standards, regulations or guidelines by which to abide.

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[55] M. Mileski, *Courtroom encounters: an observation study of a lower criminal court*, 5 Law & Society Review 473 (1971)

[56] I. Bacik, A. Kelly, M. O'Connell, H. Sinclair, *Crime and poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity* 7(2) Irish Criminal Law Journal 104 (1997)

[57] C. Hamilton, *Sentencing in the District Court: "Here be dragons"*, 15(3) Irish Criminal Law Journal 9 (2005)

[58] A. Neier, Crime and Punishment: A Radical Solution (New York: Stein and Day, 1976) at 163 cited in T. O'Malley, *Principles of Sentencing*, 1(2) Irish Criminal Law Journal 138 (1991)

[59] See e.g. P. O'Mahony, *The courts: introduction* IN Criminal justice in Ireland (P. O'Mahony, ed.)(Institute of Public Administration: Dublin, 2002)

In selecting the most appropriate courts, a number of factors were influential, including where particular immigrant groups were living according to the 2006 census, recommendations of solicitors/barristers, pilot observations, the presence/absence of duty interpreters, the logistics of getting to and from the courts on a regular basis, the type of court and the cases they dealt with, and the aspiration to be as representative as possible. The first court chosen was a busy, city centre court in Dublin which has duty interpreters and which, because of its location, deals with significant numbers of LEP defendants [henceforth City Centre Court]. The second court was a custody court, in Dublin but removed from the city centre which also deals with high numbers of LEP defendants; initially a different court had been chosen but, as is outlined below, a change was made after a number of days as I considered my position as a researcher may have been compromised [henceforth Custody Court]. The third court chosen was actually a set of three courts that share a judge who moves between them on alternate days. These courts are located in medium to large towns outside of Dublin; while they also deal with civil matters, the sittings in these courts were considerably longer than the Dublin courts, such that there were equal if not more numbers of criminal cases heard [henceforth collectively the Rural Court].

Although the public is entitled to enter the courts, permission was requested from the President of the District Court to carry out the research. This was granted without any difficulty, and the President's Office assisted with contact information and in contacting every court that I wished to visit.

Preparing for the interviews

Interpreters and solicitors/barristers were chosen as the most appropriate for interview; each had a lot to contribute alone, but it was considered that the groups were also complementary in the sense that while legal advocates are law-orientated and situated within the criminal justice system, interpreters are language-orientated and (in Ireland) situated outside the system. Additionally, the two groups inevitably come into contact and work together, such that different perspectives of the same situation and relationship were likely to emerge. It was decided that, although it would yield interesting results, a number of issues stood in the way of interviewing LEP defendants; their lack of English was a fundamental barrier that would in almost all cases necessitate the use of interpreters, and aside from funding issues, using an interpreter to investigate the adequacy of interpreting carried greater philosophical and ethical issues which would be too great to overcome for the purposes of this study. With

regard to judges, it seemed that the majority of their interaction with interpreters and interpreting was publicly visible, and would not add as much richness to the data as interviews with the above groups whose interaction went beyond what could be observed in the courtroom. Finally, while the Gardaí are very present and active in the courtroom, the majority of their interaction with interpreters is in the pre-court phase of the justice system. As a result semi-structured interviews of between 45 and 90 minutes were carried out with 9 interpreters and 9 solicitors/barristers.

For both groups it was important that my sample be as representative as possible; for this reason although I aimed at a reasonable gender mix, in my observations the majority of interpreters – though not by a huge amount – were female, and in certain courts there were far more male criminal solicitors than female. Overall I observed more solicitors than barristers, and because I spent more time in Dublin courts I recruited more interpreters and legal professionals here. The divergence of these groups also meant that recruiting them involved different methods.

Legal professionals were recruited through contacts made at events (conferences, seminars), personal contacts, and the majority by approaching solicitors/barristers whom I had observed in particular courts. Usually this was done towards the end or after I had finished in a particular court to ensure that the behaviour I observed was not influenced by the interview, a precaution aimed at protecting the validity of my observations that was also preferable on a practical basis; solicitors/barristers were generally busy at court, such that contact by telephone was preferable in terms of making the request for participation and providing full details without interruption and in more relaxed circumstances. All the participants that I approached agreed immediately to be interviewed, the only hesitation being in one case being over whether they could usefully contribute, and all were happy to receive the information sheet. One solicitor, on the other hand, recruited himself by approaching me to find out what my research was about, and gladly agreeing to be interviewed.

Of the legal professionals recruited 3 were barristers (2 female, 1 male); and 6 were solicitors (5 male, 1 female). All 3 barristers and 2 of the solicitors were based in Dublin, and 4 of the solicitors were based in the Rural Court where over the course of observations only one barrister appeared on one occasion, while in the Custody Court the vast majority of appearances were by barristers, and in the City Centre there was a mixture, though it was

mostly solicitors who appeared. The barristers had between 4 and 10 years experience, and the solicitors had all been practicing for a minimum of 6 years, and some of them for much longer than this. All solicitors/barristers had experience working with interpreters and/or LEP defendants, and the majority of them had a huge amount of experience in the area; one barrister had slightly more experience in the area of asylum and refugee applications.

A small number of interpreters were recruited from a request for participation sent out with the monthly bulletin of the Irish Translators and Interpreters Association, while the remainder were contacted directly in court. It seemed equally important that interpreters be unaware of my purpose in court; aside from influencing their behaviour, some court interpreters I observed were particularly young, inexperienced and intimidated by the court setting, and feeling observed might have caused them to feel uncomfortable or threatened. As such I generally approached them towards the end of observations in a particular court; while the identities of solicitors and barristers are often referred to in court, interpreters remain completely anonymous on a personal level, such that it was necessary to approach potential participants directly in court. This was facilitated on a practical level by the fact that in most courts I was seated with the interpreters, usually on the same bench, and was therefore in close contact with them. Although my approach initially made many of the interpreters nervous, when it was accepted that they were being asked for their participation in research rather than being scrutinized or evaluated, almost all were willing to participate, although four did not consent to have the interview recorded.

The first criterion for selecting interpreters involved representing the most commonly interpreted languages; in 2007 the top five were Polish, Lithuanian, Romanian, Russian, and Mandarin and all are represented in the sample; the direct approach recruitment method almost always involved interpreters of these common languages as these were most often in court and in court for the longest periods. Interpreters of less common languages usually arrived, interpreted and left very quickly, and were much more difficult to approach, which is why the less common languages in the sample (Ukrainian and Spanish) were recruited through the call for participation. The second desired criterion of recruitment was that participants should have varying degrees of training and experience. This was difficult to know with any certainty without interviewing the person (though observation alone usually gave a good indication), and was also somewhat difficult as interpreters of common languages are often those with the most experience. In general, most of the interpreters I interviewed had a good

level of experience, with only one very inexperienced interpreter, and most also had a high level of education – often in a language-related field – and a good understanding of the interpreting process and related issues. From my observations in the field, I consider that the level of experience and knowledge of these interpreters is not representative of interpreters overall.

In terms of gender, 7 of the interpreters were female and 2 were male. 7 were based in Dublin and 2 were based in the Rural Court, though most Dublin-based interpreters had also travelled and interpreted outside Dublin. In terms of nationality and languages 2 were Chinese (one a native Mandarin speaker, one a native Cantonese speaker); one was Latvian (Latvian, Russian and Lithuanian as mother tongues); one was Lithuanian (Lithuanian, Polish and Russian as mother tongues); one was Ukrainian (with Ukrainian and Russian as mother tongues); two were Polish (Polish mother tongue); one Romanian (mother tongue Romanian, also interprets French) and one Spanish (mother tongue Spanish, also interprets Portuguese). The length of time the interpreters had been in Ireland varied hugely from 7 months to 20 years, the average standing at just over 6 years. 5 of the interpreters had a minimum of an undergraduate degree in philology or linguistics; 2 had completed the Certificate in Community Interpreting from DCU and 4 overall had some prior training in interpreting. Three had worked as an interpreter before coming to Ireland. 7 of the interpreters freelanced for several interpreting agencies, and only two interpreters worked solely for Lionbridge.

The Data Collection

In the District Court

Over the course of seven months I spent a total of 45 days or an approximate 183.5 hours[60] as an observer in a total of seven courts (including a brief period in the first Custody Court and counting the Rural Courts separately). In the course of this time I observed how twelve different judges dealt with approximately 376 LEP cases and issues related to interpreting. The number of interpreted cases on any given day varied in the same way that the length of the court list and the amount of the court list that was processed varied; for example the court list in the Rural Court could run over to over 200 and the court would regularly sit until well after 6pm, while those in the City Centre Court were often significantly shorter but the numbers of LEP defendants were higher at an average of 13 per day (as against an average of 7 in the

[60] This is the number of hours I spent inside the courtroom, excluding lunch breaks etc.

Custody Court and 9 in the Rural Court). These figures are quite vague, however, as many of the cases did not progress to a point where the defendant's English could be evaluated, some defendants did not have interpreters though they appeared to struggle, and in some cases interpretation was provided where none seemed necessary; these figures therefore represent the cases that I identified as probably involving LEP defendants.

Before attending each court I contacted the registrar, and in each case made myself known to them on arrival. While I did not specifically request that my presence be made known to the judge, in each case the sitting judge was informed of my presence and while some did not ask to speak to me, others expressed their interest in the research and their willingness to help in any way. It was from a conversation with one such judge that the need to change research setting to a different court arose; for the reasons mentioned above, I emphasised the immigration aspect of my research over the interpreting aspect, and the judge discussed a number of relevant issues with me including the type of offences associated with certain nationalities and issues of religion in taking the oath. On returning to the sitting, a case arose in which the offence largely involved abusive racial comments made to a student Garda. I found the response of the judge in this case unusual in the context of what I had observed to date; no reference was made to the victim's status as a Garda, but much was made of the racial comments, and the sentence included a contribution to an immigrant charity, specifically one that deals with the *real* problems of immigrants, and mandatory attendance of a course to curb aggressive, potentially racist behaviour. Although that this may have been the judge's course of action in any case, I felt it was possible that my presence had somewhat affected the judge's attitude, and decided that changing courts would be the safest option for ensuring the reliability of my results for the Custody Court.

In preparation for the process of court observation, I had endeavoured to find descriptive accounts of what to expect in a courtroom, particularly a District Court, but if they exist such descriptions are well-kept secrets and I found nothing that even partially prepared me for my pilot visit to the City Centre Court, though it was this shock that later influenced the course of my data collection. The only real image I had of a courtroom was that of the typical televised trial drama which in no way prepared me for the mayhem of the City Centre Court. However, aside from the offers of help and information that I received without exception in every court and by every judge, registrar and other member of staff that I spoke to, another advantage of being officially recognised as a researcher in the court was that I was offered seating that was

more advantageous than the public gallery; either on the interpreter's bench, with solicitors, or in the press area. This greatly reduced the difficulties in hearing court dialogue and observing procedure, although it also transpired that not all courts were quite as chaotic as the City Centre.

Being known to the court staff and knowing that I was 'supposed' to be there also made the court atmosphere somewhat less intimidating. Even physically entering a court can be intimidating as some courts have security checks that separate members of the public from legal and other staff with special passes that exempt them from this procedure; as a researcher I was also given the privilege of bypassing this step. The District court is a public setting that very few members of the public enter unless under obligation to do so; in the months I sat in court I saw only one member of the public who came to court on a regular basis simply to observe, and the public galleries were filled almost exclusively with defendants, their families and friends. In addition, some District Court judges are particularly conscious of the public that is present and will not hesitate to have somebody removed from the court if they consider it appropriate. During the observation this was particularly – though not exclusively – the case in the Rural Court where on one occasion, for example, the judge asked the Gardaí to remove a 'child' from the courtroom as it was not a suitable place for them. The 'child' was actually a tiny Asian woman, but although the Garda realised this, she was nonetheless brought outside without any apparent thought of contradicting the judge.

One of the registrars I contacted before sitting in the Rural Courts expressed concern that I was intending to take notes. She explained that while everybody was free to sit in court, only the press were authorised to write things down, and the previous week the judge had removed somebody from court for taking notes without permission. She seemed very nervous on my behalf, though it was the case that registrars in general tended to have a deferential and sometimes almost fearful attitude towards judges. Although it seemed unusual, I nonetheless sought permission from the judge to avoid an embarrassing scenario; the judge was more than accommodating, interested in the research and willing to help in any way he could; throughout my time in these courts he spoke to me on several occasions to explain things he thought I should know, and to ask how the research was progressing and my opinions on what I was observing. He was conscious of every person in the courtroom and their purpose there, to the extent that he introduced me on my first day in each of the Rural Courts and explained why I was there. I had, again, sought to minimize the interpreting aspect

of my research and focussed on the language aspect, such that this intervention was not of great concern with regard to the validity of my observations.

It quickly became clear that I had access to a considerable amount of data from cases where no interpreting was taking place. The only way of identifying possible interpreting cases was by the names on the court list, and while in the Dublin courts there was no problem obtaining a court list as they circulated relatively freely (though distribution was strictly controlled in the Rural Court), all cases were scheduled to be heard either at 10.30 or at 2pm, and each registrar called the list in a different order – some as the names appeared, others according to, for example, the prosecuting Garda. Just as defendants had to sit in court and wait until their case was called, there was also no way of predicting when a possible interpreted case would be called. Over time, as court dialogue became increasingly comprehensible to me – due to its repetitive nature and some supplementary research– it became clear that the dialogue was highly structured and in many ways different from the legal language depicted in the literature. In addition, it was becoming clear that many interpreting issues were more closely linked – and linked in different ways - to the language and dialogue of the court than I had anticipated, and any analysis of an LEP defendant in court would have to take this into consideration. As a result of these circumstances, data collection was widened to include the language and dialogue of the court more generally.

As an exploratory undertaking, I began by recording as much dialogue and detail in the court as possible, and in transcribing my notes certain themes began to emerge more solidly as the link between interpreting and the language of the court became stronger and more apparent. It was striking that in spite of its fascinating nature, to my knowledge there has been no previous attempt at describing the language and dialogue of the Irish District court. Although in general almost nothing was known about language in the judicial process before the 1970s,[61] since then a significant literature on language and the law has emerged, but although research has been concentrated in the English-speaking common-law world, reference to legal language in Ireland is conspicuously absent.[62] Part of the interest in widening the data

[61] Language in the judicial process (J.N. Levi & A.G. Walker, eds.)(New York: Plenum 1990) at 8-9; Interest began with the first comprehensive description of legal language by a lawyer, Mellinkoff, who analysed the structure of written legal language and its origins; See Chapter Two and D. Mellinkoff, The Language of the Law (Boston: Little, Brown & Company, 1963)

[62] See e.g. Gibbons: in a thorough examination of legal language, Gibbons deals with the legalese of the US, England, Wales and Northern Ireland, Australia and Canada, qualifying absences by explaining that "I have not encountered information on the legal language of other English speaking countries." [J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003) at 40]; Discussing the legal discourse of common law countries, Maley mentions that that of England, Canada, the US,

collection came from the obvious differences between District Court language and existing descriptions of court and legal language. The flexibility of the research method was fundamental in permitting the broadening of the data collection. Other researchers in the area of court language – most notably Conley and O'Barr – have also found that is common to enter the court with one goal or hypothesis in mind, while "[s]ome of the topics we ultimately studied had not occurred to us in advance but emerged only from process of repeated observations."[63]

Conducting Interviews

Writing the interview schedules – one for legal professionals and one for interpreters – was a challenge due to the exploratory nature of the research. Initial drafts were written before much observation had been carried out, and it later transpired that some questions based on findings of studies and literature elsewhere had no bearing or relevance in the Irish context. For these reasons, the legal professional schedule in particular evolved slightly over time, though the essence did not change. Questions, based on the research questions that had evolved from the theoretical framework, centred around a number of topics:

1. **Right to an interpreter:** how is this understood? Are interpreters provided where (not) needed? Are services adequate?
2. **Payment, cost:** Who pays, and how is cost perceived?
3. **Fair procedure:** Who decides when an interpreter is needed? How is this done? Is the issue taken seriously?
4. **What is being interpreted?**
5. **Pre-trial and documents:** Can interpreters access information/do they have contact with defendants before court?
6. **Quality etc.**: What is the perception of quality, monitoring, qualifications, standards? What are attitudes like towards interpreting and interpreters in court?

Care was taken to create precise questions that did not imply or give any answers, and were unbiased, but many of which were also open-ended enough to encourage interviewees to talk freely, and to talk about things that had not been considered and were not included in the schedule.

Australia and New Zealand "are manifestly similar", but does not mention Ireland [Y. Maley, *The language of the law* IN Language and the law (J. Gibbons, ed.)(London: Longman, 1994) at 13]

[63] J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005)

The interview schedule for solicitors/barristers looked for basic details about the interviewee and their work, including the amount time spent in courts and with interpreters and LEP defendants. Interviewees were asked about the type of cases, nationalities and languages they dealt with, what they saw as barriers to communication, their views on the performance and standards of interpreters and understanding of the interpreter's role; they were asked to describe particularly good and bad experiences, their view of how interpreting impacts on the court, and their understanding of the right to an interpreter; other topics and questions arose organically from these. Interviews were almost always relatively relaxed, free-flowing and relevant as the barristers and solicitors I spoke to were extremely eloquent, focussed and precise: when I phrased a question poorly or unclearly, clarification was almost always requested, and interviewees were concerned about giving the information that was being requested, not misunderstanding the question, and not veering away from the point of the research. This approach to the process facilitated the task, although it also meant that no lapse in concentration would go unnoticed! To a limited extent it seemed that some of the interviewees erred on the side of being politically correct, while at the same time some of the information and opinions given were surprisingly open.

Before each interview, the interviewee was given (another copy of) the information and consent sheet, asked if they had queries or questions, and the consent form was signed before recording began. All solicitors and barristers were happy – and preferred - to have the interview recorded. At the end of each interview the interviewee was given the opportunity to add any extra information, which many did, and some of the solicitors had done research for extra information before the interview; for example, one had kept an interesting letter from an LEP defendant on the basis of the language used in it; one pointed out a new publication of relevance, and another gave me the transcripts of a criminal trial at which they had represented one of the LEP defendants, and at which there had been many interpreting problems.

The interview schedule for interpreters was necessarily different. It began, as above, with questions, queries and the consent of the interviewee. Interpreters were asked about their nationality, languages, educational and employment background, and about practicalities - who they worked for, how they procured employment, how often they worked, financial conditions, training and assignments. They were questioned about the District (and other)

courts – the type of cases and defendants they worked with, their views on court language and proceedings, their relationships and consultations with solicitors/barristers, logistical details about interpreting in, before and out of court. They were asked what working in the court was like – contact with others, attitudes, problems and good experiences, and about their work with LEP defendants and their role in court – language levels, attitudes of and relationships with defendants, the interpreter's role; ethics, training, monitoring, challenges and their view of interpreting standards in Irish courts.

The main challenge in the interviews with interpreters was that they tended to become quite long, as the number of questions was high and the information being volunteered rich and plentiful. All interviewees had at least a reasonable command of English, while the majority spoke excellent English, and all had a lot to say about their experiences and their opinions of interpreting in the Irish justice system. Almost all of them had many years of experience not just in the courts but in every aspect of the system; with the Gardaí, Refugee Appeals Tribunal (RAT) and Office of the Refugee Applications Commissioner (ORAC), the prison service, probation, consultations with solicitors and so on. The hope that the two different groups – advocates and interpreters – would talk about many of the same issues and situations from different perspectives was realised; in some matters the views of the two groups coincided while it differed in others. It was sometimes the case that my observations confirmed the views of neither side, and it was at these points that the value of a three-dimensional view of the issue appeared most valuable.

Problems with, and limitations of data collection

There were some limitations inherent in the choice of methods, including the possible influence of subjectivity on data collection and interpretation, and while as an observer I endeavoured to remain as neutral and objective as possible, the possibility of bias – whether in terms of the data collected, or how it was interpreted - must be acknowledged. There are also limitations to the recording of data in court proceedings as note-taking by hand is the only means by which to record information. It is not unusual for ethnographic fieldnotes to reflect the researcher's presence, as they involve ongoing commentary about the research; the challenge is to present an account where that presence has been removed in as far as is appropriate.[64] The notes I took, and my perceptions of particular cases were particularly challenged in the Rural Court where I was often able to compare them with the reports in local

[64] J. van Maanen, Tales of the field: on writing ethnography (Chicago: University of Chicago Press, 1988)

newspapers. In these articles, quotations, usually of the judge, were used liberally but rarely corresponded to my notes and sometimes appeared to misrepresent what had been said. Therefore, while there is no doubt that "the validity of newspaper information is questionable",[65] and while I consider my note-taking to reflect accurately what I observed, quotations used are not transcripts of recordings and should be understood and acknowledged as such. Generally I have distinguished between when I was sure of having cited a person verbatim (by using quotation marks) and when the essence of the words spoken was noted (no quotation marks). Even still it has been estimated by British psychologist Alan Baddeley that verbatim speech stays in memory for a mere 2 seconds, insufficient time in many cases to make a truly accurate note of what has been said.[66]

As a researcher concerned with interpreting, a major concern with the methodology was the issue of measuring interpreting quality; it was never going to be possible to analyse the technical, linguistic quality, and it was unclear what information would be relevant and possible to record. To enhance my observational capacity I began the study of Polish as the language most frequently interpreted in Irish courts, and while my standard was far from fluent, having some understanding added an extra dimension to observations, as did my background in languages, mainly from the perspective of a theoretical understanding about the functioning of language and having had some interpreting training and translation experience.[67] However, the fact that interpreting in the District Court is almost always whispered meant that any assessment of quality had to be based on the observation of behaviour, the visible participation or non-participation of interpreters, and the opinions of interpreters and solicitors/barristers. While two country studies on interpreting did not find an appraisal of quality based on non-technical factors problematic,[68] it is acknowledged here that discussions of quality are limited to that which was observable and views of interviewees on the matter, and that they are limited in their lack of technical linguistic assessment.

A qualitative approach also creates the risk that the sample of courts, and of solicitors/barristers and interpreters are not representative of District Courts, legal

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[65] F. Roberto, *The press as a source of socio-historical data: issues in the methodology of data collection from newspapers*, 20(1) Historical Methods 5 (1987)

[66] A.D. Baddeley, Human Memory: Theory and Practice (London: Erlbaum, 1990)

[67] I speak Spanish, French and German and studied linguistics, interpreting and other language related subjects as part of my B.A. in Applied Languages; I have also worked as a translator.

[68] I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992); MVA Consultancy, Foreign language interpreters in the Scottish criminal courts (Edinburgh: Scottish Office Central Research Unit, 1996)

professionals or interpreters, and the concern with the non-representative nature of interpreters in terms of training and experience has been mentioned. It should be added, however, that after the nine interpreter interviews and the nine solicitor/barrister interviews, it was felt strongly that no new or relevant data was emerging, and that the information gathered through the process was well-developed and cohesive among and between the two groups of interviewees.[69] In addition, it was only possible to include a relatively small number of District Courts; while the diversity in the courts chosen, the number of judges represented,[70] and the repetitive and substantively similar nature of District Court proceedings alleviate some of the limitations of the small sample, it is also acknowledged that other courts and other judges may possibly take different approaches to the ones observed during the research.

Recording and Analysing the Data

As soon as possible, and usually immediately after each interview the data were documented; in the case of recorded interviews the entire interview was transcribed, and in the case of unrecorded interviews, the hand-written notes were written up in greater detail. In the course of courtroom observations – particularly once the focus of the data collection was widened to include courtroom language more generally – there were often many pages of notes, and because I was in court up to 4 times a week it was particularly important for the documentation to be completed as soon as possible.

While the information that was sought in the interview process was relatively specific, or at least belonged to a pre-set group of themes, the information gathered in the course of courtroom observation was not predetermined. At the beginning of the observations most of my focus was on how the interpreted case was dealt with, and categories of interest and relevance emerged fairly quickly; how an LEP case was recognised, who offered or looked for what information, in what circumstances and at what point an interpreter became involved, the physical aspects and logistics of the interpreted case, what was (not) being interpreted and so on. The more judges, defendants, interpreters, solicitors, barristers, Gardaí and registrars I observed, the more complex the data became due to the very diverse ways in which the single issue of interpreting was dealt with. Nonetheless patterns of behaviour eventually began to

[69] A. Strauss & J.M. Corbin, Basics of qualitative research: techniques and procedures for developing grounded theory (Newbury Park, California: Sage, 1998)

[70] At 31st December 2009 there were 62 serving District Court judges, 12 of these were observed at some point (Courts Service Annual Report 2010)

emerge from the data, and observations were more readily observed and classified. Different areas of thematic interest began to emerge, particularly in the writing up of notes as there was time to reflect on what had happened in the course of the day, and to juxtapose this with the overall context of what I had observed, and it was at this point – by which time I had also become far more familiar with the language and proceedings of the District Court – that the idea of considering language and dialogue more generally arose. The main consequence of this at the data collection stage was the significant increase in note-taking! It is important to note however, that this did not detract from the recording of LEP or interpreted cases.

Early analysis is recommended by Miles and Huberman on the basis that it encourages reflection and the generation of strategies for collecting new and better data and makes analysis "an ongoing, lively enterprise",[71] and the analysis of data from interviews and courtroom observations was an ongoing process that was part of the procedure from the very beginning of the fieldwork. The first phase was the ongoing reflection that was part of the transcribing and writing up stage after every interview and day of observation. As part of this process, the data already collected were frequently reviewed in light of new data; this helped with the development and verification of thematic areas. A "start list" of codes for the analysis of data had been devised from the review of literature and the analysis of existing document,[72] but codes were revised both during the data collection phase and afterwards.

By the time the data collection phase ended, the data had already been reviewed many times and a second phase of analysis and coding began. During this phase the interviews of interpreter and legal professionals were analysed separately at first, and the information coded into a series of categories and sub-categories pertaining to the interview schedules; in the next phase the interviews of both groups were analysed concurrently, and the codes modified to correspond to the other set of interviews and to both the initial set of research questions and an evolved set of questions influenced by the fieldwork. By the end of this phase the information obtained from the interpreter interviews fell into 6 categories, and that obtained from solicitor/barrister interviews into 8 categories with numerous sub-categories, all of which were easily cross-referenced although the difference in the data obtained meant that the categorisation was necessarily different for both sets.

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[71] M.B. Miles & A.M. Huberman, Qualitative Data Analysis: An expanded sourcebook (Thousand Oaks, Calif./London: Sage, 1994)

[72] M.B. Miles & A.M. Huberman, Qualitative Data Analysis: An expanded sourcebook (Thousand Oaks, Calif./London: Sage, 1994) at 58

The data collected from courtroom observation were more copious and diverse; the interviews represented over 20 hours of dialogue, and the observations over 183 hours of observations or an approximate 376 LEP cases alone. The total number of cases observed would amount to between five and ten times that figure. These data were also divided into three basic categories; language, proceedings and interpreting, and within these there were numerous sub-categories that developed, evolved and changed over the course of the coding. Once all the data had been reviewed repeatedly, and the conceptual categories refined and cross-referenced with those of the interviews, the writing up phase began.

A final stage in the methodology was the distribution of the discussion chapters to those who had indicated, at the interview stage, their interest in receiving them. Chapters were sent to all solicitors/barristers and two interpreters, and one interpreter and two solicitors gave feedback on them; one solicitor noted the absence of direct input by judges and LEP interpreters, an issue that had been carefully considered in the research design and rejected for ethical and methodological reasons, while the interpreter observed that it was a monolingual study, and that as such the linguistic aspect of the research could not go any further than it did. Although it involved a small amount of feedback, the descriptions of District Court language and the interpreting process, as well as the substantive issues addressed in the chapters, were validated by these participants.

Conclusion

As an exploratory study, qualitative methods were chosen for their flexibility, while a triangulation of methods was adopted to ensure a multidimensional perspective on the topic, to allow for the supplementation and crosschecking of information, and to ensure greater credibility. The choice of non-participant observation and qualitative interviewing was strongly influenced by a long tradition of these methods being employed in court and language studies elsewhere, and it was also a response to the speculative and anecdotal nature of existing accounts on court interpreting in Ireland; these methods were designed to obtain a more holistic, descriptive account of the processes involved.

The District Court was chosen as the research setting based on its quantitative significance in processing criminal cases and interpreted cases, the fact that little is known about how it functions, and the fact that the District Court has recourse to quite punitive sanctions. To be as representative as possible and overcome hypothesised differences in interpreting-related

procedures, three courts were observed; a City Centre and a Custody Court within the Dublin Metropolitan Court District, and a Rural Court. Although the courts are open to the public, permission to carry out research was requested from and granted by the President of the District Court; registrars were contacted in advance, and judges informed of my presence. After the observation period began, data collection was extended to include language and dialogue more generally; it was only through using the observation method and being present in the courtroom that the significance of language to the interpreting issue emerged, while the qualitative nature of the research allowed the flexibility to adapt accordingly.

Solicitors/barristers and interpreters were chosen as the groups to interview as they work with LEP defendants both in and out of the courtroom, they work together, and while one profession is law-based the other is language-based which was expected to engender a significant difference of perspective on the issues, which it did. Semi-structured interviews were particularly appropriate in this exploratory study, and they allowed a number of themes to emerge that had not been anticipated. In addition, some of the initial issues that featured in interview schedules and had been identified in the literature were later removed as irrelevant in the Irish context.

Overall the choice of methods necessitated a great deal of reflection and self-awareness, both in terms of collecting data and interpreting it, in order to avoid bias and subjectivity as far as possible and where appropriate. Although by the nature of the methods used, sample sizes were relatively small, it is considered that the methodology was appropriate for the study, and that within its own limitations it achieved what it was intended to: the creation of a descriptive account of language and interpreting in the District Court, removing some of the 'unknown' from the issues of interpreting for LEP defendants, and permitting a more informed consideration of how interpreting impacts on the District Court and whether LEP defendants can access justice fairly and on an equal basis with English-speaking defendants. It was particularly notable throughout the entire research period that, aside from prolonged difficulties with ethical approval, there were no other barriers to the research or difficulties of access; instead those approached and involved were extremely helpful, including the President's Office, the individual judges, the registrars and all those asked to participate in interviews. This openness and willingness to engage greatly facilitated and enhanced both the research process and, undoubtedly, its findings.

Chapter Six: The Language of the District Court

Introduction

This chapter explores and describes the language of the District Court in an effort to understand what an individual, including someone with limited English, will experience when coming into or before a District Court for the first time. In the first section the paradox presented by District Court language is addressed, namely the fact that it is simultaneously inaccessible to outsiders and yet apparently effective and functional, and it is submitted that the answer lies in the features of the District Court's function and procedures: these necessitate and perpetuate the use of an 'insider' language whereby much communication is implicit and dependent on a shared and detailed knowledge base. The first section will further describe the features of this 'insider' language: the truncation of sentences and omission of key pieces of information, District Court jargon, and the use of formal and standardised language. Consideration will then be given to the characteristics of, and contrasts between the language use of courtroom participants: the linguistic sophistication and reflective language use of legal professionals, the jargon and sometimes failed formality of the Gardaí, the manipulation of jargon by repeat offenders as well as the comprehension difficulties and colloquial, informal speech of the average defendant, and finally the linguistic discretion and control available to and practised by Irish District Court judges.

The second section puts these descriptions into context by providing a step-by-step account of what a typical District Court case might sound like. To facilitate such a description, a set of discrete linguistic units has been created that broadly parallel the procedural steps through which a case moves in the system, focussing particularly on the guilty plea. These are imaginary to the extent that no such divide is marked in reality, and they are misleading to the extent that a case will not typically progress in a linear fashion through these units, that not all units apply to all cases, and that most cases are not dealt with in one sitting but may come before the court numerous times and over an extended period before being disposed of. In using these linguistic units, the aspiration is to capture the language of the District Court in action and to enable a clearer view of how it functions in context, and in so doing to illustrate how and why this language is both exclusionary and an effective system of communication.

Section A: Describing the Language of the District Court

To walk into an Irish District Court for the first time is to enter an unfamiliar world of incomprehensible, organised chaos. Scores of people busily fulfil often unidentifiable roles. Silence is regularly called for, yet noise levels are often such that proceedings cannot be heard, a factor compounded by solicitors/barristers addressing the court (judge) with their backs to the rest of the court, and by the widespread custom of ignoring microphones and mumbling at high speed. Of that which is audible, most will make no sense. And yet things typically progress seamlessly and in an orderly fashion with a seeming minimum of confusion. The judge, registrars, solicitors, barristers, Gardaí, probation officers and so on proceed with efficiency and ease, and almost all of those present, including many defendants and their families, appear oblivious to and unfazed by the mayhem that surrounds them and that is, to the uninitiated, seemingly impenetrable.

That an outsider and someone unfamiliar with the District Court may understand very little or nothing of what is going on is perhaps unsurprising; the language used in a court of law is widely perceived as differing from that used in everyday life, and one might reasonably expect to have difficulty understanding the complex legal arguments and legal language of antagonistic lawyers as they do battle to win their case. However, these factors alone cannot account for the comprehension difficulties experienced in the District Court, not least because they do not accurately represent the District Court setting; first of all the District Court deals mainly with minor matters that are considered "not that serious"[1] which means, among other things, that "[f]or the most part (...) we don't really open law a whole lot. (...) We're not getting into difficult legal terminology, we're not getting into legal argument."[2] Secondly, battles between lawyers are unlikely as the prosecution of criminal cases is generally conducted by the Gardaí such that usually only the defence is represented by a legal professional. And thirdly - and related to both of these - confrontation and conflict are limited and where they exist tend to be of a minor nature; the following rare example of disputed facts illustrates the nature of District Court matters:

> **Solicitor:** "The facts are as the Inspector stated, bar I'd like to say one thing": the defendant didn't 'throw' the pint at the Garda, but an accident resulted in its spilling on the Garda.

[1] Anna, Interpreter
[2] Gwen, Solicitor

Inspector: (...) "The Garda's report intimated that the pint was thrown at him."
Solicitor: (....) "There's no doubt that the Garda got wet, but it is the manner in which it happened that I am disagreeing with."
Judge: [summing up] "Mr. [Solicitor] says that it happened - inadvertently or otherwise - that the Garda got wet. The Garda's report says that the pint was fired at, thrown at, poured..."
Solicitor: "We would say it wasn't thrown, but there is no doubt that it was spilled."[3]

If the bulk of issues being dealt with are not of a serious nature, if legal argument is rarely raised and legal terminology infrequently used, and if only one side is represented by legal professionals, the question is *why* the language of the District court is difficult to understand. The answer, it is submitted, lies in the fact that while outsiders and those unfamiliar with the District Court struggle to make sense of what is happening, the 'regulars' - all those that work and spend a significant amount of time in this setting – can understand proceedings and communicate successfully despite the fact that many of them not do not come from a legal background, and in spite of frequently deficient communicative conditions including poor acoustics and the sometimes breathtaking speed at which participants speak and at which things generally proceed. The defining characteristic of District Court language, and the explanation for its inaccessibility, is thus not its legal characteristics but its more general 'insider' nature, or the fact that access to the language of the District Court is restricted to regulars or insiders - those with experience and who share a specific knowledge base that includes aspects of the law, District Court procedure and certain jargon. It is on the basis of this shared knowledge that insider language functions, and at the core of its functionality are two distinguishing features of the District Court: its large workload and the consequent perceived need for speed, and the repetitive nature of its workload.

The District Court being the busiest of the criminal courts, its workload is heavy and intense, and an individual District Court can have a list of up to 200 cases to deal with. Though it may not be possible to get through an entire list of this length in one day, and accepting that courts have lists of differing lengths and sit for varying numbers of hours, a court that sits between 10.30 and 1 and from 2 to 4pm with a list of 100, for example, has 2.7 minutes to dedicate to each of these cases. Some will be dealt more quickly, others will take longer, but the clear consequence in any event is that "the District Court is a court of speed. I mean that's the

[3] Judge Z, Rural Court, 11.12.2009

whole essence of it."[4] There is a strong sense that without being able to process cases at speed the system would grind to a halt, and to achieve this speed necessitates a high level of communicative efficiency.

It is essentially the repetitive nature of District Court proceedings that facilitates this communicative efficiency; each case progresses through the system according to established procedure, as part of which a set of specific elements need to be addressed including, for example, the charge, the facts of the case, the mitigating circumstances of the defendant, the sentence and so on. The same elements are addressed by the court repeatedly which means that the same questions are asked (e.g. as to what the facts of the case are), the same information is provided (e.g. as to the defendant's social situation), and the same decisions are made (e.g. as to what the sentence will be). This routinization means, for example, that a barrister knows exactly what elements will need to be dealt with and what information will be required in a case that he or she is representing, and it explains why poor communicative conditions have much less impact on insiders with knowledge of District Court procedure than on those unfamiliar with the context. It is also in the repetitive and routinized nature of District Court proceedings that the features of insider language can be found.

Omissions and Truncations

These constitute perhaps the most prominent feature of insider language in the District Court and refer to the omission of key pieces of information in discourse, as well as the truncation of sentences and questions whereby selective grammar is used: verbs and pronouns are often omitted and even single word sentences may suffice for successful communication as certain knowledge can be assumed and the relevant information thus omitted, both with regard to the procedures of the court and the context of the case. As an example, a judge may address the court presenter and ask "Directions?" The question lacks the key information that the directions are those of the DPP in regard to whether the offence before the court can be tried summarily. It is a truncated, one-word question that in its more complete version might be: "Do you have directions from the DPP in this matter?" The judge, the court presenter and the solicitor/barrister will be aware that this is a hybrid offence[5] and that the jurisdiction of the court to deal with it must be addressed. Communication, therefore, will continue and the response of the court presenter will be given, while those unfamiliar with the District Court

[4] Mark, Solicitor
[5] See Chapter Five

procedures, with the jurisdiction of the District Court and with the nature of the offence in question are unlikely to understand the meaning or import of the question.

In addition to the nature of proceedings in the District Court being repetitive, the same offences - traffic, public order and so on[6] - are tried by the District Court over and over again, and the same sections of the same Acts are naturally used in these prosecutions (e.g. Section 47 Road Traffic Act, Section 4 Public Order Act). It thus becomes possible to omit certain information such as the name of the Act where this knowledge can be assumed ("It's a Section 4"). Although not used in every circumstance, omissions and truncations are extremely common in District Court procedure due to the vast quantity of knowledge that can be assumed, and this feature of the language undoubtedly contributes to the speed of processing offences:

> "Remand in custody, the 5th of November"[7]
>
> "Any previous road traffic?"[8]
>
> "Am I to put the Section 38 to him?"[9]
>
> "Any previous?"[10]

Many more examples will be given in the case break-down in Section B.

Standardised Phrases and Formalities

As the District Court is essentially a formal setting as well as a setting of routine, formalities and formal, deferential language are used as standard by all official participants, principally the judge, solicitors and barristers, and the Gardaí. Terms of address are extremely important, and the judge is consistently addressed as 'Judge' by most participants (though some defendants use 'Your Honour'), with some solicitors/barristers and Gardaí punctuating every sentence – often multiple times - with the term 'Judge'. The judge also uses terms of address such as 'counsel', 'Superintendent', 'Inspector' and so on (e.g. "Forgive me, counsel. In relation to Mr. C, I believe you indicated to me there were a number of outstanding charges"[11]), and will sometimes address a person using the third person ("Does the registrar have a date for

[6] See statistics of the Courts Service in Chapter Five
[7] Judge R, Custody Court, 22.10.2009
[8] Judge Y, Rural Court, 13.11.2009
[9] Judge P, Custody Court, 30.09.2009
[10] Judge S, Custody Court, 09.10.2009
[11] Judge Q, Custody Court, 23.10.2009

Balbriggan?"[12]) as well as regularly speaking *as* the court in the third person (The court notes that ...), and being addressed as such in return (I submit to the court that ...) Solicitors/barristers sometimes refer to each other as 'my friend', and inevitably refer to the client formally as Mr./Ms..

Many of the deferential expressions used to address the court are standardised formalities and phrases that are used over and again in the same context. Among these are a small number of archaisms routinely used by solicitors/barristers to address the court, often at the end of the case:

> If it please you, Judge
> May it please the Court
> Much obliged[13]

In making submissions or requests to the court the conditional tense is often used: 'I would ask the court', 'I would request that...', and the formal and respectful nature of the requests are often verbalised ("Very formally I would ask you to fix recognisance"[14]; "In my respectful submission"[15]). Because of the routine nature of proceedings, many of these phrases become standardised and are used over and over again. Deference to the judge and consequent standardisation of phrases applies across proceedings, and not just to submissions; for example, the prosecution may verbalise the fact that it is the judge who must decide ("Judge I'm in your hands"[16]), and when giving evidence will use the same formulaic description relevant to the charge ("I made a lawful demand...."[17]).

District Court Jargon

Here 'jargon' refers to the vocabulary or technical terms used in the District Court. These can basically be divided into three sub-categories:

a) terms that are specific to the legal context but are in common usage and therefore familiar to the average person

[12] Judge Q, Custody Court, 23.10.2009
[13] These terms are widely and frequently employed by solicitors and barristers
[14] Barrister, Custody Court, 27.10.2009
[15] Barrister, Custody Court, 22.10.2009
[16] Court Presenter, Custody Court, 27.10.2009
[17] Prosecution, Rural Court, 11.11.2009

Examples: accused, allegation, convict, guilty plea, judge, lawyer

b) legally-based terms that are specific to the District Court but would be unfamiliar to, or unlikely to be fully understood by the average person

Examples: bench warrant, précis, recognisance

This section may also include Latin terms, used in moderation in the District Court

"The other matters will be remanded simpliciter"[18]
"I think I could accept the bona fides of it"[19]
"What was the alleged modus operandi?"[20]

c) terms that are commonly used in everyday language but have either a different or a very specific meaning in the District Court context

Examples: directions, instructions, application, sheets, jurisdiction, hearing, mention, take into consideration, strike out, appear, elect, plead, on her/his feet, at risk and so on[21]

The latter category is the largest, and the one that is potentially the most challenging for outsiders due to the confusion that may be caused by the use of familiar terms, but in an unknown context.

It is notable that defendants are not generally expected to be familiar with this terminology ("Before lunch you mentioned the word 'strike out'; where do you know that from?"[22]). However, an important feature of District Court language is that because of its repetitive nature much can be acquired through direct experience; the more time one spends in the District Court, the more likely one is to understand what is going on. Naturally training and the

[18] Judge Q, Custody Court, 23.10.2009
[19] Superintendent, Rural Court, 02.12.2009
[20] Judge R, City Centre Court, 13.05.2009
[21] See Appendix A for a more comprehensive list of District Court jargon
[22] Judge Z, Rural Court, 18.11.2009

provision of the relevant information is another route to this knowledge, but the fact that much can be acquired through osmosis is relevant.

Section B: How language is used by court participants

The above features of insider language are used by all District Court participants to a greater or lesser extent. Aside from this common feature, however, the language or speech style of participants can differ significantly, with those from a legal background often using language that is not only more formal, but more sophisticated, fluent and self-reflective than the Gardaí, whose less experienced members, perhaps in trying to match the sophistication and formality of the language used by legal professionals, often lose control when attempting improvised formal use of language, and while some defendants (repeat offenders) master some of the jargon, their use of language is often reflective of a lower socio-economic background.

Barristers, Solicitors and Judges: Sophistication and Consciousness of Language Use

The adept and sophisticated use of language by judges, solicitors and barristers is striking, and their fluid, rapid and concise presentation is both notable and potentially a source of serious comprehension difficulties for those less fluent and able. In practice in court, judges and barristers/solicitors consistently demonstrate a highly sensitized consciousness of the language they use and its impact. Consciousness is sometimes displayed that the language of the court diverges from that of everyday life ("When, to use plain man's language, 'he went berserk'" [23]), and judges may modify speech where this causes difficulty:

> **Judge:** "Is it your intention or aspiration to engage a legal representative?"
> **Defendant:** "Sorry?!"
> **Judge:** "Do you want to pay for a solicitor?" [24]

> **Judge:** "Give me one good reason why you should not receive a custodial sentence in respect of (...) the language you perpetrated on the Garda when she was executing her duty."

[23] Judge R, Custody Court, 19.10.2009
[24] Judge Z, Rural Court, 18.11.2009

Defendant: "Eh, can you break that down for me?"

Judge: "Would you like 2 months detention?"[25]

Judges, solicitors and barristers also commonly reflect aloud on the suitability of their words:

Judge

"I have my own suspicions, if I might use the word."[26]

"I'm going to ask Garda P. the alleged time - and I stress 'alleged'."[27]

"My hands are tied. I don't mean it technically, I mean it symbolically."[28]

Solicitor/barrister

"...if you want to use the expression, 'horsed in' a payment of 2000 Euros."[29]

"...a failure, but with a small f, rather than a capital F. I'd like to put it that way."[30]

"It's an explanation rather than an excuse, and it's certainly not a defence, Judge."[31]

The same reflective consciousness was apparent in interviews with solicitors/barrister:

"...for want of a better word" (Solicitor, Thomas)

"...would be average. I wouldn't say excellent. Average, I would have thought" (Solicitor, Mark)

"There isn't, how shall I say, how do I put this best? ...." (Barrister, James)

Solicitors/barristers also tend to measure the effect of their words and may distance themselves from what they are saying on a client's behalf:

"He instructs me that he does not suffer from any addiction"[32]

"I told him the court might call his bluff and ask for urine analysis. Those are his firm instructions."[33]

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[25] Judge Z, Rural Court, 18.11.2009
[26] Judge Z, Rural Court, 04.12.2009
[27] Judge Z, Rural Court, 10.12.2009
[28] Judge S, Custody Court, 14.10.2009
[29] Rural Court, 11.11.2009
[30] Rural Court, 01.12.2009
[31] Rural Court, 04.12.2009
[32] Solicitor, Rural Court, 04.12.2009
[33] Solicitor, Rural Court, 11.11.2009

Judge: "Where is his passport?" (....)

Barrister: "He says that he lost it."[34]

Some of the comments made by solicitors/barristers on the language they use are also interesting to consider in this context. Solicitor Mark feels the public nature of the setting necessitates consciousness of how language is used; "it's a public forum; people are listening, the press are attending," while James feels it is important to speak clearly "and without recourse to flowery language 'cause it's not your job and it doesn't make you better at it." However, he recognizes a tension between this and "making sure that the way you express yourself is appropriate" and reflects that "if we all spoke in a straight kind of way, I mean obviously we'd be done out of a job". Solicitor Gwen explains that sometimes you want to convey things to the judge about the client without offending them, and spoke of a colleague who used her fantastic command of the English language to do this; "[she] was absolutely brilliant at that (...) and clients absolutely loved her, because they didn't realise (...). They just heard big words and thought 'she's super'."

The Language of the Gardaí

In the District Court, however, generally only the defence is represented by a legal professional while the prosecution is conducted by a member of the Garda Síochána. The difference in the professional background and training of solicitors/barristers and the Gardaí is likely to be influential in the language use and speech styles of both in court, and a distinction can also be made between the language of the court presenter (Superintendent or Inspector) and other Gardaí: the former prosecutes the bulk of cases and is a permanent fixture in the courtroom with potentially more experience of District Court language than many of the Gardaí who come to court to prosecute a particular case.

The Gardaí tend not to reflect on their use of language in the same way as legal professionals, and they also tend not to use the archaisms often employed by solicitors and barristers (may it please etc.). In general their speech styles could be said to be slightly less 'flowery'; instead of making requests using expressions like 'if the court was so minded', or 'I would respectfully submit', a Garda may use a more simple yet still formal style, often employing the conditional tense:

[34] Custody Court, 27.10.2009

"I would ask you to strike that out"

"I would be seeking a return to trial on that"[35]

Formalities are thus observed and much of the dialogue will involve standard phrases that a Garda will use to give evidence of an arrest or a charge: I made a lawful demand, I made a legal demand, he was handed a true copy of the charge sheet.[36] Omissions, truncations and District Court jargon are also widely and comfortably used by members of the Gardaí. However, while the court presenter often uses formal language successfully in addressing the court ("That is effectively the case, Judge"[37]; "No documents have been proffered to me, Judge"[38]), it is sometimes the case that when a Garda witness with less experience presents the evidence and facts of the case, their attempts at improvised formality fail and betray a less sophisticated grasp of the language:

"The likeliness to re-offend again would be pretty high"[39]

"His demeanour towards me was one of aggression"[40]

"I inadvertently forgot"[41]

"There was an exchange of unpleasantries"[42]

The Language of Defendants

Due to the insider nature of District Court language it can be difficult for defendants to understand, particularly where they do not have a solicitor. In such situations judges sometimes have to spend considerably more time dealing with certain elements of the case, as that which is apparent to a solicitor and can thus be truncated or omitted in communication must be made explicit to an outsider where an informed response is required.[43]

Judge: "Do you understand the charge before the court?"

Defendant: "No."

[35] Standard phrases used frequently with some modification in all courts
[36] More examples will be given in Section Two under The Charge
[37] Superintendent, Rural Court, 02.12.2009
[38] Court Presenter, Custody Court, 22.10.2009
[39] Member of the Garda Síochána [Garda], Rural Court, 19.11.2009
[40] Garda, Custody Court, 19.10.2009
[41] Garda, Rural Court, 11.11.2009
[42] Garda, Rural Court, 02.12.2009
[43] See example Jurisdiction below

Judge: "Right. It is alleged that...." [explained charges] "So do you understand those?"

Defendant: "I was arrested...."

Judge: "What?"

Defendant: "I was arrested for being drunk."

Judge: "Yeah. Do you intend pleading guilty or not guilty?"

Defendant: "I plead guilty to being drunk."

It is worth pointing out that as the majority of defendants are represented, the voice of the defendant is that which is heard least in proceedings, and it is not unusual for a defendant to remain silent for the duration of their case. Interestingly as the above extract suggests, it is sometimes the case that the judge also has difficulty communicating with an unrepresented defendant, though it is impossible to say whether this is due to frustration at proceedings being slowed down, to problems with the use of non-standard English, or to the judge being focused on interaction using insider language and therefore perhaps not attuned to language that deviates from this. However the language used by the average defendant is clearly not insider language and it often lacks formality and sophistication, and in straying from the grammar of standard correct English may suggest a lower socio-economic background:

"Once he ownded the vehicle I thought it was OK"[44]

"I haven't got this chance before. Thanks very much"[45]

"That's exactly what happened. I just didn't know how to say it like that"[46]

Judge: "Do you wish to apply for a legal aid solicitor?"

Defendant: "Yes"

Judge: "What solicitor do you want?"

Defendant: "I don't know"

Judge: "You are entitled to choose your own solicitor."

Defendant: [Looking around, obviously doesn't know any] "Whatever you have."

Judge: "What?"

Defendant: "Whatever you have."[47]

[44] Defendant, Rural Court, 10.12.2009
[45] Defendant, Custody Court, 22.10.2009
[46] Defendant, Rural Court, 04.12.2009
[47] Judge P, Custody Court, 01.10.2009

As in this example, judges sometimes display a degree of condescension in terms of believing themselves more linguistically sophisticated than the defendant:

> **Judge:** "Two months ago."
> **Defendant:** "No, a couple of months ago."
> **Judge:** "A couple generally means two. What does it mean to you?"[48]

> **Defendant:** "As far as I'm aware I never had probation."
> **Judge:** [disparagingly] "You would *be* aware if you had."[49]

> **Judge:** "*In vino veritas*, which means that when you're drunk you say what you mean."
> **Defendant:** "I know what it means."[50]

Many defendants appearing in the Irish District Court are not there for the first time, however; such defendants may be familiar with the system and insider language. Solicitor Matthew says that repeat offenders "would know the system very well, in terms of the procedure, and what happens when you come before the court for the first time; what a bail application is like etc.", and James agrees that "they know the process, they know what's coming next, they know the difference between a summary and an indictable offence, (...) they know what it means when a judge refuses jurisdiction, they know the kind of things that a judge will take into account in deciding whether or not to grant bail. They know the kind of things that a judge will take into account in determining the correct sentence." The repeat offender is thus likely to be able to understand and perhaps even use insider language: "I'm remanded on these 4".[51]

Linguistic Discretion and Control: The Style of Individual Judges

The judge is "the God of the court"[52], at the head of the court and at the helm of all that happens. While solicitors, barristers, the Gardaí and other official participants in the District Court must adhere to set protocol, the judge is at liberty to choose his or her own style of language, and each has his or her own mannerisms, expressions and methods of conducting

[48] Judge S, Custody Court, 29.10.2009
[49] Judge S, Custody Court, 08.10.2009
[50] Judge P, Custody Court, 01.10.2009
[51] Defendant, Custody Court, 19.10.2009
[52] Stella, Interpreter

procedures and keeping control of the courtroom. For example, while solicitors, barristers and Gardaí consistently use formal terms of address, a judge may refer to or address the defendant formally (Mr. D), indirectly as 'the client' or 'the defendant', on a first name basis, or using terms of address such as "my dear fellow".[53] The judge is generally the most verbally active person in court, though some judges are more so than others and this is something that seems to equate directly to the level of intervention practised by the judge. It is the judge who controls proceedings and the speech of others – who can speak, when, and to say what; some do this forcefully by interrupting, contradicting, forbidding or demanding speech, while others are less intrusive and may request specific information or invite participants to speak.

> **Judge S:** "Would you mind answering the questions. You're continually writing instead of listening."[54]
>
> **Judge S:** "Will you speak up a little so I can hear you"[55]
>
> **Judge Z:** "I don't give a damn. I'm just interested in finding out whether you have been engaged in criminal activity elsewhere"[56]
>
> **Judge Y:** "Would you like to say anything?"[57]
>
> **Judge Q:** "Would you answer, please?"[58]

Judges also use language in different ways to control the courtroom, for example by expressing their authority or their expectations when behaviour is perceived to deviate from that which is appropriate:

> **Judge S:** "This is *my* court"
>
> **Judge S:** "*I'll* decide how I'll run my list"
>
> **Judge S:** "I'm entitled to put the case back"[59]
>
> **Judge R:** "I'm the Presiding Judge in this matter"[60]
>
> **Judge Y**: "I would suggest, quietly, that neither you nor the prosecution has the right to decide who should appear"
>
> "Were you appointed a District Court judge recently?"[61]

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[53] Judge Z frequently used such expressions, and occasionally the first names of younger defendants
[54] Judge S, Custody Court, 27.10.2009
[55] Judge S, Custody Court, 06.10.2009
[56] Judge Z, Rural Court
[57] Judge Y, Rural Court, 13.11.2009
[58] Judge Q, Custody Court
[59] Judge S, Custody Court
[60] Judge R, Custody Court
[61] Judge Y, Rural Court

Judge Z: "Now listen here, my good man. This is not a public house you're in now" "I'm not going to be tolerating this kind of arrogance.... I'd ask you to have some manners at the very least. It's not a lot to ask, but there you are"[62]

In addition and related to this, the judges I observed also spent time delivering monologues or lectures that only sometimes related to the case before the court on such topics as frustration with bureaucratic or court-based inefficiencies ("I really wish you'd prepare these things before you came in"[63]; "In the High Court...if they worked any slower they'd slip into reverse"[64]); societal and moral ills ("The insidious nature of this problem in this society is not recognised"[65]); money ("Don't mess up dates. Don't waste taxpayers' money"[66]); rights and duties ("The defendant is entitled to a presumption of innocence. He is entitled to use the system fully and fairly"[67]); criminality, courtroom control and so on. As these examples suggest, the linguistic discretion and control of judges is used in a variety of different ways and represents probably the most individualistic aspect of District Court dialogue.

Deviance from Standard District Court Language: Informality, Colloquialisms and Humour

As has been seen, deviance from standard District Court language is largely controlled by the judge, and in some cases judges themselves may indulge in such deviance (such as the monologues above, the use of informal and colloquial language, or humour) but not tolerate it from other court participants; solicitors and barristers appear to know, or quickly assess, what style or degree of informality is appropriate for any given judge, and to adapt their language use accordingly. Deviance from standard District Court language may be an attempt to reduce the banality of proceedings ("I'm trying to debate the matter with you. I have to make decisions that are not bland or rubber-stamped"[68]) or perhaps to render things less formal:

"What was naughty about his driving?"[69]

"His excuse doesn't wash."[70]

"I believe he's trying to pull the wool over this court's eyes"[71]

[62] Judge Z, Rural Court
[63] Judge S, Custody Court, 27.10.2009
[64] Judge Z, Rural Court, 19.11.2009
[65] Judge Z, Rural Court, 12.11.2009
[66] Judge T, City Centre Court, 14.04.2009
[67] Judge U, City Centre Court, 15.04.2009
[68] Judge R, Custody Court, 19.10.2009
[69] Judge P, Custody Court, 29.09.2009
[70] Judge S, Custody Court, 14.10.2009

"As they say in Ireland you want jam on both sides of your bread"[72]

"Had you a liquid lunch or something?"[73]

"This man was polluted"[74]

Such informality and colloquialisms are predominantly used by judges, but are also employed occasionally by solicitors and barristers, and concurrent use with archaisms, formality or jargon can create a bizarre effect:

"Because of the turn number I told him he could go off for a cup of tea. May it please."[75]

"Unless he's in the loo. [Pause] We are pleading, Judge."[76]

Informality, the minor nature of the court's workload, or the authority of the judge are also sometimes indicated through the humour not uncommonly used by judges:

Judge: [to Garda in bullet-proof vest] "I'm just looking at your vest; are you in danger of being shot?"
Garda: "Sorry, Judge. I apologise for my attire."[77]

Defendant: "Not guilty."
Judge: "Is it going to be one of those cases? Cut throat?"
Solicitor: [Smiling] "It is, yes."[78]

Garda: [The defendant assaulted Mr. X in Y Park]
Judge: "What were they doing in the park? Were they there to feed the ducks?"
Garda: [They were at a concert]
Judge: "What was the nature of the alleged assault? (...) Did he throw the duck bread at him?" [79]

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[71] Judge Z, Rural Court, 10.12.2009
[72] Judge Z Rural Court, 07.12.2009
[73] Judge Y, Rural Court, 13.11.2009
[74] Judge R, City Centre Court, 12.05.2009
[75] Solicitor, Rural Court, 01.12.2009
[76] Solicitor, Custody Court, 30.09.2009
[77] Judge Y, Rural Court, 13.11.2009
[78] Judge P, Custody Court, 01.10.2009
[79] Judge P, Custody Court, 30.09.2009

Solicitor: [Defendant pleading guilty to theft of significant amount of alcohol] "This is a young man who has been in country for 2 years. The plan was that he was going to have a party."

Judge: [laughing] "They weren't going to be thirsty, I can tell you that!"[80]

Section C: Language in action: a break-down of the District Court case

In this section the District Court case is broken down into a set of linguistic units, created for the purpose of contextualising the language described above. The linguistic units used here do not exist in reality, as in reality there are no marked divisions between the different aspects of a case that are dealt with by the court on a particular day, but they broadly represent the stages that a case goes through when being processed and eventually disposed of. On each day, the case before the court has a Beginning, a Middle and an End, with the Middle being the most variable and that which is dependent on the type of offence in question and on the stage at which the case is at as it moves through the system. Analysis of the District Court case as a series of linguistic units allows a better understanding of the use of insider language in action.

The Beginning

Standing in court

All stand in court[81]

Garda X and [Defendant]

DPP versus [Defendant]

Defendant A followed by Defendant B

In the District Court everything starts with the registrar or court clerk who opens each court session and calls each individual case. The voice of the registrar remains otherwise silent for the most part. There is a degree of amusement to be had when the name is foreign, as registrars inevitably struggle and judges have at least as much difficulty ("Can you pronounce

[80] Judge Z, Rural Court, 19.11.2009

[81] Standard phrase used with modifications by registrars

that properly? Have you got that in front of you? It's number 36 on the list"[82]). District Court jargon and archaisms are prominent, and participants are established using the expression 'to appear':

> **Judge:** Who's appearing?[83]
> "Any appearance by or on behalf of [Defendant]?"[84]
>
> **Solicitor/barrister:** Judge, I appear for Mr. N.
> If it please you, Judge, I appear for Mr. D[85]

In the event of a foreign-sounding name being called the presence, lack of or need for an interpreter may be addressed,[86] and if one is assigned the judge often officialises their presence verbally; "I certify for the interpreter present"; "I certify for a Polish interpreter".[87] In the case of unrepresented defendants the question of legal representation may be introduced at this point:[88]

> **Judge:** "Do you have a solicitor?"
> **Defendant:** "No."
> **Judge:** "Do you know a solicitor?"
> **Defendant:** "No."[89]

The purpose of the appearance is sometimes made explicit by the solicitor/barrister concurrently ("I appear. It's an ID matter"[90]), the judge may raise the context ("What's this about?"[91], "There are two prosecutions before me"[92]), or the context may remain undisclosed. If the case is in progress through the system, what happened on previous occasions may be raised ("It was conceded on the last day that ..."[93]).

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[82] Judge Z, Rural Court, 01.12.2009
[83] Standard phrase used by judges
[84] Often used by Judge Z in Rural Court
[85] Standard phrase used with modifications by solicitors/barristers
[86] How and to whom interpreters are assigned will be explored in Chapter Seven
[87] Commonly used phrases
[88] See also legal aid applications
[89] Judge R, City Centre Court, 27.04.2009
[90] Barrister, Custody Court, 14.10.2009
[91] Judge R, Custody Court, 19.10.2009
[92] Judge Z, Rural Court, 12.11.2009
[93] Solicitor, Rural Court, 18.11.2009

In many instances participants are not present or ready to proceed. For example, a solicitor/barrister may need to 'take instruction' from the client and will request that the matter be allowed 'to stand', be 'put back' or be put to 'second calling', all further examples of District Court jargon meaning that the case will be called again later. As with other aspects of court procedure, judges have individualised responses to and tolerance levels for such requests; some will acquiesce without question ("Of course, no problem"), while others become impatient:

> **Barrister:** "I'd like to ask for second calling."
> **Judge:** "Why?"
> **Barrister:** "I need to take instructions"
> **Judge:** "You should know your business..."[94]

The Middle

What happens in The Middle depends on the type of case and what stage of the system it is at. It usually involves a combination of the following units:

> **The Applications** [Strike out/bench warrant; Legal Aid; Bail; Disclosure; Remands/adjournments]
> **The Charge**
> **Jurisdiction**
> **The Plea**
> **The Facts/evidence**
> **Criminal Record**
> **Mitigation/defence**
> **Sentence**

This analysis focuses on the guilty plea, such that while all of the units before 'The Plea' are the same, the principal difference thereafter is that on a plea of not guilty the case proceeds to a hearing which from a linguistic perspective cannot be said to differ substantially from the guilty plea at District Court level, though evidence is given and cross-examination carried out ("I put it to you that..."[95]), and there is more likely to be conflict and submissions as to the

[94] Judge R, Custody Court, 20.10.2009
[95] Commonly used by solicitors/barristers disputing evidence of Gardaí

unlawfulness of arrest and so on ("I submit he didn't tell him in full where the power of search was from"[96]).

The Applications

An application is basically any request made to the court. They typically involve heavy use of 'insider' language including District Court jargon.

Strike out; bench warrant

In the event of non appearance by one party, certain applications may be made; if the defendant fails to appear the prosecution may ask for a bench warrant, which gives the Gardaí the power to bring that person before the court. A Garda will typically say 'My application would be for a bench warrant', a request which uses the characteristically formal conditional tense and District Court jargon: 'application' and 'bench warrant'. If the prosecuting Garda fails to appear and has not given the court presenter instructions, the defence may ask that the charge be struck out or dropped. "Application to strike out"[97]; this example uses a truncated sentence without the pronoun and the verb, and more District Court jargon. Strike outs can be made for many other reasons, such as the charges being withdrawn, and they are also regularly requested by the prosecution.

Legal Aid

> "Would you consider a certificate for legal aid?"[98]
> "There would be an application for bail and legal aid"[99]
> "Would you consider granting legal aid, Judge? He would be at risk."[100]

Legal aid is often dealt with in tandem with assigning legal representation; for example the judge will assign the defendant a legal aid solicitor. If the defendant is already represented, an application may be made by the solicitor/barrister for legal aid. The term 'at risk' is confusingly used to mean that there is a risk that the defendant may be given a custodial sentence, a condition of the scheme, and the request is often made with formal, deferential language, possibly because of the apparently wide discretion of judges to grant or withhold the

[96] Barrister, Custody Court, 12.10.2009
[97] Solicitor, City Centre Court, 02.04.2009
[98] Solicitor, Rural Court, 12.11.2009
[99] Solicitor, Rural Court, 13.11.2009
[100] Solicitor, Rural Court, 18.11.2009

assistance. It is also likely that the more stringent a judge is about legal aid, the more formal and deferential the request will be; judges appear to have different criteria by which they consider granting legal aid and very different approaches to applications. Judge Z, for example, often pursued the matter of vehicle ownership at length:

> **Judge:** "Do you have possession or control of a vehicle?"
> **Defendant:** "Yes."
> **Judge:** "How much is it worth?"
> **Defendant:** "Around 1500 Euro."
> **Judge:** "Why don't you sell it and pay for your legal fees?"
> **Defendant:** (smiling) "Nobody wants to buy it."
> **Judge:** "Do you drive it?"
> **Defendant:** "Yes."
> **Judge:** "Does it run on water?"
> **Defendant:** "No."
> **Judge:** "Where do you buy fuel?"
> **Defendant:** "In Shell."
> **Judge:** "It is not the intention of this court to spend the taxpayers' money. You can submit a statement of means and you should sell your vehicle to pay your legal fees."[101]

Some judges routinely granted it as it was applied for or asked basic questions including if the person was at risk or if the person was working. However Judge Y, for example, would not deal with the issue of legal aid when she replaced the sitting judge for a day, saying mysteriously "I have introduced very strict conditions for legal aid that you mightn't like, so I'll leave it to the sitting judge."[102] In relation to linguistic discretion, the issue of legal aid and the related issue of taxpayer's money was a popular monologue topic for District Court judges.

Bail Applications

> **Judge:** "Any objection to the defendant being admitted to own bail?"[103]
> **Judge:** "Is there an objection to bail?"
> **Prosecution:** "There would be an objection to bail." [104]

[101] Judge Z, Rural Court, 11.11.2009
[102] Judge Y, Rural Court, 13.11.2009
[103] Judge Z, Rural Court, 02.12.2009

Prosecution: "No objection."[105]

Judge: "On the basis of the evidence I'm refusing bail."[106]

Judge: "I am refusing bail today. If you adduce medical or other evidence you can go to the High Court with it."[107]

When the defence makes an application to have the defendant released on bail, the judge commonly asks the prosecution if there are objections to granting bail, whereupon any objections are outlined; these may be based on considerations such as a 'history of warrants' (where the person had not appeared for trial previously), on the person being a 'flight risk' (likely to leave the jurisdiction), or not having proven his/her identity ("It's an identity issue"[108]). The judge will grant bail or otherwise. Unlike other units the judge rarely truncates this question, and although formal language is used, the terms 'objection' and 'bail' could be considered words in common usage here. However the granting of bail often involves a number of conditions set by the prosecution and/or the judge which are considerably less easy to follow; the conditions and how they are expressed can be complex and vary considerably, and they are generally delivered at such speed that sometimes even solicitors/barristers have difficulties. Of the following the first three are reasonably standard conditions often imposed by the Gardaí, while the remainder – imposed by judges – differ notably in their complexity and the formality of their construction:

Stay away from [Area]

Reside at [address]

Sign on daily at X Garda Station

"No alcohol, no unprescribed medication"[109]

"Lead a sober and industrious life...barred from all licensed premised in the state....not to associate with anyone on bail...."[110]

"On leaving custody he must go immediately to [Place] Residential Treatment. He must reside there and take all directions. Curfew; he must not leave [Place] at any time unless under direction, and he must take all treatment."[111]

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[104] Judge R, Custody Court, 22.10.2009
[105] Judge Q, Custody Court, 23.10.2009
[106] Judge W, City Centre Court, 30.03.2009
[107] Judge R, Custody Court, 20.10.2009
[108] Custody Court, 06.10.2009
[109] Judge S, Custody Court, 14.10.2009
[110] Judge Z, Rural Court, 11.11.2009

While for some judges the unit ends here, others address the defendant to warn (or threaten) about compliance and/or to ensure that the conditions have been understood before a bail bond is signed:

> "I will review bail on [date], and if there is any suggestion that you are not in compliance you will be spending Christmas in [Prison]."[112]

> "If you've any difficulty in understanding, consult with your solicitor. It's tremendously important that you comply. I wish you well."[113]

> "May I ask you, before you sign the bail bond, do you understand the conditions of bail or do you seek clarification on any point?" [114]

The registrar usually recalls the case some time later, the judge asks "is this your signature?", and on confirmation a copy of the bail bond is given to the defendant.

Remands/adjournments

> **Barrister:** "Judge, I've been instructed to seek a remand"[115]
> **Solicitor:** "I'm looking to adjourn that by consent"[116]
> **Prosecution:** "My application would be for 4 weeks"

Requests for cases to be remanded or adjourned are made very frequently and for a myriad of reasons: common ones include for DPP directions, for reports, to engage counsel, for disclosure and so on. Again, judges vary enormously in their tolerance of such requests; some grant them freely, some do not grant them without what they consider sufficient reason, and some are particularly concerned that any delays be consented to:

> "It's clearly marked for hearing, so it's either on or out, I'm afraid."[117]
> "And he's prepared to consent to custody for 6 weeks?"[118]

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[111] Judge S, Custody Court, 12.10.2009
[112] Judge Z, Rural Court, 11.11.2009
[113] Judge Q, Custody Court, 23.10.2009
[114] Judge Z, Rural Court, 07.12.2009
[115] Custody Court, 23.10.2009
[116] Rural Court, 11.11.2009
[117] Judge Y, Rural District Court, 13.11.2009

"Is there consent, then, to remand in custody for one week?"[119]

Consent is not always forthcoming:

Judge: "Is there consent?"

Barrister: "No, there is no consent to any time at all." (...)

Judge: "We go into evidence when there's a dispute."[120]

Disclosure

Barrister: "We are seeking disclosure."[121]

Solicitor: "I am waiting for statements. I have them in one and not in another."[122]

Barrister: "The application is to put it back for one week, and for a précis."[123]

Judge: "An order for précis and CCTV where applicable."[124]

Judge: "Would you be kind enough to get a précis and send it to Ms. [Solicitor]'s office."[125]

The defence has the right to the prosecution's evidence. In District Court jargon the solicitor or barrister will 'seek disclosure', make an 'application' for disclosure, or seek or make applications for a 'précis' (statement of evidence), statements, CCTV, interview memos and so on for which the judge will make an 'order'. Applications vary slightly between solicitors/barristers, and different terms are used more frequently in some courts than others.

The Charge

"Allegation, please"[126]

"What's being alleged?"[127]

"What is the charge?"[128]

[118] Judge S, Custody Court, 14.10.2009
[119] Judge Q, Custody Court, 23.10.2009
[120] Judge S, Custody Court, 08.10.2009
[121] Barrister, Custody Court, 20.10.2009
[122] Solicitor, Rural Court, 02.12.2009
[123] Barrister, Custody Court, 20.10.2009
[124] Judge R, Custody Court, 20.10.2009
[125] Judge R, Custody Court, 20.10.2009
[126] Judge R, Custody Court, 22.10.2009
[127] Judge P, Custody Court, 30.09.2009
[128] Judge S, Custody Court, 16.10.2009

The defendant has been charged with a criminal offence which should be known to the defendant, the solicitor/barrister and the prosecution. As such it is not surprising that 'insider' language is generally used in referring to it, such as in the judges' enquiries in the form of truncated questions above, and in the reading of the charge, which in District Court jargon is frequently abbreviated to a section number, the nature of the offence or a combination of both:

> **Judge:** "Strike out Section 4. That leaves us with Section 49"[129]
>
> **Barrister:** "He's also anxious to deal with the Section 13 matter"[130]
>
> **Judge:** "Straightforward shoplifting"[131]
>
> **Court Presenter:** "Three counts of criminal damage"[132]
>
> **Garda:** "Section 2, public order"[133]

The set of charges may be more complex, as one solicitor indicates here in a typically eloquent manner: "In addition to the new charges before the court today, there are a number of others of some antiquity".[134] Particularly when defendants are unrepresented, judges tend to ask them whether or not they understand the charge, though different judges concern themselves with this to varying degrees:

> **Judge:** "Do you understand the charge before this court?"
>
> **Defendant:** "I suppose, I guess. Yes."
>
> **Judge:** "No, I have to be absolutely clear. Do you want me to read out the charge?"
>
> **Defendant:** "No, I understand."[135]

For charge sheet offences, evidence is required with regard to the arrest. The typical examples of one judge's questions below indicate their 'insider' nature: it is a standard request for standard information, the arresting Garda is fully anticipating the question, and the Judge can thus dispense with grammatically complete sentences.

> "Evidence of arrest, charge and caution?"[136]

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[129] Judge Z, Rural Court, 10.12.2009
[130] Custody Court, 27.12.2009
[131] Judge S, Custody Court, 12.10.2009
[132] Custody Court, 09.10.2009
[133] City Centre Court, 30.04.2009
[134] Solicitor, Rural Court, 18.11.2009
[135] Judge Z, Rural Court, 10.12.2009

"Reply after caution to the Section 13 offence?"[137]

Much of the time the Judge simply waits as the Garda is sworn in and begins to gives the evidence without prompting. These excerpts demonstrate the standard and formal manner in which evidence is given about the charge; terms and expressions like 'legal demand', 'lawful demand', 'true copy of the charge sheet', 'Garda Station of his/her choice', 'conveyed to the station' are commonly used by Gardaí in providing this evidence.

> "Judge, this morning before the court I charged defendant on charge sheets [numbers]. He was cautioned for each sheet and made no reply."[138]
>
> "I explained in ordinary language what this meant and why I was stopping him."[139]
>
> "He gave no reply after caution ... He was handed a true copy of the charge sheet."[140]
>
> "The defendant was conveyed to [Town] Garda Station."[141]
>
> "I made a legal demand for him to produce his licence at a Garda Station of his choice."[142]

Jurisdiction

This unit applies only to hybrid or 'either-way' offences.[143] On any given day it can involve one or a combination of three elements: the 'directions' or 'instructions' of the DPP as to whether the case may be tried summarily; the Judge's willingness to try it in the District Court; and the 'election' of the defendant of summary trial. The insider nature of District Court language – particularly omissions, truncations and jargon – is very apparent in this unit, and the jargon can be particularly misleading or confusing; the words 'directions' and 'election', for example, though having a very specific meaning in this context, can mean very different things in other contexts. If the case is not to be tried summarily the prosecution must produce a 'book of evidence' ('the book') for the defence which must be 'served' on the defendant ("All charge sheets on indictment please. (...) The guard is about to serve the book"[144]).

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[136] Typical phrasing of Judge Z
[137] Judge Z, Rural Court, 01.12.2009
[138] Garda, Custody Court, 23.20.2009
[139] Garda, Custody Court, 12.10.2009
[140] Garda, Custody Court, 27.10.2009
[141] Garda, Rural Court, 19.11.2009
[142] Garda, Rural Court, 13.11.2009
[143] See Chapter Five
[144] Court Presenter, Custody Court, 22.10.2009

DPP directions

Judge: "Have directions been given?"[145]

"First of all do we have instructions?"[146]

"The DPP consents to summary?"[147]

"Mode of trial?"[148]

The judge frequently uses truncated questions to ask the prosecution about the DPP's orders. The order may not yet have been received, and if it has the details will be given in formal language:

Court Presenter: "We are still awaiting directions in this matter. The file is with the DPP and I've been told it's being given priority."[149]

"I have directions from the Director, so it is purely an indictable matter, and I would be seeking a return to trial on that"[150]

The judge's decision

The Judge may ask for the details of the alleged offence in order to decide whether to accept or refuse jurisdiction:

Judge: "What's the allegation, so that I can consider jurisdiction?"[151]

"I refuse jurisdiction. It's not a minor offense."[152]

Judge: "Nobody was intimidated?"

Prosecution: "No, Judge."

Judge: "I'll accept jurisdiction."[153]

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[145] Judge R, Custody Court, 22.10.2009
[146] Judge S, Custody Court, 08.10.2009
[147] Judge Z, Rural Court, 02.12.2009
[148] Judge Z, Rural Court, 02.12.2009
[149] Court Presenter, Custody Court, 06.10.2009
[150] Court Presenter, Rural Court, 12.11.2009
[151] Judge R, Custody Court, 22.10.2009
[152] Judge S, Custody Court, 06.10.2009
[153] Judge S, Custody Court, 27.10.2009

The defendant's election

The decision of the defendant may be requested or simply given: as the defendant can only waive the right to jury trial if he/she is aware of that right, judges are concerned to very varying degrees about whether this is the case.

Judge: "Is your client ready to elect?"
Barrister: "Electing District Court, Judge, aware of....." [trailed off][154]

Judge: "Have we dealt with jurisdiction under Section 2?"
Barrister: "Electing for District Court. I would ask for disclosure."[155]

Judge: "Is the client accepting this court?"
Barrister: "Yes"
Judge: "Knowing his rights?"
Barrister: "Yes"[156]

The Plea

Judge: "Is there a plea of guilty?"
Barrister: "Yes, Judge"[157]

Judge: "Can you indicate how you're pleading; guilty or not guilty?"
Defendant: "Guilty"[158]

It is probably fair to say that the notion of admitting or denying guilt is fundamental to our criminal justice system and is therefore not difficult to understand, despite this unit involving the frequent use of truncated sentences and the occasional use of more formal constructions. The solicitor/barrister may 'indicate' or 'enter' a plea on appearance, in which case language style may involve more elements of insider language.

[154] Judge S, Custody Court, 09.10.2009
[155] Judge R, Custody Court, 22.10.2009
[156] Judge S, Custody Court, 08.10.2009
[157] Judge R, Custody Court, 22.10.2009
[158] Judge Z, Rural Court, 11.11.2009

"I appear. There's a plea, Judge"[159]

"We are in a position to indicate a guilty plea"[160]

"It's in for a plea or a date. I'll take a date, please."[161]

In District Court jargon a case is often described as being 'in' (before the court) or 'put back' (remanded/adjourned) for a particular purpose. These include for 'mention', 'hearing', 'a probation report', 'a book of evidence', 'a plea or a date' and so on. In the expression 'a plea or a date', 'a plea' is a guilty plea and 'a date' indicates that a date to be set for hearing if the plea is one of not guilty. Thus, in the last example the barrister is indicating a plea of not guilty, quite an obscure reference if one is not familiar with District Court language and procedure.

The Facts

Judge: "Election of summary trial, a plea of guilty, I'll hear the facts"[162]

"Now, facts please"[163]

The 'facts' of the case are basically what is alleged by the prosecution to have happened in relation to the offence before the court. Logically, therefore, the prosecution is the primary element in this unit and in the event of a guilty plea the facts will be furnished or established by the arresting Garda or the court presenter. As mentioned, these may also be considered in respect of jurisdiction, and it is not uncommon for them to be given on a number of occasions by the prosecution and/or to be summarised or revised by the judge. The facts of each case are necessarily different, but a common feature is the speed and low volume with which Gardaí tend to deliver them, often making them very difficult to follow and understand. The insider standardised phrases used by the Gardaí are also common, as similar details concerning the court are given in many cases, including the behaviour of the defendant:

"I have to say that Mr. X was fully co-operative and completely truthful. Anything he was asked he answered truthfully"[164]

"He hasn't come to the attention of the court"[165]

[159] Solicitor, Rural Court, 02.12.2009
[160] Solicitor, Rural Court, 11.11.2009
[161] Barrister, Custody Court, 23.10.2009
[162] Judge Z, Rural Court, 07.12.2009
[163] Judge S, Custody Court, 19.10.2009
[164] Garda, Rural Court, 12.11.2009
[165] Garda, Rural Court, 12.11.2009

Questions from the judge will often supplement the Garda's account:

> **Judge:** "The chinchillas, were they returned to the owner?"
> **Solicitor:** "Well, a rabbit escaped."[166]

> **Judge:** "He abused somebody who tried to help him. Did it continue in the presence of the Gardaí?"
> **Prosecution:** "He had to be restrained."
> **Judge:** "How much damage was done?"
> **Prosecution:** "80 Euro."[167]

Efficiency and relevance appear to be two important characteristics in the presentation and establishment of the facts. Consider the following questions fired quickly (and without verbs) by one judge to ascertain the missing details: "Time of evening? ... People present in the premises? ... Value, circumstance, location? ... People present, elderly, young? ... Manner of entry? ... No violence?" [168]

The facts are rarely disputed, though occasionally an issue may be contested or questioned and the judge may give an unrepresented defendant the opportunity to do so. Otherwise they are often affirmed by the solicitor/barrister or the Judge:

> **Solicitor:** "That's the position. There's just one issue I'd like to put to the Guard."[169]
> **Judge:** "Have you any questions for the Garda?"[170]
> **Solicitor:** "The facts are as the Inspector has fairly stated"[171]
> **Judge:** "In relation to the facts you've no quibble."[172]
> **Judge:** "The facts there speak for themselves."[173]

[166] Judge Z, Rural Court, 01.12.2009
[167] Judge S, Custody Court, 09.10.2009
[168] Judge R, Custody Court, 22.10.2009
[169] Solicitor, Rural Court, 13.11.2009
[170] Judge Z, Rural Court, 18.11.2009
[171] Solicitor, Rural Court, 01.12.2009
[172] Judge Q, Custody Court, 23.10.2009
[173] Judge R, Custody Court, 19.10.2009

A final possibility, which relates somewhat to Mitigation below, is that the judge may seek clarification or explanations on certain elements of the facts:

> **Judge:** "Why was the accused not insured?"[174]
>
> "Why does he not have a passport? Where is it?"[175]

Criminal record

> **Judge:** "Has he previous?"[176]
>
> "Any previous?"[177]
>
> "Previous convictions?"[178]
>
> "Previous?"[179]
>
> "Now, are there any previous convictions?"[180]
>
> **Garda:** "No previous"[181]
>
> "Reading of 70. One previous conviction. Section 47 Road Traffic"[182]

In this unit the defendant's criminal history, or lack thereof, is established, and most dialogue is between the judge and the prosecution, though the solicitor/barrister sometimes provides the requisite information. The dialogue of this unit is generally very fast and insider language is common with truncation of questions and statements used more often than not. The details of previous offences are given and if these are numerous the judge may ask for the most recent or for a breakdown:

> **Judge:** "What was the last one?"[183]
>
> "What is the pattern?"[184]
>
> "What is the gist of the rest?"[185]

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[174] Judge R, City Centre Court, 12.05.2009
[175] Judge S, Custody Court, 27.10.2009
[176] Commonly used, e.g. Judge S, Custody Court, 06.10.2009
[177] Commonly used, e.g. Judge R, Custody Court, 20.10.2009
[178] Commonly used, e.g. Judge Z, Rural Court, 11.11.2009
[179] Commonly used, e.g. Judge Z, Rural Court, 11.11.2009
[180] Judge R, Custody Court, 19.10.2009
[181] Commonly used, e.g. Court presenter, Rural Court, 02.12.2009
[182] Court Presenter, Rural Court, 10.12.2009
[183] Judge Z, Rural Court, 11.11.2009
[184] Judge Q, Custody Court, 23.10.2009
[185] Judge S, Custody Court, 06.10.2009

Mitigation

> **Judge:** "Would you tell the court what's causing this? What's causing this recidivism by Mr. C.?"[186]
>
> "What's going on in his life? Anything in mitigation?"[187]
>
> "What are the financial, family and work circumstances?"[188]
>
> "What do you have to say in defence?"[189]
>
> "What's your explanation?"[190]

The objective of this unit is for (usually) the defence solicitor/barrister to throw as positive and favourable a light as possible on the defendant, personally and/or in relation to the offence. Details will be given about the defendant's background, typically highlighting either the fact that this represents an aberration from their usual, upstanding selves, or that their social background and many difficulties have contributed or led inevitably to deviance; reasons, explanations, excuses, apologies and aspirations are proffered in an effort to mitigate the severity of sentence. The unit may be opened by the judge addressing either the solicitor/barrister or the unrepresented defendant, or by the solicitor/barrister, who in either case will generally deliver a monologue that constitutes the bulk of the unit. Interestingly, the use of 'insider' language is relatively rare, which may be due to the desirability that the defendant understand what is being said on their behalf and thus feel fairly and truly represented. That said, Mitigation is often – like the rest of the District Court case – extremely repetitive with the same type of information being given in the same cases over and again. The judge, and their known sympathies and intolerances, undoubtedly influence the details given, though the following topics are commonly broached:

Age, character and employment

> "It's hardly the work of a criminal mastermind"[191]
>
> "He's not an aggressive type"[192]
>
> "He's a young man in gainful employment. He's never been in bother before"[193]

Family support and background

[186] Judge R, Custody Court, 19.10.2009
[187] Judge R, Custody Court, 20.10.2009
[188] Judge Z, Rural Court: phrase commonly used
[189] Judge S, Custody Court, 27.10.2009
[190] Judge Z, Rural Court, 02.12.2009
[191] Solicitor, Rural Court, 11.11.2009
[192] Solicitor, Rural Court, 12.11.2009
[193] Solicitor, Rural Court, 13.11.2009

"He comes from a big family, his father died when he was [age]"[194]

"He is living with his father, who is behind him there."[195]

"He is a man who has two young children. He is in a stable relationship with his wife"[196]

Alcohol and drugs status

"He appreciates he has a very serious drug problem"[197]

"He is a man who would benefit from treatment"[198]

"He admits that a few drinks had been taken"[199]

"He has no addictions"[200]

Achievements, co-operation and guilty pleas

"He's one of the success stories"[201]

"He has turned his life around, he's trying to improve. He drinks a lot less than before."[202]

"I would respectfully submit that his plea of guilty is not based on being caught red-handed"[203]

"He did assist the Gardaí, and when he was approached on the street he admitted the offence, thereby saving the Gardaí time and expense"[204]

Apologies, remorse and acknowledgment of mistakes

"He wants to apologise for his behaviour"[205]

"It was an appalling mistake"[206]

"He greatly regrets and is embarrassed by this"[207]

"He throws himself on the mercy of the court, Judge"[208]

Acknowledgment of seriousness

"He knows that he's facing a custodial sentence today"[209]

"He is fully aware that the court will take a very dim view"[210]

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[194] Barrister, Custody Court, 19.10.2009
[195] Solicitor, Rural Court, 10.12.2009
[196] Barrister, Custody Court, 22.10.2009
[197] Barrister, Custody Court, 08.10.2009
[198] Barrister, Custody Court, 22.10.2009
[199] Solicitor, City Centre Court, 26.03.2009
[200] Barrister, Custody Court, 27.10.2009
[201] Solicitor, Rural Court, 12.11.2009
[202] Solicitor, City Centre Court, 12.05.2009
[203] Barrister, Custody Court, 22.10.2009
[204] Solicitor, Rural Court, 10.12.2009
[205] Solicitor, Rural Court, 21.11.2009
[206] Solicitor, Rural Court, 01.12.2009
[207] Solicitor, Rural Court, 10.12.2009
[208] Barrister, Custody Court, 22.10.2009
[209] Barrister. Custody Court, 08.10.2009

Request for leniency

> "I would ask for leniency. He has pleaded guilty to an opportunistic offence."[211]
>
> "He regrets the offence. These are his only two transgressions ever. I would ask you to be lenient, Judge."[212]

The following illustrates a typical monologue:

> "He is a Polish man of 36. He has been married for 2 and a half years. He minds his friend's child. He was employed in warehousing for a year and a half. He is on social welfare. He knows that his behaviour was stupid. Drink is the problem, alcohol-dependency. He did plead guilty."[213]

Judges sometimes react to the points raised, for example in congratulating a person on an achievement, or – more commonly - expressing disbelief or a lack of acceptance:

> **Judge Z:** "It was disrespectful of the client to raise the issue of his bereavement in this court in defence of his position. If you respect the dead, this is the last place it should be resurrected"[214]
>
> "I'm always suspicious of people who use innocent children to save their own bacon"[215]
>
> "I wouldn't accept that. You're nothing but a blackguard"[216]
>
> "Why was he drinking all night and all day. That doesn't show any remorse or contriteness."[217]
>
> **Judge Q:** "It is not credible"
>
> "For him to make excuses like this is no credit to him at all."[218]
>
> **Judge S:** "He may have had something terrible happen to him... but it doesn't really seem to have much to do with the offences"[219]

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[210] Barrister, Custody Court, 27.10.2009
[211] Barrister, Custody Court, 22.10.2009
[212] Solicitor, Rural Court, 03.12.2009
[213] Barrister, Custody Court, 27.10.2009
[214] Judge Z, Rural Court, 19.11.2009
[215] Judge Z, Rural Court, 04.12.2009
[216] Judge Z, Rural Court, 07.12.2009
[217] Judge Z, Rural Court, 10.12.2009
[218] Judge Q, Custody Court, 23.10.2009

"A bad childhood? That sounds like you're blaming your parents"[220]

Judge R: "Excellent, well done. I congratulate you"[221]
"I see that, which is very excellent news"[222]
"I'm impressed by one factor only - he's been drug-free since the 18th of December."[223]

Sentence

Judge: "Section 49 convict and fine 400 Euro, 4 months"
"Convict and fine 200 Euro, one month to pay, 10 days in default. Recognisance on own bond 50 Euros"[224]

Judge: "I'm imposing a three month sentence. I will suspend it for 12 months. He will enter a Probation bond, 12 months, in his own bond 200 Euro. He will provide compensation to the owner of the property. In what sum [Inspector]?"
Prosecution: "200 Euro."
Judge: "And he will attend counselling. The second matter, convict and taken into consideration in light of the sentence imposed."[225]

Sentence may be (or have been) adjourned for a variety of reasons such as for a pre-sentence report, probation report, community service report, substance abuse report and so on, and it is naturally imposed by the judge. As such it is generally only the judge who speaks in this unit which is notable for the extreme speed and low volume with which it is customarily delivered, for the amount of jargon used, and for the complexity of sentence structure as well as the complexity of the sentence itself which may involve numerous orders: details of fines involving the amount and how long the person has to pay; dates, length and place of custodial sentences which may suspended or given concurrently; the length of time of disqualification from driving; probation or community service; Probation of Offenders Act, compensation or contributions to charities or the court poor box, taking into consideration of offences and so

[219] Judge S, Custody Court, 08.10.2009
[220] Judge S, Custody Court, 06.10.2009
[221] Judge R, Custody Court, 19.10.2009
[222] Judge R, Custody Court, 20.10.2009
[223] Judge R, Custody Court, 22.10.2009
[224] Judge O, Custody Court, 02.10.2009
[225] Judge Q, Custody Court, 23.10.2009

on. Where sentencing is in respect of multiple charges, as it often is, this unit can be utterly bewildering.

In addition some judges offer a degree of sentencing rationale or reasoning:

> **Judge:** "What I'm trying to do is keep people out of prison. I think it's in the interests of justice"[226]
>
> "I've no option but to send him to jail"[227]
>
> "I took a dim view because this man has been twice disqualified from driving."[228]
>
> "Cigarette smuggling is a serious offence. Convict, fine 400 Euro, four months in prison, suspended for two. Enter into a peace bond for 12 months on own bond of 1000 Euro."[229]

Finally in this unit the judge frequently expresses his/her views on the crime or the convicted person, and monologues are not uncommon:

> **Judge S:** "It's crimes like this that prevents people getting help when they need it"[230]
>
> "It's a blatant, criminal, putting-lives-at-risk thing to do"[231]
>
> "This was outrageous. (...) It's more than a drink problem"[232]

> **Judge Z:** "It's important for this court to understand how many people this person has contaminated"[233]
>
> "It is a sad reflection of certain people in Ireland who persist in this shameful [behaviour]"[234]

The End

If the case is not being disposed of on that date but must come before the court again, a further date is given and the purpose of the new date often specified. Jargon and truncated sentences are usual:

[226] Judge Z, Rural Court, 11.11.2009
[227] Judge S, Custody Court, 06.10.2009
[228] Judge Q, Custody Court, 23.10.2009
[229] Judge T, City Centre Court, 07.05.2009
[230] Judge S, Custody Court, 08.10.2009
[231] Judge S, Custody Court, 29.10.2009
[232] Judge S, Custody Court, 06.10.2009
[233] Judge Z, Rural Court, 12.11.2009
[234] Judge Z, Rural Court, 02.12.2009

"28th of October for a plea or a date in all matters"[235]

"In for hearing, 11th of July. 2pm"[236]

"By consent to the 15th, this court, to verify ID"[237]

"Remand in custody, 8th of April 2009"[238]

"Remand on continuing bail until 23rd of April."[239]

"For directions ASAP"[240]

If being disposed of, the judge may formally announce this:

"That completes that matter"[241]

"That leads me to conclude the proceedings in respect of Section 50."[242]

"The accused is now free to go. He's at his liberty."[243]

Some judges end by thanking the participants – sometimes as a signal that it is over, and as the solicitor/barrister did at the appearance stage at the beginning of the case, he or she will usually thank the court with formal and archaic expressions:

Much obliged

If it pleases the court[244]

Breaking down the case in this manner may create a somewhat false illusion as things do not always progress in this, or any, neat sequence; there is no pause or divide between what have been labelled units here; turns are not taken slowly, one by one, as it may appear when neatly written down; and a case may come before the court on numerous occasions, and over long periods of time, before it is disposed of. The reality is that when a case is called, three or four units may be dealt with in less than a minute and the case swiftly remanded or adjourned to another date. In one breath, the solicitor or barrister, for example, can cover multiple topics,

[235] Judge S, Custody Court, 14.10.2009
[236] Judge T, City Centre Court, 30.04.2009
[237] Judge S, Custody Court, 09.10.2009
[238] Judge X, City Centre Court, 01.04.2009
[239] Judge X, City Centre Court, 26.03.2009
[240] Judge S, Custody Court, 12.10.2009
[241] Judge Q, Custody Court, 23.10.2009
[242] Judge Z, Rural Court, 18.11.2009
[243] Judge R, Custody Court, 22.10.2009
[244] These are commonly used phrases

providing information and making applications, all with fast flowing and formal articulacy, replete with District Court jargon, punctured with truncations and omissions, and wrapped in deferential archaisms.

Conclusion

In one sense, the District Court is a model of efficient and effective communication. In another sense its exclusive and exclusionary language makes it inaccessible and meaningless to outsiders. Its defining feature is its reliance on shared knowledge and experience to function as communication, and the language used in the District Court is both a product of, and facilitative of District Court proceedings and the workload of this court; things move quickly due to the large workload, such that speech and proceedings are often rapid and difficult for outsiders to follow. The perceived need for speed is also undoubtedly a factor in some of the principal features of the 'insider' nature of District Court language: the omission of pivotal pieces of information that another participant can be assumed to identify and understand implicitly, and the grammatical truncation of sentences, whereby principally verbs and pronouns are omitted and sentences or questions may consist of only one word.

The effectiveness of such communication stems from the repetitive nature of District Court proceedings; first of all the same type of cases, often with similar circumstances, are dealt with over and over again such that those familiar with the District Court will be familiar with the cases being processed and can easily understand truncated references such as "It's a Section 99". Secondly, the processing of the District Court case is essentially a ritualised, routinized procedure that consists of a combination of a limited set of elements; the elements relevant to the case depend on the offence in question and on the plea, while the elements dealt with on a particular day depend on the stage at which the case is in the system, what the case is in for on that day, and what is being sought. On any given day a case will have a very formal Beginning and End in which standardised, deferential and often archaic expressions are used by participants to address the court. The Middle section typically consists of a combination of the following units: Applications (strike outs, warrants, legal aid, bail, disclosure, remands), The Charge, Jurisdiction, The Plea, The Facts/evidence, Criminal Record, Mitigation/defence and The Sentence. The more experience one has in the District Court, the easier it becomes to understand and use the language. In addition to omissions and truncations, District Court insider language features formalities and standardised phrases, as well as District Court jargon which can be divided into three sub-categories: legally-based language that is familiar and

commonly used; legally-based language that is not commonly used; and everyday words that are used in a different sense or have a specific meaning in the District Court context. The latter sub-group is the largest, the most commonly used, and also that which can potentially create the most confusion for those unfamiliar with the language and proceedings.

Perhaps the final defining feature of the language used in the District Court is the difference in the speech of various participants. Judges are undoubtedly the most verbally active and in control of the speech used in the courtroom; they use all the features of insider language, but it is also the judge that controls variance or deviance from this including the use of humour, informalities and colloquialisms. Judges also reserve the discretion to use terms of address inappropriate for other participants and to deviate from set procedure to deliver monologues or lectures on topics that may include, for example moral ills, societal problems or bureaucratic frustrations. Judges, in common with solicitors and barristers, not only tend to be fluent and excellent language users, but also reflective language users that demonstrate a sensitised consciousness of the language they use, and they will often reflect on or qualify a choice of words.

This tendency is not evident in the language used by the Gardaí who nonetheless use very formal, standardised language in the course of proceedings. The difference between solicitors and barristers and the Gardaí is further underlined by the less experienced Garda, who sometimes attempts to improvise with formal and sophisticated language but fails to use the formal language correctly. In general, members of the Gardaí tend not to use archaic or 'flowery' expressions to the same extent as solicitors/barristers, and a different style is in evidence. Though the voice of the defendant is that which is heard least in the courtroom, there is a notable difference in the language of repeat offenders who have experience and knowledge of the language and procedures of the District Court, and the average defendant who has no such experience, as the former often understands and can use insider language, specifically District Court jargon. However, the language spoken by defendants often suggests a lower socio-economic background as it lacks the correctness of standard English and the formality otherwise used in court.

District Court language reflects the defining feature of the court itself; generally minor, repetitive matters lacking conflict, processed at high speed and with little legal argument, presided over by judges with significant discretion as to how their court is run and offences

processed, and where the defence is usually conducted by a solicitor/barrister and the prosecution by a member of the Garda Síochána. The language of the higher courts can thus be expected to differ considerably, and indeed it has been described by solicitor Gwen as being slower and more complex, and involving "a lot of references to legal decisions and precedence", as well as "legal argument about the admissibility of evidence and rules in evidence and hearsay, and a lot of Latin terms"; solicitor Mark considers there to be "more formality, it's slower, and I suppose it's more perhaps pompous"; while James depicts it as having "an extra degree of formality" and being "a little bit more obfuscated, and reliant on seemingly dense terminology". The language used in the District Court is thus unique to this setting, yet it is not designed to be inclusive or facilitative of outsiders, and without direct experience in the court, and/or the requisite knowledge of certain aspects of law, procedure and jargon, what one encounters in the District Court is a world of incomprehensible mayhem.

Chapter Seven: Interpreting in the District Court

Introduction

This chapter introduces interpreting in the District Court: how and to whom interpreters are assigned, what interpreters are expected to do and what they are actually doing, and perceptions of interpreting standards in the courts. Section A considers in detail the various circumstances under which an interpreter is assigned or not assigned in District Courts; how the interpreter may simply appear or the issue be raised by Garda, solicitor/barrister or judge; how second callings or adjournments may arise if an interpreter is not available; and how it may happen that a foreign defendant is not assigned an interpreter. It also considers situations where the wrong interpreters are assigned to defendants. Section B looks at the interpreter at work, considering the oath and what the interpreter is expected to interpret, as well as where interpreters are prevented from interpreting. It looks at the challenges to interpreting created by the dynamics of the District Court, and a typology of District Court interpreters is created that identifies different types of interpreter and describes the work typically done by these; the Silent Interpreter, the Selective Interpreter, the LEP Interpreter, the Advocate and the Competent Interpreter. Finally, perceptions of interpreting quality and standards are discussed.

Section A: Providing interpreters for LEP defendants

Interviewees – interpreters and legal professionals alike – were adamant that interpreters should be provided as necessary to defendants in court; first of all, as Gwen puts it, to make "sure that the accused is afforded every opportunity to have a fair trial", and secondly to protect against any suggestion that procedures were not carried out correctly and thus to avoid appeals on the basis that the defendant's "rights were trampled on because they didn't really understand what was going on".[1] Most solicitors/barristers recognise that "there's a big difference between basic, conversational English and understanding what goes on in a court"[2], and that basic English is insufficient to follow a case for which a certain level of procedural knowledge is also required. It was also suggested that even when a person can speak English

[1] Mark, Solicitor
[2] Gwen, Solicitor

well, the intimidating nature of the court setting can cause nerves and seriously diminish a person's language ability; James points out that "if you're panicked or in fear; there can be a block there"; Gwen maintains that "you always have to bear in mind, I think, it's an intimidating scene", and Thomas has experienced many incidences where "the person who appears to have excellent English falters when challenged in the court system". This indicates a belief that interpreters may be needed even where defendants have some English.

Solicitors/barristers indicated that there is a collective responsibility to ensure that interpreters are assigned where needed. Aoife remarked that while it is essentially the judge's responsibility to ensure that things are run properly, there is an onus on the defendant and/or their representative to request an interpreter if needed. Mark also feels that "if the client doesn't understand he must say so", but points out that at the end of the day whether or not an interpreter is assigned is "not our decision, it's the judge's". Gerard and Stephen consider it the solicitor's professional responsibility to ensure that clients fully understand, and Matthew emphasizes the collective nature of responsibility, the primary role being with the Gardaí, the onus in court on the solicitor, and overall the responsibility lying with "everyone in the criminal justice system, no matter what angle you're coming at it from, to ensure the basic objective, which is that somebody who is there who doesn't speak English as their first language knows what's happening."

What is his command of the English language? Assessing Proficiency and Assigning Interpreters

Fundamentally the names on the court list are used to identify foreign defendants; as barrister Aoife explains "you'd know from the names that they're not Irish". The nature of Irish immigration means that this is effective though not foolproof:

> **Solicitor:** "He is an Irish national, though his name would belie that. His father is a Malaysian national."[3]
>
> **Judge:** "Nationality?"
> **Solicitor:** "I don't actually know."
> **Judge** [to defendant] "What is your nationality, Sir?"
> **Defendant** [Mohammed]: "Oirish."[4]

[3] Rural Court, 17.12.2009

It is often at the start of the case that the issue of interpreting arises, though no set procedure is followed and the issue may equally arise at a later point or not at all. One of six things usually happens:

1. no mention is made of language or interpreting but an interpreter appears
2. the court presenter/Garda raises the issue
3. the solicitor/barrister raises or is consulted on the issue
4. the judge raises the issue of nationality/language/interpreting
5. (AND/OR) no interpreter is present: second calling, adjournment or remand requested
6. no mention is made of language or interpreting and no interpreter appears

1. No mention is made of language or interpreting but an interpreter appears

Very often interpreters have, or can access, a court list and they generally remain attentive to the names being called by the registrar. It is usually easy for them, as solicitor Mark points out, to "recognise their own nationality's names", and once these are called an interpreter will often appear next to a defendant with no mention being made of that fact by the court.

2. The court presenter/Garda raises the issue

This is perhaps least common, but it happens occasionally that the court presenter or a Garda alerts the court to the fact that an interpreter is required:

> "Polish interpreter, please"[5]
>
> "It is very important that he have a Latvian interpreter."[6]

3. The solicitor/barrister raises or is consulted on the issue

> "I appear. A Slovakian interpreter is needed."[7]
>
> "Judge, I appear in this matter. There's an interpreter here."[8]
>
> "A Russian interpreter was assigned the last day."[9]

[4] Judge Z, Rural Court, 16.12.2009
[5] Court Presenter, City Centre Court, 14.04.2009
[6] Court Presenter, City Centre Court, 07.05.2009
[7] Solicitor, Rural Court, 11.11.2009
[8] Barrister, Custody Court, 06.10.2009

Very often a solicitor will indicate the presence, lack of or need for an interpreter at the same time as announcing their appearance. The solicitor/barrister is also frequently consulted by the judge for their opinion on whether or not an interpreter is required. This view is often accepted:

> **Judge:** "A Polish interpreter is required, I am told, so I will accept that that is the case."[10]

> **Judge:** "Do we need an interpreter?"
> **Solicitor:** "No, Judge."[11]

Sometimes, however, the judge will pose further questions, and may request an interpreter even where the solicitor/barrister and/or the defendant claim that none is required:

> **Judge:** "Does he need an interpreter?"
> **Solicitor:** "He doesn't need one."
> **Judge:** "Does he have sufficient competence; can he speak English?"
> **Defendant:** "Yes."
> **Judge:** "Where are you from?"
> **Solicitor:** "Pakistan"
> **Judge:** "And what language do they speak in Pakistan?"
> **Defendant:** "Urdu."
> **Judge:** "What?"
> **Defendant:** "In Pakistan? Urdu."
> **Judge:** "Go to your solicitor and write it down."
> **Solicitor:** "Urdu. U - R - D - U."
> **Judge:** "I request an interpreter for that date."[12]

This case was remanded for an interpreter despite the fact that the solicitor declared the defendant's ability to speak English and that the defendant had no apparent difficulties understanding or speaking English. While Urdu is the national language of Pakistan, it is a

[9] Solicitor, City Centre Court, 01.04.2009
[10] Judge O, Custody Court, 02.10.2009
[11] Judge Z, Rural Court, 01.12.2009
[12] Judge Z, Rural Court, 02.12.2009

mother tongue only for a small percentage of the population and it is not even clear that the defendant speaks it - the defendant told the judge that Urdu is spoken in Pakistan, but not that it was his own language. Without further assessment there was no reason to assume that this defendant needed an interpreter, let alone an Urdu interpreter. Even claiming to be a native or fluent speaker of English is not always accepted without question:

> **Judge:** "Language?"
>
> **Solicitor:** "English."
>
> **Judge:** "Has he proficiency in English?"
>
> **Solicitor:** "Yes, Judge. He's fluent."
>
> **Judge:** "His response to the charge after caution was; 'you give me this tomorrow? I do not understand.' If he speaks English, why did he not understand?"
>
> **Solicitor:** [laughing] "The reason he did not understand was that the charge was a 500-year-old provision. It took me a good while to find out (...)"[13]

The solicitor/barrister has a responsibility to ensure their client has an interpreter if one is needed, particularly as some judges address the issue only if it is first raised by a party to the case, and there is no guarantee that one will be provided if it is not directly requested. It is also clear that while the ultimate decision of assigning an interpreter lies with the judge, the solicitor/barrister's opinion carries heavy weight. As well as often having the confidence of the court on this matter, solicitors/barristers portray confidence in their own judgment, rarely expressing doubts or alluding to the fallibility of their opinion. However there are a few factors that cast a doubt over the ability of a solicitor/barrister to make this judgment without error; aside from not being trained to assess a person's linguistic competence, it is notable that where the opinion of a solicitor/barrister *is* challenged, the judge often reaches a different conclusion. More importantly, it is sometimes the case that defendants whose solicitors have declined an interpreter seem to struggle without one, suggesting that solicitors/barristers may sometimes overestimate the ability of their client to speak English: perhaps this is because consultations are possible even with limited English, perhaps solicitors are simply respecting their client's instructions, or perhaps the client has expressed a wish to 'get it over with', and to proceed without an interpreter is more expeditious.

[13] Judge Z, Rural Court, 01.12.2009

Whatever the reason, it is notable in court that although solicitors/barristers regularly request interpreters for their clients, it is also the case that they often advise the court against their necessity. In the following examples the court is willing to provide an interpreter but the solicitor seems more anxious to proceed without one:

> **Judge:** "Does the defendant speak English?"
> **Defendant:**" A little bit."
> **Judge:** "Is there a Polish interpreter?"
> [Second calling for an interpreter]
> **Judge:** "It was put back for an interpreter."
> **Solicitor:** "Judge, his English is quite good."
> **Judge:** "Well, when he was asked..."
> **Defendant:** "Don't speak English very well. Can understand."
> **Judge:** "Well, that's fine."[14]

> **Solicitor:** "A Russian interpreter was assigned the last day."
> [Second calling for another reason]
> **Judge:** "Is there a Russian interpreter?"
> **Polish interpreter:** "In Court [Number]."
> **Solicitor:** "I've explained to him about the CCTV. He understands what's happening."[15]

> **Garda:** "If an interpreter is required, he is in Court [Number]"
> **Solicitor:** "Judge, they do speak some English."[16]

4. The judge raises the issue of nationality/language/interpreting

If a case is already in the system and the defendant's file contains a note that an interpreter has been certified, the judge may raise the issue by asking if the interpreter is present, or by requesting their presence:

> "A Polish interpreter is required"[17]

[14] Judge X, City Centre Court, 26.03.2009
[15] Judge X, City Centre Court, 01.04.2009
[16] Judge T, City Centre Court, 30.04.2009
[17] E.g. Judge O, Custody Court, 02.10.2009

"Do we have a Slovakian interpreter?"[18]

"He's a Latvian-speaking Russian"[19]

Depending on the judge, at the beginning of the case the judge may enquire as to the defendant's need for an interpreter, usually through questions on nationality, language and language ability, or simply whether or not an interpreter is needed. As noted, these questions are often directed at the solicitor/barrister:

"What nationality do we have here?"[20]

"Does the defendant speak English?"[21]

"Is there a language difficulty?"[22]

"What language are we speaking, please?"[23]

When a defendant is unrepresented, or as a preference in the case of some judges, the defendant will be questioned directly. The nature of the assessment procedure is simple and usually consists solely of asking the defendant if they speak English or if they understand what is going on:

Judge: "Is your command of the English language OK?"
Defendant: "Yeah."[24]

Judge: "Do we need an interpreter? " [to defendant, slowly] "Do you speak English?"
Defendant: "Yes, I do."
Judge: "All right."[25]

Judge: "Does Mr. G need an interpreter?"
Garda: [hesitantly] "No."
Judge to defendant: "Do you understand what's going on?"
Defendant: "I do."

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[18] E.g. Judge X, City Centre Court, 01.04.2009
[19] Judge Z, Rural Court, 01.12.2009
[20] Judge Z, Rural District Court, 11.11.2009
[21] Common question, for example Judge X, City Centre Court, 23.03.2009
[22] Judge V, City Centre Court, 06.05.2009
[23] Judge P, Custody Court, 29.09.09
[24] Judge Z, Custody Court, 18.11.2009
[25] Judge X, City Centre Court, 23.03.2009

Judge: [unsure] "You do?"

Defendant: "I do."

Judge: "OK."[26]

Judge: "What is your understanding of the English language? I mean, can you speak English?"

Defendant [French]**:** "Yeah."

Judge: "Do you want the assistance of an interpreter?"

Defendant: [Didn't understand, question repeated several times] "No."

Judge: "Comprends?"

Defendant: "I'm all right."[27]

Judge: "Do you have sufficient English?"

Defendant: [laughing] "Yes, I've been speaking English for 12 years."[28]

While there is insufficient detail in the first three extracts to gauge with any certainty the defendant's level of English, the final two extracts provide a little more information. They are particularly interesting because although this information points to two opposite conclusions about the defendant's proficiency, the outcome in both was the same: no interpreter was provided. The last extract is grammatically sophisticated, it contains factual detail to support its complexity, and it was delivered with confidence and fluidity, all of which strongly support the defendant's claim of proficiency. The penultimate extract does the opposite; the first 'yeah' provides little information, but the question about the interpreter had to be repeated several times before the defendant understood; additionally his spoken English was laboured and heavily accented. The case proceeded with the aid of an Irish friend, but it moved slowly and painstakingly, with the defendant unable to understand the court, and the court equally unable to understand the defendant. A full description of the case is provided in Appendix B that illustrates the delays and frustrations caused for both sides when an interpreter is needed but not provided.

Some interpreters have expressed concern about the methods used to assess a defendant's English. In Marta's experience when a defendant says they understand English this is accepted

[26] Judge R, City Centre Court, 27.04.2009
[27] Judge Z, Rural Court, 21.11.2009
[28] Judge Z, Rural Court, 19.11.2009

without question, but she does not feel this is sufficient evidence of whether a person is proficient enough to stand trial. She says a person is *probably* going to say yes when asked if they speak English for a variety of reasons: perhaps because it is an easy question, or they may *think* they can understand; they may also be ashamed that they cannot speak English, or they may just want to get things finished quickly. However, Marta regularly sees such defendants struggling and completely lost after a few minutes when they realise that they are not able to follow what is going on - even where they had been able to converse with the solicitor previously. Jevgenius gave the example of a Slovak defendant who said that his English was OK and that he didn't need an interpreter, but when the judge asked 'how do you plead?', he didn't understand and the case had to be postponed.

Every judge deals with the interpreting issue in their own manner, but it is fair to say that if a request for an interpreter is made, it will be granted, and there is a strong sense that judges "err on the side of caution",[29] appointing interpreters if there is any doubt in order to protect themselves. Mark explains that the judge's orders "stand up to better scrutiny if the defendant that he has sentenced or penalised has been legally represented and has had an interpreter," and Aoife concurs, explaining that a judge could be judicially reviewed if the hearing "wasn't conducted pursuant to the Constitutional rights of the person". She opines that "District Court judges would be very cautious about not exposing themselves like that." Overall, most feel that judges routinely grant requests for interpreters, though solicitor Gerard suggests that some have issues about 'these people' getting something for nothing and grant interpreters grudgingly. He also says that the Gardaí sometimes highlight that 'this person spoke English fluently yesterday, why does he need an interpreter today', but that in the end the interpreter is always provided:

> **Judge:** "I'm absolutely aghast that people have been in this country for 7 years and have not one word of English. I suggest that he knows as much as English as you and I. Well, that's not a matter for now. Through the interpreter can I indicate to the defendant that the matter is adjourned."[30]
>
> **Judge:** "I'm getting concerned at the amount of taxpayers' money being wasted in these particular cases." (...)
> **Judge:** "How long have you been in the country?"

[29] James, Barrister
[30] Judge Z, Rural Court, 18.11.2009

Defendant: "One year and a half."

Judge: "Oh, you've great English now!"

Defendant: [Laughed. Then confused face]

Judge: "How many English classes have you attended in the last one and a hal years?"

Defendant: "None."[31]

Judge: "How long are you in Ireland?"

Defendant: [Silence. Shrugs]

Judge: "I tell you, Sir, you've more English than I have." [Addressing court] "He knows what's going on!" [To defendant] "Off you go! Write to Santy!"[32]

These extracts raise the issue of defendants pretending not to speak English, or being perceived as doing so. Interpreter Jevgenius is of the opinion that some Lithuanian and Latvian defendants (those he interprets for) are abusing the system by pretending not to understand English; he says he has heard about defendants with many previous convictions who will use 'any excuse' to avoid more penalties or to buy time. Molly feels that while some defendants might understand and not say anything, only a very small number use the services of the interpreter in the hope that things will turn out differently. Solicitor Mark feels that the strategy of pretending not to speak English is more likely to be used in the Garda station where "they sort of feign a lack of understanding, rather than having to answer some awkward questions", but that it is less likely to be used in court, while Stephen says:

> "I think it's definitely a strategy (...) and people will certainly sometimes pretend that they have less English than they have. Because I have had experience myself of talking to people maybe at the station, and then they're in court and they don't seem to have any English at all, all of a sudden (laughs). Now it wouldn't happen too often, I have to say that. But it is certainly a tactic by some individuals, and generally the ones, they're a little bit more experienced."

[31] Judge Z, Rural Court, 17.12.2009
[32] Judge Z, Rural Court, 18.11.2009

5. (AND/OR) No interpreter is present: second calling, adjournment or remand requested

> "It should be going ahead, but I don't think the interpreter is here yet"[33]
>
> "The defendant is in court. I was hoping it might be put back. I think I'm going to need the assistance of an interpreter"[34]

If an interpreter is needed but none is present, the case may be put to second calling in the case of temporary absence, or put back so an interpreter can be ordered. A second calling may also be requested by the solicitor/barrister for a consultation "with the benefit of the interpreter."[35] Interestingly, judges routinely grant requests for the latter, in contrast to the impatience sometimes caused by requests for ordinary consultations. This suggests that the court accepts the practice of consultations being held in court where these involve interpreters, and most solicitors said it was unusual to have interpreters in their office; as Mark explains, the court is "the only place the interpreter would be", so that is where such consultations take place. In his experience the interpreter doesn't generally come to the office, as unless clients are proficient in English "there's very little we can do or achieve", though he adds that some may come with a friend. Gwen makes the point that you have to wait for the court to certify for the interpreter and that many LEP cases are disposed of on the same day she is assigned to the client. Thomas, too, rarely has interpreters in the office, but he encourages clients to bring someone with them who can speak both languages; in "more relaxed circumstances" and with more time he finds it is usually possible "to detect if they're not understanding", in which case consultation is postponed until the day of court. In Stephen's experience clients usually have a reasonable grasp of English, failing which "either a close friend or a relative would be the facilitator" in office consultations. Only Matthew's office commonly uses interpreters for consultations.

There also appears to be an expectation that interpreters *should* facilitate such consultations; Mihai says that as far as judges are concerned the interpreter's job is to work for whoever needs them and that "[w]hen you're needed, just get up and go." It emerged from interviews with interpreters, however, that these consultations have been a source of controversy, and are forbidden by agency policy on the grounds that an interpreter is hired for the court, while solicitors/barristers should request and pay for any additional interpretation. Molly explains

[33] Solicitor, City Centre Court, 13.05.2009
[34] Solicitor, Rural Court, 18.11.2009
[35] Solicitor, Rural Court, 07.12.2009

that at one point this led to "murder in court", as when interpreters refused to facilitate consultations, complaints were made to the judge who then ordered the interpreters to do so. She says the agency finally agreed to consultations where the situation permits it, but the area remains a grey one. Belén finds the guidelines unclear and says that "[s]ometimes is difficult - you are there, and they ask you, what do you do? Excuse me, I can't interpret for you?"

Ewa sees no reason *not* to facilitate consultations, but others prefer to get the judge's permission and to make sure it doesn't interfere with their cases, though this has not proven to be an ideal or popular solution: Mihai describes how a judge shouted at him for telling a solicitor to get the judge's permission; "the person in question thought it was very cheeky of me to refuse - made quite a big fuss to the judge about it", and when Jevgenius told a solicitor that he wouldn't interpret for his client because he wasn't working for him, the solicitor became very angry and insisted that "you just fucked up my case". Indeed solicitor Gerard views the refusal of interpreters to do consultations cynically, describing how there were no problems as long as interpreters were seeking work and Lionbridge wanted the courts service contract, but that this changed when their position was concretised.

In practice such consultations happen frequently and interpreters are expected to facilitate them. Ultimately they also facilitate the interpreter's job; interpreters say their job is easier and they can work more quickly if they know some details before going into court. Solicitors and barristers agree; for Matthew it is important "that the interpreter is briefed somewhat on what the situation is, because it helps everybody" and it means getting "the best use of an interpreter, if I want to be as blunt as that." James talked about a recent experience where he had explained beforehand what he would say, with the result that "it made him twice as fast (...) it just made things a lot quicker."

6. No mention is made of language or interpreting and no interpreter appears

> **Judge:** "Who's your solicitor?"
>
> **Defendant:** "L.G."
>
> **Judge:** "What?"
>
> **Defendant:** "My name is L.G."[36]

[36] Judge N, City Centre Court, 06.05.2009

When the issue of interpreting is not raised by the judge, the prosecution, the defendant or their representative, it may be that the case has been before the court already and it has been noted in the defendant's file that no interpreter is required. It is not uncommon, however, for the issue to remain unaddressed even where a defendant is in court for the first time. When and why this should be the case does not have an obvious answer, though it is the case that some judges are inclined to wait for an interpreter to be requested instead of addressing the issue themselves. In the above example the Polish defendant had no interpreter and was not asked if he wanted or needed one, though his English proficiency seemed questionable at best as he did not (appear to) understand the judge's question. The defendant was assigned a solicitor, the latter entered a plea of guilty and explained the defendant's background, and L.G. was given Section 1.1. of the Probation of Offenders Act. At no point was the issue of interpreting raised.

An interpreter could easily have been requested had the solicitor considered it necessary, as there was a Polish interpreter present. It may be that the defendant initially pretended not to speak English to buy time, but that his English was sufficient for the purposes of this case. This explanation is particularly easy to accept as the case was straightforward, the defendant had legal representation, and a Section 1.1 means that no criminal conviction was recorded. It is possible that *because* of the minor and expeditious nature of the case no necessity was felt to address the issue of interpreting: from the time the case was called (for the second time) until L.G. left the court with no criminal record, two minutes or perhaps even less had elapsed. It is possible that had the case been more serious and a custodial sentence a likelihood, the interpreting issue would have taken on more significance. This case can be contrasted with the case outlined below in the section on the LEP interpreter (and also in Appendix C) where an interpreter is dismissed for being incompetent, but only after the situation becomes so serious that a custodial sentence is involved.

The wrong interpreter?

> "You see sometimes there are people who would say, let's say, that they are Lithuanian, but they are really not. Sometimes passports are forged in order for people from outside the European Union to be able to come here - they would ask for Lithuanian interpreter, and apparently it's not Lithuanian. (...) Almost always it's Russian, because this are people either

> from Moldova, Georgia, well from Russian-speaking states. It doesn't happen that often, but it does happen."
>
> (Anna, Interpreter)

It arose in the interviews that interpreters are sometimes assigned to a client whose language they don't speak. In some cases it is an administrative error; for example Molly was once assigned to a Polish speaker whom they thought needed a Spanish speaker, and Ewa once travelled four hours to an assignment only to find that the 'Polish' defendant she has come to interpret for was Latvian. It can also be the result of false identities being claimed by defendants, as explained by Anna above. Marta had an experience where she was assigned to a 'Polish' defendant but when she started interpreting she quickly released that he didn't speak any Polish; she explained that Polish is not a language that has different, unintelligible dialects - either you speak Polish or you don't. However when she tried to tell the solicitor, the solicitor disagreed, insisted that he was Polish, and he asked her to continue. She explained that the defendant was claiming to be Polish but wasn't; this scenario can arise, she surmises, where someone has a fake passport or papers, they get caught for drunk-driving, for example, give the fake ID to the Gardaí, and then become afraid that if they say they can't speak the appropriate language their real identity will be discovered and there will be an investigation. In Marta's opinion, solicitors prefer not to ask too many questions, and in this case the solicitor made a statement in court to the effect that the man was a Polish national that preferred to speak Russian. Marta points out that not only was this not true, it didn't even make sense, but the court accepted the explanation without question. In her view some solicitors do not pay enough attention to language issues.

Section B: The interpreter at work

The Interpreter's Role: Interpreting and its challenges

> I swear by Almighty God that I shall well and truly interpret and explain to the court all matters and things that shall be required of me to the best of my skill and understanding

Some judges have interpreters sworn in and others do not. Of those that do, some have all interpreters sworn in at the beginning of the day, and some have them sworn in solely when evidence is being given by the defendant. It is thus not a consistently observed practice: even

where the interpreters take the oath at the start of the court session, some arrive late or may simply fail to take the oath. The following extract demonstrates how the practice depends on the individual judge; in this case the interpreter's demeanour indicated that she had not only never been sworn in but had never heard of such a thing:

> **Solicitor:** "Having spoken with my client through the interpreter I have a plea."
> **Judge:** "Very good, I'll hear the facts. Does the interpreter need to be sworn in?"
> [Solicitor looks at interpreter, interpreter looks alarmed, confused. She shakes her head]
> **Solicitor:** "No, Judge."
> **Judge:** "Very well."[37]

Solicitors and barristers agree that an interpreter is unlikely to have any legal responsibility to provide competent interpreting, and they refer both to the sporadic nature of oath-taking and the improbability of an interpreter being judicially reviewed. Stephen says, for example, that he is "not aware of them having a legal responsibility where they could have a duty of care and be sued for breach of that duty of care for negligence." The interpreter's oath thus seems to be little more than a formality that is observed inconsistently, perhaps to impress upon interpreters the seriousness of their undertaking or to instil confidence in the accuracy and reliability of the interpreter. It is nonetheless interesting in terms of its content; the wording suggests that the interpreter is not expected to provide verbatim or word for word interpretation, but rather to interpret *and explain*. It remains unclear if this means that an interpreter may be expected to provide explanations beyond what the defendant actually says, or if it means that where a term or concept would be incomprehensible to the court – for example if a cultural term is used that has no meaning in the Irish context - the interpreter should explain this term. It is further interesting in that it demands of the interpreter to interpret and explain only to the court and not, for example, to the defendant; and finally it is interesting in its specification that the interpreter should interpret that *required* of them, implying that perhaps not everything said in court need be interpreted.

This oath does not differ from that used in England and Wales and is likely to have existed in this form since before the Irish criminal justice system existed independently and long before the interpreter became a permanent fixture in the Irish courtroom. As such it seems unlikely

[37] Judge Y, Rural Court, 13.11.2009

that consideration has been given to the implications of its wording with regard to what is expected of the interpreter in court. This is supported by the fact that some District Court judges do seem to expect verbatim or word-for-word interpretation; a judge will sometimes pause between phrases and wait for his or her words to be interpreted. Due to the nature of interpreting this can complicate rather than facilitate the job of the interpreter; Ewa explains that "if you are fluent in both languages, you know you have to wait for the first sentence to be finished to be able to translate it. Sometimes the judge is looking at you like, 'why are you not translating?' Because he did not finish the sentence yet, I do not know what he is going to say." It is further supported by the fact that most of the interpreter's work does not involve interpreting for the court, but standing beside the defendant and quietly interpreting what is said in court, a mode of interpreting known as *chuchotage* or whispered interpreting. Finally, the court almost never directs the interpreter as to what to interpret: a judge occasionally instructs an interpreter to interpret something when it seems that it is *not* being interpreted or where it is of particular importance, but in general there is an expectation that everything said in court will be interpreted.

Interviewees all feel it is important that everything be interpreted; Anna says, for example, that although she was never given instructions about what to interpret by the agencies or the court, she interprets everything. Stella was told in training that she should interpret everything, but makes the point that this is not possible, something that is widely acknowledged; as Thomas explains "they can't interpret everything that's going on, that's the reality, because the dynamics won't allow them to." One of the main challenges, particularly for the less experienced interpreter, is the insider language of the District Court; much of its jargon is not contained in interpreting glossaries and is almost impossible to prepare for. Barrister, James talks about "the working language of the court" that all interpreters need to know; "you can't do the job unless you know what a sentence is, and then you know you need to know what, for example, a suspended sentence is." Gwen also refers to the specific nature of the language used in court; "how do you translate 'may it please the court' and some of the rubbish that we use on a daily basis? Or 'I'm obliged', or those kind of things that have a different import than the strict translation of it." From the perspective of a non-native speaker colloquialisms, local expressions and humour may also pose difficulties, and Ewa and Jevgenius affirm their biggest difficulty was the Irish accent; "It took me about a month before I could understand the accent. I had to ask questions over and over."

Other serious challenges are posed by the high speed of proceedings and the often poor acoustics in courtrooms, and there are also less obvious challenges such as the many numbers and figures that arise throughout a District Court case but which the setting can make very difficult to hear; road traffic offences involving number plates and expiry dates; theft offences involving dates, addresses, quantities, and sums; public order offences specifying times, addresses, numbers of people; fine amounts and so on. Nonetheless, allowances are almost never made for the interpretation; speakers do not slow down, speak up or use microphones, and for the most part the case continues as if nothing were different, to the point that many interpreters say they have had to learn to lip read. Some more experienced interpreters say they are sufficiently familiar with the language and procedure to anticipate dialogue and overcome this communicative interference, while others say they ask people to slow down or speak up when they have difficulties, something which I never observed happening in practice, but which interpreters say is easier with some judges than others and tends to happen more frequently in higher courts.

It is also the case that judges, solicitors/barristers and defendants can *prevent* the interpreter from interpreting everything. The judge, who controls what is said, by whom and when, sometimes interrupts:

> **Judge:** "Is he working?"
> **Interpreter - Defendant - Interpreter:** "No Judge, I-"[38]

The Judge interrupted to ask a solicitor to represent the defendant, and interrupted twice when the interpreter was explaining why the defendant had failed to appear previously. There are also times when the solicitor/barrister halts interpretation of what is said in court by consulting with the defendant through the interpreter as proceedings are ongoing, something that will be considered in the next chapter, and finally the defendant sometimes prevents the interpreter interpreting what is said in court by asking him or her questions during proceedings. Defendants also sometimes inform the interpreter that they do not need them to interpret, and interpreters react in different ways to this; Belén tells the defendant that she has to translate, and similarly Jevgenius feels that he is there anyway and if he doesn't interpret they might later use as a defence the fact they hadn't understood. Svetlana says that sometimes she translates and sometimes "I was just sitting there looking at them, and when

[38] Judge T, City Centre Court, 30.04.2009

they forgot some word, I said this is this word, and they said 'oh, ok. Thanks'". Ewa also waits until they need help: "I just step aside and Ok, I'm here anyway. If you have any question you can ask me." Mihai says he would generally wait for the solicitor or court to confirm that it is OK to do this, and Molly also says that you need to declare your position and have permission before you stop interpreting.

A Typology of District Court Interpreters

As noted, the main mode of interpreting used in the District Court is *chuchotage*, as a result of which most of what the interpreter says is not heard by any other than the defendant and the interpreter's voice is rarely heard by the court. In any case, what the interpreter says is rarely understood by any other than the defendant. It would thus be difficult to assess the quality of interpreting from a linguistic perspective, but it is possible from observation of interpreted court cases to identify how different interpreters work and *what* they interpret, rather than how they interpret. The following typology of District Court interpreters has been created to classify these interpreters and their work, thus providing an insight into the nature of interpreting in Irish District Courts. The typology encompasses the Silent Interpreter, the Selective Interpreter, the LEP Interpreter, the Advocate and the Competent Interpreter.

The Silent Interpreter

> "There he was in court there, the collar of his coat up a little; he looked like a gangster, a bit of an intellectual gangster, and his case was called, and the defendant was produced, and he said nothing throughout maybe the seven minutes of court proceedings. And just as they were preparing to put the defendant away he uttered a few words, and that would have been 15 seconds in total. Nobody really noticed; it was normal. I was sitting on a bench there, and I was looking at myself potentially, because nobody cares. That doesn't mean that it's general, but it does happen very often."
>
> (Mihai, Interpreter)

The Silent Interpreter says nothing or very little for the entire duration of a case, and is thus not interpreting what happens in court for the defendant. Throughout months of observation it became clear that the Silent Interpreter is a widespread phenomenon in the District Court, but one that attracts the attention of the court on only the rarest of occasions. The following

notes taken during observation of different courts are representative of many such notes taken, and they highlight the fact that the phenomenon is not confined to, nor is it typical of, any particular court or interpreter nationality:

> Interpreter saying nothing [Romanian][39]
> The interpreter doesn't say much in this case [Lithuanian][40]
> Serious doubts about how much Polish interpreter was actually interpreting[41]
> Interpreter said about 5 words [Chinese][42]

The Silent Interpreter is very familiar to interpreters and solicitors/barristers. James had an "alarming and frightening" experience when the Italian interpreter for his case "really was not interpreting at all", and Thomas says he has "seen a situation occasionally with inexperienced interpreters -who apparently have not been interpreting anything, virtually, at all, that's quite frustrating when that happens". Gwen, too, comments that "you've sat in court often enough to see interpreters standing beside a client completely silent for the duration. It's very frustrating." Gerard makes the point that although it is very, very common for the interpreter to stand with their mouth closed while people are talking in court, solicitors and barristers are unlikely to see when the interpreter isn't talking because of the physical set-up of the court; solicitors/barristers usually stand facing the judge and with their backs to the defendant and interpreter.

The Selective Interpreter

> "I've seen [a] few interpreters who are just looking at the ceiling while he is talking to the defendant. And saying nothing, or just interpreting the questions he asks; 'I'm asking you through the interpreter, tell me what's your address'. So they say 'what's your address?' (...) And they are quiet for half an hour, and there's a talk going on."
>
> (Ewa, Interpreter)

Ewa considers that there are not many interpreters who are skilled enough to interpret everything that goes on it court which is why they sit quietly without saying anything, or

[39] City Centre Court, 30.04.2009
[40] Rural Court, 11.11.2009
[41] Custody Court, 30.09.2009
[42] Custody Court, 06.10.2009

interpreting only what they are directed to. This is the Selective Interpreter, which is more common than the Silent Interpreter; he/she may interpret only that which directly concerns the defendant, what the solicitor/barrister says directly to the defendant, when the judge asks the defendant a direct question, or when told directly by the judge to do so, though even direct instructions are not always immediately effective:

> **Judge:** "Could the interpreter interpret that I've decided to accept jurisdiction, stay in the District Court."
> **Interpreter:** [Silence]
> The Judge looks at her expectantly and after a pause the interpreter finally nods and speaks to defendant.[43]

Barrister, Aoife, had an experience whereby a Kuwaiti interpreter would say five or six words after two or three minutes of conversation with the client, as a result of which she didn't feel that she was getting to the bottom of the issue, and she tried to reason the silence; "I felt that maybe the interpreter was a man of few words, maybe my guy was a man of a lot of words; (...) there are cultural barriers where maybe a Kuwaiti man wouldn't be happy discussing certain things with a woman", but concluded; "I don't know what the reason was that I was getting a fraction of the information from whatever chats were going on between them." Although this concerns the preparation of an asylum application, the principle remains the same in the District Court. The Selective Interpreter routinely omits those units of the case that do not seem to involve the defendant directly: monologues by judges, Jurisdiction, the Facts, Disclosure and so on.

It may be that communicative interference or the nature of District Court insider language pose obstacles too great to overcome; it may be that the interpreter does not feel it necessary to interpret these units, and it is also possible that interpreters are unaware that they should interpret them; for example Stella, the least experienced interviewee, says at first she thought she only had to interpret what the solicitor was saying for the defendant, but a solicitor reminded her she also had to interpret what the judge said. She suggested that if she didn't do this the judge would think it rude. Some also feel that the intimidating nature of the courtroom might scare inexperienced interpreters. Interpreter Molly says it is common for these to get nervous; many do not know what to do, and may come from backgrounds that

[43] Judge P, Custody Court, 30.09.2009

have not prepared them for their role; she gives the example of someone who used to be a farmer, can speak two languages, and suddenly finds himself in a courtroom. Such a person, she says, does not have the skills required for the environment. In Mihai's experience most interpreters are very "very, very shy" and do not have the courage to tell the court if they cannot hear something, and Thomas agrees that young interpreters often get nervous; "I think sometimes they can get a little star struck."

The LEP Interpreter

> "I'll give you an example. I did have, I can't remember from where, a client last week, and I was speaking to him, and the - actually, I do remember where he was from; he was Asian. But the interpreter had asked me what did a 'sentence' mean. What was a sentence! And I actually, I slightly lost the rag. I said that it's an incredibly important word – learn it!"
>
> (James, Barrister)

Ewa describes meeting another Polish interpreter who was in court for the first time; "The girl was shocked. She didn't understand anything. (...) She was working in the court as an interpreter without actually understanding anything. She said that she learned her English in France, and then she was working in Penneys. (...) It's just shocking." Poor levels of English among interpreters are widely noted; Eleanor has often been frustrated by interpreters "that clearly don't have a good enough command of the English language to interpret properly", and Stephen has often "had serious doubts as to whether the interpreter was understanding what was being said". Stella talks about one person for whom she interpreted and who actually corrected her; "he said 'no, she didn't mean that'", and Gwen does not consider it unusual for the client to have better English than the interpreter. As the interpreter's voice often remains silent it can be easy for a lack of proficiency to remain undetected, but when it is heard, the frequency of basic grammar and vocabulary mistakes is notable:

> **Interpreter:** "The ID was true" [44]
>
> **Interpreter:** "Yeah. He agree with that. Thank you Judge."[45]
>
> **Judge:** "Does he want to consult with a solicitor?"

[44] Custody Court, 27.10.2009
[45] Rural Court, 01.12.2009

Interpreter: "Yes, I would like."[46]

The following is an account from the Rural District Court where an interpreter was dismissed on account of his poor English and interpreting incompetence. The extract demonstrates that he lacked basic vocabulary, including the word for solicitor, and that his grammar is very poor, but while the judge notices this immediately he allows the interpreter to continue. As the case progresses a member of the Gardaí comes to help the struggling interpreter as it is becoming obvious that without representation the defendant is unknowingly setting up the circumstances under which the judge will be obliged to impose a custodial sentence. It is at this point that a real sense of concern and almost outrage arises in the court and leads a solicitor to behave in a way that is later censured by the judge. Nonetheless, the action leads to the dismissal of the interpreter.[47]

Judge: "Would you tell Mr. L that after he was charged and cautioned he replied 'no reply' to the criminal charge."
[The interpreter hesitated; the Judge became suspicious]
Judge: "What competency do you have in interpreting?"

The interpreter said he was a level three interpreter and the judge continued:

Judge: "Can he afford to pay for legal representation?"
Interpreter: "He won't be waiting for legal advice." (...)
Judge: "My dear man, your English isn't great. And I'm talking to the interpreter." (...)
Interpreter: "He doesn't want the legal advice."
Judge: "What?"
Interpreter: "He doesn't want the legal" [pause] "representation." (...)
Judge: "I have difficulty, Sir, in understanding your English. It is my obligation-"
[Waits for interpretation. Interpreter remains silent. Judge shouts, extremely agitated] "Translate as I'm speaking!"

The case continued haltingly through the plea of guilty, Facts and Mitigation. The penalty was to be a fine, and when it transpired that the defendant was homeless, the Judge stated that

[46] City Centre Court, 26.03.2009
[47] Judge Z, Rural Court, 19.11.2009. For a full description of the case see Appendix C: Unrepresented French defendant

the penalty had to be paid immediately or he would have to serve a sentence. The interpreter, instructed by the defendant, asked if the penalty could be less or if he could pay in instalments, and a Garda came to stand beside the interpreter and explain that unless the defendant could pay he would have to serve a jail sentence because he had no address. Finally the Judge announced:

> **Judge:** "All right, payment forthwith. In default, prison sentence of 30 days. I certify with some reluctance for the interpreter present."

The Garda explained this to the interpreter, and the judge – in an unusual move – adjourned court. In the judge's absence a number of people approached the defendant and the interpreter in seeming concern at the custodial sentence, and on his return a solicitor voiced concern to the judge about whether the defendant had fully understood what had happened. Although the judge took "grave umbrage and exception" to the implication that he had not discharged his duties fully, he recalled defendant and interpreter, and he asked the interpreter what the solicitor had said to the defendant in his absence:

> **Interpreter:** "He can have the solicitor with no money"
> **Judge:** "And when I was explaining that to him in the most simple way possible, through you the interpreter, did he not understand?"
> **Interpreter:** "He says he didn't understand."

The Judge again asked the interpreter what his competence was to interpret:

> **Interpreter:** "It is just a translating word to word."

The Judge reiterated that he had explained in great detail about the defendant's right to a solicitor and to apply for legal aid, and the interpreter said he had interpreted this:

> **Judge:** "I am not fluent in the Polish language. I am reliant on you, the interpreter, to translate."
> **Interpreter:** "He said he couldn't understand the legal terms."
> **Judge:** "Well, 'free' is very simple. What did he not understand about 'free'?"
> **Interpreter:** "He only understand -"

> **Judge:** [Interrupting] "Now listen! I expressed my dissatisfaction with you earlier on." (...) "It appears to me, Sir, that you are incompetent (...) in the field of interpretation for the purposes of the administration of justice. Please leave the court."

Court was again adjourned, and when the judge returned he vacated the earlier order "based on the lack of competence of the interpreter". He told the defendant: "I don't have one word of Polish – the assigned interpreter was totally incompetent to deal with the sensitive issues before this court", and he invited him to re-appear the following week.

The interpreter's English was, indeed, very poor and certainly inadequate, but although the case resulted in the dismissal of the interpreter on this basis it is interesting that the interpreter was not dismissed until the issue had evolved into a significant issue in the courtroom. It seemed, in fact, that everybody in court, the judge included, was looking for a way to ensure that the defendant did *not* have to serve a custodial sentence, and it also seems from the way the case progressed that the real problem lay in the lack of representation; a solicitor would not have allowed the defendant to declare himself homeless unless there was absolutely no option, and in this case the defendant *did* have a home with his father, but they had quarrelled. It seems unlikely that it would have come to this point if a custodial sentence had not been imposed, and it is interesting to compare this with the example given in Section A where no interpreter was assigned to a defendant with poor English but where the case was straightforward, lasted two minutes and ended with no conviction recorded. It seems there may be a strong connection between the seriousness of the case or penalty and the provision of interpreters and concern for interpreting quality.

The situation, however, did not end on this date, largely due to the fact that the local papers printed an account of the case that portrayed a miscarriage of justice to which the judge reacted very strongly when the defendant re-appeared the following week. The Judge called the arresting Garda as a witness, and some time was spent establishing that not only had the judge discharged his duty fully and fairly, but that the defendant had deceived the court: the Garda testified that the defendant did, in fact, understand and have some proficiency in English. In an interesting submission the solicitor tried to mitigate the effect of this testimony by explaining that while the defendant had some English, it was not sufficient for a court case. An interpreter was present throughout.

Judge: "We're trying to ascertain if he had any understanding of English at all. You may or may not be aware of why the court is seeking this information. I'll take you back to [date], [Street] at midnight. What happened? Why did you come into contact with this [man]?"

The Garda testified that she had observed him driving, stopped him and spoken with him. She told the court: "He understood", "he understood me", "he understand what I wanted; he didn't have a problem".

Judge: "Did he understand why you had stopped him?"
Garda: "I asked him to put out his cigarette; he put it out. I explained that I wanted him to take a deep breath and blow into the bag; he did it." (....)
Judge: "And arising from that [breath] test, something happened."
Garda: "He was arrested and conveyed to [Town] Garda Station. And I had requested an interpreter for him."

The Judge asked if they had spoken during this journey:

Garda: "Yes. He said that he was a Polish national and that he'd eaten too many apples." (...)
Judge: "I am absolutely satisfied that he proceeded in a methodical and premeditated fashion to mislead the court. (...) I was watching the interpreter, and while I wasn't satisfied with his competence, I was satisfied that the defendant understood what was going on."

He went on to discuss the behaviour of the solicitor, the article in the paper which he described as "grossly offensive and misleading", and he reiterated the events of the previous week. The defendant's solicitor, as the defendant was now represented, addressed the court:

Solicitor: "Yes, Judge. (...) There is just one issue I would like to address. The defendant did have some English that he had learned in school. He has what you might call 'survivor English'. He understood what the Garda was saying, and he certainly understood the process-"

The defendant had appeared in court with his father, his address was given, and the judge convicted and fined the defendant. The case is noteworthy for the variety of interpreting related issues that arise: the LEP interpreter, the defendant pretending not to speak English assessment of language proficiency and interpreting quality, and the dynamic of the interpreted case with and without representation, something that will be considered in Chapter Eight.

The Advocate

> "I remember the very first time we ever had an interpreter in court - a marvellous character, a Polish man came to court, and he ran his own show, he was larger than life. He told us that he was a photographer by profession and that he had come to Ireland with the Pope but stayed. So he turned up; it was about 10 years ago or more, and I'll always remember that the interpretation of the remarks of myself - I think I was the advocate at the time - moved well beyond what I was saying. Quite. And he was beginning to address the judge *himself* in relation to what the Polish client was saying. And he also had started very successfully in calling the Judge 'Your Honour', but he had moved quickly onto calling the Judge 'Your Majesty', and it was really one of the funniest times! I'll always remember in court this Polish interpreter. So I suppose that was an extreme example [laughs] of an interpreter running his own show completely."
>
> (Thomas, Solicitor)

It is generally accepted that an interpreter's job is to render what the speaker says into the listener's language as accurately and impartially as possible, and that this should not involve the interpreter adding personal views, opinions or thoughts to what is said, or leaving out anything that is said. As has been highlighted, however, the dynamics of the District Court oblige interpreters to make decisions about what to omit and include as they are not able to interpret everything. While solicitor Thomas thinks interpreters should "use their judgement" as to what is important, the question arises as to the point at which, in so doing, the interpreter ceases to be a language mediator and becomes an advocate of sorts. Gwen highlights this dilemma: "who's to say what's important and not? You're relying on an extremely efficient and able interpreter if they're able to say 'well, you know, I needn't give you Judge X's one hour long lecture on Coillte', you know. 'I'll tell you what's relevant to your

case.' How much faith do you put in the interpreter? If they're not going to interpret everything."

Also at this level, while outsiders to the District Court, including defendants, are not expected to understand its proceedings and discourse, interpreters are: the question arises as to whether interpreters should facilitate proceedings by changing what is said by the court to make it comprehensible to the defendant, and changing what is said by the defendant to match the formalities of the court? It is possible that the interpreter is implicitly expected to do so, as if they did not proceedings could become very lengthy. Observations suggest, in fact, that judges can become frustrated when interpreters do *not* give the desired response:

> **Judge:** [repeats] "Did you sign this?"
> **Interpreter:** [holds up hands in despair] "He's telling me something else; his friends-"
> **Judge:** [interrupting] "Never mind that, is this his signature?"[48]

> **Interpreter:** "I had an argument with my wife –"
> **Judge:** [interrupting] "And that was on the 21st?"
> **Interpreter**: "Yes." [continued interpreting]
> **Judge:** [interrupting] "Agh now, hang on, I'm not interested in any fights he had."[49]

Observations also show that some interpreters *do* change what is said; in this example the interpreter adds a level of formality to the defendant's answer:

> **Judge:** "Is he working?"
> **Defendant:** "No." [in English]
> **Interpreter:** "No, Judge"[50]

And some interpreters even speak on behalf of the defendant: in the following, the interpreter answers the judge *before* interpreting his questions:

[48] Judge S, Custody Court, 14.10.2009
[49] Judge Z, Rural Court, 10.12.2009
[50] Judge T, City Centre Court, 14.04.2009

Judge: "And may I ask if he has any objection to the case being put back because..." [four reasons at extremely high speed] "Does the defendant have any objection to that?"

Interpreter: [Immediately] "No objection."[51]

Judge: "19th June. Is that by consent?"

Solicitor and Interpreter simultaneously: "Yes, Judge."[52]

Judge: "Does he understand the bail conditions?"

Interpreter: [Immediately] "Yes, Judge."[53]

In most cases the interpreter seemed to explain what had been said afterwards, but it is not clear what or how much was explained. District Court cases are often routine and predictable and it seems that interpreters sometimes slip into the role of answering on the defendant's behalf, whether or not they have a solicitor/barrister. It also happens not infrequently that when a defendant is asked a question in court, instead of simply asking it and interpreting the answer, a private conversation ensues between the interpreter and the defendant. If this is short, the judge is unlikely to intervene, but as it becomes lengthy the judge may become frustrated:

Judge: "It's taking forever to get simple answers."[54]

Judge: "There's a lot of muttering going on there."[55]

Judge: "I want a straight answer to a straight question."[56]

Judge: [Shouting] "STOP! JUST TELL ME EXACTLY WHAT HE SAID!"[57]

Judge: "Guilty or not guilty?"

[Defendant and Interpreter consult at length]

Judge: "It's a simple question."

Interpreter: "Guilty."

[(...) Another lengthy consultation]

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[51] Judge Z, Rural Court, 01.12.2009
[52] Judge X, City Centre Court, 01.04.2009
[53] Judge X, City Centre Court, 01.04.2009
[54] Judge S, Custody Court, 16.10.2009
[55] Judge Z, Rural Court, 12.11.2009
[56] Judge Z, Rural Court, 11.11.2009
[57] Judge S, Custody Court, 12.10.2009

Judge: "What is he saying, please?"[58]

It is impossible to know what is being discussed in the consultation, but in answering for the defendant, in embellishing the defendant's answer, and in consulting with the defendant about their answer instead of simply interpreting it, the interpreter appears to go beyond the role of mediator of communication alone, and to blur the boundaries between this and the role of the legal advocate.

Another challenge arises for the interpreter where the defendant or arrested person sees them, as Thomas describes it, as "a beacon of light" because they speak the same language or are from the same place, and interpreters agree that defendants regularly view them as allies; as a defendant said to Stella; "you are Chinese, you must help me." Interpreters and defendants are often left alone together, and it is common to see them talking during proceedings; interpreters reveal that they are often asked questions like "what should I do now?", "what is going to happen next?", "Can I do this, can I do that, can I call, can I pay?"; defendants want to know how things work, about bail, prison and so on. Solicitors/barristers agree that interpreters should avoid giving legal advice, but also acknowledge that defendants are sure to ask such questions and Aoife says that interpreters, having acquired a certain amount of experience from sitting in court, may "find themselves giving semi, pseudo-legal advice". Thomas insists that although they may have a good knowledge of procedure "they can make mistakes on the legal issues" and are not in a good position to give advice. He has nonetheless seen interpreters "give preliminary advices to a client", though he considers that in general interpreters are careful not to. However, solicitors/barristers themselves often ask the interpreter to explain things, such as a bail bond, to the defendant at the end of a case if they have another client to represent.

It would be very difficult to say to what extent interpreters give legal advice or semi-legal information, but the interpreters interviewed say that while they often sympathise with defendants, their role is still a communicative one. Marta says defendants' questions in court are annoying and put her in a difficult position, and Molly finds that because some defendants "are desperate" you want to be able to help them, but "you have to draw a line." Most interpreters say that when they are asked such questions they refer the defendant to their solicitor, as they do not feel qualified or as if it were their place to answer them or offer

[58] Judge P, Custody Court, 30.09.2009

advice. When a defendant does not have a representative, Anna says she might give him some general information "like that he is entitled to a solicitor, let's say, or that he is allowed to plead guilty or not guilty, and if he pleads not guilty his case will be adjourned to some other date, just this general information."

However, Gwen's experiences suggest that not all interpreters confine their role to one of language mediation: in one case the interpreter commissioned by the defence examined videos of the police questioning and found that the original interpreter had told the accused what answers to give; "the interpreter said 'no, no, no - you don't want to say this. What you want to say is- Actually just leave it to me and I'll give the answer for you.'" In another case the interpreter was a former priest; "I think his pastoral duties got in the way of his interpretive duties. The interpreter was trying to convince the client to confess to a murder." The following is another rather extreme example of an interpreter going beyond the role of language mediator, this time in court. A Romanian defendant was charged with providing a fake driver's licence; a Garda expert witness testified that the document was a fake and was cross-examined by the defence solicitor who accepted this. The Romanian interpreter fumbled in his wallet, tapped the solicitor on his shoulder and handed him a card; he explained something, looking bemused.

Solicitor: "The interpreter has come to my assistance."

The solicitor told the court that the interpreter had given him a copy of his own driving licence, and asked if the expert witness could examine it to see if it looked real. The Garda expert witness appeared somewhat uncomfortable, but took the licence explaining that she did not have the correct equipment to make a definitive pronouncement. She confirmed that it seemed genuine and it was only at this point that the Judge intervened, stating that the interpreter was there to assist the court and could the solicitor please ask the interpreter not to interfere:

Judge: "It's not the interpreter's job to come to the assistance of the defence"

The case continued and the defendant was asked through the interpreter about how he had come by the licence and what explanation he had for being in possession of a fake one. While the defendant mumbled no more than a few words the interpreter responded:

Interpreter: "What can I say? It never occurred to me to consider that it might be a fake document or something."[59]

The court has a relatively strong, albeit slow reaction when the interpreter visibly involves himself in the case and this is verbalised by the solicitor, but when the interpreter embellishes the defendant's reply in explanation of the offence, this is accepted. Similarly, in the earlier examples the court does not remark upon the interpreter's formalising of the defendant's reply, or the fact that the interpreters answered on behalf of the defendants. This suggests that the court's objection to an interpreter acting on the defendant's behalf is limited to when intervention is blatant, but where this is subtle it is likely to go unchecked. It may be that it remains unnoticed, but it is also possible that because such intervention facilitates proceedings and the speed of proceedings, it may in fact be welcomed, particularly when the defendant is unrepresented.

The Competent Interpreter

"You don't know the language but these two seem to be quite professional. And they certainly seem to communicate with the clients what the judge is saying and back."

(Gwen, Solicitor)

An interpreter is likely to be considered competent by the court if they are experienced and familiar with the language and procedures of court, if they can speak English reasonably and carry out their job with confidence, and if their dress and behaviour is professional. Such an interpreter may appear without being called; he or she will seem to interpret everything that is said and the defendant will not look lost or baffled, they will be easily understood by the court when they speak in English and they will interact confidently with the court. Essentially, as the interpreter is rarely heard and almost never understood except when speaking English, their competence is necessarily gauged by appearances: successful participation in the court case and appropriate behaviour and dress.

Solicitor/barrister interviewees equate the quality of interpreters with their level of experience and whether they appear professional: for James the more experienced the

[59] Judge N, City Centre Court, 06.05.2009

interpreter, the higher the standard of interpreting, and Stephen is of the same opinion; he says that once an interpreter has worked for a couple of years in the District Court and done some Circuit Court trials, "they tend to know all of the issues that are going to crop up". Matthew, too, points out that interpreters who have spent a lot of time in court "know the score", and he believes that "experience is key, and I think if they have a knowledge of the way that the court system works, it makes life a lot easier." Gwen comments that judges have a much more positive attitude towards interpreters "even if they're not particularly good at what they're doing, if they seem to be doing their best", and in her positive appraisal of two interpreters she says they 'seem' professional, and 'seem' to be communicating what is said.

However, she also makes the point that she doesn't understand the language, and interpreter Molly concurs, saying that nobody actually knows what you say when you are interpreting or whether or not you are saying it right. Mihai also feels that because nobody ever checks on what is said, he could "tell a little story about Snow White while everybody's talking" if he so chose. In fact Belén makes the disquieting claim that the agency instructed them to interpret even where they couldn't hear or didn't know what was going on; "That was the first instructions we were given from the agency, like the most important thing is not only that you interpret, is that they see you are saying something". What is perceived as competence, therefore, does not necessarily mean that the person is interpreting accurately or well, and good quality interpreting may or may not be an additional attribute of the Competent Interpreter.

Perceived standards

> "I think generally it's like the standards of anything else (...) you're going to have some brilliant ones, and you're going to have not-so-good ones (...). But for the most part I've found them professional, and I've found them experienced, and I've found them approachable."
>
> (Matthew, Solicitor)

Some solicitors/barristers proclaim themselves satisfied with interpreting services; James finds that while "the standard isn't always great", overall it is quite good, and Stephen believes standards overall are pretty good and have improved since the less competent interpreters more or less disappeared off the scene. Eleanor also feels things have improved in recent years; "I think it was very poor when interpretation services started to come on board about 5

or 6 years ago" when "anyone who could speak any language was able to work as an interpreter without any real training, any real regulation." On the other hand many of the interpreters do not consider standards to be very high; Ewa believes them to be very low, and Molly feels that because of the relentless recruitment campaigns by the agencies over the years, standards have dropped massively; she says that while there used to be a preference for experience when assigning interpreters to a case, now it is not even a consideration. Interpreters also confirm that agency-provided training for court interpreters involves no more than a half day spent outlining the basic functioning of the courts system and giving some general guidelines as to what the job entails.

Overall, the feeling is that standards are mixed and Mark states that they can vary greatly; "sometimes it can leave a little to be desired" and overall "they could be better." He is concerned about the calibre of interpreters; "I'm not sure how they're recruited, from where they're recruited, whether they're Garda-vetted, whether they have previous convictions themselves. I don't know how these interpreters are appointed, (...) whether they are suitable to be interpreters." Thomas avers that he "wouldn't like to criticise, I certainly wouldn't, I mean I think that it's quite good" which is interesting in light of Gwen's point:

> "I think courts tend to facilitate interpreters. And I think if judges weren't that facilitating - it sounds awful - we might have a better standard, because if they were to say more often 'I'm stopping this trial until somebody comes in who can properly interpret', I think it's a fine line, you don't want to be rude to people, but at the end of the day it's about the accused's constitutional right to a fair trial. Without being over-dramatic about it, a lot of them aren't getting a fair trial; you're entitled to know what's being said, and a lot of them aren't."

She feels that quality varies from poor to extremely good, but that "a lot of it is substandard."

There is also, however, an almost paradoxical assumption among legal professionals that interpreters are qualified and competent, and that interpreting is monitored to ensure adequate standards. "I presume, again without knowing, that there are safeguards put in place", says Matthew, while Thomas muses that "the Court Service probably do keep an eye, do they not, on what's going on?" James supposes that agencies providing interpreters to the

court have a responsibility to ensure proper standards, "I mean they have no busines receiving the taxpayers' money otherwise", and interpreter Mihai agrees that "the court would never doubt, or if they do they do it in a silent way, but they would never doubt you abilities or your competence", and says that the fact that you appear on behalf of an agency i proof enough for the court that you are sufficiently qualified to be there. This assumption wa occasionally evident in court:

> "There's no need to repeat everything; it's all been interpreted, so he's heard i before"[60]
>
> "Would you just translate what he says. If you're an interpreter you know what t do. (...) Speak up and tell me what he is saying."[61]

Matthew wonders whether the issue of interpreting in courts may be "one of these accident waiting to happen", but he and others tend to focus on cases involving serious offences. H considers that "somebody could be convicted for a very serious offence on the basis of difficulty where something is literally lost in translation", and Gwen emphasis cases of murde and rape where the interpretation "could be the difference between somebody getting a lif sentence and not." She goes as far as to say that not having an efficient interpreter at Distric Court level "is more frustrating than anything else, but I don't know that it hugely impacts o the outcome", while Gerard also considers that interpretation at trial level is of the utmos importance, but doesn't have the same urgency at District Court level. In his view there are s many other issues of concern that you have to pick your battles - and interpreting in th District Court does not seem to be one of them. An interesting point was raised by tw solicitors about whether it is in the best interests of some solicitors *not* to complain abou interpreting standards, which Mark explains here:

> "For the hungrier solicitors, interpreters can be a source of work. (...) Some solicitors would make it their business to establish relations with an interpreter, so that the interpreter would contact them, or bring the business to them. ...It's not in the solicitor's interests to be raising difficulties about interpreters (...), so it's not likely that there'd be complaints about interpreting."

[60] Judge S, Custody Court, 12.10.2009
[61] Judge S, Custody Court, 16.10.2009

Gwen further feels strongly that "judges would be very, very reluctant to allow an appeal on the basis of poor interpretation" as it would get a lot of media attention and "the whole system would then be called into question." She spoke of her experience appealing a case in the Court of Criminal Appeal; the legal team had planned to make interpreting one of the grounds of the appeal, but

> "It was quite apparent to us -that the Court of Appeal did not want to know about us saying it was down to the interpreter.- They froze, said 'the interpreters are doing the best they can.' - In other words forget that point and move onto something else, because you're wasting your time on that one."

Conclusion

It is generally accepted that LEP defendants should have access to an interpreter when appearing in court to ensure their right to a fair trial, and to reduce the possibility of judicial reviews, and that even those with good English may falter and become nervous in the intimidating setting such that interpreters should be provided wherever there is any doubt. Although it is conceded that there is a collective responsibility to ensure interpreters are assigned when necessary, and in practice the issue can be raised by any party to the case, how the issue is dealt with in court and the ultimate decision about assigning an interpreter depends on the judge. Some judges wait until an interpreter is requested, while some raise the issue themselves. In assessing proficiency, some judges are guided by the solicitor/barrister and some address the defendant, generally asking if he or she speaks English or can understand. There is some evidence that solicitors/barristers can overestimate the language proficiency of their clients, and it was found that when defendants say they speak English they may do so for a number of reasons, such as believing their English good enough or wanting to get things over with. However, there is also some evidence to suggest that such defendants often have difficulties understanding the case; sometimes LEP defendants leave the court in obvious confusion, and some approach the registrar or a member of the Gardaí for help after their case is finished. Although it appears to happen rarely, interpreters for the wrong language are sometimes assigned as a result of administrative errors or because of a false identity provided by the defendant.

Decisions about interpreters are difficult to predict: some defendants with clear communication difficulties say they don't need an interpreter and are accepted at their word, some defendants who neither want nor seem to need them are assigned interpreters, and some defendants are not asked if they want one, even when they appear to struggle. Whenever an interpreter is requested, however, it will not be denied, however grudgingly granted. If no direct request is made, on the other hand, there is no guarantee that an interpreter will be assigned. The impression given by judges and solicitors/barristers in court and in their interviews is satisfaction with how the need for interpreters is assessed and how interpreters are assigned, and there is no evidence of self-doubt about the competence to make accurate assessments. There is a suggestion, however, that the more serious the case, the more concern there will be about providing an interpreter and conversely, the less serious a case – and the less likely to provoke a judicial review - the less urgency there will be.

Sometimes interpreters take an oath that they will interpret to the best of their ability, but the swearing in of interpreters is a sporadic practice that depends on the judge and it is unlikely to be more than a formality. The wording of the oath is interesting in that it suggests that an interpreter should interpret *and* explain, interpret only for the court, and interpret only that which is required of them. In practice the interpreter is not instructed what to interpret, and most interviewees agree that everything should be interpreted. It is equally acknowledged, however, that the dynamics of the District Court make this impossible; insider language, high speed proceedings, often poor acoustics and the fact that allowances are rarely made for interpretation are some of the main obstacles. Interpreting is also sometimes prevented by the judge's interruptions, by a defendant asking private questions, or by the solicitor/barrister using them for private consultation as the case is ongoing.

Observations in Court have allowed a typology to be created of different types of interpreting styles, the first of which is the Silent Interpreter who stands beside the interpreter but says nothing or very little. These interpreters are widely known and have been the cause of some alarming experiences, but they go largely unremarked in court. Related and perhaps more common is the Selective Interpreter who omits certain parts of the case, usually those not directly involving the defendant such as monologues by judges, disclosure, and the facts. The Selective Interpreter usually interprets direct communication between the court and the defendant, that which directly involves the defendant, as well as anything he or she is directed to. It is probable that the Silent Interpreter is inexperienced, and possible that the Selective

Interpreter does not consider it their job, or necessary, to interpret more. It is possible in both cases that insider language and communicative interference impede interpreting, and that the interpreter is unprepared, inexperienced and nervous. The LEP interpreter does not speak English well; although the majority of interpreting in the District Court is done through whispering, *chuchotage,* when the interpreter's voice *is* heard it often reveals a lack of fluency, and it has been found that the defendant sometimes speaks better English than the interpreter.

Challenges are posed by the nature of District Court proceedings to the role of the interpreter as a mediator of communication alone: because of the impossibility of interpreting everything, the interpreter must make decisions about what to include and what to omit. Additionally, many defendants see interpreters as allies and will often ask them for advice. The Advocate on an extreme level may give the LEP defendant legal advices, they may tell them what to say or they may speak on their behalf. They may also answer on behalf of the defendant in court in the same way as a solicitor/barrister would. On a less extreme level, the Advocate may, for example, embellish the answer of the defendant with District Court formalities. The nature of District Court proceedings may favour the interpreter as Advocate where intervention is subtle, particularly where the defendant is unrepresented and the interpreter can facilitate proceedings. Finally, the Competent Interpreter is perceived as such by the court when he or she behaves professionally, appears to interpret most of what happens and is understood by the court when he or she speaks English. Usually the Competent Interpreter is experienced, familiar with the language and procedure of court, and speaks reasonable English. However, a professional appearance does not necessarily guarantee good and accurate interpretation.

Some interpreters consider that standards are dropping as a result of mass recruitment, a lack of training, and a system that does not give preference to or acknowledge experience. Some solicitors/barristers find the interpreters good overall, but most say that standards are mixed and range from excellent to sub-standard. At the same time there is an assumption that interpreters are competent, that they are monitored and that steps are taken to ensure the quality of court interpreters. Although it is agreed that interpreters are necessary for LEP defendants, there seems to be a tendency in court to tolerate all kinds of interpreters and a reluctance to complain about standards. It was suggested that it may not be in the best interests of solicitors to complain where interpreters bring them business, and that the higher courts are reluctant to hear appeals based on the quality of interpreting. Perhaps most

fundamentally, there is a strong sense that the cases heard in the District Court are of such a minor nature that any issues with the quality of the interpreting are more of a frustration that a real influence on the outcome of the case, or danger to the liberty of the defendant, and that there are other problems in the District Court that are more pressing than assuring interpreting quality.

Chapter Eight: The Impact of Interpreting and the LEP Defendant

Introduction

In this chapter a slightly broader perspective is taken on interpreting in Irish District Courts. Beyond describing when and how interpreting takes place, it questions how interpreting and the LEP defendant have impacted on the District Court and the District Court case, and looks at how the dynamics of the interpreted case are influenced not just by the competence of the interpreter but also by the presence and competence of legal representation. In the first section it considers the interpreter's place in courtroom interaction, and assesses how interpreters perceive and are perceived in the court context. It will look at whether and how interpreting can delay or lengthen proceedings, and it will raise the issue of representation in LEP cases: the attitude of the court with regard to legal representation, and how the presence of a legal representative can change the dynamic of the interpreted case. The second section revisits the linguistic units of the District Court case, this time to analyse how the LEP or interpreted case differs from the monolingual one. It details differences in language and content that go beyond a strict focus on interpreting to look at how the fact of not being Irish or English-speaking can change the content of some units, and how some units apply to non-Irish or LEP defendants in different ways. At the end of the chapter, a final section will be dedicated to a consideration of the right to an interpreter in practice, drawing on empirical findings, analysis of the right, analysis of documentation, and linguistic court interpreting studies.

Section A: Interpreting and Court Dynamics

The interpreter in court

While interpreters are not entirely new to Irish courts, neither have they been a traditional fixture in the courtroom. Now the consistent presence of one or a number of interpreters is commonplace, and they have become standard participants in District Court proceedings in the same way as solicitors, the Gardaí, probation officers and so on. This becomes immediately apparent on entering court in the morning before it is in session, the time when solicitors, barristers and Gardaí consult each other and the registrar informally for information

and clarifications, to make arrangements, come to agreements and so on. The subject of interpreting, principally the language needs of clients and the availability of interpreters, has become an intrinsic part of this interaction:

> "What language is he?"[1]
>
> "The translator isn't here yet"[2]
>
> "We have a lot of interpreters today"[3]
>
> "Is there any interpreter here for G.B.?"[4]
>
> "There is no Chinese interpreter."[5]

Sometimes light-hearted jokes are made:

> **Prosecution:** "What nationality is he?"
>
> **Barrister:** "We think Egyptian."
>
> **Prosecution:** "So he walks like an Egyptian?!"[6]

Some courts reserve an area for interpreters, but otherwise they might sit with solicitors/barristers, the Gardaí or even in the public benches and, as with other participants may not always be easy to identify. Typically interpreters are sent by Lionbridge and wear identifying badges, but these are not always visible and most interpreters dress professionally such that cases of mistaken identity can occur, though these are not always appreciated: on one occasion a young Garda approached and asked a solicitor if she was a Polish interpreter. She said no, but afterwards muttered to another solicitor; "Do I look like a fucking interpreter?"[7] In general however, the relationship between interpreters and others in court is somewhere between amiable conviviality and tolerant detachedness, with an apparently harmonious working rapport. Court participants chat and joke with interpreters, thank and praise them for their work ("Good job, it's not easy"[8]), and some even try a few words in the interpreter's language ("Do cvidanya"[9]).

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[1] Custody Court, 12.10.2009
[2] Rural Court, 12.11.2009
[3] Solicitor, Rural Court, 01.12.2009
[4] Barrister, Custody Court, 12.10.2009
[5] Custody Court, 12.10.2009
[6] Custody Court, 06.10.2009
[7] Custody Court, 02.10.2009
[8] Solicitor, City Centre Court, 30.03.2009
[9] Solicitor, City Centre Court, 02.04.2009

Interpreters describe working in the District Court as a positive experience overall; they feel they are treated with respect and that their help is needed and appreciated, though some more experienced interpreters say attitudes were not as positive before interpreting was contracted out; Marta says that some of the registrars hated interpreters and were very unpleasant, and Anna describes how "nasty things were happening in court, because different translation agencies would be fighting for new cases", and she felt that interpreters were totally disrespected. She considers, however, that things have changed and says "I think I would see my role as respected now". Molly still feels that because they are not directly employed by the Courts Service they are treated as outsiders, but most criticisms levelled by interpreters with regard to their current situation were aimed, perhaps ironically, at the agency; those interpreters working in the area for a number of years report that treatment has become more anonymous and less attentive over time, and that it is marked by a lack of appreciation, flexibility and personalized management.

Interpreters find the attitudes of judges to be positive; Mihai finds them neutral and fair, Belén thinks they are polite and good, and Jevgenius feels that judges treat interpreters very well. For Stella it varies from judge to judge, and Molly also emphasizes a divergence between those who are conscious of the interpreter and keen to ensure they do a good job and those who don't even notice their presence. Some interpreters seemed a little more reserved about the relationship with solicitors/barristers: while Ewa feels interpreters are respected because they facilitate communication and Jevgenius finds solicitors/barristers grateful for the work, some seem to consider the relationship built on utility alone and therefore somewhat negative: Mihai feels "[t]hey treat you the same way you would treat a tool that you think you might need tomorrow - half nice, half polite, and half kind of neutral", and Stella agrees that solicitors approach interpreters when they need them, expect co-operation and want the job done quickly. Marta further asserts that they fail to appreciate the difficult nature of the job and how much interpreters actually help them, and Belén feels that they often make demands beyond that which can reasonably be expected.

There is also a little tension in the dynamic from the perspective of solicitors/barristers. Attitudes are generally positive, respectful and appreciative: Matthew says that "it's important to have a good working relationship with them", and James considers that "everyone treats each other with respect and courtesy and (...) in a professional manner." Mark says that people have become used to interpreters and Gerard finds that things generally run smoothly.

At the same time, however, interpreting is seen as "yet another layer of expense added to the criminal justice system"[10], and concerns are raised as to whether money is being well spent. According to Eleanor resources are not being used well and interpreters are "paid more through the agencies than some lawyers are getting on the legal aid scheme per hour." Although she concedes that the agency may take the main cut, she notes that "they're certainly paid for the time that they're there or have been waiting." Mark also considers interpreting a lucrative profession and has heard "that you would probably make more money in courts as an interpreter than as a solicitor". Gerard comments that interpreters 'aren't slow' about filling in their time sheets, as does Gwen who empathises with judges' increasing frustration with interpreters who fail to do their job competently, "and the only thing they do efficiently is produce their cert. for a signature to make sure they're paid." She mentions a case she was involved in where the "company made more out of the substandard interpreting facilities than the solicitor and the junior counsel", and suggests that people who complain about legal fees should look at what is spent on a very, very poor interpreting and translation service.

Interpreters' accounts of their earnings are at variance with the perceptions of solicitors/barristers. They say that pay was excellent before services were contracted to a single service provider, but that wages have fallen progressively since then and that current rates are poor and uncompetitive; the agency may be making a lot of money, they say, but they are not. They explain that as freelancers, interpreters pay their own tax making the hourly rate considerably less in reality, and because assignments are sporadic they may only work for a couple of hours per week. Belén also suggests that the minimum time for which one must be paid on an assignment is consistently dropping, and interpreters say that every time they are offered an assignment they have to consider if it is worth it, particularly when short notice is given or travel is required, as the transport rates paid are poor. Belén sums up the issue:

> "Taking into account the current prices situation, and the fact that is not a full time job, or at least is difficult to make a full time job 'cause there is no need for interpreters full time, I would say that the rates are low. ... Now the rates are 18 [Euro an hour], it's not worth it."

[10] Thomas, Solicitor

Svetlana was not able to make a living from interpreting as the work was not frequent or regular enough and Ewa says she continues in the role because she likes it, but that the pay is not good enough, particularly considering that "usually after working for a few years you get a rise, and our wages were slashed". She reveals that many interpreters left after the latest pay cut and Molly agrees that it caused a lot of interpreters to lose heart. Anna thinks rates are "a disgrace" and considers the fact that "qualifications are never checked by anyone" to be a core problem preventing interpreters from fighting for higher rates. The fact that cutbacks are being made due to the economy is also referred to by solicitors/barristers; Matthew points out that in the children's court "they are doing as best they can to cut down on the number of interpreters" and Eleanor says that cases requiring interpreters are sometimes dealt with first to reduce expense, and that the legal aid board is "trying to cut down on interpreters" in the Refugee Legal Service. Observations also suggest that duty interpreters are being cut back in some courts.

Delays and the lengthening of proceedings

The need for an interpreter can cause delays when there is none present in court; there may be a second calling if the interpreter is temporarily absent, or if one needs to be ordered the case may be remanded or adjourned. Second callings for consultations with an interpreter also create short delays, though they seem to expedite proceedings in the long run. All of these delays are beyond the control of the individual interpreter and are more organisational matters than strictly interpreting-related. In fact, solicitor Gerard makes the point that delays caused by interpreting are negligible in the greater scheme of things, and aside from the fact that in the District Court remands and adjournments for other reasons are extremely common, proceedings are perhaps most often delayed by administrative efficiencies of the court itself. Because of the fact that cases are frequently remanded, a lot of court time is spent re-establishing what happened previously:

> **Judge:** "Refresh my memory."[11]
>
> **Judge:** "There was damage to a series of cars....isn't that right?"[12]

These delays are exaggerated by the lack of a unified system of record-keeping and a reliance on hand-written notes; files have to be located and deciphered ("I'm guessing this says

[11] Custody Court, 23.10.2009
[12] Custody Court, 27.10.2009

Lithuanian interpreter, I can't really read it"[13]); the information of different parties must be pieced together, disputes over differences resolved, and gaps and enigmas worked out before the case can proceed, a particular problem in courts where files regularly change hands, and judges, solicitors and barristers change and move around:

> **Judge:** "There is conflicting evidence, because nobody actually recalls what the evidence is."[14]
>
> **Judge:** There seems to be a sheet missing here. It was for ID to be established.[15]
>
> **Judge:** "The defendant was in custody by consent."
> **Barrister:** "There was never any consent."[16]

Beyond administrative delays, the interpreted case is often perceived as taking much longer than a monolingual case - at least twice as long. The obvious logic is that everything must be said at least twice, once in the language of the defendant and once in that of the court. However, this is only the case when there is direct communication between the defendant and the court, in which case the court must wait while its questions or comments are interpreted for the defendant, and then wait while the response of the defendant is interpreted for the court. In a typical District Court case there will only be direct communication when the defendant is giving evidence, usually at a hearing, or when the judge asks the defendant a direct question which might happen, for example, during the Plea or the Facts. The vast majority of interpreting in the District Court involves *chuchotage*, a non-disruptive mode of interpreting whereby the interpreter stands beside the defendant and whispers an interpretation of proceedings. This does not lengthen proceedings, and indeed Mark comments that "in the District Court where most business is done more quickly, then it's not so much a factor; I don't think it slows up". Barrister James agrees that most cases that come before the court "are just being remanded back for something else" and do not involve much dialogue except where somebody is giving evidence, and Stephen does not consider that interpreting delays "your run-of-the-mill case where there is, say, a plea of guilty", but comments that in a contested hearing "it adds a lot to it because everything has to be interpreted; each witness that gets up, it all has to be interpreted."

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[13] Judge Y, Rural Court, 13.11.2009
[14] Custody Court, 09.10.2009
[15] Custody Court, 27.10.2009
[16] Custody Court, 20.10.2009

The dynamic of the interpreted situation also depends very much on the competence of the interpreter, whether or not the defendant is represented, and how well prepared the solicitor/barrister is.

The Assumption of Representation

A number of factors suggest that the court largely functions on the premise that defendants will be legally represented. Firstly the right to representation is taken very seriously; much time is spent in court ensuring defendants are aware of the right, and ample opportunity is given to defendants to procure representation. Secondly, on a practical basis the language of the District Court is not designed to be, nor is it, easily understood by outsiders, and an unrepresented defendant can cause delays and frustration in court; while some judges are prepared to spend time with unrepresented defendants, the preference for legal representation is sometimes manifested in an unwillingness to explain things:

> **Judge:** "Convict, fine 170 Euros, one month, 5 days."
> **Defendant:** "Sorry?!"
> **Judge:** "Convict, fine 170 Euros, one month, 5 days."
> **Defendant:** [Clearly didn't understand, shrugged shoulders and left][17]

Another indication of the preference for the voice of the legal representative in court is that judges sometimes overtly silence defendants:

> **Judge:** "What is her drug status?"
> **Defendant:** "I have the letter-"
> **Judge:** [interrupting] "Listen, I'm asking your solicitor to ask you."[18]

> **Judge:** "You are not placed to say anything, Sir. I'm waiting for your solicitor."[19]

> **Interpreter:** "The defendant would like to speak."
> **Judge:** "He has a solicitor for that."[20]

[17] Judge Y, Rural Court, 13.11.2009
[18] Judge Z, Rural Court, 12.11.2009
[19] Judge Z, Rural Court, 11.11.2009
[20] Judge S, Custody Court, 29.10.2009

Judges also verbalise the dependence of defendants on their solicitor to explain what has happened in court:

> "Mr. [Solicitor], who is present today, will fully inform you of the import and meaning of..."[21]
>
> "Your solicitor will advise you what the consent of the DPP means."[22]
>
> "If you've any difficulty in understanding, consult with your solicitor. It's tremendously important that you comply."[23]

The solicitor facilitates communication between the court and the defendant, a role comparable to that of the interpreter in that it often involves 'translating' the words of the court for the defendant and vice-versa:

> **Judge:** "What ages are the children?"
>
> **Solicitor:** [to defendant] "What ages are the children?"[24]

> **Defendant:** "Where am I supposed to get 500 Euros?"
>
> **Judge:** "What?"
>
> **Solicitor:** "Where is he going to get 500 Euros?"[25]

> **Judge:** "It says here you find prison a challenging environment, Mr. D."
>
> **Defendant:** "No."
>
> **Judge:** "Hmmmm?"
>
> **Defendant:** "NO."
>
> **Solicitor:** "He's saying that he doesn't want to go back to prison."[26]

> **Judge:** "What is your connection with the motor vehicle... that you were illegally driving on that day?"
>
> **Solicitor:** "It was a friend's car, Judge."[27]

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[21] Judge Z, Rural Court, 18.11.2009
[22] Judge Z, Rural Court, 02.12.2009
[23] Judge Q, Custody Court, 23.10.2009
[24] Judge Z, Rural Court, 12.11.2009
[25] Judge Z, Rural Court, 18.11.2009
[26] Judge Z, Rural Court, 12.11.2009
[27] Judge Z, Rural Court, 18.11.2009

As in these examples, the solicitor often answers on behalf of the client or intervenes to give the appropriate response, and there is sometimes a sense that the solicitor prevents the defendant from damaging the case by saying something inappropriate; this notion resonates with the words of one judge who declared that when she gives the defendant an opportunity to speak without their solicitor "saving them from themselves", she would never hold what they say against them.[28] From another perspective the solicitor/barrister expedites proceedings: without their presence, insider language cannot be successfully used in communication, and proceedings can be delayed where the court takes the time to explain things to defendants; Thomas suggests that the solicitor has an "important role to play in court in speeding things up", and that if the defendant doesn't want a solicitor "it's going to take longer, with more judicial time". If the court is not prepared to take this time there is no guarantee that a defendant will leave the court understanding what has happened.

As such, it is desirable from the court's perspective that a defendant be represented; not only do the solicitors make proceedings more reliable in terms of avoiding judicial review, they facilitate smooth and quick proceedings, a logistical advantage without which the court which would be unable to process the sheer volume of cases it is listed to hear. For defendants, legal representatives are desirable as they can generally represent the interests of the client to the court with greater effect than a layperson, and they can ensure that the defendant understands what has happened in court. An LEP defendant is undoubtedly even more reliant on the solicitor/barrister to speak on their behalf and to explain what happens in court, particularly when they do not have an interpreter.

The Unrepresented and Represented LEP defendant

The first question is whether or not LEP defendants *have* legal representation. Barrister Aoife is confident that LEP defendants are less inclined than Irish defendants to get a solicitor; in her opinion "whereas 90% of Irish people have solicitors", many non-Irish defendants charged with offences, particularly minor ones, "just want them out of the way". Some solicitors/barristers also expressed the concern that LEP individuals may not always be fully informed of their rights in Garda stations, including the right to a solicitor. Gerard considers this among the biggest barriers to the system for LEP defendants, and Eleanor gives the example of a Georgian client who was arrested and brought into custody but "didn't have, in

[28] Judge S, Custody Court, 29.10.2009

his own language, explained to him that he was entitled to have a solicitor. No solicitor wa called". It may also be the case that the likelihood of engaging a solicitor is related to one' previous experience in court: Aoife opines that "people who are in the system day in, day out they have such a good idea of what's going on, not only with procedural issues, but thei rights; they're very, very aware of it." Many LEP defendants will have not spent much time i Ireland and may even have been arrested entering the country, and while there ar undoubtedly repeat LEP offenders, many LEP defendants will be appearing in court for the firs time. Nonetheless, in court all defendants are given the opportunity to engage representation and although observations did not verify Aoife's assertion that most LEP defendants do no have representation, they did confirm that many LEP defendants decline representation, ofte anxious to have things dealt with quickly:

> **Friend of defendant:** "He doesn't want a solicitor. He wants to deal with it today."[29]
>
> **Judge:** "Is it your wish or aspiration to be legally represented?"
> **Defendant:** "I know I was in the wrong."[30]

Where an LEP defendant is unrepresented and has an interpreter, communication is fairl straightforward as the interpreter mediates between judge and defendant, and with a competent interpreter this does not take any longer than it would via a solicitor/barriste though it clearly takes longer than in the case of an unrepresented English-speakin defendant. Having an interpreter in this situation may even be advantageous for th defendant as he or she is likely to make the judge's questions more comprehensible, and ma also render the defendant's responses more formal and court-friendly, as a solicitor/barriste would. It is unclear at what point such an interpreter may be considered to be advocating fo the defendant, which is a serious ethical issue, but it is also the case that the Advocat Interpreter may disadvantage the defendant: for example, while the court will assume tha any consent given is informed, the defendant may potentially find himself in custody fo another two weeks where remand has been consented to on his behalf. However, as this rol expedites – or at least doesn't delay – proceedings, the court appears at worst to tolerate an at best to welcome and expect it.

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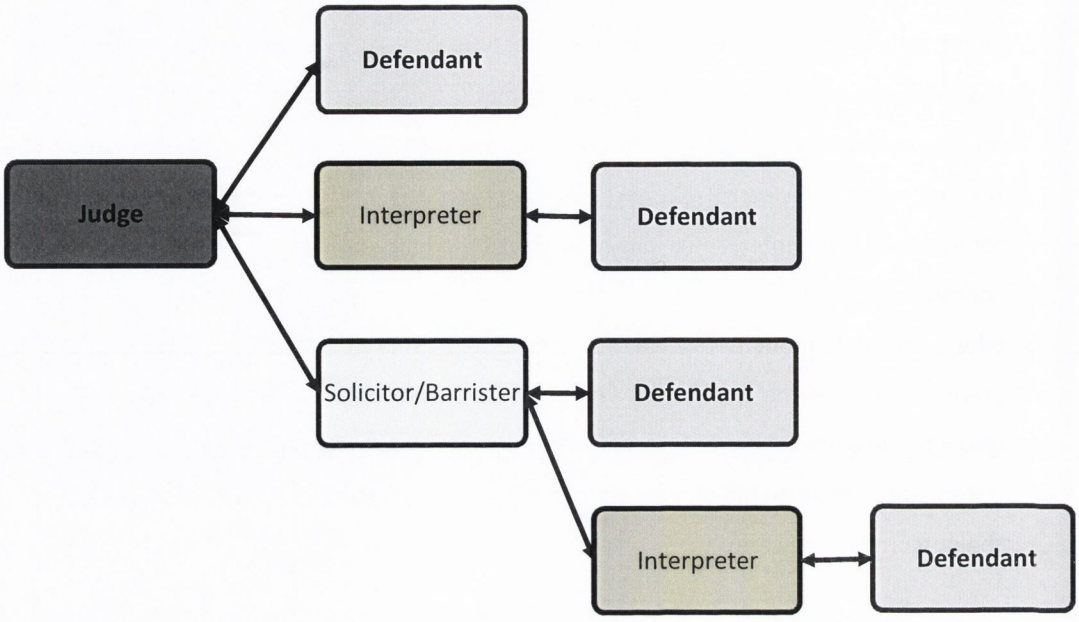
[29] Rural Court, 12.11.2009
[30] Rural Court, 07.12.2009

An incompetent interpreter can greatly disadvantage the unrepresented LEP defendant: the Silent, Selective or LEP interpreter may not interpret or even understand proceedings, and may not represent accurately to the court what the defendant says. Yet the court, in providing an interpreter, may reasonably assume that the defendant has understood proceedings, and the defendant will clearly be expected to comply with court orders; what are the implications, for example, if the interpreter fails to interpret the bail conditions and the defendant does not comply with them as a result? Although, as we have seen, such a situation is also possible where the defendant is represented, the unrepresented defendant necessarily relies to a greater extent on the interpreter. The words spoken by the interpreter for the defendant can also influence the attitude of the court towards the defendant, and if misrepresented have the potential to influence the judge's opinion of the defendant negatively, and possibly even affect the outcome of the case.

The unrepresented LEP defendant without an interpreter is relatively rare, but it was seen in the last chapter that communication can become very difficult, complicated and lengthy if the defendant declines representation and no interpreter is assigned.[31] Court proceedings are generally unaffected by an LEP defendant who is represented but does not have an interpreter, but the defendant, as was also seen, may struggle to understand proceedings and is reliant on the solicitor/barrister for explanations of what happens in court. The most complex situation is that of the defendant with representation *and* an interpreter, the most obvious factor being that there are now four people involved in communication between the court and the defendant instead of the three: the judge, the solicitor/barrister, the defendant and the interpreter.

[31] See Appendix B: Unrepresented French defendant



Communication in the District Court

When the defendant is represented, the preference is often to communicate with and through the representative. Many if not most of the questions asked by the judge are routine and predictable, and the solicitor/barrister will have the necessary information to answer. It is when the defendant must be consulted for this information that communication can become unwieldy: the judge puts a question to the solicitor/barrister; if the interpreter has been listening and understands, the question may be simultaneously interpreted for the defendant whose reply will be interpreted for the solicitor/barrister, who will answer the judge. Very often, however, the solicitor/barrister will first 'translate' what the judge says for the (possibly LEP) interpreter who will interpret it for the defendant; the Selective or Advocate interpreter may engage in a private conversation before giving a reply to the solicitor/barrister, and the judge is finally answered. When the solicitor/barrister is not standing next to the defendant he or she may be literally running back and forth during the exchange.

This scenario frequently occurs even when standard, basic information is requested that anybody familiar with District Court proceedings could have anticipated. It is clear in such situations that the solicitor/barrister has either not consulted with the client, or that instructions were insufficient. The practice of taking instructions 'on the hoof', as Judge Z calls it, is very common, and is often commented on as a concern of judges:

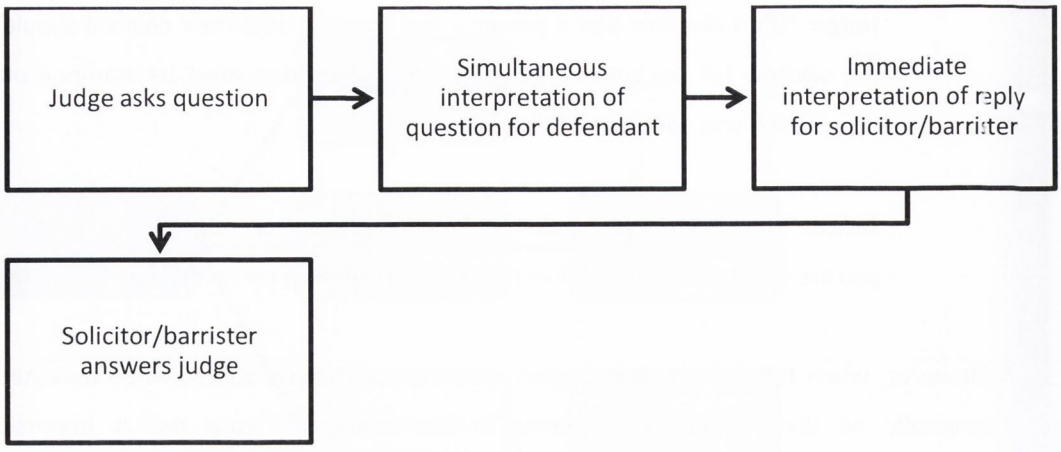
Judge: "It's a disgrace that a person's first meeting with their counsel should be at the window [of the custody box]; it is a practice that must be stamped out. (...) Imagine if it was your own brother or sister."[32]

Judge: "You haven't even spoken to him?! This is outrageous, this man is in custody; you are consenting to a week in custody without even consulting him."[33]

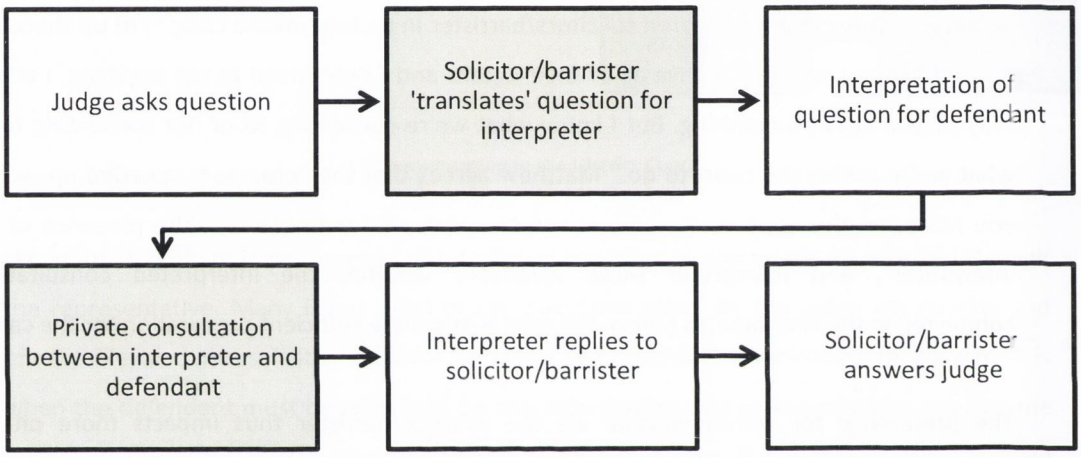
However, when the defendant is English-speaking such consultations, when necessary, can generally be done relatively discreetly. In the interpreted case this is impossible as consultation involves the interpreter, and particularly where the interpreter is not 'competent'[34] proceedings can become complicated. Barrister James supports the idea that delays are caused by unprepared solicitors/barrister in an interpreted case; "I'm up there and if I'm doing my job right, I have all of their details and I don't need to say anything; I should only maybe clarify something. But I know what we're consenting to or not consenting to, or what we're asking the court to do." Matthew agrees that the "process is speeded up -where you have had the opportunity beforehand to speak with your client in the presence of the interpreter", and interpreter Mihai questions whether the interpreted consultations conducted in the few minutes before the case is heard are sufficient preparation for the case.

The preference for communication via the solicitor/barrister thus impacts more on the interpreted case than on the monolingual case when communication with the defendant is necessary; lengthened proceedings in the interpreted case are often the result of this preference, and can be compounded by a solicitor/barrister's lack of preparation and/or by an incompetent interpreter.

[32] Judge R, Custody Court, 22.10.2009
[33] Judge S, Custody Court, 06.10.2009
[34] As per Chapter Seven, accurate interpreting may or may not be an additional attribute of the competent interpreter



Communication through Competent Interpreter



Communication through LEP/Selective Interpreter

There is another, less obvious consequence of the unprepared solicitor/barrister in the interpreted case, which instead of inconveniencing the court may disadvantage the LEP defendant. Solicitors/barristers frequently take instructions from their client quietly and as proceedings are ongoing, and such consultations are particularly common in advance of Mitigation (when the solicitor must provide the court with specific details about their client) and during the Facts unit; this generally precedes Mitigation and readily facilitates such consultations as it is usually involves only the prosecution and judge. When an English-speaking defendant and solicitor/barrister consult as the Garda is giving the Facts it is conceivable that the defendant can hear what the Garda is saying at the same time, and would therefore be in a position to challenge something if necessary. The LEP defendant who is reliant on the services of an interpreter would not be in such a position; while the interpreter is facilitating the consultation it is impossible for him or her to interpret the Facts at the same

time. Observations suggest that this occurs regularly in court and that it may therefore be common for the Facts in an interpreted case to remain uninterpreted, something which essentially deprives the LEP defendant of the opportunity to contest the prosecution's version of events. Although contesting or disputing the Facts on a plea of guilty is rare, it is nonetheless possible for an error to be made, particularly considering the frequency of errors and omissions in case files resulting from administrative inefficiencies and poor record-keeping in the District Court. It is a short step to suggesting that for an LEP defendant, prior consultation with the solicitor/barrister may mean the difference between having parts of the case interpreted and not.

Section B: The LEP/Interpreted Case

The Charge

The Charge unit in the LEP/interpreted case does not differ greatly from the monolingual case, which in and of itself is of interest: the court does not generally seem to question whether or not steps were taken on arrest to ensure that the LEP defendant understood the charge, for example through the provision of an interpreter. The issue arises outside of court and concerns the Gardaí more directly but it is of relevance here due to the fact an integral part of a charge sheet case is the evidence of arrest, and it is of interest because over the course of observations a pattern emerged from the evidence given of replies made by LEP defendants after caution: in case after case no reply was made to the charge:

> **Garda:** "The defendant is a Polish man with poor English. ... The defendant made no reply to the charges."[35]
>
> **Solicitor:** "He has a certain amount of English. ..."
> **Garda:** "There was no reply after caution."[36]
>
> **Judge:** "The evidence is that he made no reply after caution."
> **Interpreter:** [Silent][37]

[35] Judge R, City Centre Court, 12.05.2005
[36] Rural District Court, 17.12.2009
[37] Judge Z, Rural District Court, 01.12.2009

Garda: "He was charged over the telephone by an interpreter."

Judge: "The evidence is that he made no reply after caution."

Interpreter: [Not interpreting][38]

The pattern emerged during analysis and after the period of observation, such that little can be said other than to highlight the question of whether or not this pattern is significant, and if so what the implications may be. Firstly there is the question of whether or not a defendant must be fully informed in detail of the charge against him/her; it arose in court that if the reason for arrest is obvious there may be no need to verbalise the charge, raising the question of whether there are circumstances where that which is obvious to an Irish person may not be obvious to someone unfamiliar with Irish culture and the criminal justice system. Another issue concerns the consequences of making no reply after caution; if a defendant who does not respond is considered to be availing of the right to silence and this silence is not identified as the result of incomprehension, will this silence carry negative consequences?

In terms of the type of charges answered by LEP defendants, while it is difficult to generalise and this study did not attempt to quantify the offences being observed, the comments of solicitors/barristers largely support observations in the court. Basically LEP defendants come before Irish District Courts on the full range of possible offences; Matthew feels that "you can't pinpoint one particular area", but it is the experience of some solicitors/barristers that LEP defendants tend to answer minor and less serious matters: Aoife considers that charges are generally of a minor nature such as public order, drunk and disorderly, driving offences. She is of the impression that "they're not the people who are going into places to try and shoot people or anything (...) They're not the worst cases in the world", and Mark comments that up until now "they have been involved at the lower end of the criminal structure -in road traffic matters". Many of the solicitors have experienced particular trends in offences among certain nationalities, particularly young Eastern European men being charged with driving offences such as drunk driving. Thomas, being politically correct, submits that "there would be an unusually large proportion of young Eastern European, I don't know if that's a really good term, but European men are charged with drunk driving", and Stephen considers that "they seem to have a blind spot about that". Gwen agrees and expands on this categorization:

[38] Judge Z, Rural District Court, 01.12.2009

> "They seem to fit into niches for some reason. The Eastern Europeans seem to be predominantly road traffic cases, and you know after serious nights out on the town assaults and manslaughter, murder cases. I think there was some staggering statistic about a Lithuanian would be more likely to be killed by his own in Ireland than at home. (...) [S]ome of the readings of the drunk driving cases are just phenomenal when you see the level of alcohol in their system when they're driving around, -they're scarily high readings. So they seem to fit into that category. (...) The Romanis would be mostly begging and those kind of cases, and the Romanians would be predominantly credit card fraud, ATM related theft and fraud stuff. (...) The Nigerians you'd get a fair bit of minor theft and fraud, coming in pinching groceries-. So they tend to fit into categories; I'm not saying that you'd obviously apply that rigidly."

Naturally, different solicitors have had varying experiences in representing different defendants on different charges in courts, but the pattern of young Eastern European men being charged with road traffic matters, particularly drunk driving, emerges most strongly. This experience also depends on where they practice. For example, in certain courts in Dublin a huge number of LEP cases involve individuals arrested under Section 12 of the Immigration Act, while such cases are unlikely to come before more rural courts. Under Section 12 a person can be arrested and detained if they do not satisfactorily prove their identity, and these cases are often remanded for very lengthy periods as identification is verified; some judges show concern for whether the defendant understood why he/she was being held:

> **Judge:** "And has it been explained to Mr. Y why he's being held in custody?"
> **Barrister:** "It has."
> **Judge:** "And he understands why he is being held?"
> **Barrister:** "He does, Judge, completely."[39]

Barrister Eleanor expressed deep concern about the Catch-22 situation many asylum seekers find themselves in as a result of being arrested under Section 12:

[39] Judge R, Custody Court, 22.12.2009

> "it means that they're left with a criminal conviction, and it makes it much more difficult for them, then, to obtain asylum or leave to remain, which certainly requires a clean sheet, so by virtue of their fleeing from their country without documentation; usually it's held against them if they do have correct documentation, that they couldn't be fleeing their country if the authorities allowed them correct documentation, so they're in a Catch-22 situation. The other big issue is that they end up in the criminal system, in prison with convicted offenders, or people on remand - for weeks on end until they're actually able to obtain the necessary documentation to prove their identity. It's a shame that they are criminalised like that, and it is a breach of their rights."

Section 12 cases are striking in that most require interpreters; the Chinese interpreters that I interviewed, for example, said that ID cases constituted the majority of their work, and in the Custody Court a huge number of cases were 'Section 12s'. Because of the nature of these cases, they involve much discussion about receiving and not receiving ID, verifying ID and so on:

> "We have not received any ID yet"[40]
> "The Egyptian embassy is trying to establish his identity"[41]
> "We are still awaiting verification of ID"[42]
> "I'm not satisfied with the ID; it's a military card"[43]

Such discussions also frequently involve the questioning of defendants to try and resolve identity issues; interrogations almost inevitably require interpreters and communication can become complex when the interpreter is not competent. The following extract is from the case of three Chinese co-accused heard in the Custody Court in mid-October; the defendants had been in custody since mid-August:

> **Prosecution:** "This ID issue is ongoing since the 13th of August, and no progress has been made."

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[40] Custody Court, 22.10.2009
[41] Custody Court, 16.10.2009
[42] Custody Court, 29.10.2009
[43] Custody Court, 16.10.2009

He explained that the defendants had provided Chinese national ID cards, the Chinese embassy had been contacted, and they had been awaiting a response since the 29th of August. No response was forthcoming; e-mails were not replied to and phone calls were not returned.

> **Prosecution:** "The Irish Embassy in Beijing has also been onto the authorities there to try to get a sample ID; they were given a lot of different sample documents, but not the Chinese identity card. These are for use only within China."
> **Judge:** "So they are not prepared to give a sample ID?"
> **Prosecution:** "No."

The prosecution told the court he believed the defendants had access to passports. He said they had travelled from China to an EU country, possibly Spain, but that they had to have a passport getting onto the plane. He said that organised crime gangs are smuggling people into Ireland.

> **Judge:** "It is not disputed that they had the passports getting onto the plane. The passports were allegedly taken by traffickers." (...) "The usual story" (...) "I am not accepting it."
> **Prosecution:** "I believe they still have their genuine passports."
> **Judge:** "You think they got fake documents to get in? But you are only surmising; it's what usually happens."

She then asked the barrister what the defendants said to this, and the barrister, interpreter and defendant consulted as the prosecution continued to talk.

> **Judge:** [to defendants] "Where is your genuine passport, each one of you?"
> **Interpreter:** "My passport was taken by-"
> **Judge:** [Interrupting] "I can't hear you. Where did each one of them come from? Where did you get a flight from?"
> **Interpreter:** "No idea."
> **Judge:** "No idea?!"

The barrister said they had taken a number of flights, and the prosecution expressed doubts about whether they were telling the truth.

Judge: "Who delivered the documents?"

[Barrister, defendant and interpreter continue to consult]

Judge: "It's a simple question. I don't know why it's taking so long (...) and why the blank faces."

Interpreter: "One friend."

Judge: [shouting] "WHAT FRIEND?""

The Judge then decided to hear them one at a time; "it goes to credibility." The first defendant was called as a witness and went to take the oath.

Registrar: "I swear by Almighty God-"

Interpreter: "I swear by Almighty God-"

Registrar: "No; repeat it to him in Chinese."

The interpreter is speaking in whispers, and the judge repeatedly asks her to speak up.

Barrister: "Now, if you could just address your answers to the Judge."

Interpreter: [Nothing]

Barrister: "Tell him to address his answers to the Judge."

The interpreter is clearly confused; she had no idea that she had to interpret the oath, and she doesn't seem to understand what is going on: even when instructed to, she fails to interpret what the barrister says. In addition, the judge is interrupting frequently as well as asking multiple questions at high speed without waiting for these to be interpreted, or waiting for an answer:

Barrister: "He gave an answer there, Judge, you interrupted."

Judge: "Where is his real passport? He's saying" (...) [that he has no idea, that a foreigner took it before he came to Ireland.] "Where was he when the foreigner took it?"

Interpreter: "I was on the flight."

Judge: "What flight? A minute ago he said it was in the airport. Is he saying it was stolen from him?"

The case continues at length in the same vein and is eventually remanded for another two weeks. At the end of October the three defendants, still in custody, are brought before the court again. ID has still not been verified, but the defendants have applied for asylum. The Judge comments:

Judge: "This is a straightforward charge, but if they are convicted complications arise with regard to how well they co-operated in establishing their identity."
Barrister: "I would submit that they have."
Judge: "I am not pre-judging them. They may well be innocent, but people forget that this is very important in mitigation."

The Judge puts the case back for a hearing four weeks later and asks if this remand is by consent. The barrister writes down the date for the interpreter, and asks her to ask them it if is OK.

Judge: "There is liberty to reapply should they wish to change their plea, or if they find other ID." [to prosecution] "If you verify their identification earlier, please apply; there is an onus to reapply."

The barrister seems to be listening to the interpreted reply of the defendants with regard to consent, but the Judge has moved on to the next case without waiting for a response. The Chinese interpreter turns to sit down, and sighs heavily.

The interpreter on this date is not the same as the interpreter on the first date. She gives the impression of being extremely competent, and she later revealed that she has been in Ireland for 20 years and working as an interpreter for six. The interpreter from the first date was also later interviewed. Her English in the interview was poor, but essentially she described her participation in the case as follows:

She was asking questions, and I didn't hear them, but somehow I kept interpreting to the defendant anyway. He had no idea what I'm talking

about. When the Judge asked 'what did the defendant say?', I just say 'yeah' to the Judge. I said he couldn't hear me, but that was just an excuse. I don't know if the Judge knew or not, but she said OK, and repeated the question.

The first part of this case demonstrates an inexperienced and incompetent LEP interpreter, but although it was obvious that she did not know what she was doing and that her English was poor, no remark was passed on this. In addition, throughout the case the court did little to accommodate interpretation: even a competent interpreter could not realistically have interpreted all of the judge's questions, and any answers being given were continuously interrupted or ignored. A question that has not yet been considered is how interpreted communication takes place in terms of whether the judge talks to or simply through the interpreter: standard practice when using an interpreter is to talk in the first and second person to the person being addressed as if there were no intermediary, and for the interpreter to speak in the first person as if the words were their own. Observations suggest that while the majority of interpreters in the District Court do this, judges alternate between addressing the defendant directly, using the third person, and asking the interpreter to say something:

Judge: "Can I ascertain through the Lithuanian interpreter, how long are you in the country?"[44]

Judge: "Does he have a solicitor?"
Interpreter: "No, I don't"
Judge: "Does he want an opportunity to speak with a solicitor?"
Interpreter: "No."
Judge: "Does he understand?"
Interpreter: "Yes, I understand."[45]

In the case of the three Chinese co-accused the judge moved frequently between the second and third person ("Where is your genuine passport, each one of you?"; "Where is his real passport?"), and the barrister begins his examination of the witness using the second person ("if you could just address your answers to the Judge"), but is then forced to address the interpreter directly as she has not understood ("Tell him to address his answers to the Judge"). Judges commonly move between using the second and third person in all cases, usually

[44] Judge Z, Rural Court, 11.11.2009
[45] Judge P, City Centre Court, 26.03.2009

alternating between addressing the defendant directly and talking to the solicitor/barrister about the defendant, and it is to be expected that the same should happen in interpreted cases. However, judges also use the third person when there is no solicitor/barrister present and some address the interpreter directly, both of which contravene the norms of interpreted communication. While Chapter Six revealed that the District Court judge has full linguistic discretion in the courtroom, this nonetheless suggests a lack of awareness about how to work with interpreters, although interpreter Mihai considers it more as a lack of interest:

> "You're not talking to the interpreter, I'm not there. I'm not on trial, you cannot ask me. You ask the defendant. I will ask him, and he will answer and I'll give you the answer. (...) I don't think it takes very, very much, really, to understand what a triangular communication means, but I do believe there's no interest really, rather than understanding."

Bail Applications

The Bail Unit of the LEP case is distinctive in that many objections to bail commonly apply to LEP defendants, such as being a flight risk:

> "He has no ties to the jurisdiction. Straightforward unlikely to appear"[46]
> "He is a flight risk. He has no ties here, no family, no job. He is from Poland. He lives here, but doesn't own any property"[47]

The other principal issue affecting bail for many LEP defendants is identity; aside from Section 12s, bail is unlikely to be granted in any case where identity is an issue, such as where a defendant has given a false name or address to the Gardaí:

> **Prosecuting Guard:** "There is an objection to bail for both defendants"
> **Judge:** "On what grounds?"
> **Prosecuting Guard:** They both gave false names, dates of birth and addresses in the past. They gave false details on arrest yesterday, and have produced no identification.[48]

[46] Judge S, Custody Court, 12.10.2009
[47] Court Presenter, Custody Court, 16.10.2009
[48] Judge O, Custody Court, 02.10.2009

Some LEP defendants may also have difficulties understanding the concept of bail; some interpreters report that because bail doesn't necessarily exist in the legal system of the LEP defendant – or exist in the same form, when bail is set at 200 Euro they think they have to pay that sum and the case is over, and Marta considers that such confusion is one of biggest barriers for the LEP defendants in the Irish system. Additionally, the unit itself is particularly fast-moving to the point that a defendant with limited English would not be in a position to understand the conditions of their bail without having them interpreted or explained. There is, therefore, heavy reliance on the interpreter or representative in this unit: even a competent interpreter may find it difficult to keep up and solicitors/barristers do not always have the time to explain the conditions before the bail bond is signed as many remain 'on their feet' throughout the following cases. It sometimes happens in this scenario that the solicitor/barrister instructs the interpreter to 'explain' the bail bond to the defendant, which seems inevitably to lead to confusion; the bail bond is a legal document which the interpreter is not trained to understand or explain, and without the relevant experience an interpreter may not themselves understand the concept of bail, the bail bond, or the conditions:

> **Judge:** "Is this your signature?"
> **Interpreter:** [confused] "Me?"
> **Judge:** [impatient] "Would you ask him if this is his signature?"
> **Interpreter:** "Yes, I signed it just now."
> **Judge:** "Yes, he did."
> [Defendant is released, looks confused, asks interpreter something]
> **Interpreter:** [whispers to barrister] "Is he free?"
> **Barrister:** "I appear for....." [Doesn't answer, next case begins]
> [Interpreter points to door, defendant leaves. Later she approaches barrister again]
> **Interpreter:** [whispers] "Sorry, is he free?"[49]

It is clear here that the interpreter has difficulties understanding the bail process (and the basics of interpreted dialogue), and on a number of occasions I observed interpreters spend some time trying to decipher bail bonds, sometimes engaging the help of a Garda or solicitor/barrister, before the defendant left the courtroom holding the document and looking very confused.

[49] Judge S, Custody Court, 14.10.2009

Jurisdiction, Plea and Facts

The Jurisdiction and Plea units do not differ greatly in the LEP/interpreted case if at all; sometimes reference is made to the interpreter or comprehension of what is going on: "Having spoken with my client through the interpreter, I have a plea"[50]; "Through the interpreter can I ascertain whether Mr. S understands that his solicitor is indicating a plea of guilty?"[51] It is during the Facts that the voice of the interpreter is most likely to be heard by the court at any length as the Judge may wish to clarify things or put questions to the defendant. As it more frequently consists of the Garda citing facts at high speed and very often in a low, unclear voice, it is a particularly challenging unit for the interpreter and allowances are rarely made for the interpretation. It is also during the Facts that, as we have seen, the solicitor/barrister uses the interpreter to consult with the client, leaving the facts uninterpreted. The combination of these factors may make the Facts Unit the least likely to be interpreted for the defendant.

LEP defendants are sometimes called to give evidence during the Facts or in the case of a hearing, and as with all witnesses they must take an oath. The issue of religion may arise, and courts provide defendants with the appropriate Holy Book, though more commonly a language issue arises and an interpreter is involved. Perhaps because it happens so seldom that an LEP defendant is sworn in to give evidence, there is often uncertainty as to the protocol: whether the interpreter should also be sworn in, whether the oath should be taken in English or in the defendant's own language, and whether the interpreter should confirm that the oath has been properly taken. Some judges seem to take for granted that the oath must be taken in the defendant's language:

> "Explain if you are going to give evidence you must repeat the oath in your own language after the interpreter, and the interpreter must confirm that it has been fully taken"[52]

In the following extract, on the other hand, it is the reaction of the defendant that leads to the oath being taken in Romanian:

[50] Solicitor, Rural Court, 13.11.2009
[51] Judge Z, Rural Court, 10.12.2009
[52] Judge S, Custody Court, 27.10.2009

Registrar: "I swear by Almighty God-" [Defendant turns and addresses interpreter at length]

Judge: "What is he saying, please?"

Interpreter: "He doesn't understand."

Solicitor: "I think he's saying he wants to take the oath in his own language." [to interpreter] "Roma?"

Interpreter: "Romanian."

Judge: The registrar will announce the oath to the interpreter, the interpreter will translate it and the defendant will repeat it.[53]

Criminal History, Mitigation and Sentence

The criminal history unit rarely differs in the LEP/interpreted case as the record of the defendant is generally confined to the Irish one, and does not involve, for example, any record of crimes committed in an immigrant's country of origin. Judge S on rare occasions asked about criminal history outside Ireland:

"Does he have previous in this or any other jurisdiction?"[54]

"Can you tell me more about the charges in other countries?"[55]

Solicitor Stephen submits that where the case is more serious, checks would be more detailed, but that this happens more in the higher courts; "certainly for District Court matters, they don't seem to pursue that line; they check the Irish system and if there's nothing there they don't tend to go further. Maybe if there is something on the Irish system they may check with Interpol."

The Mitigation unit always includes details related to the fact that the defendant is not Irish; monologues usually begin with the nationality of the defendant, and if it has not already been stated, the Judge may ask how long the person has been in this country or what their purpose here is:

Solicitor: "He is a Slovakian national"[56]

[53] Judge P, Custody Court, 30.09.2009
[54] Judge S, Custody Court, 12.10.2009
[55] Judge S, Custody Court, 27.10.2009
[56] Rural Court, 11.11.2009

Solicitor: "This is a Lithuanian man who has been in Ireland for 5 years"[57]

Judge: "How long has he been living in this country?"[58]

That the defendant was foreign and therefore not familiar with Irish law was raised a couple of times by solicitors/barristers in Mitigation. In one case a barrister submitted that if a foreign national is being asked for his name and address he should be cautioned that not to give this information would be an offence, but the judge replied that the same principle applied as would to an Irish person; that the circumstances of the event were so obvious that this was not necessary.[59] In another case a 27 year old Lithuanian defendant was charged with possession of a knife. His solicitor told the court that he worked in a garage and had left work with the knife still in his pocket, but that he "didn't realise the seriousness of having a knife in his pocket"; he was convicted and fined 200 Euro.[60] On another occasion a Polish defendant was charged with failing to produce an NCT, and his solicitor suggested that, despite a pattern of driving offences, he had not been aware until consultation how serious these were; he had 4 young children, needed the car for his family and work, was "extremely contrite" and undertook to abide by the traffic laws in future. He was convicted and fined 250 Euro.[61] These three judges did not seem to consider foreignness a mitigating factor, and Judge Z seemed to support this ideology:

"If you wish to remain in the State you must abide by the law like other citizens"[62]

"You're very welcome in this country, but you must comply, as any resident, with the laws of the land".[63]

Interpreter Mihai expressed concern that consideration is not given to the fact many minor offences "have probably a cultural or an intercultural connotation" and that mistakes are made "because they move into a different country; they would assume everything works as in their own country", and it is not until an offence is committed that they realise what they did is unacceptable here. However, this concern was not voiced by other interviewees, and interpreter Jevgenius considers that non-Irish defendants generally realise that they have committed an offence and they get on with it, as does solicitor Thomas who says that "while

[57] City Centre Court, 07.05.2009
[58] Judge P, Custody Court, 29.09.2009
[59] Judge R, City Centre Court, 12.05.2009
[60] Judge T, City Centre Court, 07.05.2009
[61] Judge P, Custody Court, 29.09.2009
[62] Judge Z, Rural Court, 11.11.2009
[63] Judge Z, Rural Court, 02.12.2009

they're all such different systems, basically it's the same thing"; the allegation is heard, accepted, "then they like to have an opportunity to give an excuse, and they take and respect the sanction when it's applied." Stephen concurs, saying that "most of them are quite realistic, that they say 'I've done wrong, I've been caught, I'll accept the punishment'."

When the Judge reads the sentence this happens at such high speed and is often so complex that it is inevitably difficult to follow and understand, and to interpret. It is not necessarily usual for the judge to check that the defendant has understood, but by doing so in the following example the judge reveals that the interpreter may not even have understood him, and that the defendant certainly hasn't:

> **Judge:** "And I trust the defendant understands the order."
>
> [Interpreter looks at the solicitor then at Judge]
>
> **Interpreter**: "Sorry?"
>
> **Judge:** "I trust the defendant understands the order."
>
> [Interpreter addresses defendant who shakes head. Interpreter continues to talk]
>
> **Judge:** [Sighs] "Well anyway" [The court giggles]. "We're talking about Christmas cards."[64]

Discerning whether or not judges differentiate between Irish and non-Irish defendants in sentencing is not an aim of this research, but on relatively rare occasions conditions are imposed that would not be relevant to the Irish defendant, specifically conditions requiring departure from the jurisdiction. One judge wanted to know if a Polish defendant would be going home, saying "it's not because he's not from the jurisdiction. It's not about that. It would be the same if he were from Donegal."[65] He was given a peace bond for one year, the terms of which included a return to Poland if he had no other means of surviving here, and the obligation to notify the Gardaí of flight dates. In a similar case a Romanian defendant was given a peace bond which included an undertaking to return to Romania, to show the Gardaí his travel tickets, and the condition that "If he is not gone in two weeks he will be picked up, brought back to me and put in prison."[66] Another charge was dismissed by the judge on condition that the defendant leave the state by a particular date and not return for 12 months.

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[64] Judge Z. Rural Court, 02.12.2009
[65] Judge S, Custody Court, 06.10.2009
[66] Judge S, Custody Court, 06.10.2009

Finally, some judges, in these examples Judge Z, comment on criminality in the context of immigration:

> **Judge:** "Can I ascertain through the Lithuanian interpreter, how long are you in the country?"
> **Interpreter:** "One and half years."
> **Judge:** "You've found your criminal feet very quickly."[67]

> **Judge:** "I'm reluctant to give Mr. X any more leeway. He has not just worn out his welcome in this country ... He seems to have come to this country [to commit crimes]. (...) This is a difficult time for every person in this State; you are making a total mockery of those who are unemployed."[68]

> **Judge:** "You were made very welcome in this country; you were treated with dignity and respect. ... I'm not going to see this country abused."[69]

Conclusion

According to the accounts of solicitors/barristers and interpreters, many things changed after Lionbridge started their interpreting contract. Before this, the situation in courts was held to be messy and unorganised; for solicitors/barristers this seems to have been an indication of poor standards, and interpreters found, correspondingly, that they were not well treated or respected. Since the contract, some solicitors/barrister consider that services have improved and interpreters say treatment in court is much better, but interpreters also say that the attitude and treatment of the agency has diminished considerably, and that not only have pay rates been slashed but interpreting standards have fallen, not least because professional interpreters are losing heart and leaving. However, although solicitors/barristers say they are relatively pleased with the interpreting service, once the issue of money arises, attitudes change and much is said about the concern of interpreters for their time sheets, the fact that they earn more than solicitors or barristers in some cases, and the substandard service that is offered in return. This suggests that the perception of interpreting standards is based on partly on appearances - if things run smoothly the interpreter is perceived as being competent – and

[67] Judge Z, Rural Court, 11.11.2009
[68] Judge Z, Rural Court, 01.12.2009
[69] Judge Z, Rural Court, 07.12.2009

partly in terms of money, and there is a strong feeling that resources are being wasted and insufficient return gained.

Interpreting-related delays are often administrative, and can be considered negligible in the overall scheme of remands, adjournments and second callings. The vast majority of interpreting in the District Court involves the interpreter whispering an interpreted version of proceedings for the defendant, which does not impact on the court. Interpreting *does* impact on the court and cause delays, however, under a particular set of circumstances; unavoidably where the court addresses the defendant dialogue may take twice as long, but proceedings can become far more protracted when the interpreter is incompetent: the LEP Interpreter, for example, may require things to be repeated, sometimes many times, or the Selective Interpreter may leave the court waiting during a private conversation with the defendant, necessitating intervention by the court to ask additional questions. Proceedings can also become much lengthier when a solicitor/barrister has not taken (full) instruction from their client, as this often leads to unwieldy four-way dialogues when basic, predictable questions are asked by the court. The lack of protocol surrounding interpreted events in the District Courts also causes confusion and delay, as roles and expectations seem unclear; the basic norms of interpreted interaction, the swearing in of interpreters and LEP defendants, and the line between the interpreter as mediator of communication and the interpreter as advocate are three obvious examples of this.

The interests of the LEP defendant are also linked to the competence of the solicitor/barrister and interpreter, as they rely on one or both to explain what happens in court, and to address the court on their behalf. Where unprepared solicitors/barristers consult the defendant during proceedings, important parts of the case, usually the Facts, may not be interpreted for the defendant, thus depriving him or her of the opportunity to contest the prosecution's version of events, or to correct errors. It also emerged that because the court often fails to make allowances for the interpreter, the Facts and the Sentence are among those units that pose particular difficulties for interpretation due to high speed, poor acoustics, and complexity; factors which lessen the likelihood of their being properly interpreted for the LEP defendant. An incompetent interpreter may not interpret anything or may interpret selectively or incorrectly, something of particular concern when the defendant is expected to have understood and therefore to comply with court orders including bail conditions and the sentence. The interpreter may also, for example, consent to remands on the defendant's

behalf without consultation, and they may change, omit or otherwise misrepresent the defendant's words. This has the potential to influence the judge negatively, and because of the enormous judicial discretion of the judge, could potentially influence the outcome of the case.

In terms of the substantive differences of LEP/interpreted cases, LEP defendants appear before the District Court on all possible types of offences, though young Eastern European men appear particularly often on driving offences, and certain courts deal with a large number of Section 12 Immigration offences that are notable in almost always involving interpreters. It was found that the court does not seem to differentiate between fluent speakers of English and LEP defendants when hearing evidence of arrest, yet a pattern was identified showing that LEP individuals regularly fail to make any reply when cautioned by a Garda on arrest, suggesting the possibilities of language difficulties. Some objections to granting bail seem to apply particularly to non-Irish defendants such as failing to provide ID or providing false details to the Gardaí, as well as being a flight risk, while some orders made by the judge require that the offender leave the country. The fact that a defendant is not Irish is always referred to during Mitigation, when their country of origin, as well as the length of time they have been here and their purpose is discussed, but not being Irish and therefore not being familiar with the law does not seem to be acceptable as a mitigating factor for Irish District Court judges.

LEP defendants and interpreters have now become fixtures in Irish District Courts. Considering that speed is the essence of District Court proceedings, the interests of the court would clearly be served in interpreted cases by agreed protocol that is adhered to by all participants, by the full preparation of solicitors/barristers and by the guaranteed competence of interpreter, and for the LEP defendant it is of perhaps as great significance to have prior consultation with a solicitor/barrister as to have a competent interpreter. Additionally it seems clear that the impact of interpreting cannot be considered in isolation but that the many other elements of District Court proceedings that influence how it happens, and how successfully it happens, must be taken into account.

The right to an interpreter in practice

This section uses the foregoing analysis to consider the right to an interpreter in practice in Ireland, focusing on what the findings tell us about compliance with the new EU Directive on the rights to translation and interpreting in criminal proceedings.

Entitlement, provision and payment of interpreters

In Ireland, interpreters are routinely granted where requested. The right of LEP defendants to have an interpreter granted is accepted by courts, and no appeals have been based on interpreters not being provided (although a number of judicial reviews of the asylum process have). Where an interpreter is provided, the court certifies for it, and the costs are covered. Under the new EU Directive, there must be a procedure to ascertain whether or not an interpreter is needed. This is completely lacking in Irish courts, where some judges 'assess' language proficiency, others ask the solicitor/barrister if an interpreter is needed, and some judges wait until one is requested before dealing with the matter.

Under the Directive, any appropriate manner may be used to ascertain fluency, including consulting the suspected or accused person. From a linguistic perspective consulting with the defendant is probably the most effective way to assess proficiency if done properly: questions like 'do you speak English?' are not reliable, however, as a defendant may answer 'yes' for a number of reasons including fear, wanting to get the process over with, shame, exaggerated conception of their own fluency and so on. Some jurisdictions have devised rating scales to ascertain proficiency, but otherwise research suggests that judges should ask open-ended questions and be alert to clues that can indicate a lack of proficiency, such as grammar mistakes, inappropriate responses, or repeating the question. Judges in Irish District courts rarely go beyond asking the defendant if they understand, or speak English when assessing fluency; this is an area where the suggestion of the Directive might be usefully taken up that trainers of judges, prosecutors and other relevant personnel pay attention to communication issues.

The Directive consolidates the position of the ECtHR that interpreting should be provided at all stages of criminal proceeding and for communication with legal counsel in direct connection with questioning, hearings, appeals, or procedural applications like bail. This thesis has focussed only on the courtroom, but found that interpreted prior consultations with the

solicitor/barrister to be of particular significance in terms of the impact on court proceedings and the LEP's access to justice. It has emerged that most interpreted consultations take place at the courtroom before or during proceedings, rather than in the solicitor's office. Although issues of consultation go beyond interpreting practices to District Court practice more generally, the Directive seems to prescribe a wider use of interpreters than is currently the practice in Ireland.

(Not) Ensuring quality and standards

The area of quality and standards, as well as appeals of this aspect of interpreting is complex, and it is questionable how much the prescriptive provisions of the Directive can meaningfully contribute to this area. However it is also clear that quality is one of the biggest issues in the Irish context.

In general there is no requirement for a court interpreter to be *qualified*, but interpreter competence is a basic requirement in ensuring the right to a fair trial, due process and access to justice. Interpreting should be of sufficient quality to allow the defendant to understand the case against him, and to defend himself. The Canadian Supreme Court has provided a five-point test that can usefully be applied in assessing whether proceedings were fair based on the quality of interpreting; it need not be perfect, but should be, at a minimum continuous (no breaks, interruptions or summaries), precise (word-for-word and idea-for-idea, as far as possible), impartial (objective and unbiased), competent (to ensure "justice is done and seen to be done"), and contemporaneous (accurately timed - consecutive favoured over simultaneous interpreting), the question being whether the accused may not have understood a part of the proceedings due to a language difficulty.[70] Although this is part of a wider test devised for the assessment of individual cases, it is nonetheless the case that by this standard the minimum requirements of justice with regard to interpreting are not being met in the District Court. In addition, while judges are responsible for ensuring not just the provision of interpreters but their effectiveness, judges in Irish District Courts do not generally monitor interpreting, and they almost never intervene, even where nothing or almost nothing is being interpreted.[71]

It has been shown that the complexity and difficulty of the interpreting process requires specific and rigorous training, and that not only is bilingualism no proper measure of

[70] *R. v Tran* [1994] 2 S.C.R. 951

[71] *Kunnath v The State*, [1993] 4 All ER 30, [1993] 1 WLR 1315, 98 Cr App Rep 455, [1994] Crim LR 937; *R. v Tran* [1994] 2 S.C.R. 951

interpreting competence, but the use of an untrained interpreter can have serious and unintended effects; interpreters can alter the nature and content of proceedings, the court's perception of the defendant, and influence or change the outcome of a case. Although the interpreting process is acknowledged as being imperfect, trained interpreters are aware, at a minimum, that the source message should be conveyed as accurately and completely as possible, maintaining style, register, formality and tone; and they should be aware of how to behave, what to interpret, and how to deal with potentially complex and pressurised situations. However, ECtHR and Irish cases have set a precedent in accepting the interpreting ability of people who are bilingual but have no interpreting training or competence. In addition, the competence of interpreters cannot be guaranteed under the current system in Irish courts; this thesis has documented serious concerns about the calibre of interpreter being employed, the lack of ethical and practical guidelines, the lack of training and quality controls.

An important provision of the Directive is its requirement of Member States to take 'concrete measures' to ensure that interpreting of an adequate quality is provided in courts, and it recommends establishing a register of qualified, trained and independent interpreters, something that the ITIA has also advised. The register is a recommendation, but taking measures to ensure quality is an obligation. It is clear that there are virtually no quality checks in the recruitment and provision of interpreters to Irish courts, that there is no monitoring in the court, either by the agency or the judge, and that the interpretation that is taking place is flawed on many levels. However, both the agency and the Courts Service have maintained that the provision of quality interpreting has been, and is, consistently assured, or that 'concrete measures' have already been taken, which leaves uncertain ground for the Directive to have any impact.

Appeals

Successful appeals based on the quality of interpreting are extremely rare, and it has been found that courts tend to deal with issues of quality either not at all or on a superficial level. In many ECtHR and HRC cases it is considered unnecessary to consider the issue of quality where a violation of the right was found on another ground, and other claims are deemed unsubstantiated. Appeals often fail because the interpreting issue was not raised at trial, and the Directive follows this line in suggesting that authorities should be able to exercise control over a particular case *if put on notice*. However, an Irish court has correctly pointed out that a

defendant who cannot speak English cannot be expected to know whether or not the interpretation of what he says is correct. A major issue with proving inconsistencies, omissions or incorrect interpretation at trial is the fact that it is generally not recorded and the only record of proceedings is in English. It is thus difficult to prove to a court's satisfaction that interpreting was inadequate.

Although this thesis is not looking at asylum cases *per se*, many judicial reviews of the asylum process in Ireland are based on issues with interpreting quality from which two main points are strongly in evidence: firstly, if the issue was not raised during proceedings, judges often have a scathing reaction to applicants trying to blame interpreters 'at the eleventh hour', and secondly, attempts to attribute incorrect findings of credibility to poor or inaccurate interpreting have been construed as simply taking issue with a choice of words, and it is established that such discrepancies must not be considered in isolation or construed, alone, as rendering negative findings of credibility invalid. While judges have recognised that being an LEP defendant can make criminal proceedings more difficult, the most explicit comment on interpreting in a criminal case was to the effect that problems with interpreting are matters of inconvenience and not impediments to justice. This can perhaps inform the answer to why there have been so few interpreting-related appeals (four in total), and why those that have been brought were almost all unsuccessful (three of the four).

The suggestion emerged strongly in the views of solicitors that judges routinely provide interpreters – not necessarily because it is right or necessary, but to protect against judicial review. This speculation is supported by the fact that judges sometimes provide interpreters when they are not genuinely needed, and by the fact that concern about interpreting issues appears to increase according to the seriousness of the case. Seen from this angle, it becomes less surprising that issues of quality go unnoticed or are quietly ignored in court. To at least some extent, the concern of the court seems to be whether or not an interpreter is provided, and not whether or not the defendant understands what is going on. Considering the 'insider' nature of District Court language, the lack of concern for the comprehension of defendants may relate less to the particularity of not being an English speaker, and more to the general exclusion of defendants from District Court proceedings.

Conclusion

Introduction

This thesis arose from the question of how Ireland's District Court has dealt, and is dealing with the sudden and significant rise in the numbers of people with little or no English language skills (Limited English Proficient or LEP) appearing before it. The large, rapid and diverse growth in immigration to Ireland, particularly over the last ten years, has meant having to put in place an infrastructure to deal with large numbers of LEP defendants speaking a wide variety of languages and dialects, a situation for which the Court was not equipped and with which it had very little experience. From around 2000 onwards this meant that huge changes were underway in Ireland's courts, yet there has been little academic interest in what these have actually entailed or the implications of how the issue has been dealt with. The first relevant academic article did not appear until 2007. Focussing on the rights of those without fluency in the court's language to access justice, Bacik reviewed the relevant international and regional legal framework, as well as looking at the domestic law and practice; she found current practice to be unacceptable. The article, which appeared some months before a single agency began providing interpreting and translation services to the courts, questioned the privatisation of these services, and highlighted flaws that could have serious consequences for the quality of service and the rights of defendants. Yet this major development was introduced with otherwise barely a whisper, and if anything the media channelled public attention to the huge cost of the contract to the taxpayer.

The objective of this thesis is to begin to fill in some of the gaps in knowledge on the basis that this issue is an important one on a number of levels:

- interpreting issues have been responsible for major miscarriages of justice in other jurisdictions, and research has shown that its impact on courts is generally much greater than realised and can greatly influence court proceedings and their outcome;

- LEP defendants are entitled to the same fair and just treatment as English-speaking defendants, and they should be able to access justice fairly and on an equal basis with those fluent in the language of the court;

- finally, it is logical that the increase in LEP defendants will have had a qualitative as well as a quantitative impact on the District Court, as it has experienced not only an increased workload but a shift in the type of defendant appearing before it, and has nonetheless had to continue to operate efficiently and communicate with defendants.

Located in the District Court where the bulk of criminal offences – and therefore also LEP defendants – are dealt with, the thesis therefore aimed first of all to explore and describe the reality of what happens when a person with limited English ability appears on a criminal charge from a practical, language-based perspective; secondly, it aimed to analyse whether or not these LEP defendants could access justice fairly and on a par with their English-speaking counterparts from both a practical perspective and the perspective of the right to an interpreter; and thirdly it aimed to consider the impact of these LEPs on the court and the system, examining in particular how the provision of interpreting services is affected by more general trends in the criminal justice system.

Considering the paucity of directly relevant literature and previous studies, it was clear that answering these research questions would require an exploratory approach. A triangulation of research methods was used in order that the research be as comprehensive as possible in taking full advantage of existing resources, and to provide greater legitimacy, as there was obvious conflict between the documentation that did exist. Four methods were used.

The first method used was ethnographic non-participant observation; over the course of seven months hundreds of interpreted (and English language) cases and LEP defendants were observed in a number of courts in Dublin and outside of Dublin. This allowed personal observation of the reality of LEP defendants, the work of interpreters in court and how courts deal with related issues. The choice of this methodology was based on the need to start removing the speculative and anecdotal nature of what is known about court interpreting.

Secondly and complementing the observation methodology was a series of eighteen semi-structured interviews with key participants in interpreted cases – interpreters and solicitors/barristers. This style of interview facilitated questions on specific issues of relevance, but also allowed for the introduction of additional, unanticipated information which drove the exploratory nature of the research. The choice of interpreters meant that although the voices of some interpreters have been heard vicariously through their representative organisation

(ITIA), a more nuanced picture of interpreters' experiences was revealed, while the views of barristers and solicitors on interpreting issues has been almost completely absent in previous documentation.

The third method was legal analysis. An analysis of Irish cases up to August 2010 that ruled or commented on interpreting was carried out in an effort to understand the extent to which interpreting has arisen as an issue in Irish courts, and the ideologies of Irish judges in dealing with it. As there is no explicit constitutional or statutory right to an interpreter in Irish courts, the right to an interpreter in Ireland was also examined in terms of provision, as well as who it applies to, who pays for it, what has to be interpreted, responsibility for ensuring quality and so on. This included an analysis of other relevant instruments, courts and bodies, namely the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR); the International Covenant on Civil and Political Rights (ICCPR) and the Human Rights Commission (HRC); important common-law judgments, and the new EU Directive on the rights to translation and interpretation in criminal proceedings (EU Directive).

The fourth and final method involved a review of existing reports, publications, studies and articles, as well as a qualitative content analysis of newspaper articles in two mainstream newspapers from 2000 to 2010. These sources constituted a wealth of relevant information that had never been exploited, but consolidating and analysing them enabled a broad picture to be painted of how interpreting was being portrayed in official reports, in the reports of interested bodies, by the press and so on. It also allowed the identification of two distinct ideologies on the interpreting issue in Ireland; the 'official' view that all is well, and the 'alternative' view that all is very far from being well.

Methodological Perspectives

The methodology used in this thesis makes an original contribution to research in this area while the use of ethnographic methodology draws on a long tradition of courtroom research elsewhere, its use in Irish courts has been extremely limited, as a result of which very little has been written about how the District Court actually works on a day-to-day basis. However, an empirical presence within the court itself was the only methodology that allowed personal observation of the day-to-day reality of LEP defendants and of the interpreter's work, and it contributes strongly to removing the speculative and anecdotal quality of existing accounts of court interpreting. Without having spent months sitting and observing in District Courts it

would have been impossible to anticipate or understand, for example, the degree to which interpreting is intimately connected with the procedure and participants of the District Court, and to the language of the court. The ethnographic method also contributes to sentencing research for which the case-law of higher courts and the analysis of court records have been more commonly used; this method involves the creation of an ethnographic description that can be useful in understanding what happens during the sentencing process, rather than understanding sentencing outcomes. It has, again, been common in courtroom studies to complement ethnographic observation with interviews

The research methodology used in this thesis is unique in its combination of methods; generally, qualitative accounts using ethnographic and interview methods are not complemented by the other two methods used here. However, the triangulation of research methods ensured a multi-dimensional perspective on, and a more complete view of, the issues at hand in a context where almost nothing was known on the topic. It also improved the legitimacy of findings, and resulted in the emergence of broad themes that cut across individual methods.

Criminal Justice and Interpreting in Ireland

As multi-disciplinary research, this thesis contributes to existing knowledge in a number of ways. The thesis makes a contribution to Irish criminology and the study of criminal justice in Ireland; as a 'fledgling' discipline, research, and particularly empirical research on the Irish criminal justice system is limited. The thesis provides an in-depth ethnographic account, from a language perspective, of how the District Court functions in practice, and contributes to an empirical understanding of District Court proceedings, and therefore to the sentencing process, on which there has been very limited commentary and of which there is limited understanding in Ireland. To this it adds an original dimension: interpreting. Aside from Bacik's comprehensive look at issues related to interpreting,[1] Riordan's speculative comments in his article on immigrants in the criminal courts more generally,[2] and the recent chapter in O'Malley's 'The Criminal Process' that discusses language-related rights in the courtroom,[3] there has been no academic commentary on the topic of interpreting in Ireland's courts; prior

[1] I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 109 (2007)
[2] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007)
[3] T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009)

to this no empirical research had been carried out and nothing was known about interpreting in action in Irish courts.

In addition, the thesis contributes to an understanding of interpreting services as part of the criminal justice system by considering how the issue of service provision has been dealt with by the Courts Service, and the ideology discernable in how the issue has been depicted by various sources, including the Courts Service, the media and the ITIA. A consolidated picture of the growth and status of the service is considered within the wider framework of relevant trends in the Irish criminal justice system and the right to an interpreter in Ireland (including the new EU Directive), which provides a more complete, in-depth and relativistic understanding of these services than has been available up until now.

The thesis thus makes an original contribution to an underdeveloped body of criminological knowledge in Ireland and to knowledge about the sentencing process in Ireland, and it represents a first attempt at understanding the part played by interpreting in this. Criminology and criminal justice studies on an international level have neglected the role and impact of language and interpreting in the criminal process, such that the thesis adds to the international body of knowledge on the issue. The thesis is also inevitably connected with the question of immigration in Ireland, as immigration is directly responsible for the rise in LEP defendants coming before the District Court. While the focus was on language as a barrier more general issues arise throughout, including judicial review of the asylum process prosecutions under Section 12 of the Immigration Act 2004, and the impact on the bail process of not being Irish. While the literature on immigration and crime is growing quickly elsewhere it is all but absent in Ireland; this thesis therefore makes a contribution to a criminological perspective on immigration.

The thesis deepens the understanding of the right to an interpreter in Ireland. This has been dealt with previously, notably by Bacik[4] and O'Malley,[5] though the analysis in this thesis goes into more depth on the sources of the right, and it updates the right as per recent decisions of the ECtHR, recent Irish case-law, and the new EU Directive, which only became law in October 2010. Finally, it considers Irish case-law in a more qualitative sense in an effort to understand not just the rulings on interpreting, but the attitudes displayed by judges towards the issue of

[4] I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 10 (2007)
[5] T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009)

interpreting more generally, and to this end it includes relevant judicial reviews of the asylum process, and offers an analysis of the ideology of Irish judges in this matter.

In presenting an ethnographic account of interpreting in the District Court, the thesis adds to the literature on interpreting more generally. Previous interpreting studies, many of which have been carried out in English-speaking common law countries, have focussed almost exclusively on higher courts and have involved technical linguistic analyses of the interpreting process or psychological studies of its impact. This thesis contributes to knowledge of interpreting in lower courts, something which has largely been overlooked, and it considers the issue in a broader criminological context, exploring how interpreting impacts on the court, on court proceedings and on access to justice. In terms of language, the thesis presents the first descriptive account of the language used in an Irish court - the District Court; this is also an original contribution to the literature on legal language more generally, the bulk of which has also focussed on higher courts and on English-speaking common-law countries, but with the conspicuous absence of Ireland.

Principal findings

It is found that there is a distinct ideological division in how the issue of interpreting is represented in the media as well as how it is viewed politically, officially and by interested bodies; essentially there is the 'official' view that portrays the 'positive and proactive' reaction of the Courts Service to increasing ethnic diversity in courts and the provision of interpreting services, and the 'alternative' view, which is that of an ailing system where problems with the provision and quality of interpreting are of such magnitude as to represent a genuine impediment to justice for LEP defendants.

Adhering to the former ideology, newspaper articles on the issue in the Irish Independent, Ireland's best-selling broadsheet newspaper and generally considered to have a populist social agenda and a conservative economic one, have consistently been headlined with sensational claims of 'soaring' costs and huge sums being 'forked' out and 'lost in translation'. These articles have also consistently connected these costs with foreignness and immigration, referring to non-nationals, foreign defendants and immigrants, and one early article went as far as referencing a "huge surge on crime with overseas links".[6] Some anecdotal accounts have also depicted District Court judges adhering to this ideology in their refusal or reluctance to

[6] R. Riegel, *Translator shortage causes havoc in court schedules*, Irish Independent, 14 May 2001

provide interpreters. Money emerged as a strong and contentious theme throughout the thesis: from the contracting of the agency, Lionbridge, based on their ability to offer best value services, to the EU Commission subsequently taking the Irish Government to court over the allegedly illegal tender process and translation companies being reported for making enormous settlements with Revenue[7]; from the Independent newspaper claims of huge 'payouts' to interpreters and the perception of interpreters getting paid more than senior counsel in some circumstances, to consistent interpreter wage cuts and reports of 'cowboy' agencies taking the bulk of profits.

The 'official' view fails to take into consideration the vast numbers of well-founded concerns about the quality of interpreting in practice that are expressed strongly and in some cases consistently by various sources; indeed this thesis finds that the sheer number and prevalence of factors acting as barriers to interpretation in the District Court makes the likelihood of proceedings being fully and accurately interpreted on a consistent basis very low. A set of linguistic units was created to facilitate descriptions and understanding of language and interpreting, broadly paralleling the stages through which a typical District Court progresses and it was found that one or a combination of the factors listed below regularly prevent important units like the facts, bail conditions and the sentence from being interpreted, while the plea, mitigation and communication addressed directly to the defendant are the most likely to be interpreted. Those factors are:

- language: the 'insider' language used, the complexity of language and detail;
- conditions: communicative interference (speed, acoustics etc.);
- lack of awareness: consultation with solicitor/barrister; interruption by judge
- the interpreter: e.g. Silent Interpreters, Selective Interpreters, LEP interpreters

With regard to the first point above, this thesis finds that the language of the District Court is characterised by its 'insider' nature, making it almost impossible for outsiders without experience in the court to understand. This is not, as one would imagine, primarily because of the complexity of legal arguments and legal language or 'legalese', but mainly because key words and phrases - as well as grammar - are regularly omitted from speech, and District Court jargon, which includes seemingly common words with a different or specific meaning in this

[7] Word Perfect Translations Ltd. also provide interpreters to the court where Lionbridge cannot fulfil an assignment; in September 2010 they were reported for their €1.67 million settlement with Revenue. C. Keena, *Translation company pays €1.67m to Revenue*, Irish Times, 15 September 2010

context, is very common. This communication between court 'regulars' (judge, solicitor/barrister, prosecuting Garda) is based on assumptions of shared knowledge of law, procedure and jargon, which is made possible by the repetitive nature of proceedings, and which facilitates greater speed of proceedings while effectively excluding outsiders; this includes most defendants, but also inexperienced interpreters.

In relation to the second two points, it is found that there is a lack of consistent practice or protocol with regard to court procedures, which appear to be completely at the discretion of individual judges, and how these are carried out suggests a lack of awareness about interpreting issues, particularly in unreliable language assessments, confused swearing in of interpreters, and the failure to use the norms of interpreted conversation. Ethically questionable issues, such as interpreters acting as advocates, either go unnoticed or are tolerated, and allowances are generally not made for interpreter to do their job. Communication is often very unwieldy due to the court's preference for the voice of the legal representative, and a casual approach to prior consultation in the District Court means consultations regularly take place during proceedings which can prevent the actual proceedings from being interpreted.

The final point above involved the creation, for the purpose of this thesis, of a typology of interpreters working in Irish District Courts. Five 'types' of interpreters were identified: the Silent Interpreter, who remains silent or almost silent for the duration of the case; the Selective Interpreter who interprets selectively - usually direct communication with the defendant or when directed to interpret; the LEP Interpreter, whose English may be worse than the defendant's; the Advocate, who to a greater or lesser extent appears to adopt the role of advocate through answering on the defendant's behalf, embellishing or formalising what the defendant says and so on; and the Competent Interpreter who, due to a combination of professional attire, competency in English, apparent familiarity with court proceedings and language and self-confidence, appears competent. They may or may not also interpret well and accurately.

Two final aspects of the practice of District Court interpreting in Ireland are worth comparing with what the broader, international literature on court interpreting has consistently found. First, the issue that interpreting causes delays; this thesis has found that the level of delay caused by interpreting in the District Court is very low in the greater scheme of things; most

delays are caused by poor organisation, the lack of protocol, and by characteristics of the District Court itself, and as most interpreting involves non-intrusive *chuchotage*, or whispered interpreting, dialogue is lengthened only in hearings or direct communication with the defendant. The second aspect is the notion of the interpreter as the 'necessary evil'; that interpreters are barely tolerated and negatively perceived. This thesis finds little support for this, and finds, on the contrary, that interpreters have been accepted as part of the landscape, are treated well within the courts (interpreters had far more complaints about the agencies), and are happy with their treatment.

Immigration, and interest in the interpreting issue, peaked in 2007 when the then Minister for Justice, adhering to the 'official' view of interpreting, claimed that procedural guarantees – including the right to an interpreter – were sufficiently protected in Ireland. However, analysis of the right to an interpreter in Ireland finds this claim overstated: the right is not directly protected in the Constitution or by statutory provision, and while the right is accepted by courts, and requests for interpreters are routinely granted, anything beyond provision is a very grey area. It is interesting that while the available information suggests that a large number of criminal cases in the last ten years have involved LEP defendants, and although the quality of interpreting is shown to be inconsistent at best and the system of assigning interpreters unreliable, only four criminal appeals involving LEP defendants have emerged as clearly based on interpreting. Of these, three were unsuccessful, and in the fourth the applicant's sentence was reduced - partly based on the language difficulties of the defendant, but also partly because of the victim's wishes.[8]

Some of the solicitors interviewed gave a number of plausible explanations for the low levels of appeals. It was suggested that interpreting is not a battle solicitors/barristers are likely to choose; firstly, because there are many other issues of more immediate concern to be tackled in the District Court; secondly because it is not in the interest of the 'hungrier'[9] solicitor to complain about interpreters, as they can be a source of business in bringing foreign clients; and thirdly because judges would be – and are – extremely reluctant to allow appeals based on interpreting due to the media attention this would engender and the fact that it would call the whole system into question.

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[8] *The People (at the Suit of the D.P.P.) v Vasile Vardoshilli*, unreported, Court of Criminal Appeal, Finnegan J., February 9, 2009

[9] From interview with solicitor, Mark; hungry for business

This thesis has suggested a number of other reasons for the low number of appeals; in terms of the District Court, there is a strong perception that as only minor offences are dealt with, interpreting isn't as big an issue as in higher courts and in practice evidence was found that the concern of the court with regard to interpreting rose according to the seriousness of the case. It also emerged that protecting against judicial review, and ensuring procedural correctness, are at least as important to the court as the defendant's comprehension, if not more so, and a judgment of the Irish Court of Criminal Appeal has explicitly held that interpreting problems create inconvenience, but do not impact on the fairness of proceedings.

Overall, predominant and dual concerns emerge about the amount of money being spent on interpreting services and the quality and reliability of services being provided in return, but limited concern is found for the impact of poor services on the District Court in terms of access to justice.

The Language and Practice of the District Court

A number of theoretical contributions are made in this thesis, and the framework created using Garland's Culture of Control is useful in outlining what these are. Basically, in agreement with Kilcommins et al.,[10] the thesis finds little concrete evidence that a culture of control is responsible for affecting the provision and implementation of interpreting services in the Irish District Court. The thesis finds that trends identified by Garland, and in other parts of the Irish criminal justice system, are somewhat in evidence in the provision of interpreting services and the LEP defendant's access to justice but that overall, services and access to justice are affected by local practices, namely the characteristics of the District Court; by the language ideology of Irish judges which has historical roots[11] and is comparable to historical judicial attitudes towards language and interpreting elsewhere; and at least potentially and theoretically by increasing European, and particularly EU, protection of the right to an interpreter.

Punitiveness and the primacy of prison

The orientation of Irish courts towards custody and the primacy of prison has been noted in the Irish criminological literature and non-Irish persons appear to be over-represented, at least

[10] S. Kilcommins, I. O'Donnell, E. O' Sullivan, B. Vaughan, Crime, punishment and the search for order in Ireland (Dublin: Institute of Public Administration, 2004)

[11] See M. ní Dhonnachadha, *Irish language interpreting in the courts since the 1850s*, Unpublished MA Thesis, DCU (2000) and Introduction of this thesis

in terms of committals to Irish prisons. This thesis did not analyse the actual sentences given to LEP offenders, but in its examination of language and interpreting it observed the sentencing process. It is not possible to say whether or not poor interpreting services are responsible for LEP individuals being committed to prison, but it is argued that interpreting, particularly poor interpreting, affects the sentencing process and that poor interpreting, inefficient court practices, and not being Irish may disproportionately affect the bail process in particular.

Studies elsewhere have shown that how a defendant speaks in court affects how he is perceived; O'Barr found, for example, that the 'powerful' style of speech, most associated with the well-educated, with white collar men and with expert witnesses[12], was perceived more positively in terms of credibility and the veracity of testimony, competence, intelligence, and trustworthiness.[13] It emerged in this thesis that the speech of most District Court defendants could not be so characterised, and that in fact some judges display condescending attitudes towards a person's speech where this is conspicuously different from that used more generally in the court, suggesting that the concept that speech influences perceptions may also hold true in Irish courts. Further to this, studies have also shown that an interpreter can consciously or unconsciously alter this perception by modifying the defendant's speech, and indeed it has been accepted by the High Court in Ireland that when communication is via an interpreter, the words, style, syntax and emotion are not those of the defendant;[14] there is evidence, in fact, that interpreters often convert speech to a more powerless style of speech. This may be of significance in Irish District Courts considering the very wide discretion of judges and that the quality of interpreting has been found to be unreliable.

More concretely, this thesis has also found that certain parts of the case are less likely to be interpreted than others, implying an inbuilt processing differential for non-English speaking defendants. In addition, information – such as mitigating factors – that is likely to affect the judge's decision may be omitted or altered directly through poor interpreting, indirectly through poor interpreting in a solicitor-client consultation, or through the failure of a solicitor/barrister to ensure adequate consultation before court. In interpreted cases, details

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[12] W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982)

[13] J.M. Conley, W.M. O'Barr & E.A. Lind, *The power of language: presentational style in the courtroom*, 6 Duke Law Journal 1375 (1978)

[14] *MacCarthaigh v Ireland* [1999] 1 I.R. 200 in which MacCarthaigh's citation of M. B. Shulman, *No hablo ingles: court interpretation as a major obstacle to fairness for non-English speaking defendants*, 46 Vanderbilt Law Review (1993) was accepted as 'true enough'

of the offence presented by the prosecution are often not interpreted for the defendant, putting the defendant in a difficult position to understand the case against him or to correct even a simple error, yet this thesis has found chronic problems of efficiency in the District Court which regularly lead to errors and information gaps; without proper interpreting, such errors may go undiscovered and have a negative impact on the case.

Finally, and perhaps most vitally, it is argued that bail is a specific area where not being Irish could take on disproportionate importance. First, bail is a concept unfamiliar to some non-Irish defendants; second, bail conditions are among the procedural elements least likely to be interpreted in the District Court; and third, non-Irish defendants may be more likely to have bail refused considering the heightened flight risk issue, but also as there seems to be an issue with certain non-Irish groups giving the Gardaí false details. An LEP defendant released on bail, who understands neither what it means nor what conditions he is obligated to adhere to may be more likely to breach those conditions and/or fail to appear at the subsequent court date, both of which carry serious consequences including arrest, loss of sureties, remands and possibly harsher sentences. This argument may be particularly salient in light of the fact that a huge proportion of overall committals to Irish prisons involve committals on remand: 29% of committals in 2009, 37% in 2008 and 42% in 2007, the year that immigration trends peaked.

It has also been suggested by Riordan, a judge of the District Court, that LEP defendants are less likely to be given probation or community service orders because of (perceived) language difficulties and a lack of available interpretation services[15] – something that is likely to have become more acute with recent cutbacks to the Probation Service. This thesis cannot confirm or deny this assertion: judges rarely handed out probation or community service orders during the observation phase of this study.

The changing nature of the criminal justice system

Privatisation is one of the trends identified by Garland in the changing nature of criminal justice systems; in Ireland there has been discussion of privatising prisons and prison escorts, though this has not happened as yet. However, interpreting and translation services have been contracted to a sole service provider since 2007. A managerial lexicon is very much in evidence in the reports of the Courts Service who have referred to the contract as the "rationalisation and management of interpreting services", and to interpreting as "the

[15] Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007)

efficient management of cases." This thesis agrees with the findings of Kilcommins et al.[16] that this appears to be little more than rhetoric, and a real emphasis on cost-effectiveness is missing: there is no evidence of monitoring or evaluation being carried out on the service. However, although this thesis argues that the lack of complaints about interpreting by courts or lawyers has little or nothing to do with the interpretation, this silence has translated into an appearance of customer satisfaction; in 2008 a Courts Service newsletter pointed to a satisfaction rating of 99.5%, and suggested that the offending .5% was due to teething issues. Rhetorically, therefore, the system appears cost-effective, well managed and successful, and this is amply supported by the lack of appeals based on interpreting. However, although this puts the Government in a comfortable position with regard to the new EU Directive, it completely obscures the reality.

The new emotions of crime

The media has become an extremely important influence in crime and criminal justice policy; although O'Connell's study of the impact of media reporting on perceptions of crime found that Irish newspapers displayed broadly comparable patterns in their reporting of crime, this thesis finds that coverage by the media of the interpreting issue has been distinctly split between the support of 'official' ideology by the Independent, and support of the 'alternative' ideology by The Times. Reporting on the subject by the Independent was undoubtedly sensational, though it seems, like the Courts Service, to have lost its interest in the topic. The Times has given considerably more coverage, and more recent coverage to interpreting in courts. It has only, additionally, been partly sensationalised; although most articles associate the issue with foreigners or immigrants, only one early article made a link with increasing immigrant offending.

Due process concerns

In Ireland in recent years, the many legislative changes wrought in the battle against crime and organised crime have caused serious concern about the declining protection of due process rights. The interpreting issue is interesting in that it is new, at least on a large scale, and protection of it therefore less likely to *decline* per se; the historical connection between interpreting and the Irish language arises in a completely different context and has less to do with fair procedure than the right to speak and use the Irish language. Although the right to an

[16] S. Kilcommins, I. O'Donnell, E. O' Sullivan, B. Vaughan, Crime, punishment and the search for order in Ireland (Dublin: Institute of Public Administration, 2004)

interpreter has no explicit standing in Ireland, it is accepted as part of natural justice or the right to a fair trial, and where an interpreter is requested by a defendant or their representative, one is routinely assigned. Rather than declining, the right can be considered as having gained additional strength through the incorporation into Irish law of the ECHR and more particularly through the new EU Directive.

The issue of interpreting standards and quality have been shown to be less straightforward, and the conflicting positions taken by various courts – including Irish courts - could potentially be seen as a tension between crime control and due process, but this would be stretching the reality: it is well documented that there has always been tension in courts between interpreting as necessary to facilitate justice, and accepting that the quality of interpreting provided can impact on the fairness of proceedings. On a practical level, the needs of the individual must be balanced with those of the court, and the District Court as a court where speed is paramount must take a practical approach to the issue. Additionally, while legal professionals tend to be excellent language users, there is no expectation that they have knowledge or understanding of linguistic processes, but the fact that these are not always based on common sense means that a lack of awareness can impact on the approach to interpreting. Judges are also conscious of protecting themselves against judicial review, and for this, provision will almost always suffice; it is argued that when courts rule on interpreting issues, either failing to rule or ruling inconsistently on issues of quality is due more to a reluctance to call the system into question, among other things, combined with an inconsistent understanding and appreciation of language issues. There are tensions, but they are not between due process and crime control.

This thesis also argues that in the context of the Irish District Court, any consideration of whether an LEP defendant can access justice on an equal basis with Irish, English-speaking defendants goes beyond the issue of interpreting alone and must take the issue of representation into account. For LEP defendants, the competence of the interpreter and effective interaction with a lawyer are of similar – and interconnected – importance, but the current system of brief consultations taking place in the minutes before court or during proceedings are arguably insufficient to ensure access to justice. The new EU Directive, in its provision that interpreters should be made available for necessary meetings with lawyers, has the potential to strengthen this area. However, the breadth of the Directive's provisions also has the potential to increase dramatically the cost of interpreting in criminal proceedings.

Considering the 'official' view on current practice (and spending) in Ireland, it is therefore also possible that any real change will be resisted either actively or with passive self-confidence in the adequacy of the existing system, and that the Directive's full potential will not be realised.

Otherness

A differential in processing and a potential difference in sentencing based on language and interpreting issues has been discussed. However, there is no real evidence – from the sources used in this thesis – of an 'otherisation' of immigrants in the context of criminal justice. In courts, judges want to know the nationality of non-Irish defendants, how long they have been there, and why they are here, but there is no suggestion that this is anything more than an element of an individual's social background. Discussions in the media and other documentation on the provision of interpreting services in the courts almost invariably refer to the fact that these services represent increasing diversity, and/or that they are being provided for foreigners or immigrants, but the main focus has not been on the 'foreignness' of the people, but the fact either that they need language services to access justice, or that these language services are costing the state a lot of money.

It is also argued that the common concern with the provision of interpreting services to the court and the provision of an interpreter to an individual defendant is, to at least some extent, the fact of ensuring provision rather than ensuring that the defendant understands proceedings; considering the 'insider' nature of District Court language, this may have less to do with the particularity of not being an English speaker, and more to the general exclusion of defendants from District Court proceedings. The defendant in a District Court is an outsider or 'other' by virtue of not being an 'insider' and in a poor position to understand District Court 'insider' language.

The thesis also found that the common use of non-standard English by defendants differs from the formality used by all regular court participants, and diverges dramatically from the exceptional sophistication of the language used by legal professionals in court; this resonates with the suggestion made in Bacik et al.'s study that the backgrounds of those adjudicating and those being judged may have an impact on sentencing as judges and lawyers are generally from middle-class backgrounds and defendants disproportionately from economically-

deprived areas,[17] and with the findings of various linguistic studies that high levels of education and social status are more likely to lead to more positive and 'successful' interaction in court. Considering the condescension and linguistic superiority demonstrated by some District Court judges and the wide discretion practised by judges in sentencing, it is therefore also suggested that the linguistic 'otherness' of the defendant may have an effect on the sentencing process.

Conclusion

That a person may be deprived of his or her liberty due to faulty interpreting is not only a real possibility, but it also carries wider implications for prison populations and for society. The literature shows that serving even a short prison sentence can have a disproportionate effect on a person in terms of their future employment and the likelihood of re-offending; it also shows that a custodial sentence is one of the strongest predictors of recidivism, and that being held on remand as part of confinement is another. The literature on immigration and crime investigates the link between immigration and criminality as well as the possibility of discrimination in sentencing, but the possibility has not really been considered that a person's inability to speak the language and their dependence on (potentially poor) interpreting may go beyond creating difficulties for the defendant in court and actually have an impact on sentencing. Immigrants are commonly overrepresented in prison populations, yet the contribution of the language barrier to this has not been given due consideration.

In Ireland, the prison population is at an all time high. In 2007 one third of committals to Irish prisons involved non-Irish persons; while this fell to 'only' one quarter in 2009, when those committed for immigration offences are taken out of the equation, *more* non-Irish people were committed to prison in 2009, the majority from EU countries other than the UK. It is not known how many of those committed would have required an interpreter, but a low estimate might be somewhere between 15 and 20% of all committals. Considering the standards of interpreting and the obstacles to interpreting observed in the District Court, the number of LEPs being held in Irish prisons is an area of concern. Aside from the large numbers committed on remand, concern is further increased by the fact that the huge growth in the prison population over 2009 and 2010 has been particularly characterised by the increase in shorter prison sentences, especially of less than three months. It is at least notable that many of these

[17] I. Bacik, A. Kelly, M. O'Connell, H. Sinclair, *Crime and poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity*, 7 Irish Criminal Law Journal 104 (1997)

pertain to road traffic offences, the offence this thesis has established to be most strongly and consistently associated with young Eastern European men, and that, according to the last available statistics, Polish and Lithuanian interpreters are those most frequently requested in court, while Latvian also features in the top six.

Statistics can be misleading, and the paucity of complete and reliable statistics from the Irish criminal justice system makes analysis difficult. However, it is clear that large numbers of non-Irish committals are contributing to a growing prison population, a growth that is increasingly fuelled by the District Court. Considering further that chronic issues of inefficiency, linguistic exclusion and exclusivity, and questionable interpreting and interpreting practices have emerged as characteristic of the District Court's processing of (LEP) defendants, the case for making a correlation becomes strong. In the criminological literature, the identification of a culture of control and increasingly punitive criminal justice systems has contributed to an understanding of rising prison populations on a macro level; in Ireland the prison population has reached an all-time high, and analysis suggests that a culture of control continues to be in a 'stuttering' state. This thesis has found that the provision of interpreting services within the District Court, while influenced by some of the trends identified by Garland, is affected more obviously by the characteristics of that Court, the language ideology of Irish judges, and increasing EU and European protection of the right to an interpreter. It is suggested, therefore, that considering the question from a more localised perspective is likely to yield results that would neither emerge from nor be relevant on an international level.

References

Books

Aequitas: Access to justice across language and culture in the EU (E. Hertog, ed.)(Antwerp: Lessius Hogeschool, 2001)

After the war on crime: race, democracy, and a new reconstruction (M.L. Frampton, I. Haney López, & J. Simon, eds.)(New York/London: New York University Press, 2008)

Crime, inequality and the state: a reader (M.E. Vogel, ed.)(London: Routledge, 2007)

Language in the judicial process (J.N. Levi & A.G. Walker, eds.)(New York: Plenum 1990)

Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000)

Law Society of Ireland human rights law manual (B. Moriarty & A. Mooney Cotter, eds.)(Oxford: Oxford University Press, 2004)

Multi-level governance (I. Bache & M. Flinders, eds.)(Oxford: Oxford University Press, 2004)

A. Ashworth, *Victims' rights, defendants' rights and criminal procedure* IN Integrating a victim perspective within criminal justice: international debates (A. Crawford & J. Goodey, eds.)(Aldershot: Ashgate, 2000)

A.D. Baddeley, Human memory: theory and practice (London: Erlbaum, 1990)

P.C. Bartholomew, The Irish judiciary (Dublin: Institute of Public Administration, 1971)

S. Berk-Seligson, *Bilingual court proceedings: the role of the court interpreter* IN Language in the judicial process (J.N. Levi & A. Graffam Walker, eds.)(New York/London: Plenum Press, 1990)

S. Berk-Seligson, The bilingual courtroom: court interpreters in the judicial process: with a new chapter (Chicago, Ill./London: University of Chicago Press, 2002)

H. Singh Bhui, *Criminal justice and race equality* IN Race and criminal justice (H. Singh Bhui, ed.)(London: Sage, 2008)

H. Singh Bhui, *Foreign national prisoners: issues and debates* IN Race and criminal justice (H. Singh Bhui, ed.)(London: Sage, 2008)

A. Bottomley, Decisions in the penal process (London: Robertson, 1973)

A.E. Bottoms, *The philosophy and politics of punishment and sentencing* IN The politics of sentencing reform (C. Clarkson & R. Morgan, eds.)(Oxford: Clarendon Press, 1995)

A. Bottoms & J.D. MacClean, Defendants in the criminal process (London: Routledge & K. Paul, 1976)

B. Bowling & C. Phillips, Racism, crime and justice (Harlow: Longman, 2002)

A. Bryman, Social research methods (Oxford: Oxford University Press, 2008)

I. Butler & L. Noaks, Silence in court?: a study of interpreting in the courts of England and Wales (Cardiff: School of Social and Administrative Studies University of Wales College of Cardiff, 1992)

R. Byrne & J.P McCutcheon, The Irish legal system (Dublin: Butterworths, 1996)

R. Byrne & J.P McCutcheon, The Irish legal system (Dublin: Bloomsbury Professional, 2009)

V.R. Charrow, *Linguistic theory and the study of legal and bureaucratic language* IN Exceptional language and linguistics (L.K. Obler & L. Menn, eds.)(New York: Academic Press, 1982)

V. Charrow, J. Crandall & R. Charrow, *Characteristics and functions of legal language* IN Sublanguage: studies of language in restricted semantic domains (R. Kittredge & J. Lehrberger, eds.)(Berlin, New York: Walter de Gruyter, 1982)

S. Cohen, Folk devils and moral panics (London: Routledge, 1972)

J. Colin & R. Morris, Interpreters and the legal process (Winchester: Waterside, 1996)

J.M. Conley & W.M. O'Barr, Behavioral analysis of the American criminal courtroom (Durham, N.C.: Duke University Law and Language Project (Research Report 4), 1977)

J.M. Conley & W.M. O'Barr, *Rules versus relationships in small claims disputes* IN Conflict talk: sociolinguistic investigations of arguments in conversation (A. Day Grimshaw, ed.)(Cambridge: Cambridge University Press, 1990)

J.M. Conley & W.M. O'Barr, Just words: law, language and power (Bristol: University of Chicago Press, 2005)

C. Cooper, *Refugees, asylum seekers, and criminal justice* IN Race and criminal justice (H. Singh Bhui, ed.)(London: Sage, 2008)

S. del Valle, Language rights and the law in the United States: finding our voices (Clevedon, England/Buffalo NY: Multilingual Matters, Ltd., 2003)

R. Dueñas González, V.F. Vasquez & H. Mikkelson, Fundamentals of court interpreting: theory, policy and practice (Durham, NC: Carolina Academic Press, 1991)

D. Eades, *Evidence given in unequivocal terms: gaining consent of Aboriginal young people in court*, IN Language in the legal process (J. Cotterill, ed.)(Basingstoke: Palgrave Macmillan, 2002)

A.B. Edwards, The practice of court interpreting (Amsterdam/Philadelphia: John Benjamins Publishing Company, 1995)

L. Ellison, The adversarial process and the vulnerable witness (New York: Oxford University press, 2001)

M. Fitzgerald, 'Race', ethnicity, and crime IN Criminology (C. Hale, K. Hayward, A. Wahidin & E. Wincup, eds.)(Oxford: Oxford University Press, 2009)

F. Füredi, Culture of fear (London: Continuum, 2002)

F. Füredi, The politics of fear (London: Continuum, 2005)

D. Garland, Punishment and modern society: a study in social theory (Oxford: Clarendon, 1990)

D. Garland, The culture of control: crime and social order in contemporary society (Oxford: Oxford University Press, 2001)

J. Gibbons, Forensic linguistics: an introduction to language in the justice system (Oxford: Blackwell Publishing Ltd., 2003)

P. Goodrich, Legal discourse: studies in linguistics, rhetoric and legal analysis (London: Macmillan, 1987)

E. Granger & M. Baker, *The role and experience of interpreters* IN Working with interpreters in mental health (R. Tribe & H. Raval, eds.)(Hove: Brunner/Routledge, 2003)

G. Griffin, The collegians (New York/London: Garland, 1979)

E.G. Guba, *The context of emergent paradigm research* IN Organization theory and inquiry: the paradigm revolution (Beverley Hills, Calif.: Sage, 1985)

E.G. Guba & Y.S. Lincoln, *Competing paradigms in qualitative research* IN Handbook of qualitative research (N.K. Denzin & Y.S. Lincoln, eds.)(Thousand Oaks, Calif./London: Sage, 1994)

J.J. Gumperz, *Fact and inference in courtroom testimony* IN Language and social identity (J.J. Gumperz, ed.)(Cambridge: Cambridge University Press, 1982)

S. Hale, Community interpreting (Basingstoke: Palgrave Macmillan, 2007)

C. Hamilton, The presumption of innocence and Irish criminal law (Dublin: Irish Academic Press, 2007)

M. Hammersley, *Observation, participant and non-participant* IN Encyclopedia of sociology (G. Ritzer, ed.)(Thousand Oaks: Sage, 2007)

O. Heaven & B. Hudson, Race, ''ethnicity'' and crime' IN Criminology (C. Hale, K. Hayward, A. Wahidin & E. Wincup, eds.)(Oxford: Oxford University Press, 2005)

, 1952)

E. Hertog & J. van Gucht, *Status quaestionis* (Intersentia, 2008)

E. Hickey, Irish law and lawyers in modern folk tradition (Cork: Four Courts Press in association with The Irish Legal History Society, 1999)

P. Hillyard, Suspect community: people's experience of the Prevention of Terrorism Acts in Britain (London: Pluto Press in association with Liberty, 1993)

K. Holt Barrett, *Guidelines and suggestions for conducting successful cross-cultural evaluations for the courts* IN Race, culture, psychology and law (K. Holt Barrett & W.H. George, eds.)(Thousand Oaks, California; London: Sage, 2005)

R. Hood, S. Shute & F. Seemungal, Ethnic minorities in the criminal courts: perceptions of fairness and equality of treatment (London: Lord Chancellor's Department, 2003)

B. Hudson, Understanding justice: an introduction to ideas, perspectives and controversies in modern penal theory (Buckingham: Open University Press, 2003)

R. Hyland, *Babel: A She'ur*, 11 Cardozo Law Review 1585 (1990) reprinted in Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000)

P. Ignazi, Extreme right parties in Western Europe (Oxford: Oxford University Press, 2003)

P. Jansen, *The role of the interpreter in Dutch courtroom interaction: the impact of the situation on translational norms* IN Topics in interpreting research (J. Tommola, ed.)(Turku: University of Turku, Centre for Translation and Interpreting, 1995)

ECHR and human rights (U. Kilkelly, ed.)(Bristol: Jordans, 2009)

T. Jones & T. Newburn, Policy transfer and criminal justice: exploring US influence over British crime control policy (Maidenhead: Open University Press, 2007)

F. Kafka, The trial (Harmondsworth: Penguin, 1953)

H. Kemshall, *Crime and risk* IN Risk in social science (P. Taylor-Gooby & J. Zinn, eds.)(Oxford: Oxford University Press, 2006)

H. Kemshall & M. Maguire, *Public protection, partnership and risk penality: The multi-agency risk management of sexual and violent offenders* IN Criminal justice, mental health and the politics of risk (N. Gray, J. Laing & L. Noaks, eds.)(London: Cavendish Publishing Ltd, 2002)

S. Kilcommins, I. O'Donnell, E. O' Sullivan, B. Vaughan, Crime, punishment and the search for order in Ireland (Dublin: Institute of Public Administration, 2004)

N. Lacey, *Legal constructions of crime* IN The Oxford handbook of criminology (M. Maguire, R. Morgan & R. Reiner, eds.)(Oxford: Oxford University Press, 2002)

R.T. Lakoff, Language and woman's place (New York/London: Harper and Row, 1975)

Y. Maley, *The language of the law* IN Language and the law (J. Gibbons, ed.)(London: Longman, 1994)

J. Mason, *Qualitative interpreting: asking, listening, Interpreting* IN Qualitative research in action (T. May, ed.)(London: Sage, 2002)

G.M. Matoesian, Reproducing rape: domination through talk in the courtroom (Cambridge: Polity Press, 1993)

H.E.S. Mattila, Comparative legal linguistics (Aldershot, UK: Ashgate, 2006)

D. Mellinkoff, The language of the law (Boston: Little, Brown & Company, 1963)

R. Mesthrie, *Clearing the ground: basic issues, concepts and approaches* IN Introducing sociolinguistics (R. Mesthrie, J. Swann, A. Deumert, W.L. Leap, eds.)(Edinburgh: Edinburgh University Press, 2000)

H. Mikkelson, Introduction to court interpreting (Manchester: St. Jerome Publishing, 2000)

M.B. Miles & A.M. Huberman, Qualitative data analysis: an expanded sourcebook (Thousand Oaks, Calif./London: Sage, 1994)

H. Montgomery Hyde, Norman Birkett: The life of Lord Birkett of Ulverston (London: Hamish Hamilton, 1964)

J.I. Moore & R.A. Mamiya, *Interpreters in court proceedings* IN Immigrants in courts (J. Moore & M. Fisher, eds.)(Seattle; London: University of Washington Press, 1999)

R. Morris, *Great mischiefs: an historical look at language legislation in Britain* IN Language legislation and linguistic rights (D.A. Kibbee, ed.)(John Benjamins Publishing Company: Amsterdam/Philadelphia, 1998)

R. Morris, *Taking liberties? Duplicity or the dynamics of court interpreting* IN Interpreting in legal settings (D. Russell & S. Hale, eds.)(Washington, D.C.: Gallaudet University Press, 2008)

R. Morris, Court interpreting 2009: an undervalued and misunderstood profession? Or: will justice speak? (Monographs on Translation and Interpreting, MonTI 2: 47-79)(2010)

W. M. O'Barr, L. Walker, J.M. Conley, B. Erickson& B.R. Johnson, *Political aspects of speech styles in American trial courtrooms*, Working Papers in Culture and Communication 1(1) (Philadelphia: Temple University Department of Anthropology, 1976)

MVA Consultancy, Foreign language interpreters in the Scottish criminal courts (Edinburgh: Scottish Office Central Research Unit, 1996)

A. Neier, Crime and punishment: a radical solution (New York: Stein and Day, 1976)

T. Newburn & R. Sparks, *Criminal justice and political cultures* IN Criminal justice and political cultures: national and international dimensions of crime control (T. Newburn & R. Sparks, eds.)(Oregon, USA: Willan Publishing, 2004)

W.M. O'Barr, Linguistic evidence: language, power, and strategy in the courtroom (New York/London: Academic Press, 1982)

D. O'Connell, *Watched kettles boil (slowly): the impact of the ECHR Act 2003* IN ECHR and Irish Law (U. Kilkelly, ed.)(Bristol: Jordans, 2009)

D. O'Connell, S. Cummiskey, E. Meeneghan & P. O'Connell, ECHR Act 2003: a preliminary assessment of impact (Dublin : Dublin Solicitors Bar Association ; Law Society of Ireland, 2006)

I. O'Donnell, *Who gets punished?* IN Crime and poverty (I. Bacik & M. O'Connell, eds.)(Dublin: Round Hall Sweet & Maxwell, 1998)

P. O'Mahony, *Criminal chaos: seven crises in Irish criminal justice* (Dublin: Round Hall Sweet & Maxwell, 1996)

P. O'Mahony, Mountjoy prisoners: a sociological and criminological profile (Dublin: Stationery Office, 1997)

P. O'Mahony, *The Courts: introduction* IN Criminal Justice in Ireland (P. O'Mahony, ed.)(Institute of Public Administration: Dublin, 2002)

P. O'Malley, *Penal policies and contemporary politics* IN The Blackwell companion to criminology (C. Sumner, ed.)(Oxford: Blackwell Publishing, 2003)

T. O'Malley, The criminal process (Dublin: Round Hall - Thomson Reuters, 2009)

E. O'Sullivan, *Punishing poverty and personal adversity* IN Crime and poverty (I. Bacik & M. O'Connell, eds.)(Dublin: Round Hall Sweet & Maxwell, 1998)

A. Philipps, Lawyer's language (London: Routledge, 2003)

S.U. Philips, Ideology in the language of judges: how judges practice law, politics, and courtroom control (New York; Oxford: Oxford University Press, 1998)

J. Pratt, Penal populism (London: Routledge, 2007)

H. J. Rubin & I.S. Rubin, Qualitative interviewing: the art of hearing data (Thousand Oaks, Calif.: Sage Publications, 2005)

B.D. Sales, A. Elwork & J. J. Alfini, *Improving comprehension for jury instructions* IN Perspectives in law and psychology: the criminal justice system (B.D. Sales, ed.)(New York: Plenum, 1977)

A. Sanders & R. Young, *From suspect to trial* IN Oxford handbook of criminology (Oxford: Oxford University Press, 2002)

M. Saville-Troike, The ethnography of communication: an introduction (Oxford: Blackwell, 2003)

S. Schane, Language and the law (London: Continuum, 2006)

J. Shapland, J. Willmore & P. Duff, Victims in the criminal justice system (Aldershot: Gower, 1985)

M. Shlesinger, *Interpreter latitude vs. due process: simultaneous and consecutive interpretation in multilingual trials* IN Empirical research in translation and intercultural studies (S. Tirkkonen-Condit, ed.)(Tübingen: Gunter Narr, 1991)

N. Nic Shuibhne, *The Constitution, the courts and the Irish language* IN Ireland's evolving Constitution: 1937-1997: collected essays (T. Murphy & P. Twomey, eds.)(Oxford: Hart Publishing, 1998)

S. Shute, R. Hood & F. Seemungal, A fair hearing?: ethnic minorities in the criminal courts (Uffculme: Willan, 2005)

L. Solan & P.M. Tiersma, Speaking of crime: the language of criminal justice (Chicago: University of Chicago Press, 2005)

B. Spalek, R. Lambert & A. Haqq Baker, *Minority Muslim communities and criminal justice: stigmatized UK faith identities post 9/11 and 7/7* IN Race and criminal justice (H. Singh Bhui, ed.)(London: Sage, 2008)

M. Stephens, Crime and social policy: the police and criminal justice system (Eastbourne: Gildredge Press, 2000)

K. Storey, *The linguistic rights of non-English speaking suspects, witnesses, victims and defendants* IN Language legislation and linguistic rights (D.A. Kibbee, ed.)(Amsterdam/Philadelphia: John Benjamins Publishing Company, 1998)

A. Strauss & J.M. Corbin, Basics of qualitative research: techniques and procedures for developing grounded theory (Newbury Park, California: Sage, 1998)

P. Tiersma, Legal language (Chicago/London: University of Chicago Press, 1999)

S. Trechsel, Human rights in criminal proceedings (Oxford: Oxford University Press, 2005)

R. Tribe, *Working with interpreters* IN Race, culture, psychology and law (K. Holt Barrett & W.H. George, eds.)(Thousand Oaks, California; London: Sage, 2005)

J. van Maanen, Tales of the field: on writing ethnography (Chicago: University of Chicago Press, 1988)

C. Wadensjö, Interpreting in interaction (New York: Addison Wesley Longman, 1998)

J. Waldron, Maamstrasna: The murders and the mystery (Dublin: Edmund Burke Publisher, 1993)

D. Walsh, Criminal procedure (Dublin: Thomson Round Hall, 2002)

B. Western, Punishment and inequality in America (New York: R. Sage Foundation, 2006)

J.B. White, *Law as rhetoric, rhetoric as law: the arts of cultural and communal life* IN Law and language (T. Morawetz, ed.)(Aldershot: Dartmouth, 2000)

J.Q Whitman, Harsh Justice: criminal punishment and the widening divide between America and Europe (Oxford: Oxford University Press, 2003)

R. Wodak-Engel, *Determination of guilt: discourse in the courtroom* IN Language and power (C. Kramarae, M. Schulz & W.M. O'Barr, eds.)(1984)

J. Wood & C. Shearing, Imagining security (Cullompton: Willan, 2007)

Theses

M. ní Dhonnachadha, *Irish language interpreting in the courts since the 1850s*, Unpublished MA Thesis, DCU (2000)

A.B. Pérez, *Interpreting in the Irish courtrooms: the impact of lack of regularisation on the quality of the interpreter's performance,* Unpublished MA Thesis, DCU (2000)

R. Morris, The impact of court interpretation on legal proceedings, M.A. Thesis; Hebrew University of Jerusalem (unpublished, 1989)

J.A. Radmann, Do you speak English?: A study on English language proficiency testing of Hispanic defendants in U.S. criminal courts (M.A. Thesis, Louisiana State University, 2005)

Articles

A. Ashworth, *Criminal justice and the criminal process,* 28(2) British Journal of Criminology 111 (1988)

A. Ashworth & M. Hough, *Sentencing and the climate of opinion*, Criminal Law Review 776 (1996)

I. Bacik, A. Kelly, M. O'Connell, H. Sinclair, *Crime and poverty in Dublin: an analysis of the association between community deprivation, District Court appearance and sentence severity*, 7 Irish Criminal Law Journal 104 (1997)

I. Bacik, *Breaking the language barrier: access to justice in the new Ireland*, 2 Judicial Studies Institute Journal 109 (2007)

J. Banks, *The criminalization of asylum seekers and asylum policy,* 175 Prison Service Journal 43 (2008)

C. Barner-Barry, *An introduction to nonparticipant observational research techniques*, 5(1) Politics and the Life Sciences 139 (1986)

V. Benmaman, *Interpreter issues on appeal*, Proteus: Newsletter of the National Association of Judiciary Interpreters and Translators Volume IX No. 4 (Fall 2000)

M. Bosworth & M. Guild, *Governing through migration control: security and citizenship in Britain,* 48 British Journal of Criminology 705 (2008)

L. Campbell, *The Criminal Justice Act 2007 - a theoretical perspective*, 17(2) Irish Criminal Law Journal 8 (2007)

L. Campbell, *From due process to crime control: the decline of liberalism in the Irish criminal justice system*, 25 Irish Law Times 281 (2007)

L. Campbell, *The culture of control in Ireland: theorising recent developments in criminal justice*, 1 Web Journal of Current Legal Issues (2008)

G. Carey, *Trial courts and legal language*, 17 Irish Law Times 134 (1999)

G. Carey, *Criminal trials and language rights*, 13(1) Irish Criminal Law Journal 15 (2003)

G. Carey, *Towards simpler legal language*, 18 Irish Law Times 177 (2008)

R.P. Charrow & V.R. Charrow, *Making legal language understandable: a psycholinguistic study of jury instructions*, 79(7) Columbia Law Review 1306 (1979)

R. Coen, *The decline of due process and the right to silence's demise*, 18(1) Irish Criminal Law Journal 10 (2008)

J.M. Conley, W.M. O'Barr & E.A. Lind, *The power of language: presentational style in the courtroom*, 6 Duke Law Journal 1375 (1978)

V. Conway & M. Mulqueen, *The 2009 anti-gangland package: Ireland's New Security Blanket?*, 19(4) Irish Criminal Law Journal 106 (2009)

B. Danet, *'Baby' or fetus'? Language and the construction of reality in a manslaughter trial*, 32(3-4) Semiotica 187 (1980)

B. Danet, *Language in the legal process*, 14(3) Law & Society Review 445 (1980)

B. Danet & B. Bogoch, *Fixed fight or free-for-all? An empirical study of combatitiveness in the adversary system of justice*, 7(1) British Journal of Law & Society 36 (1980)

R.C. Davis, E. Erez & N. Avitabile, *Access to justice for immigrants victimized by crime: the perspectives of police and prosecutors*, 12 Criminal Justice Policy Review 183 (2001)

E.M. de Jongh, *Foreign language interpreters in the courtroom: the case for linguistic and cultural proficiency*, 75(3) The Modern Language Journal 285 (1991)

F. de Londras, *Kow towing to the twin gods of time and money: the guilty plea discount*, 14(1) Irish Criminal Law Journal 14 (2004)

D. Duffy, *"Balance" in the criminal justice system: misrepresenting the relationship between the rights of victims and defendants*, 19(1) ICLJ 2 (2009)

P. Dwyer, *The Garda as prosecuting advocate in the District Court*, 9 Irish Law Times 89 (1991)

I. Edwards, *An ambiguous participant: the crime victim and criminal justice decision-making*, 44 British Journal of Criminology 967 (2004)

A. Elwork, B.D. Sales & J.J. Alfini, *Juridic decisions: in ignorance of the law or in light of It?*, 1 Law and Human Behavior 163 (1977) at 165

B. Fanning & F. Mutwarasibo, *Nationals/non-nationals: immigration, citizenship and politics in the Republic of Ireland*, 30(3) Ethnic and Racial Studies 439 (2007)

M.M. Feeley & J. Simon, *The new penology: notes on the emerging strategy of corrections and its implications*, 30 Criminology 449 (1992)

J. Fitzpatrick, *Speaking law to power: the war against terrorism and human rights*, 14(2) European Journal of International Law 241 (2003)

D. Fottrell, *Reporting to the UN Human Rights Committee—a ruse by any other name? Lessons for international human rights supervision from recent Irish experiences,* 19 Irish Law Times 61 (2001)

F. Füredi, *The only thing we have to fear is the culture of fear itself*, (2007) available at www.spiked-online.com/index.php?/site/article/3053

D. Garland, *Beyond the culture of control*, 7(2) Critical Review of International Social and Political Philosophy 160 (2004)

L. Gelsthorpe, *Back to basics in crime control: weaving in women* 7(2) Critical Review of International Social and Political Philosophy 73 (2004);

A. F. Gordon, *Abu Ghraib: imprisonment and the war on terror*, 48 Race and Class 42 (2006)

J. Griffiths, *Ideology in criminal procedure or a third 'model' of the criminal process*, 79 Yale Law Journal 359 (1970)

S. Guerin, *Criminal practice: the use of interpreters and translators in the Irish courts*, Bar Council conference on Criminal Procedure, Dublin (2004)

S. Hale, *Interpreters' treatment of discourse markers in courtroom questions*, 6(1) Forensic Linguistics 57 (1999)

S. Hale, *How faithfully do court interpreters render the style of non-English speaking witnesses's testimonies? A data based study of Spanish-English bilingual proceedings,* 4(1) Discourse Studies 25 (2002)

S. Hale & J. Gibbons, *Varying realities: Patterned changes in the interpreter's representation of courtroom and external realities*, 20 Applied Linguistics 203 (1999)

C. Hamilton, *Sentencing in the District Court: "Here be dragons"*, 15(3) Irish Criminal Law Journal 9 (2005)

M. Hall, *The relationship between victims and prosecutors: defending victims' rights?* 1 Criminal Law Review 31 (2010)

D. Healy & I. O'Donnell, Crime, consequences and court reports, 20(1) Irish Criminal Law Journal 2 (2010)

B. Hudson, *Justice in a time of terror*, 49 British Journal of criminology 702 (2009)

P. Ignazi, *The silent counter-revolution: hypotheses on the emergence of extreme right-wing parties in Europe*, 22 European Journal of Political Research 3 (1992)

J. Jackson & E. Gray, *Functional fear and public insecurities about crime*, 50 British Journal of Criminology 1 (2010)

C.J.F. Kidd, *Disciplinary proceedings and the right to a fair criminal trial under the European Convention on Human Rights*, 36 International & Comparative Law Quarterly 856 (1987)

S. Kilcommins & B. Vaughan, *A perpetual state of emergency: subverting the rule of law in Ireland*, 35 Cambrian Law Review 55 (2004)

S. Kilcommins & Barry Vaughan, *The Europeanisation of human rights: an obstacle to authoritarian policing in Ireland*, 4(4) European Journal of Criminology 437 (2007)

T. Krings, A. Bobek, E. Moriarty, J. Salamonska & J. Wickham, Migration and recession: Polish migrants in post-Celtic Tiger Ireland, 14 (2) Sociological Research Online (2009)

W. de Koster, J. van der Waal, P. Achterberg & D. Houtman, *The rise of the penal state: neo-liberalization or new political culture?* 48 British Journal of Criminology 720 (2008)

L. Loader & R. Sparks, *For a historical sociology of crime policy in England and Wales since 1968*, 7(2) Critical Review of International Social and Political Philosophy 5 (2004)

E.F. Loftus & J.C. Palmer, *Reconstruction of automobile destruction: an example of the interaction between language and memory*, 13(5) Journal of Verbal Learning and Verbal Behavior 585 (1974)

F. de Londras, *Kow towing to the twin gods of time and money: the guilty plea discount*, 14(1) Irish Criminal Law Journal 14 (2004)

M. Malloch & E. Stanley, *The detention of asylum seekers in the UK: representing risk, managing the dangerous*, 7(1) Punishment and Society 54 (2005)

P.L. Martens, *Immigrants, crime, and criminal justice in Sweden*, 21 Crime and Justice 183 (1997)

R. Matthews, *The myth of punitiveness,* 9 Theoretical Criminology 175 (2005)

M. Mileski, *Courtroom encounters: an observation study of a lower criminal court*, 5 Law and Society Review 473 (1971)

D. Morgan, *The life of a court interpreter*, 86 Graya 51(2) (1982)

R. Morris, *The face of justice: historical aspects of court interpreting,* 4(1) International Journal of Research and Practice in Interpreting 97 (1999)

R. Morris, *The moral dilemmas of court interpreting*, 1(1) The Translator 25 (1995)

R. Morris, *Interpreters and the legal process*, 146(6759) New Law Journal 1310 (1996)

R. Morris, *The gum syndrome*, 6(1) Forensic Linguistics 6 (1999)

D. McCabe, *Magistrates, peasants and the petty sessions courts: Mayo 1823-50,* V Cathair na Mart 45 (1985)

J. McCulloch & S. Pickering, *Pre-crime and counter-terrorism: imagining future crime in the 'war on terror',* 49(5) British Journal of Criminology 628 (2009)

W.M. Oliver & N.E. Marion, *Political party platforms: symbolic politics and criminal justice policy,* 19(4) Criminal Justice Review 397 (2008)

W.M. O'Barr & J.M. Conley, *Subtleties of speech can tilt the scales of justice: when a juror watches a lawyer,* 3 Barrister 8 (1976)

M. O'Connell, *Is Irish public opinion towards crime distorted by media bias?*, 14(2) European Journal of Communication 191 (1999)

I. O'Donnell, *Challenging the punitive obsession*, 8(1) Irish Criminal Law Journal 51 (1998)

I. O'Donnell, *Crime and justice in the Republic of Ireland,* 2(1) European Journal of Criminology 99 (2005)

I. O'Donnell, *Stagnation and change in Irish penal policy*, 47(2) The Howard Journal 121 (2008)

I. O'Donnell & E. O'Sullivan, *The politics of intolerance - Irish style*, 43(1) British Journal of Criminology 41 (2003)

I. O'Donnell, E. P. Baumer & N. Hughes, *Recidivism in the Republic of Ireland*, 8 Criminology and Criminal Justice 123 (2008)

Judge T. E. O'Donnell, *The Constitution, The European Convention on Human Rights Act 2003 and the District Court – a personal view from a judicial perspective*, 1 Judicial Studies Institute Journal 137 (2007)

P. O'Mahony, *Punishing poverty and personal adversity*, 7(2) Irish Criminal Law Journal 152 (1997)

P. O'Mahony, *The Courts: introduction* IN Criminal justice in Ireland (P. O'Mahony, ed.)(Dublin: Institute of Public Administration, 2002)

T. O'Malley, *Principles of sentencing*, 1(2) Irish Criminal Law Journal 138 (1991)

T. O'Malley, *Time served: the impact of sentencing and parole decisions on the prison population*, Paper delivered to Irish Penal Reform Trust, Morrison Hotel, Dublin, June 28, 2010

E. O'Sullivan & I. O'Donnell, *Coercive confinement in Ireland: the waning of a culture of control, punishment and society*, 9(1) The International Journal of Penology (2007)

H.L. Packer, *Two models of the criminal process*, 13 University of Pennsylvania Law Review 1 (1964)

C. Pantazis & S. Pemberton, *From the 'old' to the 'new' suspect community: examining the impacts of recent UK counter-terrorism legislation*, 49 British Journal of Criminology 646 (2009)

A.C. Rigney, *Questioning in Interpreted testimony*, 6 Forensic Linguistics 83 (1999)

Judge D. Riordan, *Immigrants in the criminal courts*, 2 Judicial Studies Institute Journal 95 (2007)

F. Roberto, *The press in the methodology of data collection from newspapers*, 20(1) Historical Methods 5 (1987)

M. Rogan, *Crime control without the criminal law? Perspectives on emerging strategies of dealing with crime—Part I,* 25 Irish Law Times 23 (2007)

M. Rogan, *Crime control without the criminal law? Perspectives on emerging strategies of dealing with crime—Part II,* 25 Irish Law Times 42 (2007)

A. Ryan, *The Criminal Justice (Drug Trafficking) Act 1996: decline and fall of the right to silence?*, Irish Criminal Law Journal 22 (1997)

A. Ryan, *Arrest and detention: a review of the law*, 10(1) Irish Criminal Law Journal 2 (2000)

N. Nic Shuibhne, *State duty and the Irish language*, 4(1) Dublin University Law Journal 33 (1997)

M. B. Shulman, *No hablo ingles: court interpretation as a major obstacle to fairness for non-English speaking defendants*, 46 Vanderbilt Law Review (1993)

S. Snacken, *Resisting punitiveness in Europe?,* 14 Theoretical Criminology 273 (2010);

J. Bainbridge Stafford, *No comprendo: the non-English speaking defendant and the criminal process*, 68(1) Journal of Criminal Law and Criminology 15 (1977)

P.M. Tiersma, *The judge as linguist*, 27 Loyola of Los Angeles Law Review 269 (1993)

M. Tonry, *Explanations of American punishment policies,* 11(3) Punishment and Society 377 (2009)

B. Vaughan, *The potential dangers of risk analysis for the criminal justice system*, 12(3) Irish Criminal Law Journal 3 (2002)

B. Vaughan, *The Maginot line of Irish criminology part I: The rise of the regulatory impulse*, 19(2) Irish Criminal Law Journal 34 (2009)

B. Vaughan & S. Kilcommins, *The governance of crime and the negotiation of justice*, 10 Criminology and Criminal Justice 59 (2010)

J.W.P Veugelers, *Right-wing extremism in contemporary France: a "silent counterrevolution"?*, 41 Sociological Quarterly 19 (2000)

S. Walklate & G. Mythen, *How scared are we?* 48 British Journal of Criminology 209 (2007)

D. Walsh, *The Criminal Justice Act, 2006: A crushing defeat for due process values?* 1 Judicial Institute Studies Journal 44 (2007)

M. Welch & L. Schuster, *Detention of asylum seekers in the US, UK, France, Germany, and Italy: a critical view of the globalizing culture of control*, 5 Criminal Justice 331 (2005)

International legal instruments

United Nations

Universal Declaration of Human Rights, Dec. 12, 1948, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., at 72, U.N. Doc. A/810

International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980)

Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (entered into force Sep. 3, 1981)

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Dec. 9, 1988, G.A. Res. 43/173, U.N. Doc. A/43/49

Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (entered into force Sep. 2, 1990)

Human Rights Committee

Human Rights Committee General Comment No. 13, 8, April 13, 1984, *Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14),* (21st Session, 1984), Compilation of General Comments & General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 14 (1994)

HRC General Comment No. 23, *The Rights of Minorities (Art. 27),* April 8, 1994, U.N. Doc. CCPR/C/21/Rev.1/Add.5

Human Rights Committee General Comment No. 32; Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007)

Regional legal instruments

Council of Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 226 (entered into force Sept. 3, 1953)

European Union

Treaty on European Union [TEU, Maastricht Treaty], 1992 O.J.C. 191/01, Feb. 7, 1992 (entered into force Nov. 1, 1993)

The Tampere European Council (Presidency Conclusions) Oct. 15-6, 1999

Charter of Fundamental Rights of the European Union, 2000 O.J.C. 364/1, signed in Nice Dec. 7, 2000

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 2007 O.J.C. 306/01, Dec. 13, 2007 (entered into force Dec. 1, 2009)

Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, 2001 O.J.C. 12/02, Jan. 15, 2001

European Commission Green Paper, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, COM (2003) 75, Feb. 19, 2003

Proposal for Council Framework Decision on certain Procedural rights in Criminal Proceedings throughout the European Union, Brussels, 28 April 2004, COM (2004) 328 final, 2004/0113 (CNS)

Council of the European Union, Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, 10287/07, Brussels, 5 June 2007 COM(2004) 328, 28.4.2004

Proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings, COM (2009) 338 final 2009/0101 (CNS), July 9, 2009

Council of the European Union, Resolution on a Roadmap for strengthening procedural rights of suspected and accused persons in criminal proceedings, O.J.C. 295/01, Dec. 4, 2009

European Commission, Proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, COM (2010) 82 final, 2010/0050 (COD), March 9, 2010

Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, PE-CONS 27/10, Sep. 24, 2010 (not yet published in the Official Journal)

Domestic instruments

Ireland

Irish Constitution 1937

Criminal Justice Act, 1951, No. 2/1951

Criminal Justice Act, 1984, No. 22/1984

Criminal Procedure Act, 1967, No. 12/1967

Criminal Law (Jurisdiction) Act 1976, No. 14/1976

Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987, S.I. No. 119/1987

Criminal Justice Act 1993, No. 6/1993

Criminal Justice (Drug Trafficking) Act 1996, No. 29/1996

Criminal Law Act 1997, No. 14/1997

Criminal Justice Act 1999, No. 10/1999

Criminal Justice Act 2007, No. 29/2007

Criminal Justice (Amendment) Act 2009, No. 45/2009

Bail Act 1997, No. 16/1997

Proceeds of Crime (Amendment) Bill 2003, No. 27/2003

Refugee Act, 1996, No. 17/1996

European Convention on Human Rights Act 2003, No. 20/2003

Official Languages Act 2003, No. 32/2003

Victims' Charter and Guide to the Criminal Justice System, Department of Justice, Equality and Law Reform, 1999

United Kingdom

Statute of Pleading, 1362, 36 Edw. 3 [Stat. 1] Ch. 15 [England]

Courts of Justice Act 1731, 4 Geo. 2, Ch. 26 [England]

United Nations: Communications of the Human Rights Committee

Dominique Guesdon v France, Communication No. 219/1986, U. N. Doc. CCPR/C/39/D/219/1986 (1990)

Yves Cadoret and Hervé Le Bihan v France, Communication No. 221/1987, U.N. Doc. CCPR/C/41/D/221/1987 (1991)

Harward v Norway, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991 (1994)

Safarmo Kurbanova v Tajikistan, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002 (2003)

Nallaratnam Singarasa v Sri Lanka, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004)

Michael and Brian Hill v. Spain, Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (1997)

Victor P. Domukovsky, Zaza Tsiklauri, Petre Gelbakhiani and Irakli Dokvadze v Georgia, Communications Nos. 623/1995, 624/1995, 626/1995, 627/1995, U.N. Docs. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995, CCPR/C/62/D/627/1995 (1998)

Shukuru Juma v Australia, Communication No 984/2001, U.N. Doc. CCPR/C/78/D/984/2001 (2003)

Nallaratnam Singarasa v Sri Lanka, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004)

Council of Europe: European Court of Human Rights

Isop v Austria, App. 808/60, 5 YB 108 (1962)

X v Austria, App. No. 6185/73, 2 DR 68 (1975)

Luedicke, Belkacem & Koç v Germany, 2 E.H.R.R. 149 (Ser. A No. 29) (Nov. 28, 1978)

K v France, 35 DR 203 (1983)

Öztürk v Germany, 6 E.H.R.R. 409 (Ser. A No. 73) (Feb. 21, 1984)

Colozza v Italy, App. No. 9024/80, 7 E.H.R.R. 516 (February 12, 1985)

Bideault v France, App. No. 11261/84, 48 DR 232 (1986)

Brozicek v Italy, App. No. 10964/84, 23 Eur. Ct. H. R. (Dec. 19, 1989)

Kamasinski v Austria, App. No. 9783/82, 168 Eur. Ct. H. R. (Ser. A) (Dec. 19, 1989)

SEK v Switzerland, App. No. 18595/91 (Jan. 12, 1994)(unreported)

Stanford v United Kingdom, App. No. 16757/90 (Series A, No. 282-A)(Feb. 23, 1994)

Roos v Sweden, App. No. 19798/92 (April 6, 1994)

Santa Cruz Ruiz v UK, App. No. 26109/95 (Oct. 22, 1997)(unreported)

Zana v Turkey, App. No. 18954/91, 94 Eur. Ct. H. R. (Nov. 25, 1997)

Güngör v Germany (dec.), App. No. 31540/96 (May 17, 2001)

Čonka v Belgium, App. No. 51564/99 (Feb. 5, 2002)

Cuscani v UK, App. No. 32771/96, 36 E.H.R.R. 2 (Sep. 24, 2002)

Tasos Asproftas v Turkey, App. No.16079/90, Eur. Crt. H.R. (Sep. 26, 2002)

Despo Andreou Papi v Turkey, App. No. 16094/90 (Sep. 26, 2002)

Costas Strati v Turkey, App. No. 16082/90 (Sep. 26, 2002)

Eleni Vrahimi v Turkey, App. No. 16078/90 (Sep. 26, 2002)

Lagerblom v Sweden, App. No. 26891/95 (Jan. 14, 2003)

Abkingöl v Germany, App. No. 74235/01 (Nov. 18, 2004)

Hermi v Italy, App. No. 18114/02 (Oct. 18, 2006)

Ladent v Poland, App. No. 11036/03 (March 18, 2008)

Işyar v Bulgaria, App. No. 391/03 (Nov. 20, 2008)

Amer v Turkey, App. No. 25720/02 (Jan. 13, 2009)

Protopapa v Turkey, App. No. 16084/90 (Feb. 24, 2009)

Baka v Romania, App. No. 30400/02 (July 16, 2009)

Diallo v Sweden, App. No. 13205/07 (Jan. 5, 2010)

Domestic cases

Ireland

R. v Burke [1858] 8 Cox C.C. 44

O'Coleain v D.J. Crotty [1927] 61 I.L.T.R. 81

Attorney General v Joyce and Walsh, [1929] I.R. 526

The State (Buchan) v Coyne [1936] 70 I.L.T.R. 185

Christie v Leachinsky [1947] AC 573

Melling v Ó Mathghamhna [1962] I.R. 1

Conroy v Attorney General [1965] I.R. 411

State (Healy) v Donoghue [1976] I.R. 325

Clune v D.P.P. and Clifford [1981] I.L.R.M. 17

O'Monachain v An Taoiseach, unreported, Supreme Court, July 16, 1982

An Stát (Mac Fhearraigh) v Mac Gamhna, unreported, High Court, July 1, 1983

Ó Domhnaill v Merrick [1984] I.R. 151

Coughlan v Patwell [1993] 1 I.R. 31

D.P.P. v Ivan O'Kelly, unreported, February 10, 1999

MacCarthaigh v Ireland [1999] 1 I.R. 2002

Naomitsu Kanaya v Minister for Justice, Equality and Law Reform [2000] 2 I.L.R.M. 503

Orange Communications Ltd v Director of Telecoms (No.2) [2000] 4 I.R. 159

Benson v Minister for Justice, Equality and Law Reform, unreported, High Court, April 2, 2001

Youssef Benderare v The Minister for Justice Equality and Law Reform, Conor Bowman sitting as The Appeals Authority, unreported, High Court, Smyth J., October 2, 2002

Fuwa Oladale Olawale v The Office of the Refugee Applications Commissioner, The Minister for Justice, Equality and Law Reform, unreported, High Court, Smyth J., October 3, 2002

G.K. v Minister for Justice, Equality and Law Reform [2002] 1 I.L.R.M. 81

MacCarthaigh v Minister for Justice, Equality and Law Reform [2002] 6 I.C.L.M.D. 70

Petrea Stefan v Minister for Justice, Equality and Law Reform, the Refugee Appeals Authority Ireland and the Attorney General [2002] 2 I.L.R.M. 134

Skender Memishi v The Refugee Appeals Tribunal, Rory McCabe, The Minister for Justice, Equality and Law Reform, The Attorney-General, and Ireland, unreported, High Court, Peart J., June 25, 2003

Nadya Zabolotnaya, Vladimir Zabolotnaya v Minister for Justice, Equality and Law reform, Refugee Appeals Tribunal, Refugee Applications Commissioner, Ireland and the Attorney General, unreported, High Court, November 1, 2004

D.P.P. v Ismet Ceka [2004] I.E.C.C.A. 25

D.P.P. v Yu Jie [2005] I.E.C.C.A. 95

Grace Ecdobar v John S. Ryan as Chairperson of the Refugee Appeals Tribunal [2005] 1 I.L.R.M. 113

Wei Sung Jiang v D.P.P., unreported, High Court, Peart J., November 16, 2005

Daud Abdilahi Gilingil v Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Attorney General Ireland; Human Rights Commission, unreported, High Court, Feeney J., June 1, 2006

Omaar Aly Sherif v Refugee Appeals Tribunal, unreported, High Court, Herbert J., November 16, 2006

Fitzpatrick & Anor v K. & Anor [2006] I.E.H.C. 392

M.U.Z. v The Refugee Appeals Tribunal (Tribunal Member, Elizabeth O'Brien) and the Minister for Justice, Equality and Law Reform [2007] 1412 J.R. (unreported, High Court, Edwards J., February 12, 2010)

MacCárthaigh v An tAire Dlí agus Cirt, ex tempore March 6, 2008

D.P.P. v Adriano Martins Costa & Jose Claudio Batista [2008] I.E.C.C.A. 1

A.Z.N. v Refugee Appeals Tribunal & Anor [2009] I.E.H.C. 432

S.O.A. v The Minister for Justice, Equality and Law Reform and Judy Blake, Sitting as the Refugee Appeals Tribunal, unreported, High Court, Clark J., March 24, 2009

M.M.A. v The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal, unreported, High Court, Clark J., May 12, 2009

S.I.M. v Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform and Human Rights Commission [2009] I.E.H.C. 323 (unreported, High Court, Cooke J., July 3, 2009)

The People (at the Suit of the D.P.P.) v Vasile Vardoshilli, unreported, Court of Criminal Appeal, Finnegan J., February 9, 2009

The People (at the Suit of the D.P.P.) v Valdas Valiukas, unreported, Court of Criminal Appeal, Kearns J., April 27, 2009

M.A.W. v Refugee Appeals Tribunal and The Minister for Justice, Equality and Law Reform [2009] I.E.H.C. 330 (unreported, High Court, Cooke J., July 8, 2009)

Radzuik v The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal, unreported , High Court , Cooke J., July 24, 2009

T.M.A. v The Minister for Justice, Equality & Law Reform and the Refugee Appeals Tribunal [2009] I.E.H.C. 606 (unreported, High Court, Cooke J., December 9, 2009)

The People (at the Suit of the D.P.P.) v Stanislaus Stokowski, unreported, Court of Criminal Appeal, Finnegan J., December 17, 2009

A.A. v The Minister for Justice, Equality and Law Reform & Olive Brennan sitting as The Refugee Appeals Tribunal [2010] I.E.H.C. 143

F. & Anor v Refugee Appeals Tribunal [2010] I.E.H.C. 134

T.D. v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform [2010] I.E.H.C. 125 (unreported, High Court, Cooke J., April 28, 2010)

Australia

Gaio v R. [1960] 104 CLR 419

Gradidge v Grace Bros. Pty. Ltd. [1988] 93 FLR 414

Canada

Andre Mercure v Attorney General for Saskatchewan [1988] S.C.R. 234

R v Tran [1994] 2 S.C.R. 951

R v Dow [2009] Q.C.C.A. 478 (Quebec Court of Appeal)

Britain

R. v Lee Kun [1915] 11 Cr. App. R. 293

R. v Attard [1958] 43 Cr App R 90

R v Iqbal Begum [1991] 93 Cr. App. R. 96

R. West London Youth Court, Ex p. N [2000] 1 W.L.R. 2368, [2000] 1 All E.R. 823

United States

Gregory v Chicago, R. I. & P. R. Co. 124 NW 797 (1910)

Gaio v R. [1960] 104 CLR 419

United States v Desist, 384 F.2d 889, 901-02 (2d Cir.1967), aff'd, 394 U.S. 244 (1969)

United States ex rel. Negron v the State of New York, 310 F. Supp. 1304 (1970) at 389 and 434 F.2d 386 (1970)

United States v Carrion, 488 F.2d 12, 14 (1st Cir.1973), cert. denied, 416 U.S. 907 (1974)

State v Rios, 12 Ariz. 143, 144 539 P.2d 900, 901 (1975)

United States v Anguloa 598 F 2d 1182 (1979)

People v Kendricks, 459 N.E. 2d 1137, 1139 (Illinois Appeal Court, 1984)

People v Resendes 210 Cal Rptr 609 (1985)

United States v Mayans, 17 F.3d 1174, 1179-80 (9th Cir. 1994)

Diaz-Marroquin v Immigration and Naturalization Service [2001] U.S Court of Appeals for the Ninth Circuit, U.S. App. Lexis 2352

Hong Kong

R. v Kwok Leung and Others [1909] Hong Kong L.R. 161

Mauritius

Kunnath v State [1993] 1 W.L.R 1315, [1993] 4 All E.R. 30, 98 Cr. App. R. 455

Reports

United Nations Human Rights Committee

Concluding Observations of the Human Rights Committee on Ireland's state report, 3 August 1993, UN Doc. CCPR/C/79/Add.21

Concluding Observations of the Human Rights Committee on Ireland's state report, 19 July 2000, UN Doc CCPR/C/SR 848

European Commission

T. Spronken & M. Attinger, *Freedom, security and justice- procedural rights in criminal proceedings: existing level of safeguards in the European Union*. European Commission, 12 December 2005

E. Hertog & J. van Gucht, *Executive summary: Status quaestionis*, available at www.agisproject.com/Documents/status%20 Quaesionis%20Summary.pdf (AGIS Project JLS/2006/AGIS/052)

Spronken and Attinger, *Freedom, Security and Justice; Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*. European Commission, 12 December 2005, at http://arno.unimaas.nl/show.cgi?fid=3891

Ireland

Courts Service

Courts Service Annual Report (various years)

Courts Service Strategic Plan 2005-2008

Courts Service Strategic Plan 2008-2011

J. Jackson & S. Doran, *A study of the jurisdiction of the criminal courts in Ireland*, Report to the Working Group on the Jurisdiction of the Courts (Courts Service, 2003)

Highlighting Ireland's ethnic diversity, Courts Service Annual Report 2005

Changing Ireland, Courts Service News, June 2006

From Irish to Urdu, Courts Service News, June 2006

Interpreters keep the message clear, Courts Service News, July 2008

Prison Service

Irish Prison Service Annual Report (various years)

The Katherine Howard Foundation and the Irish Penal Reform Trust, (2007) The Whitaker Committee 20 years on: lessons learned or lessons forgotten?

Office of the Refugee Applications Commissioner, Information leaflet for applicants for refugee status in Ireland, Sep. 2003

NCCRI

National Consultative Committee on Racism and Interculturalism, *Interpreting, translation and public bodies in Ireland: the need for policy and training*, Advocacy Paper 5 (2007)

National Consultative Committee on Racism and Interculturalism & Office of the Minister for Integration, Developing quality, cost-effective interpreting and translating services for Government service providers in Ireland (2008)

Immigrant Council of Ireland

Immigrant Council of Ireland, Press Release: Level of callers to ICI does not support rhetoric of migrants 'going home', 16 July 2010

Irish Translators' and Interpreters' Association (ITIA)

Irish Translators' and Interpreters' Association (ITIA), Submission to the Working Group on the Jurisdiction of the Courts (2002)

Irish Translators' and Interpreters' Association (ITIA), Submission on the Courts Service Statement of Strategy 2008-2011 (2008)

Irish Translators and Interpreters Bulletin (various dates)

M. Phelan, *The courts service interpreting tender*, ITIA Bulletin June 2005

E. Hayes, *Interpreting services cost courts €2m*, ITIA Bulletin August 2007

M. Phelan, *Court interpreters in the news (for the wrong reasons),* ITIA Bulletin October 2007

Donegal Democrat reports on lack of court interpreters [Donegal Democrat 25 October 2007], ITIA Bulletin October 2007

E. Hayes, *Editorial*, ITIA Bulletin October 2007

U. Fuehrer, *Cowboys and Indians,* ITIA Bulletin February 2008

CSO

CSO, Census 2006: Non-Irish nationals living in Ireland

CSO, Population and Migration Estimates, April 2010

Other

Dáil Debates, Volume 638: Written answers – EU Directives, Brian Lenihan, Minister for Justice, Equality and Law Reform, Sep. 26, 2007

United Kingdom

Home Office, Justice for All, CM 5563 (2002)

House of Commons Justice Committee, The Crown Prosecution Service: gatekeeper of the criminal justice system, Ninth Report of Session 2008-09, HC 186 (2009)

UK Association of Police and Court Interpreters (APCI), Position Paper: Outsourcing of language services in England and Wales (2010) available at http://www.eulita.eu/sites/default/files/APCI_position_summary.pdf

Australia

Australia Attorney-General's Department, Review of Commonwealth Criminal Law (Australia) (Canberra: Australian Govt. Pub. Service, 1991)

Newspaper articles

[by date]

M. Phelan, *Lost in translation: many court interpreters fail test*, Letter to Irish Examiner

R. Riegel, *Translator shortage causes havoc in court schedules*, Irish Independent, 14 May 2001

C. Coulter, *Time to look at Garda rules for non-nationals*, Irish Times, 4 March 2003

C. Coulter, *The trials of foreigners translate into a difficulty*, 10 March 2003

Judge attacks low standards of translators, Irish Independent, 28 January 2004

K. Donaghy, *Trying times for courts as translation costs soar*, Irish Independent, 3 May 2004

P. Melia, *Courts are set to spend €750,000 on languages service*, Irish Independent, 19 July 2004

Concern at judge's call for foreigners to pay interpreters, Irish Times, 14 May 2005

Judge refuses to appoint translator for man accused of handling stolen phone, Irish Independent, 28 July 2005

T. Felle, *€550,000 payout for court interpreters*, Irish Independent, 17 August 2005

€15m is lost in translation by the courts, Irish Independent, 20 January 2006

K. Holmquist, *Act now, while times are good*, Irish Times, 14 March 2006

C. O'Brien, *Are we lost in translation?*, Irish Times, 4 April 2006

B. Heffernan, *Recruitment of court interpreters is put in the dock!,* Irish Independent, 6 June 2006

M. Phelan, *Interpreting in the courts,* Letter to the Irish Times, 9 June 2006

Translation firm sees business head for €1m, Irish Independent, 1 September 2006

G. Deegan, *Costs are soaring as more interpret in court*, Irish Independent, 22 November 2006

Growing demand exposes poor translation service, Irish Times, 27 April 2007

Irish lead resistance to draft EU law on suspects' rights, Irish Times, 12 June 2007

J. O'Brien, *Courts body to fork out £2m on interpreters as demand rises*, Irish Independent, July 2007

Judge dismisses 'incompetent' Polish translators, Irish Examiner, 12 October 2007

FG line on interpreters breaches human rights, Irish Examiner, 5 January 2008

M. Carolan, *Irish translation sought in criminal trial*, Irish Times, 7 March 2008

J. Smith, *European Commission threatens Irish State with legal action over Lionbridge contract*, Irish Times, 20 September 2008

N. Anderson, *The clock ticked on towards two before the legal sparring began*, Irish Independent, 20 November 2008

Up to 1,300 Poles leaving Ireland every week, Irish Independent, 8 December 2008

K. Doyle, *100,000 workers leave Ireland as pressure on jobs grows*, Herald.ie, 29 December 2008

M. Nee, *Murder case postponed for interpreter no-show*, Galway Advertiser, 8 January 2009

A. Phelan, *No English, just foul language*, Irish Independent, 15 January 2009

3,000 Poles leave Ireland every month, Sunday Tribune, 18 January 2009

R. Mac Cormaic, Irish Times, 19 February 2009

M. Tighe, *Interpreters in court pay row*, Irish Times, 29 March 2009

C. Taylor, *Ireland brought to court over contract*, Irish Times, 14 April 2009

C. Lally, *Interpreter system poor – GRA*, Irish Times, 29 April 2009

F. Black, *Immigrants leaving in thousands: applications for PPS numbers by foreign nationals plunge*, Irish Independent, 24 December 2009

Proposal to bolster defendants' rights to interpretation, Irish Times, 15 March 2010

Fines Bill, Irish Times, 16 March 2010

F. Gartland, *Professional fees for criminal legal aid work cut by 8%*, Irish Times, 27 March 2010

C. O'Brien, *No quality controls laid down for courts and Garda translators,* Irish Times, 7 June 2010

C. O'Brien, *Hundreds of court, Garda interpreters have no qualification,* Irish Times, 7 June 2010

C. Keena, *Translation company pays €1.67m to Revenue*, Irish Times, 15 September 2010

Websites

World Prison Population Rates per 100,000 of the national population, available at http://chartsbin.com/view/egq

Appendix A: District Court jargon

Table 1: Archaisms used in addressing the court

Expression	Context	Meaning
If it please you, Judge **If it please the court** **May it please, Judge** **May it please the Judge** **May it please the court** **May it please**	Barrister: If it please you, Judge, I appear for Mister X Judge: I am refusing bail Barrister: If it please the court Solicitor: I'd ask you to consider an application for legal aid Judge: Not on the basis - he's not at risk Solicitor: May it please	Flexibly used in numerous contexts – usually by solicitors/barristers - and difficult to give a precise definition; most generally it is an expression of deference to the court. It also tends to be used to indicate acceptance of a judge's order, and particularly of a decision that is not in the defendant's favour
Obliged **Much obliged**	Obliged Much obliged I'm obliged I'm very much obliged to the court	Thank you. Used by solicitors/barristers as well as the Gardaí, usually the court presenter. It usually marks the end of a case

Table 2: Words not used in everyday language

Term	Used in context	Meaning
bench warrant	Prosecution: My application would be for a bench warrant	In the District Court bench warrants are often issued when a person fails to turn up for a court date. If ordered by the judge the Gardaí can arrest that person and bring them before the court (the bench) to address the warrant
bond **bail bond** **peace bond** **probation bond**	Judge: Convict, 200 Euro, one month to pay, 10 days in default. Recognisance on own bond, 50 Euros You are now discharged from the conditions of your bail bond Judge: Enter into a peace bond for 12 months on own bond of 1000 Euro. The terms of the bond include ... Judge: He will enter a Probation bond, 12 months, in his own bond 200 Euro - 6 months, 5 months suspended. Probation bond, 1 year, 500	A sworn undertaking by sureties in respect of a defendant's adjudged liability in proceedings. May include numerous conditions

book of evidence **[the book]**	Judge: Consent to remand, [date], for book of evidence - How are you getting on with the book? Prosecution: The guard is about to serve the book	The book of evidence, prepared by the prosecution where a case goes forward for trial on indictment, contains the prosecution's evidence and is served on the defendant in court
indictable **Indictment**	Prosecution: It is purely an indictable matter, and I would be seeking a return to trial on that - The DPP now consents to trial by indictment	Triable/to be tried by jury
peremptory	Judge: 4th August, 2.30 peremptory hearing	There is no excuse for non-compliance
précis	Barrister: The application is to put it back for one week, and for a précis	A statement of evidence
remand	Judge: Remand on continuing bail to [date] for election, plea or date Prosecution: Application to remand in custody	When the hearing is adjourned to a future date, the defendant is either admitted to bail or kept in custody
recognisance	Judge: I'll fix recognisance in his own bond	A recognisance is a bond, with or without sureties, that is acknowledged before or a court of authorised officer, and enrolled in a court of record. Its purpose is to secure the performance of some act by the person bound, such as to appear in court, keep peace, or be of good behaviour
second calling	Solicitor: I'd like to ask for second calling	Where the case is called later for a second time. Logically third callings are also possible, though less common
summary disposal **summary justice** **summary trial**	Prosecution: There is consent to summary disposal Prosecution: The DPP has agreed to summary justice Prosecution: Consent to summary trial in all matters	Whereby the offence is tried in the District Court without a jury
Summons	Barrister: No summons has been received	The document that requires the person in question to attend court

Table 3: Words specific to a legal environment, but also in common usage

Term	
accused	judge
allegation	judgment
bail	lawyer
barrister	legal aid
convict	(not) guilty plea
custody	oath
detain (detention)	probation
evidence	sentence
guilty plea	solicitor

Table 4: Everyday words used in a different sense or having a specific meaning in the District Court context

Term	Example	Meaning
adjourn (adjournment)	Solicitor: I'm looking to adjourn that by consent Solicitor: I am seeking an adjournment Judge: I'll adjourn sentence for a pre-sentence report Judge: We'll adjourn for five minutes	A hearing is suspended or put off until a future date
appear (appearance)	Judge: Any appearance by or on behalf of Mr. X? Barrister: I appear for the defendant/Mr. X	To appear: to be before the court To appear for: to represent
application (apply)	Prosecution: My application would be for a bench warrant/remand Advocate: There is an application for bail /counsel /disclosure /a précis /to put it back	Requests made to the court
caution	Garda: He made no reply after caution Judge: The court is obliged to caution you that if you intend to use an alibi for your defence you must furnish this in writing to the prosecution within 14 days	To inform someone of their legal rights or obligations: the Garda cautions a person on arrest, and when sending a case forward for trial to a higher court, a caution is made about using an alibi
consent	Judge: Is that by consent? / Is there consent? Prosecution: The DPP consents to summary disposal.	This can refer to the defendant's consent to be remanded or the DPP's consent to summary trial
consult (consultation)	Judge: Did you have a consultation with your solicitor? Solicitor: I haven't had a chance to consult with my client.	Usually refers to the meeting between lawyer and client
conviction (convict)	Judge: Any previous convictions? Judge: Convict, fine 100 Euro. Convict, 2 months from 13th of September	Usually used in reference to previous convictions, or to announce sentence
directions	Judge: Do you have directions from the DPP? Prosecution: The DPP has directed trial on indictment	Instructions from the Director of Public Prosecutions as to whether the offence is to be tried summarily or sent forward for trial on indictment
disclosure	Barrister: We are seeking disclosure	Whereby the prosecution reveals or discloses their evidence

elect	Solicitor: He is electing this court	Where the defendant has the right to trial by jury but may choose to have their case tried summarily in the District Court
facts	Judge: I will hear the facts	The facts or circumstances of the alleged offence
flight risk	Prosecution: There would be an objection to bail; he is a flight risk. He has no ties here; no family, no job.	There is a real danger that the person will leave the jurisdiction while on bail and not turn up to trial
go back	Prosecution: If it could go back to [Court] in 2 weeks time Judge: Your case has to go back for a week	A case can 'go back' to another judge (or court) to deal with certain issues, or it can be remanded or adjourned to another date
hearing	Judge: The hearing is set for the 10th of June at 2pm Solicitor: I'm seeking a date for hearing	On a not guilty plea the case proceeds to a hearing
instructions	Judge: Do we have instructions? Solicitor: I haven't had a chance to take instruction from Mr. B	Depending on the context 'instructions' may be those of the DPP with regard to summary trial (Jurisdiction), or they may be the instructions given by the defendant to the solicitor/ barrister
jurisdiction	Judge: I accept jurisdiction on all sheets - Have we dealt with jurisdiction under Section 2?	In the District Court this usually refers to whether or not a hybrid offence will be tried summarily or on indictment
liberty to reapply	Judge: For mention with liberty to reapply	The next court date is fixed, but should the reason for the remand by resolved earlier, there is liberty to request an earlier court date
(the) list	Judge: Put it to the end of the list for proper consultation Solicitor: It's his first time on the list	The actual court list with the names of all the defendants and usually the names of the prosecution Garda and the number of offences. Can also be used more abstractly to refer to the order in which cases are heard or to a person's record of appearing before the court
mention	Judge: Remand, [Date] at 10.30 for mention. All sheets. Judge: Is that for hearing or for mention?	The first stage a case goes through in the system – it is mentioned

mitigation	Judge: What's going on in his life? Anything in mitigation?	The provision of factors that mitigate the severity of the offence
on her/his feet	Judge: Would you go and see if he's on his feet?	Actively participating in court
order	Judge: An order for précis and CCTV where applicable Judge: I have a number of orders. First, the sentence is adjourned to this court on [date] for a community service report. Second, there is an order for compensation: €49,840 to be discharged by monthly instalments of 500. In respect of the second offence, 5 months consecutive, adjourned for community service report. A compensation order will be served on you. There are consequences regarding non-compliance with this order.	Anything the court orders to be done; the court may order the Prosecution to furnish evidence or make orders in sentencing an offender; fines, custodial sentences, community service order, probation order and so on. A judge may make, conclude or vacate an order (which annuls it). An order may refer to one specific thing (a High Court order, indictment order, exclusion order, safety order); or it can be used in more general reference to what the court orders. The word is also used in other senses, perhaps most notably in the contexts of order in court, public order and order an interpreter
plead (plea)	Judge: How do you plead? Advocate: We are pleading, Judge - The application is to plead - There is a plea of guilty	To say that you are guilty or not guilty; a plea is 'entered'. It is also possible to plead law, though in practice in the District Court generally it generally refers to pleading guilty or not guilty
represent (represented)	Judge: The court notes that the defendant is not legally represented Advocate: I'm representing Mr. X / the Minister	Acting on behalf of, acting as the legal advocate for
return (to trial)	Judge: Mr. X, this court is now returning you for trial to the present sittings of the Circuit Court	Send forward for trial on indictment in a higher court
serve (a sentence)	Judge: If he doesn't have the money he will have to serve 21 days	Spend time in prison

serve (the book)	Judge: Has the book been served? Prosecution: All charges on indictment please, the Guard is about to serve the book.	If the case is proceeding to trial on indictment, a book of evidence must officially be given (served) to the defendant by the prosecution in court. Other orders such as a summons may also be served on the defendant
sheet(s)	Prosecution: One sheet – strike out Judge: It's not noted on that sheet	The charge sheet; the piece of paper on which the details are written of the person being charged with an offence by the Gardaí
stand	Judge: If you want to take instructions I can let it stand Advocate: If you could let it stand to permit me to consult with the defendant	If the case is called and one of the parties is not ready to go ahead it may be allowed to stand, and called again later
strike (out)	Judge: Strike out Section Four. That leaves us with a Section 49. Prosecution: Strike out please, Judge Solicitor: Application to strike out	If an offence is struck out, the prosecution is dropped. It often happens if the prosecuting Garda fails to turn up and has not instructed the court presenter to proceed, and the Gardaí ask for strike outs for various reasons

submission (submit)	Judge: I'm making my judgment; have you any more submissions or are you going to interrupt as I go along? Advocate: In my respectful submission, he is a man with two young children. I submit the Garda didn't tell him in full where the power of search was from.	In the District Court, submissions often represent what the solicitor/barrister submit in defence or explanation of their client's actions, but legal submissions can also be made, and forms or documents such as a statement of means or a passport can be submitted to the court
take into account/ take into consideration	Judge: Convict and take into account	When a person is convicted of an offence, they can plead guilty to another offence and ask to have it taken into consideration; in this case it is noted with the record of sentence, and the accused cannot be prosecuted for that offence unless the conviction is reversed in an appeal
travel	Judge: Garda X's case can travel with that order	If more than one offence is before the court, and one of them is being sent back to another District Court judge, the offences may be kept together, and allowed to 'travel' together
warrant	Garda: Application to remand in custody; he has eight previous warrants	A written authority to execute process; e.g. a warrant may be issued for a person's arrest to have them brought before the court

Appendix B: Unrepresented French defendant

The following scene takes place in the Rural Court on a Thursday morning in November, 2009. Judge Z is sitting, and the defendant, a young French man who is working in the town, has been called. He arrives without a solicitor.

Judge: "What is your understanding of the English language? I mean, can you speak English?"

Defendant: "Yeah."

Judge: "Do you want the assistance of an interpreter?"

Defendant: [Doesn't understand; the question is repeated several times]

Defendant: "No."

Judge: "Comprends?"

Defendant: "I'm all right."

(...)

Judge: "May I ask you whether it is your wish or aspiration to have legal representation?"

Defendant: [Looks at Judge in confusion; clearly doesn't understand]

Judge: "Do you want to pay for the professional services of a lawyer?"

Defendant: "Yeah."

Judge: [making a note] "Yes."

Defendant: [Suddenly unsure] "I already do. I already pay the fine."

Judge: [sighs] "Let's start again." [Asks in an equally complex manner if he wants a solicitor]

Defendant: *Silence* [Doesn't seem to understand the question]

Judge: "Well, your English isn't that good, and my French is disastrous. Can you come back at 2.15?"

Defendant: "Yeah."

Judge: "I'll try to get a French interpreter for then."

The Judge is about to adjourn the case when another young man appears beside the defendant.

Judge: "You've a Dublin accent, good man! What's your competence in the French language?"

Friend: "I don't speak French. I'm here to help him to understand. He has good English but with the mic he couldn't hear."

Judge: [laughing] "Agh now, if you have complaints about the P.A. system, direct them to [the Courts Service]. It has nothing to do with me – I just do my best!"

[Court laughs]

Friend: "He doesn't want a solicitor. He wants to deal with it today."

Judge: "I have obligations..."

[Asks if he wants to apply for the assistance of a solicitor under the Criminal Justice Legal Aid Act]

Defendant: "No."

Judge: [noting] "Legal Aid declined. (....) Inspector X will go slowly."

Inspector: [Facts: the accused had been in town on the date in question. He was drunk; he had told three Gardaí to fuck off and called two female Gardaí bitches. Cannabis was found on his person]

Judge: "What work do you do here?"

Defendant: "I am a pestrry chiff."

[The defendant's accent is so heavy, it is very difficult to understand him]

Judge: [Flummoxed] "You're a what?!!"

Defendant: "Pest-rry chiff" [pause] "Chiff."

Judge: "You're a chef! You've heard the facts. In my experience this usually happens when people are intoxicated of one of a number of substances. ... Give me one good reason why you shouldn't go to prison for 2 months ...."

Defendant: "I was drunk...."

[The defendant's English is extremely difficult to understand; Judge Z asks him to repeat himself several times after each answer, such that every question is requiring 4/5 turns before each side understands the other]

(...)

Judge: "Why didn't you have manners? Why didn't you give your correct name?"

Defendant: "I was drunk...."

Judge: "Where do you work?"

[He repeats the question at least 4 times; he cannot hear or understand the defendant's answer. The friend then names the place of work, but he still can't understand. Finally a solicitor calls out the name of the hotel that the defendant is working in.]

Judge: [to the friend] "Tell me, my good man, how do you fit into this?"

Friend: "I work with him. He asked me to come up with him in case he didn't understand something."

(...)

Judge: [to the defendant] "Like everybody else you're very welcome in this country, but I won't tolerate abuse of our police service. If you want to abuse [it] you can go back to the Eiffel Tower, stand on top, and abuse to your heart's content, but it won't be tolerated here. ... It would be a good idea to go up and apologise to those two female guards."

Defendant: "I already did."

[Or something similar, it is particularly difficult to understand what he is saying]

Judge: "What?"

Defendant: [repeated what he had said]

Judge: "What?"

Friend: ['Interpreting'] "He already went and apologized the next day."

Judge: "Good." [To defendant] "Aren't you lucky you have him!"

[The Judge adds something about the defendant learning English now; he goes on to read the sentence at high speed. The defendant and his friend look completely bewildered]

Friend: "Does he have to sign a bail bond or anything?"

Judge: [Seems not to have heard; there is no response]

Court is adjourned for lunch.

The defendant and his friend go to the registrar, apparently to ask for information and/or explanations.

Appendix C: Dismissal of Polish interpreter

This is the case of a young, male Polish LEP defendant who is being prosecuted for drunk driving in 2009; Judge Z is presiding. The description that follows involves two dates; on the first date there are several parts to the case, as it is put back, and court is adjourned a number of times. The defendant is unrepresented.

Part A

Judge: "What is your nationality, Sir?"

Defendant: [Silence]

Judge: "Polish, is it?"

Defendant: "Yes."

Judge: "What is your command of the English language?"

Defendant: [Silence]

Judge: "Right. My Polish is great but I've forgotten most of it. We'll try and get an interpreter for 2. [Aside] That doesn't mean anything to you. How are you supposed to run a court under these conditions? Mr. L, will you take a seat, suí síos."

Part B

Court has resumed after lunch and the Polish interpreter has arrived; a young man.

Judge: "Would you tell Mr. L that after he was charged and cautioned he replied 'no reply' to the criminal charge."

The interpreter hesitated in translating this and the Judge became suspicious.

Judge: "What competency do you have in interpreting?"

Interpreter: "Level 3."

Judge: "Would you inform Mr. L that the court knows that he is not legally represented."

Interpreter: "Yes."

Judge: "Can he afford to pay for legal representation?"

Interpreter: "He won't be waiting for legal advice."

(...)

Judge: "My dear man, your English isn't great... and I'm talking to the interpreter."

(...)

Interpreter: "He doesn't want the legal advice."

Judge: "What?"

Interpreter: "He doesn't want the legal" (pause) "representation."

Judge: "Could you please inform him [that he is entitled to be represented]."

Interpreter: "He said he's just one month here..."

(...)

Judge: "I have difficulty, Sir, in understanding your English. It is my obligation..."

Judge Z pauses for the interpreter to interpret. The interpreter remains silent, and the Judge shouts at the interpreter, becoming extremely agitated now.

Judge: "Translate as I'm speaking! My obligation....is to inform....of his right [to a solicitor]."

Interpreter: "He says he can't afford a solicitor."

Judge: "That's the point I'm coming to. If he can't afford a solicitor.....he is entitled to apply for free legal aid. Does he want a solicitor?"

Interpreter: "He doesn't know."

Judge: "Would you inform Mr. L that it is my obligation to inform him of his rights. I don't know if he has the capacity to watch 'Who wants to be a Millionaire', but he doesn't have the option of phone a friend, ask the audience, or do 50:50."

At this point, everybody in the court is laughing.

Judge: "Does he understand the charge?"

Interpreter: "Yes. Yes, he does."

Judge: "Is he pleading guilty or not guilty?"

Interpreter: "Guilty."

Judge: "Guilty."

Interpreter: "Yes, he pleads guilty, Judge."

Judge: "To the best of your competency translate the evidence."

Garda: [Gives the evidence very slowly. He is watching the interpreter to see if he is ready for him to continue. This is very unusual] ".....the defendant was conveyed to [Town] Garda Station...."

Judge: "Would you ask Mr. L if he wishes to say anything to the Court by way of explanation."

The defendant looks extremely embarrassed or uncomfortable.

Interpreter: "He has no excuses, he said."

(...)

Interpreter: "He is a single. (...) .....money from part time work."

Judge: "Can I confirm if his address is [address]?"

Interpreter: "Not any more."

Judge: "What is his present address?"

Interpreter: "He is homeless."

Judge: "And who is living at that address?"

Interpreter: "His father."

Judge: [asked why he wasn't living with his father] "Has there been some sort of disagreement?"

Interpreter: "Yes."

Judge: "Considering his lack of address ... the penalty must be paid forthwith. If he doesn't have money....he will have to serve 21 days."

Interpreter: "He's asking if that could be less."

The Judge leans forward as if he isn't sure what the interpreter has just said.

Interpreter: "If you could drop the price...less amount."

The interpreter explains that the defendant is asking if he can pay in instalments. The Judge says that unfortunately he doesn't make the laws.

Judge: "How much money does he have on him today?"

Interpreter: "He doesn't have any money, Judge."

Judge: "He doesn't look like he's homeless."

Interpreter: "He says he looks after himself."

Judge: "I can see that."

Judge: [As he has no address and cannot pay the fine forthwith:] "He has to go to prison."

Interpreter: "There's nothing he can do, Judge, he said. (...)."

Judge: "Who lives at home with his father? [Accepting, he says, that it is true about the dispute]

Defendant: "He's living on his own."

(....)

By now a young female Garda has come to stand beside the interpreter and defendant; she is conveying the Judge's words to the interpreter; she explains to him that unless the defendant can pay today he has to serve a jail sentence because he had no address that the fine can be

sent to; the Inspector had said that he wasn't happy that the defendant could be contacted without an address.

> **Interpreter:** "Can he say something? Can he put his address at the old one for correspondence?"
>
> **Judge:** [Asked the Inspector if he would be happy with that]
>
> **Inspector:** [He would have concerns]
>
> **Judge:** "All right, payment forthwith. In default, prison sentence of 30 days. I certify with some reluctance for the interpreter present."

The Garda continues to explain what Judge Z is saying to the interpreter. However, as the Garda is explaining the first part, the Judge continues to explain that he has 14 days to lodge an appeal if he wishes. It appears that the interpreter is not listening, nor could he be conveying the Judge's advice, as he is still interpreting what the Garda is saying.

> **Judge:** "Court is adjourned."

This is the only time Judge Z has adjourned the court in the middle of a session. After he leaves the courtroom, a group of various different people who are present in the courtroom approach the defendant and talk to him and the interpreter for some time. The group includes a solicitor, other Polish defendants, and the Garda who was helping out earlier. There is an air of concern about what has happened.

Court Resumes

The solicitor that had been talking to the defendant stands up and addresses the Judge. She expresses a concern that the defendant had not fully understood what was happening. She notes that he is still unrepresented. Judge Z becomes extremely angry, and shouts:

> **Judge:** "I take grave umbrage and exception to [what you are implying]. If you want to take over the administration of justice ... . It is completely unethical and unprofessional to engage with a defendant who is in custody when you have no authority to do so."

The monologue continues for some time, after which the interpreter and defendant are re-called.

Judge: "May I ask him, did he approach her, or she did she approach him?"

Interpreter: "She approached him."

Judge: "And what did she say (...)?"

Interpreter: "He can have the solicitor with no money" (...)

Judge: "And when I was explaining that to him in the most simple way possible, through you the interpreter, did he not understand?"

Interpreter: "He says he didn't understand."

Judge: "And what is your competence (...)?"

Interpreter: "It is just a translating word to word."

The Judge says that he had spent a long time and gone into great detail about the defendant's right to have a solicitor, and his right to apply for legal aid if he could not afford a solicitor.

Judge: "Did you tell him that?"

Interpreter: [That he had]

Judge: "I am not fluent in the Polish language. I am reliant on you, the interpreter, to translate (...). "

Interpreter: "He said he couldn't understand the legal terms."

Judge: "Well, 'free' is very simple. What did he not understand about 'free'?"

Interpreter: "He only understand..."

Judge: [Interrupting] "Now listen! I expressed my dissatisfaction with you earlier on. What agency are you from? What agency?"

Interpreter: "[Agency]."

Judge: (....) "It appears to me, Sir, that you are incompetent (...) must be dismissed (....) in the field of interpretation for the purposes of the administration of justice. Please leave the court."

[To solicitor] "I am absolutely appalled [at the] suggestion that I had not discharged my duty line by line (...). Your conduct (...) is grossly offensive and (...) irresponsible (...) To approach the defendant in the manner you had. (...) You could have conveyed your concerns to a member of the Garda Síochána (...). Your conduct suggests that I have failed miserably in my duty."

Court adjourned until further notice

The Judge leaves the courtroom for a second time, which is even more unusual than his leaving before. There is a buzz about the court as people discuss what has happened. The adjournment lasts for a considerable amount of time. Finally court resumes. Judge Z tells the court that he deems it appropriate to vacate the earlier order with regard to Mr. L's sentence based on the lack of competence of the interpreter.

Judge: "It's not for me to choose the interpreter, but from now on, Ms. [interpreter] from [Town] is the only interpreter to attend in future. (...) With regard to the competency of [Agency] to assign interpreters to this court (...) his incompetence to speak English was of concern to me from the very beginning."

He went on to question whether he should certify for the interpreter; he mentioned that the interpreter had approached the registrar, and he found that there was no reason he shouldn't be paid for his attendance.

Judge: "Any interpreter from [Agency] shall not assist the court with any defendant before the court from now on. I am concluding my order."

[To the defendant] "I don't have one word of Polish – the assigned interpreter was totally incompetent to deal with the sensitive issues before this court."

The Judge says he had believed the interpreter to be conveying the correct information; he had informed him at length about his rights with regard to legal aid and representation, and so on.

Judge: "I will invite you to come back next Thursday. Do you understand that?"

Defendant: [Shakes head.]

Garda: [that had been helping] "Judge, there is another Polish national in court; he can understand and tell him - if that's acceptable."

The Polish national in question arrives, and with the Garda and the defendant it was established that the defendant could come back to court the following Thursday.

Judge: "Does Thursday or Friday suit him best?"

Friend – Garda – defendant: "Thursday."

The Judge Formally requests an interpreter for the remand date, and specifically requests that the above-mentioned Polish translator be present.

Judge: "Mr. L, you are free to go."

**

Part 3

The Next Week

The case of the same Polish is called.

Judge: "Is there any appearance by or on behalf of Mr. L?"

Solicitor: "Yes, Judge. I appear. He's speaking to the interpreter."

Judge: [reading] "A Polish national. Is Garda W here?"

Court Presenter: "Yes, Judge."

As Garda W was coming to the witness stand, Judge Z asked her what Mr. L's understanding of English was. The Garda took the oath.

Judge: "We're trying to ascertain if he had any understanding of English at all. You may or may not be aware of why the Court is seeking this information. I'll take you

back to [date], [Street] at midnight. What happened? Why did you come into contact with this [man]?"

The Garda testified that she had observed him driving; she stopped him and spoke with him.

Garda: "He understood, (...) he understood me, (...) he understand [sic] what I wanted; he didn't have a problem."

(...)

Judge: "Did he understand why you had stopped him?"

Garda: "I asked him to put out his cigarette; he put it out. I explained that I wanted him to take a deep breath and blow into the bag; he did it (....)"

Judge: "And arising from that [breath] test, something happened."

Garda: "He was arrested and conveyed to [Town] Garda Station. And I had requested an interpreter for him."

Judge: "During this journey to [Town] [did you communicate with him]?"

Garda: "Yes. He said that he was a Polish national and that he'd eaten too many apples."

(...)

Judge: (...) "I am absolutely satisfied that he proceeded in a methodical and premeditated fashion to mislead the court. (...) I was watching the interpreter, and while I wasn't satisfied with his competence, I was satisfied that the defendant understood what was going on. (...)

The Judge goes over what had happened on the previous court date with the solicitor who had "wittingly or otherwise" addressed the court on the grounds that she wasn't happy with proceedings. He then explains that the press had proceeded to publish an article on the case that was "grossly offensive and misleading"; it did not note that Ms. [Solicitor] was not appearing on behalf of the defendant, but talked about unfair procedure. (...)

Judge: "Ms. [Solicitor] was physically and emotionally upset. The problem is this; if I had said to a solicitor representing a client at the end of their case that 'you have made a dog's dinner' of it, it should rightly be reported. (....) Ms. [Solicitor] got up

and intervened where she had no audience, and the Court had to respond, because the implication was that I had not discharged my duties fairly and fully. I had timed the case, and I had spent 40 minutes going over and over and over again, and I was absolutely satisfied that he had understood. (....)"

The Judge goes on to say that the reporters should go back "and put right the wrongs they have stated." He says that he had asked the prosecution whether they could envisage any situation where the court could allow time to pay the fine, but the answer had been 'no'; if the Prosecution had agreed, and said 'yes, he's around [Town], we know where to find him', that would have been the end of the matter. Judge Z points out that it is not for him to comment on the prosecution's decision over which he has no discretion, but that issues arose by the conduct of the defendant. He says that he is clearly concerned with Ms. [Solicitor]'s behaviour, and believes her intervention to have been wrong. However:

Judge: "I have no doubt in my mind that from the minute the interpreter started, the defendant understood what was happening; I am satisfied that he knew, chapter and verse, exactly what was happening."

(...)

Solicitor: "Yes, Judge. (..) There is just one issue I would like to address. The defendant did have some English that he had learned in school. He has what you might call 'survivor English'. He understood what the Garda was saying, and he certainly understood the process-"

(...)

Court breaks for lunch.

Solicitor: [to defendant, smiling] "Now go away!"

After lunch

Mr. L is called.

Solicitor: "Judge, I appear. This is the same case that was being heard before lunch."

Judge: "You're not in a position to indicate a plea."

Solicitor: "Oh, I am, Judge. There continues to be a plea. Just the interpreter ..."

He looks around, waiting for interpreter.

Judge: "Wait a moment for the interpreter."

(...)

A few minutes later the Garda was sworn in again and gave the facts: that at 12.11 am, the accused was stopped driving vehicle with [Registration]; he was arrested and a breath test was administered. The result was 46.

Judge: "Is legal aid a requirement?"

Solicitor: "I would like to re-apply for legal aid. He moved here recently from Poland; his father is here in court with him. He didn't think he was over the limit. He is living with his father - who is behind him there - at that address again."

Court Presenter: "I am satisfied that he is at that address, Judge."

Judge: "May I enquire before I complete the order of the court if he is unclear about any aspect of the proceedings here today?"

Interpreter: "He understood everything, Judge."

The Judge convicted and fined the defendant.

Solicitor: "I would apply for the release of his passport."

The passport was handed over.

Judge: (...) "He's fully discharged from his bond."

End of case

Appendix D: Table of fieldwork participants

The Interpreters:

Name	Gender	Nationality Time in Ireland	Languages other than English	Qualifications & Experience
Svetlana	F	Ukrainian 3 years	Ukrainian, Russian and German	B.A. English and German philology/linguistics; 3 years experience
Anna	F	Lithuanian 5 years	Lithuanian, Polish, Russian (mother tongues); Arabic and Turkish	Linguistics background; **Graduate Certificate in Community Interpreting** (DCU); 5 years experience
Marta	F	Polish 4 years	Polish	English degree (including interpreting); 3 years experience
Mihai	M	Romanian 11 years	Romanian and French	B.A. English; Masters French Literature; 6/7 years experience
Belén	F	Spanish 7 years	Spanish and Portuguese	English at school; **Graduate Certificate in Community Interpreting** (DCU); 4 ½ years experience
Molly	F	Chinese 20 years	Cantonese and Mandarin Chinese	Studied business and administration in London; 6 years experience
Stella	F	Chinese 7 months	Mandarin Chinese	English at school; graphic design degree and Masters; 7 months experience
Jevgenius	M	Latvian 2 years	Latvian Russian Lithuanian	Learned English in the US on an exchange. 2 jobs; security guard and interpreter; 15 months experience
Ewa	F	Polish 2 years	Polish	English Degree; 10 years as interpreter; 7 years as court interpreter

The legal professionals:

Name	Profession Gender	Location	How long practising	Criminal work with LEP defendants / interpreters
Aoife	Barrister F	Dublin	4 years	Focus not criminal; has worked with immigrants and interpreters particularly asylum
Matthew	Solicitor M	Dublin	c. 10 years	Criminal solicitor works daily with LEP defendants and interpreters
Eleanor	Barrister F	Dublin	10 years	Works daily with immigrants and interpreters; focus on asylum but experience in criminal
Gerard	Solicitor M	Dublin	6 years	Criminal solicitor; about 10% of clients non-Irish; works frequently with interpreters and LEP defendants
James	Barrister M	Dublin	4 years	Represents LEP defendants in criminal matters daily; also asylum experience; worked in ORAC; taught asylum law
Thomas	Solicitor M	Rural	c. 30 years+	c. 20% of criminal case-load non-Irish; works regularly with LEP defendants and interpreters
Gwen	Solicitor F	Rural	11 years	At District Court level c. 25 – 30% of workload LEP defendants; works regularly with LEP defendants and interpreters
Stephen	Solicitor M	Rural	c. 15 years	Large criminal workload and deals regularly with LEP defendants and interpreters
Mark	Solicitor M	Rural	c. 20 years +	LEP defendants as part of criminal workload 1-2 days per week