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Dear delegate,

Welcome to the 2012 Annual Conference of the Irish Association of Law Teachers at the Fitzpatrick Castle Hotel, Dublin.

We are pleased to welcome delegates from North and South, from the UK, Italy and from the US.

Last year we held a very successful annual conference in Athlone under the theme *Added Value(s) – The Role of Law in Contemporary Society*. As it has been quite some time since we held the annual conference in Dublin, the Council of the IALT decided to hold it in the memorable setting of the Fitzpatrick Castle Hotel.

During the past year, the IALT has spearheaded discussion in relation to research metrics and publishing expectations and outlets for legal academics. We are pleased that nationally there is now a variety of publishers catering for textbooks, practitioner-texts, monographs and peer and non-peer reviewed journals. This allows for dissemination of a wide range of research and knowledge.

The IALT Spring Seminar took place on Thursday 26 April 2012 in Trinity College Dublin. Professor William Binchy, Regius Professor, Trinity College and Professor David Gwynn Morgan, Professor Emeritus of Law, UCC addressed the audience on the interesting subject of Law Reform and Social Transition, followed by a reception.

IALT News, the newsletter of the IALT was circulated April 2012. As always, short articles on substantive legal issues, research or teaching innovations as well as institutional news are welcome for inclusion in the newsletter. To keep up with IALT news and members, join the IALT's new LinkedIn group.

The over-arching conference theme of this conference of *Legal Scholarship and Judicial Reasoning: A Mutual Interaction* provides an opportunity for us as law teachers and researchers to reflect upon the influence of academic thinking on judicial thought and vice versa. This is a theme reflected in many of the papers to be presented and considered by two of our distinguished speakers in the plenary session on Saturday afternoon.

The Association has awarded two Postgraduate Student Scholarships to enable two students to attend and present at this year's conference. This is the second year that these scholarships have been awarded and, as was the case last year, the judges of the applications reported that the standard of the applications was

very high. They were awarded to Magdalena Duggan of University of Limerick and Eva Barrett of Trinity College Dublin. The Council of the IALT is delighted to see such emerging talent and also to have a sound representation of excellent postgraduate students presenting their work at the Conference again this year.

At the conference itself, we will be awarding the IALT Kevin Boyle Book Prize for Outstanding Legal Scholarship on Friday evening and the Association will also mark the considerable academic contribution of Professor Robert Clarke by awarding him Honorary Membership at the conference.

The social outing on Saturday afternoon will be to the James Joyce Tower & Museum which hosts a fascinating collection of Joyce memorabilia including letters, photographs, first and rare editions and personal possessions of Joyce, as well as items associated with the Dublin of Ulysses.

The Annual General Meeting of the Association will be held on Sunday afternoon at 2pm, and the Council would encourage all members of the Association to attend. The election of officers for the coming year will take place at the AGM. If you are interested in serving on the Council for the forthcoming session, please let a current Council member know.

I would like to take this opportunity to acknowledge the people who have worked so hard in ensuring that the IALT conference this year is a success. Special thanks go to the IALT Council members for all their input into organising this event and throughout the year. I would also like to thank all the speakers over the weekend who have put such effort into preparing and delivering such a wide range of thought-provoking papers which showcase the breadth of vision and critical thinking of the IALT community and which allow for a unique opportunity of cross-fertilisation of ideas. Truly the influence of legal scholarship is alive and well.

The Council is most grateful to our Plenary speakers, Professor Steve Hedley, Lawrence Donnelly, Professor Brice Dickson and Ms Justice Mary Laffoy for their individual and collective contribution to the conference.

Finally, I would like to thank our sponsors Thomson Round Hall and Clarus Press for their continuing generous support of the IALT.

I hope you enjoy the intellectual and social aspects of the weekend.

Best wishes,

*Deirdre Ahern*

**President of the Irish Association of Law Teachers 2011-2012**



## ABOUT THE IALT

The Association was founded in 1979 with the objective of advancing legal education, legal research and the work and interests of law teachers on the island of Ireland. Now, as then, the Association is proudly an all-island organisation bringing together legal academics and teachers of law from both sides of the border. It remains committed to furthering excellence in legal education and research through conferences, research projects and by acting as a collective voice for law teachers and researchers.

The Association is managed by a Council elected by the membership. Ordinary Membership is open to all teachers and researchers of law on the island of Ireland, though Associate Membership is also available to individuals based outside Ireland. The Association has representatives at all third level institutions in the country and maintains links between teachers and academics between these institutions.

In 2011 Thomas Mohr and Jennifer Schweppe edited *30 Years of Legal Scholarship* (Round Hall, 2011), an insightful collection of essays by legal academics in celebration of the 30 year anniversary of the IALT's foundation. Copies of the book are available to purchase directly from the IALT at a special price for IALT members (contact Noel McGrath of UCD).

For more information on the activities of the IALT see [www.ialt.ie](http://www.ialt.ie).

**IALT COUNCIL 2011-2012**

Deirdre Ahern, Trinity College Dublin **(President)**  
Val Corbett, Independent Colleges **(Secretary)**  
Fergus Ryan, Dublin Institute of Technology **(Membership Secretary)**  
Noel McGrath, University College Dublin **(Treasurer)**

David Capper, Queen's University Belfast  
(succeeded in September 2012 by Noelle Higgins of NUI Galway)  
Michael Doherty, Dublin City University  
Mary Faulkner, King's Inns  
Eugene McNamee, University of Ulster  
Thomas Mohr, University College Dublin  
Seán Ó Conaill, University College Cork  
John Stannard, Queen's University Belfast  
Jennifer Schweppe, University of Limerick  
Frank Watters, Dundalk Institute of Technology

Each third level institution also has an IALT representative. If you do not know who your representative is, please contact the Membership Secretary.

The Council for 2012-2013 will be elected at the AGM which takes place on Sunday at 2pm in the James Joyce Suite.

## **The Kevin Boyle Book Prize for Outstanding Legal Scholarship**

This prize is awarded to an Ordinary Member of the IALT who has published a book in the twenty four months preceding the closing date that is deemed to have made an outstanding contribution to the understanding of law. The prize is awarded biennially.

The Kevin Boyle Book Prize is named in honour of the IALT's esteemed co-founder, Professor Kevin Boyle (1943-2010). A lawyer, academic and human rights advocate of international repute, Professor Boyle was instrumental in the establishment of the Irish Association of Law Teachers in 1979 and served as its President from 1982-83 and again in 1986. His vision of the Association as an all-island body committed to the development of teaching and scholarship on the island, and friendly collaboration between academics in both jurisdictions lives on to this day. In recognition of his contribution, Professor Boyle was made an honorary member of the IALT at our Annual Conference in Limerick in 2010.

Educated at Queen's University Belfast and the University of Cambridge, Professor Boyle started his auspicious academic career as a lecturer at Queen's University Belfast in 1966. In 1978, he became the first whole-time member of staff in NUI, Galway where, in 1980, he initiated the internationally renowned Irish Centre for Human Rights. In 1989 he was appointed Professor of Law at the University of Essex, at which he led the Human Rights Law Centre from 1990 to 2003, and again from 2006 to 2007. In addition to a forty year career in academia, Professor Boyle had qualified at the bar in Northern Ireland, England and Wales, and in the Republic of Ireland.

The inaugural IALT Kevin Boyle Book Prize was awarded to Dr Eoin Carolan of UCD in 2011 for *The New Separation of Powers: A Theory for the Modern State*.

The 2012 Book Prize will be awarded on Friday 16 November 2012. The five nominations for this year's Prize are:

**Suzanne Egan, *The UN Human Rights Treaty System: Law and Procedure* (Bloomsbury Professional, 2012)**

**Suzanne Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press, January 2012)**

**Aoife Nolan, *Children's Socio-economic Rights, Democracy and the Courts* (Hart, 2011)**

**Trevor Redmond, *People, States and Hope: Cosmopolitanism and the Future of International Law* (Wolf Legal Publishers, 2012)**

**Mary Rogan, *Prison Policy in Ireland: Politics, Penal-welfarism and Political Imprisonment* (Routledge, 2011).**



**2012 ANNUAL CONFERENCE PROGRAMME**  
**“Legal Scholarship and Judicial Reasoning:  
A Mutual Interaction”**

**16-18 November 2012**  
**Fitzpatrick Castle Hotel,**  
**Killiney Co. Dublin**

**Friday 18 November 2012**

- 5.30pm**                    **Registration opens**  
Venue: **The Library Bar**
- 6.30pm**                    Welcome Reception & Awarding of the  
*IALT Kevin Boyle Book Prize for Outstanding Legal  
Scholarship*  
  
Venue: **The Library Bar**
- 19.30pm                    Buffet Dinner  
Venue: **The George Bernard Shaw Suite**

**Saturday 19 November 2012**

- 9.00am**                    **Registration opens**  
  
Venue: **The Wintergarden**
- 9.30-11.00am:**            **Parallel Sessions I\***
- Session A – Perspectives in the Role of Scholarship and Judicial Reasoning
- Session B – Meeting the Challenges of Transitional Justice
- Session C – Relationships and the Modern Family

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\* Details and locations of Parallel Session below.

**11.00-11.30am:**                   **Coffee**  
Venue: **The Wintergarden**

**11.30-1.00pm:**                   **Parallel Sessions II\***

Session D – Postgraduate Research Showcase

Session E – The Irish Constitution in Review: Critical Developmental Perspectives

Session F – New Directions in Corporate and Commercial Law

**1.00-1.45pm:**                   **Lunch**  
*Sponsored by*



Venue: **The George Bernard Shaw Suite**

**1.45-3.50pm:**                   **Conference Plenary Session**  
Venue: **The Jonathan Swift Suite**

Chair: Dr Deirdre Ahern, President, IALT 2011-2012

*Plenary Speakers:*

Professor Steve Hedley, University College Cork, “Managerialism in Irish Universities, Revisited”

Larry Donnelly, NUI Galway, “Taking the Next Steps in the Development of Irish Clinical Legal Education”

Professor Brice Dickson, Queen’s University Belfast, ““Legal Scholarship and Judicial Reasoning: A Scholar’s Perspective”

The Hon. Ms Justice Mary Laffoy, High Court, “Legal Scholarship and Judicial Reasoning: A Judicial Perspective”

**4.00pm:**                    *Social Outing to James Joyce Tower & Museum, Sandycove (book in for this on registration) Congregate in Lobby at **4pm sharp** Transport provided.*

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\* Details and locations of Parallel Sessions below,

**7.30pm:** Conference pre-dinner reception and Gala Dinner  
Venue: **The Wintergarden**

*Conference Dinner sponsored by*



*Awarding of Honorary Membership of IALT to Professor Robert Clarke*

*Announcement of Conference Postgraduate Scholarship Winners*

**Sunday 20 November 2012**

**10.00-11.30am** **Parallel Sessions III\***

Session G – Innovation in Teaching and Learning

Session H – Financial Crime: Meeting the Regulatory and Enforcement Challenge

Session I – Current Issues in Employment Law Pedagogy and Practice: A Comparative Perspective

**11.30-11.45am:** **Coffee**  
Venue: **The Wintergarden**

**11.45.-1.00pm:** **Parallel Sessions IV\***

Session J – Historical and Contemporary Perspectives on Criminal Law and Criminal Trials

Session K – Private Law Remedies Explored

Session L – Contemporary Perspectives on Education and Religion

Session M – Contemporary Medico-Legal Controversies

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\* Details and locations of Parallel Session below.

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**1.15-2.00pm:** Lunch  
Venue: **The George Bernard Shaw Room**

**2.00-3.00pm:** *Annual General Meeting of the IALT*  
Venue: **The James Joyce Suite**

Report on activities of the IALT in 2011, approval of accounts and election of Council members for the coming year.

**3pm** **Conference Close.**

## **PARALLEL SESSIONS**

### **Saturday 9.30-11.00: Parallel Session I**

#### **SESSION A - PERSPECTIVES ON THE ROLE OF SCHOLARSHIP AND JUDICIAL REASONING**

Venue: Oscar Wilde Suite

**Chair: Dr Thomas Mohr, University College Dublin**

1. Brian O'Beirne, Trinity College Dublin, **"The Interaction between Legal Scholarship and Judicial Reasoning: A Morally and Fiscally Suspect Status Quo"**
2. David Prendergast, Trinity College Dublin, **"Democracy, Judicial Review, and Legal Scholarship"**
3. Dr Diarmuid Rossa Phelan, Trinity College Dublin, **"Misunderstandings about Focus of Judicial Reasoning"**

#### **SESSION B – MEETING THE CHALLENGES OF TRANSITIONAL JUSTICE**

Venue: Samuel Beckett Suite

**Convened by: Professor Colm Campbell, University of Ulster**

1. Amaia Alvarez Berastegi, University of Ulster, **"Challenges of Intra-democratic Transitions: The Basque Country and the North of Ireland"**
2. Katie Boyle, University of Limerick, "The Interaction between Legal Scholarship and Judicial Reasoning and the Teleological Journey to Justiciable Economic, Social and Cultural Rights in Northern Ireland and Beyond"
3. Dr Siobhán Wills, University College Cork, *"Moving Beyond the Secretary-General's Bulletin on Observance by United Nations forces of humanitarian law: Setting and Enforcing Standards of Accountability for Peacekeepers"*
4. Professor Colm Campbell, University of Ulster, **"Beyond the Third Dimension Towards a Typology of Transition, Justice and the Democratic State"**

#### **SESSION C – RELATIONSHIPS AND THE MODERN FAMILY**

Venue: J.M. Synge Suite

**Chair: Dr Fergus Ryan, Dublin Institute of Technology**

1. Brian Tobin, Trinity College Dublin, **"The Efficacy of Ireland's Cohabitation Regime"**

2. Dr Maebh Harding, University of Portsmouth, **“The Legitimacy Presumptions: an Unsatisfactory Surrogate for Proper Regulation of Modern Parenthood in Ireland”**
3. Dr Lucy-Ann Buckley, NUI Galway, **“Judicial Approaches to Marital Financial Autonomy in Ireland and Canada: A Relational Perspective?”**
4. Dr Ronagh McQuigg, Queen’s University, **“The Inter-American Commission on Human Rights and the Issue of Domestic Violence”**

### **Saturday 11.30-1.00: Parallel Session II**

#### **SESSION D - IALT POSTGRADUATE RESEARCH SHOWCASE**

Venue: Oscar Wilde Suite

**Chair: Dr Noelle Higgins, NUI Galway**

1. Meredith Raley, NUIG, **“The Changing Connection between National and International Law: NHRIs and Article 33”**
2. Amina Adanan, NUI Galway, **“Universal Jurisdiction over Slavery before World War II”**
3. Eva Barrett, Trinity College Dublin, **“Ireland’s On-Shore Wind Policy: ‘Caught Between A Rock And A Hard Place’”**  
*Awarded IALT 2012 Annual Conference Postgraduate Scholarship*
4. Magdalena Duggan, University of Limerick, **“Creating a Legal Framework for Preimplantation Genetic Diagnosis in Ireland – regulation, recommendations and some potential tort law scenarios”**  
*Awarded IALT 2012 Annual Conference Postgraduate Scholarship*

#### **SESSION E - THE IRISH CONSTITUTION IN REVIEW: CRITICAL DEVELOPMENTAL PERSPECTIVES**

Venue: Samuel Beckett Suite

**Chair: Professor Gerry Whyte, Trinity College Dublin**

1. David Kenny, Trinity College Dublin, **“The ‘Person’ of the Citizen, and the Resurrection of Article 40.3”**
2. John O’Dowd, University College Dublin, **“Recalibration of the ‘scales of justice’? - Some thoughts about ‘fine-tuning’ by constitutional amendment”**
3. Dr Oran Doyle, Trinity College Dublin, **“Constitutional Review of Administrative Action”**

**SESSION F – NEW DIRECTIONS IN CORPORATE AND COMMERCIAL LAW**

Venue: J.M. Synge Suite

**Chair: Dr Deirdre Ahern, Trinity College Dublin**

1. John Quinn, Dublin City University, **“Enlightened Shareholder Value after the OFR”**
2. Edmund Shanahan, Trinity College Dublin, **“On Mountains and Molehills: Theoretical Innovation and Resistance to Change in Corporate Rescue Law”**
3. Caterina Gardiner, NUI Galway, **“The Proposed Common European Sales Law: A New Direction for European Contract Law?”**

**Sunday 10-11.30: Parallel Session III**

**SESSION G – INNOVATION IN TEACHING AND LEARNING**

Venue: Oscar Wilde Suite

**Chair: Dr Yvonne Daly, Dublin City University**

1. Dr Brenda Daly, Dublin City University, **“Legal Education in a Digital Age: Can Web 2.0 Technology Enhance the Student Learning Experience and Increase Student Engagement?”**
2. Dr Chris Taylor, Bradford University, **“Supporting Student Engagement in Empirical Socio-legal Research within LLB Skills Development”**
3. Dr Maria Cahill, University College Cork, **“Encouraging Students to Critically Evaluate Judicial Reasoning: UCC’s Advanced Legal Reasoning Module”**

**SESSION H – FINANCIAL CRIME: MEETING THE REGULATORY AND ENFORCEMENT CHALLENGE**

Venue: Samuel Beckett Suite

**Chair: Dr Noel McGrath, University College Dublin**

1. Lauren Kierans, American University Bulgaria, **“An Analysis of the Current Sectoral Approach and the Proposed Generic Approach to Whistleblowing Law in Ireland”**
2. Shaun Elder, University of Limerick, **“Financial Regulatory Reform: Discretionary decision-making within a new Enforcement Policy”**
3. Marian O’Neill, Waterford Institute of Technology, **“Fitness and Probity Due Diligence Framework under the Central Bank Reform Act 2010 (No. 1)”**

**SESSION I - CURRENT ISSUES IN EMPLOYMENT LAW PEDAGOGY AND PRACTICE: A COMPARATIVE PERSPECTIVE**

Venue: J.M. Synge Suite

**Convenor: Dr Michael Doherty, Dublin City University**

1. Debra Burke, Western Carolina University, **"The Pedagogical and Ethical Implications of Unpaid Work Placement"**
2. David Nagle and Professor Carol Daugherty Rasnic, Virginia Commonwealth University **"Employment Discrimination Law in the USA: A Comparative Perspective"**
3. Anthony Kerr, University College Dublin, **"From Labour Law to Employment Law"**
4. Dr Desmond Ryan, Trinity College Dublin, **"The Employment Law Curriculum"**

**Sunday 11.45-1.00: Parallel Session IV**

**SESSION J - HISTORICAL AND CONTEMPORARY PERSPECTIVES ON CRIMINAL LAW AND CRIMINAL TRIALS**

Venue: Sean O'Casey Suite

**Chair: Seán Ó Conaill, University College Cork**

1. Mark Coen, Dublin City University, **"No Real Roots in this Country": Historical Reflections on the Inclusion of Jury Trial in the Constitution"**
2. Dr Yvonne Daly, Dublin City University, **"Fade and Fairness: Modern Media and Criminal Trials"**

**SESSION K - PRIVATE LAW REMEDIES EXPLORED**

Venue: Oscar Wilde Suite

**Chair: Professor Steve Hedley, University College Cork**

1. Dr Denise Amram, Scuola Superiore Sant'Anna Pisa, **"The Interaction between Legal Formants in Italy: Few Considerations about a Civil Law System"**
2. Dr. Sara Drake, Cardiff University, **"The Quest for Effective Remedies in the Field of EU Competition Law: From Procedural Autonomy to "Soft" Codification"**
3. Dr Niamh Connolly, Trinity College Dublin, **"The Transformation of Restitution Law: which came first, the chicken or the egg?"**

**SESSION L - CONTEMPORARY PERSPECTIVES ON EDUCATION AND RELIGION**

Venue: J.M. Synge Suite

**Chair: Dr John Stannard, Queen's University Belfast**

1. Sarah Arduin, Trinity College Dublin, **"Can Special Education and Equal Opportunity Be Reconciled In Ireland? Reflections From A Small Nordic Country"**
2. Professor Carol Daugherty Rasnic, Virginia Commonwealth University, **"A House Divided: Which Factions Owns Church Property after a Doctrinal Split?"**
3. Dr Fergus Ryan, Dublin Institute of Technology, **"Education, Religion, and Sexual Orientation: Is there a happy medium?"**

**SESSION M - CONTEMPORARY MEDICO-LEGAL CONTROVERSIES**

Venue: Samuel Beckett Suite

**Chair: Val Corbett, Independent Colleges Dublin**

1. Andrea Mulligan, Trinity College Dublin, **"Crafting a Legal Framework for Assisted Reproduction: Values, Rules and Judicial Incrementalism"**
2. Fiona Broughton, University College Cork, **"Judicial Reasoning and Compulsory Prophylactic Treatment for HIV: the Role of Legal Scholarship in Clarifying the Law on the Pre-natal Child's Right to Health Care"**
3. Caroline Somers, University College Cork, **"Judicial Reasoning and Legal Scholarship: Breaking the Silence Surrounding End-of-Life Decision-Making for Newborns"**
4. Sarah Fulham-McQuillan, Trinity College Dublin, **"Medical Negligence Litigation: A Risky Game of Chance?"**

## **Abstracts for Parallel Sessions**

### **Saturday 9.30-11.00: Parallel Session I**

#### **SESSION A - PERSPECTIVES ON THE ROLE OF SCHOLARSHIP AND JUDICIAL REASONING**

Venue: Oscar Wilde Suite

**Chair: Dr Thomas Mohr, University College Dublin**

1. Brian O'Beirne, Trinity College Dublin, **"The Interaction between Legal Scholarship and Judicial Reasoning: A Morally and Fiscally Suspect Status Quo"**

Currently, the interaction between the endeavour of legal scholarship and the act of judicial reasoning is best characterised in terms of Brownian Motion: judges sometimes happen to heed legal scholarship relevant to their reasoning, sometimes not, and legal scholars sometimes happen to heed judgments relevant to their area of interest, sometimes not. The aim of this paper is to show why the Brownian Model is morally and fiscally problematic.

On the judicial front, the very possibility of a "correct" judicial decision requires access to all relevant legal resources, including potentially enlightening legal scholarship. Only through such access can the judiciary do their job to the best of their ability. The Brownian Model of interaction is morally problematic because it leaves litigants in danger of losing out on the benefit of accurate and informed decisions. In this respect, the status quo is also fiscally problematic: unnecessary appeals from lower courts, appeals which would not have happened given the appropriate input by legal scholars, are a drain on State and individual resources. Given the harsh economic climate we currently face, the need to stem this drain is all the more pressing.

On the legal scholarship front, the integrity of legal academia, as an enterprise that makes a valuable contribution to the legal and political landscape, depends in some measure on the expectation that scholars will be heard. The status quo is morally problematic for it fails to generate such an expectation: it leaves legal scholars somewhat toothless in respect of the normatively loaded issues which they take in hand. Furthermore, legal scholarship, *qua* legal problem solver, is currently an untapped State resource; this is fiscally indefensible given the harsh aforementioned harsh economic climate that we face.

This paper will suggest we implement an alternative model which remedies these problems.

2. David Prendergast, Trinity College Dublin, **"Democracy, Judicial Review, and Legal Scholarship"**

There are democratic concerns about judicial power and they arise most dramatically in the context of judicial review of legislation where the courts are empowered to strike down laws for incompatibility with constitutional

standards. This is huge political power, yet judges are unelected and immune from removal from office on the basis of popular opinion.

Process theories of judicial review aim to address these concerns by explaining how judicial review can protect democracy. John Hart Ely's book, *Democracy and Distrust*, published in 1980, still represents the most significant statement of process theory. According to process theory, the courts ought to play a restrained role in judicial review, exercising their power only to protect the health of democracy.

Thus, process theory sees the courts as guardians of democracy. Judges represent a bulwark against the standing possibility of democracy decay. To perform this role, the courts must have independence – and yet this is precisely why the democratic concerns arise in the first place. It can be seen as a “who guards the guardians” problem. Part of the answer to this question can be found in the immense sense of respect that attaches to judicial office. Judges are respected: by others and also by themselves. This sense of self-respect is important. Contemporary advocates of process theory in the United States, such as Richard Pildes and Michael Dorf, have added to the above account of why judges can be trusted to act in good faith and with due restraint. Their suggestion is that law professors' critical scrutiny of judicial decisions is very important in providing judges with incentive to perform their role competently and within proper parameters.

In this paper I aim to evaluate the above argument on its own terms and tentatively endorse it – based on an understanding of democracy as non-essentialist – as an argument of general worth and not just of relevance in the United States.

3. Dr Diarmuid Rossa Phelan, Trinity College Dublin, **“Misunderstandings about Focus of Judicial Reasoning”**

This paper will address the mistake of assuming that the scholarly analysis of cases into authoritative lines of precedent is the sole or dominant line of judicial reasoning, under the following topics.

1. There is a major contrast between lower and superior courts, based in part on difference in function. Courts of summary jurisdiction are summary. Legal scholarship focuses on appellate legal reasoning. There are several benefits to summary jurisdictions and how they sort out cases. However so far as lines of authority are concerned, randomness increases, flawed hearings increase. Anyone who thinks law is pointless has not practiced across the gamut of course from summary jurisdiction to appellate. Appellate have their own tricks and power trade offs to reach conclusions not rule determined
2. The common law tradition differs to civil inter alia by absence of advocate general / parquet. As one might also expect, the synthesis of doctrine and academic also differs.
3. Difference in starting points: importance of statute and statutory instrument / regulation, compared with academic focus on cases. Importance of clear rule

compared with academic focus on marginal case.

4. Difference in focus: justice *inter partes* not continuity of supposed precedent narrative. Narrative of parties, not of law.

5. Focus and influence of facts. Whole range, sometimes not caught even in whole report.

6. Judicial reasoning in conduct of cases, in questions, in engineering possibility of settlement, in motion and interim rulings. Contrast limited academic focus on appellate written decisions.

7. Facts, facts, facts. Burden of Proof.

## **SESSION B – MEETING THE CHALLENGES OF TRANSITIONAL JUSTICE**

Venue: Samuel Beckett Suite

**Convened by: Professor Colm Campbell, University of Ulster**

1. Amaia Alvarez Berastegi, University of Ulster, **“Challenges of Intra-democratic Transitions: The Basque Country and the North of Ireland”**

Can a transitional justice process occur in a peaceful, democratic society? The obvious answer is no: transitional justice is related to dictatorships, gross human rights violations, disappearances, dirty wars and other atrocities against the rule of law. However, the praxis shows these processes also happen in polities which are formally democratic before and after the transition. In these cases, the aim is to move from conflict to peace and develop a human rights-based substantive democracy. Analysing the cases of the Basque Country and the North of Ireland, this paper explores the challenges of the model of transition defined as intra-democratic. The study examines the field of transitional justice within the liberal democratic state, whose main feature is a less stressed break with the past than in paradigmatic transitions (from dictatorship to democracy). This paper, therefore, raises some questions about the concept of intra-democratic transition: can transitional justice, as such, happen when an armed conflict as defined in international law has been denied? Can the process of justice be holistic and global when the political system has not broken completely with the past? When will the correct moment to deal with the past occur?

2. Katie Boyle, University of Limerick, **“The Interaction between Legal Scholarship and Judicial Reasoning and the Teleological Journey to Justiciable Economic, Social and Cultural Rights in Northern Ireland and Beyond”**

Northern Ireland is a conflicted democracy existing within a wider democratic state committed to liberal democracy and the full application of International human rights law. Whilst the UK pertains to comply with Article 2(1) of the ICESCR in achieving progressively the rights enunciated therein, adjudication in the UK Courts and the ECtHR would suggest otherwise. This paper aims to examine the alleged economic, social and cultural (ESC) human rights deficit through the prism of recent case law in the UK and against the backdrop of the Bill of Rights forum in Northern Ireland. The paper questions the legitimacy of

the judicial enforcement of ESC rights and argues that the transitional context of the peace process in Northern Ireland has in fact revealed a potential UK wide human rights deficit, thereby facilitating judicial acceptance of legitimate ESC adjudication beyond the transitional state. The nature of this dialectic process assists in understanding the crucial interaction between *Legal Scholarship and Judicial Reasoning*, as the mutual interaction between the two reframes the status of human rights enforcement. The legal reasoning of Lord Steyn in the McKerr case (McKerr v Northern Ireland [2004] UKHL 12) acts as a paradigmatic shift, within a NI - UK context, of the judiciary turning to legal scholarship to clarify the applicability of international human rights standards – allowing academic discourse to play a pivotal role in the legal reasoning of the judiciary and, thus, in the shaping of domestic law. This paper posits that this paradigmatic shift works in tandem with a teleological movement towards ESC justiciability whereby the mutual interaction of scholars and judges plays a pivotal role in the substantive enforcement of international human rights norms pertaining to the indivisibility principle.

3. Dr Siobhán Wills, University College Cork, **“Moving Beyond the Secretary-General's Bulletin on Observance by United Nations forces of humanitarian law: Setting and Enforcing Standards of Accountability for Peacekeepers”**

UN peacekeeping missions do not normally deploy without first securing a Status of Forces Agreement (SOFA) with the host State granting immunity from prosecution in the local courts. Since peacekeepers are not normally parties to a conflict they fall outside the scope of the Geneva Conventions, and their Additional Protocols, at least as originally conceived. The Secretary-General's *Bulletin on Observance by United Nations forces of humanitarian law* deals only with violations of IHL and is of limited applicability since it does not deal with crimes and abuses committed by peacekeepers that are not actively engaged as combatants. The Bulletin does not define the criteria for determining when peacekeepers become actively engaged as combatants; nor the criteria for when they might regain civilian protected status. Unfortunately some peacekeepers commit acts, and omit obligations, that would be serious violations of the laws of armed conflict if committed, or omitted, by a party to the conflict. Peacekeepers may also abuse the local population in other ways that although not prohibited under the laws of armed conflict are nevertheless abusive or exploitative.

Currently the ICRC is pushing for acceptance of an approach that would treat IHL rules and principles as binding on peacekeepers whenever they are deployed in armed conflict situations, whether they are parties to the conflict or not. The UN is resistant on the grounds that such an approach might render UN military personnel legally vulnerable to attack at all times, even when they are deployed in a part of the country where there are no hostilities. This is a questionable premise. However, arguably IHL is not the most appropriate *primary* means of regulating peacekeepers' conduct at all since many of the problems that typically arise do not fall squarely within the ambit of IHL.

4. Professor Colm Campbell, University of Ulster, **“Beyond the Third Dimension Towards a Typology of Transition, Justice and the Democratic State”**

In transitional discourse two critical elements have been under-analysed: time and the quality of democracy, yet both are key to analysis of the democratic state and transitional justice. It is possible to construct a conceptual representation of conventional transitional justice analyses using only three dimensions: authoritarian→democracy, war→peace, and exogenous→endogenous. But adding time as a fourth dimension (past→present) extends analysis beyond the initial period to permit examination of a newly recognized phenomenon of ‘post-transitional justice’ in the consolidating democracy. Combining these insights with analyses of the quality (or thickness) of democracy identifies four situations in which the democratic state can intersect with transitional justice: Intra-democratic transition, post-transitional justice, the use of transitional justice like-mechanisms by consolidated democracies, and accountability following external intervention.

### **SESSION C – RELATIONSHIPS AND THE MODERN FAMILY**

Venue: J.M. Synge Suite

**Chair: Dr Fergus Ryan, Dublin Institute of Technology**

1. Brian Tobin, Trinity College Dublin, **“The Efficacy of Ireland’s Cohabitation Regime”**

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 was truly ground-breaking in that not only did it introduce a civil partnership regime largely akin to marriage for same-sex couples, but in Part 15 it also established a redress model of relationship recognition for those opposite-sex and same-sex cohabitants who do not marry or register a civil partnership in order to benefit a financially dependent party when a cohabiting relationship ends. This paper examines the operation and impact of this statutory regulation of cohabitation to ascertain whether this regime adequately respects the autonomy ordinarily associated with non-marital relationships and the constitutional position of the marital family. The appropriateness of regulating the phenomenon of cohabitation in Ireland at present is considered at the outset of the paper. Thereafter, it is argued that the statutory redress scheme achieves as equitable a balance as possible between the competing concerns of providing protection for vulnerable cohabitants and allowing people to continue to self-regulate their non-marital relationships. Further, this paper demonstrates that the statutory cohabitation scheme also largely assuages constitutional concerns in this area. Finally, it is suggested in this paper that when coupled with available empirical evidence pertaining to cohabitation trends in Ireland, the strict criteria applicable before a vulnerable cohabitant can seek redress from his/her former partner indicate that the statutory regulation of cohabitation is unlikely to have a significant impact on non-marital couples.

2. Dr Maebh Harding, University of Portsmouth, **“The Legitimacy Presumptions: an Unsatisfactory Surrogate for Proper Regulation of Modern Parenthood in Ireland”**

This paper will discuss the inherent unsuitability of the current law regulating parenthood in Ireland to deal with cross border assisted reproduction issues. It will be argued that the current law is outdated and open to abuse leaving children born through foreign assisted reproductive services parentless and stateless. There is no coherent understanding of what a ‘parent’ is in Irish law, yet the primacy given to the marital family in the Irish Constitution means that the status is vitally important. It is argued that it is time to reconsider what parenthood means in an Irish context and what aspects of the status the so-called constitutional ‘protections’ are actually protecting. This paper will the problems currently encountered when couples make use of cross border reproductive services such as sperm donation or surrogacy. The paper will also pose three questions: What is the law governing parenthood in Ireland? Why is that status given preferential treatment in child centred disputes? Is it possible to give up the status of parent in Irish law?

3. Dr Lucy-Ann Buckley, NUI Galway, **“Judicial Approaches to Marital Financial Autonomy in Ireland and Canada: A Relational Perspective?”**

Feminists have challenged the liberal conceptualization of autonomy, proposing instead a variety of “relational autonomy” models. These models have been widely applied in the analysis of different areas of family law, but have not yet been much considered in the context of spousal financial ordering on marital breakdown. Nor is it clear whether courts are willing to adopt relational autonomy perspectives when approaching spousal agreements on property issues, or whether it would in fact make any significant difference, were they to do so. This paper examines the impact of the feminist critique of autonomy on the case law on marital property and spousal support agreements in Ireland and Canada, focusing on the conceptualization of autonomy in each jurisdiction. The paper identifies reasons why courts might be reluctant to embrace relational perspectives, while noting that relational autonomy theory has in fact had a considerable impact on judicial thought-processes in some contexts. The paper concludes that, although relational autonomy theory may make a very significant difference in some cases, the number of such cases may be smaller than many feminists might expect. The case law may therefore suggest ways in which the feminist approach should be refined. Nevertheless, the paper contends that the relational approach to autonomy remains important, both in principle and as a practical concern where courts are evaluating the weight to be accorded to marital agreements under family law legislation. Accordingly, the lack of movement towards a relational perspective in Irish family property law is a matter of concern.

4. Dr Ronagh McQuigg, Queen's University, **"The Inter-American Commission on Human Rights and the Issue of Domestic Violence"**

On 21 July 2011 the Inter-American Commission on Human Rights issued its much awaited decision in the case of *Jessica Lenahan (Gonzales) v United States*.<sup>1</sup> In a landmark decision the Commission found the United States to be in violation of the American Declaration of the Rights and Duties of Man 1948 due to a failure to protect a victim of domestic violence and her children. This paper will seek to analyse the *Lenahan* decision and its significance. The decision is particularly noteworthy given the strong opposition of the United States Supreme Court to the placing of positive duties on the state to protect individuals from the criminal acts of other individuals. The case law of the European Court of Human Rights had a substantial influence on the Commission's reasoning, and this influence will be examined in the paper.

At a broader level, the decision in *Lenahan* gives further weight to the principle that the failure of a state to provide sufficient protection to victims of domestic violence constitutes a clear violation of human rights standards. In analysing the importance of this decision it must be remembered that until relatively recently domestic violence was not viewed as being a human rights issue. The fact that the United States, the most powerful nation in the world, has now been held to be in violation of human rights standards for its failure to protect a victim of domestic violence and her children is testimony to the remarkable way in which human rights law has evolved in relation to violence against women in the home. It is now the case that domestic violence constitutes a pressing issue, not only for national law, but also for regional and international human rights law systems.

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<sup>1</sup> Case 12.626, Report No. 80/11 (2011).

## **Saturday 11.30-1.00: Parallel Session II**

### **SESSION D: IALT POSTGRADUATE RESEARCH SHOWCASE**

Venue: Oscar Wilde Suite.

**Chair: Dr Noelle Higgins, NUI Galway**

1. Meredith Raley, NUIG, **“The Changing Connection between National and International Law: NHRIs and Article 33”**

International human rights law is simultaneously one of the most important and most difficult areas of law. UN treaties help to set human rights norms globally, but encouraging states to integrate these norms into their laws and policies has proven to be a continual challenge. In recent years, there have been many innovations in the interface between international human rights law and the national legal system.

National Human Rights Institutions (NHRIs) have existed in some form for decades, but it was not until the early 1990s that the international community began to truly exploit their potential to act as a new interface between international and domestic law. This began with the General Assembly adopted The Paris Principles, a set of guidelines for establishing and maintaining a NHRI. While NHRIs can serve many functions, one of their main duties is to work with their national government and civil society to encourage the implementation of treaties the state has ratified, as well as encourage the ratification of all human right treaties.

The Convention on the Rights of Persons with Disabilities is the first human rights treaty of the 21st century, and as such contains many innovations. One such innovation is Article 33, which requires states to establish a national framework to guide the implementation process. The framework in Article 33 has 3 components: A focal point within government to take charge of the implementation process, a coordination mechanism to ensure that all branches and levels of government work together, and an independent monitoring mechanism, based on the Paris Principles.

The changing relationship between international human rights and domestic law has repercussions for all branches of government. If the implementation of human rights treaties improves, it will have a substantial impact on the laws and policies of almost every country on the planet.

2. Amina Adanan, NUI Galway, **“Universal Jurisdiction over Slavery before World War II”**

Universal Jurisdiction is a principle in customary international law which allows any state to prosecute the alleged perpetrator of a serious human rights abuse, in their own national courts. This applies regardless of the place of commission of the crime or, the nationality of the perpetrator(s) or victim(s). In customary

international law, the crimes to which the principle applies nowadays are: piracy, slavery, genocide, war crimes, crimes against humanity and torture.

This paper argues that unlike piracy, slavery was not subject to universal jurisdiction under customary international law prior to the outbreak of World War II. World War II being the turning point for universal jurisdiction in international criminal law. The slave trade was prohibited from 1807 onwards by the leading world powers at that time. And in 1815 the Declaration Relative to the Universal Abolition of the Slave Trade was signed. Despite this, cases such as 'Le Louis' (1815) and 'The Antelope' (1825) demonstrate that pirates and slave traders were treated differently when it came to domestic prosecutions for acts committed on the high seas. From 1615 onwards the pirate fell into the category of *hostis humanis generis* or an enemy of mankind. However this was not the same for slave traders, engaging in an inhumane trade.

In conventional law, the omission of slavery from universality is evident in the Slavery Convention of 1926. In contrast other crimes such as counterfeiting of currency and the trafficking of dangerous drugs were subject to universal jurisdiction via treaties created in the early twentieth century.

This paper analyses and compares the development of universal jurisdiction over slavery, compared to that of piracy, before the Second World War.

3. Eva Barrett, Trinity College Dublin, **"Ireland's On-Shore Wind Policy: 'Caught Between A Rock And A Hard Place'"**

*Awarded IALT 2012 Annual Conference Postgraduate Scholarship*

The Irish Environmental Protection Agency or EPA (the body charged with monitoring Ireland's greenhouse gases) project that Ireland will not meet her annual EU greenhouse gas targets from 2016 on. In addition Coillte (the state owned entity in charge of forestry and a major developer of renewable energy) believe that Ireland will also fail to meet her self-imposed target to attain a 40 percent share of electricity from renewable sources (and mainly on-shore wind) by 2020. While neither body elaborated on the underlying reasons for these predictions, there is one particularly significant impediment affecting on-shore wind development in Ireland. This is the clash that exists between the EU's recent climate action legislation and the legislation designed to ensure biodiversity and environmental protection. The source of this clash, its effect on Irish on-shore wind development and Ireland's resulting inability to meet her EU obligations will be analysed in the following paper.

4. Magdalena Duggan, University of Limerick, **"Creating a Legal Framework for Preimplantation Genetic Diagnosis in Ireland – regulation, recommendations and some potential tort law scenarios"**

*Awarded IALT 2012 Annual Conference Postgraduate Scholarship*

Preimplantation genetic diagnosis, yet another breakthrough achievement of modern reproductive medicine, is gradually becoming a reality in Irish fertility clinics. The technique, used in conjunction with IVF, involves the examination of

DNA extracted from a single cell of a human embryo at a very early stage of its development. Its main objective is to detect serious genetic and chromosomal abnormalities which are responsible for the occurrence of potentially fatal disorders. Only the embryos found to be unaffected by a particular condition are used for subsequent implantation in the womb. The controversies stemming from the rationale behind PGD, which boils down to 'choosing the best future child' have divided the medical and legal community, nonetheless, they might also provoke further reflection.

The aim of this paper is to explore the law relating to Preimplantation Genetic Diagnosis in this jurisdiction. In the first part the author will outline the medical and ethical aspects of the discussed technique. The second section will describe and analyse the current legal status of the assisted reproduction in Ireland, in general, as well as provisions and judgments relevant to the clinical use of PGD, in particular. Attention will be drawn to the provisions of the law of civil obligations, applicable in cases where availing of the diagnosis did not produce the effects envisaged by the prospective parents. The third, final part will attempt to create a merely hypothetical but optimal model of regulation for PGD in the light of recommendations available under international and domestic law. The experience of other jurisdictions that have already regulated the issue will also be briefly presented.

It is anticipated that the paper will provide some inspiration for the drafters of the long awaited Irish legislation on assisted reproduction, in which Preimplantation Genetic Diagnosis, despite its ethical considerations, should be and, hopefully, will be duly acknowledged.

## **SESSION E - THE IRISH CONSTITUTION IN REVIEW: CRITICAL DEVELOPMENTAL PERSPECTIVES**

Venue: Samuel Beckett Suite

Chair: **Professor Gerry Whyte, Trinity College Dublin**

1. David Kenny, Trinity College Dublin, **"The 'Person' of the Citizen, and the Resurrection of Article 40.3"**

In the last several years, a new development in the protection of constitutional rights has taken place that might prove to be a significant innovation. This development, spearheaded by Hogan J in the High Court, is the resurrection of an express constitutional right that has heretofore received surprisingly little judicial attention: the right to the person, protected as one of the personal rights in Article 40.3.

In three High Court cases in 2011, Hogan J invoked the right to the person to vindicate the rights of claimants. In *Kinsella v Governor of Mountjoy Prison*,<sup>1</sup> Hogan J held that the detention of an individual in a secure, isolated cell in Mountjoy Prison for an extended period of time was a violation of his right to the person. This right was violated not only because of the physical consequences of his detention, but also because of the significant mental strain. The right to person protects “not simply the integrity of the human body, but also the integrity of the human mind and personality.” In the case of *H v HSE*,<sup>2</sup> Hogan J ordered the detention of a young man in St Patrick’s Institution, not for any punitive reason, but in the interest of his own safety and welfare. He relied, in part, on protection of the “person” in Article 40.3.2° to justify the jurisdiction of the Court. In *A v Refugee Appeals Tribunal*,<sup>3</sup> Hogan J relied on the right to person to quash a decision of the Refugee Appeals Tribunal, which had not sufficiently regarded the risk that A, a minor, would be subject to female genital mutilation if she were deported.

There are further cases where Hogan J has used the right to person in a more ancillary sense, or relied on the general protect of Article 40.3 to bolster his conclusions.<sup>4</sup> There are several possible ways for this right to develop. It might be a source of novel constitutional rights protections, with the expansive idea of the person, including the integrity of the human mind and personality, used to offer rights protection in situations where the Constitution previously did not tread. More modestly, it could be a way to recognize, with more legitimacy and a stronger textual basis, rights that were previously drawn from other constitutional provisions, such as the right of bodily integrity and the right to secure care for children. Either way, I believe this is a significant development, and I propose to explore these possibilities in my paper.

2. John O’Dowd, University College Dublin, **“Recalibration of the ‘scales of justice’? - Some thoughts about ‘fine-tuning’ by constitutional amendment”**

In recent years attention has been drawn to the way in which certain amendments or proposed amendments to the Constitution have tried to ‘fine tune’ it by making changes that, expressed in general terms, are so specific in their effects as to alter, prospectively, the law as laid down in particular cases or lines of cases. Critics have characterized this practice as quixotic and foreign to the nature of judicial interpretation of the Constitution in our system and as one that it renders the effect of amendments more, rather than less, opaque to the voters. The last twenty years have also seen the permeation of amendments to the text of the Constitution by concepts, even whole phrases, drawn from judicial decisions. This blurring of the distinction between the language of interpretation and the language of enactment should raise some questions about the impact

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<sup>1</sup> [2011] IEHC 235.

<sup>2</sup> [2011] IEHC 297.

<sup>3</sup> [2011] IEHC 373.

<sup>4</sup> See, for example, *S v Minister for Justice* [2010] IEHC 31; *N v Minister for Justice* [2011] IEHC 290; *M v Minister for Justice*; *Baily v Governor of Mountjoy Prison* [2012] IEHC 366; and *Temple St v D* [2011] IEHC 1.

scholarly analysis of constitutional interpretation has in a small jurisdiction. With a relative dearth of case law in many areas and a limited opportunity for the Supreme Court to refine its case law through a series of decisions on a topic, scholarly exegesis and extrapolation of judicial decisions may have a more than usually important role. This is accentuated by the relative ease with which an amendment can be proposed, a factor that creates a sometimes febrile environment of speculation and debate about what kinds of amendment would be feasible and appropriate to deal with the undesired consequences of specific judicial decisions (or extrapolations of such decisions). The paper reviews the process by which the distinction between constitutional discourse (judicial, professional and academic) and what the Constitution itself says is undermined by piecemeal amendments and what implications this has for the role of scholars in that process.

3. Dr Oran Doyle, Trinity College Dublin, **“Constitutional Review of Administrative Action”**

The Supreme Court decision in *Meadows v Minister for Justice, Equality and Law Reform* has introduced a proportionality test into administrative law where it is alleged that an administrative decision has breached constitutional or ECHR rights. This test is roughly analogous to the proportionality test nominally applied to the constitutional review of legislation. The meaning and import of the Supreme Court decision has been contested in the High Court. It has been applied most often in the immigration context, where three notably different approaches have emerged. This paper reviews the Supreme Court decision in *Meadows* and how it has subsequently been applied. It argues that it is time to reconsider the application of the “proportionality test” in all cases of constitutional review. A starting point for this reconsideration involves recognition that there are three types of decision-maker whose decisions may impugn rights: legislative decision-makers, discretionary administrative decision-makers, and administrative functionaries. An understanding of the different characters of each of these decision-makers, combined with an understanding of how their decisions interact to affect people’s lives, is a necessary precursor to deciding on how constitutional review should be structured. In particular, it informs the answers to the two crucial questions: what power should a decision-maker have to decide that a *prima facie* breach of a constitutional right is required? On what basis and to what extent should the courts defer to such decisions? In this paper, I begin to formulate an answer to those questions.

## **SESSION F – NEW DIRECTIONS IN CORPORATE AND COMMERCIAL LAW**

Venue: J.M. Synge Suite

**Chair: Dr Deirdre Ahern, Trinity College Dublin**

1. John Quinn, Dublin City University, **“Enlightened Shareholder Value after the OFR”**

One of the most scrutinised aspects of the Company Law reform in the UK was the adoption of Enlightened Shareholder Value (ESV), a new line of thinking in relation to the corporate objective i.e. in whose interest's should companies be run. Under Enlightened Shareholder Value a company could no longer only serve their shareholder's best interests but must also take into account non-shareholder constituents during the decision making process. The theory's overall aim according to the Company Law Review Steering Group (CLRSG) was to “achieve competitiveness and efficient creation of wealth and other benefits for all participants in the enterprise.” This suggests quite a shift away from the traditional shareholder value in model which was in operation in England that required managers to focus on running the company for the exclusive benefit of the shareholders.

The CLRSG took a two-step approach to implementing this new theory. First of all they recommended a statutory set of directors' duties which would require directors, during the decision making process, to “take into account” a wide range of interests such as employees, suppliers, the community and the environment. Secondly they planned on enacting an increased reporting, disclosure and transparency requirement in the shape of an Operating and Financial Review (OFR). The OFR was to act as an enforcement mechanism to ensure that directors were, in practice, taking into account these non-shareholder interests by requiring the detailed disclosure of information in relation to company's policies and success of those policies on these constituents among other requirements. However a few months after its enactment into law the OFR was withdrawn on the basis that it was a disproportionate and unnecessary burden on companies.

This paper seeks to address the life of Enlightened Shareholder Value after the OFR, by assessing whether the theory has the potential to achieve its goals in the wake of the OFR's deletion.

2. Edmund Shanahan, Trinity College Dublin, **“On Mountains and Molehills: Theoretical Innovation and Resistance to Change in Corporate Rescue Law”**

A war has raged among legal academics on both sides of the Atlantic Ocean and elsewhere for much of the last thirty years. That war relates to the intellectual coherence and practical worth of company rescue legislation. This legislation is both complex and technical. That which is ostensible in it can be misleading: company rescue can take many forms. Many of these forms can seem uninviting to the management of a struggling company. From the creditors' perspective, company rescue legislation can seem equally uninviting; it can work against the

time-hallowed principles of insolvency law and it serves to weaken property rights. At a practical level, corporate rescue law has in important ways been transformed from what had originally been envisaged by its original drafters. In the United States, the Chapter 11 process which was traditionally regarded as debtor-friendly has often been hollowed out by creditors willing to refinance an ailing corporation's operations. In these cases matters are resolved to the creditor's satisfaction prior to the court appearance. In the UK, which has traditionally been creditor-friendly, a system of both formal and informal rescue solutions is now available of a kind that is the most sophisticated in Europe. The literature relating to all of this is vast. It ranges from the technical innovativeness of Finch (2012) and LoPucki (2003) to that of Jackson (1986) and Franken (2004). The objective of this paper is to analyse judicial pronouncements in company rescue cases in the United States, the United Kingdom and the Irish Republic, so as to determine the influence upon judges of leading insolvency law academics. The argument is presented within the context of the appropriateness or otherwise of formal rescue initiatives for companies with varying ownership structures and of the efficacy in many cases of informal rescue.

3. Caterina Gardiner, NUI Galway, **"The Proposed Common European Sales Law: A New Direction for European Contract Law?"**

On 11<sup>th</sup> October, 2011, the European Commission published its proposal for a Regulation on a Common European Sales Law, ("CESL"). This proposal marks an innovative approach to the problems caused by a fragmented sales law regime across Europe. The proposal, instead of seeking to ensure harmonisation of Member States national laws, envisages a *voluntary* 'second regime' of contract law introducing a set of rules for cross-border sales transactions common to all Member States. Under the proposal, a trader would be free to choose to offer a contract under the regime or to remain with existing national contract law. In other words, the proposal introduces an 'opt-in' system of sales law which would exist alongside Member States' domestic sales law. Undoubtedly, the origins of this new approach of using an optional instrument lie in the failure of the Commission to achieve agreement on a comprehensive Consumer Rights Directive based on a maximum harmonisation approach. By using the technique of an optional instrument, it is evident that the Commission has moved away from the difficult path of full harmonisation as a means of avoiding problems of fragmentation of national laws regulating consumer transactions. Key to the success of the CESL will be whether businesses will be prepared to 'opt in.' In this regard, an important factor will be legal certainty as to the interpretation of its provisions. Many of the provisions of the CESL are open-ended and businesses may fear that the text leaves too much room for varying interpretations. In the first instance, it is still national courts which will make decisions and interpret the provisions of the optional instrument. There is likely to be some uncertainty at least in the early days and particularly with regard to provisions which are unfamiliar to Irish and U.K. courts such as the general duty of good faith. This paper will examine the provisions of the proposed optional instrument, its prospects for success and its likely interpretation by national courts and the European Court of Justice.

## **Sunday 10-11.30: Parallel Session III**

### **SESSION G – INNOVATION IN TEACHING AND LEARNING**

Venue: Oscar Wilde Suite

**Chair: Dr Yvonne Daly, Dublin City University**

1. Dr Brenda Daly, Dublin City University, **“Legal Education in a Digital Age: Can Web 2.0 Technology Enhance the Student Learning Experience and Increase Student Engagement?”**

This paper analyses the usefulness of online teaching and learning tools and Web 2.0 technology to enhance both the learning experience of law students and to encourage students to effectively engage in an online environment.

This paper is based upon the findings of a pilot study that utilised Web 2.0 technology in two modules: LG347 Healthcare Law & Society and LG308 Law & Dispute Resolution. Two technology based learning resources were developed and incorporated as part of teaching and assessment for these modules: Xtranormal animation software and Wikis (available via the Moodle VLE). The first section of the paper presents an overview of the reasons why the Xtranormal software and Wikis through Moodle were selected as the two technology based learning resources to incorporate into delivery and assessment of both modules. Justification for selection of these particular technology based learning resources is critiqued in respect of the extant literature within this section. The second section of the paper presents an overview of how the two learning resources are currently incorporated into LG347 Healthcare Law and Society, and LG308 Law & Dispute Resolution. The author will then present findings from a survey of the students’ experience of using these technology based learning resources, as well as highlighting issues that have arisen in the development and implementation of the two technology based learning resources, concluding whether in practice Web 2.0 technology does in fact enhance student learning and increase student engagement.

2. Dr Chris Taylor, Bradford University, **“Supporting Student Engagement in Empirical Socio-legal Research within LLB Skills Development”**

This paper will discuss a recent initiative to develop a training, mentoring and supervision structure for undergraduate law students participating in qualitative socio-legal research projects in conjunction with partner institutions and organisations. This work is being conducted as part of an existing research partnership between Bradford University Law School and West Yorkshire Police, details of which can be found at

<http://www.brad.ac.uk/management/research/groups/law/wyprcp/>

This work is intended to produce a generic framework which can be used with other partners to enable undergraduate law students to gain invaluable research,

interpersonal and presentation skills to enhance their marketability within a safe and structured learning environment which also promotes student engagement with the wider community, thereby enhancing the impact of Law School research activity.

Working semi-autonomously with private and public sector organisations students will be able, not only to supplement their own skills and learning but also to contribute to the wider community by means of applied socio-legal research. Such opportunities do not currently exist at undergraduate level and so students often feel ill-equipped to develop more applied research and presentation skills within a real research setting which has benefits outside of undergraduate assessment and which make a real contribution to the community. It is essential, however, that students are properly trained, mentored and supported in this role and so the purpose of this project is to develop an integrated framework to support students in this work.

As part of this project students are placed within a local police station where office space and administrative support has been provided by West Yorkshire Police. Students will formulate a research strategy aimed at assessing community attitudes within the West Bradford policing area towards issues such as media engagement, intra community communication and the communication of policing initiatives and successes. The work is funded by West Yorkshire Police and the Higher Education Academy.

3. Dr Maria Cahill, University College Cork, **“Encouraging Students to Critically Evaluate Judicial Reasoning: UCC’s Advanced Legal Reasoning Module”**

Conscious of the reticence with which students engage with judicial reasoning and the consequent lack of rigour with which they engage with legal argumentation as they read cases, this new module aims to provide a forum within which critical evaluation of judicial reasoning is encouraged in a rigorous and supportive environment. This paper will outline first the background to the development of the course at UCC, the initial impetus for this innovative module development, and the example taken from colleagues in other jurisdictions who lead in this area. Next, it will outline the core learning objectives, and the themes considered in the various topics comprising the lecture series, and how the lecture series complements the other subjects – both clinical and substantive – taken by students during their degree. Finally, and most importantly, the paper will describe the innovations taken in module delivery and assessment, the challenges faced by students, and their feedback and self-assessment.

## **SESSION H – FINANCIAL CRIME: MEETING THE REGULATORY AND ENFORCEMENT CHALLENGE**

Venue: Samuel Beckett Suite

**Chair: Dr Noel McGrath, University College Dublin**

1. Lauren Kierans, American University Bulgaria, **“An Analysis of the Current Sectoral Approach and the Proposed Generic Approach to Whistleblowing Law in Ireland”**

This paper compares the current sectoral whistleblowing law in Ireland with the proposed generic regime, and seeks to determine which legislation is more conducive to encouraging and protecting whistleblowers. The paper begins with a review of why whistleblowers are needed and why they need to be protected. It proceeds to highlight the attitudinal shift towards whistleblowers that is emerging in Ireland and the growing recognition of their fundamental role in uncovering wrongdoings. The paper then assesses whether appropriate reporting mechanisms and protections for whistleblowers are in place. This analysis reveals that existing law provides reporting mechanisms and protections for a limited number of persons in a limited number of sectors only. There is a lack of awareness of some provisions and other provisions can be both confusing and burdensome. Finally, the Draft Heads of the Protected Disclosure in the Public Interest Bill 2012 are considered. The Draft Heads provide more robust protections for whistleblowers than has been seen to date. Nonetheless, it is concluded that it does not go far enough; many provisions of the new law need to be added, omitted, and amended to ensure that all potential whistleblowers are offered appropriate protection.

2. Shaun Elder, University of Limerick, **“Financial Regulatory Reform: Discretionary decision-making within a new Enforcement Policy”**

Following the global financial crisis (GFC) the G20 advocated reformed financial regulatory architecture. The EU and US engaged in rules, tools and institutions reform. Calls for a greater role for the moral signalling power of the criminal law were made. With both financial and regulatory paradigms in flux the ongoing GFC aftermath, a time of deep uncertainty, provides an ideal opportunity to both re-examine prior regulatory enforcement models, and to incentivise new proposals reflecting high standards.

One recent international survey identified sanction origin as a key feature of five identified enforcement models. The EU Commission in 2010 declared enforcement one of four essential financial regulatory reform pillars. It highlighted discourse upon the interplay of criminal/administrative sanction as one of sixteen important recommendations. Discretionary decision-making around such interplay requires a pathway choice and launching factors.

Jurisdictional, legitimacy, spatial and temporal issues arise including: Who deploys the preferred pathway? What criteria are applied in such decision-making? When is such taken? What procedures are required so as to maintain all options for as long as needed? Can decisions be reversed? What tool-kit is

available, path specific or transversal? In the event of investigative action or ultimately sanction what rules govern publicity? Should there be a transparent enforcement policy statement open to public consultation and scrutiny containing answers to these and other relevant questions?

This paper explores the intersection of criminal/civil/administrative sanctioning in relation to the financial regulatory control domain. Interplay issues are examined via three empirical studies: a recent EU survey of national Member State practice in the environmental sector, in the operationalization of Australian policy in ASIC the securities and investments commission, and in the US SEC co-operation practice within which a co-operative infringer may forestall criminal proceedings. Conclusions are drawn toward a best practice standard with potential for universal application.

3. **Marian O'Neill, Waterford Institute of Technology, "Fitness and Probity Due Diligence Framework under the Central Bank Reform Act 2010 (No. 1)"**

The purpose of this legal framework is primarily to strengthen and support the financial system thereby protecting the consumer and preventing potential future serious damage to both the financial services sector and to the national economy. In the context of the strengthening of the regulation of the financial services sector in Ireland this paper takes a look at the legal framework for fitness and probity due diligence standards that will apply to all financial institutions and to their controllers from 2013 onwards irrespective of whether the controller is an employee selling services or is the chairman or a member of the board exercising executive powers. The legal framework is found in Part 3 of the Central Bank Reform Act 2010 (the 2010 Act), Statutory Instruments No. 437 and No. 615 of 2011 and two codes issued under section 50 of the 2010 Act namely the Fitness and Probity Code and the Minimum Competency Code.

Part 3 of the 2010 Act is addressed to all regulated financial service providers in Ireland who are authorised by the Central Bank, the Irish regulatory authority (the Regulator). The 2010 Act imposes statutory obligations on all regulated financial service providers having regard to the standards of fitness and probity required to be demonstrated by their existing officials, managers, directors, and others who perform controlled functions within regulated financial institutions in Ireland. These statutory obligations will also apply in the context of new incoming officials, managers, directors and others who are to perform controlled functions prior to those individuals being appointed to take up the controlled functions. In addition the legal framework imposes many legal duties upon the Regulator including the vesting of a power to apply for administrative sanctions and to seek orders, including injunctions, from the High Court against both individual controllers and the financial institutions which can lead to both the imposition of civil and criminal liability.

**SESSION I CURRENT ISSUES IN EMPLOYMENT LAW PEDAGOGY AND PRACTICE: A COMPARATIVE PERSPECTIVE**

Venue: J.M. Synge Suite

**Convenor: Dr Michael Doherty, Dublin City University**

1. Debra Burke, Western Carolina University, **“The Pedagogical and Ethical Implications of Unpaid Work Placement”**

Work placement may be defined as controlled experiential learning where a student receives academic credit while employed by an organization in a chosen area. Such experience imparts skills and abilities knowledge through the interaction with technical experts in an actual work environment, and allows students to witness professionals so as to develop their own professional persona. Unlike the classroom environment in which skills and abilities training also transpires, the internship experience uniquely allows students to acquire knowledge in context. Such contextual learning is desirable because it permits students to gain task and environment knowledge, as well, i.e., knowledge concerning customers, suppliers, technology, competitors, products/services, and political, legal, and social trends, which is gained through experience. In addition to being a beneficial situational learning experience, work placement programs also give applicants an advantage when seeking permanent employment.

But is an unpaid internship experience a legitimate investment in human capital that eventually will produce economic returns for the intern and society? Or is the receipt of gratuitous services inherently exploitative, despite its educational value? Do unpaid work placements disproportionately burden students in lower socio-economic classes and perpetuate economic discrimination? It seems axiomatic and obvious that the use of unpaid labor, albeit seemingly voluntary, is ethically suspect unless otherwise justified. This presentation examines the pedagogical and ethical imperatives of unpaid internships, and briefly examines some legal implications under minimum wage legislation. It concludes that the reciprocity of benefits between students and employers suggests that the relationship is an ethical one, particularly if the experience is enriched through the supervision of faculty members, who guide the integration of learning, assess and monitor results, and provide timely feedback.

2. David Nagle and Professor Carol Daugherty Rasnic, Virginia Commonwealth University, **“Employment Discrimination Law in the USA: A Comparative Perspective”**

The United States was arguably the forerunner in federal employment discrimination law, beginning with the 1963 Equal Pay Act (equal pay for equal work as between the sexes). The most comprehensive legislation was Title VII of the 1964 Civil Rights Act (prohibiting workplace discrimination on grounds of race, color, religion, national origin, and sex), followed by the 1967 Age Discrimination in Employment Act, the 1972 Rehabilitation Act, and the 1990 Americans with Disabilities Act.

The American panelists' remarks will focus on differences between American federal law and EU (and European domestic) statutory and judicial laws particularly in the areas of

(i) age (*Petersen and Wolf*, 2009, at the EU level, and *Homer and Clark et al.* in the UK, 2012); (ii) sexual orientation or preference (see especially the EU's Amsterdam Treaty and the 2000 Framework Directive, compared with federal appellate court decisions in the U.S.A. and the still pending bill for ENDA [Employment Non-Discrimination Act]); and (iii) efforts at affirmative action (see, *e.g.*, *Ricci v. Destefano*, a city firefighter affirmative action plan struck down by the Supreme Court in 2009); and (iv) the impact of the 2012 Presidential election on statutory enforcement in this area.

The U.S.' federalism permits additional state statutes in this area. Thus, there is also an abundance of state non-discrimination statutes (*e.g.*, New York Human Rights Act).

Notably absent in U.S. non-discrimination law are protections on grounds of political belief (see, *e.g.*, national laws in Denmark Luxembourg, Norway, Portugal, Spain), ideology or philosophy (Belgium); marital or family status; and the uniquely Irish domestic protection for the travelling community.

The two American panelists combine experiences in the areas of practice and teaching of law.

3. Anthony Kerr, University College Dublin, **"From Labour Law to Employment Law"**

Presenter and panel reflections.

4. Dr Desmond Ryan, Trinity College Dublin, **"The Employment Law Curriculum"**

Presenter and panel reflections.

## **Sunday 11.45-1.00: Parallel Session IV**

### **SESSION J - HISTORICAL AND CONTEMPORARY PERSPECTIVES ON CRIMINAL LAW AND CRIMINAL TRIALS**

Venue: Sean O'Casey Suite

**Chair: Seán Ó Conaill, University College Cork**

1. Mark Coen, Dublin City University, **"No Real Roots in this Country": Historical Reflections on the Inclusion of Jury Trial in the Constitution"**

This paper will examine the official and public discourse on jury trial which formed the backdrop to its inclusion in the Constitution of Ireland. A historical analysis will demonstrate that the future of the jury could not be taken for granted in the post-Independence period. The extent to which it should and would be retained was one of the great controversies of 1920s and 1930s Ireland. The authorities discovered that the system which had often refused to convict as a challenge to British authority was equally capable of returning anti-prosecution verdicts in the Irish Free State. Severe legislative curtailments of jury trial were necessitated, it was argued, by the intimidation of jurors and by anti-Government feeling. In addition, there were forceful criticisms of this type of trial in official quarters.

In spite of this unpromising backdrop, jury trial was enshrined in the new Constitution. Opponents of the Government worried that the provision for special courts in Article 38 would render hollow the guarantee of jury trial in the same article. While this fear proved unfounded, the questioning official attitude to jury trial did not end with the enactment of the Constitution. In time it abated, suggesting the bedding down of the constitutional order and a growing acceptance of the jury as a domestic institution which had generally served its purpose well.

This paper highlights attitudes to jury trial which have not previously been synthesised. It demonstrates that the jury was viewed with suspicion by parts of the new Irish Establishment and that national identity, as well as law and order concerns, was invoked to justify its abolition. It raises the question why jury trial was included in the Constitution.

2. Dr Yvonne Daly, Dublin City University, **"Fade and Fairness: Modern Media and Criminal Trials"**

It has been well-established that the right to a fair trial, protected under Art.38.1 of the Irish Constitution and under Art.6 of the European Convention on Human Rights, is one of the most significant rights afforded to an accused person. This paper examines the threat posed to that right by modern media coverage of criminal events and trials, including the use of social media.

The paper begins by outlining the test applied by the courts in relation to any pre-trial claim that adverse publicity is likely to interfere with the fairness of a criminal trial. This test has been clearly established such that the court must be satisfied that there is a real or serious risk that the relevant trial would be unfair. The paper will examine the ways in which such unfairness might arise and the methods considered by the courts to ensure fairness in such cases, including, in particular, the so-called “fade factor”.

The paper will go on to look at the specific challenges posed by ongoing media interest in a particular individual or criminal activity, and will consider the concrete examples of *People (DPP) v McCarthy, Costello and Dundon* [2008] 3 IR 1 and *Mustafa (Abu Hamza) (No. 1) v United Kingdom* (2011) 52 EHRR SE11. The enduring faith in judicial directions to the jury to decide cases solely on the evidence presented at trial will be highlighted and the value of same considered.

One other matter that will be discussed is the prevalence of social media; the “tweeting”, messaging and other dissemination of anybody’s views on any issue, at any time. The courts have been faced with difficulties in ensuring fair trials in this regard too and the question can be asked, if the Internet never forgets, is the “fade factor” still effective?

## **SESSION K – PRIVATE LAW REMEDIES EXPLORED**

Venue: Oscar Wilde Suite

**Chair: Professor Steve Hedley, University College Cork**

1. Dr Denise Amram, Scuola Superiore Sant’Anna Pisa, **“The Interaction between Legal Formants in Italy: Few Considerations about a Civil Law System”**

As known, Italy is a Civil Law system, where statute law prevails on judicial precedents. This paper aims to show how flexible this definition is, especially in case of intense interaction between legal scholarship and courts.

In the last years, in fact, an increasing as well as mutual contribution between academics and judges has been able to reverse the hierarchical relationships between legal formants to plug the gap in the protection of some fundamental rights (I). In particular, we will illustrate the intense dialogue between legal scholarship and courts on non-pecuniary losses, which led to the elaboration of the “Danno Biologico” category (i.e. pain and suffering), 15 years before the statutory law (II). Moreover, we will remark how, in the evaluation of personal injury damages, precedent is currently considered almost binding, as recently shown by the Italian Supreme Court (III). Then, we will describe how such stimulating interaction between legal formants affects current Italian legal debates, as homosexual couples protection or euthanasia - where the legislator has not intervened yet, or as IVF - where the Act n. 40 of 2004 is strongly questioned also by ECHR (IV). Finally, we will consider the results of our analysis in a comparative perspective in order to find out whether the illustrated Italian experience is an isolated phenomenon or not (V).

2. Dr. Sara Drake, Cardiff University, **“The Quest for Effective Remedies in the Field of EU Competition Law: From Procedural Autonomy to “Soft” Codification”**

In its 2001 ruling in *Courage*, the Court of Justice of the European Union (CJEU) finally answered the calls of academic commentators and introduced a Union-wide right to damages for individuals seeking compensation for breach of the EU competition law rules. Although the judgment filled an important gap in the EU’s quest for effective remedies, for many, it did not go far enough. In 2008, the European Commission published a White Paper on Damages which proposed the codification of the right to damages established in *Courage* and the introduction of Union-wide measures to increase the standard of effective remedies across the EU. This triggered a broad and on-going debate into the role of private enforcement in this field and, more importantly for the purpose of this paper, the extent to which the EU should intervene in the national procedural autonomy of the Member States. This paper uses the White Paper as a case study to explore the EU’s approach towards the regulation of legal remedies and to determine which approach is to be preferred. To answer this question, the paper presents three different models which illustrate some of the key regulatory and constitutional issues facing the EU in its regulation of legal remedies in the field of EU competition law. Whether the proposal is adopted or not (a legislative proposal is due by the end of 2012), the paper will conclude that unless the EU and its Member States address the thorny constitutional issue of competence in the field of remedies more generally, a full and complete system of effective remedies across the EU in any field will be difficult to achieve.

3. Dr Niamh Connolly, Trinity College Dublin, **“The Transformation of Restitution Law: which came first, the chicken or the egg?”**

*How does a radical transformative idea take hold and become orthodox, uncontested law? How do judges and scholars work together to effect dramatic change in the common law?*

This paper explores the interplay between judicial decision-making and academic scholarship in the dynamic creation of the common law. The radical transformation of the law of unjust enrichment offers an unparalleled example of the law-making function of the common law judge at its most creative. It provides the perfect case study to explore how such dramatic change takes place and the respective, mutually interdependent, roles of scholar and judge.

The transformation of restitution is due to the reconceptualization of the law as based on the principle against unjust enrichment instead of implied contract. All other developments in the modern law of unjust enrichment flow from this single big idea.

Professor Birks identified unjust enrichment as the causative event in many restitution cases. Although prior judicial authority opposed his analysis, Birks won the argument, judges adopted his analysis, and the law has indeed changed.

Birks' seminal *Introduction*<sup>1</sup> was widely cited in judgments until it became sufficiently assimilated as the orthodox statement of the law no longer to require attribution. The development of an intellectual structure underpinning the general principle, and in particular, Birks' own taxonomic work, has been an essential accompaniment to the adoption of the general theory.

The role of academics is essential to such dramatic shifts in the common law. Scholars offer a cohesive conceptualisation of the law. They draw attention to overlooked precedents and authorities from other common law jurisdictions. The common law may be cases, but precedents, like words, mean what we say they mean.<sup>2</sup> Academics select and reshape authorities to fit their explanation. Ultimately, precedents may take on the meaning attributed to them by academics, lawyers and judges.

How do scholars persuade the judiciary; through their scholarly writing, through teaching, through key figures who transcended the two domains or perhaps through informal dialogue? In the context of an adversarial legal system it is not a simple bilateral relationship: counsel constitutes a filter between academic and judge.

Lastly, will lessons from the refoundation of modern restitution on unjust enrichment assist in predicting the fate of other radical proposals, including absence of basis analysis?

## **SESSION L: CONTEMPORARY PERSPECTIVES ON EDUCATION AND RELIGION**

Venue: J.M. Synge Suite

**Chair: Dr John Stannard, Queen's University Belfast**

1. Sarah Arduin, Trinity College Dublin, **"Can Special Education and Equal Opportunity Be Reconciled In Ireland? Reflections From A Small Nordic Country"**

Ireland has undertaken significant changes in the form and delivery of special education over a short period of time. Until relatively recently, special education existed on the margins of society in general, and the education system in particular. Now more than ever, special education is identified as being an important component of the wider education community. The right to education of persons with learning difficulties is now well established under the Irish Constitution and has received official recognition through the enactment of a detailed legislative framework, culminating with the Education for Persons with Special Educational Needs Act 2004. Nonetheless, despite the evidence of a shift in its policy, Ireland is still far from providing equal educational opportunities for this category of persons with learning difficulties.

In this context, this paper questions whether the Irish special education system

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<sup>1</sup> PBH Birks, *An Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985).

<sup>2</sup> L Carroll, *Through the Looking-Glass, and What Alice Found There* (1871)

can ever be reconciled with the ideal of equal educational opportunities and, if so, what are the roads that would lead to such a path of establishing a right to quality education.

While attempting to respond to this dilemma, this paper considers the perspective of the Finnish education system. Very often praised for its welfare system, democratic practice, low level of unemployment and sustainable economic growth, Finland has recently attracted the attention of the international community for its success in educational outcomes. This small country – about 5,4 millions of inhabitants – illustrates positively how all students, regardless of their abilities and/or capabilities to learn, have a right to receive a quality education that is best suited to their individual needs and, consequently, that enables them to learn and foster at their own level and own speed in the best suited environment. In this sense, equality of both status and opportunity, which are key elements in equity, are cornerstones of the Finnish education system.

Based on this review, this paper calls for some reflections on the way the Irish special education system should move forward in the future.

2. **Professor Carol Daugherty Rasnic, Virginia Commonwealth University, “A House Divided: Which Factions Owns Church Property after a Doctrinal Split?”**

Intra-denominational splits in U.S. churches have pitted sectors against each other in legal challenges regarding ownership of church property. The result has been an American court departure from their usual hands-off stance in internal church affairs.

Outcomes of such litigation generally require the court to acknowledge internal church governance before applying property law. As American courts look to legislative history when statutory language is ambiguous, they also much consider history and culture underlying the drafting of these internal church policies when they are unclear.

Several Episcopalian parishes split after the election of an openly homosexual man as bishop of New Hampshire at the 2003 national convention. At that same session, dioceses were permitted to determine whether to bless unions between gay persons. These evolved church doctrines were regarded by many Episcopalians as a departure from Biblical directives. After such divisions, who owns the physical property?

Deciding these complex issues compound property law with religious hierarchy, culture, and history. Also relevant, at least peripherally, is the American constitutional doctrine of religious freedom. The position of the departing group is that it exercised this freedom because it was the Episcopal Church structurally altered its doctrine. The argument is that with this exercise property ownership attaches.

The main focus of this paper is the litigation involving the Episcopal Church USA, in particular, the Diocese of Virginia. As the largest Episcopal diocese in the country, the Virginia litigation (compounded by a unique state statute) has arguably received the most publicity of all these legal actions. Some similar cases from other denominations and in other American states follow the discussion of the Episcopal litigation.

3. Dr Fergus Ryan, Dublin Institute of Technology, **"Education, Religion, and Sexual Orientation: Is there a happy medium?"**

This paper focuses on the delicate intersection between denominational education and lesbian and gay visibility. It examines, in particular, the impact of section 37 of the Employment Equality Act 1998, which permits a school run in accordance with religious tenets to discriminate where reasonably necessary to uphold its religious ethos. This exemption potentially undercuts the general principle in employment law that employers cannot discriminate on the basis of sexual orientation, family status or civil status.

Where a school has been established with a view to promoting a particular religious ethos, it is arguable that it should be permitted to do so. Indeed, the constitutional provisions on religious liberty (Article 44) and protecting parental choice in education (Article 42) heavily lean in favour of the view that a denominational school should be free to instil a particular set of values consistent with its religious viewpoint.

On the other hand, the predominance of denominational schools in Ireland potentially limits opportunities for minority teachers, particularly lesbian, gay and bisexual (LGB) teachers, and teachers who subscribe to minority religious perspectives (or who are not religious). It appears such teachers do secure positions in denominational schools but at a price. The 'chilling effect' of section 37 may, in particular, lead LGB teachers to conceal or downplay their sexual orientation in the workplace. It also potentially stymies discussion of issues relating to sexual orientation in schools, where an increasingly visible cohort of LGBT pupils seeks support and acceptance.

While acknowledging the right of parents through denominational schools to instil a particular ethos in students, this paper asks whether a workable accommodation can be struck that would allow schools to promote their ethos without prejudicing LGB and other minority teachers.

## **SESSION M – CONTEMPORARY MEDICO-LEGAL CONTROVERSIES**

Venue: Samuel Beckett Suite

**Chair: Val Corbett, Independent Colleges Dublin**

1. Andrea Mulligan, Trinity College Dublin, **“Crafting a Legal Framework for Assisted Reproduction: Values, Rules and Judicial Incrementalism”**

The purpose of this paper is to compare contrasting approaches to the regulation of assisted reproduction with a view to informing the Irish debate. The particular aspect of regulation that will be examined is the primacy accorded to normative values in legal regimes. The paper will begin by considering the United Kingdom’s Human Fertilisation and Embryology Acts, which set out a thorough scheme of regulation that is permissive and relatively value-neutral. This system places substantial decision-making power in the hands of clinicians to deny treatment to their patients, while drawing few bright-line rules around the practice of assisted human reproduction. The French system, by contrast, regards assisted reproduction with caution and expressly prohibits certain reproductive technologies by reference to normative beliefs. Post-menopausal and single women, as well as gay couples, are denied access to treatment on the basis that such treatment would be against the interests of the resulting children. Both the UK and France choose schemes of pervasive legal regulation, but they take widely different views on the role of societal values within them.

The paper will then go on to ask which, if either, of these would be better suited to the Irish context. Are the value-free, individualistic, Human Fertilisation and Embryology Acts a good model for Ireland, or would the heavy-handed, moralistic, French example be better? In attempting to answer this the paper will also explore a possible virtue of the Irish status quo: the fact that legislative inertia means that development of this area of law rests, for the moment, in the hands of the courts. Though unsuited to large-scale policy formulation, the judiciary may have some role to play in the moulding of existing laws to suit new realities.

2. Fiona Broughton, University College Cork, **“Judicial Reasoning and Compulsory Prophylactic Treatment for HIV: the Role of Legal Scholarship in Clarifying the Law on the Pre-natal Child’s Right to Health Care”**

The High Court made an order in 2010, during the pregnancy of a mother who was tested HIV positive, for compulsory treatment of her infant once born in an attempt to reduce the risk of transmission. *HSE v F* (2010) is pivotal in relation to judicial recognition of health care rights before birth. However, this *ex tempore* decision is not reported and the judicial reasoning remains unexamined from a legal scholarship perspective.

In this case, the High Court made an order to protect the health care rights of a child who was not yet born at the time of the hearing or the making of the order. The case was not reported or recorded publicly in any way other than the limited

insight given by the media. The result of this is that legal and medical practitioners, academics, parents and the general public are blind to the details of the judgment. Moreover, the judiciary itself remains unaware of the reasoning of Birmingham J. in this case; the *ratio decidendi* is unknown and so no precedent can be properly set down.

For background information, the paper will outline the risks of HIV during pregnancy and available treatments to reduce this treatment. The Irish legal position regarding pre-natal children's rights to health care will then be detailed. The final section of the paper examines the High Court proceedings in *HSE v F* (2010) including pleadings and affidavits, the order of the Court as well as discussing insights gained from an interview with the defendant of this case. The paper will conclude with a statement on the importance of legal scholarship in this area to examine judicial reasoning in cases such as *HSE v F* (2010) in an attempt to clarify the law on pre-natal children's health care rights.

3. Caroline Somers, University College Cork, **“Judicial Reasoning and Legal Scholarship: Breaking the Silence Surrounding End-of-Life Decision-Making for Newborns”**

The judicial reasoning associated with the emergence of a new line of case-law often engenders scholarly interest in an area. The resulting legal scholarship can have an important influence on subsequent judicial reasoning.

This paper engages with the first aspect of this proposition by critically evaluating the origins of judicial end-of-life decision-making for the newly born in England in 1981. To do so, the paper analyses the prevailing clinical culture of decision-making which allowed for the withholding of treatment (including food) from healthy children with intellectual disabilities. This aspect of clinical practice appears anomalous today and requires explanation.

Societal attitudes are evaluated through the analysis of contemporary sources. What emerges is a picture of a society with high levels of agreement that these were private decisions to be made between parents and doctors – and without the intervention of the law. But agreement was not complete. It was the intervention of one societal group in particular, the pressure group Life, which made legal intervention a virtual inevitability. A series of strategic interventions from Life worked to translate the issue from an exclusively medical matter, to one that could, in appropriate circumstances, require a legal response.

The paper investigates the nature of the law's response when it was required to intervene in the pivotal cases of *R v Arthur* and *Re B* in late 1981. The emergence of this new line of case-law, and subsequent corpus of judicial reasoning, has led to a rich body of research in the area in England that facilitates new scholarship. The paper concludes that the ongoing absence of legal intervention in Ireland has resulted in a dearth of legal scholarship here, thereby prolonging the silences associated with this area of clinical practice and ensuring a gap in our knowledge in this important field.

4. Sarah Fulham-McQuillan, Trinity College Dublin, **“Medical Negligence Litigation: A Risky Game of Chance?”**

When a patient is misdiagnosed, or when treatment is delayed, their chances of recovery may be diminished. If there is no physical injury, traditional harm in tort law is not demonstrated. Instead, he or she may claim for loss of chance. Until the Supreme Court case of *Philp v Ryan* [2004] 4 IR 241, only patients with an initial chance of recovery of above 50%, could claim. This may have changed in Ireland, but on what basis?

*Philp v Ryan* introduced into Ireland the possibility of awarding damages for loss of therapeutic opportunities and shortened life expectancy. The Supreme Court pronounced the availability of loss of chance in Ireland. It will be demonstrated that this decision is difficult to reconcile with established loss of chance principles. The future of loss of chance in Ireland will be questioned.

Judicial reasoning is leading the way in loss of chance litigation, to the extent that legal scholarship is falling behind. There *is* mutual recognition of the need for the doctrine. However, this paper demonstrates how the principles underlying its implementation are getting lost in translation.

Merging quantification of damages and causation is creating a distinction between the probable hypothesis of a past event (often deemed to be factual) and the possibility of a future event (suggested by the proven negligence), and reformulating the standard of proof accordingly.

Courts rely on statistics to demonstrate the existence of the chance. This will be examined, and questioned whether statistical evidence regarding a hypothetical event is compatible with a balance of probabilities.

A conclusion is reached on the viability of loss of chance in certain medical negligence cases and the effect this is having on the state of causation principles and tort law generally. This paper suggests that legal practice and scholarship have much to learn from each other in developing loss of chance in medical negligence.