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Paper:

Parry, R. (2015). Is Ireland a Bilingual State?. *Northern Ireland Legal Quarterly*, 66(3), 199-221.

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Is Ireland a bilingual state?

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Abstract

This article is a critique of the recent judgments of the Irish Supreme Court on the subject of bilingual juries in Ireland. By ruling that to allow Irish speakers to be tried by a jury that speaks Irish would be unconstitutional, despite the constitutional status of the Irish language as a national and the first language of the state, it has undermined the bilingualism of the Irish state and betrayed the principal function of the state that the founders had envisaged. The article argues that the issue of bilingual juries in Ireland has left the state on a crossroads, but in a position where it must act. It concludes by offering two alternatives: either to abandon its commitment to bilingualism or to honour it fully.²

Introduction

What is a bilingual state? What does the status of a ‘national language’ mean, and in what contexts can the citizen interact or be denied interaction with the state and its institutions, especially its legal system, through the medium of a national language? Specifically, should the citizen charged with a criminal offence have the right to be tried through the medium of the national language by a tribunal competent in that language? These were some of the questions that confronted the Supreme Court of Ireland in *Ó Maicín v Ireland*.³

These were the facts. The appellant, a native of Rosmuc in Connemara, County Galway, was charged with committing an assault and producing an offensive weapon. He was to stand trial at Galway Circuit Criminal Court for these offences. Both alleged assailant and victim were native Irish speakers. The incident occurred and was to be tried in an area where the most recent census figures show that the language enjoys extensive everyday use by significant numbers of the population and is within the competence of the majority of the

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2 A work-in-progress version of this article was presented as a paper at the Regulating Language, Regulating Rights symposium hosted by Cardiff University’s Language, Policy and Planning Research Unit on 28 April 2015. The author is grateful to the participants for their comments. He also wishes to thank the NILQ’s editor and anonymous reviewers, and Dáithí Mac Cárthaigh BL, for their suggestions.

3 *Ó Maicín v Ireland and Others* [2014] IESC 12 (27 February 2014); [2014] 2 JIC 2703.

population.⁴ The appellant wished to present his defence in Irish and to have his case heard by a bilingual jury, that is, a jury who were sufficiently competent in Irish to hear the case without the assistance of a translator or interpreter. He asked that a jury district consisting of bilingual citizens capable of serving on a bilingual jury be created, or some alternative administrative arrangement whereby 12 jurors could be randomly selected from a list of bilingual citizens.

The appellant's argument was that he was constitutionally entitled to be tried by a tribunal which spoke the national and first language of the state. He was not arguing that he should be tried by an Irish-speaking jury in order to have a fair trial. No doubt, the quality of the process would be better if he were tried by a tribunal that spoke and understood his language without interpretation. But that was not the basis of his submission. Neither was he asking for special provisions to be in place in the cause of compassion, inclusivity, diversity or some other humane consideration. His case was that he was an Irish speaker in a sovereign state whose constitution recognises the Irish language as the national and first official language and, accordingly, he had a right to be tried by a tribunal, that is, a judge and jury who spoke his language.

The Supreme Court of Ireland rejected his application and ruled that a bilingual jury would be unconstitutional. That judgment is one whose significance transcends criminal justice issues, such as trial fairness or due process. Its relevance for criminal process is in many ways secondary. Its true significance is that it challenges a particular sovereign state's commitment to constitutional bilingualism. This article's purpose, in light of the judgment in *Ó Maicín*, is to determine, as a matter of constitutional principle and practice, whether or not the Irish state is a bilingual state.

Justice in the bilingual state: a paradigm

Bilingualism is a linguistic term whose meaning is derived from the Latin for 'two tongues', that is, two languages.⁵ Bilingualism as a human phenomenon manifests itself at several levels, from the individual or familial to the communal, regional or national.⁶ State bilingualism is a form of societal bilingualism, in that it concerns bilingualism in its collective meaning. But a bilingual state does not necessarily consist of individuals who are all fluent in both languages of the state. Indeed, the global norm is for individual bilingualism to be a trait of the minority in any given society.⁷

This is not an essay in socio-linguistics: it does not explore the cognitive or typological definitions of bilingualism. The question that this paper poses is, what is the bilingual state? This expression, bilingual state, is not a legal or constitutional term of art. However, there are states which are bilingual and whose bilingualism is a keystone in their constitutions. These provide us with paradigms of a bilingual state.⁸ Modern Finland, for example, was established as a bilingual state, Finnish and Swedish, by the founding constitution of 1919.⁹

4 The Census 2011 figures for Ireland indicate that 75% of the population of Galway County within the *Gaeltacht* speak Irish, with 50% of Galway City within the *Gaeltacht* able to speak the language. The data can be accessed on the Central Statistics Office website, see <www.cso.ie/en/media/csoic/census/documents/census2011pdr/Pdf,8,Tables.pdf>.

5 See *Oxford English Dictionary* <www.oed.com>.

6 For an overarching guide, see Suzanne Romaine, *Bilingualism* (2nd edn Blackwell 1995).

7 See Mark Sebba, 'Societal Bilingualism' in Ruth Wodak, Barbara Johnstone and Paul Kerswill (eds), *The SAGE Handbook of Sociolinguistics* (Sage 2011) ch 30.

8 Finland, Cyprus and Belarus, for example, are bilingual states.

9 See D C Kirby, *Finland in the Twentieth Century* (C Hurst 1979) 69.

However, the overwhelming majority of the population speak Finnish only. The minority who speak Swedish also mostly speak Finnish and so, on an individual level, are bilingual.¹⁰ But the linguistic demographics are irrelevant to Finland's constitutional status as a bilingual state.¹¹ The constitution of the state guarantees the right to language and culture, declares Finnish and Swedish to be the national languages of the state, and guarantees the right to use either language in the courts and to receive official documents in either language. Both languages are treated by law on an equal basis.¹²

Giving further effect to these constitutional rights are the provisions of the Language Act 2003, which confirms the equal status of both languages as national languages.¹³ Section 14 of the Act deals with the language of criminal proceedings and provides that the national language of the defendant is used as the language of those proceedings. In situations where there are several defendants who speak different languages, or a language other than the national languages, the court determines the language of the proceedings 'with regard to the rights and interests of the parties'.¹⁴ But the first principle which the law upholds is that the language of the defendant shall be the language of the proceedings, which means that, not only has the defendant the right to use his or her national language, but the defendant will also be tried by a tribunal which speaks that language. Finland, of course, is not a common law jurisdiction and the particular issues and dilemmas that arise in the context of jury trials do not apply there. We must therefore look for a better precedent.

Perhaps the archetypal bilingual state in the common law world, and therefore the most appropriate model for comparison, is Canada. Canada's federal bilingualism is entrenched in its constitution and is given further meaning in legislation. In summary, Canada regards English and French as official languages of equal status.¹⁵ The origin of Canadian bilingualism can be found in the British North America Act of 1867 which established the Canadian confederacy and gave dominion status for Canada.¹⁶ Although the Act did not establish Canada as a bilingual state at the outset, it gave the right to use either English or French in debates in the Canadian Parliament and the legislature of Quebec, the right to use either language in certain courts and legal proceedings established by Parliament, and in Quebec, and ensured that legislation published by the Canadian Parliament and the legislature of Quebec would be bilingual. The Act formed the basis of the Canadian Constitution until 1982, when it was redesignated the Constitution Act 1867 and incorporated into Canada's Constitution Act of 1982.¹⁷

The Canadian Charter of Rights and Freedoms is the key instrument in the country's modern constitution, forming the first part of the Constitution Act of 1982. It confirms the official bilingualism of Canada as a federal state and the bilingualism of the province of New Brunswick. Section 16 of the Charter declares that English and French are official

10 There are also other languages spoken in Finland which enjoy varying levels of state support and protection but which are not national languages. The demographic profile is summarised here <www.ethnologue.com/country/FI/languages>.

11 See Markku Suksi, 'Implementing Linguistic Rights in Finland through Legal Education in Finnish and Swedish' in Xabier Arzoz (ed), *Bilingual Higher Education in the Legal Context* (Martinus Nijhoff Publishers 2012) 101–32.

12 Constitution of Finland, s 17: see <www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>.

13 423/2003: see s 1.

14 Language Act 2003, s 14.

15 For historical background and social context see John Edwards (ed), *Language in Canada* (CUP 1998).

16 British North America Act 1867, s 133. This section declares the official and constitutional status of English and French.

17 See <<http://laws-lois.justice.gc.ca/eng/Const/Index.html>>.

languages and have equality of status and equal rights and privileges. Furthermore, s 19 of the Charter states that, 'either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament'. Giving effect to the phrase 'equality of status and equal rights' is the Official Languages Act (Canada) 1988. Section 2 of the Act states that the purpose of the legislation is to:

- (a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;
- (b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and
- (c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

Equality is a keyword in this Act and it is this Act which turns the broad constitutional principles into practical legal rights. The preamble emphasises the guiding values that 'English and French are the official languages of Canada and have equality of status and equal rights' and underlines the commitment of the government of Canada 'to enhancing the vitality and supporting the development of English and French linguistic minority communities, as and to fostering full recognition and use of English and French in Canadian society'.¹⁸ The government of the Canadian state is the guarantor of the development and maintenance of bilingualism. It is not a passive or an indifferent role. Not only is linguistic equality a key constitutional principle, it is clear that it is the business of the state, through its government, to safeguard and support Canada's bilingualism and to work with the provinces to achieve this. The Act's detailed provisions set out how bilingualism is given effect and, among other things, define the role and function of the Commissioner of Official Languages in implementing and promoting language rights.¹⁹ This Act, in addition to confirming the right to use either French or English in the Canadian federal courts²⁰ and the duty of federal courts to ensure that any person giving evidence in his or her chosen official language is not placed at a disadvantage by doing so,²¹ gives parties in the federal court the right to a tribunal which speaks their official language.²²

In the context of criminal jury trials, the right to a tribunal which speaks one of the official languages is given further manifestation by the Canadian Criminal Code which applies in all the federal criminal courts throughout Canada. The Code gives accused

18 Official Languages Act 1988, Preamble.

19 Ibid ss 49–81.

20 Ibid s 14: 'English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.'

21 Ibid s 15(1).

22 Ibid s 16: '(1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that (a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter; (b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and (c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.'

persons the right to a trial before a judge and jury who speak their official language.²³ The Supreme Court explained the meaning of this provision in its judgment in *R v Beaulac*.²⁴ It held that language rights are distinctive constitutional rights that are wholly independent of other legal principles or values, such as the right to a fair trial or the right to give evidence and to be understood by a court of law. Bilingualism is an intrinsic value that is enshrined in the constitution and in the law of the state. The right to be tried by a jury who speak the accused's official language derives primarily from the constitution of the state, the meaning of Canadian citizenship and the state's commitment to bilingualism rather than criminal process principles, such as trial fairness or best evidence considerations.

To implement this constitutional right, provinces have created slightly different mechanisms to summon jurors who speak one or both of the official languages. This is because the language demography of Canada is such that, with the exception of Quebec, French is spoken by a minority in all the provinces. Only a minority of the Canadian population are individually bilingual, that is, both English and French speaking.²⁵ However, although both the numbers and percentages of French speakers are low in certain provinces, all provinces are bound by law and by the constitution to ensure that an accused can be tried by a tribunal that speaks his or her official language.

To give a few examples, in provinces such as Alberta²⁶ or Saskatchewan,²⁷ where approximately 2 per cent of the population are French speakers, or about 61,000 and 20,000 respectively, there exist administrative arrangements whereby a list of French speakers is created. In a criminal trial in those provinces where the accused speaks French, jurors are randomly selected from that list. In Ontario, where about 600,000 speak French, the register of jurors is divided into three parts: those who speak only French; those who speak only English; and those who are bilingual.²⁸ As with most common law jurisdictions, jurors are randomly selected from the appropriate list to ensure independence and impartiality. If the number of those who speak the accused's official language is so small that the summoning of an independent and impartial jury is difficult, the court can transfer the trial to a venue where there is a higher number of people in the population who speak the accused's language.²⁹

In Canada, the right to be tried by a jury who speak an official language is absolute because the state treats both official languages on a basis of equality, regardless of linguistic demography, in the administration of justice. Moreover, there are tried and tested mechanisms to ensure that this is done, even in provinces where the numbers who speak the defendant's official language are low. These mechanisms, although necessarily requiring jury selection from what is sometimes a small percentage of the general population, achieve the key objective of empanelling a competent, independent and impartial tribunal. After all, the chances of empanelling a competent, independent and impartial tribunal of 12 people from a population of 60,000 is not statistically significantly less probable than if the population was 600,000. And in the quarter of a century since these processes were devised

23 See the Criminal Code of Canada, s 530: 'On application by an accused whose language is one of the official languages of Canada . . . the accused [shall] be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.'

24 *R v Beaulac* [1999] 1 SCR 768.

25 <<http://officiallanguages.gc.ca/en/statistics/canada>>

26 See Jury Act (Alberta) 2000.

27 See Jury Act (Saskatchewan) 1998.

28 See Juries Act (Ontario) 1990, ss 7–8.

29 See Criminal Code of Canada, s 531.

and in the years since they have been implemented, the criminal justice system of Canada has, apparently, not come to a grinding halt.

The legal status of the Irish language

The present constitutional and legal status of the Irish language in the Republic of Ireland owes its origins to Irish independence: the fact that Irish is an official language of an independent, sovereign state is fundamental to this discussion. Independence for the 26 counties of the island of Ireland, established by the Irish Free State (Constitution) Act 1922, heralded cultural as much as political emancipation. Article 4 of the constitution of 1922 made Irish the national language and English 'equally recognised as an official language'. This meant that, despite the slightly ambivalent phrasing on the status of English, this was to be a bilingual state. Under British rule, the Irish language had been outlawed as a language of law and justice by virtue of the Administration of Justice (Language) Act (Ireland) 1737, which required the business of the courts to be conducted in English only.³⁰ This Act of the British Parliament, which had thus made English the sole language of justice in Ireland, represented a position which was to continue until Irish independence. One of the first tasks of the newly established Irish state was to repeal this Act.

The 1737 Act, however, remains in force in Northern Ireland (the creation of the Government of Ireland Act 1920), which, of course, voted itself out of the Irish Free State in 1922 in order to remain in the UK.³¹ That the 1737 Act is alive and well on the statute book in Northern Ireland and that its discriminatory effect on Irish speakers does not offend Article 14 of the European Convention on Human Rights 1950 (ECHR) are judicial findings that have been upheld by the Court of Appeal in Northern Ireland in recent times.³²

Irish is thus spoken by a significant number of the people of Northern Ireland but does not enjoy official status in Northern Ireland and there is no domestic legislation for its promotion or protection.³³ There is no legal right to use the Irish language in court proceedings in Northern Ireland, for example. Before the advent of the constitutional changes of the late 1990s, any prospect for laws recognising Irish language rights in Northern Ireland seemed dead in the political water.³⁴ However, under the terms of the Belfast Agreement of 1998, the policy ground began to shift when the UK recognised a responsibility for respecting linguistic diversity, including, specifically, Irish and Ulster Scots in Northern Ireland.³⁵ This was to be followed by the St Andrews Agreement in 2006, when

30 S 1: 'All proceedings in courts of justice, patents, charters, pardons, commissions, &c. shall be in English and in legible character, not in court-hand, and with usual abbreviations in English.'

31 For the language policy of Northern Ireland post-partition, see, generally, Thomas Hennessey, *A History of Northern Ireland 1920–1996* (Macmillan 1997).

32 See *Mac Giolla Cathain v the Northern Ireland Court Service* [2010] NICA 24.

33 For further observations on the social and political significance of the Irish language in Northern Ireland, see Aodán Mac Póilín (ed), *The Irish Language in Northern Ireland* (Ulltach Trust 1997).

34 Camille O'Reilly argues that support for the Irish language in Northern Ireland occurs in the context of three discourses or perspectives which she labels as decolonizing, cultural and rights discourses. The three reflect different interpretations of the issue: see Camille O'Reilly, *The Irish Language in Northern Ireland: The Politics of Culture and Identity* (Macmillan 1999).

35 'All participants recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.': Belfast Agreement 24. <www.gov.uk/government/publications/the-belfast-agreement>

the British government undertook to introduce legislation for the Irish language and to work with the Northern Ireland Executive in protecting and developing it.³⁶

Contemporaneously with these domestic initiatives, the UK also ratified the European Charter for Regional or Minority Languages (ECRML) in respect of both of the native languages of Northern Ireland as a further step towards implementing its commitment to linguistic diversity.³⁷ The regional or minority languages protected under the Charter within the UK are Irish, Welsh, Scottish Gaelic, Scots, Manx, Ulster Scots and Cornish. All these languages enjoy the protection of the Charter's general principles, specified in pt II, Article 7 of the Charter. Irish, Welsh, and Scottish Gaelic are also protected under the articles contained in pt III of the Charter, which are more detailed and which list specific measures that are undertaken to protect a minority or regional language.³⁸ Protection under pt III is a matter for the state party to decide, taking into account the circumstances of the relevant minority or regional language and the extent to which it is used.³⁹

Despite these encouraging initiatives, the Belfast and St Andrews Agreements, and indeed the ECRML, have had little impact hitherto on improving the position of the Irish language in Northern Ireland. In the fourth and most recent cycle of monitoring and in periodical reports on the implementation of the ECRML in the UK,⁴⁰ in the context of Northern Ireland, the documents make for depressing reading. The Committee of Experts' report, noting that competence for language policy is mainly devolved, remarked that disagreements and discord on the language issue within the power-sharing Executive in Northern Ireland meant that 'it was again not possible to agree within the Executive on the relevant text to be included in the report'.⁴¹ The report, although recognising the Committee of Experts' difficulty in obtaining a clear impression of the position in Northern Ireland, nevertheless concluded 'that legislation is needed for the protection of the Irish language'.⁴² This key recommendation was subsequently adopted by the Committee of Ministers which recommended the adoption and implementation of a 'comprehensive Irish language policy, preferably through the adoption of legislation providing statutory rights for the Irish speakers'.⁴³ In the interests of parity and balance, it also recommended the strengthening of 'work done by the Ulster Scots Agency and [to] take measures to establish the teaching of Ulster Scots'.⁴⁴

36 St Andrews Agreement, 2006, Annex B, 'Human Rights, Equality, Victims and Other Issues'.

37 ECRML, Strasbourg: Council of Europe, 5 November 1992. The ECRML was ratified by the UK on 27 March 2001.

38 ECRML, *Explanatory Report*, paras 38–51. For commentary, see Jean-Marie Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (Council of Europe Publishing 2005) 72–81.

39 See Woehrling (n 38) 81; also José Manuel Pérez Fernández, 'Article 2. Undertakings and Article 3. Practical Arrangements' in Alba Nogueira López, Eduardo J Ruiz Vieytes and Inigo Urrutia Libanora (eds), *Shaping Language Rights* (Council of Europe Publishing 2012) 121–44.

40 In accordance with ECRML, Article 15.

41 *Report of the Committee of Experts on the Application of the Charter in the United Kingdom Adopted by the Committee of Experts on 21 June 2013 and Presented to the Committee of Ministers of the Council of Europe in Accordance with Article 16 of the Charter*, paras 12–13. See also paras 205–270 for detail. <www.coe.int/t/dg4/education/minlang/Report/EvaluationReports/UKECRML4_en.pdf>

42 *Ibid* para 14.

43 *Recommendation CM/RecChL(2014)3 of the Committee of Ministers on the Application of the European Charter for Regional or Minority Languages by the United Kingdom (Adopted by the Committee of Ministers on 15 January 2014 at the 1188th meeting of the Ministers' Deputies)* para 2. <www.coe.int/t/dg4/education/minlang/Report/Recommendations/UKCMRec4_en.pdf>

44 *Ibid* para 4.

Recently, the Northern Ireland government's Culture Minister has attempted to implement the Council of Ministers' recommendation by proposing legislation that would give rights to Irish speakers and promote the use of the language.⁴⁵ Inspired by language legislation in Wales and Scotland, the consultation document proposed, among other things: granting official status for the Irish language; allowing its use in the Northern Ireland Assembly, the courts of law and by other public bodies; ensuring its place within the education curriculum; establishing the office of an Irish language commissioner; and the recognition of *Gaeltacht* areas.⁴⁶ The political narrative was revealing, with a deliberate attempt to de-sectarianise the language by emphasising the fact that 'the Irish language is not the preserve of any particular group or of any section of the community; it is part of our shared cultural heritage and it belongs to everyone'.⁴⁷

It is a vision that is unlikely to be universally shared in Northern Ireland.⁴⁸ That should not surprise us.⁴⁹ Despite the progressive tone of recent political dialogue and the growth in the nomenclature of human rights and multiculturalism, the harsh truth remains that 'the issue of language is one which both reflects and inflames the ethnic divisions prevalent within Northern Irish society'.⁵⁰ Irish speakers in Northern Ireland are predominantly Catholic and, in the eyes of many in the Protestant community, the language continues to symbolise 'the linguistic expression of a cultural tradition and a political enterprise that are both profoundly alien'.⁵¹

However, the position in the Republic of Ireland is, or at least ought to be, very different.⁵² Irish in the Republic of Ireland is not protected by the ECRML because, although it is a minority language *de facto*, it is an official language of the state.⁵³ After all, the Irish Constitution of 1922 recognised Irish as the national language of the new state. Then, with the 1937 constitution, the primary status of the Irish language was further entrenched, so that Article 8 of the Constitution of Ireland declared that:

1. The Irish language as the national language is the first official language.
2. The English language is recognised as a second official language.
3. Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.⁵⁴

45 <www.northernireland.gov.uk/index/media-centre/news-departments/news-dcal/news-dcal-100215-the-irish-language.htm>

46 *Proposals for an Irish Language Bill: A Consultation Document* (Department of Culture, Arts and Leisure, February 2015).

47 See *Belfast Telegraph*, 10 February 2015.

48 The politicisation of the Irish language and its ideological significance during the troubles is the subject of a detailed study by Diarmait Mac Giolla Christ, *The Irish Language, Symbolic Power and Political Violence in Northern Ireland 1972–2008* (University of Wales Press 2012).

49 See Gearóid Ó Tuathaigh, 'Language, Ideology and National Identity' in Joe Cleary and Claire Connolly (eds), *The Cambridge Companion to Modern Irish Culture* (CUP 2005) 42–58, 56: 'Within Northern Ireland the status and significance of the Irish language (and, in a more complex manner, of Ulster Scots) remains an issue of real political significance.'

50 See Colin Coulter, *Contemporary Northern Irish Society* (Pluto Press 1999) 26.

51 *Ibid* 27.

52 The contrast in the fortunes of Irish in the Republic of Ireland compared with that of Northern Ireland is also discussed by Seán Hutton, 'Notes on the Novel in Irish' in Eamonn Hughes (ed), *Culture and Politics in Northern Ireland 1960–1990* (Open University Press 1991) 119–37.

53 ECRML, Article 1.a.ii.

54 *Bunreacht na hÉireann* (Constitution of Ireland) 1937, Article 8.

The Irish Constitution's commitment to upholding the status of the Irish language as the nation's first language and thus giving it constitutional precedence over English should, no doubt, be understood in the context of the bloody and bitter struggle for independence which, in the 1930s, was well within living memory.⁵⁵ However, it must also be recognised that the restoration of the dignity and standing of the Irish language was at the intellectual heart of the struggle for independence and located deep in the psyche of the Irish nationalism movement.⁵⁶

After all, the *raison d'être* or mission of the Irish state was to provide the Irish people with a homeland where their language, culture and way of life would flourish in direct contrast to their experiences under foreign rule.⁵⁷ Language was and is a powerful determinant of nationhood and a marker of the organic, historical nation.⁵⁸ The Irish language is therefore, in anthropological terms, proof that the Irish nation is not a political contrivance. As the 1937 constitution's chief architect remarked, the Irish language 'is an essential part of our nationhood'.⁵⁹ The independence movement was thus driven by a desire to liberate the Irish nation from the injustices and insults of foreign rule. As the Irish language had been downtrodden by the British, so it would be exalted by the Irish state.⁶⁰ Whatever may have been the political or psychological motives behind the enthronement of Irish as first official language, the legal implication was to establish Ireland as a bilingual country.

If the creation of the Irish state promised an upturn in the official fortunes of the Irish language, as a living, daily spoken language, circumstances were less promising. Irish had suffered a rapid decline in the numbers of its speakers in the aftermath of the famine in the middle of the nineteenth century, although the genesis of the decline may be traced back to the seventeenth if not the sixteenth century.⁶¹ The reversal of this decline was something which the Irish state, at least initially, seemed eager to remedy, inheriting the efforts of the Gaelic League a generation earlier.⁶² Gaelicisation was thus the state's policy of reviving the national language, with a particular emphasis on, and possibly undue faith in, Irish medium school education as the appropriate organ for achieving this objective.⁶³ Of course, Gaelicisation was never an exercise in language displacement or an attempt to drive out English and replace it with Irish. It was in fact an attempt to create citizens that could speak

55 See Charles Townshend, *The Republic: The Fight for Irish Independence 1918–1923* (Allen Lane 2013).

56 See Ó Tuathaigh (n 49) 49: 'The leaders of the main political groupings in the new state accepted that the government of an independent Irish state had an obligation to give official recognition and support to the Irish language, the principal marker of the Irish nationality on whose behalf a national state had been demanded.'

57 See Terrence Brown, *Ireland, A Social and Cultural History 1922–1985* (Fontana 1985) 45–78 and 279.

58 See Joshua A Fishman, *Language and Ethnicity in Minority Sociolinguistic Perspective* (Multilingual Matters 1989) 269–320.

59 See Eamon de Valera, 'Language and the Irish Nation', speech broadcast on Radio Eireann, 17 March 1943.

60 See Paul Bew, *Ideology and the Irish Question: Ulster Unionism and Irish Nationalism 1912–1916* (Clarendon Press 1994) 84–5.

61 No doubt that decline was due to a combination of reasons and voluntary abandonment cannot be ruled out as being one of them. See Ó Tuathaigh (n 49) 48: 'The Irish continued to insist that they were a distinct nation, and they demanded a national state. Yet they were abandoning the most distinctive mark of nationhood, the Irish language.'

62 Ibid 48.

63 R F Foster, *Modern Ireland 1600–1972* (Allen Lane 1988) 546: 'The approach was tacitly recognised as unsuccessful by everyone who had anything to do with it, though education ministers and Gaelic League officials resisted any attempts to quantify or examine the actual results of the policy.'

both languages of the state.⁶⁴ Other strategies included the designation of Irish-speaking areas as protected *Gaeltacht* areas, a policy which paradoxically may have entrenched the general perception that Irish was a dying language and that the *Gaeltacht* areas were no more than enclaves or reservations for a dying culture.⁶⁵

Promoting the national language as first official language of the state also had some impact, albeit piecemeal, on the administration of justice. The Legal Practitioners (Qualification) Act 1929, for example, required Irish barristers and solicitors to have competent knowledge of the Irish language and, in the same vein, the Courts of Justice Act 1924 required certain members of the judiciary to have command of the language.⁶⁶ Section 44 of the 1924 Act made it a requirement, as far as it was practicable in the circumstances, to assign circuit judges with knowledge of Irish to courts where Irish was in general use so that justice could be dispensed without the judge relying on an interpreter.⁶⁷

But it was Kennedy CJ, the first Chief Justice of the liberated Ireland, in *Ó Foghludha v McClean* who gave the clearest expression to the meaning of the Irish language's constitutional status, and the state's duty towards it:

The declaration by the Constitution that the National language of the Saorstát is the Irish language does not mean the Irish language, is or was at that historical moment, universally spoken by the People of the Saorstát, which would be untrue in fact, but it did mean that it is the historic distinctive speech of the Irish people, that it is to rank as such in the nation, and, by implication, that the State is bound to do everything within its sphere of action . . . to establish and maintain it in its status as the National language . . . none of the organs of the State, legislative, executive or judicial may derogate from the pre-eminent status of the Irish language as the national language of the State without offending against the Constitutional position.⁶⁸

Yet, despite this robust constitutional affirmation and the revivalist agenda initiated at the dawn of Irish independence, the twentieth century, as it unfolded, saw continued decline in the Irish language as a daily spoken language.⁶⁹ Census figures for 2011 showed that the population of the Irish state was 4,581,269.⁷⁰ According to the official figures, about 1.77m could speak Irish, a figure which equated to about 41.1 per cent of the population. This, at first glance, appeared quite encouraging. However, of these only 82,600 (1.8 per cent) spoke Irish daily, 110,642 weekly and 613,236 occasionally outside the school classroom. Detailed regional analysis showed areas where the language had particular strength, such as *Gaeltacht* districts, of which Connemara is one, where 96,628, or 68.5 per cent, could speak Irish.

Why did not the exalted constitutional status of Irish inspire its revival? Whereas the language was granted high status by the constitution, little was done by the state to implement bilingualism in everyday life. There was a complete disconnection between the declared constitutional principle and its practical implementation. Irish language policy thus descended into a series of empty gestures and ritualistic use in the spirit of tokenism. Despite the requirement of competence among lawyers practising in the courts of law, Irish

64 Different societal models of bilingualism are considered by Suzanne Romaine, 'The Bilingual and Multilingual Community' in Tej K Bhatia and William C Ritchie, *The Handbook of Bilingualism* (Blackwell 2006) 385–405.

65 Ó Tuathaigh (n 49) 50.

66 Subject to a few provisos and qualifications. For a useful summary of the constitutional position of the Irish language, see James Casey, *Constitutional Law in Ireland* (Roundhall 2000) 73–7.

67 Courts of Justice Act 1924, s 44.

68 Per Kennedy CJ in *Ó Foghludha v McClean* (1934) IR 469.

69 See Liam Kennedy, *Colonialism, Religion and Nationalism in Ireland* (Institute of Irish Studies 1996) 204–08.

70 See Central Statistics Office (n 4).

was seldom heard and rarely taken seriously.⁷¹ The state's constitutional obligation to provide Irish versions of legislation in accordance with Article 25 went into suspension in the 1980s.⁷² This meant that only English versions were being drafted, a state of affairs which the Irish Supreme Court held to be unconstitutional and which was later remedied.⁷³

At least one of the principal reasons for the disconnection between principle and practice was due to the fact that 'the constitutional status of Irish was not translated into statutory legal rights for Irish speakers'.⁷⁴ After much prevarication, recognition of this fundamental flaw in the constitutional architecture led to remedial legislation for the Irish language. The Official Languages Act (Ireland) 2003 appears to draw much of its inspiration from the Welsh Language Act (UK) 1993, in that its mechanism for promoting the use of the Irish language is to require public bodies to prepare policy schemes to provide services through the medium of Irish.⁷⁵ The phrase official languages in the title of the Act is somewhat misleading because the principal concern is Irish – it has little interest in protecting or promoting English, which probably does not need protecting or promoting. Irish language schemes are approved by a designated government minister and are subject to three-yearly reviews. The Act is the first concerted attempt in legislation to create a mechanism for implementing bilingualism in Ireland.

The Official Languages Act also establishes the office of Irish Language Commissioner whose chief function is to monitor and ensure compliance by public bodies with the Official Languages Act and their duties thereunder.⁷⁶ However, the role of the Irish Language Commissioner in Ireland seems to have hitherto proved frustrating and thankless. In 2014, the postholder resigned over what he felt were the blatant failures of the Irish government to promote the language and ensure that the public bodies which it funded complied with the provisions of the Act.⁷⁷ Indeed, he warned that the Irish state's policy on the Irish language was in jeopardy of becoming 'a sham' unless the state could guarantee an absolute right to deal with its departments through the medium of Irish and, to achieve this, build the capacity to deliver services in Irish by having sufficient numbers of Irish-speaking administrators.⁷⁸

The Official Languages Act contains provisions dealing with Irish in law-making and in the conduct of legal proceedings. Section 7 requires the publication of legislation simultaneously in Irish and English (reinforcing the constitutional provision). Section 8 grants the right to use either Irish or English in court proceedings, and 'that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language'.⁷⁹ If the cause of bilingual juries in Ireland seems at first glance to have found its statutory champion, hope is quickly dashed with the following sub-section which provides that disadvantage can be averted through the use of simultaneous or consecutive interpretation of the proceedings.⁸⁰

71 The gulf between the rhetoric and the reality is succinctly described by Niamh Nic Shuibhne in 'First among Equals? Irish Language and the Law' (1999) 93(2) *Law Society Gazette* (Ireland) 16, 18–19.

72 See John Smith, 'Legislation in Irish – a lot done, more to do' (2004) 9(3) *Bar Review* 91.

73 See *Ó Beoláin v Fahy and Others* [2001] 2 IR 279.

74 Ó Tuathaigh (n 49) 50.

75 The Act entered into force on 14 July 2003.

76 Official Languages Act 2003, ss 20–30.

77 <www.thejournal.ie/irish-language-commission-formally-steps-down-1330219-Feb2014>

78 *Irish Examiner*, 10 February 2014.

79 Official Languages Act 2003, s 8(2).

80 *Ibid* s 8(3).

Lest anyone should believe that this represents a special or distinctive arrangement in response to the demands of the bilingual state, the right to translation of proceedings where the accused does not speak the language of the proceedings is a fundamental human right and a basic tenet of a fair trial as protected by Article 6 ECHR.⁸¹ Translating the evidence of witnesses or accused persons for the benefit of a tribunal that does not speak their language, and vice versa, is the best and only solution in most cases where the accused or witness is either a foreign national or is a member of an ethnic minority with poor command of the official language. But it is not the perfect scenario, as it is not merely poetry that is lost in translation. Not only is factual error, or at least a lack of nuanced interpretation, a potential risk, more crucially, the translator becomes the voice of the evidence. The tribunal therefore hears and focuses on the simultaneous translation heard through earphones and misses the subtle tell-tale signs and signals of veracity, or lack of it, that can only be gained by listening to evidence at first-hand.⁸²

The right to use Irish in court proceedings is the only right granted to Irish speakers by the Act, and, in this respect, is similar to the Welsh Language Acts of 1967 and 1993 which granted the right to use the Welsh language in court proceedings, but no other legal right.⁸³ Despite its long-standing status as the official language of a member state, it was only as recently as 1 January 2007, upon the instigation of the Republic of Ireland, that Irish acquired the status of an official and working language of the EU. This, arguably, is further proof of Irish political ambivalence towards the Irish language.

Bilingual juries in Ireland

The jury as an institution was imported to Ireland in the middle ages, and by the seventeenth century had all but supplanted alternative native legal customs and processes.⁸⁴ After independence, the common law system was largely preserved and the right to trial by jury, except for minor offences, became a constitutional right in accordance with Article 38.5 of the constitution. Traditionally in Ireland, as in England, the jury was a middle-class, male and unrepresentative institution. The full democratisation of jury service in Ireland occurred more or less in tandem with England and Wales in the post-independence era.⁸⁵

Prior to the Juries Act (Ireland) 1976, the position in Ireland was governed by the Juries Act (Ireland) 1927 which based jury service eligibility rules on a property qualification and, to all meaningful purposes, excluded women. Following the Irish Supreme Court's ruling in *de Barca & Anderson v Attorney General*,⁸⁶ which declared the provisions of the 1927 Act to be unconstitutional, s 6 of the Juries Act 1976 was enacted. This created a position

81 Article 6(3)(e) ECHR provides that everyone 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'. However, the Official Languages Act 2003 does guarantee the right to use an official language, regardless of any question of competency, unlike the ECHR which only guarantees the right to an interpreter if that is necessary because of the defendant's lack of linguistic proficiency: see *Fryske Nasjonale Partij and Others v Netherlands* (1987) 9 EHRR CD 261.

82 See *A Review of the Criminal Courts of England and Wales by the Rt Hon Sir Robin Auld, Lord Justice of Appeal* (ISO 2001) ch 5, paras 62–72; also Sir Roderick Evans, 'Bilingual Juries?' (2007) 38 *Cambrian Law Review* 145–70.

83 Welsh Language Act 1993, s 22.

84 The historical background is summarised in Law Reform Commission Report, *Jury Service* LRC 107–2013, April 2013, 6–7. See also John D Jackson, Katie Quinn and Tom O'Malley, 'The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past' (1999) 62(2) *Law and Contemporary Problems* 203–32. However, very little has been written about the significance of the Irish language in the history of the jury in Ireland.

85 See Katie Quinn, 'Jury Trial in the Republic of Ireland' (2001) 72(1) *International Review of Penal Law* 197–214.

86 [1976] IR 38.

analogous to that which had been established a few years earlier in England and Wales, by virtue of the Juries Act (UK) of 1974, whereby virtually all adults between 18 and 70 years of age would be eligible for jury service.

The emergence of the belief in jury representativeness also engendered judicial support for the mechanism of random selection from the general population.⁸⁷ In *de Burca v the Attorney General*, Henchy J encapsulated this growing judicial enthusiasm for random selection from a representative cross-section of society:

the jury must be drawn from a pool broadly representative of the community so that its verdict will be stamped with the fairness and acceptability of a genuinely diffused community decision . . . it is left to the discretion of the legislature to formulate a system for the compilation of jury lists and panels from which will be recruited juries which will be competent, impartial and representative.⁸⁸

That juries should in principle be representative, include women and be drawn from a broad cross-section of society is uncontroversial. But Ireland's bilingual status also calls for juries who can function through both official languages. The judgment in *de Burca* would prove decisive in the deliberations in *Ó Maicín*, where, by a majority of four to one, the Supreme Court held that the defendant was not entitled to be tried by a jury who spoke Irish.⁸⁹ All the judges were in agreement that the case turned on the question of language rights, the fundamental issue being the nature and parameters of those rights in criminal proceedings.⁹⁰ But the Supreme Court, by a majority, concluded that, 'the appellant's constitutional right to conduct official business in Irish had to give way to the constitutional obligation for jury panels to be truly representative'.⁹¹

In *Ó Maicín*, the prosecution had argued that summoning a bilingual jury, that is, a body of people with sufficient skills to be able to hear and determine evidence in Irish without an interpreter, would be practically difficult if not impossible, and creating a linguistic test would be unconstitutional as it would interfere with the principle that a jury should be randomly selected from the community in general. At the judicial review proceedings, the High Court ruled that jury selection by linguistic ability, albeit restricted to the official languages of the state, would not accord with the provisions of s 11 of the Juries Act 1976⁹² and Article 38 of the constitution.⁹³ The High Court held that the summoning of an Irish-speaking jury would call for unlawful and unconstitutional interference with the principle of random selection from the district population as whole.⁹⁴ It also held that the provisions of s 44 of the Courts of Justice Act 1924, which requires judges assigned to Irish-speaking circuits to have sufficient knowledge of Irish to be able to preside without an interpreter, did not extend to the jury.⁹⁵

87 See Flaherty J in *O'Callaghan v the Attorney General* [1993] 2 IR 17, 25.

88 [1976] IR 38, 74.

89 *Ó Maicín v Ireland* (n 3).

90 *Ibid*, 'Summary' 1.

91 *Ibid* 2.

92 See Juries Act 1976, s 11: 'Each county registrar, using a procedure of random or other non-discriminatory selection, shall draw up a panel of jurors for each court from the register or registers delivered to him under section 10 (omitting persons whom he knows or believes not to be qualified as jurors).'

93 See the High Court judgment, *Ó Maicín v Ireland and Others* [2010] IEHC 179.

94 *Ibid* per Murphy J para 3: 'A jury is selected from the electoral register of that jury district. The selection is made by random sampling. The selection cannot be restricted in any way, for example, by way of political affiliation, religious belief, cultural identity or otherwise . . . the random selection is an integral part of the jury. It would be absurd to say that the basis for jury selection should be otherwise than a random selection of a jury.'

95 *Ibid* para 2.2.

But the principal authority relied upon was the previous Supreme Court authority of *Mac Cárthaigh*.⁹⁶ In that case, the defendant was tried for robbery and wished to conduct his defence through the medium of the Irish language, relying upon the constitutional status of the language. The alleged offence and subsequent trial took place in Dublin. The prosecution argued that Article 38.5 of the constitution meant that to selectively summon an Irish-speaking jury would offend the principles of jury representativeness and random selection. The Supreme Court agreed and held that to make fluency in Irish a requirement for jury service would seriously compromise the representative character of the jury and would therefore be unconstitutional. It held that the need to select jurors randomly from the entire community triumphed over the Irish speaker's purported claim to a right to a tribunal that spoke his language. The Supreme Court referred to a number of authorities which emphasised the importance of the jury being drawn from and being representative of the entire community, including *de Burca & Anderson v Attorney General*.⁹⁷

In *Mac Cárthaigh*, the alleged impracticality of summoning a jury with the ability to understand legal argument and court proceedings in Irish was considered.⁹⁸ The capacity within the general population to comprehend evidence and legal direction in the Irish language would also be a matter of debate in *Ó Maicín*, and this is something to which we shall return shortly. But the *Mac Cárthaigh* ruling was criticised for being at odds with the constitutional position of the Irish language as the first official language of the state.⁹⁹ It should be noted that the third section of Article 8, which states that 'provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes' (emphasis added), was not relied upon. Article 8.3 of the constitution makes clear that the departure from the primary position of Irish being the first official language requires legal provision and there is nothing explicit in the Juries Act (Ireland) 1976 permitting such a departure.

The Law Reform Commission in Ireland in its consultation paper on juries, published in March 2010, also gave *Mac Cárthaigh* some consideration.¹⁰⁰ Among the topics considered was the argument for bilingual juries and the Law Reform Commission stated that it:

concur with the approach taken in the *Mac Cárthaigh* case and considers that it would not be desirable to make provision for all-Irish juries. The Commission considers that confidence in the jury system is best preserved through selecting jurors for all cases from a broad cross-section of the community, including cases where a defendant would prefer an Irish speaking jury. The Commission is also conscious that there would be significant administrative difficulties in selecting a panel of jurors competent in the Irish language particularly in cases being tried outside Irish speaking areas. Additionally, the Commission considers that it is important that persons other than the defendant should be able to comprehend the proceedings in court.¹⁰¹

The final report that was later published added nothing to this initial finding.¹⁰² In *Ó Maicín*, the binding *stare decisis* significance of the earlier judgment in *Mac Cárthaigh* was considered.

96 *Mac Cárthaigh v Ireland* [1999] 1 IR 200.

97 *Ibid* 206.

98 *Ibid* 211.

99 For commentary see Gearoid Carey, 'Criminal Trials and Language Rights' (2003) 13(1) *Irish Criminal Law Journal* 15 and (2003) 13(3) *Irish Criminal Law Journal* 5.

100 See Law Reform Commission, Consultation Paper, *Jury Service* LRC CP 61–2010, March 2010.

101 *Ibid* para 4.99.

102 Law Reform Commission Report (n 84).

It was recognised that the position of the Irish language in Galway is radically different to that of Dublin and that this could provide a basis for valid factual distinction. However, the majority held that the judgment in *Mac Cárthaigh* was to be followed.

The majority acknowledged that the appellant, in principle, enjoyed a constitutional right to conduct official business fully in Irish. However, that principle was not absolute and in some circumstances had to give way to other considerations. It was held that it would neither be possible nor constitutional to create an Irish-speaking jury district on a geographical basis nor to draw up a list of Irish-speaking citizens capable of serving on a jury by some other mechanism.¹⁰³ As with the judges in *Mac Cárthaigh*, demographic considerations weighed heavily on judicial reasoning in *Ó Maicín*. It was said that the weak currency of the Irish language meant that it would be very difficult to raise a jury with the requisite linguistic skills to try a case in Irish without the help of an interpreter or translator.¹⁰⁴ The level of competency required for the task simply could not be determined with any degree of accuracy.¹⁰⁵

With this perceived danger that the pool of eligible jurors could be smaller than the official figures suggest, the challenge of ensuring impartiality and independence when a jury is summoned from a more selective pool of citizens was also noted.¹⁰⁶ Perhaps this, rather briefly mentioned point, reveals more about the anxieties of the non-Irish-speaking population and their perceptions and preconceptions of speakers of the language than any of the other more thoroughly rehearsed arguments. However, these anxieties about the linguistic competence and strength in numbers and, consequently, potential impartiality of the Irish-speaking population did not accord with the expert evidence heard and unchallenged by the court.¹⁰⁷ That expert evidence stated that, in the Connemara *Gaeltacht*, 67 per cent of a population of 13,444 speak Irish on a daily basis and that, in some areas, some 85–90 per cent of the people speak Irish to a standard that enables them to understand legal matters. Accordingly, 12 people chosen at random from an Irish-speaking population of about 10,000 in the district where the alleged offence in *Ó Maicín* was committed would have both the competence and independence to try a defendant in Irish without an interpreter.

Clarke J, unpersuaded by this evidence and its support for creating a bilingual jury district in the Connemara *Gaeltacht*, also introduced a further objection to bilingual juries.

103 Clarke J in *Ó Maicín* (n 3) para 6.12.

104 *Ibid* para 6.6.

105 *Ibid* para 6.9: 'there was, in reality, no evidence available as to the level of competence, so far as ability in Irish to the extent necessary to fully understand legal proceedings is concerned, of any particular percentage of persons in *Gaeltacht* areas'.

106 *Ibid* para 6.10: 'an overly narrow jury area runs the very real risk that a high proportion of persons from it may be excluded from any particular jury because of a connection with the events giving rise to the trial or parties or witnesses likely to be involved. It seems to me to follow that a constitutionally compliant jury panel must be based on a sufficiently large geographical area containing a sufficiently wide population so as to ensure that any panel selected from that area is both reasonably representative and unlikely to suffer significant exclusion on the basis of a connection with the case. There will always be persons who, if selected for a jury panel, would be excluded from any individual case on the basis of such a connection. On average the number of persons so excluded will, taking one case with the next, be much the same. However, if the jury area is drawn over-narrowly, then the percentage of persons so excluded will represent a much greater infringement on the broad representative character of the jury panel as a whole. One hundred people excluded by connection from an overall potential jury panel of (say) 30,000 is neither here nor there. A similar group excluded from a potential jury panel of 500 or even 1,000 would be a different thing altogether. It follows that a constitutionally compliant jury must be drawn from a sufficiently large area and population to avoid the risk of excessive exclusion by connection.'

107 See Hardiman J, *ibid* paras 125–7.

He claimed a need to strike a balance between the rights of Irish speakers to use their language in their dealings with the state and the rights of others to use English, which is also an official language. In other words, the judge discovered a social tension in Irish language policy which could give rise to a conflict of rights unless kept in check. His view was that promoting Irish language rights might lead to the diminishing of English language rights:¹⁰⁸

While the State, and each of its organs, has an obligation to promote and respect the high status of the Irish language there may, nonetheless, be limitations on an entitlement to have Irish used which derive from the limited use of Irish in ordinary everyday life at least so far as many parts of the country is concerned. Other citizens are entitled to use English as an official language if they wish and their rights so to do must also be respected.¹⁰⁹

This reasoning, described as a false antithesis by Hardiman J, who delivered the sole dissenting judgment which I shall turn to later in this article,¹¹⁰ appears to present us with a linguistic zero-sum principle. It is reasoning which appears to say that granting the right to a bilingual jury to an Irish-speaking defendant would lead to an injustice, that is, the exclusion of a significant proportion of the population who do not speak Irish from the opportunity to be randomly selected to serve on the jury panel in that particular trial (no matter how infrequently a request for an Irish-speaking jury might arise in reality). That is the only injustice that is discernible, as the citizen who might wish to use English in a criminal trial before a bilingual jury in Ireland could do so without resort to an interpreter or translator as there are very few monolingual Irish speakers remaining in any part of the country. Furthermore, such injustices must be committed on a weekly basis throughout Canada to monolingual English or French speakers who are denied the remote chance to serve on juries in trials where the defendant's official language is French or English. This, however, was something which the majority of the judges in *Ó Maicín* refrained from contemplating.

In accordance with the precedent laid down in *Mac Cárthaigh*, it was further held that, as juries should be representative of the entire community, they should also be randomly selected and no interference with that principle could be supported.¹¹¹ Does this assume that the Irish-speaking population is not in other respects representative of the Irish population in general? There is good evidence which suggests that Irish speakers share the same demographic balance as non-Irish speakers in terms of gender and age.¹¹² Somehow, these facts, which temper concerns about representativeness and which provide perspective and proportionality to the debate, were overlooked or ignored. This only reinforces the view that the judgment of the majority of the judges in *Ó Maicín* was driven more by ideology than evidence.

As for Ireland's purported bilingualism, Clarke J, reflecting upon the state's responsibilities towards the Irish language, concluded that, 'there is a clear constitutional

108 Per Clarke J, *ibid* para 3.7: 'It follows that those wishing to conduct official business in Irish do have a right, derived from the constitutional status of the Irish language, to have their business conducted in Irish. However, it equally follows that that right is not absolute and must be balanced against all the circumstances of the case (not least the fact that the great majority of the Irish people do not use Irish as their ordinary means of communication) particularly the fact that other citizens are entitled to conduct their business in English as an official language, and also any other competing constitutional interests which may arise.'

109 Clarke J, *ibid* para 3.3

110 Hardiman J, *ibid* para 102.

111 Clarke J, *ibid* para 3.8. See also O'Neil J, para 36.

112 Central Statistics Office (n 4).

obligation on the State to encourage the use of Irish for official business'.¹¹³ Indeed, the obligation to encourage is repeated: 'it does not seem to me that the general obligation of the State can, therefore, be put any higher than an obligation to encourage'.¹¹⁴ This interpretation of the State's obligation towards the Irish language did not go unchallenged. Even MacMenamin J, who concurred with Clarke J on the unconstitutionality of bilingual juries, and who concluded that the decision in *Mac Cárthaigh* should be followed,¹¹⁵ nevertheless felt that 'the duty of the State goes further than merely to seek to encourage the status of the first national language'.¹¹⁶

But it was Hardiman J who took issue with this point most vehemently and attacked the false antithesis which claimed that granting Irish speakers the same right as English speakers to be tried by a tribunal who spoke their language would somehow undermine the rights of English speakers. He also robustly rejected the claim that the state had no more than 'an obligation to encourage' and condemned it as an attempt to dilute the constitutional position of Irish in breach of the proper function of the Supreme Court to uphold the constitution.¹¹⁷ Hardiman J held that the appellant had a constitutional right to be tried before a jury who could understand Irish without the assistance of an interpreter. In both tone and content, Hardiman J's judgment is one of the most remarkable dissenting judgments in the history of Irish law: I would suggest that every member of the Oireachtas should read it.

For Hardiman J the crucial fact was that Ireland had been officially a bilingual country since independence and, accordingly, this had implications for the state's treatment of the language in conducting official business, including the business of the courts:

The effect of Article 8 of the Constitution is to establish Ireland as a bilingual State in terms of the Constitution and the laws. It is a historical truism that official Ireland has always been reluctant to behave as if the State were indeed, in law and in practice as well as in constitutional theory, a bilingual State. But that does not take from the fact that Ireland is, by its Constitution, a bilingual State. The Judges, of course, are bound to uphold the Constitution.¹¹⁸

Hardiman J also declared that he did not believe that there was any other country in the world in which a citizen would not be entitled to defend himself or herself before a court in the national and first official language and to be understood directly in that language.¹¹⁹ The expeditious solution he proposed was that the relevant government minister should exercise a statutory power to order a bilingual jury district and that the Connemara *Gaeltacht* could be declared a jury district from which a bilingual jury could be summoned.

In *Ó Maicín*, a technical point was also identified and which may yet prove highly significant to the future discussion of this issue. The trial judge had refused the defendant's application for a bilingual jury on the basis that he did not have the power to investigate the competency in Irish of potential jurors as there is no statutory provision enabling him to carry out such an enquiry.¹²⁰ In the Law of England and Wales, the provisions of s 10 of the Juries Act 1974 enable the courts to disqualify any juror who cannot speak English. All

113 Clarke J in *Ó Maicín* (n 3) para 3.4.

114 *Ibid* para 3.5.

115 MacMenamin J, *ibid* paras 20–4.

116 *Ibid* para 24.

117 Hardiman J, *ibid* paras 85–6.

118 *Ibid* para 21.

119 *Ibid* Appendix 2, 9.

120 See Hardiman J, *ibid* para 63.

jurors in criminal trials in England and Wales must be linguistically competent, meaning they must understand English. In Ireland, however, the Juries Act 1976 is silent on a potential juror's language skills. Section 6 makes all citizens over 18 and under 70 years of age, and whose names appear on the electoral register, eligible to serve on a jury: however, no language competence is set out.¹²¹

Is this silence by accident or by design? A more cynical view would be that this was a calculated political sleight of hand, one designed to avoid the language issue altogether and thus allow the courts to circumvent the constitutional status of Irish. That the Irish Law Reform Commission's otherwise comprehensive and detailed report on jury service was virtually silent on the significance of Ireland's bilingualism would tend to reinforce this suspicion.¹²² Indeed, even among scholars with an interest in jury composition and jury representativeness in Ireland, the language issue is often ignored.¹²³ It leads the external observer to the conclusion that language policy in Ireland is politically a thorny if not unmentionable issue.

But the plot thickens. Despite there being no statutory language test for jury service, it came to light during the proceedings that court staff and county registrars responsible for summoning jurors do identify and exclude persons unable to communicate in English. Such persons are often economic migrants and other immigrants from the EU or further afield. However, this ad hoc administrative practice has no statutory basis. O'Neil J valiantly sought to find some legal basis for this administrative practice¹²⁴ and suggested that s 9(2) of the Juries Act 1976 might offer that basis. That section gives a county registrar the power to excuse any person from jury service if that person shows that there is good reason why he or she should be so excused. However, regrettably, the learned judge failed to distinguish between eligibility and excusal: to excuse an individual from jury service on a particular occasion due to personal circumstances, such as financial hardship or poor health, is obviously not the same as saying that an individual is ineligible for jury service. Whereas the former may appropriately fall within the province of a bureaucratic decision, the latter cannot as a matter of due process: the magnitude of such a decision requires legal authority more than that which can be provided by administrative action. His response to the corollary that if the provision could be used to justify the exclusion of non-English speakers, so it could also exclude non-Irish speakers if the circumstances of the case so required, was simply that it would be 'a breach of the cross community representation principle enjoined by Article 38'.¹²⁵

Hardiman J, conversely, believed that the practice of court administrators weeding out non-English speakers was without proper legal basis and required urgent legislative attention.¹²⁶ That, surely, is the correct legal position. Addressing that specific matter may

121 The other provisions specify groups and categories of persons that are excluded from the process: See Juries Act 1976, ss 8–9.

122 Law Reform Commission Report (n 84) 12–13. It briefly mentions the Supreme Court judgment in *Mac Cárthaigh* and the High Court judgment in *Ó Maicín*, but does not consider the impact of Ireland's bilingualism on the rules on jury service.

123 For example, Niamh Howlin, 'Multiculturalism, Representation and Integration: Citizenship Requirements for Jury Service' (2012) 35 *Dublin University Law Journal*, 148–72.

124 See O'Neil J in *Ó Maicín* (n 3) 28–33.

125 *Ibid* para 33.

126 Hardiman J, *ibid* paras 12–14, 161–75.

yet offer the path to proper democratic scrutiny and open public debate on the state's language policy in the context of criminal jury trials.¹²⁷

Setting a precedent?

It is, I suspect, unnecessary to draw out the obvious distinctions between Canada and Ireland on the issue of bilingual juries. But the judgments in *Ó Maicín* also reflect internally divided opinions on the issue. Their heated and passionate tone, and especially that of the dissenting judge, betray deeply held and discordant views on the proper place of the Irish language in Irish society. The stark contrast with Canada is that there upholding linguistic equality and honouring the principle of bilingualism take precedent over arguments about jury representativeness. In addition, judicial opinion on the proper role of the state in maintaining bilingualism marks a point of divergence between Canada and Ireland. For the majority in the Irish Supreme Court in *Ó Maicín*, a 'duty to encourage' seemed adequate. In Canada, conversely, the law states that the state has duties in 'enhancing the vitality and supporting the development of English and French linguistic minority communities' and 'fostering full recognition and use of English and French in Canadian society'.¹²⁸ The latter represents true commitment to bilingualism. The former does not.

If the ruling in *Ó Maicín* means that Ireland has declined to follow the Canadian model and precedent, it is also the case that it may have set a precedent. Across the water from Dublin, the case for bilingual juries has also been exercising minds. Indeed, as long ago as the 1930s, the legal status of the Welsh language was a matter of public debate and gave rise to a national petition calling for rights for Welsh speakers in courts and public administration.¹²⁹ The petition, among other things, called for the right to use the Welsh language in legal proceeding and mechanisms to decide whether Welsh or English shall be the language of any particular trial.¹³⁰ It also called for Welsh-speaking jurors where evidence is given through the medium of Welsh in the cause of justice and evidential accuracy.¹³¹ The twentieth century would see the enactment of legislation that would promote equality between Welsh and English and guarantee the right to use the Welsh language in legal, including criminal, proceedings.¹³² However, that legislative reform did not also create the right to a tribunal which understands the Welsh language.

In Wales, the debate often focused on trial fairness and efficiency in the administration of criminal justice.¹³³ Advocates of bilingual juries wished Welsh and English to be treated equally in public life and in the courts of Wales. But they also based their case on the alleged advantages to the criminal justice process if jurors understood the evidence without having to rely on an interpreter.¹³⁴ In recent times, the comprehensive review of the criminal courts in England and Wales, chaired by Sir Robin Auld, provided a further opportunity to

127 As a postscript to this judgment, the Supreme Court ordered the state to pay the entire costs of the proceedings in the High Court and Supreme Court, as the case raised important constitutional issues. See *Irish Times*, 29 May 2014 <www.irishtimes.com/news/crime-and-law/courts/state-ordered-to-pay-costs-of-man-s-action-over-bilingual-jury-1.1812967>.

128 Official Languages Act 1988, Preamble.

129 See J Graham Jones, 'The National Petition on the Legal Status of the Welsh Language, 1938–1942' (1996) 18 *Welsh History Review* 92–123.

130 National Library of Wales, *The Welsh Language Petition* (Welsh Language Petition Committee 1939).

131 *Ibid* 9.

132 See the Welsh Language Act 1967, s 1, and the Welsh Language Act 1993, s 22.

133 It is a debate that had enjoyed intermittent currency. In 1973, the Lord Chancellor, Lord Hailsham of St Marylebone, announced that Lord Edmund Davies had recommended to him that bilingual juries should not be introduced: see HL Deb 12 June 1973, vol 343, cols 534R–37L.

134 See Roderick Evans J, 'Bilingual Juries?' (2007) 38 *Cambrian Law Review* 145–70.

examine the subject: he recommended that it should be the subject of consultation and discussion in Wales.¹³⁵

Not only were there arguments in favour of bilingual juries, but also objections to such a development. The objections mirrored those heard in Ireland, those being that the language is spoken by a minority of the population and so to summon bilingual juries would unreasonably limit the pool of eligible jurors, even to the extent that they would not be representative of the entire community.¹³⁶ The legal community in Wales considered the merits of bilingual juries in a bilingual country.¹³⁷ Officialdom also responded when the Office for Criminal Justice Reform in England and Wales published a consultation paper on the use of bilingual juries (Welsh and English) in some criminal trials in Wales, which outlined the principal arguments for and against bilingual juries.¹³⁸

The government was slow to report its findings on the consultation paper and one member of Parliament strove to stimulate the discussion by presenting a private Bill to revise the law in favour of bilingual juries. Not surprisingly, his efforts were frustrated by the parliamentary machine.¹³⁹ Then, in early 2010, the Ministry of Justice finally published its official response to the consultation.¹⁴⁰ Of the 24 responses that were received from organisations and individuals the majority of respondents were in favour of bilingual juries. However, the government's unfavourable response was not unexpected.

The government considered that the overriding question was the case for bilingual juries in principle.¹⁴¹ The report addressed that question by reflecting on the significance of jury representativeness and random selection's part in the process and found that 'much of the authority of, and widespread public confidence in, the jury system derives from its socially inclusive nature'.¹⁴² The report identified the chief barriers to bilingual juries in Wales as being the interference with random selection and jury representativeness.¹⁴³ There was nothing unexpected in this response. Indeed, it simply reiterated the well-rehearsed arguments against bilingual juries. What it failed to do was fully to consider the impact and significance of the bilingual national policy on the issue.

The report also relied upon research commissioned by the Ministry of Justice and carried out at University College London on the jury system in England and Wales, focusing particularly on the representative element within the jury.¹⁴⁴ This was, without doubt, substantial research into various aspects of the subject and its relevance to the jury as an institution. However, the consideration of the linguistic situation in Wales was cursory and sparse. Jurors' linguistic skills in courts in Wales were reviewed over a period of a week and on that basis it was found that only a small minority of potential jurors considered

135 See *Review of the Criminal Courts of England and Wales* (n 82), ch 5, para 72. 'the proposal of a power to order bilingual juries in particular cases is worthy of further consideration—but not by me. It should be developed and examined, with appropriate consultation, in Wales'.

136 *Ibid*, ch 5, paras 62–72.

137 *The Lord Chancellor's Standing Committee on the Welsh Language: A Report of the Criminal Justice Sub-Committee on the use of the Welsh Language in the Criminal Justice System in Wales* (Lord Chancellor's Office 2002) para 114.

138 Office for Criminal Justice Reform, *The Use of Bilingual (English and Welsh-speaking) Juries in Certain Criminal Trials in Wales* (Office for Criminal Justice Reform 2005).

139 See HC Deb 16 January 2007, vol 455, no 26, 657–58.

140 See Ministry of Justice, *The Use of Bilingual (English and Welsh-speaking) Juries in Certain Criminal Trials in Wales* CP(R) 08/10 (Ministry of Justice 9 March 2010).

141 *Ibid* 17.

142 *Ibid*.

143 *Ibid* 18.

144 See Ministry of Justice, *Diversity and Fairness in the Jury System*, Ministry of Justice Research Series 2/07 (Ministry of Justice June 2007).

themselves to be fluent in Welsh. Indeed, it was claimed that only 6.4 per cent of those who were summoned to serve on a jury were fluent in Welsh, leading to this conclusion: ‘such a low level of Welsh fluency among serving jurors indicates that conducting jury trials with a full bilingual jury would be difficult to achieve, certainly on any regular basis’.¹⁴⁵

Of course, this figure of 6.4 per cent does not correspond with the figures in the 2011 census which state that around 20 per cent of the population can speak the language.¹⁴⁶ The report did not explain how the data was collected (or what questions the prospective jurors were asked), although the authors speculated that respondents in Wales may have flinched at the possibility of having to perform such an onerous public duty as jury service in Welsh.¹⁴⁷ Such speculation, based on the sample of a week’s survey, is methodologically inadequate and renders any conclusion unreliable. Even more irresponsible is the government’s reliance on this evidence in its response to the call for bilingual juries. Indeed, the government’s report engages in socio-linguistic hypotheses that the bilingual skills of the Welsh-speaking population are unlikely to be sufficiently robust to cope without the assistance of the professional interpreter.¹⁴⁸

But whatever doubts we may have about the soundness of these findings, the government cannot be criticised for taking cognisance of the Irish position on bilingual juries. With the judgment in *Mac Cárthaigh* readily to hand, the authors of the report held up the Irish precedent as a model of good judgment:

The country where the linguistic position is probably most closely analogous with the position in Wales is the Republic of Ireland. The Government notes that the Irish Supreme Court . . . has decided that there is no right under the Irish constitution to be tried by an Irish-speaking jury. The judgment was based mainly on random selection arguments. This judgment is particularly striking in that Irish has a formal constitutional position as the first language of the Republic of Ireland, and English as second language, rather than Irish and English being regarded broadly as equals as Welsh and English are in Wales.¹⁴⁹

The government report was deficient in a number of respects. Although there was generous acknowledgment of and support for the Irish example, there was no mention of the alternative Canadian model. Ireland’s concept of bilingual justice and the Irish Supreme Court’s ruling on the unconstitutionality of granting Irish speakers the right to be tried by a jury that speak their official language gave the British government the perfect excuse to dismiss the claims of Welsh speakers. The reasoning was simple. If a sovereign state which claims that its national language is the first official language refuses the right to be tried by a jury that speak that official language, why should we recognise such a right in Wales? That the Irish courts could have offered the British government such a justification on a plate

145 Ministry of Justice (n 144) 112.

146 <<http://gov.wales/statistics-and-research/census-population-welsh-language/?lang=en>>

147 Ministry of Justice (n 144) 113: ‘it may well be that when asked to declare whether they were fluent when there may have been a possibility of having to perform an official function using the Welsh language (jury service), the respondents were less optimistic (or perhaps more realistic) about their level of proficiency in Welsh’.

148 Ministry of Justice (n 140) 19: ‘it is a moot point whether evidence is best understood directly, rather than through a professional simultaneous interpreter, where two languages are in use during a trial. Certainly, one would have to have a very high level of understanding of both languages—in effect, perfect bilingualism—to be able to understand evidence given in both languages.’

149 Ibid 20.

should be the source of discomfort in Ireland. Left unaddressed, this is a subject that has the potential to become another 'sordid' chapter in the history of the Irish language.¹⁵⁰

Conclusion

In less than a decade, Ireland will be marking the centenary of its independence as a nation. It will be an opportunity for the nation to reflect on its journey thus far and to ponder over its future direction. Ireland has changed and will continue to do so. On 22 May 2015, the Irish people, in a plebiscite, approved changing the state's constitution to extend civil marriage rights to same-sex couples.¹⁵¹ This would have been unthinkable a generation ago. Yet the Irish people's capacity for generosity and fairness and their willingness to embrace change in the interests of justice should not be underestimated.

The creation of the Irish state as a bilingual state was also an act of justice and a deliberate renunciation of a colonial past when the Irish language was demeaned, routinely mocked and excluded from the courts of justice. Yet, the issue of bilingual juries betrays the Irish state's neurosis about its bilingualism. It is a bilingual state which fails to ensure equality to both its official languages in the administration of justice. Because of this, the Irish speaker in the criminal courts of the Republic of Ireland is in no significantly better position than his or her counterpart in Northern Ireland.

Some may respond to this paper by claiming that it amounts to condemning the Irish state's bilingualism on the basis of a single issue. The reply is that, firstly, to be tried by a court of justice in your official language and by a tribunal which understands your official language is the hallmark or the litmus paper indicator of true state bilingualism. It is a right and privilege that only sovereign people in their sovereign state can expect to enjoy. It is the right which distinguishes the status of Welsh or Irish in the UK from French and English in Canada or Finnish and Swedish in Finland. Secondly, this issue is indicative of a deeper malaise within the Irish state with regard to its national and first official language. It is a malaise that in recent years resulted in an Irish Language Commissioner resigning in despair and thousands of people taking to the streets of Dublin to protest at the treatment of the Irish language by governments in both the republic and the north.¹⁵²

Aggravating Ireland's failure to behave and set an example as a bilingual state is that it has established an unfortunate precedent for another linguistic community which currently lacks the political and democratic means to reject that precedent and adopt the Canadian model. Wales, although proclaiming Welsh as an official language,¹⁵³ and with a nascent legislature of its own to legislate for its future, must also function within the straightjacket imposed by being part of the unitary British state, the unified jurisdiction of England and Wales and in a context whereby power over criminal justice is not devolved.

As for Ireland, it has the political and legal means to act. The immediate task is to determine what ought to be the language test for jury service in the Juries Act 1976. Is it seriously suggested that competence in English and only English can be the appropriate qualification in this bilingual state? The palpably unlawful practice of excluding non-English

150 See J J Lee, *Ireland 1912–1985: Politics and Society* (CUP 1989) 135. The author uses the word when discussing the state's failure to revive the Irish language: 'What might have been a noble chapter in the history of the new state became instead a sordid one. None of the instinctive ritualistic excuses could explain this away. The British could not be blamed. Partition could not be blamed . . . the responsibility for the failure of policy lay with the formulators of policy.'

151 *Irish Times* <www.irishtimes.com/news/politics/marriage-referendum>.

152 *Irish Times*, 15 February 2014 <www.irishtimes.com/news/social-affairs/thousands-march-for-language-rights-1.1693607>.

153 See Welsh Language (Wales) Measure 2011, s 1.

speakers by court administrators without any statutory or other lawful basis cannot continue and it is a matter for Ireland's legislature to address with urgency.

This specific issue will unavoidably lead to the wider discussion on Ireland's bilingualism and the state's response to the Irish Supreme Court's interpretation of the constitution in the context of bilingual juries. That debate should lead to one or two outcomes. If the Irish legislature agrees with the Supreme Court's judgment in *Ó Maicín*, it should put in motion processes to amend the Irish Constitution so that a new Article 8 is enacted in these terms:¹⁵⁴

Article 8 (as amended)

1. The first official language of the Republic of Ireland is English.
2. The Irish language is also recognised as an official language.

Such a formula would reflect the slightly inferior status of Irish and would thus justify a policy of linguistic inequality. Of course, it would be subjected to democratic scrutiny not only in the Oireachtas but also by the people of Ireland in a referendum.¹⁵⁵ Who knows, it might finally lay to rest any pretence the Irish state residually holds about being a bilingual state.

There is, of course, the alternative course. Ireland could renew its commitment to its founders' vision of a bilingual state based on linguistic equality and the place to start would be the subject of bilingual juries. The Supreme Court having twice declared bilingual juries to be unconstitutional, ensuring the constitutionality of bilingual juries would require changing that constitution. That change would need to be initiated by the body politic. The required change might take the following form:

Article 38.7 (as amended)

A person to be tried on any criminal charge shall be tried before a judge, judges or judge and jury who speak the official language of Ireland that is the language of the person to be tried or, if the circumstances warrant, who speak both official languages of Ireland.

Such a formula, in plain language, spells equality. Further supplementary amendments to the Juries Act 1976 to deal with the mechanics of drawing up lists of bilingual citizens from which potential jurors would be summoned should cause little difficulty: there are ample precedents in Canada.

Having been the subject of repeated judicial scrutiny, perhaps it is high time that this matter is subjected to democratic scrutiny. Is it not time for the Irish people to decide the sort of bilingual state theirs should be?

¹⁵⁴ For guidance on the process, see, for example, *Casey* (n 66) 709–19.

¹⁵⁵ *Bunreacht na hÉireann*, Article 46.

