AGUISÍNÍ LE BREITHIÚNAS HARDIMAN BRMH IN *Ó MAICÍN V ÉIRE* [2014] 4 I.R. 477, AGUISÍNÍ ATÁ FÁGTHA AR LÁR ÓN TUAIRISC OIFIGIÚIL[1]

Achoimriú: Scrúdaíonn an t-alt seo an chuid sin de bhreithiúnas Hardiman Brmh san Chúirt Uachtarach sa chás Ó Maicín v Éire a fágadh ar lár ón tuairisc oifigiúil agus a fhoilsítear anseo den chéad uair go poiblí na hAguisíní sin sa dá theanga inar thug sé uaidh iad agus an gnáthchíoradh don chló déanta orthu. Bhain an cás le teidlíocht cúisí ar díotáil ar cainteoir Gaeilge é go gcuirfí ar a thriail é os comhair giúiré dátheangach. Scrúdaítear an teidlíocht sin sna haguisíní seo sa chomhthéacs idirnáisiúnta agus pléitear go mion na meicníochtaí a chuirtear ag obair le breitheamh, giúiré agus ionchúisitheoir le Fraincis a chinntiú don chúisí Fraincise in áiteanna i gCeanada ar mionlach fíorbheag iad lucht labhartha na Fraincise. Is cinnte gur ceantar é seo a ndeanfar tuilleadh taighde agus obair pháirce ann.

Údar: Dáithí Mac Cárthaigh BL, Abhcóide le Dlí; Comhordaitheoir Dlí agus Gaeilge Óstaí an Rí; Údar An Ghaeilge sa Dlí (Leabhar Breac, 2020), Dr Seán Ó Conaill, Stiúrthóir BCL (Dlí & Gaeilge) Scoil An Dlí, Coláiste na hOllscoile Corcaigh

Bhain an cás seo le teidlíocht chainteoir dúchais Gaeilge ar ghiúiré dátheangach a thuigfeadh idir fhianaise agus óráidí a fhoireann dlí go díreach as Gaeilge seachas trí ateangaire le go mbeadh sé ar chomhchéim os comhair na Cúirte leis an ionchúiseamh stáit a bhí á riaradh trí Bhéarla. Dhiúltaigh an Chúirt Uachtarach don éileamh ar an ábhar nach bhféadfaí, faoi láthair ar aon nós, giúiré dátheangach a bheadh sách ionadaíoch a chur le chéile do thriail an chúisí. Is féidir breithiúnais an mhóraimh in *Ó Maicín* a chur le cásanna eile a cinneadh le blianta beaga anuas ina bhfeictear éileamh ar an bpragmatachas breithiúnach maidir le cúrsa dlí agus teanga.[2] Thug Hardiman Brmh, a bhí mar uachtarán na Cúirte, breithiúnas easaontach uaidh i bhfabhar an iarratasóra. Bhraith sé ach go háirithe ar chleachtais Cheanada chun giúiré a thuigeann Fraincis a chur le chéile in áiteanna ar mionlach beag iad lucht labhartha na Fraincise. Thug sé suntas freisin do chleachtais ilteangacha Chúirt Bhreithiúnais an Aontais Eorpaigh agus do chearta teanga i nDlí an Aontais. Go dté na haguisíní seo chun leasa fhorbairt na dlí-eolaíochta san ábhar seo.

Tionscnamh taighde amháin a thiocfadh leis na ceithre bhreithiúnas a tugadh in *Ó Maicín* is ea tuilleadh taighde i ndáil le giúiré a roghnú i bpolaití le níos mó ná teanga oifigiúil amháin. Ghlac móramh na Cúirte Uachtaraí in *Ó Maicín* leis, faoi mar a ghlac Cúirt Uachtarach roimhe sin leis in *Mac Cárthaigh v Éire* (1998) T.É.T.S. 57, cás ar an dul céanna, go bhfágtar an cúisí faoi mhíbhuntáiste agus é ag labhairt le giúiré trí ateangaire, ach chinn nach raibh réiteach níos fearr ar fáil.

Lorg Mac Cárthaigh, mar athbhreithniú breithiúnach sa chéad áit agus níos déanaí mar achomharc chun na Cúirte Uachtaraí, ordú ag treorú go mbeadh an giúiré ina chás sa Chúirt Chuarda comhdhéanta de dhaoine a raibh ar a gcumas an Ghaeilge a thuiscint gan chúnamh ó ateangaire. Theastaigh ón gCárthach a thaobh féin den chás a reáchtáil as Gaeilge. D'áitigh sé trína abhcóide nach mbeadh an éifeacht chéanna leis na pointí a dhéanfaí ar a shon dá gcaithfí iad a aistriú go Béarla ar dtús agus d'éiligh sé dá réir mura mbeadh Gaeilge ag gach ball den ghiúiré go sárófaí a chuid cearta. Foráiltear le halt 6 d'Acht na nGiúiréithe 1976 go bhfuil gach saoránach atá os cionn ocht mbliana déag d'aois agus a bhfuil a (h)ainm ar chlár toghthóirí na Dála cáilithe agus faoi dhliteanas chun fónamh mar ghiúróir mura bhfuil sé

[1] Tá an gnáth-chíoradh don chló déanta.

[2] Séan Ó Conaill, 'Judicial Pragmatism at the Expense of Language Rights: The Ó Maicín Decision' (2014) Tráchtaireacht ar Thionscadal Bunreachtúil COC ar fáil ag <constitutionproject.ie/?p=309>

neamh-inroghnaithe nó dícháilithe ar chúis eile. Níl aon cháilíocht teanga luaite sa reachtaíocht áfach (sa Bhéarla nó sa Ghaeilge). Foráiltear le halt 11 gur cheart painéal giúróirí a chur le chéile ar shlí randamach nó ar shlí neamh-idirdhealaitheach eile.

Foráiltear le hAirteagal 38.5 de Bhunreacht na hÉireann mar seo a leanas: 'Ní cead duine a thriail in aon chúis choiriúil ach i láthair choiste tiomanta, ach amháin i gcás cionta a thriail faoi alt 2 [cionta achomair] alt 3 [cúirteanna speisialta] nó alt 4 [binsí míleata] den Airteagal seo.' Scrúdaigh an Ard-Chúirt cad é go díreach is giúiré ann. Thagair Ó hAnluain Brmh do réasúnaíocht Griffin Brmh,[3] sa chás *de Burca v The Attorney General*[4] agus ghlac leis an ráiteas '[that] the jury should be a body which is truly representative, and a fair cross-section of the community'. Le forbairt a dhéanamh maidir leis an gceist arb fhéidir giúiré a chur le chéile as measc cainteoirí líofa Gaeilge amháin tharraing O'Hanlon Brmh as an gcás Meiriceánach *Taylor v Louisiana*[5] inar dúradh 'Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial' agus chinn sé dá ndeonódh sé an t-órdú a bhí á lorg ag an gCárthach dó go bhfágfadh sé ar leataobh cuid an-mhór den phobal (idir bhéarlóirí gan dóthain eolais ar an nGaeilge agus ghaeilgeoirí gan dóthain eolais ar théarmaí dlí na Gaeilge). Tharraing sé aird freisin ar na fadhbanna praiticiúla a bhainfeadh le painéal giúróirí a chur le chéile toisc an líon íseal cainteoirí Gaeilge i measc an mhórphobail (de réir an daonáirimh) agus in éagmais aon liosta de na cainteoirí Gaeilge.[6] Sheas an Chúirt Uachtarach le cinneadh Uí Anluain Brmh san Achomharc.

Cuireann Carey béim ar an tslí go dteipeann ar an gcinneadh seo míniú a thabhairt maidir le cén fáth go bhfuil forlámhas thar Airteagal 8,[7] ina n-aithnítear an Ghaeilge go soiléir mar phríomhtheanga oifigiúil an Stáit, ag smaointe nach bhfuil sainráite sa Bhunreacht ar nós giúiré ionadaíoch ina bhfaightear trasghearradh ceart den phobal. D'áitigh Carey,[8] ag scríobh dó in 2003, gur gá cothromaíocht cheart a bhaint amach idir ionadaíocht agus cearta teanga agus mhol sé fiú dá mbeifí le seasamh leis an gcinneadh sa todhchaí go raibh sé ag siúl go mbeadh bunús ní b'áitithí mar bhunús leis. D'áitigh Parry '[t]he result of this judgment is that, despite the purported provisions of Art 8, there can be no serious argument that there exists in Ireland the sort of institutionalised bilingualism that is to be found in Canada'.[9] Sa Bhreatain Bheag cuireadh argóintí den chineál céanna chun cinn gur cheart go mbeadh painéil giúiróirí dátheangacha ann ionas go mbeadh an cosantóir ar mian leis an Bhreatnais a úsáid in ann dul faoi thriail le giúiré a thuigfeadh an teanga gan aon ghá le hateangaire.[10] Tá an chosúlacht ar an scéal áfach nár glacadh leis seo[11] ar an mbunús céanna le hÉirinn, mar gur áitíodh go mbeadh ar a laghad ceithre chúigiú de phobal na Breataine Beaga á n-eisiamh ar bhonn teanga.[12]

[3] [1998] T.É.T.S. 57 ag lch 61.
[4] [1976] IR 38 ag lch 82.
[5] (1975) 419 US 522 ag lch 530
[6] [1998] T.É.T.S. 57 ag lch 63.
[7] Gearoid Carey, 'Criminal Trials and Language Rights: Part II' (2003) 13(2) Irish Criminal Law Journal 5, ag lch 8.
[8] ibid.
[9] Gwynedd R. Parry, 'An Important obligation of citizenship': language, citizenship and jury service' (2007) 27(2) Legal Studies 188 ag lch 199.
[10] An Breitheamh Onórach Roderick Evans 'Bilingual Juries' The Centre for Welsh Legal Affairs' Seventh Annual Lecture, National Library of Wales, 25 Samhain 2006. 38 Cambrian Law Review 145.
[11] Fógra ó Aire Dlí agus Cirt na Breataine Bige an 9 Márta 2010.
[12] Lloyd Jones, Sir David 'The Machinery of Justice in a Changing Wales', The Wales Office Annual Lecture, lch 21.

Ghlac an Chúirt Uachtarach d'aon ghuth in *Mac Cárthaigh* agus le móramh na mbreithiúna in *Ó Maicín*[13] le fírinne an tsleachta seo a leanas as an alt acadúil 'No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for non-English Speaking Defendants' le Michael Shulman sa *Vanderbilt Law Review*:[14]

> When a defendant testifies in a criminal case, his testimony is critically important to the jury's determination of his guilt or innocence. The first noticeable difficulty in the present system of court interpretation is that non-English speaking defendants are not judged on their own words. The words attributed to the defendant are those of the interpreter. No matter how accurate the interpretation is, the words are not the defendant's, nor is the style, the syntax, or the emotion. Furthermore, some words are culturally specific and, therefore, are incapable of being translated. Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony. While juries should not attribute to the defendant the exact wording of the interpretation and the emotion expressed by the interpreter, they typically do just that[15] ... Given that juries often determine the defendant's guilt or innocence based on small nuances of language or slight variations in emotion, how can it be fair for the defendant to be judged on the words chosen and the emotion expressed by the interpreter?'

Scríobh an Chúirt Uachtarach in *Mac Cárthaigh* mar seo a leanas ag lch. 69 díreach tar éis dóibh an mhéid thuas a leagan amach:

> 'Tá sé sin fíor go leor, ach caithfear a rá, in Éirinn faoi láthair, nach bhfuil réiteach níos fearr ann. Dá mbeadh ar gach ball den ghiúiré bheith in ann cúrsaí dlí a thuiscint as Gaeilge gan cabhair ateangaire, chuirfí formhór de mhuintir na hÉireann ar leataobh. Dhéanfadh sé sin sárú ar Airteagal 38.5 den Bhunreacht, mar a mhínigh an Chúirt Uachtarach é i gcás *de Búrca v Attorney General* [1976] I.R. 38 agus *The State (Byrne) v Frawley* [1978] I.R. 326.'

Tugaimid ar aird gur measa cás an chúisí a riarann a chosaint as Gaeilge trí ateangaire os comhair giúiré ná cás an chúisí nach bhfuil ceachtar de theangacha an Stáit aige. Labhróidh abhcóide an chúisí ón iasacht leis an ngiúiré go díreach as Béarla chun úsáid an ateangaire ag an gcúisí a mhaolú. Labhróidh abhcóide an ghaeilgeora leo go hindíreach tríd an ateangaire agus bainfear de an gléas is cumhachtaí dá bhfuil aige: a ghlór. Is ábhar suime é freisin gur chuir an Chúirt in *Mac Cárthaigh* béim ar chúrsaí dlí a thuiscint i nGaeilge seachas ar ghnáththuiscint ar an teanga. Níor cuireadh a leithéid de riachtanas chun cinn riamh maidir le giúróirí le Béarla ó thaobh iad a bheith i dtaithí ar an réim teanga chasta shainiúil dhlíthiúil sa Bhéarla os comhair cúirte.

Tagann spreagadh i gcomhair tuilleadh taighde ó bhreithiúnas Clarke Brmh (mar a bhí an uair sin ann) in *Ó Maicín* ag 553:

> I ndálaí reatha, agus fiú sna ceantair Ghaeltachta, ní fheictear domsa gur cruthaíodh go mbeifí ábalta giúiré ag a mbeadh cumas dóthanach sa Ghaeilge

[13] Hardiman Brmh ag 514-5, Clarke Brmh ag 546 (O'Donnell Brmh ag aontú).
[14] [1993] 46, 175 ag 177.
[15] Fágadh an abairt seo a leanas ar lár ón mbreithiúnas in *Mac Cárthaigh*: 'In addition, American juries often are biased against non-English speaking defendants; therefore, these defendants are disadvantaged from the outset of the case.'

> a rollú chun triail choiriúil thábhachtach a stiúradh gan cúnamh aistritheora gan, ag an am céanna, líon an-suntasach daoine, a bheadh cáilithe ar chuma eile, a eisiamh ón teidlíocht i leith suí ar an ngiúiré lena mbainfeadh. Fad is go leanfaidh na dálaí sin ar aghaidh, de thoradh na cearta a thabhairt don Uasal Ó Maicín dá n-áitíonn sé, dhéanfaí *líon suntasach daoine a eisiamh go neamhcheadmhach ó thaobh an Bhunreachta de ón bpainéal giúiré ó riachtanas ionas go mbeadh giúiré a rollfaí mar sin ina shárú ar an gceanglas bunreachtúil um ionadaíocht.* Dá n-athrófaí na dálaí bunaidh ansin, dar ndóigh, d'fhéadfadh go n-athrófaí an chothromaíocht idir cearta teanga an Uasail Ó Maicín agus an ceanglas bunreachtúil sin fosta. Mar sin féin, níl mé sásta, i láthair na huaire, go bhfuil an tUasal Ó Maicín i dteideal an cineál giúiré atá á lorg aige.' (aibhsiú curtha leis)

Ardaítear an cheist cé acu is féidir nó nach féidir painéal giúróirí a chur le chéile atá ionadaíoch agus dátheangach araon óna bhféadfaí giúiré a chuir faoi mhionn i gcomhair triail ar díotáil. Ní hionann gan móramh den Chúirt Uachtrach a bheith sásta go raibh fianaise dá leithéid os a gcomhair agus a rá nach bhféadfaí cás mar sin a léiriú riamh. Is ábhar cuí i gcomhair tuilleadh taighde é an cheist an bhféadfaí a leithéid a chur i gcrích.

Is gá a rá arís, faoi mar a dúirt Henchy Brmh do mhóramh na Cúirte Uachtaraí in *The State (Byrne) v Frawley* ag 350 gur *ar mhaith leis an gcúisí* atá an ceart bunreachtúil chun giúiré ionadaíoch: '[t]he constitutional right to a jury drawn from a representative pool existed for his [the accused's] benefit.' Dúirt Finlay Uacht. (mar a bhí an uair sin ann) don Ard-Chúirt rannach sa chás céanna ag 333:

> The right to trial by a jury conferred by Article 38 seems to me clearly and manifestly to be *a protection and privilege accorded to the person charged with an offence against criminal law other than a minor offence*. It is not derived from any concept of the human personality nor from any principle or concept antecedent to and superior to positive law. There do not appear to me to be any grounds for regarding it as a right vested in the community generally. (aibhsiú curtha leis)

Mar sin, conas is fearr *cearta bunreachtúla an chúisí ar díotáil* a réiteach lena chéile .i. a chearta chun (i) a chosaint a riaradh trí Ghaeilge gan mhíbhuntáiste (ii) os comhair giúiré a roghnaítear go bunreachtúil (.i. atá ionadaíoch).

Is fiú súil a chaitheamh ar Cheanada, tír den dlí coiteann le dhá theanga oifigiúla faoina bunreacht, rud a rinne Hardiman Brmh go cuimsitheach sna haguisíní seo. Foráiltear in alt 11 den Canadian Charter of Rights and Freedoms, cáipéis bhunreachtúil, le haghaidh triail le giúiré i dtéarmaí atá an-chosúil le hAirteagal 38.5 de Bhunreacht na hÉireann

> 11. Any person charged with an offence has the right […]
>
> f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

Foráiltear le hAirteagal 38.5 de Bhunreacht na hÉireann mar seo a leanas: 'Ní cead duine a thriail in aon chúis choiriúil ach i láthair choiste tiomanta, ach amháin i gcás cionta a thriail faoi alt 2 [mionchionta/dlínse achomaire.], alt 3 [cúirteanna speisialta] nó alt 4 [binsí míleata] den Airteagal seo.'

Is cosúil go bhféadfadh modh *inoibrithe* i gcomhair giúiré dátheangach a roghnú atá bunaithe ar alt 11(f) de Chairt Cheanadach na gCeart agus na Saoirsí, teacht slán ó thaobh Airteagal 38.5 de Bhunreacht na hÉireann. Seo réimse dlí-eolaíocht atá faoi éabhlóid. Go gairid tar éis do Chúirt Uachtarach na hÉireann a breithiúnas a thabhairt in *Mac Cárthaigh*, thug Cúirt Uachtarach Cheanada uaithi breithiúnas fíorthábhachtach in *R. v Beaulac* [1999] 1 S.C.R. 768 ag deimhniú cheart an chúisí ar díotáil chun giúiré Fraincise/dátheangach in British Columbia in ainneoin gur mionlach beag iad lucht labhartha na Fraincise sa Chúige sin.

Is í an cheist atá le freagairt, trí thaighde rianúil eolaíoch agus obair pháirce thurgnamhach, cé acu a chuirfeadh nó nach gcuirfeadh modh British Columbia (mar atá leagtha amach ag Hardiman Brmh sna haguisíní seo) giúiré atá ceadaithe faoin mBunreacht .i. atá sách ionadaíoch, ar fáil dá mbainfí leas as in Éirinn.

In Aguisín I dá bhreithiúnas in *Ó Maicín* déanann Hardiman Brmh anailís chuimsitheach ar an gcur chuige Ceanadach maidir le cearta teanga faoi Bhunreacht Cheanada ag díriú ar an dlí-eolaíocht agus ar fhoinsí acadúla. Pléann cuid mhór d'anailís Hardiman Brmh leis an gcur chuige sna dúichí sin i gCeanada nach bhfuil an Fhrancis á labhairt iontu go forleathan agus tugann sé ar aire gur féidir, fiú i gcúigí ar nós British Colombia, gur féidir leis an gcur chuige ceart-bhunaithe dátheangach seo triail le giúiré i dteanga an mhionlaigh an áisiú. Ríomhann Hardiman Brmh tráchtaireacht acadúil, gan aon ráiteas breise a chur léi, a deir gur féidir trialacha le giúiré a bhogadh go hionad eile sa chúige céanna ina bhfuil céatadán níos airde fainciseoirí. Liostálann sé in Aguisín V na ceantair Ghaeltachta i gContae na Gaillimhe. Cé nach bhfuil aon ráiteas ó Hardiman Brmh in Aguisín V tugann a bhreithiúnas foilsithe agus na sleachta a luann sé ó fhoinsí acadúla mar aon leis an liosta de na ceantair Ghaeltachta i gContae na Gaillimhe le fios go soiléir go bhfuil Hardiman Brmh ag léiriú cad iad na céimeanna íosta a d'fhéadfadh an Stát a thógáil chun go bhféadfaí giúiré Gaeilge a thionól. Is ábhar suntais é freisin go ndéanann Hardiman Brmh tagairt arís agus arís eile do bhreithiúnais agus do scríbhinní Bastarche Brmh i gCeanada agus tagann siad le roinnt breithiúnas a thug Hardiman Brmh roimhe sin ar nós *Ó Beolán v Fahy* [2001] 2 IR 279.

Leanann forbairt na dlí-eolaíochta ar an ábhar seo. Dúirt Ní Raifeartaigh Brmh san Ard-Chúirt sa chás *Ó Cadhla v An tAire Dlí agus Cirt* [2019] IEHC 503 ag mír 5:

> I mBunreacht na hÉireann, ainmnítear an Ghaeilge mar an chéad teanga oifigiúil; ní hamháin mar theanga amháin de dhá theanga oifigiúla, ach mar an chéad teanga oifigiúil. Thairis sin, ní féidir breathnú ar an seasamh oifigiúil seo atá ag an teanga mar iarsma uaillmhianach seanchaite den smaointeoireacht agus den chultúr a bhí ann sa bhliain 1937; mar ghlac Éire bearta gníomhacha le déanaí chun stádas na Gaeilge a ardú laistigh den Aontas Eorpach. An 13 Meitheamh, 2005, chomhaontaigh Comhairle Airí an Aontais Eorpaigh le hiarratas na hÉireann ar stádas oifigiúil oibre iomlán a dheonú don Ghaeilge agus le Rialachán ón gComhairle 1/1958 leasaíodh Rialachán (CE) 920/2005 ón gComhairle chun an Ghaeilge a áireamh mar theanga oifigiúil oibre de chuid an Aontais Eorpaigh. Is díol spéise é go n-áirítear sna haithrisí den Rialachán go raibh 'béim' ag Éirinn ina hiarratas gurb í an Ghaeilge an chéad teanga oifigiúil in Éirinn.

Agus ag mír 89:

> [F]ad a leanann Airteagal 8 den Ghaeilge a choinneáil sa seasamh oifigiúil atá aici mar chéad teanga oifigiúil an Stáit, (lena n-áirítear riaradh an cheartais), dealraíonn sé domsa gur chóir do na cúirteanna í a fhorléiriú ar bhealach lena

> dtugtar éifeacht dhearfach phraiticiúil do cheart dlíthí an Ghaeilge a úsáid ina chás Cúirte Dúiche seachas ar bhealach íostach spárálach.

B'fhéidir go bhfuil an chuid is géire d'Aguisíní Hardiman Brmh le fáil in Aguisín II, áit ar bhraith sé go láidir ar stádas na Gaeilge san Aontas Eorpach agus ar an taithí idirnáisiúnta maidir le teangacha oifigiúla. In Aguisín II cíorann Hardiman Brmh staid teangacha oifigiúla an Aontais Eorpaigh agus cuireann sé an stádas seo i gcomhthéacs na n-aidhmeanna polasaí atá leagtha amach ag an Stát féin i leith na Gaeilge. Ansin cuireann sé an seasamh seo i gcodarsnacht ghlan leis na haighneachtaí a rinne an Stát in *Ó Maicín* agus ceistíonn sé an bhfuil aon stát áit ar bith ar domhan a d'aighneodh go ndiúltódh sé an ceart do chainteoir dúchais dá phríomhtheanga oifigiúil agus dá theanga náisiúnta é féin nó í féin a chosaint go díreach sa teanga sin os comhair cúirte. Ní chuireann Hardiman Brmh fiacail ann nuair a deir sé dá mb'fhíor dó seo maidir le cás na Gaeilge sa Stát gurbh é a bheadh ann ná 'cliseadh chomh táiríseal sin is go bhfuil sé beagnach gan fhasach i réimse ar bith den bheartas poiblí, anseo agus thar lear, go comhaimseartha nó go stairiúil'. Thairg Hardiman Brmh sólás éigin don Stát áfach nuair a dúirt sé nár chreid sé go raibh sé seo fíor maidir le cás na Gaeilge in Éirinn sa lá atá inniu ann agus go bhféadfadh an Stát ach roinnt bheag oibre a dhéanamh, giúiré a chur ar fáil chun an cás a thriail as Gaeilge. In Aguisín IV nótálann Hardiman Brmh go raibh an Stát gníomhach chun stádas oifigiúil oibre san Aontas Eorpach a bhaint amach don Ghaeilge agus go raibh dualgas ar an Stát céanna 'a thabhairt chun cuimhne gurb í an Ghaeilge teanga Náisiúnta agus príomhtheanga oifigiúil na hÉireann chomh maith.'

Ina breithiúnas in *Ó Cadhla v An tAire Dlí agus Cirt*, a bhaineann adhmad as gach breithiúnas a thug an Chúirt Uachtarach uaithi in *Ó Maicín*, chinn Ní Raifeartaigh Brmh go raibh oibleagáid ar an Stát gach céim réasúnach a thógáil chun a chinntiú go gcuirfí an t-iarratasóir ar a thriail sa Chúirt Dúiche os comhair breitheamh dátheangach. Glacadh arís le fírinne an tsleachta ó alt Michael Shulman (thuas) agus chinn an Chúirt nár ghá ceart an chúisí a chosaint a chur i láthair as Gaeilge gan mhíbhuntáiste a chaolú toisc nár ghá don chinnteoir fíricí a bheith ionadaíoch agus cúirt achomair gan ghiúiré i gceist.

In Aguisín III dá bhreithiúnas scrúdaigh Hardiman Brmh stádas reatha na Gaeilge 'don fhíor-dhlíthí sa saol fíor i gcodarsnacht leis an teoiric bhunreachtúil'. Fiafraíonn sé dá réir an raibh aon tionchar ag na arduithe stádais a fuair an Ghaeilge de réir a chéile ón tréimhse faoi riail na Breataine trí achtú bhunreachtanna 1922 agus 1937 dóibh siúd ar theastaigh uathu rochtain a bheith acu ar riaradh an cheartais i nGaeilge. Dhírigh Hardiman Brmh ar *M'Bride v McGovern*[16] cás inar ciontaíodh cainteoir Gaeilge toisc nach raibh a ainm agus a shloinne as Béarla ar a chairt aige. Ríomhann Hardiman Brmh sleachta ó bhreithiúnais O'Brien LCJ agus Gibson Brmh inar bhéimnigh siad beirt nach raibh aitheantas sa bhliain 1906 ag aon teanga seachas an Béarla. D'aithin Hardiman Brmh go raibh 'uirísleacht mhórtasach' le fáil i mbreithiúnais na Cúirte ón ré réamh-neamhspleáchais agus d'fhiafraigh sé 'an ndéanann na hathruithe mór is fiú dlíthiúla agus bunreachtúla ó bhí 1922 ann difríocht phraiticiúil ar bith?' Chríochnaigh Hardiman Brmh a thráchtaireacht in Aguisín III leis an gceist bhiorach 'nach bhfuil sna hathruithe sin ach madraí a chur i bhfuinneoga?'

Más féidir breitheamh, giúiré agus ionchúisitheoir le Fraincis a sholáthar do mhionlaigh bheaga na Fraincise in Iarthar Cheanada gan dochar don phrionsabal go gcaithfidh giúiréithe a bheith ionadaíoch agus do Cheannas an Dlí, ní mór dúinn in Éirinn tabhairt faoina thuilleadh taighde ina thaobh seo.

[16] [1906] 2 IR 181. Tá clú ar an gcás seo toisc go raibh Pádraig Mac Piarais os chomhar na Cúirte mar abhcóide ann.

APPENDICES TO THE JUDGMENT OF HARDIMAN J IN *Ó MAICÍN V ÉIRE* [2014] 4 I.R. 583, WHICH ARE OMITTED FROM THE OFFICIAL REPORT[17]

Abstract: This article examines that part of Hardiman J's judgment in the Supreme Court in Ó Maicín v Ireland which was not included in the official report and which appendices are now published here for the first time in the two languages in which they were originally given and following the usual editorial conventions. The case dealt with the entitlement of an Irish speaking accused on indictment to be tried before a bilingual jury. That entitlement is examined in these appendices in the international context and the mechanics of providing French speaking judges, juries, and prosecutors in those parts of Canada where French speakers are a very small minority are discussed in detail. This is certainly an area in which further research and field work will be carried out.

Author: Dáithí Mac Cárthaigh BL, Barrister at Law; Law and Irish Coordinator, Kings' Inns; Author An Ghaeilge sa Dlí (Leabhar Breac, 2020), Dr Seán Ó Conaill, Director BCL (Law & Irish), School of Law, University College Cork

This case involved the entitlement of a native Irish speaker to a bilingual jury which would understand both evidence and his legal team's speeches directly in Irish as opposed to through an interpreter in order that he be in the same position before the Court as the state prosecution which was being conducted through English. The Supreme Court refused his claim on the grounds that it was not possible, at present in any event, to assemble a sufficiently representative bilingual jury for the trial of the accused. The majority judgments in *Ó Maicín* can be grouped together with other cases in recent years calling for judicial pragmatism on issues concerning law and language.[18] Hardiman J, presiding, delivered a dissenting judgment in favour of the applicant. He relied especially on Canadian practices for assembling a juries which can understand French in places where French speaker are a small minority. He also drew attention to the multilingual practices of the Court of Justice of the European Union and to language rights in EU Law. It is hoped that these appendices will aid the development of jurisprudence in this area.

One particular area of further research which would resonate with all four judgments delivered in *Ó Maicín* is that in relation to jury selection for a polity with more than one official language. The majority of the Supreme Court in *Ó Maicín* accepted, as had a previous Supreme Court in the similar case of *Mac Cárthaigh v Éire* (1998) T.É.T.S. 127, that an accused is disadvantaged when addressing a jury through an interpreter but held that there was no better solution available.

Mac Cárthaigh sought an order, initially by way of judicial review and subsequent on appeal to the Supreme Court, directing that the jury in his Circuit Court case would be comprised of people who had the ability to understand Irish without the assistance of an interpreter. Mac Cárthaigh wished to conduct his side of the case through Irish. He claimed, through his counsel, that points made on his behalf would not have the same effect if they had to be

[17] The usual editorial conventions have been followed.

[18] Séan Ó Conaill, 'Judicial Pragmatism at the Expense of Language Rights: The Ó Maicín Decision' (2014) Commentary posted on the Constitutional Project UCC available at <constitutionproject.ie/?p=309> accessed 27 October 2020.

translated into English first and he thus claimed that unless all members of the jury were Irish speakers, his rights would be violated. The Juries Act 1976 at Section 6 provides that every citizen aged over 18 whose name appears on the Dáil electoral register is qualified and liable to serve on a jury unless otherwise ineligible or disqualified. However, the legislation does not stipulate any requirement as to language proficiency (either in English or Irish). Section 11 further stipulates that the jury panel should be assembled in a manner which is random or otherwise non-discriminatory.

Article 38.5 of the Irish Constitution provides 'Save in the case of the trial of offences under section 2 [summary offences], section 3 [special courts] or section 4 [military tribunals] of this Article, no person shall be tried on any criminal charge without a jury.' The exact meaning of what constituted a jury was examined by the High Court. O' Hanlon J quoted and accepted Griffin J's reasoning,[19] in the earlier case of *de Búrca v The Attorney General,*[20] that 'the jury should be a body which is truly representative, and a fair cross-section of the community'. To further elaborate on the issue at hand as to whether the jury could be drawn from a pool of fluent Irish speakers only O'Hanlon J quoted the American case of *Taylor v Louisiana*[21] which stated 'Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial' and held that if he were to grant Mac Cárthaigh the order sought that he would be excluding a very large segment of the community (both English speakers with insufficient knowledge of Irish and Irish speakers who did not have a sufficient knowledge of legal terms in the Irish language). He also highlighted the practical difficulties that would be involved in assembling such a panel of jurors given the low percentage of Irish speakers in the population generally (citing census data) and the absence of any list of known Irish speakers.[22] On appeal the Supreme Court affirmed O'Hanlon J's judgment.

Carey highlights how this decision fails to elaborate why Article 8, which clearly recognises Irish as the first official language of the State,[23] is prevailed over by ideas which are not expressly stated in the Constitution such as having a representative jury which compromises of a fair cross section of the community. Carey, writing in 2003,[24] argued that a proper balance needs to be found between representativeness and language rights and suggested presciently that even if the decision were to be upheld in the future he hoped that a 'more convincing' explanation justifying it would be forthcoming. Parry has argued that '[t]he result of this judgment is that, despite the purported provisions of Art. 8, there can be no serious argument that there exists in Ireland the sort of institutionalised bilingualism that is to be found in Canada.'[25] In Wales, similar arguments have been advanced that there should be panels of bilingual juries so as to allow a Defendant who wished to use the Welsh language to be tried by a jury who would understand the language without the need for an interrupter.[26] It would appear however that such suggestions have been dismissed on similar grounds to

[19] [1998] T.É.T.S. 127 at 131.
[20] [1976] IR 38 at p 82.
[21] (1975) 419 US 522 at p 530
[22] [1998] T.É.T.S. 127 at 133.
[23] Gearoid Carey, 'Criminal Trials and Language Rights: Part II' (2003) 13(2) Irish Criminal Law Journal 5, 8.
[24] ibid.
[25] Gwynedd R. Parry, 'An Important obligation of citizenship': language, citizenship and jury service' (2007) 27(2) Legal Studies 188, 199.
[26] The Honourable Mr Justice Roderick Evans, 'Bilingual Juries', The Centre for Welsh Legal Affairs' Seventh Annual Lecture, National Library of Wales, November 25th 2006 38 Cambrian Law Review 145.

the refusals in Ireland,[27] where it was noted that to do so would exclude at least four fifths of the total population of Wales.[28]

The veracity of the following passage from the academic article, 'No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for non-English Speaking Defendants' by Michael Shulman in the *Vanderbilt Law Review,*[29] was accepted by an unanimous Supreme Court in *Mac Cárthaigh* and the majority of judges in *Ó Maicín:*[30]

> When a defendant testifies in a criminal case, his testimony is critically important to the jury's determination of his guilt or innocence. The first noticeable difficulty in the present system of court interpretation is that non-English speaking defendants are not judged on their own words. The words attributed to the defendant are those of the interpreter. No matter how accurate the interpretation is, the words are not the defendant's, nor is the style, the syntax, or the emotion. Furthermore, some words are culturally specific and, therefore, are incapable of being translated. Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony. While juries should not attribute to the defendant the exact wording of the interpretation and the emotion expressed by the interpreter, they typically do just that[31] ... Given that juries often determine the defendant's guilt or innocence based on small nuances of language or slight variations in emotion, how can it be fair for the defendant to be judged on the words chosen and the emotion expressed by the interpreter?

The Supreme Court in *Mac Cárthaigh,* immediately after setting out the above, wrote as follows at pp.139-40:

> That is true enough, but it must be said in today's Ireland there is no better solution available. If every member of the jury had to be able to understand legal matters in the Irish language without the assistance of an interpreter, most of the people of Ireland would be excluded. That would amount to a violation of Article 38.5 of the Constitution as the Supreme Court explained it in the case of *de Búrca v The Attorney General* [1976] I.R. 38 and *The State (Byrne) v Frawley* [1978] I.R. 326.

We note in passing that an accused conducting his defence in Irish before a jury through an interpreter is in a worse position than an accused who does not speak either official language of the State. The non-national accused's counsel will address the jury directly in English to ameliorate the use of the interpreter by the accused. The Irish speaker's council will address them indirectly, in Irish, through an interpreter, being deprived of counsel's most powerful tool: his voice. It is also of interest to note that the Court in *Mac Cárthaigh* emphasised an understanding legal matters in the Irish language as opposed to a more general understanding of Irish. No such requirement has ever been put forward in relation to English speaking

[27] Announcement of the Justice Minister 9 March 2010.
[28] Sir David Lloyd Jones, 'The Machinery of Justice in a Changing Wales', The Wales Office Annual Lecture, 21.
[29] [1993] 46, 175 at 177.
[30] Hardiman J at 619, Clarke J at 649 (O'Donnell J concurring).
[31] The following sentence was omitted from the judgment in *Mac Cárthaigh*: 'In addition, American juries often are biased against non-English speaking defendants; therefore, these defendants are disadvantaged from the outset of the case.'

jurors concerning their familiarity with the complex and specialist legal register used in the English language in a Court setting.

Encouragement for further research comes the judgement Clarke J (as he then was) in *Ó Maicín* at 656:

> In current conditions, and even in Gaeltacht areas, it does not seem to me that it has been established that it would be possible to empanel a jury with sufficient competence in Irish to conduct an important criminal trial without the assistance of a translator without, at the same time, excluding quite a significant number of persons, otherwise qualified, from the entitlement to sit on the jury in question. For as long as those conditions continue to exist it follows that conferring on Mr. Ó Maicín the rights which he asserts would necessarily result in the *constitutionally impermissible exclusion of a significant number of persons from the jury panel so as to render a jury thus empanelled in breach of the constitutional requirement of representativeness*. If the underlying conditions were to change then, of course, the balance between Mr. Ó Maicín's language rights and that constitutional imperative might also change. However, for the present I am not satisfied that Mr. Ó Maicín is entitled to the type of jury which he seeks. (emphasis added)

The question arises as to whether it is indeed possible to assemble a jury panel which is both representative and bilingual from which a jury could be sworn for a trial on indictment. The fact that the majority of the Supreme Court was not satisfied that such evidence was before them does not mean that such a scenario could never be demonstrated. The question of the feasibility of such an exercise is an appropriate topic for further research.

It needs to be reiterated, in the words of Henchy J for the majority of the Supreme Court in *The State (Byrne) v Frawley* at 350, that '[t]he constitutional right to a jury drawn from a representative pool existed for his [the accused's] benefit.' Finlay P. (as he then was) stated for the divisional High Court in the same case at 333:

> The right to trial by a jury conferred by Article 38 seems to me clearly and manifestly to be *a protection and privilege accorded to the person charged with an offence against criminal law other than a minor offence*. It is not derived from any concept of the human personality nor from any principle or concept antecedent to and superior to positive law. There do not appear to me to be any grounds for regarding it as a right vested in the community generally.' (emphasis added)

The question remains how best to reconcile the *constitution rights of the accused on indictment* to (i) conduct his defence through Irish without disadvantage (ii) before a constitutionally selected (i.e. representative) jury.

It is instructive to look to Canada, a constitutionally bilingual common law country, as Hardiman J has done comprehensively in these appendices. The Canadian Charter of Rights and Freedoms, a constitutional document, provides in section 11 for trial by jury in terms very similar to those found in Article 38.5 of Bunreacht na hÉireann:

> 11. Any person charged with an offence has the right […]

> f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

Bunreacht na hÉireann, Article 38.5, provides: 'Save in the case of the trial of offences under section 2 [minor offences/summary jurisdiction], section 3 [special courts] or section 4 [military tribunals] of this Article no person shall be tried on any criminal charge without a jury.'

It appears that an *operable* method for the selection of a bilingual jury which stands on section 11(f) of the Canadian Charter of Rights and Freedoms, should also find a firm footing on Article 38.5 of Bunreacht na hÉireann. This is an evolving area of jurisprudence. Shortly after the Irish Supreme Court delivered it judgment in *Mac Cárthaigh*, the Canadian Supreme Court gave its benchmark judgment in *R. v Beaulac* [1999] 1 S.C.R. 768 confirming the right of an accused on indictment to a French speaking/bilingual jury in British Columbia in spite of the French speakers being a small minority in that province.

The question to be answered, by scientific and methodical research and experimental field work, is whether the British Columbian method (as set out by Hardiman J in these appendices) would yield a constitutional permissive, that is to say sufficiently representative, jury if used in Ireland.

In Appendix I to his judgment in *Ó Maicín,* Hardiman J conducts a detailed analysis of the Canadian approach to language rights under the Canadian Constitution with a focus on case law and academic commentary. Hardiman J devotes a significant portion of this analysis to the approach in parts of Canada where French is not widely spoken, noting that even in provinces such as British Columbia, the bilingual rights focused Canadian approach can facilitate a jury trial in the minority language. Hardiman J quotes, without adding further comment, academic commentary noting that jury trials can be moved to another part of a province where there is a greater percentage of French speakers. In Appendix V, he lists designated Gaeltacht areas in County Galway. Although Hardiman J refrains from comment in Appendix V, his published judgment and his quotation of academic sources together with this list of Gaeltacht areas in Galway clearly point to Hardiman J demonstrating the minimal steps the State could take to enable the assembly of an Irish speaking jury. Hardiman J's repeated reference to the judgments and writings of Bastarche J in Canada are noteworthy and consistent with some of Hardiman J's earlier rulings such as his judgment in *Ó Beoláin v Fahy* [2001] 2 IR 279.

The jurisprudence continues to develop in this area. Ní Raifeartaigh J in the High Court stated in the case of *Ó Cadhla v An tAire Dlí agus Cirt* [2019] IEHC 503 at paragraph 5:

> The Constitution of Ireland designates the Irish language as the first official language; not merely one of two official languages, but the first official language. Further, one cannot simply view this official position of the language as a quaint and aspirational relic of the thinking and culture of 1937; more recently, Ireland took active steps to elevate the status of the Irish language within the European Union. Final agreement by the EU Council of Ministers to Ireland's application for a grant of full official working status to Irish occurred on 13th June 2005 and Council Regulation (EC) 920/2005 amended Council Regulation 1/1958 to include Irish as an official working language of the EU. Interestingly, the recitals to the Regulation include the

> fact that Ireland in its application had 'stressed' that Irish was the first official language of Ireland.'

And at paragraph 89:

> [F]or as long as Article 8 continues to maintain the Irish language in its position as the first official language of the State (including in the administration of justice), it seems to me that the courts should construe it in a manner which gives positive and practical effect to a litigant's right to use the Irish language in his District Court case rather than in a minimalistic, stinting manner.'

Perhaps the most cutting section of Hardiman J's appendices is to be found in Appendix II, where he also relied heavily upon the position of the Irish language in EU law and the international experience with official languages. In Appendix II, Hardiman J explores the position of the official languages of the European Union and places this status in the context of the Irish State's own stated policy aims towards the language. He then places this position in stark contrast with the arguments of the Irish State in *Ó Maicín* questioning whether there is any state in the entire world that would submit before a court that it would refuse a native speaker of its first official and national language the right to defend themselves fully before a court in that language. Hardiman J pulls no punches when he notes that if this were truly the position in relation to Irish in the State then it would represent 'a failure so abject as to be almost without precedent in any area of public policy, here or abroad, contemporary or historic'. Hardiman J did however offer the State some succour by noting that he did not consider this to be the case when it comes to the Irish language in modern Ireland and that with minimal action the State could provide a jury to try the case in Irish. In Appendix IV, Hardiman J notes that the Irish State pro-actively procured recognition of the Irish language as an official and working language of the European Union and that the same State 'must recall that Irish is also that National and first official language of Ireland'.

In her judgment in *Ó Cadhla v An tAire Dlí agus Cirt*, which draws on all the judgments delivered by the Supreme Court in *Ó Maicín*, Ní Raifeartaigh J held that the state was obliged to take all reasonable steps to ensure that the applicant be tried in the District Court before a bilingual judge. The veracity of the passage from Michael Shulman's aforementioned article was again accepted and the Court found that the accused's right to present his defence in Irish without disadvantage need not be comprised because the issue of a representative finder of fact did not arise in court of summary jurisdiction without a jury.

Hardiman J, for his part in Appendix III to his judgment, chose to look at the current legal status of Irish for a 'real litigant in real life as opposed to the undoubted change in constitutional theory'. In doing so, he posed the question as to whether the incremental constitutional advancement of the legal status of the Irish language from pre-independence through the 1922 and 1937 Constitutions has had any impact on those seeking to access justice through the medium of Irish. Hardiman J focused his attention on the case of *M'Bride v McGovern,*[32] where an Irish speaker was successfully prosecuted for failing to display his name in English on his cart. Hardiman J quotes from the judgments of O'Brien LCJ and Gibson J where both judges emphasised that in 1906 the only language recognised was English. Hardiman J, noting the 'unmistakable air of haughty condescension' in the judgments of the pre-independence Court and questioned whether 'all the plangent legal and

[32] [1906] 2 IR 181. This case is probably best known as one of the few documented records of Patrick Pearse having appeared before a court as a barrister.

constitutional changes since 1922 make any difference in practice?'. Hardiman J pointedly concluded his comments in Appendix III, asking if the manifold changes that took place since the case in 1906 were of any practical use or were they 'merely window dressing'.

Ultimately, if a French speaking judge, jury, and prosecutor can be provided for the small French speaking populations of western Canada without damage to the principle of representative juries and the rule of law, it certainly behoves us in Ireland to undertake further study in this regard.

AGUISÍN I

Ceanada - Sampla de Thír Dhátheangach. Cearta teanga faoi Bhunreacht Cheanada

Tá an Chairt Cheanadach um Chearta agus Saoirsí 1982, ('an Chairt') (Cuid I den Acht um an Bunreacht, 1982) mar Sceideal B le hAcht Cheanada (Ríocht Aontaithe) 1982, c. 11). In ailt 16-22, ar a dtugtar 'Teangacha Oifigiúla Cheanada', leagtar amach stádas an Bhéarla agus na Fraincise i gcúinsí éagsúla, lena n-áirítear an seomra cúirte. Foráiltear an méid seo a leanas sa Chairt:

> OFFICIAL LANGUAGES OF CANADA
>
> 16. (1) *English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.*
>
> (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
>
> (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.
>
> 16.1. (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
>
> (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.
>
> 17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.
>
> (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.
>
> 18. (1) *The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.*
>
> (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.
>
> 19. (1) *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.*
>
> (2) *Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.*

> 20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
>
> (a) there is a significant demand for communications with and services from that office in such language; or
>
> (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.
>
> (2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.
>
> 21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.
>
> 22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.' (aibhsiú curtha leis)

Déantar tagairt shonrach do Chúige New Brunswick sa Chairt. Bhí New Brunswick, mar aon le hOntario, Québec agus Nova Scotia, ar cheann de na chéad chúigí a cuireadh le chéile chun Tiarnas Cheanada a bhunú in 1867. Deir Coimisinéir Teangacha Oifigiúla New Brunswick go ndearnadh an chéad agus an t-aon chúige dátheangach i gCeanada de New Brunswick le hachtú Acht Teangacha Oifigiúla New Brunswick in 1969. Rinneadh cearta teanga áirithe sa chúige seo a chumhdach ag leibhéal na Cónaidhme faoin gCairt um Chearta agus Saoirsí. Baineann na hoibleagáidí a thagann ó na cearta sin leis an Reachtas agus a chuid institiúidí chomh maith le rialtas New Brunswick. Mar chuid de Bhunreacht Cheanada, tá dlí nó gníomh rialtais ar bith nach bhfuil comhsheasmhach leis an gCairt míbhunreachtúil. Deir Michel Hélie:[33]

> As an influential and active minority language rights advocate with broad roots in New Brunswick, it is difficult not to see Michel Bastarache's influence in these constitutional provisions. As he wrote in 1991: "Fighting assimilation, therefore, requires a degree of linguistic institutional completeness which, I submit, can only be achieved through meaningful constitutional protection."[34]

[33] Michel Hélie, 'Michel Bastarache's Language Rights Legacy' (2009) 47 S.C.L.R. (2d) 377, 381.
[34] Michel Bastarache, 'Language Rights in the Supreme Court of Canada: The Perspective of Chief Justice Dickson' (1991) 20 Man. L.J. 392, ag 400.

Tháinig Cearta Teanga i gCeanada as comhréiteach stairiúil agus polaitiúil idir an dá phobal bhunaidh: coilínigh na Breataine Móire agus coilínigh na Fraince. Phléigh Hélie an stádas tosaigh maidir le cearta teanga san Acht um an Bunreacht 1867 ag lch 379:

> With small deference to the need to ensure a modicum of accommodation for the participation of the minority Francophone population in federal institutions, *section 133 of the Constitution Act, 1867 guarantees the right to use either French or English in the federal Parliament and federally established courts, as well as the requirement that federal statutes be published in both languages.*
>
> Even the modest guarantees under section 133 were contingent upon Quebec accepting to be subject to the same strictures in regard to its provincial assembly, courts and statutes. Although section 133 was not made applicable to any of the other original uniting provinces, it was extended to Manitoba upon its entry into Confederation.
>
> *From this perspective of Confederation, the survival of the French language and culture would depend on the people and government of Quebec.* Developments after Confederation intended to do away with the use of the French language in other parts of the country, notably in New Brunswick, Ontario and Manitoba, would confirm this view of Confederation to the dismay of many French-Canadians. In response, an alternative interpretation of Confederation developed which was premised on a compact between two nations (or two founding peoples): English Canada and French Canada. (aibhsiú curtha leis)

Deir Hélie gur achtaíodh Acht na dTeangacha Oifigiúla (Ceanada)(ATO) chun 'a degree of official bilingualism at the *federal level* throughout Canada',[35] a sholáthar agus gurbh fhreagra é ar thuarascáil dar teideal '*The B&B Report*'.[36] Agus trácht á dhéanamh aige ar an tuairisc sin deir Hélie ag 380:

> *The meaning of the equality of both official languages is not self-evident.* For instance, the right to receive services from the federal government in the official language of choice was *subject to demographic requirements*. The B&B Commission sought an *approach 'determined by the realities of Canadian life'*. It adopted 'an approach aimed at attaining the greatest equality with the least impracticality'. This meant that services should be available *'wherever the minority is numerous enough to be viable as a group.* (aibhsiú curtha leis)

Ba é an cur chuige sin a chuaigh i bhfeidhm ar Acht 1969. B'éard a rinne an Chairt Cheanadach um Chearta agus Saoirsí 1982, de réir Hélie ná 'entrenches the key aspects of the OLA [Official Languages Act]'.[37] Shonraigh Hélie ag lch 381 athrú suntasach amháin ón OLA:

> The most noteworthy change is the absence of any express reference to Quebec in sections 16 to 22 of the Charter and the presence of special provisions under which *New Brunswick subjects itself to language rights equal to and beyond those applicable to the federal government*. For instance, under section 20(2),

[35] Hélie, Michel, 'Michel Bastarache's Language Rights Legacy' (2009) 47 S.C.L.R. (2d) 377 ag 380.
[36] Hugh R. Innis, *Bilingualism and Biculturalism: An Abridged Version of the Royal Commission Report* (Ottawa: McClelland and Stewart Ltd 1973).
[37] Hélie, Michel, 'Michel Bastarache's Language Rights Legacy' (2009) 47 S.C.L.R. (2d) 377 ag 381.

New Brunswick must provide services in both official *languages without reference to demographic criteria*. More significantly still, section 16.1 (added in 1993) provides that the *English and French 'linguistic communities' (not merely the languages) have 'equality of status and equal rights' including*:

> '…the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities." (aibhsiú curtha leis)

Trialacha le Giúiré i gCeanada

Conas a dhéantar giúiré frainciseoirí a chur le chéile.

Beag beann ar dhéimeagrafaic theangeolaíoch chúige, nuair a bhíonn triail le tionól, tá an duine cúisithe i dteideal trialach trí cheachtar de theangacha oifigiúla Cheanada .i. Béarla nó Fraincis agus áirítear air sin breitheamh agus giúiré atá líofa sa teanga. Déanann British Columbia, cúige béarlóirí den chuid is mó ina bhfuil mionlach cainteoirí Fraincise, soláthar ina leith sin trí dhá chlár giúiréithe a choinneáil. Ar laithreán gréasáin Dlí agus Cirt British Columbia soláthraítear an fhaisnéis seo a leanas do ghiúróirí féideartha:

> The provincial voters list is used to summon individuals for English-speaking jury trials. Names in the database are picked at random and summonses are issued to those that have been identified. If you are a registered voter in British Columbia, your name and address appear in this database.
>
> Since 1990, Francophone accused persons in British Columbia have the right to be tried by a judge and jury who speak French. *French-speaking jury trials are very rare in British Columbia, with only one, on average, occurring per year*. It's important to ensure the French-speaking juror list is updated so that French-language jury trials can be provided whenever possible.
>
> If you are a French-speaking British Columbian and wish to have your name transferred from the current database used for summoning individuals for English-speaking jury trials to the database used for summoning for individuals for French-speaking trials, *click here*. The information you provide will be kept confidential.' (aibhsiú curtha leis)

Coinnítear liosta giúróirí go sonrach le haghaidh trialacha Fraincise in British Columbia in ainneoin an lín bhig trialacha dá leithéid a bhíonn ann. Déanann Seirbhísí Cúirte British Columbia earcaíocht go gníomhach don liosta giúróirí sin trí iarracht a dhéanamh an fheasacht go bhfuil sé ann a mhéadú. Fógraíodh an sliocht thíos ar laithreán gréasáin Sheomra Nuachta Rialtas British Columbia do ghiúróirí féideartha in Victoria, British Columbia, an 20 Meán Fómhair 2013:

> VICTORIA - Are you French-speaking or bilingual and eligible to be a juror? If so, B.C.'s court services invites you to put your name on its French-language jury list. All eligible B.C. voters are listed on the general jury list.

> Adding your name to the French-language jury list is as simple as going to the website ... and choosing to move your name from the general jury list to the list for French-language trials.[38]
>
> *Why It Matters:*
>
> Serving on a jury is a civic responsibility that is essential to our justice system. Many British Columbians may be unaware there is a juror list specifically for French-language trials. The website helps expand the pool of eligible bilingual individuals.' (aibhsiú curtha leis)

An tábhacht a bhaineann le triail le giúiré i ndáil le hionadaíocht ghiúiréithe i gCeanada.

Bhreathnaigh roinnt tráchtairí acadúla ar an gceist seo. Nótálann Schuller & Vidmar gur rogha é athrú ionaid i gcúinsí speisialta don duine cúisithe ar mian leis nó léi a thriail nó a triail a stiúradh sa teanga arb í teanga mhionlach an chúige í:[39]

> LIMITATIONS ON THE RIGHT TO A JURY TRIAL
>
> Although the right to jury trial is enshrined in the Canadian Charter of Rights and Freedoms, that right needs to be understood in the context of the Criminal Code.[40]
>
> [...]
>
> Canada has two official languages, English and French. Section 530 of the Code provides that an accused has the right to be tried by a judge and jury who speak the language of the accused, or, *if special circumstances warrant it, a judge and jury composed of persons who speak both languages. Section 531 provides that a change of venue to a different territory within a province may be made in order to obtain a jury with the required language skills.* Additionally, as will be discussed in more detail below, exceptions are made for aboriginal peoples in Canada's arctic regions.
>
> [...]
>
> When summary conviction offenses are taken into account, the vast bulk of criminal cases, at least ninety percent, are tried by judge alone. That said, the institution of the criminal jury continues to occupy an important place in Canadian law. (aibhsiú curtha leis)

Níor tógadh mórán cásanna maidir le hionadaíocht ghiúiréithe i gCeanada. Díríodh sna cásanna a tógadh ar inscne agus ar mhírialtachtaí i ndáil le roghnú saoránach bundúchasach (lch 501):

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[38] 'B.C. calls for French-speaking jurors' (British Columbia Gov News 20 September 2013) <https://news.gov.bc.ca/releases/2013JAG0296-001436> 28 October 2020.
[39] Neil Schuller and Regina Vidmar, 'The Canadian Criminal Jury' (2011) 86 Chi.-Kent L. Rev. 497 ag 499-500.
[40] Criminal Code, R.S.C. 1985, c. C-46 (Can.).

> *Litigation based on an unrepresentative jury pool is sparse. At the start of the trial the prosecution or defense may challenge the whole jury array on the grounds of fraud, partiality, or misconduct, but such challenges have been infrequent*. In *R. v Catizone* and *R. v Nepoose* new arrays were ordered when too few women appeared on the original arrays. In *R. v Nahdee*, the accused successfully challenged the array because of irregularities in the selection of aboriginal persons, and in *R. v Born with a Tooth*, the Crown prevailed on a challenge to irregularities in the selection of aboriginal citizens. *However, challenges to arrays on the grounds that they did not contain a sufficient proportion of persons of a racial or ethnic group have tended to fail if there were no irregularities in the selection process itself.* If the challenge to the array is not made at the start of trial, section 670 of the Criminal Code states that any irregularity in the summoning or empanelling of the jury shall not be grounds for reversing a verdict. It is not clear how successful an appeal would be if strong evidence showing deliberate racial or gender biases in selection were produced after a conviction. (aibhsiú curtha leis)

Ar lch 504, agus iad ag trácht ar dhúshláin fhoráilteacha, nótálann Schuller & Vidmar go bhfuil líon na gceisteanna dlíthiúla faoi ionadaíocht ghiúiréithe an-íseal, ó tharla an cásdlí agus an Cód Coiriúil a bheith mar atá:

> Given the tighter controls in Canada on the trial process, coupled with the restrictive pretrial questioning of jurors and the fact *that legal issues of jury representativeness are minimized by case law and the Criminal Code*, peremptory challenges have not been as controversial as they have been in England or the United States. (aibhsiú curtha leis)

Tá ceart ann chun triail le giúiré i gceachtar teanga náisiúnta de chuid Cheanada (R. v Beaulac)

Ba é *R. v Beaulac* [1999] 1 S.C.R 768 an dara ceann de na trí chás arbh imeacht suntasach iad ón gcásdlí roimhe sin maidir le cearta teanga i gCeanada.[41] Is é *ratio,* agus go deimhin oidhreacht *Beaulac,* gur cearta ar leithligh iad cearta teanga; ní bhaineann siad leis an gceart chun triail chothrom nó leis an gcumas cosaint a riaradh i dteanga amháin seachas a chéile. Is cearta daonna iad dá dtugtar cosaint i gCeanada go bunreachtúil agus tríd an reachtaíocht. Níorbh é ba chuspóir le haitheantas dlíthiúil a thabhairt do dhá theanga oifigiúla nósanna imeachta córacha a chinntiú ach féiniúlacht chultúrtha láidir a thabhairt do theanga mhionlach cúige faoi leith. Tháinig ann dó seo as comhréiteach polaitiúil stairiúil. Is príomhghné den fhéiniúlacht chultúrtha í an teanga agus má theipeann ar Stát cearta teanga na saoránach a dheimhniú, beidh na cearta sin gan mhaith.

Thug Bastarache Brmh breithiúnas na Cúirte agus ag míreanna 20 agus 22 nótáil sé an fhreagracht a chuireann cearta teanga dá leithéid ar an 'gcóras':

> These pronouncements are a reflection of the fact that *there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities*. The objective of protecting official language minorities, as set out in s. 2 of the Official Languages Act,

[41] Ba iad na cásanna eile *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 agus *Arsenault-Cameron v Prince Edward Island* [2000] S.C.R. 3.

> is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. *Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided.* This is consistent with the notion favoured in the area of international law that *the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.'* (aibhsiú curtha leis)

Mír 22:

> With regard to existing rights, equality must be given true meaning. *This Court has recognized that substantive equality is the correct norm to apply in Canadian law*. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. (aibhsiú curtha leis)

I ndiaidh *Beaulac* bhí an oibleagáid ar chúirt triail a sholáthar sa teanga náisiúnta a roghnódh an cúisí, an Fhraincis nó an Béarla, soiléir. Is é an t-aon rud is gá don duine a léiriú ná an cumas teagasc a chur ar abhcóide tríd an teanga roghnaithe; ní féidir líofacht sa teanga eile a thabhairt san áireamh.[42] Tá sé d'oibleagáid ar an Rialtas a chinntiú go bhfuil an bonneagar institiúideach cuí ansin chun tacú le cearta teanga i dtimpeallachtaí oifigiúla. Dúirt Bastarche Brmh ag mír 39:

> I wish to emphasize that mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because *the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis.* (aibhsiú curtha leis)

Shonraigh Bastarche Brmh bunús cearta teanga den sórt sin, agus dúirt ag mír 34:

> The solution to the problem, in my view, is to look at the purpose of s. 530. It is, as mentioned earlier, to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity *Ford, supra*, at p. 749. *The language of the accused is very personal in nature;·it is an important part of his or her cultural identity. The accused must therefore be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself. The principles upon which the language right is founded, the fact that the basic right is absolute, the requirement of equality with regard to the provision of services in both official languages of Canada and the substantive nature of the right all point to the freedom of Canadians to freely assert which official language is their own language* ... The court, in such a case, will not inquire into specific criteria to determine a dominant cultural identity, nor into the language preferences of the accused. *It will only satisfy itself that the accused is able to instruct counsel and follow the proceedings in the chosen language.'* (aibhsiú curtha leis)

Mionléiríodh an cuspóir le dhá theanga oifigiúla a bheith ann ag mír 41:

[42] *R. v Beaulac* [1999] 1 SCR 768 [34].

> The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. *Language rights have a totally distinct origin and role.* They are meant to protect official language minorities in this country and *to insure the equality of status of French and English.* This Court has already tried to dissipate this confusion on several occasions.' (aibhsiú curtha leis)

AGUISÍN II

An Ghaeilge i nDlí na hEorpa (1)

De réir laithreán gréasáin oifigiúil an Choimisiúin Eorpaigh:

> Tá 24 teanga oifigiúil agus oibre ag an Aontas Eorpach: An Béarla, an Bhulgáiris, an Chróitis, an Danmhairgis, an Eastóinis, an Fhionlainnis, an Fhraincis, *an Ghaeilge,* an Ghearmáinis, an Ghréigis, an Iodáilis, an Laitvis, an Liotuáinis, an Mháltais, an Ollainnis, an Pholainnis, an Phortaingéilis, an Rómáinis, an tSeicis, an tSlóivéinis, an tSlóvaicis, an Spáinnis, an tSualainnis agus an Ungáiris.'(aibhsiú curtha leis)

De réir laithreán gréasáin oifigiúil Uachtaránacht na hÉireann ar an AE, 2013:

> Nuair a chuaigh Éire isteach sa CEE i 1973, rinneadh teanga 'chonartha' den Ghaeilge, cé nár theanga oifigiúil oibre í. I 2005 vótáil Comhairle Airí an AE d'aon toil go mbeadh an Ghaeilge ar an 21ú teanga oifigiúil agus oibre de chuid an Aontais Eorpaigh. Tháinig an cinneadh sin i bhfeidhm an 1 Eanáir 2007.

Rinneadh cinneadh Chomhairle na nAirí ar iarratas ó Rialtas na hÉireann. Dá réir sin, an 1 Eanáir 2007 ba í an Ghaeilge teanga náisiúnta agus príomhtheanga oifigiúil na hÉireann de bhua Airteagal 8 den Bhunreacht a glacadh in 1937. Seachtó bliain ina dhiaidh sin, d'eagraigh Rialtas na hÉireann go mbeadh an Ghaeilge ina teanga oifigiúil agus ina teanga oibre de chuid an Aontais Eorpaigh. In 2007, áfach, tugadh isteach rud ar cuireadh síos air mar 'maolú sealadach díomuan', de réir láithreán gréasáin na hUachtaránachta 'mar gheall ar dheacrachtaí dóthain aistritheoirí Gaeilge a earcú'. Rinneadh athnuachan ar an maolú sin le Rialachán AE Uimh. 1257/2010 ón gComhairle.

Beartas Poiblí faoin nGaeilge in Éirinn

Cuirtear an beartas poiblí reatha in Éirinn i dtaca leis an nGaeilge in iúl sa *Straitéis 20 Bliain don Ghaeilge 2010-2030*. Bhí tacaíocht traspháirtí don bheartas seo de réir laithreán gréasáin oifigiúil na Roinne Ealaíon, Oidhreachta agus na Gaeltachta. Dearbhaítear san fhoinse chéanna:

> Eascraíonn an Straitéis as próiseas comhairliúcháin agus taighde, lena n-áirítear tuarascáil a rinneadh don Roinn (Ollscoil Chathair BÁC, 2009), *An*

> *Staidéar Cuimsitheach Teangeolaíoch ar Úsáid na Gaeilge sa Ghaeltacht* (OÉ Gaillimh & OÉ Má Nuad, 2007) agus tuarascáil Choimisiún na Gaeltachta (2002).

Lainseáladh an beartas sin le ráiteas Rialtais inar réamh-mheasadh aitheantas na Gaeilge mar theanga oifigiúil agus mar theanga oibre de chuid an Aontais Eorpaigh, agus sonraíodh ann gur tharla an t-aitheantas sin 'ar iarratas Rialtas na hÉireann'. Dearbhaíodh ann chomh maith (sa leagan Béarla): 'As one of the oldest languages in Europe *that is still used as a vernacular language*, Irish has a special role to play in this tapestry ['the diverse rich tapestry of European culture'] and it is the duty of the Government to ensure that it continues to flourish.' (aibhsiú curtha leis). Lean an Ráiteas air: 'The Government is committed to the development of the Irish language and the promotion of functional bilingualism, while fully recognising the value of English to Irish citizens as the dominant language used in international discourse.' Níos faide ar aghaidh sa Ráiteas, agus go suntasach, deirtear ann: *'It is a choice for the citizen, whether they wish to engage with the State in Irish or in English.'* (aibhsiú curtha leis).

Fiú má ghlactar leis go bhfuil coinníoll na féidearthachta ag baint leis an ráiteas díreach thuas, is léir gur ráiteas é a bhfuil an-tábhacht ag baint leis. Is mian leis an Uasal Ó Maicín idirghníomhaíocht a dhéanamh le horgán an-tábhachtach den Stát, Cúirt a bunaíodh faoin mBunreacht, i nGaeilge, agus ardaítear an cheist sa chás seo cibé an fíor é nó nach fíor é gurb é 'a choice for the citizen whether they wish to interact with the State in Irish or English', agus go deimhin an bhfuil an Ghaeilge 'still used as a vernacular language'. Tá an Stát tiomanta don dá thairiscint sin.

De réir Foclóir Béarla Oxford (OED) ciallaíonn an focal 'vernacular', nuair a úsáidtear mar ainmfhocal é, 'the language or dialect *spoken by the ordinary people* of a country or region'; nuair a úsáidtear mar aidiacht é ciallaíonn sé 'the language spoken as one's mother tongue; not learned or imposed as a second language'. Más amhlaidh go deimhin, mar a fógraíodh go hoifigiúil, go bhfuil an Ghaeilge 'still used as a vernacular language', dealraíonn sé go bhfuil an tairiscint sin éagsúil ó thairiscintí eile a cuireadh ar aghaidh sa chás seo cosúil leis an tairiscint nach féidir giúiré Gaeilge a chur ar fáil chun an cás i gcoinne an Uasail Ó Maicín a thriail nó an tairiscint nach mbeadh giúiré de chainteoirí Gaeilge ionadaíoch ar an bpobal ina iomláine. Tugann an Breitheamh léannta Clarke faoi deara, agus an ceart aige, ag mír 2.3 dá bhreithiúnas:[43]

> Níl rogha ar bith ag roinnt daoine ach go dtriálfar iad os comhair giúiré nach labhraíonn a dteanga dhúchais. In Éirinn sa lá inniu tá a lán 'Éireannach úr' nó daoine eile agus tarlaíonn sé go bhfuil siad sa dlínse ag feidhmiú a gceart amhail an ceart oibriú faoi Chonarthaí Eorpacha. D'fhéadfadh daoine dá leithéidí a bheith ábalta Béarla a labhairt (nó, Gaeilge b'fhéidir) go méid níos mó ná níos lú ach níl a lán díobh líofa go leor is go mbeadh siad ag iarraidh fianaise a thabhairt i gcás tábhachtach a bhaineann le cúiseamh coiriúil tromchúiseach ina gcoinne seachas ina dteanga dhúchais. Mura mbeadh duine ábalta triail chóir a bheith acu choíche, dáiríre, ach amháin dá mbeadh an cinnteoir ábalta a theanga dhúchais a labhairt, mar sin i dtéarmaí praiticiúla, bheadh sé dodhéanta a lán de na daoine sin a thriail.'

Tá sé sin follasach ann féin ach ní chreidim go mbaineann sé ar dóigh ar bith leis an gcás reatha ar cás é ina bhfuil saoránach Éireannach agus cainteoir dúchais Gaeilge cúisithe as cion a líomhnaítear a tharla sa Ghaeltacht inar tógadh é. Tá cás duine dá leithéid an-éagsúil ó chás duine ón iasacht, duine nach labhraíonn ceachtar de theangacha oifigiúla an Stáit, nó

[43] Mír 230 sa tuairisc oifigiúil [2014] 4 I.R. 477 ag 538.

nach labhraíonn maith go leor iad, ach a tháinig isteach sa Stát go deonach, in ainneoin go raibh a fhios sin aige.

Mar a tharlaíonn, pléadh le cearta daoine den chineál sin a bhí ar intinn ag Clarke Brmh le gairid agus go cuimsitheach le Treoir 2010/64/AE ó Pharlaimint na hEorpa agus ón gComhairle an 20ú Deireadh Fómhair 2010. Leagtar amach go cuimsitheach cearta teanga daoine 'who do not speak or understand the language of the proceedings' sa Treoir sin. Tá sé ríthábhachtach go ndéantar cearta teanga agus cearta eile daoine sa chatagóir sin a urramú go cúramach, ach tá siad an-éagsúil ó chearta duine san áit a bhfuil an t-achomharcóir anseo. Is cearta teanga iad go príomha na cearta a áitíonn sé seachas cearta chun triail cothrom nó cearta comhionannais. Ní hé sin le rá nach bhfuil na cearta den chineál sin aige, ach go bhfuil siad éagsúil ó na cearta teanga atá i gceist go sonrach anseo.

Rinneadh na 24 teanga oifigiúil agus oibre de chuid an Aontais Eorpaigh a liostáil thuas. I gcás gach aon teanga de na teangacha sin, seachas an Ghaeilge, tá sé ar chumas an Stáit arb í a theanga sin í, trialacha coiriúla agus imeachtaí dlí eile a stiúradh, laistigh dá dhlínse féin, sa teanga sin a ndearna an Stát sin teanga oifigiúil oibre den Aontas Eorpach di. Lena rá ar bhealach eile, níl teanga oifigiúil, gan trácht ar 'theanga náisiúnta agus príomhtheanga oifigiúil', dá sórt ag ceann ar bith de na tíortha seo nach bhfuil orgáin an Stáit sin ábalta gnáth-ghnó a stiúradh inti.

Gan trácht ar an Aontas Eorpach, ardaím an cheist an bhfuil stát ceannasach áit ar bith ar domhan a bhfuil mar 'theanga náisiúnta agus príomhtheanga oifigiúil' aige agus mar 'theanga oifigiúil agus oibre' ag an bpríomh-eagraíocht idirnáisiúnta a bhfuil sé ina bhall de, teanga nach féidir lena chuid orgán féin, *dar leis an Stát féin*, gnáth-ghnó a stiúradh inti. An bhfuil Stát ceannasach neamhspleách áit ar bith ar domhan ina ndiúltaítear do shaoránach dúchasach, cainteoir dúchais de chuid 'teanga náisiúnta' agus 'príomhtheanga oifigiúil' an Stáit de réir an Bhunreachta, an ceart é féin nó í féin a chosaint go díreach sa teanga sin os comhair Binse de chuid an Stáit sin a comh-rinneadh go cuí agus atá ábalta an saoránach sin a thuiscint go díreach? De réir na gcosantóirí Stáit, is Stát dá leithéid sin í Éire. Níl ceann ar bith eile ann.

Nócha bliain i ndiaidh neamhspleáchas a bhaint amach, deir Stát na hÉireann é féin, sa chás reatha seo, go náireach, gur Stát go díreach dá leithéid í Éire. Tá an cás seo, go páirteach, faoi cibé atá nó nach bhfuil an t-áitiú náireach sin ceart. Úsáidim na téarmaí láidre sin toisc gurb í an Ghaeilge príomhtheanga oifigiúil an Stáit le trí nó ceithre ghlúin anuas agus is ábhar éigeantach í sna scoileanna ar feadh an mhéid chéanna ama. Má tá áitiú an Stáit ceart, is fianaise é ar chliseadh an-suntasach beartais ar leanadh de ar feadh na tréimhse iomláine den Stát a bheith ann, cliseadh chomh táiríseal sin is go bhfuil sé beagnach gan fhasach i réimse ar bith den bheartas poiblí, anseo agus thar lear, go comhaimseartha nó go stairiúil. Ach ní chreidim go bhfuil áitiú an Stáit ceart. Níl sé, de réir na fianaise sa chás seo, dodhéanta ar chor ar bith giúiré a chur ar fáil chun an gnáthchás seo a thriail i nGaeilge. Ach teastaíonn beart éigin ón Stát, ar chostas íosta nó gan costas ar bith, beart nach bhfuil sé toilteanach a dhéanamh.

AGUISÍN III

Dátheangachas arna dhiúltú ag an Rialtas réamh-neamhspleáchais

Is é bunús an cháis seo, i mo thuairimse, go bhfuil an Stát tiomanta go bunreachtúil do bheartas dátheangachais. Is é sin, go deimhin, an phríomhdhifríocht atá déanta ag an dá

Airteagal bhunreachtúla leantacha dá dtagraítear thuas [na hAirteagail i mBunreachtaí 1922 agus 1937 a bhronn stádas mar theanga oifigiúil ar an nGaeilge], i gcomparáid leis an staid a bhí ann faoi riail na Breataine. Sular tháinig an chéad Airteagal díobh sin i bhfeidhm, ní raibh Éire ina tír dhátheangach go breithiúnach, ach bhí sí ina tír Bhéarla *amháin*, i súile an dlí. Ardaíonn an cás seo an cheist: an bhfuil athrú tagtha ar an staid sin don fhíor-dhlíthí sa saol fíor i gcodarsnacht leis an teoiric bhunreachtúil?

In *M'Bride v M'Govern* [1906] 2 I.R. 181, ionchúisíodh an t-achomharcóir, '*Niall McBride'*, mar a thugtar air sa tuairisc oifigiúil nó Niall Mac Giolla Bhríde mar a thugadh sé air féin, as cairt a úsáid ar bhóthar poiblí gan a ainm nó a sheoladh a bheith péinteáilte i litreacha soléite ar chuid éigin fheiceálach den taobh sin den chairt a bhí le feiceáil ón taobh eile den bhóthar, i gcontrárthacht le halt 12(2) den *Summary Jurisdiction (Ireland) Act*, 1851. Éisteadh an cás sa tsean-Chúirt Ghearr i nDún Fionnachaidh, Co. Dhún na nGall, agus dúradh gur tharla an cion i mbaile fearainn in aice láimhe. Chruthaigh an gearánach [M'Govern] nach raibh an fhaisnéis ábhartha péinteáilte ar an gcairt i litreacha a bhí soléite *dó féin* ach go raibh siad péinteáilte i litreacha '*believed to be Irish'*. D'admhaigh an gearánach 'that the letters were of the proper dimensions and that they might be legible to people who could read the Irish language'. Chruthaigh an tAchomharcóir [Mac Giolla Bhríde] go raibh a ainm agus a sheoladh péinteáilte mar is ceart ar a chairt i litreacha agus i gcarachtair inléite i nGaeilge. Cruthaíodh chomh maith go raibh Gaeilge á labhairt sa cheantar lena mbaineann ag trí cheathrú den daonra agus gur labhair céatadán mór díobh sin an Ghaeilge agus an Béarla araon agus nár labhair 'líon suntasach' díobh ach an Ghaeilge amháin.

De réir na bhfíricí sin, chiontaigh na Giúistísí an tAchomharcóir ar an mbonn nach raibh an fhaisnéis, a bhí péinteáilte i nGaeilge, i litreacha inléite mar a ceanglaíodh leis an Acht ach shonraigh siad cás ar iarratas ón gCosaint. Ag éisteacht an cháis shonraithe, rinne triúr abhcóidí ionadaíocht thar ceann an achomharcóra agus bhí P.H. Pearse ar dhuine acu. Ba é Timothy Healy K.C. M.P. an príomh-abhcóide, ach níor labhair sé leis an gCúirt, áfach, agus d'fhéadfadh sé nach raibh sé i láthair. Ba é P.S. Walsh B.L. an tríú habhcóide, Conallach, a bheadh ina Uachtarán ar Chúirt Dúiche na Cipire ina dhiaidh sin agus, ón mbliain 1931, ina Phríomh-Bhreitheamh ar na Séiséil. D'aighnigh an Choróin mar seo a leanas: 'the Statute had been passed by an English speaking parliament, legislating in the English language, and *that the presumption is that it was intended* that the name and residence should be in the English language and in English characters.' (aibhsiú curtha leis) Cuireadh béim ar an ráiteas *'the Irish language has never been officially recognised in this country'* (lch 183) (aibhsiú curtha leis). Mar fhreagra, dúirt an tUasal Mac Piarais gur bhain an Reacht le 'a bilingual country and therefore there was no presumption that it was intended that the name must be in English or in English characters.' Ba é Peter O'Brien, Tiarna Ó Brian Chill Fhionnúrach, L.C.J a thug uaidh an príomhbhreithiúnas.

Má bhí aithne ag gach duine ar bhuail 'Niall McBride' leo riamh ina shaol air mar Niall Mac Giolla Bhríde *seachas* na póilíní, cléirigh na cúirte agus seirbhísí eile na bunaíochta, bhí aithne níos fearr ar Thiarna O'Brien Chill Fhionnúrach mar 'Peter the Packer' ag gach duine *lasmuigh* den bhunaíocht, agus go príobháideach, ag níos mó ná an beagán laistigh di. Ba ómós glic é seo dá scil mar ionchúisitheoir na Corónach, agus níos déanaí mar Ard-Aighne, chun giúiré a 'phacáil' leo siúd ar dhócha iad a bheith i bhfábhar fíorasc ciontach a thabhairt i dtrialacha achrannacha Chogadh na Talún, sna deich mbliana a lean 1879. Aisteach go leor, ní raibh an *leas-ainm* seo gan imir den chion. Thug an t-abhcóide, an náisiúnaí, agus an t-údar cuimhní cinn, Maurice Healy, cuntas ar a cháil chomhaimseartha go foirfe nuair a scríobh sé in *The Old Munster Circuit*, i ndiaidh mórán athchuimhní geanúla a thabhairt ar O'Brien: 'Pether only just missed being a great man'.

Dúirt O'Brien L.C.J gur 'McBride' a thugtaí ar an gcosantóir, 'whose name in Irish I will not venture to pronounce least my faulty pronunciation might shock the many Irish scholars who take an interest in the case'. Sheas sé le leagan amach na Corónach ag rá:

> The characters were not the characters of the language which the Crown and legislature recognise as the language of the United Kingdom *for all legal and official and public purposes*. Parliament conducts its debates in English and legislates in English. The enacting body expresses itself, and the enactment which contain the relevant provision is expressed, in English. English is the language of the Crown; of, as I have said the legislature both in debate and enactment; of all the government administrative and public departments; of the Courts, of the Supreme Courts; of the Courts of Summary Jurisdiction, where the very offence under consideration is to be investigated and, in the eyes of the law, of the Constabulary who, under the 14th Section of the Act, are to take cognisance of the offence. (aibhsiú curtha leis)

In ainneoin 'the very ingenious, interesting and, from a literary point of view, instructive arguments of Mr Walsh and Mr Pearse' ba é tuairim na Cúirte, i mbreithiúnas Gibson, Brmh:

> Counsel have not cited, and I have failed to discover, any statute relating to this country in which Ireland is treated as bilingual and requiring special and distinctive treatment accordingly, or in which recognition was given to the fact that in certain parts of the island the inhabitants used the Irish tongue … for civil purposes [civil, that is, as opposed to Ecclesiastical] *there is no trace in the Statute Book of the recognition of any language but English*. (aibhsiú curtha leis)

Tá sé follasach nach bhfuil baint a thuilleadh ag na coinníollacha dlí arna réamhaithris ag an Tiarna O'Brien agus ag an mBreitheamh Gibson in Éirinn níos mó. Tá Éire anois, go dlíthiúil agus go bunreachtúil, ina tír dhátheangach. Ní féidir a rá a thuilleadh 'complaints under [the Act] are to be heard and determined by Justices who speak [exclusively] in the English language'. Agus, go deimhin, tá foráil reachtúil speisialta dá mhalairt. Ná ní hé an Béarla teanga eisiach na tíre a thuilleadh 'for all legal and official and public purposes'. Éisteadh an t-achomharc seo i nGaeilge.

Sna breithiúnais agus san argóint atá tuairiscithe in *M'Bride*, tá mothú nach deacair a aithint den uirísleacht mhórtasach i bhfrásaí amhail: 'in letters believed to be Irish'; 'the Irish language has never been officially recognised in this country'; 'McBride, whose name in Irish I will not venture to pronounce, least my faulty pronunciation might shock the many Irish scholars who take an interest in the case'; agus sa sliocht iomlán ó bhreithiúnas Gibson Brmh.

Is í an cheist a ardaítear sa chás seo, an ndéanann na hathruithe mór is fiú dlíthiúla agus bunreachtúla ó bhí 1922 ann difríocht phraiticiúil ar bith? An bhfuiltear le breathnú ar an tír i ngach slí phraiticiúil fós mar thír aonteangach Bhéarla, agus tír gurb é an t-aon lamháltas a dhéantar inti don chainteoir Gaeilge ná go gcuirfear ateangaire ar fáil, mar a chuirfear ateangaire ar fáil do chainteoir teanga ar bith ar domhan a thugtar chun cúirte?

Cinneadh *M'Bride v M'Govern* i dtír a bhí an-difriúil go bunreachtúil, go polaitiúil agus go stairiúil, domhan eile ar fad beagnach. Léireofar sa chas seo, ina thoradh, cibé acu, go deimhin, a athraíodh, nó nár athraíodh staid an chainteora Ghaeilge ina thír féin, agus os comhair a chúirteanna féin, chun tairbhe dó tríd an iliomad athrú atá déanta ó bhí 1906 ann. Nó nach bhfuil sna hathruithe sin ach madraí a chur i bhfuinneoga?

AGUISÍN IV

'An Teanga Náisiúnta agus an Phríomhtheanga Oifigiúil' i nDlí na hEorpa (2)

In *Groener v An tAire Oideachais agus Coiste Gairmoideachais Bhaile Átha Cliath* (Cás C-379/87) [1989] 5 E.C.R. 3967, chuir Iníon Groener, ar náisiúnach Ísiltíreach í, an dlí ar an Aire Oideachais agus ar Choiste Gairmoideachais Bhaile Átha Cliath. Rinne sí agóid i gcoinne fhoráil faoina raibh ceapachán mar mhúinteoir lánaimseartha ealaíon in institiúid de chuid an Choiste Ghairmoideachais coinníollach ar chruthúnas i ndáil le heolas leordhóthanach ar an nGaeilge. Is trí theastas speisialta maidir le cumas sa Ghaeilge a chur ar fail a chuirtí an cruthúnas sin ar fáil de ghnáth. Iarradh réamhrialú ar an gCúirt Bhreithiúnais Eorpach faoi Airteagal 177 den Chonradh. Ardaíodh trí cheist maidir le léiriú Airteagal 48(3) den Chonradh (maidir le saorghluaiseacht oibrithe laistigh den Chomhphobal) agus Airteagal 3 de Rialachán 1612/68 a rinne an Chomhairle an 15ú Deireadh Fómhair 1968, maidir le saorghluaiseacht oibrithe chomh maith. Sonraíodh sa rialachán deireanach sin 'nach mbeadh feidhm' le forálacha dlíthiúla, le rialacháin nó le gníomhartha nó cleachtais riaracháin i mBallstát sa chás go gcuireann siad teorainn ar iarratas ar fhostaíocht agus ar thairiscintí fostaíochta nó ar cheart na náisiúnach eachtrannach fostaíocht a ghlacadh agus leanúint den fhostaíocht sin, agus foráiltear leis i leith cúrsaí gaolmhara. Tá an rialachán deireanach sin, áfach, faoi réir díolúine nach gcuirfear i bhfeidhm é 'to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'.

Ag míreanna 18 agus 19 den bhreithiúnas chinn an Chúirt Bhreithiúnais:

> 18. As is apparent from the documents before the Court, although Irish is not spoken by the whole Irish population, the policy followed by Irish governments for many years has been designed not only to maintain but *also to promote* the use of Irish as a means of expressing national identity and culture. It is for that reason that Irish courses are compulsory for children receiving primary education and optional for those receiving secondary education (*sic*). The obligation imposed on lecturers in the public vocational education schools to have a certain knowledge of the Irish language is one of the measures adopted by the Irish government in furtherance of that policy.
>
> 19. The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State *which is both the national language and the first official language*. However, implementation of such a policy must not encroach on a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving for measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring discrimination against nationals of other Member States. (aibhsiú curtha leis)

I gcás *Groener* cinneadh go raibh na rialacha náisiúnta comhréireach ag mír 21:

> 21. It follows that the requirement imposed on teachers to have an adequate knowledge of such a language must, provided that the level of knowledge required is not disproportionate in relation to the objective pursued, be regarded as a condition corresponding to the knowledge required by reason

> of the nature of the post to be filled within the meaning of the last sub-paragraph of Article 3(1) Regulation 1612/68.

Leanadh an cás sin i dtuairim an Abhcóide Ghinearálta Van Gerven (18ú Feabhra, 1993) sa chás *Federación de Distribuidores Cinematograficos v Estado Español* (Cás C-17/92). Bhain an cás sin le ceanglas scanndin a iomportáladh ó thríú tíortha a athghuthú i gceann de theangacha oifigiúla na Spáinne. Rinne an tAbhcóide Ginearálta scrúdú ar Dhlí an Chomhphobail maidir le cearta teanga agus lean sé mar seo a leanas:

> 26. It follows from this case-law that rules within the framework of the cultural policy of national or regional authorities may where appropriate be warranted by an overriding reason of general interest recognised by Community law justifying certain restrictions to the movement within the Community of persons, goods or services. *That applies to measures intended to ensure the preservation and appreciation of historical and artistic treasures or the dissemination of knowledge of the arts and culture ('tourist - guide' judgments) which are directed towards preserving the freedom of pluralistic expression of the various social, cultural, religious and philosophical trends in a country ('Mediawet' judgments) or towards the protection of a national language (Groener judgment).* These overriding reasons of general interest may, I think, be described in general as the protection, development and dissemination of a Member State's own cultural heritage or that of a region thereof, in a pluralist context and as a component of a cultural heritage common to the Member States. (aibhsiú curtha leis)

Mar an gcéanna, tá sé seo a leanas sa téacsleabhar a bhfuil an-mheas air le TC Hartley, *The Foundations of European Community Law*, an 6ú Eagrán (Oxford, 2007) ag lch 68:

> COURT PROCEDURE
>
> What languages may be used in court proceedings? The question depends on what is known as the 'language of the case'. *Any one of the official languages of the Member States (including Irish) may be chosen, and the theory behind the rules governing the choice of language is that the Community is regarded as multilingual and consequently able to operate in any official language. Community institutions are therefore required to accommodate themselves to the needs of the other party.*
>
> In direct actions the basic rule is that the applicant has the choice of languages. However, where the defendant is a Member State, or an individual or corporation having the nationality of a Member State, the language of the case is the official language of the State. Where the Member State has more than one official language - as, for example, is the case with Belgium - the applicant may choose between them. Except in the rare cases where a Member State brings enforcement proceedings against another Member State, the Community will always be party to a direct action; the effect of these rules, therefore, is to benefit the other party. The Court may depart from the rules at the request of the parties; however where the request is not made jointly by the parties, the Advocate General and the other party must be heard. (aibhsiú curtha leis)

Beidh sé le feiceáil ón méid roimhe seo (nach bhfuil iontu ach na cásanna is ábhartha den mhórán cásanna Eorpacha atá ar fáil maidir le cearta teanga) gur bhain a lán de na cásanna le dlíthiúlacht na mbeart - i dtéarmaí Dhlí na hEorpa - a rinne na Stáit chun a dteangacha

náisiúnta nó oifigiúla a chosaint nó a fhorbairt. D'fhéadfadh teanga naisiúnta a bheith i gceist nó teanga de chuid réigiún den tír, ag brath ar na cúinsí. De réir mar is eol dom, ní raibh cás ann go dtí seo maidir le Stát a bhunaigh teanga mar an teanga náisiúnta agus mar phríomhtheanga oifigiúil an Stáit, agus a dhiúltaigh ansin gnó oifigiúil a stiúradh sa teanga sin. Tá a leithéid de smaoineamh aiféiseach agus frithráiteach. Tá súil agam nach gcuirfidh Éire an chéad sampla de chás den sórt sin ar fáil sna Cúirteanna i Lucsamburg nó in Strasbourg.

Sa sliocht ó théacsleabhar an Uasail Hartley thuas, is léir go mbeadh saoránach Éireannach a chuirfeadh an dlí ar Éirinn os comhair Chúirt Bhreithiúnais an Aontais Eorpaigh i staid níos láidre chun a éileamh go ndéanfaí a ghnó ann a stiúradh i nGaeilge, ná an saoránach Éireannach céanna agus é cúisithe ag an Stát as cion coiriúil chun a éileamh go ndéanfaí a thriail, i réigiún Gaeltachta in Éirinn, a stiúradh sa teanga sin. Ach, díreach mar a mheasann Dlí na hEorpa go bhfuil an tAontas Eorpach ilteangach, is amhlaidh a mheasann Dlí na hÉireann go bhfuil Éire dátheangach. Is é an toradh sa dá chás sin gur féidir leis an dlíthí cibé teanga oifigiúil a rachaidh sé chun dlí inti a roghnú. Fuair Stát na hÉireann aitheantas don Ghaeilge mar theanga oifigiúil agus oibre den Aontas Eorpach. Ní mór don Stát céanna a thabhairt chun cuimhne gurb í an Ghaeilge teanga Náisiúnta agus príomhtheanga oifigiúil na hÉireann chomh maith.

AGUISÍN V

I.R. Uimh. 245 de 1956.

ORDÚ NA LÍMISTÉIRÍ GAELTACHTA, 1956

Foráiltear le mír 2 mar seo a leanas: 'Cinntear leis seo gur límistéirí Gaeltachta chun críocha an Achta Airí agus Rúnaithe (Leasú), 1956 (Uimh. 21 de 1956), na toghranna ceantair agus na coda de thoghranna ceantair a luaitear sa Sceideal a ghabhas leis an Ordú seo.' Foráiltear [*inter alia*] leis an Sceideal mar seo a leanas:

> CONTAE NA GAILLIMHE.
>
> 1. Na Toghranna Ceantair seo a leanas: Abhainn Ghabhla, Baile Chláir na Gaillimhe, Camus, An Carn Mór, Ceathramha Bhrún, Cill Aithninn, Cill Chuimín (Gaillimh), Cill Chuimín (Uachtar Ard), An Cnoc Buidhe, Conga, An Chorr, An Crampán, Eanach Dhúin (Gaillimh), An Fháirche, Na Forbacha, Garmna, Inis Mór (Oileáin Árainn), Leitir Móir, Mágh Cuilinn, An Ros, Sailchearnach, Scainimh, Sliabh an Iongna, An Spidéal, An Turloch agus na hUilleannaí.
>
> 2. (1) An chuid sin de Thoghroinn Cheantair Bhaile an Teampaill atá comhdhéanta de na Bailte Fearainn seo a leanas: Baile an Gharráin agus An Poll Caoin.
>
> (2) An chuid sin de Thoghroinn Cheantair Bhearna atá comhdhéanta de na Bailte Fearainn seo a leanas: Achadh an Ghliogair, Acraí Corr, An Aill, Áth Buidhe, Áth Tighe Seonaic, An Baile Ard Thiar, An Baile Ard Thoir, An Baile Nua, Baile na hAbhann, Baile Brún, Baile Búrc, Baile an Mhóinín Thiar, Baile an Mhóinín Thoir, Bearna, An Bhuaile Bheag Thiar, an

Bhuaile Bheag Thoir, Buaile na Sruthán, an Cheapach, Cloch Scoilte, Cluain na nGabhar, Cnoc an Uaráin, Cnocán na Cathrach, An Coimín Mór, Corbhuaile (Loingseach), Corbhuaile (Muirgeanach), An Corcuileann, An Drom Thiar, An Drom Thoir, Na Fabhraí Maola Thiar, Na Fabhraí Maola Thoir, Gob na Mara, Gort na Leice, An Leac Liath, An Léana Bodhar, An Léana Riabhach, Lisín an Chaoráin, Loch Ínse, An Pollach, Roisín, An Saorphort, An Seanbhaile Dubh, An Seanghort, Tón na Breacaighe, Na Troscaí Thiar agus na Troscaí Thoir.

(3) An chuid sin de Thoghroinn Cheantair Bhinn Corr atá comhdhéanta de na Bailte Fearainn seo a leanas: Barr na nEang, Barr na Sruthán, Doire Fhada Thiar, Doire Naomh-ghleann, Imeallach Dáith Ruaidh, Fineasclain, An Gleann Aibhneach, Gleann Ceocháin, Leitir Séagha, Leitre agus Log an Tairbh.

(4) An chuid sin de Thoghroinn Cheantair Chloch na Rón atá comhdhéanta de na Bailte Fearainn seo a leanas: Inis Ní, Iorras Beag Thiar agus Iorras Beag Thoir.

(5) An chuid sin de Thoghroinn Cheantair na Gaillimhe (Tuath) atá comhdhéanta de na Bailte Fearainn seo a leanas: An Caisleán Gearr, Mionloch agus An Pháirc Mhór.

(6) An chuid de Thoghroinn Cheantair na Gaillimhe Thuaidh (Uirbeach) a bhfuil an Abhainn Bháite mar thórainn leis an taobh Thoir-Theas di, a bhfuil Abhainn na Gaillimhe mar thórainn leis an taobh Thiar-Theas di agus a bhfuil tórainn Cheantar Uirbeach na Gaillimhe mar thórainn leis an taobh Thuaidh dhi.

(7) An chuid sin de Thoghroinn Cheantair na Leacaighe Bige atá comhdhéanta de na Bailte Fearainn seo a leanas: Coilltreog agus Na Croisíní.

(8) An chuid sin de Thoghroinn Cheantair Leitir Breacáin atá comhdhéanta de na Bailte Fearainn seo a leanas: Bun na bhFioscán, Cartrún an Phóna, An Cnocán Bán, An Doirín, Na Groigin, An Liath, Muintir Eoghain Láir, Muintir Eoghain Thiar agus Muintir Eoghain Thoir.

(9) An chuid sin de Thoghroinn Cheantair Lisín an Bhaile atá comhdhéanta den Bhaile Fearainn seo a leanas: An Carn Mór Thoir.

(10) An chuid sin de Thoghroinn Cheantair Mhuigh-Iorras atá comhdhéanta de na Bailte Fearainn seo a leanas: Dún Riabhchain, Garraidhe Ómain, An Leith-Eanach Theas, Lios Uachtair agus An Tamhnach Mhór.

(11) An chuid sin de Thoghroinn Cheantair Thulach Aodháin atá comhdhéanta de na Bailte Fearainn seo a leanas: An Baile Dóighte, Ceathramha an Lustráin, Cluain na Binne, Cnoc an tSeanbhaile, Coill an Raontha, Droma Bheag, Gort an Chalaidh, Gort Uí Lochlainn, Liagán agus Tulach Aodháin.

APPENDIX I

Canada – a study in legal bilingualism. Language rights under the Canadian constitution

In the Canadian Charter of Rights and Freedoms 1982 ('the Charter') (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11) sections 16- 22, which are entitled 'Official languages of Canada', set out the status of English and French in various settings, including the court room. The Charter states as follows:

> OFFICIAL LANGUAGES OF CANADA
>
> 16. (1) *English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.*
>
> (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.
>
> (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.
>
> 16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
>
> (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.
>
> 17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.
>
> (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.
>
> 18. (1) *The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.*
>
> (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.
>
> 19. (1) *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.*
>
> (2) *Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.*

> 20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
>
> (a) there is a significant demand for communications with and services from that office in such language; or
>
> (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.
>
> (2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.
>
> 21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.
>
> 22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.' (emphasis added)

The province of New Brunswick is referred to specifically in the Charter. New Brunswick, along with Ontario, Quebec and Nova Scotia, was one of the first provinces to join together to form the Dominion of Canada in 1867. The New Brunswick Commission for Official Languages comments that with the enacting in 1969 of the New Brunswick Official Languages Act it was made Canada's first, and only, bilingual province. Certain language rights in this province were then entrenched at a federal level by the Charter of Rights and Freedoms. The obligations flowing from these rights apply to the Legislature and its institutions as well as the government of New Brunswick. As part of the Canadian constitution, any law or government action inconsistent with the Charter is unconstitutional. Michel Hélie states that:[44]

> As an influential and active minority language rights advocate with broad roots in New Brunswick, it is difficult not to see Michel Bastarache's influence in these constitutional provisions. As he wrote in 1991: "Fighting assimilation, therefore, requires a degree of linguistic institutional completeness which, I submit, can only be achieved through meaningful constitutional protection." [45]

[44] Michel Hélie, 'Michel Bastarache's Language Rights Legacy' (2009) 47 S.C.L.R. (2d) 377, 381.
[45] Michel Bastarache, *Language Rights in the Supreme Court of Canada: The Perspective of Chief Justice Dickson* (1991) 20 Man. L.J 392 at 400.

Language Rights in Canada were born out of a historical and political compromise between its two founding peoples: the British settlers and the French settlers. The initial status of language rights in the Constitution Act of 1867 was discussed by Hélie at p 379:

> With small deference to the need to ensure a modicum of accommodation for the participation of the minority Francophone population in federal institutions, *section 133 of the Constitution Act, 1867 guarantees the right to use either French or English in the federal Parliament and federally established courts, as well as the requirement that federal statutes be published in both languages.*
>
> Even the modest guarantees under section 133 were contingent upon Quebec accepting to be subject to the same strictures in regard to its provincial assembly, courts and statutes. Although section 133 was not made applicable to any of the other original uniting provinces, it was extended to Manitoba upon its entry into Confederation.
>
> *From this perspective of Confederation, the survival of the French language and culture would depend on the people and government of Quebec.* Developments after Confederation intended to do away with the use of the French language in other parts of the country, notably in New Brunswick, Ontario and Manitoba, would confirm this view of Confederation to the dismay of many French-Canadians. In response, an alternative interpretation of Confederation developed which was premised on a compact between two nations (or two founding peoples): English Canada and French Canada.' (emphasis added)

The Official Languages Act 1969 ('OLA'), Hélie comments,[46] was enacted to provide 'a degree of official bilingualism at the *federal level* throughout Canada' and was a response to a report entitled 'The B & B Report'.[47] On commenting upon this report Hélie says at 380:

> *The meaning of the equality of both official languages is not self-evident.* For instance, the right to receive services from the federal government in the official language of choice was *subject to demographic requirements.* The B&B Commission sought an *approach 'determined by the realities of Canadian life'.* It adopted 'an approach aimed at attaining the greatest equality with the least impracticality'. This meant that services should be available *'wherever the minority is numerous enough to be viable as a group."* (emphasis added)

It was this approach that influenced the 1969 Act. The Canadian Charter of Rights and Freedoms 1982, according to Hélie, 'entrenched the key aspects of the OLA'.[48] Hélie noted at p 381 one significant departure from the OLA:

> The most noteworthy change is the absence of any express reference to Quebec in sections 16 to 22 of the Charter and the presence of special provisions under which *New Brunswick subjects itself to language rights equal to and beyond those applicable to the federal government.* For instance, under section 20(2), New Brunswick must provide services in both official *languages without reference*

[46] Hélie, Michel, 'Michel Bastarache's Language Rights Legacy' (2009) 47 S.C.L.R. (2d) 377, 380.
[47] Hugh R. Innis, *Bilingualism and Biculturalism: An Abridged Version of the Royal Commission Report* (Ottawa: McClelland and Stewart Ltd 1973).
[48] Michel Hélie, 'Michel Bastarache's Language Rights Legacy' (2009) 47 S.C.L.R. (2d) 377, 381.

> *to demographic criteria*. More significantly still, section 16.1 (added in 1993) provides that the *English and French 'linguistic communities' (not merely the languages) have 'equality of status and equal rights' including:*
>
> > 'the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.'

Jury trials in Canada

How a Francophone jury is assembled

Regardless of the linguistic demographics of a province, when a trial is to be held, the accused person is entitled to a trial through either of the official languages of Canada, ie English or French, this includes a judge and jury that are fluent in the language. British Columbia, a predominantly Anglophone province with a French speaking minority, has provided for this by means of maintaining two jury registers. The Justice website for British Columbia provides the following information to potential jurors:

> The provincial voters list is used to summon individuals for English-speaking jury trials. Names in the database are picked at random and summonses are issued to those that have been identified. If you are a registered voter in British Columbia, your name and address appears in this database.
>
> Since 1990, Francophone accused persons in British Columbia have the right to be tried by a judge and jury who speak French. *French-speaking jury trials are very rare in British Columbia, with only one, on average, occurring per year.* It's important to ensure the French-speaking juror list is updated so that French-language jury trials can be provided whenever possible.
>
> If you are a French-speaking British Columbian and wish to have your name transferred from the current database used for summoning individuals for English-speaking jury trials to the database used for summoning for individuals for French-speaking trials, *click here*. The information you provide will be kept confidential. (emphasis added)

A juror list specifically for French-language trials is maintained in British Columbia, despite the fact that a small number of such trials which take place. British Columbia's court services actively recruits for this jurors list by trying to increase the awareness of its existence. The excerpt below was advertised on the Government of British Columbia Newsroom website to potential Francophone jurors in Victoria, British Columbia, on the 20th September 2013:

> VICTORIA - Are you French-speaking or bilingual and eligible to be a juror? If so, B.C.'s court services invites you to put your name on its French-language jury list. All eligible B.C. voters are listed on the general jury list.
>
> Adding your name to the French-language jury list is as simple as going to the website … and choosing to move your name from the general jury list to the list for French-language trials.
>
> *Why It Matters:*

> Serving on a jury is a civic responsibility that is essential to our justice system. Many British Columbians may be unaware there is a juror list specifically for French-language trials. The website helps expand the pool of eligible bilingual individuals. (emphasis added)[49]

The importance of the jury trial in Canada - Jury Representativeness.

Some academic commentators have looked at this issue. Schuller & Vidmar note that a change of venue is also an option, in special circumstances, for an accused person who wishes to have the trial conducted in the language that is the minority language of a province:[50]

> LIMITATIONS ON THE RIGHT TO A JURY TRIAL
>
> Although the right to jury trial is enshrined in the Canadian Charter of Rights and Freedoms, that right needs to be understood in the context of the Criminal Code.[51]
>
> [...]
>
> Canada has two official languages, English and French. Section 530 of the Code provides that an accused has the right to be tried by a judge and jury who speak the language of the accused, or, *if special circumstances warrant it, a judge and jury composed of persons who speak both languages. Section 531 provides that a change of venue to a different territory within a province may be made in order to obtain a jury with the required language skills.* Additionally, as will be discussed in more detail below, exceptions are made for aboriginal peoples in Canada's arctic regions.
>
> [...]
>
> When summary conviction offenses are taken into account, the vast bulk of criminal cases, at least ninety percent, are tried by judge alone. That said, the institution of the criminal jury continues to occupy an important place in Canadian law. (emphasis added)

Few cases have been taken regarding jury representativeness in Canada. The cases which have been taken have centred on gender and irregularities in the selection of aboriginal citizens (p 501):

> *Litigation based on an unrepresentative jury pool is sparse. At the start of the trial the prosecution or defense may challenge the whole jury array on the grounds of fraud, partiality, or misconduct, but such challenges have been infrequent*. In *R. v Catizone* and *R. v Nepoose* new arrays were ordered when too few women appeared on the original arrays. In *R. v Nahdee*, the accused successfully challenged the array because of irregularities in the selection of aboriginal persons, and in *R. v Born with a Tooth*, the Crown prevailed on a challenge to irregularities in the selection of aboriginal citizens. *However, challenges to arrays on the grounds that they*

[49] 'B.C. calls for French-speaking jurors' (British Columbia Gov News 20 September 2013) <https://news.gov.bc.ca/releases/2013JAG0296-001436? accessed 28 October 2020.
[50] Neil Schuller and Regina Vidmar, 'The Canadian Criminal Jury' (2011) 86 Chi.-Kent L. Rev. 497, 499-500.
[51] Criminal Code, R.S.C. 1985, c. C-46 (Can.).

> *did not contain a sufficient proportion of persons of a racial or ethnic group have tended to fail if there were no irregularities in the selection process itself.* If the challenge to the array is not made at the start of trial, section 670 of the Criminal Code states that any irregularity in the summoning or empanelling of the jury shall not be grounds for reversing a verdict. It is not clear how successful an appeal would be if strong evidence showing deliberate racial or gender biases in selection were produced after a conviction. (emphasis added)

At p 504, while commenting on peremptory challenges, Schuller & Vidmar note that legal issues on jury representativeness are at a minimum, given the case law and Criminal Code:

> Given the tighter controls in Canada on the trial process, coupled with the restrictive pretrial questioning of jurors and the fact *that legal issues of jury representativeness are minimized by case law and the Criminal Code*, peremptory challenges have not been as controversial as they have been in England or the United States. (emphasis added)

There is a right to a trial by jury through either of the national languages of Canada (R v Beaulac)

R v Beaulac [1999] 1 SCR 768 was the second of three cases that marked a significant departure from the preceding case law regarding language rights in Canada.[52] The *ratio* and indeed legacy of *Beaulac* is that language rights are distinct; they are not related to the right to a fair trial or to the ability to conduct a defence in one language or another. They are human rights which are protected in Canada, constitutionally and through legislation. The purpose of giving legal recognition to two official languages was not to ensure fair procedures but to give strong cultural recognition to the minority language of a given province. This was born out of a historical political compromise. Language is a key element of cultural identity and the failure of the State to validate the language rights of citizens renders those rights hollow.

Bastarache J delivered the judgment of the Court and at paragraphs 20 and 22 noted the responsibility such language rights placed on 'the system':

> These pronouncements are a reflection of the fact that *there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities*. The objective of protecting official language minorities, as set out in s. 2 of the Official Languages Act, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. *Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided.* This is consistent with the notion favoured in the area of international law that *the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.* (emphasis added)

Paragraph 22:

[52] The other cases were *Reference re Secession of Quebec* [1998] S.C.J No. 61 and *Arsenault-Cameron v Prince Edward Island* [1999] S.C.J No. 75.

> With regard to existing rights, equality must be given true meaning. *This Court has recognized that substantive equality is the correct norm to apply in Canadian law*. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. (emphasis added)

After *Beaulac,* the obligation on a court to provide a trial in the national language chosen by the accused, either French or English, was clear. All a person needs to demonstrate is the ability to instruct counsel through the chosen language, a fluency in the alternative language is not a matter to be considered.[53] It is the obligation of the Government to ensure the proper institutional infrastructure is there to support language rights in official settings. Bastarche J stated at paragraph 39:

> I wish to emphasize that mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because *the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis.* (emphasis added)

Bastarche J enunciated clearly the origins of such language rights, and at paragraph 34 stated:

> The solution to the problem, in my view, is to look at the purpose of s. 530. It is, as mentioned earlier, to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity *Ford, supra*, at p 749. *The language of the accused is very personal in nature;··it is an important part of his or her cultural identity. The accused must therefore be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself. The principles upon which the language right is founded, the fact that the basic right is absolute, the requirement of equality with regard to the provision of services in both official languages of Canada and the substantive nature of the right all point to the freedom of Canadians to freely assert which official language is their own language* ... The court, in such a case, will not inquire into specific criteria to determine a dominant cultural identity, nor into the language preferences of the accused. *It will only satisfy itself that the accused is able to instruct counsel and follow the proceedings in the chosen language.* (emphasis added)

The purpose of having two official languages was elaborated upon at paragraph 41:

> The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. *Language rights have a totally distinct origin and role.* They are meant to protect official language minorities in this country and *to insure the equality of status of French and English.* This Court has already tried to dissipate this confusion on several occasions. (emphasis added)

[53] *R. v Beaulac* [1999] 1 SCR 768 [34].

APPENDIX II

Irish in European Law (1)

According to the official website of the Commission of the European Union:

> The European Union has twenty-four official and working languages. They are: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, *Irish*, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish. (emphasis added)

According to the official website of the Irish presidency of the EU, 2013:

> When Ireland joined the EEC in 1973, Irish was a 'treaty' language, although not an official working language. In 2005 the EU Council of Ministers voted unanimously to make Ireland the twenty-first official and working language of the European Union. This decision took effect on 1st January 2007.

This decision of the Council of Ministers was made at the request of the Irish Government. Accordingly, on 1 January 2007, Irish was the national and first official language of Ireland by virtue of Article 8 of the Constitution adopted in 1937. Seventy years later, the Irish Government arranged for it to become an official and working language of the European Union. However, what was described as 'a temporary and transitory derogation' was introduced in 2007, according to the presidency website 'because of difficulties in recruiting sufficient numbers of Irish language translators'. This derogation was renewed by Council Regulation EU No. 1257/2010.

Public Policy on Irish in Ireland

The present public policy in Ireland in relation to the Irish language is expressed in the *Twenty-Year Strategy for the Irish Language 2010-2030*. This policy commanded cross party support according to the official website of the Department of Arts, Heritage and An Gaeltacht. The same source declares:

> The Strategy is the result of a consultative and research process, including a report commissioned by the Department (DCU, 2009), the *Comprehensive Linguistic Study of the Use of Irish in the Gaeltacht* (NUIG & NUIM, 2007), and the report of Coimisiún na Gaeltachta (2002).

This policy was launched by a Government statement which anticipated the recognition of Irish as an official and working language of the European Union and stated that that recognition took place 'at the request of the Irish Government'. It further declared: 'As one of the oldest languages in Europe *that is still used as a vernacular language*, Irish has a special role to play in this tapestry ['the diverse rich tapestry of European culture'] and it is the duty of the Government to ensure that it continues to flourish.' (emphasis added). The Statement continued: 'The Government is committed to the development of the Irish language and the promotion of functional bilingualism, while fully recognising the value of English to Irish citizens as the dominant language used in international discourse.' Later in the Statement,

and very significantly, it is said: *'It is a choice for the citizen, whether they wish to engage with the State in Irish or in English.'* (emphasis added)

Even assuming a condition of feasibility as attaching to the immediately previous statement, it is plainly one of the greatest significance. Mr. Ó Maicín wishes to interact with a very important organ of the State, a Court established under the Constitution, in Irish, and this case raises the question of whether or not it is in truth 'a choice for the citizen whether they wish to interact with the State in Irish or English', and indeed whether Irish is 'still used as a vernacular language'. The State has committed itself to both these propositions.

According to the Oxford English Dictionary the word 'vernacular', used as a noun, means 'the language or dialect *spoken by the ordinary people* of a country or region'; used as an adjective it means 'the language spoken as one's mother tongue; not learned or imposed as a second language'. I can only say that if indeed, as has been officially declared, Irish 'is still used as a vernacular language', that proposition seems quite at variance with others which have been advanced in this case such as the proposition that it is not possible to supply an Irish speaking jury to try the case against Mr. Ó Maicín or the proposition that a jury of Irish speakers would be unrepresentative of the community as a whole. Mr. Justice Clarke, at para. 2.3 of his judgment observes, quite correctly: [54]

> Some persons have no option but to be tried before a jury which does not speak their native tongue. In modern Ireland there are many 'new Irish' or others who happen to be in the jurisdiction exercising rights such as the right to work under the European Treaties. Such persons may be able to speak English (or, perhaps, Irish) to a greater or lesser extent but many are not sufficiently fluent that they would wish to give evidence in an important case involving a serious criminal accusation against them other than in their native language. If a person could not ever have a fair trial, as such, unless the decision maker could speak his or her native language then it would, in practical terms, be impossible to put many such persons on trial.

This is self-evidently true, but I do not believe it is of any relevance to the present case, which is the case of an Irish citizen, a native speaker of the Irish language, charged with an offence allegedly committed in the Gaeltacht where he was reared. Such a person's case is quite different from that of a non-national, a person who does not speak, or speak sufficiently well, either of the official languages of the State, but who has immigrated voluntarily into the State, notwithstanding that he knows this.

As it happens, the rights of a person such as Clarke J envisages have been recently and comprehensively dealt with by Directive 2010/64/EU of the European Parliament and of the Council of 20th October 2010. This Directive sets out in comprehensive terms the language rights of a person 'who does not speak or understand the language of the proceedings'. It is extremely important that the language and other rights of persons in this category are carefully observed, but they are quite different from those of a person in the position of the appellant here. The rights he asserts, in the main, are language rights as opposed to fair trial rights or equality rights. That is not to say that he does not enjoy rights of the latter kinds, but merely that they are distinct from the language rights specifically in question here.

[54] Paragraph 230 in the official report [2014] 4 I.R. 583, 641-42.

The twenty-four official and working languages of the European Union have been listed above. In the case of every single one of those languages, other than Irish, the State whose language it is, is capable of conducting criminal trials and other legal proceedings, within its own jurisdiction, in the language which it has made an official and working language of the European Union. To put this another way, none of these countries maintains as such an official language, not to mention as a 'national and first official language' a language in which the organs of that State itself are incapable of conducting routine business.

Apart altogether from the European Union, I raise the question of whether there is a sovereign State anywhere in the world which maintains as its 'national and first official language', and as an 'official and working language' of the principal international organisation of which it is a member, a language in which its own organs are said *by the State itself*, to be incapable of conducting routine business. Is there, anywhere in the world, a sovereign independent State which refuses to a native born citizen, a native speaker of the State's constitutionally enshrined **'**national' and 'first official language', the right to defend himself or herself in that language before a duly constituted Tribunal of that State, which is capable of understanding the citizen directly? According to the State defendants, Ireland is just such a State. There is no other.

Ninety years after independence, the Irish State itself, in this present case, most discreditably says that Ireland is just such a State. This case is partly about whether that shaming contention is correct. I use these strong terms because Irish has been the State's first official language for three or four entire generations and a compulsory subject in schools for as long. If the State's contention is correct, it evidences a truly dramatic failure of a policy pursued for the whole period of the State's existence, a failure so abject as to be almost without precedent in any area of public policy, here or abroad, contemporary or historic. But I do not believe the State's contention is correct. It is not, on the evidence in this case, at all impossible to provide a jury to try this fairly routine case in Irish. But it requires some action by the State, at minimal or no expense, which it is unwilling to take.

APPENDIX III

Bilingualism rejected by pre-Independence Government

The essence of this case, in my view, is that the State is constitutionally committed to a policy of bilingualism. This, indeed, is the main difference made by the two successive constitutional Articles referenced above [the Articles in the 1922 and 1937 Constitutions which conferred on Irish the status of official language], by comparison with the position under British rule. Prior to the coming into force of the first of these Articles, Ireland was judicially held not to be a bilingual country, but to be an *exclusively* English-speaking country in point of law. This case raises the issue whether that position has changed, for a real litigant in real life as opposed to the undoubted change in constitutional theory.

In *M'Bride v M'Govern* [1906] 2 IR 181, the appellant, '*Niall McBride'*, as he was called in the official report, or Niall Mac Giolla Bhríde as he called himself, was prosecuted for using a cart on a public road without having his name and residence painted upon it in some conspicuous part of the off-side in legible letters, contrary to s.12(1) of the Summary Jurisdiction (Ireland) Act, 1851. This case was tried in the former Court of Petty Sessions in Dunfanaghy, County Donegal, and the offence was said to have happened in a nearby townland. The complainant [M'Govern] proved that the relevant information was not

painted on the cart in letters legible to *him* but were painted in letters *'believed to be Irish'*. The complainant 'admitted that the letters were of the proper dimensions and that they might be legible to people who could read the Irish language'. It was proved by the appellant [Mac Giolla Bhríde] that his name and residence were correctly painted on his cart in legible letters and characters of the Irish language. It was further proved that in the district in question, the Irish language was spoken by three quarters of the population and a large proportion, both spoke Irish and English and a 'considerable number' spoke Irish exclusively.

On those facts, the Justices of the Peace convicted, and did so on the basis that the information, being painted in Irish, was not in legible letters as required by the Act but they stated a case at the request of the Defence. On the hearing of the case stated, the appellant was represented by three counsel, one of whom was P.H. Pearse. The leading counsel was Timothy Healy K.C., M.P., who did not however address the Court, and may not have been present. The third counsel was P.S. Walsh, B.L., a Donegal native, later President of the District Court of Cyprus and, from 1931, Chief Justice of the Seychelles. The Crown submitted that: 'the Statute had been passed by an English speaking parliament, legislating in the English language, and *that the presumption is that it was intended* that the name and residence should be in the English language and in English characters.' (emphasis added). It was emphasised that *'the Irish language has never been officially recognised in this country'* (p183) (emphasis added). In reply, Mr. Pearse argued that the Statute was one applying 'a bilingual country and therefore there was no presumption that it was intended that the name must be in English or in English characters.' The principal judgment was delivered by Peter, Lord O'Brien of Kilfenora, LCJ

If 'Niall McBride' was known as Niall Mac Giolla Bhríde to everyone he had ever met *except* policemen, magistrates' clerks and other servants of the establishment, the euphoniously-titled Lord O'Brien of Kilfenora was much better known as 'Peter the Packer' to everyone *outside* the establishment, and, privately, to not a few within it. This was a wry tribute to his skill, as Crown Prosecutor and later Attorney General, in 'packing' a jury with those likely to favour a conviction in the fraught trials of the Land War, in the decade after 1879. Oddly enough, this *soubriquet* was not without a tinge of familiarity, even affection. His contemporary reputation was perfectly caught by the Nationalist barrister and memoirist, Maurice Healy, who wrote in *The Old Munster Circuit*, after many affectionate recollections of O'Brien: 'Pether only just missed being a great man'

O'Brien L.C.J said the defendant was called 'McBride, whose name in Irish I will not venture to pronounce least my faulty pronunciation might shock the many Irish scholars who take an interest in the case'. He upheld the contention of the Crown saying:

> The characters were not the characters of the language which the Crown and legislature recognise as the language of the United Kingdom *for all legal and official and public purposes*. Parliament conducts its debates in English and legislates in English. The enacting body expresses itself, and the enactment which contain the relevant provision is expressed, in English. English is the language of the Crown; of, as I have said the legislature both in debate and enactment; of all the government administrative and public departments; of the Courts, of the Supreme Courts; of the Courts of Summary Jurisdiction, where the very offence under consideration is to be investigated and, in the eyes of the law, of the Constabulary who, under the 14th Section of the Act, are to take cognisance of the offence.' (emphasis added)

Notwithstanding 'the very ingenious, interesting and, from a literary point of view, instructive arguments of Mr. Walsh and Mr. Pearse', the Court, in the judgment of Gibson J held that:

> Counsel have not cited, and I have failed to discover, any statute relating to this country in which Ireland is treated as bilingual and requiring special and distinctive treatment accordingly, or in which recognition was given to the fact that in certain parts of the island the inhabitants used the Irish tongue … for civil purposes [civil, that is, as opposed to Ecclesiastical] *there is no trace in the Statute Book of the recognition of any language but English.* (emphasis added)

It is manifest that the conditions of law recited by Lord O'Brien and Mr. Justice Gibson, no longer apply in Ireland. Ireland is now, legally and constitutionally, a bilingual country. It can no longer be said that 'complaints under [the Act] are to be heard and determined by Justices who speak [exclusively] in the English language'. And indeed, there is special statutory provision to the contrary. Nor is English any longer the exclusive language of the country 'for all legal and official and public purposes'. This appeal was heard in Irish.

In the reported judgments and arguments in *M'Bride*, there is an unmistakable air of haughty condescension in such phrases as: 'in letters believed to be Irish'; 'the Irish language has never been officially recognised in this country'; 'McBride, whose name in Irish I will not venture to pronounce, least my faulty pronunciation might shock the many Irish scholars who take an interest in the case'; and in the entire exert from the judgment of Gibson J.

The question which this case raises is, do all the plangent legal and constitutional changes since 1922 make any difference in practice? Is the country to be regarded for all practical purposes as still mono-lingual in English, with the only concession made to an Irish speaker being that an interpreter will be provided, as an interpreter will be provided to a speaker of any language under the sun, who is hauled into court?

M'Bride v M'Govern was decided in what was constitutionally politically and historically a very different country, almost a different world. This case, in its result, will indicate whether or not the position of an Irish speaker in his own country, and before his own courts, has in fact been altered to his advantage by the manifold changes since 1906. Or are those changes merely window dressing?

APPENDIX IV

'National and first official language' in European Law (2)

In *Groener v Minister for Education* (Case C-379/87) [1989] 5 E.C.R. 3967, Ms. Groener, who was a Dutch national, sued the Minister for Education and the Dublin VEC. She objected to a provision which made appointment as a full-time teacher of art in a VEC institution conditional on proof of an adequate knowledge of the Irish language. This proof was usually provided by production of a special certificate of competency in Irish. The European Court of Justice was asked for a preliminary ruling under Article 177 of the Treaty. Three questions were raised on the interpretation of Article 48(3) of the Treaty (relating to freedom of movement for workers within the Community) and Article 3 of Regulation 1612/68 made by the Council on the 15th October 1968, also relating to the free movement of workers. This latter regulation stated that legal provisions, regulations or administrative actions or practices in a Member State 'shall not apply' where they limit application for and offers of employment

or the right of foreign nationals to take up and pursue employment and provides for cognate matters. This latter regulation however is subject to the exception that it is not to apply 'to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled'.

At paragraphs 18 and 19 of the judgment, the Court of Justice held:

> 18. As is apparent from the documents before the Court, although Irish is not spoken by the whole Irish population, the policy followed by Irish governments for many years has been designed not only to maintain but *also to promote* the use of Irish as a means of expressing national identity and culture. It is for that reason that Irish courses are compulsory for children receiving primary education and optional for those receiving secondary education (*sic*). The obligation imposed on lecturers in the public vocational education schools to have a certain knowledge of the Irish language is one of the measures adopted by the Irish government in furtherance of that policy.
>
> 19. The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State *which is both the national language and the first official language*. However, implementation of such a policy must not encroach on a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving for measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring discrimination against nationals of other Member States. (emphasis added)

In the *Groener* case, the national rules were found to be proportionate at para. 21:

> 21. It follows that the requirement imposed on teachers to have an adequate knowledge of such a language must, provided that the level of knowledge required is not disproportionate in relation to the objective pursued, be regarded as a condition corresponding to the knowledge required by reason of the nature of the post to be filled within the meaning of the last sub-paragraph of Article 3(1) Regulation 1612/68.

This case was followed in the opinion of Advocate General Van Gerven (18th February 1993) in *Federación de Distribuidores Cinematograficos v Estado Español* (Cás C-17/92). This case related to a requirement to dub into one of the official languages of Spain films imported from third countries. The Advocate General surveyed Community law on language rights and continued as follows:

> 26. It follows from this case-law that rules within the framework of the cultural policy of national or regional authorities may where appropriate be warranted by an overriding reason of general interest recognised by Community law justifying certain restrictions to the movement within the Community of persons, goods or services. *That applies to measures intended to ensure the preservation and appreciation of historical and artistic treasures or the dissemination of knowledge of the arts and culture ('tourist - guide' judgments) which are directed towards preserving the freedom of pluralistic expression of the various social, cultural, religious and philosophical trends in a country ('Mediawet' judgments) or towards the protection of a national language (Groener judgment).* These overriding reasons of

> general interest may, I think, be described in general as the protection, development and dissemination of a Member State's own cultural heritage or that of a region thereof, in a pluralist context and as a component of a cultural heritage common to the Member States. (emphasis added)

Equally, the well-regarded textbook, TC Hartley, *The Foundations of European Community Law*, 6th Edition (Oxford, 2007) has this to say, at p 68:

> COURT PROCEDURE
>
> What languages may be used in court proceedings? The question depends on what is known as the 'language of the case'. *Any one of the official languages of the Member States (including Irish) may be chosen, and the theory behind the rules governing the choice of language is that the Community is regarded as multilingual and consequently able to operate in any official language. Community institutions are therefore required to accommodate themselves to the needs of the other party.*
>
> In direct actions the basic rule is that the applicant has the choice of languages. However, where the defendant is a Member State, or an individual or corporation having the nationality of a Member State, the language of the case is the official language of the State. Where the Member State has more than one official language - as, for example, is the case with Belgium - the applicant may choose between them. Except in the rare cases where a Member State brings enforcement proceedings against another Member State, the Community will always be party to a direct action; the effect of these rules, therefore, is to benefit the other party. The Court may depart from the rules at the request of the parties; however where the request is not made jointly by the parties, the Advocate General and the other party must be heard. (emphasis added)

It will be seen from the foregoing (which is merely the most relevant of the many European cases available on language rights), that many of the cases related to the legality or otherwise, in terms of European law, of measures taken by the States to protect or develop their national or official language. This may be the national language or the language of a part or region of a country, depending on circumstances. There has not to date, as far as I am aware, been a case of a State who constituted a language as the national and first official language of the State, and then refused to conduct official business in that language. The very idea is ludicrous and contradictory. It is to be hoped that Ireland does not provide the first example of a case of that sort in the Courts at Luxembourg or Strasbourg.

In the extract from Mr. Hartley's textbook above, it emerges that an Irish citizen suing Ireland before the European Court of Justice would be in a stronger position to require his business there to be conducted in Irish, than the same Irish citizen who has been charged with a criminal offence by the State would be to require his trial, in a Gaeltacht region of Ireland, to be conducted in that language. But, just as European Law regards the European Union as multilingual, Irish law regards Ireland as bilingual. The result in each case is that a litigant may choose which of the official languages he will litigate in. The Irish State procured the recognition of Irish as an official and working language of the European Union. That same State must recall that Irish is also the National and first official language of Ireland.

APPENDIX V

S.I. No. 245 of 1956.

GAELTACHT AREAS ORDER, 1956

Article 2 provides: 'The district electoral divisions and parts of district electoral divisions specified in the Schedule to this Order are hereby determined to be Gaeltacht areas for the purposes of the Ministers and Secretaries (Amendment) Act, 1956 (No. 21 of 1956).' The Schedule provides [*inter alia*]:

> COUNTY OF GALWAY.
>
> 1. The District Electoral Divisions of Owengowla, Claregalway, Camus, Carnmore, Carrowbrowne, Killannin, Kilcummin (Galway), Kilcummin (Oughterard), Knockboy, Cong, Cur, Crumpaun, Annaghdown (Galway), Cloonbur, Furbogh, Gorumna, Inishmore (Aran Islands), Lettermore, Moycullen, Ross, Selerna, Skannive, Slieveaneena, Spiddle, Turlough and Illion
>
> 2. (1) That part of the District Electoral Division of Ballintemple comprised in the Townlands of Ballygarraun and Pollkeen.
>
> (2) That part of the District Electoral Division of Barna comprised in the Townlands of Ahaglugger, Oddacres, Aille, Aubwee, Attyshonock, Ballard West, Ballard East, Newvillage, Ballynahown East, Brownville, Ballyburke, Ballymoneen West, Ballymoneen East, Barna, Boleybeg West, Boleybeg East, Boleynashruhaun, Cappagh, Cloghscoltia, Cloonagower, Oranhill, Knockaunnacarragh, Kimmeenmore, Corboley (Lynch), Corboley (Morgan). Corcullen, Drum West, Drum East, Forramoyle West, Forramoyle East, Seapoint, Gortnalecka, Lacklea, Lenabower, Lenarevagh, Lisheenakeeran, Loughinch, Pollagh, Rusheen, Freeport, Shanballyduff, Shangort, Tonabrocky, Trusky West and Trusky East.
>
> (3) That part of the District Electoral Division of Bencorr comprised in the Townlands of Barnanang, Barnanoraun, Derryadd West, Derrynavglaun, Emlaghdauroe, Finnisglin, Gleninagh, Glencoaghan, Lettershea, Lettery and Luggatarriff.
>
> (4) That part of the District Electoral Division of Roundstone comprised in the Townlands of Inishnee Island, Errisbeg West and Errisbeg East.
>
> (5) That part of the District Electoral Division of Galway (Rural) comprised in the Townlands of Castlegar, Menlough and Parkmore.
>
> (6) That part of the District Electoral Division of Galway North (Urban) bounded on the South-East by Terryland River, on the South-West by the River Corrib and on the North by the boundary of Galway Urban District.
>
> (7) That part of the District Electoral Division of Lackaghbeg comprised in the Townlands of Kiltroge and Crusheeny.

(8) That part of the District Electoral Division of Letterbrickaun comprised in the Townlands of Bunnasviskaun, Poundcartron, Knockaunbaun, Derreen, Griggins, Lee, Munterowen Middle, Munterowen West and Munterowen East.

(9) That part of the District Electoral Division of Lisheenavalla comprised in the Townland of Carnmore East.

(10) That part of the District Electoral Division of Moyrus comprised in the Townlands of Doonreaghan, Garroman, Lehanagh South, Lissoughter and Tawnaghmore.

(11) That part of the District Electoral Division of Tullyokyne comprised in the Townlands of Ballydotia, Carrowlustraun, Cloonnabinnia, Knockshanbally, Killarainy, Drummaveg, Gortachalla, Gortyloughlin, Leagaun and Tullokyne.