IRISH TRAVELLERS' ACCESS TO JUSTICE: ARE YOU THE FAIREST OF THEM ALL?

Abstract: Published in 2022, the Irish Travellers' Access to Justice Report revealed deep distrust between the Mincéirí and Irish criminal justice bodies, including the judiciary, based in a perception of anti-Traveller bias. In this article, the authors set out the results of the Report, describe the concept of unconscious bias and identify some effective solutions, including those used in other high-stakes environments, such as healthcare, where decision-makers face complex and life-changing decisions. Measures adopted in judicial training to address the problem of bias in judicial decision-making are assessed and suggestions are made to expand and improve the response of the judiciary in this respect.

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> *'Mincéirí lesko, gradum ar geels'gresko, tom ar a sragon, stafa a tribli, graisk a lesko araik a d'arp cuid a Rilantu l'esko. Rilantu Mincéirí cūī'i a tapa a araik sūl'a a crush ain a suwnied a cūī'i a Rilantu a staffie turk. Ela, Mincéirí lesko, gradum ar geels'gresko a tapa's awást kamrailid's, nil a nūs a state policies, McVeigh (2008) leskos a tom whider a Mincéirí ar a state policies a 'assimilation and culturalgenocide', gyē a criminalisation a a crush an ara mishlor. Rilantu a nīd'as, anti-Mincéirí racism a tom, gramail ar normalised. A tapa an persistence a Mincéirí grani leskos a thadyur a thom a communities a mals's a gruber.'*[1]

Introduction

In 1963, the Irish government published the *Report of the Commission on Itinerancy*. While the Report emphasises the need to make 'all efforts directed at improving the lot of the itinerants,'[2] it places the fault for anti-Traveller hostility on the part of the general population at the feet of Travellers:

> 'Hostility to a class or group as now exists in relation to the itinerants is uncharacteristic of our people... The normal kindly feelings of the people...will once again predominate when the immediate pressure of the itinerants' wrongdoings has been relieved… '[3]

[1] This is a short description of the Irish Travellers' Access to Justice (ITAJ) project in Cant, translation for which was provided to the Irish Travellers' Access to Justice project by Oein DeBhairduin to accompany the presentation of a piece of art by Traveller artist Leanne McDonagh to the University of Limerick by the ITAJ team. The English translation for this is: 'Traveller language, culture and traditions, rich in their tapestries, rooted in community, and embedded in oral traditions are a vital part of Ireland's history. Irish Travellers share a distinctive lifestyle and culture based on a nomadic tradition and have been documented as part of society in Ireland for centuries. However, Traveller culture and traditions have survived in spite of, rather than with the support of, State policies. McVeigh (2008) describes the official response to Travellers as a state policy of 'assimilation and cultural genocide', including through the criminalisation of nomadism. Among the Irish public, anti-Traveller racism is embedded, accepted and normalised. The persistence of Traveller culture speaks to the strength and depth of the Community's connections and traditions'.

[2] Government of Ireland, *Report of the Commission on Itinerancy* (Pr 7272, 1963) <https://opac.oireachtas.ie/AWData/Library3/Library2/DL013441.pdf> > accessed 28 October 2024. With respect to the term 'itinerant', see n 5 below on language.

[3] ibid 104.

Thus, as the Irish Traveller Movement explains, 'Travellers are guilty of another sin: creating anti-Traveller racism in the inherently noble Settled Irish; without the 'problem' of Travellers, there is no 'problem' of racism'.[4] The improvement of 'the lot of the itinerants' is seen through the lens of an ultimate aim of absorbing Mincéirí/Travellers 'into the general community', the Report finds.[5] Since then, as McVeigh describes, this response to Travellers in Ireland has become a state policy of 'assimilation and cultural genocide', including through the criminalisation of nomadism.[6] In 2017, an Taoiseach Enda Kenny formally recognised Mincéirí/Travellers as a separate ethnic group, worthy and deserving of protection, but the relationship between the State – including the judicial branch – and Mincéirí/Travellers is not a positive one. This is not an easy conversation to have; it is not easy for anyone, not least judges, to accept that they are biased: '[B]ecause [judges] have worked hard to eliminate explicit bias in their own decisions and behaviors, [they] assume that they do not allow racial prejudice to color their judgments.'[7]

In this article, we describe the relationship between Mincéirí/Travellers and judges as shaped by racism on the part of the settled population against the Mincéirí/Travellers in Ireland. We describe unconscious bias and institutional racism, present empirical evidence of Travellers' experiences of institutional and individual racism within the Irish criminal justice system, and describe a range of measures to address Travellers' access to justice. We propose several solutions, seen through the lens of judicial training informed by international human rights law. The solutions can be adapted to other institutions but require extensive work, where racism must be acknowledged on both an individual and institutional level. Ultimately, we seek to promote human rights standards of equality, dignity, and respect relating to Mincéirí/Travellers, and seek to end their disproportionate criminalisation and penalisation.

This article adopts the position that racism generally and anti-Traveller racism specifically is an historically embedded characteristic of our society. None of us is to blame for the existence of these systems of oppression that pre-date us. However, each of us bears responsibility for our own actions in the present, and for developing an awareness of how those actions relate to these omnipresent systems. Our decisions, our choices, our omissions, our silences – do they perpetuate these systems or disrupt them? This is the question we ask the reader to keep in mind when engaging with this article.

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[4] Irish Traveller Movement, 'Review of the Commission on Itinerancy Report' (*Irish Traveller Movement,* 2017) <https://itmtrav.ie/wp-content/uploads/2017/02/ITM-Review-of-the-1963-Commission-on-Itinerancy.pdf> accessed 28 October 2024.

[5] Different terms have been used by the State to describe its indigenous nomadic ethnic community, some of which are now seen as racist, and some of which have been reclaimed by the Community. For example, though the Commission on Itinerancy was aware that Travellers took offence to the term 'itinerant', they insisted on using the term throughout the document while denying Traveller ethnicity: 'Itinerants (or Travellers as they prefer themselves to be called) do not constitute a single homogenous group, tribe or community within the nation although the settled population are inclined to regard them as such. Neither do they constitute a separate ethnic group.' Government of Ireland (n 2) 37. The most common term used, 'Travellers', was assigned to the community which refers to itself internally as 'Pavee' or 'Mincéirí'. 'Travellers' is a term used across Europe, including by its human rights bodies, to describe a multiplicity of traditionally nomadic ethnic groups which have no connection to one another beyond their shared nomadism. Travellers are equally distinct from Roma. At a European policy level, groups designated as Travellers include the *Gens du voyage* in France, *Woonwagenbewoners* in Belgium, and *Reizigers* in Holland; see European Union Agency for Fundamental Rights, *Roma and Travellers in Six Countries – Technical Report* (Publications Office of the European Union 2021) <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-roma-travellers-survey-technical-report_en.pdf> accessed 29 October 2024. . Given that 'Travellers' is an exonym – assigned by outsiders rather than an endonym emerging through self-identification – we prefer to use the term Mincéirí; though given unfamiliarity to the general population, we use 'Mincéir/Traveller' or 'Mincéirí/Travellers' for clarity.

[6] Robbie McVeigh, "The "Final solution": Reformism, ethnicity denial and the politics of anti-Travellerism in Ireland' (2008) 7(1) Social Policy and Society 91, 100.

[7] Pamela M Casey and others, 'Addressing Implicit Bias in the Courts' (2013) 49 *Court Review* 64.

Manifestations of Racism: Institutional Racism and Unconscious Bias

Institutional or systemic racism manifests in the contemporary period as policies and practices, tacit and/or written, which permeate institutions advantaging dominant groups relative to racialised minorities. Institutional bias may not be intentional or direct. Indeed, in contemporary Western societies it often operates through omission – through failure to consider whether some groups might have different or greater levels of need, whether they might experience different or more barriers to access or participation, or whether they might be subject to individual prejudice. In this sense, institutional bias is particularly insidious, difficult to identify and difficult to combat. It is nowhere and everywhere. The fault of no one and everyone. Because this form of bias is structural and institutional – built by tradition, custom, convention and inherited colonial systems, influencing the ways we conduct governance, education, health, justice – it has a devastating impact. Institutional racism produces different and worse outcomes for racialised minorities, thereby perpetuating their marginalised status.

In the courts, institutional racism can manifest through the standard operation of policy and practice. For example, in the context of bail, all of the following are issues facing Mincéirí/Travellers in the Irish criminal justice process:

- Treating the cultural practice of nomadism as evidence of flight risk;
- Imposing a condition of bail that a person be restricted from entering a county;
- Requiring rehousing in the private rented sector in which the applicant will experience racism and violence;
- Failure to consider the impact of racism in the employment market on the ability of racialised minorities to meet financial bail conditions, or on their ability to demonstrate mainstream measures of stability and community ties as conditions of pre-trial release.[8]

Institutional racism is also perpetuated by the influence of individual bias on actions of individuals with the capacity to exercise discretion. For judges, sentencing is the key area in which discretion is exercised. Judges are required to put aside any biases in making sentencing decisions. The reality, however, is that we are all the sum of our experiences and knowledge and that therefore the range and limits of those experiences and knowledge will shape our decision-making.

In a recent indictment of racism in the judiciary of England and Wales, a study entitled 'Racial Bias and the Bench,'[9] 95 per cent of legal practitioner respondents surveyed said that race plays a role in the processes or outcomes of the justice system, with 29 per cent saying that it played a fundamental role. The experimental research of Rachlinski et al, which involved 133 judges from three jurisdictions, showed that not only do judges internalise the same unconscious racial biases that exist in the general population, but also that judicial decision

[8] A more in-depth discussion of access to bail is detailed in Sindy Joyce and others, *Irish Travellers' Access to Justice* (European Centre for the Study of Hate, 2022) ch 11. <https://researchrepository.ul.ie/articles/report/Irish_Travellers_Access_to_Justice/20179889?file=36081176> accessed 28 October 2024.

[9] Keir Monteith and others, 'Racial Bias and the Bench: A Response to the Judicial Diversity and Inclusion Strategy 2020-2025' (The University of Manchester, 2022) <https://documents.manchester.ac.uk/display.aspx?DocID=64125> accessed 28 October 2024.

making is affected by these biases if the judge is not conscious of the need to guard against the impact of racial bias.[10] Professional commitment to impartiality, they found, is not sufficient to guard against the impacts of unconscious bias. However, judges *can* mitigate against its effects on decision-making when racial identity is 'prominent' and therefore the need to guard against unconscious bias is more apparent.

For Mincéirí/Travellers, these findings are highly significant. Travellers are a racialised group within Irish society – they are a group apart, subject to racism and discrimination within public and private service provision and the jobs market. As a group, Travellers are stereotyped and ascribed negative characteristics, including criminality. It is of the utmost importance to Travellers' access to justice that our judiciary is aware of the racialisation of Travellers and understands anti-Traveller racism as precisely that – racism. It is only with this awareness – and with knowledge of Travellers' experiences of institutionalised racism in Irish society – that the judiciary will have the tools necessary to recognise and set aside the unconscious anti-Traveller bias that is embedded in Irish culture.

International human rights law recognises institutional racism as one of the key barriers to accessing justice. The European Court of Human Rights (ECtHR) has acknowledged, for example, in *Lingurar v Romania* that Roma communities in Romania are 'often confronted with institutionalised racism', which places a positive obligation on member States to 'take all possible steps to investigate whether or not discrimination may have played a role in the events'.[11] The Court found in that case that in the context of a police raid, the authorities had 'automatically connected ethnicity to criminal behaviour', which was discriminatory and a violation of Article 14, taken in conjunction with Article 3 of the European Convention on Human Rights ('the Convention') under its substantive limb. The Court noted that where there exists 'evidence of patterns of violence and intolerance against an ethnic minority, the positive obligations incumbent on member States require a higher standard of response to alleged bias-motivated incidents'.[12] The dismissal by the domestic authorities and courts of the allegations of the applicants in the absence of an in-depth analysis of the relevant circumstances of the case equally, the Court found, amounted to a violation of Article 14 of the Convention taken in conjunction with Article 3 in its procedural aspect. It cannot be denied that in Ireland, there is, as the ECtHR described, an 'automatic connection of ethnicity to criminal behaviour', or as Mulcahy states, a persistent construction of Travellers/Mincéirí as a criminogenic community.[13]

The authors are not aware of any material circulated to the judiciary in Ireland that acknowledges institutionalised racism against the Micéiri/Travellers, save that contained in the Irish Travellers Access to Justice Report.[14] As described later in this article, new judges are introduced to the concept of unconscious bias, with a dedicated section on the position of the Mincéirí within the criminal justice system, but these are small steps towards addressing a problem that has remained unacknowledged until relatively recently. Certainly, other than the Irish Travellers Access to Justice Report (described below), there has been no formal study to examine the extent of systemic bias within the justice system here, as has

[10] Jeffrey J Rachlinski and others, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 *Notre Dame Law Review* 1195.
[11] *Lingurar v Romania* App no 48474/14 (ECtHR, 16 April 2019) [80].
[12] ibid.
[13] Aogán Mulcahy, "Alright in Their Own Place': Policing and the Spatial Regulation of Irish Travellers' (2012) 12(3) *Criminology and Criminal Justice* 307.
[14] The Equal Treatment Bench Book for England and Wales was criticised by Monteith and others for failing to recognise institutional racism in that jurisdiction; see Judicial College, *Equal Treatment Bench Book* (Crown Copyright, 2023) <https://www.judiciary.uk/wp-content/uploads/2022/09/Equal-Treatment-Bench-Book.pdf> accessed 28 October 2024.

occurred in England and Wales. We would be unique in the world if we could boast a judiciary, none of whom harboured biases against a people in respect of whom there has been a long history of mutual distrust and towards whom public attitudes generally are significantly negative, as set out above.

The Irish Travellers Access to Justice Project – A Short Description[15]

Funded by the Irish Research Council and the Irish Human Rights and Equality Commission, the Irish Travellers Access to Justice project (ITAJ) documents Mincéirí/Travellers' perceptions of, and experiences with, the criminal justice process, specifically policing and the courts' system. This work – focusing on the experiences of local minority ethnic communities, and particularly traditionally nomadic communities and their interaction with criminal justice agencies – reflects a growing body of work internationally in an area of study described as indigenous criminology.[16] While much of this research has focused on interactions and engagements with the police, it was stated as important that the research also explored perceptions and experiences of Mincéirí/Travellers of the judiciary.

'Access to Justice'

The ITAJ team understands the term 'access to justice' as having the ability to use the tools of the legal system to protect one's rights. In the context of the criminal law, access to justice is often considered – and sometimes exclusively – through the lens of the provision of legal aid: by providing legal aid, and providing an 'equity of arms' between the individual and the State, access to justice is preserved. In an Irish constitutional context, we additionally must recall Article 38.1, which has been interpreted as providing a panoply of rights to those involved in criminal matters. O'Malley is correct of course in stating that the judiciary has had an important role in elaborating on and enforcing rights in the context of access to justice,[17] but we believe that the statement by this barrister in a separate research project stands:

> 'I think [the criminal justice system is] set up by settled people for settled people. I don't think they really understand the Travelling community, I don't think they understand or make any effort to understand the culture. I think that the justice system in Ireland works well for a particular type of person ... [The system] is set up to deal with someone who is white, reasonably well to do, not necessarily wealthy but not dirt poor either. Moderately educated and reasonably accepting of authority or compliant with authority figures. And as soon as you step outside too many of those strictures, you're going to have a bad experience of the Irish justice system. It is not well suited to cater for diversity. There are exceptions. But I think the

[15] This article explores the narrow issue of Mincéirí/Travellers' perceptions of, and experiences with, members of the judiciary. In doing so, a relatively limited number of quotations are taken from the rich qualitative data collected in the research. Further details of the research are available in the project's final report: Sindy Joyce and others (n 8).

[16] See Chris Cunneen, 'Criminology, Criminal Justice and Indigenous People: A Dysfunctional Relationship? The John Barry Memorial Lecture' (2008) 20(3) *Current Issues in Criminal Justice* 323-336; Chris Cunneen and others, *The Routledge International Handbook on Decolonizing Justice* (Routledge 2022); Chris Cunneen and Juan Marcellus Tauri, *Indigenous Criminology* (Policy Press 2017); Christ Cunneen and Juan Marcellus Tauri, 'Indigenous Peoples, Criminology, and Criminal Justice' (2019) 2 *Annual Review of Criminology* 359-381; Juan Marcellus Tauri, 'Indigenous Critique of Authoritarian Criminology' in Kerry Carrington, Matthew Ball, Erin O'Brien and Juan Marcellus Tauri (eds), *Crime, Justice and Social Democracy: International Perspectives* (Palgrave Macmillan 2013).

[17] Tom O'Malley, *The Criminal Process* (Round Hall 2009) paras 1 - 1-07.

> exceptions are very much down to individual excellence rather than a standard maintained by the system. I would stand over that as a general statement.'[18]

Lima and Gomez echo this when they state that there is no access to justice when, 'for economic, social, or political reasons, people are discriminated against by law and justice systems.'[19] Equally, effective access to justice equally attainable for all persons regardless of disadvantage, requires not only the absence of discrimination, but also positive measures to recognise and remove barriers to access. Further, while the criminal justice system has gone some way to address the access needs of those charged with criminal offences, Charleton and others note that while the rights of the accused can be characterised as 'enduring and immovable', victims of crime are 'less certain in the assertion of [their] rights'.[20] Following the transposition of the Victims' Directive,[21] victims' rights are more widely recognised, through the introduction of the Criminal Justice (Victims of Crime) Act 2017, but gaps remain and victims remain, primarily, witnesses in criminal proceedings rather than rights-bearers.

In considering how constitutional and statutory rights are vindicated in practice, the ITAJ team used 'access to justice' as a rights-based analytical and evaluative framework, recognising that the simple recognition of rights does not, as the Global Access to Justice Project states, 'automatically imply their practical implementation.'[22] The Global Access to Justice Project, for example, notes that there is a range of barriers to access to justice including poverty, but also 'legal, economic, social, cultural and psychological barriers' that prevents people accessing and using the legal system.'[23]

At an international level, there has been recognition of the need to develop the right to access to justice beyond structural barriers. For example, the Organization for Security and Co-operation in Europe (OSCE) Ljubljana Guidelines on Integration of Diverse Societies highlight the importance of understanding access to justice as more than the articulation of rights, particularly with respect to minority communities.[24] These guidelines emphasise the importance of trust in the legal system as crucial, and state that a lack of trust, or a perception that the majority are favoured, 'undermines social cohesion, fosters alienation and can increase the risk of conflict, including of an inter-ethnic nature.'[25] Also emanating from the OSCE, the Graz Recommendations on Access to Justice and National Minorities[26] foreground the importance of the principle of non-discrimination, and the principles of equality in law and equal protection of the law, and in particular requires the State 'to take positive measures to ensure that persons belonging to minorities can effectively obtain a remedy if their rights have been violated or need enforcing.'[27]

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[18] Amanda Haynes and Jennifer Schweppe, *Lifecycle of a Hate Crime: Country Report for Ireland* (ICCL 2017).
[19] Valesca Lima and Miriam Gomez, 'Access to Justice: Promoting the Legal System as a Human Right' in *Encyclopaedia of the UN Sustainable Development* (Springer International Publishing 2019) 1-10.
[20] Peter Charleton and others, *Charleton and McDermott's Criminal Law and Evidence* (2nd edn, Bloomsbury 2020)
[21] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L315/57.
[22] Global Access to Justice Project, 'Project Overview' (*Global Access to Justice*, 2024) <https://globalaccesstojustice.com/project-overview/> accessed 28 October 2024.
[23] ibid.
[24] Organisation for Security and Co-operation in Europe High Commissioner on National Minorities, *Ljubljana Guidelines on Integration of Diverse Societies* (The Hague, 2012).
[25] ibid 59.
[26] Organisation for Security and Co-operation in Europe High Commissioner on National Minorities, *The Graz Recommendations on Access to Justice and National Minorities & Explanatory Note* (The Hague, 2017).
[27] ibid 6.

Finally, the New Zealand Law Society advocates the use of what it describes as a model of person-centred access to justice, which it states, '… seeks to reflect the diverse needs of individuals when they encounter the systems aimed at delivering justice', and acknowledges that barriers to accessing justice exist in part because of people's circumstances, including 'how vulnerable they may be because of discrimination, disability or from other causes.'[28] The Report states clearly that institutional racism builds barriers which prevent minority communities from accessing justice. The Report divides the barriers to access to justice into two main categories: cultural/social and institutional, which 'can overlap to create intersectional barriers such as lack of trust in the justice system, or corruption.'[29] The report lists a range of interventions designed to address the more significant barriers to accessing justice, including the development of cultural awareness and bias training for professionals involved in the justice system (including the judiciary, court and tribunal staff, lawyers), as well as programmes of work to transform the criminal justice system, with a strong focus on more equitable outcomes for Māori. The Report states:

> 'Systemic racism in our institutions (including the justice system) perpetuates unjust outcomes. It can also lead to feelings of alienation, mistrust, fear and lack of participation in justice processes. The disproportionate impact on tangata whenua [the Māori people] is a key focus of recent Government reports.'[30]

Drawing on the work of the New Zealand Law Society[31], the ITAJ project adopted a person-centred model of access to justice, and understands the concept, in accordance with OSCE standards, as requiring sufficient trust in the system of justice and those who operate it to engage with it; awareness and understanding of one's rights within that system; accessible processes and supports; being heard, treated respectfully, and treated fairly. It is not, the Report of the project states, the responsibility of minority communities to address lack of trust in the criminal justice system, or to compensate for the barriers to access that this creates:

> 'Rather, it is the responsibility of the State, and particularly those who work in the criminal justice system to earn the trust of minority communities. Trust-building requires reforms which address the practices which engender mistrust. More generally, it requires an acknowledgement of the permeability of our criminal justice institutions to the impacts of prejudices and inequalities that pervades wider society. Any misconception that our institutions are impervious to such realities would be a barrier to making them so.'[32]

Having described the operational framework used to understand access to justice for the purposes of the ITAJ project, we now move to describe the methodological approach used to collect data to understand the experiences of Mincéirí/Travellers of the criminal justice system.

Methodology

The research was guided from the outset by the principles of participatory research and co-design. The project was overseen by an Advisory Committee consisting in the majority of

[28] New Zealand Law Society, *Access to Justice: Stocktake of Initiatives – Research Report* (New Zealand Law Society 2020) 4.
[29] ibid 10.
[30] ibid 12.
[31] ibid.
[32] ibid.

national Mincéir/Traveller organisations: the Irish Traveller Movement, Pavee Point, the National Traveller Women's Forum, Mincéir Whidden and the Traveller Mediation Service. The Advisory Committee also included representatives of the Department of Justice and An Garda Síochána. A representative of the Irish Human Rights and Equality Commission sat on the Advisory Board in an *ex-officio* role. An invitation sent to the Chief Justice to appoint a member of the judiciary to the Advisory Board was not responded to. The Advisory Committee was established at the outset of the 18-month project and its oversight informed all stages of the research from the design of the research instruments, to sampling, data collection and data interpretation. The project involved the collection of original qualitative and quantitative data with Mincéirí/Travellers in Ireland. Multiple modes of data collection were utilised, two of which will be drawn upon in this article.

A total of 326 Mincéirí/Travellers, equivalent to one in every 60 adult Mincéirí/Travellers in Ireland, responded to a survey documenting their perceptions of and experiences with the criminal justice system in Ireland, including the judiciary. The survey instrument was disseminated remotely and responses were recorded by interviewers via an electronic survey instrument, as well as via voice recording which facilitated the inclusion of open-ended questions. Thus, the interviewer-administered survey instrument collected both statistical data and narrative testimonies from each participant. The latter were included to document critical positive and negative incidents with members of criminal justice bodies and to respect the oral culture of the Mincéir/Traveller community. Participants to the survey were drawn from 25 of the 26 counties in Ireland. The data was then weighted using census data on Ireland's Mincéir/Traveller community to ensure that the ITAJ dataset was representative of the jurisdiction's Mincéir/Traveller population on the basis of age, gender and county.

In addition to the survey, 29 in-depth qualitative interviews were conducted with national and regional Mincéir/Traveller organisations and community projects around Ireland. The expertise and experiential knowledge provided insights into the relationships between community advocacy/support organisations and the police and courts, as well as the relationship of the wider ethnic community to these bodies. The geographic dispersal of the participants additionally contributed to exploring regional commonalities and differences in experiences of access to justice.

The data collection instruments were co-designed by the ITAJ research team, which intentionally consisted, largely, of Mincéirí/Travellers. While the Mincéir/Traveller members of the team led on participant recruitment and the dissemination of the survey, all members of the research team participated in this process. Qualitative data was subjected to thematic analysis[33] with the aid of QSR NVivo computer-aided qualitative data analysis software.[34] Quantitative weighted data was subjected to analysis with the aid of SPSS computer-aided quantitative data analysis software. All members of the research team contributed to the interpretation of the findings.

Irish Travellers Access to Justice: Research Findings

The ITAJ project asked participants to articulate their perceptions of both the gardaí and judges. Though the data shows that Mincéirí/Travellers' perceptions of judges cannot, on any scale, be described as good, it should be noted that they are more positive than those held in relation to other institutional actors.

[33] Douglas Ezzy, *Qualitative Analysis: Practice and Innovation* (Routledge 2002)
[34] Lumivero, *NVivo* (Version 14, 2023) <https://www.lumivero.com>

Interviews with Traveller Organisations

In interviews with those working in Traveller organisations, a small minority of participants were of the view that judges are impartial when engaging with Mincéirí/Travellers:

> 'I think judges are a little bit more impartial [than gardaí], and when I say that, I mean that they're there to uphold the law, and within the parameters of what the law is they are very respectful ... and I think that's the experience that most Travellers have.'
>
> - Interviewee from Traveller Organisation

That said, the majority of those interviewed described the relationship between Mincéirí/Travellers and judges negatively. For example, this interviewee highlights perceptions of institutional racism:

> 'My impression from what I've read, from what I've heard, and from my engagement with people who have been through the courts is that the judges, kind of – are not that sympathetic to Travellers, and some of them are kind of – not only are they not sympathetic, they're quite racist … There's a historical racism there for Travellers that's gone back a very long time … So I think that's been – that's in – in the institutions. I think it's also under judicial institutions as well. I don't think justice is blind.'
>
> - Interviewee from Traveller organisation

Another theme was the view that racialised stereotypes affect how judges treat Travellers:

> '… they're very well educated, and anything they've ever heard about me has been negative and wrong, so I have no hope here … I have actually seen Travellers going to the court system and … as soon as they walk in the door they fall apart because the fear and the - there's nothing of equality … There's nothing of an understanding of a community. This man is going against me or woman is going against me and that's it.'
>
> - Interviewee from Traveller Organisation

Survey Participants

The vast majority of survey participants reported that they had direct contact with An Garda Síochána in the five years prior to the survey, and a smaller number had direct experience with the judiciary.

Trust

The concept of trust is famously difficult to define, connected as it is, as Fleming and McLaughlin observe, to a 'potpourri of other psychosocial concepts, namely, opinions, perceptions, sentiments, expectations, judgement, satisfaction and legitimacy.'[35] At a very basic level, Hardin explains that when we say that we trust someone, it means that we believe that they have the right intentions towards us, and that they are competent to do that which we trust them to do.[36]

[35] Jenny Fleming and Eugene McLaughlin, 'Through a Different Lens: Researching the Rise and Fall of New Labour's 'Public Confidence Agenda'' (2012) 22(3) *Policing and Society* 262.
[36] Russell Hardin, *Trust* (Polity Press 2006) 17.

The European Commission Flash Eurobarometer 2022 found that the general population's perception of the independence of the judiciary in Ireland, which is key to trust, was higher in Ireland than the EU average. In fact, 73 per cent stated that they would rate the justice system in Ireland very or fairly good in terms of the independence of judges and courts, compared to 53 per cent across 27 EU Member States. The Department of Justice recently conducted research on confidence of the public in the criminal justice system, but did not ask about public trust in judges; rather, the survey instrument asked about the Courts' Service, which we cannot use to infer trust in the judiciary.[37]

The most relevant data in terms of trust in the judiciary is the European Social Survey in 2018 (the nearest point in time to ITAJ) which measured trust in the legal system. Participants were asked to rate their trust in the legal system in a scale of 0-10 where 0 is no trust and 10 is complete trust. The mean trust of the general population in the legal system is 5.25 according to the 2018 data where only 6 per cent of the sample had no trust at all in the legal system.[38] In the European Social Survey, people who report being a member of a group that is discriminated against have a mean trust in the legal system of 4.44.[39] The ITAJ research used the same scale, and found that the average trust of Travellers in the courts was 3.33. A full 30% of ITAJ participants stated that they have *no* trust in the courts, and fewer than five per cent stated that they have complete trust in the courts. Having considered the levels of trust in the judiciary, we now turn to how Mincéirí/Travellers perceive how they would be treated by judges.

Perceptions of Treatment by Judges

Perceptions of fairness of treatment is an important means of evaluating *fairness*, and the ITAJ research asked participants to respond to the statement, 'Judges in this area treat everyone fairly regardless of who they are'. Possible responses were strongly agree, agree, disagree, strongly disagree, and don't know/prefer not to say. Here, 18 per cent were of the view that judges in the area treat everyone fairly, regardless of who they are (falling to eight per cent in respect of gardaí). At the other end of the scale, 27 per cent strongly disagreed that judges in the area treat everyone fairly regardless of who they are (increasing to 42 per cent in relation to gardaí).

The ITAJ team asked survey respondents to indicate their level of agreement with the statement that judges in their area treat Travellers with respect. Only nine per cent of respondents agreed that judges in the area treat Travellers with respect, with 35 per cent strongly disagreeing with the statement. Finally in this context, ITAJ data shows that Travellers overwhelmingly perceive judges as more *strict* with Travellers than they are with settled people: 82 per cent of ITAJ survey respondents were of the view that judges are more strict in dealing with Travellers compared with the settled majority.

It is important to assess the impact of contact with a member of the judiciary on perception. Perceptions were somewhat more negative among those with direct contact in the five-year period prior to the survey. Among those who had contact with a judge, average trust was 3.19, compared to 3.51 among those who said they had no contact with a judge in that period. Five per cent of those with contact thought that judges *do* treat Travellers with respect

[37] Department of Justice, *Criminal Justice Public Attitudes Survey 2022 Results* (Department of Justice 2022) <https://www.gov.ie/pdf/?file=https://assets.gov.ie/277252/70494843-f7fd-4eff-9d0f-41f3bde8bbd3.pdf#page=null> accessed 29 October 2024.

[38] European Social Survey, *European Research Infrastructure (ESS ERIC)* (Norwegian Agency for Shared Services in Education and Research 2018). < ESS Data Portal>

[39] ibid.

compared to 10 per cent of those with no contact. 81 per cent of those with contact perceived that judges *do not* treat Travellers with respect compared to 71 per cent of those with no contact. 15 per cent of those with contact agreed that judges treat everyone fairly, compared to 20 per cent of those with no contact. 78 per cent of those with contact disagree that judges in their area treat everyone fairly, regardless of who they are, compared to 60 per cent of those with no contact.

Clearly, Travellers perceive the criminal justice system as one which is unfair, one in which they cannot expect respectful treatment, and one in which they have low levels of trust. More disappointingly, responses were more negative from those with direct experience of interaction with judges. As well as measuring *perceptions* of Mincéirí/Travellers of criminal justice institutions, the ITAJ team explored *experiences* of Travellers with those institutions, which will now be discussed.

Experiences with the Judiciary: Good Practices

The survey instrument developed by the ITAJ team provided an opportunity for respondents to provide critical incident testimonies. The purpose of these questions was to give Mincéirí/Travellers – who are the experts in their own lived experience – the opportunity to tell us in their own words about their experiences with gardaí and judges. Descriptions of *both* positive and negative experiences were elicited. Specifically, participants were asked if they would recount first, the most positive and second, the most negative experience they had with a member of the Irish judiciary in the five years prior to the survey. This data proved invaluable to understanding the basis for Mincéirí/Travellers' subjective assessments of their experiences with the criminal justice system. Of the survey respondents, 59 per cent had no experience with a judge in the five years prior to the survey.

Among survey participants, 31 per cent reported that, although they had direct contact with a judge in the five years prior to the survey, none had been positive; eight per cent reported that they had had a positive experience with a judge that they were willing to share. Procedural justice was a key theme in accounts of positive encounters with judges. Procedural justice is multidimensional, consisting of such practices as:

> 'treating people with dignity and respect, treating people as if they can be trusted to do the right thing, acting properly during the encounter, taking the time to listen to citizens, making fair decisions, and considering the citizen's feelings during the encounter'.[40]

Approaching Mincéirí/Travellers, as rights bearers, but more fundamentally, as human beings, has a positive impact on how they experience the criminal justice system. Mulcahy cites a Mincéir/Traveller participant to his research who explained why he perceived an interaction with a police officer as positive: '[H]e actually talked to me, I found, like a human being, not as a Traveller.'[41] In the ITAJ research, this perspective was echoed repeatedly in descriptions of positive encounters with criminal justice professionals. Here, we describe four sub-themes associated with procedural justice: compassion, respect, listening, and addressing anti-Traveller racism.

[40] Christopher Donner and others, 'Policing and Procedural Justice: A State-of-the-Art Review' (2015) 38(1) *Policing: An International Journal of Police Strategies & Management* 153, 155.
[41] Aogán Mulcahy (n 13) 315.

Compassion

Compassion was a commonly cited dimension of positive experiences with judges described by survey respondents. What may seem like standard practice to a judge – putting a stay on an eviction, or recommending drug rehabilitation – are cited by Mincéirí/Travellers as impactful, positive experiences:

> '… it was a Traveller family who were being threatened with eviction and they were fighting the eviction and there was some compassion shown by the judge and he put a stay on the eviction to basically allow the parties to negotiate a settlement or somewhat terms of accommodation. So I witnessed compassion.'
>
> - Survey respondent

> '... my son who got mixed up on drugs and things, couldn't be no good got of him and the judge sectioned him to go to rehab and counselling and to get himself in order and to change his life around and things like that. Like when he was very down, like he was putting him into prison to get help and ordered him to (name of facility) to get on back on track and things which I found was helpful ...'
>
> - Survey respondent

> '… this was last two or three year maybe where a Traveller woman … she was a victim of domestic violence and she got into her husband's car and left her house with her kids and the guards actually arrested her, did her for no insurance, no seatbelts, something else. Anyway, brought her to court over it. When the woman explained why she was driving the car; well, the judge ate the guard. He apologised to the woman in the court and he, he let her off because the driving offence she was up in court over and couldn't apologise enough to her and explained to her that this shouldn't be the way that things are dealt with ….'
>
> - Survey respondent

Respect

As has been noted, simply treating a Traveller 'like a human being' was a defining characteristic of what Travellers described as positive encounters with criminal justice professionals. The impact of respectful engagement emerged in this context:

> '... he respected that I didn't have the money to pay the fines. And he said, 'Sure, if you don't have it, sure that's understandable, I respect that as well.' And he said, 'Would you do a bit of community service?'. And I said, 'I will.' And he said, 'well, that's fair enough, I respect your honesty, and I respect that you're not wasting time. And I'll take it all into consideration.' And he gave me sixty hours of community service, and he said not to start 'til after the new year. So I said, that was fine with me.'
>
> - Survey respondent

Listening

The theme of listening was a common in positive experiences with judges. This is not surprising – having one's voice heard is key to procedural justice:

> '… the judge … he heard the evidence from both sides and he gave a fair, fair judgement, assessment like. I was happy enough with the judgement like.'
>
> - Survey respondent

> '... so then the judge [said] 'Have you anything to say'? And I stood up and I said that, I said, 'Listen your honour' I said like 'I've spent me whole life fucking acting the bollox fucking enough and now I'm spending, trying to spend the second half of me life helping people not to go down the road that I went down', I said 'I did have tax in my car', I said it hadn't arrived, I'm trying to study [course] and help people the whole lot and he, he turned around and said 'D'you know what [name of interviewee] it's not everyday people come in here and change their lives around and you know you've done good for yourself, I'm going to let you off here today', You know, it was one of those so I was like 'ah aright' so that's been the first and last positive experience I've ever had.'
>
> - Survey respondent

Addressing Anti-Traveller Racism

Given the esteemed place that judges hold in Irish society, when a judge calls out anti-Traveller racism by a solicitor, this is a profoundly positive experience for Mincéirí/Travellers:

> '... a solicitor asked a Traveller, 'well if you were living in the real world like the rest of us...' So, the judge asked him, 'what do you mean the real world? We're all living in the real world'.'
>
> - Survey Respondent

Another survey respondent met a judge after he had retired from the bench who acknowledged to them that his treatment of Travellers was less than fair. This apology was stated by the Mincéir/Traveller to be a 'very big thing' for him to do:

> '[The judge] went so far as saying that he was sorry for in the past what he had done. … That was very big, yes that was a very big thing, and now he's since retired that judge but I actually met him, I've seen him, maybe I met him over the course of my work, maybe on, maybe eight or nine occasions and when I met him one day … and he … admitted that he had been wrong to many a Traveller'.
>
> - Survey respondent
>
> -

Negative Experiences with the Judiciary

Among survey participants, 19 per cent reported that although they had had a direct encounter with a judge in the five years prior to the survey, none had been negative; 16 per cent stated that they had a negative experience that they would be willing to share. In the same way that positive experiences are characterised by a perception that principles of procedural justice are adhered to, a perception of the absence of procedural justice was core to descriptions of negative experiences with the criminal justice system. In this section, we focus on additional themes identified in descriptions of negative encounters, whose import was confirmed by corroborating data from other sections of the survey and interviews with employees of Traveller organisations.

Presumption of guilt

It is trite to observe that the presumption of innocence is fundamental to the Irish criminal justice process. As part of ITAJ research, we explored how Travellers perceive the presumption in practice. Both survey respondents and interviewees from Traveller organisations described a belief that Travellers are guilty until proven innocent:

> 'No, my experience will tell me that Travellers are presumed guilty until proven innocent. That's my experience.'
>
> - Interviewee from Traveller organisation

> 'It's automatically, they're a Traveller, they done it … I would say the majority of guards and judges and even solicitors would think, 'Oh c'mon, this fella's a Traveller', now do you know. 'More than likely done it'.'
>
> - Interviewee from Traveller organisation

> 'I feel it's an assumption of guilt straight away. You have to prove your innocence the whole way through.'
>
> - Interviewee from Traveller organisation

> 'I have to almost plead to be treated in my own right as an individual rather than the Community I come from.'
>
> - Interviewee from Traveller organisation

Survey participants who had been in court as a defendant in the five years prior to the survey were asked about their most recent case. The majority said that they pleaded guilty, and half of those who pleaded guilty said that the fact that they are a Traveller affected their decision to plead guilty.

> 'I knew her by name, she knew me by name. I knew her over the last twenty years and as soon as I came in front of her through court, then I'm a Traveller, not a person …'
>
> - Survey respondent

Comprehending proceedings

Accessing justice presumes, we believe, that the individual engaged in the system understands what is happening during court proceedings. Justice is not something that should happen *to* someone, but rather a process of which *they are a crucial part*. The ITAJ project specifically explored whether defendants and victims/witnesses understood what was happening during the course of a criminal trial. The findings are concerning.

Just under half of survey participants who had been defendants in criminal proceedings in the five years prior to the survey said they understood all of what was said by the judge, the prosecutor and the defence solicitor or barrister. A sizable minority understood *nothing* of what was said by the judge or the prosecutor. The vast majority understood only some of what the solicitor or barrister for the defence said.

Those who reported gaps in understanding, but did not seek clarification, explained that they were too embarrassed to ask for clarification, or that they thought asking for clarification would be held against them.

> '[Asking a question] only makes me look more ignorant and it only makes me show my lack of education. So I will just sit there and nod quietly until they make a decision about me.'
>
> - Interviewee from Traveller organisation

Mincéirí/Traveller victims of crime appearing as *witnesses* in criminal proceedings were also asked how much they understood of what was said in court. Slightly less than half understood

everything that was said by the judge, the prosecutor and the solicitor or barrister for the defence. A minority understood nothing of what was said by any of these criminal justice professionals.

Sentencing

The overrepresentation of Mincéirí/Travellers in Irish prisons has been recognised for decades.[42] ITAJ asserts that this is the outcome of a 'pipeline to prison' involving the entire criminal process. Nonetheless, as the Report states, 'the sentencing process is a core aspect of the criminal process and crucial to exploring in the context of Travellers' relationships with, and perceptions of, the criminal justice process.'[43]

A majority of employees of Mincéir/Traveller organisations interviewed thought that the sentences imposed on Mincéirí/Travellers were higher than those that would be imposed on settled people. A number of individuals from Mincéir/Traveller organisations spoke of individual judges in this regard:

> 'Well, in my particular area, if anybody was in court they'd say, 'Aw well - I'm destroyed, such and such a judge is up this week'.'
>
> - Interviewee from Traveller organisation -

Indeed, this interviewee from a Mincéir/Traveller organisation was of the view that solicitors were aware of the biases that judges might have towards Mincéirí/Travellers, and thus frame their statements before the judge in that light:

> '[J]ust take this for example. The solicitor will say 'your honour, this is a Traveller man and he's a widow and living at the side of the road with seven children.' Just take this example, that scenario. But there's times then that the same solicitor, depends on the case, depends on whose judging, will not say he's a member of the Traveller community. You know what I'm saying. So, he knows unconsciously, you know, he knows he knows the judge. Whether to say that or rather not say it.'
>
> - Interviewee from Traveller organisation -

Doyle et al have noted that large gaps in data on ethnicity make it difficult to definitively determine whether there is a relationship between ethnicity and the length of custodial sentences handed down.[44] However, snapshot data from the Irish Prison Service provided to the ITAJ project allowed the team to make some observations about the types of offences for which Travellers are in prison First, Mincéirí/Travellers are more likely to be in prison for less serious offences than non-Mincéirí/Travellers; second, Mincéirí/Travellers are more likely to be in prison for property offences than non-Travellers; and third, when we look at the most common offences for which people are in custody, there are more commonalities by ethnicity than by gender for Mincéirí/Travellers, which is unusual.[45]

Judicial Responses to Traveller Experiences

In their responses to the ITAJ survey and in the experience of the judges who have engaged with training initiatives in this regard, Mincéirí/Travellers must overcome three key obstacles

[42] David Doyle and others, *Sometimes I am Missing the Words: The Rights, Needs and Experiences of Foreign National and Minority Ethnic Groups in the Irish Penal System* (Dublin, Irish Penal Reform Trust 2022); Liza Costello, 'Travellers in the Irish Prison System: A Qualitative Study' (Dublin, Irish Penal Reform Trust 2014).
[43] Joyce and others (n 8) 108.
[44] Doyle and others (n 42); Costello (n 42).
[45] Joyce and others (n 8) 111.

if they are to not only access justice, but feel that they have had a fair hearing in court. We will now explore how these responses can be addressed by the judiciary.

First, the judges and lawyers involved must be careful to use plain language and to ensure, respectfully, that the participants understand what is being said. This is one of the main themes in all induction courses, but it bears repeating here.

The second issue is a perception on the part of the Mincéirí that they are perceived as guilty. This may emanate from shame, as described in the literature, but clearly the perception is reinforced by the words and actions of those in court, including the judiciary, as has been set out in very specific examples in the Report. Given the unique position of the judge, she should strive to ensure that in the case of a vulnerable party or witness such as a Traveller/Mincéir, every effort is made to reassure that party and to vindicate the right to a fair trial with particular emphasis on the presumption of innocence. Judges should also understand the cultural and historical factors, many of which are outlined above, which lead to a Mincéir fearing that they will not be believed in a court. Even in a busy list, expressly welcoming a party who may feel disenfranchised or at a disadvantage and encouraging them by respectful words, tone, and body language can make an enormous difference to that party's experience in court.

Thirdly, the judiciary must address its institutional biases. If we accept, as we must, that Travellers in Ireland are subject to institutional racism embedded in criminal justice institutions, we must address the issue. Article 4(g) of the Council of Europe Ministerial Recommendation, *Combating Hate Crime*, cautions that member States should:

> '… pay due attention to the importance of … the need for the criminal justice system to identify, address and take measures to eliminate any institutional bias and discrimination in order to combat impunity, increase the trust of victims in that system and improve the experiences of those who engage with the system.'[46]

It further asks in Article 10 that those in a position of power or authority, such as members of the judiciary, to 'be conscious of their responsibilities, seek to prevent and combat individual and institutional bias and discrimination, and foster an inclusive society which promotes principles of human rights.'[47] This position is supported by empirical research conducted with judges: '[W]hen judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.'[48]

It must be accepted that individual judges and the judiciary as a collective do not deserve the trust of Travellers/Mincéirí – or indeed anyone – by right; rather, that trust must be earned. The Explanatory Memorandum to CM/Rec(2024)4 observes:

> 'Through recognising, naming, and challenging institutional bias and discrimination, and fostering a culture of inclusion which promotes and celebrates difference,

[46] Recommendation CM/Rec(2024)4 of the Committee of Ministers to member States on combating hate crime (7 May 2024) <https://search.coe.int/cm?i=0900001680af9736> accessed 29 October 2024.
[47] ibid.
[48] Rachlinski and others (n 10) 1221.

> criminal justice institutions can increase their trustworthiness in the eyes of those exposed to hate crime.'[49]

The Irish judiciary, as we will see, has begun this process, and made important steps to recognising institutional biases, as well as addressing them.

Raising Awareness

The first step in any attempt to address cultural biases or the more serious problem of institutional racism, is to raise awareness of biases in a general way. It is very rare for any community to acknowledge unconscious bias unless they have information about the phenomenon and, even better, have undergone tests to identify specific biases. Judicial training, in the sense of small workshops as opposed to annual conferences, began in earnest in Ireland in 2020. The first topics addressed were induction (for all new judges), and ethics and unconscious bias courses (for all serving judges). When the Irish Travellers Access to Justice report was published, these courses were adapted to focus on the experiences of the Mincéirí/Travellers in courts.

Tackling biases is not a simple or a straightforward task. Any attempt to raise awareness must start by addressing the problem that most people do not accept that they are unconsciously biased. Usually, and obviously, because they may not be consciously biased; the clue is in the label: unconscious bias. Many respond to the issue by pointing out, for instance, that they cannot be biased against women, a common unconscious bias, because they are women.

In fact, this is very little protection: a woman, a Black woman, a poor man, a Mincéir/Traveller, all are just as vulnerable to the onslaught of damaging messages from history, from society and from our culture. The minority or target of the bias is no exception and is bombarded with the same messages of worth. Every examination of this issue must start with the facts: as a matter of historical fact, most positions of power in Europe and America (where many of our cultural references come from) have traditionally been held by relatively rich, white, settled men. While matters have improved in that regard, wealthy, white men are vastly overrepresented in positions of power throughout the world. Throughout our history and culture, strong explicit and implicit messages have reinforced the view that women are inferior to men, and black or brown people are inferior to white. Similarly, nomadic groups, such as the Mincéirí/Travellers, have been treated as though they have no value compared with the worth of the settled community.

To address unconscious bias is to ask humans to override a strong and very useful form of neural shortcut. Not only this, but if you are a judge, it is to ask you to acknowledge that you had a head start as most, if not all, judges hail from a relatively privileged background.[50] Judges would like to think that they were appointed on merit alone; we all would. That simply cannot be so when equally talented and intelligent people did not have the same socio-economic advantages. As Doyle observes of the membership of the superior courts:

> 'By and large, they are upper middle class in background. The majority were educated in fee-paying schools prior to attending University. Following this, they would most

[49] Explanatory Memorandum to Recommendation CM/Rec(2024)4 of the Committee of Ministers to member States on combating hate crime (Council of Europe, 2024) 26 <https://rm.coe.int/combating-hate-crime/1680b08c6b> accessed 29 October 2024.

[50] James Rooney, 'Judges, Education and Class in Ireland' (2023) 7(3) *Irish Journal of Legal Studies* 92; Laura Cahillane , 'Judicial Diversity in Ireland' (2016) 6(1) *Irish Journal of Legal Studies* 1.

> likely have trained as barristers, membership of and success in that profession generally being a prerequisite for a senior judicial appointment. Whatever their social backgrounds, therefore, by the time they are serious candidates for judicial appointment, they must be exceptionally wealthy individuals working in a small professional caste.'[51]

Privilege plays a large part in achieving positions of power in Irish society. This kind of admission is difficult. The people most disadvantaged are those with no head start, no advantage, no privileged position at birth or in early life.[52] To be poor, nomadic, a person of colour, female, disabled or a migrant, for instance – in any combination – is to be at a disadvantage statistically. If you share any two or more of these traits, as Crenshaw articulates through her theory of intersectionality, [53] you are far less likely to secure a position that is powerful or financially well rewarded. Personal work on bias, reading papers on the topic and using cognitive forcing strategies[54] helps. The Harvard implicit association test [IAT] is a good starting point[55] and all new judges are encouraged to take this test. The same test features in the ethics programme, a workshop which was undertaken voluntarily by over half of all serving judges in the first year it was made available, and which has been attended by all judges appointed since 2020.

Personal Bias becomes Institutional Racism

Bias is a magnificent heuristic tool, enabling the brain to filter out information and focusing only on a very small number of key identifiers. The problem arises when these biases lead to unfair results. This problem intensifies when the same biases are held by large numbers of people. In these cases, bias becomes institutionalised. We know, for instance, that the Mincéirí/Travellers and certain socio-economic settled districts in Ireland are over-policed and over-represented in criminal statistics as a result. This creates a vicious cycle and deepens the distrust, as articulated in the Irish Travellers Access to Justice Report, between Mincéirí and the judiciary.

More over-policing, justified by the higher crime rate in that community, is used in turn to monitor, to carry out more searches and negative interactions increase, creating further distrust and so, the engagement becomes more confrontational as the Mincéirí perceive the unfair attention to their community and the cycle continues. A one-day workshop will not solve this problem. Identification of the problem is essential, but nothing will change if there is no action to change the culture and the tone of the engagement between communities. Action is the crucial step.

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[51] Oran Doyle, 'Conventional Constitutional Law' (2015) 38(2) *Dublin University Law Journal* 311, 325-326.

[52] RP Media Online, 'The Head Start in the Race of Life' (*YouTube*, 10 September 2020) <https://www.youtube.com/watch?v=8vvHWAjh3Ks> accessed 29 October 2024.

[53] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

[54] Cognitive forcing strategies (CFS) are techniques designed to mitigate cognitive biases and enhance decision-making processes. They involve learning to recognise the need to pause and engage in reflective reasoning, thereby reducing the likelihood of decision-making driven by cognitive bias or fixation on a particular decision or outcome. These strategies include any method whereby a decision or conclusion is delayed, ideally requiring a list of reasons for the decision, thus forcing otherwise hidden biases into the open. By fostering awareness and structured thinking, these strategies aim to improve overall decision quality Cf; V Sameera, A Bindra and G Rath, 'Human errors and their prevention in healthcare' (2021) 37(3) Journal of Anaesthesiology Clinical Pharmacology 328 https://doi.org/10.4103/joacp.joacp_364_19; P Croskerry, G Singhal and S Mamede, 'Cognitive Debiasing 2: Impediments to and Strategies for Change' (2013) 22 BMJ Quality & Safety ii65 https://doi.org/10.1136/bmjqs-2012-001713.

[55] 'Implicit Association Test (IAT)' (*Project Implicit*, Harvard University) <https://implicit.harvard.edu/implicit/selectatest.html> accessed 29 October 2024.

A Study of the New York Police Department (NYPD) in 2020[56] showed that working on individual biases meant that police officers were more aware of bias but also showed that, despite this, their actions and arrest patterns did not change. Structural biases are more difficult to address than personal biases, they require separate consideration and, usually, affirmative action. Awareness is personal and, taken alone or even when rolled out across a team or organisation, raising awareness is not enough.

Actions against Bias and Systemic Racism: Slow Down!

Interesting work on systemic bias has been carried out in the medical community, as described in a paper by O'Sullivan and Schofield, entitled 'Cognitive Bias in Clinical Medicine'.[57] Just as the NYPD study suggests, and international human rights law requires, the authors conclude that raising awareness alone is not enough, although it is an important step. The problem arises differently in medicine as the bias there refers to a bias towards certain diagnoses, resulting in incorrect treatment and causing physical harm to patients. It may be easier for the medics to examine the issue as the acknowledgement of errors does not carry with it the implication of racism on the part of the participants. The flaw in the medical reasoning might be termed laziness, which may not be an attractive characteristic, but, we suggest, it is easier to acknowledge than racism.

Even here, in considering a bias involving a medical decision, most doctors do not accept that they have biases. These authors have examined the effect of bias in clinical decision-making. Their conclusions are that there is a place for training in identifying biases but more importantly, training in metacognitive practices and in games can help to address the biases. In the context of judicial training, we add that affirmative action of encouraging better representation of Mincéirí in the professions and in the judiciary. This last recommendation is also in line with recommendations by Kang, who has written extensively in this field[58] and whose work is also circulated at the judicial training courses on bias.

Availability bias is particularly prevalent in medical decision making – an easy answer is reached for and, if recently seen, a particular answer (symptom) is treated as important. It is more available to the brain and treated as the obvious solution. Confirmation bias is, arguably, as prevalent in judging as it is in medicine. The diagnosis comes first as an intuitive response to a feature of the case, then the evidence is gathered to support that result. In another article by Royce and others,[59] the authors describe their conclusions as follows:

> 'By understanding how physicians make clinical decisions, and examining how errors due to cognitive biases occur, cognitive bias awareness training and debiasing strategies may be developed to decrease diagnostic errors and patient harm. Studies of the impact of teaching critical thinking skills have mixed results but are limited by methodological problems... Instruction in metacognition, reflective practice, and cognitive bias awareness may help learners move toward adaptive expertise and help clinicians improve diagnostic accuracy.'[60]

[56] Martin Kaste, 'NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior' (*NPR*, 10 September 2020) <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior> accessed 29 October 2024.
[57] Eoin O'Sullivan and Susie Schofield, 'Cognitive Bias in Clinical Medicine' (2018) 48(3) *Journal of the Royal College of Physicians of Edinburgh* 225-232.
[58] Jerry Kang, 'What Judges Can Do about Implicit Bias' (2021) 57 *Court Review* 78.
[59] Celeste S Royce, Margaret M Hayes and Richard M Schwartzstein, 'Teaching Critical Thinking: A Case for Instruction in Cognitive Biases to Reduce Diagnostic Errors and Improve Patient Safety' (2019) 94(2) *Academic Medicine* 187.
[60] ibid.

The strong message is that training alone gives a low yield. References to meta-cognition refer to the practice of reflecting on why a particular decision is being made. For most judges, this comes with the job. Reflecting on the case before delivering a ruling is built into the function of the judge in many courts. In the medical field, the solution of deliberately slowing down decision-making has been more successful than awareness training. Forcing doctors to deliberate and give reasons as to why a specific decision was being made reduced the biases identified and made the medics consider the important factors rather than going straight for the obvious short-cuts. In judging and in medicine, therefore, metacognition and reflection are more successful than training in identifying biases taken alone; the clinician is aware of the issue but is then forced to examine her thought processes and ask: What else could this be? Have I considered alternatives?

In the training context, judges at induction are asked to compile a checklist which is a reminder of how fair procedures can be demonstrated in their courts. They can also be asked to estimate their confidence levels in their decisions. In a clinical context, student doctors who were asked to estimate their confidence in their diagnoses were seen to have effectively debiased themselves. If judges rate their confidence in the fairness of a ruling before making the decision they will benefit from this practice.

The checklist is popular and effective in clinical medicine, and it has its mirror in the checklists prepared at induction training for judges in order to emphasise the fairness of the process and ensure respect for all parties appearing in court. A theme that is repeatedly raised and emphasised in judicial training workshops is the danger of preferring, or even appearing to prefer or give more respect to one party or lawyer in the court room. In this way, we seek to internalise the message that human rights will not be respected if the judiciary does not tackle the human biases that we all have – particularly those which are not conscious. In addressing systemic bias, a checklist must be even more searching and carefully prepared. Good examples can be seen in American judicial training programmes to counter racial bias in court, asking the judicial participant to consider the overall data of her court outcomes in deciding whether or not there is a structural bias at play.[61]

Actions against Bias and Systemic Racism: Game Methods or Workshops

The most interesting method set out is the last of the suggested remedies and is also suggested by O'Sullivan and Schofield. This is gaming methods or, as they appear in judicial training, workshop scenarios. When the situation is not real, and a simulated scenario is enacted in which the trainees' biases are exposed and then discussed, this has far more impact on participants than lectures or articles on the topic. This proposition is supported in the approach of the European Judicial Training Network to judicial training and in the literature about adult education generally.[62] The effectiveness of this training has been born out anecdotally by those judges who have attended workshops offered by the Judicial Council.

[61] The National Judicial College 'Twenty Actions Judges Can Take to Combat Racial Injustice' (*The National Judicial College,* February 2021) <https://www.judges.org/wp-content/uploads/2021/05/Twenty-Actions-Judges-Can-Take-to-Combat-Racial-Injustice.pdf> accessed 29 October 2024.

[62] The European Judicial Training Network (EJTN) is the principal platform for the training of the judiciary in the EU. For one example of the Network's preference for interactive learning, see Magalie Grellier Faucampre and others, 'Judicial Training Methods - Distance Learning Handbook' (European Judicial Training Network 2020) 14 – 15 <https://ejtn.eu/wp-content/uploads/2023/10/Handbook-Distance-learning-2020.pdf> accessed 29 October 2024..

The method of learning employed is a workshop in judge-craft methods. In such courses, cases are designed in which judges sit to hear a hypothetical scenario using an actor as a witness and judicial responses to challenging situations are developed and discussed. The method has been employed widely in the judiciary since 2020 and has been welcomed by the vast majority of judges. Of those who attended such training, which numbers include all judges appointed since 2021, the vast majority endorse the method as a valuable learning tool which encourages development of best practice.

In these hypothetical scenarios, the judicial participant must decide if she will take action and the situation is deliberately created so as to test the common biases against minorities who, due to the vicious cycle described, now distrust garda witnesses, lawyers and the judge herself, and may well act in a disrespectful and provocative way. The scenarios require a participating judge to step into the shoes of a Mincéir who is expecting bad treatment. In some scenarios, the judge can literally do this by playing the ascribed role in one or more enactments.

This roleplay helps participants to understand, in a much more powerful way than hearing a lecture, or reading this article, how difficult it is for members of a group that has traditionally had an uneasy, even a difficult relationship with authority figures. Having undergone this kind of intensive group work, a judge is more likely to ask, in future, real-life situations: is this just understandable distrust in the court or the witness? How can I respond to encourage trust rather than ignore this dynamic? The lesson is much easier to recall, and the expertise of other judges is harnessed in reinforcing the message and making it more effective. We can be objective about the performances of others in a way that is more difficult when assessing our own performances. Judges have been admirable in their willingness to undertake this experimental training and to be criticised by their peers. They have also been enthusiastic about its effects. Not all judges find it the most enjoyable method of training, but this is in line with global figures about adult learning; adults, like children, are all different and have difference preferences when it comes to learning styles. In general, a course that caters for two or more such learning styles (e.g. reading material, watching a demonstration, engaging in role play) will engage more participants. A majority of judges who have undertaken courses involving 'games' or workshop hypothetical training agree that role play is an invaluable learning tool. It is also one of the styles of learning that judges have commented on in individual surveys.[63]

Actions against Bias and Systemic Racism: Perspective-Taking

Once the *Irish Travellers Access to Justice* report was published, it was sent to every judge undertaking the ethics training course or undergoing induction. This comprises the vast majority of judges in Ireland as over 90 per cent have undertaken ethics training generally and, of these, a substantial majority also attended this voluntary course. Key quotations from the report and comments from its authors were highlighted in the training materials. The 'Unconscious Bias' course now takes place in tandem with the induction so that all new judges participate in the course. In workshops on avoiding re-traumatisation for victims of

This is in line with Harvard studies on third level education; see Peter Reuell, 'Lessons in Learning' (*Harvard Gazette*, 4 September 2019) <https://news.harvard.edu/gazette/story/2019/09/study-shows-that-students-learn-more-when-taking-part-in-classrooms-that-employ-active-learning-strategies/> accessed 29 October 2024; see also research on professional education generally e.g. Graham Gibbs, *Learning by Doing* (Oxford Brookes University 2013).

[63] Judicial Council feedback on individual courses in 2022 and 2023 invariably included responses confirming, consistently across all courses, that the best features of the courses were the cross-jurisdictional nature of the training, the role play sessions with actors and discussions with colleagues.

rape, the Mincéir women are considered an especially vulnerable group. The position of the Mincéirí/Travellers as statistically more likely to experience significant educational disadvantage and literacy challenges, for instance,[64] is discussed at the relevant workshops and practical solutions are proposed to ensure that every Traveller witness or litigant is treated with respect.

As the training in combatting unfair bias has developed, judicial trainers have worked, increasingly, with members of the Mincéir community. The main speaker at the 'Unconscious Bias' section of induction for new judges is a Mincéir/Traveller and Mincéir/Traveller speakers contribute to a separate 'Unconscious Bias' course apart from the induction sessions. In this way, while emphasising the seriousness of systemic racism globally, we also highlight the fact that the most obvious victims of racism in Ireland are the Mincéirí/Travellers.

The effect of a speaker or participant giving a personal history and perspective of the problem cannot be overestimated. The same approach was taken to the perspective of victims in courses on sexual violence. These sessions simply do not have the same power if the judges do not hear from the victims themselves. In a similar way, the 'Unconscious Bias' course has evolved to make the address from members of the Traveller Community a key presentation in the training. The personal perspective is not only more memorable and powerful, but the judges are meeting and discussing the problem of race with one who is directly affected. The human sympathy between participants and speakers in these interactions is also a small step towards rebuilding trust between the two groups.

Actions against Bias and Systemic Racism: The Future of Fairness

There is more that can, and must, be done. While individual judges have acted as champions of fairness, engaging with Mincéirí/Travellers and encouraging more interaction and mutual understanding, reaching out in this way should not be confined to individual judges and should become an institutional imperative.[65] This could be done by consciously selecting champions of Mincéirí as judicial trainers and by ensuring a continuing emphasis on bias training in the judicial training programme for each trainer. Individual judges might receive more intensive training on the issue and a sub-committee could be created within the Judicial Studies Committee to review progress in this area.[66]

The promotion of Mincéirí within the justice system is long overdue. Travellers are already at a disadvantage simply because of the societal and cultural biases against them. In a judiciary that claims to be fair and to reflect our society, there are few gaps more glaring than the absence of any Mincéir judges in the history of the State. It is hard to treat as 'other' those who are among the judges with whom you serve. The judiciary should represent the people. This is not just a matter of optics or perception, though these are important for role modelling and to be transparently representative. It is more fundamental; the judiciary should have a deep understanding of racism and how to remedy systemic and individual injustices. Minority groups and those who have been the subject of systemic racism are well placed to develop these skills at the highest levels. Perhaps most importantly, the judiciary should

[64] Dorothy Watson, Oona Kenny and Frances McGinnity, *A Social Portrait of Travellers in Ireland* (ESRI 2017).
[65] The work of District Judges Susan Fay and Shalom Binchy is notable in this field, and that of the late Elizabeth MacGrath, District Judge in Nenagh for many years, provides an ideal template in this regard.
[66] One example of an intensive training course is available here: The National Judicial College 'The Antiracist Courtroom & Reducing Disparity Through Nontraditional Diversion' (*The National Judicial College,* October 2024) <https://www.judges.org/courses/the-anti-racist-courtroom-theory-and-practice/> accessed 29 October 2024.

attract the best and brightest of our legal population. These are just as likely to be found in the Traveller Community as elsewhere, but Mincéirí currently lack the confidence and the opportunities to develop their talents in this regard and must struggle against the systemic racism described in this article before considering such a career.

This dearth of Traveller participation is noticeable at every layer in the administration of justice. To be the champions of justice, we must embrace true equality which includes equality of opportunity - this means positive action. To echo the Access to Justice report, it is not for the excluded community to demand a place at the table but for those who set the agenda to invite and welcome the participation of all. At this stage, the most practical start is to work actively to attract Travellers into the legal profession so as to create a realistic prospect of appointment to the judiciary for those who wish to travel along that path.

Actions against Bias and Systemic Racism: Positive Consideration of Mincéirí/Traveller Identity

Given the similarities between levels of imprisonment of Mincéirí/Travellers and other nomadic indigenous ethnic groups, the principles supporting the introduction of Gladue reports in Canada are certainly worth considering in an Irish context. These reports have the aim of ensuring that the cultural context of First Nation peoples in Canada are considered in sentencing hearings:

> In *R v Gladue*[67] the Supreme Court of Canada considered the context and application of section 718.2(e) of the Canadian Criminal Code, which provides that, in sentencing a person of Canada's indigenous population, the court should take into account the principle 'all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders*.' [68] The Court observed that the section was not a simple codification of existing principles, but '[alters] the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender.'[69] The purpose of the section, the Supreme Court of Canada found, was directed 'in particular, at reducing the use of prison as a sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders.'[70]

Following the decision, reports for indigenous offenders, called 'Gladue reports' were introduced. Significantly, these are different from pre-sentence reports, as they are not aimed at assessing the suitability for the individual for community sentencing, but rather 'explain risk in the context of the circumstances of the Indigenous person being sentenced and avoid the trap of relying on the impacts of colonialism to further justify the incarceration of Indigenous people.'[71]

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[67] [1999] 1 SCR 688.
[68] Emphasis added.
[69] *Gladue* (n 67) [33].
[70] ibid [48].
[71] Kelly Hannah-Moffat and Paula Maurutto, 'Re-contextualizing pre-sentence reports: Risk and race' (2010) 12(3) *Punishment & Society* 262.

Unfortunately, despite the formalisation of this process, there has been no reduction in the number of indigenous peoples in prison. There are, too often, gaps between policy and practice in the operation of Gladue reports. A report by the Canadian Department of Justice notes a number of impactful shortcomings in the operationalisation of the Gladue decision.[72] Specifically, there are jurisdictional variations within Canada in the use of Gladue reports. Some courts have argued that Gladue reports are only necessary in 'exceptional circumstances'. In other cases, courts argued that pre-sentencing reports would suffice. The absence of national standards for the preparation of Gladue reports has also been raised as an objection to their use. Knowledgeable writers trained to write to the standards required by the courts are necessary. Often, either appropriately skilled personnel or the funding to pay them are not available. Where defendants request the report, they may have to pay for its production. Where they are available, members of the judiciary may employ Gladue reports inconsistently. In some cases little use is made of the report beyond noting that the offender is indigenous. Where the reports are used, however, they do affect the case: a review of cases indicated that in 23 per cent of cases where Gladue principles were used, there was evidence that they had reduced the use or length of custodial sentences or that they had affected bail considerations. Consideration includes:

> 'the availability of programming, proximity of custodial facilities to the offender's community, and the likelihood of rehabilitation and rehabilitative resources. If available, courts were willing to sentence the offender to healing lodges or treatment centres. These analyses also provided considerable discussion in relation to the impact the Gladue factors had on the Indigenous offender and what would be in the best interest of all (the public, the administration of justice, and the offender) in rendering the court's decision. In many of these cases, the courts made note of the availability (or lack thereof) of resources for the Indigenous offender for programming specific to Indigenous offenders, such as Indigenous-specific therapies, ceremonies or custodial programs (e.g., treatment centres or sweat lodges).'[73]

In cases that involved a bail decision, some courts granted bail based on Gladue factors.[74] If properly resourced and introduced as a regular feature in judicial training, legislation providing for this kind of report would be a welcome step in addressing the biases that we have outlined.

Conclusion

We have presented the results of a report into the Mincéir experience of the justice system and outlined judicial responses to the challenges identified. We situate this discussion in the context of a society in which anti-Traveller racism is an embedded and pervasive reality.

At the judicial level, while we have little data to explore the extent of the problem, the report *Irish Travellers Access to Justice* demonstrates that Mincéirí/Travellers have a negative view of the judiciary, by and large, and those that have experience of the justice system have an even more negative view than those who do not.

[72] Anna Ndegwa, Laura Gallant and Jane Evans, *Applying R v Gladue: The use of Gladue reports and principles* (Department of Justice Canada 2023).
[73] ibid 23.
[74] ibid 64.

In developing a judicial training programme to try to counter personal biases and systemic biases, the judiciary has taken some welcome steps towards a fairer system. More progress is needed. Identifying and promoting more champion judges is an easy and urgent next step. The essential work will be encouraging Mincéirí participation in the professions and on the bench. This should be a priority for the judiciary. Only then can the institution be described as truly fair when it comes to the treatment of Mincéirí.