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## Being deaf in court

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(Received 2 June 2014; accepted 11 June 2014)

Based on cases involving deaf people as complainants, victims, the indicted or as affected parties, we endeavour in this study to explore how the judiciary facilitates accessibility and participation during the court process and how it takes into account language differences when reviewing cases and as mitigating circumstances when deciding the outcome of the case. The study is based on data from observations of court cases – both civil and criminal – on court documents and decisions, and on interviews with complainants, defendants and judges. We focus in particular on one deaf person's experience of compulsory admission (sectioning) to a psychiatric ward. The cases can be understood as 'critical events' by addressing injustice in terms of communicative barriers that have led to debate within and outside of the deaf community. The cases illuminate issues about accessibility, accountability and discrimination as well as the limits to and opportunities for individual and collective redress and legal activism through courts. We use the cases to discuss opportunities and inequalities inherent in the legal system and suggest multiple levels at which injustice occurs.

**Keywords:** deaf; legal actions; justice; rights; critical events

Since the 1990s, the number of legal actions initiated by members of minorities and other vulnerable groups has increased in Norway (Lundeberg 2008). Legal activism – formulating individual and group interests as legal claims – may be an important empowering instrument in a democratic society in that it can subject the private and public exercising of power to judicial control, and can counteract arbitrary and deficient administrative practices that may emerge within closed, professional regimes and regimes which are, to some extent, ethno- and phonocentric (Baumann and Dirksen 2004; Breivik 2007, Ladd 2003, 2005; Lundeberg 2008; Haualand 2002). Individual rights may ensure vulnerable citizens basic resources in order to be able to function, work and participate in society, and follow their own life projects. A further question regarding justice is how legal instruments may empower supposedly vulnerable<sup>1</sup> people – such as the deaf or other minority members – to participate in decision-making, and to express their feelings and experiences.

In this study we ask how the legal system facilitates for deaf peoples special needs and takes into account language differences when processing and reviewing cases and as mitigating circumstances when deciding the outcome of the case.<sup>2</sup> Based on cases

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involving deaf people as complainants, victims, the indicted or as affected parties, we endeavour to discuss questions regarding the legal position of minorities. Cultural and communication differences may result in misjudgements, different conceptions of justice, deviance, incomprehensible behaviour and crime. People from minority backgrounds are more often subjected to repressive state power and measures of social control, such as punishment and confinement; minorities have a higher rate of compulsory admission to psychiatric treatment (Iversen et al. 2011), and are also overrepresented in Scandinavian prisons (Kristiansen 2013; Skardhamar and Telle 2000). This makes it especially important to study the way in which the judiciary facilitates accessibility and participation during the court process and how it takes into account language differences and barriers when reviewing cases and as mitigating circumstances when deciding the outcome of the case.

Three cases are discussed. First, gang crimes committed by deaf youths a few years ago in Örebro, Sweden. Second, a deaf man convicted of rape in Norway. Third, a young deaf man, Lars, brings to court his compulsory admission to hospital and treatment on a psychiatric ward. Few previous studies have focused on court proceedings involving deaf or disabled people in *civil* cases. Through a thick description of Lars' case, we will provide an insight into how the legal process and the communicative challenges and possibilities might be experienced from a minority's point of view. The aim is to use the case to explore the dynamics of agency, as the individual and collective capacity to act more or less independently and to pursue own chosen goals, within the legal field. This also implies exploration of how the field puts limitations and constraints upon the different agents. We will take as a starting point an actor-oriented perspective, and utilize concepts from the sociology of deviance and institutions (Goffman 1961, 1963; Becker 1963; Foucault 1977; Sykes and Matza 1957; Skog 2006; Copes 2014). Finally, we will use concepts of rights and justice to address the limits to and opportunities for individual and collective redress and legal activism at court. However, at different levels, all the cases can be defined as 'critical events' because they have actualized questions of a number of judicial dilemmas and the legal protection of deaf people and other minorities.

### Critical events and critical court cases

The term 'critical event' has been borrowed from the anthropologist Das (1995). It may refer to both large and small events that are crucial for people both personally and collectively. On a personal level, a critical event represents a biographical turning point, where old beliefs are challenged and worldviews and identification elements must be assembled anew. On a collective level, it concerns events that come to represent common points of reference on a larger scale – for a minority, a local community or even a nation. A critical event will typically create a distinction between the *before* and the *after*.

In the late 1970s a deaf man, Fritz Moen, was convicted of murdering two young women in Trondheim, Norway. In 2004, however, he was found innocent of one of the murders and in 2006, after his death, he was cleared of the second murder. This grave miscarriage of justice reflected badly on the court itself, on the Norwegian judicial system and on all parties involved in the original trial. This case seems to represent a key *critical event* in Norway – challenging the presupposition of Norway as a constitutional state safeguarding citizens' rights.

In the late 1990s, a gang of deaf youths in Örebro, Sweden, carried out a number of violent acts. Their victims were random, non-deaf residents accused of being part of the hearing majority's oppression of deaf people (Breivik 2006a). This *critical event* made

headlines in the Swedish national media, and it challenged the legal system, the general majority public as well as the deaf minority. The criminal actions were condemned by all parties, but they had, nevertheless, impact beyond this, as we shall demonstrate later.

Both cases of seem to comprise all facets of a critical event: Fritz Moens conviction for the double murder dramatically changed his life; later, various aspects of Norwegian society were affected – especially in terms of the legitimacy of the legal system and the position of minorities. For the deaf community, too, the case served as a critical event in that it revealed the dangers inherent in taking a passive stance or even actively supporting the prejudgement of a marginal member of one's community.

The following critical events all touch on the legal protection of deaf people, how their needs are met by the judicial system and how the dilemma between discrimination and equality before the law has been judged and defined in the court's final decision.

## Method

Our study (2010–2012) is based on combined sources of data: analyses of qualitative interviews, observation data and documents.<sup>3</sup> We have carried out ethnographic fieldwork of some selected court cases, both civil and criminal, involving minorities as complainants or defendants. We have also collected relevant court verdicts from Norway and Sweden. Interviews and analysis of documents were included in the study, in particular related the Lars' case, see later.

The main case analysed in this study – Lars' – was based on a multi-methodological design. Thick descriptions and contextual data were enabled by fieldwork during the trial, by in-depth interviews, by access to hospital journals and the medical assessments and history of Lars and a copy of all trial documents. Lars was interviewed with the assistance of one sign-language interpreter some weeks after the trial. Follow-up of interviews with Lars was conducted by email while Lars was still in compulsory care and at three different points in time some months after the court decision had been made. The in-depth interviews were made to get knowledge of how he felt that his special needs were accommodated for inside and outside court, how he experienced the court proceedings and how the case affected life. The aim of the thick descriptions of Lars' case was to provide insight into his subjective experiences of communicative challenges and possibilities. The interviews, fieldwork and document reviews were conducted to gather systematic information about the court process, to explore how Lars accounted for his own legal actions and how he made sense of and chose to frame the events surrounding the trial and its subsequent repercussions. These data were supplemented with interviews with others involved in the judicial process, such as Lars' lawyer and his family members. The interviews were semi-structured, but the theme of how the judicial process was experienced was covered in all the interviews. The criminal cases which will be analysed in the next section were carried out using court decisions, newspaper articles, police reports and electronic correspondence with one police investigator.

## Deaf gang crime – a violent quest for respect

In the late 1990s a gang of deaf youths in Örebro, Sweden, carried out a number of violent acts, their victims random, non-deaf residents (Breivik 2006a). These gang crimes were dubbed a 'wave of violence' by the Swedish national media. Under the headline 'Deaf Gang Spreads Terror', the Swedish newspaper *Aftonbladet* (2000) described how these youths, aged 16–21, had terrorized Örebro for years by robbing, abusing and beating up



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non-deaf people. A number of criminal cases against these youths ensued. Apart from their young age, the criminal justice system did not find any other mitigating circumstance for their crimes, and the two men believed to be the main perpetrators and gang leaders were sentenced to several years in prison for a range of offences. A 21-year-old man was convicted of aggravated robbery, abuse, violence against an officer (*forulempning*) and illegal persecution (*förfogande*), and a 19-year-old was sentenced to two years in prison for aggravated robbery, abuse and vandalism. Four other deaf adolescents under the age of 18 were also suspected of serious crimes.

Their status as deaf occupied centre stage at the trials, mainly as the youngsters' justification for their criminal acts. The defendants claimed that their crimes had been triggered by sustained oppression and bullying because of their differentness as deaf (Breivik 2006a). Two of the youths stated to *Aftonbladet* (2000) that their violence was an expression through which to demonstrate their strength and power: 'We wanted to show people who can hear that we can do it too!' ('Vi ville visa de som hör att vi också kan!').<sup>AQ8</sup> The language barrier had supposedly prevented them from defending themselves against such bullying, or expressing opposition through legal means. Violence and crime seemed to be the answers to their humiliation, in a display of a kind of counterpower. Displaying physical strength and exercising violence seemed to serve as a way of drawing attention to and playing out their opposition and resistance to a largely phonocentric, hearing regime (Breivik 2005a, 2006a, 2006b). It was ostensibly a response to years of oppression as a minority. In court, the defendants explained that the violence was a desperate act against their experiences of discrimination, disrespectful treatment and misunderstandings. They also stated that they had been bullied for using sign language. The Swedish magazine for the deaf, *Dövtidningen*, wrote that they had 'wanted to exhibit their power' (2000, 5).

In the courtroom, the criminal offenses were explained as a means of gaining respect in the absence of alternatives (Breivik 2006a; Bourgois 2002). A self-presentation such as this has been described as 'techniques of neutralization' (Sykes and Matza 1957) and as the framing of victim narratives. Offenders make justifications to rationalize their deviant/transgressive behaviour. In this case, the offenders proposed that they were victims of circumstance or were forced into situations beyond their control. Furthermore, the offenders claimed that their violent crimes were for the greater good in protecting themselves from oppression and placing the injustice on the public agenda. However, these neutralization techniques are usually regarded as valid only by the delinquent, and not by the legal system or society at large. The crux is not only how they represented themselves and attempted to legitimize their crimes and make them understandable, but also how the surrounding deaf community and the general public responded to their actions and framings. Although the offenders constructed their identities around a quest for respect, they were also trapped in their victim narrative. This *we are suffering* narrative might lead to engendering compassion and even pity in others, but also to an increased distance and amplified conflict between *us* and *them*, especially when violence is exercised against 'innocent others'.

Neither the deaf community in Örebro, nor the Swedish Deaf Association supported the gang. Indeed, the deaf official way of gaining respect had focused on negotiation, cooperation and legitimate political action, and fairly good results had been achieved.<sup>4</sup> A 'nice' ethnicity had largely been the focus; a kind of normalized otherness made acceptable to the majority; violent action on behalf of the deaf community was regarded as jeopardizing this. As the crimes of the deaf gang had exposed such unpleasant aspects

of their own minority group, the mainstream deaf response had to be ambivalent as the incident comprised ethno-political dilemmas. In this case, disapproval and silence were the clearest responses (Breivik 2006a).

This critical event did, however, have some constructive repercussions. After the incident, the Örebro police department started to train their officials in sign language (Dövtidningen 2000; Breivik 2006a). The event also brought about a range of activities that strengthened the importance of sign language and the recognition of previously neglected social problems.<sup>5</sup> First, it made visible a range of social problems related to minority languages and communication challenges within the municipality and its handling of marginalized, young minority members. Second, it provoked debate and reflection in the general public and the minority itself.

Such results may be regarded as constructive outcomes from critical events – even though the crimes in themselves were considered to be illegitimate and scarcely comprehensible. The trial and the responses it provoked did show, however, that the legal system functions simultaneously as an arena for acknowledgement and marginalization. Most importantly, such court cases bring to the fore important dilemmas for national judicial systems when faced with cultural, ethnic and language differences. This has been noted with regard to language, ethnic and other minorities (Andenæs 2000; Eskeland 2009; Grønhaug 1999; Ilsen 2005).

AQ9

### The case of a deaf rapist

In 2008, a deaf man in Norway was sentenced to three years and six months in jail for rape. On appeal, however, the defendant explained to his defence that he had failed to understand the victim's protest; according to him, he understood the scream of 'No!' as 'Now!'. The jury partly accepted his testimony and that his deafness was a mitigating circumstance somehow excusing his actions. His sentence was then reduced to just one year's imprisonment. The case, and particularly the reduced prison term, were heavily debated and disapproved of by the deaf community and general public, and caused outrage because the apologetic stance of the court felt like an insult to deaf people. 'There is no excuse for rape!' was a frequent statement (Biseke 2013).<sup>6</sup> This case thus highlights different perceptions of the importance of language/culture as a mitigating circumstance or excuse in the processing of criminal cases and in evaluating degrees of complicity and guilt.

National newspaper headlines seemed to suggest that the man had been given a reduced sentence in that because he was deaf, he had misunderstood the victim. The story caused outrage within the deaf community who thought that deafness should never be used as an excuse. Many people felt that he had 'given being deaf a bad name' (Biseke 2013, 95). Maren Oriola (2011), a regular blogger from the deaf community, wrote that the man had not only raped his victim, but also the Norwegian justice system, sign language, deaf culture and pride. It was seen as a major setback for the work of deaf organizations which, for decades, had continuously fought against an understanding of the deaf as inferior and potentially dangerous individuals, associated with primitive minds, impulsive behaviour and a predisposition for violent crime (Simonsen 2012). The court's decision was regarded as threatening the legal position of the deaf as sane citizens who should usually be considered to be reasonable and accountable for their actions, similar to other non-deaf people. The prevailing response from the deaf community was that deaf people are not above the law; if one chooses to break the law, one should face the consequences.

AQ10

This case seems to illustrate the way in which a form of compassion exercised by the authorities may be regarded as misplaced, or as demonstrating paternalistic attitudes towards ‘vulnerable’ groups. It also highlights dilemmas for the minority in terms of tackling the incident itself, the court case and the media coverage. Crime committed by members of the deaf community seems to call for a dual awareness: an understanding of justice based on equality, a universal concept of people as equal individuals; and, justice based on inequality, regarding each individual as unique and different from all others. Justice means combating arbitrariness while taking the person’s opportunities and abilities into consideration during the court process and in the judgement, thereby ensuring a fair trial no matter the gravity of the case.

### Deaf man versus the psychiatric establishment

Our final case involves a deaf man, Lars,<sup>7</sup> diagnosed with paranoid schizophrenia,<sup>8</sup> who brings to court his compulsory admission to and treatment at a psychiatric ward. We will use this case to study the nature and consequences of juridification for marginalized groups. How does Lars use the court as an empowering arena; what are the opportunities, challenges and consequences?

Lars was committed against his will to the Kollen psychiatric institution in 2010.<sup>9</sup> He was not considered a danger to himself or others, however, and the decision to keep him on a psychiatric ward was justified by the intention of ensuring his continued improvement and prevent his health from deteriorating. Two days after hospitalization, Lars appealed to the Supervisory Commission<sup>10</sup> which decided that compulsory care was still required because it was convinced that Lars lacked the ability to understand the severity of his illness and behave adequately to recover. The Commission’s decision barely refers to Lars’ arguments; the hospital’s understanding dominates the review. The psychiatric hospital’s medical assessments of Lars are described in detail. According to the law, however, the impact of the coercive intervention on Lars’ life should have been given considerable weight, yet his deafness and language situation are not mentioned as relevant. Moreover, the Commission claims, despite the lack of interpretation services and a proper sign-language environment, the institution ‘is technically and materially capable of providing Lars with adequate treatment and care’.

Some months after the decision was taken to admit him to hospital, Lars brought the case to court, claiming that the decision was wrong. He acknowledged suffering from mental illness, but claimed he would voluntarily take the medication prescribed. According to him, there was no longer any need for him to be sectioned, so he appealed to the court to regain his freedom.

The case may illuminate the process of juridification of conflicts, what occurs when problems are transformed and framed as legal claims and judicial ways of thinking and acting (Magnussen 2007; Blichner and Molander 2008; Lundeberg 2008). The right to counsel, a periodic judicial review and free access to a court hearing, provide legal protection if the patient remains in opposition and would like a court to assess the case. Although the number of cases involving sectioning has been stable in recent years,<sup>11</sup> the number of cases brought before the courts has increased, from around 100 in 2001–2003 to 178 cases in 2009.<sup>12</sup> However, in most of the cases the patient was either discharged before the trial, or withdrew (53) the case. The number of cases won by the patient is relatively low: only six of 59. Nevertheless, most patients do not appeal to a higher court. Court reviews are usually heavily weighted in favour of hospital staff, while a patient’s input during such hearings is usually minimal.

## Access to court

Minorities often experience that they have insufficient information about their rights, the judicial process and that they are poorly prepared for what they can expect of a trial (Andenæs 2000). The law is supposed to ensure the deaf, other language minorities and disabled people the right to access to communication during judicial proceedings and activities. Here, we would like to address the importance of accessibility inside and outside the courtroom, as a prerequisite for enjoying one's rights and participating in communities. The Anti-Discrimination and Accessibility Act 2008 defines accessibility as a basic right and any lack thereof as discrimination. Communication must be understood in a broad sense, including body language and gesticulation (Benhabib 1992). The authorities are responsible for providing suitable conditions. For minorities such as sign-language users, the most effective service a court can provide is qualified sign-language interpreters trained in legal procedures and terminology. A similar legal obligation to provide access to communication is required of private and public attorneys inside and outside the courtroom.

The principle of equality before the law is preconditioned on making the trial as accessible as possible for all parties involved. One prerequisite is ensuring that the person has a rational, factual understanding of the nature and intent of the proceedings, and the ability and opportunity to consult with a reasonable degree of understanding his or her lawyer. Lars, however, expressed that he had some difficulty in comprehending the basic roles and responsibilities of the judge, the defence attorney, the state attorney and expert witness, and the impact of being a party at the proceedings. During the trial, Lars gave no indication of when he misunderstood; he did not ask the examiner to repeat questions or rephrase statements in a manner he could fully comprehend.

## The role of interpreters and experts

During most of the legal counselling, Lars had access to sign-language interpreters. To ensure effective communication with his lawyer in preparing his case, he also used written notes. He was assisted by two sign-language interpreters. However, the legal setting requires knowledge of legal procedures and terminology, but interpreters do not always possess this. Interpreters working in court settings in Norway do not have to have any formal training or certification in legal/court interpretation. They may also have difficulty translating non-linguistic aspects of the communication process that deal with culturally embedded ways of using the body, expressing or hiding emotions and of facing one another in the courtroom (body posture, eye contact and so forth). These are important modes of communication in court, affecting the judgement of a person's reliability and truthfulness.

The interpreter is certainly an ambiguous figure in court, almost an entity out of place. The courtroom structures a particular form of social practice in terms of conflict resolution between people. The arrangement of the courtroom also expresses certain hierarchical relationships between participants. However, no space is reserved specifically for interpreters; their position in court varies from case to case. Their presence may also disrupt the order of the court's traditional seating arrangements. Interpreters also experience normative discrepancies and role conflicts in court procedures: legal norms and courtroom structures pressure participants to adopt an adversarial stance (Jasanoff 1995; Lundeberg 2008). Associating the interpreter with the complainant does not only affect the former's status as neutral, but may also have adverse repercussions for the minority persons

involved. Judges may assume – more or less unconsciously – that the interpreter is a spokesperson for the minority’s position, rather than a neutral party present to facilitate understanding between the participants. On the other hand, however, because the court appoints the interpreters, the minority might regard them with mistrust and align them with the authorities. As it is difficult to assess the quality of interpretation of a language one does not comprehend, this may result in a loss of trust in the system. Concern for procedural efficiency and economy may have a problematic role in legal decision-making. Good interpretation in court can be time consuming and rouse the impatience of regular actors who would like to speed up the process. The legal protection of the minority can be jeopardized if communication and time are disregarded.

In this case, the situation was also aggravated by prevalent attitudes towards Lars’ status as mentally ill. Lars was given little authority to bear witness to his own experience. Typically, mentally ill persons are more likely to be stigmatized as not being capable of understanding their own best interests or of taking care of themselves, without any further examination of the person’s actual abilities (Goffman 1963; Rhodes 1991; Rose 1985). Lars’ behaviour in court is primarily identified with and interpreted by a medical framework, not as an expression of a minority’s appeal for linguistic and cultural recognition.

The court process is also dominated by testimonies and the expert knowledge of representatives from the field of psychiatry. The ideal of impartiality is an important prerequisite for the legitimacy of experts’ power in court. Science would claim to be able to develop and possess knowledge that approaches non-partisan ‘truth’. In Lars’ case, the experts witnessed as a part of the government’s (in the form of the hospital authorities’) biased claims in the case. The assessments by these professionals are performed not only to predict ways in which the promotion of their patient’s health may be achieved, but also to ensure that the earlier decision to hospitalize Lars is defensible before the court. Psychiatric interventions are not simply defined in terms of cure and care, but in terms of minimizing the risk of being held accountable for wrongdoings (Rose 2009). Mental health professionals may thus become caught up in a ‘blaming system’ in which every risk is potentially preventable, and for which someone is to be held culpable.

Lars, however, has not engaged any of his own experts to strengthen his case. There are no witnesses to support his arguments about injustices in terms of social barriers, a lack of sign-language communication and discrimination. No experts knowledgeable about the linguistic, educational and cultural characteristics of the deaf population appeared during the trial. A medical perspective focusing on regular treatment and downplaying matters of cultural and communicational differences dominated the case. The way in which cultural and linguistic differences often result in different renderings of deviance and normality are not taken into account.

## The trial

The case was first brought before the court in January 2011, three months after Lars had been hospitalized against his will. The issue at stake in court was the fulfilment of the treatment criterion. Would Lars benefit from the treatment offered? Lars claimed that the psychiatric institution had failed to meet his needs as deaf, as good communication in a signing environment was not provided.

The case was settled on the condition that the treatment unit accepted Lars’ claims. The parties agreed to put the case on hold to give the treatment unit responsible for Lars a chance to meet the requirements. If not, the case would resume, and, probably to pressure



the hospital in charge, the parties agreed to reconvene in court five months later. However, the agreement did not specify in any detail what kinds of requirements would be necessary to secure Lars' stabilization or an improvement in his health. After the settlement, Lars returned to Kollen. He was later transferred to an institution with fewer patients and restrictions, from which he was allowed more periods of leave. However, as time went by, little progress had been made with regard to the adjustments the hospital had promised to carry out in the court settlement. Five months later, Lars was back in court.

By the time the second trial started, Lars had been hospitalized for almost eight months. This is far above the average for compulsory admission, which in 2011 was 28 days (Helsedirektoratet 2012). This case was scheduled to last three days but was completed in just one. Lars' claims were quite similar to his original ones, and he entered the courtroom frustrated and none too confident. His lawyer argued on his behalf that:

Compulsory hospitalization is not necessary because Lars is willing to undertake treatment voluntarily. He is willing to take the medication; he just needs someone to remind him to take the pills. He will meet at the hospital and be under public supervision. He is not dangerous to himself or others. Compulsory treatment can only be used when other measures have failed. He sees it as a burden to be deprived of his freedom at hospital. His health has not improved as fast as the psychiatrist expected. Moreover, institutionalization is a greater restriction of freedom for Lars, as deaf, than for others. He is dependent on an interpreter, but his access to help is far too scarce. He has difficulties in communicating, both with staff and with other patients, and he becomes isolated. The programme at Kollen is not designed specifically for deaf people, such institutions do not exist. The institution did not apply for assistance from a person who communicates in sign language until recently. (Citation from the verdict, 3–4)

Despite this, the severity of his mental illness became the main focus of the court proceedings; his deafness and obstacles to communication at the hospital were not recognized as important. Lars is treated as a mentally ill person, not as a deaf person belonging to a linguistic minority. The schizophrenic label becomes a master status, vanquishing all other identities. His ability to be understood, explain his version of the case and succeed in his argumentation is limited by his being defined as a person who cannot communicate rationally. Lars also experiences his deafness as an additional barrier during the trial. His silence, emotional outbursts and non-verbal expressions are apparently used as 'proof' of his 'mental illness' and instability. Lars' deafness seems to strengthen the others' categorization of him as deviant and sick, and his points of view and behaviour are constantly interpreted in light of the illness. He is deemed to be less able to take care of himself or recognize his best interests. The way in which Lars' language difficulties might lead to misunderstandings and misinterpretations are not taken into account during the trial.

At trial, Lars claims that he is socially excluded by being involuntarily placed among hearing patients who cannot sign. He feels imprisoned, locked up in silence. He explains that involuntary hospitalization is a greater infringement of freedom for him than for others; with interpreters available for just two hours a week, he is largely deprived of any opportunity to communicate at the hospital. Some treatment sessions are carried out without interpretation. In practice, Lars feels like he is living in linguistic isolation, in circumstances which may make him worse. The Mental Health Care Act requires the use of coercion to be limited to cases where it is likely that the patient will benefit from treatment in the near future. How the institution legitimizes further forced that

hospitalization is highly relevant since eight months have elapsed since his admission. After eight months, with few results to show, Lars asks the court how the hospital could argue that he will continue to benefit from treatment. He claims that being deprived of the opportunity to socialize and communicate with other patients and staff every day for eight months has rather been harmful to his mental health, even that it has done no good at all.

Lars was not satisfied with the presentation of the case in court. The possibility of deterioration caused by long-term institutionalization was rarely discussed.<sup>13</sup> Institutionalization involves restricting a person's physical and psychological autonomy and providing a new set of rules, relationships, meanings and rewards through which identity and behaviour are reconstituted. The psychological assessments by experts responsible for Lars' treatment did not take into account the potential psychological distress and harm caused by his hospitalization. In addition, Lars feels stigmatized by the schizophrenic label and has lost touch with friends: his life has been put on hold, and he cannot plan ahead, for example for further education, since he is hospitalized indefinitely.

Throughout the case, those responsible for Lars' treatment expressed their unease about the current situation involving a lack of resources to hire interpreters during his treatment. However, they also blamed Lars for his lack of cooperation. They emphasized his frequent refusal to comply and his difficulty in meeting the requirements of the role of patient. They said Lars had isolated himself from other patients: he often did not show up at meals and was unwilling to take part in shared daily activities. This kind of behaviour fits with a social typology which Goffman (1967) has characterized as 'retreat'. With his muted daily ambitions and pessimistic projections of the future, Lars mainly exhibited a form of passive dissent that did not fulfil the institutional expectation of active engagement.

Lars explained his resistance and lack of adaption to institutional norms and everyday activities by stating that he felt more alone spending time with other patients than by himself. There was nobody he could really communicate with, he said, and he felt that he was excluded and systematically rendered invisible by both staff and other patients. He was thus deprived of the opportunity to be an active part of a therapeutic community among staff and patients, despite the fact that such participation was presumed to be a key to improvement. Consequently, Lars failed to build relationships<sup>14</sup> or establish social contact, because he was constantly subjected to patterns of interpretation and communication which were alien to him. He adapted to the feeling of being in an alien hospital environment by maintaining a high level of isolation, forming minimal social ties and seeking little support from other patients and staff. Because of this, most incentives and disincentives had become insufficient, misplaced or irrelevant and were dispassionately discounted by him. He mostly kept to his room.

Seen from Lars' point of view, there were no other possibilities for adaption available for him at Kollen psychiatric institution because he could not make use of the arrangements. He felt he had no other choice than to escape to loneliness to protect himself from degradation, 'micro-humiliation' and an assault on the self as inferior as deaf which he identified as more or less inherent in all sorts of institutional activities (Goffman 1967).

The institution did not seriously consider that his lack of cooperation could result primarily from Lars' exclusion from expressing his feelings, experiences and perspectives in the institutional social settings. Violation of the house rules was met with disciplinary treatment measures. His secluded behaviour did not fulfil the systemic expectations of active engagement. Nonetheless, Lars counteracted this by actively engaging in the legal

discourse. He started to protest formally, referring to applicable laws and rights. His passivity in everyday life combined with active resistance through formal complaints certainly posed a kind of threat to the institution's order.

The violations which Lars attempted to address through the justice system are not just about deprivation, the restriction of rights or the abuse of power; violation may also involve forms of oppression and domination rooted in the majority culture's patterns of interpretation and communication. Injustice in this respect is not only about behaviours which constrain subjects' freedom or do them harm, which is obviously a concern in this case, but also about how such behaviours impede a positive understanding of self (Honneth 1995; Lundeberg 2008). The injustices which Lars experiences during the hospitalization and court process he regards as due to his status as both mentally ill and deaf.

### The final verdict

It took 18 days for the final court decision to be handed down. The court dismissed Lars' complaints and arguments and fully absolved the state of the unlawful use of force. Compulsory treatment would thus continue; as part of the verdict states: 'The petition for discharge was not sustained and the state is to be rendered free of guilt. The verdict is unanimous'. As we have seen before, the main arguments from the hospital's and state's points of view have centred on fulfilling 'the treatment criterion' and mantras surrounding Lars' current and future benefits in being forced to continue to follow the hospital's prescribed treatment programme (medication, dialogue and everyday life structurations). The accuracy of clinical predictions about the patient's future behaviour – specifically whether Lars will take his medication – is relatively poorly justified. The court seems to accept this knowledge as more or less self-evident, justifying decisions already taken by the establishment: as a result, there is no one to blame other than the 'problematic patient'. A lack of accessibility is not made legally relevant.

During the case, the crux of Lars' argument was that there should be a higher ceiling for subjecting deaf people to involuntary treatment and confinement than for others, due to the language difference and likelihood of experiencing greater isolation. The responsibility for establishing institutional practices that make adjustments to prevent discrimination based on such differences lies with the public authorities. These questions are not substantially taken into account in the judgment. The legal process and discourses of the courtroom deflect the conflict and discussions away from such questions of injustice in terms of social barriers and accessibility to professional and medical considerations and prognoses for further treatment. The justification for the infringement of Lars' freedom is reduced to a belief or disbelief in whether he will continue to take his medication if released.

The court does, however, briefly mention Lars' status as deaf in the verdict, thereby admitting that his difference could be taken into account. The end of the verdict reads thus:

The Court is aware that everyday life within the institution, for Lars as deaf, might be more burdensome than for many others, but this is a matter that he probably also has to cope with in any other circumstance. For Lars it is therefore positive that the institution now seems to have employed an extra person who can sign. (from the verdict, 8)



The judges do thus offer Lars some support in admitting that a deaf patient faces more challenges than others do, but they state resignedly that this would be so in any case. The institution's accessibility practices are not optimal according to the court, but nor are they regarded as critical in relation to how the minority's difficulties would be taken care of by social arrangements elsewhere in society. The court does not supply any evidence for this statement. The court thus avoids discussing matters of structural change, for instance by proposing institutional standards which could better compensate for the inherent and pre-existing disadvantages that minorities face. By downplaying social factors and accessibility barriers, the court contributes to a disability discourse which focuses on incapability as an individual dysfunction, and not on incapability as a result of disabling structures. Instead, by allowing further involuntarily hospitalization, the court justifies long periods of compulsory treatment though there are few indications of any benefit for the patient.

Lars' case highlights how the combination of deafness and mental illness creates a dual stigma and amplifies communication difficulties. Lars claims in his testimony that 'As a schizophrenic, I feel stigmatized as sick. If I had not been mentally ill, people would have believed in me. This is an extra heavy burden'. In a mental hospital setting, resistance is likely to be regarded as 'unrecognizable', 'irrational' behaviour, part of the justification for further treatment (Foucault 1977). Lars withdrawal was judged as representing a form of illegitimate dissent and his rejection and unwillingness were seen as proof of his illness: this behaviour contributed to the decision to keep him under compulsory care. However, hallucination, fragmented thoughts and bizarre behaviour in specific patients with a minority background may not correspond with the schizophrenia diagnosis, but could instead be culture-specific forms of stress reactions (Norredam et al. 2015). Health workers' lack of knowledge of the patient's language and culture may result in over-diagnosing and involuntary admissions. Inattention to cultural differences may result in conflict, decreased patient satisfaction, misdiagnosis or suboptimal outcomes.

The court process and its decision may have several implications. First, the verdict seems to demonstrate little concern for the fact that being forced into long-term isolation in an environment that leaves one with few possibilities for communication could be mentally harmful and hamper improvement. Psychosocial aspects of everyday communication and the implications of institutionalization are deemed of little importance. Second, the court favours a medical approach. The hospital's task is primarily to ensure medical treatment, and culture and language differences play just a minor role in this. Third, the court does not stipulate that deaf people's needs should be accommodated when compulsory admission to hospital is used.

What might Lars' case tell us about the possibilities of and limits to using the court as an arena for social recognition? The question is how the judiciary takes disability, cultural and language differences into account during the court processes. In the following we will discuss the legal protection of minorities in light of the three cases presented above. We will investigate how some court cases can emerge as critical events, an occurrence which creates new understandings, relations, identities and distinctions impacting on one or more person(s).

## Discussion

Lars said that the most important result from bringing his case to court was that he had the opportunity to show resistance. He experienced that accessibility and procedural

rights (right to free counselling and sign-language interpreters, etc.) made the legal action possible and contributed to the opportunity to participate on more equal terms in court. One constructive element in the court process is that discrimination, unnecessary detention, mistreatment and malpractice may be addressed before a third party. If one is deprived of one's freedom, the legal review is particularly important, especially in Norway where involuntary admission rates to psychiatric hospitals are the highest in Europe (Iversen et al. 2009). Coercion<sup>15</sup> has been the subject of a heated debate in the Norwegian public sphere as it conflicts with legal and human rights, and evokes debates about autonomy and paternalism and the patient's right to the most efficacious treatment (Diseth and Høglend 2013). An important consequence of legal actions such as Lars' is that professional discretion and assessment may be scrutinized and challenged (Lundeberg 2005; Magnussen and Nilssen 2013). Conflict over professional principles and patients' rights to increased autonomy and legal protection against inadequate treatment may also be placed on the agenda by legal means. Indeed, the practices of health and welfare staff are increasingly being shaped by the (real or imagined) fear of legal action taken by their users and patients; they act under what Rose refers to as 'the shadow of the law' (2002, 228). Court cases and rights may also constitute means through which to resist coercive measures and unjust procedures and hold the authorities accountable for wrongdoings. One further advantage of bringing a case to court is that the conflict will be subject to contradiction in an open process where both parties have an opportunity to explain themselves, and where an independent third party makes a final, binding decision.

Nevertheless, the legal discourse and procedures do exhibit some weaknesses. Going to court is often a time consuming, expensive way of achieving recognition, for example Lars' case took six months to complete. This is particularly problematic in cases concerning the infringement of a person's freedom. The use of court restricts and narrows potential topics and arguments, as the legal discourse structures what is regarded as relevant. The legal institutionalization of the argumentation is subjected to temporal, social and content constraints (Habermas 1996). The legal procedures define the topics and questions that can be addressed, the time schedule, the participants and roles. The mechanism of complexity reduction makes the process more efficient, but also constitutes a communicative constraint on the parties (Lundeberg 2008). Some topics are legally relevant while others are not. Both Lars' case and the cases of gang violence in Örebro show that the judiciary did not regard injustice in terms of social barriers because of disability or cultural and language differences as important or mitigating circumstances. The limitations of and barriers to legal conflict resolution can, in Nils Christie's (1977) words, lead to 'conflict theft': juridification might alienate the parties of the conflict, in that it is only what is legally relevant which counts as part of the solution.

Court procedures may be experienced as alienating, increasing the distance and conflict between the parties involved. Lars felt that the trial was heavily biased in favour of the hospital's decision and the authority of the state attorney:

I felt that he did not see the matter from my point of view at all. He angled it in a completely different way and argued in a way that made only his visions come through and he convinced the judge.

Lars' case shows how the interconnected power of the legal and psychiatric apparatuses is likely to deflect conflicts and discussions away from patient autonomy and social barriers and discrimination towards questions of individual dysfunctions, diagnosis and future treatment needs. The legal process seems to contribute to widening the gap between

medical and socio-political measures, in spite of the clear political focus on diminishing social barriers.

One major concern regarding the use of court as an empowering arena is the consequences of losing the case (Mathiesen 1977). However, winning the case does not necessarily constitute a realization of justice and there are several ways to lose. A complete loss may both aggravate the situation of the individual and may cause public attention on the issue to vanish. However, losing a case may also lead to constructive attention being drawn to the injustices done to an individual or to a distinct vulnerable group; courts can create a public space for criticism and debate, and a trial can demonstrate and publicize the unjust consequences of the implementation of law; this may lead to a request for social change. In spite of the fact that Lars lost his case and did not regain his freedom, his experience was that the hospital did subsequently pay more attention to his special needs and improved the availability of the interpretation service and exposed him to fewer restrictions. Similarly, the case of hate crime in Örebro showed how the court process led to the municipality recognizing shortcomings and improving its services for the deaf. In some cases, on the other hand, the purpose of legal activism is not to gain a decision as to who is right in a legal sense; instead, the judicial process is used as an arena for political statement, as a revolt against the established legal order, against the values, the appeal basis and evidence on which the court is founded. The case is not brought to court to end the conflict, but to open cases up, bring about discussion and place issues on the political agenda.

Lars is one of the very few deaf people who has taken the opportunity to use the court as an empowering arena, and the Örebro case is a rare example of a group that did crime to express their despair and resistance to prolonged suppression. Common to these cases are expressions of experiences of a range of mistreatment suffered by the minorities: subjection to actions which make the minority appear as of less worth or deviant and which systematically disadvantage them, even in the absence of any intention to discriminate. However, such actions depend on whether the individual in question is willing and able to stand out and self-identity as a victim, as oppressed, as a member of a group that is considered vulnerable. It is the impaired or the minority itself that will have to report any violation of the law and repair any lack of adjustment. Juridification will hinge on the costs and willingness of those concerned to pursue legal redress. The personal cost of taking the case to court might be too burdensome; as we have learned from our cases, standing out as mentally ill and/or disabled is potentially identity threatening. Identifying a vulnerable group as suffering from discrimination and needing special treatment may lead to further victimization of a group, increased public stigma and further marginalization (Grue 2010). As we have seen in the case of the deaf rapist where misunderstandings and misinterpretations were emphasized as a mitigating circumstance by the court – making the difference count – this was not viewed as fair, but as a stigmatizing and degrading action which contributed to an understanding of the deaf as inferior, irresponsible and potentially dangerous individuals. Activism for disability rights and the battle against discrimination thus can to some extent become a reification of the basis of that discrimination. Discussions of justice must thus consider how lack of access to means of interpretation and communication in a society render the experiences, feelings and perspectives of one person or a group invisible at the same time as they are being stereotyped and mark out as the deviant other.

## Conclusion

The three cases above can be understood as critical events by addressing injustice in terms of communicative barriers. The court may be an arena for critical events because it is linked to authority, enjoy a high symbolic status as an institutional place open to the general public, that are traversed by ideas, rituals and artifacts of justice. The trial creates a public space for criticism that we otherwise would not have had and that affect the lives of those involved. The data collected from the three cases address issues about accessibility, accountability and discrimination which specifically address deafness, but the discussion about how the judiciary takes – or should take into account disability, cultural and language differences during the court process and when reviewing cases is highly relevant for understanding minority cases in general. The court processes that we have discussed made visible a range of social problems related to minority languages and communication challenges. However, the cases point to a critical potential, they also highlight some fundamental difficulties in protecting the legal rights of people with minority language backgrounds. First, rights are not strictly enforceable; realizing rights depends on accessible resources and professional discretion from gatekeepers of law. Second, lack of communication accessibility may lead to misunderstandings and misjudgements which threatens the legal position of the deaf people. The cases shows that communication barriers prevents deaf to participate in the legal decision-making on equal terms, to defend themselves and to be considered reasonable and accountable for their actions, similar to other non-deaf people. Third, the court has difficulties to address the complexities of such cases; the legal system is subjected to temporal, social and content constraints. Communicative problems are primarily handled as an individual incapability, and not as a matter of institutional responsibility and change. The court tends to ignore discussing matters of structural change, for instance by proposing institutional standards which could better compensate for disadvantages that deaf face. Finally, while rights may enable the violation of freedom or discrimination to gain attention within the legal system, they fail to prevent the injustice in the first place, and are often unable to restore the injustice that has already been committed. The challenges of ensuring justice for people who differ from the majority in their culture, language and/or competence occurs at many levels which indicates a need for a more communicative and culturally sensitive legal system.

## Notes

1. The token vulnerabilities of minority members, such as the deaf, are challenged and discussed in Breivik (2005a, 2005b) and Ladd (2003, 2005) by focusing on the strengths, abilities and possibilities within these communities.
2. Here we define deaf people as a minority, in so far as they have sign language as their first language. As such, deaf people are small minorities in any nation state. In some discourses around this minority status, the distinction between Deaf (with a capital D) and deaf (pointing towards the hearing loss only) has been important. We acknowledge this, but we choose not to go deeper into this issue here. For more elaboration see Breivik (2005a).
3. The study was carried out by both authors. In addition, Michelle Biseke, our master student from the University of Bergen contributed with court observations and fieldwork among deaf youths in Norway.
4. Sweden is considered to be one of the nations that has most thoroughly implemented the demands and needs of the deaf. For instance, sign language is recognized as a national minority language of the deaf in Sweden.
5. Personal communication with the chief police investigator of the crimes at the time.
6. Michelle Biseke carried out participant observation among deaf youths at that time.

7. All names have been changed to preserve anonymity.
8. Like Lars, many patients who have been admitted to hospital involuntarily or who have been given compulsory treatment suffer from schizophrenia. Such patients are also generally characterized by homelessness, a lower income, lower education and weaker social networks than patients receiving voluntary treatment (Helsedirektoratet 2012). However, Lars had a resourceful family supporting him, his own apartment and had just started higher education.
9. This deprivation of liberty was based on a professional medical assessment that did not require a court order. Norwegian mental health legislation is supposedly based on society's confidence in psychiatry as a profession. According to the Norwegian Mental Health Care Act (14), compulsory psychiatric mental health care may be provided to prevent the severe deterioration of a patient's health status if he or she is suffering from a suspected or confirmed serious mental disorder – this is known as *the treatment criterion* – or if there is an obvious threat to the patient's life or that of others.
10. This Commission is the court of appeal for decisions related to compulsory mental health care and coercion. It monitors mental health care implemented without patients' consent as well as the use of force. Before the case ends up in court, the patient has to try his or her case before the Commission. In 2011, the Commission received approximately 2238 complaints about compulsory mental health admissions (54%) and the County Governor handled 850 complaints about the use of involuntary medication. About 600 people consulted the Patient and User Ombudsman on decisions involving coercion.
11. Approximately 5000 people were hospitalized in psychiatric care in 2009 (NOU 2011, 9; Økt selvbestemmelse og rettssikkerhet).
12. Involuntary admission rates to psychiatric hospitals in Norway are high compared to other countries (Iversen et al. 2009). Involuntary referral rates from European countries range between 6 (Portugal), 218 (Finland) and 259 (Norway) per 100,000 inhabitants. Norway also uses compulsory admission more than other Nordic countries.
13. In *Asylums*, Goffman (1961) is mainly concerned with the details of having been hospitalized at a psychiatric hospital and the nature and effects of the process he defines as 'institutionalization'. He describes how the institutionalization process socializes people into the role of 'the good patient', someone 'dull, harmless and inconspicuous', which in turn reinforces notions of chronicity in severe mental illness.
14. He did, however, form a friendship with one of the female patients, but he was told by staff to keep his distance and not engage too intensely in that relationship (supposedly because of the problems this particular patient was dealing with).
15. Coercion in the sense of shielding, restraints and involuntary medication.

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